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Belsner v Cam Legal: looking back to look ahead

As the headline case rumbles on, Dan Stacey explores the courts' previous stances on the issue of fiduciary duties & solicitors' remuneration

IN BRIEF

- Previous rulings, both before and after the Attorneys' and Solicitors' Act 1870, established the position of the courts on fiduciary duties and solicitors' remuneration.
- There is no indication that such duties relating to remuneration do not survive into the present.

The ongoing YouTube soap opera of *Belsner v Cam Legal* in the Court of Appeal is now to have further screenings on 4, 5 and 6 October 2022. It is a convenient opportunity to consider fiduciary duties and solicitors' remuneration, one of the issues at stake in the appeal. It is suggested here that a solicitor owes a fiduciary duty to deal fairly with the client in respect of remuneration before and during the currency of the retainer.

Fair dealing

First, that a fiduciary duty is owed by a solicitor to a client is not in doubt: eg *Clark Boyce v Mouat* [1994] 1 AC 428 at p437E. That is due to the element of confidence and influence inherent in the solicitor/ client relationship.

Second, it might (as a result) be expected that a duty subsists in respect of dealings between the solicitor and client over the solicitor's remuneration. The client is relatively ignorant as to costs, and the solicitor is experienced. In *Bristol & West v Mothew* [1998] Ch 1, [1996] 4 All ER 698 Millett LJ summarised (at 18D) the situation 'where the fiduciary deals with his principal'. He said that in such a case 'he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction'. A retainer amounts to an agreement or dealing between client and solicitor.

Third, the case law which has considered the interplay of fiduciary duties and solicitors' remuneration indicates that such a duty (a) is owed by the solicitor to the client in respect of remuneration; and (b) comes into existence at or before the time of the agreement.

The key case is *Clare v Joseph* [1907] 2 KB 369. The issue was whether a client could rely upon an oral agreement under which the solicitor agreed to take less than the taxed rates.

The Court of Appeal stated that before the passing of s 4 of the Attorneys' and Solicitors' Act 1870 ('the 1870 Act') the court viewed with 'great jealousy' agreements between solicitor and client. Per Fletcher Moulton LJ at p376:

> 'At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were however viewed with great jealousy by the courts because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration and there was so great an opportunity for the exercise of undue influence that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitors part to benefit himself at his client's expense'.

Even more on point are the words of Buckley LJ at p378:

> 'The law in existence when the Act of 1870 was passed is clear; the solicitor could not charge his client more than the amount of his bill of costs when taxed, and it was his duty to advise his client that it was contrary to his interest to pay more. Further, if there were an agreement between them by which the client was to pay less, the solicitor being in a fiduciary relationship to him, owed the duty advising him that he ought not to enter into such an agreement if other provisions in it were contrary to the client's interest. The solicitor was under these disabilities when bargaining with his own client because it was his duty to guard him from acting in a way prejudicial to his interest'.

And per Lord Alverstone CJ at p372:

> 'We have had considerable discussion in this appeal as to the state of the law before 1870; in my opinion it is correctly stated in *Cordery on Solicitors* 3rd ed at p 261. Agreements as to costs were often made before 1870 and upon the application of the client, they were considered and examined by the courts and they were not infrequently held to be binding both on the solicitor and the client. The inquiry was always directed to the question whether the agreement was fair and reasonable and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair and unreasonable but was held binding upon him'.

In summary, the courts considered that before 1870:

a. there was a great opportunity for the exercise of undue influence on

the part of the solicitor when agreeing terms as to remuneration;

b. solicitors were under disabilities when bargaining with their own client because it was the solicitor's duty to guard the client from acting in a way prejudicial to the client's interest;

c. solicitors were:
   i. in a fiduciary relationship with their client and consequently must advise their clients;
   ii. not to enter into an agreement as to costs if other provisions were contrary to the client's interest; and
   iii. that it was contrary to their interests to pay more than the solicitor's bill when taxed;

d. the court would only enforce such agreements if satisfied that they were made under circumstances which precluded any suspicion of a benefit at the expense of the client;

e. the court had an unfettered right to determine what was fair and reasonable between the solicitor and the client; and

f. there is no indication that the court considered that where remuneration was concerned the duty only arose after the retainer was concluded; to the contrary, the reasoning of Buckley LJ (duty to advise not to enter into an agreement) and Fletcher Moulton LJ (such agreements only enforceable if properly entered into) is consistent with such an obligation arising before entry into the retainer.

The pre-1870 cases on the basis of which the Court of Appeal reached those conclusions included:

- *Scougall v Campbell* (1826) 3 Russ 545, 38 ER 679 per Lord Chancellor Eldon: 'if any solicitor tells a client beforehand, that he will not undertake his business, if his bill is to be taxed; or if any solicitor, in the progress of a cause, gives his client to understand, that he will go on with it or not go on with it, according as his bills are to be taxed or not to be taxed, I think it my duty to say, that the judges of the land will not permit him to be a solicitor in any other cause…'; and
- *Drax v Scroope* (1831) 2 B & Ad 581, in which an attorney relied upon an agreement between himself and the client (a 'special agreement') under which the client had agreed to a scale of charges for journeys (excluding travelling expenses) which exceeded the usual rate permitted on taxation. It was held per Lord Tenterden: 'No agreement of this kind even with reference to journeys can be absolutely binding; the Master must still exercise his judgment as to the propriety of allowing the charges according to the circumstances laid before him. And if it appeared in this case that the Master had thought no discretionary power was left him and that he was precluded by the agreement from entering into to consideration upon which the charges were made, there would have been ground [for taxation]'.

Importantly, these underlying fiduciary obligations on solicitors survived *after* the passing of the 1870 Act. The Court of Appeal in *Clare v Joseph* considered that the 1870 Act merely regulated the procedure for the control of such agreements and did not alter the substance of the law. Fletcher Moulton LJ stated (at p376): 'Before 1870 the court had full power to investigate [agreements between solicitor and client as to remuneration] and in my opinion … s 4 [of the 1870 Act] did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them' (and Buckley LJ and Lord Alverstone CJ said similar things). There is no indication that such duties relating to remuneration do not survive into the present. To the contrary, the increasing complexities of modern litigation might point all the more clearly to the requirement of such duties when negotiating remuneration.

Fourth, it does seem wholly artificial to distinguish between fiduciary duties owed before the retainer and those owed afterwards on entry into the retainer. Nor does this distinction benefit the solicitor. A solicitor's client (unlike most of those who enter into contractual relations) has, even after becoming contractually bound, a free hand to terminate the agreement whenever they like, subject to paying incurred fees.

So, if a fiduciary duty is owed, but not before contractual relations are established, and thus only comes into existence on (say) agreement to the contractual documentation, then presumably at that very point the solicitor is bound to inform the client of the adverse nature of the agreement they have just entered into, their right to terminate the retainer, and indeed to advise the client that they ought to exercise that right (a right which the client can enforce without any significant downside and no or minimal fees incurred).

Fifth, the alternative to the existence of a fiduciary duty is unpalatable. The common law is typically hostile to duties owed between contracting parties: the buyer shall beware. Contracting parties need not disclose what they know but the counterparty does not; can seek payment well above market rates; may allow the other party to contract on disadvantageous terms. The vast majority of solicitors' retainers are entirely fair and reasonable as between them and their client. On the occasions when they are not, is the client to be limited to the vagaries of regulatory intervention and a slap on the wrist? **NLJ**

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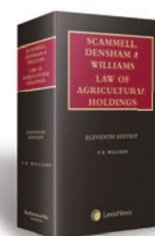

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