Practice and Precedents Editor's Notes

A Solicitor's retainer

The source and origin of a solicitor's duty is the retainer, or contract of engagement, between himself and a client.[1] The retainer may be written, oral[2] or inferred from conduct.[3] In practice, a written retainer is the most effective way of controlling risk on issues of solicitors' duty of care. The extent of this duty has been considered earlier this year in two cases, one an unreported County Court decision[4] which came to the Practice and Precedents Editor's attention via a news report in the Gazette[5] and the other a reported decision of the Administrative Court.[6]

Harry v Curtis Law LLP

The Practice and Precedents Editor is very grateful to Francesca O'Neill of 1 Chancery Lane who appeared for the successful defendant and who kindly shared copies of both her skeleton argument and detailed note of the Judgment on which these Practice and Precedents Editor's Notes are based.

This case involved an unsuccessful professional negligence claim made by the buyer against her solicitors. In June 2018 the buyer, Victoria Harry, purchased a 999 year lease of 5 Bluebell Street, a new-build house, for £182,000 from Persimmon. The house is situated on a new development in Derriford in the north of Plymouth. Derriford is described on the developer's website as being "a well-established residential area with an easy link to the A38, Devon's main road route from Exeter into Cornwall via the Saltash Bridge".

The buyer instructed a local firm of solicitors, Curtis Law LLP,[7] to act on her behalf in connection with her purchase. The firm had previously acted for her in selling a previous property and the abortive purchase of another house in Plymouth. They acted for her on a fixed fee basis of £695 plus VAT and disbursements. Under the terms of the retainer, they agreed to investigate title and carry out searches including a local search.

In response to question 3.4 of the CON29 Enquiries of local authorities form which asks about nearby road schemes, the local authority did not disclose any new road schemes within 200 metres of the property. In relation to planning, the local search did, in the details of the planning permission for the development, reveal the "Construction of a new link road and bridge across Forder Valley." But there was no indication that the scheme would be close to the house.

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[1] Jackson and Powell on Professional Liability, 9th edition, para 11-004.
[2] See, for example, *Whelton Sinclair v Hyland* [1992] 41 E.G. 112 where a retainer was established by a conversation in a telephone call.
[3] See, for example, *Aroca Seiquer y Asociados v Adams* [2018] EWCA Civ 1589 where the buyers of holiday homes in Spain (who were in the UK) instructed Spanish solicitors. The solicitors wrote letters to them headed "Dear client", which was an offer to act for them, and that offer was accepted by agents making appointments for the buyers to see the solicitors, who then acted for them.
[4] *Harry v Curtis Law LLP,* unreported 3 March 2022 Plymouth County Court.
[5] See *https://www.lawgazette.co.uk/news/conveyancer-on-fixed-fee-had-limited-duties-to-client-court-finds/5111935.article* [Accessed 24 June 2022].
[6] *McDonnell v Dass Legal Solutions (MK) Law Ltd (t/a DLS Law)* [2022] EWHC 991 (QB).
[7] Trading as Curtis Whiteford Crocker.

Approximately 18 months after completion of the purchase, the local authority started construction work on the Forder Valley Link Road scheme with a planned opening in summer 2022.[8] This scheme is a major construction project and its route runs past the end of Bluebell Street, less than 50 metres from Number 5. The reply to question 3.4 on the local search was therefore wrong.

The buyer then sued her solicitors for breach of retainer, claiming that they should have advised her about the road scheme. She claimed a diminution in value and that she had suffered considerable distress and argued that she would not have bought the house had she known about the road scheme.

The solicitors had undertaken their work for a fixed fee and on a strictly limited retainer. It is now well established that paying a low fee, or even nothing, for a professional services does not affect the standard of the work that must be undertaken. In *Burgess v Lejonvarn*[9] an architect who had supplied her professional services to friends free of charge had been under no contractual duty to provide the services, but any work done had to be done with reasonable skill and care. She owed her friends a duty of care in tort because, although not clients in a contractual sense, they were clients in a professional sense. She possessed a special skill and had assumed a responsibility on which they had relied.

However, a low fee and strict limitation of a retainer can circumscribe the work that had to be done. In *Thomas v Hugh James Ford Simey Solicitors*[10] the Court of Appeal decided that solicitors acting in a high volume, fixed costs scheme for low value personal injury cases were not under a duty to advise further about heads of claim which a client had said he did not wish to pursue and for which he said that he could not provide supporting evidence.

The judge found that there was no obligation on the part of the solicitors to advise the buyer on matters which were part of the wider development as opposed to just 5 Bluebell Street. So, they were not required to check all the documents on the developer's planning cloud which related to the whole development and were not required to pass on to the buyer plans and search results that related to the whole development or to road schemes that would not affect the property. They were entitled to rely on the results of the searches, which did not raise any particular concerns.[11] There was no need to make further enquiry or read several hundred pages of planning material that related to the development.

The circumstances of the case can be contrasted with those in *Faragher v Gerber.*[12] In this case the buyer's solicitor failed to make enquiries which would have unveiled the plans for a major new highway, the "Limehouse Link", in front of the property, which was a flat. The solicitor received a local search which, in reply to the question concerning possible construction of any new road or improvement to any road stated: "The applicant is advised to make enquiries of the LDDC[13] to ascertain whether [it] has any proposals in the vicinity of the property". The

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[8] For details of the scheme, see *https://www.plymouth.gov.uk/parkingandtravel/transportplansandprojects/currenttransportprojects/fordervalleytransportimprovements/fordervalleylinkroad* [Accessed 24 June 2022].

[9] *Burgess v Lejonvarn* [2017] EWCA Civ 254.

[10] *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303. See also *Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB).

[11] Thus distinguishing *Orientfield Holdings v Bird & Bird* [2017] EWCA Civ 348.

[12] *Faragher v Gerber* [1994] E.G. 122 (C.S.).

[13] London Docklands Development Corporation.

buyer was not informed of this answer. The court also concluded on the evidence that the solicitor made no enquiries which would have elicited plans for a major new highway on the doorstep of the property. Once work on the road began, the buyer was put to great inconvenience, having to move out of the flat. The buyer successfully claimed against her solicitor.

Mrs Harry was also under pressure from Persimmon to exchange contracts. She had agreed to exchange and complete within 28 days of her reservation. In return, she received a number of incentives, including a £3,000 discount. As a consequence, she put her solicitors under pressure.[14] Whilst this deadline was met, the court did consider what effect it might have had. The solicitors argued that they could not have carried out any wider investigations in the time they had, and that, even if they had had time, they would not have gone beyond the search results. The court preferred the latter. Extra time would have made no difference, as there was no obligation to go further than the search they carried out.

At the end of the day, the buyer was unsuccessful in her claim. Perhaps she might have had more success, in the case of an official search, claiming against the local authority for negligence as it failed to disclose the road scheme, or where the search was instead a "regulated search"[15] carried out by a commercial organisation, against the search provider.

McDonnell v DASS Legal Solutions (MK) Law Ltd (t/a DLS Law)[16]

The second case involved a claim for damages of £2.5 million against a firm of solicitors ('DLS') for breaches of duties relating to a purchase transaction in 2017.

Mr McDonnell was a prominent member of the Buckinghamshire business community. His particular interests were in waste disposal and land. He alleged that DLS had failed to protect him against the loss of opportunity to benefit from a contract to buy a scrap and storage yard at Aylesbury. DLS had acted for Mr McDonnell in various matters for about 3 years prior to the events in issue.

The property was to be acquired by Arc Holdings and Investments Ltd, a company which had been specifically formed for this purpose. Mr McDonnell asserted that he owned a 70% beneficial interest in the company, although his shares were registered to an associate, Charles Giblin. The sale fell through when this associate agreed to transfer the land to a third party, Midwest Formwork UK Ltd, which had recently purchased a neighbouring piece of land.

Mr McDonnell argued that not only had he lost out on the deal to purchase the property, but the property was transferred to Midwest Formwork UK Ltd at a significant undervalue. He claimed that he had instructed DLS to draw up a deed of trust to protect his interest either at a meeting in January 2017 or by letters written in February 2017. He argued that it had failed to do so, nor did it advise him on how to protect his beneficial interest.

It was not disputed that there had been ongoing relationships between the parties since 2014, nor that there were a series of signed client care letters governing those relationships where the claimant had chosen to be a client. However, there was a signed letter of engagement with Arc Holdings and Investments Ltd concerning the purchase of the land and DLS denied that Mr

[14] Apparently witnesses on both sides agreed that this pressure was tantamount to bullying.
[15] Previously known by the sector as a Personal Search.
[16] *McDonnell v DASS Legal Solutions (MK) Law Ltd (t/a DLS Law)* [2022] EWHC 991 (QB).

McDonnell was its client or that there was any suggestion that Mr McDonnell's interests were other than coterminous with those of Arc Holdings and Investments Ltd. It also denied any request or duty to protect Mr McDonnell's personal interests and that the instructions relating to a deed of trust were understood to relate to a trust of family assets in Ireland.

The judge, Mrs Justice Foster DBE, formed the clear impression that Mr McDonnell was a man of considerable intelligence and business acumen and had an excellent working awareness of corporate structure, its scope and limitations, as well as of his own potential vulnerability and liabilities. However, the judge did find that his evidence on the important matters including whom he spoke to and what he said to them was unsatisfactory. When being cross-examined, his answers were evasive and intended to minimise evidence of his controlling roles and the judge felt that he was prepared to lie when the truth seemed to disadvantage him, or to get himself off the hook when answering difficult questions. This all suggested that he had not given the instructions he claimed he had given.

The judge was satisfied that Mr McDonnell often preferred to operate "off-book" or in the shadows. Rather than being a director of a company he would choose someone to act as his nominee. This allowed him to remain undetectable, but still exercise some control.

Mr McDonnell had a variety of advisers available to him and a history of presenting the issues he wished to be dealt with, to be resolved in a manner that he chose, and of asking for such advice as he needed.

It was held that there was no express retainer between the parties in relation to the purchase of the property. Mr McDonnell had been explicit, at the meeting in January 2017, that Arc Holdings and Investments Ltd would be DLS's client in relation to the property purchase and that instructions should be taken from Charles Giblin. So, he had quite deliberately chosen not to be a client and there was no implied retainer.

Even if there had been a retainer, DLS would not have been in breach because, at all times, Mr McDonnell knew precisely what he was doing. He held blank stock transfer forms signed by Charles Giblin to enable him to register himself as majority owner of the shares in Arc Holdings and Investments Ltd, and believed they were his protection. So, it was not more likely than not that he would have taken advice that he should be a director or shareholder of Arc Holdings and Investments Ltd. A deed of trust would not have made any difference to the outcome concerning the sale of the land.

Mr McDonnell's claim was therefore dismissed.

In relation to an implied retainer, Jackson and Powell says:

"In a situation where the parties act as if the relationship of solicitor and client existed, although there is no express agreement to the effect, the court will readily hold there is an implied retainer to be inferred from the parties' conduct."[17]

There are a number of clear principles which apply to the implication of a solicitor's retainer and the courts are not swift to imply one.

[17] Jackson and Powell on Professional Liability, 9th edition, para 11-005.

First, the test is for implication is necessity. In *Caliendo v Mishcon de Reya*[18] Arnold J described the key question at paragraph 682, as being:

"Was there conduct by the parties which was consistent only with Mishcon de Reya being retained as solicitors for the Claimants?"

Secondly, choosing not to enter an express retainer indicates that an implied retainer is unlikely. In *James-Bowen v Metropolitan Police Commissioner*[19] at paragraph [24] it was said by Moore-Bick LJ that:

"In circumstances where the parties could have entered into an express retainer but have not chosen to do so, I think the court should be slow to find that they have entered into such a contract by conduct. In my view it cannot properly do so unless they have behaved towards each other in a way that can be explained only by the existence of an intention to enter into legal relations of a particular kind."

Third, an objective consideration of all the circumstances is necessary to determine whether an intention to enter a contractual relationship must be implied. In *Caliendo v Mishcon de Reya*[20], Arnold J recalled the dicta of Lightman J in the Court of Appeal in *Dean v Allin & Watts*[21] at paragraph [22]:

"… As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could 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."

In *Dean v Allin & Watts*[22] "all the circumstances" included that the person in question was not liable for the solicitor's fees and did not directly instruct the solicitors. Other circumstances identified were where a contractual relationship had existed in the past as if that were so, the court might assume the parties intended to resume that relationship, and a failure to advise the former client to obtain independent legal advice might indicate the advice was not necessary because the solicitor was acting for him.

Finally, an implied retainer will not be imposed for convenience. In *Searles v Cann & Hallett*[23], where the issue was whether borrowers' solicitors had impliedly agreed to act as solicitors for the lenders, it was said at first instance that:

"No such retainer should be implied for convenience but only where an objective consideration of all the circumstances makes it so clear an implication that [the solicitor himself] ought to have appreciated it."

Russell Hewitson

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[18] *Caliendo v Mishcon de Reya* [2016] EWHC 150.
[19] *James-Bowen v Metropolitan Police Commissioner* [2016] EWCA Civ 1217.
[20] *Caliendo v Mishcon de Reya* [2016] EWHC 150.
[21] *Dean v Allin & Watts (A Firm)* [2001] Lloyd's Rep. P.N. 605.
[22] *Dean v Allin & Watts (A Firm)* [2001] Lloyd's Rep. P.N. 605.
[23] *Searles v Cann & Hallett* [1993] P.N.L.R. 494.