Case No: HC-2016-000259

Neutral Citation Number: [2017] EWHC 1350 (Ch)

IN THE HIGH COURT OF JUSTICE

**CHANCERY DIVISION**

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 9/6/2017

**Before**:

MASTER CLARK

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**Between:**

|  |  |  |
| --- | --- | --- |
|  | **LEXLAW LTD** | Claimant |
|  | **- and -** |  |
|  | **MRS SHAISTA ZUBERI** | Defendant |

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**Robert Jones** (of **Lexlaw Ltd**) for the **Claimant**

**Adrian Davies** (instructed by **Woodford Wise Solicitors**) for the **Defendant**

Hearing date: 24 May 2017

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Judgment

**Master Clark:**

**The application**

1. This is my judgment on the defendant’s application dated 7 November 2016 seeking an order for the trial of a preliminary issue.

**Parties and the claim**

1. The claimant is an incorporated solicitors practice. The defendant is its former client, for whom the claimant acted in her claim against National Westminster Bank Plc and the Royal Bank of Scotland for mis-selling interest rate hedging products. The claim arises out of a damages based agreement between the parties on 15 April 2014 (“the DBA”).
2. Although the “Brief Details of Claim” on the front page of the claim form state that the claim is for damages for breach of contract and payment of an unpaid invoice for legal services, the very brief particulars of claim endorsed on the second page of the claim form refers only to the non-payment of an invoice dated 1 July 2015 in the sum of £125,123.14 (plus interest thereon). The claim as it stands is therefore in debt only.
3. The defendant disputes her liability to pay this amount on a number of grounds:
   1. that the DBA was procured by the actual, alternatively presumed, undue influence of the claimant’s principal, Mohammed Akram;
   2. that the defendant was induced to sign the DBA by misrepresentations made by Mr Akram, so that it was voidable and has been avoided by her;
   3. that the claimant negligently, and/or in breach of its tortious, contractual and/or fiduciary duties to the defendant, failed to advise her of the true nature and consequences of the DBA causing damage, the compensation for which is to be set off against the sum claimed by the claimant;
   4. that the DBA is unenforceable against the defendant by reason of failing to comply with section 58AA(2) and 58AA(4) of the Courts and Legal Services Act 1990 (“CLSA 1990”).
4. The defendant does not assert that she has no liability to the claimant for the work carried out by it in the period between 15 April 2014 and 18 May 2015 (the date on which she wrote to the claimant formally disinstructing it). Although no claim in quantum meruit is currently pleaded against her, she accepts (in her witness statement dated 10 June 2016) that she is liable to pay the claimant for its reasonable fees on a time-costed basis for that period.

**The preliminary issue**

1. The preliminary issue (“the issue”) sought to be tried by the defendant is (as reworded in the course of the hearing with the agreement of both sides):

“*Whether the DBA is unenforceable by virtue of section 58AA(2) of the CLSA 1990, by reason of failing to satisfy the conditions in section 58AA(4) CLSA 1990, as pleaded in paragraph 64 to 71 of the Amended Defence dated 22June 2016.”*

**Unenforceability of the DBA**

*The DBA*

1. Clause 6.2 of the DBA provides:

*“With the exception of the circumstances set out in clause 6.3 (in which you agree not to terminate this Agreement), you may terminate this Agreement at any time. However, you are then liable to pay the Costs and the Expenses incurred up to the date of termination of this Agreement within one month of delivery of our bill to you.”*

1. “Costs” and “Expenses” are defined in clause 1.2 as, respectively, charges for time spent working on the claim calculated in accordance with hourly rates, and disbursements. There is no issue between the parties as to the meaning and effect of clause 6.2; and that in certain circumstances it would require the payment of a sum greater than the agreed percentage provided for in the DBA. In addition, neither side alleges that the clause was engaged in the events that happened in this case.

*The statutory framework*

1. The statutory framework consists of Section 58AA of the CLSA 1990 and the regulations made under it, the Damages-Based Agreements Regulations 2013 (“the Regulations”). The drafting in both is not user friendly.
2. Section 58AA(2) of the CLSA 1990 provides, so far as relevant:

“(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But … a damages-based agreement which does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

(4) The agreement—

…

(b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner.”

1. The Regulations provide, so far as relevant:

“(2) In these Regulations—

“the Act” means the Courts and Legal Services Act 1990;

…

*“client”* means the person who has instructed the representative to provide advocacy services, litigation services (within section 119 of the Act) or claims management services (within the meaning of section 4(2)(b) of the Compensation Act 2006) and is liable to make a payment for those services;

*“costs”* means the total of the representative's time reasonably spent, in respect of the claim or proceedings, multiplied by the reasonable hourly rate of remuneration of the representative;

*…*

*“expenses”* means disbursements incurred by the representative, including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees;

*“payment”* means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees;

*“representative”* means the person providing the advocacy services, litigation services or claims management services to which the damages-based agreement relates.

**4.— Payment in respect of claims or proceedings other than an employment matter**

(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, a damages-based agreement must not require an amount to be paid by the client other than—

(a) the payment, net of—

(i) any costs (including fixed costs under Part 45 of the Civil Procedure Rules 1998); and

(ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,

that have been paid or are payable by another party to the proceedings by agreement or order; and

(b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.

…

(3) … in any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.”

*The defendant’s defence*

1. The defendant (in paras 69 to 71 of the Defence) asserts that clause 6.2, in providing for payment by the defendant of “the Costs and Expenses” requires her to make a payment other than “the payment” (as defined in reg 1(2) of the Regulations, set out above), in contravention of regulation 4(1) and/or 4(3).

*The claimant’s reply*

1. The Reply at para 24 to 26 responds:

“24. The suggested non-compliance with the DBA Regulations set out at paragraph 70 of the Defence is denied. The terms relied upon by the Defendant do not contravene the Regulations as alleged or at all.

25. In the alternative, the sums relied upon by the Defendant only became payable by the Defendant upon termination of the DBA; and thus, cannot be caught by the Regulations.

26. In the further alternative, in so far as the clause(s) set out by the Defendant are not enforceable it/they should be severed from the DBA but do not render the entirety of the DBA enforceable.”

**Whether to order a preliminary issue – the test**

1. The Court of Appeal has warned on several occasions of the risks of delay and increased costs resulting from trial of preliminary issues, particularly in complex cases. In *Rossetti Marketing Ltd & Anor v Diamond Sofa Company Ltd* [2012] EWCA Civ 1021, [2013] Bus L.R. 543, Lord Neuberger described preliminary issues as offering a siren song to the parties. There have been other warnings as well, in the cases of *SCA Packaging Ltd v Boyle* [2009] UKHL 37, [2009] ICR 1056 and *Bond v Dunster* [2011] EWCA Civ 455. It is clear from these authorities that I should take a cautious approach to deciding whether to order a trial of a preliminary issue.
2. There are several useful summaries of the factors which the Court should take into account in making its decision. These are found in:
   1. Section 8 of the Technology and Construction Court Guide – 2017 White Book, Vol 2, paras 2C-43;
   2. *Steele v Steele* [2001] CP Rep 106 – a decision of Neuberger J, in which he identified 10 factors which could be relevant;
   3. *McLoughlin v Jones* [2001] EWCA Civ 1743, [2002] QB 1312, in which David Steel J set out the following principles:
      1. Only issues which are decisive or potentially decisive should be identified;
      2. The questions should usually be questions of law;
      3. They should be decided on the basis of a schedule of agreed or assumed facts;
      4. They should be triable without significant delay making full allowance for the implications of a possible appeal;
      5. Any order should be made by the court following a case management conference.

I have considered this guidance and do not set it out.

1. In addition, I also have in mind the guidance of Briggs J in *Lexi Holdings Plc v Pannone & Partners* [2009] EWHC 3507 (Ch) at [4]:

“questions of case management, questions of cost, delay and the use of the parties’ and the court’s resources must come first and foremost in the consideration whether any particular issue should be dealt with as a preliminary issue.”

*Defendant’s submissions*

1. The defendant’s counsel submitted that the issue was suitable to be determined preliminarily for the following reasons. First, the outcome of the issue was likely to be determinative of the claim at least one way; though of course if the claimant succeeded on the issue, the remainder of the claim would have to go to trial. Secondly, he submitted that, since there are no competing contentions as to the construction of clause 6.2, there would be no need for any factual inquiry by the court, which will be concerned with a question of statutory construction, a matter of pure law. Thirdly, he submitted that determination of the issue was likely to save costs and time, since it would, if the defendant were successful, obviate the need for the extensive factual enquiry which the other defences raised by her would require. The trial of the issue will take ½ - 1 day; whereas the trial of the whole claim would take 4 to 5 days.

*Claimant’s submissions*

1. The factors relied upon by the claimant’s counsel as militating against the trial of the issue were as follows. First, he submitted that determination of the issue in the defendant’s favour would not dispose of the claim, as two further issues would arise.
2. The first issue is, he submitted, whether the claimant is entitled to any form of payment, and, if so, on what basis and in what amount. However, the defendant accepts that a timely amendment to make a claim based on quantum meruit could not sensibly be opposed by her; and, as noted, above, has accepted her liability to pay the claimant reasonable remuneration for the relevant period. If she succeeded on the issue, the quantification of the claimant’s remuneration could either be referred to the costs judge; or, if determination of the basis of that remuneration were required, that confined issue could be dealt with relatively shortly. Thus, even if determination of the issue did not wholly dispose of the claim, it would substantially reduce its ambit.
3. The second issue put forward by the claimant’s counsel as requiring determination is whether clause 6.2 is severable from the DBA, preventing its unenforceability. However, if clause 6.2 is in contravention of the Regulations, then to permit it to be severed would radically undermine the purpose of the relevant legislation. The claimant’s counsel did not cite any case in which a provision which offended in this way had been severed. I regard this argument as having no real prospect of success, and not providing a reason for the issue not to be tried.
4. The claimant’s counsel’s primary submission was that the issue could not be determined on agreed (or largely agreed) facts and a factual enquiry would be necessary. Initially, he submitted that the court would need to have regard to the factual matrix surrounding the DBA in order to construe it; but as noted above, there is no issue between the parties as to the meaning of clause 6.2 of the DBA. In the course of the claimant’s counsel’s argument, it became clear that the issue of the enforceability of the DBA comprises two sub-issues:
   1. the proper construction of the Regulations, and in particular, reg 4(1); and
   2. if clause 6.2 is in breach of the Regulations, whether the breach was a material breach.

As can be seen above, the claimant has not pleaded its position in respect of either of these issues.

1. As to (1), the claimant’s counsel was constrained to accept that no factual inquiry was necessary. As to (2), he referred to and relied upon *Hollins v Russell* [2003] EWCA Civ 718; [2003] 1 WLR 2487, in support of the proposition that a DBA will only be unenforceable if a breach is material. He then relied upon [109] in *Hollins*, in which the Court stated that “*materiality will depend upon the circumstances of the case*”; and submitted that whether a breach was material required a factual enquiry, which was a factor rendering its trial as a preliminary issue inappropriate.
2. *Hollins* was a case concerning conditional fee agreements. These were governed by section 58 of the CLSA 1990, which, so far as relevant, provided:

“**58.— Conditional fee agreements.**

(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(3) The following conditions are applicable to every conditional fee agreement—

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor

**58A.— Conditional fee agreements: supplementary.**

…

(3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c)—

(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and

(b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).”

1. As can be seen, these provisions are structured in the same way as those for damages based agreements set out above. *Hollins* was concerned with the meaning of “satisfies the conditions” which is common to both sets of provisions. As to this the court said, at [105] to [109]:

“105. … In approaching the meaning of the words “satisfies the conditions” we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements which is immaterial in the context of the other two purposes of the statutory regulation.

106. The question whether something is “satisfied” inevitably raises questions of degree. What is enough to satisfy? There can be different degrees of satisfaction. A court may be satisfied beyond reasonable doubt or on the balance of probabilities but it is still satisfied. Different things can be satisfied in different ways. Hunger is satisfied by enough to eat. Greed may only be satisfied by more than enough. Sufficiency produces satisfaction. Conditions are satisfied when they have been sufficiently met. How sufficiently must depend upon the purpose of the conditions. It is not impossible to imagine conditions which would only be sufficiently met if they were observed in every minute particular: the specifications for precision machinery might be an example. But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required.

107. The key question, therefore, is whether the conditions applicable to the CFA by virtue of section 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Costs judges should accordingly ask themselves the following question:

“Has the particular departure from a regulation pursuant to section 58(3)(c) of the 1990 Act or a requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?”

If the answer is “yes” the conditions have not been satisfied. If the answer is “no” then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied.

108. We would not draw any formal distinction between the conditions contained in the section itself and those contained in the Regulations. The meaning of “satisfies” must be the same in each case. However, it is more difficult to envisage questions of degree coming into the question whether the conditions in the section have been sufficiently met. Either the CFA relates to permissible proceedings or it does not. But one example might be that in section 58(4)(b) which requires that a CFA providing for a success fee “must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased”. Was that condition sufficiently met by an agreement such as that in *Tichband v Hurdman*, which left blank the percentage in the clause where it should have been filled in but stated it clearly in the risk assessment (see paragraph 133 below)? The answer to that question is obviously “yes”.

109. We would, however, draw from both *Ex p Jeyeanthan* [2000] 1 WLR 354 and the *Factortame (No 8)* case [2003] QB 381 the principle that sufficiency or materiality will depend upon the circumstances of each case. This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach. Quite the reverse. At the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met.”

1. *Hollins* was considered and discussed in *Garrett v Halton BC* [2006] EWCA Civ 1017 [2007] 1WLR 554, which also concerned conditional fee agreements. *Garrett* was not cited by either side, but I provided them with an opportunity to consider and make submissions in respect of it. *Garrett* involved two sets of cases in which the solicitors’ obligations under the relevant regulations were to inform their clients of certain matters. The primary issue was whether there is substantial compliance with (or no material departure from) a requirement if a breach does not in fact cause the client to suffer detriment. As to this, Dyson LJ said, at [32]:

“If it had been intended that a CFA should only be enforceable where the client suffered actual damage, it would have been easy enough so to provide. But the focus of the scheme was on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach of one of the requirements of the scheme. In our view, it is fallacious to say that a breach is trivial or not material because it does not in fact cause loss to the client in the particular case. The scheme has the wider purpose of providing for client protection (as well as the proper administration of justice).”

1. The court held that the enforceability of a CFA (like any other contract) must be determined (or determinable) as at the date it is made: [35], [36]; and that there was no room for any consideration of the actual consequences of the failure to comply: [37]. It concluded:

“38. The importance of *Hollins v Russell* is that it dealt a fatal blow to challenges that were being made by defendants' insurers to the enforceability of CFAs on the grounds of minor technical breaches of the statutory requirements. The court explained that Parliament did not intend that such breaches should render CFAs unenforceable. The breaches had to be material in the sense that they had a materially adverse effect on the protection afforded to the client or on the proper administration of justice. The primary statutory purpose of the requirements was to provide protection to claimants. In these circumstances, it seems to us that it would be extraordinary if the court were required to hold that, however egregious the breach, it was not material if it had not in fact caused the client to suffer any loss. The solicitor might have been guilty of serious negligence or even have acted deliberately to further his own interests at the expense of those of his client. In such cases, on the argument advanced on behalf of the Law Society, there would be no material breach unless the court concluded that the client had actually suffered loss as a result of the breach. That would be a startling result in view of the plain language in which the 1990 Act and the 2000 Regulations are expressed, and the purpose that they were intended to serve.

39. We see no basis for interpreting the statutory provisions as having that effect. In some cases, it may be helpful to have regard to what actually happened, because that may shed light on the potential consequences of a breach (if the matter is judged at the date of the CFA) and therefore on the extent to which the breach had a material adverse effect on the protection afforded to the client. In our view, however, in most cases the court should focus its attention principally on the terms of the CFA and the advice and information given by the solicitor and other relevant circumstances which existed at the date of the CFA and make a judgment as to whether, in the light of that material, the departure from the requirement in question had a material adverse effect on the protection afforded to the client.”

1. The claimant’s counsel sought to use these passages to argue that in this case the court would be required to investigate the “*advice and information*” given to the defendant when she entered into the DBA in order to decide whether any breach of the statutory requirements was material. As to this, as already noted, in *Garrett* the relevant breaches concerned the advice and information given to the client, so it was of course necessary for the court to determine what that was. In this case, the breach consists of an identified contractual provision, and it is difficult to see how advice and information could be relevant to determining whether the breach was material.
2. It is therefore incumbent on the claimant to identify the factual circumstances which it maintains are relevant to materiality. It has not done so in its Reply, which does not address materiality. In his submissions, however, the claimant’s counsel put forward the following as factual matters relevant to materiality:
   1. Whether the defendant was given any advice as to the DBA, and the adequacy of that advice;
   2. Whether the defendant was given an opportunity to consider the DBA before entering into it;
   3. Whether the defendant entered into the DBA freely and without improper pressure.

In my judgment, none of these matters could have any relevance to the question of whether the alleged breach was material, which is a matter of whether clause 6.2 contravenes regs 4(1) and/or 4(3) of the Regulations. By way of example, even if the defendant had been advised in terms that clause 6.2 did contravene the Regulations, that would not detract from the materiality of the breach. Materiality in this case is concerned with contractual consequences of the breach, namely whether it provided for payment of a kind prohibited by the Regulations.

1. I therefore reject the claimant’s submission that any factual enquiry will be necessary to determine the issue. This may be contrasted with the determination of the other issues in the claim which will require extensive factual investigation. I accept the defendant’s submission that a preliminary trial of the issue is capable of saving substantial time, effort and costs. This is a consideration which comes “first and foremost” in reaching my decision.
2. The claimant’s counsel made a number of further points which he said favoured not ordering a preliminary issue. First, referring to *Steele v Steele* (p10, l.18), he submitted that a just result could not be achieved unless there was a trial of the various allegations made by the defendant against the claimant. I reject this submission as plainly wrong – a just result does not require the court’s determination of every issue between the parties, and Neuberger J’s dicta cannot be read as stating that. Secondly, he relied upon the likelihood of each side appealing any determination of the preliminary issue. I do not regard this as a conclusive factor; and, in any event, the outcome of any appeal may still be largely determinative of the claim.
3. Finally, the claimant’s counsel relied upon *Steele v Steele* at p12, l.28:

“Ninthly, the court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination.”

He submitted that if the issue was determined against the claimant, it would avoid the consequences of that determination by seeking to amend to make a quantum meruit claim.

1. This has already been considered in paragraph 19 above: even if the claimant amended its claim, the determination of the issue would effect a substantial saving in time and costs.

**Conclusion**

1. Taking all the above considerations into account, I have formed the clear view that it would be right to order a trial of the issue as a preliminary issue.