

THE HIGH COURT

2005 No. 1050P

BETWEEN

TERENCE KENNEDY

PLAINTIFF

AND

KILLEEN CORRUGATED PRODUCTS LIMITED

DEFENDANT

AND

DOOR FIX LIMITED

THIRD PARTY

AND

THE LAW SOCIETY OF IRELAND

NOTICE PARTY

Judgment of Finnegan P. delivered the 28th day of November 2006.

1. The Plaintiff was injured in the course of his employment by a shutter type door and issued proceedings in the Circuit Court. The Defendant, the employer, joined the Third Party. Liability is very much in issue. The matter was transferred to the High Court as the Plaintiff's injuries, it transpired, were much more serious than originally thought.

2. The Plaintiff's Senior Counsel furnished a detailed Advice on Proofs on the 1st February 2005. Included was the following advice –

"Agents should write an open letter to the Defendants requesting them to admit the following facts:-

- (a) Was not the shutter door defective prior to the Plaintiff's accident.
- (b) Did not Mr. Geoghegan report that defect to the Defendants prior to the accident.
- (c) Did not Mr. Kerrigan inspect the damage.
- (d) On inspection of the door did not the Defendants find faulty sensors which were replaced.
- (e) Were not the sensors inappropriately placed prior to the accident.
- (f) Were sensors replaced as a result of the accident.

In the event that this is not replied to agents should arrange to have interrogatories delivered in a similar line and insist on sworn replies."

3. The Plaintiff applied to the Master for an Order for the delivery of interrogatories. The grounding Affidavit referred to a letter dated 22nd March 2005 requesting the Defendant to admit facts and to Senior Counsel having advised that interrogatories are necessary. In a written decision dated 4th November 2005 the Master set out the law as to interrogatories clearly and correctly. Interrogatories must serve a clear litigious purpose at the time of application for the same. The test to be applied is whether it is essential for the proper presentation of the Applicant's case that the information be furnished at that juncture. The Master went on to consider each of the interrogatories sought to be delivered and in short he found that they each failed the test. He concluded his ruling with the following paragraph –

"I won't be making the order sought by the Plaintiff in this application but before I make the order dismissing the application I am calling on the Plaintiff's solicitor under Order 99 Rule 7 to show cause why he should not repay to his client any costs which the client may be ordered to pay to the Defendant."

4. The Rules of the Superior Courts Order 99 Rule 7 provide as follows –

"If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require), why the solicitor should not repay to his client any costs which the client may have been ordered to pay any other person, and thereupon may make such order as the justice of the case may require. The Court may refer the matter to the Taxing Master for inquiry and report; and may also nominate a solicitor to attend and take part in such inquiry. Notice of the order shall be given to the client in such manner as the Court may direct. Any costs of the solicitor nominated as aforesaid shall be paid by such parties, or out of such funds as the Court may direct; or, if not otherwise paid may be paid out of such monies (if any) as may be provided by the Oireachtas."

5. On the 9th December 2006 Senior Counsel who had advised on proofs and the Plaintiff's solicitor attended before the Master. Senior Counsel made submissions. The Master reserved his decision until the 3rd February 2006. In fact the Master handed down a decision on the 2nd February 2006 in the form of a written decision. The relevant part of the Master's Order reads as follows –

"It is ordered that the said motion do stand struck out.

And it is ordered that the Plaintiff do pay to the Defendant the costs of this motion when taxed and ascertained with a stay on execution of the within order for costs until the determination of these proceedings.

It is further ordered that pursuant to Order 99 Rule 7 (RSC) that the costs of this motion and order of the Plaintiff's solicitor be disallowed and that the Plaintiff's solicitor do repay to his client any costs which the client has been ordered to pay to the Defendant.

And in the event of the solicitor for the Plaintiff making an application to the High Court pursuant to Order 63 Rule 9(RSC) in respect of the said Order pursuant to Order 99 Rule 7(RSC) herein the Master doth appoint Mr. Manus McClafferty as solicitor to represent the Plaintiff at the hearing of the said application."

6. In the course of his written decision the Master said –

"I was of the view, last November, that the interrogatories application was pointless and misconceived. It did not need two days of legal argument to convince me of that: it was "glaringly obvious". I remain of that view. The solicitor has not attempted to persuade me otherwise. Clearly, there is no suggestion here that the solicitor has acted "improperly", but I do not propose to rule on whether the motion was "unreasonable" (in the sense of not permitting of a reasonable explanation) or "negligent" (a failure to act with the competence reasonably expected of ordinary members of the profession). I have a simpler test to apply, employing the language of Order 99 Rule 7: were costs incurred "without any reasonable cause"?

I am of the view that the costs of this motion were incurred without any reasonable cause and I will make an Order under Order 99 Rule 7 requiring the solicitor to reimburse his client for the costs the latter is liable to pay the Respondent and cancelling the solicitor's entitlement to be paid by his client for the costs of the application."

7. The Plaintiff appeals to this Court the terms of the Notice of Motion being as follows –

"An Order pursuant to Order 63 Rule 9 of the Rules of the Superior Courts appealing so much of the Order of the Master of the High Court made on the 3rd February 2006 relating to the Order made by him pursuant to Order 99 Rule 7 (RSC) that the costs of the motion and order of the Plaintiff's solicitor be disallowed, that the Plaintiff's solicitor do repay to his client any costs which the client has been ordered to pay to the Defendant and that in the event of the Plaintiff's solicitor making an application pursuant to Order 63 Rule 9 (RSC) in respect of the Order pursuant to Order 99 Rule 7(RSC) appointing Manus McClafferty as solicitor to represent the Plaintiff at the hearing of the said application."

8. The Notice Party applied to be joined as a Notice Party as the issues arising on this appeal affect solicitors generally and I acceded to that application.

9. The inherent jurisdiction of the High Court over solicitors has not been affected by the Solicitors Acts 1954 – 2002: Solicitors Act 1954 section 14(3). Order 99 Rule 7 of the Rules of the Superior Courts has its origin in the exercise of that jurisdiction. The Courts have fixed solicitors personally with costs in a wide variety of circumstances – acting for either plaintiff or defendant in an action without authority, joining a plaintiff without his authority, acting for a non existing plaintiff, defending an action with knowledge that no defence is possible, failure to deliver bills of costs, acting against a former client, instituting fraudulent proceedings, instituting a collusive action, instituting a frivolous and vexatious action, unreasonably pleading fraud and undue influence. In short the jurisdiction has been exercised where there has been improper conduct during proceedings.

10. The leading modern authority on the jurisdiction of the Court to disallow costs and/or to order a solicitor to pay costs personally is *Myers v Elman* 1940 AC 283.

11. In the course of his judgment Maugham L.J. said –

"My Lords, as I understand the judgment of Greer and Slesser L.JJ., those learned judges were of opinion that the jurisdiction of the Court to order a solicitor to pay the cost of proceedings is a punitive power resting on the personal misconduct of the solicitor and precisely similar to the power of striking a solicitor off the rolls or suspending him from practice The jurisdiction to strike off the rolls or to suspend a solicitor seems to me to be of a very different character. Apart from the statutory grounds it is of course true that a solicitor may be struck off the rolls or suspended on the ground of professional misconduct, words which have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency: in *Re a Solicitor. Ex parte The Law Society* (1912) 1 K.B. 302. Mere negligence even of a serious character, will not suffice."

12. Maugham L.J. then considered a number of authorities where Order 99 Rule 7 type orders had been made and concluded –

"These cases did not depend on disgraceful or dishonourable conduct by the solicitor, but on mere negligence of a serious character, the result of which was to occasion useless costs to the other parties.... I think the authorities show that the jurisdiction may be exercised where the solicitor is merely negligent."

13. Lord Atkin however saw the jurisdiction as a disciplinary jurisdiction in cases of misconduct. In ordering a solicitor to pay costs the Court was not exercising a kind of summary jurisdiction in contract or tort by way of awarding damages. The Court does not concerned itself with a breach of duty to the other litigant but with a breach of duty to itself. He did not however agree with the standard of conduct posited in the Court below – "by misconduct is meant something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute; for example wilfully misleading the Court in the conduct of a case." He considered this too favourable and in his view the cases show that a breach of duty owed to the Court committed by gross negligence may lead to the exercise of the punitive jurisdiction.

14. Lord Wright in his judgment held that there existed in the Court the jurisdiction to punish a solicitor by ordering him to pay costs, whether the costs of his own client or the costs of the opposite party or both. The ground for making such an order was that the solicitor had been guilty of professional misconduct not of so serious a character as to justify striking him off the roll or suspending him. The proceedings are penal. At p. 319 he went on to say –

"The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger CB in *Stephens v Hill* (1842) 10 M & W 28. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an Affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve a personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty too. The

summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence or an action for breach of warranty of authority brought by the person named as Defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party to the action."

15. In summary then Maugham L.J. saw the Court's primary object in exercising the jurisdiction as compensation, Atkin L.J. as punitive and Wright L.J. as both compensatory and punitive.

16. In *Edwards v Edwards* 1958 P. 235 Sachs J having referred to *Myers v Elman* at p. 248 continues –

"It is, of course, axiomatic but nonetheless something which in the present case should be mentioned, that the mere fact that the litigation failed is no reason for invoking the jurisdiction: nor is an error of judgment, nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to a "serious dereliction of duty", something which justifies according to other speeches in that case, the use of the word gross. It is not, however, normally necessary to establish mala fides or other obliquity on the part of the solicitor; though it may be that if mala fides is established that might turn the scale in a particular case: and it is right at this stage to make it clear that no imputation whatever is made against the solicitor's honesty.

No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the Court and oppressive conduct generally."

17. On my review of the authorities I am satisfied that the power of the court to make an order under Order 99 Rule 7, whether as to costs as between the solicitor and his own client or an Order that the solicitor personally bear the costs awarded against his own client, depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the Court or at least of gross negligence in relation to his duty to the Court. In the present case I am satisfied that the conduct of the solicitor falls far short of this requirement. In particular I have regard to the circumstance that the solicitor acted on the advice of Senior Counsel. While acting on such advice would not justify a breach of duty to the Court it will in general be an answer to a charge of negligence. Put at its highest in the present case the solicitor has been guilty of negligence but not of negligence which could be characterised as "gross". In these circumstances the jurisdiction to make the Order, whether that jurisdiction be punitive, compensatory or both did not arise and the Order ought not to have been made.

18. A further issue however arises namely has the Master jurisdiction to make an Order under Order 99 Rule 7.

19. The Court Officers Act 1926 section 5(2) provides as follows –

"5(2) In addition to the general superintendence and control aforesaid the Master of the High Court shall also have and exercise such powers and authorities and perform and fulfil such duties and functions as shall be from time to time conferred on or assigned to him by statute or Rule of Court, and in particular (unless and until otherwise provided by statute or Rule of Court) shall have and perform all such other powers, authorities, duties and functions as are or become vested in him by virtue of any other provision of this Act"

20. The Courts (Supplemental Provisions) Act 1961 section 14(3) provides as follows –

"14(3) Rules of Court may, in relation to proceedings and matters (not being criminal proceedings or matters or matters relating to the liberty of the person) in the High Court and Supreme Court authorise the Master of the High Court and other principal officers within the meaning of the Court Officers Act 1926 – 1951, to exercise functions, powers and jurisdiction in uncontested cases and to take accounts, conduct enquiries and make orders of an interlocutory nature."

21. Paragraph 4(2) of the Eighth Schedule of the Act sets out the powers and functions of the Master –

"4(2) The Master of the High Court shall have and exercise such powers and authorities and perform such duties and functions as are from time to time conferred on or assigned to him by statute or Rules of Court, and in particular (unless and until otherwise provided by statute or Rules of Court) shall have and perform all such other powers, authorities, duties and functions as are vested in him by virtue of subsection (3) of section 31 of the Act of 1926."

22. The reference to subsection (3) of section 31 of the Act of 1926 is to the provision which abolished the then existing posts and offices and provided that where a post is abolished the powers, authorities, duties and functions of the holder of the post insofar as they remained capable of being exercised or performed should be vested in the Master.

23. The Court and Court Officers Act 1995 section 24 provides as follows –

"24 The Master of the High Court is hereby authorised by law to exercise limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution."

24. The Constitution Article 37.1 provides as follows –

"37.1 Nothing in this Constitution shall operate to invalidate the exercise of limited judicial functions and powers of a judicial nature in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a Judge or a Court appointed or established as such under this Constitution."

25. Section 25 of the Court and Court Officers Act 1995 provide as follows –

25.—(1) Subject to subsection (2) of this section and section 26 of this Act, the Master of the High Court may, in all such applications made ex parte or by motion on notice whether interlocutory or otherwise and in all such applications for judgement by consent or in default of appearance or defence as may from time to time be allocated for hearing by the Master of the High Court by the President of the High Court, exercise all the functions, powers and jurisdiction which a judge of the High Court exercises from time to time.

(2) Without prejudice to the powers of the Master of the High Court under the *Jurisdiction of Courts and Enforcement of*

Judgments (European Communities) Act, 1988, the Master of the High Court shall not exercise any function, power or jurisdiction in respect of any of the following matters:

- (a) matters relating to criminal proceedings;
- (b) matters concerning the liberty of the person, including attachment;
- (c) the granting of injunctions;
- (d) bail;
- (e) the trial of any issue before the trial of an action;
- (f) conditional or other orders in State Side matters, or any other form of application for judicial review, save orders for enlargement or abridgement of time;
- (g) any cause or matter concerning a Ward of Court;
- (h) any matter relating to custody of children;
- (i) approval of settlements in cases in which damages are claimed on behalf of infants;
- (j) applications under *section 63 of the Civil Liability Act, 1961*.

(3) All the functions, powers and jurisdiction exercised by the Master of the High Court immediately before the passing of this Act by virtue of any statute or rule of court may continue to be exercised by the Master of the High Court save in so far as the same are inconsistent with the exceptions mentioned in subsection (2) of this section.

(4) The Master of the High Court may exercise such further or other functions and powers in relation to matters arising before the trial of an action as may from time to time be conferred on the Master of the High Court by rules of court.

(5) All orders of the Master of the High Court shall be subject to appeal to the High Court.

(6) Rules of court may be made by the Superior Courts Rules Committee, with the concurrence of the Minister in relation to any function, power or jurisdiction conferred on the Master of the High Court under this section.

26. From the foregoing it will be seen that the 1926 Act provides that the Master shall have powers, authorities, duties and functions under statute or Rules of Court. Again under the 1961 Act section 14(3) the Master may be authorised by Rules of Court to exercise functions, powers and jurisdiction in uncontested cases and to take accounts, conduct enquiries and make Orders of an interlocutory nature. The Eighth Schedule of the 1961 Act provides that the Master shall have and exercise powers, authorities, duties and functions conferred by statute or Rules of Court. The 1995 Act section 24 enables the President of the High Court to allocate certain applications for hearing by the Master and where such allocation is made the Master may exercise all the functions, powers and jurisdiction of a Judge of a High Court.

27. In *Taylor v Clonmel Health Care* 2004 2 ILRM 133 Geoghegan J. dealt with the Master's jurisdiction in the following terms –

"Although with reference to the Master the word "jurisdiction" is included in the index to the Rules of the Superior Courts it is not included in the body of the Rules and is, in my opinion, a misnomer. The Master has the powers and duties conferred upon him by the Rules of the Superior Courts. The powers of the Rules Making Committee in this regard in turn derive from the Courts (Supplemental Provisions) Act 1961 and by cross reference the Courts and Court Officers Act 1926. But as I would see it, it is not a conferring of jurisdiction on the Master. It is rather limited powers given to the Master to exercise the jurisdiction conferred on the High Court. The Rules of the Court simply regulate the jurisdiction already conferred. The Rules do not themselves confer a jurisdiction. Under the definition of "Court" in the Rules of the Superior Courts the Master is included when exercising his powers under the Rules."

28. Order 63 Rule 6 provides as follows –

"In any case in which the Master may make an Order the costs of the application shall be in the discretion of the Master, who may direct payment of a sum in gross in lieu of payment of costs to be taxed."

29. Order 99 contains an almost identical provision in Rule 1(1) and Rule 5(2)(a). –

"1(1) The Costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

"5(1)(2) In awarding costs the Court may direct –

- (a) that a sum in gross be paid in lieu of taxed costs."

26. Adopting Geoghegan J's approach it seems to me that Order 63 Rule 6 confers upon the Master his limited powers in relation to costs. In terms Order 99 refers throughout to the Court and "the Court" is defined in Order 125 –

"The Court" means either, as the context requires, the High Court or a Judge or Judges thereof and includes the Master, the Examiner and the Probate Officer where they respectively have jurisdiction."

27. I am satisfied that the context in Order 99 Rule 7 does not require the phrase "the Court" to include the Master as his powers as to costs are dealt with separately in Order 63. Thus I am satisfied that Order 99 Rule 7 does not apply to proceedings before the Master. Accordingly the Master had no power to make the Order the subject matter of this appeal. This is consistent with the scheme

of Order 63. Rule 2 of the Order permits the Master on consent to assess damages or to take an account. Order 63 Rule 3 permits the Master on consent to try an issue of fact. Complex issues can arise on an application under Order 99 Rule 7: thus in *Myers v Elman* in the High Court the costs issue was argued over five days. The issue will require a determination as to whether the solicitor whose conduct in issue has been guilty of professional misconduct or of negligence which is sufficient to amount to misconduct or of gross negligence. Leaving aside any issue arising under Article 37 of the Constitution jurisdiction could only be conferred upon the Master by statute, by Rules of Court or by an allocation by the President of the High Court. There is no statute nor is there a Rule nor is there such an allocation.

28. For the like reason the Master has no power to make an Order under Order 99 Rule 7 to refer the matter to the Taxing Master for inquiry and report and to nominate a solicitor to attend and take part in such inquiry.

29. Accordingly I allow the appeal and I set aside the Order of the Master made on 2nd February 2006 insofar as it related to costs and the appointment of Manus McClafferty as solicitor to represent the Plaintiff. I will hear the parties as to the orders to costs which he should make in relation to the original application and on this appeal.