

Solicitor's Liability: Failure to Give Complete Advice

The high incidence of breaches of duty by solicitors is an ever present reality.¹ These breaches continue despite attempts by the Law Society, through such means as the Professional Legal Training Course and the *Bencher's Bulletin*, to educate the profession about its responsibilities to the public. This article will examine solicitor's liability, specifically the duty of a solicitor to give complete advice to a client in light of recent cases.²

It is important to begin with a review of the different types of duties owed by a solicitor to a client and the applicable standard of care. Next, recent cases will be used to illustrate the breadth of this duty and the willingness of the courts to expand the scope of a solicitor's retainer beyond its original terms. This is important because solicitors can expose themselves to unnecessary liability by interpreting their retainers too strictly. Finally, the article will conclude with a discussion of how the high incidence of solicitor's liability could be limited.

DUTIES OWED BY SOLICITOR TO CLIENT

To begin with, the duties owed by solicitors to their clients must be reviewed. These duties are succinctly stated by Riley J. in *Tiffin Holdings Ltd v. Millican et al.*³:

The obligations of a lawyer are, I think, the following:

- (1) To be skilful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of his client.

- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.⁴

These duties can be grouped into three types: contractual duties, duties in tort and fiduciary duties.⁵

Contractual Duties

Contractual duties are the simplest to define and arise from the retainer that a solicitor enters into with a client. These duties will include those necessary to effect the performance of the services that are the subject of the retainer. Any attempt to limit the scope of contractual duties to less than that required of a reasonably competent solicitor should be evidenced in writing in simple, concise terms.

Duties in Tort

Solicitors also owe their clients implied duties, most importantly the duty to exercise reasonable care and skill in the performance of the services which they are retained to provide. This duty arises in tort and is important because an action in tort will often exist after an action in contract has been statute-barred because of the expiration of a limitation period. There has been much judicial debate about whether a negligent solicitor can be liable to a client in tort. In 1938, the English Court of Appeal held in *Groom v. Crocker*⁶ that a solicitor could only be liable to a client in contract. *Groom* was followed until Oliver J. decided in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*⁷ that *Groom* was not good law in light of the House of Lord's decision in *Hedley Byrne & Co. Ltd. v.*

Heller and Partners Ltd.^{8,9}. In Canada, this issue has been resolved by the Supreme Court's decision in *Central Trust Co. v. Rafuse*¹⁰, where solicitors who performed work negligently without reasonable care and skill were found to be liable in tort, as well as in contract.

In *Central Trust*, the defendant solicitors acted in connection with the purchase of the shares of a company. A condition of the contract of purchase and sale was that the purchasers would obtain a mortgage on real property owned by the company. The proceeds of the loan were to be paid to the vendors in satisfaction of the purchase price. An application for the mortgage loan was made to the plaintiff trust company by the purchasers on behalf of the company. The plaintiff then retained the defendants to perform the necessary legal services in respect of the mortgage transaction. The sale closed and the vendors were paid the proceeds of the mortgage. The company subsequently defaulted on the mortgage and the plaintiff began foreclosure proceedings. In its defence, the company argued that, pursuant to the Nova Scotia *Companies Act*¹¹, the mortgage was void because it was *ultra vires* the power of the company to give financial assistance for the purchase of its shares. At trial, the mortgage was declared void and the plaintiff subsequently sued the defendants for breach of contract and negligence.

On appeal, the issue was whether the defendant solicitors could be concurrently liable in contract and tort for the negligent performance of the services that they had been retained to perform. Le Dain J., for the Court, held that they could. In doing so, the Court

affirmed *Midland, supra*, and firmly established the concurrent liability of negligent solicitors in contract and tort in Canada.

Fiduciary Duty

The last type of duty owed by solicitors to their clients is a fiduciary duty. Solicitors are in a position of trust and must therefore act *bona fide* in their clients' best interests, to the exclusion of all other interests.¹² Having reviewed the duties of solicitors, the standard to which these duties must be performed will now be discussed.

STANDARD OF CARE

Solicitors are required to exercise reasonable care, skill and knowledge in the performance of the professional services that they undertake.¹³ The standard of care is "what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession".¹⁴ In determining the amount of knowledge that a reasonably competent solicitor should possess, *Le Dain J. in Central Trust, supra*, held that:

A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.¹⁵

The standard of care will not be affected by whether a solicitor is practising in an urban or rural area or in a small or large firm, but rather by the type of work that he or she undertakes. For example, a solicitor involved in tax planning will necessarily have to

exercise a higher standard of care than a solicitor doing simple incorporations. To cite Newbury J. in *Marbel Developments Ltd. v. Pirani*¹⁶:

From this I take it that any solicitor taking on a task for a client must bring reasonable care and skill to that task, regardless of his geographical location and practising environment. In other words, the extent of the solicitor's duty is determined by the work undertaken, rather than by his or her particular circumstances.¹⁷

BREACHES OF A SOLICITOR'S DUTY TO GIVE COMPLETE ADVICE¹⁸

Having reviewed the basic principles, the specific duty of a solicitor to give complete advice to a client will now be discussed. Liability for breaches of this duty sometimes arises in contract when a solicitor fails to give the advice specifically requested.

However, liability for breaches of this duty most often arises in tort when a solicitor negligently fails to exercise reasonable care and skill and gives advice, which unbeknownst to the client, is incomplete.¹⁹ The cases cited below reveal how broadly the courts have applied this duty.

Failure to Inform as to the Progress of a Matter

A solicitor will be in breach of contract and in breach of his or her duty to keep a client informed, if the client is not consulted in respect of matters that fall outside the solicitor's discretion. The duty to keep a client informed is set out in the Law Society's

Professional Code of Conduct, Chapter 3, Rule 3 of which states:

A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Without limiting the generality of the foregoing, the quality of service provided by a lawyer may be measured by the extent to which a lawyer:

- (a) keeps the client reasonably informed,

(b) answers reasonable requests from the client for information,

...

(k) discloses all relevant information to the client, and candidly advises the client about the position of a matter, whether such disclosure or advice might reveal neglect or error by the lawyer.

A recent decision of the British Columbia Supreme Court in *Shiokawa v. Tohyama*²⁰ illustrates the danger of failing to keep a client informed.²¹ In *Shiokawa*, the plaintiff was a resident of Japan and the registered owner of real property in Victoria. The defendants included Yoshinao Tohyama (a friend of the plaintiff), Pacific Coast Savings Credit Union and Woods Adair, the solicitors for Pacific Coast. Through the use of a forged power of attorney, Tohyama induced Pacific Coast to lend money to the plaintiff, the repayment of which was secured by a mortgage registered against the plaintiff's property. Tohyama spent the amount of the loan and when it was not repaid, Pacific Coast demanded repayment from the plaintiff directly, which led to the discovery of the fraud. On an application by the plaintiff, the Court ordered the cancellation of the mortgage registered on the title of his property. Having lost its money and security, Pacific Coast subsequently sued the defendant solicitors for damages.

The material facts in respect of Pacific Coast's claim were as follows: once Pacific Coast had approved the plaintiff's loan, it sent the solicitors a power of attorney document that purported to appoint Tohyama the plaintiff's attorney (the "Power of Attorney"), as well as its standard-form commitment letter and mortgage instructions. The mortgage instructions required the solicitors to:

ENSURE POWER OF ATTORNEY IS SATISFACTORY FOR THIS TRANSACTION. ENSURE P.O.A. HAS OPENED AN ACT AT P.C.S.C.U. BROADMEAD BRANCH PRIOR TO DISBURSE.²²

Upon review of the Power of Attorney, which was purported to have been executed in Japan, the solicitors noted several problems that would have prevented the Land Title Office from accepting it. These problems included an unusual legal description of the plaintiff's property, a limitation on the use of the Power of Attorney if the plaintiff lacked sufficient mental capacity, an authorization for transactions with the Royal Bank of Canada, but not with Pacific Coast, as well as an unusual form of notarization. These deficiencies were communicated to a third-party emissary in contact with Tohyama. A new power of attorney (the "First Substitute") was then provided by the emissary. The First Substitute corrected the deficiencies in the Power of Attorney, but was dated before the Power of Attorney and contained numerous spelling mistakes. The solicitors brought this to the attention of Pacific Coast and advised that the Land Title Office might not accept the Power of Attorney because of its deficiencies and that the closing of the transaction might be delayed. The emissary provided the solicitors with a further amended power of attorney (the "Second Substitute"), a signed original of which was delivered to the solicitors on the same day that it was purported to have been executed and notarized in Japan. Nevertheless, the solicitors filed the Second Substitute and it was accepted for registration by the Land Title Office. The solicitors then reported to Pacific Coast that its mortgage on the plaintiff's property had been registered.

Wilson J. held that the solicitors had breached their duty of care to Pacific Coast by not immediately reporting to it the deficiencies in the Power of Attorney and by not seeking

further instructions when the unusual circumstances surrounding the Power of Attorney suggested that further inquiry was warranted.²³ Wilson J. further held that the issue was not whether the solicitors were negligent in failing to detect the fraud, but rather whether the solicitors had failed to meet the standard of care required of solicitors acting for financial institutions. Wilson J. stated:

It was no part of the solicitors' instructions to authenticate the Special Power of Attorney. They were instructed to "insure" that the Special Power was "satisfactory for this transaction". "Satisfactory", in the context of the many specific instructions, in the commitment letter and mortgage instructions, means "adequate for the needs of the case". "The case" was the registration of a mortgage against Mr. Shiokawa's title.²⁴

Wilson J. also held that the solicitors knew or should have known that Pacific Coast was relying on the Power of Attorney when it authorized the loan. Therefore, once they had found deficiencies in it, their obligation was to have immediately contacted Pacific Coast and to have sought further instructions. Wilson J. noted that by acting without instructions from their client, the solicitors assumed the risk associated with the forged Power of Attorney:

The procedure contended for by Pacific Coast is a reasonable standard of conduct in fulfilling that duty in the circumstances. Pacific Coast was entitled to know that the document it had relied upon to authorize the loan transaction would not suffice in attaining a registration of its financial charge. Pacific Coast was entitled to know that a substitute document, or documents, to effect that purpose, was proposed in the place of the document upon which Pacific Coast had relied. A telephone call by the solicitors, to Pacific Coast, advising that they – ". . . did not believe the Special Power of Attorney could be registered at the Land Title Office . . . that the closing of the transaction might be delayed as a result of the deficiencies in the power of attorney and that . . . Mr. Cherneske had advised he could provide another power of attorney . . ." is not a reasonable or prudent compliance with the solicitors' duty. Pacific Coast was entitled to see the substitute document, or documents, to make its own decision on whether it would assume the risk of continuing the loan

transaction. The solicitors proceeded without any instructions and thereby assumed the risk associated with the substitute documents.²⁵

Failure to Warn Against Specific Risks

Solicitors also have a duty to alert their clients to the specific risks that arise in relation to the matter that is the subject of a retainer. The basis for this duty is described in the English Court of Appeal's decision in *Boyce v. Rendells*²⁶:

. . . if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks.²⁷

The decision of the Ontario Superior Court of Justice in *Turi v. Swanick*²⁸ deals with this duty in the context of an incorporation of a corporation under the Ontario *Business Corporations Act*²⁹. In *Turi*, the plaintiff retained the defendant to incorporate a clothing store business. The plaintiff's express purpose for incorporating was to avoid personal liability for any of the debts or liabilities that might be incurred in the operation of the store. The business failed and the corporation went bankrupt. After the bankruptcy, a supplier successfully sued the plaintiff for the price of certain goods which were intended for use by the business, but which were sold and delivered to the plaintiff personally. The plaintiff subsequently brought an action against the defendant for breach of contract and negligence. It was claimed that the defendant should have advised his client that he risked personal liability if the corporation did not use its full corporate name on all contracts and orders for goods made by the corporation.

The action was allowed, and Spiegel J. held that, even though the defendant had advised the plaintiff about the proper use of the corporate name, he had nevertheless been negligent in failing to advise the plaintiff of the consequences of the corporation failing to use its name correctly.³⁰ Spiegel J. went on to state that, for the defendant to have satisfied his duty to take reasonable care to minimize the plaintiff's risk of incurring personal liability, he would have had to have advised the plaintiff of this risk in writing.³¹

Notwithstanding that *Turi* is an Ontario decision, it is prudent practice for solicitors in British Columbia to send their clients post-incorporation, reporting letters. Such letters should make reference to the requirement of Section 106 of the *Company Act*³² that a company use its proper corporate name in all business dealings. Such letters should also mention the personal liability that Section 106 imposes on directors, officers and persons acting on a company's behalf to indemnify any supplier, customer or holder of an instrument of a company for any losses incurred as a result of the company's failure to correctly use its corporate name. It is imperative that solicitors understand that the implied terms of their retainers require them to inform clients of all risks inherent in the matter upon which they are advising. The level of such explanation will inevitably depend upon the sophistication of a particular client.

Failure to Advise on Matters Not Specifically Covered by a Retainer

The liability of a solicitor for failing to advise a client on all issues relevant to the matter that is the subject of his or her retainer, whether or not the client has so instructed the solicitor, is closely related to a solicitor's liability for failing to warn against specific

risks. This duty is problematic because it removes a solicitor's ability to feel comfortable that he or she has satisfied the terms of the retainer by performing the specific tasks requested by the client. However, the breadth of this duty is not as wide as first seems. For example, a solicitor retained to act for the purchaser of a residential property containing rental units has been held to have been negligent for failing to check whether the rents being charged were in excess of that allowed by law.³³ Conversely, it has also been held that a solicitor retained to advise on the implications of exercising an option to purchase land is not bound to consider the validity of the option.³⁴

An illustration of the scope of a solicitor's duty to fully advise a client on all issues relevant to the matter upon which he or she has been retained to advise can be found in the decision of Newbury J. in *Marbel Developments, supra*. In that case, the plaintiff developer sued the defendant solicitor for breach of contract and negligence in connection with a failed stratification of an apartment building.

The plaintiff completed the construction of an apartment building in April 1990, intending to sell its suites individually. This required the stratification of the building. To do so, the plaintiff was required to file a strata plan and a disclosure statement with the Superintendent of Real Estate and the Registrar of Land Titles pursuant to the *Real Estate Act*³⁵. An important fact is that the *Condominium Act*³⁶ required that, if an application was made to stratify a new building, the application had to be accompanied by a certificate of a surveyor stating that the building had not been occupied prior to the date of the certificate, such certificate expiring 90 days after being declared.

The defendant was retained in mid-May 1990 to prepare the disclosure statement and file it along with the strata plan. The defendant prepared the disclosure statement and filed the documents with the Superintendent of Real Estate on May 25, 1990. The defendant's secretary then contacted the plaintiff to confirm the first filing and to request another \$360 for the Land Title Office filing. The plaintiff responded that there was "no rush" to file the documents with the Land Title Office and that it could wait until the defendant returned from his vacation. When the defendant returned in mid-June, he was unable to contact the plaintiff and did not pursue the matter until March 1991, by which time the occupancy certificate had expired.

However, even before the defendant eventually pursued the matter, the plaintiff had begun renting out suites in the building. This prevented the possible issuance of another occupancy certificate because the building was now occupied and triggered a more costly and less certain stratification application process. The plaintiff eventually sold the building as a rental building because it could not be economically and certainly stratified. The plaintiff then sought damages from the defendant for the difference between the sale price of the building and the amount it would have received, had it been able to sell the suites individually.

Newbury J. allowed the action. She held, notwithstanding that the defendant had initially only been retained to prepare the disclosure statement and to attend to certain filings, as time dragged on, the scope of his retainer changed:

However, when Mr. Mand [one of the principles of the plaintiff] decided in May that there was “no rush” to complete the filings, and several weeks dragged on without Mr. Pirani’s [the defendant] being able to contact Mr. Mand, the situation changed. The expiry date began to become relevant and there arose the risk that at the very least, the certificate would become unusable. The client was unaware of that risk or any other risk it was running by delaying matters; and the lawyer, having the greater skill and knowledge, became bound to make reasonable efforts to avoid damage to his client resulting from those risks. As Mr. Pirani acknowledged on the stand, a simple letter in July or August of 1990 would have sufficed for this purpose.³⁷

Newbury J. also held that, although the defendant was a general practitioner working in a small firm and had undertaken the work for only \$650, the standard of care owed by a solicitor to a client did not vary based upon geographical, practice type or economic considerations. In support of this, Newbury J. cited *Central Trust, supra*, and concluded:

From this I take it that any solicitor taking on a task for a client must bring reasonable care and skill to that task, regardless of his geographical location and practising environment. In other words, the extent of the solicitor's duty is determined by the work undertaken, rather than by his or her particular circumstances. Further, and subject to any different standard of care imposed by the terms of the retainer, the standard is only one of reasonable competence: it is not a standard of perfection - which usually seems eminently reasonable in hindsight - or of strict liability. To quote yet again from *Midland Bank, supra*:

“Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, *Griffiths v. Evans*

and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer." [at 583]³⁸

It seems clear from this decision that the scope of a retainer will vary, and is often extended as the relationship between a solicitor and a client changes and as time passes.

CONCLUSION

In conclusion, it seems clear that the courts will extend the scope of a retainer to the degree necessary to ensure that a solicitor meets a reasonable standard of care and skill in performing the services that he or she was retained to perform. The courts appear to be taking a liberal approach in deciding that, just because a client does not request a particular service, this does not mean that a solicitor owes his or her client any less complete advice than would otherwise be expected of a reasonably competent practitioner. Evidence of this approach is particularly apparent when the client is unsophisticated and ignorant of risks and issues that a reasonably competent practitioner should be aware. While this approach appears particularly onerous and may impose duties beyond those that a solicitor may have specifically undertaken to perform, it must be remembered that clients are often unaware of any and all relevant issues, which is why they initially retained the solicitor.

One way for solicitors to meet their duties would be for them to “think outside of the box”, as it were, and to redefine their client relationships from ones based on one-time jobs to ones based on long-term business relationships, in which a conscientious solicitor is as important to the success of a client’s business as a good accountant or a marketing

strategy. If this were to happen, the types of breaches discussed in this article would seldom occur. Solicitors apprised of their clients' long-term needs would be more likely to keep their clients abreast of developments in their files, consult with them regularly regarding uncertain matters, ensure their clients were fully aware of all the ramifications of particular actions, provide their clients with the information necessary to make informed decisions and communicate important information in writing. Not only would this redefinition lead to fewer actions against solicitors, it might also provide solicitors with better and more consistent revenues from clients, increasingly dependent on the good advice of their solicitors.

¹ The Lawyers Insurance Fund, the fund that insurers British Columbian lawyers, reports that in 2002 there were 342 claims for liability insurance coverage. See the Law Society of British Columbia, *2002 Annual Report* (Vancouver: Law Society of British Columbia, 2003) 19.

² The author would like to thank Terry Dunn and Joel Hagyard for providing several of the cases used for this article and Kira Lynne for her advice on style and grammar.

³ (1964), 49 D.L.R. (2d) 216 (Alt. S.C.), rev'd 53 D.L.R. (2d) 674, res'd 60 D.L.R. (2d) 469.

⁴ *Tiffin Holdings*, *supra* note 3 at 219.

⁵ For a general discussion of these duties please see Jackson, R.M. & Powell, J.L., *Professional Negligence* (London: Sweet & Maxwell, 1997) 192.

⁶ [1938] 2 All E.R. 394.

⁷ [1978] 3 All ER 571 (Ch.D.).

⁸ [1964] A.C. 465.

⁹ It may be more apt to describe Oliver J.'s decision as torpedoing *Groom* and the line of cases that followed it. Such that when the English Court of Appeal decided *Forster v. Outred & Co.*, [1982] 2 All E.R. 753, the Court only concerned itself with the issue of when a cause of action for negligence against a solicitor arose.

¹⁰ [1986] 2 S.C.R. 147.

¹¹ R.S.N.S. 1967, c. 42, s. 96(5).

¹² See *e.g.* the decision of Lowry J. in *3464920 Canada Inc. v. Strother*, [2002] B.C.J. No. 1982 (Q.L.) (B.C.S.C.) and the decision of the House of Lords in *Nocton v. Lord Ashburton*, [1914] A.C. 932.

¹³ *Central Trust*, *supra* note 10 at 208.

¹⁴ *Midland Bank Trust*, *supra* note 7 at 583.

¹⁵ *Central Trust*, *supra* note 10 at 208.

¹⁶ [1994] B.C.J. No. 135 (Q.L.) (B.C.S.C.).

¹⁷ *Ibid* at para. 34.

¹⁸ The categories of specific breaches are taken from *Professional Negligence*, *supra* note 5 at 228-234.

¹⁹ *Ibid* at 228-229.

²⁰ [2003] B.C.J. No. 1997 (Q.L.).

²¹ For a decision that came to the opposite conclusion, see *De Yong and Raibmon v. Weeks et al.* (1984), 55 A.R. 305 (Alt. C.A.).

²² *Shiokawa*, *supra* note 20 at para. 20.

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- ²³ *Ibid.* at para. 55 and 61.
- ²⁴ *Ibid.* at para. 50.
- ²⁵ *Ibid.* at para. 55.
- ²⁶ (1983), 268 E.G. 268, reprinted in [1983] 2 E.G.L.R. 146.
- ²⁷ *Ibid.* at 272, column 2 and 149, column 2.
- ²⁸ (2002), 61 O.R. (3d) 368.
- ²⁹ R.S.O. 1990, c. B.16, s. 10(5).
- ³⁰ *Turi*, *supra* note 28 at para. 49.
- ³¹ *Ibid.* at para. 53.
- ³² R.S.B.C. 1996, c. 62.
- ³³ *Goody v. Baring*, [1956] 2 All E.R. 11 (Ch.D.).
- ³⁴ *Midland Bank*, *supra* note 7.
- ³⁵ R.S.B.C. 1979, c. 356, s. 63.
- ³⁶ R.S.B.C. 1979, s. 61, s. 8 & 9.
- ³⁷ *Marbel Developments*, *supra* note 16 at para. 28.
- ³⁸ *Ibid.* at para 34.