Knowing the limits

Making sure your retainer is in writing is only the first step to minimising misunderstanding about its scope, say **Simon Butler** and **Tom Rainsbury**

Knowing the limits on your duty to advise and when it is legitimate to stop acting for a client are important questions which can carry important consequences. Unfortunately, there are no straightforward answers, but one of the key principles that should guide practitioners is the need to express with clarity what is covered by the retainer, so that there can be no ambiguity and misunderstanding.

The importance of understanding what is covered by the retainer is best illustrated in the case of *Tom Hoskins PLC v EMW Law* [2010] EWHC 479 (Ch). The claimant instructed solicitors to act in the sale of five properties. The transaction was completed late and on unfavourable terms. The claimant alleged that the solicitors had failed to obtain the landlord's consent to assign in respect of the leasehold properties in time for the contract to be made unconditional. Furthermore, they had been negligent in drafting the contract of sale.

Mr Justice Floyd held that the defendant had been negligent. In determining liability, it was necessary to determine the scope of the retainer in the absence of a formal letter. The judge considered that its scope had to be spelled out from the nature of the transaction. He acknowledged that a solicitor was not normally required to give general commercial advice. On the facts, the judge held that, although the obtaining of the landlord's consent fell outside the retainer, the scope of the retainer extended to providing legal advice and assistance in connection with the making of that application.

In *Mason v Mills & Reeve* [2011] EWHC 410 (Ch), the defendant firm was retained in relation to the completion of a management buy-out. Before completion, the defendant received an email exchange which mentioned that one of the shareholders was about to undergo a heart operation. The MBO was completed and the shareholder subsequently died during his operation, resulting in adverse tax consequences. The claimants alleged that, following the receipt of the email, the defendant should have advised a deferral of the MBO until after the heart procedure.

Implied terms

Mr Justice Arnold dismissed the claim. He considered the scope of a solicitor's duty to his client, saying that this depended on the express and implied terms of the retainer. The key implied term of any retainer was the duty to exercise reasonable care and skill. The scope of that duty would first and foremost depend on the client's instructions.

Relevant circumstances also included the nature of the client and the degree of expertise which the solicitor held himself out as possessing. There was no duty to advise in respect of matters in relation to which a solicitor reasonably believed the client was already receiving advice. In order to place limits on the duty of care, a solicitor had to ensure that the client had understood and consented to this.

On the facts, the judge found that the retainer extended to giving advice as to the tax consequences flowing from the MBO, but not to advising on how the transaction fitted into the shareholders' personal financial and tax planning positions.

As a matter of good practice, a retainer ought to be in writing. This should help minimise the risk of misunderstanding. But it is not essential, as confirmed in *Fladgate LLP v Harrison LLP* [2012] EWHC 67 (QB). Mrs Justice Lang held that "the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer is in writing. It may be oral. It may be implied by the conduct of the parties in the particular case…".

> **"Expectations should be managed from the outset in relation to issues such as costs, the relative strengths and weaknesses of arguments which they wish to pursue and the scope of the retainer. It is important to provide regular updates in this respect"**

Aside from scope, termination of the retainer is the other area most frequently raising difficulties.

Reasonable grounds

The common law has traditionally implied that a contract of retainer is an "entire" contract. Once instructed, a solicitor must continue to act until the very end. The main exception is where there are reasonable grounds for refusing to act and reasonable notice is provided.

This position has been reflected in the regulatory framework. Rule 2.01(2) of the Solicitors' Code of Conduct 2007 provided

that a solicitor "must not cease acting for a client except for good reason and on reasonable notice". The guidance gave the examples of circumstances where there had been a breakdown in confidence or an inability to obtain proper instructions.

The new outcomes-focused Code of Conduct 2011 appears to preserve this position. Outcome 1.3 provides that, when deciding whether to terminate instructions, a solicitor must comply with the law and the code. By ceasing to act without good reason and reasonable notice, it "may tend to show" that the outcomes have not been achieved.

In *Richard Buxton (Solicitors) v Mills-Owens* [2010] EWCA Civ 122, the solicitors terminated their retainer after they were instructed to advance a claim on a basis which they felt was "doomed to disaster". Under the terms of business, they were entitled to stop acting where there was good reason to do so.

The costs judge considered that, absent improper instructions, the retainer should not have been terminated. This decision was upheld on appeal by Mr Justice Mackay.

Allowing the appeal, the Court of Appeal identified that there was no comprehensive definition of what amounted to a "good reason". However, the court resisted a narrow interpretation of the expression, emphasising that it was wrong to restrict its scope to circumstances where a solicitor was instructed to do something improper. The appellants had been right to consider that the arguments were not properly arguable. The court held that there had been a good reason to terminate the retainer and the appellants were entitled to their fees.

In the more recent case of *Minkin v Cawdery Kaye Fireman & Taylor* [2012] EWCA Civ 546, the solicitors had provided the client with an estimate of costs. Due to unexpected events, the estimate was exceeded. The client complained that the interim bill was too high. The solicitors indicated that they would not carry out any further work until the account was satisfied. Further words were exchanged before Mr Minkin sent an email maintaining that he had lost confidence in the firm.

The Court of Appeal held that the solicitors had suspended rather than terminated the retainer. Moreover, they had been entitled to do so since, in accordance with the terms of business, there was no "reasonable justification" for non-payment. The terms made it clear that the estimates were not binding and Mr Minkin was informed as to his right to challenge any bill. The retainer had been terminated by the client in his email (which the judge said had been akin to Lord Sugar pointing his finger and saying "You're fired"). The client was therefore liable to pay costs until that date.

This principle was amplified in *French v Carter Lemon Camerons LLP* [2012] EWCA Civ 1180, the client had instructed the respondent solicitors to act for her in litigation against an insurance company. The relationship broke down and she was subsequently highly critical of her solicitor. A meeting was convened in which a senior partner gave conflicting messages as to whether the firm could continue to act in such circumstances. At the end of the meeting, however, he confirmed that they would continue to act at least until the case management conference. After the CMC, the claimant sent an email which reiterated her allegations and stated that she was left with no choice but to represent herself. The client insisted that the solicitors provide her with all the relevant files.

The Court of Appeal held that the retainer had not been terminated during the course of the meeting. Even if it had been, there was a strong argument that the solicitors were contractually entitled to terminate in view of Ms French's complaints. Instead, the retainer had been terminated in the appellant's email after the CMC. The solicitors were accordingly entitled to assert their lien.

What these recent cases show is that it is important to communicate with the client throughout proceedings to ensure the client's expectations are being met in accordance with the retainer. This means managing the client's expectations with a reality check and possibly revisiting the retainer at important stages of the process.

Practical steps

A number of important points can be distilled from these cases:

1. The retainer should make the nature of the engagement clear. The terms should accurately define the respective scope and limits of the solicitor's responsibilities.
2. The retainer should clearly state that costs estimates are not binding, providing examples of the circumstances in which they may be renegotiated.
3. The retainer should inform the client of his right to challenge any bill.
4. The retainer should spell out a right to suspend work pending payment of any outstanding bills or payments on account.
5. The retainer should include an express term making it clear that, in the event of termination, the solicitors are entitled to charge certain fees and to assert a lien for unpaid fees.
6. The terms or business should comply with the regulatory framework. Solicitors are under a professional duty to continue acting unless there is a "good reason" to terminate their services. It may be instructive to identify examples of circumstances which constitute good reasons.
7. It may be possible to circumvent the entire contract rule by including contractual rights to payment before the end of proceedings.
8. It is important to ensure that a client care letter and terms of business are sent to the client.
9. Expectations should be managed from the outset in relation to issues such as costs, the relative strengths and weaknesses of arguments which they wish to pursue and the scope of the retainer. It is important to provide regular updates in this respect.
10. The client should be informed immediately if cost estimates are likely to be exceeded and the reasons for this.
11. All advice and information given to clients should be recorded in writing.
12. Finally, the termination of a retainer should be seen as an exceptional course of action. What amounts to a "good reason" has been left open for debate by the appellate court. This is understandable, due to cases being fact sensitive. However, failure to get the answer right may expose the solicitor to the risk of non-payment of fees or a claim in negligence.

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