

Chancery Bar Association Seminar  
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Old Hall, Lincoln's Inn

**BAD POINTS TERMINATION AND ADVOCATES DUTIES:**  
**BUXTON V MILLS-OWEN**

BY

DAVID HOLLAND  
LANDMARK CHAMBERS

1. The recent Court of Appeal case of BUXTON V MILLS-OWEN [2010] 122 contains some interesting observations not only on the circumstances in which a solicitor engaged in litigation can terminate his retainer and still obtain payment, but also (more generally) on the duty of advocates when instructed to put forward points which they don't think are properly arguable.
2. The facts are as follows.
3. Mr Buxton is a solicitor. He is well known in planning and environmental law circles. He generally acts for Applicants or Claimants.
4. Mr Mills-Owen is a resident of the New Forest. He is greatly concerned to protect the environment in that area. He was particularly exercised by the decision of the Secretary of State (following the recommendation of a Planning Inspector on appeal) to grant planning permission to one of his neighbours to construct an extension to that neighbour's house. He wished to challenge that decision and, in June 2005, he instructed Mr. Buxton to act on his behalf in that challenge.
5. The retainer was on Mr. Buxton's standard terms and conditions. These included the following:

*7 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.”*

6. The route by which a decision of the Secretary of State on appeal is challenged is section 288 (1) of the Town and Country Planning Act 1990. This provides:

*“(1) 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.”*

Thus it is important to realize that the grounds for challenge are narrow and, essentially, procedural or on points of law. There is no jurisdiction to appeal or challenge a decision on the merits or on matters of planning judgment, as it were.

7. Following his instruction, Mr Buxton obtained the opinion of specialist counsel. In an opinion dated 1<sup>st</sup> July 2005, he concluded:

*“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...*

*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.”*

8. Despite this advice, Mr Mills-Owen instructed Mr Buxton to issue proceedings. This was done on 5<sup>th</sup> July 2005. There were, on the Claim Form, four grounds of challenge as follows:

*a) 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.*

*(b) The permission granted when read together with the application gives no explanation of precisely what the permission is for.*

*(c) 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.*

*(d). 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.”*

9. On 16<sup>th</sup> September 2005 new counsel was instructed. On 25<sup>th</sup> September 2005, in an email, he stated 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.”*

10. Counsel drafted a skeleton which was sent to Mr. Mills-Owen on 19<sup>th</sup> December 2005. It dealt only with ground (a) set out in the Claim Form.

11. However on 20 December 2005, Mr Mills-Owens wrote a long letter to the Mr Buxton commenting in detail on the skeleton argument. He complained, in effect, that the skeleton did not deal with the planning merits of the decision. He also said that the skeleton argument should include grounds (b), (c) and (d).

12. On 28 December 2005, he wrote again insisting that the matters referred to in his earlier letter must be included in the skeleton argument. He stated his concern 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.

13. During the following weeks, correspondence continued between Mr Mills-Owens and the Mr Buxton. The latter stated and maintained his position that grounds (b), (c) and (d) were not arguable errors of law, whereas ground (a) was. Mr Mills-Owens was, on the other hand, adamant that all four grounds should be included in the skeleton argument and advanced at the hearing.

14. Counsel was then asked to reconsider the matter. He prepared a Note dated 3<sup>rd</sup> January 2006. He stated that he could only operate “within the very tight parameters set by the law”. He dealt with grounds (b) to (d) in detail, describing them as points “which are not going to succeed” and “outside the scope which the law allows”. He added that ground (a) was the only argument which “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.”

15. The skeleton argument was still unacceptable to Mr Mills-Owens. On 6<sup>th</sup> January 2006, he insisted that it should not be lodged with the court since it was “fundamentally flawed”.

16. In a letter of 7<sup>th</sup> January 2006, Mr Buxton said that an impasse had been reached. He then said this:

*“Perhaps I have not made it clear that counsel is constrained in what 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...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 eg. 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. In a letter of 11<sup>th</sup> January 2006, Mr Mills-Owens stated:

*“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 monies are owing but would like it taxed.”*

18. On 16<sup>th</sup> January, Mr Mills-Owens replied to a suggestion that counsel’s skeleton should be lodged stating that he expected Mr Buxton to follow his “abundantly clear” instructions. He said that he would prepare his own skeleton argument.

19. On 17<sup>th</sup> January 2006, Mr Buxton wrote that the instructions of Mr Mills-Owens were not clear:

*“(a) as to whether you wish us to continue acting for you and if so (b) whether to instruct counsel to appear on your behalf on 6<sup>th</sup> February and if so (c) 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.

21. On 24<sup>th</sup> January, Mr Buxton spoke to the Law Society and was advised that he could not disclose to the other side 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 appellants’ position was “untenable” and that they had “good reason” to terminate the retainer.

22. 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.

23. On 26 January, Mr Mills-Owens said that Mr Buxton did not have his permission to discuss his (Mr Mills-Owens’) skeleton argument or any 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*”.

24. On 27<sup>th</sup> January 2006, Mr Buxton wrote stating:

*“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...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 suspect that unless you are prepared to take our advice and permit 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)...”*

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

*We have however now given you notice at many points that we will have to terminate the retainer if you do not take our 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.”*

26. On 31 January, Mr Mills-Owens sent a letter stating, *inert alia*:

*“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.*”

27. In his first letter of 1<sup>st</sup> February 2006, 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.

28. On 3<sup>rd</sup> February 2006, Mr Buxton wrote to Mr Mills-Owens saying that the appeal was fixed to be heard by Ouseley J on 6<sup>th</sup> February. He 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.”*

29. On 6<sup>th</sup> February:

- (i) Mr Buxton successfully applied to come off the record.
- (ii) Ouseley J refused Mr Mills-Owens' request for an adjournment.
- (iii) At the substantive hearing (which followed immediately afterwards), Mr Mills-Owens represented himself. His appeal was dismissed.

A subsequent application for permission to appeal was also refused by Waller LJ.

30. Following this, Mr Buxton submitted his bill to Mr Mills Owen in the sum of £6,605.41. Mr Mills-Owen challenged the bill and it came before Master O’Hare on detailed assessment on 31<sup>st</sup> January 2008. Despite finding that the arguments which Mr. Mills-Owen wished to advance were “doomed to disaster” and “doomed to failure”, he nevertheless held that the solicitors were not entitled to terminate the retainer. Thus, as the retainer was an entire contract, the solicitors were not entitled to payment of their charges.

31. Mr Buxton appealed and the appeal came before MacKay J. It was dismissed. The judge described the arguments which Mr Mills-Owen sought to advance as “bound to fail”, nevertheless he held that Mr Buxton was not entitled to terminate his retainer. The nub of his decision is in the following passage

*“...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 bound to fail and therefore he will not do it. I have very considerable sympathy for the solicitors here who had a 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.”*

32. The judges judgment had lead the learned editor of Cook on Costs to state as follows:

*“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'*

### The issues on appeal

33. Mr Buxton appealed to the Court of Appeal. The Law Society intervened. There were three issues on the appeal:

- (i) Whether the solicitor's retainer was an "entire contract" (the "entire contract point").
- (ii) Whether the Judge was correct to conclude that an instruction by the client to the solicitor to pursue arguments which counsel had described as "outside the scope which the law allows" and "wrong in law" did not involve impropriety on the part of the solicitor such as to justify the termination of the retainer (the "impropriety point").
- (iii) Whether the learned Judge was correct to hold that a solicitor can only terminate his retainer if he is instructed to do something which is improper (the "termination point").

The Law Society intervened only on the second and third points.

34. So far as the first point is concerned, Mr Buxton referred to many authorities and sought to submit that the rule or principle that a solicitor's retainer to conduct litigation was an entire contract was out of date when applied to modern litigation. He had some support. In PEROTTI V COLYER BRISTOW [2003] EWHC 25 (Ch) Lindsay J (at paragraph 136) said:

*"Mr. Perotti asserts that the retainer was an "entire Contract" within the meaning of, for example, Underwood Son & Piper v Lewis [1984] QB 30 CA. I confess to real difficulty in seeing the notion of an entire contract being applied to a contemporary instruction of Solicitors to conduct litigation. Whilst it is easy enough to comprehend that if a contract is made, for example, for a ship to take goods to Bombay, the shipowner is not to be able to leave them in Capetown and then to demand a rateable proportion, nautical mile by nautical mile, of the agreed price but before more recent requirements as to fees, few, if any, instructions of Solicitors in 1992 to conduct litigation would have contemplated other than that there should be payment from time to time before the whole journey, so to speak, had been completed"*

35. However, the Court of Appeal were unsympathetic. They had "no doubt" that the retainer was an entire contract. They relied on the previous and well known Court of Appeal case of UNDERWOOD V LEWIS [1894] 2 QB 306 in which Lord Esher MR had stated:

*"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 the end "*

36. I personally think that there was something in Mr Buxton's point on this issue. However, it also seems to me that the argument is really not worth having. The matter is essentially one of contract. There is nothing to stop a solicitor from expressly providing that, if his retainer is terminated for whatever reason, he will be entitled to his fees up to the date of termination. I would suggest that there is nothing wrong with something like the following wording:

*"If this retainer is terminated by either party for whatever reason, then we will be entitled to recover our fees up to the date of termination."*

37. However, the Court of Appeal allowed the appeal essentially on the other two grounds.

38. They held that, at common law and under the express terms of this retainer, the solicitors were entitled to terminate the retainer for "good reason". They relied on other passages from the Underwood case in which Lord Esher had said that a solicitor could terminate his retainer if he had "*reasonable ground for refusing to act further for the client*". In the same case AL Smith LJ had said:

*"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 and the 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."*

39. They also referred to section 65 (2) of the Solicitors Act 1974 which provides that 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."

40. However, they had then to decide what "good reason" meant and whether Mr Buxton had good reason to terminate his retainer with Mr Mills-Owen.

41. The Court held that the judge was 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. Whether there is “good reason” in any case is fact-sensitive.

42. The court referred to the Solicitors Practice Rules 1990 which had applied at the time. Paragraph 12.12 provided 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 included the following:

*“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.”*

43. The present rules are in the Solicitors Code of Conduct 2007 which came into force on 1<sup>st</sup> July 2007. The terms of rule 2.01 (2) are to all intents and purposes identical stating:

*“You must not cease acting for a client except for good reason and on reasonable notice.”*

Again the Guidance to Rule 2 (at paragraph 8) states:

*“Examples of good reasons include where there is a breakdown in confidence between you and the client, and where you are unable to obtain proper instructions.”*

Rule 11 of the Solicitors Code of Conduct 2007 applies where solicitors are acting as advocates or exercising a right to conduct litigation (see sections 28 and 119 of the Courts and Legal Services Act 1990). Rule 11.01 (3) states:

*“You must not...draft any documents relating to any proceedings containing (a) any contention which you do not consider to be properly arguable”.*

44. By section 28 (2A) of the Courts and Legal Services Act 1990:

*“Every person who exercises before any court a right of audience granted by an authorised body has—*

*(a) a duty to the court to act with independence in the interests of justice; and*

*(b) a duty to comply with rules of conduct of the body relating to the right and approved for the purposes of this section;*

*and those duties shall override any obligation which the person may have (otherwise than under the criminal law) if it is inconsistent with them.”*

45. Thus if the solicitor himself is acting as the advocate, it would be improper for him to put forward a contention that he did not consider to be properly arguable. But what if he instructs counsel?

46. The court referred to the Bar Code of Conduct which 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 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;*

*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.*

*708. A barrister when conducting proceedings in Court:*

*(f) must not make a submission which he does not consider to be properly arguable ”.*

47. The Court was quite clear that a solicitor had “good reason” to terminate his retainer if the client insisted that he instruct counsel to put forward an argument which he or she did not consider to be properly arguable. Dyson LJ stated:

*“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 (i) not to include in the court documents that they drafted any contention which they did not consider to be properly arguable and (ii) not to instruct counsel to advance contentions which they did not consider to be properly arguable”*

48. The court also referred to the overriding objective in CPR Part 1.1 and CPR part 1.3 which provides:

*“The parties are required to help the court to further the overriding objective.”*

They made reference to the earlier case of GEBERAN TRADING CO LTD V SKJEVESLAND [2002] EWCA Civ 1567, [2003] 1 WLR 912 (at para 37), where in setting out some of the duties of an advocate, the Court of Appeal had stated:

*“It is well established that as an officer of the court an advocate has a duty to the court, which overrides his duty to his client: see Rondel v Worsley [1969] 1 AC*

191 , 227–228, per Lord Reid. Accordingly, an advocate may not deceive or knowingly mislead the court. The advocate must bring to the attention of the court all relevant decisions and legislative provisions of which he is aware: see, for example, *Copeland v Smith (Practice Note)* [2000] 1 WLR 1371 . The advocate must bring to the attention of the court any procedural irregularity during the course of the trial: see *R v Langford* *The Times*, 12 January 2001. The advocate must conduct the proceedings economically: see *Practice Direction (Civil Litigation: Case Management)* [1995] 1 WLR 508 . **Under the CPR , it is the express duty of the parties, and hence their legal advisers, including advocates, to help the court to further the overriding objective in rule 1.3.** These are merely some examples of the practical application of the advocate's duty to the court.”

49. The Court expressly disapproved the passage from Cook on Costs 2010 set out above. Dyson LJ concluded:

*“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.”*

50. In the circumstances, the Court allowed the appeal and held both the Mr Buxton was entitled to terminate his retainer and entitled to be paid for the work he had done up to the date of termination.

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