
Does a Barrister owe a duty to its instructing solicitor

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Overview

The High Court recently endorsed the commonly held view that a barrister's duty is to their lay client and not to their instructing solicitors in *McFarland-Cruickshanks v England Kerr Hands Solicitors* [2021] EWHC 525 (Comm). We consider the importance of the Commercial Bar Association supply of legal services agreement ("COMBAR terms") and the common law position following that judgment.

The Claim

The Claimant, a barrister, issued a claim against her instructing solicitor for unpaid fees for work undertaken in a patent claim. The Defendant solicitors served a Counterclaim contending that as a result of the Claimant's breach of contract and/or negligence (in respect of the manner in which the pleadings had been settled and advice to settle the claim), the Defendant had suffered losses in the sum of £151,975, representing fees which the Defendant says it could not claim from its client pursuant to a Conditional Fee Agreement.

The Claimant applied for summary judgment on the claim and/or to strike out the Counterclaim.

The issue to be determined by the Court was whether a duty was owed by a barrister to their instructing solicitors. The contract between the parties was made on the basis of the COMBAR terms, payment Basis A (the traditional arrangement that the solicitor will pay the barrister's fees). Of significance to the question of scope of duty was Clause 4.1 of those terms which provided that the Claimant would provide her services to the Defendant as the Claimant's client, acting for the benefit of the lay client.

The Claimant argued that the COMBAR terms were clear and the parties were able, and permitted, to contract on such other terms should they wish but the Defendant had not done so.

As the services were not provided for the benefit of the solicitor, the Court held that that the Claimant could not be liable to her instructing solicitors in contract for loss claimed as a result of the barrister allegedly breaching the contract terms (i.e. failing to exercise reasonable skill and care). In considering whether the Claimant owed the Defendant a duty at common law, a key consideration for the Court was that the Defendant was a party to the contract with the Claimant and the parties were free to make their own bargain. For that reason there was no basis for the Court to impose a duty at common law when the contract made provision for the relevant duty. The counterclaim was struck out.

Conclusion and takeaway points

The Judgment confirms that a barrister owes a duty to their lay client and not to their instructing solicitors. That is not to say that in different situations no such duty will exist because solicitors and barristers are free to contract on such terms as they wish.

This case also serves as an important reminder of the COMBAR terms and the need for solicitors to ensure that they are contracting on terms, and adopting a payment basis, which are suitable.

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