IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2019] EWHC 2573 (Ch)

No. HC-2016-001362

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 31 July 2019

Before:

MR JUSTICE NUGEE

B E T W E E N :

VINCENT JAMES WALSH — Claimant

- and -

GREYSTONE FINANCIAL SERVICES LIMITED — Defendant

MS ALLEN (instructed by Crofts Solicitors) appeared on behalf of the Claimant.

MR GUPTA (instructed by Coyle White Devine) appeared on behalf of Coyle White Devine.

J U D G M E N T

MR JUSTICE NUGEE:

1 This matter comes before me. It is a follow on to the trial of the action which I heard at the end of March and into the beginning of April and which resulted in a substantial judgment which I handed down ultimately on 4 July 2019. In that judgment, I dismissed the claimant's claims, the claimant being a Mr Walsh who had sued a firm of financial advisers as being vicariously liable for alleged deceits and negligence of one of their employees, a Mr Williams-Denton. For the reasons given in my judgment, which is [2019] EWHC 1719 (Ch), I found that none of the deceits in relation to the earlier schemes that Mr Williams-Denton had recommended to Mr Walsh were made out, that claims of negligence in relation to both these schemes and the later scheme were statute barred, and that other claims in relation to the later scheme were barred because of my findings of fact on what was called the knowledge issue. It is not necessary for me to refer in any more detail to the underlying issues. The judgment is a public document and anybody can read it for themselves.

2 Having handed that down on 4 July, a hearing for the consequential matters was fixed and eventually took place on 23 July. At that hearing, there was no dispute that the claimant should pay the defendant's costs of the proceedings on the indemnity basis to be the subject of detailed assessment if not agreed. I did hear argument as to the quantum of interim payment and made a decision as to the quantum of interim payment. There was no dispute in relation to the other matters dealt with which were interest on costs and permission to rely on documents in other proceedings. The solicitor, a Mr Tom Blackburn of Crofts Solicitors, who then appeared for Mr Walsh, was not in a position to deal with permission to appeal and I agreed to adjourn that to come back before me, if so advised, in the week of 2 to 6 September when I am sitting in vacation. I provided that the time for appealing to the Court of Appeal should be extended to 21 days after the end of that week.

3 The current position then is that the action is over save for the outstanding possibility of an application for permission to appeal and whether permission, if sought, is granted or not the possibility of applying to the Court of Appeal either for permission if permission is refused at this level or for the substantive appeal if permission is granted.

4 The solicitors who acted during the litigation, a firm called Coyle White Devine, for Mr Walsh had, by that stage, ceased to act for him. I will have to look at the circumstances in which they did so in a moment but, for present purposes, it is sufficient to say that Mr Walsh is now represented by Crofts Solicitors instead of Coyle White Devine and that Coyle White Devine have outstanding claims for costs of the action. Mr Walsh paid substantial sums to them on behalf of costs, but their position is that further substantial sums are owing from him, that they are exercising a lien, both a common law solicitors' lien and, pursuant to their retainer, an express contractual right to a lien over Mr Walsh's papers, and that they are unwilling to deliver up any papers to him or, more pertinently, to Crofts. What I have before me is an application on behalf of Mr Walsh for an order for release of the papers by Coyle White Devine to Crofts, it being accepted that that should be subject to Crofts giving an undertaking to preserve Coyle White Devine's lien and I will have to come back to the terms of that undertaking in due course.

5 Ms Allen, who has appeared for Mr Walsh, has invited me first to resolve the question as to whether the retainer of Coyle White Devine was brought to an end by them or by Mr Walsh. It is her position that on the correspondence, it was brought to an end by Coyle White Devine. Mr Gupta, who appears for Coyle White Devine, submits that the retainer was terminated by Mr Walsh himself. This is potentially significant when it comes to the

exercise of the court's power to require the former solicitors to hand over papers to the new solicitors.

6 The relevant material can be fairly shortly stated. Coyle White Devine, who had incurred liabilities to counsel, eventually, after failing to secure payment from Mr Walsh of everything that they considered they were entitled to, served him with a statutory demand. Mr Walsh took separate advice from Crofts in relation to the statutory demand and has indeed brought, with their assistance, an application to set aside the statutory demand. That is not before me and is due to be heard, I believe, in October. However, in those circumstances, on 13 June 2019, Coyle White Devine wrote to Mr Walsh and having explained that a solicitor is only entitled to terminate the retainer for good reason, such reasons including a refusal by the client to pay an interim bill in a contentious matter, they continued:

> "In all the circumstances, it is now abundantly clear that Coyle White Devine cannot continue to act for you in relation to the claim against Greystone Financial Services Limited or any other matters. Accordingly, and with regret, please treat this letter as notice of termination of your retainer with CWD. We are required to provide you with reasonable notice of termination which, in the circumstances, I consider to be seven days. Accordingly, your retainer will terminate on 20 June 2019. That said and as previously advised, we do not intend to carry out any further work on your matters pending termination. For completeness, I have enclosed a notice of change which I would invite you to complete, sign, and return by 4.00 p.m. on 14 June 2019 notwithstanding the termination period. To this end and where we are unable to carry out any further work, it is not appropriate for CWD to remain on the court record. If you have alternative legal representatives such as Crofts Solicitors, they can file and serve a notice of change on all of the parties. For the avoidance of doubt, should I not receive a notice of change by 4.00 p.m. on 14 June 2019, I will be obliged to make a formal application to be removed from the court record as acting for you the costs of which will be sought from you. I hope that this will not be necessary."

7 Then he referred to the lien which Coyle White Devine intended to exercise and expressed his regret at having to write a letter in those terms. Enclosed with the letter was a draft notice of change which provided for Mr Walsh to give notice that his legal representative, Coyle White Devine, had ceased to act for him and that he would now be acting in person. However, in fact, on the next day, Crofts Solicitors replied to Mr Sheehan and enclosed a notice of change in which it gave notice that it, Croft Solicitors Limited, had been instructed to act on behalf of Mr Walsh in place of Coyle White Devine. That was signed on behalf of Crofts Solicitors.

8 The covering letter, under the heading "Notice of change of legal representatives" said:

> "Please find enclosed by way of service notice of change of legal representative... Our client's position in respect of your termination of retainer is fully reserved."

9 It then dealt with the intention to exercise a lien and took the point that:

> "As you have terminated the retainer with our client in a matter where there is a continuing litigation, the usual position would be for you to hand over the papers to us in return for a suitable undertaking to hold the same until resolution of the issue of costs. This is in order to avoid interference with the course of justice and to prevent prejudice to our client. We invite you to adopt that course of action."

10 I need not refer to any more of the correspondence. It is clear from that that the initiative of a termination of a retainer came from Coyle White Devine in the letter of 13 June giving, as solicitors need to, a reasonable period of notice, in that case seven days, and that if nothing else had been done, the contract would have come to an end on 20 June. It was also apparent that, in fact, the contract came to an end on 14 June as Crofts had been instructed in place of Coyle White Devine.

11 Mr Gupta's submission is that although the letter of 13 June made it clear that the contract would otherwise terminate on 20 June, it was technically Mr Walsh's decision to bring the contract to an end on 14 June and therefore he was the one who should be regarded as terminating the retainer. I have already indicated in the course of argument that I do not accept that submission. Whatever would have been the case had Mr Sheehan of Coyle White Devine's letter simply stopped by saying, "We are bringing the contract to an end on the 20th," and Mr Walsh had reacted by bringing it to an end earlier, in the circumstances of this case, Mr Sheehan positively invited Mr Walsh to change solicitors on the 14th notwithstanding what he calls the termination period and, indeed, backed up that invitation by a threat that if that was not done by 4.00 p.m. the next day, Mr Walsh would be exposing himself to a risk of further costs. It may be that, in fact, Mr Sheehan would not have recovered any costs if he had jumped into court before the 20th, but he certainly does not say in his letter that he will wait until the 20th to see if notice of change is filed. He makes it clear that Mr Walsh will be putting himself at risk as to costs unless notice of change is filed on the 14th.

12 In those circumstances, it seems to me that it would be a triumph of form over substance to regard the contract as, in effect, terminated by Mr Walsh. The analysis which I prefer to adopt is that it was Coyle White Devine who chose to bring the contract to an end. I express no views and I have heard no argument on whether they were or were not justified in doing so but whether or not they were justified in doing so, it was their decision to bring the contract to an end, coupled with an invitation to Mr Walsh to effectively abridge the termination period from seven days to one day, an invitation which he accepted. That does not, in my judgment, mean that he is to be regarded as the one who brought the retainer to an end. It was Coyle White Devine who did so.

13 There is an interesting semi-parallel with the facts of one of the cases put before me, *Gamlen Chemical Company (UK) Limited v Rochem Limited & Ors* [1980] 1 WLR 614. In that case, the solicitors acting for the defendants regarded themselves as not having been paid the fees that they thought should be paid by their clients and wrote a letter to the clients indicating that unless those costs were met, they were not prepared to continue. That was in the middle of ongoing litigation. In February 1979, they wrote to say that unless certain sums were paid, they would apply to be removed from the record of solicitors. The deadline was extended a number of times and eventually in June they wrote saying:

> "These circumstances leave me no alternative but to apply to the court for my firm to be removed from the record as solicitors 'and' my firm can no longer act for 'the personal defendants'."

Then they did write to each of the defendants on 3 July in which they said:

> "We cannot continue to act either for you or any of the other defendants in regard to this action unless our position in respect of costs is secured."

Then they said they would issue a summons to come off the record.

14 Oliver J at first instance said this (see 620F):

> "It seems to me that they [that is the former solicitors] have unequivocally intimated, both by taking out the summons on June 25 and then in their further letter of July 3 that they were not prepared to go on unless some arrangement was made as to their costs. That seems to me to be a clear case of the solicitor discharging himself."

That was despite the fact that they remained on the record.

15 On appeal, Mr Bueno, on behalf of the solicitors, argued that Oliver J was wrong on the facts. Goff LJ deals with that in this way at 621B:

> "I agree that each case must depend upon its own facts but, in my judgment, Oliver J's view of the inference to be drawn from the facts in the present case was clearly right.
>
> Mr Bueno said that all his clients were doing was to fire 'warning shots' across the defendants' 'bow' but after earlier warnings, they took up a categorical position by their letter of June 25 and by issuing and serving a summons forthwith and that under a rule which applies where a solicitor has ceased to act and, as Oliver J pointed out, they emphasised that position in their letters of July 3.
>
> For my part, I do not think that they can complain and say, 'We did not discharge ourselves; you discharged us' because the defendants not being willing to meet the bill took the appellants at their word and instructed other solicitors and therefore I see nothing in the first suggested ground of distinction."

16 Although the facts in that case were slightly stronger than the current case because the solicitors had taken out a summons to discharge themselves, the comments of Goff LJ that the solicitors could not say it was the client who discharged them, in circumstances where the clients have taken them at their word and gone off to other solicitors, are, as Mr Gupta accepted, not inapposite in relation to the present case. What Mr Walsh has done is exactly what Coyle White Devine invited him to do which was to accept the reality of the position that the retainer was at an end and simply abridge and bring forward the formal termination from 20 June when it would otherwise expire to 14 June. In those circumstances, I do not think, echoing the words of Goff LJ, that Coyle White Devine can complain and say, "We did not discharge ourselves; you discharged us" in circumstances where Mr Walsh not being willing to meet his bill - although, I should say that Mr Walsh in correspondence says that he is willing to pay whatever is properly due - took the solicitors at their word and instructed other solicitors. In those circumstances, I proceed on the basis, as I made clear in the course of argument, that it was Coyle White Devine who brought the retainer to an end.

17 In those circumstances, there is really no dispute as to the principles. They are set out very helpfully in Mr Gupta's skeleton argument which Ms Allen expressly accepted was an accurate statement of the law and I can read, effectively, from Mr Gupta's skeleton argument. At paragraph 6, he refers to section 68 of the Solicitors Act 1974 which provides in subsection (1):

> "(1) The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs, and for the delivery up of, or otherwise in relation to, any documents in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court."

18 Then there is a reference to a decision of Soole J, *Hanley v J C & A Solicitors* [2018] EWHC 2592 (QB) where, at [60] to [63] and [71], he set out the relevant principles. He came to the conclusion that the court had no jurisdiction to make orders in respect of documents which were the solicitor's own property. That is a proposition which is not disputed by Ms Allen and she only seeks delivery up of those documents which are Mr Walsh's property rather than Coyle White Devine's property.

19 There is then a reference to the notes to the **White Book**, 2019, at paragraph 42.2.5 and, again, I will read that:

> "Where a client discharges a solicitor, the court has no power to call upon the solicitor to hand over documents because the solicitor's lien to retain those documents endures. However, where the solicitor discharges themselves in the course of an action, their possessory lien over the documents becomes subject to the practice of the court under which the court will ordinarily order the documents to be handed over to the new solicitor against an undertaking by the new solicitor to preserve the former solicitor's lien, though in exceptional circumstances, the court may be justified in imposing terms."

20 Then there is a reference to the *Gamlen* case. Then in *French v Carter Lemon Camerons LLP* [2012] EWCA Civ 1180 at [27] to [28], there is reference by the Court of Appeal in the judgment, I believe, of Morgan J who gave the only reasoned judgment to an extract from **Halsbury's Laws of England** which reads as follows:

> "**Effect of change of solicitors**
>
> In the event of a change of solicitors in the course of an action, the former solicitor's retaining lien is not taken away but his rights in respect of it may be modified according to whether he discharges himself or is discharged by the client. If he is discharged by the client otherwise than for misconduct he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers even in a divorce case. If, on the other hand, he discharges himself, he may be ordered to hand over the papers to the new solicitor on the new solicitor's undertaking to hold them without prejudice to his lien, to return them intact after the action is over and to allow the former solicitor access to them in the meantime and if necessary to prosecute the proceedings in an active manner."

21 At [28], Morgan J then referred to a citation from *Gamlen*:

> "...for the principles which apply in a case where the solicitors' retainer is terminated in the course of continuing litigation ... the normal response of the court, when faced with a solicitor who has discharged himself in the course of litigation, even where the solicitor is entitled to discharge himself, is to order the solicitor to hand over the client's papers to the client's new solicitors, subject to an undertaking from the new solicitors to preserve the lien of the original solicitor. This course is usually adopted 'in order to save the client's litigation from catastrophe'."

22 I was referred by Ms Allen to another passage in *Gamlen*, this time in the judgment of Templeman J at 626H which justifies that statement and it reads as follows:

> "But if the appellants [that is the solicitors] had reasonable cause to discharge themselves, and did so, they are, nevertheless, for the reasons given in *Heslop v Metcalfe*, to which I have already referred and which Goff LJ has read, bound to hand over the papers of the clients to their new solicitors against the undertaking of the new solicitors to preserve the lien, for what it is worth, unless there are exceptional circumstances which justify some modification of the usual practice."

23 The reference to *Heslop v Metcalfe* is to a passage in the judgment of the Lord Chancellor, Lord Cottenham, which is cited by Goff LJ at 622F as follows:

> "Undoubtedly, that doctrine may expose a solicitor to very great inconvenience and hardship if, after embarking in a cause, he finds that he cannot get the necessary funds wherewith to carry it on. But, on the other hand, extreme hardship might arise to a client if - to take the case which is not uncommon in the smaller practice in the country - a solicitor who finds a poor man having a good claim and having but a small sum of money at his command may go on until that fund is exhausted and then refusing to proceed further may hang up the cause by withholding the papers in his hands. That would be great grievance and means of oppression to a poor client who, with the clearest right in the world, might still be without the means of employing another solicitor. The rule of the court must be adapted to every case that may occur, and be calculated to protect suitors against such conduct... I then take the law as laid down by Lord Eldon, and, adopting that law, must hold that Mr Blunt is not to be permitted to impose upon the plaintiff a necessity for carrying on his cause in an expensive, inconvenient, and disadvantageous manner. I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause."

24 In those circumstances, the Court of Appeal upheld the practice which had, as those citations show, been followed by the court for a long time.

25 Templeman LJ summarised the position at 624G:

> "Where the solicitor has himself discharged his retainer, the court then will normally make a mandatory order obliging the original solicitor to hand over the client's papers to a new solicitor against an undertaking by the new solicitor to preserve the lien of the original solicitor."

26 Then he refers to the fact that since this is a discretion, the court retains in exceptional circumstances a right to impose terms. Indeed, he says:

> "For example, if the papers are valueless after the litigation has ended and if the client accepts that he is indebted to the original solicitor for an agreed sum and has no counterclaim, or accepts that the solicitor has admittedly paid out reasonable and proper disbursements, which must be repaid, the court might make an order which would only compel the original solicitor to hand over the papers to a new solicitor providing that in the first place the client pays to the original solicitor a sum, fixed by the court, representing the whole or part of the monies admittedly due from the client to the original solicitor. Much would depend on the nature of the case and the stage which the litigation had reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the court is asked to make."

27 However, in this case, Mr Gupta has taken a stance on the basis that there is really no reason to hand anything over at all.

28 Apart from the first point which I have rejected that it was Mr Walsh who brought the retainer to an end, Mr Gupta's argument really came down to the position that there is really very little left in this litigation and no necessity shown for Mr Walsh to have access to the papers at all. The papers which were used by counsel, that is Mr Beswetherick, at trial, namely the trial bundles together with daily transcripts of the evidence and the judgment, remain in counsel's possession. Coyle White Devine has accepted that it has no objection to counsel continuing to act for Mr Walsh and Mr Gupta's position is that there is, in those circumstances, no reason why Mr Beswetherick cannot deal with the only outstanding matter which is the possible application for permission to appeal and a possible service of an appellant's notice to the Court of Appeal whether permission is or is not granted, and that Mr Walsh himself and his new solicitors, Crofts, have no need to have access to the documents.

29 Although it may well be that it would be possible for Mr Beswetherick to act in Mr Walsh's interests in that way, it would leave both Mr Walsh and Crofts in a most peculiar position in instructing counsel who had access to documents but in circumstances where neither the client nor the solicitors had access to the same documents themselves. That seems to me such an unusual way of conducting litigation that I do not think that Mr Walsh and his new solicitor should be put into that position. Apart from anything else, as Ms Allen pointed out, it is always possible that if Mr Beswetherick's advice is not to Mr Walsh's liking, Mr Walsh and Crofts might wish to seek alternative advice. That would have to be done at quite short notice because the time for the adjourned hearing for dealing with permission expires on 6 September. However, leaving aside that possibility, it is the duty of solicitors to form their own view on the proposed course of litigation even when counsel is instructed.

30 It has long been established that it is not appropriate for solicitors simply to slavishly follow the advice of counsel but to bring to bear on the advice they give to their clients their own experience of litigation and their own assessment of the merits and demerits of any particular proposed course of action. In those circumstances, I think it would put both Mr Walsh and Crofts at a significant disadvantage in the progress of the litigation even though it has largely run its course and there is very little left in it, as I have explained, not to have access to the documents that are necessary for the purposes of considering and preparing an application for permission to appeal and an appeal.

31 Those documents seem to me to be limited to those which are in counsel's possession, namely the trial bundles, the transcripts of the evidence, and the judgment itself. The judgment is a public document and Crofts already have access to it. It is said by Mr Gupta that some of the most important documents - the statements of case, the witness statements, and the like - are already in Mr Walsh's position having been emailed to him. That is no doubt the case but in order to form a view on the merits or demerits of an application for permission to appeal in a case which turns almost entirely on factual questions and on the documented course of events, it is, in my judgment, entirely appropriate that Mr Walsh and Crofts should also have access to the remainder of the trial bundles which contain the chronological bundles, including such parts of the criminal proceedings and the employment proceedings as were adduced in evidence at trial. I therefore will direct that Coyle White Devine hand over to Crofts, against Crofts giving a suitable undertaking, the documents which I have referred to, that is the trial bundles and the daily transcripts of the evidence.

32 I will not make an order in relation to any other documents - in particular, reference was made to counsel's opinion on the merits and to possible without prejudice offers and the like - because none of those, however interesting they may be, seem to me to go to the question of whether there are arguable grounds of appeal and whether the prospects of appeal are sufficiently good to make it worth making the application for permission. That is the purpose for which, on the authorities, papers should be handed over, namely, to allow the litigation to be progressed and it seems to me that it would be wrong to make further inroads into Coyle White Devine's lien beyond that needed for that purpose.

33 So I will limit the order to the documents I have identified, namely the trial bundles and the daily transcripts, and I will hear from Ms Allen as to the terms of the undertaking that Crofts is volunteering in order to preserve Coyle White Devine's lien so far as possible.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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