

Update

Duty bound: Shepherd Construction Ltd v Pinsent Masons LLP

A view from Neil Jamieson and Sarah Crowther

In a recent decision, the Queen's Bench Division held that a long-standing relationship between solicitors and a client involving many instructions over time did not give rise to a duty to keep under review the suitability of advice and drafting it had previously provided.

This judgment should be of interest to all professionals and their insurers in its consideration and rejection of any such general ongoing duty as **"hopelessly wide"** and **"commercially and professionally worrying"**.

The alleged general retainer

The claimant began to retain Masons solicitors from 1989 on various matters and in mid-1998 instructed the firm to advise on and draft various amendments to standard forms of construction subcontract.

Masons' advice and drafting correctly reflected the law then in force regarding "pay when paid" clauses in construction contracts ie, clauses which make payment by B to C conditional on B first receiving payment from A. Statute provided that such clauses were ineffective unless, inter-alia, A had an administration order made against it under the Insolvency Act 1986.

In late 2007, a developer engaged the claimant as a main contractor on a shopping centre project and the claimant entered into subcontracts with three parties based on Masons'

1998 drafting. In March 2009, the developer went into administration by way of a directors' resolution. This alternative route into administration had only been added to the Insolvency Act 1986 by way of amendment in 2002 and was therefore not covered by Masons' 1998 drafting.

As a result, the "pay when paid" clauses in the subcontracts were ineffective and the claimant had to pay the subcontractors, even though it had not received any payment in from the developer. Its total losses were over £10.6 million

Masons' advice and drafting was not negligent when the work was done in 1998. So the claimant sought to argue that its relationship with Masons was in the nature of a single contract or retainer, comprising various specific instructions/commissions, under which Masons had an ongoing duty to keep under review the suitability of the advice and drafting it had previously provided. Masons allegedly breached that duty by failing to identify that its 1998 drafting needed updating to reflect the 2002 statutory amendment.

In contending for the single retainer, the claimant relied on the extensive and long lasting relationship between it and Masons (and its successor partnerships), involving over 70 pieces of work between 1998 and 2009, including advice on 13 subcontracts. The claimant also relied on the consistency as regards the individual lawyers involved in the different pieces of work and broad consistency as regards the type of work undertaken and the terms of fees charged.

The judgment – no general retainer

The judge rejected the claimant's contention that there was a single general retainer. There was no suggestion that any express single retainer had been agreed or that the claimant was ever asked to make payment in relation to a single retainer rather than for individual pieces of work. The placing of specific commissions, even a large number of them, does not give rise to a necessary implication of an overarching general retainer. Indeed, the very fact that there were specific commissions suggested that that is all that they were. The fact that a law firm sends out unsolicited briefings, invitations to seminars and marketing materials does not change things, nor does the fact that the same individual lawyers may have been involved in many of the matters. It was not alleged that any of the lawyers involved were aware that the earlier contracts had become outdated and/or gave rise to potential commercial problems.

The judge therefore concluded that the general retainer allegation was "hopelessly wide". He commented that **"there is something commercially and professionally worrying if professional people are to be held responsible for reviewing all previous advice or indeed services provided"** in the absence of a specific retainer. Imposing such a continuing duty would, in effect, turn solicitors into insurers against future legal or other changes impacting on work they had previously done for their clients. This would be unworkable: how long would obligations imposed by an implied retainer continue? Would the obligations survive the departure or retirement of the relevant solicitors? What payment terms would apply? Simply asking these questions shows how difficult it would be in most cases to define a general retainer.

Successor firms - general retainer even less likely

There was an added complication in that Masons had merged to become Pinsent Masons in 2004, which in turn became Pinsent Masons LLP ("PMLLP") in 2008.

The claimant accepted that a single general retainer spanning all three firms was unarguable (not least because the successor firms did not assume responsibility for the services provided by its predecessor(s)). Instead, the claimant argued that there were three general retainers, one with each successive firm, based on correspondence sent at the time of the merger/LLP formation and conduct of the parties which was alleged to be suggestive of continuity of service.

The judge had no doubt that these matters did not give rise to a general retainer to review the advice and drafts of the predecessor firms and he commented that it was highly unlikely that such an obligation would ever be implied.

Circumstances which might give rise to a duty to review previous work

Although the judge rejected the claimant's general retainer analysis, he did identify certain situations which might result in the implication of a duty to reconsider advice given under previous retainers. He said he could "see some force", for example, in an argument that

- (i) an instruction to solicitors to review a subcontract may carry with it a duty to revisit previous related advice concerning the same document; and similarly
- (ii) a retainer to review one standard form document may lead solicitors to conclude that other standard forms require revision and impose a duty to alert that client to that need.

The judge also gave the example of a private client solicitor retained to advise first on a will and then later on a divorce. That solicitor should expect to be under a duty to advise that remarriage would revoke the earlier will. A duty to look backwards under those circumstances is not surprising and goes to show that the existence or otherwise of a duty to review previous work is fact specific. Wisely, the judge did not attempt to set out any general principles although he did acknowledge that the passage of time would be an important factor. The key consideration in each of the above examples is the knowledge of the solicitor (actual or constructive) of earlier work for the same client which the subsequent retainer bears upon. These may not be issues unique to a solicitor who has acted before: they may be matters which any solicitor, whether or not previously instructed, ought to regard as relevant issues for investigation in carefully carrying out his instructions.

Conclusion

Although this case was in the field of construction law, the issues it addresses are relevant across the professions and to their insurers. The finding that there was on the facts no general retainer to review and revise previous work, and that such a retainer will rarely be implied, was unsurprising but welcome all the same. The fact remains, however, that there can be scope on particular facts for claimants to contend that a professional owed a duty to reconsider earlier work, usually as an incident of a new retainer.

A suitable disclaimer may help to dispose of some potential claims and firms may wish to revisit their terms of business in light of this judgment. The only circumstances in which a disclaimer is likely to be over-ridden are where it should have been reasonably obvious in the context of new work that previous advice needed to be revisited or a warning issued to that effect. As a consequence, a common sense approach to risk management should avoid most problems. In particular, although engagement letters should always

be drafted tightly, advisers should not take too narrow a view when considering the knock-on effect of a particular set of instructions in the context of what they know or might reasonably be expected to find out about a client's business and previous work undertaken for that client.

Continuity in client relationships will always help to flag up connections between different pieces of work and even if no duty arises it may help to create opportunities for further work.

Further information

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