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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	**Chapter 11**
ARCAPITA BANK B.S.C.(C), et al.,	:	**Case No. 12-11076 (SHL)**
Debtors.	:	**(Jointly Administered)**

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION TO PAY LINKLATERS FEES IN CONNECTION WITH EUROLOG INITIAL PUBLIC OFFERING

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and its affiliated debtors in possession (collectively, the "Debtors") in the above-captioned jointly administered chapter 11 cases hereby submits this objection (the "Objection") to the *Debtors' Motion for Order Confirming the Debtors' Authority to Pay Certain Transaction Expenses Incurred in Connection with the EuroLog Initial Public Offering* [Docket No. 377] (the "Fee Motion"),[1] and in support thereof, respectfully states as follows:

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Fee Motion.

PRELIMINARY STATEMENT

1. The Debtors posit in the Fee Motion that the payment of $2.36 million of Linklaters' fees (the "IPO Fees") they seek authority to fund might be an ordinary course payment that the Debtors could have made even without authorization from this Court. The facts and circumstances belie that assertion and further make clear that not only is the payment not ordinary course, it should not be made by the Debtors at all.

2. While the Debtors emphasize their belief that the proposed EuroLog IPO will maximize the value of the EuroLog Assets on favorable terms for the Debtors' estates, there are actually many stakeholders other than the Debtors that stand to benefit directly from the EuroLog IPO if it goes forward. If permitted to fund the IPO Fees, the Debtors shift any risk associated with the payment of Linklaters' fees from all those parties that would directly benefit from the IPO to the Debtors' creditors.[2] The beneficiaries of the EuroLog IPO include unaffiliated lenders at operating companies and intermediate holding companies that stand to be pre-paid with IPO proceeds, co-investors with meaningful equity ownership positions in the EuroLog Assets (including an approximately 78% equity interest in one of the three asset portfolios to be included in the EuroLog IPO), and Arcapita's management investment vehicle. But only the Debtors are being asked to pay Linklaters' fees at this time. If the fees were paid from the IPO

[2] Notably, the Engagement Letter (defined below) contemplates that on November 12, 2012, Linklaters will invoice for all unbilled time if the EuroLog IPO has not yet been launched. See Engagement Letter ¶ 3.4.1. If the Fee Motion is granted, it is safe to assume that the Debtors will be called upon to fund those fees as well and the Debtors will seek to rely on the approval of the Fee Motion to fund such future payments. If this were to occur, Linklaters will have been paid more than $4.7 million with no value having been received by the Debtors' estates.

proceeds, all beneficiaries would share proportionally in the cost; and all would share in the risk that the IPO does not happen.

3. The payment for which authority is sought is based on an engagement letter (the "Engagement Letter") entered into on July 31, 2012 by Linklaters and the EuroLog Non-Debtors.[3] The Engagement Letter was signed eighteen months after the work is alleged to have begun on the EuroLog IPO transaction. More significantly, the Engagement Letter was signed one week after the Debtors filed the IPO Motion,[4] and one day after the Debtors' internal counsel admonished the Committee's advisors for the Committee's failure to approve the current payment of the IPO Fees that was purportedly required under a longstanding agreement.

4. The Debtors suggest in the Fee Motion that Linklaters "expected" to be paid monthly, however, neither the Debtors nor their affiliates had agreed to pay Linklaters on a monthly basis and eighteen months of prior dealing without any payment

[3] The Debtors refer to these entities as the "EuroLog Non-Debtors" and we borrow this defined term herein, although it is not readily apparent based on the description of the transactions in the IPO Motion and associated term sheets, whether either of these entities has a material role in the EuroLog IPO or why the EuroLog Non-Debtors were chosen to retain Linklaters. In the Fee Motion, the Debtors list a number of tasks that must be completed for the EuroLog IPO to be launched. That list includes many actions to be taken by the EuroLog Subsidiaries (which are different than the EuroLog Non-Debtors), Listco and the Debtors, which will prepare the prospectus for the transaction. In addition, the Debtors claim that "the EuroLog Non-Debtors must prepare the necessary corporate governance documents to establish Listco." Fee Motion at 5. The Debtors do not explain why the EuroLog Non-Debtors were designated as the parties responsible for this task. Perhaps more significantly, in the Fee Motion, the Debtors state that it is the Debtors themselves that are responsible for finalization of the prospectus and related documentation for the EuroLog IPO. See id. Drafting the prospectus and related activities are a major part of the services Linklaters is providing. Id. at 6-7. If Linklaters is indeed rendering services to the *Debtors* in connection with the EuroLog IPO as the Fee Motion suggests, the Debtors must seek to amend the scope of the Linklaters Retention Order and, if approved, Linklaters should seek compensation for its services in accordance with the Bankruptcy Code, Bankruptcy Rules, Local Rules and any applicable orders of this Court.

[4] [Docket No. 350].

ought to have tempered any expectations Linklaters had in that regard. More realistically, this course of dealing conclusively demonstrates that the Debtors, the EuroLog Non-Debtors, and Linklaters never expected Linklaters to be paid monthly but that payment would occur at launch of the EuroLog IPO out of the proceeds of the deal, which is typical in IPO transactions and is exactly what is contemplated in the Engagement Letter, but for the special prepayment requested by Linklaters because of the Debtors' bankruptcy filings.

5. The Engagement Letter is plain in its acknowledgement of the realities of the Debtors' bankruptcy cases. Indeed, the Engagement Letter states that the Debtors' bankruptcy filings "have prompted us [i.e., Linklaters] to revisit the terms of our engagement with you [the EuroLog Non-Debtors]."[5] The Debtors are not, however, parties to the Engagement Letter and are not obligated thereby to pay any portion of the IPO Fees. Notwithstanding the Debtors' bankruptcy cases, Linklaters sought an interim payment ***from the Debtors*** for the work Linklaters was doing under the Engagement Letter with the EuroLog Non-Debtors. Most significantly, however, Linklaters expressly conditioned the obligation to make that payment on the Committee's consent to the payment being made, as follows:

> 3.3 Following the Bankruptcy Filings and the market led delay to the Transaction, we have agreed that it would be appropriate for us to raise an interim invoice with respect to certain of the work we have performed to date in furtherance of the Transaction. We recognise that the settlement of any such invoice will require the sanction of the Bankruptcy Court ***and associated support of the creditor committee formed in connection with the Bankruptcy Filings (the "Creditor Committee").*** Accordingly, you agree to use all reasonable endeavours to

[5] Engagement Letter at 1.

> procure that an interim invoice is presented to the Bankruptcy Court (***with the support of the Creditor Committee***) in order that the Bankruptcy Court is in a position to approve settlement of such invoice as soon as reasonably practicable.[6]

6. The Debtors and the EuroLog Non-Debtors have more than complied with any obligation imposed in the Engagement Letter – they diligently sought the Committee's consent to make an interim payment to Linklaters, which the Committee denied. As such, the Debtors could not present an invoice for payment to the Bankruptcy Court "with the support of the Creditor Committee", which is all Linklaters asked them to do. Linklaters did not demand, nor did the EuroLog Non-Debtors or the Debtors agree, that it would pursue a non-consensual downpayment on Linklaters' fees from the Debtors' limited assets in connection with a transaction that may never provide the Debtors with any value.

7. Notwithstanding this fact, one week after their non-debtor affiliates entered into the Engagement Letter, and in the absence of any contractual obligation requiring them to do so, the Debtors filed the Fee Motion and effectively announced that they had agreed with Linklaters to hold the EuroLog IPO hostage unless the Court authorizes the immediate payment by the Debtors of approximately $2.36 million of IPO Fees.[7] The Court should deny this improper demand.

8. To be clear, denial of the Fee Motion will not mean that Linklaters would be expected to work on the EuroLog IPO for free. Instead, it means Linklaters

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[6] Id. ¶ 3.3 (emphasis added).

[7] See Fee Motion at 3 ("Unless the Debtors are allowed to pay for transaction costs in the form of Linklaters' legal expenses, then the EuroLog IPO cannot proceed. Hence, unless this Motion is granted, the accompanying IPO Motion for permission to launch the EuroLog IPO is superfluous.")

will continue to have recourse against the entities for whom it is performing services, specifically the EuroLog Non-Debtors. As such, Linklaters will have the choice (a) to stop working on the EuroLog IPO, and thereby subject itself to any consequences for terminating the engagement, including under the Solicitors' Regulatory Authority Code of Conduct, which, like the terms of the Engagement Letter itself, prohibits Linklaters from abandoning its client without "good reason"[8] or (b) to continue to work and, as is typical in public offerings, look to the IPO proceeds to provide for payment of its fees. If the IPO does not go forward, Linklaters will still have a claim for payment against the EuroLog Non-Debtors under the Engagement Letter. In addition, the Engagement Letter specifically contemplates that once the issuer referred to as "Listco" has been incorporated, that entity will also retain Linklaters, which would then give Linklaters the comfort that its claim would be able to access the assets that would be involved in the EuroLog IPO, assets which have enough value that the Debtors chose to file the IPO Motion. As discussed above, the only effect of the Debtors' acquiescence to Linklaters' current demand is to shift the risks associated with payment of Linklaters' fees from all

[8] Under English law Linklaters may not be entitled to any payment if it terminates the engagement without good reason. See Richard Buxton (Solicitors) v Mills-Owens & Anor [2010] EWCA Civ 122 (23 Feb. 2010) ("[W]hen a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all necessary steps in it, and to carry it on to the end." "[I]t seems to me that from [the time of Cresswell v Byron (1807) 14 Ves 271] downwards it has been held that a solicitor cannot sue for his costs until his contract has been entirely fulfilled, unless the case is brought within some recognised exception to the general rule.") (quoting Underwood, Son, & Piper v Lewis [1894] 2 QB 306 (7 May 1894)). True and correct copies of the Buxton v. Mills-Owens and Underwood, Son & Piper v Lewis cases are attached hereto as Exhibit A. Given that Linklaters specifically agreed that Committee support was required for any payment by the Debtors, and such support has not been given, we would expect the EuroLog Non-Debtors would argue that any cessation of work was without good reason.

of these entities and the other stakeholders in the EuroLog IPO to the Debtors' unsecured creditors. This unusual and inappropriate arrangement must not be approved.

9. As discussed in more detail below, given the uncertainty regarding the EuroLog IPO and its value to the Debtors, the ethical and contractual obligations of Linklaters to continue to perform its services, and the fact that Linklaters will continue to have recourse to the EuroLog Non-Debtors for the fees they agreed to pay, the Court should not permit the Debtors to make the gratuitous payment solicited in the Fee Motion. Finally, if any payments are to be made to Linklaters by the Debtors, then Linklaters, as estate-retained professionals, should be required to submit a fee application seeking payment, which will be subject to objection and approval by the Court.

BACKGROUND

10. On March 19, 2012 (the "Petition Date"), each of the Debtors, with the exception of Falcon Gas Storage Company, Inc. ("Falcon"), filed with the Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On March 22, 2012, the Court entered an order consolidating the chapter 11 cases for joint administration. On April 20, 2012, Falcon filed with the Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

11. On March 20, 2012, the Debtors filed the *Debtors' Motion for Interim and Final Orders (A) Authorizing Debtors to (I) Continue Existing Cash Management System, Bank Accounts, and Business Forms and (II) Continue Ordinary Course Intercompany Transactions; and (B) Granting an Extension of Time to Comply with the Requirements of Section 345(b) of the Bankruptcy Code* [Docket No. 12] (the "Cash Management Motion"). The Court has not approved the Cash Management Motion on a final basis, but instead approved on roughly a monthly basis interim budgets

pursuant to which the Debtors are able to fund operating expenses of non-debtor subsidiaries. [Docket Nos. 22, 62, 86, 133, 198, 310, 369]. On numerous occasions throughout these chapter 11 cases, the Debtors' advisors have represented that the Debtors would *not* transfer funds to third parties without first consulting the Committee or seeking authority from the Court. This has been the working understanding between the Debtors and the Committee and has given rise to the monthly budget review and approval process. To date, the Debtors and the Committee have ultimately reached agreement on all proposed funding of non-debtor expenses by the Debtors, other than with respect to payment of the IPO Fees.

12. On May 17, 2012, the Court entered an order (the "Linklaters Retention Order")[9] authorizing the Debtors to employ and retain Linklaters as special counsel to provide certain services, including, but not limited to, advising the Debtors and assisting Gibson, Dunn & Crutcher L.L.P. in relation to issues arising from the impact of the Debtors' chapter 11 cases on their underlying investments in portfolio companies. The Linklaters Retention Order does not specifically contemplate that Linklaters would provide or was providing the Debtors advice related to the EuroLog IPO or that Linklaters would be paid by the Debtors for services rendered to the Debtors' non-debtor affiliates. The Linklaters Retention Order specifically contemplates that Linklaters may render legal services to the Debtors' non-debtor affiliates, but provides that:

> to the extent that Linklaters is acting directly for any non-Debtor affiliates, and except as may be otherwise agreed as appropriate in connection with particular transactions, ***Linklaters will seek compensation for its services and reimbursement of expenses directly from such non-Debtor affiliates, and not from the Debtors or the Debtors' assets***, and such compensation and reimbursement of incurred

[9] [Docket No. 146].

> expenses shall not be subject to approval by the Court pursuant to the Bankruptcy Code, Bankruptcy Rules, Local Rules or any order of the Court; *provided*, *however*, that any amounts sought from a Debtor as compensation for services and reimbursement of expenses in connection with particular transactions shall be subject to approval by the Court pursuant to the Bankruptcy Code, Bankruptcy Rules, Local Rules or any order of the Court."[10]

13. On May 31, 2012, the Debtors announced that they were initiating a process to seek debtor in possession financing to fund, *inter alia*, administrative expenses and deal funding needs.[11]

14. On July 26, 2012, the Debtors filed the IPO Motion requesting authority to enter into any and all agreements and transactions necessary to launch and consummate the EuroLog IPO, subject to final consent from both the Committee and the Joint Provisional Liquidators of Arcapita Investments Holdings Limited.

15. On August 8, 2012, the Committee filed a statement of its views and a reservation of rights with respect to the IPO Motion.[12] Until the Committee has been given an opportunity to properly evaluate the necessary information to determine whether the EuroLog IPO should proceed, the "jury is still out" on whether the EuroLog IPO is a worthwhile transaction. Regardless of the outcome of that evaluation, however, even if the Committee does support the EuroLog IPO as a means to monetize certain portfolio assets that are partially and indirectly owned by the Debtors, it does not follow that the Debtors should commit to fund in the near future all or even a substantial portion of Linklaters' fees, which are obligations of the EuroLog Non-Debtors.

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[10] Linklaters Retention Order ¶ 3 (emphasis added).

[11] Omnibus Hr'g Tr. 13:2-8 (May 31, 2012) [Docket No. 201].

[12] [Docket No. 376].

16. On July 31, 2012, pursuant to the Cash Management Motion, the Debtors filed their proposed budget (the "Budget") for the period from August 5, 2012 through September 8, 2012, to support their request for a seventh interim cash management order.[13] As part of the Budget, the Debtors sought to pay Linklaters $2,355,000 for the IPO Fees. In advance of the August 1, 2012 omnibus hearing, at which the Budget was scheduled to be heard for approval, the Debtors agreed, based on the Committee's objection, to withdraw their request to pay Linklaters for fees incurred in connection with the EuroLog IPO as part of the Budget and file a separate pleading seeking authorization to make such payment.

17. Also at the August 1, 2012 omnibus hearing, the Debtors announced that their cash balance as of July 21, 2012 had dropped to $88.2 million,[14] down from approximately $147 million on the Petition Date.[15]

18. On August 8, 2012, the Debtors filed the Fee Motion. Since the Debtors submitted the Budget, the Committee has negotiated in good faith with the Debtors to consensually resolve the issue of the IPO Fees and the Fee Motion. To date, no agreement has been reached with the Debtors to resolve this objection.

OBJECTION

19. The Committee objects to the Debtors' payment of the IPO Fees as requested in the Fee Motion. First, the Fee Motion represents the Debtors' acquiescence to Linklaters' attempt to bootstrap payment of professional fees that it agreed to receive from two of the Debtors' non-debtor affiliates into a payment obligation of the Debtors,

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13 [Docket No. 356]

14 Omnibus Hr'g Tr. 15:20-21 (Aug. 1, 2012) [Docket No. 378].

15 Omnibus Hr'g Tr. 9:19-21 (Mar. 29, 2012) [Docket No. 55].

under threat of stopping work if its newly fashioned demand is not met. The Court should not countenance this attempt to hold the EuroLog IPO hostage and force payment of the IPO Fees out of fear that Linklaters will cease to provide its services unless its demands are met, particularly from a professional that has been separately retained pursuant to an order of this Court to provide services to the Debtors. Second, the Debtors' proposed payment of the IPO Fees at this juncture is not within the ordinary course of the Debtors' businesses under section 363(c) of the Bankruptcy Code, nor does it constitute an exercise of the Debtors' sound business judgment under section 363(b) of the Bankruptcy Code.

20. Alternatively, even if the Court determines that the Debtors may fund the IPO Fees (which the Committee respectfully submits it should not), under the terms of the Linklaters Retention Order, Linklaters must file fee applications and comply with other procedures before it can be paid from the Debtors' estates.

I. Proposed Payments by Debtors of IPO Fees to Counsel for EuroLog Non-Debtors Should Not be Permitted

21. The Fee Motion and the events preceding its filing demonstrate the lengths to which the Debtors have been willing to go in order to secure privileged treatment for an estate professional with respect to fees incurred by the Debtors' non-debtor affiliates. The Committee understands that over the past eighteen months, Linklaters provided services in connection with the EuroLog IPO without an executed engagement letter or payments of its fees. Notwithstanding the Debtors' suggestion in the Fee Motion that Linklaters "expected" to be paid monthly, neither the Debtors nor their affiliates had agreed to pay Linklaters on a monthly basis and, therefore not surprisingly, eighteen months of work was done by Linklaters without any payment. The course of dealing makes clear that the Debtors, the EuroLog Non-Debtors, and Linklaters

expected Linklaters to be paid at the launch of the EuroLog IPO out of the proceeds of the deal, which is typical in IPO transactions. As the Engagement Letter makes clear, it is only on account of the Debtors' bankruptcy filings that Linklaters sought a special prepayment, a demand with which the Debtors have bent over backwards to comply.[16]

22. By attempting to prepay the IPO Fees before launching the IPO, the Debtors and Linklaters seek to deviate from their long course of dealing and from standard IPO market practice. The Debtors offer no compelling justification for this departure from their prior conduct other than a threat from Linklaters that it will stop working if the Debtors do not make good on an arrangement that Linklaters just negotiated with the EuroLog Non-Debtors.

23. As described above, the Engagement Letter does not obligate the Debtors to make the payment unless the Committee consents. First, Linklaters expressly "recognise[d] that the settlement of any such invoice ***will require*** the sanction of the Bankruptcy Court and associated support of the [Committee]."[17] Next, the obligation imposed in the Engagement Letter is to "procure that an interim invoice is presented to the Bankruptcy Court (with the support of the [Committee]). . ."[18] Because the Committee does not at this time consent to any payment from Debtor assets to Linklaters under the Engagement Letter, no such payment can be demanded by Linklaters or made by the Debtors.

24. Even if payment were required under the terms of the Engagement Letter, which is it is not, this Court should not approve it for payment by the Debtors.

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[16] See Engagement Letter ¶ 2.

[17] Id. ¶ 3.3.

[18] Id.

The Debtors are not parties to the Engagement Letter, and did not obligate themselves to make that payment. Linklaters is simply trying to bootstrap its purported entitlement to payment now against the EuroLog Non-Debtors into immediate and significant payment obligations of the Debtors, which this Court should reject.

II. Debtors' Payment of IPO Fees Is Improper Under 11 U.S.C. §§ 363(c) and 363(b)

a. Payment of the IPO Fees Is Not in the Ordinary Course of the Debtors' Businesses

25. The Debtors assert that they have authority to pay the IPO Fees within the ordinary course of their businesses pursuant to section 363(c) of the Bankruptcy Code. Courts apply two tests when determining whether a transaction is in the "ordinary course of business" under section 363(c) of the Bankruptcy Code: (i) the vertical test, or the "creditor's expectation test," and (ii) the horizontal test, or the "industry-wide test."[19] In order for a transaction to be considered in the "ordinary course of business," it must meet *both* the vertical and the horizontal tests.[20]

26. Courts use a two-step "horizontal" and "vertical" test to determine whether a particular transaction is properly classified as an ordinary course transaction under section 363(c)(1) of the Bankruptcy Code.[21] A transaction satisfies the vertical test when "from the vantage point of a hypothetical creditor . . . the transaction subjects a

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[19] Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne), 114 F.3d 379, 384 (2d. Cir. 1997).

[20] See, e.g., In re Drexel Burnham Lambert Grp., Inc., 157 B.R. 532, 537 (S.D.N.Y. 1993) (referring to the vertical and horizontal tests as a "two-part test"); In re Enron Corp., No. 01-16034 (AJG), 2003 WL 1562202, at *16 (Bankr. S.D.N.Y. Mar. 21, 2003) ("[I]f either dimension of the test is not satisfied, the disputed transaction is not in the ordinary course of business.") (quoting In re Crystal Apparel, Inc., 220 B.R. 816, 831 (Bankr. S.D.N.Y. 1998)).

[21] See Lavigne, 114 F.3d at 384.

creditor to economic risk of a nature different from those he accepted when he decided to extend credit."[22] Under the vertical test, the "touchstone of 'ordinariness'" is the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business.[23] A debtor's prepetition business practices and conduct are the primary focus of the vertical analysis.[24]

27. With respect to the "vertical" test, the Debtors argue that monetizing investments in portfolio companies and investments fits within the Debtors' ordinary course of business and, accordingly, so does paying related expenses.[25] This argument puts the cart before the horse. In the EuroLog IPO Motion, the Debtors do not attempt to argue that the EuroLog IPO itself is within the ordinary course of the Debtors' business. Instead, the Debtors seek authorization under sections 105(a) and 363(b) of the Bankruptcy Code for authorization to launch the EuroLog IPO as supported by the Debtors' business judgment. It is rather peculiar then that the Debtors assert in the Fee Motion that payment of Linklaters' fees is in the ordinary course of the Debtors' business, when the underlying transaction for which the fees were incurred is outside of the ordinary course of the Debtors' businesses.

28. In addition, the Debtors have not demonstrated (or even alleged) that they typically agree to pre-pay the legal fees incurred by affiliates in connection with IPOs of the Debtors' partially owned portfolio investments. The Debtors have not

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22 Id. (quoting Chaney v. Official Comm. of Unsecured Creditors of Crystal Apparel, Inc. (In re Crystal Apparel, Inc.), 207 B.R. 406, 409 (S.D.N.Y. 1997)).

23 Lavigne, 114 F.3d at 384-85.

24 In re Nellson Nutraceutical, Inc., 369 B.R. 787, 797 (Bankr. D. Del. 2007).

25 See Fee Motion ¶ 19 ("Monetizing existing investments and funding new investments is the day-to-day business in which the Debtors engage.")

offered any evidence that such practice is customary for them and failed to meet their burden to establish that the proposed payment satisfies the vertical test. Accordingly, the proposed payment of the IPO Fees is not in the ordinary course of the Debtors' businesses.

29. The Debtors' proposed payment of the IPO Fees also fails the "horizontal" test. A transaction satisfies the "horizontal" test when, "from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry."[26] This test was adopted to "assure that neither the debtor nor the creditor do anything abnormal to gain an advantage over other creditors."[27]

30. The Debtors' request to pay the IPO Fees is also not an ordinary course transaction under the horizontal or "industry-wide" test. The Debtors have not established any custom of even issuers pre-paying legal fees in connection with contemplated public offerings, and the Committee believes the custom is exactly the opposite – the expenses of the issuer in an IPO are typically paid from the proceeds of the issuance. Moreover, the attempt by the Debtors and Linklaters to convert a payment under an agreement with non-debtor affiliates into a payment obligation of the Debtors is abnormal and clearly intended to shift typical IPO deal risk from Linklaters to the Debtors' creditors. Therefore, the proposed payment of the IPO Fees fails the "horizontal" test and the Fee Motion should be denied.

b. Payment of the IPO Fees Is Not Within the Debtors' Sound Business Judgment

31. The Debtors argue that paying the IPO Fees constitutes an exercise

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[26] In re Dana Corp., 358 B.R. 567, 580 (Bankr. S.D.N.Y. 2006) (quoting Crystal Apparel, Inc., 207 B.R. at 409).

[27] In re Econ. Milling Co., 37 B.R. 914, 922 (D.S.C. 1983).

of sound business judgment because the payment will advance the EuroLog IPO, which is in the best interests of the Debtors and their estates. The Debtors' rationale is apparently that Linklaters is demanding immediate payment in order to continue with the transaction, the Debtors believe that pursuing the EuroLog IPO transaction is an exercise of their sound business judgment and, therefore, paying Linklaters whatever it demands in order to facilitate the EuroLog IPO must similarly be in the Debtors' best interests. The Debtors' logic is flawed and applicable case law indicates that the Debtors' decision to seek payment of the IPO Fees is not a sound exercise of business judgment.

32. To determine whether to approve a debtor's proposal to use or sell property of the estate outside of the ordinary course of business under section 363(b) of the Bankruptcy Code, courts apply the "business judgment" test.[28] The business judgment test requires, among other things, due care, good faith, and no abuse of discretion or waste of corporate assets.[29]

33. While the Debtors emphasize the importance of Linklaters' services to the EuroLog IPO transaction, Linklaters' purported leverage in this regard cannot convert the Debtors' off-market and inappropriate fee arrangement into an exercise of sound business judgment.

34. As an initial matter, this entire argument rests on the flawed premise that Linklaters has an entitlement under the Engagement Letter to immediate

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[28] See, e.g., Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d. Cir. 1983) (noting that court must "expressly find from the evidence presented . . . a good business reason to grant such application."); Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 143 (2d. Cir. 1992).

[29] See In re Innkeepers USA Trust, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (citing In re Integrated Res. Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992)); In re Bidermann Indus. USA, Inc., 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997).

payment of some portion of its fees. As discussed above, that is an incorrect reading of the Engagement Letter, which in fact requires an immediate payment only if the Committee consents. As such, Linklaters' demands, and its threats if those demands are not met, ring hollow because it did not negotiate for what the Debtors are now demanding.

35. Moreover, even if Linklaters were entitled to non-consensual payments under the Engagement Letter, the Debtors should not fund them. The EuroLog Non-Debtors (represented by key members of the Debtors' management team) agreed in the Engagement Letter just over one week ago for the EuroLog Non-Debtors to pay amounts to Linklaters that both the EuroLog Non-Debtors and Linklaters were both well aware the EuroLog Non-Debtors do not have the wherewithal to fund. In fact, the Engagement Letter specifically contemplates that the Debtors would be asked to fund all of the IPO Fees even though they will receive only a fraction of the proceeds of the EuroLog IPO. That determination simply does not bear the hallmarks of "due care, good faith, and no abuse of discretion or waste of corporate assets" that an exercise of sound business judgment requires.[30] Accordingly the Court should deny the Fee Motion.

III. If Debtors Fund IPO Fees, Linklaters Retention Order Requires Linklaters to File a Fee Application

36. The Linklaters Retention Order expressly prohibits the sort of bootstrapping of payment obligations from Linklaters' non-debtor representations into Debtor obligations. Specifically, the Linklaters Retention Order provides, in relevant part, that:

> [T]o the extent that Linklaters is acting directly for any

[30] See In re Innkeepers USA Trust, 442 B.R. 227, 231.

> non-Debtor affiliates, and except as may be otherwise agreed as appropriate in connection with particular transactions, ***Linklaters will seek compensation for its services and reimbursement of expenses directly from such non-Debtor affiliates, and not from the Debtors or the Debtors' assets***, and such compensation and reimbursement of incurred expenses shall not be subject to approval by the Court . . . , *provided, however*, that any amounts sought from a Debtor as compensation for services and reimbursement of expenses in connection with particular transactions shall be subject to the approval by the Court pursuant to the Bankruptcy Code, Bankruptcy Rules, Local Rules or any order of the Court.[31]

37. Linklaters agreed in the Linklaters Retention Order not to seek payment from the Debtors for services like those at issue in the Fee Motion. If Linklaters did seek reimbursement for such fees from the Debtors, it agreed that approval of such fees would follow the requirements of the Bankruptcy Code, Bankruptcy Rules, Local Rules or any order of the Court. In other words, the express terms of the Linklaters Retention Order foreclose the approval of the Fee Motion at all, but certainly to the extent that it seeks an end-around the obligations of filing a fee application subject to Court approval and objection from parties in interest.

RESERVATION OF RIGHTS

38. The Committee has requested limited discovery from the Debtors in connection with the Fee Motion. Due to the accelerated briefing schedule, which was shortened even further to permit discussions between the parties, at the time of filing this Objection the Committee has not received documents in response to its discovery requests nor has it yet been able to depose the Debtors' witness in support of the Fee Motion. The Committee expressly reserves all of its rights to raise any further objections or arguments it may have following completion of discovery.

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[31] Linklaters Retention Order ¶ 3 (emphasis added).

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court: (i) sustain this Objection; (ii) deny the Fee Motion; and (iii) grant the Committee such other and further relief as is just.

Dated: New York, New York
August 13, 2012

MILBANK, TWEED, HADLEY & M^c^CLOY LLP

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Exhibit A

A

Court of Appeal

*Richard Buxton (a firm) *v* Mills-Owens (Law Society intervening)

[2010] EWCA Civ 122

B 2010 Feb 9; 23 Sir Mark Potter P, Dyson, Maurice Kay LJJ

Solicitor — Retainer — Termination — Client insisting on advancing points considered unarguable by legal representatives — Solicitor terminating retainer when client refusing to abandon unarguable points — Whether termination capable of being lawful in circumstances other than improper instructions — Whether solicitors lawfully terminating for good reason — Whether entitled to C *payment for all work done — Solicitors' Practice Rules 1990 (as amended), r 12.12*

A firm of solicitors was retained by the client to advise on and prosecute a statutory appeal against the grant of planning permission in relation to a property near his home. The contract of retainer contained a provision entitling the solicitors to terminate the retainer "only for good reason". The client insisted on a challenge to D the planning inspector's decision on the merits, refusing to accept that a challenge could only be made on a legal or procedural error. Failing to persuade the client to allow counsel only to advance the one arguable point of law, the solicitors informed the client that they could not continue to represent him and terminated the retainer. The solicitors submitted their final fee account for assessment. The master held that the solicitors should not have terminated their retainer, but should have carried out the client's instructions even though they were of the view that "such instructions E were doomed to disaster" and that, since they "were retained for the entire business" they were not entitled to recover any costs other than for disbursements. On appeal the judge, sitting with assessors, held that since the solicitors had not been asked to do anything improper they had not been entitled to terminate their retainer and affirmed the order of the master.

On the solicitors' appeal—

Held, allowing the appeal, that at common law a solicitor might terminate his F retainer on reasonable notice and if he had reasonable grounds for so doing, and the retainer contract reflected that position; that the circumstances in which a solicitor might lawfully terminate his retainer were not restricted to those in which he was instructed to do something improper; that it would have been understood by all solicitors as officers of the court that they were under a professional duty not to include in court documents which they had drafted any contention which they did not consider to be properly arguable and not to instruct counsel to advance G contentions which they did not consider to be properly arguable; that, since the client had insisted that grounds be advanced which the solicitors and counsel considered not to be properly arguable, the solicitors had had reasonable grounds for terminating the retainer; and that it followed that, even though they had not completed the entire contract, the solicitors were entitled to be paid their profit costs and disbursements for the work done prior to termination (post, paras 40, 41, 43, 45, 47, 49, 50, 51, 55–56, 57, 58).

H *Per curiam*. If an advocate does not consider a point to be properly arguable he should refuse to argue it. He should not advance a submission but signal to the judge that he thinks it weak or hopeless by using the coded language "I am instructed that" (post, para 45).

Decision of Mackay J [2008] EWHC 1831 (QB); [2008] 6 Costs LR 948 reversed.

The following cases are referred to in the judgment of Dyson LJ:

Geveran Trading Co Ltd v Skevesland [2002] EWCA Civ 1567; [2003] 1 WLR 912; [2003] 1 All ER 1, CA
Underwood, Son & Piper v Lewis [1894] 2 QB 306, CA
Vansandau v Browne (1832) 9 Bing 402

The following additional cases were cited in argument:

Cutter v Powell (1795) 6 Durn & E 320
Perotti v Collyer-Bristow [2003] EWHC 25 (Ch); [2003] WTLR 1473
Sumpter v Hedges [1898] 1 QB 673, CA
Taylor v Laird (1856) 25 LJ Ex 329
Warmingtons v McMurray [1937] 1 All ER 562, CA
Wilson v William Sturges & Co [2006] EWHC 792 (QB); [2006] 4 Costs LR 614

The following additional cases, although not cited, were referred to in the skeleton arguments:

Bolton v Mahadeva [1972] 1 WLR 1009; [1972] 2 All ER 1322, CA
Cocker v Tofield Swann & Smythe (unreported) 12 May 2000; [2000] CA Transcript No 887, CA
Cresswell v Byron (1807) 14 Ves 271
Dakin (H) & Co Ltd v Lee [1916] 1 KB 566, CA
Hall and Barker, In re (1878) 9 Ch D 538
Harris v Osbourn (1834) 2 C & M 629
Heywood v Wellers [1976] QB 446; [1976] 2 WLR 101; [1976] 1 All ER 300, CA
Mayor of Nottingham's Case (1661) 1 Sid 31, pl 8
Romer and Haslam, In re [1893] 2 QB 286
Singh v Haq (unreported) 22 January 1998; [1998] CA Transcript No 103, CA
Wadsworth v Marshall (1832) 2 C & J 665
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA

APPEAL from Mackay J (sitting with assessors)

The firm of solicitors, Richard Buxton, claimed against their former client, Huw Llewelyn Paul Mills-Owens, fees due under a retainer in the matter of an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of a planning inspector to allow an appeal against the refusal of a local authority to grant planning permission. On 31 January 2008 Master O'Hare ruled that no profit costs were due and payable since the solicitors had terminated their retainer without just cause before the work had been completed but that the solicitors were entitled to payment of the costs of the disbursements.

By an appellant's notice dated 20 February 2008 the solicitors appealed, with permission of Mackay J. By a respondent's notice dated 7 March 2008 the client sought to appeal against that part of the ruling which deemed that he should bear the costs of the disbursements in the matter. By a decision dated 28 July 2008 Mackay J [2008] 6 Costs LR 948 dismissed the appeal, and substantially dismissed the cross-appeal.

By a notice of appeal filed on 12 August 2008, and with permission of the Court of Appeal (Waller LJ) granted on 4 February 2009, the solicitors appealed on the grounds that the judge had erred (1) in not recognising that a solicitor might have "just cause" to terminate a retainer with a client in circumstances which fell short of an instruction to act improperly; (2) in not recognising that an instruction to advance a claim which the solicitor

believed was bound to fail if so advanced could amount to sufficient just cause; and (3) in applying the principle of "entire contract" to the solicitor's retainer.

By a respondent's notice filed on 15 August 2008 and with permission of the Court of Appeal (Arden LJ) granted on 26 March 2009 the client cross-appealed on the issue of whether he was liable to pay the cost of counsel's fee for settling the skeleton argument on the statutory application and the solicitors' costs of advice on the ground, inter alia, that if a solicitor had wrongly terminated his retainer and ceased to be entitled to profit costs he should not be entitled to recover disbursements.

Richard Buxton, solicitor (of *Richard Buxton, Cambridge*) for the solicitors.

The client in person.

Richard Drabble QC and *David Holland* (instructed by *Mills & Reeve, Birmingham*) for the Law Society.

The court took time for consideration.

23 February 2010. The following judgments were handed down.

DYSON LJ

1 The principal issues that arise on this appeal are whether (1) the appellant solicitors were entitled to terminate their retainer and (2) whether they were entitled to their profit costs and disbursements up to the date of termination.

2 The solicitors were retained by Mr Mills-Owens to advise upon and prosecute a statutory appeal under section 288 of the Town and Country Planning Act 1990 against a decision to grant planning permission by the planning inspector on behalf of the First Secretary of State. They terminated the retainer because Mr Mills-Owens insisted that they and counsel who had been instructed in the case should advance certain points which neither they nor counsel considered to be properly arguable.

3 Following the termination of the retainer, the solicitors submitted their final fee account which showed a balance due of £6,605·41. Mr Mills-Owens wanted the fees to be assessed by a costs judge. The assessment came before Master O'Hare who on 31 January 2008 held that the solicitors should not have terminated their retainer, but should have carried out the instructions of Mr Mills-Owens even though they were of the view that "such instructions were doomed to disaster". In the result, since "they were retained for the entire business", Master O'Hare held that they were not entitled to recover any costs other than for disbursements.

4 The solicitors appealed. In a reserved judgment given on 28 July 2008, Mackay J, sitting with Master Simons and Mr Martin Cockx as assessors, dismissed the appeal. In agreement with Master O'Hare, he held that the solicitors were not entitled to terminate their retainer. This was an entire contract which could only be terminated for "just cause". Importantly, he said that, if a client wants a claim to be advanced on a particular basis which does not involve impropriety on the part of the solicitor or counsel, it is no answer for the solicitor to say that he believes that the claim, if so advanced, is bound to fail. He cannot refuse to advance the claim for that reason. He cannot terminate the retainer unless to

continue would involve impropriety or misleading the court. On the facts of this case, the solicitors were not entitled to any profit costs, although, with minor exceptions, they were entitled to their disbursements. Mr Mills-Owens had already made substantial payments on account of profit costs and disbursements. The solicitors appeal with the permission of Waller LJ. The Law Society were given permission to intervene in the appeal because in their view the case raises an issue of considerable importance to the solicitors' profession: in what circumstances can a solicitor instructed in litigation lawfully terminate his retainer prior to the conclusion of the case whilst maintaining his right to be paid for the work that he has done? Mr Richard Drabble QC submits on behalf of the Law Society that the statement by Mackay J that, absent any impropriety or misleading of the court, the solicitor is not entitled to terminate his retainer is incorrect. We have been assisted by the submissions of Mr Drabble, assistance which was not available to Mackay J.

The retainer

5 The solicitors were instructed in June 2005 to advise on and prosecute an appeal against a planning inspector's decision confirming the grant of planning permission in respect of Hangersley House, a property close to the Mr Mills-Owens's property at Westwood, St Aubyns Lane, Hangersley, Ringwood, Hampshire.

6 Section 288(1) of the 1990 Act provides:

> "If any person— . . . (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds— (i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section."

7 Mr Mills-Owen agreed the solicitors' terms of business which included:

> "2 *Charges and expenses*
> "*Basis for charging*
> "Our charges are based on the time we spend dealing with a case. Time spent will include meetings with you and perhaps others (for example, counsel and experts); attending court; any time spent travelling; considering, preparing and working on papers; correspondence; writing and receiving letters; and making and receiving telephone calls. Charges are assessed in units of six minutes (1/10th of an hour) . . .
> "*Payments on account*
> "It is normal practice to ask clients to pay sums of money from time to time on account of the charges and expenses that are expected in the following weeks or months. Such monies will be placed on client account, and will not be withdrawn from there other than to meet disbursements without our invoicing you. Prompt payment on account helps to avoid delay in the progress of their case. We particularly like to have cover for fees of people we instruct on your behalf, such as counsel and experts. We will offset any such payments against your final bill, but

it is important that you understand that your total charges and expenses may be greater than any advance payments . . .

"3 *Billing arrangements*

"In longer running matters, we may send you interim bills for our charges and expenses while the work is in progress. These may be sent at agreed intervals, for example quarterly, or (it often happens) as 'milestones' in a case are passed (sic). We will send you a final bill after completion of the work . . .

"*Termination*

"You may terminate your instructions to us in writing at any time. However we may keep all your papers and documents while there is money owing to us for our charges and expenses. You are still liable for those until we stop acting. In practice, appropriate arrangements will be made with your new advisers, in continuing litigation matters, particularly where these are legally aided. In some circumstances, you may consider we ought to stop acting for you, for example, if you cannot give clear or proper instructions on how we are to proceed, or if it is clear that you have lost confidence in how we are carrying out your work. We may decide to stop acting for you only with good reason, for example, if you do not pay an interim bill or comply with our request for a payment on account. We must give you reasonable notice that we will stop acting for you."

The facts

8 Pursuant to their instructions, the solicitors obtained the advice of specialist counsel, Mr James Findlay. In an opinion dated 1 July 2005, Mr Findlay explained that challenges to an inspector's decision can only be made on points of law and that a difference of view as to the merits, particularly if those merits concern matters of planning judgment, does not give rise to an error of law. At para 6, he said: "The hurdles that face somebody wishing to challenge a decision are thus high. In this case, I consider there is no reasonable prospect of success for any challenge." Having considered a number of points of detail to which it is not necessary to refer, he concluded at para 15:

> "Whilst I can fully appreciate Mr Mills-Owens' frustrations, which in part at least appear to be shared by the local planning authority, the inspector reached a decision that he was entitled to come to and there is no reasonable prospect of challenging it."

9 Despite this advice, the solicitors were instructed to issue proceedings. This they did on 5 July. Because of the time limits for lodging grounds of appeal, these were drafted at short notice. Four grounds were included in the claim form: (1) the inspector failed properly to deal with the issue of exceptional circumstances in his consideration of the applicability of the policy NF-H3 and the cumulative effect and consequences of the two interdependent applications; (2) the permission granted when read together with the application gives no explanation of precisely what the permission is for; (3) the appeal process has left the claimant without the ability to make proper representations on appeal and not allowed the appeal to be considered in a proper manner; (4) there was no proper consideration or

screening of the necessity for an environmental impact assessment. This was important given that the area is a National Park." A

10 On 16 September, the solicitors instructed new counsel, Mr Peter Harrison. On 25 September, he e-mailed the solicitors and said that he considered that there was a "proper argument that the inspector has misapplied policy NF-H3 and hence made an error of law which would justify quashing the decision". He said that there were arguments the other way and the prospects of success were "still perhaps 50/50 but I do think that the point is worth taking and should be argued". B

11 Mr Harrison drafted a skeleton argument which was shown to Mr Mills-Owens on 19 December. It dealt only with ground (1) of the four grounds identified in the claim form. On 20 December, Mr Mills-Owens wrote a long letter to the solicitors commenting in detail on the skeleton argument. He said that the skeleton argument made no mention of the development being in the New Forest National Park Area, of the importance of the environmental law in respect of it, or that the planning process had given no consideration to the effects on the environment of the development. He also said that the skeleton argument should include grounds (2), (3) and (4). C

12 On 28 December, he wrote again repeating that the matters referred to in his earlier letter must be included in the skeleton argument. His concern was that the skeleton argument did not address his serious concerns about the environmental effects of the development and that the planning authorities had not given due consideration to them. He said that putting the whole emphasis on seeking to prevent an increase in the size of the development to the exclusion of environmental consequences might appear to the court to be petty. The inclusion of the devastation already caused and that would be caused might give the court a true picture of his real concern which he wished the court to address. D E

13 During the following weeks, correspondence continued between Mr Mills-Owens and the solicitors. The solicitors stated and maintained their position that grounds (2), (3) and (4) were not arguable errors of law, whereas ground (1) was. Mr Mills-Owens was adamant that all four grounds should be included in the skeleton argument and advanced at the hearing. Mr Harrison was asked to reconsider the matter. He prepared a note dated 3 January 2006. He stated that he could only operate "within the very tight parameters set by the law". He dealt with grounds (2) to (4) in the following terms, at paras 8–10: F

> "8. In ground (2) Mr Mills-Owens suggests that he had difficulty in determining the precise scope and detail of the planning application and what would actually be allowed by the grant of permission. It is clear that the latest application is one in series and that it is designed to be the last stage in a staged expansion of the buildings on the plot. This point was considered by the inspector who makes clear in paras 6, 7 and 12 of the decision letter that he has judged that he had sufficient material before him to be clear what he was being asked to grant planning permission for and the effects of it. Unfortunately this is precisely the type of judgment that the court will say was for the decision maker and will not itself made a second decision on. This is the case even if the court itself considers that it may have come to a different view. G H

A "9. In ground (3) it is suggested that the inquiry procedure did not permit Mr Mills-Owens to make the most effective representations opposing the appeal. However, in this case the relevant rules and regulations were followed. Mr Mills-Owens did put written representations before the inspector and the High Court will not, in my view, be prepared to rule that the current regulations which govern all written representation appeals are unfair or that decisions taken under them should be quashed.

B "10. Ground (4) raises the issue of whether or not an environmental impact assessment ("EIA") should have been required. However, despite the fact the proposals are in a National Park I do not consider that the regulations or the relevant case law would require an EIA in relation to the development for which planning permission was granted in this case."

C **14** He then considered whether there was any harm in raising these points anyway. He said, at para 11, that his experience was that it was counter-productive to raise points "which are not going to succeed". He gave a number of reasons for this, including that such points distract from the strength of clear points on which there is a strong argument. Judges look less favourably on a case "where they feel that points which are clearly D outside the scope which the law allows are being set up alongside points supported by arguments which the law supports." He added that ground (1) was the only argument which, at para 14: "has any proper chance of succeeding and that to put forward the other points would be wrong in law and not helpful to the case overall". He concluded by saying that his skeleton argument should be amended to give some more context for ground (1) by making clear that it was Mr Mills-Owens's concern to protect E the environment which was the motivation behind the challenge.

15 The skeleton argument was amended to reflect this advice and Mr Mills-Owens's concern to protect the environment was amplified, but in its amended form the skeleton argument was still unacceptable to Mr Mills-Owens. On 6 January 2006 , he insisted that it should not be lodged with the court since it was "fundamentally flawed". He instructed F the solicitors to seek an adjournment of the hearing to enable him to consider the matter fully.

16 In his reply of 7 January, Mr Buxton said that an impasse had been reached. The skeleton argument had to be lodged by 16 January. A request for an adjournment was "unrealistic". He then said:

"Perhaps I have not made it clear that counsel is constrained in what G can be said in the skeleton argument. Quite apart from the likely effect on costs, he will personally be criticised by the court if he makes points that he considers unarguable. I enclose a transcript of a decision by Sullivan J one of the most respected planning judges, which sets out the court's approach in these types of circumstances. You will gather why we take the view we do. I refer to the sidelined sections towards the beginning of the judgment. Your underlying concern relates as you quite H understandably put it to the 'legal responsibility of the relevant authorities to conserve and enhance the natural beauty wildlife and cultural heritage' in the National Park. You must understand that such responsibilities have been dealt with already in the development plan. It is *that* which the inspector has, we say, failed to adhere to. If you get the

decision quashed, then the matter goes back for reconsideration on a proper basis, taking those points properly into account—as you require. It is not the High Court's job to do that now, and it will not. The above reflects my and counsel's opinion. We entirely respect your views and of course have to respect your instructions. In such circumstances there are three possible courses of action: to accept what we say and allow the skeleton to go in as amended (as sent to you with my last letter) though you are welcome to make suggestions as to *specific* amendments you consider should be made to the text e g to correct what you say are inaccuracies; to take a second opinion from another barrister experienced in this field. Time is relatively tight, but this is nevertheless easily done. You could even do this via another firm of solicitors though it would be more efficient for me to do so; withdraw your instructions to us and simply go elsewhere. This would be disappointing but we cannot act for you if we are at cross purposes. Please let me know what you want to do."

17 On 11 January, Mr Mills-Owens replied that he had been to London to request the adjournment. He said: "I am sorry that you have left me at this late stage to do my skeleton argument myself. I will of course pay your bill where moneys are owing but would like it taxed."

18 On 14 January, Mr Buxton suggested that the skeleton argument as drafted should be lodged by 16 January. That would leave open the option of putting a supplementary skeleton argument in at a later stage. On 16 January, Mr Mills-Owens replied that he expected Mr Buxton to follow his "abundantly clear" instructions. He said that he would prepare his own skeleton argument which he would submit to the court shortly.

19 On 17 January, Mr Buxton wrote that the instructions of Mr Mills-Owens were not clear "(1) as to whether you wish us to continue acting for you and if so (2) whether to instruct counsel to appear on your behalf on 6 February and if so (3) what is to become of the skeleton argument". He asked what Mr Mills-Owens wanted him to do.

20 Mr Mills-Owens lodged his own skeleton argument with the court. The first Mr Buxton knew of this was when he received a communication from the Treasury Solicitor. Mr Buxton had drafted a letter to be sent by his firm to the court explaining why he had not submitted a skeleton argument. On 24 January, he spoke to the Law Society and was advised that he could not send the letter or even disclose the existence of another skeleton argument without the authority of Mr Mills-Owens. Mr Buxton explained the facts to the Law Society representative and was told that, on those facts, the solicitors' position was "untenable" and that they had "good reason" to terminate the retainer.

21 On 25 January, Mr Buxton wrote to Mr Mills-Owens saying that, unless he authorised him to send the letter to the court or gave revised instructions "such that we do indeed represent you along the lines we recommend", he would have to terminate the retainer and apply to the court to come off the record. Mr Buxton said that he had read Mr Mills-Owens's skeleton argument and said that it did not "properly address the legal point in the case".

22 On 26 January, Mr Mills-Owens said that Mr Buxton did not have his permission to discuss his (Mr Mills-Owens's) skeleton argument or any

A other document with the defence. He said that the letter to the court "is not correct and therefore prejudicial to me". He had made it abundantly clear that he did not and would not approve of the skeleton argument drafted by counsel. He said: "At the risk of being blunt may I suggest you read my letters and address and follow my instructions."

23 On 27 January, Mr Buxton said that he had not sent the letter to the
B court because he had decided to obtain Mr Mills-Owens's authority before doing so. Mr Mills-Owens's skeleton argument was unlikely to find favour with the court:

> "I am not saying that it will certainly fail, that would be dangerous, but from quite a lot of experience of these types of cases, which are very difficult in the first place, I believe that this is a likely outcome."

C Later in the letter, he said:

> "If you entirely decline to advance any legal argument along the lines of the first skeleton argument (whether the document is put in or not) it seems to me that we will simply be unable to act."

The letter concluded:

D
> "What I need from you in the immediate future, please, are instructions as to whether you want us to continue to act for you, and if so we must discuss on what terms in relation to arguments that may be advanced. I may need finally to clarify with the Law Society what our professional obligations and possibilities are in this very unusual situation, but I suspect that unless you are prepared to take our advice and permit
E counsel to argue as he sees fit—even on the basis of your skeleton argument while otherwise relying on the witness statement—it will be necessary to come off the court record so that you will have to appear on 6 February as a litigant in person (or with other representation). Please could you clarify that you understand this. I repeat, please also confirm whether or not you do wish to continue to instruct us (and counsel): if so, we believe it will be vital during the course of next week to have a
F conference in London with counsel firmly to agree what can and cannot be said. We will also need further putting in funds as previously advised. I should also advise that this recent work has taken us over the monies paid on account to some degree. I will advise in more detail next week following your response."

24 On 30 January, Mr Buxton wrote again to Mr Mills-Owens
G enclosing a copy of the skeleton argument submitted by the Treasury Solicitor. He said:

> "the slow speed of communication by post combined with your recent approach to the case has put us in an impossible position in terms of representing you . . . We have however now given you notice at many points that we will have to terminate the retainer if you do not take our
H advice and we do not received adequate instructions . . . So there is just one last chance to try to get matters on to a proper footing and to argue the case as the court would expect at the hearing next week."

25 On 31 January, Mr Mills-Owens repeated many of the points he had already made. He was "appalled and dismayed" to see from the letter of

27 January that Mr Buxton had been discussing his witness statement and skeleton argument with one of the defendants and requested "a typescript of all such conversations and/or copy of the letter(s) with time(s) and date(s) by return and ensure that any statements made which are contrary to my instruction are withdrawn". He went on: "I should make it clear that while you do not follow my instructions you are clearly not acting for me. My instructions are clear and concise and straightforward." He insisted that the skeleton argument drafted by Mr Harrison which he had not accepted was "flawed, factually incorrect and prejudicial to my case". However, he failed to identify any such flaw, error or prejudice. He instructed Mr Buxton to apply to the court for an adjournment so that he had time either to prepare all four grounds of appeal and not just ground (1) or to have time to instruct someone who was prepared to address the true environmental case that he wished to place before the court.

26 In his first letter of 1 February, Mr Buxton wrote that, since he had not heard from Mr Mills-Owens, he was making an application to take his firm off the record. In a second letter of the same date, he wrote:

> "I do not like to do it, but professionally have no alternative (unless you are prepared to sit down with me and counsel and discuss the ground rules within which we have to work) to do other than stand down and suggest you seek alternative advice."

27 On 3 February, the solicitors wrote to Mr Mills-Owens saying that the appeal was fixed to be heard by Ouseley J on 6 February. They intended to attend in order to assist the judge in case he had questions about the procedural position. Counsel was not instructed to attend, but would be available at short notice should Mr Mills-Owens or the judge so require. Mr Mills-Owens replied on the following day saying:

> "You are not my solicitor. You do not have my permission to act for me or represent me . . . I do not want to be approached by you or counsel or indeed anyone representing your firm in court. I would consider that a gross interference in my case."

28 On 6 February, Ouseley J refused Mr Mills-Owens's request for an adjournment. Mr Mills-Owens represented himself. His appeal was dismissed as was his subsequent application for permission to appeal. Ouseley J dealt with ground (2) at paras 8–19 of his judgment. At para 19, he said that the understanding of the extent of the demolition could be gleaned from the plans which were incorporated as part of the application. The contention that there was a permission for an unknown or unspecified number of dwelling units was "a simple misreading of the documents". The concerns which Mr Mills-Owens had raised "over the, to him, alarming extent of the permission, are all misconceived".

29 Ouseley J rejected ground (1) at paras 28–32. As the solicitors were willing to advance this ground of challenge, there is no need to consider what the judge said about it. Ouseley J dealt with ground (4) in the following way, at paras 36–37:

> "36. Mr Mills-Owens next argued that a screening opinion was necessary because this development was development in a National Park which is a sensitive area for the purposes of the Town and Country

Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI No 1999/293). However, a screening opinion is necessary to see whether development is EIA development. EIA development has to be Schedule 2 development, likely to have a significant effect on the environment. Schedule 2 development means development 'of a description mentioned in column 2 of the table in Schedule 2 where— (a) any part of that development is to be carried out in a sensitive area or (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development.' Therefore, if the development does not appear in column 1 of Schedule 2, no screening opinion is required even though the development is in a sensitive area.

"37. The raising of the roof, or even the raising of the roof and the infill link extension, does not come within any of the heads of development set out in column 1 to Schedule 2. This could not remotely be described as an urban development project. Nor could it be described as a change or extension to an urban development project. That point is misconceived."

30 It seems that Ouseley J did not deal separately with ground (3).

The relevant professional codes of conduct

31 The Solicitors' Practice Rules 1990 (as amended to 1 October 1999) provided, at para 12.12, that "a solicitor must not terminate his or her retainer with the client except for good reason and upon reasonable notice". The notes to rule 12.12 in the Guide to the Professional Conduct of Solicitors 1999 include:

"1. It is open to a client to terminate a solicitor's retainer for whatever reason. A solicitor must complete the retainer unless he or she has a good reason for terminating it.

"2. Examples of good reasons include where a solicitor cannot continue to act without being in breach of the rules or principles of conduct, or where a solicitor is unable to obtain clear instructions from a client or where there is a serious breakdown in confidence between them."

32 With effect from 1 July 2007, the Solicitors' Code of Conduct 2007 came into force. This is not directly applicable in the present case, because it post-dates the solicitors' retainer. Nevertheless, it is worth noting that rule 2.01(2) provides that a solicitor "must not cease acting for a client except for good reason and on reasonable notice". The guidance to rule 2 provides at para 8 that examples of good reasons for ending a retainer include "where there is a breakdown in confidence" and where the solicitor is "unable to obtain proper instructions". Rule 11.01(3) provides: "you must not construct facts supporting your client's case or draft any documents relating to any proceedings containing: (a) any contention which you do not consider to be properly arguable . . ."

33 The Bar Code of Conduct (2004) provides so far as material:

"603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed . . . (c) if the instructions seek to limit the ordinary authority or discretion of a barrister in the conduct

of proceedings in court or to require a barrister to act otherwise than in conformity with law or with the provisions of this Code . . ."

"*Drafting documents*

"704 A barrister must not devise facts which will assist in advancing the lay client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing . . . (b) any contention which he does not consider to be properly arguable . . . provided that nothing in this paragraph shall prevent a barrister drafting a document containing specific factual statements or contentions included by the barrister subject to confirmation or their accuracy by the lay client or witness . . ."

"*Conduct in court*

"708 A barrister when conducting proceedings in court . . . (f) must not make a submission which he does not consider to be properly arguable."

34 Although the Civil Procedure Rules ("CPR") are not formally part of the Solicitors' Practice Rules or Code of Conduct, in discharging their professional obligations in the conduct of litigation, solicitors must also have regard to the CPR. In particular, CPR r 1.3 requires the parties to "help the court to further the overriding objective". That duty extends to the legal advisers of the parties, including advocates: see *Geberan Trading Co Ltd v Skjevesland* [2003] 1 WLR 912, para 37. The overriding objective is defined in CPR r 1.1 as enabling the court to deal with cases justly. In my judgment, it is clear that the overriding objective is not furthered by the parties advancing hopeless arguments.

The judgment of Master O'Hare

35 Master O'Hare said in his judgment, at para 10:

"Nevertheless, I think the solicitors (although undoubtedly in difficult circumstances) ultimately adopted a course which, I think, was the wrong course. I think they should not have terminated the instructions as they did. I do not think they had just cause, regardless of what notice they gave. I think what they should have done was carry out the client's instructions, even though they had given (and would no doubt repeat) that such instructions were doomed to disaster. Because they have failed to carry out the client's instructions, I do not think they are entitled to charge him fees in this matter. They were retained for the entire business; that is conducting a statutory appeal. That has to be a statutory appeal on the basis of the instructions made by the client, so long as they are legal, honest and decent. Clients cannot instruct solicitors to do anything improper but (however unwise I might think they were) I do not think this client's instructions were, in any way, improper."

36 He said, at para 11:

"There is no reason for cross purposes. So long as the solicitors advise the client that his course of instruction is doomed to failure, I think they ought to follow his instructions. Also, I think it is wrong when [the solicitors' letter of 7 January] says, at the start, 'We entirely respect your views and, of course, have to respect your instructions'. Well, it is more

A than respect for instructions which is needed; so long as they are proper instructions (however misguided solicitors think them) they should not just respect them, they ought to follow them."

The judgment of Mackay J

37 Having summarised the correspondence to which I have referred
B above, Mackay J [2008] 6 Costs LR 948 recorded the submission of Mr Buxton that Mr Mills-Owens was instructing him to advance an improper case and that, for that reason, he was not only entitled to cease acting, but had a professional obligation to do so by reason of rule 12.12 of the Solicitors' Practice Rules 1990 (as amended). At para 21 of his judgment, the judge said that there are occasions where the line is difficult to draw between an argument which is "improper" and one which, though
C bound to fail, can nevertheless be properly advanced. He then said, at para 21:

> "but in my judgment at the end of the day if a client who is prepared to pay for a case to be advanced, wants the claim advanced on a particular basis, which does not involve impropriety on the part of the solicitor or counsel, then it is no answer for the solicitor to say that he believes it is
D bound to fail and therefore he will not do it."

At para 22, the judge expressly indorsed the observations of Master O'Hare quoted above.

38 He concluded this part of the judgment, at para 23:

> "I have very considerable sympathy for the solicitors here who had a
E very difficult problem and a difficult client. But the litigator's back must be broad, and provided that he has given clear advice to that client, if that client wishes to pursue a case which the solicitor honestly believes is going to lose, the client is entitled to instruct him to do so, absent any impropriety or misleading of the court. It is my judgment, assisted by but not dependent on the solicitor assessor sitting with me that the position here fell short of the line where the solicitor would have been entitled to
F terminate the retainer and that the costs judge here was right to assess the matter in the way he did."

Were the solicitors entitled to terminate the retainer?

39 I am in no doubt that the retainer was an "entire contract". In *Underwood, Son, & Piper v Lewis* [1894] 2 QB 306, 310 Lord Esher MR
G explained:

> "when a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all necessary steps in it, and to carry it on to
H the end."

40 The solicitors were retained to institute and take the statutory appeal to the end. But that did not mean that the retainer could not be terminated before the end. The position at common law is that a solicitor may terminate his retainer before the end on reasonable notice and if he has

a "reasonable ground for refusing to act further for the client": per Lord Esher in the *Underwood* case, at p 313. Where the parties have agreed in what circumstances the solicitor may terminate the retainer, then the matter is governed by their contract. In this case, the parties agreed that the solicitors could terminate "only with good reason". That reflects the common law position. Unsurprisingly, it also reflects rule 12.12 of the Solicitors' Practice Rules 1990 (as amended) and rule 2.01(2) of the 2007 Code of Conduct.

41 Did the solicitors have a good reason to terminate the retainer? There is no comprehensive definition of what amounts to a good reason to terminate in the Solicitors' Practice Rules or the Code of Conduct (although examples are given in both documents), or in any of the authorities that have been cited to us. That is not surprising, since whether there is a good reason to terminate is a fact-sensitive question. I accept the submission of Mr Drabble that it is wrong to restrict the circumstances in which a solicitor can lawfully terminate his retainer to those in which he is instructed to do something improper. I accept that solicitors should not lightly be able lawfully to terminate their retainers, leaving their clients with the task of finding fresh solicitors to complete the job. But the desirability of protecting a client from an arbitrary and unreasonable termination is not a sufficient justification for giving such a narrow interpretation of the phrase "good reason" as the judge has given in this case. Indeed, the 1999 Guide to rule 12.12 of the 1990 Rules (as amended) and the guidance to the 2007 Code of Conduct give the examples of a solicitor being unable to obtain clear instructions from the client or where there is a serious breakdown in confidence between solicitor and client. Further, section 65(2) of the Solicitors Act 1974 deems a failure by a client within a reasonable time to pay a reasonable sum on account of the costs of contentious business to be "good cause whereby the solicitor may, upon giving reasonable notice to the client, withdraw from the retainer".

42 In the *Underwood* case, AL Smith LJ said, at p 314:

> "On the other hand, it is clear that the solicitor may be placed in such a position by the client as to absolve him from the further performance of that contract. It appears to me from the case of *Vansandau v Browne* (1832) 9 Bing 402 and subsequent cases which have been cited, that the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on; and, speaking for myself, I should say that the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable; and many other cases may be supposed in which the solicitor may be entitled to refuse to act for the client any further. I should say that, when a solicitor is in a position to show that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he may decline to act further, and in such case the solicitor would be entitled to sue for the costs already incurred. But we have not now to deal with such a case. The sole question here is, whether the solicitor is entitled without rhyme or reason to throw up his retainer, having given due notice of his intention to do so. I do not think that he is so entitled."

43 The particular question that arises on this appeal is whether a solicitor has good reason for terminating a retainer if a client insists on his putting forward a case and instructing counsel to argue a case which is "doomed to disaster" (Master O'Hare) or which the solicitor believes "is bound to fail" (Mackay J). I agree with Mackay J that it may be difficult to draw the line between an argument which can properly be articulated and put forward (but which has little, if any, prospect of success) and an argument which cannot properly be articulated and which is believed to be bound to fail. The Bar Code of Conduct puts the matter very clearly. Counsel may not draft any document (which must include a skeleton argument) containing a contention which he does not consider to be properly arguable; and he may not make any submission in court which he does not consider to be properly arguable. A corresponding provision appears at rule 11.01(3) of the 2007 Code of Conduct for Solicitors. It must be acknowledged that there is no express provision in those terms in the 1990 Rules (as amended). Nevertheless, I am in no doubt that even before the point was spelt out in the 2007 Code, it would have been understood by all solicitors that, as officers of the court, they were under a professional duty (1) not to include in the court documents that they drafted any contention which they did not consider to be properly arguable and (2) not to instruct counsel to advance contentions which they did not consider to be properly arguable. That duty was reinforced by CPR r 1.3.

44 Our attention was drawn to *Cook on Costs* (2010) where there is a reference to the decision of Mackay J [2008] 6 Costs LR 948. The author says, at p 6:

> "If a client is prepared for a case to be advanced and wants the claim advanced on a particular basis which did not involve impropriety on the part of the solicitor or counsel, then it is no answer for the solicitor to say that he believes it is bound to fail and therefore he will not do it. Whatever one thought about the client's stance, his instructions were firm and unequivocal as to how the case was to be presented and the solicitor ought to have followed them. The situation fell short of the line where the solicitor would have been entitled to terminate the retainer and the solicitors were not entitled for any fees for the work they had done. I suggest the solicitor should have continued to act and adopted the traditional coded message to the court used in these circumstances: 'I am instructed to say.' "

45 For reasons that I am about to give, I consider that the solicitors were entitled to terminate the retainer in this case. But I refer to this passage in *Cook on Costs* because I do not agree with the last sentence. In my judgment, if an advocate considers that a point is properly arguable, he should argue it without reservation. If he does not consider it to be properly arguable, he should refuse to argue it. He should not advance a submission but signal to the judge that he thinks that it is weak or hopeless by using the coded language "I am instructed that". Such coded language is well understood as conveying that the advocate expects it to be rejected. In my judgment, such language should be avoided.

46 I now turn to the facts of this case. The contentions which the solicitors and both counsel were unwilling to advance were ones which they all considered not to be properly arguable. They were ones which they

believed they could not properly articulate as legal arguments and which were hopeless. Mackay J was right to say in his judgment that, at para 10:

> "The application was from the start bedevilled by what the costs judge found was a fundamental problem. The client did not understand and still does not understand the limited basis upon which such a planning appeal is possible. He wanted the appeal to be presented on a much wider basis by reference to the merits of the case and the need for the safeguarding of an environment of which he is understandably protective. He found it difficult, indeed impossible, as the costs judge below found, and as I find, to accept that for such an appeal to succeed it is necessary to point to a procedural error or some other legal flaw in the approach of the planning inspector. This was the thrust of an initial advice from counsel received within a week of two of the first instruction of the solicitors, to the effect that there was no reasonable prospect of challenging the decision."

47 To the extent that Mr Mills-Owens insisted (as he did) that a challenge should be made to the planning inspector's decision on the planning merits of the case, such a challenge could not, as a matter of law, be made under section 288 of the Town and Country Planning Act 1990. Mackay J seems to have recognised this at para 10 of his judgment. Mr Mills-Owens would not accept that a challenge could only be made for legal error. It would be improper in a section 288 appeal to advance an argument based on the merits of the decision of the planning inspector; and if Mr Mills-Owens insisted that such an argument be advanced, the solicitors had good reason for terminating the retainer. Mackay J did not explain why it would not be improper to advance an argument which sought to challenge a decision on the facts when such a challenge is not permitted by section 288.

48 In fact, although the main concern of Mr Mills-Owens was to challenge the planning inspector's decision on the facts and although in his judgment Mackay J described grounds (2), (3) and (4) in the claim form, at para 11: "as going more to the general merits of the planning decision," in fact those grounds as pleaded were not expressed as going to the merits of the planning decision.

49 The reason why neither Mr Harrison nor the solicitors were willing to include grounds (2) to (4) in the skeleton argument was that they considered that they were hopeless and were not properly arguable. In my judgment, they were right to do so. I have already set out, at para 14, above what Mr Harrison said about these grounds in his note dated 3 January 2006. Mr Harrison rightly said in relation to ground (2) that it was a matter of planning judgment for the inspector whether there was sufficient material for him to be clear as to the subject matter of the application for planning permission. In any event, this ground was dismissed by Ouseley J because the extent of the proposed development was obvious from the plans which were incorporated as part of planning application. Ground (3) was hopeless for the reasons given by Mr Harrison and was not, it seems, pursued before Ouseley J in any event. Ground (4) was hopeless for the reasons given by Ouseley J: see para 30 above.

50 Thus the solicitors and Mr Harrison were of the opinion that grounds (2) to (4) could not properly be put forward because they were

A hopeless arguments. They shared the view expressed by Mr Findlay who (unlike the solicitors and Mr Harrison) had not been able to find a single argument which had any prospect of success. Mr Findlay had said that the case had "no reasonable prospect of success" and that it was "doomed to fail". Mr Harrison (who considered that there was a 50:50 chance of success on ground (1)) had similarly said in his note dated 3 January that grounds
B (2) to (4) were "outside the scope which the law allows" and were "wrong in law". It is true that in his letter dated 27 January, Mr Buxton said that he was not saying that the skeleton argument drafted by Mr Mills-Owens would certainly fail, but he believed this to be the "likely outcome". That sentence, if taken in isolation, would suggest that Mr Buxton did not consider that grounds (2) to (4) were unarguable and bound to fail. But if the correspondence is viewed as a whole, it is clear that Mr Buxton did
C not consider that he could properly submit a skeleton argument which included grounds (2) to (4) or instruct counsel to argue those grounds and Mr Harrison agreed with him.

51 I conclude, therefore, that the solicitors had good reason to terminate the retainer.

D *Are the solicitors entitled to be paid for work done and disbursements incurred up to the date of termination?*

52 The solicitors had received payments on account which, in accordance with their terms of business, had been placed in their client account and had not been withdrawn except to meet disbursements. No invoices had been submitted to Mr Mills-Owens before the termination. The solicitors' terms of business are silent as to the payment of fees in the
E event of termination by the solicitors for good reason.

53 It is, therefore, necessary to look to the general law to see whether the solicitors were entitled to be paid for the work they had done even though they had not completed the "entire contract". It has long been established that, where a solicitor terminates an "entire contract" before completion and does so for good cause or on reasonable grounds, he is
F entitled to be paid for the work that he has done. In *Vansandau v Browne* (1832) 9 Bing 402, it was held that an attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may for reasonable cause and on reasonable notice abandon the conduct of the suit and recover his costs for the period during which he was employed.

54 In the *Underwood* case [1894] 2 QB 306, solicitors had declined to continue to act for their client before the litigation in which they were acting
G had been completed. They brought an action for the amount of their bill of costs for work done to date. The trial judge held that a solicitor may terminate his retainer without cause and judgment was entered in favour of the solicitors. As we have seen, the Court of Appeal said that the retainer could only be lawfully terminated on reasonable grounds. They ordered a retrial. It was implicit in the decision to order a retrial that, if the solicitors
H were able to show that they had a reasonable ground for terminating the retainer, their claim for costs would in principle succeed. In his judgment, Lord Esher MR said, at p 310:

> "it seems to me that from [the time of *Cresswell v Byron* (1807) 14 Ves 271] downwards it has been held that a solicitor cannot sue for his costs

until his contract has been entirely fulfilled, unless the case is brought within some recognised exception to the general rule."

An exception to this general rule is where the solicitor terminates the retainer on reasonable grounds.

55 None of the cases cited to us contains a statement of the legal basis for the principle that, where a solicitor terminates his retainer for good reason, subject to any relevant provision contained in the agreement between the parties, he is entitled to be paid his profit costs and disbursements for work done prior to the termination. One possible analysis is that, at any rate in a case such as the present, where the client insists on the solicitor putting forward contentions which the solicitor does not consider to be properly arguable, the client repudiates the retainer and the solicitor accepts the repudiation by terminating. The solicitor may then elect to claim the fees due (if any) under the agreement or on a quantum meruit. It is, however, unnecessary to consider this further, since the common law rule that a solicitor is entitled to be paid for all the work he has done prior to termination if he terminates for good reason has been part of our law for almost 200 years. It follows that the solicitors are entitled to be paid their profit costs and disbursements for the work done prior to the termination. There should in principle be no difficulty in calculating these, since the basis for charging was clearly defined in the solicitors' terms of business: see para 8 above.

Overall conclusion

56 For the reasons I have given, the solicitors were entitled to terminate their retainer and entitled to their proper costs and disbursements for work done prior to the termination. I should add that Mr Mills-Owens has permission to cross-appeal in relation to the issue of disbursements, but that issue does not now arise. Finally, I should record my view that, throughout his dealings with Mr Mills-Owens, Mr Buxton has acted in a thoroughly professional manner and has shown conspicuous patience.

MAURICE KAY LJ

57 I agree.

SIR MARK POTTER P

58 I also agree.

Appeal allowed.
Cross-appeal dismissed.

J C B

1894

IN RE EVELYN. EX PARTE GENERAL PUBLIC WORKS AND ASSETS COMPANY.

Vaughan Williams, J.

for a perpetual injunction was one which he had no jurisdiction to make. I will only add one further observation. Whatever may be the circumstances under which the Court of Bankruptcy ought to interfere in such a case, it is quite plain that it is especially the duty of the Court to interfere where the person claiming the right to deal with the property claims under the bankrupt himself. As I have said, the order was in my opinion made without jurisdiction, and it follows that this appeal must be allowed.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors for appellants: *G. S. & H. Brandon.*

Solicitors for respondent: *Hadden-Woodward, McLeod, & Blyth.*

A. P. P. K.

C. A.

1894

May 7.

[IN THE COURT OF APPEAL.]

UNDERWOOD, SON, & PIPER *v.* LEWIS.

Solicitor and Client—Retainer in Common Law Action—Refusal of Solicitor to act further during pendency of Action—Action for Costs previously incurred—Entire Contract.

The contract of a solicitor who accepts a retainer in a common law action is, in the absence of agreement to the contrary, an entire contract to conduct the case of the client until the action is finished. He is not entitled, therefore, without good cause, on giving reasonable notice to his client, to decline to act further in the action for him, and thereupon sue for his costs in respect of the previous conduct of the client's case.

APPLICATION of defendant for judgment or new trial.

The action was by solicitors for the amount of a bill of costs.

At the trial before Grantham, J., with a jury, the facts, so far as material to this report, appeared to be as follows. Three actions had been brought against the defendant, one of which was by contractors for work done on premises belonging to the defendant, and the other two were respectively by the architect employed by the defendant in connection with such work for services rendered and commission, and for libel. The defendant retained the plaintiffs to act as his solicitors in the conduct of his defence to such actions respectively. While the actions

were respectively pending, the plaintiffs declined to act further for the defendant in the same; and subsequently brought the action for the amount of their bill of costs in respect of the conduct of the defendant's defence to the actions respectively previously to their so declining to act further. The defence set up was that the plaintiffs were retained by the defendant to act as his solicitors in the actions until they were determined, and, not having done so, they were not entitled to recover. The plaintiffs in their reply alleged certain reasons for their refusal to act further for the defendant in the actions, and that they had given the defendant reasonable notice of their intention not to act further for him. The learned judge at the trial ruled that a solicitor retained in an action was entitled, during the pendency of the action, to decline to act further for the client therein, without shewing any grounds for so doing, provided he gave reasonable notice to the client of his intention to decline to act further, so as to enable the client to obtain the services of another solicitor; and that the solicitor could thereupon sue the client for his costs in respect of the conduct of the action previously to his so declining to act further, subject, however, to the disallowance on taxation of charges for work, if any, that was thrown away in consequence of the solicitor's declining to act further. He therefore held that it was unnecessary to determine any question as to the validity or otherwise of the reasons alleged by the plaintiffs for refusing to act for the defendant, or to go further into the evidence relating thereto. It was not contended that the notice given by the plaintiffs of their intention to decline to act further was not reasonable in point of time; and, therefore, upon the ruling of the learned judge, a verdict and judgment were entered for the plaintiffs for the amount claimed, subject to taxation of the plaintiffs' bill.

Sir H. James, Q.C., and *Jelf, Q.C.* (*Bankes*, with them), for the defendant. A solicitor who is retained in an action at common law is not entitled, at his own will and pleasure, or from motives of his own unconnected with the conduct of the client, to refuse to act further for the client during the pendency of

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the action, and thereupon to sue the client for the costs previously incurred. The authorities clearly shew that the contract of the solicitor upon such a retainer is an entire contract to conduct the case for his client until the end of the action, subject, however, to the right of the solicitor to determine the contract for good cause, giving reasonable notice to his client of his intention so to do: see Resolution in Bankruptcy, per Lord Eldon, in 1801 (1); *Cresswell* v. *Byron* (2); *Harris* v. *Osbourn.* (3) The contract of the solicitor is in this respect like any other contract to perform an entire piece of work; and he cannot, while the special contract still exists and is not completely performed, sue as on an implied contract for work done. As in the case of any other contract, there may be conduct of the client, amounting to a breach of the obligation on his side, which would entitle the solicitor to withdraw from the contract, and sue for work already done and disbursements—e.g., failure by the client to provide the necessary funds if requested to do so. But the contention here is that the solicitor may without any reason withdraw from his contract. There are some expressions in some of the cases—e.g., *Vansandau* v. *Browne* (4); *Harris* v. *Osbourn* (3); *Whitehead* v. *Lord* (5)—which may be relied on for the plaintiffs as proving that the solicitor is entitled, without shewing any cause, to decline to act further for the client during the pendency of an action, on giving reasonable notice to the client; but it is submitted that the true explanation of these expressions is that the only point with which the judges who used them were then dealing was that reasonable notice must be given, not whether or not there must be good cause for the solicitor's declining to act further. [They also cited 1 *Siderfin* 31. pl. 8; *Wadsworth* v. *Marshall* (6); *Bryan* v. *Twigg* (7); *Nicholls* v. *Wilson* (8); *Hawkes* v. *Cottrell* (9); *Harris* v. *Quine* (10); *Stokes* v. *Trumper* (11); *Beck* v. *Pierce.* (12)]

Lockwood, Q.C., and *H. Tindal Atkinson*, (*Winch, Q.C.*, with

(1) 6 Ves. 2.
(2) 14 Ves. 271.
(3) 2 C. & M. 629.
(4) 9 Bing. 402.
(5) 7 Ex. 691.
(6) 2 C. & J. 655.
(7) 3 L. J. (Ch.) 114.
(8) 11 M. & W. 106.
(9) 3 H. & N. 243.
(10) Law Rep. 4 Q. B. 653.
(11) 2 K. & J. 232.
(12) 23 Q. B. D. 316, 323.

them), for the plaintiffs. It is submitted that, whatever may have been the tendency of the earlier authorities, the case of *Vansandau* v. *Browne* (1), and subsequent cases, particularly *Harris* v. *Osbourn* (2) and *In re Hall & Barker* (3), shew that the law is now that a solicitor, on giving reasonable notice to his client, may withdraw from the conduct of a suit, and thereupon may recover the costs in respect of the previous conduct thereof. The contract of the solicitor is no doubt that he will conduct the action till the end, unless he previously determines the retainer by reasonable notice; and, therefore, unless such notice is given, he cannot recover anything before the end of the action. But upon giving such notice he may sue for work previously done. The contract is not like one to do an entire work for an entire sum. The language used by Bosanquet, J., in *Vansandau* v. *Browne* (1), and by Parke, B., in *Harris* v. *Osbourn* (2) and in *Whitehead* v. *Lord* (4), shews that the effect of the solicitor's contract is as contended for by the plaintiffs. The client may at any time determine the retainer, and, that being so, it would be unjust that the solicitor should be bound to go on till the end of the litigation at whatever personal inconvenience to himself. In the ordinary course of things a solicitor would not give up work from which he may derive profit; but cases may be supposed in which, having regard to considerations of health or other circumstances, he might reasonably think it undesirable to continue to act in a litigation; and it would be a great hardship that he should be bound to continue to act or else submit the validity of his reasons to the verdict of a jury; whereas the client is under no corresponding obligation. [They also cited *Rowson* v. *Earle* (5); Tidd's Practice, 9th ed. p. 86.]

Jelf, Q.C., in reply, cited *In re Romer & Haslam.* (6)

LORD ESHER, M.R. I am of opinion that the ruling of the learned judge at the trial was incorrect. When one considers the nature of a common law action, it seems obvious that the law must imply that the contract of the solicitor upon a retainer

(1) 9 Bing. 402.
(2) 2 C. & M. 629.
(3) 9 Ch. D. 538.
(4) 7 Ex. 691.
(5) Mood. & M. 538.
(6) [1893] 2 Q. B. 286.

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in the action is an entire contract to conduct the action to the end. When a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all the necessary steps in it, and to carry it on to the end. If the meaning of the retainer is that the solicitor is to carry on the action to the end, it necessarily follows that the contract of the solicitor is an entire contract—that is, a contract to take all the steps which are necessary to bring the action to a conclusion. When it is shewn that there were no special terms, but only the ordinary retainer for the purposes of the action, the implication I have mentioned is that which every reasonable person would make, and therefore the implication which the law makes in such a case. This is the view taken by the judges in the older cases which have been cited, e.g., by Lord Eldon when sitting as Chief Justice of the Common Pleas. He says in *Cresswell* v. *Byron* (1): "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill." It may perhaps be said that Lord Eldon meant that under no circumstances could an attorney possibly obtain payment for the work done by him unless he continued to act for the client till the conclusion of the action. If he meant to say that, no doubt the rule as laid down by him has been modified; but to engraft a modification on a rule is not to abrogate it altogether. I do not propose to go through all the cases cited, but it seems to me that from that time downwards it has been held that a solicitor cannot sue for his costs until his contract has been entirely fulfilled, unless the case is brought within some recognised exception to the general rule. What are the exceptions to the rule which have been recognised? One such exception the judges have very naturally implied on the only ground upon which judges are entitled to make any such implication, viz., on the ground that any reasonable person would suppose both parties to the contract to have understood and intended to act upon it. This exception must certainly be

(1) 14 Ves. 271.

engrafted on the rule as laid down by Lord Eldon, and I have no doubt that he would have mentioned it himself, if it had been brought to his notice. A solicitor cannot reasonably be expected to disburse out of his own pocket money which he may be unable to get back from his client or the other side, or which at any rate he may be kept out of for a long time. Therefore the Courts have held, because every person of ordinary sense would come to the same conclusion, that the solicitor is entitled, if he thinks right, to ask his client to find money for necessary disbursements; and, if the client fails to do so, the solicitor is entitled to say that he cannot act for the client further, because he does not comply with the obligation which is implied on his part. But it has been held that in such a case a solicitor cannot throw his client over at the last moment, which might be ruin to the client, and, even though the solicitor may have good cause for declining to act further for the client, he must give him reasonable notice of his intention to do so. It is hardly disputed that the law was as I have stated until the case of *Vansandau* v. *Browne*. (1) I cannot make out that the expressions in that case relied on by the plaintiffs really come to anything but this, viz., that, whether the solicitor must have reasonable cause or not, at all events he must give reasonable notice to the client of his intention not to proceed further. *Harris* v. *Osbourn* (2) is a more satisfactory case to my mind. What Lord Lyndhurst said there seems to meet this very case. He said: "I consider that, when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination." It is obvious that by "special contract" he there intends the contract implied by law in this case as opposed to the general contract to do work upon a quantum meruit. He proceeds: "I do not mean to say that under no circumstances can he put an end to this contract; but it cannot be put an end to without notice." He recognises, therefore, that there may be circumstances which justify the solicitor in putting an end to the contract, but says that he cannot do so without giving reasonable notice. The result of what he says seems to me to be that, though there may be valid reasons for giving such a notice, if no such notice is

(1) 9 Bing. 402. (2) 2 C. & M. 629.

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given, the contract of the solicitor is an entire contract, and he cannot sue for his costs before the termination of the action. It has been argued that the doctrine contained in these cases has been exploded by the decision of Jessel, M.R., in *In re Hall & Barker*. (1) I cannot think that that decision had the effect so attributed to it, and, if it had, I think it ought to be overruled. I think that what he really meant to decide was merely that it would be unjust to apply the rule undoubtedly applicable to common law actions in the case of Chancery suits, where the proceedings might be of a very long and complicated character and be divided into several stages, and, if the same implication were made as in the case of a retainer in common law actions, the solicitor might be unable to recover anything for the work he had been doing for a long period of years; that it would be wrong in such cases to make the same implication as in the case of a common law action, because it could not be said that all reasonable people fairly considering the matter would come to the conclusion that both parties must have understood that the solicitor was employed on the terms that he would carry on the litigation until the end. With that decision so construed, we have on the present occasion nothing to do. We are here dealing with the case of actions in the nature of a common law action. I take it that the plaintiffs were employed in each of these actions in the ordinary way, and that not one of them was finished. The learned judge has held that, without any cause shewn, at his own will and pleasure, a solicitor, upon giving a sufficient notice in point of time of his intention so to do, can put an end to the contract, though it is primâ facie an entire contract, i.e., one by which he undertakes that he will carry on the action and not ask for any costs till the end; and that, having done so, he may bring an action for the costs already incurred. I cannot find any authority for this view, which appears to me to destroy entirely that implication with regard to the nature of the contract which I have mentioned, and which appears to me to be grounded on reason and good sense. It seems to me that the decision of the learned judge was wrong, and that the case ought to have gone on in order to see whether

(1) 9 Ch. D. 538.

the solicitors had a reasonable ground for refusing to act further for the client. What may amount to a sufficient ground for such a refusal may not be in all cases clear. It may be doubtful how far matters happening to the solicitor on his side only would affect his contract. The case of the illness or death of the solicitor has been suggested during the argument, and it has been said that such a contingency would not only exonerate him from further performance of the contract, but would also entitle him or his representatives to sue for costs already incurred, although he had not performed his original contract by carrying on the action till the end. It might be argued, on the other hand, that such cases would fall within the general rule applicable to contracts for the performance of some entire piece of work, such as that of a captain of a ship who undertakes to navigate the ship on a particular voyage for an entire sum only to be paid on the completion of the voyage. It is, however, unnecessary for the present purpose to decide that question. For the reasons which I have given, I think that this case must go down for a new trial.

A. L. SMITH, L.J. The question is whether the plaintiffs, who are solicitors, are entitled, under the circumstances of this case, to recover the amount of their bill of costs. I propose to confine my decision to the case now before us, which relates to the retainer of a solicitor in an action at common law. It seems to me clear upon the authorities from the year 1801 down to the present day, that the contract of the solicitor on a retainer such as this is an entire contract, and that, subject to certain limitations, he thereby undertakes to carry on the action till its end. That doctrine is laid down in plain terms in *Harris* v. *Osbourn* (1), where Lord Lyndhurst said, that "when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination." Again, in *Whitehead* v. *Lord* (2), Parke, B., said: "The rule as applicable to this case was correctly laid down in *Harris* v *Osbourn* (1), that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final termination, and that he cannot

(1) 2 C. & M. 629. (2) 7 Ex. 691.

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sue for his bill until that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives." I do not find that this doctrine, so far as it applies to common law actions, is really dissented from by Jessel, M.R., in *In re Hall & Barker*. (1) He there says that he will not adopt it in relation to the suits in equity then before him, but he enunciates it as the principle applicable in the case of common law actions. Then, again, in the case of *In re Romer & Haslam* (2) the same principle is enunciated. Therefore primâ facie the contract of the solicitor, when he accepts a retainer in a common law action, is an entire contract to carry on the action till it is finished, and he cannot sue for costs before the action is at an end. On the other hand, it is clear that the solicitor may be placed in such a position by the client as to absolve him from the further performance of that contract. It appears to me from the case of *Vansandau* v. *Browne* (3) and subsequent cases which have been cited, that the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on; and, speaking for myself, I should say that the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable; and many other cases may be supposed in which the solicitor may be entitled to refuse to act for the client any further. I should say that, when a solicitor is in a position to shew that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he may decline to act further; and in such case the solicitor would be entitled to sue for the costs already incurred. But we have not now to deal with such a case. The sole question here is, whether the solicitor is entitled without rhyme or reason to throw up his retainer, having given due notice of his intention to do so. I do not think that he is so entitled. The expressions used by judges in the case of *Vansandau* v. *Browne* (3) and cases

(1) 9 Ch. D. 538. (2) [1893] 2 Q. B. 286 (3) 9 Bing. 402.

subsequent to it, which have been relied upon for the plaintiffs, may be summed up as amounting to this, viz., that at any rate the solicitor cannot throw up his retainer without giving due notice. Most of these cases have arisen with regard to the Statute of Limitations. The client having set up the Statute of Limitations in answer to an action by a solicitor for costs, the question was whether the retainer which had been accepted had been put an end to, so that the solicitor's right of action had accrued and the statute had commenced to run. The judges held that notice was necessary in order to put an end to the retainer, and, no such notice having been given by the solicitor, the retainer was a continuing one; and, the contract being an entire one, the statute had not begun to run. So interpreted, the expressions relied on for the plaintiffs seem quite consistent with the view that notice cannot be given by the solicitor to determine his retainer except for good cause. The learned judges who made use of these expressions do not seem to me to have had their minds directed to the point whether, due notice being given, the solicitor can throw up his retainer without rhyme or reason. I think that the law is that he cannot do so in a common law action. The learned judge at the trial held that he could. I do not think that decision was correct.

DAVEY, L.J. I am of the same opinion. I so entirely agree with the reasons given by the Master of the Rolls and my learned brother, A. L. Smith, L.J., that I do not think it necessary to add anything. I only desire to say, that I express no opinion on the question what the effect would be of a solicitor's death or becoming personally incapacitated pending the action.

Application for new trial granted.

Solicitors for plaintiffs: *Underwood, Son, & Piper.*
Solicitors for defendant: *Letts Brothers.*

E. L.