

JERSEY / JUDGMENT

AG -v- Begg [2014] JRC 254 (18 December 2014)

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judgment

the bailiff: 1. On 2 nd October the Court sat to hear the Attorney General's representation that Advocate Begg had been guilty of professional misconduct. Advocate Begg accepted that he was guilty of the two charges which the Attorney General had relied upon but disputed certain aspects of one of them. At the conclusion of the hearing, the Court imposed a fine of £15,000 and ordered Advocate Begg to pay £5,000 towards the costs of the Attorney General. We now give our reasons for that decision. 2. The complaints relate to litigation in the Petty Debts Court which Advocate Begg conducted on behalf of the defendant in those proceedings who was a 26 year old Portuguese woman of limited means. We shall refer to her as "the client". The charges 3. The two charges which the Attorney General relied upon were stated in the representation as follows:- " Charge 1 Failure to uphold the dignity and high ethical and technical standards of the legal profession, contrary to Article 2 of the Law Society of Jersey Code of Conduct. Particulars Advocate Andrew Philip Begg failed between July 2011 and February 2012 to promote the best interests of [the client] in his conduct of her defence to a Petty Debts Court claim. In particular he:-

- (a) failed to give her an estimate of the likely cost of his services once it was clear that the matter was proceedings towards a trial;
- (b) failed to keep her informed as the case progressed of the amount of work he was recording and the amount he was charging for it;
- (c) failed to keep his work and his charges proportionate to the size and nature of the case;
- (d) failed to advise her that there was a risk that she would lose at trial;
- (e) failed to advise her that if she won at trial she would not recover a substantial part of his costs because they were so disproportionate; and
- (f) submitted a single invoice, only after the case was over, claiming £31,192. Charge 2 Failure, having been instructed by a client in a contentious matter, to canvass with that client on a positive and on-going basis, and in a fully informed manner, all available dispute resolution processes contrary to Article 22 of the Law Society of Jersey Code of Conduct. Particulars

Advocate Andrew Philip Begg between July 2011 and February 2012, while acting for [the client] in respect of a Petty Debts Court action which proceeded to trial, failed to canvass a resolution of the dispute on a positive and ongoing basis and in a fully informed manner with his client. In particular he:-

- (a) failed throughout the engagement to encourage her to consider settling the case;
- (b) discouraged her from accepting a settlement offer that was made in January 2012;
- (c) failed to inform her of the level of costs she was incurring in fees to him;
- (d) failed to advise her that there was a risk that she would lose at trial; and
- (e) failed to advise her that if she won at trial she would not recover a substantial part of his costs because they were disproportionate." 4. At the hearing before us, Advocate Begg accepted that he had behaved as specified in the particulars of both charges. He admitted Charge 2 fully but he contended that, in relation to Charge 1, what he had done amounted to a failure to uphold the 'high technical standards' of the legal profession but that it did not amount to a failure to uphold the 'dignity' or the 'high ethical standards' of the profession as alleged by the Attorney General. The factual background 5. There is no dispute about the essential facts. In July 2011, the client became aware, following a visit from the Viscount's Department, that judgment had been entered against her by default in the Petty Debts Court for £4,840 plus fixed costs in respect of a claim for debt brought by her mother's cousin ("the plaintiff"). The client said that she had never received the summons and denied owing the sum in question. Her case was that the money had not been lent to her but had been lent to her mother ("the mother"). She said that it was the mother who had asked the plaintiff for the loan in question in order to help the mother's husband fix a roof in Madeira. However, she said the mother had not told the plaintiff the truth about the purpose of the loan because the plaintiff would not have lent the money for that purpose as she did not get on with the mother's husband. The mother had therefore told the plaintiff that the loan was for the client in order to help the client with her struggling shop business. 6. The plaintiff's case, on the other hand, was that the money had indeed been lent to the client. The plaintiff said that the mother had requested the loan on the client's behalf. The plaintiff relied on the admitted fact that she had lent other sums to the client in the same way (i.e. on the request of the mother), which had been repaid. 7. From the first, the client explained her limited means to Advocate Begg. She explained that she could only afford to pay £150 a month in respect of the judgment and that the mother was on a disability allowance. Advocate Begg knew from an early stage that the client's only asset was a car worth about £5,000 together with her business, and he was also aware that this was struggling because he was told that the client had previously borrowed money from the plaintiff via the mother in order to help with the business. He further knew that the client was very reluctant to sell the car as she needed it for her business. 8. Advocate Begg acted for the client in her application to have the judgment set aside and in this he was successful on 27 th July, 2011. Advocate Begg prepared a standard letter of engagement dated 13 th July, 2011. Unfortunately this was sent to the

wrong address. According to Advocate Begg, the client picked up a further copy from the office and on any view, a further copy was e-mailed to the client in September 2011 as one of a number of attachments to the e-mail. The client never signed or returned the letter of engagement and Advocate Begg never checked that she had received or read it or understood its terms. The client says that she did not read the letter of engagement; albeit that she accepts that it was e-mailed to her as described. 9. The letter of engagement set out that Advocate Begg's hourly rate was £375 and stated at (vi) that, if a contested matter were to be resolved in her favour, she would not recover all her costs from the other side but that she would be liable to pay his fees in full. 10. The litigation duly proceeded. There was an unsuccessful mediation which was attended only by the plaintiff and the mother, various pleadings etc. were exchanged and there were certain hearings. 11. Shortly before the trial, the plaintiff (who had hitherto represented herself) instructed Advocate Tremoceiro and on 12 th January, 2012, he made a written offer which was without prejudice save as to costs. The offer was that the client should pay £4,780 in monthly instalments of £150 but that each party should bear their own costs. 12. Advocate Begg forwarded the offer on to the client by e-mail the same day. However, it is clear that he advised her to reject it. His e-mail says "I presume that Advocate Tremoceiro's proposal is rejected ..." At the time of this offer, the costs incurred by Advocate Begg on the matter had reached £15,000 but he did not inform the client of this fact, nor did he provide any estimate of the potential overall costs if the matter went to trial or of the risk of losing at trial; nor did he advise her specifically that even if she won at trial, she would not be able to recover many of his costs from the other side following taxation. In ignorance of these matters, the client rejected the offer. 13. The case went to trial in February 2012 at which the plaintiff, the client and the mother all gave evidence and there were affidavits from witnesses in Madeira. The Relief Magistrate referred to the case of *JK Fruit and Vegetables Catering Limited v Harbour Lights Hotel Limited* [1987 - 88] JLR 72 to the effect that an agency by estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. He held that that was the situation here, in that the client had authorised the mother to enter into loan arrangements on her behalf with the plaintiff in the past and that the plaintiff had acted to her detriment as a result of that arrangement. He held therefore that the client was liable for the slightly reduced sum of £4,180 and further ordered the client to pay the plaintiff's costs on the standard basis. 14. It is clear that this decision came as a shock to Advocate Begg as well as to the client. Advocate Begg accepts that he was convinced that the client had a strong case and would win and he had not hitherto considered the question of agency by estoppel, which was not raised until the judgment of the relief Magistrate. 15. Following the conclusion of the case, Advocate Begg sent the client a fee note on 14 th March, 2012, in the sum of £31,192 (including GST). He clearly realised that the sum was substantial and his covering e-mail included the following passage:- "Please don't let this depress you: I appreciate that you and your mother are in tight financial circumstances and that, for the foreseeable future at least, you will only be able to afford to pay by instalments. That's fine by me even it is only £150 per month - i.e. the

amount which you told [the plaintiff] you would be able to pay her. As you and I agreed, following the hearing, it would, frankly, serve her right if, as a result of her turning down your very reasonable offer and (as a result) you having to defend the proceedings, you aren't in a position to pay her anything!" [original emphasis] 16. The client replied the same day confirming that the fee note most certainly was a shock to her as she was 'completely unexpected it to be that much and that looking back it would have been a much better idea to just sell the car!' . She said that she would be paying £150 per month and that she would be letting the Viscount's Department know that she could not afford to pay the plaintiff anything until she had finished paying off Advocate Begg as his debt was much bigger and more important to her. She said that the plaintiff would simply have to wait until she had finished paying Advocate Begg before the plaintiff could start receiving any money whatsoever. She asked Advocate Begg for a standing order form. 17. Advocate Begg replied by e-mail later the same day "I understand the shock but at the same time I am sure you appreciate the amount of work that it was necessary to do. It's obviously easy to be wise in hindsight! You could, indeed, have sold the car but you didn't; and [the plaintiff] could have accepted the £150 per month but didn't; and ironically, it all turned on what your mother did, or didn't, tell [the plaintiff] in that conversation about the £3,000." He said that he would send her a standing order form the next day. 18. He subsequently sent a standing order form for completion by e-mail dated 30 th March. In that e-mail he said as follows:- "Having thought about my fee note, my accounts department realises that, at the rate of £150 per month, it is going to take absolutely ages to pay the GST (to say nothing of the Income Tax) which obviously isn't cost effective from my point of view! What I propose doing, therefore is to issue an interim fee note once a year. Apart from anything else, that will make the GST payments (and, indeed, Income Tax payments) more manageable. I take the opportunity of attaching the first such fee note (for £1,800) - to be paid by monthly instalments of £150 as agreed - at least for the time being, pending an improvement in your financial position." 19. In January 2013, Advocate Begg became aware that the client was selling her shop business but was not using him as her lawyer for the sale and had told the purchasers not to use him. On 9 th January, he sent a hostile e-mail accusing her of seeking dishonestly to conceal the sale from him in order to avoid paying his bill. He ended the e-mail by saying:- "I hope that you are now going to come clean! Please let me know who is acting for you in the sale. For the avoidance, I am not necessarily expecting payment of my fee in full but, if you are selling the shop, I would fully anticipate receiving a substantial lump sum payment on account - and, if it isn't enough to settle in full, I assume that the monthly payments of £150 will continue. Whether or not I am willing to allow that arrangement to continue will depend on what you plan to do after you sell the shop and whether, for instance, you/[your partner] have a job out of which that £150 per month - or hopefully more, can be paid." [Original emphasis] 20. In fact, the client made no profit from selling the business. The client confirmed in an affidavit that she had advised the purchaser of her business not to use Advocate Begg and had chosen not to do so herself; but this was not to avoid him finding out about the sale; rather it was because she was so upset about how he had treated her by charging her so much without warning. 21. Following this e-mail, the client

complained to the Law Society and the matter proceeded from there. Shortly before the disciplinary hearing was due to take place in March 2014, Advocate Begg wrote to inform the client that he had written off her debt. Advocate Begg admitted two charges of misconduct before the Disciplinary Committee of the Law Society subject to certain reservations and on 9 th April, 2014, the Disciplinary Committee referred the complaint to the Attorney General pursuant to Article 23(1)(c) of the Law Society of Jersey Law 2005 . Discussion 22. In our judgment this is a clear case of professional misconduct and, to be fair, Advocate Begg does not dispute that essential finding. We would summarise the aspects in which he has been guilty of misconduct as follows:- (i) He failed to give the client any indication of the likely cost of defending the claim. She was therefore never given the chance of considering on an informed basis whether she should do so or continue to do so. (ii) This failure was exacerbated by the fact that he did not inform her at any stage of how costs were increasing. This was particularly significant when it came to consideration of whether to accept the settlement offer put forward by the plaintiff on 12 th January, 2012. At that time, Advocate Begg's time costs had risen to £15,000. This was over three times the amount at stake and three times the value of her car. It was clearly a vital piece of information for the client to have when deciding whether to settle at that stage. She was left in complete ignorance. In his affidavit to the Law Society, Advocate Begg stated that she must or should have known the general size of the costs because she knew that he was charging £375 per hour and that she could have asked him about the level of costs at any time. But it is not for the client to take a guess at how many hours a lawyer has spent on a matter and then multiply that by the hourly rate in order to work out what the cost level might be. The duty is fairly and squarely on the lawyer to keep the client informed so that the client may make an informed decision at any stage of the proceedings. In *Shakespeares v Reddish* 2000/44 this Court said on page 8 of the judgment:- "We are satisfied that the implied term for a solicitor to act with reasonable skill and care requires him to consider the relationship between the amount at stake and the possible costs involved in pursuing a claim and to draw these to the client's attention so that the client may make an informed decision as to the best course of conduct." Whilst that comment was made in relation to the contractual terms of a retainer, we have no hesitation in holding that a blatant failure to fulfil that duty, as in this case, amounts to professional misconduct. (iii) Advocate Begg failed to advise the client at any stage that there was a risk that she might not succeed at trial. It is clear that he thought that she was bound to win. Nevertheless, a lawyer should appreciate that, particularly on issues of fact which turn on the credibility of witnesses, a result can never be guaranteed. As a result of his failure to even raise the possibility with her, she was deprived of the opportunity of reaching an informed decision as to whether to settle. He failed to consider with her the desirability of settling at any stage. (iv) Similarly, it is extremely important to a client to know what the consequences of winning may be. It is a pyrrhic victory to succeed in obtaining damages only to find that the level of damages awarded is less than the gap between the costs recovered from the other party following taxation and the costs payable to the client's own lawyer. That would undoubtedly be the position here. This aspect needs to be pointed out clearly and unambiguously to a client and it was not sufficient to rely on the general wording

to that effect in the letter of engagement. (v) Advocate Begg's conduct in submitting a single invoice for £31,192 after the case was over was unacceptable. It is hardly surprising that the client was extremely shocked and dismayed. The fee was over six times the amount at stake. Furthermore, his conduct thereafter was inappropriate. He clearly indicated to her that she should pay him rather than the plaintiff who now had a judgment debt. At the rate which he suggested, the fee note would have taken some 17 years or so to clear and this assumed that she was not paying anything in respect of the plaintiff's debt or the costs which had been awarded to the plaintiff. His response to the discovery that she had instructed another lawyer on the sale of her business was also inappropriate. 23. Advocate Scholefield submitted on Advocate Begg's behalf that he always intended to write off or reduce the fee note if appropriate and he produced evidence that Advocate Begg had often shown considerable flexibility and generosity in relation to fees charged to other clients. The difficulty with that submission is that, even if Advocate Begg thought to himself that he would be willing to show flexibility, he never gave any indication of this to the client. On the contrary, the various e-mails that we have referred to above give no hint of his being willing to accept anything other than payment of the full invoice, even over a very long period. There was never any hint of a suggestion that the bill was open to discussion or reduction. Indeed, his email of 9th January is on its face inconsistent with a willingness to reduce the bill. It is of course however accepted that he eventually wrote off the bill shortly before the disciplinary hearing was to take place. 24. Advocate Scholefield concedes - as does Advocate Begg himself - that on these findings, Advocate Begg has fallen below the high technical standards required of a Jersey lawyer and is guilty of professional misconduct. However, he submits what Advocate Begg did does not amount to a failure to uphold the 'dignity' of the profession nor does it amount to a breach of the 'high ethical standards' of the profession as alleged by the Attorney General. 25. In our judgment, Advocate Begg's conduct does amount to a failure to uphold the dignity of the profession. It is a criticism often heard of lawyers that they allow clients to run up enormous bills out of proportion to what is at stake. It is of the first importance that lawyers should be aware of their duty not to let this happen unless the client is fully aware on an informed basis of what is occurring. It is important for the standing and reputation of the profession that lawyers take all reasonable steps to avoid such an occurrence. Conduct such as that of Advocate Begg is liable to bring the profession into disrepute and in our judgment amounts to a failure to uphold the dignity of the profession. Upholding the 'dignity' of the profession means upholding the standing and reputation of the profession and Advocate Begg's conduct did not do that. 26. As to whether the conduct breached the high ethical standards required of the profession, the Attorney General does not allege that Advocate Begg's failure to inform his client of the risks and costs as the case went along was a breach of ethical standards. However, he does submit that, once the case was over and Advocate Begg faced the choice as to how much to require his client to pay, his conduct did breach the high ethical standards required. He billed for his entire charges with no discount despite the modest amount at stake and his knowledge of the client's lack of financial resources; he gave no indication that he was prepared to settle for a lesser sum; he suggested that he should be paid ahead of the plaintiff; and he was

discourteous and applied inappropriate pressure on the client to pay in his e-mail of 9 th January, 2013. 27. In our judgment, putting these matters together, Advocate Begg did breach the high ethical standards required of the profession. Sanction 28. Ultimately, the exact labelling applied by the Attorney General to the professional misconduct in question is not the important factor; it is the Court's overall assessment of the gravity of the misconduct. 29. We accept, as does the Attorney General, that in not informing the client of the level of fees being incurred and the possibility of settlement, Advocate Begg was not motivated by financial self-interest. Had we concluded that he was, the Court would have taken a much more severe approach. We accept that the explanation for his conduct is a mixture of inefficiency coupled with a mistaken conviction that the case would be won and a mistaken desire not to cause her stress as the litigation progressed. But, for the reasons we have given, the misconduct was such as to bring the profession into disrepute and cannot be adequately reflected by a private rebuke or a public reprimand. The lowest penalty which we can properly impose is that of a fine. 30. We have been referred to a number of other disciplinary cases in Jersey but, as in criminal sentencing, it is a perilous and unsatisfactory course to try and compare the detailed facts of one case with another in order to see whether the penalty should be higher or lower. 31. We take into account Advocate Begg's admissions of guilt of professional misconduct made at a comparatively early stage and the fact that he has written off his entire fee note, which has no doubt come as a great relief to the client (although it came late and meant that she was under the stress of thinking she had to pay it for close to two years). Conversely, we also note that this is not Advocate Begg's first appearance for professional misconduct. On the previous occasion he was fined £20,000 for conduct of a different nature. We also take note of Advocate Begg's financial position. Were it not for that, the fine would have been higher. 32. In all the circumstances, the Court concluded that an appropriate fine was one of £15,000 together with an order that he pay £5,000 towards the costs of the Attorney General. Authorities *JK Fruit and Vegetables Catering Limited v Harbour Lights Hotel Limited* [1987

- 88] JLR 72. Law Society of Jersey Law 2005. *Shakespeares v Reddish* 2000/44. Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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