

Unbundling unshackled?

Sophie Belgrove & Alison Padfield examine the Court of Appeal's approach to solicitors' duties under a limited retainer



Recent research by Ipsos MORI for the Legal Services Board and Legal Services Consumer Panel indicates that law firms are beginning to develop affordable alternatives to a traditional retainer (*Qualitative research exploring experiences and perceptions of unbundled legal services*, 6 August 2015). Clients who choose alternatives to full-service representation tend to do so for reasons of reduced cost and the opportunity to exercise greater control over a case. The need for alternatives has grown in light of the greatly reduced availability of legal aid. "Unbundling" of legal services is becoming more commonplace; the term "unbundling" denotes provision of discrete legal advice or assistance under a limited retainer. Recent cases illustrate the need for clients and solicitors to understand the scope of solicitors' duties in this developing area.

Padden

In *Padden v Bevan Ashford Solicitors* [2011] EWCA Civ 1616, [2012] 2 All ER 718, the claimant alleged that the defendant had failed to advise her properly in connection with the provision of security over her matrimonial home to a third party, in order to assist her husband who was facing prosecution for misappropriating client funds. In a short consultation with a newly-qualified solicitor employed by the defendant, the claimant explained that her "main concerns were that her husband not be sent to prison...[and] the only way in which he might avoid going to prison was to pay back [the third party]". The solicitor advised her not to proceed

further advice was given. Subsequently, another solicitor certified that the claimant had "had the consequences of this deed and the obligations which it imposes on her explained", that he was satisfied that she "[understood] the nature of this deed and its meaning and effect", and that "[she had] freely consented to it without undue influence". He had given her no advice. The appeal was allowed: merely advising the claimant not to enter into the transaction was insufficient, and she should have been advised that, whatever she did, a prosecution was almost inevitable. This case illustrates the importance of advising a client properly even where acting under a limited retainer.

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Following a retrial, *Padden* reached the Court of Appeal again ([2013] EWCA Civ 824, [2013] All ER (D) 186 (Jul)). Ultimately, the firm was liable because the claimant had given the "clearest possible evidence that she would not have signed the documents if she had been advised, as she should have been by any competent lawyer, that the completion of

the proposed transactions would have been very unlikely to prevent a prosecution”.

Minkin

Minkin v Landsberg (practising as *Barnet Family Law*) [2015] EWCA Civ 1152, [2015] All ER (D) 153 (Nov) involved an appeal against the dismissal of a solicitors' negligence claim. The defendant had been instructed to draft a consent order reflecting an agreement between the claimant and her husband for approval by the court in divorce proceedings. The claimant came to regret having entered into the consent order and commenced proceedings against the firm. It is implicit in a solicitor's retainer that she will proffer advice which is "reasonably incidental" to the work she is carrying out, and the question arose as to whether the giving of such advice was "reasonably incidental" to the drafting of the consent order. The Court of Appeal (Jackson, King and Tomlinson LJ) held that it was not. It observed that legal aid was no longer available in divorce proceedings and that it was "now commonplace for the parties to negotiate their own agreements and then to instruct solicitors for limited purposes, such as drawing up a consent order for the court's approval". This service was "invaluable to both courts and litigants", saving court time and stemming the increase in disputes relating to consent orders.

The Court of Appeal went on to hold that, although the defendant had not followed best practice and recorded the limited terms of the retainer in writing, its terms had been proved at trial, and she was not under a duty to advise beyond those limited terms. (In an interesting twist, the husband also ended up in the Court of Appeal, in a dispute about his solicitor's right to payment under a full retainer after ceasing to act: *Minkin v Cawdery Kaye Fireman & Taylor* [2012] EWCA Civ 546, [2012] 3 All ER 1117.)

Minkin should allow solicitors to give limited advice to clients who lack funding for full representation without fear that they will be held responsible for matters which fall outside the scope of the limited retainer, provided that proper advice is given under the retainer (see *Padden*). Clarity as to the scope of the retainer is plainly key; it is surprising that the Law Society's March 2015 Practice Note, *Unbundling civil legal services*, while recognising that it would be prudent to do so, suggests that solicitors may decide that it is not necessary to issue a tailored client care letter when providing unbundled legal services.

NLJ

Alison Padfield & Sophie Belgrove, barristers,
Devereux Chambers
(www.devereuxchambers.co.uk;
www.chaffanbrass.co.uk)