

IN THE COUNTY COURT
AT CENTRAL LONDON

Case No: B 90 YJ 688

Thomas More Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Start Time: 14:09 Finish Time: 14:49

Page Count: 12

Word Count: 4,680

Number of Folios: 65

Before:

HIS HONOUR JUDGE WULWIK

Between:

MISS ALICIA ROMAN

Claimant

- and -

AXA INSURANCE PLC

Defendant

Mr Roger Mallalieu (instructed by **Shakespeare Martineau LLP**
trading as **Lime**) for the **Claimant**

Mr Nicholas Bacon QC (instructed by **Taylor Rose TTKW**) for the **Defendant**

APPROVED JUDGMENT
(As approved by HHJ Wulwik)

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His Honour Judge Wulwik:

Introduction

1. This is an appeal by the defendant, AXA Insurance UK PLC, against the order dated 7 April 2017 of Deputy Master Campbell sitting as a Deputy District Judge in the County Court at Kingston-upon-Thames, the order being made in detailed assessment proceedings. Permission to appeal was granted on the papers by His Honour Judge Dight on 7 June 2017. A respondent's notice was served seeking to uphold the decision of the Deputy Master on additional grounds.
2. The issue is whether Deputy Master Campbell was right to conclude that the claimant, Mrs Alicia Roman, elected to treat a conditional fee agreement with a firm of solicitors, Secure Law Limited, as continuing notwithstanding her instruction of new solicitors, Lime Personal Injury, so that when the new solicitors, Lime, went on to win the claim, costs were payable to Secure Law under their conditional fee agreement.
3. The order of His Honour Judge Dight dated 7 June 2017 provided for the appeal to be heard before Judge Dight, the designated civil judge, or the former deputy designated civil judge, sitting with a Master of the Senior Courts Costs Office as an assessor. I was nominated by Judge Dight to hear the appeal, and with the agreement of the parties sat without an assessor, the issue being one of law.

The defendant's grounds of appeal

4. The defendant's grounds of appeal were essentially twofold:
 - i) That the Deputy Master was wrong to find that the claimant elected to affirm the conditional fee agreement entered into by the claimant with Secure Law, it being said that the conditional fee agreement was an entire contract and that the repudiation of the contract discharged the claimant from liability under it.
 - ii) That the Deputy Master was wrong to find that the claimant affirmed the conditional fee agreement with Secure Law by continuing with the claim with the new solicitors, Lime, on the same terms as the conditional fee agreement with Secure Law, it being said that the claimant instructed Lime on a new conditional fee agreement and not on the basis of the original conditional fee agreement with Secure Law.

The additional grounds relied on in the respondent's notice

5. The claimant, in the respondent's notice, relied on the following additional grounds for upholding the order of Deputy Master Campbell:
 - i) That the claimant had waived any right to treat the conditional fee agreement with Secure Law as terminated, and remained liable under it in the event her claim succeeded.
 - ii) That by her acceptance of Secure Law's proposals and/or her instruction of Lime, the claimant accepted the partial performance of Secure Law and her liability to pay for such partial performance in the event her claim succeeded, notwithstanding the contract was otherwise one of entire obligation.

- iii) That there was an implied term in the conditional fee agreement with Secure Law that the solicitors could terminate the agreement for good reason, such as the ill health of the principal of the firm, and that in such circumstances the claimant would be liable under the conditional fee agreement for work done by Secure Law up to the date of such termination, subject to her claim succeeding.

The Facts

- 6. On 7 May 2012 the claimant, Mrs Roman, was involved in a road traffic accident with the defendant's insured. On 17 May 2012 the claimant entered into a conditional fee agreement with Secure Law providing for a 100% success fee. The original conditional fee agreement was filed with the Court, and it is said to have been in the form of the Law Society model conditional fee agreement to be read in conjunction with the Law Society's document 'What You Need to Know About a CFA'. The Law Society model conditional fee agreement is a one page document supplemented by the Law Society document 'What You Need to Know About a CFA'. It is clear from the latter document that the conditional fee agreement is prospective in effect.

Page 2 of the document provides:

"Ending this agreement

If you end this agreement before you win or lose, you pay our basic charges and disbursements. If you go on to win, you also pay a success fee.

We may end this agreement before you win or lose.

Basic charges

These are for work done from now until this agreement ends...."

Page 6 of the document provides:

"...(b) Paying us if we end this agreement

- (i) We can end this agreement if you do not keep to your responsibilities.....
- (ii) We can end this agreement if we believe you are unlikely to win.....
- (iii) We can end this agreement if you reject our opinion about making a settlement with your opponent.....
- (iv) We can end this agreement if you do not pay your insurance premium when asked to do so....."

7. On 24 April 2014 Secure Law issued proceedings on behalf of the claimant. In about October or November 2015, Secure Law decided to close their department. In a letter to the claimant and other clients, they wrote as follows (tab 12, page 44 of the appeal bundle):

“Dear Sirs

Re: Your Personal Injury Claim

I am writing to inform you of some changes which are occurring within Secure Law.

As a result of ongoing discussions with another law firm, we are in the process of restructuring our personal injury and clinical negligence teams.

This will mean all of our files will be transferred to another firm of solicitors specialising in personal injury and clinical negligence.

We propose to transfer your claim to Lime - The Personal Injury Company (part of Shakespeare Martineau LLP) who will be in touch with you very shortly.

Lime - The Personal Injury Company has over 50 years' experience of dealing with personal injury and medical negligence work on behalf of Claimants. Several of their team are members of the Association of Personal Injury Lawyers as well as being members of the Law Society's Personal Injury and Clinical Negligence Panel.

Lime - The Personal Injury Company will continue to act on your behalf and will represent you on the same basis as was agreed by Secure Law.

Should you not wish Lime - The Personal Injury Company to carry on with your case, then you of course have the right to instruct a Solicitor of your choice. However I am confident that you will be very pleased with the service they offer. If you do not write to us before 5pm on Thursday 5th November 2015 notifying us who you wish your case to be transferred to, you shall be deemed to have given us your consent to transfer your case to Lime - The Personal Injury Company on 6th November 2015. Any written notice from you must be addressed to Mr Bob Harvey at Secure Law Limited, First Floor Unit 2A, Oaktree Court, Mulberry Drive, Cardiff Gate Business Park, Pontprennau, Cardiff CF23 8RS.

You will shortly receive a letter from Lime - The Personal Injury Company indicating who will now be acting for you on a personal basis.

We are grateful for your instructions in this matter and wish you every success in working with Lime - The Personal Injury Company to bring to a successful conclusion as soon as is possible.

Yours sincerely

For and on behalf of Secure Law”

8. On 10 November 2015 Lime wrote to the claimant (tab 12, page 40 of the appeal bundle):

“Dear Mrs Roman

Your Claim for Personal Injury

I enclose a copy of a letter directed to you from your previous solicitors, Secure Law Limited, confirming that they are unable to continue to act for you in respect of your claim, and that your file of papers has been passed to us at Lime Personal Injury.

I am delighted to have the opportunity to pursue your claim for you. Please note, however, that you are under no obligation to instruct this firm, but I hope that you will choose to do so.

Lime Personal Injury is a trading name of Shakespeare Martineau LLP and we have been defending the rights of people involved in personal injury and medical negligence claims for over 50 years.

I have instructed our agents, Clear Visits Limited, to visit you to go through the documents that we need you to sign in order that we can progress your claim further. The documents referred to in this letter will be given to you during your appointment with the representative.

I can assure you that we will continue to act on a No Win - No Fee basis and our agreement with you will be on the same terms that you had with Secure Law Limited. Financially the outcome will be exactly the same.

Our Instructions

I confirm that I am Associate Solicitor and Team Leader of Lime Personal Injury. The Supervising Partner with overall responsibility in this matter is Mrs Kathryn Hart. Once your signed Conditional Fee Agreement (CFA) has been received from you, I will write to you with a comprehensive update in respect of your claim.

Your Agreement with Lime Personal Injury

I am pleased to confirm that this firm is prepared to pursue your claim on a Conditional Fee Agreement (CFA) - often known as the 'No Win - No Fee Scheme'.

Obviously we believe that your claim will be successful. However, not all claims do succeed and should you lose, in some cases you can be ordered to pay the other side's costs. We will also have to pay disbursements such as expert report fees and Court fees. I understand that Secure Law Limited have taken out a policy of insurance to protect you against paying those fees. I will seek to have that policy transferred to this firm once I have received your signed CFA. I will then advise you further in that regard.

Documents for your Information

Copy letter from Secure Law Limited

Our Terms of Business

Conditional Fee Agreement (the agents will bring this) .”

9. On 11 November 2015 the claimant signed a copy of the letter to her from Lime indicating that she accepted the terms set out in Lime's letter to her. On the same date, 11 November 2015, notice of change of solicitors was filed with the Court. On 17 November 2015 the defendant made a Part 36 offer of £22,500 which was accepted by the claimant, the defendant therefore having to pay the claimant's standard basis costs under the deemed costs provisions applying under CPR Part 36.
10. On 25 February 2016 proceedings for detailed assessment were commenced under CPR 47.6. The parties were unable to reach agreement as to costs, and on 4 May 2016 the claimant applied to the County Court at Kingston-upon-Thames for provisional assessment of her bill under CPR 47.15. On 11 May 2016 the matter was transferred to the Senior Courts Costs Office. On 15 September 2016 Deputy Master Campbell completed the provisional assessment, rejecting the defendant's argument that having chosen not to continue with the claim for the claimant they were not entitled to be paid. The defendant sought a reconsideration of this point at an oral hearing in accordance with CPR 47.15(7), the hearing taking place on 1 November 2016 and resulting in judgment being handed down on 7 February 2017.

The decision of the Deputy Master

11. The Deputy Master upheld his provisional assessment, finding that the claimant had elected to treat the conditional fee agreement with Secure Law as continuing by instructing Lime on the same terms as Secure Law and that when the claimant won the claim by agreeing damages with the defendant Secure Law became entitled to payment under the conditional fee agreement with Secure Law. At paragraphs 18 and 19 of his judgment, the Deputy Master said this (tab 9, pages 31-32 of the appeal bundle):

“Decision

18 As I indicated at the conclusion of the argument, I accept Mr Mallalieu's submissions. Whilst Ms Culley is right in that Secure Law did not fulfil its part of the contract by seeing the litigation through to the end, that is not without more sufficient to disentitle the firm to its costs. It is necessary to consider what happened to the contractual obligation. It was this. Mrs Roman was offered and she accepted that Lime would complete the work on her behalf in place of Secure Law. There was no requirement or obligation upon her that she should do so. On the contrary, she could have said 'I do not want to instruct Lime', in which case I would have agreed with Ms Culley that upon the application of Underwood, she would have been relieved of her obligation to pay any fees to Secure Law because the firm had terminated the agreement, other than in a manner permitted by the CFA before a 'win' had been achieved. But that is not what happened. As Chitty on Contracts 24-001/2 explains (see Mr Mallalieu's skeleton argument at 13), not every breach of contract has the effect of 'discharge by breach'. The contract is not rescinded *ab initio* not is it extinguished by the breach. Whilst the innocent party, or in some cases both parties, can be excused from further performance of their primary obligations under the contract, the innocent party is not ordinarily bound to treat himself as discharged. If the contract is still executory, he may elect instead to treat it as continuing - 'An innocent party, faced by a repudiatory breach is therefore given a choice: he can either treat the contract as continuing ('affirmation of the contract') or he can bring it to an end ('acceptance of the repudiation'). He must 'elect' or choose between these options'.

19 In my judgment, that is what happened here. Mrs Roman elected to treat the contract as continuing, with the work to be done by Lime on the same terms as those upon which its predecessors were acting, and when the 'win' was achieved upon her acceptance of the Part 36 offer, the entitlement to payment was triggered under the CFA. It follows that I have not been persuaded that a liability to pay Secure Law's costs ceased to exist when the firm ended the CFA. For that reason this review, under CPR 47.15(7), fails."

The case of *Budana*

12. The hearing of the defendant's appeal against the decision of the Deputy Master was, in effect, put back until after the decision of the Court of Appeal in *Budana v Leeds Teaching Hospitals NHS Trust (Law Society intervening)* [2018] 1 WLR 1965. That was a claim for damages for personal injuries where the claimant, Ms Budana, retained solicitors under a conditional fee agreement with a 100% success fee where she was subsequently advised to transfer her case to a larger specialist firm, the original firm that she instructed having decided that personal injury litigation was no longer viable for them. They wrote to Ms Budana explaining their decision that they

had put in place a process to transfer her case to a new firm of solicitors who were specialists in personal injury litigation and who would continue to act for her on the same no win, no fee agreement that Ms Budana had with them, and that they would automatically transfer the case to the new firm unless she instructed them otherwise.

13. However, matters did not end there. The original firm of solicitors entered into an agreement with the new firm for the sale to and purchase by the new firm of the original firm's book of personal injury business; the two firms entered into a master deed of assignment for the transfer by the original firm to the new firm of cases listed in a schedule which included Ms Budana's claim; and she entered into a second deed with the new firm under which she ratified the master deed and agreed to the transfer of the rights and obligations under the original conditional fee agreement with the first firm to the new firm.
14. The claim settled. On the detailed assessment of costs, the claimant Ms Budana, contended that the new firm continued to act for her under the original conditional fee agreement with the first firm of solicitors and with its 100% success fee. The defendant argued that Ms Budana could only recover her base costs under the later conditional fee agreement with the new firm since the original fee agreement had been terminated and that, even if it had survived, the original conditional fee agreement could not have been transferred to the new firm but instead had been novated.
15. The District Judge refused to allow the success fee, finding that the original conditional fee agreement had been terminated. The Court of Appeal held that the conditional fee agreement had not been terminated, but that the deed of assignment and letter of instruction to the new firm whereby Ms Budana had agreed to the transfer of the first firm's rights and obligations, including those under the conditional fee agreement providing for a success fee to the second firm, constituted a new contract between the claimant and the second firm involving the discharge of the first firm from all obligations under the original conditional fee agreement and the consent of Ms Budana to the new firm assuming such obligations, with the result that the original conditional fee agreement had been novated, and that the novation of the original conditional fee agreement did not prevent the recovery of the success fee.
16. Gloster LJ dealt with the issue of termination of the original conditional fee agreement with the first firm of solicitors in paragraphs 37-41 of the judgment at page 1982 of the report:

“Issue (1): Termination:

37. I can deal with this issue shortly since in my judgment it is clear that the BR CFA was not terminated by BR's conduct, and that the judge erred in law in reaching the contrary conclusion.

38. As the claimant submitted, neither the 22 March letter nor any (purported or actual) transfer of the BR CFA could amount to a termination of the contract without

the claimant having elected to treat the contract as terminated. It is trite law that a repudiatory breach by one party cannot unilaterally terminate the contract. Instead, the innocent party may elect between termination and affirmation of the contract. Unless and until the innocent party terminates the contract, it subsists. This basic proposition of contract law has been recently reaffirmed in *Geys v Société Générale, London Branch* [2013] 1 AC 523.

39. Accordingly, in my judgment, the BR CFA undoubtedly subsisted after the 22 March 2013 letter, the Master Deed and the second deed – even assuming (without deciding) that these individually or collectively amounted to a repudiatory breach of contract. Even if BR had indeed wished to end the contract, or their obligations thereunder, they could not, in the particular circumstances of the case, do so unilaterally.
40. Moreover, in my judgment the claimant did not terminate the contract but instead affirmed it by the second deed and her conduct more generally. On the instant facts, which are not in dispute, the terms of the documentation clearly show that the claimant did not elect to terminate her contract with BR, but instead decided to preserve and, to use a neutral word, transfer it. Of course, that per se is not determinative of whether that transfer must be characterised as a novation, which would involve a discharge of the original contract. But, on these facts, it is sufficient to determine that the claimant did not terminate the contract in response to such repudiatory breach, if any, as there might have been by BR.
41. The BR CFA therefore survived and BR remained entitled to payment, if it fulfilled its entire obligations under the contract. The defendant (rightly) did not submit that, even if the contract was affirmed and was fully performed, the breach would itself amount to a failure to fulfil BR's entire obligations under the contract.”

The Present Case

17. The main point in this appeal is whether the Deputy Master was right in finding that the claimant, Mrs Roman, elected to treat the conditional fee agreement with Secure Law as continuing with the work to be done by Lime on the same terms as the original fee agreement with Secure Law. The defendant says that in this case the original conditional fee agreement was terminated by Secure Law's conduct in no longer being willing to act for the claimant and by the claimant accepting that

repudiatory conduct by entering into a new conditional fee agreement with Lime. The defendant says that unlike *Budana*, the original conditional fee agreement did not remain in place following the claimant's instruction of the new firm.

18. The letter from Secure Law to the claimant proposed transferring the claimant's claim to Lime, and that Lime would continue to act on her behalf and represent her "on the same basis as was agreed by Secure Law". The letter from Lime to the claimant dated 10 November 2015, and which she signed on 11 November 2015, enclosed the copy letter from Secure Law. That letter indicated that Lime's agents, Clear Visits Limited, would be visiting the claimant to go through the documents that the claimant would have to sign, those documents including a new conditional fee agreement with Lime which the agents would bring with them on their visit. The letter from Lime assured the claimant that they would continue to act on a no win, no fee basis and that their agreement with the claimant would be "on the same terms that you had with Secure Law Limited. Financially the outcome will be exactly the same".
19. There are a number of points to be made:
 - i) The conditional fee agreement entered into by the claimant with Secure Law was clearly on the authorities an entire contract and was accepted to be an entire contract by the claimant.
 - ii) The letter from Secure Law sought to terminate the conditional fee agreement entered into by the claimant with Secure Law because Secure Law's relevant department ceased to exist with the restructuring of their personal injury and clinical negligence teams. That was not a permitted circumstance for ending the conditional fee agreement under the Law Society document 'What You Need to Know About a CFA' so as to entitle Secure Law to payment. The letter from Secure Law to the claimant was a repudiatory breach of the conditional fee agreement entered into by the claimant with Secure Law.
 - iii) The letter from Secure Law to the claimant indicated that Lime's agreement with the claimant would be "on the same basis as was agreed by Secure Law", while the letter from Lime to the claimant stated that their agreement with the claimant would be "on the same terms that you had with Secure Law Limited". Neither letter suggested that the conditional fee agreement entered into by the claimant with Secure Law would continue if the claimant's case was transferred to Lime. On the contrary, the letter from Lime to the claimant made it clear that she would have to enter into a new conditional fee agreement with Lime before they could act for her.
 - iv) The claimant accepted the repudiatory breach of the conditional fee agreement entered into with Secure Law by proceeding to instruct Lime and entering into a new conditional fee agreement with Lime.
 - v) Unlike in *Budana*, the parties did not take any steps with a view to the conditional fee agreement entered into by the claimant with the first firm Secure Law continuing to subsist. There was no affirmation by the claimant of the conditional fee agreement with Secure Law, as there was in *Budana* by the second deed in that case and Ms Budana's conduct more generally. As Gloster LJ said, the terms of the documentation in *Budana* clearly showed that Ms

Budana did not elect to terminate her contract with the first firm of solicitors but instead decided to preserve and transfer it. That is not the position in the present case.

20. In my judgment, the Deputy Master was wrong to find that the claimant, Mrs Roman, elected to affirm the conditional fee agreement with Secure Law or that the claimant affirmed the conditional fee agreement by continuing with the claim with Lime on the same terms. The original conditional fee agreement with Secure Law did not continue to subsist.
21. As to the respondent's notice and the additional grounds relied on by the claimant for upholding the decision of the Deputy Master, these can be dealt with shortly:
 - i) There was no waiver by the claimant of the right to treat the conditional fee agreement with Secure Law as terminated. The claimant accepted the repudiatory breach of the conditional fee agreement with Secure Law by instructing Lime and entering into a new conditional fee agreement with Lime.
 - ii) The claimant did not accept the partial performance by Secure Law and her liability to pay for such partial performance. It was an entire contract. There was no term in the conditional fee agreement with Secure Law entitling them to payment for partial performance.
 - iii) The case of *Budana* did not find that there was an implied term in the conditional fee agreement in that case that it could be terminated for good reason, with the solicitors to be entitled to payment. There is a much more limited right of termination on the part of solicitors in the Law Society document 'What You Need to Know About a CFA', where the solicitors are still to be entitled to payment. Further, as the defendant says, the reason that Secure Law chose to end their conditional fee agreement with the claimant had nothing to do with the conditional fee agreement or the claim, it being a commercial decision by Secure Law to close the department.

Conclusion

22. In the result, I would allow the defendant's appeal. I will hear from the parties as to the appropriate form the order should take, and as to costs.

This transcript has been approved by HHJ Wulwik