THE TIMES
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Moot Problem: YLT Solicitors LLP v Ira McKew

The facts

Mr McKew is a struggling manufacturer. He had bought a factory in 2008 and set it up to manufacture inflatable pin cushions. His venture was a let-down and so he started to look for new options in the summer of 2009. Mr McKew was approached by Mr Bardot, an inventor. Mr Bardot had designed a new revolutionary product: diet fizzy water. The secret to the product lay in the design of the bottle, which could store more bubbles of air than ordinary bottled water.

Mr Bardot wanted Mr McKew to be the exclusive producer of the product. They spent a long time negotiating a contract and arrived at a final draft in November 2009. Within the agreement was a recital that *"Mr Bardot owns the unchallenged registered design to the bottle"*.

Mr McKew wanted advice on the contract before signing it. He approached YLT Solicitors LLP ("YLT"), a small, full-service, high-street firm. Mr McKew could not spare much money to pay YLT because he had to save to modify his factory to make the bottles. YLT and Mr McKew agreed that the person at the firm who charged the lowest fee, a paralegal, Mr Butcher, would consider the contract and consider whether it protected his interest appropriately. They also agreed that Mr Butcher would cap his fee at £500.

Mr McKew sent YLT the contract and various documents including 6 bundles of printed email correspondence with Mr Bardot. Within the bundles of correspondence was a lengthy email dated 1 June 2009 from Mr Bardot to Mr McKew setting out why the bottle was different to others offered by the main market competitor, MBV Ltd. Mr Bardot also wrote within this email that *"We've received a Form DF19A regarding the design"*. A Form DF19A was the standard form used to challenge a design registration.

Mr Butcher sent an advice to Mr McKew on behalf of YLT on 1 December 2009, saying that the agreement appeared to be in order. Mr McKew signed the agreement on 1 June 2010 and immediately spent several thousand pounds developing his factory to produce the bottles. Mr Bardot's Diet Fizzy Water went onto the market in August 2011 and was an instant success. However, in February 2012, Mr Bardot wrote to Mr McKew advising that MBV had invalidated the design registration protecting the bottle and was about to bring out their own version of it: Water Lite. MBV released Water Lite, which instantly outsold Mr Bardot's Diet Fizzy Water, killing its market share. Mr Bardot was made bankrupt.

The decision at first instance

Mr McKew issued proceedings against YLT on 1 May 2016, claiming Mr Butcher's advice on 1 December 2009 was negligent. He claimed that Mr Butcher should have read the email dated 1 June 2009 and known (or ought to have known) that this was a form to challenge a design registration. Mr McKew's case was that (a) Mr Butcher should have advised him that the recital

that *"Mr Bardot owns the unchallenged registered design to the bottle"* was not accurate and (b) if he had been aware of this, he would have investigated the matter and probably not entered the agreement with Mr Bardot.

The trial was heard in the County Court at Central London by HHJ Hubley. Mr Butcher gave evidence and said that he could not remember whether or not he had read the email when he reviewed the papers. However, he was clear that he did not know what a DF19A was and would not have researched it: he assumed it was a technical issue relating to the product. Mr Butcher said that *"I was asked to look over the standard terms of an agreement for a very small fee. I can't be expected to read every email in a load of email chains and research every word in it"*.

YLT also called Ms Rahimi, a solicitor, as an expert witness. Ms Rahimi said that a qualified or trainee solicitor should have known what a DF19A was or been aware that it was something to research as it appeared to be a court form of some kind. However, she thought that a paralegal would not know this because they would not have received the same training.

HHJ Hubley found for Mr McKew. In doing so:

(a) She held that the scope of the retainer included reading all of the documents provided by Mr McKew and that the fixed fee paid to YLT did not inform the scope of the retainer in this case: *"it was no excuse that it was unprofitable to read all the documents provided by Mr McKew for the agreed fee"*.

(b) She found that the fee was also irrelevant to determining the standard of care. The judge relied on the comments of Mr Hynter QC (sitting as a Deputy of the High Court) in *Johnson v. Bingley, Dyson and Finney*:

> *"*[the] *evidence was that…so-called cut-price conveyancers whose advertisements, due to reforms some deem progressive others regressive are now permitted and whose profits cannot be achieved other than by completing transactions by post…It is bad enough, if it be true, that the lifting of traditional restrictions designed to safeguard professional standards should lead to a lowering of those standards. It would be worse if judges were to hold that such lower standards should be substituted as the norm for the traditional standards"*

(c) She held that a qualified (or even a trainee) solicitor should have known what a Form DF19A was or been aware that it was something to research as it appeared to be a court form of some kind.

(d) She held that Mr Butcher should have read the email with the same care as if he was being paid to do so on an uncapped hourly rate; had he done so, he would have known that the recital was inaccurate. She rejected that paralegals could be held to a lower standard than a qualified or trainee solicitor because they held themselves out as being competent to practise law. HHJ Hubley held that Mr Butcher ought to have advised Mr McKew that the recital could not be relied on because he ought to have been aware that there was likely a challenge to the design registration.

(e) She held that, had Mr Butcher told Mr McKew that the recital was inaccurate, he would not, on the balance of probabilities, have entered into the agreement with Mr Bardot.

The Appeal

In their application for permission to appeal, YLT did not seek to challenge the findings of HHJ Hubley (a) that a solicitor should have known what a Form DF19A was; and (b) that had Mr Butcher told Mr McKew that the recital was inaccurate he would not have entered into the agreement with Mr Bardot. YLT's appeal is focused on HHJ Hubley's judgment on the standard of care.

YLT has been given permission to appeal to the High Court on two grounds:

(a) That the judge was wrong not to consider the fee when determining the standard of care.

(b) That the judge was wrong to find that a paralegal ought to be held to the same standard as a solicitor.

Materials

1. *Burgess and another v Lejonvarn* [2017] EWCA Civ 254
2. *Johnson v Bingley, Dyson and Finney*, The Times, 28 February 1995
3. *Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB)
4. *Minkin v Landsberg (trading as Barnet Family Law)* [2015] EWCA Civ 1152
5. *Graham Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303
6. *Waters v Maguire* [1999] Lexis Citation 2733
7. *Inventors Friend Ltd v Leathes Prior* [2011] EWHC 711 (QB)
8. *Nettleship v Weston* [1971] Vol. 2 QB 691
9. *Matrix-Securities Ltd v Theodore Goddard (a firm and another)* [1998] STC 1
10. *Duchess of Argyll v Beuselinck* [1972] Vol 2 Lloyd's Law Reports 172