Case No: B2/2015/0154

Neutral Citation Number: [2015] EWCA Civ 1152
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT**
**DISTRICT JUDGE JACKSON**
**3CL10395**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2015

**Before :**

**LORD JUSTICE JACKSON**
**LORD JUSTICE TOMLINSON**
and
**LADY JUSTICE KING**

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**Between :**

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| **SHARON MINKIN** | **Appellant** |
| **- and -** | |
| **LESLEY LANDSBERG (PRACTISING AS BARNET FAMILY LAW)** | **Respondent/ Defendant** |

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**Mr Simon Sugar** (instructed by **Simons, Levine & Co**) for the **Appellant/Claimant**
**Miss Jacqueline Simpson** (instructed by **Mills & Reeve LLP**) for the **Respondent/Defendant**

Hearing date: 13th October 2015

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# Judgment

**Lord Justice Jackson:**

1. This judgment is in seven parts, namely:



## Part 1. Introduction

2. This is an appeal by the claimant in a solicitor's negligence action against the dismissal of her claim on liability. The central issue in this appeal is whether the solicitor's duties were limited to the extent that the defendant alleged and the judge has held.

3. The defendant solicitor in this case was instructed to put into an acceptable form the terms of a consent order agreed between the husband and the wife following divorce. Although the underlying matrimonial proceedings were in progress at a time when legal aid was available, the issues thrown up by this case have now assumed wider importance. That is because legal aid is no longer available for divorcing couples seeking to resolve their financial disputes. As King LJ explains in her judgment, it is 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 under section 25 of the Matrimonial Causes Act 1973. Therefore it is now often the case in the matrimonial context that solicitors undertake a limited retainer of the kind which is in issue in the present case.

4. The claimant in this action is Mrs Sharon Minkin. Her ex-husband is Mr Gary Minkin. When summarising the matrimonial proceedings, I shall refer to the parties as the husband and the wife. When discussing the professional negligence action, I shall refer to Mrs Minkin as the claimant. The defendant solicitor is Ms Lesley Landsberg, who practises as Barnet Family Law.

5. After these introductory remarks I must now turn to the facts.

## Part 2. The facts

6. The husband and the wife were married on 1st September 1991. The husband was a financial advisor, who set up his own business, Consolidated Financial Management Limited. The wife was an accountant, who assisted in the husband's business. They had three children. In later years they lived at 50 Moffats Lane, Brookmans Park, Hertfordshire ("the house").

7. There were problems in the marriage and the parties decided to divorce. They effectively separated on 11th November 2007, although they remained living in the same house.

8. Following the filing of a divorce petition, the husband and the wife entered into discussions about the financial position. Their main assets were the house, a flat in Spain and the husband's business.

9. Early in 2009 the husband and the wife reached agreement as to the division of their assets and their future financial arrangements. They recorded this agreement in a home made document headed "Minutes of Agreement to Consent to an Order". In essence they agreed that:

   i) The house would be sold and, after discharging various debts, the proceeds would be divided 67% to the wife and 33% to the husband.

   ii) The husband would have the Spanish flat.

   iii) The husband would pay to the wife £800 per month for the maintenance of the children.

   iv) The husband would pay £300 per month maintenance for the wife.

10. The wife then had second thoughts about this agreement and she sought the advice of Tilley and Co ("Tilley"), a firm of solicitors practising in St Albans. In early February 2009, the wife had a meeting with Tilley to discuss the issues. On 12th February 2009, Tilley wrote to the wife setting out the terms on which they were willing to continue acting for her. In the first part of that letter they wrote:

> "On a preliminary review of the settlement proposals it does not seem to be a satisfactory offer but would need further disclosure to back this advice up.
>
> I advised you that if you felt comfortable with the offer and felt that it was a good deal then you could of course accept it. However, the other options available to you are:
>
> (a) dealing with this matter through mediation without the advice of solicitors; and
>
> (b) negotiations through solicitors without any disclosure;

> (c) an application to the court with the requirement for full and frank disclosure before a settlement could be reached."

11. The husband was annoyed that the wife had been having second thoughts about the financial arrangements. There seems to have been an incident between them. On 23rd February 2009 Tilley wrote to Tynan Solicitors ("Tynan"), who were acting for the husband as follows:

> "Our client is extremely distressed about your client's recent behaviour towards her and the children. Our client states that your client is bullying her and has threatened her that if she does not settle the financial matters regarding the divorce he will make her life unbearable.
>
> Given that the parties cannot live within the same house amicably and that Mrs Minkin cannot leave her children, we ask that your client move out of the former matrimonial home temporarily until the matrimonial assets can be divided fairly.
>
> Mrs Minkin informs us that she has signed a consent order but that this was done under duress. Mrs Minkin withdraws her consent to the order as drawn up by your selves. We ask that you send a copy of the letter to the Court immediately. We have instead been instructed to issue Ancillary Relief proceedings."

Tilley sent a copy of that letter to their client, the wife.

12. Despite the incident between them, the husband and the wife presented their draft consent order to the court for approval. At a hearing in the Barnet County Court on 4th March 2009, Deputy District Judge Maunder refused to approve the consent order. In particular, he required the order to set out details of the husband's debts which were to be repaid out of the proceeds of sale of the house. The court adjourned the approval hearing to 7th April 2009.

13. Following the hearing on 4th March, the wife consulted an organisation called Jewish Women's Refuge. On their advice she made an appointment to see the defendant.

14. At a meeting on 9th March 2009, the claimant outlined the matters which had been agreed and asked the defendant to put the consent order into proper form, so that it could be approved by the court. The defendant accepted those instructions.

15. Later on the same day, the defendant sent two letters to the claimant. In the first letter, the defendant explained that she was acting under the "Legal Help Scheme". That was a legal aid scheme in 2009 under which the costs of one meeting and a modest amount of work were covered. In the second letter dated 9th March 2009, the defendant confirmed the client's instructions. She then stated:

> "**My Advice**
>
> On the basis of the information given to me, I advised you that the Order as currently drafted would need amending to show that the sale of the former matrimonial home is to be postponed and that the property is to be let for 12 months.
>
> There are other amendments that will have to be made as the recitals do not match the order in so far as in the recitals, the first part of the order; it states how the net proceeds of sale are to be applied however they are different from the body of the order. To that end I have written to Gary, copy enclosed, requesting full details of the creditors.
>
> Other amendments include the chattels for both the former matrimonial home and the Spanish property and an amendment so that the spousal maintenance continues even in the event of Gary's death so that such payments are to be met from his estate.
>
> I raised concerns that if Gary were to reside in America it would be difficult for you to enforce the order as you would have to have the order registered in the US and would have to instigate enforcement proceedings there. Such proceedings would be costly and unlikely to succeed as he would suggest that his circumstances have changed.
>
> **Action to be taken**
>
> I have written to Gary seeking further information. Upon receipt of the Information I shall re-draft the order for your approval. In the meantime I should be obliged if you would kindly let me know whether you have completed/or signed a Statement of Information for a Consent Order. "

16. On 10th March 2009, the claimant replied. She confirmed that the defendant had correctly understood her instructions. She raised a number of points about the consent order. In the penultimate paragraph she wrote:

> "I know the risks for maintenance if Gary is overseas but I don't think he will agree to capitalise my maintenance and I just want to bring this all to an end as swiftly as possible."

17. Thereafter the defendant corresponded with Tynan. The two firms of solicitors drew up a consent order, which (a) embodied the matters agreed between the husband and the wife and (b) was in a form likely to be approved by the court. The draft consent order was filed at court in late March 2009.

18. In early April 2009, Tilley, who had ceased acting for the claimant, sent their file to the defendant. The file arrived on 6th April 2009.

19. On 7th April 2009 the husband and the wife attended at the County Court without solicitors on either side. The court approved the draft consent order and made a formal order in those terms.

20. Subsequently endless problems arose. There was much litigation between the husband and the wife. I need not go through that saga. It is all set out in the judgment below, but the details are not relevant to the present appeal.

21. The claimant came to regret having entered into the consent order. She blamed the defendant for her advice or lack of advice, which had resulted in the consent order being made. In those circumstances, the claimant commenced the present proceedings.

## Part 3. The present proceedings

22. By a claim form issued in the Barnet County Court on 21st October 2011, Mrs Minkin claimed damages for professional negligence against Ms Landsberg practising as Barnet Family Law.

23. The main thrust of the claimant's case was that the defendant was negligent in the advice that she gave and the advice she failed to give during the period leading up to the consent order. If the defendant had given competent advice, the claimant would not have submitted to the consent order dated 7th April 2009. Instead she would have obtained a much more favourable outcome of her claim for financial relief and property adjustment.

24. The claimant also made complaint about the defendant's conduct of the subsequent litigation, as a result of which certain costs orders were made against the claimant.

25. A central issue in the case was the scope of the defendant's retainer. The defendant's case was that this was strictly limited. The defendant set out her recollection of what was agreed on 9th March 2009 in paragraph 15 of her witness statement as follows:

> "The Claimant instructed me to complete the draft order to add missing information in relation to the debts owed by her and Gary Minkin, the contents of the former matrimonial home and a property in Spain and their agreement to postpone the sale of the former matrimonial home for 12 months, during which time it was to be let out. She informed me that she had been advised by Tilley & Co in relation to her financial position and entitlement to ancillary relief. I was led to believe by the Claimant that the agreement which had been reached with Gary Minkin reflected all that had been discussed between them and the advice of Tilley & Co. As a result, I was required only to redraft the poorly drafted order, that I was led to believe had been approved by the court but for the poor drafting, to reflect that which had already been agreed and include missing information to the extent necessary for the approval of the court

to be obtained. For the avoidance of doubt, I was not instructed to advise on the contents of the Minutes or the merits of the agreement already reached. I would not have been able to give any advice in any event as I did not have a full picture of the parties' financial resources. Mrs Minkin did not provide me with any documents relating to the parties' respective financial resources and did not at any time seek advice as to the agreed settlement."

26. The action came to trial on 4th November 2014 before District Judge Jackson. The trial lasted four days. The claimant appeared in person. Counsel, Miss Jacqueline Simpson, appeared for the defendant. Both the claimant and the defendant gave oral evidence and were subject to cross-examination. The defendant also called expert evidence as to the valuation of the husband's business.

27. The judge delivered judgment orally on Friday 7th November 2014 after the completion of closing submissions. The judge dismissed the claimant's claim. I would summarise her findings and reasoning as follows:

i) The defendant acted under a limited retainer, namely to embody the matters agreed between the husband and the wife in a consent order which the court would approve.

ii) The claimant's instructions to the defendant required her to finalise the consent order swiftly before the husband departed to America.

iii) The claimant did not on any occasion before 7th April 2009 tell the defendant that she had agreed to the terms of the draft consent order under duress from her husband or that she wanted to resile from what she had agreed.

iv) The defendant received Tilley's file on 6th April 2009. That file contained Tilley's letter dated 23rd February 2009. This was the first intimation sent to the defendant of the claimant's wish to resile from the agreement. The defendant did not read through Tilley's file on the day when it arrived.

v) The claimant was an intelligent woman, who knew her own mind and understood the legal issues. She did not appear to be subservient to the husband.

vi) The defendant performed her duties under the retainer. She was not under a duty to advise on the merits of the agreement reached between the husband and the wife.

vii) If the defendant was negligent, the claimant's claim would have failed because the damages claimed were speculative.

viii) The defendant handled the litigation after March 2009 competently. She was not responsible for the costs orders which the court made against the claimant.

28. The claimant is aggrieved by the judge's decision, accordingly she appeals to the Court of Appeal.

## Part 4. The Appeal to the Court of Appeal

29. By an amended notice of appeal, the claimant appeals against the judge's decisions on breach of duty and causation of loss. The essence of the claimant's appeal is that the defendant's retainer was not limited to the extent that the judge held. The defendant was under a duty to give broader advice and she did not perform that duty. Accordingly the Court of Appeal should set aside the judge's decision on breach of duty. The Court of Appeal should remit the case to the County Court to determine the issues of causation and damages.

30. The defendant's case on appeal is that the judge's decision on breach of duty was correct. If the judge was wrong, however, the defendant accepts that the judge failed to address the issue of causation. In those circumstances, the Court of Appeal should analyse the evidence itself and conclude that the claimant could not succeed on causation. In relation to damages, the judge reached the right result, but by the wrong route.

31. The central issue in this appeal is the extent of the defendant solicitor's duty to advise in circumstances where the parties had reached agreement and solicitors were being asked to put that agreement into proper form for approval by the court. I shall therefore address that issue first.

## Part 5. What was the extent of the solicitor's duty to advise?

32. The extent of a solicitor's duty to his/her client is determined by his/her retainer. The starting point in every case is to ascertain what the client engaged the solicitor to do or to advise upon.

33. The classic formulation of this principle is to be found in *Midland Bank Trust Co Limited v Hett, Stubbs and Kemp (a firm)* [1979] 1 Ch 384, a case concerning solicitors' liability for failure to register an option. At 402 to 403 Oliver J said:

> "The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.
>
> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors - or upon professional men in other spheres - duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases

> such as *Duchess of Argyll v. Beuselinck* [1972] 2 Lloyd's Rep 172; *Griffiths v. Evans* [1953] 1 W.L.R 1424 and *Hall v Meyrick* [1975] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer."

34. In *Carradine Properties Limited v DJ Freeman & Co* [1955-1995] PNLR 12, the plaintiffs engaged contractors to demolish a building in Clacton. The contractors damaged an adjoining property, thereby exposing the plaintiffs to liability. The plaintiffs instructed the defendant solicitors to make a claim against the contractors and, subsequently, to consider making a claim against the estate agents who had selected those contractors. The plaintiffs did not inform the defendants that they themselves had an insurance policy covering the incident and they did not ask the defendants to consider the plaintiffs' insurance position. Thompson J held that the defendants were not negligent in failing to think of the point themselves and to proffer advice upon it. The Court of Appeal upheld this decision. Lord Denning MR attached importance to the fact that the plaintiffs' managing director was very experienced in insurance matters. At 12-13, Donaldson LJ said that the precise scope of the duty to advise would depend *inter alia* upon the extent to which the client appeared to need advice. He continued:

> "An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

35. In *Hurlingham Estates Limited v Wilde & Partners* [1997] 1 Lloyd's Law Reports 525, the defendant solicitors acted for the plaintiff in the purchase of (a) shares in a company called ALM and (b) the lease of the shop where ALM carried on business. The transaction was structured in such a way that the plaintiff incurred a tax charge of £69,455. Lightman J held that the defendants were liable for failing to advise the plaintiff how to structure the transaction so as to avoid the tax charge. He rejected the defence that the defendants had limited the scope of their duties by agreement. At 526 Lightman J said:

> "The second remarkable feature is that there is no written record of the alleged (but disputed) agreement to limit the solicitors' duties. Any such agreement must plainly, if it is to have any legal effect, be clear and unambiguous: the client must be fully informed as to the limited reliance he may place on his solicitor and the reason for it (i.e. the solicitor's lack of any basic knowledge or competence), that this limitation is not a normal term of a solicitor's engagement, and that the client may be better advised to go to another solicitor who is not so handicapped and can be retained with no such limitation on his duties. Common sense requires that all these matters should also be recorded in an attendance note of the meeting where

> they are discussed and agreed, and should subsequently be recorded in a letter to the client."

36. In *National Home Loans Corporation PLC v Giffen Couch & Archer* [1998] 1 WLR 207, the plaintiff, a mortgage lender, instructed the borrower's solicitors to investigate title, to report on the plaintiff's printed form and to carry out a bankruptcy search. The defendants complied with those instructions. They did not, however, notify the plaintiff about the borrower's existing arrears or the threat of legal proceedings. The trial judge held that the defendants were liable for breach of duty and awarded damages of £78,192. The Court of Appeal reversed that decision, holding that the defendants complied with their instructions and correctly answered all the questions on the plaintiff's printed form. Peter Gibson LJ (with whom Hobhouse and Leggatt LJJ agreed) applied the principles stated in *Midland Bank* and *Carradine Properties.* He took into account that the plaintiff was an experienced commercial lender, which had specified the particular matters about which it required to be advised.

37. In *Credit Lyonnais SA v Russell Jones & Walker (a firm)* [2002] EWHC 1310 (Ch); [2002] All ER (D) 19, the claimant instructed solicitors in relation to the exercise of a break option contained in a lease. The solicitors gave correct advice about the service of the notice, but failed to advise about the requirement to pay £11,500. As a result of the claimant's non-payment, the landlord declined to accept premature termination and the claimant had to buy its way out of the lease. Laddie J held that the solicitors were liable for breach of duty. He reviewed the authorities in this field including some well known cases which I have not traversed in this judgment. Laddie J summarised the principles at [28] in a passage with which I respectfully agree:

> "A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although *White v Jones* [1995] 2 A.C. 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."

38. Let me now stand back from the authorities and summarise the relevant principles:

i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.

iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.

iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.

v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.

39. In respect of proposition (v), I am somewhat more cautious in my formulation of the principle than was Lightman J in *Hurlingham*. The passage which I have quoted from *Hurlingham* certainly reflects good practice in appropriate cases, but I doubt that it embodies any universally applicable rule of law. There are many situations in which the client cannot afford to pay for all the relevant research and advice that the solicitor would be competent to provide. In those situations the choice may be between a limited retainer or no retainer at all.

40. I turn now from legal principles to the facts of the present case. The claimant and her husband negotiated a settlement of their financial disputes. The claimant consulted Tilley and received legal advice about the merits of the settlement. Tilley warned the claimant that the husband's offer did not seem satisfactory and advised her of the alternatives. These included negotiation, mediation and litigation with full disclosure on both sides. Having received that advice, the claimant decided to adhere to the settlement which she had agreed with the husband. Accordingly, after changing solicitors, she instructed the defendant to put that agreement into a form which the court would approve.

41. It would have been good practice for the defendant expressly to confirm in one of her two letters dated 9th March 2009 the limited nature of her retainer. She did not do so and that was contrary to good practice. The fact remains, however, that the judge, having heard the oral evidence of both parties concerning the crucial meeting on 9th March, accepted the limited nature of the claimant's instructions to the defendant. This court cannot go behind that finding of fact.

42. Mr Simon Sugar, for the claimant, submits that despite the limited nature of the retainer the defendant should have warned the claimant of the following matters:

i) The defendant was not advising the claimant about the merits of the agreement.

ii) The agreement may be unfair.

iii) There had been no investigation of the husband's means and assets.

43. The question arises, therefore whether, in all the circumstances of this case, the giving of such advice was reasonably incidental to the work which the defendant was carrying out under the retainer. I conclude that it was not for four reasons:

i) As Miss Jacqueline Simpson for the defendant submits, all of those matters were obvious to the claimant.

ii) The claimant was an intelligent woman who had qualified and practised as a chartered accountant. The judge found that the claimant was well versed in the litigation; she understood *Duxbury* calculations and similar matters. The emails and correspondence in the Court of Appeal bundle amply illustrate the claimant's grasp of the issues and her competence.

iii) The claimant had, to the knowledge of the defendant, already taken legal advice from other solicitors about the proposed consent order.

iv) In the claimant's letter of 10th March 2009 she rejected the defendant's warning about the difficulties of enforcement after the husband had emigrated. She wrote in the terms which I have quoted in paragraph 16 above. The claimant made it plain that, despite the risks, she wished to conclude the consent order "as swiftly as possible".

44. Mr Sugar advances a separate argument based upon a reference to the husband's "bullying". The claimant mentioned this to the defendant as a reason why she was not sleeping at the former matrimonial home. Mr Sugar submits that this should have prompted the defendant to inquire whether the claimant had agreed to the financial settlement under duress.

45. It is a curious feature of this case that the claimant told Tilley that the husband had coerced her into agreement, but on the judge's findings, she never said anything to the defendant about that aspect. Nor, at the meeting on 9th March, did the claimant show to the defendant Tilley's letter dated 23rd February 2009. Having regard to the matters set out above, I do not think that the defendant should have been alerted to ask the claimant about duress. It is clear from paragraph 24 of the judge's judgment that the claimant presented as an articulate and intelligent client, who knew her own mind and had reached a considered decision about what she wanted to achieve from the settlement.

46. Finally Mr Sugar submits that the position changed on 6th April 2009 when the defendant received Tilley's file. That file contained Tilley's letter to Tynan dated 23rd February 2009, with its allegation that the husband used duress to secure the wife's agreement. Mr Sugar submits that the defendant ought to have read the file on the day it came in. The defendant should then have moved swiftly to advise the claimant against finalising the consent order on the following day.

47. I cannot accept this argument. By 6th April the defendant had carried out the work which she had been instructed to do. There was no obligation upon her immediately to read Tilley's file. Nothing alerted the defendant to the need either to read the file or to intervene before the consent order was made on 7th April.

48. In the result I conclude that the defendant was operating under a defined and limited retainer. Her task was to re-draft the consent order, so as to set out the matters agreed between husband and wife in a form likely to be approved by the court. The defendant did not have a duty to warn the claimant about the matters identified by Mr Sugar. She did not have a duty to investigate the question of duress. She did not have a duty to read through Tilley's file on the same day that she received it.

49. Having dealt with the extent of the defendant's duty, I must now reach a decision on the issues in the appeal.

## Part 6. Decision

50. It is clear from the correspondence and from the judge's findings of fact that the defendant carried out the work which the claimant instructed her to undertake. She put the matters agreed between the husband and the wife into proper form. The court duly approved the draft consent order.

51. The defendant did not give to the claimant the warnings which Mr Sugar identified in the course of his submissions. She did not investigate the issue of duress and she did not read Tilley's file on the same day that it came in. In my view, the defendant was acting under a limited retainer and she was not under a duty to take any of those steps.

52. I would therefore uphold the judge's decision on liability and dismiss the claimant's appeal on that basis.

53. If I am wrong in that regard, the issue of causation arises. The judge made no decision on causation, as both counsel have pointed out.

54. On the issue of causation Miss Simpson for the defendant submits that the evidence is all one way. Mr Sugar accepts that Tilley gave to the claimant the warnings which (on the claimant's case) the defendant should have given. The claimant ignored those warnings. There is no reason to suppose that the claimant would have acted differently if the defendant had given the same warnings.

55. Counsel have taken us through the transcripts of the evidence. In my view the evidence was not such that the judge could have found that the claimant would have acted differently if given the warnings previously identified. The claimant had made up her mind (despite Tilley's warnings) to go through with the agreement. Furthermore she wanted the matter to be tied up as swiftly as possible, as stated in her letter of 10th March 2009. In those circumstances the claimant could not succeed on causation and it would not be appropriate to remit the case to the trial judge on that issue.

56. Finally, I come to quantum of damages. The judge held that the measure of damages was speculative. Miss Simpson concedes that that finding was not correct. She accepts that there was evidence before the court about the value of the house, the

value of the husband's business and the value of the Spanish property. Nevertheless, says Miss Simpson, it is clear from the evidence that the claimant has not suffered any loss. Therefore the judge reached the right result by the wrong route.

57. In my view the damages issue is not as clear cut as that. If the claimant were to succeed on breach of duty and causation, the proper order would be to remit the case to the County Court to reconsider the issue of damages. The County Court would proceed on the basis of the evidence at trial and any further evidence which the court permitted the parties to adduce. In the circumstances, however, the damages issue does not arise.

58. In the result, therefore, I would dismiss this appeal.

Part 7. Executive summary and conclusion

59. Following divorce the claimant, an experienced accountant, negotiated a settlement of all financial issues with her former husband. She instructed the defendant solicitor to amend a draft consent order, so that it was in a form likely to be approved by the County Court. The defendant carried out those instructions.

60. The claimant subsequently had cause to regret the consent order to which she had submitted. She made a claim for professional negligence on the basis that the defendant failed to advise or warn her against entering into the consent order. The district judge dismissed the claimant's claim on the basis that the retainer was limited and the defendant was under no duty to give such advice or warnings.

61. The claimant now appeals to this court. In my view, on the judge's findings of fact, the defendant was working under a limited retainer. The defendant was not under a duty to give the broader advice or warnings for which the claimant now contends. Also, on the basis of the evidence at trial, the claimant could not succeed on causation.

62. Before parting with this case I wish to express my thanks to counsel. Both Mr Sugar and Miss Simpson presented their arguments clearly and concisely. They thereby assisted the court and at the same time served the best interests of their respective clients.

63. If my Lord and my Lady agree, this appeal will be dismissed.

**Lady Justice King:**

64. I also agree and would dismiss the appeal for the reasons stated by Lord Justice Jackson

65. In March 2009, when the events described by Lord Justice Jackson took place, legal aid was still available to parties in ancillary relief, (now financial remedy) cases, subject to a 'means and merits' assessment. Tilleys were therefore able to obtain legal aid for the wife which would have enabled her, had she chosen to do so, to act upon the advice given to her by Tilleys in their letter of 12 February 2009.

66. Legal aid is no longer available in financial remedy cases, no matter the level of hardship caused to the protagonists or the complexity of the proceedings. Without

becoming embroiled in the effect such legislation may have had upon access to justice, what is indisputable is that one of the consequences of legal advice not being available to those unable to pay, is that where an unrepresented divorcing couple reach an agreement, they are faced with the challenge of producing an order reflecting the settlement, the terms of which must be drafted in proper form to be put before a district judge as a consent order.

67. Since the hearing of the present appeal, in *Sharland v Sharland* [2015] UKSC 60; [2015] 3 WLR 1070 paras [19] & [20], the Supreme Court has highlighted the long established position that an agreement in a financial remedy cases cannot oust the jurisdiction of the court whilst noting the public policy considerations which encourage parties to reach agreements as to the distribution of their assets following divorce and the heavy influence such an agreement will have upon the court when asked to approve the terms of a consent order.

68. Lady Hale said in *Sharland*:

> "19. Thus it is impossible for the parties to oust the jurisdiction of the court…….Furthermore, "the court does not either automatically or invariably grant the application to give the bargain [the] force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act 1973 as amended": see *Xydhias v Xydhias* [1999] 2 All ER 386, per Thorpe LJ at 394.
>
> 20. Although the court still has to exercise its statutory role, it will, of course, be heavily influenced by what the parties themselves have agreed. Section 33A of the Matrimonial Causes Act 1973 as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984 provides that, notwithstanding the preceding provisions of Part II of the Act (which deal with the court's powers and duties in relation to financial provision and property adjustment), on an application for a consent order, "the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application" (and see Family Procedure Rules 2010, rule 9.26). This permits the court to make the order in the terms agreed, but does not in any way inhibit its power to make further inquiries or to suggest amendments to the parties."

69. The procedure to be followed in order to achieve a binding order in financial remedy cases is to be found in *Family Proceedings Rules 2010 r9.26*: *Application for Consent Orders for financial remedy.* The rule provides for the filing of a Statement of (financial) Information with the draft order for which the court's approval is sought. The parties do not need to attend before the judge unless directed to do so. The judge retains complete discretion to approve or reject a draft order, or to require a fresh

draft; alternatively if it is thought necessary, the judge can order a hearing with the parties in attendance.

70. The court it follows, is not a rubber stamp, it exercises, as Lady Hale said in *Sharland* an "independent assessment to enable it to discharge its statutory function". The court retains its discretion as to whether to approve an order and to make such enquiries as it thinks necessary but not to the extent, as it was put by Munby J (as he then was) in *L v L [2008] 1 FLR 26,* as "bloodhound or a ferret".

71. It may be thought that an agreement having been reached, the subsequent drafting of the order is a simple enough task – after all, it might be asked, how hard can it be to write down what has been agreed? The answer is "Very hard". A consent order in financial remedy cases is a complex legal document which must deal with all aspects of the parties' financial lives now and for the future; many elements of a financial remedy order apply to every case, no matter how modest or substantial the assets may be. To take some examples:

- A pension sharing order is technical and requires a number of annexes to be filed,

- Where the house is to be sold and the proceeds divided, the order must set out with precision what is to be deducted from the gross sale price before distribution. If the property is to be transferred to one party, provision to release the departing spouse from their covenants under the mortgage need to be made and back up arrangements set out in case a release cannot be achieved. What if there is CGT to be paid on a property, who is to pay it and what form should any indemnity take?

- Where the wife is to have term maintenance, until, for example, the husband retires, what factors will bring the maintenance to an end prior to that date and is the order to be extendable or, pursuant to *s28(1)A Matrimonial Causes Act 1973*, not extendable?

- If there is a maintenance order, is the *Inheritance (Provision for Family and Dependants) Act 1975* to be excluded and if so, who is going to know the precise wording which is required in order to ensure that such a critical provision is effective?

72. An indication of the problems which can arise is found in the present case; a case where the divorcing couple are highly educated and used to dealing with technical and complex concepts and documents, and where the husband had legal representation when the proposed consent order was first put before the court. The district judge was nevertheless obliged to reject the proposed order (twice), as, amongst other defects, the debts to be deducted from the proceeds of sale from the former matrimonial home were inadequately identified.

73. The District Judges, more than any other level of the judiciary, are finding their lists are overwhelmed as a consequence of the increase in court time taken by each case where (as is now routinely the case) the parties appear as litigants in person.

74. Following a contested financial remedy case where there are no lawyers representing the parties, the District Judge will draft an order which reflects his or her decision; there is no scope for ambiguity or misunderstanding as he or she knows precisely what he wishes to achieve and drafts the order accordingly. When however two unrepresented parties come before the judge with an agreement, the situation is entirely different. The district judge has neither the time, nor should he or she attempt, to interpret the minutiae of the agreement and draft/redraft the proposed consent order. That is not to say that he will not correct obvious errors and technical defects, but his task is to approve the order, not to sit with the parties and painstakingly work through with them every possible parameter of the draft in order to ensure they have considered every angle and future eventuality; to do so runs the risk that the judge will be seen to be giving advice or is seeking to interfere or undermine an otherwise unimpeachable agreement reached between the parties.

75. In order to address this problem a number of solicitors specialising in matrimonial finance cases now offer (as they have in personal injury cases for sometime), bespoke or "unpacked" services whereby they will undertake to act for a litigant in person in relation to a discrete part of a case which is particularly challenging to a lay person. Most commonly in matrimonial finance cases, this is the drafting of the Form E (financial disclosure), or, as here, the drafting of the order. This service is invaluable to both courts and litigants alike, saving as it does court time but also stemming the increasing number of applications to the courts in relation to the working out of orders which do not accurately reflect the true intentions of one or other of the parties.

76. There would be very serious consequences for both the courts and litigants in person generally, if solicitors were put in a position that they felt unable to accept instructions to act on a limited retainer basis for fear that what they anticipated to be a modest and relatively inexpensive drafting exercise of a document (albeit complex to a lay person) may lead to them having imposed upon them a far broader duty of care requiring them to consider, and take it upon themselves to advise on aspects of the case far beyond that to which they believe themselves to have been instructed.

77. It goes without saying that where a solicitor acts upon a limited retainer, the supporting client care letters, attendance notes and formal written retainers must be drafted with considerable care in order to reflect the client's specific instructions. It may well be that with further passage of time, tried and tested formulas will be devised and used routinely by practitioners providing such a limited retainer service. In the present case the defendant, as identified by Jackson LJ, did not observe best practice having failed to set out with precision the limits of the retainer in the client care letter. Notwithstanding that error, I too am entirely satisfied that the defendant was acting under a limited retainer and carried out the work which the claimant had instructed her to undertake.

**Lord Justice Tomlinson:**

78. I agree with both judgments.