Browne Jacobson

Legal professionals: Duty, scope, and limits to both – context is key

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In claims against legal professionals the existence and scope of the retainer between the parties along with establishing that the legal professional actually owes a duty of care to the claimant are crucial – that's pretty much first base. Unsurprisingly such considerations are acutely fact sensitive and require a forensic examination of what happened in the circumstances of the claim, including all communications between the parties (spoken and written). Once those issues are decided the claim can move on, if appropriate, to whether there has been a breach of duty by the legal professional in the advice that was (or was not) given.

Two recent cases, McClean v Thornhill [2023] EWCA Civ 466 and Lewis v Cunningtons Solicitors [2023] EWHC 822 (KB) are useful contrasting illustrations of the court's approach to the analysis these matters require, including the impact of any attempts by the legal professional to disclaim liability. As to the question of breach of duty, there has been a revisiting in those judgments of the extent to which a legal professional has a duty to warn and where that sits with an acceptance of a client's autonomy in decision making; whilst there are often tensions, it is for the professional to advise and, with the benefit of that, it is for the client to decide.

The disputes

Andrew Thornhill KC is a specialist tax barrister and was engaged by the promotors of certain film finance schemes which were intended to result in significant tax savings (via sideways loss relief) for investors. He advised that the schemes met the statutory requirements for relief and consented to being identified as the promotor's tax adviser in the scheme's information memoranda (the memo) and for his advice to be provided to prospective investors should they request it. When, many years later HMRC challenged the efficacy of the schemes, the claimants, all investors in the schemes, reached a settlement of their tax liability with HMRC and pursued claims alleging that Mr Thornhill KC, although instructed by the promotor, had assumed a duty of care to them and was in breach of that duty.

Ms Lewis instructed Cunningtons Solicitors to act on her behalf in divorce and financial ancillary relief. When there had only been limited disclosure of her husband's financial circumstances (although there was information that he had a substantial police pension pot) Ms Lewis told Cunningtons that her husband had made an offer to her to settle the finances between them. They responded that they could not advise her as to the reasonableness or otherwise of that offer without further financial disclosure. Ms Lewis signed a disclaimer to the effect that she was accepting the offer without advice to do so; the consent order recording that settlement was completed and endorsed by the court. Again, many years later she pursued a claim against Cunningtons that they were in breach of duty as to their failure to advise her that she would be entitled to a pension sharing order and/or that the settlement was therefore disadvantageous to her.

Was there a duty?

In Cunningtons there was clearly a retainer between the parties and so it owed Ms Lewis a duty of care as the client. Defending the claim there were efforts to assert that this was a limited retainer (limited to the consent order only along the lines of Minkin v Landsberg (2015)) which was robustly rejected by the court. Much was made of the fact that at the outset of the retainer it was not limited in any way, it was general as to divorce and financial matters – it did not morph into such at a later stage when the husband made a series of low ball offers.

In Thornhill the position was much more complicated – Mr Thornhill KC had been instructed to advise the promotors - not the investors. The investors were not his clients so there had to be a consideration of whether the claim fitted within those limited circumstances where

duties have been assumed by the legal professional to a non-client – at trial there had been a finding that he did not, and the investors appealed.

The Court of Appeal agreed with the trial judge that there was no duty of care owed; he had not assumed any duty of care to the investors. He had not stepped outside his role as adviser to the promotors; he did not take on some type of independent / neutral role advising both promotors and investors, he always remained on the sales side of the transaction as a barrister advising the promoters.

The memo was the only way via which the advice could be obtained by the investors (Mr Thornhill KC did not speak to them nor communicate with them in any way directly) and consent for that was only given on the terms of the memo and supporting documents which expressly required the investors to take and rely on their own advice. It was objectively unreasonable for investors to rely on Mr Thornhill KC's advice without making independent enquiry and he could not have reasonably foreseen that they would do so. Given no duty was owed to the investors their appeal was dismissed.

Breach of duty

In the absence of a duty being owed in Thornhill any issues of breach were irrelevant to Mr Thornhill's liability. The difficulty on breach in Cunningtons is that there was no clear evidence that Ms Lewis understood the advice that she was being given (such as it was) and importantly what it meant for the options available to her.

Given the general nature of the retainer and Cunningtons' knowledge of the husband's pension, to say they were unable to advise in those circumstances was in itself a breach of duty. They could and should have advised that she at least could apply for a 50% pension sharing order, that she should not sign the consent order and should make that application. That would have given her clarity on her options and simply getting her to sign a disclaimer was no answer to her situation as it presented at that time.

Impact warranties/disclaimers

The memo in Thornhill required potential investors to consult their own tax advisers and it was a requirement before investing that they sign a warranty to the effect that they had relied only on the advice of, or had consulted with, their own professional adviser. This warranty was an important factor in the Court of Appeal concluding that it was objectively reasonable for a barrister to assume that investors would have taken their own professional advice – with his advice as a starting point but nevertheless independent of him. It was a factor militating against there being a duty at all. Interestingly, Mr Thornhill KC did not provide his advice subject to a disclaimer as such, which LJ Carr suggested was likely to expose such advisers to claims. However, the investor warranties and other important memo content was enough to avoid an assumption of responsibility in this instance.

There was also a disclaimer in Cunningtons, but it had a wholly different impact – of course here that a duty was owed was not in dispute. Ms Lewis was required to sign a disclaimer which stated that she understood that she had not been given any advice as to financial matters and that because there had been no financial disclosure Cunningtons could not advise her whether the settlement was reasonable or fair. In the circumstances of this dispute the disclaimer did not work to limit the scope of the duty owed to Ms Lewis; rather that Cunningtons proceeded based on the signing of a disclaimer rather than providing further advice was itself a breach of duty.

What about a warning?

Staying with Cunningtons, the disclaimer itself warns Ms Lewis that in agreeing to the terms offered by her husband she was doing so without full financial disclosure and without the benefit of advice – that was a form of warning to her of risk. The difficulty for Cunningtons was that Ms Lewis was found to be an unsophisticated client, bullied during her relationship and who took Cunningtons' assertion that they could not advise her "*literally*". To the extent this was a warning it wasn't enough to discharge the duty owed to her; given the financial information that was available (especially as to the husband's pension) advice could have been given (discussed above).

With the conclusion no duty of care was owed by Mr Thornhill KC to the investors, the issue of whether there was any breach of duty fell away – however the Court of Appeal dealt with the point in case the issue "*might have future relevance*". The trial judge found that the advice reflected an approach a reasonable competent tax silk could have taken at that time – the Court of Appeal largely agreed with that but on appeal it was pressed that it was negligent of Mr Thornhill KC to advise in such strong and unequivocal terms without any caveat as to the degree of risk as to the efficacy of the schemes. The Court agreed with that to the extent that *"Non-negligent advice would, at least, have acknowledged that no two cases are factually the same, and accordingly no existing authority could be said to cover the circumstances of the LLPs' case exactly; and that the...statutory tests each engaged a risk of challenge by HMRC."* It was not framed as a

duty to warn but there was a finding that reasonably competent tax advice would have identified that risk and to that extent there would have been a breach had there been a duty of care.

Where are we now on disclaimers and warnings?

We have in Thornhill an illustration of the way in which the court controls the circumstances in which there can be a liability to a non-client. That said the comments of LJ Carr in her judgment in the Court of Appeal are telling – that where unequivocally positive advice is given and there is no express disclaimer of responsibility (here by Mr Thornhill KC) which is to be made available to third parties there must be an acceptance there is an exposure to a claim, such as made by the investors, that a duty is owed to them based on an assumption of responsibility. It was the overall context that avoided the finding of such a duty including the terms of the memo which was described as the "*only gateway*" to Mr Thornhill KC's advice. Moving forward it's anticipated that advisers are going to be at the very least extremely reluctant for their opinions to be used in this way without a robust disclaimer by them.

Furthermore, the category of investment (unregulated) and the nature of the investors (sophisticated, high net worth individuals with an IFA advising) in Thornhill was clearly of significance, setting this dispute apart from more run of the mill circumstances. A disclaimer on its own in, say consumer territory where there is nothing else to suggest that the investors ought to take any indemnity advice, may well not be enough to save the advisor. In those circumstances, it would be easier to argue the test for an assumption of responsibility has been met, despite the terms of the disclaimer and perhaps as is reflected by the failure of the disclaimer in Cunningtons (where the client was altogether more vulnerable). Whilst admittedly in the context of a duty being owed there getting the client to sign a disclaimer was not an adequate substitute for ensuring she had a clear view of the options available.

There are elements of disclaimers and warnings sometimes being two sides of the same coin – both seek to lay down a marker that in proceeding the client is doing so at their own risk, exercising their autonomy to do so. As to their impact does it, at least in part come down to their wording and the context? In Thornhill the investors were clearly advised to secure their own advice in circumstances that they had the wherewithal and funds to do that. In Cunningtons there was a disconnect between the standard wording of the disclaimer and the situation and a client that was found to be unsophisticated and under pressure (financial and/or otherwise). As ever, the wider context and the factual matrix of cases will always be highly relevant.

Finally, we are in economically turbulent times and that increases the challenge for professional advisers of managing the unbundling of legal services and acting within the confines of a limited retainer. Generally the courts are relatively unimpressed by efforts to limit the scope of duty by reference to the instructions being low budget and in the absence of limits to scope being expressly determined by the terms of the retainer. Cunningtons shows the real dangers in this area; there is a theoretical attraction in task specific legal services but putting them into effect day to day, in the shifting landscape of an ongoing retainer is challenging. Not only is it crucial to set the ambit of the retainer at the outset, keep that under review at crucial stages (amending if necessary) but also to ensure that the client understands what the solicitor is advising on and perhaps more particularly what they are not.

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