Neutral Citation Number: [2021] EWHC 560 (QB)

Appeal No: 51 of 2020
Claim No: F90LV027

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Date: 9th March 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

(1) TRACEY BELL	**Appellants**
(2) TRACEY BELL LTD	
- and -	
BRABNERS LLP	**Respondent**

- -
- -

John Meehan (instructed by Pure Legal Ltd) for the Applicants
The **Respondent** did not appear and was not represented

Hearing date: 9.3.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal pursuant to paragraph 7.2 of CPR PD52D, permission to appeal having been refused on the papers by Johnson J on 6 December 2020 (an order drawn up and sealed on 10 December 2020). The proposed appeal arises out of a judgment on a preliminary issue by DJ Jenkinson ("the Judge") delivered on 27 August 2020.

Mode of hearing

2. The mode of hearing was a BT conference call. I am satisfied that that mode was necessary, appropriate and proportionate in the context of the pandemic; and that it involved no prejudice to the interests of any party. I was able to hear, in exactly the way I would have in a court room, the submissions made by Mr Meehan. A remote hearing eliminated any risk to any person from having to travel to a court room or be present in one. There was no need in this case for a video hearing. The open justice principle was secured through the publication in the cause list of the case and its start time, and the publication of an email address usable by any member of the press or public who wished to observe this public hearing. The hearing was recorded and this ruling will be available in the public domain.

The preliminary issue

3. The hearing before the Judge was a preliminary issues hearing in the context of detailed assessment of costs where the Respondent, as the Applicants former solicitors, was making a claim for payment under a conditional fee agreement ("the Agreement"). A central dispute was whether the Agreement had been properly terminated on 11 November 2016, so that in principle the costs sought were recoverable. The Judge resolved what was called "Point One" of certain Points of Dispute at the hearing in favour of the Respondent. The Judge explained in his judgment that this preliminary point was "that no costs should be payable at all" because the Respondent was "not entitled to terminate the retainer".

Communication with the Court: CPR 39.8

4. In the course of consideration by this Court of the application for permission to appeal a letter was written dated 6 November 2020 by the Respondent to the Court, asking that it be placed on the court file urgently. This was a detailed five-page letter making submissions as to why permission to appeal should be refused. In the run up to the renewal hearing before me a further copy of the letter was emailed to my clerk by the Respondent, early yesterday afternoon. When I saw the letter I took steps to discover whether it had been copied to the Applicants' representatives. The letter on its face did not record that it had been cc'd. Upon looking at it, the email to my clerk was not cc'd to the Applicants' representatives. I shared, with representatives for both parties, the email that my clerk had received and the attachment. The position, confirmed by subsequent emails from the parties, comes to this. The letter was not provided to the Applicants' representatives when it was written to the court in November 2020. Nor was it provided to them when it was re-sent to the Court yesterday. The Respondent, through the lead solicitor with conduct of this matter, has apologised. I mention these

circumstances because it is a cardinal principle of the conduct of proceedings before the Court that, absent an identified compelling reason, a party's communications with the Court on matters of substance or procedure (unless they are purely routine, uncontentious or administrative) must always be copied to the other parties to the proceedings. It is inappropriate, and unjust, to seek to communicate with the Court without this transparency. This cardinal principle is clearly recorded in CPR 39.8. Observance of it is important. Having said that, and having taken the steps I have described, in the circumstances of the present case I am satisfied that I am able fairly to deal with this application on its merits.

The Judge's analysis

5. In his judgment the Judge resolved the preliminary issue as to whether the Agreement (and retainer) had lawfully been terminated finding three distinct bases on which the Respondent had been entitled to terminate. The first was section 65(2) of the Solicitors Act 1974. The second was repudiatory breach of an express "core" obligation, by which – as Mr Meehan, in my judgment rightly, accepts – the Judge clearly had in mind the Applicants' obligation to make payments on account. The third was the "good reason" at common law to terminate a retainer for non-payment: a common law entitlement discussed by Dyson LJ (for the Court of Appeal) in Richard Buxton (a firm) v Mills-Owens [2010] EWCA Civ 122 [2010] 4 All ER 405 at paragraph 40. On any and all of those three bases, held the Judge, there was an entitlement to terminate and the preliminary issue was resolved in favour of the Respondent.

The Agreement

6. Mr Meehan has taken me through the most relevant features of the contract documents. The Agreement records: "this is [a] bespoke agreement which has been specifically drafted to take account of the unusual circumstances of this particular case". It records that it is a "Discounted agreement" (as Mr Meehan elegantly puts it: "no win, low fee"). It provides:

> ***If, however, we terminate this Agreement as a result of you having failed to discharge obligations under "your responsibilities", you will be liable to pay our basic charges and disbursements in full; if you then go on to win the claim, you will also pay successfully.***

It then incorporates the Terms and Conditions. Those Terms and Conditions make provision for:

> ***Payments on account***
>
> ***Where the agreement provides that monies are to be paid regardless of whether the claims won or lost, we will be entitled to ask you to pay those monies as and when they are incurred. We will do this no more frequently than every month. We may also ask you for a reasonable payment on account of disbursements yet to be incurred.***
>
> ***If you fail to pay those monies, or any other monies that are due to us, we may exercise lien over any papers or other property that we hold.***

I will refer to that latter provision as *"the Lien Consequence"*. The Terms and Conditions then make provision for:

> ***Ending this agreement***
>
> **…**
>
> ***We may end this agreement before you win or lose. Details are given below.***

Later, under a heading "Your responsibilities":

> ***Your responsibilities***
>
> ***You must:***
> - ***give us instructions that allow us to work properly;***
> - ***not ask us to work in an improper or unreasonable way;***
> - ***not deliberately mislead us;***
> - ***cooperate with us;***
> - ***go to any expert examination or court hearing which we have asked you to attend.***

I will refer to that provision as *"the Express Responsibilities"*. The terms and conditions later make provision for:

> ***What happens when this agreement ends before your claim ends?***
>
> **…**
>
> ***(b) Paying us if we end this agreement***
>
> ***(i) We can end this agreement if you do not keep to your responsibilities as set out above. If this happens, you must pay our basic charges and are disbursements (including barristers fees where those are due) immediately upon termination; if you go on to win the claim, you must also pay a success fee[].***
>
> ***(ii) We can end this agreement (at any stage) if we believe you are unlikely to win. If we end the agreement in the circumstances, the claim will be regarded as having been lost, unless you going to win the claim, in which case you will also pay our basic charges.***
>
> ***(iii) We can end this agreement if you reject our advice about making a settlement with your Opponent. You must then pay our base costs and disbursements (including barristers' fees where those are due) immediately upon termination. If you asked us to get a second opinion from a specialist solicitor or other lawyer outside of our firm, we will do so. You pay the cost of a second opinion.***
>
> ***(iv) We can end this agreement if you do not pay your insurance premium when asked to do so.***

Then:

> ***What happens after this agreement ends***
>
> ***After this agreement ends, we may apply to have our name removed from the record of any court proceedings in which we are acting unless you have another form of funding and asked us to work for you.***
>
> ***We have the right to preserve our lien unless another solicitor working for you undertakes to pay us what we are owed including a success fee if you win.***

Finally in the definition section "lien" is defined as follows: "Our right to keep all papers, documents, money or other property held on your behalf until all money due to us is paid. A lien may be applied after this agreement ends".

The central basis of the appeal

7. The central basis on which the Applicants seek permission to appeal, in what the skeleton argument rightly recognises are overlapping grounds of appeal, involves two key contentions.

    i) The first key contention is that the Lien Consequence constituted the contract expressly spelling out the clear consequence of non-payment on account, namely that there would be a power to exercise lien. The Applicants emphasised that a lien could, in principle, be exercised during the currency of a retainer. The essential submission is that the contract spelled out "the consequence" – as I put it to Mr Meehan, "the sole consequence" – of non-payment on account.

    ii) The second key contention concerns the Express Responsibilities. The argument is that the contract expressly spelled out "the grounds" – as "the sole and exclusive grounds" – on which the Respondent was entitled to end the Agreement. The Express Responsibilities were what was described in the Agreement as the "Details … given below"; they were the "obligations under 'your responsibilities'"; they were "your responsibilities as set out above".

8. On the basis of those two key contentions the Applicants, through Mr Meehan, submit that it is at least properly arguable with a realistic prospect of success that the Judge was wrong in law in respect of each of the three bases on which the Judge found the Respondent was entitled to terminate the Agreement. The answer, in the case of all three of those bases, is essentially the same. The Applicants say that, in the light of the clear and express terms of the Agreement – properly construed – there is no room: for section 65(2); or for repudiatory breach entitling termination for non-payment on account; or for the common law entitlement to terminate. The Applicants submit that it would be to rewrite the bargain between the parties for any of those three bases to be recognised. They submit that on the clear express terms of the agreement there is no basis for any "implication" of a term into the contract, citing Marks & Spencer v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72 at paragraph 28. They rely on the principle articulated in the Richard Buxton case at paragraph 40: "Where the parties have agreed in what circumstances the solicitor may terminate the retainer, then the matter is governed by their contract". The Applicants' case is that it contradicts the express terms of the contract for any of the three bases to be identified and the Judge was wrong in law. There are some other points advanced by the Applicants to which I will return later.

Analysis

9. The question for me is whether the appeal would have a real prospect of success or whether there is some other compelling reason for it to be heard (CPR 52.6). In my judgment, there is no realistic prospect of this appeal succeeding: it is not properly arguable that the Judge was wrong in law in resolving the preliminary issue in favour of the Respondent. I agree with Johnson J who also reached that conclusion.

10. In my judgment it is clear that the contract did not spell out that the sole consequence of non-payment on account was the Lien Consequence. The Agreement provides that lien may be exercised. It does not state that that is the sole or exclusive consequence.

Properly interpreted, as Johnson J put it: "the fact that the contract provided that the Respondent would be entitled to exercise a lien in the event of non-payment did not mean that the Respondent was obliged to continue to act in the event of non-payment. Nothing in the contract required the Respondent to continue to act in the event of non-payment". Mr Meehan accepts that the logical consequence of his submissions would be that the Respondent solicitors were required to continue to act under the retainer. I asked him whether they would be entitled to "down tools" and his submission was that they would not be. The lien itself (described in the Lien Consequence) is reflective of the fact that the retainer could be at an end: the definition of lien emphasises its applicability after the agreement ends. By section 65(2) of the 1974 Act, Parliament made this express statutory provision:

> ***If a solicitor who has been retained by the client to conduct contentious business requests the client to make a payment of a sum of money, being a reasonable sum on account of the costs incurred or to be incurred in the conduct of that business and the client refuses or fails within a reasonable time to make that payment, the refusal or failure shall be deemed to be a good cause whereby the solicitor may, upon giving reasonable notice to the client, withdraw from the retainer.***

In my judgment, it is plain that this provision fits perfectly well and comfortably alongside the express provisions in the Agreement as to payment on account and as to ending the agreement. This also makes clear and obvious sense and fits with the lien.

11. Revealingly, and sensibly, Mr Meehan in his oral submissions today advanced the proposition – at least as an alternative position – that there would have been "other protections" for the Respondent, beyond the Lien Consequence, in circumstances of non-payment on account. Mr Meehan identified two such protections. The first was his submission that it would be open to the Respondent to have claimed the payment of monies due as a debt including by pursuing them in the courts, making a debt claim. As I put to him, that would – at least to some extent – involve the Respondent invoking the common law. The second protection for which Mr Meehan contended was the applicability of section 70 of the 1974 Act under which Parliament made provision entitling a solicitor to apply for an assessment in the context of a bill. That of course is an express statutory protection found within the 1974 Act. These examples, in my judgment, strongly reinforce the basic conclusion that the Lien Consequence is not, in the Agreement, the express and exclusive, sole consequence arising from non-payment on account. Just as the common law debt action 'overlay' fits with the contractual provisions, in my judgment clearly the common law entitlement described at paragraph 40 of the Richard Buxton case also applies:

> ***The position at common law is that the solicitor may terminate his retainer before the end on reasonable notice and if he has a 'reasonable ground for refusing to act further for the client'.***

Moreover, just as the statutory section 70 'overlay' fits with the contractual provisions, in my judgment, clearly the statutory section 65(2) entitlement also applies.

12. Furthermore, and importantly, it is clear – in my judgment – that the contract does not spell out that terminating the Agreement ("ending this agreement") is something which can take place, solely and exclusively, if the Applicants have failed to discharge one of the Express Responsibilities. In my judgment – beyond argument –

the contract does not, in the provisions relating to the Express Responsibilities: exclude termination for repudiatory breach; exclude section 65(2); or exclude the common law 'reasonable ground'. The contract says that the agreement can be brought to an end if the Express Responsibilities are not kept to. It does not say that those are the only circumstances in which the agreement can be brought to an end.

13. But even if it were right to characterise the Express Responsibilities as the sole and exclusive grounds on which the agreement could be brought to an end by the Respondent, in my judgment the Applicants then sail into the teeth of the point recognised by Johnson J when refusing permission to appeal. The Express Responsibilities include the duty to "cooperate with us". Mr Meehan's submission is that that general provision must "yield to the specific" provisions found elsewhere in the agreement. He submits that the duty to cooperate does not include the duty to make payments on account. In my judgment, and beyond argument, it is clear that the duty of cooperation falls to be interpreted and applied, viewed against the Agreement as a whole. It is, in my judgment, not properly arguable with a realistic prospect of success that the duty to cooperate is narrowed down to exclude matters which have been dealt with expressly. The "core" duty, as the Judge recognised it to be, to make the payments on account, in my judgment, clearly falls squarely within that duty of cooperation. As Johnson J put it: "the refusal to pay, as required by the contract, amounted to a failure to cooperate with the Respondent so as to entitle the Respondent, for this separate reason, to terminate the contract".

14. In my judgment, the submissions made based on the Lien Consequence and the Express Responsibilities as express terms of the contract do not, even arguably, undermine the Judge's conclusion on any of the three bases on which he founded the judgment, nor do they undermine the additional basis (the duty of cooperation) identified by Johnson J. There is no realistic prospect that this court at a substantive appeal would overturn the Judge's order in relation to the relevant preliminary issue on the basis of these arguments.

Other points

15. I said earlier that there were other points advanced by the Applicants in this case and I will turn to deal with the principal ones now. Before the Judge and in the grounds of appeal the argument was advanced that section 65(2) could not, in any event, be relied on since it applies only to "contentious business" and the Agreement expressly records that it is "not a contentious business agreement within the terms of the 1974 Act". That point was not advanced in the Applicant's skeleton argument or orally by Mr Meehan. In my judgment, the Judge was clearly right to reject this objection. Parliament has clearly distinguished between "contentious business agreements" on the one hand and "contentious business" on the other. That is clear from the structure and provisions of Part 3 of the 1974 Act, perhaps most clearly from section 64(1) which refers to "contentious business done by [a solicitor which] is not the subject of a contentious business agreement". There was nothing in that point and Mr Meehan was right in my judgment not to pursue it.

16. The next point is that Mr Meehan relied on the judgment of Lavender J in Belsner v Cam Legal Services Ltd [2020] EWHC 2755 (QB). Mr Meehan's pithy encapsulation of what that case decides was along the lines that 'solicitors cannot rely on a provision in circumstances of uninformed consent by the client'. As Mr Meehan rightly

recognised the application of that approach was specific to the issue arising in that case, which involved the implications of non-disclosure by a solicitor in the context of the fiduciary duty between solicitor and client. Mr Meehan submitted that the principle applies by analogy. As he put it: 'rights outside the express provisions of an agreement are not rights of which solicitors can take advantage against the client who is uninformed'. In my judgment, the principles discussed already – those applicable to the common law, to repudiatory breach, to construction of the contract, and to section 65(2), as well as to the cooperation duty within the Express Responsibilities – all operate in the context of an agreement between solicitor and client. In the absence of a sustainable arguable point by reference to those matters, Mr Meehan's 'Belsner principle' cannot through the back-door supply for the Applicants what they have failed to achieve through the front-door. If, on the other hand, there is a sustainable arguable point by reference to those matters, Mr Meehan's 'Belsner principle' is not needed and adds nothing. There is also a second fatal objection, in my judgment, namely this. As Mr Meehan fairly and rightly accepts, this argument was not one raised below, nor was it an argument raised in the grounds of appeal. Belsner may be a recent case, but principles relating to fiduciary duty and uninformed consent are in no way new.

17. Finally, there was a series of points criticising the Judge for not undertaking an analysis in the judgment as to whether, for the purposes of section 65(2), the costs invoiced and the purported termination of the Agreement involved "a reasonable sum" and the giving of "reasonable notice". The Applicants submit that the Judge's conclusion on the first preliminary issue is arguably vitiated: by reason of a failure to conduct that analysis; or alternatively an unreasonable conclusion by the Judge (favourable to the Respondent) in relation to these points. In my judgment, there are three distinct bases on which it would not be appropriate to grant permission to appeal on these points. The first is that I have seen nothing to indicate that these points were argued before the Judge, still less as part of the first preliminary issue which is the subject matter of the appellant's notice. There is no material before me which shows that these points were argued below. Mr Meehan accepts, again very fairly, that he cannot really take that aspect any further forward than what the court has been told in an email from those who instruct him, namely: that there were no 'agreed facts' as to reasonableness of the sum and reasonableness of notice; and that there were no 'concessions' made. But that falls far short of these points having been argued below. For that first reason alone I would refuse permission to appeal in relation to these issues. Secondly and linked to the first point, I have been shown nothing from the underlying materials in this case which could arguably support the conclusion that the Judge acted unreasonably in the way in which issues were considered or dealt with or reasoned. On an application for permission to appeal it is incumbent on the applicant to demonstrate to the Court that what is said to be a flaw in the approach of the court below is one that arises by reference to the materials. Thirdly, these points – as Mr Meehan, in my judgment rightly, accepted – are points relating to section 65(2). Even if there were anything in them, which I do not accept there is, they would not be a basis for granting permission to appeal in circumstances where the Judge had identified two other distinct bases for the conclusion he arrived at, to which Johnson J has added a fourth (the cooperation duty).

Conclusion

18. In the circumstances and for all these reasons I am not able to accept that this appeal has a real prospect of success. Nor is there some compelling reason for the appeal to be heard. The application is therefore refused.

9.3.21