Case No: QB/2017/0249

Neutral Citation Number: [2018] EWHC 2881 (QB)

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**On appeal from the order of Master Brown**

**in the Senior Costs Office 29 September 2017**

**giving effect to the judgment of Master Simons delivered on 27.01.2017**

**Case No: CC 1604222**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/10/2018

**Before**:

MR JUSTICE WALKER

(sitting with assessor, Master Haworth)

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**Between:**

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|  | **Mr Manjit Gill** | Claimant  (Appellant) |
|  | **- and -** |  |
|  | **Heer Manak Solicitors** | Defendant  (Respondent) |

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**Mr Robin Dunne** (instructed by **Deep Blue Costs**) for the **claimant (appellant)**

**Mr Andrew McGee** (instructed by **Maya and Co Solicitors**) for the **defendant (respondent)**

Hearing date: 14 March 2018

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**Judgment**

**Mr Justice Walker:**

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| --- | --- |
| A. Introduction and overview | 1 |
| B. The Background Facts | 9 |
| B1 The litigation | 9 |
| B2 The retainer | 13 |
| B3 Termination of the retainer | 16 |
| C. Relevant legal principles | 19 |
| D. The master’s judgment and the rival arguments | 24 |
| D1 The master’s judgment | 24 |
| D2 The rival arguments | 25 |
| E. Analysis | 29 |
| F. Conclusion | 35 |

# A. Introduction and overview

1. This appeal is brought following the grant of permission by me on 7 December 2017. In form it is an appeal against paragraph 1(i) of an order of Master Brown in the Supreme Court Costs Office dated 29 September 2017. However, in that part of his order Master Brown was recording the resolution by Master Simons of preliminary points argued before Master Simons on 27 January 2017.
2. In his oral judgment that day Master Simons explained that the claimant below (now the appellant), Mr Manjit Gill, instructed the defendant below (now the respondent), a Coventry law firm known as Heer Manak Solicitors (“the firm”), to work on his behalf in litigation between himself, among others, and HM Commissioners of Revenue and Customs (“HMRC”). The firm employed, among others, Mr Shusheel Gill. In order to avoid confusion I shall refer to each of them by using both first name and surname.
3. Agreed terms between Mr Manjit Gill and the firm were set out in a client care letter (“the retainer”) dated 7 June 2013. However on or shortly after 27 December 2013, just over four months before the scheduled date of trial, Mr Manjit Gill was informed that the firm was closing down or had closed down. He was also informed that the reason for this was that the firm had been unable to secure a competitive rate of professional indemnity insurance which would be economically viable.
4. Eventually Mr Manjit Gill received a letter dated 4 February 2014 from another Coventry law firm, Lexton Law Solicitors (“Lexton”). Lexton’s letter said that his file had initially been transferred to Messrs Guildhall Solicitors of Foleshill, Coventry, but that “a change in circumstances” had led to the file now being transferred to them. The letter added that Mr Shusheel Gill had on 3 February commenced employment with them, “so the continuity of your file will be unaffected”.
5. The relevant part of the order under appeal stated that:

1. The claimant’s preliminary points heard at the hearing before Master Simons were resolved as follows:

(i) the defendant was entitled to terminate the retainer as a result of the closure of the solicitors practice on 27 December 2013.

1. This “preliminary point” was one of three that were dealt with by Master Simons on 27 January 2017. What had happened was that, in accordance with the retainer, the firm had requested and received payments on account for charges and expenses to be incurred as the matter progressed. More than three years after closure of the practice, the firm made a claim for amounts over and above those which had been paid on account. The third of the preliminary points concerned whether this claim was barred by estoppel. Master Simons concluded that it was not. There is no appeal against that conclusion.
2. As to the preliminary point now under appeal, questions arose as to whether the firm had good reason for termination of the retainer, and if so whether it had given reasonable notice of termination of the retainer. Master Simons answered both these questions in favour of the firm. His answer to the first question is not now challenged. The only question under appeal is whether he was right to conclude that reasonable notice had been given.
3. The appeal before me was argued by counsel who had appeared below, Mr Robin Dunne for Mr Manjit Gill and Mr Andrew McGee for the firm.

# B. The Background Facts

## B1 The litigation

1. The litigation involving HMRC which was the subject of the retainer concerned a worldwide freezing order obtained by HMRC on 13 May 2013. There were six defendants to HMRC’s claim. HMRC alleged that the first, second and third defendants had unpaid tax liabilities. There was no allegation of that kind against Mr Manjjt Gill, who was the sixth defendant. What was said against him was that transfers to him of properties by the first to third defendants were made in order to put those properties beyond the reach of HMRC.
2. The freezing order was put into effect against all Mr Manjit Gill’s personal and business bank accounts. At that time, and throughout the period of the retainer, Mr Manjit Gill was on a course of full time tertiary education. His evidence was that the freezing of all his personal and business accounts had a potentially catastrophic effect. The value of the assets frozen was approximately £672,000. He states that he knew he needed expert and specialist legal representation.
3. Mr Manjit Gill records that a case management hearing was held on 20 December 2013. He was present at court, where he met the firm’s representative. There was no suggestion of any difficulty with the firm.
4. At the case management hearing preparations were made to ensure that everything would be ready, no later than the end of April 2014, for a trial. Among other things:
   1. disclosure and inspection were to be completed during February 2014;
   2. witness statements were to be exchanged on 7 March 2014, with supplemental witness statements served by 21 March 2014; and
   3. all parties were to file and serve skeleton arguments by 29 April 2014.

## B2 The retainer

1. A solicitor’s retainer to conduct litigation is an example of what, although known as an “entire contract”, is better described as involving an “entire obligation”: see *Vlamaki v Sookias and Sookias* [2015] EWHC 3334 (QB); [2015] 6 Costs L.O. 827 at paragraph 10. The “entire obligation” is, in effect, a condition precedent which must be satisfied before remuneration can be claimed: a solicitor can generally only claim remuneration when all work has been completed, or when there is a natural break. That, however, is subject to a common law exception and to any agreement to the contrary.
2. In the present case the retainer included provisions enabling the firm to make charges even though the entire obligation had not been carried out. Only one such provision is relied on for present purposes. I shall refer to it as “the termination provision”. What I shall call clause [29] and [30] of the retainer provided:

[29] We may decide to stop acting for you only with good reason, for example, if you do not pay an interim bill or comply with our request for a payment on account. We must give you reasonable notice that we will stop acting for you.

[30] If you or we decide that we will no longer act for you, you will pay our charges on an hourly basis and expenses.

1. Clause [29] embodies the common law exception mentioned above: see section C below.

## B3 Termination of the retainer

1. As to the circumstances in which the retainer was terminated, the evidence before the master consisted of two witness statements. The first, which I shall refer to as “Manak 1”, was made on 6 September 2016 by Mr Kulwant Singh Manak, a former partner in the firm. On the relevant preliminary point, the only relevant passage in Manak 1 is found in paragraph 9:

9. The first question is whether the Firm is entitled to any payment at all given that it has ceased to practice. As I understand it, this is not a question of fact, but a question of law. I am advised that the cessation of the Firm’s practice cannot affect its entitlement to charge for work done before the cessation. I accept that there may be issues about how much it can properly charge, but those issues are not before the court on the preliminary issue. I shall therefore leave my legal representatives to deal with the points of law in the skeleton argument which is to be prepared for the hearing of the preliminary issue.

1. The other witness statement before the master was made by Mr Manjit Gill. I shall refer to this witness statement as “Manjit Gill 1”. In it the firm is referred to as “HM”. Relevant paragraphs in Manjit Gill 1 for present purposes are paragraphs 7 to 13:

7. I had a meeting with HM on 5th June 2013, at which I discussed the proceedings, and they agreed to represent me in them. They sent me a “terms of business” letter on 7th June 2013 [pages 1 - 5] which set out the basis upon which they would act for me

8. I expected them to represent me until the proceedings were concluded.

9. The proceedings developed over the course of the following months, and a case management hearing was held on 20th December 2013. At that hearing, which I attended along with HM, the Court set out a timetable for the future conduct of the case [pages 6 - 7]. There were numerous directions, including the matter being listed for a lengthy trial in April 2014.

10. There had been no suggestion whatsoever that there was any difficulty with HM’s firm when I met with them at Court on 20th December. In fact I received letters from them dated 24th December 2013 and 27th December which, again, mentioned no difficulties.

11. I cannot now recall precisely how it was communicated to me, but on or shortly after 27th December 2013**,** I received a communication from HM to the effect that they were ceasing to trade, were closing down or had closed down with effect from 27th December 2013, and would not be able to provide me with any representation at all. A copy of the announcement from their website is at [pages 8 - 11]. I cannot now recall whether exactly the same wording was sent to me by letter or email, or whether I received a telephone call, but the information contained within the website announcement that I have exhibited was in effect the information that was communicated to me on or shortly after 27th December 2013.

12. At this point I simply did not know what to do. I was aware that the trial in my case was fast approaching, and that various steps needed to be dealt with in accordance with the court’s directions. I was however deep in my studies so did not immediately make contact with other solicitors, but planned to do so.

13. I was contacted I believe in mid to late January by Mr Shusheel Gill, who had been dealing with my case at HM, to say that he had now found employment at Lexton Law Solicitors. Lexton Law then wrote to me by letter dated 4th February 2014 [page 12]. I signed the form of authority that they sent to me in that letter, and they then acted for me until the case was successfully concluded.

1. An exhibit to Mr Manjit Gill’s statement included an extract from the Law Society Gazette for 17 January 2014. It reported that the Solicitors Regulation Authority (“SRA”) had confirmed the names of 136 firms which closed because they did not secure professional indemnity insurance. The firms had entered what was described as an “Extended Policy Period” after 1 October and were given 90 days to secure cover, or face immediate closure on or before 29 December. The Gazette quoted the SRA as saying:

In the majority of cases the firms closed in an orderly manner, dealing appropriately with client files and monies.

# C. Relevant legal principles

1. In *Underwood, Son & Piper v Lewis* [1894] 2 QB 306 the Court of Appeal discussed the circumstances in which a solicitor may be entitled to terminate a retainer. Lord Esher MR noted that there may be cases in which a solicitor was entitled to say that the retainer must come to an end. He added:

But it has been held that in such a case a solicitor cannot throw his client over at the last moment which might be ruin to the client, and, even though the solicitor may have good cause for declining to act further for the client, he must give him reasonable notice of his intention to do so.

1. At pages 311 to 312 of the report, Lord Esher explained the result:

The result … seems to me to be that, though there may be valid reasons for giving such a notice, if no such notice is given, the contract of the solicitor is an entire contract, and he cannot sue for his costs before the termination of the action.

1. AL Smith LJ gave a judgment which focussed on the importance of a solicitor having good cause to terminate the retainer. His judgment did not in any way detract from the points made by Lord Esher MR as to the need for reasonable notice. Davey LJ agreed with the other members of the court.
2. It is not disputed by the firm that the same principles apply to the termination provision in the retainer. It is essential that such notice as is given is “reasonable”. If the notice is not “reasonable” then the firm cannot point to any applicable provision departing from the general principle that remuneration can only be claimed when all work has been completed, or when there is a natural break. In the absence of reasonable notice, the firm would accordingly be unable to claim for the costs which were sought before the master.
3. It is common ground that when assessing whether notice was “reasonable”, the court must apply objective standards.

# D. The master’s judgment and the rival arguments

## D1 The master’s judgment

1. The relevant part of the master’s judgment was as follows:

29. The final aspect which seems to me to be of importance is, was there reasonable notice, and this is a much more difficult point, and I accept what Mr McGee says that this must be fact specific in this case. Mr Dunne says that the solicitors have known from October that there was a possibility that their practice would be closed down by the Solicitors Regulation Authority if they could not find insurance in that time, and he says that the solicitors would have known right up until December that they were under threat of closing down, but they still gave no indication to the client that this might be the case. Mr Dunne is right when he says there is no evidence as to what the position was as to whether or not the solicitors were endeavouring to obtain insurance during this time. But I do not accept the point necessarily that the solicitors knew, or the person dealing with the case, who was clearly not one of the partners, knew what the situation was himself and still failed to tell the client that the practice was closing down even though he was dealing with him right up until a few days before the firm cased to trade. And I ask myself at any time would it be commercially sensible for solicitors to warn their client that they might be closing down because they cannot get proper professional insurance. It seems to me that solicitors would be running a very high risk by telling every client that there is a risk that we might be closed down, but we have to give you reasonable notice.

30. Again I accept Mr McGee’s point that one has to look at the way the solicitors behaved. They did not give notice, and I can understand the reasons why they did not give any notice, because they could not. It was not until the very last minute, two days before the period they were given by the Solicitors Regulation Authority for them to stop the firm from trading, and they said they were closing down. One has to look at what they then did. They informed the client on their website that the client had to go and get other solicitors, this is the procedure and they have to go to other solicitors and the defendant would make arrangement with these new solicitors. The defendant in this case, once it was contacted by the new solicitors, passed the document on without demanding any payment of their fees so that the client could continue with his case.

31. So I do not accept the submission that no reasonable notice was given in the circumstances of this particular case. As I indicated before, I do think that is it is an appropriate analogy to say that if I find that, given the circumstances of this case, there will always be a difficulty in the case of bankruptcy of a solicitor or the intervention of a solicitors’ firm, or the death of a solicitor, to say well this termination was done without notice and, therefore, the solicitors are not entitled to recover any fees.

## D2 The rival arguments

1. In broad terms the submissions for Mr Manjit Gill can be grouped under 3 heads:

(1) The master erred in law by making a finding based on assumptions unsupported by evidence;

(2) the master erred in law because, where no notice is given prior to termination it is incumbent upon the firm to justify why they were unable to inform their client of the need, mid-litigation, to find new representation; and

(3) where, as here, the firm do not make any attempt to explain the circumstances or justify the decision it must follow that the court will find that reasonable notice was not given.

1. It was stressed on behalf of Mr Manjit Gill that he did not say that there could never be circumstances where giving no notice is reasonable. Rather, it was submitted that the master had no basis upon which to make the finding he did.
2. Paragraphs 4 to 6 of the firm’s written submissions dated 8 November 2017 give an overview of the firm’s stance:

4. The Appeal is of course by way of review, not rehearing. So the question is whether this decision is one which was open to the Master on the facts before him. It will be noted that at the hearing Appellant took points about the lack of evidence as to what Respondent did to seek alternative insurance. However, the Master’s decision is not based on evidence as to what steps the Respondent took to secure alternative insurance. Rather, he relies on the commerciality of the decision to keep their difficulties to themselves for as long as possible. He takes the view that this was a reasonable way for them to behave.

5. It is submitted that this is a view which he was entitled to take. It cannot be regarded as being outside the reasonable range of conclusions which he might have reached.

6. Respondent goes further by arguing that Master Simons’ decision was not merely permissible; it was obviously correct. No firm of solicitors is likely to see it as commercially sensible to admit that it cannot obtain indemnity insurance until the latest possible date. To do so would be commercial suicide, and it is entirely understandable that Respondent here did not do so.

1. At the hearing before me the firm accepted that Master Simons had held that Mr Manjit Gill received no notice of the firm’s termination of its retainer. The firm did not seek to challenge that finding by Master Simons. Also at the hearing before me, the firm noted that in paragraph 29 of his judgment Master Simons canvassed a possibility that the representative of the firm dealing with the case, not being a partner, may not have known what the situation was. Entirely properly, as it seems to me, the firm made clear that they did not rely upon any such possibility.

# E. Analysis

1. In the particular circumstances described above, the relevant question for the master can be described shortly. It was whether, on the evidence before the master, the firm’s decision to terminate the retainer with no advance notice to Mr Manjit Gill was reasonable.
2. I stress the words “on the evidence before the master”. No relevant factual evidence was filed by the firm. The only evidence before the master came from Mr Manjit Gill. That evidence was all one way. Mr Manjit Gill was embroiled in very substantial litigation with a considerable amount of money at stake. He was a student. He needed specialist legal representation. Much had to be done between 20 December 2013 and the end of April 2014. In these circumstances there was no understatement in an assertion on behalf of Mr Manjit Gill that the firm had “left him in the lurch”.
3. It was accepted on behalf of the firm that the objective test for reasonableness involved looking at the point view of both sides, and balancing their interests. It was submitted that while the master had not expressly referred to such a balance, that was in essence what paragraphs 29 to 31 of the judgment were concerned with. For my part, however, I do not read paragraphs 29 to 31 in that way. Those paragraphs do not look at the position from Mr Manjit Gill’s point of view. As it seems to me, in this regard the master erred in law.
4. Moreover, in circumstances where no relevant factual evidence was filed by the firm, I cannot accept that the master was entitled to make the assumptions set out in paragraphs 29 to 31. As recorded in the Law Society Gazette, a majority of solicitors in the firm’s predicament dealt with it in an orderly manner. In the absence of relevant factual evidence, there is no reason to think that the firm was not equally able to deal with termination of the retainer in an orderly manner. The course it took, giving Mr Manjit Gill no notice at all, can hardly be described as “orderly”.
5. The firm suggested that it was a proper inference that an experienced solicitor had worked out what the possibilities were and had seen that the proper way to deal with the matter was the course of action described in the letter of 4 February 2014 (see section A above). The firm stressed that from a solicitor’s perspective there was considerable risk in giving away to clients, before it was absolutely necessary, the fact that there was a danger of the firm closing down. I am not persuaded by these submissions. First, even if the firm’s partners had in mind the course of action described in the letter of 4 February 2014, the initial course of action described in that letter was less than satisfactory. There was no indication that the transfer made of the file was to a firm which could be expected to have the expertise necessary to advise Mr Manjit Gill. I add, although it is not necessary to my decision, that it is difficult to see that the firm had any authority to transfer the file in the way that it apparently did. More generally, however, the submission gives no weight to the potential difficulties for a person in Mr Manjit Gill’s position. He was left without cover during a period when there might have been significant developments in the litigation, and in any event when a tight timetable had been imposed at the case management hearing on 20 December. Termination of the retainer without notice occurred during the holiday season. I have no doubt that a reasonable observer would have appreciated well before 27 December that termination without notice would risk putting in jeopardy Mr Manjit Gill’s ability to comply with that timetable.
6. For all these reasons I conclude that the master was wrong to hold that the retainer could be terminated with no notice. That being so, it necessarily follows that in the present case the firm was not entitled to terminate the retainer and cannot claim the fees which it sought in the proceedings before the master.

# F. Conclusion

1. For the reasons given above the appeal succeeds.