



Claims Initiative of the Year

Limiting your liability

Increasingly it seems claims are brought against solicitors to compensate clients for what previously would have only been considered bad luck. Of all the professions, solicitors seem to be treated harshly by the Courts who often try to compensate clients out of solicitors' professional indemnity insurance.

The purpose of this newsletter is to suggest some practical ways a solicitor can seek to either exclude or limit liability.

1. Exclusion of Liability

The general principle is that liability for negligence in a contract may be excluded if the words are sufficiently clear. However, for solicitors, there are other constraints which prohibit this. The Professional Conduct Rules prevent solicitors from specifically excluding liability for negligence. Additionally, the Unfair Contract Terms Act disallows any exclusion for death or personal injury, or an attempt to exclude fraud.

2. Limiting Liability

Although a solicitor is specifically prohibited from contractually excluding any liability for negligence, there are some ways whereby a solicitor can limit such liability.

2.1 Retainer

Where the terms, scope and limits of a retainer are not clearly set out, there is a risk that a Court could subsequently extend a duty to cover matters which the solicitor believed he was not instructed to do. An example is where a solicitor is acting in a property transaction but fails to consider the tax implications. If it transpires that the transaction could have been structured in a different way, with the tax payable having been reduced, it is open to the client to argue that the solicitor was under a duty to consider the tax complications of the transaction. In his defence a solicitor will argue that his retainer was confined to conveyancing matters only. If the precise terms of the retainer were set out at the beginning, such a claim could be prevented.

Practical Tips

- Draft a retainer letter when sending out a Rule 15 Client Care Letter. Set out clearly the exact terms and scope of the retainer.
- Obtain the client's consent to these limits of the retainer.
- Keep contemporaneous attendance notes of all meetings and discussions with the client relating to the terms of the retainer. This will prevent any ambiguity or damaging conflicting oral evidence, in the event a claim is subsequently made.

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- When preparing a bill, make sure the description of the time charged directly relates to the task carried out by the solicitor as part of the retainer. Phrases such as "dealing with the matter generally" could defeat any limit of the scope of the retainer, as they could be construed as extending the terms and thereby the duty.

2.2 Limiting the amount recoverable

The Professional Conduct Rules do not forbid such a limitation as long as a solicitor does not limit his liability to below the minimum level of cover required by the Solicitors Indemnity Rules. This is currently £1,000,000.

Practical Tips

- Set out in the retainer letter the financial cap on any compensation. Such limit may be dictated by the availability and limit of indemnity of your PI insurance.
- Consider whether there is another professional involved in giving advice. Typically this could be an accountant, or, say, an architect or a property project manager. If there is, it is wise to include a proportionality clause in the retainer letter stating that the solicitor is only liable to the extent that he actually causes any loss. If such a clause is not included, under common law, the advisers will all be jointly and severally liable to the client and it remains open for the client to choose to sue one of those advisers only should he so wish. Whilst it is possible to seek a contribution from another professional in such circumstances, recovery is not always certain and it is therefore better to include a proportionality clause.

2.3 Liability to non clients

It is possible in certain circumstances for a Court to find that although there is no direct contractual relationship between a solicitor and a third party, the solicitor does owe a duty of care to a non client.

Practical Tips

- Be wary of the situation where another party in a transaction is not legally represented. One way of avoiding an assumption of responsibility in such circumstances is to write to the unrepresented party and state in clear terms that they should seek independent legal advice. (The solicitor is potentially in a position of conflict of interest in such situations in any event.)
- Agree with the client that if any advice is passed to a third party, the terms of disclosure need to be clearly agreed by the solicitor with the client and communicated to the third party, beforehand.
- If you become aware that your advice might be passed to a third party, you should seek to clarify the existence and scope of any such duty with the third party in the same way as you would with the client. This should be in writing.

Conclusion

There may be some reluctance by solicitors to seek to negotiate limitations with their clients as they might see it as putting themselves at a competitive disadvantage. However, given that accountants already have a history of seeking to limit their liability through their letters of engagement, there is no reason why solicitors cannot do so and indeed, should not do so. It is an appropriate reaction to the recent increase in claims seeking compensation against solicitors.



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

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