BRIEFING

GROWTH IN PROFESSIONAL NEGLIGENCE CLAIMS

CLAIMS AGAINST PROPERTY SOLICITORS

In recent years there has been a substantial growth in professional negligence claims against solicitors i.e. claims for breach of contract, negligence, trust or fiduciary duty. Insurers have apparently paid out over £2 billion in the last 10 years or so with half of such claims being property related. Premiums have increased as a result.

The Pandemic is likely to only add to the number of Claims as once profitable deals become unprofitable and professionals are held to blame if a party can or cannot escape liability. It has also made supervision and communication much more difficult so more matters are likely to fall through the cracks due to a lack of a cohesive approach or due administration or overall control.

The recent case of *Maloney -v- Mundays LLP (19 May 2021)* relates to events in 2006 in relation to the purchase by the Claimant of a Budgens Store in Ascot where, in simple terms, the Court held that the Defendant Solicitors had failed to:

- Ensure that all of the relevant land was transferred to the Claimant.
- Draft the relevant documents clearly and consistently re the sale of the business.
- Properly advise as to the Stamp Duty payable as they incorrectly recorded the price in the SDLT 1 form as £642,700 rather than £1,642,700 (thereby resulting in a £40,000 underpayment of Stamp Duty).

As a result of their failings, Mundays LLP were ordered to pay damages and interest in excess of £800,000.

The standard reasons normally given for such growth in professional negligence claims are as follows:

- The availability of third party funding to pursue such claims, particularly for Group claims relating to failed property investment schemes.
- The growth in the number of law firms now specialising in pursuing such claims and their willingness to do so on a no win no fee basis i.e. the growth of the Claims Industry.
- The increase in cyber and other frauds which have led to solicitors making payments to fraudsters, such as in the Dreamvar case.
- Solicitors being an easy target as they have compulsory insurance cover.
- Higher expectations on the part of clients and a greater willingness to sue their professional advisers.

However, there is clearly underlying all of this a real issue as to poor service. Standards are not being maintained sufficiently. In what is a very competitive industry for property solicitors, the focus can be too much on profitability and not on client service. Often, the person or persons dealing with the matter were too busy. This appears to be particularly so in relation to domestic conveyancing as this produces the greatest number of complaints to the SRA in relation to lack of actual advice and care and attention. This often relates to the purchase of leasehold properties.

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The vast majority of property related claims against solicitors never reach Trial or even reach the Courts. Some are plainly unmeritorious but many are settled because liability is either admitted or difficult to contest. And, in the main, these claims result from very simple and basic failings by the solicitors, such as:

- Missing deadlines - particularly in relation to leasehold enfranchisement claims and business tenancy renewals or filing SDLT returns.
- Failing to ensure the final documentation actually reflects the agreed terms- in *Elliott -v- Hattens (18 May 2021)* the Defendant Solicitors had failed to provide for the agreed Guarantee of the tenant's liability which resulted in a substantial loss to the Claimant when the premises were badly damaged by fire.
- Failing to read all relevant documents or to actually proof-read the documentation produced. It is amazing in this technological age how many executed documents have blanks in them where dates were to be inserted, or missing sections or attachments, or contradictory provisions (such as in the Mundays case).
- Proceeding on the basis of assumptions rather than checking the facts or the law.
- Not keeping the client informed or advised as a transaction progresses.
- Not properly briefing associates as to the purpose of the transaction and all relevant issues.
- Failing to properly amend precedent documents.
- Not keeping proper notes or recording advice.
- Poor drafting so ambiguity and uncertainty results.
- Not making clear the extent of a retainer and, accordingly, being held liable, for example, for not giving tax or corporate or Planning advice.

In the ongoing case of *Karis Developments -v- Howard Kennedy LLP*, the Claimant is alleging that the documentation was not drafted in a sufficiently watertight manner as instructed but simply allowed the other partyt, the local authority, to terminate the agreement at its absolute discretion. The lack of care and attention by solicitors is often on both sides of the transaction and has led to many claims to rectify documents to correctly reflect what was agreed rather than what the solicitors documented.

The case of *Moda International Brands Limited -v- Gateley LLP (23 May 2019)* is a good example of what can go wrong on a property transaction and why (although the relevant solicitor involved was actually a specialist in company and corporate law)? In brief, the Defendant solicitors were held to have been negligent in failing to advise their client as to a change in the terms of the transaction whereby the client would no longer receive a share of the profit on part of the property being sold. The Claimant was awarded damages of £221,209.22 based on the loss of the chance to have received such profit share.

The failings of the solicitor in the Moda case, and the reasons for them, were as follows:

- He was too casual in the way he dealt with the matter. Perhaps because he knew the client well and was very friendly with the individual behind it? In particular, he failed to keep proper notes or records (which the Judge held hampered his evidence). He claimed he had orally informed the client of the change made to its profit share but there was no evidence to this effect and his evidence was not accepted.
- He failed to pass relevant documentation to the client for its consideration and approval, such that the client was wholly unaware of the change to the original terms as to profit-sharing.
- He was extremely busy on other work at the time with some 30-35 live client matters.
- He wrongly reassured his client that there was nothing untoward in the documentation.

Ironically, if the solicitor had kept accurate notes and records, and accepted a mistake was made, it may well have been possible to seek rectification of the transaction. The solicitor argued that he had no duty to give commercial advice as to the transaction itself but he had simply not kept the client properly informed and, in any event, the duties of a solicitor were summarised in *Minkin -v- Landsberg (2015)* as including:

- To carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

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- To proffer advice which is reasonably incidental to the work that he/she is carrying out.
- To warn an inexperienced client of risks which are (or should be) apparent to the solicitor but not the client.

In *County Personnel (Employment Agency) -v- Alan R Pulver & Co (1987)* Bingham LJ stated that:

"If in the exercise of a reasonable professional judgment a solicitor is, or should be, alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further".

Examples of particular property issues that often give rise to claims are as follows:

- Faulty drafting of rent review clauses and, in particular, formulae as to RPI increases or failing to disregard improvements under an earlier Lease.
- Uncommercial/impractical drafting of tenant break clauses and negligent service of tenant or landlord break notices- with the result the break is ineffective and the tenant remains bound by, or still entitled to, the lease.
- Ineffective or invalid lease assignment covenants which allow the tenant to essentially walk free.
- Failing to advise on Planning restrictions and/or to advise the client to obtain specialist Planning advice.
- Failing to appreciate the tax implications of the transaction or regulatory issues (such as the need for a Licence for HMO accommodation).

- Failing to obtain mortgagee's consent or the consent of some other requisite party.
- Failing to observe statutory deadlines in enfranchisement claims or serving enfranchisement notices or counter-notices that are invalid.
- Reliance on inadequate surveys or proper investigation of the state of the property. In *Large -v- Hart (15 January 2021)* the Defendant Surveyors were found liable for considerable damages due to substantial construction defects in a residential property the Claimants had bought as their dream house but the damages payable were discounted to reflect the sum the Claimants had already recovered from their solicitors, Michelmores LLP.
- Inadequate consideration of the title to the property and the existence or effect of rights of way or light or covenants that inhibit redevelopment or use.
- Waiver of rights against the other party, such as forfeiture of a Lease or the ability to rescind a contract.

In *Orientfield Holdings Limited -v- Bird & Bird LLP (2017)*, the Court of Appeal confirmed that the solicitors were negligent in that, having obtained a Plansearch report detailing planning applications within 300 meters of the property being purchased, they were then under a duty to draw to the attention of their clients that there was to be a major school site development close to the property.

In *Robinson -v- Ness & Co (2017)*, the solicitors were negligent in not advising their client that planning consent was required to convert a house into 5 flats. A solicitor has a duty to identify matters that may be important to the client to know and bring such matters to the client's attention.

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In *O'Neill -v- Bull (2018)*, the solicitors were negligent in not drawing to the attention of their clients prior to exchange of contracts a term of the offer of mortgage that required a surveyor's report confirming there was no subsidence.

But establishing negligence is just the first stage in recovering damage from solicitors. It is then necessary to establish causation and loss arising directly from such negligence and many claims do fail at this stage. The client needs to establish that, correctly advised, it would have acted differently and that the loss claimed would have been averted.

In *Gabriel -v- BPE Solicitors (2017)*, the solicitors negligently drafted a property loan facility agreement but the Court held that the claim for damages of £200,000 failed as the client would have lost the loan monies even if the agreement had been correctly drafted.

And, whilst conveyancing does give rise to a substantial number of claims, it is only fair to say that not only is this in a minority of cases but also in one of the busiest, if not the busiest, areas of the law. Moreover, the work done is subject to far greater consequence and scrutiny than other fields of the law as, if there is any failing on a property purchase or lease, this is often revealed on any further sale of the property or assignment of the lease.

In conclusion, and at a time when clients are stressing that their priority concern is quality of service rather than cost, it is vitally important for firms to ensure that they do act professionally. All major firms spend substantially on training for their lawyers but many lawyers work under considerable pressure and there are still a considerable number of claims. In a sense, the fact that all legal firms have substantial professional indemnity insurance may actually lessen concerns as to quality but this does lead to firms being targeted as they can afford to pay out and, in any event, nothing can compensate a firm for losing a client because they are dissatisfied with the service provided.

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