Bell, book and candle: exorcising the ghost of the general retainer?

The recent Technology and Construction Court decision of Mr Justice Akenhead in Shepherd Construction Ltd v Pinsent Masons LLP (2012) raises once again the issue of a client’s so-called “general retainer” of a solicitor.

Factual background
Between 1989 and 2008 the claimant construction company retained the defendant and its previous practices (until 2004, Masons; from 2004 to 2008 Pinsent Masons; and from 2008, following incorporation as an LLP, Pinsent Masons LLP) to advise on disputes with its sub-contractors and, latterly, the drafting of sub-contracts.

The problem arose from “pay to be paid” clauses in the sub-contracts. They allowed main contractors, such as the claimant, to delay payments to their sub-contractors until the main contractor, was paid by the employer. They were outlawed by the Housing Grants, Construction and Regeneration Act 1996 except where the employer was “insolvent”. “Insolvency” was defined and included the making of an administration order.

The defendant’s previous practices drafted sub-contracts for the claimant which were intended to take advantage of this proviso by allowing the claimant to withhold payments to sub-contractors where its employer was “insolvent”.

The law changed in 2002 to permit a company to go into administration by its directors passing a resolution to that effect. The claimant complained that this change in the law had not been reflected in the drafting of the sub-contracts. The claimant could not take advantage of the “pay to be paid” clause where the employer had adopted this route into administration.

The claimant sue Pinsent Masons LLP (but not the previous practices) alleging that there was a “single” or overarching contract to advise on statute law (and changes in it) relating to the sub-contracts. The claimant emphasised the provision of unsolicited client briefings and seminars in addition to the retainers on the specific sub-contract disputes and drafting.

The decision
The defendants applied to strike out the claimant’s particulars of claim. It was impossible to understand how separate instructions to Masons, then Pinsent Masons, and finally the LLP to advise on disputes arising from the sub-contracts; and the drafting of the sub-contracts could be transmuted into a single contract. The judge agreed.

The accompanying allegation of an ongoing duty to advise on changes in the law was, however, more difficult. Akenhead J was unable to see “…how the placing of specific commissions on a more or less informal basis, even if there are a large number of them, can give rise to the necessary implication that there was or must be some overarching general retainer by which the solicitor is required to keep under relatively constant review all advice and drafting previously done”.

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The problem confronting the claimant was the absence of a specific retainer to keep the earlier advice under review – it might have been different if there had been such a retainer, but there was not. In its absence, it was impossible to determine the scope of the implied general retainer argued for by the claimant. What the solicitor was supposed to do under it? For how long should the earlier advice be kept under review? And who was to pay for the cost of doing so? The absence of answers to these important questions made it impossible to impose an implied retainer so the claimant failed on this point also.

To that extent, the decision is helpful to the profession and obviously correct. However, Akenhead J also commented that “different considerations may apply” in the case of a family solicitor. Thus, where a solicitor drafts a will and later deals with a divorce but knows that a later re-marriage would invalidate the earlier will, “it may be incumbent upon the solicitor at least to advise his client of this consequence. However, that may be because there is an analysis a general retainer by which the solicitor is required from time to time to give advice to his client for reward.”

Comment

Unfortunately, this obiter comment leaves the general retainer lingering in the uneasy realms of the living dead. It conflicts with the principle that a solicitor is not expected to travel outside the scope of his specific retainer. The key may lie in the final comment that the solicitor’s obligation to volunteer further advice, only arises when he is retained to give advice for reward. That sounds like a new, discrete retainer rather than an ongoing “general” retainer.

The answer to the question when a solicitor is expected to proffer unsolicited advice may lie in Credit Lyonnais SA v Russell Jones & Walker (2010), where Laddie J adopted counsel’s analogy of a dentist asked to treat a specific tooth and noticing that an adjacent tooth needs treatment: he should warn the patient. The critical point, however, is that the duty to offer this device is only triggered by a new retainer to advise on a specific matter “adjacent” to the problem arising from the earlier advice.

The “general retainer” argument has long been favoured by clients who have failed to instruct their solicitor to advise on a specific issue, which has subsequently caused them difficulty. In practice, it gives rise to problems (as in this case) because it is not based on any specific instructions or indeed any identifiable contract. It would be nice to think that the general retainer lies buried at the crossroads with a stake through its heart. However, in the tradition of Hammer films, it then rises from the dead at irregular intervals. The main consolation is that its existence is (probably) fictional.