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Liability of a lawyer as regards Legal Opinions

by *Roy Santanu*.¹

In giving an opinion, lawyers are expected to assume responsibility for the views expressed in the opinion. Primarily, that responsibility will be to the persons to whom the opinion is addressed which, in most cases, will be the financial institutions providing or arranging for the provision of finance and also, perhaps, such

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a person as the trustee of any security that might be taken. The lawyers will need to consider who else might seek to hold them responsible on the opinion and, commonly, the lawyers will attempt to restrict their responsibility to the named addresses of the opinion.

It is common for the opinion to conclude with a statement making it clear that it is only the person to whom the opinion is addressed who may rely upon the opinion. The opinion sometimes states, specifically, that the opinion may not be relied upon by assignees of the lenders or any other person who might have or acquire an interest derived through the lenders (such as a sub-participant). Notwithstanding such an express limitation and disclaimer, a lawyer may find that some other person may seek to hold him responsible for the view that has been expressed or, more generally, for the way in which the transaction has been structured.

It is, therefore, necessary to consider the grounds upon which a lawyer will assume responsibility for the views that he has expressed in his opinion or, more generally, for his involvement in the transaction. To a large extent, this will depend upon the jurisdiction in which the lawyer has been working, but he may also find himself exposed to the laws of the jurisdictions in which his opinion was received or in which his advice was acted upon. What follows is limited to a brief and very general view of law on those questions.

The lawyers instructed by or on behalf of the lenders will have a responsibility to the lenders for the accuracy of his opinion. Where he has been retained directly by a lender, the responsibility will be a contractual responsibility arising from the retainer. In the case of a syndicated facility the lawyer will usually be retained by the agent and will not be retained separately by each of the lenders.

In that case, the lawyer would have a contract with the agent but not with the lenders, unless it could be shown that each of the lenders unanimously authorised each other to retain the lawyer. That may be difficult, especially if the documentation contains the usual provision by which the lenders acknowledge that they have not relied upon the agent for legal advice.

To overcome any theoretical problems that this may give rise to concerning the reliance that the lenders in the syndicate may place upon the legal opinion, it will usually be addressed to the agent and to each of the lenders. In that situation, the responsibility of the lawyer would be governed by the law of tort which, at the end of the day, would

be much the same as in the law of contract, namely, not to be negligent in giving the opinion.

In the absence of a legal opinion, a lawyer who knows that the lenders are relying upon his advice would have a general responsibility to advise correctly and not to give negligent advice. The duty would probably extend to pointing out any pitfalls in the documents and there would be a general responsibility to ensure that the lawyers were apprised of any legal risk to which they might be exposed by the transaction.

In rendering his legal opinion, the lawyer will formally set out his advice and, in the qualifications and assumptions contained in the opinion, he will cover or limit most of the matters which he would otherwise need to advise upon generally, including the pitfalls. It is perhaps ironic that the rendering of a legal opinion has the practical effects of limiting the various matters which the lawyer would otherwise need to explain to the lenders in quite some detail.

If the legal opinion has been given by the borrower's lawyer as, for instance, with respect to the law of the borrower's domicile, then that lawyer will have a responsibility in the law in tort to lenders. That responsibility would be that he should not be negligent in giving his opinion and, again, the assumptions and qualifications stated in the opinion will limit the scope of his responsibility. He will not have a responsibility in contract as he was not instructed by the lenders.

In so far as third parties are concerned, the persons who might seek to establish some form of liability against a lawyer involved in a transaction would be investors or assignees of the original lenders who have suffered a loss on the transaction and who have derived their interest in the transaction at some later time, usually through one of the original parties.

This might, for instance, include a bond holder. They would not have a claim in contract and so they would seek to establish a claim in tort based upon a failure to take reasonable care in the legal work done by the lawyer, but it is difficult to imagine how such a claim could be successfully mounted, except in the most unusual of circumstances.²

² In England the case of *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* [1964] A.C. 465 extended the tort of negligence for misstatements, where a duty of care was owed. Whether such a duty would exist,

Such an investor would need to establish that he relied upon the lawyer in circumstances where it was reasonable to do so. The lawyer ought to have known that, a person such as the investor concerned, would so rely on the legal opinion and that such reliance played a significant part in the decision to invest. It is suggested that merely knowing the name of the lawyer who was involved would be insufficient.

The distinction between a liability in contract and in tort will relate primarily to the time limits for instituting a suit against the lawyer if his advice or opinion has proved to be incorrect. Generally speaking, those time limits are calculated from the date from which the law deems the cause of action to have accrued. The damages which could be recovered against the lawyer would be limited, basically, to the loss that the lawyer should reasonably have expected at the time he gave his advice, to have resulted from his negligence. The lawyer would not be responsible for any other loss such as, for instance, resulting from a bad commercial decision which was not based upon the lawyer's advice.

End.

Is a Developer/Promoter liable to pay Service Tax for Construction of Residential Complexes?

by Chowdhury Amarnath.³

The Finance Act 2005 (**Act**) has extended the levy of Service Tax to Construction of Complexes.

therefore, would depend upon the facts of the case at issue. There would need to be some "special relationship" between the parties which gives rise to a duty of care. It is unlikely that such a duty would arise in all but the most exceptional of cases. A further ingredient which would be necessary for liability in tort would be "reasonable foreseeability". The lawyer giving the opinion could only be liable in tort to third parties if it was reasonably foreseeable that such third parties would rely on his opinion. This is another reason why it is common to state within the terms of the opinion that no one other than the addressee may rely upon it. Since reliance would appear to be a necessary ingredient of liability in tort, by precluding third party reliance, expressly within the opinion, it is submitted that liability will be avoided.

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The Act provides that complexes having more than 12 (twelve) residential houses or apartments together with common areas and other appurtenances would fall under the net of Service Tax.

The Service Tax is levied on the contractor who is constructing the Residential complexes on behalf of the promoter. These contractors would have to charge Service Tax on the bill relating to construction of these residential complexes.

It is also important to note that this tax has been extended to certain related activity like:

1. glazing,
2. plastering,
3. painting,
4. floor and wall tiling,
5. wall covering and wall papering,
6. wood and metal joinery and carpentry,
7. fencing and railing,
8. construction of swimming pools,
9. acoustic applications or fittings and other similar activities.

If the Residential Complex is intended to be used for personal use then Service Tax provisions are not applicable.

Therefore any service in relation to construction of a residential complex is liable to service tax and not the selling value of the residential complex. The taxable event in the service tax law is rendering of service and not the sale of a movable or immovable property. Thus a promoter who is promoting a building or complex and engages a contractor for construction of the same, the charges paid or payable to the contractor shall be liable to service tax.

Therefore, if the promoter is constructing a building on his own, there is no obligation for service tax registration on such promoter. Consequently, in view of the above and in the opinion of the author it would be prudent on the part of the developer to take over the property of the owner and then on its own account cause development in the property. Joint development may give rise to tax liability, in which case the owner will be liable for service tax, in regard to

construction made by developer for owner's portion only.

End.

Legal Quotations.

When there is a rift in the lute, the business of the lawyer is to widen the rift and gather the loot.

Arthur Garfield Hays.

The lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. It's about a Will, and the trusts under a Will – or it was once. It's about nothing but Costs now.

Charles Dickens – Bleak House.

A solicitor's account:

To my professional charges for crossing the street to greet you, and on discovering that it was not you, crossing the street again. 25 guineas.

Anonymous.

You want justice, but do you want to pay for it? When you go to a butcher you know you have to pay, but you people go to a judge as if you were off to a funeral supper.

Bertolt Brecht.

When you have told anyone that you have left him a legacy, the only decent thing is to die at once.

Samuel Butler.

If I were asked what point I'd best like to have in my favour I'd say, a deaf judge. Or if not that, one regularly tired out.

Anthony Trollope – Orley Farm.

All classes are criminal today. We live in an age of equality.

Joe Orton – Loot.

A lawyer without history or literature is a mechanic, a mere working mason: If he possesses some knowledge of these, he may venture to call himself an architect.

Sir Walter Scott.