



## Knowing your client

**This newsletter highlights to all professionals the importance of establishing the correct identity of their client.**

This may, at first, appear an obvious piece of advice but we find that dealing with claims against professionals can be complicated if it is not easily apparent who the professional was acting for. In fact, it is comparatively simple when first engaged by a client or when a new client takes over from an existing client to agree who the professional's client is and to confirm that in writing so there is no dispute at a later stage. However, there are many examples of confusion or uncertainty regarding the identity of a client. Most of the problems which occur are in commercial situations.

A business can operate as an individual, a partnership or a limited company and when it does operate only as one of those entities and is known by only one name, problems are less likely to arise. A business may, however, simultaneously be operating as a number of connected limited companies or a professional may be dealing with somebody who is trading as an individual as well as acting as the director of a limited company without clearly distinguishing between the two. We have often seen cases where a business uses a trading name which does not make it immediately apparent whether it is an individual, partnership or limited company. Ideally, the documents of any business ought to make the position clear but this does not always happen.

There are good reasons why the client's identity needs to be established at the earliest point.

The identity of the client can be crucial in defending professional negligence claims. A fundamental principle of law is that a party can only claim damages against a professional for losses which it has suffered. We often come across claims where one legal entity has contracted with the professional although another related legal entity has actually suffered the loss which is being claimed. Unless we have good evidence proving who the client was, it is harder for us to use this "no-loss" argument. A typical situation is where one limited company gives instructions to an architect, engineer or surveyor to carry out work in relation to a property although that property is owned or being bought by a second limited company.

Another example is where a professional has dealt with somebody who is the director of two limited companies. If there is no clear written confirmation that the professional is instructed by the first company, who may turn out to have suffered no loss, it will be easier for the Court to infer that the person giving instructions to the professional was acting in his role as director of the second limited company (which has suffered the loss) or that the professional was acting for both.

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Where a claim is defended using the "no-loss" argument, claimants often respond by arguing that the party engaging the professional was acting as an agent for an undisclosed principal i.e. for the other party who has suffered loss as a consequence of the professional's action. The relationship of principal and agent can exist between two related entities but there has to be clear evidence that they intended that relationship at the time. As the term suggests, the fact that one party is acting as agent for a principal will not be known to the professional and, for the argument to succeed, the law does not require that the professional even needs to know of the existence of the principal.

Our advice to professionals is to take care, at the beginning of their engagement, to confirm the identity of the client, for it will be harder, at a later stage, for a claimant to convince the Court that there was an agent-undisclosed principal relationship. The issue is an important one because a claimant who has a contract with a professional is in a much stronger position than the claimant who has no contract to rely upon.

As a simple risk management measure, a professional can always minimise the prospects of a dispute by stating in the appointment document that the contract of services with the client is not intended to benefit anybody else.

As well as taking precautions to establish who the client is at the start of a contract, it is also important to be vigilant throughout the course of it. We often see, on files of professionals, correspondence from a client where the stationery changes; for example, an existing trading name is suddenly used by a new limited company. Sometimes, in the middle of a file we have seen requests to carry out work for another client without there being proper clarification of whether the new client is a substitution for the old one or whether the professional now has two clients. Professionals in the construction industry are used to changes in the course of projects which are sold on and where there are assignments or novations. It is vital that every professional agrees in writing who the client is when such changes occur.

### Practical Summary

- Establish whether the client is an individual, a partnership or limited company.
- Ensure that the name of the client is recorded in writing.
- Check all correspondence and other documents sent to or received from the client, checking for any changes in the name or description of the client; for example, a partnership being incorporated into a limited company.
- Immediately raise with the client any apparent changes in the reference to the client.
- Expressly agree that no benefits under the contract are to be conferred on third parties.
- Always look out for assignments, novations or similar developments which may change the identity of the client.

Our specialist in-house claims advisors are always available to answer questions which arise in the course of a contract and which have a bearing on your potential professional liability.



Please note that this information is not intended to constitute advice or a complete statement of relevant law.

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