

## **The Perils of Positive Advice**

### ***Levicom International Holdings BV & Anr v Linklaters (a firm)***

#### **Miles Harris, 4 New Square\***

Just over a year ago it appeared that Linklaters had fought off a substantial professional negligence claim by Levicom. Mr Justice Andrew Smith had ruled that although aspects of the advice given to Levicom had been negligent, Levicom failed on causation: it had not acted on the negligent advice. He awarded Levicom nominal damages of £5. In a stunning reversal of that position, the Court of Appeal (Lord Justices, Jacob, Lloyd and Stanley Burnton) has overturned that decision. In a lengthy Judgment, handed down on 11 May 2010, the Court held that Linklaters' negligence had been much more extensive than the Judge had thought and that, contrary to his findings, the negligence had caused Levicom's loss: it caused Levicom not to enter into a settlement which would have left it in a financially advantageous position. The case represents a rare example of when the Court of Appeal will interfere with findings of fact in a complex case and illustrates the difficulties solicitors often face when they seek to avoid liability by arguing their client would have disregarded competent advice.

Levicom was a participant in shareholders' agreement regulating the affairs of a telecoms company in the Baltic region. A larger shareholder, NetCom, had bought another telecoms company trading in the same region and Levicom believed that this was in breach of the agreement. NetCom had made noises about offering Levicom a deal and subsequently made a formal offer, but Levicom's reaction was that these overtures were not enough. It asked Linklaters for advice as to the strength of its case and whether it should accept the offer. Linklaters gave very positive advice, putting the chances of success as "not less than 70%". They advised that the offer should be rejected and that Levicom should arbitrate. After further attempts to settle foundered, Levicom did arbitrate. In the course of that arbitration the advice which it received from both leading counsel (now instructed) and Linklaters became less positive. In the event, mid-way through the arbitration, it accepted an offer which was much less valuable than the original offer.

The Court of Appeal held that Linklaters' initial advice was negligent in a number of respects. Liability turned on the proper construction of the shareholders agreement and whilst Linklaters were entitled to favour one particular construction, they were not entitled to advise that it had such high prospects of success. There was every possibility that the Arbitrators might favour a different construction. Indeed, Lord Justice Stanley Burnton disagreed on that construction with both Mr Justice Andrew Smith and Sir Richard Buxton (who had given permission to appeal). Nor were Linklaters entitled to advise that the offer should be rejected and that Levicom should arbitrate. They had failed to appreciate the very real difficulties facing Levicom's case as to the measure of damages. In truth, far from having a strong claim for very substantial damages, Levicom had a weak claim for very modest sums. Linklaters

simply did not know enough about the real value of Levicom's claim to give the robust advice that it gave.

Critically, for Levicom, the Court of Appeal further held that the Judge was wrong to find that Linklaters' negligence was not causative of loss. There was persuasive evidence, not taken into account by the Judge, that Levicom not only listened to Linklaters' advice, but was not happy to proceed to arbitration unless Linklaters' advice was positive. In any event, it was really for Linklaters to show that its advice, which Lord Justice Stanley Burnton described as "bullish" was not the cause of Levicom's decision to fight rather than settle. As the Lord Justice noted "one has to ask why a commercial company should seek expensive City solicitors' advice (and do so repeatedly) if they were not to act on it." Lord Justice Jacob put the issue in stark terms: "When a solicitor gives advice that his client has a strong case to start litigation rather than settle and the client does just that, the normal inference is that the advice is causative. Of course the inference is rebuttable – it may be possible to show that the client would have gone ahead willy-nilly. But that was certainly not shown on the evidence here. The Judge should have approached the case on the basis that the evidential burden had shifted to Linklaters to prove that its advice was not causative. Such an approach would surely have led him to a different result."

As a result of the Judgment Levicom is now entitled to pursue its multi-million pound claim in an assessment. It will also seek to recover its very substantial costs.

The case illustrates not only the willingness of the Court of Appeal to set aside decisions where the, no matter how lengthy and careful the Judgment, the trial Judge had gone astray, but also the perils of solicitors providing robust advice without having first carried out a thorough investigation. In *Queen Elizabeth's Grammar School Blackburn Ltd & Anor v Banks Wilson (A Firm)* Lord Justice Sedley said: "Clients, I know, want two inconsistent things. They want confident advice on which they can act, and they want cautionary advice about the risks of doing so. It is the solicitor's unhappy lot to have to try to satisfy both requirements simultaneously". Linklaters' error, in the light of the findings of both the trial Judge and the Court of Appeal, was to satisfy the first of these objectives at the cost of ignoring the second.

**\* Counsel for Levicom were Justin Fenwick QC and Ben Patten QC, both of 4 New Square**