Professional conduct

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If you are acting for spouses, civil partners, cohabitees, when do they need to have independent advice about the terms of a trust affecting the family home?

This was the issue in the next case.

On the facts, it was held that there had been no breach of duty or negligence.

Even if the female cohabitee had had independent advice about the terms of the trust, she would have signed it.


The defendant, a firm of solicitors, prepared a declaration of trust with regard to the home of cohabitees. The female cohabitee did not have independent advice about the terms of the trust, and sued the defendants for negligence and for not having advised her to seek independent advice.

Behrens J said:

“Mr McCue referred me to Chapter 15 of the Guide to the Professional Conduct of Solicitors (1999 Edition) where the following appears:
A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.

He also referred me to the passage on cohabitees in the Law Society Conveyancing Handbook – 2005 Edition where the following guidance appears:
9.8.1 All co-habitees whether they are spouses, civil partners, co-habitees or joint purchasers may need to be advised independently about their respective rights in the property to be purchased. Solicitors should be alert to the possibility of a conflict of interests arising in this situation.

9.8.2 It is advisable for cohabitees who are to be co-owners to enter into a separate deed of trust ...which sets out their respective interests in the property

9.8.4 In Oxley v Hiscock [2004] EWCA 546 the Court of Appeal provided guidance on the steps to be taken when acting for cohabitees:

The solicitor should always enquire about the source of funds for the purchase and the future liability for the mortgage.

If there is evidence that the purchase is actually a joint acquisition or that others may be acquiring rights under a potential constructive trust, the client(s) should be advised either
to purchase the property as legal co-owners and/or to record their arrangement in a trust deed.

When drafting the transfer and/or trust deed decisions have to be made as to whether the equitable interest is to be held as joint tenants or tenants in common.

I also consider that it is not possible to give definitive guidance as to whether there is a duty to advise the clients on the merits of an agreement relating to the beneficial ownership of a home occupied by cohabiting couples. The agreement may be so one sided or contrary to what might be considered to be fair that one or other of the parties needs to be advised as to this and to take separate independent advice. All will depend on the facts of the individual case.”

On the facts of this case, it was held that there was no breach of duty. If the judge was wrong, he was of the view that the claimant would have signed the deed of trust even if she had had independent advice.