LAWYERS FALLING OUT: WHO CAN SUE FOR WHAT?

Now that over 20 years have passed since the House of Lords' decision in *Hall v Simons* [2002] 1 AC 615 one can safely venture the opinion that the abolition of advocates' immunity did not lead to the sky falling in. On the other hand, clients can and do bring claims against lawyers of all kinds in relation to their (alleged) failings whether as advocates or advisers and there now remain very few areas outside the field of criminal law where a wrong will not be afforded a remedy.

But why stop there? What of claims by lawyers against each other? Where a case goes pear-shaped due to lawyer A's negligence why can't lawyer B sue A to recover damages for B's financial losses consequent upon that negligence, such as the lost opportunity to derive fees which would have been recoverable from the client but for that negligence?

Developments in recent years, particularly in litigation, have created increasingly fertile conditions for such claims. If attorneys ever did place an *honorarium* in the pocket of counsel's robes it is not how business is done nowadays. Solicitors have detailed fee agreements with clients, and solicitors enter detailed contracts with counsel, giving rise to a chain of contracts, section 61(1) of the Courts and Legal Services Act 1990 having removed any impediment to contracts with barristers. Those contracts will include an obligation to exercise reasonable skill and care and solicitors and barristers not unnaturally expect that the other will do so. Furthermore, lawyers increasingly act as teams, and frequently undertake cases on a joint venture basis with some or all the fees dependent on success, whether under a CFA or DBA, and any lawyer working as part of such a team can be expected to appreciate that one lawyer's incompetence may cause losses not just to the client but to other members of the legal team.

Does this mean that where things go wrong lawyers can sue each other? Can we look forward to claims by instructing solicitors against barristers seeking damages for the lost opportunity to recover fees for work done or to earn further fees, or indeed by barristers against their instructing solicitors to the same effect? And what of claims between counsel, with juniors turning on leaders or leaders on juniors? Might the Bar consume itself in internecine warfare?

There has been little if any domestic authority but *McFarland-Cruickshanks v England Kerr Hands Solicitors Ltd* [2021] EWHC 525 (Comm), a decision of HHJ Worster in the Commercial Court in Birmingham, suggests the courts will not embrace claims of that kind.

The claimant was an IP barrister who sued her solicitors for unpaid fees in relation to a patent action in which she had been instructed by the solicitors on COMBAR/City of London Law Society terms. The solicitors counterclaimed alleging that *they* had suffered financial loss as a result of the barrister's alleged breach of contract and negligence which, it was said, had led to the patent action being compromised on unsatisfactory terms, which in turn meant that the solicitors lost the opportunity of claiming fees from the client pursuant to a CFA. The claimant sought a strike out or summary judgment on the basis that no contractual or tortious duty was owed by her in respect of the losses in question.

The COMBAR terms provided by clause 3.2 that the barrister would "*exercise skill and care in supplying the Services*" but clause 4, headed 'Benefit of the Services', also said this:

> "*Unless otherwise agreed in writing, the Barrister's Services are provided to the Solicitor as the Barrister's client, acting for the benefit of the Lay Client. Subject to*

> *the duties of the Barrister and the Solicitor to the court, the Barrister and the Solicitor acknowledge and agree that each owes a primary duty to the Lay Client*."

But on the other hand, clause 12, headed 'Liability', said this:

> "*The Barrister is not liable for any loss or damage suffered by any persons, firms or partnerships other than the Lay Client and the Solicitor*".

HHJ Worster held that the COMBAR terms had not been intended to displace the traditional understanding that a barrister's services were provided to a solicitor for the benefit of a lay client and not for the solicitor's own benefit. Clause 4.1 was a pointer in that direction, and something more would have had to be said to institute a contractual duty owed to the solicitor for his own benefit. The underlying commercial purpose was also to provide advice and services to the lay client and not for the benefit of the solicitor, and there was a risk of a conflict of interest if concurrent duties were owed to the lay client and instructing solicitor. The judge therefore concluded:

> "*The words used in clause 4.1 read in the context of this agreement lead me to the clear conclusion that services are not provided for the benefit of the solicitor. The Claimant's construction is more consistent with business common sense. If the services are not provided for the benefit of the solicitor, I do not see that the solicitor can say that the barrister is liable to him in contract for any loss he (the solicitor) suffers if the barrister breaches that term of the contract. That is not what is contemplated by these terms. It goes beyond the nature and the scope of the duty in relation to the supply of services which the words provide for. I conclude that there is no relevant contractual duty owed to the Defendant by the Claimant*."

The learned judge reached a similar conclusion when going on to consider whether the barrister owed a duty of care in tort to take reasonable care not to cause financial loss to the solicitors.

The judge noted the dearth of authority in this area although he considered at length an Australian case, *O'Doherty v Birrell* [2001] VSCA 44, in which one barrister had sued another when they had both been retained for the same party in underlying proceedings. O'Doherty alleged that Birrell had failed to prepare for a hearing which was adjourned meaning that O'Doherty could not recover fees for work he had done, and that Birrell had owed him a duty of care to take reasonable care to protect him from financial loss of that kind. That contention was roundly rejected by the Court of Appeal of Victoria, by reason of the potential for any such duty to conflict with the duty to the client, and for policy reasons, or in the court's words:

> "*The law does not readily create or countenance conflicting duties of care. The duty of co-counsel, retained to represent the interests of the same client in the same litigation, is to serve the interests of the client. They act as a team in discharging that duty and the relationship of each is primarily with the client, not with each other. It would, it seems to us, detract from the obligations which separately and together they have to the client if co-counsel, in the course of discharging those obligations, were also required to discharge a duty to each other of the type contended for. "*

> "*Having arrived at our conclusion that there is no duty of the kind alleged here, we would add that in our opinion there are strong policy interests, grounded in the ethics of the profession, which militate against the existence of the duty for which the plaintiff*

> *contends. For the law to encourage co-counsel to sue one another to recover what they regard as their full entitlement to fees will inevitably lead to a loss of confidence by the public in the profession, not least by provoking a species of satellite litigation calling into question the manner in which the principal litigation was conducted but at the same time without altering its result*."

HHJ Worster concluded that no duty at common law was owed in this case either. Ultimately, the public policy arguments were not decisive. Rather, in the judge's view, it was critical that the parties could have chosen, as foreshadowded by the terms of clause 4.1 of the COMBAR terms, a contractual model which provided for a duty owed directly to the solicitors to protect them from economic loss but they had not done so. Thus, to impose a common law duty would run counter to the contract that had in fact been agreed. For good measure the judge indicated that the same result would follow if one applied other tests for the imposition of a duty of care. The necessary proximity was lacking, loss to the solicitors was not reasonably foreseeable, and nor would the imposition of a duty of care be fair, just or reasonable. Nor, given the basis of contracting, was there a voluntary assumption of responsibility.

What are the implications of this decision?

Clearly, it signals that where cases go wrong there may be limited scope for solicitors to seek damages from barristers for their own lost fee income as it is likely to be difficult to establish any duty on the part of the barrister in respect of the solicitors' own losses.

To that extent the decision may raise the odd cheer in the Inns of Court, but what is sauce for the goose is sauce for the gander and the same inhibition should apply where a barrister has reason to blame his instructing solicitor for a case heading south. So, there may be the odd answering cheer in Chancery Lane as well.

Also noteworthy is the fact that the terms of the contract were crucial both, unsurprisingly, when considering the claim in contract, and when considering whether there was any scope for a claim in tort. To that extent the case fits the model of situations where the parties' choice to contract on a certain basis precludes any role for tort to 'fill the gap'.

On the other hand, there will be exceptional cases such as where solicitors themselves seek advice from counsel e.g., to decide whether to enter a CFA or DBA. In such a case there should be no difficulty in finding a duty encompassing financial losses sustained by solicitors who take a case they would not have taken on but for advisory negligence.

Closer to the line would be a case where the contract between the lawyers is to act for the client but where it is drawn in a way which is consistent with a concurrent duty on the part of one lawyer to look out for the economic interests of the other. In such a case these issues will resurface, and the courts may have to grapple with the policy considerations alluded to in the Australian decision. One can expect that the courts would not relish the spectacle of lawyers suing each other for the lost opportunity to make more money, but it is questionable whether that would suffice to bar a claim. One might think that the centrality of the client's interests and the potential for conflict hold the key to the problem, together with practical considerations such as that unless there is a client waiver the court would not be able to adjudicate on matters veiled by privilege. And this is to say nothing of the problems which might arise were multiple 'lost opportunity' claims, not necessarily consistent with each other, to be launched against a lawyer by the client and one or more co-venturing professional colleagues. In most cases one

would expect those considerations to militate strongly against any contractual or tortious duty to protect a co-lawyer from economic loss.

For those who believe 'the more litigation the better' all this will be a disappointment, but it may at least promote comity between different branches of the legal profession: less a case of lawyers falling out, than friends reunited.

The full judgment for *McFarland-Cruickshanks v England Kerr Hands Solicitors Ltd* [2021] EWHC 525 (Comm) can be viewed here.

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