Spire Property Development LLP & Anor v Withers LLP: What duty exactly has been assumed?

Introduction

The Court of Appeal, in *Spire Property Development LLP & Anor v Withers LLP* [2022] EWCA Civ 970, considered the content of a solicitor's duty when s/he proffers advice outside the scope of the agreed retainer. Though the court stressed the fact-sensitive nature of the enquiry, it also made a number of general observations in the course of judgment, which will be of interest to litigants faced with similar scenarios.

Factual Background

The circumstances giving rise to the appeal were relatively straightforward.

The underlying claimants, Spire Property Development LLP and Hortensia Property Developments LLP ('the Developers') retained Withers LLP ('Withers') in 2012 on the purchase of 2 high-grade listed properties in Fulham. The 2 properties shared a boundary, and the Developers planned to develop them both in parallel. Both purchases completed in November 2012.

Unfortunately, it subsequently emerged that electricity cables were present beneath both properties. In 2014, the Developers contacted Withers again, informing them of the cables. The proper interpretation of the relevant exchange, and the obligations that arose from it, was the subject of the appeal.

In the first instance trial, the Developers alleged that Withers had been negligent by:

> i) Failing to make sufficient searches or enquiries in 2012 to identify the cables underneath the properties; and
>
> ii) Failing to investigate and advise adequately in 2014 on any rights that the Developers may arising from the discovery of the cables.

Withers' appeal was limited to the second point i.e. that they had not been negligent in failing to proffer extensive advise on the Developers' potential remedies in 2014.

The relevant communication

In considering this question, the court carefully scrutinised the relevant email exchanges between the parties.

The 2 critical emails were one from the Developers on 28 January 2014, raising 3 specific queries, and Withers' response of 3 February 2014.

The Developers' email stated as follows:

Dear Hannah

Just following up on the below. Couple of points arising:

> *1. Should the existence of the cable not have come up on the radar as a result of seller's replies to enquiries, even if it didn't appear on the title docs?*
>
> *2. Could you elaborate slightly on the statutory rights of access point? Does this mean that UK Power could have laid the cable at Sloane and KC without having any kind of legal permission from the owners? It would seem impossible that the owners of the sites were not aware of such a large cable being laid on their property.*
>
> *3. If, as there surely must have been, there is some kind of legal documentation relating to the laying of the cable on either site, then the question remains as to why this hasn't shown up on our radar?*

We need to decide how we are going to approach UK Power about this issue, so would be very helpful to get your thoughts on the above. The better prepared we are the more likely we will succeed in getting the cable moved.

Many thanks,

Kind regards

In response, Withers stated:

Dear Barnaby

> *1. In response to your email below and using the same numbering:*
>
> *2. The seller can only provide such information as they may have and there were no wayleave agreements or deeds of easement relating to any electricity cable revealed in the seller's replies to enquiries, other than the rights relating to the electricity transformer chambers. In addition, St Mark's was acquired from receivers and therefore the information provided was extremely limited and they had no knowledge of the property whatsoever.*
>
> *3. Utility companies have statutory rights of access onto private land to lay pipes, wires, cables and other service infrastructure. Under the Electricity Act 1989, electricity companies can acquire a wayleave to install an electric line on, under or over private land, together with rights of access of inspection, maintenance and replacement. A wayleave can either be agreed or can arise where the owner of occupier fails to respond to a notice requiring him to grant a wayleave or gives it subject to conditions unacceptable to the electricity company. Wayleaves, whether*

> *acquired under the Electricity Act 1989 or granted by a landowner do not need to be registered at the Land Registry. It is therefore possible that a wayleave was granted sometime ago when the cable was originally laid and was not known to the seller. In relation to the Sloane Building, the seller acquired the property in 2010 and before then it had changed hands in 2009 and 1999. Prior to 1999 it appears that the site was owned by the local authority. The seller may therefore not have been aware of the cable. As to St Mark's, the receivers will have had limited information and are unlikely to have known about such matters.*

Please see comments above.

Kind regards

Hannah

The Developers argued that, in their initial email, they had impliedly requested to know of any rights or remedies they may have against the utility company that had laid the cables. As Withers' email did not advise of any potential actions they might have against the utility company the Developers had, on their case, relied on that advice and reduced the scope of their development, believing that no remedy was available in respect of the cables.

Withers, on the other hand, pointed to the fact that they had been asked 3 discrete, limited questions, following the conclusion of their retainer. They had, on their case, simply responded to the questions asked, and had not assumed responsibility to advise on wider remedies that might be available against the utility companies in respect of the cables.

Judgment

Summarising the effect of the previous authorities dealing with the scope of a solicitor's duty in the ordinary course of providing services further to a retainer (such as *Minkin v Lansberg* [2015] EWCA Civ 115 and *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347) Carr LJ, delivering the main judgment of the court, stated:

The general principle is thus that a retainer solicitor owes no duty to go beyond the scope of their express instructions and give advice in relation to other matters. This is subject to the qualification that the duty extends to giving advice that is 'reasonably incidental'… [57]

Her Ladyship then observed that, in an ordinary case, the retained solicitor will owe a concurrent tortious duty. However, '[*w]here there is no retainer, different considerations arise. The concept of assumption of responsibility… remains the foundation of the tortious liability'* [59].

In such cases, the questions of whether any responsibility had been assumed and, if so, the *'extent of any such assumption'* should be judged '*objectively in context and without the benefit of hindsight'* and the '*primary focus'* must be on exchanges between the solicitor and client. Therefore, the enquiry in each case was going to be extremely fact-sensitive [60].

It was observed that many of the previous authorities fell into 2 categories: those involving the scope of a solicitor's duty under the retainer, and those involving 'one-off' enquiries from former or prospective clients.

Carr LJ then noted the fact that the Developers had relied heavily on *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 and *Khan v Meadows* [2021] UKSC 21 in resisting the appeal; in particular, the '*purpose test'* and the analysis suggested by the Supreme Court which involved looking at what risk the duty was supposed to guard against, and whether the loss suffered represented the fruition of that risk. However, on considering this, Carr LJ stated that:

…the purpose test is inapposite to the question arising here, namely the content of the duty owed by the professional as a matter of conduct. By contrast, the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the SAAMCO principle) rather than the extent of the duty in the first place. Indeed, the purpose test was formulated for a different exercise and on the assumption that the professional's obligation to advise fell within the scope of the duty… [71]

This is an important distinction. *Manchester* and *Khan* were both concerned primarily with whether particular heads of loss fell within the scope of the duty owed by the professional. Of course, there has been a great deal of authority on this point, dating back to *SAAMCO.* The Court of Appeal in *Spire* were considering the distinct question: what services, precisely, had the professional agreed to provide? Clearly, where there is a detailed retainer, this will be easily determined. In cases where there is no retainer, or the retainer is less detailed, or in cases such as *Spire* itself where the retainer has ended, it will be more difficult to answer that question.

On the facts, Carr LJ stated that the '*basis of any liability'* would be an assumption of responsibility by Withers, as there was no contractual duty to advise. The '*central question'*, therefore, was the '*scope of the assumption of responsibility on the facts'* [72].

This was to be determined on an objective construction of the relevant exchanges between the Developers and Withers. Whilst the court noted that these were '*not to be read as if they were formal legal documents, and must be considered in the context that they were exchanges between a solicitor and former client who were familiar to each other and involved in ongoing professional relationships'*, the Developers were '*both highly experienced and well-resourced'* and a party *'whose communications and any requests Withers was entitled to take at face value'* [73].

Carr LJ reviewed the communication and concluded that:

1. From the very outset, there was '*implicit criticism of Withers'*, and an objective interpretation of the communications was '*guarded and restrictive'* rather than *'open and expansive'* [77].

2. Though the Developers' email raised the possibility that they were considering the possibility of having the cables moved at someone else's expense, Withers were '*not asked to (and did not) comment, let alone advise, at any stage on that possibility'* [80].

3. In fact, the Developers only questions related to what had happened at the time of the purchase. The queries raised, and Withers' answers '*had all been backward, not forward, looking'* [84].

Objectively, therefore, in answering the Developers' queries, Withers had not assumed responsibility '*for anything going beyond answering those three questions'* [91] and Withers were not to be taken as having assumed a duty to advise on the wider rights and remedies that the Developers may have had. This conclusion was also reinforced by the wider context that, at the time of the communication, neither the Developers nor Withers knew what legal authority the utility companies had for laying and maintaining the cables.

Observations

The case is an important one where the question is precisely what extra-contractual duty a solicitor has assumed and will be of interest to litigants in similar cases; either in the directly comparable scenario of questions being posed to a solicitor some time after the retainer has ended, or more generally, where a solicitor is asked to advise on something outside the scope of the agreed retainer.

The following points can be distilled from *Spire:*

1. Where the query/advice is outside the scope of the retainer, the question to be determined is what the solicitors have assumed responsibility for.

2. This is a highly fact-sensitive exercise, and must be judged objectively by reference to the communications passing between the solicitor and client, and to the context in which those communications were made.

3. For that reason, the extent to which previous authorities will apply by analogy will be limited. In that sense, courts will have similar latitude in determining the scope of the solicitor's assumption of responsibility as they do when interpreting contracts. Therefore, unfortunately, it may be difficult to predict the likely outcome of litigation with any great certainty; something that ought to be stressed to clients.

4. However, there are factors that may be likely to influence the court's approach. In *Spire*, Carr LJ specifically pointed out that the Developers were sophisticated clients, and therefore Withers were entitled to take their communication at face-value. It is

possible that, where lay clients are concerned, the courts will take a more expansive approach to the content of the solicitor's duty.

Therefore, though it may not be completely determinative in future cases, *Spire* does appear to suggest that, at least in the case of sophisticated clients, the court will require them to be explicit if they wish for advice on a particular topic and will be hesitant to impose wide-ranging obligations on solicitors to advise if the request itself was equivocal.

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