THE HIGH COURT

[2024] IEHC 605

[Record No. 2017/1462S]

BETWEEN

ALAN McGEE

PLAINTIFF

AND

SHEILA FANNING AND JAMES FANNING

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered electronically on the 31st day of October 2024.

Introduction.

1. This is an application for summary judgment by the plaintiff, who is a solicitor, in respect of fees allegedly due to him by the defendants for legal services provided to them as his clients, in respect of three separate actions, between the years 2013-2017.

2. The defendants are a mother and her son, respectively.

3. At its simplest, the plaintiff's case is that in the years 2013-2017, he acted as solicitor for the defendants in a number of civil actions.

4. In February 2017, the first defendant signed a document in which she covenanted to pay unspecified fees to the plaintiff and to counsel for work done by them on a number of cases listed in a schedule to the document.

5. On 28 March 2017, the first defendant's husband, who is a party to a number of the actions, died.

6. On 09 May 2017, the first defendant signed a further handwritten document, in which she agreed to pay specified sums to the plaintiff and to named counsel for work done by them in three separate cases.

7. On 28 July 2017, the plaintiff issued the summary summons herein, claiming judgment in the sum of €163,058 in respect of the fees due to him and to counsel; together with interest thereon pursuant to s.22 of the Courts Act 1991; and the costs of the proceedings.

8. In an affidavit sworn by the second defendant on behalf of both defendants, he complained that the defendants had never been provided with any detailed bill of costs by the plaintiff.

9. Eventually, the parties agreed to send the matter for expert determination. That determination was carried out by Mr Tony McMahon, Legal Costs Accountant, who issued his determination on 30 March 2023. He determined that legal fees of €197,014 were properly due and owing in respect of the work done by solicitor and counsel on the three cases. It was accepted by the plaintiff that that figure had to be reduced by €10,000, due to a payment of fees on account that had been made by the defendants.

10. The plaintiff alleges that the fees have not been paid by the defendants. In this application he seeks summary judgment for €187,014, plus interest pursuant to the Courts Act 1991 amounting to €22,401, giving a total sum claimed of €209,415, plus costs.

11. The first defendant has sworn a number of affidavits in which she stated that in the course of giving instructions to counsel to settle one of the actions on certain terms, she had a conversation with counsel, in which she was told that her legal team would reduce their fees, as the matter was going to settle. She assumed that there would be a 50% reduction in their fees, as their opponent in that action was accepting 50% of the sums claimed from them in the substantive proceedings.

12. The second defendant further alleges that he is not liable to pay any fees, as he was never a client of the plaintiff. He states that he was not a party in two of the actions, and in the third action, being the liquidation proceedings, he was only named by the liquidator as someone whom the liquidator wished to cross-examine. The first defendant stated that his only involvement in the litigation, was to relay instructions from his father and mother to the plaintiff. He stated that he had signed the covenants to pay fees, in his capacity as witness to the signature of his mother on those documents.

13. Very broadly speaking, those are the issues in the case. The defendants submit that in light of these issues, the matter is not appropriate for summary judgment and should be remitted to plenary hearing.

Background.

14. It is necessary to set out the background to this application in some detail. As noted above, the plaintiff's case is that he was retained to act as solicitor by the defendants. In particular, it is alleged that he acted on their behalf in the following actions: -

(a) *Arnold Fanning, Sheila Fanning & Midland Web Printing Limited v Ulster Bank Limited* [Record no. 2015/7664P] ('the specific performance case');

(b) *Ulster Bank Ireland Limited v John Whelan, Paula Whelan, Danstone Limited, Arnold Fanning and Sheila Fanning* [Record No. 2012/12553P] ('the Court of Appeal case');

(c) *Midland Web Printing Limited (in liquidation) & Alan McClean Official Liquidator* [Record No. 2016/45 COS] ('the liquidation case').

15. On 06 February 2017, the first defendant executed three documents in which she covenanted to pay legal fees due to the plaintiff and to senior and junior counsel out of a life policy held with Caledonian Life ('the Caledonian Bond'), the release of which bond was at issue in the proceedings bearing record no. 2015/7664P. She confirmed that the bond would be partly encashed to discharge the fees in full within four weeks of the relinquishing of the security held over the bond by Ulster Bank. In each document, the signature of the first defendant, was witnessed by the second defendant.

16. On 28 March 2017, Mr Arnold Fanning died. He was a party in a number of the proceedings outlined above. On 25 April 2017, the second defendant sent an email to the plaintiff in which he stated "Let's be clear. No one said that the fees were not going to be paid". He went on to state in the email that there had been an agreement that if he and his mother accepted the settlement agreement with Ulster Bank, the plaintiff would take a "substantial discount" on his fees. He went on to state that it had been agreed in the previous summer, that the plaintiff would get all the costs taxed by the Taxing Master. He stated that the plaintiff had never done that. He went on to state that they still wanted the fees taxed, as he felt that the fees that the plaintiff was looking for were not in line with what had been said to them outside the court. The second defendant went on to state as follows: -

> "*You had clearly said that Ulster Bank were disputing your fees on the appeal court hearing and that you would be lucky to get half of what you are looking for in front of a Taxing Master. In turn you said that you would discount your fees in line (which meant substantial discount).*"

17. By letter dated 04 May 2017, the first defendant wrote to the plaintiff stating that she had repeatedly asked for his fees to be taxed by the Taxing Master over the last year and he had failed to do so. She stated that when they had paid money on account in the previous years, the plaintiff had agreed to get his fees taxed. She requested that he get all his fees in relation to all the cases taxed by the Taxing Master.

18. On 09 May 2017, a meeting was held between the plaintiff and the defendants, which was also attended by the plaintiff's secretary, Ms Sharon Deveraux, who drew up a comprehensive memo of the meeting. The meeting commenced at 12.45hrs. It concluded at 15.15hrs. In the course of that meeting, the first defendant signed a handwritten document in which she stated that she had agreed fees on the liquidation case, the specific performance case and the appeal to the Court of Appeal. In respect of each case a figure was given in respect of the fees due to the plaintiff and to counsel. The document stated that the fees as outlined therein, would be paid in the following way: €69,000 would be paid from recovery of VAT on completion of a transaction with the liquidator. The directors of a company called Clarionmount Limited would furnish a resolution confirming that the VAT recovered could be paid directly to the plaintiff in respect of his fees. The balance of fees due would be discharged from encashment of the Caledonian Bond, or from funds with Bank of Ireland. It was stated that the funds being released from the Caledonian Bond, or from

Bank of Ireland, would be paid within six weeks of the date of that document. The document was signed by the first defendant. Her signature was witnessed by the second defendant. It was also signed by the plaintiff and his secretary.

19. By letter dated 26 May 2017, the first named defendant again called on the plaintiff to have the costs taxed by the Taxing Master.

20. On 28 July 2017, the plaintiff issued the summary summons herein. On 31 July 2017, an undertaking was given on behalf of the first defendant not to encash the Caledonian Bond. That bond is still extant.

21. In an affidavit sworn on 02 November 2017, the plaintiff stated that as liability for the quantum of legal fees in relation to the proceedings the subject matter of the claim herein, had already been agreed in writing, it could serve no purpose whatsoever to seek to have the matter referred to taxation, other than to further increase costs and cause delay. He went on in that affidavit to state that the discussions relating to taxation of his fees, were entirely superseded by the written agreement on fees, which dealt with both the liability to fees, the quantum of the fees and the payment schedule in respect of those fees. He stated that in those circumstances, all matters relating to the fees, had been agreed in writing and signed by the relevant parties and that any reference to taxation in those circumstances, would only add further costs and delay.

22. In the course of a long affidavit sworn on 06 December 2017, the second defendant stated that no detailed bills of costs were ever furnished to him, or to the first defendant in respect of any of the three sets of proceedings, which are the subject matter of the proceedings herein.

23. It is alleged by the plaintiff that on 06 March 2018, when the matter was before Costello J (then sitting as a judge of the High Court), counsel for the

defendants indicated to the court that it had been agreed that the matter should be referred to expert determination and that that determination would resolve the matter once and for all. The plaintiff stated that on that basis, Costello J took the action out of the list, with liberty to re-enter.

24. The plaintiff has stated that due to procrastination and obstruction on the part of the defendants, it was necessary to re-enter the matter before the High Court in order to have the matter proceed to an expert determination.

25. A year later, on 11 March 2019, an order was made by Reynolds J on consent of the parties directing that the matter should proceed to expert determination. The operative part of the order was in the following terms: -

> "*It is ordered that the Bills of Costs the subject matter of the within proceedings proceed to expert determination at the expiration of 21 days from the date hereof before either of the now retired former Taxing Masters, Flynn or Moran, with the plaintiff to select which of the said Taxing Masters to be appointed as nominated expert subject to their availability and that a timescale be fixed for the expert determination to proceed by the nominated expert.*"

26. There were further difficulties having an expert appointed to carry out the expert determination in respect of the fees due. Eventually, the expert determination was carried out by Mr Tony McMahon, legal costs accountant. He held a hearing at which both parties were represented by their solicitor and legal costs accountant. He issued his determination on 30 March 2023. Having examined the files in respect of each of the three sets of proceedings and having heard the respective legal costs accountants, he determined that the fees due to the plaintiff came to €86,100 inclusive of VAT. He found that the fees due to senior counsel were €56,088 inclusive of VAT;

the fees due to the first junior counsel were €38,376 inclusive of VAT and the fees due to the other junior counsel were €16,450, there being no VAT due on these fees. This amounted to a grand total of €197,014.

27. The plaintiff accepts that the figure of €197,014, must be reduced by the sum of €10,000 to reflect a payment on account that had been made by the defendants in respect of counsel's fees.

28. On 16 February 2024, the plaintiff issued the notice of motion herein, seeking judgment for €187,014, plus interest thereon pursuant to s.22 of the Courts Act 1991, and costs.

Submissions on behalf of the Plaintiff.

29. The plaintiff's case is that the defendants accepted that fees were due to him in respect of the work done by him and counsel on the three cases. The only dispute between the parties was in relation to quantum. Eventually the parties agreed that the issue of quantum would be determined by an expert.

30. To that end, a hearing was held before the legal costs accountant, Mr Tony McMahon, where both parties were represented by solicitor and legal costs accountant and when the defendant's solicitor had been furnished with the complete files in each case in respect of which the fees were claimed.

31. It was submitted that the defendants fully participated in that hearing through their solicitor and legal costs accountant. It was submitted that they are bound by the determination reached by the expert in respect of the quantum of fees due to the plaintiff and counsel. It was submitted that judgment should be granted for the amount as found by the expert, together with interest pursuant to the Courts Act 1991 and costs.

Submissions on behalf of the Defendants.

32. As already noted, the defendants have pleaded that despite requests, they were never furnished with any detailed bill of costs in respect of any of the cases.

33. It was submitted that while they had agreed to go to expert determination in respect of the issue of fees, the defendants' solicitor, who no longer acts for them in these proceedings, did not allow the second defendant meet with their legal costs accountant in advance of the hearing before the expert. The second defendant alleges that the defendants were badly represented by their former solicitor and by the legal costs accountant retained by him in respect of the hearing before the expert. The second defendant has made a complaint about his former solicitor to the Legal Services Regulatory Authority.

34. The second defendant further submits that he was never a client of the plaintiff's firm and therefore cannot be liable for legal fees to that firm. He states that he was never a party to any of the actions in which the plaintiff acted for his mother or father.

35. The first defendant has put forward the defence that in a conversation that she had with counsel, it had been agreed that there would be a substantial reduction in their fees, due to the fact that the substantive action with Ulster Bank was going to be settled on a basis of a 50% discount. She assumed that their fees would be equally discounted by at least 50%.

36. It was submitted that in light of these issues, the matter was not suitable for summary judgment and should be remitted to plenary hearing.

The law.

37. Summary judgment procedure is only suitable when there is a clear *prima facie* legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in his affidavit to cross the threshold that he has at least an arguable defence to the plaintiff's claim, such that he should be allowed to resist judgment being marked against him in a summary manner and should be allowed to have the matter remitted to plenary hearing.

38. The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v Anglin* [1996] 1 IR 75. In that case Murphy J, giving the judgment of the court, endorsed the following test laid down in *Banque de Paris v DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v Daniel* [1993] 1 WLR 1453:-

> "*The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence*."

39. The test set down in the *Anglin* case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607 in which case Hardiman J stated as follows at page 623:-

> "*In my view the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable case*?"

40. In *Harrisrange Limited v Duncan* [2003] 4 IR 1, McKechnie J having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The court has had regard to all of these cases and to the principles set out in *Harrisrange* in reaching its determination herein.

41. The court has also had regard to the dicta of Moriarty J in *Allied Irish Banks v Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications.

Conclusions.

42. In order to obtain summary judgment, it must be very clear that the plaintiff is entitled to the sum claimed from a defendant; and conversely, that the defendant does not have any stateable defence to that claim.

43. As Part 10 of the Legal Services Regulation Act 2015 did not come into force until 07 October 2019, the legal position in relation to a client's right to be furnished

with a bill of costs in this case, is governed by s.68 of the Solicitors (Amendment) Act 1994 (hereinafter 'the 1994 Act').

44. Section 68(1) of the 1994 Act provides that on taking instructions to provide legal services to a client, a solicitor shall provide particulars in writing of the actual charges, or an estimation of such charges that are likely to arise as legal fees in the matter. This was known colloquially as a 'section 68 letter'.

45. Section 68(6) provides that on the conclusion of any contentious business carried out by a solicitor on behalf of a client, he shall show on a bill of costs to be furnished to the client, a summary of the legal services provided in connection with the contentious business; the total amount of damages or other monies recovered arising out of the proceedings; and details of all or any part of the charges which have been recovered by the solicitor on behalf of the client from any other party. The subsection further provides that the bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of legal services by the solicitor.

46. Section 68(7) provides that nothing in the section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill of costs for taxation. Subsection (8) provides that where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amount (or any part thereof) of that bill of costs, the solicitor shall take all appropriate steps to resolve the matter by agreement with the client and shall inform the client in writing of the client's right to require the solicitor to submit the bill of costs, or any part thereof, to a Taxing Master of the High Court for taxation on a solicitor and own client basis.

47. It appears to be the case that no s.68 letter was ever provided to either of the defendants. No such letter has been exhibited in these proceedings.

48. It also appears that no bill of costs was ever furnished by the plaintiff in any of the actions in which he maintains that he acted for the defendants. There is no bill of costs exhibited in these proceedings.

49. There being no bill of costs presented, there was no notification to the defendants that they had a right to have such costs taxed by a Taxing Master as required by s.68(8) of the 1994 Act.

50. It is clear from the evidence before the court that the defendants requested that the solicitor's fees be taxed. They made that request on a number of occasions. The solicitor maintained that it was not possible to have the costs taxed, as the defendants had agreed the fees by virtue of the agreements signed by the first defendant in February and May 2017.

51. The proceedings were issued on foot of these agreements. The plaintiff has further argued that by virtue of the consent order made on 11 March 2019 sending the matter of the quantum of fees for expert determination; and having regard to the fees as found to be due and owing by the expert in his ruling dated 30 March 2023; the defendants have no response to the claim for these fees, as determined by the expert.

52. In this regard, the plaintiff relies on the decision in *Dunnes Stores v McCann & Others* [2020] 3 IR 1 as authority for the proposition that where parties have agreed to submit a particular dispute to expert determination that determination is final and binding in all respects.

53. The plaintiff further submits that as the defendants were represented by solicitor and counsel at the time when the matter was sent for expert determination by agreement of the parties; and as they participated in that process through solicitor and

legal costs accountant, they are bound by the outcome of that determination. Accordingly, it is submitted that the court should grant judgment for the amount as found by the expert as being due and owing by the defendants in respect of legal fees.

54. On the evidence before me, I cannot hold that the agreement that was obviously reached between the parties to submit the quantum of fees for expert determination, amounted to an agreement that the defendants would be liable for the fees as found by the expert.

55. In order for that to be the case, two things would have to have happened: first, the first defendant would have to have abandoned her defence that there had been a representation by counsel that the level of fees charged by her legal team, would be significantly reduced. There is no evidence that in sending the issue of quantum for expert determination, she had abandoned that line of defence.

56. Secondly, it would have involved the second defendant accepting that he had been a client of the plaintiff and that he was therefore liable for the fees incurred in having the solicitor act in the three actions, notwithstanding that he was not a party to those proceedings.

57. As the second defendant was not a party in two of the actions, and was only named in the liquidation proceedings as someone whom the liquidator wished to cross-examine, it is difficult to see how he could have been a client of the plaintiff in respect of those actions. There is no evidence before the Court that the second defendant ever agreed to assume any liability qua client.

58. Furthermore, the determination reached by the expert, makes it clear that he was only dealing with the reasonableness of the fees that were charged, having regard to the work done by solicitor and counsel in each case. In the determination he specifically noted that the legal costs accountant acting for the defendants had made

the case that in the Ulster Bank case, the first defendant had never given the plaintiff any instructions. The expert noted "I advised Mr O'Donnell that I could not address these issues in the context of this determination".

59. In these circumstances, I am satisfied that there is no clear evidence that there was agreement between the parties that the expert determination would be binding in terms of liability, as distinct from being a binding determination on the value of the work done on a full value basis. This case is different to the authority cited by the plaintiff, because in the *Dunnes Stores v McCann & Others* case there had been a written agreement between the parties that certain disputes would be referred to an expert for determination and that that determination would be final and binding. There was no written agreement in this case. The consent order remitting the matter for expert determination does not state that such determination would be binding on the parties. In these circumstances, I am satisfied that this issue will require oral evidence to resolve it completely.

60. I am not satisfied on the evidence before me, that it has been established that the second defendant was ever a client of the plaintiff. He was not named in two of the actions as being a party to those proceedings. It is arguable that he may be regarded as a party to the liquidation proceedings. However, there is no written evidence before me that he ever retained the plaintiff as his solicitor in any of the proceedings. This issue will require oral evidence.

61. An additional reason why it is not appropriate to grant summary judgment, is the fact that in the summary summons the sum claimed as being due from the defendants was €163,058, plus interest pursuant to the Courts Act 1991, and costs. The summary summons has never been amended. In such circumstances, the amount claimed from the defendants cannot be amended to €187,014, plus Courts Act interest,

simply by claiming such sum in a notice of motion seeking summary judgment. If the plaintiff wishes to amend the underlying amount claimed by him in respect of fees, he will have to make an application to amend the summary summons.

62. I am satisfied that oral evidence will be required on the precise terms on which it was agreed to submit the matter for expert determination. In these circumstances, I refuse to grant the plaintiff summary judgment in the sum claimed in the notice of motion.

63. I will remit the matter to plenary hearing. As the first defendant has died since the hearing of this application, the action will have to be reconstituted. Accordingly, I will not set down any definitive timeline for delivery of pleadings; save to state that the plaintiff can deliver a statement of claim when the action has been reconstituted. The defendants will have six weeks from delivery of the statement of claim to them, within which to file their defences.

64. In relation to the costs of this application, having regard to the decision of the Supreme Court in *ACC v Hanrahan* [2014] 1 IR 1, the appropriate order should be to reserve the costs of this application to the trial of the action.

Proposed Final Order.

65. Having regard to the findings of the court in this judgment, the court would propose that the final order should be in the following terms:

(a) Refuse the reliefs sought by the plaintiff in his notice of motion dated 16 February 2024;

(b) remit the matter to plenary hearing;

(c) direct that the plaintiff may deliver a statement of claim when the action has been reconstituted;

(d) the defendants are to have six weeks from receipt of a statement of claim within which to deliver their defences;

(e) reserve the question of costs of this application to the trial of the action;

(f) liberty to apply.

66. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

67. The matter will be listed for mention at 10.30 hours on 26 November 2024 for the purpose of making final orders.