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DEFINING THE RETAINER

It can sometimes be problematic to determine the full range of issues that a solicitor should address in order to meet obligations to a client. Much depends on the retainer agreement, of course, which should always be crafted so as to set out the scope of work to be done, and not done. Developments in the matter can never be ruled out, however, and the prospects of the client claiming that they have been failed through an oversight by the adviser as to their full responsibilities can never be ruled out.

A good example of such a claim succeeding was *Normans Bay Ltd v Coudert Bros* [2003] EWHC 191. The client was investing in a Russian clothes manufacturer under a privatisation programme. The solicitors – who held themselves out as being experts in this field – prepared the share purchase and investment agreements, but failed to establish the correct duration for the programme. By submitting the tender for a five year period rather than the three years that was in fact required the bid failed. The firm argued that it was for the client to establish the commercial criteria under which they would make their bid, but it was held that they were liable since the point was reasonably incidental to the instructions.

Other cases, however, have ruled otherwise. In the Jersey case of *Pickersgill v Riley* [2004] UKPC 14 the solicitor (P) had advised a client (R) in relation to the acquisition of a 28 year lease of business premises in Jersey through his company M. The shares in M were then sold to an English company W. Riley gave a personal guarantee of the rent due to the lessor of the Jersey premises which continued after the sale of M, although W did later agree to indemnify R for this. M later became insolvent and it then transpired that W was no more than a shell company without assets. R succeeded in the Jersey courts in claiming that P had failed in his duty to investigate the financial standing of W.

Allowing the appeal the Privy Council held that the duty of care depended in all cases on the content of instructions received and the particular facts of the case. A solicitor was not required to ‘travel outside his instructions’ and make investigations

not expressly or impliedly requested by the client. R was a sophisticated businessman who was well used to giving personal guarantees, and this was also a factor, as was the fact that he had negotiated the share sale himself without the adviser’s input.

In the recently reported case of *Swain Mason & Others v Mills & Reeve* [2012] EWCA Civ 498 the appellants were the daughters and executors of a successful businessman who had retired. He was known to be in poor health and to suffer from heart problems. The firm were retained to advise on a management buy out of his business in which the daughters held shares, and were also instructed in relation to tax advice for the daughters and their father as to the transaction. Shortly after the transaction had completed the father died in the course of a routine and planned operation. There were taxation consequences of his dying so soon after the deal had completed and a claim was made that the firm had failed the clients by failing to envisage these consequences.

The finding in favour of the firm, which was upheld on appeal, was largely based on the fact that the firm had not been expressly instructed as to this eventuality and had learnt of the operation only through chance. They knew of the ill health of the deceased, but had no reason to suppose that there were unusual risks in what was a relatively routine procedure.

Even if there is encouragement in such decisions the risk, confusion and bad-feeling that is bound to arise in any such dispute is, of course, to be avoided wherever possible. Certain areas might be excluded in general – many firms exclude responsibility for tax advice in their terms of business documentation, for example. Beyond this, when taking instructions thought should always be given to any ancillary issues on which the client might expect advice and the firm’s responsibilities for them should be clearly recorded in the retainer. The adviser will then need to continue to be alert to any related developments that come to their attention during the retainer and make sure that they are addressed and that any such discussions are noted on the file. ■

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