Case No: D 10 CL 583

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand, London, WC2A 2LL

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Before:

DISTRICT JUDGE LANGLEY

Between:

PAULINE WRIGHT	**Claimant/Respondent**
- and -	
RIX & KAY SOLICITORS	**Defendant/Applicant**

MR. G LAZARUS (instructed by **Brown Turner Ross Limited**) for the **Claimant/Respondent**
MR. PAGE (instructed by **Rix & Kay Solicitors**) for the **Defendant/Applicant**

APPROVED JUDGMENT

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Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

DISTRICT JUDGE LANGLEY :

1. This matter comes before the court on the defendant's application made by application notice dated 24th August 2017 in which it seeks an order striking out the, it says "respondent", I think it means the claim's claim, and/or for summary judgment under Part 24 because the applicant believes that on the evidence the claimant has no real prospect of succeeding on the claim and the respondent, I think it means, knows of no other reason why the disposal of the claim should await trial. It is supported by a witness statement of Alan Charles Foster, a solicitor and partner in the defendant firm of solicitors. His witness statement is dated 12th September 2017 and there are various exhibits to that.

2. In response there is a witness statement of Samantha Bushell, a solicitor and a director of Brown Turner Ross Limited Solicitors who act for the claimant in this matter. Her witness statement is dated 20th August 2017 and in this case there are no exhibits. In addition to this and apart from the claim form there are fairly lengthy particulars of claim, a defence and a particularly lengthy reply.

3. The test which the court must apply when considering an application to strike out a statement of case is set out in Part 3.4 of the Civil Procedure Rules. Under subparagraph (2) there is provision as follows:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of... process [which does not apply]... or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order [which is also not said to apply]."

4. Alternatively, it is brought under Part 24 of the Civil Procedure Rules for summary judgment. Under Part 24.2 of those rules there is provision that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

The application is brought by the defendant and there is no counterclaim.

5. The proceedings were commenced by issue of a claim form on 11th March 2015. They were proceedings brought by Mrs. Pauline Wright against Rix & Kay Solicitors of Uckfield, East Sussex. The claim form states that the claimant instructed the defendant's solicitor firm to advise and act on her behalf in relation to matrimonial proceedings in 2002/2003. The claimant claims that the defendants were negligent in the way they acted on her behalf in that they failed to properly advise the claimant or properly investigate the financial positions of the parties. The value of the claim is said to exceed £100,000 but be limited to £150,000. The negligence is denied and the claimant who is represented by Mr. Lazarus of counsel today, who also prepared and drafted both the particulars of claim and the reply, has submitted that the claim is essentially a claim for a loss of opportunity.

6. The background to the matter is that in 2002 the claimant, Mrs. Wright, instructed the defendant solicitors firstly to act for her in her divorce petition, which they did. They provided an estimate of their costs in respect of that in the sum of £500 plus VAT and disbursements, which would include the court fee. She also informed them that she was going to enter mediation with her husband in relation to the financial matters and, indeed, it appears that there were three meetings, certainly two, with the mediator which concluded in Mrs. Wright and her husband reaching an agreement as to the financial matters.

7. Mrs. Wright then wrote to the defendant solicitors setting out what had been agreed. She had a subsequent meeting with the defendants and met the fee-earner who in turn entered into some correspondence with the husband's then solicitors and a consent order was drafted and subsequently approved by the court.

8. This was a claim for a divorce petition presented in circumstances where the parties had been married for twenty-two years and there were three children. The claimant was employed. The defendant had been a police officer and had retired from the police force and at this moment in time was a publican. The property was owned in joint names subject to a mortgage and there were various other small debts which the parties were responsible for.

9. So far as the defendant firm was concerned, it is clear that they gave a quotation for the costs of the divorce petition and must have obtained the sums on account which they requested. When it became clear that the financial remedies were to be resolved by way of the mediation entered into between the parties personally and without any direct input by any solicitors, the defendant solicitors sought legal help to assist the claimant and the certificate that was issued was for help with mediation. That was issued on 3rd August 2002. It was initially limited to £350 and subsequently extended to a total of £550. There is no suggestion by the claimant that she ever sought to instruct the defendant firm privately in relation to the ancillary relief matters.

10. Before the mediation was attended by the claimant and her husband the defendant solicitors did advise her that full and frank disclosure would be required from both parties and also pension sharing orders, offsetting and maintenance. It is clear from the note made by the mediator at the end of the mediation that neither party had provided full financial disclosure but they were nonetheless willing to and did reach an agreement as to the financial matters. The last meeting with the mediator when it appears the terms were agreed was on about 20th June 2002.

11. The claimant then wrote to the defendant solicitors. The letter is undated. It is marked at the top that it was received on 27th June. It says:

> "Please find enclosed the pension breakdown forms issued from Sussex Police Authority Pay and Finance. They apparently indicate my share to be £45,375. I enclose my husband's working-out of this figure."

And then she says:

> "We have agreed to the following in principle subject to your appraisal."

12. Under (6) of that it stated that she is to retain £20,000 in the equity of the property as part of the lump sum pension payment and under (8) that the rest of the pension, £25,000, will be paid at £145.60 per month. The other matters concerned the former matrimonial home, the endowment policies as there was an endowment mortgage, the split of the equity and child maintenance. There was also provision that he would bequeath or sign over the right of widow's pension on his death to Mrs. Wright regardless as to whether she cohabited or remarried and they agreed the value of the former matrimonial home was £265,000. She describes in her letter that this is just a crude list of the agreements to date, she, "Would like the opportunity to discuss the proposed arrangements with you in person," and she completed the fee-earner's funding application which she returned.

13. She did then see the fee-earner concerned on 28th August 2002. In the intervening period there had been correspondence and the help with mediation had been applied for and was granted on 3rd August 2002. The terms of the agreement were gone through and the handwritten notes of the fee-earner are before the court. They are set out clearly and are quite detailed.

14. Then on 23rd September 2002 the defendants wrote to the claimant's then solicitors regarding the agreed terms of financial settlement which they say, "Our client understands are as follows," and they then set out the terms that have been agreed. Under (5) it stated:

> "Both parties are to retain their own pensions intact, your client to retain his Sussex Police Authority pension and our client her NHS pension."

Then on the second page of a three-page letter they say this:

> "We are instructed it had originally been suggested the equity in the former matrimonial home and the policy values be split 55 per cent to our client and 45 per cent to your client with our client retaining an additional £20,000 in the equity by way of offsetting the amount to be received by her from your client's pension. It had been suggested your client would retain a chargeback on the former matrimonial home in respect of the balance of his 45 per cent share mentioned above. Our client

> would receive £25,000 from your client's pension which would be paid to her by way of maintenance of £145.60 per month."

In the next paragraph she continues:

> "We have suggested to our client that instead of there being a pension sharing or attachment orders made against your client's pension, which we are quite sure he would wish to avoid if at all possible, to avoid the need of there being chargeback provisions against the former matrimonial home and your client paying ongoing maintenance and a capital clean break only being achieved it would be simply and as equitable if the matter is dealt with by way of offsetting and our client retaining all of the equity of the former matrimonial home, your client retaining all his pension intact, not being required to pay ongoing maintenance to our client and for there to be a clean break order between the parties."

15. It goes on to deal with other matters. It appears that that, in fact, was what occurred and a consent order was lodged with the Eastbourne County Court, in fact, after the transfer of the property into the claimant's sole name subject to the mortgage had already taken place. The order was approved by the court and the matter was resolved.

16. It then appears that at some time in 2013 perhaps, it is not very clear where, the claimant saw an advertisement for solicitors dealing with cases in which the pension rights of a party had not been properly achieved in divorce proceedings and it was the claimant's solicitors who did the advertising and they now act for the claimant. I do regard how the claimant found her solicitors or why as being completely irrelevant to this application. It is no part of this court's jurisdiction at this point at any rate to pass any comment on it. It is irrelevant.

17. I should mention that the application is not made on the basis of any limitation point. It is made purely on the basis of the facts and the file which is clearly retained by the defendant solicitors.

18. Essentially, the defendant's position is that they acted for the claimant on her divorce and there is no issue about that at all. So far as the financial remedies are concerned, the mediation took place between the claimant and her then husband without legal representation. They reached an agreement which the defendant firm was instructed to put into a full consent order which would be acceptable to the court and it is the defendant's position that they were not instructed to advise as to the terms of the financial remedies or ancillary relief, as it was then known, agreed between the parties. They did not take part in the negotiations leading up to the agreement reached between the parties and, accordingly, that they had, in effect, a limited retainer.

19. The claimant's case is simply that the defendant was negligent and/or in breach of contract as set out in para.22 (e), (f) and (g) of the Particulars of Claim. These, and (g) in particular, related to the pension issues and it said in (e) that they failed to comprehend the nature of the husband's pension in payment, being a defined benefits pension from which it would have been possible to calculate the pension income

receivable from the claimant from age sixty as a result of a PSO calculated to provide equality of pension income in retirement; (f) failing to give to the claimant any or any reasonable advice as to the capital value to be placed upon that claim for pension share so as to offset the same; and (g) failing to give to the claimant any or any reasonable advice as to the likely level of the husband's residual pension income even after a PSO calculated as aforesaid or the capital value to be placed upon her loss of one-half of such residual pension income derived from a matrimonial asset during the period between the making of a PSO calculated to provide her with equality of pension income in retirement and her attaining the age of sixty when such pension income would commence.

20. There are various authorities which counsel have put before the court and I should express my gratitude to both Mr. Page of counsel who represents the defendant applicant in this matter and Mr. Lazarus of counsel who represents the claimant respondent. I do also accept that so far as the test to be applied for summary judgment is concerned the authorities set out what the court must deal with. Mr. Lazarus has helpfully included some of them in his skeleton argument. They are all clearly set out in the notes to Civil Procedure. From those it is clear that the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success and the authority for that is *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one which carries some degree of conviction, which means that it is more than merely arguable, and the authority for that is *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. Again, under *Swain v Hillman* the court must not conduct a mini-trial. It does not mean the court must take at face value without analysis everything that a claimant says in his statements before the court. In some cases it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. The court can take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial and the authority for that is *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550. There are then some references to how the court should approach the matter if there are disputes of fact and in *Three Rivers DC v Bank of England (No. 3)* [2001] 2 All ER 513 Lord Hobhouse says this:

> "The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

21. It is against that background that I turn to the various authorities to which the court has been taken. Mr. Page referred the court to the case of *Pickersgill & Anor v Riley (Jersey)* [2004] UKPC 14, a decision of the Privy Council in the Court of Appeal of Jersey on 25th February 2004, though it seems to be reported as No.12 of 2003. There in the decision of Lord Scott he says this at para.8, having referred to **Jackson and Powell on Professional Negligence**, 5th Edition, 2002 which he says correctly states the position:

> "In the ordinary way a solicitor is not obliged to travel outside his instructions and make investigations which are not expressly or impliedly requested by the client."

22. Then in support of that the text goes on to refer to *Clark Boyce v Mouat* [1994] 1 AC 428, another Privy Council decision where Lord Jauncey says at p.437:

> "When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction."

23. Mr. Page has submitted that that is precisely the situation that arose in this case. The claimant instructed the defendant so far as her financial remedies were concerned to translate the terms of agreement reached without any involvement by solicitors on behalf of either party into the form of a consent order which clearly had to be in a form which would be approved by the court and which would also be enforceable.

24. I was also referred to the decision of *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303, a decision of Jackson LJ who referred in para.27 of his judgment to the appellant's notice in which it was said that the trial judge had erred in finding no breach of duty and that, in fact, the defendant's solicitors were in breach of duty in three respects: they failed to provide an approximate valuation of the claim for services; failed to inform the claimant of the availability of an interim payment in the event that the claimant pursued a services claim; and treated what the claimant said on 23rd January 2001 about cash-in-hand payments and difficulty in obtaining evidence as putting an end to the services claim. That was not a claim for negligence arising out of a matrimonial dispute. It was a claim made under the vibration white finger protocol in which the client had been advised that he could make a claim for services and initially instructed the solicitors to do so but, when asked to provide the evidence which was required, he decided that it was not worth it and he was not going to pursue it. As identified in para.34 of his judgment, Jackson LJ says this:

> "In the present case, the problem is the opposite of that discussed in the *Minkin* line of authorities. The question is not how far a solicitor should travel beyond the confines of the retainer. The question is whether the solicitor should fulfil the original retainer, in circumstances where the client has closed down one avenue of enquiry. As Henderson LJ observed during argument, the issue concerns client autonomy."

He continues at para.42:

> "In my view, if a client instructs his solicitor that he does not wish to pursue a particular head of claim and that he does not have evidence to support it, the solicitor is not necessarily under a duty to challenge that decision or to try to change the client's mind. Obviously, issues such as this are fact-sensitive, as Mr Watt-Pringle pointed out. Even so, if the client is an adult of full capacity, there comes a point when his autonomy should be respected."

25. The other authority to which I was referred by both counsel and which is clearly the most relevant one is the decision of the Court of Appeal in *Minkin v Landsberg (T/A Barnet Family Law)* [2016] 1 WLR 1489. Again, the decision was given by Jackson LJ. In para.25 of his judgment he says this:

> "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 [the husband], 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 [former solicitors who had advised the claimant] 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 [the husband] 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. [The Claimant] 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. In para.31 of his judgment Jackson LJ said this:

> "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."

He then deals with those issues in turn, the first being: what was the extent of the solicitor's duty to advise? Then in para.38 he says this:

> "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."

27. That is the present position and represents the current law. So far as that applies to the present case and to the facts of the matter, Mr. Lazarus has submitted to the court there is a factual dispute between the parties and, clearly, if that were so, it would assist him in defending this application for strike-out or summary judgment. It is fair to say that due to the passage of time, and it is now fifteen years since the relevant acts complained of took place, the reliable memory of either the claimant or, indeed, the defendant's fee-earner is probably limited and the court will largely have to reach any decision based on the documentary evidence contained within the defendant solicitors' file, which, fortunately, is apparently still available. It is not suggested that the claimant has any written notes of anything that took place in any meetings she had with the defendants concerning, indeed, any aspect of the matter.

28. On the basis of the documentary evidence and insofar as the financial remedies are concerned, it is quite clear that the defendant advised the claimant in general terms that there would have to be full financial disclosure by both parties and it is quite clear that without that no solicitor would be unable to offer any real advice and would probably be unlikely to do so because it would be impossible to provide it. Despite that advice, it seems that the claimant did reach an agreement with her husband through mediation as to the financial consequences of the divorce.

29. The defendant acted not on a private retainer but under some public funding in the form of help with mediation with an initial financial limit of £350 which was then increased to £550, on any view of the matter, even in 2002, not a substantial sum, particularly when one considers that the estimate for the actual divorce itself was £500. It is clear from the notes and the correspondence entered into between the defendant firm, the claimant and the claimant's former husband's solicitors that they regarded their position and the terms of their retainer to be to translate the terms agreed between the parties into a consent order.

30. Complaint has been made that the claimant never asked the defendant specifically in writing to advise on financial matters. I would not criticise the claimant for that. It would not necessarily appear in correspondence. She certainly consulted the defendant firm but she did not instruct them to negotiate the terms of any financial settlement. She did not provide full disclosure herself and neither did her husband and, indeed, the letter received on 27th June 2002 states at item 2:

> "No formal full disclosure from either Brian or myself regarding the pub [it says 'of' but I think it means 'or'] my earnings."

31. Mr Wright was a publican at the time. It seems no documents concerning that or his income from it or the value of it were obtained. Also, it appears from the information set out by the mediator as to the information before him that the claimant's income may well have been understated. That is by-the-by. It is clear that the husband and wife agreed to enter an agreement, notwithstanding the lack of complete disclosure.

32. The claimant effectively submits that in those circumstances the defendant solicitors were under an obligation to advise her in detail concerning the husband's pension. In view of the level and the nature of the public funding that they were acting under it is quite clear that no such terms of retainer were agreed. Had the claimant wished to have representation in the negotiation of the terms of settlement then she could have instructed the solicitors, although it is unclear whether she would have been eligible for a full legal aid certificate in view of her means. Certainly, there is correspondence indicating she would likely have a contribution to make but it seems that no such application was ever made. Therefore, so far as the issue of the retainer is concerned, I am entirely satisfied that the only possible basis for it and the extent of it on the basis of the documents before the court and the method of funding is that it was limited to the translation of the terms agreed between the parties personally into a consent order. The fact that the defendant wrote a letter suggesting that instead of there being a chargeback to the husband and the claimant receiving £25,000, being part of the pension at a rate of £145.60 per month, the claimant should retain the entire equity of the former matrimonial home, which even allowing for the £20,000 and the £25,000 was a much larger sum - that, however, is not the issue; it was put forward on the basis that it would be much simpler - that was clearly accepted by the claimant and was carried into force in the terms of the consent order entered into and approved by the court.

33. The claimant was a staff nurse. She had obtained from the pensions agency of the NHS details of her own pension scheme which had the cash equivalent transfer value set out in it and showed the anticipated lump sum and the pension that would be available to her. It is fair to say it is a far less generous scheme than that of the husband from the Sussex Police. Be that as it may, I have concluded that the only possible terms of the retainer of the defendant was limited to obtaining mediation help from the Legal Aid Board and then translating the terms of the agreement into an order which was later approved by the court.

34. Mr. Lazarus has submitted that the claimant may give oral evidence if the matter proceeds to trial and her evidence might well be accepted by the trial judge. The fact is that even if she were to say to the judge that she instructed the defendant firm to give her advice on the proposed financial settlement it is quite clear that so far as the defendant firm is concerned, they considered their instructions to be limited to the amount of help with mediation and what that entailed. They also considered that without full financial disclosure of the parties they could not advise. Both of those are facts are indisputable and therefore, whatever view the trial judge might make of the claimant, it would not actually assist her.

35. If that is the case, the next question which the court must consider is whether that retainer would involve the solicitors proffering advice which is reasonably incidental to the work he or she is carrying out. There it is quite clear that the suggestion made by the defendant solicitors to the claimant concerning the pension and the equity in the former matrimonial home was such advice but it was advice limited to dealing with the matter within the terms of the agreement reached between the parties. It does not seek to go behind the terms of that agreement. Indeed, if the claimant's claim in these proceedings were to be accepted, it must be quite clear that the other terms of the agreement would also have to be revisited. It was an issue as to whether the agreement viewed as a whole was fair, a matter which the solicitors were unable to

advise due to the lack of disclosure by the parties. That was an agreement reached between the parties alone. They were entitled to reach that agreement not to have full disclosure and they were entitled to enter into the agreement which they had. It does not follow that going beyond what the solicitors did when they wrote to the husband's then solicitors took the matter any further or extended the terms of their retainer in any way. Accordingly, the terms of their retainer remained limited. They were aware that the claimant was clearly an intelligent woman. She was a staff nurse, clearly with responsibilities. There were various allegations against the husband which are not relevant here but having applied the various tests for summary judgment which the authorities make clear that the court should consider on an application for summary judgment I have concluded the claimant has no realistic prospect of success in this claim. The claim carries no degree of conviction which would be required. I do not, in reaching that conclusion, suggest that the claimant is in any way being untruthful. I have no doubt that she is being as truthful as she can in view of the passage of time.

36. So far as any further evidence that might be available to the trial judge is concerned, clearly, there could be a witness statement by the claimant herself which is not before this court and there could be a witness statement by the fee-earner at the defendant company. She also has not made a witness statement as yet but it is clear from Mr Foster's witness statement that she will be a witness should the matter go to trial.

37. The court has to consider whether there is an absence of reality in the claimant pursuing this claim to trial and I have concluded that there is. The contemporaneous documentary evidence does not support the claimant's claim, not always for the reasons submitted on her behalf, but because it is very clear that the terms of the retainer entered into between the parties were limited and I am satisfied that the defendant carried out the terms of their retainer and carried out the work which they agreed to do. It is clear that they did not give any overall financial advice. It is equally clear they were not in a position to do so.

38. Accordingly, the application will be granted. There will be summary judgment for the defendant against the claimant under Part 24.2 of the Civil Procedure Rules.