Solicitors' duty to advise on the risk of contractual meanings.

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THE *BALOGUN V BOYES SUTTON & PERRY* DECISION.

1. A solicitor advising a client about the meaning of a contract that the client is about to enter, may also need to advise of the *risk* of a court coming to a different conclusion about that meaning. The existence of that duty to warn will be fact-sensitive, and will depend on the strength of the factors favouring a different interpretation and thereby giving rise to the risk: Balogun v. Boyes Sutton & Perry (a firm) [2017] EWCA Civ 75, at [38].

3PB'S ANALYSIS.

2. **The decision.** Last week, the Court of Appeal handed down its judgment in Balogun v. Boyes Sutton & Perry (a firm), a case involving allegations of professional negligence against a solicitor's firm acting in a commercial landlord and tenant transaction (the acquisition of a commercial underlease).

3. Lloyd Jones LJ (with whom Gloster and King LJJ agreed) held that:

   3.1. the Respondent solicitors (**'the Solicitors'**) had correctly interpreted a term in a sub-lease when advising their client, Mr Balogun, as to its scope;

   3.2. even so, they were in breach of duty because they failed to advise him as to the *risk* that a court might interpret the term differently, and in failing to take steps to amend the draft sublease so as to remove that risk.

   The point of interest about the decision is its consideration of the circumstances that might give rise to this duty to warn of a later contrary interpretation.

4. **Factual background.** The dispute related to the terms of a headlease and underlease with regard to access to a ventilation shaft. The Solicitors knew from the outset that Mr Balogun intended to fit out and run a restaurant in the property. Access to a ventilation duct was indispensable for that plan to come to fruition.

5. The problem arose because the headlease and underlease did not correspond with each other. That gave rise to doubt about whether the proposed underlease gave Mr Balogun a right of access to the ventilation shaft.

6. **The Solicitors' advice.** The partner with conduct of the matter, who advised Mr Balogun, had correctly interpreted the terms in dispute in concluding that the underlease *did* confer a right to connect to and use the ventilation shaft. However, he had not advised Mr Balogun of the *risk* that a different interpretation could be contended for, or preferred by a court. That in itself was a breach of duty.

7. **The duty to warn of a different construction.** Lloyd Jones LJ concluded (at para. 38) that, "*… if [the partner] had considered the relevant provisions as he should, he would have appreciated that there was a possible non-correspondence between the terms of the headlease and the underlease in relation to access to the ventilation shaft [which was] a matter of great important to his client's project*" and that such risk "*was sufficiently great to require [the partner] to advise his client accordingly and to take steps to amend the draft underlease so as to remove the risk*".

8. **When will the duty to warn arise?** It is clear that the existence of the duty is very fact-specific. The Court of Appeal's analysis of previous authority[1] suggests that the duty will not usually arise unless at least: (i) there is real scope for doubt as to what the clause means; and/or (ii) the solicitor is put on actual notice of a potential challenge to his construction, at the time that he gives it.

9. On the facts in Balogun there was no suggestion of any third party disputing the meaning of the clause. On the contrary, the lessors accepted that Mr Balogun had a right to connect to the shaft. The duty to warn arose simply because of the importance of the right of access to the client's project, and the risk created by the wording of the underlease itself.

[1] At [36]-[38]. The analysis included its own earlier decision in Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson Solicitors [2001] EWCA Civ 1360.

IMPACT OF THE DECISION

10. An unusual feature of duty-to-warn cases is that, as in Balogun itself, the solicitor may be in breach of duty even when the advice that he gives about the construction of the relevant clause is *correct*. As Roth J. recognised in an earlier case,[2] it seems counterintuitive to hold a solicitor negligent when he *correctly* construes a lease, because he fails to warn that his advice may be wrong.

11. This case emphasises the importance of solicitors warning their clients of the reasonable possible counter-interpretations of a contract or contractual clause. On ordinary principles, a solicitor's advice as to the meaning of a contract is unlikely to be wrong unless no competent solicitor could have arrived at it (Balogun, at [36]). However, Balogun demonstrates that a solicitor needs to have a far greater degree of confidence before withdrawing a caveat to his advice, that a court may construe it differently.

12. Solicitors acting in a transactional context have a duty to advise their clients of the potential for dispute and the risk that a counter-interpretation to their own may be advanced, and may be applied by a court, and thereafter have a duty to take such steps as are possible to remove or reduce that risk from the transaction. Solicitors are not protected by simply providing an acceptable opinion as to the outcome of a dispute or issue.

13. If a client who finds themselves in litigation on the basis of, for example, a dispute about the interpretation of a contractual clause, goes on to succeed at trial but still incurs losses (perhaps because of delays caused by the litigation or because their legal costs are reduced on assessment or are not recovered from an impecunious opponent), they might try to recover those losses from their solicitor who had not advised them of the risks of the clause being contentious and therefore litigated upon (even though the solicitor's interpretation of the clause was ultimately accepted by a court).

14. Fortunately for the Solicitors in Balogun, for reasons that raise no point of principle (neither the superior landlord nor the underlessor had in fact disputed that the sublease did actually confer the relevant right), Mr Balogun was unable to demonstrate that their breach had caused him any loss. The appeal against the dismissal of his claim was consequently dismissed.

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[2] Baker v. Baxendale Walker Solicitors [2016] EWHC 664 (Ch)