4 NEW SQUARE
CHAMBERS

Duties towards, and responsibility for Third Parties (mostly)

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2 JULY 2024

Duties to third parties

Ashraf v Lester Dominic Solicitors [2023] EWCA Civ 4

- **Solicitors acting for bank made incorrect representation to Land Registry and transaction wrongly went ahead as a result**

- **Three categories of duty:**

  1. where the very purpose of retaining a professional is to confer a benefit on a third party

  2. where a professional person (i) makes representations on which another party reasonably relies and (ii) where the professional could reasonably foresee that reliance

  3. "*Al Kandari*" principle, where a professional steps out of their role acting for one party and takes on duties to another.

- **Duty owed. Application (expansion) of *Al Kandari* principle. The solicitor was arguably stepping outside his role as solicitor for his client**

McLean v Thornhill [2023] EWCA Civ 466

Steel v NRAM Ltd

"…the six authorities cited above demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is presumptively inappropriate." [32]

McClean v Thornhill

"It was objectively unreasonable for investors to rely on Mr Thornhill's advice without making independent inquiry in relation to the likelihood of the Scheme achieving the tax benefits; and Mr Thornhill could not reasonably have foreseen that they would do so." [117]

"A specialist professional who voluntarily provides unequivocally positive advice to their client in the knowledge: i) ii) that the advice would be made available to a third party without any express disclaimer of responsibility; and that the third party would be likely to "take comfort" from that advice and (with their advisers) be assisted by it in deciding whether to enter into a financial transaction, exposes themselves to the risk of a claim that they owed the third party a duty of care based on an assumption of responsibility." [175]

Amathus Drinks v EAGK [2023] EWHC 2312

- **Buyers' claim against auditors in respect of completion accounts**
- **Auditors relied on standard "Bannerman" disclaimer**
- **Arguable that duty of care owed to buyers, disclaimer not determinative**

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Lonsdale v Wedlake Bell [2024] EWHC Civ 712

Facts

- Discretionary trust made in 1987, intended to benefit Settlor's children, but with his nephews and nieces as "backstop" beneficiaries (who would benefit if, but only if, the primary trust failed)
- Solicitors' (admitted) negligence →Trust erroneously conferred an equal benefit on children <u>and</u> nephews and nieces.
- Power to vary trust before right of beneficiary crystalized - oopportunity to correct problem was missed by defendant
- Claim brought by Settlor (qua Settlor and Trustee) , Trustees, and intended beneficiaries

Key questions

- Who had suffered a loss?
- Was duty owed to beneficiaries (third parties)?

Key takeaway

- Duty owed to intended beneficiaries by analogy with *White v Jones* even in inter vivos transaction, at least transaction irrevocable

A brief foray into Limitation

Limitation: s14A and continuing duties: Lonsdale v Al Sadiq

Lonsdale v Wedlake Bell

- Solicitors' reassurances →reasonable not to issue proceedings, so could rely on s14A
- By continuing to act and to advise the Trustees and Beneficiaries, the solicitors had a continuing obligation so to act and advise upon the correct basis.
- Failure to correct the erroneous advice given in 2011, solicitors committed fresh breaches of duty which crystallised into fresh loss with the beneficiaries in turn attaining the age of 25.

Al Sadiq

- Mr Al Sadiq knew he could not pursue part of claim and knew exposed to costs → sufficient knowledge for s14A
- A lawyer does not generally owe a continuing duty to advise its client as to whether it has been negligent in the performance of its own retainer;
- A lawyer may owe a duty to revisit its previous advice if:
  - it expressly agrees to do so for some reason;
  - such a duty is a necessary incident of some other duty which the solicitor has undertaken to perform

Responsibility for Third Parties: Vicarious liability

General principles: two stage test

Limb 1

- **A relationship between the two persons which makes it fair, just and reasonable for the law to make one pay for the wrongs committed by another.**
  - This was traditionally limited to the relationship between employer and employee, but the scope and nature of those relationships has expanded over time.

Limb 2

- **A close connection between that relationship and the tortfeasor's wrongdoing.**
  - Historically, this was limited to torts committed in the course of the tortfeasor's employment, but this has also been broadened.

Various Claimants v Wm Morrison Supermarkets plc

- **Auditor harboured grudge against employer and published confidential data**
- **Key question whether limb 2 satisfied. Answer →No:**

➢ Act did not form part of wrongdoer's field of activities

➢ Unbroken chain of causation not enough

➢ Motive was highly relevant

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

- Rape of a congregation member by an Elder
- Limb 1 satisfied. There was a relationship akin to employment
- Limb 2 was not satisfied: not sufficient close connection
  - The rape was not committed whilst Mr. Sewell was carrying out activities as an elder
  - At the time of the rape, and in contrast to the child abuse cases, Mr. Sewell was not exercising control over the Claimant (she went to see him to provide emotional support).
  - The argument that Mr. Sewell had never '*taken off his metaphorical uniform as an elder*' was rejected as this would excessively expand the number of activities that the Defendant would have been vicariously liable for
  - Whilst Mr. Sewell's role as an elder was a 'but-for cause' of the Claimant's continuing friendship with him, 'but-for causation' is insufficient to satisfy the close connection test
  - This was not a case of gradual grooming but rather a one-off attack.
  - The role of Mr Sewell's father and Mr Sewell's prior inappropriate sexual conduct had no significance except as background information.

"The tests invoke legal principles that, in the vast majority of cases, can be applied without considering the underlying policy justification for vicarious liability. This is not to deny that in difficult cases, and having applied the tests to reach a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back, and consider whether that outcome is consistent with the underlying policy" [58(iv)]

"The same two stages, and the same two tests, apply to cases of sexual abuse as they do to other cases on vicarious liability. The idea that the law still needs tailoring to deal with sexual abuse cases is misleading. The necessary tailoring is already reflected in, and embraced by, the modern tests" [58(v)]

"… consideration of policy confirms that there is no convincing justification for the Jehovah's Witness organisation to bear the cost or risk of the rape committed by Mark Sewell. Clearly the Jehovah's Witness organisation has deeper pockets than Mark Sewell. But that is not a justification for extending vicarious liability beyond its principled boundaries"