Case Note on *Lewis v Cunningtons*: Duties Owed by Matrimonial Solicitor to Unsophisticated Client

Caytons
Changing Perceptions

INTRODUCTION

There have been a number of decisions in recent years in which solicitors have successfully defended professional indemnity claims on the basis that their retainers did not extend to giving the advice contended for. The recent decision of *Lewis v Cunningtons* [2023] EWHC 822 (KB) went the other way.

This note reviews the decision in the context of established authority.

THE FACTS

The Claimant was a care assistant. Her husband was a police officer. Their marriage broke down. She retained the defendant solicitors to act for her. The client care letter recited that the husband earned a salary of £47,000. It mentioned that he had a pension which was shortly due to pay lump sums of £120,000 and £67,000 followed by annual payments of £22,000. It said that the husband had offered the sum of £2,000 in full and final settlement but that the solicitors could not advise whether it should be accepted without having sight of his disclosure. The letter also outlined out some of the ways in which financial disputes might be settled, ranging from direct negotiations between the parties to court proceedings.

The Claimant asked the solicitors whether she could agree terms directly with the husband. They confirmed that she could. They added that they would not be able to advise whether the settlement terms were fair and reasonable. She later reverted to say that she had agreed to accept the sum of £62,000 on a 'clean break' basis. The solicitors repeated that they could not advise on whether or not that was fair and reasonable in the absence of disclosure. They asked her to sign a disclaimer to that effect, which she did.

Statements of financial information were exchanged before the consent order was signed. The husband's statement revealed that he had capital of about £590,000 including his pension. The Claimant's identified a negative asset value.

Some years later, the Claimant happened upon an advert for an organisation which specialised in 'no win, no fee' claims against matrimonial solicitors. This led her to bring the present action. She claimed that the settlement was obviously unfair. It was, she maintained, negligent and wrong for the solicitors to suggest that they could not advise her on the fairness of the settlement without disclosure from the husband. She contended that they should have advised her to seek a pension-sharing order.

The Claimant presented herself as an unsophisticated and vulnerable client. Her evidence was that she was suffering from depression and on various medications. The husband was, on her case, a manipulative bully. She said that the police had been called to the matrimonial home on somewhere between 200 and 300 occasions while they were married.

The solicitors disputed this characterisation. They maintained that the Claimant was more sophisticated than she sought to convey. They cast her as a forthright individual. They maintained, moreover, that this was a case like *Minkin v Landsberg* (2015) EWCA Civ 1152, where the solicitor's duty was limited to drawing up a consent order to reflect settlement terms agreed between the husband and wife. On their case, the Claimant was, in any event, determined to "get rid" of the husband and, to that end, would have gone ahead with the settlement even if given the advice contended for.

THE JUDGMENT

The Judge concluded that *Minkin* could be clearly distinguished. This was not what she characterised as a 'limited retainer' case. The Claimant did not go to the solicitors with settlement terms already agreed: agreement was reached some time after the solicitors were retained. The client care letter was headed "*in relation to your divorce and financial matters*".

She found that the Claimant was a *"an entirely honest witness, doing her best to help the court".* She accepted that her recollection was in some respects confused and faulty but concluded that it was more reliable than that of the solicitors. She accepted that the Claimant was unsophisticated and vulnerable, and that she had told the solicitors that she was being bullied and intimidated by the husband. She concluded that:

the characteristics of the claimant should have informed the scope of the defendant's duty to her, and increased it so as to require the defendant to give her clear advice on the basis of the information it had and to make sure that she understood it.

The Judge observed that one of the two solicitors who handled the matter conceded in her oral evidence that she was able to conclude that an earlier offer of £30,000 was unfair. She maintained, however, that it still came back to needing to know the full financial position. The other solicitor accepted that the information available to her suggested that the husband's pension pot might be worth as much as £1m.

She found that the solicitors did not need full disclosure to be able to advise the Claimant. They had sufficient information to warn the Claimant that the proposed settlement was exorbitantly in the husband's favour and that a pension-sharing order would likely be ordered if the matter went to court. She found it a clear breach not to give this advice but instead to require the Claimant to sign a disclaimer on a premise which she concluded was incorrect.

The Judge also rejected the solicitors' causation defence. She was satisfied that the Claimant would not have agreed the settlement if properly advised about its unfairness and the likely outcome in proceedings.

DISCUSSION

The Claimant may have succeeded on the facts, but the outcome was reached via an established route which has led to judgment for defendants in other cases. A few points merit closer examination with reference to some of the existing authorities.

THE SCOPE OF DUTY QUESTION

The language of a 'limited retainer,' carried over from *Minkin,* is apt to confuse. In one sense, every retainer has limits. It would not be suggested that a matrimonial lawyer is expected to give advice on how the divorce settlement might be invested, still less on an unrelated boundary dispute with a neighbour.

As Oliver J said *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a* (1978) 3 All ER 571:

> (Counsel) *sought to rely upon the fact that Mr. Stubbs was Geoffrey's solicitor under some sort of general retainer imposing a duty to consider all aspects of his interest generally whenever he was consulted, but that cannot be. There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.*

This dictum has since been cited with approval in several Court of Appeal decisions, including *Minkin* and, more recently, *Spire Property v Withers* (2022) EWCA Civ 970 . The point arising from *Minkin* is that a solicitor and client may, by agreement limit the duties *which would otherwise form part of the retainer*. An example is the conveyancing case of *Reeves v Thrings & Long* (1996) PNLR 265, where the client was determined to save costs and asked the solicitor not to prepare any reports on title. His claim failed.

In every case, therefore, it needs to be established what the solicitor agreed to do. The client care letter will usually be the starting point. It can cut both ways. In *Aurium Real Estate v Mishcon de Reya* (2022) EWHC 1253 the court refused to construe a retainer as extending to advice "*of a fundamentally different subject matter*" from that outlined in the client care letter. In the present case, by contrast, the wording of the client care detracted from the solicitors' case that they were only retained to carry out a discrete part of the work which would ordinarily be expected of a matrimonial lawyer.

The wider factual matrix will need to be taken into account. In *Aurium*, the absence of a client care letter did not prejudice the solicitor's position. Similarly, in *Minkin*, the confines of the retainer were established notwithstanding a failure by the solicitor to record them in writing. Conversely, the present case illustrates that getting the client to sign a disclaimer may not be enough to avoid liability.

REASONABLY INCIDENTAL ADVICE

Minkin confirmed that it is implicit in a solicitor's retainer that it will give advice which is reasonably incidental to the work carried out. What advice is reasonably incidental will depend on all the circumstances.

It might, for instance, be thought that, if a matrimonial lawyer is obliged to advise on the fairness of settlement terms, a transactional lawyer might be expected to advise on the wisdom of the transaction. But the courts have rejected this. In *Clarke Boyce v Mouat* (1994) 1 AC 428, the Privy Council made clear that:

> *When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.*

On closer analysis, it can be seen that the two scenarios are entirely different. In *County Personnel v Pulver* (1987) 1 All ER 289, the operation of a rent review clause had drastic financial implications. The Court of Appeal concluded that the Judge was wrong to conclude that this was not a legal matter for a solicitor to advise on. Bingham LJ (as he then was) described it as "*a classic case in which the professional legal adviser was bound to warn his client of risks which should have been apparent to him but would, on a simple reading of the clause, have been most unlikely to occur to her*".

Whether settlement terms represent a good or bad deal is, at least in part, to be measured against the likely outcome of any proceedings. This is a matter within the solicitor's expertise but in which the

client will be unlikely to have any insight. Commercial considerations are different. In *Pickersgill v Riley* [2004] PNLR 606, the Privy Council concluded:

> *It seems, therefore, to have been common ground that both Mr Riley and Mr Pickersgill took WEN to be a company of financial substance. The possibility that WEN might be a company with no or little financial substance was a commercial risk that Mr Riley, an experienced businessman, could have been expected to be aware of. It was not a risk arising out of any legal complexity. It was not a "hidden pitfall" that Mr Pickersgill had a duty to warn Mr Riley about.*

CHARACTERISTICS OF THE CLIENT

One of the factors which may inform what advice is reasonably incidental in a given matter is the character and experience of the client. In *Pickersgill* Lord Scott said:

> *The scope of the duty may vary depending on the characteristics of the client, in so far as they are apparent to the solicitor. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.*

Similarly, in *Haigh* v. *Wright Hassell* [1994] EGCS 54, Hoffmann LJ (as he then was) distinguished between a client who is "*commercially wholly inexperienced and is deluding himself*" and one who is *"reasonably sophisticated in financial matters".*

In both cases, the relative sophistication of the claimants worked against them. Cases like *Yager v Fishman Co* [1944] 1 All ER 552, *Carradine Properties Ltd v DJ Freeman Co* [1999] Lloyd's Rep PN 48 and *Football League v Edge Ellison* [2006] EWHC 1462 can be viewed in the same light.

The present case is notable as one falling at the other side of the line. The claimant, on the judge's findings, was unsophisticated and vulnerable. She had a limited understanding of the options available to her, was being manipulated by a bullying husband and was suffering from mental health issues for which she was taking medication. The Judge contrasted her with Mrs Minkin, who was an accountant.

One can only speculate as to whether the outcome might have been different if Mrs Lewis had also been an accountant.

Richard Senior
Partner
E: senior@caytonslaw.com