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Retainers, Assumption of Responsibility and Duty of Care: *Miller v Irwin Mitchell*

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Miller: summary

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- Claimant was slow getting back to the Defendant.
- 2 years on, a Letter of Claim was sent. The tour operator then notified its insurers.
- By that time, the tour operator was insolvent and insurers refused to indemnify because of late notification.

The claim

C sued D, contending that:-

a) An implied retainer arose from the time of the call, or shortly afterwards.
b) And/or there was a common law duty of care from the time of the call or shortly afterwards, by reason of assumption of responsibility.
c) Reasonable skill and care required advising C to take steps to try to ensure that the tour operator complied with its notification provisions.

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Issues

When and how are solicitors' retainers formed? At what stage does a solicitor, approached by a potential client, become obliged to start acting and advising?

When and in what circumstances will a retainer be implied?

When will a solicitor assume a responsibility to advise on something?

Express / implied retainers

Retainer (or contract of engagement) = the source of the solicitor's duties to the client.

The retainer may be written; oral; or inferred from conduct.

As a matter of good practice, any oral or implied retainer *should* be confirmed in writing: see, e.g., Minkin v Landsberg [2015] EWCA Civ 1152 at [38](v).

Express retainer: first principles

An express retainer is a contract.

C must establish that there was an (i) offer; (ii) acceptance of that offer; (iii) an intent to create legal relations; and (iv) consideration (see, e.g., Caliendo v Miscon de Reya [2016] EWHC 150 (Ch) at [669]).

Key battlegrounds:

- offer or invitation to treat?
- what services?
- which services are ‘reasonably incidental’ to those specified in the retainer?

Implied retainer: first principles

Implication from conduct. However, an implied retainer must still satisfy the other pre-requisites to contractual formation: Brown v InnovatorOne plc [2012] EWHC 1321 at [1014].

'Convenience' is not enough. The parties' conduct must be consistent only with the solicitor being retained as solicitor for the client: Caliendo at [682].

Key battlegrounds:

- Treated as *potential* client or *actual* client?
- who is the client (cf, cases where sol acting for a family or a company with shareholders)?
- the scope of the obligation(s)?
- Agreement on fees?

Miller (express / implied retainer)

Express / implied retainer featured heavily at first instance.

On appeal, however, shift in focus towards assumption of responsibility and duty of care in tort.

Express retainer (first instance)

C contended that an express retainer was created on 19.5.14, on the bases that:

- IM's television advertisement amounted to an offer to provide legal services;
- C accepted the offer when she telephoned IM;
- D did not decline to act for her and, instead, gave her advice on the phone and told her it was passing her case to the ITLG, at which point time charges were being recorded.

(see [104]).

Express retainer (first instance)

HHJ Cadwallader rejected that submission:

- IM's ad was not an offer to provide legal services; it was, at most, an invitation to treat.
- The question of whether the parties would enter into a retainer was one for further consideration on both sides;
- C could not be regarded as agreeing to enter into a contract simply be calling IM.
- The limited advice given to C during the call was provided in contemplation of a retainer, and was not advice referable to one which had come into existence during that call.
- There was no agreement on fees and that, again, militated against a finding that a binding contract had been reached.

Express retainer (first instance)

Further, C contended that the retainer which was eventually entered was retrospective, that is, that the parties agreed that they should be treated as having entered into an express retainer retrospectively as from 19.5.14 (see [106]).

HHJ Cadwallader rejected this submission:

- There was nothing in the CFA which either expressly stated that it was to have this effect, nor was there any basis for implication of such an effect;
- In any event, the CFA did not require D to have taken steps which it would have taken if there had been an earlier retainer, but which it was under no obligation to take if there was not (see [107]).

Implied retainer (first instance)

Period 1: 19.5.14 and shortly afterwards

"I reject the proposition that on 19 May 2014 and shortly afterwards, the claimant and the defendant acted in a way which was consistent **only** with the defendant's being retained as Mrs Miller's solicitors" (my emphasis).

Key points:

- IM did not suggest to C that she was a client;
- letter dated 20.5.14 (C would be contacted to "discuss whether [IM] was able to accept her case");
- C's subjective belief, as expressed in XX, inconsistent with what was said in that letter.

Implied retainer (first instance)

Period 2: 8.4.15

Further steps included (i) receipt and review of accommodation details and invoice and (ii) various chasing letters.

Two of the chasing letters stated that:

“You must be aware that no action has been taken by my firm to establish what limitation period would apply to your claim or to protect your right to take any legal action in any jurisdiction.”

HHJ Cadwallder held:

“the conduct of the Defendant is consistent (and in my view actually consistent only) with the defendant’s seeking information with a view to deciding thereafter whether or not to offer to enter into a retainer with Mrs Miller. On that footing, no implied retainer arose.”

Implied retainer (first instance)

May and June 2015

- D obtained TO's t&cs from internet; reviewed them; and obtained counsel's (free) advice. It did not seek authority from C to do so.
- As explained to counsel, D had not yet established funding and wanted the advice to "decide whether we are able to accept the claim." D did not tell C about the advice until September 2015.

June and July 2015

- D had asked for and obtained C's travel insurance documents, so as to consider how any claim might be funded. D had communicated to C that the issue of funding needed to be resolved before it took on her claim.

21 September 2015

- D wrote to C asking if there was any other legal expenses insurance and said that if not it would be happy to offer her a conditional fee arrangement.
- In the letter, D asked about the accident locus and photographic evidence.

Implied retainer (first instance)

"Even at this stage, I do not consider that the claimant and the defendant were acting in a way which was **only consistent** with the defendant having been retained as Mrs Miller's solicitors. Funding had still not been resolved. There was no agreement about fees or payment terms. Mrs Miller asked if the defendant could also assist with a clinical negligence claim so, from her perspective at least, the ambit of any potential instructions had not yet been established. **None of this is consistent only with the parties having entered into a retainer at that stage**. That did not happen, as the defendant accepts, until 25 January 2016, when the defendant told her that it was ready to proceed with her claim, the next step being the completion of the CFA." [113] (my emphasis).

Implied retainer (first instance)

25 January 2016

D informed C that it was ready to proceed with her claim, with the next step being the completion of the CFA. At this stage, it was accepted that an implied retainer arose: [111].

Implied retainer (CoA)

There was no challenge to the finding that there was no express retainer. The appeal relating to implied retainers was not formally abandoned, but it occupied only 3 of the 122 paragraphs of the Appellant's Replacement Skeleton.

Key findings:-

- "…Until late January 2016, on an objective view of the evidence, Mrs Miller was treated only as a prospective client of Irwin Mitchell." (see [34]).
- The contention that there was an implied retainer on 19 May 2014 was "fatally undermined by an abundance of evidence pointing to the opposite conclusion. As the Judge found, the Legal Helpline was a means of attracting prospective clients, but there would be a sifting process, and the question of a possible retainer would only arise after the relevant legal team (here the ITLG) had considered the information and documents they had requested Mrs Miller to provide. It was clear from Mrs Miller's own evidence that she understood that to be the position at the time of her conversation with Ms Halliwell. The matter was put beyond doubt by Ms Pegg's letter to Mrs Miller of 20 May 2014, which expressly stated that after the requested documentation had been reviewed, Ms Pegg would contact Mrs Miller "to discuss whether Irwin Mitchell was able to accept her case." (see [35]).

Conclusions

Evidential battlegrounds:

- Content of letters / correspondence / oral discussions
- Extent to which services are being provided
- Liability for and agreements on fees
- Parties' understanding of position

Other important cases:

Caliendo v Mishcon de Reya LLP [2016] EWHC 150 (Ch)

Minkin v Landsberg [2015] EWCA Civ 1152

Dean v Allin & Watts (A firm) [2001] EWCA Civ 758

Assumption of responsibility: the core of the appeal

It's necessary to focus on what duty is allegedly being assumed:

HXA (Respondent) v Surrey County Council [2023] UKSC 52 at 92:

It is very common for the language of "assumption of responsibility" to be used at a high level of generality. However, it helps to sharpen up the analysis always to ask, what is it alleged that the defendant has assumed responsibility, to use reasonable care, to do?

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Assumption of responsibility: the core of the appeal

When is there an assumption of responsibility?

- Objective test.

- Focus on things said/done by the defendant in his/her dealings with the claimant. Do any “cross the line”?

- Relevant factors: the purpose of the task and whether it’s for C’s benefit; whether D (ought to) know C will rely on D; the reasonableness of C’s reliance.

Entr’acte – Disclaimer!

- Relevant factors: the purpose of the task and whether it’s for C’s benefit; *whether D (ought to) know C will rely on D*; *the reasonableness of C’s reliance*.

Disclaimer: this webinar is not to be relied on as legal advice. Any liability in respect of the same is disclaimed. The circumstances of cases differ and legal advice on the individual case should always be sought.

Assumption of responsibility: the core of the appeal

Spire Property Development LLP v Withers LLP [2023] 4 WLR 56

Absent a retainer, a duty of care depends on an assumption of responsibility.

Where a solicitor undertakes responsibility for a task, a legal responsibility is assumed.

Whether there is an assumption, and the extent of it, is to be judged objectively and without hindsight.

Assumption of responsibility: the core of the appeal

Crossman v Ward Bracewell & Co [1984] PN 103

Solicitor advises prospective client about how he could obtain funds to pay legal costs.

Thereby assumed a duty to exercise reasonable skill and care.

Solicitor did not advise prospective client that his insurers might fund this.

Held – breach of duty

Assumption of responsibility: the core of the appeal

What about matters “reasonably incidental” to advice provided?

Spire leaves this question open, where there is no retainer.

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Miller: Court of Appeal do not decide the issue, holding the relevant advice would not have been “reasonably incidental” so the issue does not arise.

Assumption of responsibility - Claimant's arguments:

- D was operating a Legal Helpline and provided some legal advice to callers, and assumed reasonable care in respect of the advice provided.

Judge at first instance – and Court of Appeal – accept this.

It was reasonable for C to rely on the advice provided (which was, in any event, correct).

Assumption of responsibility - Claimant's arguments:

- C contended that the advice provided was "incomplete" and potentially misleading because advising C on limitation gave the impression nothing needed to be done to preserve the claim. That was wrong, C needed to tell the tour operator so that they could tell their insurer.

Court of Appeal reject that argument. C did not need to take any steps to preserve her right of action.

Also, C could not reasonably have thought she was being given wider-ranging advice on all steps necessary to "protect her position" more generally.

Assumption of responsibility - Claimant's arguments:

- Risk should be in reasonable contemplation of the legal advisor. Essentially, this was a "hidden pitfall".

Court of Appeal reject this. The risk was that the tour operator both (a) knew of the accident and (b) had failed to report it. This was a remote risk, and no general duty to take steps to safeguard against risk of unenforceability absent notice of financial difficulty.

Assumption of responsibility – issues for the future

A positive duty to advise on limitation, if the limitation period is likely to expire?

Court of Appeal say this is «strongly arguable».

Assumption of responsibility – issues for the future

Any other «obligatory steps»?

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Conclusions

Assumption of responsibility cases are highly fact-sensitive and need analysing carefully.

Pre-retainer, a potential client is entitled to rely on advice provided, where this is reasonable.

There may well be a duty to advise on limitation or other «hidden pitfalls» pre-retainer.

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