Case No: E90SE069

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
SHEFFIELD DISTRICT REGISTRY

The Law Courts,
50 West Bar,
Sheffield. S3 8PH

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Before:

DISTRICT JUDGE BELLAMY

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Between:

(1) REBECCA GALLACHER	**Claimants**
(2) RIKKY GALLACHER	
- and -	
EMERALD LAW	**Respondent**

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MR ROBIN DUNNE for the **CLAIMANT**
MR DOMINIC FINN for the **DEFENDANT**

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Approved Judgment

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DISTRICT JUDGE BELLAMY :

1. This hearing was to determine a preliminary issue concerning a dispute between the claimants, Mr and Mrs Gallacher, and their former solicitors, Emerald Law.

2. The preliminary issue is whether the solicitors have an entitlement, whether contractually or pursuant to statute and/or common law, to charge the claimants at all, and in that respect the court was to consider the relevant circumstances, the nature of the retainer, the allegations of breach and the circumstances surrounding the alleged termination. The issue has crystallised since the order was made and it is for the court to determine really who terminated the retainer and what were the reasons for the termination.

3. I need to go into some background and refer to quite a number of documents in the bundle although the judgment that will then follow is relatively short. It is a holiday sickness claim. It relates to a holiday in Fuerteventura, an all-inclusive holiday with Thomas Cook, the relevant dates were 31st October 2016 to 7th November 2016. It was for a family of five, which is the claimants Mr and Mrs Gallacher, two children and I think a mother or a mother-in-law. The allegations are that the symptoms commenced on the third day of the holiday and it was a mixture of either diarrhoea and vomiting or stomach cramps.

4. On return they were referred to the defendant solicitors, they had previously complained to the tour rep at the holiday. Only three members of the Gallacher family pursued the claim, Rebecca Gallacher, Rikky Gallacher and daughter Lily, for which Rikky Gallacher, her father, was potentially litigation friend. They each completed a pro forma document with Emerald Law, these are in the bundle, there is a cumulative one and then a more individualised one for each of the three claimants. They signed up to a CFA, the basic terms of which, for example, are in documents from page 160 of the bundle onwards, and they went for a medical report, each of them, with Dr Brittain-Dissont, and again his medical report is exhibited and confirmed. A prognosis of, I will say, food poisoning in his opinion being the more likely cause of the symptoms that they were suffering from.

5. The CFA documents made it very clear to Mr and Mrs Gallacher that: **"If we at any stage during the conduct of your case have reasonable belief that your case is fundamentally dishonest or you have provided us with misleading or inaccurate information or you fail to cooperate with us as set out in these documents, we can then cease to act for you and charge you our basic charges and disbursements."** That was at page 160, and at 167, which is part of the CFA itself, that wording is repeated insofar as it refers to dishonest or providing misleading instructions or failed to cooperate. There is also evidence of a further reminder given to Mr and Mrs Gallacher in a letter that was sent out, this is dated 1st February, page 95, and it re-emphasises: "If you have misled us please advise us immediately", but it goes on to say: "We are still acting for you. We have risk assessed your case and we find you credible with good prospects of success."

6. Statements were prepared. These were done by the solicitors, no doubt as a result of telephone discussions, and were an amplification of the pro forma document. It is helpful to look very briefly at what each of the claimants, Mr and Mrs Gallacher, said. Mr Gallacher said: "Despite my symptoms I managed to go and speak with the

Thomas Cook rep at the hotel. She simply told me where the nearest pharmacy was and how to get there. I went to the pharmacy, explained to them what my symptoms were and asked for some Imodium and I was given something called Selvacolina", which I presume is the Spanish version of Imodium. "Our illness spoilt the rest of our holiday, we could not venture far as we needed to make sure that we were near a bathroom at all times and I had to be really careful about what I was eating. My symptoms lasted for a few days after we got back to the UK. Thankfully I still had 3 to 4 days leave left from work so I did not take any time off sick."

7. Mrs Gallacher's version, again paragraph 15: "Our illness spoilt the rest of our holiday, we could not venture far as we needed to make sure that we were near a bathroom at all times and I had to be really careful about what I and my children were eating. This was really difficult as I was wary of eating food from the hotel but I could not venture far to be able to go out and eat anywhere else."

8. The claim proceeded slowly I think it is fair to say. There is some suggestion that there was a delay caused by the reluctance of Mr and Mrs Gallacher to sign letters of authority disclosing medical records which was done. By June there is an impetus to issue proceedings and a letter, page 40, dated 11th June is written. I will read from the Mrs Gallacher letter. There has clearly been a review of the file by Lorna Hughes, who I am told is a 6 year plus qualified solicitor with conduct of this matter, and she says she has reviewed the case. She considered the prospects to be greater than 51 per cent and she says this: "The basis for my assessment is as follows: You have advised that you did not consume any food or drink outside of the hotel complex prior to becoming ill; you have advised you did not consume any food or drink outside the hotel complex following your illness; you have advised you did not leave the hotel complex; you did not consume any food in the airport; you have confirmed there are no photographs of the holiday on any form of social media such as Facebook on either your social media account or any person you know on social media."

9. That is an interesting analysis of the basis upon which Mrs Hughes forms the view of a 51 per cent prospect of success. It does not, in my judgment, accord with what Mrs Gallacher has said at paragraph 15 of her witness statement. Paragraph 15 is not clearly worded but it says: "We could not venture far", that does not mean we did not leave the complex: "as we needed to make sure that we were near a bathroom at all times and I had to be really careful about what I and my children were eating." Again there is a clear inference there that food was consumed or was being consumed after the sickness, vomiting and diarrhoea symptoms occurred. "This was really difficult as I was wary of eating food from the hotel but I could not venture far to be able to go out and eat anywhere else." What it does not say, categorically, is they did not eat anywhere else. Similarly, the wording on Mr Gallacher's witness statement is equally ambiguous with those events and this is important because of what then follows.

10. There is, following the request for disclosure of the bank statements, a series of telephone calls. Mrs Gallacher first of all. At a point where they are being sent the particulars of claim to review and sign there is a discussion with Mrs Gallacher who expresses some nervousness, I think it is fair to say, about the claim and how it is going to go ahead. There is a file note because she makes a phone call and speaks to a Mr Edwards - page 101, 29th June: "Call from client to say she isn't happy to continue and is worried about it (media) and would rather stop and a bill sending which she will pay. Advised we will have to discontinue the claim against them. She

will take something against the mortgage to pay." Now I am told that that note goes on to refer to information about the outstanding work-in-progress. But this note is significant, firstly because it is not clear about what was discussed or why; secondly, it is not to Mrs Hughes but to somebody in her absence who may not have the full information that Mrs Hughes has with regard to the case; and finally, because it sets a marker in my judgment for the reaction of the defendants where they perceive there might be difficulties, and that reaction is: 'We will close the file and we will send you a bill'. It is an unusual reaction for a solicitor in a solicitor/client relationship where there appears to be no other previous concerns.

11. Mrs Hughes comes back to work. There is a chain of emails at page 190 and running backwards and there is an email from Mrs Gallacher who asks for confirmation: "Just to ease my mind, what sort of prospect we are looking at being successful? Can you confirm if Lily will have to give evidence? How and when we gave consent to issue court proceedings?" The reply, her substantive reply, is really at page 187: "Thank you for your recent email. As I have confirmed in my previous correspondence of 11th June I believe your case has, on the balance of probability, a greater than 51 per cent chance of success." There is then a discussion about what balance of probability means, confirmation the daughter will not have to give evidence, confirmation about the particulars of claim being signed and returned, and then: "Can you confirm whether you want to proceed with this case?"

12. A point taken was whether or not the telephone conversation between Mrs Gallacher and Mr Edwards could amount to termination of the retainer by Mrs Gallacher, it could only amount to termination of that retainer, but in my view that simply is not a credible explanation of that telephone call. Firstly, the note is not accurate because it is incomplete. Secondly, there is no explanation by Mr Edwards in any witness statement as to what might also have been said to put it in context. Thirdly, and crucially, it is clearly not a concern of the experienced solicitor Mrs Hughes dealing with the case because she writes and does not even mention the potential ending of the retainer, she is very clear about the claim proceeding and seeks that confirmation. It seems to me that deals with that point.

13. I then return to the history and to the discussions with Mr Gallacher on recovery of his bank statements. He rings. He has obtained his bank statements which show that he went out for a meal 2 days after his symptoms started. Mrs Hughes says she will need to assess whether this was detrimental to their case. She rings back after an hour to discuss the case and again I read this because this is the note that is created: "Confirmed that issues with information episodes their case and brings into doubt their creditability. Advised initial instructions state only ate food in hotel complex. Medical report says rest of holiday was ruined. Witness statements of Elaine and Rebecca say not able to leave hotel complex to eat elsewhere due to illness and claim was assessed as having sufficient prospects on this basis. Advised client would more than likely no longer be able to proceed with case and would be sending them a bill. Client understood issues and asked to keep him updated."

14. That is a staggeringly short note of a telephone call that effectively ends the retainer, or purports to end the retainer, for a case that has been going off for 18 months where there has been an investment of costs of around £17,000 and where there is no enquiry or note of any enquiry, and certainly there is no subsequent evidence of a note of enquiry, to Mr Gallacher of the circumstances in which they went for food, why it

was necessitated, where they went and whether or not it could be said well there needed to be evidence from a doctor to say well you cannot simply not eat once you have had vomiting and diarrhoea and you do need to consume some food. There is no analysis during that phone call by the solicitor to her client about the steps to be taken in proving a claim for breach of duty, the causation and then the quantum. It seems to be solely based on the fact it brings into doubt their creditability - I am sure she means credibility. I have not been shown any file note nor note of any discussion say for example, with the principal of the firm saying: 'We have got this CFA signed up, this is the state of evidence. We are about to issue proceedings, in fact we have sent them to the court, do we go ahead'?, A decision to terminate is taken. In discussion I used the words 'knee jerk reaction' and that remains my view, that there is no evidence of due consideration to the impact of this evidence upon the case, does it materially affect, does it, therefore, reduce the prospects of success below 51 per cent?

15. The letter that is written on 4th July is written one to Mr Gallacher, one to Mrs Gallacher, it is in similar terms. Paragraph 2 is the crucial point and the suggestion is that: "The medical evidence is inconsistent with the evidence that you have now provided that you were able to leave the hotel complex during the most severe symptoms that you experienced to consume an evening meal", but there is no enquiry about the reasons why or the location of the restaurant for example. The fact that this is a knee jerk reaction in my view is enforced by what then follows two paragraphs down, it is a demand for £7,975.88, no breakdown, no draft bill, no information as to how that sum is made up and it is a demand for payment in 14 days. It seems to me that in all the circumstances that is an extraordinary letter to write to a client at that stage. Mrs Gallacher's letter is in similar terms but it does flag up the additional information in relation to her symptoms and her witness statement, but as I emphasised earlier in this judgment, those paragraphs of her witness statement frankly are ambiguous as to what her case really was.

16. In my judgment a considered view of the effect of this information would have been for Mrs Hughes to take detailed instructions from the client, the witness statements had not been disclosed, indeed proceedings had not been commenced. She should, in my view, have taken detailed instructions, she should have then reconsidered her assessment of the prospects of success, given reasons for it and then come to her decision. It goes without saying that peremptory termination of the retainer, which is what I find, is clearly not a termination on reasonable notice. I can in my judgment, and there is no assertion that these are dishonest claimants, find at best, on the evidence before me, this is an innocent oversight which as soon as it comes to the attention of Mr Gallacher he endeavours to correct. He has only asked for the statements on I think it is 26th June and within a matter of days he is on the telephone to his solicitors.

17. For those reasons I find that the retainer was not terminated by Mrs Gallacher. The retainer was terminated peremptorily by the solicitors on 4th July and it was not as a result of any dishonest or misleading information which would justify the retainer being terminated. If anything, it is on the basis that the solicitors felt the prospects of success may have gone below 51 per cent, but that is an assumption that I am making not based on evidence. The reality is this was, as I have said before, an ill-thought through reaction and it follows, for those reasons, that the Gallachers cannot be held liable for any incurred costs under the terms of the CFA.

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This Judgment has been approved by the Judge.