Accountant’s retainer letters remain of paramount importance!

On 12 December 2016 Mr Justice Coulson handed down judgment in the High Court in a dispute involving Wilkins Kennedy (now Wilkins Kennedy LLP, "WK"), a UK top 20 firm of accountants, and Harlequin Property (SVG) Limited ("Harlequin"). Harlequin was the developer of a luxury holiday resort at Buccament Bay, St Vincent and the Grenadines in the Caribbean, funded by unregulated collective investments to the sum of around £450 million.

Harlequin had difficulties with two successive contractors as a result of delays, defective works and poor project management. The agreement between Harlequin and the second contractor, ICE, was informal and provided for fixed weekly payments resulting in a windfall to ICE of over $51 million despite the ‘agreement’ being terminated due to poor performance and failure to complete on time. WK became involved with the development on behalf of Harlequin in around 2006 as accountant and business adviser. The business plan for the development was formulated by a partner at WK and he assisted in the negotiations with the contractors. No formal engagement letter was entered, which WK sought to rectify in January 2009 seeking to introduce a limit of liability of 20 x their fee.

Coulson J held that despite there being no written contract in place, there was an implied contract between WK and Harlequin (with no limit of liability incorporated). As a result of WK’s influence in all the elements of the development the contractual duty of care was equivalent to that of a de facto Chief Financial Officer for Harlequin. WK were in breach of contract and / or negligent in advising Harlequin not to enter into any formal contract with ICE, thus depriving them of any security in respect of timescale and cost in the absence of any binding valuation mechanism for works.

Coulson J held that the lack of a wider contract with ICE was not causative of the loss but the loss to Harlequin (of overpayment to ICE to the sum of $23,261,941) was caused by the lack of a binding valuation process that would have prevented any overpayment. WK was negligent in failing to advise on this and the need to engage a quantity surveyor. A 50% reduction on damages was awarded by Coulson J for contributory negligence by Harlequin as a result of management failures and the fact they had clearly understood the need for payments to reflect work done with the assistance of a quantity surveyor to create a clear payment schedule (which they failed to do). Damages of $11,630,970 were recoverable from WK.

This case illustrates the importance of a clear retainer letter establishing the scope of the retainer and any liability from the outset (and before any works are undertaken) in order to protect an accountant (or any professional) from unfavourable terms being implied by a Court down the line after problems have arisen.

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