

# KEEPING PROPERTY PROFESSIONALS UP TO SCRATCH: THE SCOPE OF THEIR DUTIES

by

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*Last year the Legal 500 said "The 'approachable' Joanne Wicks is 'an incredible fighter' and is rightly promoted; 'she gets to the bottom of things', 'effective, unflappable advocacy', 'proactive' with 'a very good court manner'". This year it says she is "helpful and committed" and is recognised for "getting stuck in". Joanne would particularly like to thank those members of the PLA who were so nice about her.*

## Introduction

1. A property market recession brings with it a flurry of professional liability claims. Professionals make mistakes whether the market is buoyant or sluggish, but when property prices are rising, a mistake may not cause the client any loss: this is particularly true of lenders. When property prices collapse, clients are often searching for someone to blame, and the professional, backed by his or her insurance company, is an attractive target.
2. This talk concentrates on the "liability" – rather than damages - side of claims against professional and in particular on the liability of surveyors, solicitors and barristers, who are the professionals most likely to feature in claims with which property litigators are involved.

## The Contract

3. The vast majority of claims against a professional are brought by a client, with whom the professional has a contract, whether written or oral. Under the contract, the professional agrees to perform one or more particular tasks (or provide a particular service) and in return the client agrees to pay a fee for the work. It will be an implied term of the contract, if it is not an express one, that the professional will exercise reasonable care and skill in carrying out the task on which they are instructed<sup>1</sup>. This obligation correlates with the duty of care which arises in tort between a professional and his or her client.
4. It can be easy to assume from this that the only contractual term of any relevance is the obligation to use reasonable care and skill. But Oliver J warned against this assumption in *Midland Bank Trust Co v Hett, Stubbs & Kemp*<sup>2</sup> and he was right to do so. The terms of the contract should always be the starting point for a consideration of a claim against a professional, for a number of reasons.
5. Firstly, there may be relevant obligations in the contract other than the obligation to use reasonable care and skill. These obligations are important, because breach of them may sound in damages even if the professional is exercising due care and skill and acting reasonably. A graphic illustration of such a case is *Platform Funding Ltd v Bank of Scotland plc* [2008] EWCA Civ 930, in which a surveyor who was misled by a borrower into inspecting and valuing the wrong property was held to be in breach of his obligation to inspect and value the right property, regardless of the fact that he had acted reasonably and was not negligent. Another example is *Zwebner v The Mortgage Corporation Ltd*<sup>3</sup>, where solicitors gave an undertaking in their report on title that all appropriate documents would be properly executed before completion. The Court of Appeal held that this imposed an absolute obligation to ensure that the signatures to the

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<sup>1</sup> This is a common law principle, but is now also to be found in s.13 of the Supply of Goods and Services Act 1982

<sup>2</sup> [1979] Ch 384 at 434E-H

<sup>3</sup> [1998] PNLR 769

documents were genuine and not forgeries<sup>4</sup>. Moreover, breach of an absolute contractual obligation cannot be met by a defence of contributory negligence<sup>5</sup>.

6. Secondly, the express contractual terms will define the task which the professional has agreed to perform, and in doing so define and delimit the scope of the duty to exercise reasonable care and skill. Where the contract between client and professional contains many detailed terms – as for example is the case where a solicitor’s retainer is governed by the provisions of the Council of Mortgage Lenders’ Handbook – the room for the duty to exercise reasonable care and skill to operate is much reduced, since the relationship between client and solicitor is comprehensively covered by the express contractual provisions. It is yet to be seen whether the lenders’ cases which arose from the last recession will be decided the same way under the new contractual regime.
7. Thirdly, the contract may contain exclusion clauses. Surveyors’ standard terms and valuation reports are often peppered with various disclaimers, caveats and exclusion provisions. Consideration must be given as to whether these are effective under the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Solicitors are generally more circumspect, and indeed are prohibited from relying on exclusion clauses in the context of contentious business by the Solicitors Act 1974. But it is commonplace for solicitors’ standard terms to seek to limit liability for damages<sup>6</sup>. And indeed the approved form of Certificate of Title given to lender clients under Rule 3.20 of the Solicitors’ Code of Conduct is drafted so as to limit the solicitors’ liability to the matters set out in the certificate. It provides as follows:

“Our duties to you are limited to the matters set out in this certificate and we accept no further liability or responsibility whatsoever. The payment by you to use (by whatever means) of the mortgage advance or any part of it constitutes acceptance of this limitation and any assignment to you by the Borrower of any rights of action against us to which the Borrower may be entitled shall take effect subject to this limitation.”

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<sup>4</sup> But where there is ambiguity, the Courts will lean against construing contractual obligations as absolute: *Mercantile Credit Company Ltd v Fenwick* [1999] Lloyd’s Rep PN 408.

<sup>5</sup> In *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 it was held that contributory negligence is only a defence to a contractual claim where the defendant’s liability in contract is the same as his liability in tort. In *Barclays Bank v Fairclough Building Ltd* [1995] QB 214 the CA adopted the same reasoning and held that contributory negligence was not a defence to claim of breach of a contractual term which does not depend on negligence.

<sup>6</sup> By Rule 2.07 of the Solicitors’ Code of Conduct solicitors are permitted to limit liability to the minimum level of cover required by the Solicitors’ Indemnity Insurance Rules provided the limitation is brought to the client’s attention and is in writing.

Although not yet considered by the Court, it seems likely that this will pass the tests required for validity under the Unfair Contract Terms Act 1977, since it was negotiated between the Law Society and the Council of Mortgage Lenders.

## Liability in Tort

8. Just as it is a mistake to assume that the contract between the professional and the claimant is irrelevant, it is a mistake to assume that if there is no contract, there can be no liability. Tortious liability usually arises to supplement the implied contractual obligation to exercise reasonable care and skill<sup>7</sup>, but it may go further: liability in tort may arise even where there is no contract between the professional and the claimant.
9. Cases in which there is a liability in tort on professionals but no liability in contract tend to fall into two main categories. The first is where advice is given in an informal context and the professional is not paid. In such circumstances it is necessary to inquire whether, despite the informality of the contact between professional and claimant, the circumstances are such that the professional must be taken to have assumed responsibility for the correctness of the advice so as to render him or her liable under the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 965. An off the cuff comment at a dinner party may not render a solicitor liable in negligence, but advice given to a would-be client may be, even if that person never retains the solicitor<sup>8</sup>.
10. The second type of case is where the professional is in a contractual relationship, but with another person, and in carrying out his or her job under that contract, the professional's skill and expertise comes into contact in some way with a third person with whom s/he does not have a contract. Examples under this head include cases like *Smith v Bush* [1990] 1 AC 831. There, a valuer was retained by a building society to carry out a valuation report of a modest house, which was being purchased by the claimant. The claimant was sent a copy of the report, which said that no essential repairs were necessary. Although the report

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<sup>7</sup> *Midland Bank v Hett, Stubbs & Kent*, above, and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 establish that the existence of a contractual duty of care does not exclude a concurrent duty of care in tort.

<sup>8</sup> See e.g. *Crossan v Ward Bracewell & Co* (1989) 5 PN 103; *Throwley Homes v Sharratts* [1998] NPC 57.

contained a disclaimer of liability for its accuracy, the claimant did in fact rely upon it in deciding to buy the house. The House of Lords held that the valuer was liable to the claimant and that the disclaimer was ineffective under the 1977 Act. The professional in these cases is generally liable to the claimant only if it can be shown that the claimant relied upon his or her skill or expertise, but occasionally there are cases in which the professional is liable despite the fact that the claimant has never relied upon him or her: *White v Jones*<sup>9</sup>, in which a disappointed beneficiary was permitted to sue a solicitor who had failed to deal promptly with the testator's instructions to draw up a will, is such a case. The Court is slow to find that a professional has assumed a duty of care to the other side – the party with whom his client is transacting, or with whom he is in a dispute. This is particularly true of solicitors. So, for example, a solicitor answering preliminary enquiries on behalf of a vendor does not owe a duty to the purchaser to exercise due care and skill in ensuring the accuracy of his or her replies, even though the purchaser is reasonably relying upon the solicitor to take care in formulating the answers and even though the purchaser may have no other way of finding out the relevant information<sup>10</sup>.

11. There remains some doubt about the test which ought to be applied to determine whether a duty of care arises in tort in a novel situation not covered by previous authority. Some cases have been analysed in terms of the *Hedley Byrne* assumption of responsibility, some on the basis of an incremental approach based on existing cases, and others on the basis of a three-fold test which requires it to be asked whether the damage complained of was reasonably foreseeable, whether the relationship between claimant and defendant was sufficiently proximate and whether it is just and reasonable to impose a duty of care<sup>11</sup>. The current thinking is that all three approaches have validity and, if the facts are properly analysed, ought to reach the same conclusion<sup>12</sup>. In fact this theoretical debate, which troubles academics, is not often of particular importance in practice. Every case involves a careful consideration of the facts and a decision as to whether it is closely analogous to existing cases in which a

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<sup>9</sup> [1995] AC 207

<sup>10</sup> *Gran Gelato v Richcliff Ltd* [1992] Ch 560. Doubt was cast on the correctness of the decision in *McCullagh v Lane Fox & Partners* [1996] 1 PNLR 205, but it was approved by the House of Lords in *White v Jones*, above. See also *Dean v Allin & Watts* [2001] Lloyds Rep PN 605.

<sup>11</sup> See the discussion in Jackson & Powell on Professional Liability, 6<sup>th</sup> edn, paras 2-022 – 2-053.

<sup>12</sup> *Customs & Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2006] 3 WLR 1; *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2)* [1998] PNLR 564; *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

duty of care has been found to exist, and usually this process will provide an answer without the need to refer to a specific test.

12. Until recently, barristers have not generally entered into a contract, either with the solicitors who retain them or the clients on whose behalf they are instructed. Consequently the vast majority of claims against barristers are tortious claims, but no difficulty is caused in the usual case, since the relationship between barrister and lay client is clearly the same in practice as if there were a contract between them, and such as to give rise to a duty of care in tort. Of course the historic immunity from suit enjoyed by advocates has now been swept away, and barristers are liable for negligence whether acting as advisers or advocates<sup>13</sup>.

### **The Non-Negligent Mistake**

13. It is a fundamental principle of the law of negligence that not every mistake made by a professional is negligence. It is only if the professional falls below the standard of reasonable care and skill that he or she may become liable to the claimant. This is seen most obviously in the valuers' negligence cases, in which it is accepted that reasonably competent valuers may differ in their views as to valuation, and that there is an acceptable range or "bracket" of possible valuations:

"Pinpoint accuracy in the result is not, therefore, to be expected by he who requests the valuation. There is, as I have said, a permissible margin of error, the "bracket" as I have called it. What can properly be expected from a competent valuer using reasonable care and skill is that his valuation falls within this bracket."<sup>14</sup>

14. Whilst the concept of a "bracket" is well-established, and perfectly consistent with the principle that a professional is only liable in negligence if s/he falls below the standard of reasonable care and skill, in practice there can be problems with its application. One such problem is determining the extent of the bracket in any particular case. There is no simple test, no mathematical formula, which enables ready ascertainment of the extent of the "bracket". In *Merrivale Moore v Strutt & Parker* [2000] PNLR 499, an attempt was made to analyse the extent of the

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<sup>13</sup> *Hall v Simons* [2002] 1 AC 615

<sup>14</sup> *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84, at 86 per Watkins J

bracket in a series of reported cases. This approach was (rightly) rejected. Whether an over- or under-valuation of 5%, 10% or 15% falls outside the acceptable margin of error must be a decision based on all the evidence, and must take account of the particular characteristics of the property concerned and the market for it. The difficulty in advising on a surveyors' negligence case can, however, be, that as lawyers we do not have the valuation skills to work out what an acceptable bracket might be, and our surveyor expert witnesses are trained to reach an opinion on the "correct" value for a property, rather than expressing an acceptable range. In general the bracket has usually been found to lie in the range of 10-20% above or below the "true" figure<sup>15</sup>.

15. The other difficulty with the "bracket" in surveyors' negligence cases is the question whether it is enough merely to demonstrate that the valuation complained of falls outside that bracket. At first instance, at least, this question appears to be settled. It is not enough for a claimant to show that the surveyor made a mistake in getting to his valuation: he must also show that the end result was a final valuation figure which fell outside the permissible bracket<sup>16</sup>. At a higher level it may be open to argue that if the valuer makes a specific discernable error which results in his or her valuation being higher or lower than it would otherwise have been, the valuer may be negligent even though the end result falls within the acceptable bracket<sup>17</sup>.
16. Solicitors are also not necessarily negligent if they make an error of law:

"No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a Judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into"<sup>18</sup>

Nevertheless, a solicitor who makes an error of law cannot expect to get off lightly. S/he is expected to know enough of the law to recognise that a point might arise and to make reasonable attempts to research it appropriately. So, for example, in *Dean v Allin & Watts*<sup>19</sup> a solicitor was expected to appreciate that the

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<sup>15</sup> See the cases summarised in Jackson & Powell, above at para 10-061, footnote 73

<sup>16</sup> *Craneheath Securities v York Montague* [2001] Lloyds Rep PN 348; *Legal & General Mortgage Services v HPC Professional Services* [1997] PNLR 567; *David Goldstein v Levy Gee* [203] EWHC 1574

<sup>17</sup> See *Arab Bank v John D Wood* [2000] PNLR 173 at 181, per Mance LJ

<sup>18</sup> *Montriou v Jeffrey* (1825) 2 C & P 113 at 116.

<sup>19</sup> See above

enactment of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 cast doubt on the practice of creating an equitable charge by deposit of title deeds. In practice solicitors generally are found to be negligent if they have made a mistake in circumstances where the law is, in fact, clear, particularly if standard textbooks discuss the particular issue raised.

17. Understandably a higher standard of legal competence is expected of Counsel. So, the quality of a tax silk's advice is to be judged by that of the "small and rather select group of silks specialising in tax matters"<sup>20</sup>, whereas a Chancery practitioner may be judged by the standard of a reasonably competent barrister in general Chancery practice, having experience in tax and trusts matters, but not specialising in tax<sup>21</sup>. Nevertheless the general principle remains the same, namely that not every error constitutes negligence, but only an error which falls below the standard of reasonable care and skill<sup>22</sup>.

### **Liability to travel outside Instructions**

18. One issue which cropped up in cases in the last recession, and which we can expect to see again in the current one, is the extent to which a professional is required to bring matters to the attention of the client on which the professional has not specifically been asked to advise. This is of particular importance in a case where another party to the transaction is or may be guilty of fraud, and the claimant's case against the professional is that he or she ought to have spotted suspicious circumstances and alerted the client to the fraud, but its significance is not confined to such a case.
19. The law is currently most developed in relation to solicitors. The general principle is that a solicitor is not required to make investigations which are not expressly or impliedly requested by the client<sup>23</sup>. But in the course of carrying out those investigations which he has been instructed to conduct, if the solicitor sees a particular risk which is, or ought to be, obvious to the solicitor but which the client

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<sup>20</sup> *Matrix Securities Ltd v Theodore Goddard* [1998] PNL R 290

<sup>21</sup> *Estill v Cowling* [2000] Lloyds Rep PN 378

<sup>22</sup> *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 218, 229.

<sup>23</sup> *Pickersgill v Riley* [2004] UKPC 14; [2004] PNL R 31

might not appreciate, he is bound to draw it to the client's attention<sup>24</sup>. So where a solicitor is instructed by a tenant who held property under a lease with a break clause which required a particular payment to be made for the break to effectively operate, the solicitor owed the client a duty to point out the need to make the payment on time, even though the solicitor was only instructed to contact the landlord's agent to enquire whether the landlord is willing to extend the notice period under the break clause. His instructions required him to read the break clause, and in doing so he would have become aware of the obvious risk that the client would not appreciate the need to make the payment timeously. Moreover, in the course of carrying out his instructions, the solicitor may come across information which is clearly relevant to the client's decision, even though it does not relate to a legal risk. If the information is not confidential, the solicitor is required to pass it on to the client. So, for example, in *Mortgage Express Ltd v Bowerman & Partners*<sup>25</sup> a solicitor acting for a mortgagee and purchaser became aware that the vendor was purchasing the property for £150,000 and selling it on for £220,000. This clearly cast doubt on the valuation of the property obtained for the lender, which was £199,000:

"A client cannot expect a solicitor to undertake work he has not asked him to do and will not wish to pay him for such work. But if in the course of doing the work he is instructed to do so the solicitor comes into possession of information which is not confidential and which is clearly of potential significance to the client, I think that the client would reasonably expect the solicitor to pass it on and feel understandably aggrieved if he did not...if in the course of investigating title a solicitor discovers facts which a reasonably competent solicitor would realise might have a material bearing on the valuation of his lender's security or some other ingredient of the lending decision, then it is his duty to point this out."<sup>26</sup>

A solicitor will generally be in breach of his duty of care in failing to pass on information to a lender client which casts doubt on the *bona fides* of the borrower<sup>27</sup>.

20. The CML Handbook now contains detailed provisions setting out exactly when a solicitor is obliged to report to the lender the existence of a sub-sale, a direct

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<sup>24</sup> *Boyce v Rendells* (1983) 268 EG 268

<sup>25</sup> [1996] 2 All ER 836

<sup>26</sup> *Mortgage Express Ltd v Bowerman & Partners*, above at 842D-F. See also *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All ER 582; *Nationwide Building Society v ATM Abdullah* [1999] Lloyds Rep PN 616; *Mortgage Funding Corporation v Tisdall Nelson* [1998] PNL 81; *Halifax Plc v Ringrose* [2000] PNL 483.

<sup>27</sup> *Bristol & West v Fancy & Jackson*, above; *Nationwide Building Society v Balmer Radmore* [1999] PNL 606

payment etc. Consequently the scope for operation of the general *Bowerman* duty is likely to be much reduced in cases where the Handbook regulates the relationship between professional and client. In the next phase of lenders' litigation we should probably expect similar claims to be brought by lenders against valuers, whose contracts are not so prescriptive. There is certainly room for arguing that a surveyor whose investigations raise suspicions about the transaction is obliged to report those to the client. If the valuer on his inspection finds the property unoccupied, when it should have been occupied according to the information given to the mortgagee, or if he is given information about rents being achieved by a borrower which are way out of line with the rental market, these are matters which any reasonably competent surveyor would realise would affect the lending decision and ought to be reported.

### **Reliance on Others**

21. A common problem in professional negligence cases is the extent to which the professional can absolve him or herself of liability by relying on what s/he was told by others.
22. Clearly it is open to a solicitor advising on a particular point of law to place reliance on the fact the Counsel's opinion has been obtained. It is normal and proper for a solicitor without specialist experience to rely upon Counsel's advice. But the solicitor does not abdicate professional responsibility when he or she seeks the advice of Counsel<sup>28</sup>. Firstly, Counsel must be properly instructed, or the solicitor will be liable for failing to give appropriate instructions. Secondly, he must apply his mind to the advice given. He is "not entitled to rely blindly and with no mind of his own on Counsel's views"<sup>29</sup> and "if he reasonably thinks Counsel's advice is obviously or glaringly wrong, it is his duty to reject it."<sup>30</sup>
23. It is equally open to a barrister being sued for negligence to say that s/he was relying on the facts as stated in his or her instructions. If a client puts forward a version of events, to which Counsel properly applies the law, there can be no claim of negligence even if ultimately that version of events is disproved. When

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<sup>28</sup> *Ridehalgh v Horsefield* [1994] Ch 205 at 237G

<sup>29</sup> *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48 at 64A

<sup>30</sup> *Locke v Camberwell Health Authority* [2002] Lloyds Rep PN 23 at 29

asked to advise on the merits generally, however, the barrister might be liable if he or she fails to point out obvious inconsistencies between the client's version of events and the documentary or other evidence which might lead a court to disbelieve the client.

24. However, professionals frequently rely upon information which they are given by others in a much less formal way. A conveyancing solicitor may rely upon information given to him or her by the other side in preliminary enquiries or other exchanges. A surveyor may rely upon information given to him by the client or another as to, for example, the measurement of the premises or the rents being obtained for them. Whether they will be held negligent for doing so depends on all the circumstances, and in particular the extent to which it is open to the professional to check the information given. Just as a solicitor is not entitled blindly to follow Counsel's advice without applying his own professional judgment, he is not entitled blindly to take at face value assertions by others. If the conveyancing solicitor is told something by her opposite number which is flatly contradicted by the documents, she is obliged to enquire further into the discrepancy. If the surveyor is given measurements or rent figures which are readily capable of being checked or are obviously out of line with what he ought to expect, he is obliged to exercise his critical faculties and not to accept them without question.

### **Liability for Fraud**

25. A booming property market tends both to encourage, and to disguise, property fraud. When the bust occurs the frauds are exposed and claimants need to consider whether to sue their professional advisers, not only for negligence, but also for fraud. This was true of the last property recession and is proving equally true of the current one. The difference between this time and the last may be the speed with which lenders in particular turn to action against professionals in an attempt to recoup their losses. In the early 1990s many lenders were slow to realise the full extent of the claims they had against solicitors and surveyors. In the current market there is every indication that lenders are much more organised and are in the process of gathering their evidence and bringing claims on as wide a basis as possible.

26. The point which always needs to be borne in mind is that there is a critical difference, as a matter of law, between a solicitor or surveyor who fails to spot that a borrower or other person is likely to be perpetrating a fraud on their client, and one who is actually party to the fraud. The first type of claim is a claim for breach of contract and negligence. The second type of claim is for the tort of deceit (and probably also for equitable liability, as discussed below). But as a matter of practice the evidence which supports such claims may cloud the distinction. It is very unusual for a claimant to have direct evidence of dishonesty on the part of a solicitor or surveyor and a claim of deceit will be built up, evidentially, from a series of inferences about what the professional must have known about the transaction on which they were engaged. It can be difficult to tell at what point the case stops being one where the professional was simply grossly negligent about the failure to spot the signs of a fraud, and becomes one in which the professional is actually dishonest, which includes acting recklessly, or without belief in the truth of a statement made<sup>31</sup>.
27. A claim in deceit has significant advantages for the claimant, if established. These include:
- (1) a longer limitation period, as the running of time is postponed to the date on which the claimant discovers the fraud or could, with reasonable diligence, have discovered it<sup>32</sup>;
  - (2) the absence of any defence of contributory negligence, either at common law or under the Law Reform (Contributory Negligence) Act 1945<sup>33</sup>;
  - (3) more advantageous rules about the measure of damages. A victim of fraud is entitled to compensation for all actual loss flowing directly from the transaction induced by the wrongdoer, whether or not such loss was foreseeable<sup>34</sup>. This may include losses associated with a fall in the market<sup>35</sup> which would not generally be recovered in a negligence action.

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<sup>31</sup> *Derry v Peek* (1889) App Cas 337 at 374

<sup>32</sup> Limitation Act 1980, s.32(1)(a)

<sup>33</sup> *Alliance & Leicester v Edgestop* [1993] 1 WLR 1462; *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2002] UKHL 43; [2003] 1 AC 959

<sup>34</sup> *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254

<sup>35</sup> *Downs v Chappell* [1997] 1 WLR 426

28. Nevertheless, a claim of fraud must never be lightly embarked upon. Special ethical<sup>36</sup> and pleading rules<sup>37</sup> apply and the Court will exercise caution before finding a claim of fraud proved. Making a claim of fraud rather than negligence may make the case more difficult to settle: it may enable the professional's indemnity insurers to avoid cover, rendering any judgment worthless.

### **Equitable Liability**

29. Finally, a few words about liability in equity, which is only really relevant to claims against solicitors. Solicitors do not only owe their clients duties in contract and tort, they also owe them fiduciary duties. If they hold money on behalf of their clients, as they usually will in the course of a conveyancing transaction, they will also be trustees for their clients. In the last recession it was realised that the equitable rules about compensation for breach of fiduciary duty and breach of trust might provide claimants with a way around some of the limitations inherent in a claim for damages for breach of contract or negligence. The tendency of the Courts, at least in some of the cases, has been to refuse to allow claimants to get around problems by relying upon equitable duties and to attempt to assimilate the rules relating to claims in contract and tort with those relating to compensation for breach of fiduciary duty or trust. For example, in *Clarke Boyce v Mouat*<sup>38</sup> solicitors acted both for a son, who was borrowing money, and for his mother, who was charging her house as security for the loan. It was held that in contract and tort the solicitors had no duty to advise the mother as to the wisdom of the transaction: they had done all they needed to do by explaining the legal consequences of the mortgage to the mother. A claim of breach of fiduciary duty was rejected on the grounds that a fiduciary duty concerns disclosure of material facts in a situation in which the fiduciary has a personal interest in the matter or acts for another party who has such an interest. It cannot be used to enlarge the scope of the contractual duties. In *Target Holdings v Redfern*<sup>39</sup> the House of Lords introduced concepts of causation into a claim for breach of trust which do not sit easily with traditional equitable rules.

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<sup>36</sup> E.g. Code of Conduct for the Bar, para 704

<sup>37</sup> CPR PD 16 para 8.2(1); *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400; *Armitage v Nurse* [1998] Ch 241. Both of these cases are pre-CPR, but contain valuable guidance as to pleading claims of fraud.

<sup>38</sup> [1994] 1 AC 428

<sup>39</sup> [1996] AC 421

30. Nevertheless, it is always worth considering whether an equitable claim might add something to a claim against a solicitor in contract and/or tort. Possible claims include the following:
- (1) breach of fiduciary duty. Any personal dealing between a solicitor and client, or personal benefit obtained by a solicitor from a transaction, brings these duties into play. More generally, where a solicitor acts for two clients who have a conflict of interest, and in particular where he or she intentionally prefers the interest of one client over that of another, a claim for breach of fiduciary duty may arise<sup>40</sup>;
  - (2) breach of trust. Where a solicitor receives client money it will usually be held on an implied trust and subject to the Solicitors Accounts Rules 1991. If the solicitor pays away the money without authority to do so, s/he will act in breach of trust;
  - (3) dishonest assistance in a breach of trust. Where the solicitor is not himself a trustee, but the moneys are held by another on trust, the solicitor will be liable if he dishonestly assists in a breach of trust<sup>41</sup>.
31. The advantages of an equitable claim, if it can be established on the evidence, include
- (1) the possibility of more generous compensation in equity than would be available to the claimant in contract or tort;
  - (2) the absence of a contributory negligence defence, at least where the action is deliberate<sup>42</sup>;
  - (3) the disapplication of limitation periods in the case of a fraudulent breach of trust or where trust property has been converted to a trustee's use by s.21(1) of the Limitation Act 1980.

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<sup>40</sup> *Bristol & West Building Society v Mothew* [1998] Ch 1. For successful claims for breach of fiduciary duty, see *Nationwide Building Society v Goodwin Harte* [1999] Lloyds Rep PN 338 and *Nationwide Building Society v Richard Grosse & Co* [1999] Lloyds Rep PN 348

<sup>41</sup> *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 AC 164. See also *Barlow Clowes International Ltd (in liquidation) v Eurostar International* [2006] 1 All ER 333; *Pulvers v Chan* [2007] EWHC 2406

<sup>42</sup> *Nationwide Building Society v Balmer Radmore*, above.