

Bamboozling the public

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Introduction

The letter below was sent by solicitors, newly instructed by a husband on the breakdown of the marriage, to his unrepresented wife. It is not badly written, by the normal standards of the profession, and you may wonder what is the matter with it. I chose it for that reason, to show how shockingly inadequate those standards are.

The letter

Without prejudice

Dear Mrs Smith,

We have been instructed to act on behalf of your husband in connection with the matrimonial difficulties which have arisen between you.

We understand that your marriage has irretrievably broken down but that as there are no children, all financial matters have been agreed between you.

However, in order to clarify this, we should be grateful if you would confirm that you are agreeable to the matrimonial home being sold and for the net proceeds thereof to be divided equally between yourself and your husband. From the proceeds of sale, our Client is to give to you the sum of £2,000 and from your one half of the net proceeds of sale, you are to deduct a further sum of £2,000 and the total sum of £4,000 will be paid by you to your father in respect of a loan on property owned by your father in Spain. On payment of the said sum of £4,000 the property in Spain will then be transferred into the joint names of yourself and your husband so that between you you will have the ownership thereof and you will continue to use the property at separate times by agreement.

In consideration and in conjunction with this, you will agree to all or any claims you may have now or in the future in respect of ancillary relief, from your husband, to be dismissed.

If you are in agreement with this, we should be grateful if you would let us know as soon as possible so that the appropriate Deed can be drawn up for your respective signatures.

We look forward to hearing from you as soon as possible.

Yours faithfully,

The questionnaire

I sent a copy of the letter (in which only the names and addresses have been changed) to 150 clients, chosen at random. All but one are (as far as I know) native English-speakers. I asked them to complete this questionnaire:

1. Do you understand any of it?
2. Are you confident that you understand it all?
3. Please (a) *Underline the parts you do not understand at all; and*
 (b) *Put brackets round the parts you are not certain about.*
4. If you received a letter like this from your spouse's solicitor, and it reflected the terms you had agreed informally, would you do as they ask?
5. (a) What do you understand by "without prejudice"?
- (b) What do you think is the significance of the expression "your marriage has irretrievably broken down"?
- (c) What do you understand by the phrase "matrimonial home"?
- (d) What are "net proceeds of sale"?
- (e) What is "ancillary relief"?
- (f) Who do you think will get what under the arrangements in the 3rd paragraph?
- (g) What do you think will happen to the Spanish property when one of the Smiths dies?
- (h) Does the agreement affect Mrs Smith's right to claim maintenance in the future?
- (i) Could Mr Smith ask her for maintenance in future?
- (j) Is a divorce planned?
6. After answering question 5, do you want to change your answers to questions 2, 3 or 4? If so, how?
7. Please add any comments you have about
 (a) *the contents, and*
 (b) *the style of the letter,*
and how they could be improved.
8. What is your highest academic or work qualification?

The results

77 questionnaires were returned, including one from the original "Mrs Smith". In analysing the replies, I have dealt with the questions out of the numbered order. **This typeface indicates a quotation from the answers.**

8. What is your highest academic or work qualification?

27 were graduates or had a professional qualification. I have called all these "Graduates".

1. Do you understand any of it?

73 people thought they understood at least some of the letter.

Another 2 answered "no" initially but changed it to "yes".

3 (including 1 Graduate) said they did not understand any of it.

2. Are you confident that you understand it all?

Only 29 (including 11 Graduates) thought they understood it all. I will call them the "Understanders".

In fact, not one of the 77 understood it thoroughly.

6. After answering question 5, do you want to change your answers to questions 2, 3 or 4? If so, how?

4 of the 29 (including 2 Graduates) realised whilst answering the questions that they did not understand the letter as well as they had first thought.

2 Others changed their minds the other way, deciding that they did understand it after all.

I have called "Understanders" only those who were confident at the beginning that they understood everything and did not change their minds.

5. (a) What do you understand by "without prejudice"?

Only 10 of the 77 clearly understood; one more gave the right answer but expressed doubt; and there were a few near approaches which might be accepted as good enough in the circumstances.

Of the 29 Understanders, 23 did not understand "without prejudice".

Altogether:

23 thought it meant that acceptance of the offer would not create a binding agreement; and

10 thought it meant that the solicitor writing the letter was acting impartially.

So 33 (43%) were under a misapprehension which seriously threatened their rights.

(b) What do you think is the significance of the expression "your marriage has irretrievably broken down"?

Almost everyone understood the literal meaning of the words - that there was no prospect of a reconciliation.

But only 5 picked up the real significance - that these were grounds for divorce.

Another 8 said that a divorce was, or might be, imminent.

One replied **The marriage "contract" no longer exists** and one thought it meant that the parties were **legally separated**.

(e) What is "ancillary relief"?

No-one mentioned orders for the transfer or sale of property, or one-off lump sums. None said that it was relief available to either party ancillary to a decree of divorce or judicial separation. However, most knew that it involved the payment of money.

Among the answers were:

Temporary relief.

Claims other than that based on house sale.

Other support or assistance, probably financial.

Any other sums you hoped he might pay.

Maintenance payments from husband.

Payment made by the husband to Mrs Smith for "housekeeping" or suchlike.

If Mr Smith wins the pools Mrs Smith might like to claim a part of his good fortune.

34 did not answer or said they did not know.

(j) Is a divorce planned?

This question was included to check the answers to 5(b) and, to a much lesser extent, 5(e), since the catchphrases "irretrievably broken down" and "ancillary relief" suggest that divorce is intended. ("Ancillary relief" could imply judicial separation, but that is rarely sought.) But the replies to (j) do not tally with those to (b).

13 now said a divorce was planned, but only one of these had understood the "grounds for divorce" significance when answering (b), and one more now made the connection.

14 said it was not planned (or, in 1 or 2 cases, not yet);

50 did not know.

Very few justified their assertion, except that many "no"s and "don't know"s said that divorce was not mentioned in the letter. But one unduly trusting "no" said: **If planned, even such an inept letter as this must mention it.**

A chartered accountant who answered (b) **Divorce is intended**, replied to (j) as a "don't know".

(c) **What do you understand by the phrase "matrimonial home"?**

Most understood "matrimonial home", but:

2 included the contents with the house;

4 (including 1 Graduate and 1 Understander) restricted the matrimonial home to one owned or bought jointly; and

1 restricted it to a house bought after marriage.

(d) **What are "net proceeds of sale"?**

Only 9 mentioned the mortgage in the list of deductions.

Most referred to **the sale price less costs** (or **expenses**), without making clear what fell into this category. Many used etc to express their vagueness.

(f) **Who do you think will get what under the arrangements in the 3rd paragraph?**

Was the wording of the 3rd paragraph sharp practice or just shoddy drafting by the husband's solicitors?

Only 9 (22% of the Graduates and 6% of the others) spotted the hole under the verbal undergrowth and realised that the letter could be read so as to make the wife contribute more than her half share to the repayment of her father's loan. One of these - a Graduate - thought that the whole £4,000 came from the wife's share.

53 thought that the husband and wife contributed equally.

14 did not attempt to answer.

1, determined to spite me, said he did not understand the question.

(g) **What do you think will happen to the Spanish property when one of the Smiths dies?**

This question was included to sound out understanding of "joint ownership". The expression is widely used between lawyers and lay people, but I have had the impression, when explaining it to clients, that few of them realise it is a term of art; most use it to mean "in both names". Of those answering the questionnaire:

17 said that the Spanish property would pass by will or intestacy. An 18th thought this would be the result, but was not certain. Of the 17, 8 were Understanders.

17 said it would pass to the survivor. An 18th thought this would be the result. A 19th added that this would be the result **as they are not divorced**. Again, 8 were Understanders.

4 said it would pass by Spanish law, but either did not say what the effect of that would be or admitted that they did not know. A 5th thought local law would apply but was not sure.

Amongst the other answers (some of which I have summarised) were:

It depends on the will or on divorce.

It depends on the will or (unspecified) Spanish law.

The property will go to the survivor unless a will was made.

The property will go to the survivor unless they are divorced.

If it was in the wife's maiden name, and the husband survived, her share would pass by will, but if she survived, his share would pass by will or intestacy.

Half will be inherited.

Half will be paid off.

It would probably have to be sold.

The surviving partner will inherit the other half share, unless a will has been drawn up in Spain stating otherwise. I think that the survivor would have the property for life, though.

Depends on whether there is a divorce/will/no will/and what joint ownership means.

It should revert to survivor, but not necessarily unless it is willed in favour of the survivor.

Capital Gains Tax will be paid in Spain by the deceased and their beneficiaries will inherit half the home if they are divorced. If not divorced, the property devolves under Spanish law. I believe it principally passes to the children. It is necessary to make a Spanish will, have it notarised in Spanish and filed in Madrid.

6 thought the letter did not specify what was to happen on death.

15 more did not know.

Only 3 pointed out that the proposals were a recipe for arguments.

(h) **Does the agreement affect Mrs Smith's right to claim maintenance in the future?**

The Understanders did better with this question:

23 of the 28 saw that Mrs Smith's right to maintenance was affected by the agreement. A 24th correctly said that she could apply for it in future, and might get it.

2 said her right was not affected.

2 (anomalously) said they did not know or did not answer the question.

Of those who felt they understood some, but not all, of the letter:

26 answered "yes" and another 5 thought that was the answer but were not sure. One of those who answered "yes" added: **But the agreement doesn't actually mention maintenance - perhaps it should.**

3 answered no.

8 did not answer or said they did not know.

So the totals (including those who were completely bemused by the letter) are:

Yes (including doubtfuls): 57
 No: 5 including 2 Graduates
 Don't know: 15 including 5 Graduates.

(i) **Could Mr Smith ask her for maintenance in future?**

I thought this was one of the easier questions, as there is nothing in the letter to suggest that Mr Smith's right to maintenance was affected. But only 47% knew the answer. The replies were:

Yes: 36
 No: 14
 Don't know: 26
 Don't think so: 1

1 Understander thought the answer was "yes", but only because the letter was headed "without prejudice".

Of the 14 who replied "no", 3 were Graduates and 7 were Understanders.

Of the 26 who did not know the answer, 9 were Graduates and 1 an Understander.

4. **If you received a letter like this from your spouse's solicitor, and it reflected the terms you had agreed informally, would you do as they ask?**

A surprising number said that they would have agreed the terms, apparently (although this is not absolutely clear) without taking legal advice. The results are set out in the table below.

	Yes	No	No answer	%age "yes" (ignoring no answers)
Understanding Graduates	4	8	0	33
Understanding others	10	7	1	59
Non-Understanding Graduates	2	12	1	14
Non-Understanding others	9	21	2	30
All Graduates	6	20	1	23
All others	19	28	3	41

The Understanders who would have signed their consent included:

One who believed that "without prejudice" meant **unbiased**, that the arrangements in the 3rd paragraph meant **they would each get 50%**, and that the only effect of the first death on the Spanish property was that it **would probably have to be sold**.

Another who thought that "without prejudice" meant **non committal**, missed the trap about the division of the equity, and overlooked the effect of Spanish law.

A 3rd who combined several of the misunderstandings of the last two.

One who thought that the Smiths would contribute equally to the loan repayment, that the Spanish property would pass by will, that Mr Smith's future right to maintenance was lost, and that no divorce was planned.

Another who thought the same, except about Mr Smith's future right to maintenance.

One who thought that "without prejudice" meant **a neutral proposition**, that "matrimonial home" meant **purchased or owned jointly as main abode**, that the Smiths would contribute equally to the loan repayment, that the Spanish property would pass by will, and that **depending on alimony terms**, Mrs Smith's right to maintenance was preserved.

Strangely, some who admitted that they did not understand the letter fully said they would have done as the husband's solicitors asked. Amongst these were:

2 who did not know who would get what under the arrangements in the 3rd paragraph (and one of these did not know whether the rights of either to maintenance would be lost).

One who thought "without prejudice" meant **unbiased** and that "matrimonial home" meant that it was jointly owned, that Mrs Smith's rights to maintenance would not be affected, that no divorce was planned, and that **everything has been divided equally**.

One who did not offer a meaning for "without prejudice", said she had **no idea** what "ancillary relief" was and that she did not know what were the arrangements in the 3rd paragraph, thought that "matrimonial home" meant one **purchased with partner**, that the Spanish property passed by will, and that Mr Smith's right to maintenance was lost.

One who thought "without prejudice" meant **unbiased** and that **each party will get an equal share of everything**, but did not know whether the Spanish property would pass by will or not, or that a divorce was intended.

It is appalling that people should be asked to agree terms under such wild misapprehensions, especially when some trust the solicitor as an unbiased professional.

7. **Please add any comments you have about the contents and style of the letter, and how they could be improved.**

9 people described the letter as **confusing**. Some thought this was deliberate, which shows a low regard for our integrity. Among the other comments were:

From Graduates:

Stuffy as well as unclear.

Just a general woolliness!

Completely uninformative. Very badly drafted. Does not request the wife to obtain independent advice. Could lead to considerable difficulties in future.

Sly...

Prolix.

I would want clarification of para 4. I get a nasty feeling that I might be missing out on something! ... Seen worse; the paragraph splits are a bit arbitrary.... The worrying aspect is that on first reading the letter was reasonably clear except for para 4. Only when asked specific questions did

the doubts take hold.... The specific proposals seem clear but the letter avoids several important matters or makes them obscure. It is interesting that there is not an abundance of legal jargon but that the introduction of a few phrases causes all the problems.

Puzzling. Plain English or a calculation would have assisted my understanding.

It is verbose without containing the necessary information.

Sentences too long and riddled with legal jargon and seemingly unnecessary stuff like "the said sum".

From others:

The style is appalling - definitely dictated, definitely not read before despatch and arrogant.

Letter drafted as to deliberately mislead.

The sentences are typically legal language and not understood by the general public.

[It could be improved by] dropping the use of words like "said" and "thereof" and phrases like "without prejudice".

Important omissions.... Future litigation seems almost invited. [The style is] pompous, platitudinous, cliché-ridden.

The wording about them each giving £2,000 for the purchase of house in Spain is rather clumsy. The whole question of the Spanish house is fraught with difficulties. Who, for instance, will be liable for any repairs...?

Why can't the terms queried be explained in layman's terms?... It could be laid out in more readable style.

Conclusions

The sample was not a fair cross-section of the community, since all had used a solicitor in the past. Many had had regular experience of lawyers. Even so, the level of misunderstanding was frightening, and the experiment offers some important lessons:

Our clients – and other lay people – understand a lot less than we think they do.

Those who assure us they understand will often be wrong.

We should question clients to check their understanding, even of expressions we take for granted and proposals we think are clear. If we do not, we (or they) will make frequent mistakes. We may be able to shrug off blame for some of these, but they will still cause worry, anger and loss.

These problems would be greatly reduced if we took the trouble to write clearly. Unfortunately, most lawyers think this is unnecessary.