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HIDDEN CLIENTS: RECENT DEVELOPMENTS IN DUTIES OWED BY PROFESSIONALS TO THIRD PARTIES

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Introduction

This paper considers the thorny subject of duties of care owed by professionals to third party non-clients. As noted by one of the leading textbooks, the exact principles on which professionals' duties to third parties are founded are by no means clear and they differ from profession to profession.[1] There have been a number of interesting and important recent cases regarding duties owed by legal professionals in particular, which are the focus of the discussion below.

Duties to third parties who were never clients

The starting point is the well-established general rule that a solicitor acting on behalf of a client owes a duty of care only to his client.[2]

In the recent case of *Ashraf v Lester Dominic Solicitors Ltd* [2023] PNLR 14, Nugee LJ, giving the judgment of the Court, explained (at [54]) why the general rule is not surprising. Typically, where there is an engagement of a professional by a client, there is a contractual relationship between the professional and the client (the retainer), which sets out the scope of work of the professional. The tortious duty owed by the professional is a concurrent duty, the source of which is the contract of retainer. The core duty owed by a solicitor to his client is therefore to carry out the services he has agreed to carry out with reasonable care and skill. By contrast, a solicitor generally owes no similar duty to those who are not his clients for the simple reason that he has not agreed to provide any service to them at all.

Exceptionally, however, a duty of care has been held to have been owed to a person who was never a client of the legal professional. The question is: who are these "hidden clients"?

In *Ashraf*, Nugee LJ identified three categories where duties of care might be owed to non-clients, beyond which there was scant authority for such duties arising.[3]

Category 1: Where the purpose of the solicitor's retainer by his client A is to confer a benefit on a particular third party B

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[1] *Clerk & Lindsell* (24th ed.) para 9-13.

[2] *Ashraf v Lester Dominic Solicitors Ltd* [2023] PNLR 14 at [53] citing *White v Jones* [1995] 2 AC 207 at 256B per Lord Goff and *NRAM Ltd (formerly NRAM plc) v Steel & another* [2018] 1 WLR 1190 at [25]. In relation to barristers, see *Connolly-Martin v Davis* [1999] PNLR 826 at 834E-F (per Brooke LJ and the authorities cited).

[3] *Ashraf* [56]-[62]. Nugee LJ's three categories are similar to the three categories identified in *Clerk & Lindsell* (24th ed.) para 9-141 (in the same terms in the 23rd ed. at para 9-127): "*In general, it is submitted that a solicitor will owe a duty of care to a third party where either (1) there is identity of interest between the client and the third party, and the performance of the duty to the client is intended to benefit the third party; or (2) he gives advice or information, intending that a person other than the client act on that advice or information, without other independent professional advice; or (3) he has expressly or impliedly undertaken a responsibility to the third party independent from his status as the client's adviser*".

The classic example of a Category 1 case is where a testator engages a solicitor to make a will in favour of a beneficiary. In the leading case of *White v Jones* [1995] 2 AC 207, the House of Lords (by a majority) accepted the general principle that a solicitor owed no duty to those other than his client but nevertheless held that the solicitor owed a duty of care to a disappointed beneficiary.[4] Lord Goff, giving the lead judgment for the majority, held that the assumption of responsibility by the solicitor towards his client should be held to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. As Lord Goff stated at 273, the assumption of responsibility is the defendants' assumption of responsibility for the task, not the assumption of legal liability. It is undertaking to answer the question posed or to carry out the task to which the law attaches a duty.[5]

It was central to the imposition of the duty to the beneficiary that, without it, there would be no other remedy, enabling the enforcement of the duties owed to him by the solicitor. Thus, Lord Goff at 264 referred to there being "*a lacuna in the law, in the sense that practical justice requires that the disappointed beneficiary should have a remedy against the testator's solicitor in circumstances in which neither the testator nor his estate has in law suffered a loss*" and Lord Browne-Wilkinson at 276 held that:

> *"To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress. It is only just that the intended beneficiary should be able to recover the benefits which he would otherwise have received.*"

The *White v Jones* principle has been extended beyond the context of wills.[6]

Category 1 remains fertile ground for litigation. In a recent Guernsey Court of Appeal case, *Dorey v Ashton* [2023] PNLR 19, a testator had executed wills leaving personal and real property to the deceased's widow and disadvantaging his children. The children challenged the validity of the wills, arguing that he had lacked testamentary capacity. That claim was compromised. They then sued the solicitor who had been engaged to prepare the wills, claiming he had owed them a duty of care in relation to the making of the wills and had breached that duty, causing them loss to the extent of the sum paid to the widow and their legal costs. It was alleged that the solicitor knew or ought to have known that the deceased did not have testamentary capacity at the time of making the wills. The professional negligence claim failed. This was because in such a case where a prior beneficiary was disadvantaged by a subsequent change in a testator's intentions (and in contrast to a proposed beneficiary situation where a beneficiary should have benefitted but did not) there was no lacuna that needed to be filled. The estate would have a claim, and the beneficiaries could also challenge the will, as they had done. Further, the testator's interests and those of the beneficiary would usually be in conflict – as the Court noted (at

[4] Thus, upholding the result in *Ross v Caunters* [1980] 1 Ch 297.
[5] See also Patten LJ in *P & P Property Ltd v Owen White & Catlin LLP* [2019] Ch 273 at [76], that there rarely exists an actual conscious and voluntary assumption of responsibility and *Spire Property Development LLP v Withers LLP* [2023] 4 WLR 56 at [59], citing *White v Jones* and making clear that the reference to 'voluntary' assumption of responsibility in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 529 and 530 must not be taken to mean that the solicitor needs to consent to the claimant placing responsibility on them.
[6] See e.g. *Gorham v British Telecommunications* [2000] 4 All ER 867 (advice on pension and life cover).

[85]), if the solicitor was tasked with anything by the deceased, it was certainly not the task of declining to assist in making the wills and the transaction did not have the benefit of the claimants as its object.

In a further recent case, *Lonsdale v Wedlake Bell LLP* [2024] EWHC 712 (KB), Martin Spencer J refused to strike out a professional negligence claim brought against a solicitor's firm in respect of an incorrectly drafted settlement trust which had resulted in alleged losses suffered by intended beneficiaries because it was arguable that the solicitors owed a direct duty of care to the beneficiaries and not just to the settlor and trustees. Whilst *White v Jones* had suggested that there would be no duty of care where the testator remains alive (as was the case of the settlor in *Lonsdale*) the Judge held that on the particular facts a duty arguably arose because the disposition of the estate had completed and the effect of the solicitor's negligence was to make it irrevocable; the situation was therefore arguably analogous to the situation of the deceased testator in *White v Jones*.

Category 1 is the most conceptually straightforward and least controversial situation where a duty is owed to a non-client, though these recent cases illustrate that the boundaries continue to be tested.

The other two categories involve a duty of care being found for things said to or done for a third party and there may exist a degree of overlap between them.

Category 2: Representations or actions by solicitors reasonably and foreseeably relied on by other parties

The leading case in relation to Category 2 is *NRAM Ltd (formerly NRAM plc) v Steel & another* [2018] 1 WLR 1190.

The pursuer, a commercial lender (previously NRAM plc and prior to that Northern Rock (Asset Management) plc), granted a loan to a borrower in relation to its purchase of a property consisting of a number of commercial units, in return for the grant of security by the borrower to the lender over the property. Subsequently, the borrower entered into an agreement for the sale of one of the units. The borrower and lender agreed that, on the sale, the unit would be released from its security in return for a partial repayment of the loan and that the security would remain in place in relation to the remaining units. Shortly before completion, the borrower's solicitor, Ms Steel, sent an email to the lender wrongly stating that the whole loan was being repaid and requesting the execution of draft deeds of discharge over all the units. The lender did not check the correct position against its own file and proceeded to discharge the entire security over the units. The borrower subsequently went into liquidation and the lender brought proceedings against the borrower's solicitor and her firm, claiming it had suffered loss as a result of her negligent misrepresentation.

There was no issue about the fact that the solicitor had acted with gross carelessness.[7] The defence centred on the prior question of whether there was a duty of care owed to the lender.

The Lord Ordinary dismissed the action but an Extra Division of the Inner House of the Court of Session allowed the pursuer's reclaiming motion, holding that the solicitor had assumed responsibility for the representations in her email because they fell within her area of expertise and she knew that the lender was not represented by solicitors, and that, therefore, it was not necessary to consider whether the lender should have checked their accuracy. The Supreme Court allowed the defenders' appeal.

[7] See the Supreme Court judgment at [12].

Lord Wilson, giving the unanimous judgment of the Court, analysed the case-law from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 onwards. The following key points emerge.

First, *NRAM* was one of a series of Supreme Court judgments[8] holding that, contrary to what many may have thought, *Caparo Industries plc v Dickman* [1990] 2 AC 605 did not endorse a universal three-fold test of reasonable foreseeability of harm, a relationship of sufficient proximity between the parties and that it was fair just and reasonable to impose a duty of care, which was to be applied in all cases[9]. Instead, properly read, *Caparo* supported the adoption of the incremental approach.[10]

Second, Lord Wilson confirmed that the concept of assumption of responsibility remains the "*foundation*" of liability in tort for negligent misrepresentation (at [24]).[11] Lord Wilson further elaborated (at [19], [23] and [32]) that there are two key ingredients to this liability, which are distinct inquiries:

1. Was it reasonable for the representee to have relied on the representation?
2. Should the representor reasonably have foreseen that the representee would do so?

Third, Lord Wilson considered the "*unusual dimension*" of the case, namely that the claim was brought by one party to an arm's length transaction against the solicitor who was acting for the other party. Having analysed a number of authorities on the point, he concluded at [32] that the two questions he had identified were particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is "*presumptively inappropriate*". In so holding, Lord Wilson confirmed the principle that a solicitor generally owes no duty of care to non-clients, including to the opposite party.

On the facts, it was held that the reasonableness of the reliance, which was central to the concept of an assumption of responsibility, was not established. This was not information in the mind of the solicitors that was not available to opposite party – on the contrary, it was a fact wholly within the knowledge of the representee. It was held (at [38]) that a commercial lender about to implement an agreement with its borrower referable to its security does not act reasonably if it proceeds upon no more than a description of its terms put forward by or on behalf of the borrower. The lender knows the terms of the agreement, and in the instant case was likely to have proposed them. Insofar as the particular officers who saw and acted upon the email had never been aware of the terms or had forgotten them, immediate access to the correct terms was at their fingertips. Performing what was essentially a cross-check based on incrementalism, it was noted that no other authority had been cited to the court or discovered when

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[8] *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736, *NRAM Ltd v Steel*, *James-Bowen v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021, *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041 and *N v Poole BC* [2020] AC 780.

[9] Citing Lord Toulson in *Michael* at [106] and Lord Reed in *Robinson* at [21]-[29].

[10] Viz. that it is preferable that the law should develop novel categories of negligence incrementally and by analogy with established categories, as derived from *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.

[11] See also *Playboy Club* at [7] per Lord Sumption (with whom Baroness Hale, Lord Reed and Lord Briggs agreed) confirming that "*[t]he defendant's voluntary assumption of responsibility remains the foundation of this area of law*". Lord Sumption further emphasised (at [7]) that "*It is fundamental to this way of analysing the duty that the defendant is assuming a responsibility to an identifiable (although not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminate group"* and that the defendant's knowledge of the transaction in respect of which the statement is made was also essential (at [10]); *P & P Property v Owen White & Caitlin* at [75] (a negligent services case) and *Spire* at [59] per Carr LJ.

preparing the judgment where an assumption of responsibility had been found for a careless misrepresentation about a fact wholly within the knowledge of the representee.

The *NRAM* approach was applied recently by the Court of Appeal in *McClean and others v Thornhill* [2023] 1 WLR 3802. The case involved a tax silk, Mr Andrew Thornhill KC, who had been instructed by the proposer of three tax avoidance schemes and in a series of written opinions advised that investors in the schemes would obtain the tax benefits which the schemes were designed to achieve. He had consented to being identified as the tax adviser to the promoter in the information memoranda used to promote the schemes and to copies of his opinions being made available on request to prospective investors in the schemes. The revenue subsequently refused the tax reliefs claimed by investors in the schemes. The claimant investors brought a claim in negligence against Mr Thornhill. Zacaroli J, held that Mr Thornhill had not assumed responsibility towards the claimants and so had not owed them a duty of care because in the circumstances it had not been reasonable for the investors to have relied on the defendant's advice without making their own independent inquiry and the defendant could not have reasonably foreseen that they would do so.[12] On appeal by the claimants, his decision was unanimously upheld.

As to the law, Simler LJ (as she then was) giving the lead judgment made the following key points.

First, Simler LJ reiterated the general rule that a lawyer owes a duty of care to the party for whom he or she is acting but generally owes no duty to the opposite party. However, there are exceptions, for example where the legal advisor makes representations to the other side on which he relies. Even so, the general principle that no duty of care is owed usually applies and it was common ground that whether or not there was such a duty depends on assumption of responsibility as explained in *NRAM* (at [86]).

Second, Simler LJ reiterated that the *NRAM* approach requires consideration of the two distinct ingredients of negligent misrepresentation (reasonable reliance and reasonable foreseeability of reliance) which, applied in the context of solicitors means it is presumptively inappropriate for a person to rely on his opponent's solicitor (at [89]).

Third, when it comes to assessing reasonableness of reliance, the question of whether it is reasonable to act without any independent check or inquiry is highly relevant and in many cases likely to be

[12] For the practitioner seeking more detailed guidance on the factors which may be relevant in determining whether there has been an assumption of responsibility in this context, see Zacaroli J's citation of the summary of factors given by Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd (in liq.) & Ors v Price Waterhouse & Anor* [1998] BCC 617 at [6.20] as including:
"*(a) The precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence'.*
(b) The precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.
(c) The precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.
(d) The presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.
(e) The opportunity, if any, given to the adviser to issue a disclaimer."

determinative; independent inquiry is of "*fundamental importance*" and a "*central aspect*" of the reasonableness of reliance (at [89]-[92]).

On the facts, Simler LJ considered the regulatory and commercial context and then conducted a close analysis of the statements made in the various documents provided to investors in relation to the tax scheme (including the Information Memorandum ("IM") and the subscription agreement). She held that the factors against the imposition of a duty of care included the following:

a. It was an unregulated collective investment scheme (as defined in s.235 Financial Services and Markets Act 2000) which could not be promoted to the general public and could only be subscribed to through an authorised professional; the target market was high net worth, sophisticated investors with their own independent financial advisers (at [98], [102] and [104]).

b. The broader commercial context was that the promoters and the investors were on opposite sides of an arm's length sale transaction and accordingly it was presumptively inappropriate for investors to rely on anything said by the promoter's adviser, who was at all times identified as such (at [99]-[100]).

c. Of central importance, the only way investors could obtain access to Mr Thornhill's advice was through the IM and the terms of the IM required potential investors to consult their own tax advisers (at [98], [102], [110]-[111]).

d. The investors had to warrant that they had only relied on the advice of, or had only consulted with their own professional advisers with regard to the tax and other considerations related to subscription, and confirm that they had read and understood the terms of the IM and had taken appropriate professional advice before submitting the application and were aware of the risks attached (at [52], [98] and [112]).

e. The absence of an express disclaimer was not determinative; this was a multifactorial analysis and absence of a disclaimer was but one factor in the mix; it was not a trump factor given that the advice was only given to investors through the gateway of the IM with all its caveats (at [116]).

At [117], Simler LJ concluded "*For all these reasons, I am satisfied that the judge was correct to conclude that a correct application of the principles set out in NRAM meant that a duty of care did not arise in this case. Taking all the factors identified above into account, including in particular the terms of the IM, the subscription agreement and checklist, fairly understood it was objectively unreasonable for investors to rely on Mr Thornhill's advice without making independent inquiry in relation to the likelihood of the Scheme achieving the tax benefits; and Mr Thornhill could not reasonably have foreseen that they would do so*."

In a concurring judgment, Carr LJ (as she then was) (at [176]-[177]) noted that there were multiple factors pointing in favour of the existence of a duty of care to the investors including the absence of a disclaimer, the fact that Mr Thornhill knew his advice would be available to potential investors who asked for it, that potential investors were likely to "take comfort" from the fact that, as a leading expert

in the field, he had given positive advice on the scheme and, on the critical point, there was no conflict between the interests of the promoters and the investors. However, for the reasons identified by Simler LJ, those factors were not sufficient to impose a duty. The terms of the IM were critical in advising investors to consult their own tax advisers and investors were required to give warranties that they had relied only on the advice of their own advisers.

Of more general application, Carr LJ cautioned that a specialist professional exposes themselves to the risk of a claim that they owed a third party a duty of care based on an assumption of responsibility if they give unequivocally positive advice to their client knowing it would be made available to a third party without any express disclaimer of responsibility and that the third party would be likely (with their advisers) to be assisted by it in deciding whether to enter into a financial transaction (at [175]).[13]

Category 3: Solicitors stepping outside their ordinary role

The third category is where a solicitor for one party steps outside his conventional role and assumes a different role in relation to the other party. The principle that solicitors can owe a duty of care when they have stepped outside their normal role was accepted in *NRAM* at [32].

The most well-known Category 3 authority is *Al-Kandari v JR Brown & Co* [1988] QB 665 arising from a family dispute. The claimant, a mother of two children, was afraid that the father would abduct them to Kuwait. The court had made an order which, with their consent, obliged the defendants, the father's solicitors, to retain possession of his passport on which the children were also registered. With the mother's consent, the solicitors allowed their agents to take the passport to the Kuwaiti embassy for alteration (to effect removal of the children's names) on condition that it would never be out of their sight. In fact, they released the passport to the embassy overnight without informing the mother of that fact or the fact that the father was due to attend there the following day. The husband obtained his passport from the embassy and then abducted the children to Kuwait.

The defendants, having agreed to an obligation to retain possession of the father's passport, were held by the Court of Appeal to have stepped outside of their role as the father's solicitors and assumed responsibility to the mother.

Lord Donaldson MR said (at 672D): "*In voluntarily agreeing to hold the passport to the order of the court, the solicitors had stepped outside their role as solicitors for their client and accepted responsibilities towards both their client and Mrs Al-Kandari and the children*." Bingham LJ concurred stating (at 675H-676D) that "*It may nevertheless happen, even in the course of contested civil litigation, that a solicitor for a limited purpose steps aside from his role as solicitor and agent of one party and assumes a different role, either independent or both parties or as agent of both…..In so holding the passport the defendants were not acting as solicitors and agents of Mr Al-Kandari, their client, but as independent custodians subject to the directions of the court and the joint directions of the parties. I have no doubt that in this situation the defendants owed the plaintiff a duty of care, since the purpose of holding the passport at all was to protect her lawful rights*." In failing to inform the mother, the defendant solicitors had breached their duty of care to her.

[13] The Supreme Court refused permission to appeal on the ground that the point of law on duty of care was not arguable: https://www.supremecourt.uk/pta/permission-to-appeal-2023-08.html

Again, Category 3 remains a live area for disputes. In *Ashraf* a solicitor who applied to change a property title register on behalf of a bank which held a registered charge filled out a form stating whether each party was represented by a conveyancer or that its identity had been confirmed (the purpose of which was to reduce the risk of property fraud). The Court of Appeal held that it was arguable that in completing the form, the solicitor was not acting for his client alone but stepped outside that role and acted for all parties, and hence owed a duty to all parties to act with reasonable care in filling in the application form accurately.

Duties to potential or former clients

There have been further recent developments in the related context of duties of care to non-clients who may be potential or former clients. These cases arise out of claims made in relation to a period before the contractual retainer came into being or after it came to an end. Two recent cases provide examples of this.

In *Spire Property Development LLP v Withers LLP* [2023] 4 WLR 56, a firm of solicitors answered questions from former property developer clients, about why the existence of extra-high voltage electric cables running beneath two properties that the developers had purchased as development sites had not been discovered through searches during the conveyancing process. The Court of Appeal (Carr LJ with whom Popplewell and King LJJ agreed) cited *NRAM* as confirming that assumption of responsibility remains the foundation of the tortious liability; the fact that information or advice is provided gratuitously does not necessarily negate an assumption of responsibility or the requirement to perform tasks assumed with reasonable care and skill (at [59]). Whether and to what extent any responsibility is assumed is judged objectively in context; the primary focus must be on exchanges which cross the line and "*[a] fact-sensitive enquiry in each case is necessarily required*" (at [60]).

On the facts, whilst the solicitors accepted that they assumed a duty of care in relation to the answers they in fact gave, they did not owe a wider duty to advise. On a true construction of the post-termination communications, the developers were probing the solicitors about what should have been discovered in relation to the cables before completion and in answering as they did, the solicitors had not assumed a duty to advise on the developers' potential rights and remedies against the company that laid the cables.

As the Court held, the outcome turned on the application of well-established principles to the specific facts of the case. Of wider interest, the Court opined that it was important that solicitors were able to respond courteously and constructively to "one-off" requests for information or advice from former or potential clients or third parties without fear of creating legal liability. At the same time, when volunteering any such information or advice, solicitors need to take care to identify the limits of any assumption of responsibility in order to avoid the risk of litigation such as the present. Equally, those seeking information or advice from solicitors on an informal basis need to take care to understand the potential limits of the exercise and the extent to which they can reasonably rely on any response (at [104]).

In *Miller v Irwin Mitchell LLP* [2024] 4 WLR 27, the claimant sustained serious personal injuries in an accident while on holiday in Turkey. She contacted the legal helpline of the defendant solicitors on 19 May 2014 and received a call back from an adviser who gave her some limited high level and general

legal advice about personal injury claims. Documents were not then sent to the solicitor to enable the solicitor to consider the case in any more depth with a view to deciding whether they might agree to act for her until April 2015. In January 2016, the solicitor informed the claimant that it was ready to proceed with her claim. A claim was then made against the tour operator who passed it on to its insurer. The insurer declined the claim because it had not been notified within the time required by the policy. The tour operator then went into administration. Having been advised the insurer's declinature was likely to be held to be valid, the claimant abandoned her claim against the tour operator and instead sued the defendant for negligence. She contended that they should have notified the tour operator of the claim or advised her to do so shortly after she first telephoned the firm and that had it done so, the insurer would have been notified and indemnified the tour operator against the claim. The defendant denied that it owed any duty of care in relation to notification of the tour operator at the time of the May 2014 call. The claim failed.

The Court of Appeal adopted Carr LJ's summary of principles in *Spire* and held that (1) there was a voluntary assumption of responsibility in relation to advice which was actually given to the claimant; (2) the advice actually given was of a limited and general "high level" nature and was accurate; and (3) given the precise facts, the ambit of the solicitor's responsibility did not extend to the subject matter of notification of the tour operator.

Again, this was a case turning on the facts but stands as a helpful reminder that duties can be owed to persons before they become clients in relation to advice which is in fact provided prior to a retainer coming into existence.

Key takeaways/reflections

Drawing the threads together, what are the key takeaways and points for further reflection?

In a number of respects, the recent cases have made the law in relation to lawyers' duties to third parties a little clearer, though there remain considerable areas for further development.[14]

First, the cases have clearly reiterated and affirmed the restrictive approach to legal professionals' duties of care to non-clients. At the same time, they have highlighted areas where particular vigilance is required. For example, it is essential for practitioners to pay heed to the important warning given by Carr LJ in *Thornhill* of the risk of exposure for a lawyer who offers unequivocally positive advice knowing it would be made available to and relied on by a third party without any disclaimer of liability and where the third party would be likely to take comfort from that advice in deciding whether to enter into a transaction. So too, take note of Carr LJ's statement of "*lessons to be learned*" in *Spire*, warning that lawyers volunteering answers to one-off requests for advice need to take care to identify the limits of any assumption of responsibility in order to avoid the risk of litigation, as well as the outcome of *Ashraf* highlighting the risk of liability where a lawyer steps outside his or her ordinary role.

Second, *Ashraf* has provided a framework for categorising the types of case where a lawyer may exceptionally owe a duty of care to a non-client. Whilst there appears to be some overlap between the

[14] See e.g. *Charlesworth & Percy* (15th ed.) at para 10-249 noting that "*The extent to which the boundaries of a solicitor's liability will be enlarged to include additional classes of non-clients is still being worked out*."

various categories,[15] it is respectfully suggested that it is a helpful way of seeking to rationalise what may otherwise appear to be a somewhat disparate collection of cases. This is of even greater value given the modern emphasis on the incremental approach, which requires as a first step identifying the relevant closest analogy from which to reason. Future cases may well seek to develop the threefold framework and further rationalise the case law.

Third, the recent cases confirm that, for better or worse,[16] the concept of assumption of responsibility remains the foundation of liability in relation to negligent misstatement (as extended to negligent provision of services[17]).[18] In *NRAM*, the Supreme Court sought to give more concrete content to the meaning of "assumption of responsibility" by identifying the two ingredients of reasonable reliance and foreseeable reliance. This formulation was duly applied in the solicitor context in *Thornhill*.

However, this might not be the last word on the subject. The recent Privy Council case of *JP SPC 4 v Royal Bank of Scotland International Ltd* [2023] AC 461, albeit in a different context of a bank's duty to a non-client (an investment fund) in executing a payment order, approved a slightly different formulation. The Board relied on passages from *Clerk & Lindsell* (23rd ed.) and summarised that there

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[15] For example, in *Ashraf*, Nugee LJ categorised two New Zealand cases where duties of care were owed by solicitors who provided certificates confirming certain matters which were relied on by non-clients (*Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 and *Connell v Odlum* [1993] 2 NZLR 257) and *Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249 (where a duty was owed by a borrower's solicitor who gave an undertaking to ensure that an unrepresented lender's security was not affected by invalidity) as Category 2 cases but they could equally well be classed as Category 3 cases (in *Connell* itself, Thomas J (giving the leading judgment) expressly cited *Al-Kandari* and held that the case before the Court was analogous). As to how the overlap affects the shape of legal argument, see e.g. *McClean* where, in addition to arguing that representations had been made to them on which they relied, the claimants argued that Mr Thornhill had stepped outside the role of barrister and became part of the sales team or had undertaken a role akin to a joint expert (this was rejected (at [95] & [101]) with the Court holding that he was simply acting as the promoter's adviser).

[16] As Lord Hamblen and Lord Burrows observed in *JP SPC 4* at [60], the principle of an assumption of responsibility has been criticised by some commentators as being elusive and tending to obscure the real reasoning whilst others consider it to be an important and distinctive source of legal obligation. Despite the debate, the Courts have continued to apply it and to find it useful. For a recent defence of the concept of assumption of responsibility, see Lord Sales speaking extrajudicially: "*Pure economic loss and assumption of responsibility: the Peter Taylor Memorial Address for the Professional Negligence Bar Association 20 April 2023*" P.N. 2023, 39(3), 113-127.

[17] See *P & P Property v Owen White & Caitlin* at [75] (a negligent services case). *Hedley Byrne* was of course extended from the context of statements to an assumption of responsibility for the provision of services by the House of Lords in *Henderson v Merrett* [1995] 2 AC 145. In *Williams v Natural Life Health Foods* [1998] 1 WLR 830 at 834F, Lord Steyn (with whom their other Lordships agreed) described the extended *Hedley Byrne* principle as "*the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services*". See further *Benyatov v Credit Suisse Securities (Europe) Ltd* [2023] 3 All ER 636 at [41].

[18] There has been ongoing debate regarding the reach of the assumption of responsibility test beyond negligent misrepresentation and negligent provision of services. In a recent case on an employer's duties to employees, the Court of Appeal in *Benyatov* reviewed the Supreme Court and Privy Council authorities considered earlier in this paper and rejected a submission that assumption of responsibility was a fundamental principle underlying the recognition of a duty of care or a necessary part of the analysis in every case. Underhill LJ (with whom Bean and Singh LJJ agreed) held at [55] that "*In the light of those authorities it seems to me that the position is as follows. The correct course for a court which has to decide whether a duty of care should be recognised in a novel situation is to take the incremental approach endorsed in Robinson. That will in principle involve consideration of the three "Caparo factors" to the extent that they are in issue. It may be a useful analytical tool, particularly in considering the factors of proximity and/or "fairness, justice and reasonableness", to ask whether the defendant can be regarded as having assumed a responsibility to take care to protect the claimant against a loss of the kind claimed; but its usefulness will depend on the issues in the particular case.*"

are three factors which may be of particular relevance in determining whether there has been an assumption of responsibility:

"(i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care."[19]

It remains to be seen whether the *NRAM* two ingredient formulation will be treated as authoritative in the solicitors' liability sphere (or indeed elsewhere) or whether the similar but slightly expanded formulation from *JP SPC 4/Clerk & Lindsell* might instead gain any traction.

The reasonableness of the claimant's response to a negligent statement or act (reliance) would appear to shade into causation, suggesting some blending of different elements of the tort analysis when considering the issue of whether a duty of care is owed. Indeed, it was expressly noted in *NRAM* (at [12]) that "*the issue in the case might well have been cast in terms of whether [the solicitors] were the cause of Northern Rock's loss rather than whether they owed a duty of care to it*". That said, foreseeability of reliance is also a necessary part of the test and preceding as it does the negligent act, therefore properly forms part of the consideration of the duty element.

Finally, the recent cases are a reminder of the inherent **lack** of clarity in considering whether a duty of care arises in any given case which may come across the practitioner's desk. There are, as perhaps with many or all questions of duty of care, few clear cut or bright line rules making for easy answers when advising one's clients. The Supreme Court in *NRAM* (at [24]) indicated the potential for future cautious incremental development of liability but in what respects such development will take place remains unclear.[20] What is apparent is that whether there will be a duty of care in any given case will require a close factual analysis and a carefully balanced evaluation of all the factors.

Thornhill is a case in point. Carr LJ noted in her concurring judgment (at [174]) that she had initial reservations about the outcome of the appeal. But ultimately, considering all the factors for and against the existence of a duty of care, she agreed with Simler LJ that the overall balance pointed away from there being such a duty.

By way of closing, in evaluating which direction the law might go next, it is well to keep in mind what perhaps lies beneath the many and various cases in which the Courts are seeking to delimit the extent of the legal professional's duties to third parties.

On the one hand, the law has a clear interest in ensuring that, as with all professionals, where lawyers undertake work, they do it properly and with reasonable care. The risk of professional liability to third parties who may be adversely affected by a lawyer's carelessness is an extremely powerful incentive to adhere to those standards.

On the other hand, there are good reasons for continuing to limit the extent of lawyers' duties to third parties. Lawyers owe duties first and foremost to their clients. Much of a lawyer's work, both contentious

[19] On the facts, the Privy Council was concerned with an alleged negligent provision of services which explains the manner in which the factors are expressed. *Clerk & Lindsell* (both 23rd and 24th eds.) frames these factors as applying to both negligent statements and services.
[20] See also *Playboy Club* at [7].

and non-contentious, is adversarial in nature and there is manifest scope for conflict with the interests of other parties. Given this, the court is naturally slow to find that a lawyer owes a duty to third parties save for where there is something taking the case out of the ordinary. But even where there is no conflict between the interests of the client and the third party, there are sound reasons to be slow to impose duties to non-clients. The retainer remains the core source of the solicitor's scope of responsibility. Vis á vis his client, the solicitor can protect himself by the introduction of terms limiting his liability by the introduction of terms into his contract, but he cannot protect himself against any third party where there is no contract. The need for reasonable protection of the public from the negligence of solicitors also needs to be balanced with considerations of the cost and availability of obtaining professional indemnity insurance.[21]

There is also a need to be cognisant of the realities of professional practice. See, for example, ***Spire*** where Carr LJ agreed that it is important that solicitors are able to respond courteously and constructively to "*one-off*" requests for information or advice from former or potential clients or third parties without fear of creating legal liability. A pragmatic balance must be struck between enabling a solicitor to deal with practical situations which may arise (a non-client asking for ad hoc advice, a solicitor making statements to the other side in the context of litigation or a transaction) without creating a climate of fear and excessive defensiveness.

The fundamental question in every case is how and where to strike the right balance between all these competing concerns. In grappling with these and other considerations, the law continues to develop apace and there will no doubt be many more interesting developments to come.

[21] A balance recognised in ***AIG Europe Ltd v Woodman*** [2017] 1 WLR 1168 at [14] per Lord Toulson in the context of an aggregation issue and the approach to the interpretation of the Solicitors Regulation Authority's Minimum Terms and Conditions for solicitors' professional indemnity insurance.