Editor's note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors Deacons, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

DEALING WITH NON-CLIENT

Whilst claims against solicitors are usually made by clients and former clients, it is not entirely remote for non-clients to sue solicitors when there was no formal or contractual relationship between them. Practitioners should also be mindful that a retainer may be implied by conduct.

This bulletin discusses potential issues arising from solicitors' relationships with non-clients and identifies the relevant dos and don'ts from a risk management perspective.

Duty of Care?

The starting point is that a solicitor does not owe a duty of care in tort to a non-client. However, a duty of care may be imposed if the following tests are satisfied:

(i) The *Hedley Byrne* test: whether the solicitor assumed any responsibility for the non-client and whether it was reasonable for the non-client to rely on the advice/information given by the solicitor, see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

(ii) The *Caparo* threefold test: reasonable foreseeability, sufficient proximity and whether it would be fair, just and reasonable to impose the duty in question, see *Caparo Industries plc v Dickman* [1990] 2 AC 605.

The question on whether a duty of care is owed by a solicitor to a third party in situations where the work undertaken by the solicitor for a client is for the benefit of the third party is not straight forward. In general, a duty of care is owed to the third party where:-

(a) there is identity of interest between the client and the third party and the performance of the duty to the client is intended to benefit the third party, or
(b) the solicitor gives advice or information, intending that the third party acts on that advice or information without other independent professional advice, or
(c) the solicitor has specifically undertaken a responsibility to the third party independent from his status as the client's legal adviser (paragraph 9-127, Clerk & Lindsell on Torts 23rd edition).

Examples

(1) One commonly seen example of owing a duty to a non-client is will drafting vis-à-vis an intended beneficiary. In *Feltham v Bouskell* [2014] P.N.L.R. 2, a solicitor was instructed by a testator to change her will such that her step-granddaughter X would inherit the bulk of her estate. The testator was examined by a doctor, who confirmed that she had mental capacity to make a will. Solicitor A was still concerned and did not change the will as instructed. The testator eventually passed away. X being an intended beneficiary brought a claim against the solicitor for negligence. The English Court applied the principle in *White v Jones* [1995] 2 AC 207 that the assumption of responsibility by a solicitor to his client, who had given instructions for the drawing up

of a will for execution, extended to an intended beneficiary under the proposed will and held that there is a particular obligation to carry out his client's instructions with expedition especially in the case of an elderly testator.

(2) There may be an assumption of responsibility by a solicitor for a non-client when information is sought from and imparted by the solicitor who is possessed of special skill, is trusted to exercise due care, and knew or ought reasonably to have known that reliance was being placed on his skill and judgment. For example, an estate agent handling the property transaction asks a solicitor whether a landed property can be sub-divided, and the solicitor mistakenly answers yes. The solicitor may owe a duty of care to the estate agent as they may well rely on the solicitor's answer.

(3) A solicitor acting for a money lender in a mortgage loan transaction may also be held liable to the borrower and the guarantors. In *Edward Wong Finance Co. Ltd v Pomay Investments Ltd & ors and Johnson, Stokes & Master* [1980] HKLR 674, the solicitor acted for the money lender. However, on the facts, the handling solicitor undertook various tasks and adopted an advisory role vis a vis the borrower and the guarantors, but she did not tell them that she did not act for them in the transaction. Both the Court of First Instance and the Court of Appeal found that although there was no contractual solicitor-client relationship between the solicitor and the borrower or the guarantors, these parties would be justified to rely on and act in accordance with the solicitors' advice to their detriment. As a result the solicitor was held liable to indemnify the borrower and the guarantors following the line of cases commencing with *Hedley Byrne*.

(4) The Court may make a wasted costs order against a solicitor to indemnify a counter party's costs if there has been an improper or unreasonable act/omission on the part of the solicitor, or there is undue delay or other misconduct or default caused by the solicitor. In *Re Shanghai Huaxin Group (Hong Kong) Ltd* [2018] HCCW 126/2018, the solicitors acting for a company in winding up proceedings were ordered to show cause why they should not pay, *inter alia*, the costs of the petitioner, the Official Receiver and the provisional liquidators for a hearing, which would not have been necessary but for the solicitors' conduct (including giving contradictory and/or inconsistent answers, and on some occasions simply failing to answer the Court's questions). In particular, the Court was critical of the solicitors' conduct in getting clear instructions from their clients and that the solicitors' handling of the matter wasted considerable amount of the time both of the Court and the other parties.

(5) A solicitor acting for the beneficial owner of a company may also owe a duty of care to the company. In *Jim Chiu Yuen v CL Chow & Macksion Chan (a firm) & ors* [2018] HKCFI 215, the solicitors acted for an individual private investor, who was the beneficial owner of a company with substantial investments. Pursuant to a court order, the individual was not allowed to deal with the investments held by the company ("Restraining Order") and he instructed the solicitor to vary the Restraining Order in light of the volatility of the market. Accordingly, a variation order was obtained to allow the individual to dispose of the investments held by the company within 5 trading days. The individual later brought an unsuccessful claim against the solicitor for loss and damage from being deprived of the opportunity to dispose of the investments at opportune times.

Notwithstanding that the individual's claim was struck out, in considering whether the individual's claim was bad in law on the basis of the reflective loss principle and whether the company itself would have a cause of action against the solicitor, the court' found that despite the lack of a retainer between the solicitors and the company, the solicitors had assumed responsibility to the company and owed it a duty of care. This was because the solicitors understood that any variation of the Restraining Order

would have a direct impact on the company's interests, and it was reasonable for the company (acting through the individual) to rely on the solicitors' advice. More importantly, the solicitors knew or ought to have known that the company would rely thereon but they did not make any disclaimer of liability.

Key Takeaways and Dos & Don'ts

In light of the above, practitioners should be mindful of the following points:-

1. A duty of care or an implied retainer may be imposed even if the person you are dealing with is not your client.

2. Practitioners should avoid any assumption of responsibility and keep clear written records of any reasons for delay or obtain written confirmations of any understanding or arrangement signed by all relevant parties.

3. ***DO*** keep adequate written and contemporaneous records, such as attendance notes and written confirmations signed by all relevant parties, for example:

   (i) to show who is and/or is not the "client" and to remind a non-client of his/her right to seek independent legal advice.

   (ii) to show the precise scope of any retainer, to whom the relevant advice or information is given and by whom such advice or information should or should not be relied upon.

4. ***DON'T*** assume that no duty of care or implied retainer could be established by a non-client or that a written record of the understanding or arrangement between the parties as to matters per 3(i) and (ii) above is not required.

5. ***DO*** make appropriate disclaimers or include qualifications to exclude or limit potential liability to third parties when giving advice or making any statements upon which third parties may rely.

6. ***DON'T*** give unqualified statements to third parties (as in *ADT Ltd v BDO Binder Hamlyn* [1996] BCC 808) if it is reasonably foreseeable that such third party would be affected by or would rely upon such statement or advice.

7. Practitioners should also properly record non-client dealings in an office cash book and ledger when money is received on behalf of his clients, Rule 10(3) of *Solicitors' Accounts Rules* (Cap. 159F).

8. ***DON'T*** disclose any information subject to legal professional privilege unless such privilege has been waived by the client or a court order has been obtained, see Principle 8.01 Commentary 8 of the *Hong Kong Solicitors' Guide to Professional Conduct* ("**Guide**"). This issue is particularly important when a solicitor is defending a claim made against the solicitor by a third party (rather than a client) and considering what can be disclosed in the defence.

9. Last but not least, when a claim by a non-client arises or is likely to arise, practitioners should notify the authorised insurers, through the manager appointed by the Hong Kong Solicitors Indemnity Fund Limited as soon as practicable, see Principle 6.03 of the *Guide*.