

JERSEY / JUDGMENT

Cunningham -v- Sinels [2011]

JRC 015 (19 January 2011)

[2011] JRC 015

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judgment

the deputy bailiff: 1. The Court sat on 10 th January, 2011, to receive an application by the applicant for an order that the respondent should release all of the files in their possession to him forthwith for the purposes of ensuring that he or those whom he instructs have adequate time to prepare for the trial of litigation in which the applicant is the plaintiff. The summons was in fact issued as though it were part of the principal litigation, which involves a claim brought by the applicant against Andrew Cunningham, his brother, and four other defendants under Court file reference 2006/166 ("the main proceedings"). By consent, the Court ordered that a separate court file reference be given to this particular application so that the defendants and party cited in the main proceedings would not have the opportunity to be heard in relation to the relief which the applicant now seeks against the respondent. 2. The respondent practises as a firm of Advocates in Jersey. The firm was retained by the applicant in the main proceedings which are complex trust proceedings which, as is clear from the court file reference, were commenced in 2006. The substantive hearing in respect of the main proceedings had been scheduled to commence on 10 th January, 2011. A series of interlocutory orders had been made during 2010 inter alia establishing a timetable for the delivery of trial bundles, authorities and skeleton arguments. On 23 rd December, 2010, an application was made on behalf of the plaintiff, the applicant in the current proceedings, for the adjournment of a further interlocutory summons issued in the main proceedings and indeed for an adjournment of the hearing date fixed for the main proceedings. The grounds upon which that application was made was that the respondent firm had withdrawn from representation of the plaintiff, and accordingly the plaintiff found that he was unable to defend the interlocutory application and to be ready for the substantive hearing. The defendants did not consent to the adjournment of the main proceedings, but they saw that there was no serious alternative to that course of action being adopted, and the proceedings were duly adjourned. Time was extended to the defendants to file their skeleton arguments and authorities to 10 th January, and time was extended to the plaintiff to file a skeleton argument and authorities in reply to 10 th February. There was liberty to apply generally, and the Court indicated that it was open to any party to apply to fix fresh dates for the substantive hearing of the proceedings. 3. It was plain that there was a potential issue over the delivery of the files to the plaintiff or to his new lawyers. At a hearing at 4pm on 23 rd December, the Court was advised that the respondent firm

wished to assert a lien over the files pending payment of monies which were asserted to be outstanding to the firm from the plaintiff. The Court indicated on 23 rd December that it would sit on 10 th January if it were necessary to make a determination in connection with the delivery of the files in question and time was ordered to be abridged accordingly. It transpires that the respondent firm did not agree to transfer the files to the applicant. That is the background to the summons issued by the applicant and on which the Court now has to adjudicate. 4. Although Advocate Steenson had been retained by the plaintiff (with the agreement of the respondent firm) to appear for the plaintiff at the hearing on 23 rd December, he did not appear for the plaintiff on 10 th January although he was present as a courtesy to the Court. The applicant presented his summons therefore on his own account. In essence, his application was for the delivery of all the files which the respondent firm held for him in connection with the main proceedings upon the basis that he had paid a sum in excess of £400,000 to the respondent firm over the last four years, had asked for a composite fee note, which had not yet been delivered, and on the basis that:- (i) The firm terminated the relationship despite his best efforts; (ii) He needed the files to be able to instruct a new lawyer and (iii) He wanted to review the files and therefore the charges which had been made as he suspected there may have been some errors. He accepted that there might well be monies outstanding, indeed substantial monies outstanding. He did not expect to get something for nothing, and despite having difficulty in raising funds over the last eighteen months or so as his other businesses had deteriorated in terms of profitability, he was actively trying to raise funds. 5. In response, Advocate Tracey's main position was that while the firm was not asserting a lien over the files, at least for the time being, a substantial sum of money was owed by the applicant to the firm, currently approximately £154,000, and that before the substantial number of files were delivered, it would be appropriate that the firm received security for monies outstanding. Advocate Tracey indicated that fee difficulties between the applicant and the firm had started in about 2009. There were substantial arrears by May 2010, and the firm had difficulty in acting as there was no realistic prospect, in the firm's view, of being paid for its work. Trial dates which had originally been fixed for June 2010 were in fact abandoned for reasons unconnected with the plaintiff's difficulty in funding the litigation, and, in effect, the respondent firm had put down their pens collectively in or about May 2010 pending some accommodation being reached on the question of fees. The respondent firm was not unwilling to ensure that new solicitors in Jersey could have access to the files, and indeed, subject to payment of the outstanding amount or the provision of adequate security, was prepared to co-operate with the new lawyers to ensure that they were aware of the detail of the proceedings. Advocate Tracey pointed out that both the applicant and his common-law partner had signed in effect an acknowledgement of debt to the firm on 6 th December, 2010, acknowledging as at that date their debt of £166,208. Since that date a considerable amount of work had been done on the litigation, and, on the other side of the coin, the sum of £50,000 had been received from the applicant. That led to a nett position of approximately £154,000 being due as of 10 th January. 6. The respondent firm put before the Court a bundle of correspondence between 4 th February, 2010, and 5 th January, 2011. The Court recognises that it was difficult to put together at relatively short notice a complete file of all relevant correspondence, but nonetheless we also note that it is apparent that some correspondence, which may well be relevant to the underlying issues, has not been

included in the file put before us. For example, we have a copy of a letter dated 28 th October, 2010, from Advocate Philip Sinel to the applicant in which Advocate Sinel thanks Mr Cunningham for his e-mails, but we do not appear to have the e-mail correspondence to which that letter refers. We have had to do the best we can with the information which has been provided. 7. In his reply, the applicant said that he considered the respondent firm had acted irrationally in connection with fees over the last two months or so, that he felt he had wrongly been abandoned by the firm immediately prior to the case coming to Court and that his counter-signature of the letter from the respondent firm sent on 6 th December, 2010, should not in his view be taken as an admission of monies due. While he accepted that he owed some money to the firm, he did not know what the proper quantum would be. 8. Advocate Tracey put before us three authorities reflecting the position in England and Wales. These were Gamlen Chemical Co (UK) Limited-v-Rochem Limited and Others

[1980] 1 All ER 1049, A-v-B

[1984] 1 All ER 265 and Ismail and Another-v-Richards Butler (a firm)

[1996] 3 WLR 711. It was said that these cases reflected the position in England and Wales (and as a form of amicus , Advocate Steenson confirmed that he considered this was correct) and it was contended the same principles should therefore be applied in Jersey. 9. There are some differences between the position of the profession in Jersey and the position in England. First of all it is appropriate to recognise that in Jersey we have a fused profession and of course advocates and solicitors here take their respective oaths of office before the Royal Court. Secondly the statutory legislation is not the same. In England the position may well have been affected in the cases put before us by the Solicitors Act 1974 and the provisions of what was then Order 20 Rule 6 of the Rules of the Supreme Court . By contrast we have the Law Society of Jersey Law 2005 , and, to the extent that it may be relevant, the Supply of Goods and Services (Jersey) Law 2009 . Nonetheless the cases which have been put before us are helpful in many respects in illuminating the key issues which need to be considered by the Royal Court, just as they would need to be considered in similar process in England and Wales. 10. The key reason why this is so is that in Jersey, as in England, the overriding consideration is that the Court must be able to give justice to the litigants who come before it. In this case, the litigation between the applicant and his brother and others in the main proceedings has had to be adjourned because of the late withdrawal of the respondent firm. The contractual arrangements between the applicant and the respondent firm are subordinate to the litigation which is before the Court in which the applicant is the plaintiff. That subordination arises not least because the respondent firm are officers of this Court and, with the Court and the other lawyers involved, owe duties to ensure that justice is done to the litigants before the Court. The approach which this Court takes is therefore very similar to that which has been taken in the courts of England and Wales notwithstanding the differences which are mentioned above. 11. It is right also to reflect upon these comments of Lord Griffiths in the case of Kettelman-v-Hansel Properties Limited

[1987] AC 189 at page 220 where he said this:- "..... But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age." 12. Lord Griffiths was considering in that case the question of leave to amend so as to adduce a limitation defence, the application for leave being brought at a very late stage. Nonetheless, the comments which he makes are relevant comments in the context of the subordination of any difficulties arising in the relationship between a party and his lawyers to the need to proceed with the main proceedings efficiently and expeditiously. 13. It is clear that as a matter of its inherent jurisdiction over its officers, the Court can in its discretion order a solicitor or advocate to deliver the client files to the new lawyer or indeed to the client himself, or indeed order that the solicitor or advocate may retain the files either pending payment of monies outstanding or the obtaining of good security for such payment. How the discretion might be exercised will be very much dependent upon the facts of the case which is before the Court at the relevant time. It seems to us from a perusal of the authorities in question that the following factors, which do not necessarily form an all encompassing list of relevant factors, might well be generally relevant:- (i) Whether the advocate or solicitor has discharged himself from acting for the client, whether he is still acting, or whether he has been discharged by his client; (ii) Whether the nature of the retainer related to a matter pending before the Court, or whether it was a non contentious matter or indeed a matter which was no longer contentious; (iii) Whether the advocate or solicitor had acted reasonably or properly in relation to his conduct of the relationship with his client; (iv) Whether there were in fact monies due by the client to the solicitor or advocate and the proportionality of the action which the Court was asked to authorise in relation to the amount which was involved; (v) Where the balance of hardship lay between the advocate or solicitor on the one hand and the client on the other. 14. In his address Mr. Tracey set out to explain the complexities of this litigation. The Court does not consider it necessary to address what Mr. Tracey said in that respect, because it does not seem to us to be critical to the decision which we have to make. The rights or wrongs of the plaintiff's case against the defendants in the main proceedings can only be determined by the court which hears the evidence in the main proceedings and a one-sided summary of the respondent firm's perception of their difficulties in dealing with the case on behalf of the plaintiff is not particularly helpful. Nonetheless we do recognise that the nature of the plaintiff's claim in the main proceedings is complex and has required consideration of and in some cases action in other jurisdictions in order to assist him. We recognise that the respondent firm is a relatively small firm, apparently with two partners and four

associates. We specifically recognise that advocates and solicitors in Jersey would normally be considered as acting reasonably if, other than within the terms of the Legal Aid Scheme, they require appropriate payment for work which they do. Indeed the applicant in this case recognised that he should not expect, and said he did not expect, something for nothing and indeed therefore would expect to pay for the services which were provided to him. 15. There are on the other hand corresponding duties on the part of the advocate or solicitor. To some extent these may now be found in statute. In respect of contracts for the supply of services after 1 st September, 2009, the Supply of Goods and Services (Jersey) Law 2009 will apply. Article 28 of that legislation requires that the supplier of a service warrants that he will carry out the service with reasonable care and skill. There are warranties fixed by Article 29 about the time for performance of the contract for the supply of a service, and by Article 30 there is provision that the party contracting with the supplier shall be bound to pay a reasonable price where the price for the service is not determined by the contract, left to be determined in a manner agreed by the parties to the contract, or determined by the course of dealing between the parties. 16. By Regulation 3(2) of the Supply of Goods and Services (Jersey) Regulations 2010, as amended, a term of a contract for the supply of a service shall, unless the term is fair and reasonable, have no effect if it is a term that purports to exclude or restrict liability for breach of the obligations arising from the supplier's warranty set out in Article 28 of the principal legislation. 17. It is clear that for a large part of the time when the respondent firm was instructed by the applicant, these provisions could not possibly have applied, the legislation only coming into force in September 2009; but to the extent that there was any novation of the contract after that date, and to the extent that any of the provisions which we have mentioned might be relevant in the context of an argument between the applicant and the respondent firm, there may be scope for consideration of this legislation at some future date. 18. Furthermore, where a client is charged fees based on hourly rates of £300 per hour for associates or £400 per hour for partners, it seems to us that even outside the ambit of the Supply of Goods and Services (Jersey) Law 2009, there may well be either agreement between the parties that the supplier of legal services will act with reasonable care and skill, or in the absence of express terms to that effect that the Court may be satisfied that the will or *volonté* of the parties to make the contract at all was such that such a term should be implied. It is axiomatic that the higher the hourly rate, the more legitimate the expectation on the part of the client that the work will be done with greater skill and efficiency and as at present advised it seems to us that this level of charging presupposes a very high level of skill and efficiency. This type of consideration is a legitimate factor for the Court for a number of reasons, but in particular because it is appropriate that the Court as a convention compliant body under the Human Rights (Jersey) Law 2000 does everything in its power to ensure that there is access to justice within the community to enable those with grievances to have appropriate mechanisms for airing those grievances in court. 19. Having regard to the material which has been put before us, we are in no doubt at all that the respondent firm in effect ceased the retainer by indicating to the applicant that it was no longer prepared to act for him. Following an

exchange of e-mails on 5th and 6th October, 2010, the respondent firm wrote to the Bailiff's Judicial Secretary, copied to the other parties to the main proceedings, to advise that the firm was no longer able to act for the applicant. Advocate Sinel's letters of 25th and 28th October, 2010, make it plain that it was the respondent firm which was in the driving seat insofar as its continued representation of the applicant was concerned. Nothing in the subsequent correspondence changes that view. It is true that in an e-mail dated 1st December, 2010, to a Mr Jason Williams, the applicant indicated that his relationship with Advocate Sinel had collapsed, but the context of that comment was that even at that stage the applicant was seeking to reach some accommodation to enable the respondent firm to continue dealing on his behalf. 20. We have considered whether or not the respondent firm acted reasonably in seeking to discharge itself from the obligations owed to the applicant. This is an important question, as indicated above, and was very clearly canvassed in the English cases which were referred to us. By contrast with those English cases, we do not feel in a position to say that the respondent firm has acted reasonably. We note for example that in February 2010 an estimate of costs from that date to the conclusion of the trial was given to the applicant. Approximately one third of that estimate related to pre-trial preparations, but in fact the bills which have been submitted for these pre-trial preparations are nearly three times the estimate which was given. 21. We note that as of May 2010, it was said by the respondent firm that approximately £113,000 was outstanding in terms of fees, and a further £100,000 on top of that figure would be needed before the trial to enable the respondent firm to continue. Some three months later in August 2010, the respondent firm indicated that £155,184.50 was outstanding, and a further £146,000 also would be required as monies on account in October, November and December 2010 to enable the respondent firm to continue. We recognise that it is never easy to forecast expenses involved in litigation, not least because there are occasionally documents discovered or proceedings taken which were not anticipated at the time of the original estimate. We recognise too, as indicated earlier, that we have not seen all the communications between the applicant and the respondent firm over the relevant period. Nonetheless, in our view the disparity of figures is sufficiently substantial that we consider the applicant is not acting unreasonably in indicating that he wants to review the files and the charging which has been made against the work which has been done. 22. The firm relies on a letter dated 6th December which has been signed by the applicant and his common-law partner. It is the letter which is on the respondent firm's notepaper and asserts that the current debt to the respondent's firm was £166,208.76 as at 6th December. It contains other material as well. The applicant says that he did not consider that he was accepting the amount due as the firm set out. Without deciding the matter in any sense, we indicate that we do not necessarily regard the applicant's explanation of that letter as necessarily being without foundation. No doubt our view has in part been influenced by the closing account numbered 11914 for the period 1st to 22nd December, 2010, which includes the sum of approximately £2,190 in respect of meetings and telephone attendances, both externally and internally, as well as correspondence with regard to the monies asserted by the respondent firm to be due by the applicant to the

firm, all of which have charged at full hourly rates and the propriety of which might well be disputed. 23. We emphasise that we are making no finding at all as to the sum of money which may or may not be due by the applicant to the respondent firm. We do not have the information upon which to make any such finding. The limit of our conclusions for the purposes of this application is that, on the information provided to us, we cannot be satisfied that the respondent firm has acted reasonably. 24. We are also very much influenced by the fact that the respondent firm has blown hot and cold in relation to the representation of the applicant over the last seven months. We do not doubt that during that period there may well have been times when it was entirely appropriate for the respondent firm to indicate to the applicant that it was not prepared to act unless proper provision for payment was made. Nonetheless, to withdraw with some three weeks left to go before trial was in our view inappropriate. By that stage all the parties to the main proceedings would have had a reasonable expectation that unless the case were settled, the litigation would continue and would provide a resolution of their respective circumstances, subject to any appeals. By coming back on the record to act in November 2010, the respondent firm in effect legitimated those expectations, and it was wrong in our view for it to have withdrawn at the late stage it did. It was particularly inappropriate to have done so, in our view, given the very substantial sum by way of fees that had been billed during the litigation to that point. The applicant told us that he considered he had been let down, and the Court regards that response as entirely reasonable. 25. For all these reasons, as a matter of discretion, we are not minded to make an order that the respondent firm have any form of security for the amount which is outstanding. In fact there is a technical difficulty to making any such order anyway. The truth is that there is no agreement as to the amount which is actually due and the Court is certainly not going to pre-judge that question by making an order for the provision of security in such a sum. More importantly still, a requirement to provide such security would potentially have the impact that the applicant could not raise sufficient sums to cover the costs of any lawyer instructed in place of the respondent firm, which might therefore inhibit his ability to have the issues before the Court in the main proceedings come to trial in early course, and it is in the interest of all the parties to the main proceedings that this take place. 26. Accordingly we are not minded to make any order for security, and we have noted that no claim is made to a lien over the relevant files. To the extent that any such claim is asserted, and it was expressly disavowed by Advocate Tracey, we deny it. 27. That leaves over however three further matters which need to be addressed. The first of these relates to the actions which the respondent firm might take from now on to recover monies due to them. We think that is entirely a matter for the respondent firm, and it is open to that firm to take such proceedings as it is advised to take, and in such jurisdiction as it is so advised. Equally, it is open to the applicant to enter such defences to such a claim as he is advised are appropriate. As we have made clear, we express no views about the authenticity or otherwise of any such claim. 28. Secondly we note that on 4 th January, 2011, the respondent firm wrote to the Bâtonnier to indicate that whilst it originally accepted that Advocate Steenson and Advocate Nicholls of Messrs Walkers could appear for the

applicant on 23 rd December, the firm no longer agreed to any other firm (including Messrs Walkers) acting on his behalf. In a letter dated 23 rd December to Advocate Steenson, the respondent firm referred to Article 9 (1)

- (a) of the Law Society of Jersey Code of Conduct which is in these terms:- "A member shall not accept instructions from a new client in relation to a continuing matter when he is aware or becomes aware that another member has previously acted for the client in question on that matter until that member has received confirmation to a written enquiry from the other member that there is not a valid objection to accepting such instructions or a reasonable time has elapsed since such enquiry. The handing over of documents, which in this Rule means letters, faxes, e-mails and other documents (whether handwritten, printed or stored electronically) on the termination of a retainer with a member shall be in accordance with the provisions of paragraphs
- (2) (2) (4) of this Rule." 29. In the Court's view, the Code of Conduct should not be applied so as to inhibit the ability of the applicant to deal with the litigation in the main proceedings which require to be dealt with urgently in order that that case can come to trial. The key consideration is the Court's ability to do justice between the litigating parties in the main proceedings. Accordingly we would not think it is reasonable for any impediment to be placed in the way of another firm whether under the Code of Conduct or otherwise such as to prevent that firm acting for the applicant in these proceedings. Those comments are consistent with the Order which we make in relation to the transfer of the files. 30. Thirdly on 5 th January, 2011, Advocate Tracey wrote to Advocate Steenson of Messrs Walkers to indicate that subject to payment or provision for payment in relation to outstanding amounts, the files could be transferred but this could not be achieved until the respondent firm had been put in funds for their copying costs. We do not consider this to be either reasonable or appropriate. To the extent that the applicant has ownership of the papers which are held by the respondent, those papers belong to him and he is entitled to receive them, no lien or other security being authorised. It follows that if the respondent firm wishes to retain copies of any such papers, it must do so at its own expense. If in fact the papers are to be delivered to another firm of lawyers in the Island, it may well be appropriate, instead of incurring copying charges, for the new lawyers to give an appropriate undertaking to the respondent firm to enable access to the papers for defined purposes from time to time, but at all events that would be a matter between the new lawyers and the respondent firm. We do not countenance the retention of files by the respondent firm pending receipt of monies to enable those files to be photocopied. As indicated in the opening paragraphs of this judgment, the Court has extended time to the applicant to 10 th February, 2011, to file any skeleton or additional authorities in reply, and it is naturally important therefore that no delay is caused in the handing over of the files in question. 31. We recognise that the files will contain different classes of documents. Unquestionably they will contain pleadings, correspondence, discovered documents and skeleton arguments. It seems to us that all those documents should be provided forthwith. To the extent that there is any work product of the respondent firm which does not form part

of the property to which the applicant is entitled, there would of course be no reason why that should be produced. We make no order in that connection but there is liberty to apply given both to the applicant and to the respondent firm if any difficulties in this respect should arise. 32. The Order therefore is that the respondent firm should release all of the files in their possession in relation to the main proceedings to the applicant forthwith at an address in Jersey. If the applicant were to seek the delivery of those files outside the Island, that would have to be at his cost. 33. We make no order as to the costs of an incidental to the hearing of 10 th January as none has been sought. Authorities Gamlen Chemical Co (UK) Limited-v-Rochem Limited and Others [1980] 1 All ER 1049. A-v-B [1984] 1All ER 265. Ismail and Another-v-Richards Butler (a firm) [1996] 3 WLR 711. Solicitors Act 1974. Law Society of Jersey Law 2005. Rules of the Supreme Court. Supply of Goods and Services (Jersey) Law 2009. Kettelman-v-Hansel Properties Limited

[1987] AC 189. Supply of Goods and Services (Jersey) Regulations 2010. Human Rights (Jersey) Law 2000. Law Society of Jersey Code of Conduct. Page Last Updated: 04 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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