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The duty of care in professional indemnity: an update

James Holmes-Milner
Francesca O'Neill

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Professional Indemnity Update

- It has been a busy 12 months in the world of professional liability! We're going to provide a round-up of the cases you need to know about, concerning:

- **The scope of a professional's duty**
- **When does a retainer comes into being? When can a retainer be implied?**
- **What's the recent update on contribution claims?**

Starting point – scope of duty

- *Spire Property Development LLP and 1 other v Withers LLP* [2022] EWCA Civ 970:

  A solicitor's duty is limited to carrying out the tasks which the client has instructed and the solicitor has agreed to undertake;

  The court must be wary of imposing on solicitors duties that go beyond the scope of what they had been requested and undertaken to do. The duty directly relates to the confines of the retainer.

- *Spire Property Development LLP and 1 other v Withers LLP* [2022] EWCA Civ 970:

  BUT…

  Implicit in the retainer is that the solicitor will advise on matters “reasonably incidental” to the work they have agreed to carry out.

  Relevant to this: all the circumstances; the sophistication of the client; the extent of the burden involved; the level of fees charged…

- In *Minkin v Landsberg* [2015] EWCA Civ 115 the Court of Appeal recognised that solicitors would be loathe to take on narrow tasks, which usually carry with them a low fee, if they feared that they might be assuming wider duties to a client than they had bargained for.
- "Rotten tooth" analogy: see *Credit Lyonnais v Russell Jones & Walker* [2003] PNLR 2. Where a solicitor becomes aware of a risk to the client in the course of doing that for which they were retained, it is the solicitor's duty to inform the client.
- *Denning v Greenhalgh* [2017] EWHC 143 (QB): only in "obvious" cases where an extended duty arises, and a "close and strong nexus" with the retainer is required.
- The Court of Appeal in *Spire* repeated the statements of principle set out in *Minkin* and cited with approval the statement of Patten LJ in *Lyons v Fox Williams* [2018] EWCA Civ 2437 that neither *Credit Lyonnais* nor *Minkin* were authorities "for the proposition that a solicitor is required to carry out investigative tasks in areas that he has not been asked to deal with, however beneficial to the client that might in fact have turned out to be".

Further points:

- Scope of duty and breach should not be conflated. The scope of the duty should be assessed as a matter of objective construction. It does not depend on the view taken by the solicitor concerned, or whether this was consistent with a reasonably competent solicitor (*Spire* at 63-64). Nor is it determined by actual reliance by the client (at 102).
- *Spire* raises the question whether, in a case with no retainer (tort only) the common duty of care could extend to reasonably incidental matters. This issue was not decided in the appeal so remains open for another day.
- The Supreme Court's "purpose test" in *Manchester* and *Khan* (what the purpose of the duty was, and what risk it was supposed to guard against) relates to recoverability of damages. It does not address whether there is a duty in the first place (at 71).

When does a retainer come into being? *Miller v Irwin Mitchell LLP* [2022] EWHC 2252 (Ch)

- In May 2014, the claimant fell down some stairs on holiday and injured her leg.
- A matter of days later, she called the defendant's legal helpline after seeing a television advertisement.
- The claimant was given some limited advice and was referred to the defendant's international travel litigation group ("the ITLG"). The claimant was told she'd be called back – which she was.
- The ITLG repeatedly tried to make contact with the claimant and to obtain information and documents from her. The claimant was very slow in replying. Irwin Mitchell sent a number of letters saying no action had been taken on her case.
- By the time the claimant provided enough information for Irwin Mitchell so send a Letter of Claim, the underlying defendant had become insolvent.
- The underlying defendant knew of the accident but had failed to inform its insurers about it at the time, so insurers were entitled to decline indemnity.
- Claimant's case was that Irwin Mitchell should have told her to inform the underlying defendant of the potential claim, so they could inform their insurers (akin to a preliminary notice).

Miller: express retainer

- C argued an express retainer came into existence when she contacted the legal helpline. C's case was that the TV advert was an offer, which she accepted by telephoning. Judge disagrees: the TV advert was an invitation to treat and C's telephone call can not be interpretated as an agreement for Irwin Mitchell to act for her.
- C relied on Irwin Mitchell providing some advice, recording time, and referring to her internally as a "client". The key point was that Irwin Mitchell informed C the case was being referred to the ITLG for further consideration – they may, or may not, have taken the case on. There was no agreement about key issues (such as fees).

Miller: implied retainer

- C then argued there was an implied retainer.
- The leading case on this is *Dean v Allin & Watts* [2001] PNLR 921: (a) this can only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties, and (b) No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that [the solicitor himself] ought to have appreciated it.
- Is the parties conduct consistent *only* with a retainer (*Caliendo v Mischon de Reya* [2016] EWHC 150 (Ch).
- Judge held that opening a file, billing time, and referring to C (internally) as a ‘client’, combined with the other facts, was explicable with C as a potential client. So no implied retainer.

Miller: common law duty

- C also argued there was a common law duty – that having engaged with her about the case and provided some advice, Irwin Mitchell ought to have advised her of any steps it would be prudent t take to safeguard her position (notably, to inform the underlying defendant of the potential claim, and to inform their insurers).
- C contended the relationship between the parties gave rise to an 'assumption of responsibility' – where D is treated as assuming responsibility based on proximity and the obvious effect any failure by D would have on C (*P&P v Owen White & Catlin* [2018] 3 WLR 1244).
- For the same reasons C argued for an implied retainer, C contended there was an assumption of responsibility. And for the same reasons, the judge rejected this: essentially that IM made clear they were not (yet) acting for C.
- *This case is on its way to the Court of Appeal… watch this space!*

Two more cases on implied retainers…

McDonnell v Dass Legal Solutions [2022] Costs LR 855:

- Claimant, unsuccessfully, sought to argue that there was an implied retainer between himself and a firm of solicitors, based on a conversation lasting a few minutes.
- In keeping with both prior authority on the point and recent trends, the court took a stringent view towards the tests that any claimant would have to satisfy in order to show that a retainer had come into existence:
    - Where there is no express retainer, an implied retainer would only be if the test for implication was met. *That test is one of necessity.*
    - A retainer would not be implied just because it was convenient to one of the parties.
    - The fact that there was no express retainer was powerful evidence in support of the argument that there was no implied retainer either.

Aurium Real Estate v Mishcon de Reya [2022] EWHC 1253 (Ch):

- Judge rejects C's analysis that there was a general retainer to provide all legal advice necessary to successfully conclude the project. Rather, D was engaged to advise on a matter-by-matter basis by an engagement letter.
- The absence of a general retainer made it necessary to identify the precise contractual basis under which the firm had provided the advice.
- Read fairly and objectively, and having regard to the circumstances in which the letter was agreed, the agreement envisaged a continuum of drafting and negotiation between the law firm and tenants with a view to documenting an agreed surrender (of a tenancy).
- The advice complained of was outside the scope of D's engagement letter.

- The company contended that the scope of the letter had been expanded by subsequent instructions.
- Variation? The focus was on the parties' intention, determined objectively, and on whether the suggested variation went "*to the very root of the contract*", *British & Beningtons Ltd v North West Cachar Tea Co Ltd* [1923] A.C. 48, [1922] 11 WLUK 10 applied.
- No duty of care. Judgment worth reading for paragraphs 33, 69, 98, 106 as a discussion of the scope of duty of care applying the recent guidance in *MBS.*

These questions arise all the time!

Harry v Curtis Law LLP (unrep'd, HHJ Mitchell):

- An interesting decision on the scope of duty in which I acted successfully for the Defendants.
- Conveyancing negligence case. Solicitors acted on a low fixed fee conveyancing package. The scope of the written retainer promised to investigate title, and perform local authority searches. This was done, and the search did not give details of any major road schemes within 200m of the house.
- The search was wrong. In fact, the Forder Valley Link Road ("FVLR"), a major new road development linking two parts of Plymouth was to be constructed along a route running past the end of the road on which her house was situated. The new road was less than 50m from her house.

- The first is the extent to which solicitors taking on large volume, low cost work (such as conveyancing, or low value personal injury claims) can limit the scope of their retainer.
- It is clear that paying less, or even nothing, for a professional service does not alter the *standard* of the work that must be completed (see *Burgess v Lejonvarn* [2017] EWCA Civ 254).
- However, in this case, it was successfully argued that the low fee and strict limitation of the retainer *circumscribed* the work that had to be done (following *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303, *Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB)
- Solicitors were entitled to rely on the results of the searches, which did not raise any particular concerns (therefore distinguishing *Orientfield Holdings v Bird & Bird* [2017] EWCA Civ 348).
- Further information: https://www.lexology.com/library/detail.aspx?g=fb7b15bf-4e28-4b94-bb81-409801d867b9; https://www.lawgazette.co.uk/news/conveyancer-on-fixed-fee-had-limited-duties-to-client-court-finds/5111935.article

Contribution claims

Percy v Merriman White and Mayall [2022] EWCA Civ 493:

- The Claimant, Mr Percy, blamed the two Defendants, Merriman White and Mr Mayall, for various losses.
- Mr Percy ultimately proceeded by discontinuing against Mr Mayall and by settling his claim against Merriman White for £250,000. Merriman White, evidently considering that Mr Mayall bore some responsibility for what had happened, duly sought a contribution from him.
- The decision of the Court of Appeal raised fundamental issues as to what a contribution claimant has to prove, in order to recover a contribution.

- If a contribution claimant enters into a bona fide settlement in respect of a claim which, on its alleged facts, disclosed a genuine cause of action against him, the contribution defendant cannot argue that the underlying claim against the contribution claimant was ‘wrong’ (see section 1(4) of the Civil Liability (Contribution) Act 1978)
- Merriman White further advanced a more ambitious proposition. That proposition was that Mr Mayall **could not dispute his own liability either,** relying on *WH Newson Holding Limited v IMI Plc v Delta Limited* [2017] Ch 27, [59].
- The High Court agreed!

- Unsurprisingly, the Court of Appeal reversed:
- At [120], Lewison LJ gave the clearest explanation as to why, noting that it would *prima facie* rob Mr Mayall of the right to a fair trial:

> *“120. If Mr Mayall's liability were to be conclusively determined against him by a settlement made between two parties who are suing him (without any determination by a court) that would, on the face of it, deprive him of his right to have his liability determined by an independent and impartial tribunal. It is not, of course, incompatible with article 6 for Merriman White's own liability to be determined by an agreement to which it is a party, because it is always open to one party to waive its rights under article 6. But Mr Mayall has not waived his.”*

Conclusion

- Accordingly, this case now stands as clear authority for the proposition that, in contribution proceedings, whilst a contribution defendant cannot (in general) challenge the contribution claimant's liability to the underlying claimant provided the contribution claimant would have been liable if the facts alleged by the underlying claimant were proved against him, the contribution defendant can however dispute **his own** liability, just as he would have been able to in any underlying proceedings brought against him by the underlying claimant.

DEKA

CHAMBERS

James Holmes-Milner

Francesca O’Neill

jholmes-milner@dekachambers.com

foneill@dekachambers.com