GLOBAL ENERGY HORIZONS CORPORATION [GEHC] v THE WINROS PARTNERSHIP (formerly ROSENBLATT SOLICITORS [RS]) [2020] EWHC B27 (Costs)

Master James has ruled in the SCCO that three Conditional Fee Agreements (CFAs) are unenforceable in a high value commercial case by virtue of contravening Section 58 of the Courts and Legal Services Act 1990.

GEHC are a corporation investing in oil and gas industry technology. A former partner (Mr Gray) misappropriated this technology and a successful claim was brought by GEHC in this regard. However, following a liability trial, RS and GEHC disagreed about the value of the claim with the solicitors relying on expert evidence suggesting the technology was worth approx. $15m but GEHC's view that it was worth $100s millions. Whilst RS were prepared to continue acting, they expressed concerns that with a valuation of $15m, they may not recover sufficient costs, even with the liability judgment already secured.

RS had three CFAs with GEHC, each of which provided for substantial payments, with RS to fund disbursements and act on a no-win, no-fee basis. A costs order in favour of GEHC was made after the liability judgment and after detailed assessment Mr Gray was ordered to pay approx. £2.6m for liability trial costs. Under the CFA, GEHC had the right to insist that RS hand over all of that money to them but RS asked to retain approx. £1.5m. GEHC agreed as they were unaware of their right to all of the money. RS actually retained the entire sum and refused to hand over any to GEHC. GEHC claimed that RS terminated their retainer by refusing to hand over that money.

GEHC issued proceedings under S.70 of the Solicitors' Act 1974 seeking an assessment of invoices rendered by RS to GEHC. The following required preliminary issues decisions:

1. Whether the CFAs were valid or in breach of S.58 of the Courts and Legal Services Act and thereby unenforceable.
2. Was RS entitled to terminate the retainers and more specifically, whether CFA2 was wrongfully terminated, whether CFA3 was entered into as a result of misinterpretation that CFA2 had ended, and whether CFA3 was wrongfully terminated.

Master James observed that CFA1 (dated 08/12/09, retrospective to 30/09/09) was to cover costs of the letter of claim and mediation. It provided for an upfront payment of CAN$315,000 to be retained by RS regardless of a win or lose and would be credited against fees due under the CFA in the case of a "win". The CFA additionally provided for a 100% success fee (95% risk, 5% deferment) and for disbursements to be funded by RS. The intention appeared to be for the advance fee to be used to pay disbursements however, given the limited scope of the CFA, it was unlikely that amount would be needed. Pre-issue proceedings against Mr Gray were unsuccessful which constituted a "loss" under CFA1. A CFA "loss" should mean no fee but RS retained the CAN$315,000 advance.

CFA2 (dated 31/10/10, retrospective to 30/09/09) provided cover for "the claim" and an advance fee of £1m to be retained by RS whether or not success followed. Due to the retrospectivity of CFA2, it covered the same period as CFA1 i.e. during a period when a loss had already incurred.

CFA3 (dated 06/03/13) was intended to cover quantum and provided for a further advance fee of £300,000 again, to be retained by RS regardless of a win or lose. New conditions detrimental to GEHC were included, as well as a 100% success fee (95% risk, 5% deferment).

GEHC asserted that the advance fee clauses created a situation where early settlement would lead to RS receiving and retaining fees that could exceed double the base costs incurred to that point. As such, the success fee, being the difference between the fees which would be billed and work in progress, would be in excess of 100% and that is an express breach of the Courts and Legal Services Act.

Master James held that the CFAs were invalid and thereby unenforceable. The Master found that CFAs were poorly drafted as they stated that the Advance Fee would be credited against future billing but also stated that the Advance Fee would belong to RS, win or lose. Under this arrangement RS would have never rendered a final Bill lower than the amount of the Advance Fee, even if the matter had settled at an early stage where time spent/work done, success fee and disbursements, came to less than the Advance Fee, contrary to the terms of the CFA. This was a reluctant ruling as it is a technical point which the Courts have been wishing to avoid for many years.

The Master commented on the termination point that GEHC were advised that CFA2 had ended and as such, if it was terminated, it was terminated wrongfully and/or CFA3 was entered into as a result of that misinterpretation and was thereby tainted. As to whether CFA3 was wrongfully terminated, Master James held that RS would have been entitled to terminate the retainer by way of invoking the terms of the CFA, thereby being restricted to base costs only under CFA3. The Master did find however, based on the evidence, that in choosing to invoke a repudiatory breach that did not constitute its reason for ceasing to act, that the retainer had been wrongfully terminated.

Conclusion

1. Any possibility that there could be a claim for a success fee in excess of 100% will render your CFA invalid.
2. Re-defining a "loss" as a "win" under a later CFA is likely to serve only instructed solicitors and is also likely to render your CFA unenforceable.
3. Wrongful termination of an existing retainer will "taint" any consequent retainer entered into.

RS have sought permission to appeal.

This briefing is prepared by Malcolm Goodwin and Laura Dear
It is not intended to be an exhaustive statement of the law and should not be relied on as legal advice

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