# When do professionals owe duties to third parties and when do their duties go further than their retainer?

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# Overview

**<u>Duties to third parties:</u>**

- **The background.**
- **What's happened in recent cases involving barristers and solicitors? Two eye catching cases in 2023- *Ashraf* and *McClean.***
- **What about auditors?**
- **Are things different for directors and if so when?**

**<u>Scope of retainer</u>**

- **The background.**
- **How have recent cases applied the idea of what's "reasonably incidental?"**
- **Where are we on disclaimers?**

# Duties to third parties

# The background- duties to third parties

- **Where does the issue tend to arise?**
- **What's the correct test?**
- **Ascendency of "assumption of responsibility": *Steel v NRAM* [2018] 1 WLR 1190 and the *Dreamvar* litigation [2018] 3 WLR 1244.**
- ***Steel:* "there's no better rationalisation for liability in the tort of negligent misstatement than the concept of an assumption of responsibility……. Although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of liability".**

# *Ashraf v Lester Dominic Solicitors* [2023] EWCA Civ 4

- **Mr Ul-Haq was the victim of 2 frauds by FLP Solicitors relating to one property. Bank of Scotland ("BOS") also lost money.**
- **BOS instructed new solicitors- Rees Page- to protect their position by registering a conveyance of the property from Mr Ul-Haq to a Mr Attarian. The solicitors received a transfer that seemed to be signed from Mr Ul-Haq. He dealt with registration formalities and represented on the AP1 that Mr Ul-Haq was represented by FLP solicitors.**
- **In fact the transfer was a fake.**
- **Did Rees Page- BOS's solicitor- owe Mr Ul-Haq a duty?**
- ***"In general a solicitor does not owe non-clients any obligation to perform his services with competence for the simple reason that he has not agreed to provide any service to them at all."***


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# Three Categories of "Exceptional" Cases where duties are owed by solicitors to third parties: *Ashraf*

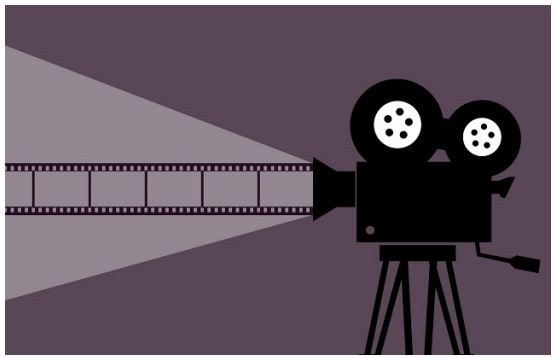
**Where the purpose of a retainer is to confer a benefit on a third party. For example, where a testator engages a solicitor to make a will in favour of a beneficiary (*White v Jones [1995] 2 AC 207*).**

**Where the Solicitor for one party makes representations to the other party upon which the other party – reasonably foreseeably – relies (relatively rare: reliance by an opposing party "*presumptively inappropriate*" *NRAM v Steel* [2018] UKSC 13).**

**The 'Al-Kandari principle' – Where a solicitor has stepped outside the role of merely acting for one party and accepted responsibilities for third parties (*Al-Kandari v J R Brown & Co* [1988] QB 665)**

# *McClean v Thornhill* [2023] EWCA Civ 466

- **Claim brought against Andrew Thornhill KC by a range of non-clients who had invested in film finance tax schemes.**
- **Mr Thornhill was the advisor to the promoters of the tax schemes- in other words he was on the "other side" of the transaction to the investors.**
- **However, Mr Thornhill consented to being named in the Information Memorandum and his opinions being made available to the investors if they requested them. The opinions contained no disclaimer of liability to third parties.**
- **The Claimants sued Mr Thornhill, alleging that he owed them a duty of care in respect of the opinions, because he had agreed could be provided to prospective investors. Only some of the Claimants had in fact seen the opinions.**



# Four difficulties with imposition of a duty in *McClean*

**The Information Memorandum advised investors to consult their own tax advisors.**

**Indeed, investors could only participate in the scheme if they warranted they had relied on the advice of their own tax advisors.**

**The promoters and the Claimant investors were on opposite sides of the transaction- was there a conflict of interest?**

**The schemes were commercial and only marketed to wealthy individuals. Sophisticated investors can be expected to take their own advice**

# The way round the problems?


**<u>The Claimants' core arguments in the Court of Appeal</u>:**

- **Were "prospectus cases" in a different class?**
- **Had Mr Thornhill effectively "become part of the sales team" in an advisory capacity, so that there was no conflict of interest as both parties wanted the same thing?**
- **Did the parts of the Information Memorandum telling claimants to get their own advice only relate to their personal circumstances rather than whether the planning worked?**
- **Was the lack of disclaimer significant?**

# The core reasoning of the Court of Appeal

- **The *Steel v NRAM* enquiry about "assumption of responsibility" involves 2 distinct issues:**
  - **Was it reasonable for the representee to rely on the representation?**
  - **Was it reasonably foreseeable to the representor that he would do so?**

- **The main factors going either way:**
  - **Factors militating in favour of duty: lack of disclaimer, advice given by the barrister in the knowledge it could be passed to investors, advice assisted the investors on the crucial issues in the investment (on which there was no conflict of interest)**
  - **Factors militating against duty: the only "gateway" to the barrister's advice was the Information Memorandum, which advised the investors to take their own advice and required them to warrant that they had done so.**

- **<u>The conclusion</u>:**
  - **It was objectively <u>unreasonable</u> for investors to rely on Mr Thornhill's advice without independent enquiry, and Mr Thornhill <u>could not reasonably have foreseen</u> that they would do so.**

# What about auditors?

***Chan Kam Cheung v Ronnie K W Choi & Anor*** **[2022] HKCFI 3028**

**To be liable to a third party, auditor will need to be aware of:**

1. **The nature of the transaction which the third party had in contemplation;**
2. **That the advice or information would be communicated to the third party; and**
3. **That it was very likely the third party would rely on that information in deciding whether to engage in the transaction in contemplation.**


**But in this case:**

1. **Buyout negotiations had been on hold for a long time;**
2. **Discussions after the audit could not have a bearing on the purpose of the audit work itself;**
3. **The mere fact of direct dealings between auditors and claimants was not enough.**

# When do auditors stray outside their usual role?

1

**Assisting in a due diligence operation being carried out on behalf of a prospective investor (*Electra v KPMG Peat Marwick* [2000] PNLR 247).**

2

**Making express representations to a prospective bidder as to the financial state of the company (*ADT Ltd v BDO Binder Hamlyn* [1996] BCC 808).**

3

**Preparing accounts for submission to a prospective investor (*Caparo Industries plc v Dickman* [1990] 2 AC 605)**

4

**Making representations for inclusion in bid defence documents (*Morgan Crucible Co PLC v Hill Samuel & Co Ltd* [1991] Ch 295).**

# The corporate context- directors' duties to a company *BTI v Sequana* [2022] 3 WLR 709

**Supreme Court considered the so-called "creditor duty" owed by directors to third party creditors – this is part of a director's duty to act in good faith and in the best interests of a company under s. 172 Companies Act 2006. However the interests of creditors arguably conflict in some circumstances with the interests of the shareholders.**

**Key issues included:**

- **Whether the"creditor duty" exists at all;**
- **When such a duty will be engaged;**
- **The content of the duty; and**
- **Whether the duty applies to a decision to pay an otherwise lawful dividend**

# Sequana- the creditor duty in more detail

**Duty engaged when directors know of:**

- **Imminent insolvency**
- **Probability of an insolvent liquidation or administration**

**What does the duty entail?**

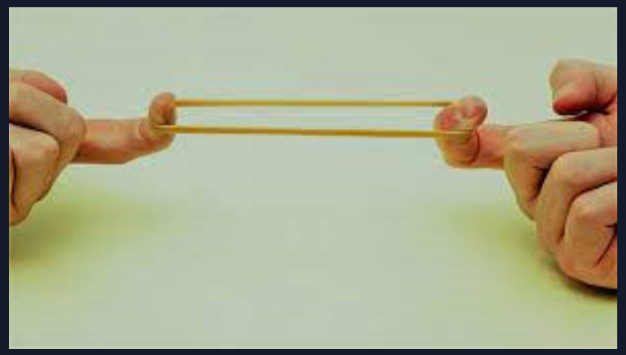
- **If insolvency inevitable- directors have to treat creditors' interests as paramount**
- **Prior to that- there needs to be a balancing exercise**

**Where does this lead?**

- **This principle arose in context of considering what duties directors owe a company- not in a claim by creditors themselves.**
- **The outcome is heavily dependent on this corporate statutory context**
- **Attempts to impose "creditor" duties on other professionals have tended to fail: *AJ Fabrications v. Grant Thornton* [1999] PNLR 811**

# An elastic idea: what's "reasonably incidental"?

# Plus: where are we on disclaimers?



# The underlying principles: *Minkin v Landsberg* [2016] 1 WLR 1489

- **A solicitor's duty is limited to carrying out the tasks which the client has instructed him or her to do, and the solicitor has agreed to undertake.**
- **The court must be wary of imposing on solicitors duties that go beyond the scope of what they had been requested and undertaken to do.**
- **However, it was implicit in any retainer that a solicitor would proffer advice that was "reasonably incidental" to the work he had agreed to carry out.**
- **What is "reasonably incidental" is an "elastic phrase", but has its limits. Where the boundary lies will depend on factors such as:**
  - **The character, sophistication and experience of the client; and**
  - **The extent of the burden that the allegedly incidental task placed on the solicitor.**

# *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970

**Do solicitors have to fix everything?**

**Issue with electricity wayleave came to light after the end of a retainer. Did the solicitors just have to answer factual questions, or should they proffer the solutions?**

**No need for solicitor "to carry out investigative tasks in areas that he has not been asked to deal with, however beneficial to the client that might in fact have turned out to be".**

# Detecting the dodgy agent? *Lennon v Englefield* [2022] PNLR 3

**<u>Does a conveyancing solicitor owe a duty to check the bona fides of her agent handling the money in the transaction</u>?**

***"when a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors".***

# Detecting the dodgy agent? *Lennon v Englefield* [2022] PNLR 3. The outcome….

***"I do not however accept that this triggered a duty on her to advise her client that as Mr Englefield was not a qualified solicitor his client account would not be as secure as a solicitor's client account…. It was outside of Ms Bourne's retainer to ask her to advise about the commercial wisdom of paying the proceeds of sale into Mr Englefield's account. There would of course have been virtually no risk of doing this if Mr Englefield had been an honest man… It is unfair to invest Ms Bourne with the hindsight of what happened after the money was paid where it was directed to be paid".***

# Where are we on limited retainers?

- ***Minkin v Landsberg*** **recognises that solicitors can limit retainers. But what do the courts make of "disclaimers"?**
- ***Lewis v Cunningtons*** **[2023] EWHC 822. Family law case involving claimant who said she was unsophisticated and bullied by husband. She agreed settlement with no pension sharing order.**

# The outcome in *Lewis*- disclaimer disapproved

The disclaimer:

"I…confirm that I have been advised that there should be an exchange of full and frank financial disclosure before my solicitors can give me any advice in relation to suitable financial settlement options.

I have instructed my solicitor that I do not wish for there to be an exchange of full and frank financial disclosure and I accept that I have not been given any advice in relation to possible settlement options…

I understand that I am going against my solicitor's advice and confirm that I wish to proceed in the absence of full financial disclosure."

*The disapproval:*

*"I find that the contents of this disclaimer do not accurately reflect the position between the parties at this date. I find that the attempt to limit the defendant's responsibilities with a "one-size fits all" disclaimer was not appropriate at this stage in this case"."*

# Conclusions – what can be drawn from recent cases?

- **Multiple cases with a restrictive approach to duties to third parties- such duties are exceptional and the courts are on the look out for how they fall into understood categories as well as satisfying the "assumption of responsibility" test.**
- **Advice of a commercial nature is hard to characterise as being "reasonably incidental" to a retainer.**
- **Disclaimers can run into difficulties if the judge regards them as inappropriately cutting down duties.**

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