IN THE COUNTY COURT AT CENTRAL LONDON Claim No: C01RM690

B E T W E E N

Mr Giles Bark-Jones

Claimant

and

Mr Andrew Lynch

Defendant

Recorder Lambert KC

Monday 17 and Tuesday 18 February 2025

Upon hearing Mr McGuiness of Counsel for the Claimant and Mr Currie of Counsel for the Defendant, and

Upon the Claimant's Application dated 20 April 2023 for enforcement of a Tomlin Order and the Claimant's Application dated 20 December 2024 in the alternative for summary judgment,

Introduction

1. This is the hearing of 2 Applications on behalf of the Claimant, the first for enforcement of a Tomlin Order and the second, in the alternative, for summary judgment on the claim, based on the admission in writing of an agreed debt as set out in the Schedule to the Tomlin.

2. It is helpful to set out here in full right at the outset the contents of the confidential Schedule to the Tomlin, which provides as follows,

"*The parties have agreed to the following terms of settlement as recorded in this Agreement:*

1. *The Defendant owes to the Claimant the sum of £204,322.66 ("the Debt "). This sum is agreed by the parties as overpaid to the Defendant net of tax by the Claimant.*

2. *In discharge of the Debt the Defendant undertakes to introduce legal work to the Claimant's firm Bark & Co ("the Firm"). Such work shall be work in respect of the core legal areas of the Firm, namely:*

   *2.1 Criminal Fraud*
   *2.2 White Collar Crime*
   *2.3 Money Laundering: and*
   *2.4 Civil Fraud*

3. *For the purposes of clause 2 in particular and of this Agreement in general the Firm may accept work in other areas at its absolute discretion. The Claimant may also reasonably refuse to accept work at its discretion.*

4. *The value of the work, measured as actual billed and received funds as profit costs (exclusive of VAT), shall be no less than two times the amount of the Debt namely £408,645.32.*

   *4.1 the work shall be introduced within a period of five calendar years from the date of the Tomlin Order which refers to this Agreement.*
   *4.2 20% of this work (namely 20% of £408,645.32 which is £81,729.06) shall be introduced within the first 18 months of this Agreement.*
   *4.3 If 408,645.32 is received in actual bill and received funds as profit cost s (exclusive of VAT) within the first 18 months of this agreement, 10% (£40,864.53) shall be payable to the Defendant.*

   *4.4 in relation to any sums received by the Firm as a result of work introduced by the Defendant pursued to this agreement, and where the value of the work (as defined in clause 4) exceeds £480 645.32, the Claimant shall pay to the Defendant a commission of 10% of the value of the work.*

5. *If at the end of five calendar years from the date of the Tomlin Order the Defendant has not fulfilled his obligations under this Agreement, the balance of any unsatisfied part of the Debt (being the Debt less one half of actual received funds for profit costs arising from work introduced by the Defendant pursuant to clause 2) shall fall immediately due as a contractual debt owed by the Defendant to the Claimant and the Claimant shall be entitled to exercise all available legal remedies, including (but not limited to) applying to the Court under claim number C01RM690 to enforce the said debt.*

6. *The Defendant shall be liable on an indemnity basis for all costs incurred in obtaining judgement and enforcing the debt (or any part thereof), should this be so required.*

7. *Both parties agree that any issues and/or disputes arising out of the Claim herein are settled by this Tomlin Order and Agreement.*

8. *If the Claimant ceases to trade as a firm of solicitors during the course of the Agreement then the Claimant will nominate a firm to which legal work shall be introduced. For this purpose, and generally meaning whether or not the Claimant ceases to trade as a firm of solicitors, the Claimant has an absolute right to assign this Agreement to any party who is a solicitor or firm of solicitor.*

9. *In the event of the death of the Defendant during the course of this agreement, the Claimant shall have no call on the estate of the Defendant.*

10. *In relation to the entirety of this Agreement, the parties owe each other a duty of utmost good faith.*

3. The Agreement was signed by the Defendant personally on 16 November 2017 and by the Defendant personally on 22 November 2017. It is dated 22 November 2017 and was approved on 4 December 2017 by HHJ Luba KC, who stayed the proceedings on those terms.

4. The Defendant now opposes both of the Claimant's Applications, pointing out that the Agreement contained in the Tomlin Schedule is unenforceable for

   (i) Illegality and/or

   (ii) Is contrary to public policy.

   because in providing for the Defendant to discharge the debt he owes by introducing to the Claimant criminal litigation work, thereby enabling the Claimant in effect to receive the funds owed to it by way of profit costs billed and received from business brought in by the Defendant, Clauses 2 to 4 of the Agreement offend the SRA's Code of Conduct (both in the form it existed in 2017 and to date), which prohibits the payment of referral fees or any form of consideration to an introducer in respect pf clients who are the subject of criminal proceedings.

5. The Defendant argues that the application of the "blue pencil test" cannot save the Agreement.

6. In respect of the assertion of an admission entitling the Claimant to the entry of summary judgment on a claim for the debt, the Defendant says that Clause 1 of the Agreement cannot be treated as an admission capable of founding the right to enter judgment.

7. The Defendant's position is that there remains a contested set of proceedings between the parties. He seeks the giving of directions for the trial.

8. For completeness, the Claimant has also addressed the Court as to whether, if Clause 1 is an admission, the Defendant should be allowed to resile from it. As part of any such consideration, all of the circumstances of the case, including the factors in CPR 14.5, (a) to (g), would fall to be considered, and accordingly I shall now set out the background to the instant Applications.

Background

9. The Claimant is a solicitor and the sole principal of Bark & Co, a firm of solicitors in the City. The Defendant was an employee of the Claimant, employed in the role of Tax Senior Manager, from 1 March 2009 until 1 April 2016, when his employment was terminated by dismissal.

10. Initially the Defendant was employed as a fee earner, specialising in VAT tribunal work. His role evolved thereafter into what I shall call "rain making", that is, attracting new business to the Firm.

11. The Defendant was on a salary of £80,000 per annum plus a bonus. The Defendant was provided with a company credit card and 2 company cars.

12. By proceedings issued in 2016, the underlying original Claim by the Claimant against the Defendant was for breach of contract, breach of fiduciary duty and/or for restitutionary or equitable relief arising out of allegations of (i) bonus payments paid in error; (ii) misuse of the company credit card (iii) acceptance of a secret commission and professional breaches by way breaches of legal professional privilege / breach of contract / non disclosures.

13. By re-amended Particulars of Claim dated 19.1.2017 the total sum sought was £415,362.19.

Procedural History

14. Proceedings were originally commenced between the parties in 2016 out of the Romford County Court. They were then transferred to the Southend County Court by Order of DJ Kemp of 29 June 2016. Next the Claim was, by Order of DJ Ashworth dated 21 October 2016, stayed until 11 November 2016 to enable the parties to attempt settlement.

15. On 23 February 2017 the Defendant filed his Defence. In respect of that Defence, on 6 March 20147 the Claimant filed a Part 18 Request. That Request was never answered.

16. By Order dated 6 June 2017 Dep DJ Cooksley, recording that it appeared to the court that the parties and "*the ten or so proposed witnesses*" were all based in London, transferred the matter to Central London.

17. On 31 July 2017 the Court ordered the Defendant to answer the Claimant's Part 18 Request. That he did not do so is apparent from the next court Order, dated 15 September 2017 and being a costs and case management order of Deputy District Judge Hull, who by paragraph 1 of that Order directed that "*Unless by 4pm on Tuesday 12 September 2017 the Defendant do comply with the court order dated 31 July 2017 in respect of the Claimant's CPR Part 18 Request, his Amended Defence be struck out without further order*".

18. The trial of the matter was listed for 5 days in a window between Monday 8 April 2018 and Tuesday 31 July 2018. By costs management order the Claimant's costs were approved in the sum of £133,270.

19. No further active steps in the litigation timetable were met, and the Claimant points to the failures to answer its Part 18 Request, or to take any further steps by way of disclosure or preparation and service of witness evidence, as indicative of the Defendant never having had any active actual intention of proceeding with his Defence to the Claim.

20. The claim instead settled in November 2017 upon terms contained in the schedule to a Tomlin Order, being stayed upon those terms in the usual way by Order of HHJ Luba KC dated 4 December 2017.

21. On 21 December 2018 the Claimant wrote to the Defendant pointing out that the Claimant's firm had yet to receive any referrals from him and alerting him to the fact that the Claimant would use the permission to apply provision to return the matter to Court in the event of future breach.

22. The Defendant replied by email dated 3 January 2019 that he had referred to the Claimant one "*Paul Muldoon, a defendant in a significant multi handed white collar fraud trial. Your firm declined to act stating that you were already defending in that case"*. The Claimant responded to that email on 29 January 2019 as follows, "*You did not refer the case of Muldoon on a number of fronts. First, you knew full well that we already had two Co-Defendants in the same case and were conflicted from acting. Secondly, Mr Muldoon was not your client to refer and was never within your gift. Mr Muldoon was at all material times represented by Mr Jim O'Keefe and continues to be represented by Mr O'Keefe".*

23. The Defendant objected to the content of that email by his own email reply of 3 March 2019. He did however acknowledge the conflict that had come to light, and it is common ground between the parties that the Claimant did not receive any "*actual billed and received funds as profit costs"* work from Mr Muldoon.

24. On 3 November 2021 the Claimant wrote again to the Defendant stating that "*We are approaching the 4 year stage and you still have not referred us any cases as per the Agreement"* and making clear that they intended to fully enforce their rights at the end of the 5 year period. They received no response to that letter.

25. The Defendant made no payments during the period of 4 December 2017 to 4 December 2022. Nor did he refer in any clients who translated into fee producing work.

Application on the Tomlin

26. Against that history, on 20 April 2023 the Claimant issued its application "*to enforce a Debt owed pursuant to a Tomlin Order approved by HHJ Luba QC on 4 December 2017 by way of: (1) judgment for 3204,322.66; (2) simple interest at 8% per annum from 5 December 2022: (3) interim charging order on the property of the Defendant: (4) indemnity costs*".

27. It appears that the Court failed to serve that Application, and the Claimant, after correspondence with the Court dated 24 August 2023, on 22 November 2023 effected personal service of the Application on the Defendant and also on his wife in respect of the charging order, by process server, the Certificates of Service being filed. (The Claimant does not proceed with the Application for a charging order at this time.)

28. The Application was then listed for hearing on 6 December 2024.

29. Two days prior to the listed hearing, the Defendant, by email of 4 December 2024, for the first time raised objection to the Application, and stated that instead of the Defendant proceeding, "*In the first instance, I would hope that we can reach some sort of compromise that avoids the need to re-ignite this litigation. But, conscious that there is a hearing on Friday, and on the assumption that we will not have a compromise in place by then, I would suggest that (for the reasons set out above), the best the court could do with the hearing is give directions to try out the issues in our old pleaded case".*

Application pursuant to CPR 24

30. At the hearing on 6 December 2024 HHJ Baucher gave Directions for the further management of the Application dated 20 April 2023, and also, in light of the Defendant's objections to the Application, in respect of any further or alternative CPR Part 24 Application that the Defendant may issue.

31. The Defendant then issued its Summary Judgment Application on 20 December 2024 on the following basis, "the Claimant relies upon the admission at clause 1 of the Tomlin Order dated 4 December 2017 that the Defendant owes to the Claimant the sum of £204,322.66 ("the Debt")".

Witness evidence

32. In support of his Applications the Claimant relies upon a witness statement dated 20 December 2024. He says as follows, "*The Defendant Mr Lynch now seeks to challenge the Agreement as unenforceable in particular as to clauses 2, 3 and 4. This position was first communicated on 4 December 2024. This is an entirely academic argument because no work was ever referred or accepted pursuant to the disputed clauses. On our side we never thought those clauses were enforceable by either party, nor was any application made to enforce any of those clauses*".

33. On behalf of the Defendant it is suggested that the final sentence reproduced above is somehow indicative of bad faith, misrepresentation, or an animus of leading the Defendant into an arrangement it was known he would not be able to fulfil. I reject those submissions. Prior to the Defendant's objection to the arrangement communicated by email of 4 December 2024 the parties had both treated the Agreement as in operation. Although in the years following it the Defendant did not fulfil the undertaking made to the Claimant to take steps to discharge his debt by the introduction of clients who translated into any billed and received profit cost producing work, the Defendant himself had made no move to object to the terms of the Agreement, nor to set them aside, nor to re-open the historic litigation and advance a defence. The Claimant continued even at the date of the hearing to acknowledge through counsel that any credits due would have been and indeed in future would still be given. I accept that whatever the legal position of Clauses 2 to 4, the Claimant had genuinely considered them to be a valid means whereby the Defendant could discharge the debt, and which would have been accepted as good discharge had they been operated.

34. I have, in addition to the witness statement in support of the Claimant's Part 24 Application dated 20 December 2024, also received the Defendant's witness statement dated 24 January 2025 in response, and a second witness statement of the Claimant dated 31 January 2025 which replies.

35. The Defendant by his statement accepts that he has not referred to the Claimant any criminal client in respect of whom work has been billed and/or paid. In respect of civil work he says that he chose not to, "*I felt unable to refer any non-criminal work (which is permitted) to the Claimant as I was not satisfied that the Claimant firm had the expertise or experience to act in the best interests of the clients".*

36. The Defendant also appears potentially now also to be trying to go behind the Tomlin on grounds of duress or improper pressure, as follows "*This Tomlin order was signed by myself at a time of great stress and uncertainty stemming from my exit from the firm and the various events which ensued. I maintain that I don't owe Bark & Co any money, in fact quite the contrary, however I was not in any position to counter the claims made against me and the Claimant knew this forcing my hand into agreeing the terms of the Tomlin Order*".

Discussion

37. A Tomlin Order is a form of consent order, named after Tomlin J and in respect of a Practice Note issued in 1927. It is a form of consent order which avoids the entering of judgment.

38. The Order of HHJ Luba KC stays the proceedings on agreed terms contained in the the Schedule. The Schedule recording the terms of settlement agreed between the parties amounts to a binding contract (unless void). The contract set out in the second part cannot be directly enforced as an order of the court but requires an application to carry the terms into effect in the case of breach, ie failure to pay the agreed sum of £204,322.66.

39. Clause 1 of the Agreement is hence a contractual term.

40. It is on its face Clause 1 is also a clear and unequivocal admission in writing. I remind myself that the Defendant has signed the following statements

"*The Defendant owes to the Claimant the sum of £204,322.66 ("the Debt "). This sum is agreed by the parties as overpaid to the Defendant net of tax by the Claimant."*

41. Undoubtedly Clauses 2.1, 2.2 and 2.3 are on their face void for illegality and/or are contrary to public policy. I have no difficulty in so finding. The Claimant however argues that loss of those clauses themselves does not undermine Clause 2 as a whole, nor Clauses 2 to 4 as a group, nor the entire Agreement as a whole. Clause 2 it is said, can be saved by the application of the "blue pencil test", alternatively that if it cannot, even if Clauses 2 to 4 are struck down, Clauses 1 and 5 survive independently. The Defendant on the other hand argues that Clauses 2 to 4 inclusive must fall, and that without them there is then no trigger of any failed obligation to cause Clause 5 to bite in respect of Clause 1, with the practical effect that no sums are due.

42. The blue pencil test is a structured approach to severance. A three-part test applies to sever parts of a contract:

1. Can the illegal provision be removed without modifying the words of the remaining terms? If it still makes sense, the illegal provision can be removed.
2. The remaining terms following the application of the "blue pencil" must be supported by consideration.
3. Following the blue pencilling of the illegal parts, the contract must continue to be the same sort of contract that the parties entered into in the first place.

43. In my judgment it would here be eminently possible, and entirely straightforward to strike through subparagraphs 2.1, 2.2 and 2.3 of Clause 2, leaving 2.4, and thereby saving both Clause 2 and the remainder of the Agreement without modification of any of the other terms. Consideration would still be present, on both sides. The more difficult question is whether not the contract would continue to be still the same "sort of contract that the

parties entered into" ( see *Francotyp-Postalia Ltd v Whitehead [2011] EWHC 367 (Ch).*

44. Would the removal of reference to criminal proceedings, while leaving in the ability to discharge the debt by the referral of work in the arena of civil fraud, change the character of the contract so as to be of a different character? I find that it would not. The contract would remain what it is, that is, an agreement that a debt is owed, but that the debt can be discharged first and to the extent that the debtor can achieve it in a period of 5 years, by the introduction of fee paying work in a field in which the debtee practises.

45. Accordingly I find that the Claimant is entitled to succeed on its first Application.

46. However, even were I wrong on that count, I also find that the Claimant is entitled to succeed on its Application for summary judgment.

47. By CPR Part 24.3 the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

48. The Claimant relies on both grounds, stating simply that the Defendant has signed his name in writing to the clear and unequivocal admissions that he has been overpaid and that he owes the Claimant the sum of £204,322.66, which debt he then undertakes to discharge. There is no evidence that any receipt of fees to reduce the balance has been received, and there is nothing to be tried.

49. The Defendant for his part argues that Clause 1 cannot be construed as an independent admission of liability to pay the sum of £204,322.66 for all purposes. It is submitted that that agreement (that the Debt is owed) was only

open to acceptance as, and only valid for, the purposes of settlement, and as part of an entire agreement made up of its constituent parts. It is submitted on his behalf that had the Agreement as a whole not been one whereby discharge of the Debt could at his election be made by the introduction of work, he would not or may not have agreed that he owed £204,322.66.

50. I regard the Defendant's position on this point as untenable. Clause 1 of the Agreement is as clear as could be. There is no ambiguity about it. It is signed by both parties. It was intended to have legal effect. It was submitted to the Court.

51. Clause 1 defines the debt. Clauses 2 onwards define the mechanism for discharge of that admitted debt.

52. Whilst I am invited by Mr Currie to consider that Clause 1 is part of a 'package deal', there is no evidence whatsoever from the Defendant to support such a contention and the Defendant himself has nowhere in his witness adduced evidence to suggest that his acceptance of the debt was conditional or that he did not intend it to bind him.

53. The admitted debt also represented a significant reduction as compared to the Claim sum and as such there was good consideration for its agreement by him.

54. The first issue for determination is whether Clause 1 is an admission to the Debt of £204,322.66. I find without any hesitation that it is.

55. The next question for determination then is whether it is a binding admission. There is no formal Application to withdraw the admission, but the Claimant has been prepared to treat the Defendant's response to its Applications as potentially amounting to such a CPR 14.5 application, and accordingly I will address this broadly, although the Defendant has not filed evidence specifically addressing it.

56. As to (a), the grounds for seeking to withdraw the admission, there are none clearly stated. The Defendant seeks to re-open the underlying litigation, but

says nothing more now than that he entered the admission at a time of great stress. As to (b), whether there is new evidence that was not available when the admission was made, there is not. As to (c), the conduct of the parties, the history set out in full in my judgment above demonstrates in my assessment a tactic of delay, in a pattern of avoidance of the reality of the situation. To date the Defendant has avoided the striking out of his defence to an original claim for in excess of £415,000 by entering the Agreement admitting a debt of less than half of the claimed sum, in the total of £204,322.66. He has then not paid a penny towards it for in excess of 7 years. He has however by the entry of the Tomlin avoided being liable for 5 years' worth of interest on the admitted Debt or any balance of that debt. The Agreement afforded him the opportunity, at his election, to discharge the debt by the referral of fee generating work into the Claimant's firm, rather than by actual payment of any funds from himself. Having failed to refer in any fee generating work, he has then continued to avoid payment of the debt for in excess of a further 2 years from the end of the Agreement period in December 2022, to date. He now seeks to continue to avoid the Debt by the argument that the Agreement contained in the Schedule to the Tomlin is void in totality, or that the legal terms cannot be severed or saved, such that no money is due and the original claim has to be re—opened and litigated, thereby postponing the hearing from December 2024 to the instant hearing and necessitating the issue of the fall-back summary judgment application.

57. Re factor (d), any prejudice to any person if the admission is withdrawn or not permitted to be withdrawn, it is obvious that the Claimant would be prejudiced by yet further deferral of its ability to recover the sums due. I do not find that the Defendant would suffer legitimate prejudice – I have seen nothing by way of any evidence to suggest that he has any defence to the Debt. This is in part because of factor (e), what stage the proceedings have reached, it being the case that the Defendant had not provided disclosure, had prepared no witness evidence, and had not answered the Part 18 Request in relation to his Defence. Had he genuinely wished to seek to pursue his Defence to the litigation or to object to the compromise, one would expect that to have been done sooner than 4 December 2024. The matter was not in any way ready

for trial. There is no basis for me to see that the Defendant had any real prospect of defending.

58. The Debt has accrued. It is payable on demand. It has been demanded. The Defendant has no defence to the Application and there is no reason why the claim should be tried. On the contrary it would be entirely contrary to the interests of the administration of justice and of the overriding objective if at this stage, in excess of 7 years after the matter was compromised and the Debt agreed and admitted, the Defendant were able now to re-activate a Defence which had not proceeded even as far as compliance with an Unless Order to answer a Part 18 Request.

59. There will accordingly be judgment for the Claimant on his Applications.

1. The Defendant shall by 4pm on 21 March 2025 pay to the Claimant the admitted sum of £204,322.66, together with interest thereon at 8% per annum from 5 December 2022 to the date hereof, and continuing until payment.
2. No order on the Claimant's Application (not today pursued) for an interim charging order
3. The Defendant shall pay the Claimant's costs of both Applications, to be subject to detailed assessment if not agreed.