

## Editor's note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors Dentons Hong Kong LLP, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

## CONFLICT OF INTEREST

The concept of conflict of interest is of utmost importance to solicitors, not only because the existence or otherwise of a conflict determines whether a solicitor can accept a retainer, but also because a conflict can take many forms and may therefore easily go unnoticed. Needless to say, acting in conflict may also lead to disciplinary action or civil liability, whether in tort, contract or equity.

### Meaning of “conflict of interest”

- A solicitor is under a duty to act in the best interests of his client. A conflict arises if the solicitor is unable to do so (see Principle 9.01 Commentary 2 of the Solicitors' Guide to Professional Conduct (the “**Solicitors' Guide**”)).
- In reality, a conflict can arise in numerous contexts and forms. This bulletin focuses on two common scenarios, discussed below.

### Acting for both vendor and purchaser in same transaction

- Generally, a solicitor may accept a joint retainer provided it does not give rise to a conflict or significant risk of conflict (Principle 9.01 of the Solicitors' Guide). In practice, it is not uncommon for a solicitor to act for both parties in a transaction with opposing interests.
- Before doing so, the solicitor should obtain the written informed consent of both clients – see discussion in the next section. Due care must also be given by the solicitor before accepting such joint instructions.
- Two classic scenarios are a solicitor:-
  - (i) acting for the vendor and the purchaser in a sale of property; and
  - (ii) acting for the lender and the borrower in a loan transaction.
- (i) In a conveyancing transaction, the solicitor may only act for both the vendor and the purchaser in limited circumstances – see Principle 9.05 of the Solicitors Guide and Rule 5C of the Solicitors' Practice Rules.
- (ii) The solicitor acting in a joint retainer in a loan transaction, especially one involving a third party surety, is subject to additional requirements. Importantly, the solicitor must not accept instructions if he suspects that they have been given under duress or undue influence (Principle 5.04 of the Solicitors' Guide). The solicitor is advised to follow the Law Society's guidelines on this topic.
- In such cases, a conflict is likely to arise as the duties owed to the different clients may require the solicitor to take two mutually inconsistent courses of action.
- For example, in a conveyancing transaction, if the solicitor becomes aware of a flaw in the property title, he owes a duty to disclose it to the purchaser and a duty not to disclose it to the vendor (e.g. [\*Hilton v Barker Booth and Eastwood \(A Firm\)\* \[2005\] UKHL8](#) at 4). The solicitor runs a very serious risk of liability to one party or another whichever way he goes.

- In any case, if a conflict or significant risk of conflict arises during the course of the retainer, the solicitor must cease to act (Principle 9.04 of the Solicitors' Guide).

### Disclosing confidential information of one client to another

- Solicitors will almost inevitably obtain confidential information relating to a client during the course of the retainer.
- Solicitors have both a duty of confidentiality to their clients (and former clients) and a duty to pass on to clients all material information regardless of its source (Principle 8.03 of the Solicitors' Guide).
- A conflict of interest arises if confidential information of client A is also material information to client B. The solicitor is obliged to disclose the information in the interest of client B, but he is obliged to withhold it in the interest of client A.
- Such conflicts may arise even where the work undertaken for client A is completely unrelated to that for client B ([Marks & Spencer Plc v Freshfields Bruckhaus Deringer \[2005\] P.N.L.R. 4](#)). For example, a solicitor may have acted for client A in a civil action and yet may be prohibited from acting for client B in a subsequent loan transaction in which client A is a party.
- The solicitor may still act for client B, provided that:
  - There is no real risk of disclosure in acting for the client; or
  - The solicitor has obtained client A's informed consent ([Bolkiah v KPMG \[1999\] 2 A.C. 222](#) at para. 237B).
- In the event that a solicitor acts for two or more clients in a joint retainer, before accepting the engagement, the solicitor must advise his clients that:
  - No information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned; and
  - If a dispute develops that cannot be resolved, the solicitor cannot continue to act for both or all of them and may have to withdraw completely (Principle 9.04 Commentary 1 of the Solicitors' Guide).
- Proper record keeping of the above advice and the clients' written consent is crucial.
- The solicitor should bear in mind that a mere undertaking not to share or seek information about the work undertaken for a previous client, whether by the solicitor himself or the subsequent client, will not mitigate the conflict ([Marks & Spencer Plc v Freshfields Bruckhaus Deringer \[2005\] P.N.L.R. 4](#)).
- The duty of confidentiality extends beyond the termination of a retainer, which means that a conflict may arise in respect of a client the solicitor acted for decades ago. Conflict checks should therefore look into both the solicitor's current client book as well as past records.
- If the solicitor does act for client B, he should take measures to prevent dissemination of confidential information, for example by erecting information barriers ("Chinese walls"). In case of a dispute, the solicitor would have to show by clear and convincing evidence these measures are effective.

## Takeaway

- Whilst it may be permissible for a solicitor to act for opposing parties in the same transaction, a proper risk analysis is essential before any decision is made to accept such engagement.
- Not only should the solicitor identify and evaluate at the outset any risks involved, he should put in place rigorous risk management measures including a continuous risk review throughout the course of the retainer, if he does decide to act.
- A firm-wide risk management policy should also be consistently applied and made known to all members of the firm.