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Professional liability

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The duties owed by financial advisers

The case of Seymour v Ockwell (Queen's Bench Division, 13 May 2005) raised a number of interesting issues concerning the respective duties owed by advisers and product providers, and their responsibilities for loss suffered by the customer.

Mr and Mrs Seymour wished to invest in a low risk product. They approached Miss Ockwell, their tax adviser and an IFA, for advice. She in turn approached her regular contact at Zurich IFA Limited (ZIFA), Mrs Clarke, for information on potentially suitable products. Based on information provided by Mrs Clarke, Miss Ockwell recommended that the Seymours invest in a product called the 'Alpha fund' operated by a company known as 'ICM' based in the Bahamas. The Seymours invested £500,000. After the investment was made, but before the end of the cancellation period, ZIFA circulated internally a memorandum raising serious concerns about the fund. The note was never passed to Miss Ockwell or Mrs Clarke.

The fund subsequently collapsed and the Seymours brought proceedings against both Miss Ockwell and ZIFA. They alleged that Miss Ockwell acted in breach of her contractual and tortious duties of care. They also alleged that ZIFA owed them a similar duty of care in tort. Miss Ockwell brought Part 20 proceedings against ZIFA for an indemnity or contribution in respect of any liability she might have to the Seymours.

As for Miss Ockwell, the Judge accepted that, whilst the ambit of the duty of care owed by a financial adviser was not necessarily the same as the duties owed under the applicable regulatory regime, a regulatory regime could be relevant to the content of the common law duty of care. Accordingly, the Judge said that the regulations afforded strong evidence as to what is expected of a competent adviser in most situations. However, the case against Miss Ockwell did not rest primarily on whether she had met the regulatory requirements. In fact, she had tried quite hard to follow the prescribed procedure. Her undoing was her failure to appreciate that it was obvious that the Alpha fund was not low risk. A variety of features clearly placed the fund outside the low risk category including: that it was administered from the Bahamas, the investment involved the purchase of shares the value of which could fluctuate and that the safety features advertised as being in place were not ones which were likely to help investors in the event of misconduct by the directors of the fund.

The Judge concluded that it was plainly beyond Miss Ockwell's retainer to recommend the Alpha fund to the claimants and on that ground alone their claim for damages had to succeed. In reaching this conclusion, the Judge rejected Miss Ockwell's argument that she should be judged by the standards of competence of a high street IFA and not by the standards of sophisticated specialist firms. Whilst the test was always what

could be expected of a reasonably competent professional, the "measure of competence" would depend on whether the professional had specialist expertise, the nature of the business and the field of practice of the individual. She was not being asked to do something outside the range of her expertise. He also said it was not a defence for Miss Ockwell to say that she relied on Mrs Clarke's recommendation. The regulations which governed professional obligations reinforced the basic principle that she needed to exercise an independent judgment. In other words, she could not delegate her task to advise as to suitable investments to Mrs Clarke.

In relation to the Seymours' case against ZIFA, the question of the existence of a duty of care had to be determined by reference to the Caparo principle. The Judge concluded that, even if the damage suffered was reasonably foreseeable, there was not a sufficiently close relationship to fulfil the proximity test, nor was it a case in which it was fair, just and reasonable to impose a duty. Therefore, the Seymours' claim against ZIFA failed. It is legitimate to expect more of specialists than generalists.

In passing, the Judge noted that the contractual chain and the framework of statutory duties also suggested there was no direct duty of care on ZIFA. If there was such a duty, it would not only ignore the contract between the adviser and the customer, but it would also bypass the regulatory regime, which firmly placed responsibility for recommendations on the shoulders of the adviser upon whom the clients had relied.

Turning to the Part 20 claim against ZIFA, the Judge accepted that it was not ZIFA's function to advise Miss Ockwell what to tell the Seymours or what to recommend to them. That was for her to decide. However, he was satisfied that the representations made by ZIFA through Mrs Clarke were made negligently and in breach of duty owed to Miss Ockwell. ZIFA was liable to her for the consequences of that negligence. ZIFA's failure to communicate the contents of its internal memorandum about the Alpha fund to Miss Ockwell as a matter of urgency was a further breach of duty for which ZIFA was answerable.

ZIFA's liability to Miss Ockwell was in essence a question of contributory negligence. The amount of contribution should be just and equitable having regarding to the extent of ZIFA's responsibility for the damage caused to the claimants. The Judge concluded that the greater share of responsibility rested with ZIFA, principally because of the failure to provide Miss Ockwell with the information in the internal memorandum. The correct contribution to be made by ZIFA was 66%.

Non-causative factors can be considered in contribution claims

Brian Warwicker v Hok International (27 July 2005, Court of Appeal) concerned the assessment of contribution between architects and engineers jointly responsible for defects in a building.

The design of a building was faulty, in that a through flow of air caused the building to become unreasonably cold and draughty. The building owner claimed against the engineers and the claim was settled. The engineers then claimed a contribution from the architects. In that claim, the Court held that the architects and engineers were jointly liable for the defect. Liability was split as to 60% against the architects and 40% against the engineers.

The architects appealed. In particular, they argued that in assessing contribution the Court should confine itself to breaches of duty that had actually caused loss, and should not consider "blameworthiness".

The appeal was dismissed. Section 2(1) of the Civil Liability (Contribution) Act 1978 provides that in assessing contribution, the Court has to find the amount which is just and equitable with regard to the party's responsibility for the damage in question. In Resource America v Platt Site Services (2004), the Court held that in reaching a decision under s2(1), it could take account of factors which were non-causative. The Court of Appeal was bound by Resource.

However, it considered the extent to which such factors should generally be taken into account. It described the discretion under Section 2(1) as "semi-structured" in that it directs the Court to attach most weight to the Defendant's responsibility for the damage. Non-causative factors can only play a limited role and a sufficient relationship between such factors and the damage in question must be shown.

The effect of this decision, combined with that in Resource, is that non-causative factors remain "in play" when contribution is being considered. This may be difficult to justify in principle. Usually in tort, you are only liable to the extent that your wrongdoing has caused a loss. However the Court of Appeal's decision does indicate that rarely, if ever, will non-causative material be a major factor in deciding contribution. It is likely that the starting point will be, almost invariably, the causative factors and where (as here) additional factors put a party in a "poor light", they will be of relatively limited impact.

Company Law Reform Bill

Following intensive lobbying from the audit profession, on 03 November 2005 the Government published its Company Law Reform Bill. Of most interest to auditors will be the proposed new criminal offence of knowingly or recklessly causing a report to include any matter that is misleading, false or deceptive in a material particular. Most significantly, the Government has proposed that a person guilty of the offence be subject to a fine, dropping the proposal that the offence carry a possible prison sentence. Further, it is made clear that the proposed offence would apply, where the auditor is an individual, to that individual and any employee or agent of the individual who is eligible for appointment as auditor of the company. In other words, the audit firm would not be criminally responsible for the offence of the individual auditor.

The future of the Bill will now depend on its progress through Parliament.

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Compensation Bill

On 02 November 2005, the Government published its Compensation Bill. The majority of the Bill is taken up with provisions relating to the regulation of claims management services. However, Section 1 contains a provision relating to the law on negligence.

The section provides that:

"A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity."

The explanatory notes which clarify this new provision state that Section 1:

"is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is solely concerned with the court's assessment of what must be done to satisfy the standard of reasonable care in the case before it."

Further, the provision "reflects the existing law and approach of the courts."

The clause as currently drafted raises a number of questions. For example, if the provision simply "reflects the existing law and approach of the Courts" then why is it thought that such a provision is needed? In addition, what does "desirable activity" actually mean in practice? The Bill does not provide an answer to that and it seems almost inevitable that litigation will be required in order to clarify the meaning of the phrase. We will be monitoring the progress of the Bill.

Further information

If you would like further information, please contact

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This Bulletin is intended only as a synopsis of recent developments. You should seek specific advice from Colin Passmore, Ian Hammond or James Pollock of the Professional Liability Group at Simmons & Simmons before you rely on any matter referred to.

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