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Conditional fee agreements: another unattractive hiccup

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Introduction

Could a firm of solicitors bring proceedings against their former client on the basis that the client was in breach of a duty of good faith, by settling the underlying litigation on terms which meant that the solicitors had no express entitlement to their costs? To what extent, if at all, when bringing such a claim, can the solicitors rely on privileged documents? And to what extent, if at all, can the solicitors rely on confidential documents, provided to them after the underlying proceedings have settled? These are some of the novel questions raised by the Court of Appeal in its recent decision of *Candey Ltd* v *Bosheh and another* [2022] EWCA Civ 1103. This article takes a closer look at this judgment.

Background

Candey Ltd ("Candey") are a firm of solicitors. They were engaged in two separate High Court actions by Mr Bosheh and his son (together the "Boshehs"). The work was carried out under a conditional fee agreement ("CFA"). The terms of the CFA meant that Candey would only be paid for each action if the Boshehs were the successful party. If that outcome occurred, Candey would benefit from an uplift of 100% on their fees.

The first action was discontinued against the Boshehs. In that action, Candey recovered its fees under the CFA in the normal way. The second set of proceedings, however, was another matter. In that action, knowing receipt (an equitable wrong which is essentially concerned with receiving funds in breach of trust) and conspiracy were alleged against the Boshehs, who in turn made a substantial counterclaim. The Boshehs settled this action shortly before trial on a 'drop hands' basis as part of a global settlement, meaning all parties simply walked away from their respective claims with no payments passing between them. The Boshehs refused to settle on terms negotiated by Candey, which would have involved them gaining a share of any recovery against a second defendant in the same action. A settlement on those terms which would have enabled Candey to recover its fees under the CFA.

Ultimately, the terms of the settlement agreed meant that Candey was unable to recover any fees in respect of the second action. Its fees amounted to some £3 million. As soon as the settlement was concluded, Candey terminated the CFA and issued a claim against its former clients. Candey claimed damages for fraud and breach of contract on the basis that the Boshehs had made misrepresentations and acted in bad faith. In particular, Candey alleged that the Boshehs had assured them that the second action was baseless and certain factual allegations against them were untrue. However, documents subsequently provided by the Boshehs by Candy showed that certain of those allegations were in fact true, making their legal position in the case more precarious than anticipated. The problem for Candey was that in order to prove these allegations against the Boshehs they would need to use privileged and confidential documents against their former client.
The claim was heard at first instance by Ms Justice Ambrose in the High Court.

Privileged and confidential material excluded

In a number of pre-trial applications, Ms Justice Ambrose ruled that Candey could not rely on either the privileged or confidential material that they sought to deploy. The judge held that this meant that the large majority of

Candey's claims had no real prospect of success, and that only one of their (weaker) claims could continue, for breach of an express term in the retainer that the Boshehs would "… *always seek to recover costs by order or agreement*".

Ambrose J. further held that there was no prospect of implying any requirement of good faith into the retainer, as Candey had argued. Unhappy that most of their claims had been disallowed by the court, Candey took their case to the Court of Appeal.

A good faith obligation?

There, the first issue Lord Justice Coulson dealt with in giving the leading judgment of the Court of Appeal, was whether there was an implied term in the CFA that the Boshehs would act in good faith towards Candey. Candey argued that the Boshehs should have in good faith taken the settlement negotiated by Candey, which was at least as advantageous to the Boshehs and would have resulted in Candey recovering its fees.

There is no general principle under English law that contractual parties must act with good faith toward each other. The exception to this is in so called 'relational contracts'. These are agreements such as a joint venture, in which the parties are committed to collaborating with each other typically on a long-term basis in ways which respect the spirit and objectives of their venture, but which it might be impossible to specify exhaustively in a written contract. In *Nehayan* v *Kent* [2018] EWHC 333 (Comm), Leggatt LJ (as he then was) said that such relational contracts:

> "… *involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party in its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.*"

In reliance on this and subsequent authorities, claimants have increasingly tried to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Few have succeeded. Coulson LJ reviewed the authorities and set out a list of characteristics which are relevant to whether a contract is relational:

> "*1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
>
> *2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
>
> *3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*
>
> *4. The parties will be committed to collaborating with one another in the performance of the contract.*
>
> *5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.*
>
> *6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.*

> *7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.*
>
> *8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.*
>
> *9. Exclusivity of the relationship may also be present*."

This is not an exhaustive list. However a relational contract would likely have most, if not all, of these characteristics. Before determining whether this test was met in the current case, Coulson LJ began his analysis by noting that there is no authority which supports the proposition that, when retaining a solicitor to act for them, the client owed that solicitor a duty of good faith. If any duty of good faith were applicable at all, many would say that it should be owed by the solicitor to the client, not the other way around.

The analysis was not affected by the fact that a CFA was in place rather than a traditional retainer. The judge held that the CFA merely governs the solicitor's remuneration. It does not alter the services or duties that the solicitor provides to or owes the client, or vice versa. The allegations against the Boshehs in the second action included claims of fraud and dishonesty. Candey should have been well aware that there was a risk those allegations might be proved to be true. In fact, when asked by the Boshehs about their chances of success, Candey had replied "*50/50: it depends on your performance in Court as witnesses*".

There was no room for a good faith obligation in such circumstances. If there were, that would turn the CFA into a guaranteed fee agreement. On the one hand, Candey would win if their clients were telling the truth, by recovering their success fees. On the other, Candey would also 'win' if their clients were found not to be telling the truth, because that would be a breach of the good faith obligation. An implied term of good faith was therefore inconsistent with the terms of the CFA. Coulson LJ concluded that contracts between solicitors and their clients display few, if any, of the characteristics of relational contracts, as set out above. Usually, the contracts are not long term, with no high degree of communication or expectation of loyalty from the client, and no exclusivity. In short, this was an ordinary CFA into which an obligation of good faith could not be implied.

Iniquity principle

Legal professional privilege arises from the principle that a person should be able to consult their lawyer in confidence, knowing that what they tell their lawyer will not be revealed without their consent. Once privilege has been established, an absolute right to withhold documents arises. In other words, the court will not be called upon to exercise any discretion, whether on the grounds of public policy or otherwise. Similarly, the fact that a privileged document may be relevant is of no consequence: were it not relevant, it would be unnecessary to claim privilege at all.

There are a small number of circumstances in which privilege may be lost or may never have come into existence in the first place. Of the latter category, one of these is called the "*iniquity exception*", which can arise in cases involving legal professional privilege and fraud. The leading authority on the iniquity exception is *JSC BTA Bank* v *Ablyazov* [2014] EWHC 2788, in which Popplewell J (as he then was) summarised the principles. He held that privilege is not prevented from attaching merely because the solicitor is instructed to put forward an account of events which the client knows to be untrue and which therefore involves a deliberate strategy to mislead the other party and the court and to commit perjury. Privilege would not, however, attach in a situation "*far from the ordinary run of cases*", where there was "*a widespread conspiracy to deceive the English court which was acted upon and*

has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale".

Coulson LJ therefore had to determine whether the current case was "*far from the ordinary run of cases*", in which clients may mislead or deceive their lawyers in order to have their case presented a certain way in court. He adopted the findings of Ambrose J in her first instance judgement, in which she held:

> "*Even taking the Claimant's case at its highest the alleged deceptions (and other wrongs) do not take this matter outside the ordinary course of the professional engagement of a solicitor or mean that there has been an abuse of the solicitor/ client relationship such that privilege over those communications are negated.*"

Any deceptions or misrepresentations made by the Boshehs to Candey were part of the normal course of litigation, particularly involving allegations of fraud, and should have been anticipated as a possibility by Candey, an experienced firm of solicitors. Claims in fraud can be made by a client's lawyer based on deceitful statements made in open court or in other ways. That does not mean that the solicitor can rely on privileged documents in order to make those claims.

Confidential documents

The final point of appeal concerned bank statements of the Boshehs that Candeys had requested pursuant to their ongoing disclosure obligations, but which had arrived after the termination of the CFA. These documents were therefore not covered by legal professional privilege, but were instead argued by the Boshehs to be confidential. Candey appealed against Ambrose J's finding that the bank statements were confidential in those circumstances and that Candey could not rely on the documents as part of its claim against the Boshehs.

Coulson LJ again began by setting out the leading authority on breach of confidence, *Imerman* v *Tchenquiz* [2010] EWCA Civ 908. In this case it was held that it was a breach of confidence for a person intentionally to obtain another person's information secretly, and without authorisation, and that in principle the person who established a right of confidence in information was entitled to an injunction to restrain the other party from looking at, copying or distributing such information. The ordinary position in civil proceedings is that evidence which was improperly and unjustifiably obtained may still be admissible but that it is a matter for the court. The test the court would adopt was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case.

Coulson LJ stated that he was in no doubt that the test was not satisfied. When the bank statements were provided by the Bosheh's bank, Candey knew that the proceedings were at an end and the CFA had been terminated. In those circumstances Candey had no right to open the statements, let alone go through them in detail. An attempt by a solicitor to recover its costs, regardless of the terms of the CFA, did not trump the public interest in excluding improperly obtained evidence. For those reasons Coulson LJ dismissed the appeal in its entirety, leaving Candey to pursue only its narrow claim on the express terms of the CFA in the lower courts.

Comment

The Court of Appeal's decision confirms that it will be a rare situation where a lawyer can use privileged or confidential documents in a claim against a former client. The court stressed the importance of a client being able to provide information to their lawyers without fear of it being used against them. The notion that the client owes their lawyer a duty of good faith was wholly rejected. Indeed, at least in relation to CFAs, the court suggested that such a duty would be incompatible with the relationship between lawyer and client.

Most claims by solicitors against their clients are for unpaid fees. In such a claim, the solicitor is entitled to rely on the fee notes rendered to the client to prove the debt, even though those fee notes would usually attract privilege. The situation is different, however, where solicitors advance a claim for other matters. In a short concurring judgment, Arnold LJ held that where a claim is brought by a solicitor against their client other than for unpaid fees, it was difficult to see how there could be an implied waiver of privilege by the client (outside of the iniquity principle where privilege does not attach in the first place). One further exception is where the solicitor has applied to come off the record, but the client has failed to serve notice of change, the solicitor would be obliged to put before the court evidence as to their inability or unwillingness to continue acting.

Beyond those exceptions, there is therefore very limited scope for lawyers arguing that their client has waived privilege. This is to be welcomed, as the concept of privileged is very important to our system of justice. It is fitting to conclude on an eloquent expression of this point by Lord Taylor in *R* v *Derby Magistrates Court* [1996] AC 487:

> "*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests.*"