IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-001619

BETWEEN	GORDON ALLAN GRAHAM Appellant
AND	MEARES WILLIAMS Respondent

Hearing: 27 October 2009

Appearances: S W Rollo for Appellant
R S Brown for Respondent

Judgment: 16 November 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Mr Graham seeks to overturn a District Court decision which found him liable to pay legal fees in the sum of $17,840.01 to his former solicitors, Meares Williams.

[2] The key issues on appeal are:

a. What was the date on which the retainer was terminated? Was it terminated, as the Judge found, on 31 May 2008, when Meares Williams gave formal notice of cancellation, or had it already been terminated on an earlier date by Mr Graham accepting Meares Williams' repudiation of the contract?

b. Did Meares Williams have good cause to terminate the contract?

Factual background

[3] In June 2006, Mr Graham consulted a solicitor, Mr Burtt. Mr Graham was involved in a number of disputes. They included injunctive proceedings in the High Court, criminal proceedings, proceedings in the Land Valuation Tribunal, a proposed claim for compensation and resource consent issues.

[4] Mr Burtt agreed to act for Mr Graham.

[5] The District Court Judge found on the evidence that the retainer that thereby came into existence was not an entire contract, but rather a series of contracts, each of the various proceedings and issues being regarded as a separate item of work. That finding has not been challenged on appeal.

[6] The Judge also found that during the course of the solicitor/client relationship, Mr Graham changed his instructions and would not accept the advice given him by his solicitors or the barrister engaged for the civil proceedings, Mr Hardie.

[7] Mr Graham's attitude prompted Mr Hardie to suggest it might be better to engage another counsel, and on 5 March 2007 Mr Hardie withdrew, the Judge found by consent. Mr Hardie then issued an invoice for the work he had done, in the discounted sum of $10,747.50.

[8] On 11 April 2007 Mr Graham wrote to Mr Hardie threatening to bring a claim against him.

[9] On 26 April 2007 Mr Graham indicated he would accept Meares Williams' advice, but then on 4 May 2007 wrote to Meares Williams changing his instructions again. At the conclusion of the letter, Mr Graham stated:

> LET ME MAKE IT VERY CLEAR WHAT MY POSITION IS

…

5 YOU EXPECT ME TO PAY MR HARDIE OF WHICH I HAVE NOTHING TO SHOW HE EVER DID ANYTHING AND YOU EXPECT ME TO PAY YOU FOR DOING WHAT MR HARDIE WAS SUPOSE [SIC] TO DO. I AM NOT PAYING TWICE

[10] On 16 May 2007, Meares Williams wrote a three-page letter to Mr Graham. The letter dealt with a number of issues, including costs issues, and also included a statement:

> Summary
>
> …
>
> c. … Twice you have withdrawn your instructions concerning these proceedings, once to Mr Hardie and now to this firm (Mr Moran). Unless you immediately and irrevocably reinstate your original instructions we will have no alternative but to withdraw from representing you. Your immediate instructions are required…

[11] Having had no response from Mr Graham to this letter, Meares Williams wrote to him again on 28 May 2007 in the following terms:

> Dear Mr Graham
>
> **Your Matters**
>
> I refer to my letter dated 16 May 2007 and note that I have not heard from you at all in reply.
>
> In that letter I requested that you provide instructions concerning a number of matters and, in respect of the ongoing High Court proceedings, that you do so by immediately and irrevocably reinstating your earlier instructions that you will consent to the making of final orders for injunction and with costs to be fixed by agreement or determination by the Court.
>
> As has now been discussed with you at length and on a number of occasions, my firm and I are not prepared to act in proceedings where it is clear that you have no defence whatsoever and when you refuse, without rational explanation, to accept advice given. Such circumstances place us in an impossible situation, professionally.
>
> Unfortunately, I must therefore advise that, if I do not hear from you on the basis referred to above by **4.00 p.m. this Thursday, 31 May 2007**, I will have no alternative other than to formally apply to the Court withdraw [sic] as your solicitor.
>
> I await hearing from you accordingly.

[12] At the time Meares Williams wrote that letter, it was unaware Mr Graham had made a complaint to the Law Society against Mr Burtt, alleging embezzlement. The complaint was undated, but the Society received it on 28 May 2007. Mr Burtt became aware of its existence on 30 May 2007.

[13] On 31 May 2007 Mr Burtt, on behalf of Meares Williams, wrote to Mr Graham purporting to terminate their relationship:

> Re: High Court Proceedings – Grey District Council and Westpower Limited and Canterbury District Law Society
>
> 1. We refer to correspondence from this office and in particular our letter to you of the 28th of May when we advised that if we had not heard from you by 4pm today we would formally apply to the Court to withdraw as your Solicitor. We have not heard from you.
>
>   You have not taken the advice of Mr Hardie nor of Mr Moran notwithstanding that the advice is clear and unequivocal and you have been advised of the consequences of your refusing to take and act on it. You have countermanded your original instructions.
>
> 2. You have sought a review of our costs by the Canterbury District Law Society as you are entitled. You were advised of this by me in my letter to you of the 16th of May. You have in your letter made assertions which are and will be totally denied. Given your position in relation to the advice tendered to you and your assertions we advise that neither I nor any member of this firm will act for you on this or any other matter now or at any other time.
>
> 3. A formal application has been filed in Court to withdraw as your representative in the proceedings in which you are the defendant.
>
> 4. You have been told of the fixture date in September. You will no doubt require to have your files well in advance of that for preparation. You or your representative will be entitled to uplift the files which we are holding. There remains the issue of the outstanding Barrister's costs and our costs. We will need to discuss.
>
> 5. This letter shall serve as notice to you that we are not representing you in any matter whatsoever from this point and we will formally seek leave of the Court to withdraw. There will be costs relating to that application.
>
> 6. Your correspondence to the Canterbury District Law Society will be addressed as soon as possible and the Canterbury District Law Society has been advised of that.
>
> 7. A copy of this letter is being forwarded to the Canterbury District Law Society.

[14] Subsequently, Meares Williams issued these proceedings seeking recovery of its unpaid costs.

[15] Mr Graham defended the claim, and by way of set-off and counterclaim contended that Meares Williams had unlawfully terminated the retainer, thereby putting him to the expense of having to engage new solicitors.

[16] Finally in this recital of the facts I should record that the Law Society found there to be no substance in the complaint against Mr Burtt.

The District Court decision

[17] In the District Court, both parties argued the case on the basis that Meares Williams had terminated the contract by its letter of 31 May 2007. The main issue was therefore whether Meares Williams had good cause to terminate.

[18] The Judge held that Meares Williams did have good cause to terminate. She accepted that the fact Mr Graham changed his instructions and refused to accept the advice of his solicitors was not itself grounds for cancellation. However, she found refusal to accept advice given was not the only issue, and that:

> [68] … the combination of change in instructions, refusal to accept proper advice, refusal to pay properly incurred costs, and claims and complaints made against both Mr Hardie and Mr Burtt made it clear that the solicitor/client relationship had broken down by the end of May 2007. The defendant was given ample notice of the impending termination.

[19] The Judge further held that the work done by Meares Williams had been undertaken with all due care and skill and that the amount of the costs was fair and reasonable.

[20] She accordingly entered judgment for Meares Williams in the full amount sought and dismissed Mr Graham's set-off and counterclaim.

Grounds of appeal

[21] Counsel for Mr Graham, Mr Rollo, contends the Judge was wrong to find that Meares Williams had just cause to terminate the contract. He submits that of the five matters relied upon by the Judge, three were not capable of constituting grounds for cancellation, whether alone or in combination; the fourth was not established on the evidence, or in any event was waived by Meares Williams; and the fifth came too late.

[22] In Mr Rollo's submission, a client refusing to accept advice and changing their instructions is something that can never, whether on its own or in combination with other factors, constitute good cause for termination. Likewise, in his submission, Mr Graham's claim against Mr Hardie was not capable of constituting just cause. Mr Rollo contended that dissatisfaction with a barrister can be of no consequence to the solicitor/client relationship and therefore cannot be grounds for termination. As regards a refusal to pay properly incurred costs, Mr Rollo accepted that a refusal to pay properly incurred costs was capable of constituting good cause, but argued that, properly analysed, Mr Graham's letter of 4 May 2007 was not a refusal, but rather a query. Mr Rollo further submitted that in any event, even if it was a refusal to pay, Meares Williams had waived any breach as evidenced by the terms of their correspondence and their conduct in continuing to act for Mr Graham after receiving his letter. Mr Rollo pointed out that in warning of pending termination, Meares Williams said nothing in their letters about refusal to pay costs, only Mr Graham's refusal to accept their advice.

[23] Mr Rollo also drew my attention to passages in the evidence where both Mr Burtt and Mr Moran (another solicitor at Meares Williams who acted for Mr Graham) suggest it was the refusal to accept instructions that was the sticking point, although Mr Moran does refer to other issues needing to be resolved.

[24] The fifth matter identified by the Judge was Mr Graham's allegation of embezzlement to the Law Society. Mr Rollo acknowledged this was potentially problematic for Mr Graham's case in that on its own the making of such a serious allegation would have justified Meares Williams in terminating the retainer.

However, Mr Rollo submitted that Meares Williams was unable to rely on the complaint as grounds for cancellation because the complaint came too late, the contract having already been terminated before Mr Graham wrote to the Law Society.

[25] In Mr Rollo's submission, Meares Williams' letter of 16 May 2007, with its ultimatum, was a repudiation of the solicitor/client contract, involving as it did a repudiation of the solicitor's primary duty to act in accordance with their client's instructions. The repudiation presented Mr Graham with the right to either cancel the contract or affirm it, and he chose to cancel it at some date between 16 and 28 May. Thus, the contract was no longer in existence when Mr Graham despatched his complaint to the Law Society.

[26] This analysis involves Meares Williams' letter of 16 May 2007 constituting both an affirmation and a repudiation of the contract. An affirmation as regards Mr Graham's breach of refusing to pay properly incurred costs (if that was the effect of his letter of 3 May), but a repudiation as regards the firm's own obligations under the contract.

Discussion

[27] The professional obligation of a lawyer to accept instructions from anyone requiring legal services within that practitioner's field of expertise is an obligation known as "the cab rank rule". Only if there is good cause is the lawyer entitled to refuse to accept the retainer. The cab rank rule is well established, it is enshrined in the ethical rules of the Law Society and it was described in *Lai v Chamberlain* [2005] 3 NZLR 291 (CA) at [106] as "one of the foundation stones of a free and democratic society". Further, as Professor Webb notes, a necessary corollary of the rule is that once the lawyer has been retained, he or she may not cease acting for a client unless the lawyer has good cause.

> … the fact that a client is difficult to communicate with, obtuse, or even obnoxious is regarded as a normal incident of professional practice and not grounds for ceasing to act. Similarly if the client's case is truly hopeless, but the client insists on proceeding against the lawyer's advice, the lawyer is compelled to continue to act.

Webb *Ethics, Professional Responsibility and the Lawyer* (2ed 2006) at 5.8.2

[28] Professor Webb's comments are supported by references in *Harley v McDonald* [2002] 1 NZLR 1 (PC) to it being in the public interest that litigants who insist on bringing their cases to Court should be represented by legal practitioners no matter how hopeless their cases may appear.

[29] It follows the District Court Judge was undoubtedly correct in ruling that Mr Graham's refusal to follow Meares Williams' advice, and his change of instructions, could not on their own constitute just cause for termination.

[30] Whether such matters are capable, in combination with other factors, to constitute good cause is a more difficult issue. Counsel were unable to refer me to any authority directly on point. However, it is unnecessary for me to decide that issue because I have come to the conclusion that in any event the other matters relied upon by the Judge, namely Mr Graham's refusal to pay costs, and his claims against Messrs Hardie and Burtt, were sufficient.

[31] I have come to that conclusion for the following reasons:

[32] First, in my view Mr Graham's letter of 4 May did amount to a refusal to pay properly incurred costs. The wording goes beyond a query or questioning. It is the assertion of a position which the writer expressly says he wants to make "very clear". I also do not accept that because Meares Williams tried to reason with Mr Graham about the costs, they thereby irrevocably waived any right to rely later upon his refusal as grounds for cancellation.

[33] Secondly, contrary to Mr Rollo's submission, I consider that Mr Graham's unfounded claims against Mr Hardie were of consequence to the solicitor/client relationship. Apart from anything else, Meares Williams was personally liable for Mr Hardie's fees.

[34] Thirdly, I do not accept that the letter of 16 May was a repudiation of the contract to which Mr Graham responded by cancelling the contract before he made his complaint against Mr Burtt.

[35] In my view, this argument smacks of an attempt to rewrite history. It was not the way the case was argued in the District Court and it was never put to the witnesses. More fundamentally, it is not supported by Mr Graham's correspondence of the time and it also suffers from the problem that Mr Graham never communicated any notice of cancellation as he was required to do under the Contractual Remedies Act 1979.

[36] Section 8 of the Contractual Remedies Act provides:

> **8 Rules applying to cancellation**
>
> (1) The cancellation of a contract by a party shall not take effect—
>
> (a) Before the time at which the cancellation is made known to the other party; or
>
> (b) before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, if—
>
> (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or
>
> (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract.
>
> (2) The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. It shall not be necessary to use any particular form of words, so long as the intention to cancel is made known.

[37] In my view, it was reasonably practicable for Mr Graham to communicate with Meares Williams, and given all the background circumstances Meares Williams could reasonably have expected to receive notice of the cancellation.

[38] Mr Rollo referred me to a passage in the decision of *Innes v Ewing* [1989] 1 NZLR 598 where at 626 Eichelbaum J suggested the common law waiver cases had survived the Contractual Remedies Act:

> ... in appropriate cases the Courts would regard the requirement of notification of acceptance of repudiation as capable of being waived by the repudiating party's attitude towards performance.

[39] However, *Innes v Ewing* was decided before the 2002 amendment to the Contractual Remedies Act which introduced the new sub clause s 8(2)(b)(ii). In my view, the amendment was intended to codify the situations in which a party can be relieved of the obligation to notify. In any event, even if I am wrong on that point and common law waiver has survived the 2002 amendment, I am satisfied there was no waiver on the facts.

[40] In my view, the evidence clearly established the contract was not cancelled until Meares Williams' letter of 31 May, by which time Mr Burtt had become aware of the complaint against him. The complaint was specifically mentioned in the cancellation letter.

[41] Mr Rollo's fall back argument was that even if cancellation had occurred on 31 May, the complaint was not the real reason for the termination. The sole operative reason for cancellation was Mr Graham's refusal to accept Meares Williams' advice.

[42] However, even if that is so, it still would not vitiate the cancellation. A party who cancels for an insufficient reason is entitled later to rely on another ground that would have justified cancellation. This even includes a reason the existence of which was not known at the time: see *Thompson v Vincent* [2001] 3 NZLR 355 CA.

[43] I am satisfied that Meares Williams' termination was justified.

[44] There was no challenge to the Judge's findings about the work being done with all due care and skill nor was there any challenge to her finding about the costs being fair and reasonable. Accordingly, my conclusion is that Mr Graham is liable to pay the legal fees and his counterclaim must fail.

Outcome of appeal

[45] The appeal is dismissed and the decision of the District Court confirmed.

[46] My expectation is that the parties will be able to reach agreement on costs. If agreement is not reached and the parties require me to make an award, then I direct Meares Williams to file its submissions first, with Mr Graham's submissions to be filed 10 working days thereafter. It may assist the parties if I indicate my provisional view is that costs should follow the event and Mr Graham pay costs on a 2B basis.

Solicitors:
Lane Neave, Christchurch
Meares Williams, Christchurch