

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) [redacted]

BETWEEN:

A LAW FIRM

Applicant

and

THREE CLIENTS

Respondents

Appearances:

An associate of the applicant law firm

The three clients did not appear

2020: May 19, 25

JUDGMENT

[1] **JACK, J [Ag.]:** This is an application pursuant to CPR 63.6 by a BVI law firm to come off the record as acting for three clients in litigation which has been pending in this Territory.

[2] The law firm acted for the clients in litigation in the Commercial Division. I do not need to set out the full details of what ensued.

[3] 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."

[4] The requirement to serve the application on all the other parties is a difference from English practice, where no such notification should be given: see **Civil Practice 2020** (the White Book) at para 43.3.4. Although the evidence of service on the other parties is not in evidence, I accept the law firm's assurances that notice of the application was given.

[5] 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 One example is where the client has withdrawn his or her instructions to the legal practitioner.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 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] Applications to come off the record for non-payment of fees are more nuanced. As **Civil Procedure 2020** 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... [I]t is now deemed to be good cause for a solicitor to withdraw from their retainer if their client, on being requested, fails within a reasonable time to make payment of a reasonable sum on account of past or future costs generally. The right to withdraw for non-payment is therefore no longer limited to cases where the non-payment by the client relates to disbursements by the solicitor but now extends to cases where the solicitor has not been paid sums on account of their own profit costs. If a solicitor refuses to proceed without good cause and without giving reasonable notice to the client to pay them money or give them instructions, etc., they commit a breach of contract and cannot sue for fees and the court may refuse to make an order under this rule."

- [7] Thus, in order to permit a legal practitioner to come off the record, the Court must be satisfied that the client has "on being requested fail[ed] within a reasonable time to make payment of a reasonable sum on account of past or future costs." What is a reasonable time will be fact-specific. However, it will not generally be simply the time needed to make a bank transfer. The Court will want to consider the efforts made by the legal practitioner to agree payments with the client; the client's circumstances; and the ease or difficulty a client may have raising funds (and the extent to which the legal practitioner knew that when accepting the retainer). In particular, the Court will bear in mind that the relationship between legal practitioner and client is one of trust and confidence. Even in the Commercial Division, clients are often vulnerable, not just in the widows and orphans sense (although such parties do appear in the Commercial Division), but also in a wider sense. Many parties to BVI litigation have no connection with the jurisdiction. Many have no previous experience of the common law or of common law procedures. Even otherwise hardnosed businessmen or women, when it comes to litigation here, may need to be treated as vulnerable.

- [8] This is not to say that a legal practitioner is obliged to extend credit to clients. Quite the contrary: the legal profession needs to survive financially. But the Court needs to take a broad view of what a reasonable time-frame for a client to pay monies on account might be. If a client is unable ever to pay (for example, because they appear to be insolvent), then what a reasonable time might be may be very short.
- [9] In the current case, on reading the papers, I caused an email to be sent on 14th May 2020 to the law firm noting the following matters:
- “(a) It is impossible to reconcile the outstanding fees claimed at [a high five-figure sum] with the fee notes. (b) The only statement of account exhibited is for [a figure of less than a quarter of the sum claimed]. (c) The evidence of [the law firm’s] attempts to pursue the fees is of the utmost vagueness. Given that some monies seem to have been paid, it behooves your firm to give an explanation. (d) There is no evidence of service of the application to come off the record on the clients.”
- [10] I listed the matter for a hearing on 19th May. In order to meet the points in the email, an associate of the firm on 15th May made a second witness statement. This listed six invoices totalling yet another (and larger) five-figure sum. No attempt was made to reconcile this amount with the figure in her first witness statement. At the hearing I put to the advocate for the firm that usually it is easy to press a button on a law firm’s computer to generate a statement of fee notes raised and monies paid, but somewhat to my surprise he said unfortunately their computer system did not permit that.
- [11] Also significant is that at least some of the fee notes did not appear to relate to the litigation, but were rather in respect of non-contentious company law advice. Now it may be relevant for the Court when deciding to give leave to come off the record whether the fees outstanding are due in respect of the litigation or in respect of other matters. However, since there was no means of seeing what payments had been made by the clients, it was impossible to get any sort of overview.

- [12] The evidence of the steps taken to obtain payment from the clients was also inadequate. At one stage, the law firm did make attempts to obtain payment of outstanding invoices and monies on account, however these can hardly be described as very strenuous efforts. Instead, when money was not forthcoming, they seem to have taken the view that they would await events. They sent an email to the client referring to forbearance, although no formal (or legally binding) offer to stand over payment was made.
- [13] In this regard, it should be noted that the BVI law firm was taking instructions from a foreign law firm. Although the BVI firm knew who its clients were, most dealings were with the foreign law firm rather than with the clients direct.
- [14] When the litigation ended badly for the clients, the BVI law firm made no attempt to contact the clients about the outstanding fees. The firm did not make even a formal demand for payment, despite the length of time it had been showing forbearance. This in my judgment is fatal to the application to come off the record. As an absolutely bare minimum, a law firm must show it has asked for payment of its outstanding fees coupled with a warning that it would make an application to come off the record if payment is not forthcoming. Here the firm just took the view that it was not going to be paid, so it was just going to apply to come off the record. That is not in my judgment appropriate: a demand needs to be made.
- [15] There is a further defect in the procedure. The BVI law firm has not shown that it served the initial application on the clients at all. On 15th May 2020, the day after the email, the BVI firm served the foreign firm with the second witness statement of the associate. They did not ask the foreign firm to confirm that they had sent these papers to the clients. So far as appears from the papers, there is no evidence of the foreign firm having forwarded the papers.
- [16] After discussing these matters with the advocate for the BVI firm, he asked for an adjournment (effectively to have a third bite at the cherry), so that he could rectify these matters without having to issue a fresh application. Where the problem with

an application is capable of remedy, for example by filling an evidential gap, the Court will often be willing to grant an adjournment. After I sent a copy of this draft judgment to the BVI firm, they said that some emails between the firm and the foreign firm had been omitted from the second witness statement. Although these further emails indicated that the BVI firm wanted to discuss with the foreign firm the question of the BVI firm coming off the record, there is still no evidence of what the foreign firm said in the course of those discussions or whether the clients knew the BVI firm was wanting to come off the record.

[17] In the current case, the defects in the application are manifest. (a) The firm cannot show what money is owed. (b) It has made no direct contact with the clients. (c) The clients have not been given, even formal, notice that, unless they pay, the firm will apply to come off the record. (d) There is no evidence that the application as initially issued has been served on the clients. The evidence of service on the clients (rather than on the foreign firm) of the second witness statement is deficient.

[18] As and when the BVI firm have remedied these defects, then it can make a fresh application. The current application, however, is so deficient that it is in my judgment incapable of resurrection. Accordingly, I refuse the BVI firm's application to come off the record.

[19] There seems to be a belief among some practitioners in this jurisdiction that applications to come off the record are a mere formality. As this judgment shows, that belief is a misapprehension.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar