

Does saying 'sorry' save money?

In most cases, the answer to this question is clearly 'Yes'.

We recently attended a without prejudice meeting in an architect's negligence case on which we had been instructed. Admissions of breach of duty had been made and our various causation and quantum defences were raised in correspondence. The claimant and their solicitors had been aggressive in correspondence and disputed the validity of the causation and quantum arguments.

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At the meeting, and as expected, we received a courteous but frosty reception. The claimant set out its position as did its lawyers. As agreed in advance of the meeting, the insured then gave a very clear and heartfelt apology to the claimant, apologised for the problems on site, acknowledged that the claimant had suffered some of the losses claimed and reiterated that we were attending the meeting to try to find a resolution to the matter. We were then able to go through each of the elements of loss claimed and set out whether the losses claimed were admitted or denied.

The effect of the apology was immediate. The tension in the room evaporated. As the meeting progressed, the claimants became much more receptive to the arguments we raised on causation and loss (sometimes to their lawyers annoyance) and we were able to narrow the areas of dispute significantly by the end of the meeting. The case then settled approximately 2 weeks later.

We made the decision in this case not to use a mediator because we believed that, before the problems on site, the claimant and the insured had maintained a good working relationship. The tactics adopted were clear,

get the apology in early to take the wind out of the claimant's sails and then use the round table meeting to get the parties working together (as opposed to through a mediator) to find a solution.

The settlement achieved was at a sensible commercial level; a fair settlement for a fair claim and much lower than the claimant had been looking for. By adopting the approach that we did at an early stage, we achieved a significant saving in both claim and defence costs and were able to get early concessions on certain losses which the claimant, had the apology not been made, might not have so readily agreed to.

Clearly this approach is not suitable in all cases but the old adage "it's never too late to say sorry" ought not to be forgotten and can often pay dividends.

For more information please contact **Andrew Crocombe**, partner, on andrew.crocombe@henmansllp.co.uk.

Andrew is an accredited mediator. Mediation, or alternative dispute resolution (ADR) is a method of resolving disputes without the complexities and costs associated with court proceedings. Whenever possible Henmans will offer ADR to clients - an approach that could save you in overall costs and your own time.



Andrew Crocombe, partner and accredited mediator

The beneficiaries are coming – but one year on they may be some time

The decision in *Vinton v Fladgate Fielder* [2010] EWHC 904, provided a renewed basis for claimants to believe that the law might develop in particular to expand the principles in *White v Jones*. That is, that a solicitor's duty to beneficiaries during the Will-making process should also extend to tax advice.

Vinton v Fladgate Fielder

The Court heard an application to strike out claims by executors and beneficiaries. Mr Justice Norris found that the claimants might bring a claim in reliance upon Fladgate Fielder's tax planning advice (i.e. a voluntary assumption of responsibility). He also refused to strike out claims in tort and based on *White v Jones*, essentially in light of his doubts about the decision in *Daniels v Thompson* and the perceived 'lacuna' in the law, as restated in *Rind v Theodore Goddard* [2008] EWHC 459, that a solicitor **could** be liable to beneficiaries.

Commentary

Market trends suggest that trust and probate claims now make up the second largest category of claim behind residential conveyancing. Various commentators have suggested that *Vinton* may be the case for a challenge to *Daniels* and which might increase such statistics. However, this is not to say that the change in the law that is postulated ought to determine the handling and outcome of such claims. Indeed, solicitors and their insurers should continue to look very critically at duties to beneficiaries;

1. *Vinton* (and cases like it) do not give beneficiaries a golden ticket. It is necessary to look more carefully at the facts and appreciate that the decision (as in *Rind*) arises from a summary hearing
2. Further, the judge's findings reflected his adverse view of *Daniels* and the ongoing review of the principles in *White v Jones*, very much driven by considerations of justice and social policy
3. *Daniels* is seven years old; it has been three years since *Rind* and the position after *Vinton* does not obviously reflect the attitude of the Court of Appeal



Philip Evans,
partner

Defending claims

What *Vinton* and similar decisions post *Daniels* highlight though is that solicitor insureds need to be mindful of beneficiaries who play a role in, or who are on the periphery of tax planning advice to a testator. Further, claimants' solicitors will continue to refine the basis of claims and to look for novel ways to overcome current legal principles. In the meantime, however, claims by beneficiaries arising out of alleged negligent tax planning advice will continue to face real hurdles. Some potential points which solicitor insureds might adopt are:

- Duty – unless beneficiaries can establish a case based on reliance they are stuck with *Daniels v Thompson*. It should not be enough that it was foreseeable that a beneficiary might be affected if tax planning advice to the testator or executor was negligent
- Scope of duty – absent an express retainer a solicitor's duty does not extend to advising on specific tax schemes that might have avoided a charge (*Cancer Research v Ernst Brown & Co*)
- "Undesirable lacuna" – this is routinely raised by claimants in response to a defence of 'no duty' and should be rejected. The basis of the 'lacuna' in *White v Jones* should not necessarily apply in relation to advice to a testator about the use and enjoyment of assets during his or her lifetime with a view to minimising IHT, given the risk of conflict between testator and beneficiary
- Causation – claimants still need to prove that different advice would have avoided a tax charge. Even if different advice would have been followed, the claim may at best be one for a lost chance. Specialist tax planning schemes in hindsight should justify only very modest percentages

The future

The law in this area is developing, but an extension of *White v Jones* is only likely with the right case and/or if beneficiaries pursue a sufficiently large sum to justify a journey to the Court of Appeal. Beneficiaries face a real risk which they may not be willing to take beyond the protocol or an early stage in proceedings, hopefully before costs become a bar to economic resolution.