PRIVATE CLIENT
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Defensive Advising Strategies 1: What you learn from practising in the field of professional negligence

COMMENTARY BY EMILY CAMPBELL, 13TH MAY 2021

Relatively speaking, barristers usually have rather broad practices. Even if (like me) a significant part of their practice is concerned with advisory work and drafting, barristers are often also engaged on various litigious matters relating to their underlying area of expertise, including professional negligence claims. By contrast, despite exposure to a variety of areas of practice whilst training, the organisation of many firms of solicitors can often have the effect that private client solicitors know little of litigation. For example, I once saw a draft witness statement prepared by a private client solicitor, where the parties in the heading were referred to separately in each capacity - as with a deed. And it is particularly problematic that private client lawyers often do not know very much about the field of professional negligence.

Limitation periods – be aware!

One significant matter relates to limitation periods. On a number of occasions, solicitors have come to me following the discovery of a problem with a trust – say an error in a draft deed. I might be asked to advise on whether the deed can be rectified or set aside. I am often not explicitly asked about any related professional negligence claim, but the first thing I would look at is whether any limitation period is about to expire. Whatever the questions set out in my instructions or the actual scope of my duty of care, I do not want to find out a limitation period has lapsed on my watch. Nor will those instructing me be very happy if I fail to help them dodge the bullet.

Some private client solicitors - and tax accountants can be added to this - have very little appreciation of limitation periods. There may be a vague sense that you have

three years from finding out about the error, which is better than nothing but is in any event an oversimplified approach to section 14A of the Limitation Act 1980. Even so, who wants to have to try to rely on section 14A, if they can start their claim within six years of accrual (accrual being a nuanced concept)? And there are many solicitors who are wholly unaware of the 15-year longstop provision in section 14B.

I would advocate that all private client solicitors should familiarise themselves with the law of limitation as it applies to professional negligence claims, and that placed firmly on the checklist when considering how to remedy an error in a trust is the question of whether there might be an associated professional negligence claim and when this might need to be protected (by standstill agreement or protective claim form).

Such an approach should also help a solicitor to flag up whether the firm might have a conflict of interest. Was the firm involved in the error in some way? Sitting on a problem caused by the firm may feel like a good idea at the time, especially whilst it is being investigated whether the damage can be mitigated, but it may well just make things a lot worse for everyone. The client might subsequently be able to rely on section 32 of the Limitation Act 1980 (deliberate concealment) and the firm's professional indemnity insurers may be able to accrue defences (e.g. failure to notify or even dishonesty). An allegation of deliberate concealment is also likely very damaging to a professional's reputation compared with simply making a mistake.

Scope of retainer – not a magic bullet

Another point I would suggest is that, although the terms of the retainer may be carefully limited, a solicitor is aware of the duties which can arise if something untoward is noticed in the course of advising on something else. The solicitor may not be able to just turn a blind eye to it rather than pointing out to the client that there is an issue, even if it is an issue upon which advice is needed from someone else.

Although in *Midland Bank v Hett, Stubbs & Kemp*[1], Oliver J stated: "*… the court must beware of imposing upon solicitors … duties which go beyond the scope of what they are requested and undertake to do … the duty is directly related to the confines of the retainer…*", the Court of Appeal of New Zealand in *Gilbert v Shanahan*[2], which is

[1] [1979] Ch 384 at 402-403.
[2] [1988] 3 NZLR 528.

mentioned approvingly in *Jackson & Powell on Professional Liability*[3], stated: *"Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer."*

There is certainly arguably a duty on a solicitor (or other professional) to point out to the client anything outside the scope of the retainer which does or would to a reasonable similar professional *"jump off the page"*. So, best practice is not to seek complete solace in the express terms of the retainer. I also often think that, where a solicitor or other professional has an ongoing role in relation to the client, he or she may have a duty to ensure that the client *"has all their beans in a row"* – that is to say that the professional has ensured that the client is told that they need certain types of advice from others (e.g. tax or foreign law advice). I have pleaded and successfully settled claims on both these bases.

Causation – a final tip

If a client regrets a transaction, it is very easy for that client to nit-pick the advice they were given and allege that if only they had been told such-and-such, they would not have entered into it. The solicitor may know or suspect that this allegation of causation is false, but it is surprisingly difficult to contradict a client's own word on this without evidence. Advice is usually formulated in a way that focuses on the points which the solicitor believes at the time – perhaps following various conversations - are material to the client, rather than listing a whole lot of peripheral points, and I would not suggest that it should be otherwise. However, it is important that a solicitor records in as much detail as possible what the client says at the time is and – perhaps most importantly - is not regarded as important.

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[3] (8th ed) at [11-169]

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