CIVIL PROCEDURE NEWS

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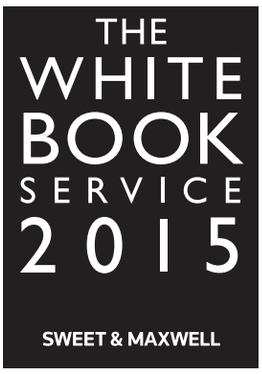

In Brief

Cases

Akcine Bendore Bankas Snoras v Yampolskaya [2015] EWHC 2136 (QB), 2 July 2015, unrep. (Green J.)

Relief from Sanctions–Litigants-in-Person–Strike out of appeal–Failure to file an appeal bundle

CPR r.3.9, Council Regulation 44/2001 (Judgments Regulation). Claimant sought to register two Lithuanian judgments under the Judgments Regulation. The judgments were made subject to a registration order on 12 December 2014. Registration order served on the Defendant on 23 December 2014. Defendant had until 23 January 2015 to appeal. On 19 January 2015 those acting for the Defendant informed the Claimant's lawyers that service had not been effected properly. Re-service took place by appointment on 22 January 2015. An appeal was then filed on 6 February 2015. The appeal bundle had to be filed by 16 March 2015. The defendant, now acting in person, failed to file the bundle in time. On 26 March 2015 an 'unless order' was issued. It provided that the bundle be filed by 1 April 2015. No bundle was filed and the appeal was struck out. **Held**, the Defendant's application for relief from sanctions was governed by r3.9 as explained by the Court of Appeal in ***Mitchell*** and ***Denton*** and see Lord Neuberger PSC's statement, at paras 29 – 31 in ***Prince Abdulaziz v Apex Global Management Ltd & Anor (Rev 2)*** [2014] UKSC 64, [2014] 1 W.L.R. 4495. In assessing the three stage ***Denton*** test, the Judge found as follows. *Stage one*, the failure to file serve an appeal bundle in time was a significant breach contrary to the proper administration of justice, see Supperstone J's reasoning in ***Davies Solicitors LLP v Rajah*** [2015] EWHC 519 (QB) at para.25. Further, it was explained that such breaches were significant due to their effect on effective timetabling of cases, specifically timetabling trials. The necessity of eliminating routine non-adherence to procedural obligations underpinned the approach in ***Denton***. Given the wider context of the Judgments Regulation regime, which was intended to secure simple and efficient registration of judgments, the failure to comply with the obligation to file an appeal bundle was one that could not but be 'significant and serious.' *Stage two*, the crucial point was that the Defendant failed to read court documents and her husband, who was also a Defendant to the action, when asked for his advice had either misunderstood or misread them. That she was a litigant-in-person at the time was thus not a relevant consideration. If the Defendant, and her husband, had been genuinely impoverished or otherwise indigent, which they were not, this might have been a relevant consideration, particularly if the merits of the underlying claim had been relevant. It was noted that no criticism could be levelled at the Claimant's lawyers, who she had asked for advice as to what she should do: they were under no duty to provide such advice. *Stage three*, in all the circumstances, and applying Lord Neuberger PSC's test from ***Prince Abdulaziz***, there was no basis to grant relief from sanction. Registration process ought therefore proceed. ***Mitchell MP v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ***Prince Abdulaziz v Apex Global Management Ltd & Anor (Rev 2)*** [2014] UKSC 64, [2014] 1 W.L.R. 4495, UKSC, ***Davies Solicitors LLP v Rajah*** [2015] EWHC 519 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.9.4.1.)

Kishenin v Kalsten Bleach [2015] EWCA Civ 1184, 7 October 2015, unrep. (Macur, Vos LJJ, Sir David Keene)

Court of Appeal–Extension of time to file appellant's notice–Litigant-in-person

CPR rr.3.9, 52.4. Claim for possession of a hotel and restaurant. Multiple parties. Appeal by second Defendant, who was the owner and sole director of the fourth Defendant company. Second Defendant was a litigant-in-person. Application made on the morning of the appeal hearing by the second Defendant to seek permission to appeal on behalf of the fourth Defendant. Application made on the basis that the basis of its appeal was the same as that of the second Defendant and that the second Defendant had meant to indicate of her appellant's notice that permission to appeal was sought for both Defendants. **Held**, the application for permission required the grant of an extension of time to file an appellant's notice to be granted. That application was governed by the three stage test set out in ***Denton v White*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296. *Stage one*: it was not disputed that the delay in filing the appellant's notice was serious and significant. *Stage two*: the explanation for the delay was that the second Defendant, as a litigant-in-person had simply made an error, one that was not realised until two days before the hearing, and one which given the nature of written submissions filed by the second Defendant clearly demonstrated that she believed such an application had already been made. Furthermore, it was clear that the second and fourth Defendants were indistinguishable in terms of the claim, the claimant was aware of this, and if the judgment were to stand against the fourth Defendant, the second Defendant was potentially at risk of directors disqualification proceedings. Notwithstanding the need to ensure that litigation was conducted consistently with the overriding objective, and particularly the need to manage claims efficiently, at proportionate cost, and in order to maintain

the efficacy of rule compliance, the present circumstances as they were 'truly exceptional' justified the grant of an extension of time (paras 16-17). ***Denton v White*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA. (***See Civil Procedure 2015*** Vol. 1 para.3.9.6.7.)

- **KW (By her Litigation Friend) v Rochdale Metropolitan Borough Council** [2015] EWCA Civ 1054, 20 October 2015, unrep. (Lord Dyson M.R., Black and Underhill LJJ.)

Court of Appeal–Consent Order–Appeal by Consent–Vires

CPR rr.52.10, 52.11, CPR PD52A para.6.4. The Court of Appeal approved a consent order in respect of an appeal from a decision made in Court of Protection proceedings. That order determined the question whether the claimant was being deprived of her liberty at home: see ***P v Cheshire West*** [2014] UKSC 19, 1 A.C. 896. The proceedings continued in the Court of Protection. Directions were given specifying that a de novo hearing would take place in order to determine the question whether the claimant was being deprived of her liberty, the judge having held that the Court of Appeal had not decided, within the terms of the consent order, that issue. In reaching that decision the judge stated that the Court of Appeal's order was one that had been reached by a procedurally impermissible route and was thus ultra vires. Notwithstanding that the judge concluded that the rule of law required the court to adhere to the decision. The Court of Appeal considered whether the consent order was ultra vires. In doing so it noted that court orders are binding until set aside or varied, and they are so even where doubts arise as to the court's power to make the order. As such the Court of Appeal deprecated any practice on the part of a judge to query whether an order of a higher court was ultra vires or otherwise wrongly made. Turning to the substantive issue it **held** that: (i) r.52.11 sets out the approach that an appeal court will normally take i.e., determine an appeal on its merits at a hearing; (ii) PD52A para.6.4 provides that an appeal court can depart from the normal approach and allow an appeal by consent without the need for a hearing. It may do so in the circumstances set out in para.6.4 i.e., where the parties consent and the court is satisfied that there are good and sufficient reasons for granting the appeal by consent; (iii) in granting an order by consent the appeal court has all the powers set out in r.52.10; (iv) in exercising its wide discretion to allow an appeal by consent under para.6.4 there was no requirement that an appeal court was required to give a decision on the merits. Moreover, the Court of Appeal rejected the suggestion that where the court of first instance had reached a decision on the substantive merits a decision on the merits was required where an appeal was allowed by consent. It also rejected the suggestion that a duty to determine the merits was owed to the first instance judge by the appeal court: the only duty the appeal court owed was to the parties and the public interest; (v) in terms of the parties' interest and the public interest it may be in their interests for an appeal court to reach a decision on the merits following a hearing in circumstances where parties had agreed to allow the appeal by consent: see for instance, ***Bokor-Ingram v Bokor Ingram*** [2009] EWCA Civ 27, [2009] F.P.R. 922 and ***Halliburton Energy Services Inc. v smith International (North Sea) Ltd*** *[2006] EWCA Civ 185.* ***R (Lunn) v Governor of Moorland Prison*** [2006] EWCA Civ 700, [2006] 1 W.L.R. 2870, CA, ***Serious Organised Crime Agency v O'Doherty*** [2013] EWCA Civ 518, CA, ***M v Home Office*** [1993] 1 A.C. 377 (HL), ***Isaacs v Robertson*** [1985] A.C. 97, PC, ***Bokor-Ingram v Bokor Ingram*** [2009] EWCA Civ 27, [2009] F.P.R. 922, CA, ***Halliburton Energy Services Inc. v smith International (North Sea) Ltd*** [2006] EWCA Civ 185, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 52.11.1 and 52APD.13.)

- **The Dorchester Group Ltd v Kier Construction Ltd** [2015] EWHC 3051 (TCC), 21 October 2015, unrep. (Coulson J.)

Admissions–Open Offer

CPR r.14.1. The Claimant issued proceedings seeking declarations, and related orders, concerning undeclared discounts that had arisen between the Defendant and a third party sub-contractor, which the Defendant had failed to pay to the Claimant. Judgment was sought based on what was said to be an admission as to liability to account for the undeclared discounts made by the Defendant in an open offer to settle. **Held**, the application was refused as: (i) the Defendant's letter was an open offer letter. It was capable of acceptance or rejection. It was contrary to the overriding objective and therefore not for parties to pick and choose elements of offers: it was either to be accepted or rejected as a whole; (ii) the offer letter made no reference to r.14.1, was not a notice for the purposes of that provision, and made no admissions. It simply set out a position upon which settlement could be based; and (iii) admissions had to be clear and unequivocal the alleged admission was neither. The question of liability as a consequence remained in issue. ***Technistudy v Kelland*** [1976] 1 W.L.R. 1047, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 para.14.1.1.)

- **Bank St Petersburg PJSC v Arkhangelsky** [2015] EWHC 2997 (Ch), 23 October 2015, unrep. (Hildyard J.)

McKenzie Friends–Assisting a company–Grant of right of audience

Legal Services Act 2007, sch.3, CPR r.39.6, PD39A, Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881. A case management conference took place in the course of long-running litigation concerning control and ownership of a large group of companies registered in the Russian Federation. A question arose as to whether the court had power to grant a right of audience to a McKenzie Friend who was assisting a company (the

Defendant). In considering the question the court noted that there was no available authority on the subject, although the jurisdiction to grant such a right was assumed in ***Tracto Teknik GmbH v LKL International*** [2003] EWHC 1563 (Ch) unrep. **Held**, unless there was a specific restriction to the contrary, the court retained its inherent jurisdiction to manage its own process and could, in circumstances where a company had no one else to address the court on its behalf, grant a right of audience to a McKenzie Friend for that purpose in order to further the proper administration of justice. The court's inherent jurisdiction to grant such rights of audience was recognised and preserved by the Legal Services Act 2007. Furthermore there was nothing in r.39.6 or PD39A, which did not provide a complete code, to preclude the grant of such a right in the present circumstances. The grant of such a right would however be exceptional. ***Watson v Bluemoor Properties Ltd*** [2003] BCC 382 and ***Avinue Ltd v Sunrule Ltd*** [2004] 1 W.L.R. 634 distinguished. ***A.L.I. Finance Ltd v Havelet Ltd*** [1992] 1 W.L.R. 455, ChD, ***Tracto Teknik GmbH v LKL International*** [2003] EWHC 1563 (Ch) unrep., ***Watson v Bluemoor Properties Ltd*** [2003] B.C.C. 382, CA, and ***Avinue Ltd v Sunrule Ltd*** [2004] 1 W.L.R. 634, CA, ref'd to. ***(See Civil Procedure 2015*** Vol. 2 para.13.19 et seq.)

- **Hobbs v Guy's & St Thomas' NHS Foundation Trust** [2015] EWHC B20 (Costs), 2 November 2015, unrep. (Master O'Hare)

Costs Assessment–Reasonableness–Proportionality

CPR rr.44.3(2), 44.3(5). A clinical negligence claim settled pre-issue for £3,500 plus costs. Costs of £32,329.12 were claimed. A provisional assessment reduced the sum claimed by approximately two-thirds on grounds of reasonableness with a further reduction in respect of proportionality. Costs were then re-assessed at a post-provisional assessment hearing. **Held**, the Master noted that both the ***Lownds*** and the ***Jackson*** tests for proportionality applied: the former in respect of work down prior to April 2013, the latter to work done thereafter. The ***Jackson*** test, which implements recommendations made in the ***Jackson*** Final Report and as explained in para.5 of Lord Neuberger MR's Implementation lecture, dated 29 May 2012, is set out in rr.44.3(5) and 44.3(2). In respect of the Jackson test, the Master first noted the approach taken to proportionality by Leggatt J in ***Kazakhstan Kagazy PLC v Zhunus*** [2015] EWHC 404 (Comm). That approach was appropriate when assessing costs in a case where very large sums of money were in issue, i.e., millions of pounds, and the claim had been hard fought by both parties. It was not an appropriate approach however were the amount of reasonable costs would not but exceed the claim's value. When assessing proportionality following the assessment of what amount of costs were incurred reasonably, the court should consider, in the circumstances of the case, which individual item or items of work should not have been done because carrying them out was disproportionate. The court should not simply reduce the total amount assessed as reasonable to determine the level of proportionate costs. In assessing whether work done on individual items was proportionate to the total value of the claim, hindsight could be used: the prohibition on hindsight set out in ***Francis v Francis & Dickerson*** [1956] P. 87 was no longer to be followed. Recovery of expenditure on medical records and expert reports which are necessary in even mid to low value clinical negligence claims were allowed on grounds of complexity and because such claims entail more work than other similar value claims. As proportionality trumps necessity, in similar value claims the question remains at large whether such, necessary items, incur proportionate costs. ***R v Supreme Court Taxing Office ex parte John Singh & Co*** [1997] Costs L.R. 49, (SCTO), ***Kazakhstan Kagazy PLC v Zhunus*** [2015] EWHC 404 (Comm), unrep., ***Francis v Francis & Dickerson*** [1956] P. 87, PDA, ***Medway Primary Care Trust v Marcus*** [2011] EWCA Civ 750, [2011] P.I.Q.R. Q4, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 para.44.4.1.)

- **Clark v Braintree Clinical Services Ltd** [2015] EWHC 3181 (QB), 09 November 2015, unrep. (HHJ. Burrell QC sitting as a judge of the High Court)

Admissions–Conditional upon proof–Permission to withdraw

CPR r.14.1. Claim for negligence arising from shoulder surgery. In terms of breach of duty, the defence set out a conditional admission of breach; conditional upon the Claimant proving the factual matters alleged in the Particulars of Claim. The Defendant applied to withdraw its admission. **Held**, a qualified admission was an admission for the purposes of r.14.1. Permission to withdraw was thus required, see r.14.1(5), and was refused as: (i) both parties conduct of the litigation was predicated upon a conditional admission having been made; (ii) the Defendant had not made the application to withdraw promptly; (iii) withdrawal of the admission would have adverse consequences for the claimant and the proper administration of justice as, the claimant would incur additional costs as further issues would have to be dealt with at trial and the trial length would inevitably increase; (iv) additionally no prejudice would accrue to the defendant by refusing the application, whereas conversely granting the application would require the defence to be amended. The overriding objective requires parties to ensure that statements of case are drafted with clarity and care, rather than in ambiguous terms. ***Woodland v Stopford*** [2011] EWCA Civ 266, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 14.1.1, 14.1.8.)

■ **Blake v Stewart** [2015] EWHC 3241 (Ch), 10 November 2015, unrep. (HHJ. Purle QC sitting as a judge of the High Court)

Representative Action–Joinder of defendant–Order dispensing with service of Order effecting Joinder

CPR r.19.6, PD19A para.3.3, r.39.3(5). Trustees of a charity brought proceedings against two defendants in respect of a claim for the misuse of charitable funds. A third defendant was joined to the proceedings as a representative defendant under r.19.6. The Order which joined the representative defendant did not require him to be served with any amended claim form or other documents relating to the proceedings. Moreover, he was not served with the claim form at any time. Further orders were made against the original defendants. It was clear however that the representative defendant knew he was a party to the proceedings, as the solicitors for the original defendants informed him of such. In November 2010 the claim was disposed of by way of consent order, agreed to by the claimant and the original defendants. The representative defendant was not at the hearing at which that order was made. In January 2015 the representative defendant applied for a declaration that the November 2010 order did not bind him. **Held**, it was clear that joinder of the representative defendant was procedurally irregular. Service of the Order ought to have been effected when it was made. Irrespective of that fact the application failed as: the five year delay, for which there was no good reason, in bringing it was inexcusable, and even taking account of the fact that the representative defendant was a litigant-in-person it was delay beyond that which could properly be allowed, see ***Tinkler v Elliot*** [2013] C.P. Rep 4, para.32; nor was any aspect of the three-stage test in r.39.3(5) made out. Furthermore, an argument that as he had never been made a party to the proceedings or been served with them r.39.3(5) did not apply was rejected. It could not be raised now due to the inexcusable delay in bringing the application, and in any event if it were necessary to do so service of the November 2010 order would be dispensed with in the exceptional circumstances of the present case: see ***Nelson v Clearsprings (Management) Ltd*** [2007] 1 W.L.R. 962, paras 45 – 50. In respect of the issue of joinder, r.19.4(5) does not require service of a claim form on a new party. All that is required is service of the Order effecting joinder. While this did not happen here, when read as a whole r.19 and PD19A, it was said to be doubtful whether such service was a pre-condition for joinder to take effect. In this regard it was noted that PD19A para.3.3 referred to ***Ketteman v Hansel Ltd*** [1987] A.C. 189, which provided that service of an amended claim form was a precondition for joinder of a new party. That was said to refer to wording under the RSC that differed from the CPR. The issue of its continuing application to the CPR was however moot: an order dispensing with service of the Order could, if necessary, be made. ***Tinkler v Elliot*** [2012] EWCA Civ 1289, [2013] C.P. Rep 4, CA, ***Nelson v Clearsprings (Management) Ltd*** [2006] EWCA Civ 1252, [2007] 1 W.L.R. 962, CA, ***Ketteman v Hansel Ltd*** [1987] A.C. 189, HL, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras.39.3.1 et seq.)

Practice Updates

STATUTORY INSTRUMENTS

■ **THE CIVIL PROCEDURE (AMENDMENT NO.5) RULES** (SI 2015/1881), In force from **3 December 2015**.

CPR r.26.2A. Amends paragraphs 2, 3 and 4 of r.26.2A and replaces paragraph 5 in its entirety. Amends r.26.2A(2) to provide that a court officer may send a money claim brought in the County Court to 'the defendant's home court or the preferred hearing centre or other County Court hearing centre' if they consider the claim should be referred to a judge for directions. Amends r.26.2A(3) so that it only applies to claims for a specified sum of money, such that where it does the claim 'must' be sent to the defendant's home court. Amends r.26.2A(4) to substitute 'must' for 'will' in respect of the duty placed upon the court, and substitute's 'preferred hearing centre' for 'preferred court'. Substitutes a new r.26.2A(5), which provides that where a claimant or defendant specifies a hearing centre other than either their preferred hearing centre or home court, respectively, within their directions questionnaire then the claim must be sent to that hearing centre.

PRACTICE DIRECTIONS

■ **CPR PRACTICE DIRECTIONS–82nd Update**, In force from **7 December 2015** in respect of PD2C and PD5B. In force from **16 November 2015** in respect of PD51J and PD 51O.

The update amends PD2C paragraph 3.3 by replacing subparagraph 1 in its entirety, deleting subparagraph 2 and renumbering subparagraph 3 as subparagraph 2. The new subparagraph 1 provides that where proceedings under either the Companies Acts or Limited Liability Partnerships Act 2000 are commenced in the County Court, they must be started in a specified County Court hearing centre. It introduces a new PD5B (Electronic Communication and Filing of Documents by E-Mail). The new PD applies to claims in both the High and County Courts, albeit it does not apply to

claims to which the CE-File electronic court filing system applies. It also does not apply to claims commenced under PD7E (Money Claim Online) unless the claim was sent to a County Court hearing centre. The update further deletes PD51J (Electronic Working Scheme) and brings into force new PD51O (Electronic Working Pilot Scheme), which will operate from 16 November 2015 for twelve months. The new scheme will apply to proceedings commenced both before and after 16 November 2015. It only applies to claims within the courts based at the Rolls Building, London.

In Detail

UNBUNDLING LEGAL SERVICES–GUIDENCE IN MINKIN V LESLEY LANDSBERG (PRACTISING AS BARNET FAMILY LAW) [2015] EWCA CIV 1152

Reductions in legal aid, the growth in numbers of litigants-in-person, as well as changes in technology and working practices, has led to a number of changes in the operation of the civil justice system. One specific change has been the increased emphasis on unbundling legal services, which as The Law Society's Practice Note, *Unbundling civil legal services*, of 19 March 2015, defines it is the

> *'provision of discrete acts of legal assistance under a limited retainer, rather than a traditional full retainer where a solicitor typically deals with all matters anticipated from initial instructions until the case is concluded. It is sometimes referred to as 'a la carte' legal services'.*

As it goes on to say,

> *'Unbundling can operate on several different levels such as:*
>
> - *providing clients with self-help packs*
> - *providing discrete advice about a specific step or steps in a case or issue on one or more occasion*
> - *checking or drafting documents*
> - *advocacy or provision of a McKenzie Friend in certain circumstances.*
>
> *The essence of unbundling in its purest form is that the case remains client-led so the solicitor does not necessarily accept service of documents, does not send out correspondence in the firm's name or otherwise communicate with third parties, does not incur disbursements and does not go on the court record. However, there are some limited retainer models that that are closer to a traditional retainer in terms of the service offered to the client but only for clearly defined elements of the case.'*

The perceived benefits of an increase in unbundling are said to be that it provides the means whereby litigants: can access a range of discrete legal services which can be tailored to the financial means; retain control of the litigation process; and, by accessing some legal advice and assistance can improve their ability to resolve disputes consensually or via litigation on a more informed basis than if that had access to no such advice or assistance. Legal Services Board research, published on 18 September 2015, supported this perception and the growth in provision of unbundled legal services by law firms.

In ***Minkin v Lesley Landsberg (Practising As Barnet Family Law)*** [2015] EWCA Civ 1152, 17 November 2015, unrep, (Jackson, Tomlinson, King LJJ.) the Court of Appeal gave guidance on the ambit of a solicitor's duty to a client where they are instructed on a limited basis in order to provide unbundled legal services.

The defendant solicitor was initially instructed to provide advice to the claimant, under the Legal Help Scheme in 2009, on the content of a draft consent order, drawn up prior to her being instructed. The consent order set out various details concerning the division of assets between the claimant and her former husband.

Consequently, the solicitor and those instructed by the former husband revised the draft consent order. The claimant and her former husband thereafter attended court where the consent order was approved. Following approval of the consent order there was considerable litigation between the claimant and her former husband.

The claimant then brought proceedings against her solicitor for professional negligence in 2011. The basis of the claim was the advice given concerning the consent order and her conduct in respect of the litigation that arose after it was approved was said to be negligent.

The claim turned on the ambit of the solicitor's retainer. The claim was dismissed. The retainer was held to be limited solely to ensure the draft consent order was amended to reflect the agreement reached between the claimant and her

former husband. The solicitor was not under a duty to advise on the merits of that agreement. In terms of her conduct in the litigation consequent to the consent order's approval that was held to be carried out competently. The claimant appealed. The appeal was dismissed

The issue for the Court of Appeal was *'the extent of the defendant's duty to advise in circumstances where the parties have reached agreement and solicitors were asked to put that agreement into proper form for approval by the court.'* (para.31.)

In answering that question Jackson L.J. reviewed the following authorities: ***Midland Bank Trust Co Limited v Hett***, **Stubbs and Kemp (a firm)** [1979] 1 Ch 384, 402-403; ***Carradine Properties Ltd v DJ Freeman & Co*** [1955-1995] P.N.L.R 12, 12-13; ***Hurlingham Estates Ltd v Wilde & Partners*** [1997] 1 Lloyd's Law Reports 525, 526; **National *Home Loans Corporation PLC v Giffen Couch & Archer*** [1998] 1 W.L.R. 207; ***Credit Lyonnais SA v Russell Jones & Walker* (a firm)** [2002] EWHC 1310 (Ch), [2002] ALL E.R. (D) 19, 28.

The following principles were drawn from the authorities (para.38):

'i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.

iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.

iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. 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.

v) 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.'

Principle v) was not, contrary to the suggestion in Lightman J's statement from ***Hurlingham***, a principle of universal application. The solicitor in this case failed to make clear the limited nature of her retainer in writing to the claimant. Good practice would have been to do so. On the facts though its nature had been explained to the claimant and she had accepted it as being such.

The question then became whether advising on the merits of the consent order's terms fell within the scope of the limited retainer: was it reasonably incidental to the express terms of the retainer?

On the facts it was not as: (i) all the matters on which the solicitor might have been expected to advise where apparent to the claimant; (ii) the claimant was an intelligent, chartered accountant who understood the litigation process; (iii) the claimant had previously taken advice on the merits of the consent order's terms from other solicitors; (iv) despite being made aware of certain risks concerning enforcement of the consent order, the claimant instructed the solicitor that she wished to finalise the order as soon as possible.

In respect of a suggestion that the husband had coerced the claimant into agreeing the terms of the consent order, this was raised by the claimant with previously instructed solicitors instructed. She had not raised the issue thereafter, and the solicitor was not under a duty to investigate the issue or to have gone through files provided by the solicitors previously instructed solicitors and which may have alerted her to the issue: there was nothing to suggest to her that reading those files was necessary at the time they were received.

The solicitor's duty under the retainer was limited to doing no more than redraft the consent form, which, as King L.J. noted, was a complex legal document.

Furthermore, and again as noted by King L.J., if solicitors were to continue to work under limited retainers, via unbundling legal services, it was important that such retainers did not give rise to a fear that a wider and broader duty of care would be imposed. If this were to happen it would be likely that solicitors would not offer such limited, unbundled, services, which in turn would negate the perceived benefits of unbundling where the wider context was, due to the removal of legal aid, one where a litigant would face a choice between obtaining no legal assistance or obtaining limited, unbundled, legal assistance. Solicitors ought therefore to take care in their approach to limited retainers; ensuring that any client care letters, attendance notes, or retainer letters are drafted to properly reflect their client's instructions.

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