

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) [redacted]

EX PARTE A PROFESSIONALLY EMBARRASSED LAW FIRM

Determined on paper

2022 July 18

JUDGMENT

- [1] **JACK, J [Ag.]**: In this matter a BVI law firm sought to come off the record as acting for its client on the basis that the firm was professionally embarrassed. It raises a short point of practice.
- [2] The law firm took the view that it was professionally embarrassed from acting for the clients. I do not need to set out the nature of the professional embarrassment. It suffices to say that I am satisfied that there were grounds on which they were obliged to cease to act. The firm had explained matters to the clients and indicated that, so long as the cause of professional embarrassment continued, the firm would be unable to act for the clients. The clients accepted that position and sought new counsel to act on their behalf. Despite some weeks passing, however, they had not engaged a new firm, although they appeared to be very close to doing so.
- [3] In these circumstances, the law firm applied to come off the record. This was on the basis that work was going to be required very shortly to be done on the case,

but the firm, because of its professional embarrassment, was unable to do that work.

[4] They served the application on the clients (and on the other parties, as is required by the Rules) and sought a determination two days later. The order was sought in the form appropriate to an *ex parte* application on notice. It gave the clients liberty to apply to vary or discharge the order within seven days. This form of order is in my judgment inappropriate.

[5] CPR 63.6 provides:

“(1) A legal practitioner who wishes to be removed from the record as acting for a party may apply to the court for an order that he or she be removed from the record.

(2) The application must be on notice to the client or former client and to all other parties.

(3) The application must be supported by evidence on affidavit which must be served on the client but must not be served on any other party to the proceedings.

(4) Any order made must be served by the applicant on the other parties' legal practitioners and personally on the former client.

(5) The applicant must file a certificate of service of the order.”

[6] An order that a practitioner come off the record is a final order. That is in my judgment incompatible with the provision in the law firm's draft order allowing the client to seek to vary or discharge the order. That is a standard provision in an *ex parte* order, but is not appropriate when a firm is allowed to come off the record. It is critical for the proper administration of justice that the Court and the parties know on whom to serve documents. A law firm cannot be in some twilight zone, where it is part off the record, part on the record. Every order made *ex parte* in the Commercial Division requires a return date within 28 days for the order to be reconsidered, so the law firm's position would remain uncertain for nearly a month.

[7] It follows that an application to come off the record is an ordinary application, where at least seven days' notice is normally required: CPR 11.11(1)(b). In the current case, the firm seeks to abridge that time. As I noted in **A Law Firm v Three Clients**,¹ there are cases, such as where a client needs time to pay the firm's fee notes, where the Court has a real discretion whether to allow the firm to come off the record,² and others

“where the Court has no choice but to accede to an application by a legal practitioner to come off the record. One example is where the client has withdrawn his or her instructions to the legal practitioner. If the client has neither nominated another firm to act nor served a notice under CPR 63.4 of wishing to act as a litigant in person, then the Court has really no discretion in the matter; it must allow the legal practitioner to come off the record. Likewise, if a legal practitioner is professionally embarrassed, for example by the client deliberately refusing to honour his or her disclosure obligations, the Court is almost bound to grant the application.

[8] It is likely to be rare in the first type of discretionary case for the Court to abridge time. This is because the clients are entitled (particularly as the decision will be a final order) to put what submissions they wish to the Court as to the reasons for non-payment and as to how the Court should exercise its discretion. However, even in the second type of case, where the Court has little or no discretion, abridgement of time is likely to be the exception than the rule.

[9] The reason is this. Where a lawyer is professionally embarrassed, it is sometimes possible for the position to be rectified. Where (as in the example given in **Three Clients**) the law firm is embarrassed by the client's refusal to honour his or her disclosure obligations, a week's reflection may cause the client to mend his or her ways and give proper disclosure.

¹ [2020] ECSCJ No 196 (25th May 2020) at [5].

² The Court has regard to, but not bound by, the law firm's standard terms and conditions on an application to come off the record: *VTB Bank v Taruta* [2022] ECSCJ No 85 (22nd March 2022) at [11].

- [10] In the current case, the clients have known for nearly a month that the law firm was embarrassed and could not continue to act. The clients have not sought to contest that assessment. Nor have they taken steps to remedy the cause of the professional embarrassment. Rather they have reached an advanced stage of negotiations with a fresh law firm and have been stringing the existing applicant law firm along. The existing law firm will be required to do work imminently but by reason of their professional embarrassment are unable to do so.
- [11] In these circumstances, in my judgment it is appropriate to abridge time for an *inter partes* determination and allow the firm to be removed from the record. Abridgement will cause the clients little prejudice. Given their refusal to remedy the cause of the professional embarrassment, removal of the existing law firm from the record is inevitable.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar