British jurisprudence and the corporate/ commercial solicitor

by Debra Rolph

British jurisprudence is now readily available on the Internet. As well as being a useful guide to corporate solicitors, this material can also provide valuable assistance in defending corporate solicitors who are sued for malpractice.

Keeping proper notes

Some judgments, although lengthy and complex, are rich in human interest. For instance, in *Fulham Leisure Holdings Ltd. v. Nicholson Graham & Jones*,[1] the plaintiff company was controlled by Mohamed Al Fayed. The events which gave rise to Al Fayed's claim against his solicitors occurred just three months before the car crash which killed his son Dodi and Diana, Princess of Wales, in Paris.

The defendant solicitors acted for Al Fayed in connection with his deal to acquire a controlling stakeholding in the Fulham Football Club. Al Fayed obtained a 75 per cent shareholding and the vendors of the club retained 25 per cent.

The negotiations in the share purchase transaction were complex and protracted. Many draft agreements were prepared and exchanged. The defendant solicitor omitted from the final draft a provision which would have allowed Al Fayed to "dilute" the minority shareholders' interest once his investment exceeded £60 million. At the time the share purchase closed, no one thought it likely that Al Fayed would invest over £60 million.

Five years later, Al Fayed's injection of funds exceeded £60 million, but he was unable to dilute the minority shareholders' position. Al Fayed eventually bought out the minority shareholders entirely for £7.75 million. Al Fayed claimed this sum from the solicitors on the basis that this was the position he would have been in from the outset had the solicitors not acted negligently in omitting the provision which would have allowed Al Fayed to dilute the vendors' shareholdings.

Mr. Justice Mann found that Al Fayed was not a helpful witness, and did not attempt to be a helpful witness. The Court treated his evidence with the greatest caution, and was reluctant to accept it unless corroborated by other evidence or the probabilities. Mr. Justice Mann also found that Al Fayed could be an impulsive decision maker. He did not agonize over big decisions in this case, nor did he give detailed consideration to important financial implications of the transaction.

Nevertheless, the Court found that the solicitors had been negligent in accidentally deleting this key provision from the final draft. The solicitors argued that Al Fayed knew that this provision was not included in the final draft, but they had no documentary evidence to support this.

The solicitors may have lost the liability battle, but they won the war. The Court took into account that, by buying the minority shareholders out, Al Fayed had obtained benefits beyond the mere ability to dilute their shareholdings. The £7.75 million deal involved "a horse-trade in which matters other than the missing right were firmly in play." Furthermore, this payment was for a minority interest in an insolvent football club with uncertain prospects. The Court could not say that this payment by Al Fayed was "reasonable" within the meaning of the case law on mitigation of damages. Mr. Justice Mann concluded that £7.75 million was not a reasonable sum to pay to cure the negligence, and did not provide a proper measure of Al Fayed's loss due to the solicitors' negligence. The Court did allow Al Fayed £6,750 incurred for legal fees.

Subsequent reports on various websites state that the defendants had offered to pay £500,000 to settle this claim; the plaintiff had demanded £6 million. The defendants were awarded their costs of the action.

Advising sophisticated clients

In *Pickersgill v. Riley*[2], the Privy Council held that solicitor Pickersgill was NOT negligent in failing to advise Riley, an experienced businessman, to investigate the financial substance of the limited company that was purchasing Riley's company. Riley had personally guaranteed his company's lease. The landlord refused to release Riley's guarantee at the time of sale. However, the purchaser company agreed to indemnify Riley for any liability under the lease. Some years later, the purchaser defaulted on the lease, and Riley's guarantee was called on. It then emerged that the purchaser was and always had been a shell company.

Riley sued Pickersgill, alleging that Pickersgill should have investigated the financial substance of the purchaser company, or advised Riley to do so.

Riley was successful in the Royal Court in Jersey, and the Court of Appeal in Jersey. Pickersgill's appeal was allowed by the Privy Council.

Their Lordships held:

- Riley was an experienced businessman who understood the nature of personal guarantees. Although the company which he had sold, and whose obligations he had personally guaranteed, had the potential for profit earning, its future profitability was speculative. It followed that the guarantee has no "hidden pitfalls" for him;
- The possibility that the purchaser might be a company of little or no financial substance was a commercial risk of which Riley, an experienced businessman, could have been expected to have been aware. It was not a risk arising out of any legal complexity or "hidden pitfall" about which Pickersgill had a duty to warn him;
- In giving clear and fair advice about the risk of taking a contractual indemnity from a limited company, Pickersgill had discharged any duty that he had, and he was not under an obligation to go further.

The scope of a solicitor's duty in any given case will depend, first and foremost, on the contents of the instructions given to him or her. It will also depend on the particular circumstances of the case. The experience of the client may also be relevant. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering a transaction. Offering an experienced businessman the same advice would be pointless or even an impertinence.

Avoiding conflict of interest

Canadian case law gives ample warning to solicitors of the peril of acting for two conflicting interests. The judgment of the House of Lords in *Hilton v. Barker Booth & Eastwood (A Firm)*[3] is yet another dire warning.

The defendant law firm acted for both Hilton and Bromage. Hilton had agreed to buy land, build flats on them, and then sell the property to Bromage. The law firm knew that Bromage had served time in prison for fraud, and had previously been bankrupt. The law firm did not disclose this information to Hilton. The law firm loaned Bromage the £25,000 he was required to contribute to the transaction; Bromage had no money of his own. The law firm did not disclose this fact to Hilton. Hilton borrowed money to buy the land and build the flats. Bromage was unable to purchase them. The bank sold the property for less than Hilton invested in them.

Hilton sued the law firm for his losses. He testified that if the law firm had made proper disclosure about Bromage's background, he would never have dealt with Bromage.

The House of Lords agreed that the law firm owed a duty to Bromage not to disclose the information about his bankruptcy and incarceration. The law firm owed a duty to Hilton to inform him (first) that they could not act for him and (second) that he should seek legal advice from other solicitors, starting afresh (and not relying on any advice that he might already have received from the firm). A bare refusal to act, without clear advice about going to new solicitors, would not have been sufficient to discharge their duty. The law firm failed to do so. Lord Walker found it unnecessary to consider whether they should also have given the same advice to Bromage.

The law firm placed itself in a hopeless conflict of interest, and was responsible for its own predicament. The law firm was responsible for Hilton's damages.

The trial judge and the Court of Appeal noted that there was no evidence whatsoever that if Hilton had been represented by independent counsel, independent counsel would have learned of the bankruptcy and fraud convictions. The House of Lords did not discuss this point at all.

This paradox has occurred more than once in our files. That is, if the client had gone to an independent solicitor from the outset, the likelihood is that he would never have discovered the information which the "conflicted" solicitor knew simply because he also acted for the "other" party. The "independent" solicitor would have had no means of discovering this information.

Because compensation for breach of fiduciary duty is available to the client by reason of the "conflicted" solicitor's non-disclosure, the client is better off than if he had received independent advice from the outset. If any reader has an answer to this conundrum, this writer would be most grateful to hear it.

There is not sufficient time or space in this column to review the many British decisions worthy of discussion. But these three cases illustrate that a modest effort to explore the British jurisprudence will yield rich rewards to anyone interested in legal malpractice and the corporate/commercial lawyer.

Debra Rolph is director of Research at LawPRO.

1 [2006] EWHC 2017 (Ch.)

2 http://www.privy-council.org.uk/files/other/pickersgill.rtf; [2004] UKPC 14

3 [2005] 1 W.L.R. 567, Reversing [2002] E.W.J. No. 2333 (Eng.C.A.); [2002] Lloyds Rep P.N. 500 (C.A.)