

## THE HIGH COURT

2010 421P

BETWEEN

DERMOT TIGHE

PLAINTIFF

AND

JOSEPH BURKE TRADING AS

MCCARTAN AND BURKE SOLICITORS

DEFENDANT

**JUDGMENT of Kearns P. delivered on the 16th day of July, 2010.**

This is a negligence claim brought by the plaintiff, a lay litigant, against his former solicitor arising out of alleged non-performance of his professional obligations to the plaintiff in relation to judicial review proceedings brought by the plaintiff against Kildare County Council.

In July 2002, the plaintiff had applied to Kildare County Council for planning permission for the development at Newtown, Enfield, County Kildare of a two storey over basement building. The Planning Authority issued a request for further information on 9th September, 2002 to which the plaintiff purported to respond on 19th December, 2002. A further request seeking clarification of certain matters was conveyed by letter dated 23rd January, 2003 which was received by the plaintiff on 6th February, 2003. It appears that the plaintiff published fresh newspaper notices on 7th February, 2003. The plaintiff's project manager, Conor Furey, Engineer, furnished additional information to Kildare County Council on 18th February, 2003. However, the Planning Authority indicated on 13th February, 2003 that the new newspaper notices were inadequate and required re-advertisement.

The plaintiff was of the view that the Planning Authority had four weeks to make its decision from the 18th February, 2003 but served a request for clarification of further information on 13th March, 2003. The plaintiff thereafter took the view that the Council was not only seeking irrelevant information but that a default permission under s. 34(8) of the Planning and Development Act, 2000, came into being on 18th March, 2003.

The plaintiff instructed Messrs. Beauchamps, Solicitors, to institute judicial review proceedings seeking declaratory relief to that effect and the same were launched in August, 2003. Messrs. Beauchamps sought and obtained an opinion from Michael Collins S.C. prior to the launch of such proceedings.

The plaintiff was dissatisfied with the legal services provided by Messrs Beauchamps. In early March, 2004 the Plaintiff retained the defendant as his solicitor for the purpose of conducting the judicial review proceedings on his behalf.

While the plaintiff attaches huge importance to a contention that the defendant first contacted him (whereas the defendant says the opposite), it is not in dispute that the plaintiff and the defendant were put in contact by a mutual friend from Roscommon. I attach no importance whatsoever to the issue as to who made the initial contact.

One of the first issues to be discussed between the plaintiff and the defendant was the payment to Beauchamps for their legal services to date, including counsels' fees. An account had been furnished by Beauchamps and in this regard the defendant indicated to the plaintiff he would consult with his wife, a costs accountant, about the amount of the bill. The plaintiff instructed Mr. Burke to offer to Beauchamps the sum of €7,500 as a compromise figure. The offer of this amount, the plaintiff understood, was accepted by Messrs. Beauchamps on the 1st April, 2004. However, I am satisfied from correspondence that certain items were not provided for in this figure, including, in particular, a fee payable to Ms. Nuala Butler S.C., as is apparent from a letter written by the defendant to the plaintiff on 2nd April, 2004. The plaintiff paid the additional sum sought and I am satisfied he can have no complaint against Mr. Burke on the basis that the defendant facilitated or condoned a double payment to Ms. Butler or to any other person who had previously advised in the matter.

While the defendant did not ultimately obtain the papers from Messrs. Beauchamps until mid-May, 2004, he identified the key issues to be determined in the judicial review proceedings in a letter dated 29th April, 2004 to Mr. John Healy of W.A. Osbourne & Co., solicitors for Kildare County Council, in which he indicated that a consultation had taken place with Mr. Collins S.C. who had advised that the following queries be raised:-

*"1. The respondents in their Statement of Opposition at paragraph 2 state that the planning application, the subject of the proceedings herein was not made in accordance with the provisions of the Planning and Development Regulations 2001. Please furnish details of how the planning application breaches the provisions of the Planning and Development Regulations, 2001*

*2. At paragraph 3 of the Statement of Grounds of Opposition, the respondents allege that the proposed development was not in accordance with the relevant statutory Development Plans and would have constituted a material contravention thereof. Please furnish details of how the proposed development was not in accordance with the relevant statutory Development Plans and would have constituted a material contravention.*

*3. Please furnish a copy of the respondent's entire planning file."*

Before continuing the narrative history, it is perhaps appropriate at this point to record that the plaintiff, at his first meeting with the defendant on 9th March, 2004, indicated that a certain official in Kildare County Council had requested the payment of a bribe to facilitate the granting of his planning application. This matter was drawn to Mr. Collin's attention when the plaintiff and defendant met

with him in consultation on 28th April. Mr. Collins took the view, supported by the defendant, that an allegation of this nature could not be proved, but could be progressed separately by means of a complaint to Kildare County Council and/or the Mahon Tribunal. It was a view and advice also given by counsel later retained in the case, Mr. James Connolly S.C.

I am thus quite satisfied that the further allegation raised by the plaintiff against the defendant in these proceedings, namely, that the defendant "did nothing" when this matter was drawn to his attention is entirely groundless. There is absolutely no independent evidence in support of the plaintiff's contention, other than the possibility that some inference to that effect might be drawn by virtue of the fact that an applicant who similarly sought planning permission for an adjoining site was treated, the plaintiff believes, more favourably than he was. However, it was quite understandable that both the defendant and senior counsel felt it was better to progress the allegation about the bribe separately from the judicial review proceedings.

Kildare County Council responded to Mr. Burke's letter on 29th April, 2004 indicating that they would respond to queries number 1 and 2 "very shortly" and pointing out that it was open to the plaintiff to attend at the offices of Kildare County Council to review his own file.

The plaintiff paid the fee involved and did carry out this exercise himself. However, he was firmly of the view that he was given part only of the file by Kildare County Council.

Mr. Collins had also advised discovery and, as is the case with all judicial review applications, there was the additional requirement that all supporting affidavits on both sides be filed before the matter could be heard in court.

In evidence, the plaintiff stated that on 18th June, 2004 the High Court (Quirke J.) directed that all relevant affidavits be filed within four weeks.

In August, 2004, the defendant sought to draft his own letter seeking voluntary discovery. However, Kildare County Council indicated they were dissatisfied with the format of the request for discovery because it did not comply with the relevant Rules of Court. The defendant accordingly requested his junior counsel to attend to same.

For the purposes of the case, the plaintiff had, as already indicated, retained the services of an engineer, Mr. Conor Furey, and the further services of Mr. Allen, Planning Consultant.

On 8 December 2004, Kildare County Council made discovery. The plaintiff was of the view, to some extent shared by the defendant, that some documents were either missing or incomplete. Over the next few months, the defendant endeavoured through telephone and other contacts with his opposite number, Mr. Healy, solicitor for Kildare County Council, to clarify the position. This clarification was ultimately achieved in May, 2005 by which time it was apparent there were no further or additional documents.

In the meantime, the plaintiff was becoming increasingly dissatisfied with the progress of the proceedings. He became aware that James Connolly, senior counsel, was the author of a study on an aspect of planning law which appeared relevant to his case. In April, 2005, the opinion of Mr. Connolly was sought and obtained in relation to the case. The plaintiff met with Mr. Connolly in consultation before Mr. Connolly furnished his opinion.

In this regard, the plaintiff raises a further complaint against the defendant, namely, that Mr. Burke, for some reason which was never clarified in evidence, sent Mr. Connolly's brief to the solicitors for Kildare County Council. This was adamantly denied by Mr. Burke in evidence and I accept Mr. Burke's evidence on that particular point.

A further complaint brought by the plaintiff against the defendant is that the defendant, while furnishing to him Mr. Connolly's opinion which indicated he had a reasonable case, did not send him the cover note attaching to Mr. Connolly's opinion which indicated the opposite and Mr. Connolly's apprehension that the case might fail. Again, on this point, Mr. Burke gave evidence that he had furnished the letter in question to the plaintiff and I accept as truthful his evidence in this regard.

Towards the end of 2005, reports having been received from Mr. Furey and Mr. Allen, it became necessary to file the critical affidavits upon which the plaintiff's judicial review application would either succeed or fail. Junior counsel prepared the affidavits in question, one of which was an affidavit to be sworn by the plaintiff. The plaintiff attended at Mr. Burke's offices on 17th November, 2005 for the purpose of swearing his own affidavit. By letter dated 9th December, 2005 the defendant confirmed to the plaintiff that these affidavits had been delivered to the other side, notwithstanding that delivery of same fell outside a specific time period for doing so which had been fixed by Quirke J. in the High Court.

The fact that these affidavits were in fact sent to the other side at that time was a matter strenuously denied by the plaintiff in the course of his evidence and is a point to which I shall later return. I am satisfied and find as a fact that the three affidavits, namely, those of the plaintiff, Mr. Furey and Mr. Allen, were all filed and delivered to the legal advisors for Kildare County Council as stated by Mr. Burke. It would certainly have been a gross dereliction of his professional duty had that not occurred, given that a hearing date for the case had been fixed for 17 January, 2006.

As the time of the case hearing drew closer, it became apparent that neither Mr. Collins nor Mr. Connolly were free or available and accordingly arrangements were made to retain Mr. Eamon Galligan S.C. The plaintiff made a substantial payment to Mr. Burke to provide for the retention of both senior and junior counsel for the hearing.

The plaintiff met Mr. Galligan in consultation on 13th January, 2006 and at that consultation Mr. Galligan explained to the plaintiff that he felt his chances of winning the case were not good, no better than 20%. In this context it should be noted that Kildare County Council had filed an affidavit sworn by Ms. Doyle of the Planning Department on 13th January along with two other affidavits. Mr. Galligan had sight of these affidavits when advising the plaintiff and formulating his view as to the likely outcome of the case.

An issue arose as to whether or not Mr. Furey, in particular, was prepared to swear a further affidavit in response to the second round of affidavits sworn on behalf of Kildare County Council. Mr. Furey made clear to the plaintiff in no uncertain terms that he could add nothing further to his former affidavit.

While, as indicated earlier, the plaintiff gave evidence that certain affidavits had *never* been filed by the defendant on his behalf, I have come to the conclusion that what he may have intended to convey to the Court was that the arrival of the second round affidavits from Kildare County Council on 13th January, 2006 came at a point in time where it was effectively too late for his side to respond by filing further affidavits. I am giving him the benefit of considerable doubt on this particular aspect of the case, because he was adamant the certain affidavits which were in existence had not been handed over by Mr. Burke to the other side, whereas the

truth of the matter is that no further affidavits from his side were ever brought into being for the very simple reason that Mr. Furey felt unable to add anything further to his previous affidavit.

However, I completely reject, and regard as totally misleading, evidence given to me by the plaintiff to suggest that any failure on the defendant's part to put in further replying affidavits to the second round affidavits delivered on behalf of Kildare County Council led to the position wherein Mr. Galligan expressed such a negative view about the likely outcome of the case.

I have read very carefully the advices furnished by Mr. Galligan by letter dated 16th January, 2006.

I note that in the penultimate paragraph of his letter Mr. Galligan refers to "settling the replying affidavit" but he was clearly mistaken in that regard as Mr. Furey had indicated that he had nothing further to add and that there were no further replying affidavits in being.

In evidence, the plaintiff indicated that he withdrew his case on foot of the advice given by Mr. Galligan and withdrew his planning application also.

His claim in negligence against the defendant was accordingly to the following effect:-

- (a) The defendant failed to not only obtain his planning file from the respondents but that of the adjoining applicant who application was successful.
- (b) The defendant did nothing about the plaintiff's statement that a certain official in Kildare County Council had sought a bribe.
- (c) The defendant failed to have his case ready for trial.
- (d) The defendant wrongly sent the brief intended for James Connolly S.C. to the solicitors for Kildare County Council.
- (e) The defendant wrongly advised the plaintiff to withdraw the planning application.
- (f) The defendant was guilty of undue delay in attending to discovery.

Before turning to the evidence given by Mr. Burke, I should conclude this part of the judgment by stating that I found the plaintiff to be a person who was totally obsessed with every detail of his dealings with the defendant, Kildare County Council and the various counsel who had advised in this case. I am also satisfied that a certain point in his evidence he was content to allow the Court proceed in the belief that certain affidavits which were in existence had never been furnished to the defendants. I also found that in many respects his replies to questions in cross-examination were evasive, argumentative and off-point. He was quick to make the most damaging allegations against the defendant, including the allegation, which I utterly reject, that the defendant solicitor fabricated notes and memos of attendances on the plaintiff. These attendances, whilst handwritten, were, I am satisfied, prepared in the ordinary way by Mr. Burke as and when the events to which they relate took place.

Mr. Burke in turn gave evidence, clarifying that he did not know the plaintiff prior to 2004. He confirmed that the plaintiff had mentioned the alleged bribe on the occasion of their first meeting. He also indicated that Messrs. Beauchamps were very negative about the likely outcome of the plaintiff's case.

He believed he had progressed matters in an efficient and professional manner, commencing with his letter raising the relevant queries, as directed by counsel on the 29th April, 2004.

He accepted that his own efforts in formulating the request had been somewhat lacking and that he had used a format for that purpose which was not in compliance with the Rules of Court. This had been rectified by Junior Counsel. He also accepted that when discovery was made by Kildare County Council in December, 2004, there had been a delay of some months in clarifying whether the documentation furnished was complete.

He was, however, satisfied that a complete discovery had been made by Kildare County Council and that that discovery dealt with the three issues raised in his letter.

He confirmed that all three Senior Counsel who had been retained in the case had advised that the issue of the alleged bribe should not be brought up in the judicial review proceedings, but should be progressed in a different manner.

He was adamant that he had sent the cover letter with James Connolly's opinion to the plaintiff. At a meeting on the 17th April, 2005 he had discussed both opinion and letter with the plaintiff. He was quite certain about this, because they had gone through Mr. Connolly's opinion in detail and had sent the plaintiff's comments on the opinion to Mr. Connolly for his further observations.

He confirmed that the plaintiff had attended at his office on 17th November, 2005 for the purpose of swearing his own affidavit and that he later confirmed to the plaintiff that the plaintiff's affidavit, along with those sworn by Mr. Furey and Mr. Allen, had been forwarded to the other side by letter dated 9th December, 2005.

While Mr. Burke agreed that this constituted a late delivery of the affidavits in question, he told the Court, and I accept, that Kildare County Council was prepared to accept same providing the hearing date was not vacated and provided also that it could file some affidavits itself in response. These affidavits came in to Mr Burke's office in unsworn form on the 13th January, 2006.

Mr. Burke stated that sufficient time still remained prior to the hearing to reply to these affidavits had his experts decided they had some material contribution to make. However, Mr. Furey was not prepared to go beyond the contents of his first affidavit and was not willing to swear any further affidavit.

In Mr. Burke's opinion, the case remained extremely difficult having regard to Kildare County Council's contention that the plaintiff's application was in breach both of the Development Plan for the area and of the relevant Planning Regulations.

Mr. Burke further explained that the reason why Mr. Collins was unable to attend to the case in January, 2006 was because he had a conflict with a case in Luxembourg to which he was obliged to give priority.

He believed he had at all time acted in a professional manner and had not caused the plaintiff the loss he complained of, which consisted of the legal fees paid to various different legal advisers to date. He also stated that the plaintiff only first made complaint about the quality of his services when he submitted his own bill to the plaintiff.

## **DECISION**

I have carefully considered all of the complaints raised by Mr. Tighe. I have taken into account the fact that he is a lay litigant and as such must be accorded a certain measure of latitude when presenting his case, both as regards rules of evidence and as regards the implications and significance of certain legal procedures.

At a particular point during the hearing, my sense of Mr. Tighe's credibility was gravely damaged by his continued assertion that certain affidavits which had been brought into existence on his behalf had never in fact been sent by Mr. Burke to the other side. This allegation, if correct, would of course have constituted a significant breach of duty on the part of Mr. Burke.

However, as the evidence progressed it became abundantly clear that all affidavits brought into being on the plaintiff's behalf were in fact furnished to the other side including, in particular, the affidavits sworn by the plaintiff, Mr. Furey and Mr. Allen.

I am very much giving Mr. Tighe the benefit of the doubt in taking the view that what he really meant to convey was that the late arrival of Kildare County Council's affidavit a few days prior to the hearing date deprived him of any realistic opportunity of putting in any further affidavit material in response. Crucially, however, Mr. Tighe does not contest Mr. Burke's evidence that Mr. Furey made it clear beyond doubt that he had nothing further to add to his original affidavit. Mr. Galligan himself was satisfied that the case should proceed to a hearing if the plaintiff, notwithstanding his advices, chose to do so. I am satisfied the plaintiff was not put under any improper pressure to settle his case and am satisfied that he voluntarily decided to withdraw his case in full knowledge of the relevant issues in the case and the uncertainty surrounding the possible outcome of any hearing.

I have during the course of the judgment indicated my findings on the other matters in respect of which Mr. Tighe makes complaint. I specifically reject any complaint that Mr. Burke negligently failed to take up planning files from Kildare County Council. This was something which the plaintiff himself could have done and which he did do himself as events transpired.

I reject Mr. Tighe's complaint that Mr. Burke "did nothing" when informed of the alleged bribe sought by an official of Kildare County Council.

While there were some delays in and about the preparation of discovery and the confirmation that the discovery was complete, delays which I estimate as being of the order of four or five months, I do not believe that this amounts in law to negligence or anything even close to negligence on Mr. Burke's part.

I find as a fact that Mr. Burke did not send the "Connolly brief" to the solicitors for Kildare County Council.

I do not accept the plaintiff's contention that Mr. Burke, either with the support of counsel, singular or multiple, wrongly advised the plaintiff in respect of any aspect of his judicial review proceedings or the likely outcome thereof.

Specifically, I find that Mr. Burke behaved with complete propriety in relation to the advice given to the plaintiff before the hearing began. The offer in question was one whereby Kildare County Council would not seek costs against the plaintiff and furthermore a very clear indication was given that any planning costs incurred by Mr. Tighe in and about his planning application would inure for his benefit in the context of any fresh application for planning permission.

In the circumstances, I reject all the complaints advanced by Mr. Tighe and dismiss the plaintiff's claim.