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A \$25m claim against a City firm

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In the current economic climate, many businesses are increasingly looking to blame their professional advisers for transactions that go wrong. However, many large professional negligence claims have in recent years collapsed or been dismissed.

One such case that did not fail was a US\$25m claim brought by PCB Litigation LLP against a city firm of solicitors, which settled mid-way through the trial in March 2009 on confidential terms.

The Claims

The main claim arose from the purchase by the Claimants for US\$14m of shares in an Italian company, which was discovered shortly afterwards to be bankrupt. It was alleged that negligent/fraudulent misrepresentations had been made by the Defendant solicitors as to the value of the shares and that the Defendants had advised against due diligence being undertaken. The Claimants alleged due diligence would have resulted in the discovery that the shares were worthless.

Subsequently, the Claimants discovered that the solicitor in question had received payments from the counter-party to the share sale (which the solicitor claimed to have been personal loans). It was alleged that they gave rise to a conflict of interests and therefore were in law bribesⁱ, from which certain presumptions flowⁱⁱ.

The Claimants also discovered that the solicitor had (unbeknown to them) undertaken work for the counterparty. This, together with the alleged bribes, led to claims for breach of fiduciary dutyⁱⁱⁱ.

The breach of fiduciary duty claims were informative of how and why the Claimants said the Defendants acted negligently. For example, the allegation that the solicitor had been negligent in advising against due diligence, fell to be assessed against the Defendants' knowledge of material matters that had been acquired through acting in conflict of interests.

The Disclosure Orders

To build the case, the Claimants made a number of successful disclosure applications, each one of which materially advanced their case.

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First, the Defendants sought inspection^{iv} of letters specifically referred to in the Defence as having been written by the Defendant on behalf of the counterparty to the transaction. This provided evidence to suggest that the solicitor may have known that assets acquired by the counterparty as part of the US\$14m purchase price were far more valuable than the amount ascribed to them in the share sale agreement.

Next, the Claimants obtained by agreement early disclosure of the solicitor's time records, which tended to suggest that there had been substantial over-billing and/or that the solicitor's retainer was as broad as the Claimants alleged.

Then, following standard disclosure^v, the Claimants sought and obtained specific disclosure^{vi} of various documents that the Defendants had failed to disclose, which showed that not only was the work undertaken by the solicitor for the counterparty far more extensive than had previously been disclosed, but the solicitor had not charged the counterparty for that work.

In December 2008, the Defendants were ordered to provide further information^{vii} about the work undertaken for the counterparty. What was provided was inadequate and in January 2009 proper compliance was. When the further information was provided, the Defendants also provided a substantial volume of electronic disclosure^{viii}.

That electronic disclosure had been ordered at the end of 2008 in a published judgment which has attracted some comment in the legal press, including criticism for duplicating hard copy disclosure and increasing costs unnecessarily. However, the outcome of the electronic disclosure more than justified the additional cost, revealing far more material relating to the breach of fiduciary duty than had been contained in the solicitor's physical files.

Third party disclosure orders were also obtained against the solicitor's personal bankers^{ix}, which revealed an invoice for £200,000 that appeared to have been fabricated by the solicitor to deceive his bank.

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Conclusion

Thus by the time the trial opened in March 2009, PCB had built a very different picture from that which existed at the outset. The Court was not shown a picture of a highly respected solicitor who was beyond reproach, but of a solicitor who was prepared to act dishonestly for financial gain; and who acted extensively for the Claimants but who ultimately preferred the interests of the counterparty.

Had the claim instead been pursued simply on the basis that the solicitor had been retained on the share sale transaction and his work fallen below the standards of a reasonably competent solicitor, the case may well have gone the way of many other substantial professional negligence cases by collapsing or being dismissed.

BY

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ⁱ A bribe means only that (i) the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) he knows that that person is the agent; and (iii) he fails to disclose to the principal that he has made that payment to the agent: *see Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573.

ⁱⁱ The court will not inquire into the donor's motive. It will irrebuttably presume that the agent was influenced. It will assume that the principal's loss on the related transaction is at least the value of the bribe: *See Hovenden and Sons v Millhoff* (1900) (83 LT 43).

ⁱⁱⁱ *see Bristol & West Building Society v Mothew* [1998] Ch 1: "*a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty*"

^{iv} CPR Part 31.14: a party may inspect a document mentioned in a statement of case.

^v CPR Part 31.6: a party is to disclose documents on which he relies or which support or adversely affect a party's case

^{vi} CPR Part 31.12: the Court can order a party to disclose specified documents or carry out a search for documents

^{vii} CPR Part 18: the Court may at any time order a party to clarify any matter which is in dispute or give additional information in relation to any such matter.

^{viii} *See Practice Direction 31PD2A* as to how parties should conduct electronic disclosure and *see Digicel & others v Cable & Wireless and others* [2008] EWHC 2522 (Ch) re the importance of following it.

^{ix} CPR Part 31.17: the Court may order disclosure from a third party.