A narrow escape! Court approves limited retainers

Often the first task for a solicitor whilst being instructed by a client is to draw up a retainer specifying the extent of the work they are required to do. This both confirms with the client the work they can expect and protects the solicitor's position if the client later contests the amount of work done. It is important that the retainer sets out the work the solicitor agrees to do and the limits of that work.

The recent case of *Minkin v Landsberg [2015] EWCA Civ 1152* re-emphasised the importance of an accurately expressed retainer in avoiding costly challenges to work undertaken by solicitors. In this particular case, the solicitor Ms Landsberg, avoided a finding that she had not adequately advised her client Mrs Minkin because she had not put the terms on which she was retained in writing.

Background

Mrs Minkin was seeking to divorce her husband, Mr Minkin. Together they drew up a consent order (the first consent order), without any legal assistance, detailing how the marital assets would be split between them. Mrs Minkin sought legal advice on the divorce from a firm of solicitors, Tilley & Co (not associated with Ms Landsberg). During this time, and after the first consent order had been drawn up, but before it had been brought before the court for approval, Mr Minkin allegedly bullied his wife. Tilley & Co wrote to Mr Minkin's solicitors stating that the first consent order was signed only under duress and that Mrs Minkin withdrew her consent. Despite this, both parties presented the first consent order to the court for approval, with no mention of duress or the withdrawal of consent. The court refused to approve the first consent order on the grounds that it failed to detail Mr Minkin's debts.

Following this, Mrs Minkin was referred by a women's refuge organisation to Ms Landsberg, a sole practitioner specialising in family law. Ms Landsberg was instructed under Legal Help, a limited form of legal aid which funded an initial meeting with the client and some limited follow up support. Ms Landsberg did not receive Mrs Minkin's file from Tilley & Co until after the work had been completed. Ms Landsberg provided very brief written advice to Mrs Minkin on how the first consent order could be amended, and highlighted potential difficulties of enforcement. Ms Landsberg confirmed that her instructions were to draft another consent order (the second consent order), but did not specify the limits of her instructions. Mrs Minkin responded confirming the instructions and disregarding the warnings about enforcement, stating that "*I just wanted to bring this all to an end as swiftly as possible.*" Following this, Ms Landsberg, in conjunction with solicitors acting for Mr Minkin, drew up a consent order in the terms outlined and in a form more likely to be approved by the court. On the day before the parties were due to attend court, Ms Landsberg received Mrs Minkin's file from Tilley & Co. Ms Landsberg did not review the file immediately, as from her point of view her instructions had been completed, and as such did not discover the alleged duress until after the order had been approved. Ms and Mr Minkin attended court on 7 April 2009, and the second consent order was approved by the judge.

Subsequently Mrs Minkin claimed that Ms Landsberg had not properly advised her as required by their (informal) retainer and her general duty as a solicitor, namely that she had not:

1. advised as to the merits of the agreement;

2. advised whether or not the agreement was fair;

3. investigated Mr Minkin's assets and means;

4. raised the issue of duress, having properly considering the situation; and

5. immediately considered the file upon receiving it from her former solicitors.

Judgment

The judge Jackson LJ, undertook a detailed examination of the relevant authorities on the extent of work that can be expected from solicitors, and other professions. He concluded, save for narrowly defined exceptions,[1] that the extent of work expected from a solicitor was that which was set out in the retainer agreement between them and their client. Good practice was to set out this agreement in writing. He also stated that solicitors were expected to advise on issues 'reasonably incidental' to the work that they are carrying out. Jackson LJ declined to define too closely what should be regarded as 'reasonably incidental' to the work being carried out. He stated it should be considered with regards to all the circumstances, including the characteristics of the client. He specified that:

> *"An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client."*[2]

Jackson LJ found that Mrs Minkin was clearly very intelligent, had a relevant professional background as an accountant, and understood a good deal of the litigation process she was involved in. The issues listed above should have been obvious to Mrs Minkin, who Ms Landsberg also knew had sought separate legal advice. Mrs Minkin had also indicated that she was aware of the risks of the proposed agreement, but that it was more important to her to conclude the consent order as quickly as possible. Mrs Minkin had not provided any documents to Ms Landsberg setting out the parties' financial positions. He also found that Ms Landsberg could not reasonably have been expected to read the file immediately, or to alert the client about the potential duress arguments.

As such, accepting the first instance judge's finding of fact on the limited scope of the retainer, the areas of advice outlined above were not reasonably incidental to work Ms Landsberg was instructed to carry out.

Judge King LJ, in a second written judgment which wholly agreed with Jackson LJ's but added further context, highlighted the practical necessity in many instances of limited instructions. She remarked that with the withdrawal of legal aid from many complex areas of law, litigants in person are increasingly left to deal with issues that are unsuitable for a judge to assist with, but which may be outside of the competence of the parties themselves. The difficulty arising from the consent order was a good example of this. She concluded that if solicitors were not able to assist on a limited basis at key points during litigation then there would be '*very serious consequences*'[3] for the courts.

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[1] See *White v Jones* [1995] 2 AC 207
[2] At paragraph [38](iv)
[3] Via King LJ at paragraph 76

Conclusion

Maybe most important in the long run was this decision's clear support of '*unbundling*' legal services, a practice which is becoming increasingly common in the legal market.

The court clarified that solicitors are not '*a general insurer against a client's legal problems*',[4] and that solicitors are free to tailor the service provided to meet the means and needs of the client. One hopes this will assist clients who, unable to afford assistance throughout the whole litigation process, will be able to receive advice at key junctures at least.

However, Ms Landsberg could easily have lost this case. The first instance judge found Ms Landsberg's account of the scope of work agreed convincing, but without written evidence it could easily have gone the other way. Many of the authorities support a client's interpretation of a solicitor's instructions where they are not confined to writing. As Jackson LJ stated:

> *"The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."*[5]

As such, this case whilst reaffirming that solicitors can offer limited services, makes clear that it is wise to carefully set out the scope of work envisaged by both parties at the outset. Otherwise a solicitor may be liable for issues which arise during litigation that were not in the minds of either solicitor or client when that work began.

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[4] *Credit Lyonnais SA v Russell Jones & Walker (a firm)* [2002] EWHC 1310 (Ch), as quoted with approval by Jackson LJ at paragraph 37
[5] At paragraph [38](v)