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Case No: D31MA018

THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER

1 Bridge Street West
Manchester
M60 9DJ

Date Monday, 27th November 2017

Before:

THE HONOURABLE MR JUSTICE BARLING

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HIGGINS & ORS **Claimants**

- and –

TLT LLP **Defendant**

- -

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MR NEIL BERRAGAN (instructed by **Knights Professional Services Limited**) for the **Claimants**
MR THOMAS OGDEN (instructed by **Not known**) for the **Defendant**

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JUDGMENT APPROVED

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

MR JUSTICE BARLING:

Introduction

1. This is an application by the claimants, represented by Mr Neil Berragan, for an order for delivery up of documents belonging to the claimants which are in the defendant's possession or control, or alternatively for an order for pre-action disclosure of documents pursuant to CPR rule 31.16. The defendant is a firm of solicitors,

represented by Mr Thomas Ogden. The application is opposed by the defendant in reliance upon a solicitor's lien.

Background

2. I will set out so much of the background as is necessary to explain my ruling. The defendant was instructed by the claimants in respect of a number of matters, including a proposed claim against tax advisors. I will call them the tax defendants. The proposed proceedings against them were for damages for a breach of contract and a breach of fiduciary duty in the form of allegedly negligent advice given in relation to a tax scheme which proved ineffective. I am told that the proposed proceedings also included a claim against one of the tax defendants for fraud based on an allegation against that tax defendant's employee. The employee in question has apparently been sentenced to a term of imprisonment in connection with the matter which formed the basis of that aspect of the claim.

3. There was a good deal of pre-action correspondence between the claimants' then solicitors, namely, the defendant, and the tax defendants' solicitors. Unfortunately, the defendant failed to serve a claim form within the time allowed. I shall need to refer to the judgment of His Honour Judge Pelling QC dated 18 September 2017, in which he declared that the claim form had not been validly served, struck out the claim, and refused other relief, with the result that the claim in effect ended that day. A formal order was made on 18 September 2017.

4. A number of applications were before the Judge, including an application by the claimants for a declaration that the claim form and particulars of claim had been validly served, or for an order dispensing with service or extending the time for service, and for relief from sanctions. Counter applications were made by the tax defendants, seeking to set aside the service of the claim form if required and various other forms of relief.

5. As I have said, the claimants' applications were unsuccessful. The Judge made the declarations referred to and struck out the claim. He also made an order for the tax defendants' costs of and incidental to the applications to be paid by the claimants. The costs order recorded that the parties agreed that the claimants would not at a later stage seek to recover any of the costs of this first claim from the tax defendants. That may have been included in the costs order because, before the judgment of HH Judge Pelling, a second claim had been issued by the claimants.

6. The findings of the learned Judge relevant to the point which I must decide are contained in paragraphs 38 to 41, inclusive, of his judgment. If there is a transcript at any stage of this judgment then it would be appropriate for those paragraphs to be set out verbatim. In view of the time I do not propose to read them out now but, by way of a summary, the Judge found that the solicitor who had conduct of the case on behalf of the defendant made a series of errors which resulted in the first claim not being filed and served when it should have been, and led to it being struck out.

7. What happened, in brief terms, was as follows. The claim form had been issued but not served while discussions were proceeding. The Judge found, first, that the solicitor left service of the claim form until very late in the period of what he described as its extended validity, there having been agreed extensions of time for

service. Having left it very late in that period, the solicitor then failed to achieve service in accordance with the requirements of the rules. It appeared that she had forgotten about the need to serve the claim form, or that she had understood the claim form to have been served in circumstances where it had simply been sent to the tax defendants' solicitors the previous July, some eight or nine months earlier. In fact, she had not consulted the wording of the consent orders, which had provided for service of an amended claim form. When, at the end of the period, she did purport to serve a document, it was not in fact the claim form that was served but the particulars of claim. Furthermore, it was not served on the tax defendants but on their solicitors, who had been asked whether they were instructed to accept service but had not confirmed that they were so instructed.

8. In her evidence to the Judge the solicitor accepted that she should not have forgotten about the consent orders, but stated that she was surprised by the need for instructions from the tax defendants concerning service on their solicitors. She considered that whether a firm of solicitors accepted service was "solely a matter of policy for the law firm concerned." In his judgment the Judge commented that that statement suggested that the solicitor was unaware of the general principle that instructions of that kind are a matter of crucial importance.

9. Thus, there had been a series of what the judge described as negligent or incompetent errors. He found these were such that there could not be a good reason for granting the relief from sanction sought. He stated:

> "The breaches that occurred in this case are not trivial. The claimants' solicitors failed to take the most basic step required in civil litigation, which was to serve the claim form on the defendants within the jurisdiction of the court in accordance with the straightforward code for service set out in Part 6 of the Civil Procedure Rules."

10. There has now been issued, but not yet served, a second claim form encompassing the subject matter of the first claim. Mr Berragan submits that, so far as the breach of contract claim for negligent tax advice is concerned, this claim is going to be dependent upon the ability of the claimants to rely upon section 14A of the Limitation Act 1980 relating to their knowledge of the relevant events. He submits that the need to surmount the hurdle of section 14A is wholly the result of the defendant's negligence in allowing the original claim to be struck out.

11. Mr Ogden suggests that the situation may not be as bad as that, as the primary limitation period may not yet have run its course. However, HH Judge Pelling QC noted:

> "There was an issue between the parties concerning limitation and the tax defendants were maintaining that if the claim form in these proceedings had not been validly served then the claimants' claims are all statute barred. Mr Maynard-Connor does not accept that is so for all the claims. He maintains that the claimants are entitled to rely on section 14A of the Limitation Act 1980 in relation to the scheme claims against

> each of the defendants, and on section 32 of the 1980 Act in relation to the employee fraud claim."

Thus, according to counsel for the claimants, they would have to rely upon section 14A in relation to the tax claim.

12. The unhappy situation which has now arisen, and has resulted in the present application, is that the defendant relies upon what it claims to be a solicitor's lien in declining to provide the documents which the claimants say they need in order properly to assess the merits of their proposed reliance on section 14A of the Limitation Act 1980 for the purposes of the new claim.

13. In the course of open negotiations between the parties prior to the hearing of this application, the stance being taken by the defendant was that the lien was relied upon in relation to payment of the defendant's fees and disbursements. However, in the last few days the matter has evolved so that the defendant now says it will release the papers on payment, or promise of payment, of certain disbursements amounting to about £40,000, without any element of fees. The disbursements in question comprise counsels' fees, experts' fees and so on, which have either been paid by TLT or, if not paid, for which TLT are responsible.

14. Mr Berragan points to a number of respects in which, contrary to Mr Ogden's submissions, the documents in the possession of TLT are required for those purposes. Several categories of document have been identified. When the matter was before His Honour Judge Pelling QC, he was shown a witness statement dated 5 April 2017 by Ms Gabrielle Armstrong, a solicitor employed by the defendant (then acting for the claimants). At paragraph 13 of her statement Ms Armstrong said:

> "Regrettably the letters of response [from the tax defendants' solicitors] failed to provide sufficient clarification to enable the claimants to make full disclosure to HMRC or fully particularise their claims. As a consequence on the claimants' behalf TLT LLP engaged in prolonged communications with each of the defendants via their respective solicitors making specific enquiries for information and documentation to assist in clarifying what is a complex factual matrix and in order to understand the accounting and tax planning practices adopted by the defendants."

15. Mr Berragan submits this indicates that the contents of the defendant's file include a good deal of information, derived from their communications and correspondence with the tax defendants' solicitors, which is highly pertinent to the merits of the tax claim, and which therefore they need to see in order properly to prosecute the second claim.

16. Without describing in detail each of the other categories of document which Mr Berragan has identified, it is certainly clear from the evidence that I have seen, and indeed is what one would expect, that there is material on the defendant's file which the claimants reasonably require to see and which they cannot replicate easily, or in a timely way. Were it as simple for them to do so as the defendant has suggested, it is highly unlikely that this application would be before me now.

The legal principles

17. As I said, the battle in this part of the application has, to a considerable extent, revolved around the entitlement of the defendant to rely upon its solicitor's lien. As to that, the legal principles are not much in dispute between Mr Berragan and Mr Ogden. They have helpfully drawn my attention to the decision of the Court of Appeal in *French v Carter Lemon Camerons LLP* [2012] EWCA Civ 1180. The leading judgment was given by Morgan J, with whom the other members of the court agreed. At paragraph 27 he referred to the convenient summary of the law in Halsbury's Laws of England, 5th Edition, Volume 66, paragraph 1,003. I quote, as the learned Judge did, from that work, under the heading "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."

18. In *French v Carter Lemon*, the court considered that it did not need to elucidate further the concept of "misconduct" referred to in that passage, because the issue did not arise. Mr Ogden, however, has taken me to a decision of the Administrative Court, on appeal from the Solicitors' Disciplinary Tribunal, in *Aaron v The Law Society* [2003] EWHC 2271 (Admin). The facts of that case do not call for comment, save that, as one might gather from the title, it concerned disciplinary proceedings rather than a claim for professional negligence. In paragraph 49 of the judgment of Auld LJ, the following reference was made to the well-known textbook Cordery on Solicitors, 9th Edition, at paragraph 1,430 to 1,440 and 1407:

> "As stated in Cordery on Solicitors .... solicitors are not liable in conduct for simple mistakes or errors of judgment, but negligence may, depending on the circumstances, amount to professional misconduct. It may be helpful for me to set in full the latter paragraph, which draws on passages from the judgments of Sir Thomas Bingham MR, as he then was, in *Ridehalgh v. Horsefield* .... and of Lord Denning MR in *Re a Solicitor* [1972] 2 All ER 811, at 815l: "

Then Auld LJ quoted the following from Cordery:

> "Professional misconduct is simply conduct which the Solicitors' Disciplinary Tribunal and the Judges from time to time regard it to be. 'Conduct which would be regarded as

> improper according [to] the consensus of professional, including judicial, opinion could be fairly stigmatised as such whether it violated the letter of a professional code or not.' Conduct does not have to be 'regarded as disgraceful or dishonourable by his professional brethren of good repute and competency' to amount to professional misconduct as even negligence may be misconduct if it is sufficiently reprehensible or 'inexcusable and such as to be regarded as deplorable by his fellows in the profession'. It will be noted that these quotations preserve the assessment of professional conduct, as to whether or not it amounts to professional misconduct, to the profession itself and to the judges."

19. The passage inside the quotation from Cordery beginning with the word "inexcusable" is a quote from the 1972 decision of Lord Denning to which I have referred. The 9th edition of Cordery quoted above appears not to be the latest edition. Mr Ogden stated that when he looked in Cordery he could not find the quotation. However, both counsel indicated that they had been unable to find anything better by the way of authority than those passages in the 9th edition.

The parties' submissions

20. It is common ground that the retainer in the present case was terminated by the client, namely, the claimants, rather than by the defendant firm itself. For that reason, Mr Berragan accepts that, in the light of the above authorities, he must satisfy the requirement of "misconduct" if the court is to be in a position to order disclosure and thereby to override what would otherwise be a solicitor's lien for unpaid costs. He submits that the present case does involve misconduct within the meaning of the passages in Cordery (a meaning that was confirmed by the judgment of Morgan J when he cited that textbook in *French v Carter Lemon*). In his submission, misconduct is not restricted to its regulatory meaning but rather, in accordance with what is said in *Aaron*, is capable where appropriate of being satisfied by a serious case of negligence. The defendant committed what Mr Berragan contends to be a repudiatory breach of its retainer: the defendant had been retained in order to lodge a claim within the limitation period and prosecute it. This the defendant failed to do, by reason of the series of negligent acts or omissions outlined earlier.

21. Mr Berragan goes on to argue that Lord Denning used the words "inexcusable" and "such as to be regarded as deplorable by his fellows in the profession" in the context of a *disciplinary* case, and that they do not circumscribe that which can amount to "misconduct" for present purposes. In any event, he submits that if they do, then those criteria are satisfied here.

22. As far as the alleged repudiatory breach of contract is concerned, it is submitted by Mr Berragan, by reference to a passage in Chitty on Contracts, 33rd edition, Volume 1, paragraph 24-041, that there should be a breach which goes to the root of the contract, and/or which frustrates the commercial purpose of the contract. In the present case, he contends that, by reason of the client/solicitor relationship, as well as an obligation to lodge the claim within the time limit and to prosecute it, there was also a requirement that a high degree of trust and confidence should exist. Where a solicitor allows a claim to be struck out through failure to serve the claim form in circumstances such as

these, the trust and confidence is wholly undermined. That goes to the root of the contract, and amounts to repudiation, entitling the client to terminate the retainer. Therefore, he submits, there exists misconduct within the meaning and for the purposes of the case law, and that affects the lien that would otherwise apply.

23. In response to a submission of Mr Ogden, Mr Berragan also submitted that where the failure in question causes serious financial loss or a substantial risk of serious financial loss, as alleged here, then it is impossible for the retainer to continue by reason of an unacceptable conflict of interest. He submits that in the circumstances the suggestion by the defendant that it should, or could, have been used to represent the claimants in the second set of proceedings currently on foot, is wholly unrealistic.

24. For these reasons, it is submitted that, notwithstanding the lien, the court ought to make an order for an interim delivery up of the defendant's file to enable the claimants to progress the second claim.

25. Mr Ogden, as I have said, opposes the application. He takes the preliminary point that it is incorrect to submit that the retainer was terminated by reason of the breach let alone for misconduct. He points to a letter from the claimants' current solicitors which refers to the conflict of interest as being, in effect, unacceptable, such that the claimants did not feel able to continue to instruct the defendant. This, he submits, terminated the retainer, and therefore it was not discharged by the clients for misconduct.

26. As far as the concept of "misconduct" is concerned, Mr Ogden submits that there can be no misconduct unless it amounts to professional misconduct. That was his primary submission. If that was wrong, and Lord Denning's remarks can cover conduct other than professional misconduct, then he submits, that the breach here is nevertheless not of such a nature to satisfy Lord Denning's test.

27. Mr Ogden also submits that there is not a repudiatory breach in the present case because the claim form, although it was struck out, was not the end of the story: there is the second claim; furthermore, as is common ground, the fraud claim was unaffected by the failure to serve in time. He also submits that there is still a tax claim available, albeit that it may be necessary to rely upon section 14A of the 1980 Act. On that basis he argues that this is far from being a case where the breach was so serious that it went to the root of the retainer, or the commercial purpose was frustrated.

28. Mr Ogden also pointed out, which may well be correct, that if the application here is successful, it will be determinative in the sense that, once access to the file is given, albeit purportedly on an interim basis, nevertheless that really provides final relief, as the lien is likely to be at the very least much less valuable than it would otherwise have been.

29. That, therefore, is the landscape of the battleground before me.

Discussion and conclusions

30. In my view Mr Ogden's preliminary point is not correct. As Mr Berragan has pointed out, if there is a repudiatory breach of contract which is accepted by the other party,

then even if the reasons for acceptance are not fully or accurately stated in correspondence, as long as sufficient reasons actually exist that is good enough. In the present case, in view of what had happened, it would have been wholly unrealistic for the defendant to have continued to represent the claimants in the second claim. Not only were the breaches multiple and cumulative, rather than there being a single occasion of forgetfulness, but the conflict of interest here would have been a huge obstacle to providing (and being seen to provide) objective advice and generally acting for the claimants in the second claim. No matter how the claimants' decision was expressed in correspondence one or two days after HH Judge Pelling QC's judgment, it is clear that as soon as it was delivered the defendant might properly have indicated that the claimants should seek, or consider seeking, independent legal advice. I am sure it came as no surprise to the defendant when the claimants did so, and indicated that the defendant should no longer act for them.

31. In my view, in the light of the authorities to which I have referred, it is reasonably clear that "misconduct" for present purposes is not restricted to matters which would be regarded as amounting to a professional or a disciplinary offence under whatever professional code is current at the material time. In the authorities, the word is not prefixed by "professional" or "disciplinary". Although its origins seem to be lost in the mists of time, "misconduct" is undoubtedly a word of considerable breadth and generality. I do not consider that for misconduct (in the relevant sense) to be found there need necessarily be any impropriety, moral turpitude or dishonesty.

32. It is, on the other hand, unlikely to be satisfied by what might be classed as "mere" negligence, or an incidence of negligence without any obvious aggravating features. If there is to be misconduct on the basis of negligence, there must, in my view, be something in the circumstances which takes the matter outside the norm, such as, for example, an act or omission, or series of acts or omissions, which calls into question the overall competence and/or carefulness of the professional in question. In the course of argument Mr Berragan suggested that gross negligence would amount to misconduct. I would accept that proposition.

33. Obviously, misconduct can also encompass behaviour implying moral turpitude, such as dishonesty, deceit and so on, but the question is how low the threshold is, and whether there must at least be misconduct in accordance with a disciplinary code. As I have said, I do not consider that that is the case. Nor do I consider that the authorities are such as to suggest that there must be moral turpitude. In my view, very serious negligence in the conduct of litigation is capable of amounting to misconduct for this purpose.

34. A number of specific factors were emphasised by Mr Berragan which do not appear to have any bearing on the question of whether there has been misconduct, although they may well be relevant considerations if and when it comes to a decision whether to exercise my discretion to make the order sought, if misconduct is found to exist.

35. First, I am told that the tax claim and the fraud claim, taken together, could quite reasonably be valued at about £4 million. I do not know how much of that sum relates to the fraud claim alone. That claim concerns monies alleged, effectively, to have been stolen, plus some consequential losses. The tax claim concerns the failure of a tax scheme. It appears not unlikely that the tax claim, which was the head of claim affected by the defendant's failures, may well be the larger of the two elements.

36. Second, I have already described how, in his order disposing of the claimants' unsuccessful applications against the tax defendants, HH Judge Pelling QC decided that the costs incurred by the claimants in those applications could not in the future be recovered from the tax defendants. Those costs, as I understand it, include some element in respect of TLT's fees. The claimants have paid some £130,000 to TLT in respect of fees, and there is said to be about £130,000 outstanding. Therefore, none of these sums will be able to be recovered from the tax defendants, even if the new proceedings against them are successful.

37. Third, it is at least on the cards that there will be a claim for professional negligence against the defendant, TLT. This will depend on the outcome of the second claim and possibly on the section 14A element of that claim. So, there may be a substantial claim or counterclaim against TLT. Yet, as things stand, TLT, through its lien, is attempting to extract payment from the claimants in advance of any such potential litigation between them.

38. Fourth, it is clearly in the interests of all parties present here that the second claim against the tax defendants should be prosecuted expeditiously and successfully. The more successful it is against the tax defendants, the better it is, not just for the claimants but also for TLT. It is, therefore, somewhat counter- intuitive that TLT should be, as the claimants say they are, holding up the investigation of the merits of that claim, including the assessment of the section 14A issue, by refusing to supply these important documents to the claimants.

39. Turning again, then, to the fundamental question of misconduct, I am satisfied that in the present case the hurdle of establishing misconduct for the purposes of the lien has been surmounted. This is not a case of just a single and unfortunate mistake on the part of the defendant. This was incompetence on a fairly grand scale, and on a continuing basis: forgetting or not knowing what the rules prescribed about service of a claim form, being ignorant of the need for solicitors to have their client's instructions to accept service and the importance of it, failing to appreciate that what was being served were particulars of claim and not a claim form, failing to consider the terms of the consent orders which were obviously clearly relevant to what needed to be done and when it needed to be done, and leaving the matter of service until very late in the day, as the learned Judge held.

40. Whether these failures occurred because someone was inadequately trained and/or insufficiently supervised and/or simply incompetent, one knows not, and one does not need to determine. There was conduct that was negligent to a very high degree, such as to satisfy the various tests formulated in the authorities as amounting to "misconduct" for present purposes.

41. Therefore, I conclude that I am in a position, if it is otherwise appropriate, to make an order overriding what would otherwise be the effect of a solicitor's lien. Taking account of all the circumstances, including the considerations to which I have specifically referred, including the likely prejudice to the defendant in the decrease in value of its lien resulting from release of the file, I have decided that I should exercise my discretion to make an order in approximately the terms that have been sought by the claimants. The papers in question should be delivered up at the earliest opportunity. The claimants' current solicitors have indicated, by way of the recitals to the draft order they have settled, that they will undertake to protect the lien to the

extent consistent with their and their clients use of the documents for the purpose of making the assessments that need to be made. I agree that the offered undertaking in that regard should be given.

42. Subject to discussing with counsel the precise terms of the order, if they cannot be agreed, I believe that these conclusions are sufficient to deal with the application.

43. As to the alternative application for disclosure under CPR 31.16, it is not necessary to deal with that ground in view of my findings on the primary basis of the application. All I will say is that there appears to be merit in Mr Ogden's submissions in opposition. I have considerable doubts whether it would be appropriate in the current circumstances to order pre-action disclosure. But, as I have said, it is not necessary to determine the point.