

# Bamboozling the Public

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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 normal 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 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 around the parts you are not certain about.

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4. If you received a letter like this from your spouse's solicitor and it reflected the terms you had agreed to 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 third 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 the future?
  
  - (j) Is a divorce planned?
  
  6. After answering Question 5, do you want to change your answers to Question 2, 3, or 4? If so, how?

7. Please add any comments you have about:
  - (a) the contents and the style of the letter, and
  - (b) how they could be improved.
8. What is your highest academic or work qualification?

## The Results

Seventy-seven questionnaires were returned, including one from the original “Mrs. Smith.” In analyzing the replies, I have dealt with the questions out of the numbered order.

8. *What is your highest academic or work qualification?*

Twenty-seven were graduates or had a professional qualification. I have called all these “Graduates.”

1. *Do you understand any of it?*

Seventy-two people thought they understood at least some of the letter.

Another 2 answered “no” initially but changed it to “yes.”

Three (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 Question 2, 3, or 4? If so, how?*

Four of the 29 (including 2 Graduates) realized while answering the questions that they did not understand the letter as well as they had first thought.

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

5. (a) *What do you understand by “without prejudice”?*

[The term, commonly used by British solicitors as a heading in letters, means that if the negotiations are unsuccessful, the letter can be used in court proceedings only if the parties consent. But if the offer is accepted, a party can use the letter to enforce the contract.]

Only 10 of the 77 clearly understood; 1 more gave the right answer but expressed doubt; and there were a few near hits that might be accepted as good enough in the circumstances.

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

Altogether:

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

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

So 33 (43%) were under a misapprehension that 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”?*

[In British law, it refers to court orders about money and property in divorce and separation proceedings.]

No one mentioned orders for the transfer or sale of property, or one-time lump sums. None said that it was relief available to either party ancillary to a decree of divorce or judicial separation. But 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 lottery, Mrs. Smith might like to claim a part of his good fortune.”

Thirty-four 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.) The replies to (j) do not tally with those to (b).

Thirteen now said a divorce was planned, but only 1 of these had understood the “grounds for divorce” significance when answering (b), and 1 more now made the connection.

Fourteen said it was not planned (or, in one or two cases, not yet).

Fifty 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) by saying “Divorce is intended” replied to (j) by saying “don’t know.”

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

[In British law, it means the home where the husband and wife lived together.]

Most understood “matrimonial home,” but:

Two included the contents with the house;

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

One 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 the “costs” category. Many used “etc.” to express their vagueness.

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

[Note that the husband’s £2,000 comes from the proceeds of the sale, but the wife’s comes from *her half* of the net proceeds.]

Was the wording of the third 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 realized that the letter could be read so as to make the wife contribute more than her half 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.

Fifty-three thought that the husband and wife contributed equally.

Fourteen did not attempt to answer.

One, 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 laypeople, but I have had the impression, when explaining it to clients, that few of them realize it is a term of art; most use it to mean “in both names.”

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

Seventeen said it would pass to the survivor. An eighteenth thought this would be the result. A nineteenth added that this would be the result “as they are not divorced.” Again, 8 were Understanders.

Four 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 fifth thought local law would apply but was not sure.

Among the other answers (some of which I have summarized):

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 favor 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 notarized in Spanish and filed in Madrid.”

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

Fifteen 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:

Twenty-three of the 29 saw that Mrs. Smith’s right to maintenance was affected by the agreement. A twenty-fourth correctly said that she could apply for it in future and might get it.

Two said her right was not affected.

Two (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:

Twenty-six 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.”

Three answered “no.”

Eight did not answer or said they did not know.

So the totals (including those who were completely confused 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 the future?*

I thought this was one of the easier questions because 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  |

One 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 to informally, would you do as they ask?*

A surprising number said that they would have agreed to 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 | % "Yes" (ignoring "no answer"s) |
|----------------------------|-----|----|-----------|---------------------------------|
| Understanding Graduates    | 4   | 8  | 0         | 33                              |
| Understanding Others       | 10  | 7  | 1         | 59                              |
| Nonunderstanding Graduates | 2   | 12 | 1         | 14                              |
| Nonunderstanding Others    | 9   | 21 | 2         | 30                              |
| All Graduates              | 6   | 20 | 1         | 23                              |
| All Others                 | 19  | 28 | 3         | 40                              |

The Understanders who would have signed their consent included:

One who believed that "without prejudice" meant "unbiased," that the arrangements in the third 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 “noncommittal,” missed the trap about the division of the equity, and overlooked the effect of Spanish law.

A third person 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. Among these were:

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

One who thought that “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 did not know what were the arrangements in the third paragraph; and 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 that “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 to 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.*

Nine people described the letter as “confusing.” Some thought this was deliberate, showing a low regard for our integrity. Among the other comments:

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 the 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 dispatch 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 with lawyers. Even so, the level of misunderstanding was frightening, and the experiment offers some important lessons:

- Our clients and other laypeople 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 that is unnecessary.

