

Newsflash

Levicom International Holdings BV v Linklaters (a firm)¹

Has the Court of Appeal changed the exposure landscape for large law firms undertaking large scale litigation? London Partner, Jacquetta Castle, discusses the recent decision in Levicom v Linklaters.

Last year, Linklaters took over the No. 1 spot as the world's largest law firm, ranked by gross revenue. Yet even the most pre-eminent international law firms can be caught out. In the last few weeks, an English Court of Appeal decision upheld a significant finding of negligence against Linklaters in relation to advice to a client on the prospects of success in arbitration proceedings.

The main importance of the decision lies in what the Court of Appeal held on causation. One of the arguments we can often use in defending claims against law firms is that even if the defendant has been negligent, it has caused no loss since the claimant did not rely on the advice given. The Court of Appeal's decision may make such a line of defence more difficult where top City law firms are involved.

The facts – in brief

Linklaters' client was the Levicom group of companies which had interests in telecommunications businesses through the Baltic States. Levicom first instructed Linklaters in October 2000 in relation to an alleged breach of a non-compete clause.

The events at issue went back to 1999, when a Swedish company had agreed to acquire 90% of an Estonian telecommunications company in which Levicom had an interest².

The shareholders' agreement contained investment and non-dilution provisions together with a covenant not to carry on within any Baltic State any cellular network business which was the same as or competitive with any business carried on by the Estonian company.

The following year the Swedish company paid approximately US\$ 227 million to acquire a Latvian mobile telephone network operator. Levicom considered that the acquisition was a breach of the non-compete clause and that under the terms of the agreement it was entitled to 10% of the purchase price.

Linklaters advised that the non-compete clause should be given a “*pan-Baltic*” construction with the effect that the Latvian and Estonian businesses would be treated as being the same and the non-compete clause would bite. This advice was repeated on numbers of occasions in robust terms.

Levicom was told that the Swedish company was in “*clear breach*” of the agreement and that it was entitled to “*substantial*” damages. Settlement offers were by the Swedish company, but with Linklaters’ advice behind it, Levicom took a “*hard line*” in negotiations. Linklaters advised that Levicom should proceed to enforce its rights by arbitration and that the prospects of succeeding on the arbitration were “*more than 70%*”.

Following the opening of the arbitration, it was clear that even if Levicom established a breach of the non-compete clause, damages would be insignificant. It was soon apparent that Levicom could not fight on and so settlement was concluded. The settlement finally reached was less favourable in its terms than the first offer received. Levicom claimed its losses against Linklaters upon the basis that but for Linklaters’ advice, it would have settled earlier and would not have proceeded to arbitration.

First Instance

The judge, Andrew Smith J, held that Linklaters were probably right on their pan-Baltic construction and that their assessment of the chances of success was within the range of opinions that could properly be given. Saying that Levicom’s prospects of success were “*in the region of, but not less than, 70%*” implied that there was a concomitant risk of up to 30% that Levicom would fail. It followed that the advice carried with it the necessary health warning.

The judge said that Linklaters had a reasonable argument for assessing damages in the way they did. He felt that that Linklaters had not really intended to advise Levicom that their damages were substantial. However, whatever was intended, this was the advice that had been given and there was no basis for it. The judge therefore held that Linklaters had been negligent. Warnings should also have been given to Levicom on the difficulties in obtaining declaratory relief and in measuring damages.

However, the judge held that Linklaters’ negligence was not causative of the loss. Even if it had received proper advice, Levicom had not shown, on a balance of probabilities, that it would have adopted a different negotiating stance. He awarded Levicom £5 nominal damages and ordered it to pay Linklaters’ costs.

Court of Appeal

The Court of Appeal unanimously reversed the first instance judgement in the firmest of terms.

Delivering the leading judgment, Lord Justice Stanley Burnton started off by addressing the question of negligence and in this he had no doubts:

“What I found striking is the bullish nature of the advice given by Linklaters, and the lack of any significant analysis or discussion of the issues. It is difficult to conceive of more bullish advice ...”

The Court of Appeal had no hesitation in pronouncing the firm negligent. The advice fell “*significantly short*”, Lord Justice Lloyd said, of what Levicom was entitled to expect and of the standard of a reasonably competent solicitor³.

Lord Justice Stanley Burnton felt that it was not clear that the Pan-Baltic construction was the correct one, though it was not necessary to decide this. It was negligent to have advanced the construction on the basis it was “*clear*” without going into the various balancing factors.

The Court of Appeal found Linklaters' negligence "*even more striking*" on the advice given as to the remedies available. Lord Justice Stanley Burnton was little short of scathing - "*I have seen nothing to show that Linklaters had a sensible basis for concluding that damages were not an adequate remedy. Nowhere in their letters is there any attempt to quantify damages*". He commented that lawyers are not in the habit of advising clients that the chances of success are 70% unless they are "*very confident indeed*" and having received such advice, Levicom naturally thought it was on a "*home run*".

Having found Linklaters negligent, the Court of Appeal went on to hold that that negligence was indeed causative of the loss.

Even though it was admittedly the case that the main directors and shareholders believed that they had a strong case, their views were reinforced by Linklaters and it was not surprising that they did not question the optimistic advice given. The Court of Appeal picked out one particular instance when a junior lawyer who was new to the case advanced more cautious advice. Levicom's reaction was that they were not "*comfortable*" about going ahead without seeking further advice from someone more senior and obtaining the firm's "*concerted view*". The Court of Appeal took this as proof that Levicom did place reliance on Linklaters.

The point that was lighted on repeatedly by the court was that while the relevant directors and shareholders might have had their own (optimistic) view from the outset, that did not mean that they were bound to ignore the advice for which they were paying. "*One has to ask why a commercial company should seek expensive City solicitors' advice (and to do so repeatedly) if they were not to act on it*".

Lord Justice Jacob summed up in his short judgment "*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.*"

Comment

The Court of Appeal in Linklaters appears to represent a departure from established law, where the burden remains on the claimant to prove causation⁴. The claimant has to prove on a balance of probabilities that if proper advice had been given, he would have acted differently. In the case of incorrect advice, he arguably only has to show reliance and he does not have to show what he would have done if correctly advised⁵.

The Court of Appeal appears to suggest that when a solicitor advises on a course of action and the client subsequently pursues that course of action, the "*normal inference*" is that the advice is causative. The inference is rebuttable if the defendants can show that the claimant would have gone ahead in any event. Lord Justice Jacob specifically stated that the correct approach, which the first instance judge should have followed, was that the evidential burden shifted to the defendants to show that its advice was not causative.

This is a significant decision for major international firms. Not only is there no hiding behind a brand name but quite the reverse. The big firms need to be doubly alive to offering a top quality service if they are going to be subjected to particular scrutiny by the courts. Law firms also have to be wary of offering unqualified advice. A comprehensive analysis of the risks and rewards in embarking upon large-scale litigation or arbitration is essential. If a case is lost or settled unfavourably, it is no

longer an answer for the law firm merely to cry “I told the client there was a risk of losing, and litigation is a risky business”.

However much a client might want to receive firm commercial endorsement, without wishy-washy “ifs and buts”, the lawyer has to make sure that his client goes into a transaction fully alive to the risks that exist – and if a client is determined to a particular course independently of advice, a comprehensive file note should be made.

The decision may also have an effect on tactical decisions when defending claims against top international law firms.

It is understood that Linklaters are seeking leave to appeal to the Supreme Court.

¹ [2010] EWCA Civ 494

² In fact, there was another Swedish company involved but for the sake of simplicity, we shall refer just to the one

³ Lord Justice Lloyd at paragraph 276

⁴ eg Wilshier v East Essex Area Health Authority [1988] AC 1074

⁵ Bristol & West Building Society v Mothew [1998] Ch1 but see comment of Lord Justice Stanley Burnton at paragraph 269 of the Linklaters’ judgment.

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