# **Assumption of Responsibility in Professional Liability Claims: Part 5**



**Introduction**  
  
In the typical professional liability claim, the claimant will be a former client. It will likely be common ground that the professional owed a coterminous duty in contract and at common law. The battleground will be over matters such as the scope of the duty, whether it was breached and whether any breach caused a loss. Less commonly, the claimant may be a third party which insists that, in carrying out services for its client, the professional also assumed a responsibility to that third party.

**This is the fifth in a series of notes which looks at assumption of responsibility in the professional liability field. It focuses on claims against lawyers.**

**A: recap**

Part 1 traced the evolution of the law from the seminal decision of the House of Lords in *Hedley Byrne v Heller & Partners* [1964] AC 465. Several of the speeches referred to an assumption of responsibility, but subsequent cases confirmed that the duty was imposed by the court: it did not need to have been consciously accepted.

*Anns v Merton BC* [1978] AC 728 laid down a two-stage test to establish the existence of a duty. The first part involved considering whether there was a sufficient relationship of proximity between the parties for it to be in the reasonable contemplation of the defendant that careless by it was likely to cause damage to the plaintiff. If it was, the second part involved considering whether there were factors which might negative the duty which would otherwise arise.

The Australian courts rejected this approach. In *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, Brennan J preferred an approach by which the law developed “*incrementally and by analogy with established categories”.*

*Anns* was overruled in *Murphy v Brentwood DC* [1991] 1 AC 398. It was long thought that the House of Lords had, in the meantime, endorsed a threefold test in the case of *Caparo v Dickman* [1990] 2 AC 605: (a) that it was foreseeable that the recipient is likely to suffer damage if the advice is wrong, (b) that there is a sufficiently proximate relationship between the parties, and (c) that it is fair just and reasonable to impose liability.

In fact, as a trio of Supreme Court cases culminating in *NRAM v Steel* [2018] UKSC 13 stressed, *Caparo* endorsed the Australian approach and rejected unifying tests. *NRAM* also underlined that, for an assumption of responsibility to arise, it would need to be established that it was reasonable for the claimant to rely on the defendant and reasonably foreseeable by the defendant that it would do so.

Part 2 considered claims against auditors, Part 3 valuers and Part 4 insurance professionals.

**B: CLAIMS AGAINST LAWYERS**

In the ordinary course, the only party to whom a solicitor owes a duty is its client[[1]](#footnote-1). At first sight, this might be thought to flow naturally from the fiduciary nature of the relationship: a duty of single-minded loyalty to the client might, after all, seem hard to reconcile with duties to others. But the authorities make clear that it is not as straightforward as that. They recognise that a duty to third parties might exist in ‘special circumstances’.

*Gran Gelato v Richcliff* [1992] Ch 560 is illustrative of the general position. Richliff was the lessee of shop premises. It agreed to grant an underlease to Gran Gelato. It retained the Second Defendant, Makenzie Mills, to act for it in the transaction.

Gran Gelato retained solicitors of its own. They raised enquiries before contract. One of these was whether there were covenants, rights or restrictions in the headleases which might affect the Plaintiff’s enjoyment of the underlease. Mackenzie Mills answered, “*not to the lessor’s knowledge*”. The transaction proceeded to completion.

Gran Gelato later tried to dispose of its interest. Investigations into title then revealed that the headlease contained a break clause. Exercise of this would have forced the underlessee to vacate the premises. This caused the sale to fall through. The underlease proved impossible to sell. Gran Gelato, by then, was unable to pay the rent. The landlord obtained possession of the shops.

Sir Donald Nicholls V-C dismissed the claim against Mackenzie Mills. He held that a solicitor acting for a Seller does not owe a duty to the Buyer when answering enquiries. Applying the threefold test, he accepted that foreseeability and proximity could be made out but did not consider it fair, just and reasonable to impose a duty. He identified three factors which he said had weighed heavily with him. On one reading, at least, the thrust of all three was that the solicitor acts as agent of the client, which is liable as principal for its errors.

In *McCullagh v Lane Fox* [1996] 18 EGLR 35, which was not a solicitors’ case, Hobhouse LJ doubted whether the Vice-Chancellor’s reasoning could be supported. He thought it inconsistent with the broker’s case of *Punjab National Bank* which we considered in Part 4.

The Court of Appeal revisited the point in *P&P Property v Owen White & Catlin; Dreamvar v Mischcon de Reya* [2019] Ch 273. This, it might be recalled, was a case about imposter vendor frauds. The Buyers sued the Sellers’ solicitors. They attacked on four fronts. They succeeded on three on appeal. The Court of Appeal held that the solicitors were in breach of warranty of authority, breach of trust and breach of undertaking. But it dismissed the argument that they owed a duty of care in tort when carrying out anti money laundering checks.

In reviewing *Gran Gelato,* Patten LJ agreed that it would have been unprincipled to lay down a rule that an agent could not owe a duty of a care to a party which had a right of action against the principal. But he expressed himself as far from convinced that it was right to interpret the Vice-Chancellor’s judgment as attempting to lay down any such rule. He read it as emphasising the need to take all relevant factors into account in determining whether a duty exists.

This interpretation is surely to be preferred: the court in Gran Gelato recognised that *[i]t is now established that the fact that the person making the representation was acting for a known principal does not necessarily negative the existence of a duty of care owed by him to the representee”.*

In any event, Patten LJ was in no doubt that *Gran Gelato* remained authority for the proposition that a Seller’s conveyancing solicitor ordinarily owed no duty to the Buyer. Indeed, this is beyond argument. In *White v Jones* [1995] 2 AC 207, Lord Goff (with whom Lords Browne-Wilkinson and Nolan agreed) cited it as an application of a wider general rule that a solicitor ordinarily owes duties to its client alone. He likewise identified *Al-Kandari v Brown* [1988] QB 688 as starting from the same general principle in the case of litigation solicitors.

*Gran Gelato* and *Al-Kandari* were, in turn, cited with approval by the Supreme Court in the Scottish appeal of *NRAM*. They were part of a series of six English, Scottish and Commonwealth authorities which Lord Wilson (with whom the rest of the panel agreed) indicated:

*demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it is reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so.*

He explained that these requirements were of general application in cases of misrepresentation but were of particular relevance to a claim against a counterparty’s solicitor. This was because, in such cases, reliance was “*presumptively inappropriate”.*

The solicitor in *NRAM* acted for the owner of an industrial estate. The Pursuer was a lender. It had a charge over the site. The owner wanted to sell one of the units. The lender agreed to release the unit from the ambit of its charge in consideration of partial repayment. The solicitor carelessly represented to the lender that the loan was being repaid in full. The lender relied on this. It was left without security for the balance of the loan. This came to light when the owner went into liquidation.

Lord Wilson held that it was neither reasonable for the lender to rely on the solicitor’s representation nor reasonably foreseeable that it would. Its claim failed.

If any doubts existed as to whether *NRAM* reflected English law, they were laid to rest following *Playboy Club London v Banca Nazionale del Lavaro* [2018] UKSC 43[[2]](#footnote-2).

In *Ashraf v Lester Dominic* [2023] EWCA CIv 4, Nugee LJ (with whom Floyd and Arnold LJJ agreed) drew on *NRAM* in seeking to rationalise the special circumstances which might justify a departure from the general rule. He identified three categories of cases. The first was where the purpose of the retainer was to convey a benefit on a third party. The second was where the solicitor made a representation to a third party on which it was reasonable for him to rely. The third was where it could be said to have stepped outside its role as solicitor and accepted responsibilities to the third party.

The ‘benefit’ cases have their genesis in *Ross v Caunters* [1980] Ch 297. There, the Defendant solicitor drew up a will for a testator. It advised him that he needed to have his signature witnessed and that the witnesses should not be beneficiaries. It omitted to mention spouses of beneficiaries. The Plaintiff was a beneficiary. Her husband witnessed the testator’s signature on the will. This meant that, by operation of section 15 of the Wills Act 1837, she was precluded from benefitting from it.

Sir Robert Megarry V-C found in her favour. He decided the case by applying the *Anns* test. He concluded that it could not make any difference to the outcome whether the beneficiary could be said to have relied on the solicitor.

The position of disappointed beneficiaries was considered again in *White*. The Judge declined to follow *Ross.* He dismissed the claim. The Plaintiffs appealed. The Court of Appeal overturned the judgment. The Defendants appealed in turn. The House of Lords was divided. The majority affirmed *Ross*, but Lords Keith and Mustill would have allowed the appeal. They considered the judgment of the Court of Appeal to be too radical an extension from existing authority to be reconciled with the incremental approach.

Lord Browne-Wilkinson, in the majority, was plainly alive to another difficulty. This is that the speeches in *Hedley Byrne* laid emphasis on reliance and foreseeability. He explained this away on the basis that *Hedley Byrne* was a case about negligent misstatement. He considered these requirements inevitable in such a case but not in the case of negligent acts or omissions.

This is not entirely convincing. The reasoning seems all the more questionable following *NRAM*. The case can be distinguished on the grounds that *NRAM* also involved negligent misstatement. But this cannot be said of at least two of Lord Wilson’s six cases. Indeed, in one of them, *Dean v Allin & Watts* [2001] 2 Lloyd’s Rep 249, the Court of Appeal held that there were no representations on which to base a claim for negligent misstatement and decided the case on other grounds. The existence of a duty to intended beneficiaries is nevertheless firmly embedded, although recognised in later cases as exceptional.

In *Ashraf*, Nugee LJ cited *Dean* as an example of his second category of cases. The Claimant was in business as a car mechanic. He was found to be unsophisticated. A pair of property developers persuaded him to lend them money. A flat was to stand as security.

The developers retained the Defendant solicitors. Their instructions were that distance meant that it was not convenient for them to sign a deed of charge. Instead, security was to take the form of a promissory note and deposit of title deeds. The Claimant was unrepresented. He told the developers’ solicitor that he was content for them to hold the deeds, which they agreed to do.

The developers failed to repay the loan. The Claimant then took legal advice. He was told that his security was inadequate and that he ought to have insisted on a charge. It was too late by then. He lost his money.

His claim failed at first instance but succeeded on appeal. In holding that the solicitors owed him a duty, the Court of Appeal took account of various factors. These included his lack of sophistication, that he was not legally represented and that both parties to the transaction agreed that there should be effective security for the loan.

The court drew heavily on *White* and *Gorham v BT* [2000] 4 All ER 867, which was another case considered in Part 4. It will be recalled that it was decided by application of *White*, which calls into question whether it properly belongs in a separate analytical compartment. Indeed, in *Dreamvar[[3]](#footnote-3)* Patten LJ viewed *White* and *Dean* alike as cases in which the client’s instructions were intended to benefit a third party. He also described such cases as “*equivalent to contract,”* in apparent allusion to the speech of Lord Devlin in *Hedley Byrne.*

Two more of Lord Wilson’s six cases were said to fall into this category. Both were decisions of the Court of Appeal of New Zealand. The first was *Allied Finance and Investments v Haddow* [1983] NZLR 22. The Claimant made a loan to the solicitor’s client. It was to be secured against a yacht. The solicitor certified that the instrument of security was binding on the client. This was incorrect. The court was satisfied that the solicitor must have known that the Claimant was likely to rely on the certificate.

There is again some difficulty with placing this decision in the second category. In *Gran Gelato*, Sir Donald Nicholls V-C viewed it as a case of ‘stepping aside,’ which would put it in category three.

The second New Zealand case was *Connell v Odlum* [1993] 2 NZLR 257. It involved a pre-nuptial agreement. The future wife’s solicitor certified that he had explained its effect to her. In fact, he had not. The agreement was declared void in consequence. The husband sued the solicitor. It applied to strike his claim out. The Judge dismissed the application. An appeal by the solicitor failed. The Court of Appeal held that it was highly arguable that the solicitor owed a duty to the husband.

Nugee LJ cited *Al-Kandari* as an example of a ‘stepping aside’ case. Matrimonial proceedings again formed the backdrop. The facts were decidedly unpleasant. Mr Al-Kandari regularly beat his wife. At one stage, he abducted their children to Kuwait while she was taking a driving lesson. He was able to do this because the children were named on his passport. Mrs Al-Kandari flew to Kuwait to try to persuade him to bring them back. She was successful in this. Then the beatings recommenced. She took the children to her parents’ home and brought custody proceedings.

Mr Al-Kandari retained the Defendant solicitors. He instructed them that he was content for the matter to be dealt with by consent. An order was drawn up. It was approved by the court. It gave Mrs Al-Kandari custody of the children and set out the conditions on which her husband could have access to them. This included an undertaking to deposit his passport with the Defendant.

He later offered to have the children’s names removed from his passport. The Defendant wrote to Mrs Al-Kandari’s solicitor with a proposal as to how this was to be done. The Defendant’s London agent was to take the passport to the Kuwaiti embassy in person. She was to meet Mr Al-Kandari there. The passport was in no circumstances to be released to him. On advice from her solicitor, Mrs Al-Kandari consented to this.

The agent duly attended the embassy. Mr Al-Kandari failed to turn up. The embassy declined to return the passport to the agent. It assured her that it would be safe in its hands. She left without it. In fact, the embassy gave it to Mr Al-Kandari. He then arranged for his wife to be abducted. She was seized, tied up and bundled into a van. Her abductors told her that Mr Al-Kandari had paid them to kill her. She managed to draw attention to herself and was freed. By then, Mr Al-Kandari had spirited the children out of the jurisdiction. His wife did not see them again.

The case predated *White,* but the Judge viewed it along similar lines. He noted that “*The whole purpose of the undertaking in this case was to protect the plaintiff and the children against any further attempt to*

*remove the children from the jurisdiction”.* He found duty and breach made out but held that the events which unfolded were not foreseeable.

The Court of Appeal analysed the case differently. Lord Donaldson MR and Bingham LJ (as he then was) started from the general proposition that a solicitor to adversarial litigation does not ordinarily owe a duty to the other side. They concluded, however, that special circumstances existed. They held that, in agreeing to hold the passport, the Defendant had stepped aside from its role as solicitor for Mr Al-Kandari and assumed responsibility towards his wife. They differed from the Judge on foreseeability. Dillon LJ agreed with both judgments.

*Ashraf* was an appeal against an order for summary judgment. For these purposes, the Court of Appeal was satisfied that it was arguable that what Nugee LJ called the *Al-Kandari* principle was engaged on the facts.

This was a fraud case. It arose from a conveyancing transaction. A Mr Ul Haq agreed to sell his house to a Mr Attarian. A lender agreed to advance mortgage finance. A firm of solicitors named FLP agreed to act for all three of them. A rogue employee stole the completion monies. The firm was intervened.

The lender retained another practice named Rees Page to try to recover the monies. It assumed that Mr Attarian was an innocent victim, as did the lender itself. He produced what purported to be a deed of transfer executed by Mr Ul Haq. Rees Page sought to confirm Mr Ul Haq’s identity, as it was required to do with an unrepresented party. It did not get very far. Under pressure from the lender, it sent the transfer and charge deed to the Land Registry. In doing so, it identified FLP as Mr Ul Haq’s representative, notwithstanding its intervention.

Mr Ul Haq later insisted that his signature had been forged. His estate brought claims against the various firms of solicitors involved in the transaction.

The argument which succeeded on appeal was that, in submitting forms to the Land Registry, Rees Page had stepped away from its role as solicitor for the lender and assumed a responsibility to all of the parties. This might seem questionable, but it needs to be kept in mind that the issue for the court was whether the estate had a realistic prospect of succeeding on the argument: not that it was made out.

That the same principles apply to claims against barristers is illustrated by *McClean v Thornhill* [2023] EWCA Civ 466, This was a case about film finance tax avoidance schemes. The Claimants were investors in the schemes. The Defendant was a tax silk. He was engaged by the promoters to advise on the efficacy of the schemes. He was aware that the promoters identified him as their tax advisor in information memoranda for the schemes and that his Opinion would be shown to them on request.

The Judge dismissed the claim. He accepted that there were factors which might point towards the assumption of a duty but concluded that they were outweighed. The Court of Appeal upheld him.

Simler LJ (with whom Sir Julian Flaux C and Carr LJ, as she then was, agreed), started with *Ross* for the general proposition that a lawyer does not ordinarily owe duties to the counterparty. She recited *NRAM* on the importance of foreseeability and reliance and the presumption that reliance was inappropriate. She traced back to *Hedley Byrne* through *Caparo* the need to enquire whether it was reasonable for a representee to have refrained from making independent enquiries.

She stressed that the question had to be addressed in the context of the transactions under consideration. Here, the schemes were unregulated collective investment schemes. They could not have been marketed directly to the public but only through Independent Financial Advisors. Each investor had been required to warrant that it had relied solely on the advice of its IFA. These were arms-length transactions in which the

promoter was on the opposite side. Mr Thornton KC was identified as adviser to the promoter, not the investors.

She rejected an argument based on *Al-Kandari* that Mr Thornhill KC had stepped outside his role as a barrister advising the promoter. She accepted that the absence of any disclaimer was relevant, but concluded that this was but one factor in the mix: it could not be a trump card.

Against this background, she was satisfied that the default expectation was that investors would not rely on what they were told about Mr Thornhill’s advice but would make their own assessment with the assistance of their IFAs. No duty could arise in the circumstances.

**C: DISCUSSION**

The courts are understandably slow to fasten solicitors and barristers with duties to parties other than their clients. Special circumstances will need to be shown.

Claims brought on the strength of representations made to the counterparty to a transaction or an opponent in litigation present a particular challenge for claimants. It is presumptively inappropriate to rely on such representations. Unless the presumption can be rebutted, reliance will neither be reasonable nor reasonably foreseeable.

Otherwise, a duty might exist where the purpose of the retainer was to confer a benefit on a third party. A well-established illustration is the intended beneficiary of a will. It might also arise where the lawyer can be said to have stepped outside its role as the solicitor or barrister for one party and to have assumed a responsibility towards one or more other parties.

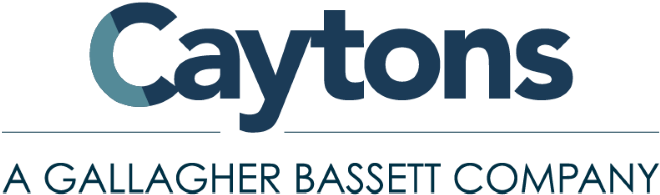
**D: coming up**

Part 6 brings this series to a conclusion. It considers claims against construction professionals.

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**Assumption of Responsibility in Professional Liability Claims: Part 4**

**Further Information**



Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.

If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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1. Individual solicitors might owe duties as officers of the court, but these are policed through the inherent jurisdiction and not the law of tort [↑](#footnote-ref-1)
2. Seemingly overlooked in *Ashraf* in which the Court of Appeal proceeded on the basis that it had not been suggested that there was any material difference between English and Scottish law [↑](#footnote-ref-2)
3. A shorthand for the conjoined appeals [↑](#footnote-ref-3)