No retainer, but still a duty of care? The decision of the Court of Appeal in *Miller v Irwin Mitchell LLP* [2024] EWCA Civ 53

Introductory

1. The Court of Appeal handed down judgment in *Miller v Irwin Mitchell* on 1 February 2024, just 9 days after hearing argument. The Court (Phillips, Andrews and Falk LJJ) upheld the decision of HHJ Cadwallader at first instance ([2022] EWHC 2252 (Ch)), in which he dismissed Mrs Miller's claim after a trial of various preliminary issues. The decision gives useful guidance to practitioners considering whether a duty of care is owed by a solicitor prior to the parties agreeing a retainer.

Background

2. Mrs Miller and her husband went on a package holiday to Turkey, which they had booked with a travel operator, Lowcostholidays Spain SLU ("Lowcost"). The contract provided that English law would apply, and the applicable jurisdiction was England and Wales.

3. On 13 May 2014, Mrs Miller fell down the staircase leading to the couple's room at the hotel, which they subsequently contended was unsafe, and sustained a 20cm open fracture to her leg. Mrs Miller had emergency surgery in Turkey before being flown home. Unfortunately, her leg became infected and after various attempts at treatment, it required amputation, which took place in November 2015.

4. Mr Miller had informed the hotel of the accident on 15 May 2014, when he also contended that the staircase was dangerous. LTS, an intermediary through which Lowcost had booked the hotel, also became aware of the incident at that point. The judge concluded that Lowcost, too, had sufficient information to notify its insurer, HCC, on 15 May 2014, albeit that it had not been communicated to the individual responsible for notifying insurers.

5. On 19 May 2014, whilst in hospital in the UK, Mrs Miller telephoned Irwin Mitchell's "Legal Helpline". She left a message and was called back by an adviser, Ms Halliwell, who collected information and gave a high level explanation of the law in respect of claims for personal injury and referred to the applicable limitation period of 3 years. Mrs Miller was aware that the purpose of the Helpline was to gather relevant information and for that to then be supplied to the relevant department of Irwin Mitchell, which would then contact her.

6. On 20 May 2014, the International Travel Litigation Group ("ITLG") of Irwin Mitchell attempted to contact Mrs Miller, without success. On the same day, it sent Mrs Miller a letter seeking further information and documents from her. Despite several chasing letters, Mrs Miller did not reply to provide any of the requested material until 8 April 2015. Irwin Mitchell then sought advice from Counsel.

7. In October 2015, Irwin Mitchell discussed a possible CFA with Mrs Miller, who also raised the possibility of a clinical negligence claim. In November 2015 Mrs Miller told Irwin Mitchell that she was to undergo an amputation, and at that point her case was transferred to a new team, dealing with higher value claims. On 25 January 2016, Irwin Mitchell contacted Mrs Miller confirming that it would act on her behalf and considered that it was ready to proceed.

8. A Letter of Claim was sent to Lowcost on 22 February 2016, with a request that it notify its insurer. HCC reserved its position on 8 March 2016 and on 11 March 2016, Plexus Law wrote to Irwin Mitchell confirming they were instructed to act for HCC.

9. On 28 April 2016, HCC declined cover for the claim and in July 2016, Lowcost went into administration.

10. Mrs Miller then brought a claim against Irwin Mitchell, alleging that she had retained the firm from 19 May 2014, and/or that it owed her a duty of care at common law. She alleged that Irwin Mitchell had negligently failed to notify Lowcost of her claim, alternatively failed to advise her to notify Lowcost of the accident and/or to tell Lowcost

that it should notify its insurer. She alleged that but for Irwin Mitchell's breaches of duty, she would have recovered in full from Lowcost/HCC.

The Judge's Judgment

11. HHJ Cadwallader dismissed the claim, having concluded that:

(a) There was neither an express nor an implied retainer between Mrs Miller and Irwin Mitchell until 25 January 2016, when a retainer was implied as a result of Irwin Mitchell confirming it would act and sending a CFA for Mrs Miller to sign (which she only signed in July 2016);

(b) No duty of care equivalent to that owed under a retainer was owed until 25 January 2016 either;

(c) Irwin Mitchell did not owe a duty to advise Mrs Miller to notify Lowcost of the accident or tell Lowcost to notify its insurer prior to 22 February 2016;

(d) If Mrs Miller had been advised to notify Lowcost of the claim on 19 May 2014 she would have done so. Lowcost would then have notified HCC timeously in compliance with its obligations under the insurance policy and there would have been a 100% chance that the policy would have responded to the claim;

(e) However, if the notification of the claim had happened on or after 8 April 2015, HCC would still have declined cover on the basis of late notification. The judge assessed the prospects that the policy would have responded at any time from and after 8 April 2015 at zero.

The Court of Appeal

Assumption of Responsibility

12. In the Court of Appeal, the case was mainly run on the footing that Irwin Mitchell had assumed a responsibility to Mrs Miller which was wide enough to include a duty to give her positive advice that she should notify Lowcost immediately of her claim, so they could inform HCC [39].

13. The judge had rejected Mrs Miller's contentions that there had been either an express or implied retainer. On appeal she did faintly pursue the claim of an implied retainer, but this was firmly rejected by the Court of Appeal on the facts, on the basis that there was "an abundance of evidence" pointing the other way [35]. It was not until much later that Irwin Mitchell had been properly instructed in the case.

14. On assumption of responsibility, Andrews LJ (giving the only reasoned judgment) adopted the useful summary of Carr LJ in *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970 at [58] – [61] of the principles on how and when such an assumption will result in a duty of care arising even though there is no retainer. The key is that the solicitor does some act involving undertaking responsibility for a task, which in turn implies that they have voluntarily assumed a legal duty to do so competently. Carr LJ emphasised at [60] that this is to be judged objectively in context and without the benefit of hindsight (confirmed at [45] in *Miller*).

15. The Court of Appeal agreed that Irwin Mitchell, through Ms Halliwell on the Helpline, did assume some responsibility towards Mrs Miller, because Ms Halliwell chose to give Mrs Miller certain "high level" level advice about her potential personal injury claim, including that there was a three-year limitation period for bringing such a claim [43]. There is no doubt that the solicitor must act competently in giving the advice which they do give, even if it is gratuitous. This includes not giving advice which is misleading by omission, as in the case of *Crossan v Ward Bracewell & Co* [1984] PN 103, which Andrews LJ considered, where the solicitor told his client that he only had two funding options, whereas in fact the client had a third [66].

16. However, as the Court of Appeal found in *Miller*, the advice which Ms Halliwell did give was accurate [67]. The real issues were (a) whether the scope of the advice which she

undertook to give extended to giving advice on Mrs Miller protecting her position more generally, in particular against the possibility that Lowcost's insurers had not been notified and (b) even if it didn't, whether there was also a duty, in assumption of responsibility as opposed to retainer cases, to give advice which was "reasonably incidental" to that actually given, and if so whether that extended here to giving advice on protecting Mrs Miller's position in the way argued.

17. Here the importance of avoiding hindsight came to the fore, because in truth Mrs Miller's case was much less attractive on careful analysis than it looked at first blush. The sequence of events which actually transpired - an infection which led to amputation, a failure by the tour operator to notify the insurer of an accident of which it was aware, and the subsequent insolvency of the tour operator - was a very unfortunate sequence but also unlikely and unexpected. Andrews LJ concluded that it could not be said that the scope of the advice which Irwin Mitchell undertook to give extended to advising Mrs Miller to take steps to protect herself against what was, in reality, a combined risk that the tour operator would be impecunious and would also fail to notify its insurers of the accident [67] - [70].

18. This case is therefore a good example of the perils of allowing sympathy (of which there was plenty for Mrs Miller) to distract from the need to view the matter without the benefit of hindsight.

19. The Court of Appeal did not consider it necessary to determine whether the duty of care extended to "reasonably incidental" advice in assumption of responsibility cases, because they considered that on any view, the advice said to be required could not possibly be considered reasonably incidental to the advice which was actually given [62].

20. We would comment that there does seem to be a real reluctance to extend the concept of "reasonably incidental" advice to cases which are dependent upon assumption of responsibility rather than retainer in the first place, although the court in both *Miller* and *Spire* declined to determine the point. Where there is no retainer, it will be attractive to

the court to limit the solicitor's liability to competence in what they have positively undertaken, and not to extend their scope of duty any further.

The Excess Clause

21. The Court of Appeal also considered (obiter) that the judge was entitled to decide a causation issue concerning Lowcost's insurance as he had, given the way it had been pleaded and presented at trial [88]. The Court of Appeal was, however, critical about the formulation of the preliminary issues which the judge had been required to determine, which in this respect sought discrete rulings on matters "integrally bound up with each other" [81].

22. The judge had been invited to determine the proper construction of the excess clause in HCC's policy, on which Irwin Mitchell relied. Lowcost's insurance with HCC was on a claims occurring basis and included a general exclusion from liability which provided that HCC would not be liable for the excess stated in the Schedule, which was a so called "non-ranking excess" of £10,000 per person, inclusive of costs, with an annual aggregate excess of £400,000. The duration of the HCC policy had been extended by Lowcost to cover an additional four months, and the effect of that was that the aggregate excess was £560,000. The evidence was that only £6,765.78 of that had been eroded before Lowcost went into administration in July 2016.

23. The judge concluded that the proper construction of that clause was that it was a "pay to be paid" clause, which operated as a condition precedent to HCC's liability, and therefore required Lowcost to disburse claims totalling £553,234.22 first from its own resources before HCC had any liability to indemnify. The effect of that construction, combined with Lowcost's impecuniosity at the relevant time, was that a claim against Lowcost would in any event have ended with no recovery by Mrs Miller.

24. On appeal, Mrs Miller sought to advance a new case, that the judge was wrong to decide the question of construction of the Excess Clause, because he should instead have

assessed the chance that a reputable insurer would have repudiated liability. The reality, Mrs Miller's counsel contended, was that the claim would have settled, and it was sufficient for the Claimant to show there was a respectable argument the Excess Clause was *not* a "pay to be paid" clause, such that there was a real chance HCC would have settled, with a payment reflecting the arguments in respect of that clause.

25. The Court declined to determine those matters, because that was not the case the Judge had been asked to address [87, 88]. The Court accepted that the construction of the Excess Clause was *"far less straightforward than the Judge appears to have thought"* [89] and that there were arguments either way which were not advanced or considered below [89, 90], but those matters could not have been decided on the evidence before the Court of Appeal in any event [93]. As Irwin Mitchell observed, the Claimant had not adduced evidence from HCC as to what it would have done if notified of the accident in May 2014 and a claim had then been made in 2016.

26. The decision is therefore also a signal reminder of the importance of carefully pleading causation allegations, particularly in cases where the claim is properly analysed as one for the loss of a chance, and of the need to adduce appropriate evidence in those respects.

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5 February 2024