IN THE PRESTON COUNTY COURT

Claim No. 9ZP00532

The Law Courts
Openshaw Place
Ring Way
Preston

Friday, 25th May 2012

Before:

DISTRICT JUDGE TURNER

Between:

MOHAMMED FAISEL

Claimant

-v-

LANCASHIRE COUNTY COUNCIL

Defendant

The Claimant was represented by MS S SAAED-LONG, Solicitor with Resolute & MR. P. TIDMAN, Costs Draftsman.

The Defendant was represented by MR. K. CORNESS, Costs Draftsman instructed by Acumension.

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE DISTRICT JUDGE: This judgment relates to two issues that I have been invited by the parties to rule upon in relation to this detailed assessment, being the termination, or otherwise, of the first solicitors' retainer (that is to say, of Alexander Solicitors Limited) and secondly, the issue of disclosure of the agreement between the Administrator and the second solicitors for the claimant (Resolute) and the issue of the Part 18 request made by the solicitors for the defendant, as to whether or not I should require the claimant to provide responses thereto, notwithstanding the confidentiality provisions of the agreement between Resolute and the Administrator.

2. The detailed assessment arises out of the claimant's successful claim for damages arising out of a tripping accident in which he was involved on 26th July 2005. He initially instructed Alexander's to represent him in the matter, on or about 22nd September 2005, pursuant to a conditional fee agreement which was entered into on that date. The CFA was a standard Law Society recommended form of conditional fee agreement and was subject, of course, to Law Society conditions, the provisions of which in relation to termination are set out on the final page of the agreement. Those provisions read as follows:

> "If this agreement ends before your claim for damages ends *(first of all, "paying us if you end the agreement" – so clearly you can end the agreement at any time)* we then have the right, to decide whether you must:
>
> (a) pay our basic charges and disbursements, including barrister's fees and success fee, immediately; or
>
> (b) pay our basic charges and success fee and disbursements and barrister's fees if you go on to win your claim for damages."
>
> Secondly, "paying us if we end the agreement" - The provision provides that:
>
> "We…" - *that is to say Alexander's* - can end this agreement if you do not keep to your responsibilities in condition (2). We then have the right to decide whether you must:
>
> (a) pay our basic charges and our disbursements, including barrister's fees and success fee, immediately; or
>
> (b) pay our basic charges and success fee and disbursements and barrister's fees if you go on to win your claim for damages.
>
> We can end this agreement if we believe you are unlikely to win. If this happens, you will only have to pay our disbursements which will include barrister's fees (if the barrister has no conditional fee agreement with us) and, if proceedings at court have been issued, you may have to pay your opponent's basic charges and disbursements. We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:
>
> (a) pay the basic charges and our disbursements, including barrister's fees; and
>
> (b) pay the success fee if you go on to win your claim for damages.

> If you ask us to get a second opinion from a specialist solicitor outside this firm we will do so, but you must pay the cost of that second opinion. We can end this agreement if you do not pay your insurance claim when asked to do so or if we are unable to obtain insurance cover for your claim."

There is than a reference to death, which I do not think I need to concern myself about, and a final provision provides that:

> "We have the right to preserve our lien unless another solicitor that is working for you undertakes to pay us what we are owed, including a success fee if you win."

3. The letters before action were written to a number of different potential defendants by Alexander's: namely, Burnley Borough Council; United Utilities; Balfour Beatty Utilities Limited and Lancashire County Council. The first three all denied liability and, ultimately, the claim focused upon Lancashire County Council. Towards the end of 2007 the claimant's first solicitors, Alexander's, went into administration, the actual date of administration being 20th December 2007. The Administrator, as part of his duties within the administration, entered into confidential agreements with two firms of solicitors, of which Resolute is one, whereby they each took over approximately 150 files of ASL (Alexander Solicitors Limited). The second solicitors took over the claimant's case in early January 2008 and, on 15th January that year, entered into a new conditional fee agreement with him. So far as I can see, and notwithstanding submissions on the point, there was no assignment - in the strict sense of the word - of this case to the second solicitors. There is certainly nothing in the files or the papers provided to me, which I have reviewed, to suggest that this occurred and that the formalities required for a valid assignment were ever entered into. On 4th March 2008, shortly after Resolute were instructed, Lancashire County Council admitted liability and, on 29th August 2008, ASL, the claimant's first solicitors, went into liquidation.

4. The claim was ultimately settled for £2,400 and, as the claimant was a minor, an infant approval hearing was necessary. This took place on 12th May 2009, which formally concluded the proceedings, save, of course, for the issue of costs which is before me today. The detailed assessment proceedings began on 20th July 2009. Points of dispute were served on 26th August 2009 and replies given on 10th September that year. Additional points of dispute were served on 15th October 2009, to which replies were given on 6th November that year. There was a joint settlement meeting between the parties' costs advocates and a settlement memorandum was filed on 1st December 2009. The defendants decided that it was necessary for them to make their Part 18 request, which they duly served on 10th May 2010, to which a reply was given by Resolute on 27th May. The defendant's application, which followed, was then filed on 2nd June 2010 and required Resolute to provide replies to the Part 18 questionnaire. There was a hearing before me on 18th August 2010 in relation to that application. Following submissions, I adjourned the application to the hearing today and, after a number of further adjourned final hearings, the matter finally came on for this detailed assessment. The Part 18 request and application centre upon the agreement between the Administrator and Resolute and I will deal with this later in this judgment.

5. In dealing with the matters in issue, I have considered all the above documentation, the statements filed in connection with the application, the parties' respective skeleton arguments and I have also received oral submissions from Ms Saaed-Long and

Mr Tidman for the claimant and Mr Corness for the defendant. I am extremely grateful too for the assistance which they have given me in my deliberations in relation to my determination of the issues.

6. [Turning to the parties submissions, in giving this judgment I am summarising, of course, and I hope the advocates will forgive me if I do not repeat each and every single item, but I hope the judgment does justice to both parties in so far as their submissions are concerned]. On behalf of the defendant, Mr Corness argues with regard to the issue of the retainer that it is the liability of the claimant's parent (as his litigation friend) to discharge the costs liability to his solicitors that is in issue. Was the parent, therefore, a creditor of ASL for the purposes of the liquidation? If, of course, the parent is not required to pay costs to ASL, then nor would the defendant be obliged to indemnify them. Further, the insolvency of ASL was a breach of the solicitors' code of conduct and constituted a disciplinary offence. As such, he says, it was wrongful conduct which brought about the determination of the client's retainer. Furthermore, the contract between the claimant and ASL was an entire contract which required to be dealt with by the solicitors to a conclusion. To determine the contract mid-term, without good reason, disentitled the solicitors to recover their costs from the client for work done up to such termination of the contract. The proposition that I have just set out is, he says, supported by the decision in *Buxton v Mills-Owen*, one of the cases to which Mr Corness referred me in the course of his submissions. Of course, in addressing that case, I also will need to allude to the other cases, such as *Underwood*, referred to within it which I have also considered. He says that it is clear from all of these factors that the payment of costs was clearly unenforceable as far as the claimant was concerned. Finally, he says, the CFA itself does not allow for determination in circumstances such as this - ie, the administration/liquidation of the solicitors - and this, of itself, is fatal to the claimant's case on this issue.

7. With regard to the disclosure and Part 18 request issue, he says it is necessary for the court to consider the financial interests of the solicitors in the conditional fee agreement. Such financial interest is likely to be set out in the confidentiality agreement between the claimant's second solicitors and the Administrator and such interest may be of a personal nature. He says the defendant is entitled to know what that interest is. It is likely to affect the risk to be considered by the solicitors before assessing what the appropriate success fee is. It is clear from the case of *Pamplin v Express Newspapers* that, if there is an issue in a document that the court must have regard to, the claimant must be put to his election as to whether to produce such a document or for the claimant to provide some other form of evidence. The success fee here, he says, should have been based upon what the solicitors knew at the time that the CFA was entered into, not what they did not know, as was clear from the case of *Barham v Athseya*(?) to which he also referred me. The monies paid to the Administrator in this case are relevant and these issues have a bearing on the risk assessment undertaken by Resolute in relation to the claim. Disclosure of the agreement and answers from the claimant to the defendant's Part 18 request are therefore required.

8. For the claimant, Ms Saaed-Long and Mr Tidman made the following submissions: firstly, with regard to the issue of termination of the retainer, they say that this case is distinguishable from that of *Buxton* which involved deliberate actions on the part of the solicitor which brought about the termination of that retainer in that case. That is not so in this case. What the court is faced with here is an intervening event which, at the time that the claimant entered into the second CFA with his current solicitors, had not

brought about the termination of the retainer. The claimant, they say, was perfectly entitled to instruct his new solicitors in the circumstances of the case and it was equally proper for those solicitors to enter into a new CFA with the claimant. The CFA was a standard Law Society form of agreement and would not necessarily cover all eventualities – for example, death or bankruptcy of the solicitors – but this did not mean that those eventualities could not be catered for in the overall context of the case. The Administrator believed that the retainer had not been terminated and the agreement, effectively, assigned the case to the new solicitors. As a matter of public policy, for the court to determine that the costs would not be recoverable in circumstances such as prevail in this case would have a profound effect upon hundreds, if not thousands, of other cases which require new solicitors to take them over from solicitors faced with insolvency that is happening so often today in the current economic climate. The Administrators, in cases such as this, value the work in progress and, as such, it is that work in progress which comprises the assets of the solicitors' firms, which need to be accumulated for the benefit of creditors. On the basis of the defendant's arguments, there would never be any such assets for the Administrator to recover. That, they say, cannot possibly be right. The case of *Jenkins & Young Brothers Transport Limited* is clear authority that cases such as we have here can properly be assigned to new solicitors.

9. With regard to the disclosure issue and the Part 18 request, they say that the agreement between the claimant's current solicitors and the Administrator is bound by confidentiality and that this is the reason for non-disclosure. It is not because the claimant's new solicitors have anything to hide. The defendants are doing no more than embarking upon a fishing expedition and it is not appropriate in this case to go behind the certificate on the bill. There could be no disclosure without either the consent of the parties or an order of the court. Therefore, it follows that the Part 18 questions cannot be answered either. The CFA clearly states Resolute have a financial interest, which is what is required. The request, in any event, is far too widely drafted to be a reasonably enforceable document. The defendant could have applied for third party disclosure, but failed to do so. In so far as CPR 31.14 is concerned, Ms Saaed-Long says it was necessary to refer to the agreement in her witness statement because the order of District Judge Freeman required it, to show the extent of any financial interest. It was no more than a business agreement, akin to referrals to solicitors from case management companies. They are never required to produce their agreements and this case is no different. The agreement, furthermore, is irrelevant and the defendant has completely misunderstood what it is all about. It has no relevance to the risk assessment, even on their own arguments, leading to the success fee. That, they say, is a matter for detailed assessment. She relies upon the cases of *Barr v BiHa Wales* and *Hutchings v BTPA* in support of her arguments with regard to the Part 18 request which must, they say, be restricted to what is necessary and proportionate. The actions of the defendant in seeking to pursue this line are wholly disproportionate and the costs of so doing outweigh the costs in dispute. If the court considers it is relevant, then of course they inform me that they will disclose it to me in my capacity as the judge of these proceedings, as part of the election process.

10. Those, therefore, are the issues with which I am concerned and I will, if I may, deal firstly with the issue of disclosure and the confidentiality agreement between the Administrator and the claimant's current solicitors. In this regard, I am of the view that it would not be appropriate to order disclosure of it to the defendant, nor do I consider it appropriate for the claimant to be required to reply to the defendant's Part 18 request in

respect of it. I say that for the following reasons: firstly, I consider the Part 18 request to be little more than a fishing expedition on the part of the defendant and it is, as is submitted by the claimant, too widely drawn. The defendants have provided me with no cogent evidence to justify going behind the certificate in the bill. The CFA clearly states that the claimant's solicitors have a financial interest in the claim. It is set out under "Statement of Financial Interest" and is two-fold. Firstly, it says that Resolute Solicitors have a financial interest in both of the above insurance policies in that, if the claim is successful and the premium recovered in full in respect of Box Legal, Resolute Solicitors would be entitled to render an additional charge to the underwriters for the administrative tasks undertaken on the underwriters' behalf. As to Benchmark 3 from Allianz Cornhill Protect, Resolute Solicitors would earn variable commission. The second and most important one is that Resolute solicitors "has a financial interest in your claim as we will derive an income from the same when your claim is completed." Such evidence as was adduced by the defendant, it seems to me, related to the risk assessment towards calculation of the success fee. That, it seems to me, is, as submitted by Ms Saaed-Long, a matter for detailed assessment. Mr Corness, if I understand him correctly, also sought to suggest that the alleged financial interest resulting from the agreement could impact upon the level of success fee, such as to bring it above one hundred per cent and thus rendering the CFA unenforceable. With respect to him, I do not consider there to be a shred of evidence to support such a suggestion, as is self-evident from the CFA itself, which is set out in simple terms.

11. Turning to the issue of the retainer, the following are, in my view, relevant to my determination upon the point:

> Firstly, the contract between the claimant and Alexander's was an entire contract: that is to say, that the onus upon Alexander's was to pursue the claim to a final and, hopefully, successful outcome.
>
> Secondly, it appears to be common ground that, if such a contract is wrongfully terminated by the solicitors, such termination goes hand in hand with the solicitors' failure to discharge their requisite obligations under the contract, such that no costs are recoverable by solicitors for the work they have done up to the date of termination. The authority for that proposition is that of Lord Justice Atkin in the case of *Wild v Simpson [1919] 2 KB 544.*
>
> Thirdly, save for what I have just stated as my second point, termination will not generally result in the client being discharged from the accrued rights under the retainer: ie, the solicitors' right to be paid for the work already done.
>
> Fourthly, bankruptcy of a solicitor terminates the retainer. That appears to be clear from the decision in *Re Moss [1866] LR 2 Equity 345*. It must, in my view, follow that, if the solicitors are a limited company, the liquidation of that company will have a similar effect.
>
> Fifthly, the CFA between the client and Alexander's provided for termination of the agreement and its consequences and I have already, of course, alluded thereto.
>
> Sixthly, the CFA makes no reference to bankruptcy or liquidation. Mr Corness argued that, as such, this is fatal to ASL regarding recovery of their fees for the work done up to termination, but I do not agree with him. The absence of any

provisions in that regard will, in my view, necessitate me to have reference to the general law, if necessary, to determine the issue.

12. Was there, therefore, a termination of the retainer by ASL and was it wrongful? In my view there was no effective termination of the retainer by ASL when the claimant changed solicitors at the end of 2007/beginning of 2008. I say this for the following reasons:

Firstly, at that time, Alexander's was not in liquidation. That did not occur until 29th August 2008, some eight or nine months later.

Secondly, ASL was merely in administration.

Thirdly, administration, amongst other things, acts as a moratorium on both insolvency proceedings and other legal processes. In short, it actually prevents any resolution for the winding-up of a company or a winding-up order being made. That is contained at paragraphs 42 and 43 of Schedule B1 of the Insolvency Act 1986.

Fourthly, paragraph 3(1) of Schedule B1 of the Act also provides that the Administrator must perform his functions with three objectives:

(a) of rescuing the company as a going concern; or

(b) achieving a better result for creditors than if the company was wound up; or

(c) realising property in order to make a proper distribution in appropriate priority.

Fifthly, it seems to me that if one of the objectives is to rescue the business as a going concern, it must follow that Alexander's business had not terminated in the sense required under the provisions of *Re Moss.*

Sixthly, the conduct of Alexander's in respect of this matter is governed by the Solicitors' Code of Conduct at 2007 and the relevant provisions of that Code of Conduct appear to me to be as follows: In paragraph 2.01 the Code provides this:

"You are generally free to decide whether or not to take on a particular client. However, you must refuse to act or, more importantly, cease to act for a client in the following circumstances…"

The two relevant circumstances here are:

firstly, when to act would involve you in a breach of the law or a breach of the Rules of Professional Conduct; or

secondly, when you have insufficient resources or lack competence to deal with the matter.

It follows from this, of course, that if – as is clearly here the case – Alexander's had insufficient resources, then they were obliged to cease to act for the claimant in those

circumstances. Secondly, and equally important, is the guidance to Rule 2. The first paragraph under the guidance states that the requirements of Rule 2 do not exhaust your obligations to clients:

> "As your client's trusted advisor, you must act in the client's best interests."

Paragraph 2 states:

> "It is not envisaged or intended that a breach of paragraphs 2.02, 03 or 05 should invariably render a retainer unenforceable. The purpose of Rules 2.02 and 2.03 is to ensure that the claimants are given the information necessary to enable them to make appropriate decisions about if and how the matter should proceed."

At paragraph 3, under the heading, "Taking on Clients" it says:

> "The retainer is a contractual relationship and subject to legal considerations,"

such that I have alluded to in terms of the administration. At sub-paragraph 3 under "Breach of the Law or Rules" it provides as follows. (It is slightly off point but only just, but it seems to me that the question of administration falls into a similar category.) It says:

> "If your client loses mental capacity after you have started to act, the law will automatically end a contractual relationship."

Well here, of course, the liquidation or the bankruptcy of a solicitor would automatically end the contractual relationship.

> "However, it is important that the client, who is in a very vulnerable position, is not left without legal representation."

Therefore, it falls upon the solicitor (or the Administrator) in this case to ensure that the claimant secures for himself appropriate second legal representation. Under the heading, "Insufficient Resources", it states:

> "Before taking on a new matter you must consider whether your firm has the resources, including knowledge, qualifications, expertise, time, sufficient support staff and, where appropriate, access to external expertise such as agents and counsel, to provide the support required to represent the client properly. The obligation is a continuing one and you must ensure that the appropriate and agreed level of service can be delivered, even if circumstances change."

At paragraphs 10 and 11, under the heading, "Ceasing to Act", the code provides that:

> "The relationship between you and your client can also be ended automatically by law"

- for example, the client's bankruptcy or mental incapacity to which I have already alluded. At 11 it says:

> "When you cease acting for a client, you need to consider what should be done with the paperwork. You must hand over the client's file promptly on request,

> subject to your right to exercise a lien in respect of the outstanding costs. You should try to ensure the client's position is not prejudiced and should also bear in mind his or her rights under the Data Protection Act 1988. Undertakings to pursue your costs should be used as an alternative to the exercise of lien, if possible. There may be circumstances where it is unreasonable to exercise lien: for example, where the amount of the outstanding costs is small, or the value or importance of the matter is not very great."

13. All of those features, it seems to me, are relevant to this particular case. Furthermore, having read the papers that I have, it seems to me that the claimant received a letter from Ms Saaed-Long regarding ASL's administration and takeover of the files by Resolute. That is self-evident, it seems to me, from a file note which is dated 15th January and which reads:

> "Call from client's dad to say that they had received the pitch letter and they would like to sign up. Discussing the claim and making observations as to current position on the file. Next step is to progress. Also discussing another claim of his. He will send. Discussing fact liability denied and we may have to issue proceedings."

It seems to me to be self-evident from that note that this client received a letter, stemming from the administration and the possible instruction of new solicitors, which in my view was, under the Code, appropriate in the circumstances of the case. As a result of that, it is also clear that the claimant decided that he did want Resolute to act for him. That is clear, it seems to me, from a letter dated 15th January 2008, written to him by Ms Saaed-Long, which reads as follows:

> "Further to our telephone call, thank you for confirming your authority for me to act in relation to your son's personal injury claim. I will now get on with the job of achieving the best possible settlement for you, but in the meantime there is just one formality which must be sorted out for my records. You will recall that you entered into a CFA with your former solicitors. That will cover the work done by them until the point at which your file was passed to me. Unfortunately, I am afraid that I will need you to sign a fresh one to cover the work done by us until the end of the claim. I know it is a chore, but without a new CFA the defendant could avoid paying your legal costs when the claim is finished. I therefore enclose a new CFA, along with an explanatory pamphlet and general engagement letter which are designed to answer any questions you may have. If you are happy to proceed, please sign the CFA where indicated and return it to me using the enclosed reply paid envelope. If you do have any questions about the CFA and how it affects you, that cannot be answered by the explanatory pamphlet or engagement letter, then please give me a call and I can go through things with you to hopefully put your mind at rest. I look forward to receiving the CFA as soon as possible."

14. It is clear to me, therefore, that, following advice and discussions with Ms Saaed-Long, it was the decision of the claimant to instruct Resolute and that the actions taken at that juncture were entirely appropriate, reasonable and indeed in accordance with the Solicitors' Code of Practice, the relevant provisions of which I have just read to you. It also follows from that that, pursuant to the CFA provisions in relation to termination or

change of solicitors as such, under the agreement the costs of ASL are duly and properly recoverable and that is my order.

15. I am sorry that this judgment has been so long, but given the issues involved I thought it important that they be given due attention and detail.