Claim No: QB/2010/0505

Neutral Citation Number: [2011] EWHC 3252 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL

Date: Friday, 18 November, 2011

BEFORE:

JOHN BOWERS QC
(Sitting as a Judge of the High Court)

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BETWEEN:

FRENCH

Claimant

- and -

CARTER LEMON CAMERONS

Defendant

- - - - - -

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The Claimant appeared in person.

MR SMYTH (Partner of Carter Lemon) appeared on behalf of the Defendant.

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Judgment

JOHN BOWERS QC:

1. This is a relatively straightforward matter that has become very complicated. The analysis has not been helped by the presentation of a rather chaotic bundle which does not follow any chronological sequence. It concerns the consequences arising from proceedings between Miss French and Groupama for breach of contract, which resulted in a trial heard by His Honour Judge Seymour QC. Miss French appeared before me as a litigant in person, assisted by a McKenzie friend. She was, at least at the time of the 2010 hearing, a secretary at Leigh Day, Solicitors. She has very helpfully produced a 75-paragraph skeleton argument, closely reasoned, which has been very helpful and includes careful research on the relevant issue in domestic and Commonwealth cases.

2. The respondent, Carter Lemon Camerons llp, were instructed as the second solicitors in preparation for the trial, which was due to come on, and did come on, in October 2010. The events with which this hearing and then the appeal were concerned predated that trial and involved the enforcement of a lien. Nicola Davis J refused leave to appeal from Master Foster's order on the papers. Kenneth Parker J, on an oral application for permission to appeal granted leave. Miss French subsequently succeeded substantially at the trial, where she was represented by a third set of solicitors. An issue from the trial in relation to costs went to the Court of Appeal, and I have read both judgments. I am told that the detailed assessment of costs hearing is fixed for three days in May 2012.

3. I now set out the relevant events chronologically in relation to this appeal.

4. The first solicitors for Miss French in relation to the action against Groupama were Lorrells, and they sent a client care letter to Miss French on 7 July 2008. In November 2009 the respondent here first became involved, I think originally in a somewhat informal manner. On 19 February 2010 they attended at Lorrells' offices to collect files, which were in a state of disarray. On 19 March 2010 a conditional fee agreement was signed with the respondent, and on 24 March 2010 the respondent went on record in the proceedings. Relationships originally between Miss French and Miss Monk, who had been recommended to her, were good, but they gradually deteriorated. It is events in May 2010 with which this application is particularly concerned, so I must consider them in some detail.

5. On 13 May 2010 Miss French claims that the respondent "positively disinstructed themselves on the basis that I had made a formal complaint". There were various relevant interchanges on that day. First, at 07.56 a letter (page 143 of the bundle) sent by email in response to an email from Miss Monk on the previous day at 13.01 dealing with various complaints Miss French had, in which Miss French writes:

> "Dear Mariel,
>
> There is little I can do when you do not keep me informed, when you ignore information and dismiss correspondence that I have carefully

> sent to you, or you ignore or refuse to answer straightforward questions that any client deserves clarification of – this is what precipitates such unnecessary correspondence.
>
> Obviously if you have overlooked something then that needs to be rectified, but it is no solution for you to keep bullying me into submission or to continue making false accusations or innuendos against me. That only serves to undermine our solicitor/client relationship – where trust is paramount.
>
> I have avoided saying anything until now but this cannot continue. Please, it would be better service if your responses from here on contained constructive and factual information on the case."

6. Miss French says in her witness statement at paragraph 24 (page 33.6 of the bundle) that this was written

> "at a point where I had reached the end of my tether with the unprofessional and questionable behaviour of that particular solicitor who had persistently bullied me, did not appear to want to follow perfectly reasonable instructions, had not been 'up front' with me or kept me informed, and so it became necessary to articulate this in correspondence."

7. At 2 p.m. that day, Miss French received a phonecall at work, which she describes as "intrusive", and she suggests that Mr Smyth, who made that call, thereby terminated the retainer improperly on the basis that she had made a complaint against the firm. She says that in that call Mr Smyth said that the only basis on which the firm would continue to act is if she withdrew the complaints. It is agreed, however, that Mr Smyth indicated that the firm would continue to represent Miss French at a CMC on the following day because of its proximity.

8. A further important email was sent by Miss French at 22.43 on that same day, 13 May, where she says, amongst other things:

> "You did not require any instruction from me in order to reply to the Defendant's facsimile of earlier this week even though I did so. I even suggested that you confirm with the Master the wording of his Order and take it from there, but you have not responded to my emails… We could have sorted all this out this afternoon and there would have been no need for this further correspondence."

9. On the following day, Miss Monk did attend the CMC before Master Foster. Miss French says that she misled the court on that occasion by saying she had no instructions from Miss French, when she in fact had. The respondents, in response, say that Miss French only arrived halfway through the appointment, and she had not been able, therefore, to give specific instructions on the day, as one would expect at the commencement of the hearing. That is alone what Miss Monk was

referring to by saying that she did not have proper instructions. Miss French says that the respondent did not at that hearing act in her best interests. Indeed, in her skeleton argument at paragraph 52 she says quite the reverse:

> "[Miss Monk and I] attended the CMC on 14 May 2010 in order to protect [the respondent's] interests, not to act in [her own interests]…and misled the court."

10. On 24 May there was a further set of complaints against Miss Monk, and on 26 May Mr Newth, a consultant for the respondent, wrote to Miss French:

> "You have now confirmed to me that you have specific allegations against this firm. First you allege serious misconduct. Secondly you allege negligence and assert that the negligence has caused you substantial prejudice and gives you an entitlement to compensation. I must recommend that you take independent legal advice on those matters which are outside my remit. I have to report that aspect to the firm while I continue with the internal complaints procedures.
>
> As to continuing to act in the light of these allegations, it is almost inconceivable in my view that a firm can continue to represent a client's best interests – pursuing that client's case against a third party – whilst defending itself against allegations by that same client where the client is claiming damages for negligence of the firm. Where allegations such as this give rise to a conflict of interest, the Solicitors Rules of Conduct require a firm to give reasonable notice that it will cease to act."

11. On 29 May Miss French received a lump sum bill from the Respondents for over £200,000. On 7 July Mr Newth decided that Miss French had not been told properly about the costs and time spent, and that led, on 16 July, to a credit note being sent to her for £72,262.50. On 17 July Miss French sought a detailed assessment of the firm's invoice, and that is referred to in an addendum at paragraph 9, which is before me. There is some disagreement as to whether it was before the Master, but I think, on balance, that it probably was, since he speaks – it is picked up on the transcript – of an addendum which started with a time estimate, and it seems to me that that is the only document in the bundle that comes close to fitting that description.

12. On 18 October 2010 the trial took place, and on 11 October 2011 the Court of Appeal overturned part of the order of His Honour Judge Seymour QC in relation to costs.

13. I should say that Miss French has made a very large number of allegations against the Respondent in the documents before me. It seems to me that this is not the appropriate vehicle to raise the allegations such as disclosure of documents covered by legal privilege (paragraph 39 of her skeleton) and failure to gain all documents from the previous solicitors (paragraph 40). So I say no more about

that.

14. There are two relevant hearings before Master Foster subsequent to the May hearing already referred to. On 22 July there was a hearing when only 20 minutes was allocated, and there is a disagreement about why that was. Then on 4 August 2010 is the order from which this appeal is made. Master Foster gave a short judgment, which I am going to read in its material parts, because it focuses on what the issues in the case really are. Paragraph 2 reads:

> "The solicitors resist the application, saying that they have unpaid fees of a little over £200,000. Whether their fees are properly a little over £200,000 or whether it is a sum rather less than that, I have no way of knowing, but it is quite clear that Miss French caused them to incur a number of costs and they are entitled to be paid.
>
> 3. The solicitors attempted to reach a compromise on the matter by saying, in effect: 'Yes we will surrender your documents to you if you give us a charge over your property'. Miss French, for reasons best known to herself, has taken the view that the solicitors are so incompetent that they could not be trusted to draw up a charge and that therefore she was not prepared to grant them a charge. That is her right. She is entitled to do that, but that unfortunately brings her back to the situation whereby she faces a perfectly lawful lien by the solicitors in respect of their unpaid fees, and I say it is a perfectly legitimate lien."

So that is his conclusion on the issue which was directly before him, that it was a perfectly legitimate lien. He goes in paragraph 4 to say:

> "Of course, it is quite clear to me that by the latest May of this year the solicitors' retainer by Miss French had been brought to an end. It had been specifically brought to an end by Miss French herself in an email of I think it is 14 or 24 May, in which she said she wished to act for herself in future. That clearly was terminating the retainer.
>
> 5. In any event, it is perfectly clear that the necessary relationship of trust between the solicitors and Miss French had completely broken down. Miss French says it was their fault, the solicitors say it was not. It is not for me to attempt to decide where the truth lies, but it is for me to decide that it is perfectly clear that the necessary relationship between solicitor and client had broken down and that therefore the solicitors were entitled, notwithstanding Miss French's own expressed determination of a the retainer, the solicitors were entitled to treat the retainer as having terminated…"

He then goes on to the question of costs. Miss French says that it was quite wrong for the Master not to attempt to decide where the truth lies.

15. So the central issue is the question of the enforceability of the lien, and Miss

French in paragraph 62 of her skeleton argument helpfully includes an extract from Senior Costs Judge Hurst's book, Civil Costs, chapter 13, where he says:

> "The solicitor's lien upon, or right to retain, his client's papers, until the bill, is paid is of a nature wholly different (from a fund realised in the cause). It applies to all his bills of costs…
>
> The Court's power to order that former solicitors hand over papers relating to a case to new solicitors is not exercised automatically. It is a matter of discretion to be exercised judicially depending upon the circumstances of the case…"

She goes on to cite the fact that

> "A contract of retainer is *prima facie* an entire obligation, that is a non-divisible contract: the solicitor is only entitled to be paid if they perform the entire contract and, conversely, is entitled to be paid nothing if the contract comes to a premature end."

16. Essentially, the issue is whether the retainer was terminated improperly. The claimant's case is that she only sought an apology from Miss Monk for her behaviour and, at the most, she was making a personal complaint against that solicitor, and the proper remedy would have been to appoint somebody else from the firm. The respondent, on the other hand, says that it was a serious complaint against the firm which needed to be investigated, and it put them in a conflict position. I have already read out the letter from Mr Newth which refers accurately to the duty of solicitors. I add, however, rule 2 of the Solicitors Code of Conduct, that it is normally unreasonable to stop acting for a client immediately before the court hearing if it is impossible to gain alternative representation.

17. It seems to me that the true analysis here is that either Miss French terminated the retainer by making her complaints, or the solicitors terminated it on giving reasonable notice, in the sense that, on 14 May, they gave notice that the position of their acting would be reviewed, bearing in mind that the following day there was the CMC, and they terminated it on 24 May by the letter that I have referred to.

18. In the recent decision of Cranston J, sitting with two assessors, Minkin v Cawdery Kaye Fireman & Taylor [2011] EWHC 177 (QB), the court reiterated at paragraph 31 that

> "At common law termination of a retainer requires solicitors to give reasonable notice and to have good cause for refusing to act further for the client: *Underwood, Son & Piper v Lewis*... There may be contractual terms reflecting or modifying these requirements, although under the Solicitors' Code of Conduct 2007 solicitors "must not cease acting for a client except for good reason and on reasonable notice": rule 2.01(2). The guidance to rule 2 of the code gives as an example of

good reason for ending a retainer where there is a breakdown in confidence or the solicitors are unable to obtain proper instructions."

19. It seems to me that there was a wholesale breakdown in confidence in this case, and it would be wrong to characterise this as simply a complaint against one solicitor in the firm and a request to have another one attached.

20. So insofar as Miss French claims that because the CFC was terminated irregularly the respondents are not entitled to any costs (paragraph 66 of her skeleton argument) I would disagree. It seems to me that this was terminated regularly by the solicitors and that Master Foster's conclusion on this is to be upheld. There are, however, other matters which she raises with which I must deal.

21. Firstly, she says that, because a request had been made for a detailed assessment, no lien could apply because of s. 64(2)(b) of the Solicitors Act 1974. I do not accept this submission and, in any event, the detailed breakdown is to be assessed as awarded by Master Campbell at a hearing next year, so that Miss French has an opportunity to deal with that. But there are also some further serious allegations that are made by her about the conduct of the hearing, and if I were minded to accept them then the appeal would succeed in that regard. But I take them in turn from the notice of appeal. It is first suggested that the judgment did not reflect the hearing. I do not accept that. There is a detailed transcript available of the key hearing. Miss French also says that the Master was "particularly intemperate" towards her, and in her skeleton argument she goes on to say that he was "extremely intemperate and intimidating" and it caused her considerable distress. I recognise, of course, that a litigant in person may not be as familiar with the sometimes robust nature of court proceedings as lawyers who appear here all the time, but clearly a Master or Judge must exercise control over a hearing and focus on relevant issues. That must be part of the overriding objective. I have read the transcript very carefully three times, and I cannot see anything in there which suggests that the Master misconducted himself or was unfair towards the claimant or was indeed intemperate. It is worth pointing out, as indeed the respondents do, that the Master, although originally saying it was going to be difficult if not impossible to hold the relevant hearing before the trial date in mid October 2010, did, of his own accord, bring forward the application when something else was taken out of the list.

22. Secondly, it seems to me that the Master was primarily engaged, insofar as he interrupted the claimant, in an assessment of what the relevant points were. To take a few examples, I cite page 183.12 lines 1-14, 183.21 lines 6-10, and 186.7 line 21. The Master must ensure that the proceedings are dealt with in the allocated time slot (in this case one hour). I had the luxury of more time being available to hear the appeal, and indeed I allowed what was listed as a half-day hearing to continue from 10.30 to 3.30 to ensure that Miss French had enough time to develop unhindered the points that she wished to take. It is true that the Master initially criticised her in relation to the original listing of the hearing, but when Miss French produced a letter from a Mr Pyecock, which put the matter into perspective, he accepted with grace that it was not her responsibility.

23. It is also suggested that the Master refused to consider evidence put before him. Although the judgment is relatively succinct, I cannot see that he left out any *relevant* issue or *relevant* evidence that had been put before him. It is also suggested that the Master prejudged the issues. Again I cannot see where that arises, save that he did indicate to Mr Smyth, for the respondent, that he could take matters relatively shortly, which made good sense in this case.

24. So as a matter of substance, I reject the appeal. There is, however, a further element of the appeal, and that is that the Master ordered the appellant to pay the respondent's costs, which he proceeded to summarily assess. The point is made by Miss French that the costs were disproportionate to the case. I think that Master Foster was in a much better position than I to assess costs, and save for the VAT issue I cannot see any basis on which he may have erred in principle in his assessment. The respondents accept that Miss French is correct that VAT should not have been included in the firm's estimate of costs dated 20 July, but says that the costs schedule was for a net amount excluding VAT of just over £8,000, and by the close of the hearing on 4 August 2010 a further £1,400 of costs at least had been generated by the adjourned hearing. On that basis, £8,000 is a reasonable estimate of the costs of the two hearings and associated preparation. It seems to me that the VAT issue, therefore, does not impact on the amount ordered, and I reject that ground of appeal.

25. The other ground that is put forward by Miss French is that the respondent could not claim any more than litigant in person rates for that hearing. I think that that is misconceived in relation to a solicitor appearing for themselves, and I simply refer to CPR 52.2-52.4 and 48.6. It follows that I dismiss this appeal.

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