Viberts v Powell

Jurisdiction:	Jersey
Judge:	Sir Philip Bailhache, Jurats Liddiard, Fisher
Judgment Date:	25 January 2011
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Text

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ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, **Kt., Commissioner, and** Jurats Liddiard **and** Fisher.

Between
Charles Thacker, David le Quesne, Christopher Scholefield, Zoë Blomfield, Rose Colley and James Lawrence, practising as Viberts
Plaintiffs
and
Caroline Powell
Defendant

Advocate O. A. Blakeley **for the Plaintiffs**.

The Defendant appeared in person and was not represented.

Authorities

Selby -v- Romeril [1996] JLR 210.

The end of lawyers? Re-thinking the nature of legal services. Professor Richard Susskind (OUP, 2008).

Louis -v- Le Liard (1990) JLR N-13.

THE COMMISSIONER:

1 These proceedings were instituted by the plaintiffs by simple summons, claiming the sum of £25,407.11p for outstanding professional fees in relation to legal services supplied to the defendant. The plaintiffs also seek interest on that amount. The claim has been particularised and the defendant has filed an answer to it. There is a tangled history to the dispute, but the essence of the matter can be encapsulated as follows.

2 The defendant has been engaged in matrimonial proceedings with her former husband. She engaged, over the period of those proceedings, a number of different legal firms. Sometimes those retainers lasted only for a few months. We are not concerned with any of these contractual arrangements, but it is clear that the constant changes of representation exacerbated the defendant's financial problems. Between June and July 2008, the defendant engaged the services of the plaintiffs. When that first retainer came to an end, a deposit of £1,000 in respect of legal fees was accepted by the plaintiffs in settlement of their account rendered for a larger amount.

3 We are concerned with a second retainer which began in December 2008. That second retainer came about in the following way. Having left Viberts at the end of July 2008, the defendant sought representation from Messrs Lemprière, Whittaker and Renouf. However, by the middle of October the plaintiffs received a request from the defendant to re-instruct them. According to the evidence of Advocate Rose Colley, the plaintiffs were reluctant to accept instructions on the ground that they had found the defendant to be a difficult client. At a meeting on 30 th October, 2008, between the defendant, Advocate Colley and others, those difficulties were discussed, as was the question of fees. On 31 st October, the plaintiffs wrote to the defendant setting out the terms upon which they were prepared to act. On the same day, however, Advocate Colley received an e-mail from the Acting Bâtonnier asking if she would represent the defendant on legal aid. After some confusion as to whether the plaintiffs or some other firm were actually being requested to act, Advocate Colley discussed the matter with the Bâtonnier and a legal aid certificate was issued to her on 17 th December, 2008. In accordance with their usual practice, the plaintiffs wrote to the defendant to ask her to complete a statement of means, so as to assess whether or not she

would be required to make a financial contribution to the costs of her representation. On or about 12 th January, 2009, the defendant attended at the plaintiffs' offices and the statement was completed. As a result, the defendant was assessed as being liable to make a nil contribution until the proceedings were concluded.

4 According to the evidence of Advocate Colley, she was concerned to be absolutely sure that the defendant understood the terms upon which the plaintiffs were prepared to act for her, and she instructed her practice manager to draft a letter of engagement to the defendant. This letter was sent on 20 th January, 2009, under cover of a personal letter from Advocate Colley dated 19 th January, 2009. The letter of engagement set out the basis upon which legal services would be supplied to the defendant and the fees which might become payable by the defendant as a legally aided client. It estimated that between 10 and 100 hours might be involved in dealing with the case. An important paragraph of the letter was headed *"YOUR CONTRIBUTION"*, and was in the following terms:-

> *"You will be charged in accordance with the following criteria:-*
>
> *1. Capital —if in the proceedings you obtain a settlement which leads to you having capital in excess of £10,000 (such as a lump sum settlement in family proceedings), we will charge you 100% of the fees at the taxation rates as set out above*.
>
> *If you recover a share in the former matrimonial home in excess of £25,000, then we can charge you 100% of the fees at the taxation rate*.
>
> *As an example, if as part of your matrimonial settlement you recover an insurance policy worth £15,000 the 100% of fees will be charged.* If you have a former matrimonial home transferred to you as part of a court order and that property has equity in it of £25,000 then 100% of fees can be charged.
>
> *If these provisions apply, then we suggest that you speak to us about the impact this will have on your costs*.
>
> *2. Income —If you do not receive capital as set out above then you will be charged on the basis of your income as follows:-*
>
> *If your household disposable income falls within £25,000 —£40,000 per annum you will be charged at 75% of the taxation rate;*
>
> *£25,000 —£35,000 per annum at 50% of that rate;*
>
> *£15,000 —£25,000 per annum at 25% of that rate;*
>
> *£10,000 —£15,900 per annum at 15% of that rate*.
>
> *If your disposable income is below £10,000 per annum no charge will be made to you*.

In all cases we will charge you for disbursements (as set out above).

In cases where your disposable income exceeds £40,000 then we will charge you 100% of the taxation rate.

Disposable income means gross income received by you and/or your spouse/partner, less £2,100 if you live with another adult and, if there are children who reside with you for at least 50% of the time, £2,900 per child.

In your case, based on your disposable income, you will be charged nil of work in progress at the taxation rate.

Disposable capital includes:-

(a) the combined capital of you and your partner;

(b) all land and buildings other than your home, including time shares;

(c) the market value of your home in excess of £25,000 after allowing for any outstanding mortgage whether the home is in sole or joint names;

(d) money in the bank, building society, post office, premium bonds, national savings certificates etc;

(e) investments, stocks and shares (including insurance policies);

(f) the monetary value of any valuable items including boats, antiques etc;

(g) money owing to you;

(h) money due from an estate or trust fund;

(i) money that can be borrowed against business assets;

(j) assets held within discretionary trusts.

In a matrimonial matter it does not include any of the above where your financial matters within separation or divorce have not yet been resolved."

5 A later paragraph of the letter was headed *"IN THE CASE OF A DISPUTE"* and provided:-

"If you wish to dispute a bill then you must refer the matter firstly to me as Managing Partner. If you are unhappy with my decision then you have the right to refer the bill to the Acting Bâtonnier for adjudication. However, you must do this within 6 months of the bill being issued.

If you or Viberts are unhappy with the result of the adjudication, an appeal can be made to the Bâtonnier. His adjudication is final and will be binding both on Viberts and yourself.

In the event that your finances change (e.g. you or your partner get a pay rise or receive a bonus) then you must inform us immediately.

If you do not inform us, then we reserve the right to charge you on what we believe your financial position is.

If you do fail to update us we will also apply for your Legal Aid certificate to be revoked.

If it becomes clear that you have misled the Legal Aid office when applying for Legal Aid and you were granted Legal Aid when you should not have been you can be directed by the Bâtonnier to pay full fees on a private client basis.

We will issue a variation to this letter if your financial circumstances do change."

6 The defendant told us that she was shocked to receive this letter. She had assumed that, as a legally aided client, and having been told that her contribution would be assessed as nil, she would pay nothing for the legal services to be rendered by the plaintiffs. However, she accepted that she did countersign the letter on 27 th January, 2009, confirming that she accepted the conditions regarding fees as set out in the letter of engagement.

7 Over the period of the engagement, various legal services were performed by the plaintiffs, and we will return to that below. On 17 th March, 2009, the defendant sent a fax to Advocate Colley complaining about the actions of a solicitor employed by the plaintiffs and concluding:-

"I cannot carry on like this as I have been back with Viberts long enough to have received the advice I have asked for many times over and to see some advantage to me or my children. Each day without a clear path for me to follow just drives me deeper into debt and despair and the total lack of control or knowledge of what [the lawyer] may be up to in my name is insupportable and I cannot continue with Viberts."

8 On 18 th March, 2009, Advocate Colley responded rejecting the complaints about the advice offered by the plaintiffs, and explaining that it would now be a matter for the Bâtonnier to determine how the defendant would be represented.

9 On 3 rd April, 2009, however, the plaintiffs received a letter dated 2 nd April, 2009, from Messrs Sinels stating:-

"As of today, we have formally been instructed by Mrs Caroline Chambers. Please can you forward all case papers to Sinels".

On 8 th April, 2009, Advocate Colley replied stating, inter alia:-

> *"Although it is not stated in your letter, I assume that Sinels are acting for Mrs Powell on a privately paying basis.* If this is the case then I will need to seek advice as to whether or not it is appropriate to hand over Mrs Powell's files given that I will now take steps to bill her for the work done on her file. I have had situations where a client who is legally aided becomes privately paying at another firm and the lien has been held to apply in the normal way.
>
> *I would be grateful therefore if you could inform me as a matter of urgency whether or not your firm is acting on a private basis.* I will then consider the position further."

10 On 8 th April, 2009, Sinels replied to confirm that they had been instructed by the defendant on a private basis.

11 On the same day, Advocate Colley wrote to the Acting Bâtonnier explaining the stance that she would be taking. She wrote:-

> *"I refer to the above legally aided client if (*sic) *this firm.* As you may recollect I agreed to deal with this matter out of turn. I recently attended a meeting with the Bâtonnier to discuss with him the difficulties that this firm were encountering with Mrs Powell and her ability to give competent instructions. Advocate Olsen wrote to Mrs Powell offering a meeting to discuss matters further.
>
> *I then received a request from Sinels for Mrs Powell's files.* I believe that Sinels are acting privately for Mrs Powell and will therefore be billing her for the work that Viberts carried out on her file. The WIP currently exceeds £40,000 and I intend to bill Mrs Powell a substantial proportion of this. I will then exercise a lien over the files until payment is made.,,
>
> *I am particularly concerned about this matter as there is not only the issue of the competence of Mrs Powell to give instructions but the fact that given that Viberts agreed to take on the certificate on the basis that Mrs Powell would be billed full Legal Aid fees at the end of the matter, I now suspect that either she has managed to obtain a loan for Sinels' fees or they are acting on a contingency basis.* If either is the case then I consider that this firm is justified in billing Mrs Powell and exercising a lien.
>
> *I would therefore be grateful if Mrs Powell's Legal Aid certificate could be revoked as a matter of urgency."*

12 In fact, evidence was given during the trial that the defendant had obtained a loan of £30,000 from a finance company and that £5,000 had been paid to Sinels on account of professional fees.

13 The plaintiffs accordingly raised an account for £25,407.11p. The account was not paid,

and on 16 th June, 2009, a summons was issued.

14 The Court ruled at the commencement of these proceedings that four issues required to be resolved:-

(i) was there a contract?

(ii) if yes, what were the mutual obligations of the parties?

(iii) were the obligations of the plaintiffs performed? and

(iv) are fees due by the defendant to the plaintiffs?

15 The first two questions can be answered relatively briefly. Mr Blakeley for the plaintiffs referred the Court to the case of *Selby -v- Romeril* [1996] JLR 210. We have no doubt that all the constituent elements of a contract were present and that there are no vitiating factors. The mutual obligations of the parties are to be found in the letter of engagement sent by the plaintiffs to the defendant, and countersigned by her. The defendant may have been reluctant to agree the terms proposed by the plaintiffs but she did so in the full knowledge of them.

16 The next question is therefore whether the plaintiffs fulfilled their obligations under the contract and rendered to the defendant the legal services to which was entitled. The defendant made a number of complaints about the plaintiffs. First, she asserted that it had been agreed that the plaintiffs would inform her when their charges reached £5,000 and thereafter at increments of £5,000. She stated that she had made it clear that she wanted to keep tight control over the level of fees because she could not afford to do otherwise. Advocate Colley denied that this was an obligation of the plaintiffs. She pointed to the provision in the letter of engagement which stated “To help you budget, we will send you an interim bill for our costs and disbursements approximately every three months while the work is progressing.” We agree that this provision is inconsistent with an obligation to report to the client at £5,000 increments. It is also inconsistent with the provision in the engagement letter which obliged the plaintiffs to update the time estimate when it approached the upper limit of 100 hours. On the basis of the time costs of a partner and of qualified staff, that would have involved reporting when the bill was between £16,400 and £20,300. It must be said, however, that there was no suggestion that any updating of the time estimate in fact took place, even though, according to the letter from Advocate Colley to the Acting Bâtonnier of 8 th April, 2009, the value of work in progress at that time exceeded £40,000. It does seem to us to be good practice to report on the level of fees incurred to a client, whether legally aided or not, periodically, whether that period is measured in time or in fee increments. Few clients can now afford an open cheque book approach where the lawyers do whatever work they think to be necessary and then render an account for the time involved multiplied by an hourly rate which is not insubstantial. Indeed, the whole approach to the provision of legal services seems to be ripe for review. It must surely be time for the profession to reconsider its business model and to adopt what

Professor Richard Susskind, in his illuminating book The end of lawyers? Re-thinking the nature of legal services (OUP, 2008) called the commoditisation or packaging of legal services for a fixed fee.

17 Be that as it may, we wish nonetheless to underline our conclusion that, in this case, the plaintiffs were by no means unfair to the defendant. On the contrary, they were initially reluctant to agree to take on the defendant as a client. They knew her to be an intelligent woman who questioned and challenged, and in some ways was a difficult client. It was only when approached by the Bâtonnier and specifically requested to act for her out of turn on a legal aid basis that they agreed to do so. We do not think that the plaintiffs ever expected to be paid for the entirety of their services, and their representation of the defendant was therefore in the best traditions of the legal profession and in accordance with the oath that all advocates and solicitors take.

18 The defendant declined to take advantage of her contractual right to have the bill of costs referred to the Bâtonnier for adjudication; nor was she prepared, despite considerable encouragement, to engage in mediation. It is not the function of this Court to engage in a line by line appraisal of the bill of costs to ascertain whether each item is justifiable or not. Our task is to ask ourselves whether, in the round, the plaintiffs performed their obligations under the contract for legal services that they had entered. The defendant suggested that the plaintiffs might have engaged in “churning” that is in engaging in spurious tasks in order to build up the billable time. There is no evidence whatever of such a practice, and we reject that suggestion. The defendant complained that there was little consultation with her. She was particularly aggrieved that a hearing took place before the Master without her knowledge and without her specific instructions. She felt that the plaintiffs had taken advantage of her distress and vulnerability, and had pushed her further and further into debt by engaging in work without telling her what they were doing. On the other side of the coin, the plaintiffs regarded the defendant as a demanding client who was constantly in communication with them and challenging and questioning their advice. She would appear to accept advice as to a particular course of action and would then later reject it. She complained about actions of the plaintiffs without any real justification; e.g. the imagined willingness of the plaintiffs to reveal her telephone number to her former husband, and the sending of a letter to Ogier when she had personally approved its contents.

19 Taken in the round, we are satisfied that the plaintiffs performed the obligations under the contract for legal services that they had entered with the defendant. We agree that the plaintiffs did make mistakes as, for example, in failing to notify the defendant that a summons was to be heard on 11 th February, 2009, relating to an application to adjourn an application for interim maintenance. Advocate Colley was away at that time and the file had been passed to another lawyer. In the context of any professional or business relationship errors will occasionally be made. We do not consider that any of the minor errors made by the plaintiffs went to the root of the contract or led to any discernible financial loss for the defendant. We have no doubt that, if the defendant had been asked about the summons to adjourn, she would have instructed her advocates to do exactly what they did, namely to oppose it vigorously.

20 We turn therefore to the final question, namely, are the fees claimed by the plaintiffs due by the defendant under the contract? We would state first of all that the grievance felt by the plaintiffs that the client whom they had accepted under the Legal Aid scheme should subsequently have engaged another firm of lawyers privately is very understandable. The question is, however, whether under the terms of the contract between the plaintiffs and the defendant they were entitled to claim fees at the time when the fee note was raised.

21 The letter of 19 th January, 2009, sent by Advocate Colley to the defendant contained the following paragraph:-

> *"On the basis of the interest you hold in property, I wish to advise you that, in accordance with the above and the Legal Aid Guidelines, at the conclusion of the matter you may be charged 100% of our work in progress, but at the Legal Aid taxation rate"*.

It is necessary, however, to look at the engagement letter of 20 th January, 2009, which was countersigned by the defendant, for the full text of the obligation. The passage cited at paragraph 4 above under the heading *"YOUR CONTRIBUTION"* lays down the conditions under which a charge will be made. If the client obtains a share in the former matrimonial home worth more than £25,000, then the client is liable to 100% of the fees at the taxation rate. If the client obtains a lump sum settlement in excess of £10,000, then equally she is liable to 100% of the fees at the taxation rate. There is no evidence before the Court that any such award was made in the matrimonial proceedings to the defendant. The same passage provides that if the client's disposable income exceeds £10,000 per annum, fees become payable at the taxation rate on a sliding scale. It has not been contended by counsel for the plaintiffs that the defendant's disposable income exceeds £10,000 per annum.

22 The basis upon which the plaintiffs claim that they are now entitled to charge fees is to be found in the passage from the engagement letter quoted at paragraph 5 above. The relevant sentences read:-

> *"In the event that your finances change … then you must inform us immediately.* If you do not inform us, then we reserve the right to charge you on what we believe your financial position is. If you do fail to update us, we will also apply for your Legal Aid certificate to be revoked".

23 Counsel for the plaintiffs submitted that they were entitled to take the view that the defendant's finances had changed, and that fees could accordingly be charged. The defendant had been receiving legal services gratuitously on the basis that she could not afford to pay for them, but by April 2009 was apparently able to afford to pay a different firm of lawyers on a private basis. She did not inform the plaintiffs before instructing Sinels privately. Counsel contended that under the terms of the contract the plaintiffs were entitled to charge at the legal aid rate.

24 The defendant admitted that she had borrowed a further £30,000 from a finance company, and stated that the payment of £5,000 to Sinels came from those borrowed monies. She contended that the plaintiffs knew about the loan, although this was not put to Advocate Colley in cross examination. The question for the Court is, however, whether the availability of those borrowed monies constituted a change in the defendant's finances. The view of the Jurats is that it did constitute a change. She was solvent and had a pot of money from which she could pay fees even if on a balance sheet test her finances had not changed. The truth may well be that the defendant could not afford to pay any fees at all. Yet she did agree, having instructed the plaintiffs under the Legal Aid Scheme, to pay Advocate Sinel £400 per hour for court work (compared with £203 per hour due to Advocate Colley under the Legal Aid Scheme) and paid a retainer of £5,000 to Sinels while the plaintiffs had received nothing. This was not fair.

25 It only remains to consider whether the plaintiffs are entitled to recover the full amount claimed under the summons. Advocate Blakeley conceded that the contract was only made on 27 th January, 2009, when the engagement letter was countersigned by the defendant. The fees claimed by the plaintiffs include £7,224.60 for work performed between 22 nd December, 2008, and 26 th January, 2009. The plaintiffs are entitled in our judgement to some payment on a *quantum meruit* basis for work done prior to the signature of the contract. See, for example, *Louis -v- Le Liard* [1990] JLR N 13. We will allow 50% of the time claimed on a *quantum meruit* basis, namely £3,612.30. We give judgment for the plaintiffs in the sum of £21,794.81, together with interest at the court rate from the date of the summons.