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Claims Against Solicitors
Divorce Under-Settlement

Divorce Under-Settlement Claims: What You Can do to Protect Against Them

As many firms involved in divorce carrying out matrimonial work will know, there has undoubtedly been an increase in these claim in recent years, often brought by the same handful of solicitors. The claims usually follow a very similar format, alleging that a firm did not properly advise on the divorce settlement and as a result the claimant has lost out on the opportunity to obtain a better settlement from the ex-spouse. The allegations can vary but often include, not seeking spousal maintenance, not sufficiently investigating an ex-partner's assets and not advising fully on a pension sharing order or getting an actuary report.

The firms that bring these claims tend to use women's magazines to advertise their services and operate on a 'no win, no fee' basis. They will often pursue claims doggedly through to issuing proceedings regardless of the merits of the claim, hoping that insurers may take a commercial view of the claims and be aware that the claimants will often make sympathetic witnesses.

Compounding this is the fact these claims will often follow many years after the underlying settlement meaning that files may no longer be held, be incomplete, or may be deficient. Further, fee earners may have moved on or will have very limited recollection of specific matters, meaning that the file is the only contemporaneous evidence relating to the claim.

Whilst the number of years between the settlement and the claim may, on the face of it, provide a limitation defence, routinely claimants' solicitors will argue that their clients are unsophisticated and had no idea that they might have a claim against their solicitors. Judges do not tend to favour technical limitation arguments, especially where they may have sympathy for a Claimant who is of limited means and so there is a real risk claims will be found to be in time for the purposes of limitation. Therefore, the limitation is unlikely to be a certainty even where advice was provided well over six years prior to a claim being made.

The other difficulty is that these claims are brought on a loss of chance basis; ie that the claimant has lost the chance to obtain a better settlement with their ex-spouse either through negotiations or by taking their case to a final hearing. The problem with these 'loss of chance' claims is that the threshold for the Claimant to overcome to show that lost chance is very low indeed. This can result in an easy 'win' at trial, and often the costs and consequences which follow are significant. There are no signs that the Courts' approach to loss of chance is going to change any time soon.

Practical Steps

1 Put things in writing

This may seem obvious, however often where the client is of limited means, solicitors will do what they can to make the advice process as efficient as possible. This means that divorce files can often lack any detailed, written advice and attendance notes. However, in defending a claim, detailed written advice is critical to demonstrate that matters have been fully considered, that no facts or legal issues have been overlooked and all of the options have been spelled out to the client. Attendance notes of telephone calls and meetings also help show the client's objectives, concerns, understanding and critically their instructions.

2 Spell it out

When dealing with unsophisticated or emotionally vulnerable clients it is tempting to discount certain options where it seems obvious that this will not be appropriate for the client. The problem with that is when, years later, the client decides that a particular option was in fact just what they had wanted. This often applies in relation to spousal maintenance and pension-sharing orders. If the courts are taking a particular approach on an issue, such as generally favouring clean break settlement, this can also be set out by the client to justify the advice you are providing. Even if you think that some of the options are not relevant or appropriate for your client, it is worth setting them out and explaining why in as clear and unequivocal a way as possible. If practicable, you should also explain the costs and consequences of deciding to take, or not to take, a particular course of action.

3 Advice on expert evidence

It is typical for solicitors to be criticised for not obtaining a pension-sharing order, even though there may be proper reasons why this was not explored. It assists the defence of any such claim if the solicitor has advised fully on pension sharing orders, explained the likely costs of instructing an expert as against the potential benefit, and even explored experts' quotes and availability. If this option is discounted then that should be recorded fully on the file. At the very least, where a pension is sizeable full disclosure should be obtained not only in relation to its value but also any additional benefits which might be included in the pension, and these should be explained to the client.

4 Explain the deal

All too often Claimants allege that they did not understand what had been agreed, especially where deals are done quickly at the door of the Court. After a settlement has been reached the deal should be explained and justified in writing.

5 Be realistic

If on the face of the deal there is an obvious inequality (such as a lump sum to the wife is far less than the value of the husband's retained pensions) this should be explained. The practical impact of the deal and whether it means that the client's current lifestyle will remain affordable should be considered as well, including the long-term viability/stability of any state benefits which may be relevant.

6 Be upfront

If a settlement is not as good as it might otherwise have been it is better to recognise that and to explain why than to risk a claim or complaint later. If a deal is not as good as it could be then that is rarely the fault of the solicitor and has more to do with the parties' approaches and their respective means.

7 Proceed with care

In cases where there is a particular disparity in incomes between the parties, or where the parties' assets overall are modest save for a generous pension (especially in armed forces/police/some public sector roles). These situations are often where claims arise. If a deal is being considered before full financial disclosure has been obtained from the other party, this should also be explained including the risks that can arise in those circumstances.

8 Show excellence in client care

Clients who like their solicitors and feel as though they have been looked after are far less likely to bring claims. Use tools such as explanatory guidance notes to help clients navigate their way through what is often an emotional process. If a client has always been difficult or is starting to be, then that is a 'red flag' which should be managed appropriately. Supervision from senior fee-earners is always key.

9 Comply with deadlines

Even where there is no obvious negligence by a solicitor, service-related issues, delays and deadlines not being complied with suggests an overall lack of care and attention, and makes a claim even harder to defend.

10 Protect yourself

If your client has ignored your advice and decided to accept an offer which you believe you can improve upon, ask them to sign a letter setting out your advice but which includes a declaration that notwithstanding that advice, they wish to proceed contrary and that this is not a point they can take against you in the future. Whilst for a number of reasons this does not necessarily provide absolute protection from a claim, depending on the circumstances, it certainly helps.

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