

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2014/0062

BETWEEN:

JSC VTB BANK

Claimant

and

(1) ~~ALEXANDER KATUNIN~~

(2) SERGEY TARUTA

(3) ARROWCREST LTD

Defendants

Appearances:

Mr. Grant Carroll and Mr. Daniel Mitchell of Ogier for the firm
VTB Bank did not appear

2022 March 14

March 15

JUDGMENT (COMING OFF THE RECORD)

[1] **JACK, J [Ag]:** By an application dated 14th March 2022, Ogier, the legal representatives of the claimant ("VTB") apply to come off the record pursuant to CPR 63.6. I listed it for hearing the same day.

[2] CPR 63.6 provides:

"(1) A legal practitioner who wishes to be removed from the record as acting for a party may apply to the court for an order that he or she be removed from the record.

(2) The application must be on notice to the client or former client and to all other parties.

(3) The application must be supported by evidence on affidavit which must be served on the client but must not be served on any other party to the proceedings.

(4) Any order made must be served by the applicant on the other parties' legal practitioners and personally on the former client.

(5) The applicant must file a certificate of service of the order.”

[3] These applications to come off the record must be served both on the client and on the other parties to the case: see CPR 63.6(2); thus the existence of the application is not confidential. Mr. Carroll tells me that VTB have been informed of the application but that the other parties have not yet been served. The application cannot therefore proceed today. However, the issues were able to be clarified, so that the Attorney-General's *amica curiae* can know the matters on which the Court would be assisted by her submissions.

[4] The evidence submitted on such applications must be sealed. Usually such applications will be heard *in camera*, because the legal practitioner may wish to disclose matters in respect of which he or she owes the client a duty of confidence. There is, however, no requirement to this effect. In the current case, there are very few matters falling into the confidential category. Nothing I say in this judgment is of a confidential nature. The adjourned hearing will be in open court, but with the ability to go into chambers, if Ogier wish to reveal confidential material.

[5] In **A Law Firm v Three Clients**, I noted that in some cases where an application to come off the record is made, the Court has no real discretion:¹

“So far as the principles applicable to applications under CPR 63.6 are concerned, there are occasions where the Court has no choice but to accede to an application by a legal practitioner to come off the record. One example is where the client has withdrawn his or her instructions to the legal practitioner. If the client has neither nominated another firm to act nor served a notice under CPR 63.4 of wishing to act as a litigant in person, then the Court has really no discretion in the matter; it must

¹ [2020] ECSCJ No 196.

allow the legal practitioner to come off the record. Likewise, if a legal practitioner is professionally embarrassed, for example by the client deliberately refusing to honour his or her disclosure obligations, the Court is almost bound to grant the application.”

- [6] However, applications to come off the record are not automatically granted. As **Civil Procedure 2021** (the White Book) says at para 42.3.2 (omitting the authorities cited):

“Under a general retainer, a solicitor is required to act for a client to the end of an action and to take all necessary steps to bring that action to a conclusion. Such a retainer is not determined by death of the client. Otherwise the retainer continues until the solicitor is discharged by the client. But the retainer is subject to implied terms enabling the solicitor to withdraw for good cause and upon reasonable notice, and enabling the client to withdraw the retainer at any time. Thus, a solicitor may withdraw for good cause where the client fails to provide a reasonable sum of money for disbursements, or the solicitor is being burdened and prevented by the client in properly conducting the action, e.g. by failing to give instructions...”

- [7] Even where the terms of a legal practitioner’s retainer contain a provision allowing the legal practitioner to terminate the retainer, the Court has the power to refuse the legal practitioner’s application to come off the record. This is because the legal practitioner is an officer of the Court and, like the Court itself, owes an overriding duty to ensuring access to justice and the rule of law.
- [8] Ogier raise two grounds for granting its application. First, continuing to act for VTB will damage its reputation. Representing a sanctioned person is contrary to Ogier’s core values. Second, continuing to act is very likely to breach various of the criminal offences created by the sanctions legislation, particularly those in regulation 11 of the **Russia (Sanctions) (EU Exit) Regulations 2019**.² They also raise an issue as to whether the ability to obtain a licence from the Governor is relevant and whether they are obliged to apply for all necessary licences.

² SI 2019/855.

[9] As to the first point, the fact that a legal practitioner does not want to act for an existing client because of matters as to the client's character or reputation have come to light may not in itself be a good ground for allowing the legal practitioner to come off the record. What Lord Pearce said in **Rondel v Worsley**³ of barristers applies equally to legal practitioners in this Territory:

"It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right."

[10] The reality is that if Ogier cease to act for VTB, VTB will have the greatest possible difficulty finding alternative representation. Corporations are obliged to appear in the Commercial Division represented by a legal practitioner: CPR 69B4(4). The Court has only very limited powers to relax this requirement: **JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd**.⁴ There is probably a power at common law for the Court to order that a firm of legal practitioners represent a pecunious client who can otherwise not obtain representation: **Escarlena v Gibraltar Health Authority; Finch v Gibdock Ltd**,⁵ but this is far from certain or straightforward.

[11] My preliminary view is that the potential damage to Ogier's reputation from continuing to represent VTB is not relevant to the determination of whether they should be permitted to come off the record. If the Court refuses to allow them to come off, they will be continuing to act pursuant to an order of this Court, not as a personal choice. That should limit any

³ [1969] 1 AC 191 at p 275. The case itself is no longer good law: *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, but without affecting this *dictum*.

⁴ [2021] ECSCJ No 605 at [9]ff.

⁵ 2017 Gib LR 149 at [60]ff, www.gibraltarlaws.gov.gi/judgments/escarcena-v-gibraltar-health-authority-finch-v-gibdock-limited-714

damage to their reputation. However, I heard very limited argument on the point and will hear further argument on the adjourned date.

[12] As to the second point, a retainer which comes to involve committing a criminal offence under subsequently applicable sanctions legislation will usually become unenforceable. However, there are a number of difficult issues on this. Firstly, the effect of illegality on contracts is unclear in this jurisdiction following the UK Supreme Court decision in **Mirza v Patel**.⁶ see **Briefline Assets Ltd v Patel**.⁷ Secondly, it may be that there is a Catch 22 situation: if the receivership continues and assets are got in, then that will be an illegal dealing; if the receivership ends, so that any property the subject of the receivership is released back to Enard or Arrowcrest, that too will be an illegal dealing. These are matters on which the Attorney-General's submissions would be helpful.

[13] As to the additional point on obtaining licences, legal practitioners owe a client a duty to act in the client's best interests. If a licence can be obtained which will legitimate the legal practitioner continuing to act for the client, then the usual position would be that the legal practitioner has a duty to apply for the licence. However, again I heard very little argument on the point.

[14] Accordingly, I will adjourn this application for further consideration on 17th March 2022. The parties should agree a time estimate. It may be necessary to adjourn for a longer hearing.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁶ [2016] UKSC 42, [2017] AC 467.

⁷ [2021] ECSCJ No 598 at [19], [2022] ECSCJ No 44 at [16]ff. See also Chitty on Contracts (33rd Ed, 2019) at para 18-022ff.