In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: No. 256

BETWEEN:-

MARSHALL DIEL AND MYERS LIMITED

Plaintiff

-v-

COLLINGWOOD ROBINSON

Defendant

JUDGMENT

(In Court)

Action for breach of contract for unpaid legal fees – whether attorneys entitled under written fee agreement to recover fees billed – whether under written fee agreement client's challenge to fees billed was brought too late – whether attorneys' advising client to litigate childcare issues in Supreme Court rather than Family Court was breach of their duty to act with reasonable care and skill in the best interests of their client

Date of hearing: 18th July, 22nd July and 2nd August 2016
Date of judgment: 10th August 2016

Mr Mark Diel, Marshall Diel and Myers Limited, for the Plaintiff
Mr Kamal Worrell, Lions Chambers, for the Defendant

Introduction

1. The Plaintiff is a law firm and the Defendant is their former client. On 30th June 2011 the Plaintiff obtained judgment in default of appearance against the Defendant for unpaid legal fees in the sum of $63,893.19 together with costs and interest. The fees were incurred in relation to a dispute between the Defendant and his former partner, R, in relation to their child, C.

2. Thereafter the matter, which has been dogged by delays, has a tortuous procedural history. I need not set it out in full. Suffice it to say that on 21st March 2014 the Court set aside the default judgment and allowed the Defendant to file a defence limited to his contentions that the proceedings should have been brought in the Family Court, or alternatively remitted there at an early stage, and not in the Supreme Court. The Defendant having filed a defence in those terms, this is the trial of the action.

Plaintiff's case

3. The Plaintiff claims to be contractually entitled to the fees claimed. It relies upon the terms of a written retainer agreement dated 16th January 2009 which was signed by both parties ("the Agreement").

4. Paragraph 4 of the Agreement is headed "*Marshall Diel & Myers' Terms of Business*". It states:

> "*We enclose a copy of our General Terms of Business. These apply to our appointment except as they are varied or supplemented by the terms of this letter.*"

5. The matters dealt with in the General Terms of Business include fees and, delivery of bills. Paragraph 4 is headed "*Your right to set a limit on fees and other charges*". The relevant part states:

"*You have the right, on giving us written notice, to set a limit on our fees and disbursements. We will notify you if that limit is reached to ask you whether you wish us to continue work (subject to a revised limit) or to cease work.*"

6. Paragraph 6 deals with payments of bills and interest on late payments. Paragraph 6.2 states:

"*Our bills are due and payable on delivery. If you do not make payment within 30 days of delivery we may:*

- *charge interest on any amount billed and unpaid, calculated from the date of delivery of the bill, at the rate of 3% per year over the base lending rate of The Bank of Bermuda Limited*".

7. Paragraph 5 of the Agreement is headed "*Fees*". It sets out the hourly billing rates of the various categories of lawyers at the firm and states:

"*Billing is usually on a monthly basis. It is expressly understood that you have thirty days from receipt of the bill to question any item and after this time this bill is accepted as accurate, due and owing.*"

8. At the end of the Agreement, the Defendant's signature appears under the sentence:

"*I/we agree to the terms contained in this letter.*"

9. It is not disputed that the Plaintiff carried out the work for which it has billed and the Plaintiff has provided a detailed breakdown of that work. Neither is it disputed that the Defendant was billed on a regular basis. The Plaintiff came off the record for non-payment of fees in March 2011. But it had made two previous applications to come off the record for non-payment of fees, in October 2009 and May 2010 (and did indeed come off the record from 1st July 2010 – 30th September 2010). On both occasions the Plaintiff had agreed to continue to act for the Defendant on his undertaking to make substantial instalment payments against his outstanding bills, although those payments were not in fact made. Thus, it is submitted, the Defendant was at all material times aware of the cost of the litigation.

10. As to the default judgment, Adam Richards, an attorney and Director of the Plaintiff who gave evidence on its behalf, stated:

> "*The Defendant was fully aware of judgment being entered against him as he contacted our offices and made an agreement to repay the sums due and owing. Indeed, the Defendant telephoned our offices on a number of occasions insisting that he would make payment.*"

11. Mr Richards' evidence was that whereas the Defendant complained that his legal fees were high he did not dispute that he had to pay them until an affidavit of 17th May 2013 filed in support of an application to stay execution of the default judgment. This was well outside the 30 day period allowed by the Agreement for questioning the bills.

Defendant's case

12. The Defendant does not accept that he did not question the Plaintiff's bills within 30 days of receipt, stating:

> "*On numerous occasions I questioned the Plaintiff as to why the bill was such an extraordinary amount, but I was simply told that I needed to pay this bill.*"

13. He accepts that he has an obligation to pay the Plaintiff's reasonable fees, but contends that the amounts which he has been billed are unreasonable. To put the Plaintiff's claim for $63,893.19 in context, as of the date the claim was filed the Defendant had already paid $65,600 in legal fees. Thus the total amount which he has been billed exceeds $129,000.

14. The Defendant initially instructed the Plaintiff in January 2009 to seek an order that R return C from Jamaica to Bermuda. Pursuant to the Plaintiff's advice, the application was brought under the Minors Act 1950 and therefore had to be made in the Supreme Court. Mr Richards gave evidence explaining that the Family Court, which derives its powers from the Children Act 1998, did not have jurisdiction to make the order, and that C's return could not have been secured through the Hague Convention on the Civil Aspects of International Child Abduction as Jamaica was not a party to the Convention. This evidence was not contested. The Plaintiff's

application to the Supreme Court was successful, and, pursuant to an order made by Wade Miller J, C's return was secured within approximately 10 days of the order.

15. There followed a series of applications and cross-applications in the Supreme Court regarding C. During the roughly two year period from January 2009, when the Plaintiff was first instructed by the Defendant, and March 2011, when the Plaintiff ceased to act for him, there were 13 summonses and 19 affidavits filed. That gives some idea of the volume of activity.

16. Upon the return of C to the jurisdiction, the matter was referred to the court social worker, Elaine Charles, for the preparation of a Social Inquiry Report. Mrs Charles had worked in child welfare for 35 years, including 12 years as the court social worker. She gave evidence that in her experience there was an informal arrangement between Bermuda and Jamaica in child abduction cases which was analogous to the arrangements between Bermuda and signatories to the Hague Convention. This could have been utilised to procure C's return through the agency of the Attorney General at no cost to the Defendant.

17. Mrs Charles further stated that when she met both parents they expressed concern at the cost of the legal proceedings. She had suggested that they speak with their lawyers as to whether the matter could be handled by the Family Court with the parties representing themselves, as the Family Court was used to dealing with litigants in person. The Defendant canvassed this option with Mr Richards, who advised him that it was better to remain in the Supreme Court. The Defendant followed that advice.

18. In June 2012 in the Family Court the Director of Child and Family Services obtained an emergency protection order in relation to C because of concerns that C was being physically abused by R and her husband. In July 2012 the Family Court made a care order in relation to C. This was initially for six weeks, but it was later extended before being superseded by a supervision order. On 21st March 2013, on the application of the Defendant, who was now represented by different counsel, Kawaley CJ gave the Defendant leave

to discontinue the action in the Supreme Court and directed that all matters which formed the subject of that action should be remitted to the Family Court. Thus one court was dealing with all outstanding matters relating to C.

19. The Defendant stated that he has found the Family Court a much more satisfactory forum than the Supreme Court. The proceedings were more informal and he felt comfortable representing himself. Although he had some legal assistance, this cost him the grand total of $4,000. There were no court filing fees and no documents to prepare whether summonses, affidavits or attorneys' letters. The Department of Child and Family Services ("DCFS"), for which Mrs Charles worked, played a formal role in the proceedings and was represented by Crown Counsel. The Defendant stated that he found the proceedings less confrontational and more geared towards finding a consensus than in the Supreme Court. The DCFS actively sought to promote reconciliation between the parties and the Defendant found its involvement beneficial. The matter was resolved by a consent order dated 12th November 2015 discharging the supervision order which was in place and awarding joint custody, care and control to the Defendant and R.

20. The Defendant submits that in the circumstances a reasonably competent attorney should have advised him that, C having been returned to the jurisdiction, the more appropriate forum for resolving the disputes about the child was the Family Court and not the Supreme Court, and that in the Family Court, unlike the Supreme Court, the Defendant would not be at a disadvantage if he did not have an attorney, and that his legal fees would have been lower than in the Supreme Court if he did. At the very least, the Plaintiff should have given the Defendant sufficient information to make an informed decision as to forum, but the Plaintiff did not do so. The Plaintiff's failure was particularly egregious as the Plaintiff must have been aware that the Defendant was having difficulty meeting his legal fees and as the Defendant had raised the possibility of proceeding in the Family Court with the Plaintiff. The Plaintiff's failure to give the correct advice as to forum was a breach of its contractual duty to act with reasonable care and skill in the best interests of their client.

Plaintiff's reply

21. The Plaintiff submits that at all material times they acted with reasonable care and skill in the best interests of the Defendant. They stand by their advice to the Defendant that the Supreme Court was the appropriate forum. As to the decision to commence proceedings there, it was the Plaintiff's experience that the informal arrangement between Bermuda and Jamaica in child abduction cases did not work in practice. As to the decision to remain in the Supreme Court, Wade-Miller J was already familiar with the facts of the case and was an extremely experienced family law judge. By contrast, the Plaintiff had concerns about a number of recent decisions by the Family Court. The nature and complexity of the case were better suited to the Supreme Court, in which issues were typically examined at greater length and in greater depth than in the Family Court. This would give the Plaintiff a greater opportunity to put across all his points, a better prospect of success, and a greater likelihood that he would feel that he had a fair hearing. Moreover, had the matter proceeded in the Family Court, it was almost inevitable that the dissatisfied party would have wanted to appeal, so the matter would have returned to the Supreme Court.

22. The Plaintiff did not accept that the approach of the Family Court was more consensual. Eg the proceedings in the Family Court lasted for more than three years and required 14 separate hearings. Both the Supreme Court and the Family Court encouraged the parties to resolve their differences amicably, but if they were unable to do so both courts would have to hear evidence to resolve any contested issues of fact. What had prolonged these proceedings was not the nature of the forum but the animosity between the parties and their aggressive approach to litigation, particularly on the part of R, which was not lawyer-driven. The Plaintiff had succeeded in the Supreme Court on almost every one of the applications which they had been instructed to make or defend. Eg on 1st October 2010, largely by a process of negotiation and consent mediated through the learned Judge, the Defendant obtained access to C for 6 out of every 14 days. He was ordered to pay child maintenance of $150 per week, which was substantially less than the $600 per week for which R had been asking.

23. As to the role of the DCFS, the reason why this was so prominent in the Family Court was because the Director of DCFS sought and obtained emergency protection, care and supervision orders in relation to C. Its role in the preparation of social inquiry reports was no different in the Family Court to its role in the Supreme Court. As to care proceedings, when a care order is granted the rights and responsibilities of the parents are severely curtailed. Decisions relating to the child are place with the DCFS. Mr Richards stated that these are draconian orders and that the Plaintiff would never advise that a client of theirs attend at such a hearing without legal representation.

24. The Plaintiff was sceptical as to whether proceedings were less expensive in the Family Court. The absence of affidavit evidence meant that witnesses had to give their evidence-in-chief orally, which prolonged hearing times, and the Family Court tended to be less decisive. Eg Mr Richards had recently attended a hearing there where it had taken the Family Court all day to decide whether to order a social inquiry report – a decision which would probably have taken the Supreme Court no more than a few seconds. The most significant reason why the Family Court proceedings had worked out cheaper for the Defendant was that in the Family Court he had represented himself. But he could have chosen to do that in the Supreme Court. Litigants can and do appear in person there, as in the present case did R.

Decision

25. This is an unfortunate case in which something has gone badly wrong with the relationship between the Defendant and his attorneys. It is a matter of regret that the parties were unable to reach a reasonable compromise over the Plaintiff's outstanding legal fees. Even at this late stage perhaps they still can.

26. I accept that the Defendant may from time to time have made generalised complaints about the levels of his fees, but I am satisfied that prior to his affidavit of 17th May 2013 he did not question any specific items for which

he was billed or dispute that he was liable to pay any of his bills, which he received on a monthly basis. As I find that the Defendant did not question any of his bills within 30 days of receipt he is liable to pay them. That is sufficient to dispose of this case.

27. However, I shall assume for the sake of argument that the Defendant is not time barred from questioning his bills. I am satisfied that, in commencing proceedings in the Supreme Court and, when the Defendant raised the issue, advising him that this was the most appropriate forum for resolving the disputes in relation to C, the Plaintiff was, for the reasons given by Mr Richards, acting with reasonable care and skill and in what they considered the best interests of the Defendant.

28. The Defendant, armed with the benefit of Mrs Charles' representations, did not have to follow the Plaintiff's advice. He could have instructed the Plaintiff to apply to remit the matter to the Family Court. He could have represented himself, whether in the Family Court or the Supreme Court, which is used to conducting child care cases with litigants in person. Or he could have instructed a less expensive firm of attorneys. Instead, when the Plaintiff applied to come off the record – not once, but twice – the Defendant asked them to continue to act for him in the Supreme Court.

29. The Defendant's case boils down to an assertion that, whatever the advantages of the Supreme Court, the Plaintiff should have advised him that the Family Court was less expensive, even if he continued to instruct attorneys, and more user friendly should he wish to act as a litigant in person. I agree that to proffer such advice would have been good practice, although the cost advantages and ease of use of the Family Court *vis a vis* the Supreme Court should not be exaggerated. However, assuming that the Plaintiff did not give such advice, this omission did not amount to a breach of contract.

30. I was referred to various provisions regarding fees in the Barrister's Code of Conduct 1981. But whether there has been a breach of that Code is a separate and distinct question from whether there has been a breach of contract. I am only concerned with the latter question. For the reasons

given above, I am satisfied that the Defendant is under a contractual duty to pay the legal fees for which he has been invoiced.

31. I shall hear the parties as to costs.

Dated this 10th day of August 2016

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Hellman J