

A **ROSEMARY JANE CATHERINE PHELPS**

v

B **1. STEWARTS (a firm)  
2. ANDREW DINSMORE**

High Court of Justice (Chancery Division)  
Bernard Livesey QC, sitting as a deputy judge

C Neutral citation: [2007] EWHC 1561 (Ch)

Hearing: 3 May 2007  
Judgment: 2 July 2007

D *Settlement of personal injury claim; specialist solicitor's negligence; failure to advise of tax charge on initial payments into discretionary trust; unsophisticated client; no tax advice in writing to lay client or litigation solicitor*E 

Mr Keating (K) had suffered personal injuries in a road traffic accident for which he was not to blame, and consulted a solicitors' firm (S) with a view to issuing proceedings against the negligent driver. S had conduct of the matter on behalf of K throughout, in the course of which they decided that K should receive specialist advice as to structuring his compensation monies so as to continue his entitlement to social security benefits.

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Accordingly, S introduced K to a sole practitioner solicitor (P) who held herself out as specialising in the creation of trusts suitable for persons receiving substantial personal injury awards. The retainer between K and P was not in writing or evidenced by writing, but had to be inferred from the circumstances. P advised K that he should have his compensation monies paid into a discretionary trust.

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Her initial standard form letter to K failed to contain any advice that monies in excess of the nil-rate band paid into a discretionary trust by him would attract an initial charge to tax of 20%. K decided to follow P's advice, and paid a total of £1,005,097 into the trust between December 1999 and March 2002. Consequently, there was an immediate loss to K of £181,000, being the initial charge to tax of 20% above the nil-rate band.

In April 2005, K issued proceedings against P, which she defended, and in which she issued a Part 20 claim against S on the grounds that they were negligent in failing to:

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- instruct her that further substantial payments were to be made into the trust;
  - instruct her to advise in relation to the whole sum to be received by K; and
  - heed oral advice said to have been given by P at a meeting on 9 November 1999 not to pay any sum other than the initial £35,000 payment into the trust without seeking further specialist advice, whether from P or otherwise.

K's claim against P was settled for the sum of £200,000 plus costs. P sought a contribution from S towards that settlement figure. S contended that P had been retained to advise comprehensively and to draft a suitable trust in respect of all compensation monies to be received by K, and that P had failed to advise that no sum above £35,000 should be paid into the trust without further advice. S further contended, on the basis of similar factual evidence in another matter in which both S and P had been retained, that P simply had not known that the payment of compensation into a discretionary trust attracted an initial tax liability of 20%. The key issue was therefore the nature and scope of the duty imposed on P by her retainer.

**Held (rejecting the Part 20 claim - para [53])**

1. Although clients have the power to determine the terms of a retainer, they do not usually have sufficient expertise to enable them to judge where the boundaries of the retainer are to be drawn. The courts therefore look to the professional for clear evidence that the client ought reasonably to have understood that the scope of the retainer was being limited and that they were assenting to such limitation (para [26]).
2. In the present case, the following facts were particularly relevant in determining the scope of P's duty to K:
  - (a) K was an unsophisticated client and this was apparent to P;
  - (b) P held herself out as having a special expertise and knowledge in relation to the problem for which she was instructed, which neither K nor S possessed;
  - (c) S had told P that a further sum of £300,000 was expected to be paid to K as compensation;
  - (d) P's standard form letter appeared to contemplate all compensation monies being paid into the trust; and
  - (e) the letter contained no advice about seeking further advice before making further payments into the trust.

Looking at the matter objectively, both parties to the retainer ought reasonably to have concluded that the other party regarded the scope of the retainer as covering advice as to the receipt of *all* payments made to K by way of compensation for his injury (para [28]). The court rejected P's evidence that she had given oral advice to seek further advice prior to paying further monies into the trust.

The also court rejected P's contention that those with specialist experience in setting up trusts operate upon a convention that such a trust is good only for the first payment and not subsequent payments, unless specialist advice was taken. Even if there were such a convention, the burden would lie upon P to prove that K was aware of it and agreed to its incorporation in her retainer (para [38]).

3. Accordingly, P had been negligent in failing to give such advice as was necessary. The only proper advice in such circumstances was that every payment into the trust above the nil-rate band would attract an initial tax charge of 20%. Even specific oral

A advice to that effect would not have discharged the duty to advise – this would only occur if the advice had been confirmed in writing both to K and (since they would carry the advice into effect) to S (para [39]). Therefore, P was not entitled to a contribution from S.

B **Cases referred to**

*Clarke Boyce v Mouat* [1994] 1 AC 428, [1993] 3 NZLR 641

*Gray v Buss Murton* [1999] PNLR 882

*Pickersgill v Riley* [2004] PNLR 31, (2004) 14 EGCS 140

*South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 WLR 87

C **JUDGMENT**

THE DEPUTY JUDGE:

[1] In a leading textbook on professional liability (*Jackson & Powell*, 6th ed at para 11-004) it is stated, in my judgement correctly, that ‘the *fons et origo* of a solicitor’s duties is the retainer (or contract of engagement) between himself and the client’.

D [2] As the words in parentheses imply, the essence of a retainer is a contract by which the solicitor agrees to provide his services for reward. The ordinary contractual rules with regard to formation, interpretation, implication of terms and variation apply in like manner to the contract of retainer as they do to other contracts.

E [3] The retainer may be written, oral or inferred from conduct. As a matter of good practice the retainer ought to be reduced to writing, or at least evidenced in writing, but, as is the case here, very often it is not and the court has to deduce its terms from such evidence as is put before it.

F [4] The most common of the terms implied into a retainer is the obligation on the solicitor to exercise all reasonable skill and care in the performance of his retainer, a duty which he owes concurrently at common law. What constitutes reasonable care will depend on all the circumstances of the case.

[5] The scope of the solicitor’s duties to his client are set by the terms of his retainer:

G ‘The scope of duty... is that which the law regards as best giving effect to the express obligations assumed by the [professional], neither cutting them down so that the [client] obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the [professional] a liability greater than he could reasonably have thought he was undertaking.’

H (Adapted from the words of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 212E-F, a case concerning the scope of professional duty of a valuer, substituting ‘[professional]’ for ‘valuer’ and ‘[client]’ for ‘lender’.)

[6] Since one of the terms of the retainer is the obligation to exercise reasonable skill and care ‘in all the circumstances’ it is not uncommon that it becomes necessary to look at all the relevant circumstances to determine the scope of duty in a particular case.

[7] The relevant circumstances are many and varied. They may include matters existing at the time of inception of the retainer, such as the characteristics of the parties themselves (as in *Pickersgill v Riley* [2004] PNLR 31 – where the client was an experienced businessman), the nature of the transaction (as in *Clarke Boyce v Mouat* [1994] 1 AC 428 – an ‘execution only’ transaction), and especially the content and nature of the ‘contractual’ words passing between the parties and the information imparted by the client to the solicitor at the beginning of the relationship.

[8] The scope of duty is a matter of some importance in professional negligence litigation since it determines what the professional has to do to discharge his duty, what types of loss may be recoverable from the professional if he does not discharge his duty, and whether there is a sufficient link between breach of duty and loss to satisfy the requirement of causation.

[9] At the heart of the dispute in the present case is a disagreement as to the scope of the duty owed by the Part 20 claimant (‘Ms Phelps’), a specialist in trust matters, and her lay client, a man called Mr Keating. There is also an inter-relationship of that duty and the duty owed by the Part 20 defendants (‘Stewarts’), a firm of solicitors which specialised in catastrophic injury claims, who were carrying out litigation on Mr Keating’s behalf. The background facts can be shortly stated.

[10] Mr Keating was a young married man who suffered serious internal spinal injuries in a road traffic accident on 16 June 1998 for which he was not to blame. In May 1999 he consulted Stewarts with a view to bringing an action for damages against the negligent driver. He was attended by a young solicitor called Andrew Dinsmore who understood that Mr Keating might well receive substantial interim payments and, unless something were done, would lose his entitlement to receive substantial social security benefits (of about £3,000 pa) on receipt of any such damages. He decided that Mr Keating should obtain advice from a person who specialised in the appropriate subject area.

[11] Ms Phelps was a solicitor sole practitioner who held herself out as specialising in the creation of trusts suitable for persons receiving substantial personal injury awards – she had accepted work from Stewarts on about a dozen previous occasions in similar situations. It is common ground that Mr Dinsmore acted as agent for Mr Keating, introducing him to Ms Phelps so that she could enter into a retainer to act as his adviser to set up a trust for him, for which her fee would be £500 plus VAT.

[12] On 1 November 1999 Mr Dinsmore telephoned Ms Phelps and explained the background to the case. His attendance note records, and his written and oral evidence confirms:

‘Advised we were looking at a Special Needs Trust in order to safeguard client’s benefits and the eligibility for Legal Aid. Pointed out we have agreed a voluntary interim of £35,000 and will be seeking a more substantial one from the Court for a suitable property... In terms of costs – Rose will do a standard letter to client.’

A [13] On 9 November 1999 Ms Phelps (accompanied by Mr Dinsmore) met Mr and Mrs Keating at their home. There is a dispute as to what advice was given. What was not in dispute is that she advised that the appropriate trust for him was a discretionary trust. It is common ground that Mr and Mrs Keating and his wife were unsophisticated persons. Ms Phelps left them her standard form letter in which she described, in fairly simple terms, what she regarded as the important features of a discretionary trust and a bare trust.

B [14] The letter contained, *inter alia*, the following information:

C 'The main point of a personal injury trust into which *any* interim payment of compensation can be paid and into which you may *also* want *any* final compensation to be paid, is that under the present interpretation of the law it can preserve your eligibility for means tested benefits which would be lost if compensation is paid to you outright. You will need to give careful thought to which type of trust you want, before you make a final decision. If you are at all uncertain, please speak to me or Andrew' (emphasis supplied).

D [15] Under the heading 'Discretionary Trusts - tax consequences' the letter explained, *inter alia*, that:

E '... income and capital gains of a discretionary trust are taxed at 34% not at your personal rate... Discretionary trusts also suffer a percentage charge to inheritance tax on the whole fund every 10 years, and on the amount of capital paid out when it is paid out after the first 10 years. The maximum percentage charge is however 6%...'

F [16] It is common ground that one of the tax consequences which should have been contained within the letter is the information that monies in excess of the nil-rate band (which at that time was £234,000) paid into a discretionary trust by a donor such as Mr Keating attracted an initial charge to tax of 20%. (There are other taxation characteristics of importance, but these are not relevant here and need not be considered further.)

G [17] After Mr Keating had made his choice, Ms Phelps drafted a discretionary trust for execution by him. In due course the following sums were paid into the trust: £35,000 on 15 December 1999, £325,286 on 3 August 2000, £624,811 on 11 March 2002, and £20,000 on 25 March 2002.

H [18] The matter which gave rise to dissatisfaction on Mr Keating's part was the tax consequences of putting the money into the trust. The main purpose of the trust was to preserve his entitlement to state benefits (running at about £3,000 pa) notwithstanding the receipt of compensation. The consequence of paying his compensation into the discretionary trust was an immediate charge at the rate of 20% on all monies paid into the trust which were in excess of the nil-rate band, an immediate loss of over £181,000.

[19] When this liability to tax was discovered, Stewarts invited Mr Keating to seek independent advice and on 15 April 2005 he issued proceedings against Ms Phelps (holding her responsible for the whole of her loss) and Stewarts (in respect of tax accruing on only the final payment into the trust, as explained in para [47] below).

[20] Ms Phelps served a defence stating that she had been retained for a limited purpose, viz advising as to the 'pros and cons' of setting up a trust, and drafting the trust for the purpose of receiving the interim payment of £35,000, and that not only was she never told that further sums were to be paid into the trust, other than the initial payment of £35,000, but she specifically advised orally at the meeting on 9 November 1999 against doing so without first obtaining further advice. She accepted that she had not given advice as to the tax consequences of paying the money into the trust, but it was reasonable for her not to give such advice:

'... in the context of her intentions, which were confined to the creation of a trust to receive the interim payment of £35,000 which was to be used for Mr Keating's short-term needs.'

She issued Part 20 proceedings against Stewarts.

[21] At a mediation on 31 January 2006 Mr Keating's claim was settled by Ms Phelps for the sum of £200,000 plus costs. The present action is a claim by Ms Phelps against Stewarts for a contribution towards the amount of the settlement, pursuant to s1 of the *Civil Liability (Contribution) Act*, on the grounds that Mr Dinsmore was negligent in failing to:

- (a) instruct Mrs Phelps that further substantial payments were to be made into the trust and to instruct her to advise in relation to the entire sum to be received by Mr Keating, or to give clear instructions to Ms Phelps to that effect; and
- (b) heed her advice at the meeting on 9 November 1999 not to do so without seeking further specialist advice from her or otherwise.

[22] Although not pleaded, Ms Phelps also ran the argument that if there were any deficiency in the formation of the retainer so that its scope was unclear or confusing, Stewarts should also take a share of the blame. At the opening of the case, Ms Phelps sought to amend her particulars of the Part 20 claim in order to add a further particular of negligence. I refused the application for reasons I propose to explain at a later point in this judgment.

[23] Stewarts denies that Ms Phelps was instructed for the limited purpose of drafting a discretionary trust to receive only the first interim payment of £35,000 – she was to advise comprehensively and draft a trust to receive all the compensation monies received by Mr Keating. She did not advise that no further sums were to be paid into the trust without seeking further advice.

[24] It can be seen that the key to a resolution of this dispute is the nature and scope of the duty which was imposed on Ms Phelps by her retainer. If it was limited

A to the drafting of a scheme suitable for the receipt of only £35,000, it is argued that Ms Phelps was not in breach of duty. The question which needs to be asked first is what was the scope of the retainer.

B [25] The terms and scope of the present retainer are not contained in any contractual document but fall to be determined by the court looking objectively at all the circumstances, including in particular what was said and written between the parties and their conduct in relation to each other at the commencement of their relationship. The personal opinions of the parties and any particular 'clear understanding' either may have had as to the scope of the duty are not relevant aids in the determination of the scope of the retainer, just as the personal intentions of the parties are not a relevant aid to the construction of a contract.

C [26] Although it is correct that the client has the power to determine the terms of the retainer, the client usually does not have sufficient expertise to enable him to judge where the boundaries of the retainer are to be drawn and the significance of doing so at one point rather than another will be lost on him, although they will (or at least ought to be) understood by the professional. For example, in the present case, D unless the client had some specialist knowledge as to the incidence of inheritance tax ('IHT') he will not have had the capacity to understand the significance of a term limiting the retainer to a particular level of interim award. The courts will therefore tend to look to the professional for clear evidence that the client ought reasonably to have understood that the scope of the retainer was being limited and that he was assenting to such limitation.

E [27] The following circumstances are of particular relevance in my judgement for determining the scope of the duty owed by Ms Phelps to Mr Keating, that is to say: that Mr Keating was an unsophisticated client and this was apparent to Ms Phelps; that Ms Phelps held herself out as having a special expertise and knowledge, in F relation to the problem for which she was instructed, which neither the client nor Mr Dinsmore possessed; that when Mr Dinsmore first spoke to Ms Phelps, he informed her that, in addition to the first interim of £35,000, there was a further sum of £300,000 which was expected; that Ms Phelps' standard letter appeared, on a perfectly reasonable reading, to envisage that the trust was one 'into which any G interim payment of compensation can be paid and into which [Mr Keating] may also want any final compensation to be paid'; that the letter did not contain any advice against making further payments into the trust without obtaining further advice; that at the meeting between Mr Keating and Ms Phelps on 9 November 1999 Mr Dinsmore was present; that her note of the meeting confirmed 'Interim pyt £35k... £300 in 3 months'. There is also the important circumstance that any H disposition of damages into a discretionary trust attracted an initial charge to tax of 20% above the nil-rate band.

[28] Of these factors, the fact that Mr Keating was 'an unsophisticated client' is in my judgement one of the most important circumstances having influence on the scope of the retainer. This case is the other side of the coin from *Pickersgill v Riley* (*op cit*). Mr Keating would not know what conventions ordinarily operated as between lay clients and trust lawyers unless these had been explained to him, nor whether

Ms Phelps had a usual practice when advising other clients of Stewarts, unless that practice had been explained to him. In my judgement, in the absence of a specific term of the retainer, or relevant limiting circumstances, a court looking at the matter objectively would conclude that both parties to the retainer ought reasonably have concluded that the other party regarded the scope of the retainer as covering not merely advice as to the immediate receipt of £35,000, but also the receipt of the further payment and such further compensation as might be received in the future.

[29] Ms Phelps disputes such a conclusion on the basis of her:

‘... clear understanding that my then current instructions related to the payment of £35,000 only... My instructions were to advise on the most appropriate trusts vehicle for the interim payment of £35,000 in order that those funds could immediately be utilised without affecting benefit eligibility... there was an urgent need to have access to the interim payment.’

She also says that at the meeting with Mr Keating on 9 November 1999 she told him and his wife in the presence of Mr Dinsmore that:

‘... the trust was set up for the purpose of receiving the £35,000 interim payment and that they should not assume they had to add further payments to it. They could do so, but they needed to think and take advice if and when further payments were made. To put the matter in context, whilst the Keatings are sensible people, both the creating of the Trust and dealing with large sums of money were foreign concepts to them.’

[30] Apart from this she said that as a lawyer specialising in trusts, she would not expect any further payment to be made into a trust without further advice being taken.

[31] Stewarts disputes this for two reasons. First, it relies on the evidence of Mr Dinsmore, who said that he had a clear recollection that Ms Phelps did not give the advice set out in the preceding paragraph of this judgment – if she had, he would have heeded and acted upon it. It was also his recollection that a further and substantial interim payment was due and he told Ms Phelps that further significant sums were to be paid into any trust fund created for Mr Keating. Secondly, Stewarts asserted that the reason Ms Phelps failed to advise of the initial tax charge was because she simply did not know that the payment of compensation into a discretionary trust attracted an initial liability to IHT at 20% for sums in excess of the nil-rate band – that was why that fact was not referred to in her standard letters. In support of this proposition Stewarts sought to adduce, as similar fact, evidence as to the advice she gave to another of their clients, a young man called Scott Fleming. It is common ground that the evidence was admissible as similar fact evidence. Ms Phelps argued that, properly understood, the evidence did not take matters further against her. She vehemently denied that she was ignorant of the initial tax charge.

**A The Fleming case**

[32] Mr Fleming had also suffered catastrophic injuries in a road traffic accident for which he was not to blame. By the end of October 2000 Stewarts had negotiated the receipt of an interim payment of £300,000 with which he intended to buy a house, a fact of which Ms Phelps when instructed became aware. She sent Mr Fleming her standard letter and saw him on 14 November 2000. On her advice he decided to go for a discretionary trust. An attendance note from Miss Lennon, the assistant solicitor dealing with the case, confirms that on 16 November 2000 she spoke to Ms Phelps and told her that there would be more than the property to go into the trust, and that she was expecting a further interim payment of just under £100,000 to cover adaptations, initial care and 'an amount for the client to live on'.

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**C** [33] On 17 November 2000 Ms Phelps wrote to the two prospective trustees of Mr Fleming's trust stating, *inter alia*:

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'I know that you would both like some more information about the duties of trustees. In reading this you should bear in mind that the trust will probably only own the house and a small amount of money initially but it is very likely that more payments will come through in the next few months, and if the personal injury action is successful one would hope that eventually the trust will receive a large amount of compensation for Scott.'

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[34] A discretionary trust was set up in accordance with Ms Phelps' advice. The sum of £300,000 was put into the trust and used to buy a house for Mr Fleming. The consequence was that Mr Fleming used up the whole of his nil-rate band of £234,000 and the balance of the monies was subject to a charge to IHT at 20% - a sum of £12,000.

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**G** [35] When his solicitors discovered the position a letter of claim was written to Ms Phelps. A response dated 2 October 2003 from her insurers denying liability stated that Ms Phelps 'specifically recalled drawing Mr Fleming's attention to the fact that there would be an immediate charge to IHT'. In her witness statement dated 3 May 2007 she stated 'I have no actual memory of this now, but I approved the [insurer's] letter and clearly this was my recollection in 2003', a position which she maintained in evidence before me.

**H** [36] Although Mr Fleming was not called to give evidence, I have no hesitation in rejecting the evidence of Ms Phelps. The point is that a dwelling house is not taken into account at all for the purposes of assessing a person's entitlement to benefits. She was therefore presented with a complete 'no brainer' - there was simply no need to put the money into a trust. It would achieve no benefit of any significance and on the debit side of the equation would both use up a potentially valuable IHT allowance and incur a further liability to an immediate tax charge of £12,000. Benefits would not have been lost had Mr Fleming used the money to buy the house without putting it into a trust. Only a person who was not aware of the liability to an immediate tax charge would allow Mr Fleming to execute the transaction through

a trust or, if he insisted, would fail to draw to the attention of the client's general solicitor the consequences of doing so through such a trust.

[37] Returning to the facts of the instant case, there is no sign in the standard letter to Mr Keating that Ms Phelps was aware of the liability to an initial inheritance tax charge as she had omitted to mention it in her standard letter, a matter which she accepted was unfortunate in retrospect. There are also a number of positive indications in the letter that she contemplated the introduction of further monies into the Keating trust, and at no point did the letter refer to the need to take advice before introducing into it any additional payment. Finally, on a credibility basis I have seen both Mr Dinsmore and Ms Phelps give evidence. I not merely prefer the evidence of Mr Dinsmore when it conflicts with that of Ms Phelps, but I do not accept on credibility grounds that Ms Phelps was telling me the truth. She said that she thought it unfortunate that the 'assumptions of "others"' (that is to say Mr Keating and Stewarts) were different from her own. She did not however seem to accept any responsibility for this state of affairs.

[38] In the circumstances, I reject Ms Phelps' version of the conversation on 9 November 2001. I do not accept that she told either Mr Keating or Mr Dinsmore that specialist advice should be taken before further payments were made into the trust. I do not accept that there was any convention with Stewarts that she dealt with the setting up of trusts on the basis that such trust was good only for the first payment and not subsequent payments, unless specialist advice was taken. In any event, since Stewarts were only the introducer of their lay client to Ms Phelps, the burden of establishing that Mr Keating was aware of the convention and assented to its incorporation into the retainer so as restrict the scope of Ms Phelps' duty to him lies upon Ms Phelps not Stewarts and has not been discharged. Nor do I accept her assertion that those with specialist expertise in setting up trusts operate upon such a convention or that such a convention would apply to a personal injury trust. Again, even if there were such a convention, the burden would lie upon Ms Phelps to prove that Mr Keating was aware of the convention and assented to its incorporation into the retainer and the consequent limitation of the retainer. Having regard to the fact that Mr Keating was an unsophisticated client and the complexity and significance of a limitation of retainer, I would not be inclined to regard any limitation, such as that for which Ms Phelps has argued, as effective unless it were in writing and, as Mr Lawrence QC for Stewarts put it, underlined in red and, as I would add, properly explained.

[39] In the light of the above, Ms Phelps has failed to establish that the scope of her retainer by Mr Keating was limited in the manner she alleges. In the absence of the limitation, it was incumbent upon her to give such advice as was necessary in the circumstances of which she was aware or ought reasonably to have contemplated. The only proper advice in those circumstances was that every payment into the trust above the IHT allowance would attract an initial tax charge of 20%. In my judgement also, even specific oral advice would not have constituted a discharge of the duty to advise. The matters were of some difficulty for lay people to take in orally, especially if they were 'unsophisticated'. In such circumstances, the duty would not have been

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A discharged unless the advice had been confirmed in writing and, in my judgement, having regard to the fact that Stewarts would have been the party carrying the advice into effect, confirmed also to Stewarts.

B [40] Accordingly, the pleaded allegations against Stewarts fail as a matter of fact. As regards the unpleaded allegation – that Stewarts were to blame for such confusion as arises over the scope of the retainer, I do not accept that Stewarts were to blame on a number of important grounds. First, they were entitled to think from all the information and discussions that passed between them and Ms Phelps that there was no limitation on the retainer. The substance of my decision is that Stewarts were entirely correct in their appreciation of the scope of the retainer. Secondly, I do not accept that there was any confusion as to the scope of the retainer. As I have indicated, I do not accept the accuracy of Ms Phelps' evidence. There was in truth in my judgement no confusion at all about the scope of her retainer – she has asserted and run her case on the basis of a confusion that did not exist. The confusion is in my judgement a 'smokescreen' to disguise the fact that Ms Phelps did not appreciate that payments into a discretionary trust attracted an initial tax charge, a fact which she was not prepared to admit. Even if there was confusion, the obligation lay upon her to take appropriate steps to clarify the understanding of her client (see *Gray v Buss Murton* [1999] PNLR 882) and this she failed to do.

#### The proposed amendment

E [41] The application to amend was made at the close of Mr Halpern's opening submission. Proceedings had been issued in April 2005, the trial was listed for the week commencing 30 April 2007. Skeleton opening submissions had been exchanged on 27 April 2007. The proposed amendment was served late on Tuesday 1 May. On Wednesday 2 May the trial was listed to commence on 3 May, as in fact occurred.

F [42] The proposed amendment was in the following terms:

G '[That Stewarts had] caused or permitted the sums of £624,811 and £20,000 to be paid into the Trust on or about 12th and 28th March respectively, notwithstanding Stewarts' own concerns, expressed in its letters of 6th November 2001 and 21st February 2002, that the Inheritance Tax consequences of payments into a similar trust drafted by Ms Phelps for another client had not been addressed.'

H [43] The letter of 21 November 2001 was written by a partner, Mr Horspool, of the firm's Esher office, who specialised in non-contentious business, commercial, property and some banking, but neither trusts nor tax. The letter was sent to the managing partner of Hanne & Co, for whom Ms Phelps was working as a consultant at the time when she gave her advice to Mr Fleming. Mr Horspool was querying an aspect of the letter of advice sent to Mr Fleming and asked 'in particular, were the inheritance tax consequences of making this particular settlement drawn to the attention of Mr Fleming?' Ms Phelps was on leave but the query was relayed to her and she reviewed the file and approved the letter of 6 December 2001 which

Hanne & Co sent in response. The letter of 6 December 2001 provided no clarification at all and did not answer the question raised. An internal memorandum of the same date indicated that it was the belief of Hanne & Co that there was no reason to notify insurers of circumstances which might give rise to a claim.

[44] The response of Mr Horspool was dated 21 February 2002. It is evident that he had been absent from the office and in hospital in the intervening period. There is no sign that he was at this date aware of the Keating case. He repeated his concerns as follows:

'Is it clear from the file that Mr Fleming was advised that tax would be payable and the amount thereof? Further is there any indication on the file who would be dealing with these tax matters if not your firm? I am concerned that neither the Return nor any payment has been made and, as a result there is an outstanding liability for tax and, presumably, interest and, probably, penalties.'

[45] It may be said that what Mr Horspool appears to be primarily concerned about was the potential liability of Hanne & Co for failing to give advice as to the liability to make a return to the Inland Revenue and pay tax which was likely to have incurred a liability to the Revenue for interest and penalties. Whatever the position, there was no response to his letter until 18 April 2002 when Hanne & Co stated their position to be that Ms Phelps had no liability because she had advised on the desirability of obtaining advice from an accountant.

[46] In the meantime, on 11 March 2002 the penultimate payment of £624,811 was paid into the Keating trust.

[47] On Friday 22 March 2002 there was a fax sent by Mr Horspool to Keith Halford of Legal Financial Needs Ltd (who appears to have taken over the role of investment adviser to Mr Keating) which appears to have been written following the recent receipt, and consideration, of a copy of the Keating deed of settlement dated 15 December 1999. It is evident that Mr Horspool had tried and failed to make contact with Mr Dinsmore who was then on leave. The document contains these words:

'I am concerned, because of the other matter I mentioned to you on the telephone, that Mrs Phelps did not advise on the tax consequences of putting this Trust into effect and, therefore, it may be that the question of Inheritance Tax has not been dealt with. I would certainly agree with you that no further monies should be put into the Trust until the tax position has been clarified.'

[48] In fact, on the following Monday, 25 March 2002, Stewarts transferred by CHAPS the final sum of £20,000 to be paid into the Mark Keating Trust. Since this payment was made after the letter dated 22 March, Stewarts have accepted liability for breach of duty and compensated Mr Keating for any loss arising from this payment.

A [49] Mr Halpern sought permission for the amendment to be allowed so that he might investigate whether Mr Horspool's concerns could be sufficiently antedated the penultimate payment on 12 March 2002 so as to enable liability for the consequences of this payment to be laid at least in some part at the doors of *Stewarts*. He said that the late application was because of late disclosure on the part of *Stewarts*. His clients were prepared to pay *Stewarts'* costs of any necessary adjournment.

B [50] *Stewarts* resisted the amendment on the grounds that it could not be made without causing serious prejudice. Mr Horspool had retired and *Stewarts* had lost contact with him – they could not deal with the amendment without him, in which case there would have to be an adjournment of the trial. They disputed that there was any significance in the allegation which Ms Phelps sought to advance. That was because: Mr Horspool was neither a trust nor a taxation expert; he operated out of the Esher office while the Fleming and Keating claims were handled in the London office by different assistant solicitors, Miss Lennon and Mr Dinsmore respectively, even though under the supervision of the same supervising partner; there was no reason to think that the letter dated 22 March was anything other than a concern which had arisen since the penultimate payment had been made on 12 March; the allegation could have been made earlier (since both the Fleming and Keating cases were dealt with by the same insurer and counsel, although the solicitors were different); Ms Phelps reviewed the files and should have had the correspondence in mind, so also should the insurer who was responsible for responding to the protocol letters in each claim; this was, in addition, a case in which any delay would compound the strains upon Mr Dinsmore (who was separately named as a defendant to the Part 20 proceedings, because he had taken this case with him when he had moved firms during the relevant period). Finally, I was reminded of the importance to the administration of justice that the court's resources should be used efficiently. Argument on the amendment was completed at 14.55 on a Thursday when it would have been too late to list a further trial for the Friday – effectively a waste of two sitting days. I refused the application and said I would express my reasons in this judgment.

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H [51] The effect of an amendment would have been to change the whole nature of the case being advanced – to do so at such a late stage would have necessitated the adjournment of the trial and the waste of two court sitting days. I was quite unpersuaded that the point could not have been anticipated by Ms Phelps' insurers or legal advisers at an earlier stage – they had been aware of Mr Horspool's letter of 22 March 2002 from the date of service of the particulars of claim and they did of course have possession of their own correspondence with Mr Horspool in the Fleming case since the date it had been received in the course of post. There is also the fact that prejudice to a party from the adjournment of a trial at the last moment goes beyond the mere incurring of costs. Although an unresolved allegation of breach of duty hanging over a large firm may be a comparatively small matter, in the present case the allegation was against Mr Dinsmore who was named as a defendant – I can well imagine the strain and tension that would be suffered by being in that position and by an adjournment. As regards the allegation which Ms Phelps sought

to advance, it was put forward on a speculative basis in the hope that something might turn up out of it. Of course, something may have turned up, but it did not seem to me at first sight that the allegation was likely at the end of the day to be one which was well founded.

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[52] My duty was to exercise a discretion in accordance with the overriding objective. It was and is my judgement that the balance of justice lay with refusing the application to amend.

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[53] In these circumstances, in my judgement Ms Phelps' claim for a contribution from Stewarts must fail.

**Counsel**

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