

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2018/CLE/gen/01088 & 2018/CLE/gen/01003

BETWEEN

ROMA BARTLETT

Plaintiff

AND

ROMONA FARQUHARSON-SEYMOUR

(d/b/a R.A. Farquharson & Co)

Defendant

Before Hon. Chief Justice Ian R. Winder

Appearances: Norwood Rolle for the Plaintiff

Gia Moxey-Lockhart for the Defendant

19 November 2020 (Plaintiff's Submissions 4 March 2021 and Defendant's Submissions
14 April 2022)

JUDGMENT

WINDER, CJ

These are counter actions by Roma Bartlett (Bartlett) and her former attorney Romona Farquharson-Seymour (Farquharson-Seymour). Farquharson-Seymour claims breach of contract and slander whilst Bartlett claims professional negligence.

1. In or around 2014 Bartlett had retained Farquharson-Seymour for the purpose of appealing the decision in her divorce ancillary relief proceedings in the Supreme Court (the divorce appeal). In 2015 the parties attended the Court of Appeal before the Deputy Registrar to settle the Record of Appeal. The bond required to prosecute the appeal was paid and the list of documents to comprise the record of the appeal lodged as per the directions of the Court.

2. In 2017 the divorce appeal was dismissed by the Court of Appeal. Bartlett avers that the dismissal of the divorce appeal was entirely due to Farquharson-Seymour's negligence. Farquharson-Seymour on the other hand, avers that key documents were not available to compile the Record of Appeal. The unavailability of the documents, she says, had nothing to do with her carriage or handling of the appeal or its process, but resulted from liens which had been placed on the files of both Bartlett and her former husband for lack of payment of legal fees to their former attorneys.

3. On 11 May 2018 Farquharson-Seymour filed action 2018/CLE/gen/01003 against Bartlett for unpaid legal fees (the fees action). In the Amended Writ of Summons Farquharson-Seymour claims damages for breach of contract and slander. Farquharson-Seymour asserts that she represented Bartlett "in several ongoing, litigious and voluminous applications" and that despite repeated requests for payment, Bartlett failed and/or refused to pay the sum of \$50,000 due and owing to her. Farquharson-Seymour also claims that subsequent to the breach of contract, Bartlett became hostile toward her and her staff and repeatedly and publicly slandered her causing damage and injury to her reputation.

4. Bartlett denied any liability in the fees action. She pleads that there were no outstanding amounts due and owing and that there was no contact with Farquharson-Seymour.

5. On 21 September 2018 Bartlett filed action 2018/CLE/gen/01088 claiming that Farquharson-Seymour mishandled the divorce appeal hereby causing the appeal to be dismissed. The particulars of the negligence alleged by Bartlett were the following:

- (a) Failing to settle, prepare and file the Record of Appeal within the time frame fixed by the Registrar of the Court of Appeal ("Registrar");
- (b) Failing to comply with the Oder (sic) of the Registrar made the 8th August 2016 within the time frame fixed by the Registrar;
- (c) Causing or permitting the said action of the Plaintiff to be dismissed.

Bartlett claimed damages including legal fees paid to Farquharson-Seymour in the amount of \$59,000.

6. In defence to the negligence action, Farquharson-Seymour denied any negligence and asserts that she exercised all reasonable care and skill in the conduct of the divorce appeal and that Bartlett's opportunity to appeal had not been completely lost as the appeal can be restored pursuant to Rules 14(4) and (5) of the Court of Appeal Rules. In response to the assertion that the appeal could be restored, Bartlett claims that from about the 14 March 2017, she instructed Farquharson-Seymour, on several occasions, to take all necessary steps to re-instate the said Appeal.

7. At case management, it was ordered that both actions be heard together.

8. The issues for determination are the following:

- i. By the retainer paid by the plaintiff to the defendant, in or about 2014, did the defendant owe to the plaintiff a duty in contract and/or in tort?
- ii. Did the defendant breach that duty?
- iii. Did the plaintiff suffer damage as a result of that breach?
- iv. What were the terms of the agreement between the plaintiff and the Defendant in the Appeal and the several other Actions in which the Defendant was instructed?
- v. Did the Defendant suffer loss and damage as a result of the plaintiff's breach.

9. Bartlett and Farquharson-Seymour both gave evidence on their own behalf at the trial. They were subject to cross examination on their witness statements which stood as their evidence in chief.

10. In her witness statement Bartlett gave evidence that the fee agreement with Farquharson-Seymour was initially a cost of \$12,000 and that there was no agreement upon which a sum of \$50,000 was payable. No hourly rate or other arrangements were

put in place. She says that it was only in late November 2017 when she received a telephone call from Farquharson-Seymour's office that there was a package at the reception's desk for her collection, that she became aware of the alleged fees. The package contained an 11 page Invoice, dated the 7th December 2016, which stated, among other things that, "... a rough estimate of over \$50,000.00 of work was done...and only \$21,300.00 was paid into Chambers".

11. In her witness statement Farquharson-Seymour gave evidence that she took instructions from Bartlett sometime in 2004 when she was dissatisfied with the outcome of the ancillary applications and expressed her desire to appeal the judge's decision to the Court of Appeal. She says that she advised Bartlett that with only a few weeks left to launch the appeal, she would need to read the transcripts to ascertain if the appeal was viable. She advised Bartlett of the possible grounds for the appeal but Bartlett did not bring the file from the divorce matter with her to chambers. During her consultation she advised Bartlett of the need to acquire the file to be able to properly prepare the record of appeal. Bartlett advised that she would obtain the file from her former attorney once she had settled fees she owed to that attorney. Bartlett's former counsel refused to release the file as the fees were never settled. She says that even though the bond was paid and a list of documents lodged, the record could not be prepared as she did not have the required documents to provide to the Court.

12. Farquharson-Seymour's evidence was that she was engaged by Bartlett to do other work for her, including:

- a. Recusal Application in the Court of Appeal;
- b. Supreme Court variation with respect to the minor child of the marriage/maintenance application;
- c. Liaising with Bartlett's Home Owners Association Chairman and another attorney;
- d. Obtaining reports from Elizabeth Estates Police Station with regard to alleged threats and other issue involving the respondent against Bartlett;
- e. Communication with Bartlett's bank to prevent her account from being frozen;
- f. Management of Bartlett's companies at the Registrar General's Department; and
- g. Work performed in relation to the application filed with respect to the Trusts before the Supreme Court.

13. Farquharson-Seymour states that despite all of the work being performed on behalf of Bartlett, her payments received on account were sporadic. She reminded

Bartlett of her growing bill on many occasions but was only given excuses as to why only a little of the bill was being paid. Farquharson-Seymour says that Bartlett's claim that her appeal was mishandled is merely a 'grasp at straws' to evade paying her outstanding legal fees. Bartlett had requested further representation from her chambers and was advised that she could do nothing more until a substantial payment was received from her.

Law, Analysis and Conclusion

14. Negligence, whether in personal injury or professional negligence, as in the current case, a duty of care must to be established. With respect to professional negligence actions, in *Martin Boston & Co v Roberts [1996] PNLR 45 (CA)* the English Court of Appeal emphasized that the test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession. Hindsight however, is not a part of the test, as the test is forward looking only.

15. Bartlett's contentions stem from what she claims is a missed time limit by Farquharson-Seymour in her divorce appeal matter and with it, the loss of chance to pursue the appeal, and if successful to enjoy the fruit garnered from it.

16. The authorities require the following questions to be asked: what was the scope of the attorney's duty and the standard of care expected; was there a breach of duty; causation; remoteness and if the above are proven; the quantification of the loss experienced by the client. Simply, it must be established that the attorney breached her duty to the client and that that breach was the cause of the damage complained of as a matter of fact, with the loss not being too remote as a matter of law. The client must also prove that any damage caused was foreseeable. There is one additional step in cases of loss of chance, that is, what were the prospects of success of the original action if the other criteria are met (*Harrison v Bloom Camillin [2000] Lloyd's Rep PN 89 (ChD)*).

17. Any delay that may have caused the time limits set by the Court of Appeal to be missed, says Farquharson-Seymour, is the shared fault of Bartlett and her ex-husband. She was unable to retrieve vital documents for the conduct of the litigation as a direct result of them owing fees to their former attorneys. The files were not turned over to her upon request to those former attorneys due to these debts. This was not a consequence of any dealings that she had with the matter.

18. I am not satisfied that the posture taken by Farquharson-Seymour represents the best practice. If in the conduct of a matter for which an attorney has been retained, she becomes aware of a risk to the client, it is the attorney's duty to inform the client (**Credit Lyonnais SA v Russell Jones & Walker [2003] Lloyd's Rep PN 7, Laddie J**):

"A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although *White v Jones* [1995] 2 AC 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."

19. Having observed the witnesses in this matter give their oral evidence and having considered the written evidence I find that Farquharson-Seymour fell short in her duty to Bartlett in her conduct of Bartlett's divorce appeal. Farquharson-Seymour was given ample warning that the divorce appeal was in danger of being dismissed well in advance of the dismissal actually taking place. On 26 October 2016, with Calvin Seymour holding for Farquharson-Seymour, Bartlett's husband made an application to have the divorce appeal dismissed. Allen, P (as she then was) advised the parties in the oral judgment of the Court that:

Rule 14 of the Court of Appeal Rules requires an application to the Registrar for dismissal of the appeal and then she will certify whether, in fact, the appellant has complied with the order and make whatever recommendation she deems fit.

Therefore, we take the matter out of the list and award costs to Mr. Mitchell for his appearance today in the sum of \$1,200.00 to be paid within 14 days of today.

20. Almost 5 months later the parties appeared before the Court of Appeal again on the matter. It was at this time that the divorce appeal was dismissed. The ruling of the Court of Appeal on 14 March 2017 was again delivered by Allen, P. (as she then was),

Crane-Scott JA added her opinion to that of the President of the Court. The oral judgment provides:

ALLEN, P.

Having considered the application of the respondent for the dismissal of the appeal on the basis that the Registrar's order was not complied with in filing and preparing the record as ordered, we are satisfied, having considered the pros and the cons of the application, that the Registrar's order of 8th August, 2016 has not been complied with. Indeed, the Registrar has certified that the record of appeal has not been filed in accordance with her order that the documents listed in the schedule were to comprise the record and were to be filed within 30 days of the order of 8th August, 2016. There has consequently been a breach of rule 13(3) of the Court of Appeal Rules and we dismiss the appeal in accordance with rule 14(3) of the said rules.

The costs of the appeal are awarded to the respondent, to be taxed if not agreed.

CRANE-SCOTT, JA

I would add that the rules of the Court of Appeal are to be complied with. In this matter, the application before us was the application of the respondent brought pursuant to rule 14(3). The appellant is represented by counsel, who was present at a settling of the record, and undertook to the court (through the Deputy Registrar) the obligation of settling the record and preparing and filing it within the time fixed by the Registrar. This was not done.

We have heard what counsel has said about the unavailability of some documents. This is not a matter with which the court is at this point engaged, inasmuch as there is no evidence on the file or in the record concerning the difficulties that counsel says she has encountered; and as far as I am concerned, there is no counter application before us, such as an application for an extension of those time limits fixed by the Registrar and, therefore, there is nothing on which we could exercise our discretion in favour of the appellant, and, therefore, I agree that this appeal ought to be dismissed for want of prosecution.

(Emphasis added)

21. Farquharson-Seymour's evidence was that she considered transcripts and material to the extent that she was able to determine that the judge had erred and that an appeal was viable. Additionally, the record of the appeal comprises all of the material which was before the judge and upon which the decision being impugned was based. All of the documents to comprise the appeal would therefore be contained in the Supreme Court's file. Farquharson-Seymour submits that she made repeated attempts to get copies of the needed documents from the Supreme Court's file. However, she stops short of indicating the result of these attempts, i.e. whether upon inspection of the file the documents required were missing from Court's divorce file. Having regard to Farquharson-Seymour's invoice, reflecting subsequent appearances before the judge

on the same divorce, I did not accept the evidence that any real effort to secure the documents were made by Farquharson-Seymour. Crane-Scott JA's oral decision exposed some of the short comings of Counsel in prosecuting the appeal.

22. This was a very contentious family matter. Appeal matters such as these need to be assessed and addressed with a level of care that went beyond what was provided by Farquharson-Seymour in the circumstances. Unfortunately, counsel's inaction in this matter appears to have diminished the trust and confidence which Bartlett placed in her as a professional. It was incumbent upon the attorney to inform the client outright within a reasonable time that in the absence of the documents she says was required, the matter would face dismissal. There is no evidence that this was done.

23. After the divorce appeal was dismissed the evidence shows that Bartlett wrote to Farquharson-Seymour via email and letter, over the course of several months. After what appears to be a frustrating time of not hearing from Farquharson-Seymour, there is an email in which the attorney notes that she spoke to Bartlett. Following this Farquharson-Seymour withdrew as Bartlett's counsel.

24. Bartlett was not guaranteed success at the Court of Appeal for her divorce appeal, in the event that she was able to properly put her case to the Court. As to the costs that Bartlett claims she was ordered to pay, there has been no cogent evidence presented to suggest that there is a costs Order in favour of her ex-husband for the \$45,200.00 being claimed.

25. Bartlett has not provided anything from which the court may assess any form of damages for the dismissal of her divorce appeal. There is no basis to determine what, if any, chances of success was there was in the appeal. In the circumstance, whilst I am satisfied that there was a duty owed which has been breached I am not in a position to make any award of damages on Bartlett's claim.

Slander

26. Farquharson-Seymour avers that Bartlett has slandered her. The particulars of the slander were pleaded as follows:

9. Subsequent to the aforementioned breach of contract, the Defendant became hostile toward the Plaintiff, her servants and/or agents and repeatedly and publicly slandered the Plaintiff, its servants and/or agents, by use of the following words:

- a. That the Plaintiff and her Firm are dishonest;
- b. That the Plaintiff is a thief and is trying to extort money from me [the Defendant]; and
- c. That the Plaintiff stole money from me [the Defendant].

10. The words spoken by the Defendant to the Public, in their natural and ordinary meaning were malicious and calculated to disparage and cause damage to the Plaintiff in her profession and concerning the Plaintiff in the way of her occupation and in relation to her conduct therein, as the Defendant made such statements publicly, or behaved as a criminal.

27. The learned authors of Halbury's Laws of England state what must be proven by counsel to be successful in her claim:

158. What the claimant has to prove to establish claim for libel or slander.

In order to establish a prima facie case in a claim for libel or slander it is necessary for the claimant to prove that the words complained of were published, were defamatory of him and were published by the defendant in circumstances in which the defendant is responsible for the publication. A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

Conteh JA succinctly defined defamation in *Garvin Gibson v Cable Bahamas Ltd SCCivApp 229 of 2012*:

The essence of the tort of defamation is the publication by the defendant concerning the claimant of any material that lowers the claimant in the estimation of right thinking members of society generally or would be likely to adversely affect the claimant in the estimation of reasonable people generally: *Sim v Stretch (1936) 2 All ER 1237.*"

28. Having considered the evidence I am not satisfied that the claim in slander has been made out, notwithstanding Bartlett was a dissatisfied client. I was not satisfied that, on balance, that the words complained of were published obviating the need for any consideration as to any possible influence they may have had on those who may have heard them. While the words complained of can be considered slanderous by the ordinary, reasonable, fair-minded person, Farquharson-Seymour has not proven, in my assessment, that the utterances were made by Bartlett.

Legal fees

29. The parties do not dispute that there was an oral retainer between them, which is permissible under the law. A retainer need not be put in writing as observed by **Charles J. in *Petrona Russell et al v Anthony Thompson et al. 2018/CLE/gen/01500***:

In terms of retainers, the law is clear. A retainer does not have to be in writing. It may be implied from the conduct of the parties. In *Blyth v Fladgate* [1891] 1 Ch. 337, it was held that though there had not been an express retainer, the relationship of solicitor and client might be inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm was liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients.

30. It has been said in the cases of ***Crossley v Crowther (1851) 9 Hare 384*** and ***Re Payne (1912) 28 TLR 201*** that in instances of an oral retainer as the parties agree were in place for the divorce appeal, where a dispute arises between solicitor and client as to its terms, it is prima facie the client's version that should prevail. In ***Gray v Buss Murton [1999] PNLR 882 (QBD)*** it was determined that the basis for this principle was that it is the client who knows what he wants the solicitor to do. It is for the solicitor to find out what the client wants to do accurately, bearing in mind that the client may not possess the legal vocabulary to express his needs correctly.

31. In ***Griffiths v Evans [1953] 2 All ER 1364***, Lord Denning opined the following with regard to oral retainers between solicitor and client:

"...the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to blame at variance with his client over it and must take the consequences."

32. Bartlett was accruing legal fees that she was not paying, says Farquharson-Seymour. The danger in oral agreements is the possibility that a client may not be adequately informed of the terms upon which work is being undertaken. In this case Bartlett's evidence was that she was never informed of Farquharson-Seymour's \$500 per hour rate. Claims to this effect are why it is unadvisable to forego written retainers. Fees and the fee structure of the attorney performing services should be documented and a copy should be given to the client to avoid disputes of this nature from occurring. The attorney who chooses to do work under an oral retainer must accept the consequences of that decision.

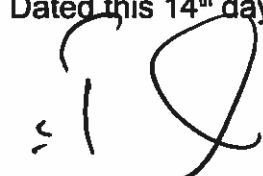
33. This does not mean that the attorney is obligated to continue to perform services for a client who is not paying their fees in a reasonable period of time or as agreed. The client should be given reasonable notice of the default by the attorney requiring that the client brings the account current and the effect of such breach if full and/or satisfactory payment is not made. The attorney has a right to cease to act in certain circumstances and non-payment of fees is one of those.

34. Bartlett is an accountant by profession. Considering her profession and the fact that she is said to be a business woman as well, her evidence that she was unaware of how she was being billed until she got the invoice complained of was difficult to believe. There is also no agreement implied or expressed by the parties that the monies paid for the divorce appeal would, in the event that the divorce appeal did not go off, would not be subsumed as payment by Farquharson-Seymour's chambers for work performed on unrelated matters. In the absence of an agreement between the parties, I can find no fault with Farquharson-Seymour applying the monies to Bartlett's account balance.

35. I have considered the evidence of Farquharson-Seymour and the invoice that was entered into evidence which contained a note which states that a rough estimate had been performed by her chambers which showed that over \$50,000 of work was carried out for Bartlett and only \$21,300 was paid, leaving a balance of \$28,700. Most of the invoice amounts per service are not itemized in the invoice and the total balance owed is represented as \$18,000 with the note regarding the \$50,000 included in the description services column. I find therefore that any alleged balance of \$28,700, based upon any rough estimate, without any particulars, cannot viably be used to sustain Farquharson-Seymour's claim for outstanding legal fees. Farquharson-Seymour has therefore not persuaded me that she is owed any further fees by Bartlett.

36. In the circumstances I make no order for costs.

Dated this 14th day of November 2022



Ian R. Winder

Chief Justice