[2017] IEHC 302

THE HIGH COURT

[2016 No. 239 SP]

BETWEEN

LUCY CARR

PLAINTIFF

AND

DANIEL J. O'GORMAN

DEFENDANT

JUDGMENT of Ms Justice Faherty delivered on the 28th day of April, 2017

1. This matter comes before the Court by way of special summons which issued on 15th June, 2016. The plaintiff seeks the release of her personal injury file which is presently in the hands of the defendant. The background is set out below.

2. The plaintiff was involved in a road traffic accident on 29th January, 2009, following which she retained the services of Holmes O'Malley Sexton Solicitors and later retained Sweeney McGann Solicitors to take over her personal injury file from Holmes O'Malley Sexton.

3. On 5th December, 2011, the plaintiff made contact with the defendant's firm for the purposes of taking over her file from Sweeney McGann. The defendant duly accepted instructions from the plaintiff in respect of her personal injuries action.

4. On 3rd January, 2012, the defendant wrote to the plaintiff advising her of a proposed course of action to progress her personal injury proceedings, and additionally advising her in relation to other proceedings which, it appears, the plaintiff was contemplating against other individuals. The latter advises are not germane to the within proceedings.

5. Insofar as the defendant accepted instructions to take over the plaintiff's personal injury proceedings, he advised as follows:

> "Going back to the instructions that we have accepted from you ie the road traffic accident …, I confirm that I am taking this case on a "no foal no fee" basis. In other words, you are not responsible for any of your legal costs. I did not make the application to PIAB so there is no charge for that. In short all of your legal costs will be recovered from Insurance Company and if that changes I will advise. However, as you may be aware, while I am telling you that costs I recover I will recover from the Insurance Company they are strictly speaking your costs and in that regard I must set out the basis upon those costs are being charged. The position is that they are being calculated on a time and complexity basis. I attach for your attention a brochure prepared by the Incorporated Law Society. This brochure sets out any questions you might have in relation to costs. In short in the event that there is a dispute in relation to a bill of costs then it can be decided by an independent authority called the Taxing Master. All of this should not in fact worry you overly by reason of the fact that I have stated to you that will not be responsible for any legal costs to this office. You should also be aware that in the unlikely event that you lose this case and it is hard to see that you would, you are exposed to costs of the Defendant which would be measured presumably on an equal basis or on a time basis. Again I don't see that you have anything to worry about in that regard but I am obliged to advise you of that position."

6. Between January, 2012 and February, 2015, the defendant's firm acted for the plaintiff in respect of her personal injury litigation. On 1st August, 2012, the defendant was constrained to write to the plaintiff advising "Clearly you have lost confidence that this firm can represent you. We also have lost confidence in fact that we can properly represent you. In those circumstances, I attach herewith our bill of costs and would be grateful if you would please arrange to drop a bank draft into the office and collect the file". This appears to have been in the context of issue having been taken by the plaintiff as to how her case was being handled. Thereafter the parties appear to have reconciled their differences.

7. On 24th November, 2014, Ms Audrey Browne of the defendant's firm wrote to the plaintiff in connection with certain instructions which had been given by the plaintiff to the defendant regarding her orthopaedic surgeon. Ms Browne referred to a communication which was received by the plaintiff from the orthopaedic surgeon in response to certain matters which had been raised by the plaintiff with him. The plaintiff was advised by Ms Browne of the potential delay in getting her personal injury action heard as a result. The plaintiff was also reminded of the defendant's request of 5th March, 2014 to be put in funds to the tune of €500, to take up the report of the said orthopaedic surgeon. The plaintiff's numerous correspondences to the effect that she would not be paying the requested contribution towards the medical report and to her belief that the defendant was obliged to pay for the reports and outlay was noted. The letter went on to state:

> "On 2nd day of October 2014 you were advised that if you were not willing to pay for the reports that we would apply to come off record. By letter dated 24th of October 2014 you made it very clear that you would not be paying for the reports.
>
> In all the circumstances outlined above it appears from correspondence that the Solicitor Client relationship has irretrievably broken down and in those circumstances we feel that it would be appropriate for us to apply to come off record in relation to this accident."

The plaintiff was advised to treat the letter as notice of the defendant's intention in this regard.

8. On 25th November, 2014, the plaintiff advised Ms Browne that she was not taking issue with the medical opinion but rather with what she alleged was a misrepresentation of a crucial fact in that opinion. Furthermore, she advised that nothing that had gone before in correspondence gave the defendant grounds to come off record. In a follow-on letter of 26th November, 2014, she repeated the alleged misrepresentation of her diagnosis in the medical opinion and advised that she would be dealing with this matter separately.

9. On 27th November, 2014, the plaintiff wrote to the defendant taking issue, *inter alia*, with Ms Browne's threat to come off record on the basis of the absence of an orthopaedic report, stating that there was "an abundance of orthopaedic reports"

10. By letter of the same date, Ms Browne advised:

> "We refer to the above matter and to my letter of 24th November 2014 advising you that we were applying to come off record in relation to the above matter. We have received a note the contents of various faxes. We note that you are anxious that we do not apply to come off record. You have stated that you believe that we can come to some accord.
>
> As you are no doubt aware an amount of work has been expended on your file and we note from your file that you were surprised at how large the file was.
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> I discussed the matter directly with Dan O'Gorman and he has advised that if you are willing to pay the sum of €5,000 on account then, in those circumstances, we will not apply to come off record. Mr. O'Gorman is quite adamant that if the said €5,000 is not paid then I am to proceed with my Notice of Motion to come off record in relation to this matter."

11. On 3rd December, 2014, the plaintiff wrote to the defendant taking issue, *inter alia*, with the delay in the progress of her case and requesting the defendant "to put this case in order" and that "[a] contract is a contract". The defendant's response of the same date noted that the plaintiff had "failed to address the issue of a contribution towards [her] costs in the sum of €5,000 plus VAT" and that if the said sum was not received within seven days a motion to come off record in her personal injury action would issue.

12. On 5th December, 2014, the plaintiff requested the defendant to "PERFORM THE CONTRACT" between them without further delay and to state what steps had been taken in furtherance of same, failing which the plaintiff would take legal proceedings. In relation to the request for €5,000 plus VAT, on 13th January, 2015, the plaintiff wrote to the defendant reminding him that that their contract was on the basis of "no foal no fee".

13. It is common case that pursuant to a notice of motion dated 12th January 2015, the defendant applied to the High Court to come off record in relation to the plaintiff's personal injury proceedings. In the affidavit grounding the application to come off record, Ms Browne avers as follows:

> "I say … that … O'Gorman Solicitors have endeavoured to progress the proceedings but same has been greatly complicated by the fact that a number of medical issues which the Plaintiff has, not all of which of referable the subject matter of these proceedings.
>
> However, during the course of 2014 I say that relations between Messrs. O'Gorman Solicitors and the Plaintiff became strained on the basis that the Plaintiff was disputing the entitlement of Messrs. O'Gorman to seek €500 for a medical report which was need to progress the proceedings from an Orthopaedic Surgeon. It was confirmed to the Plaintiff that if the amount of €500 was not made available for the report then this firm would have no option but to come off record. Unfortunately, the relationship between the Plaintiff and the firm deteriorated further throughout 2014 and to the extent that it was indicated to the Plaintiff by letter dated 27th November, 2014 that if the Plaintiff did not put this firm in funds to the amount of €5,000 plus VAT the firm would have no option but to come off record. I say that the said monies were sought on account due to the extremely voluminous nature of the Plaintiff's file and the reports and records dealing with her medical conditions referred to. With regard to the correspondence throughout 2014 with the Plaintiff, I beg to refer to a booklet of said correspondence…
>
> I say that the plaintiff has not put the firm into funds as requested and in light of this and further in circumstances where the Solicitor-Client relationship has irretrievably broken down, I seek an Order of this Honourable Court that the firm of Messrs. O'Gorman Solicitors have ceased to act and granting them liberty to come off record .."

14. By order of the High Court (Moriarty J.) of 9th February, 2015, it was declared that "O'Gorman Solicitors … have ceased to be the solicitors acting on behalf of the plaintiff [in her personal injury proceedings]".

15. On 11th February, 2015, the plaintiff again took issue with the demand for €5,000 on account and advised that the defendant in coming off record was in breach of the contract entered into in January, 2012. In the event of the defendant not coming back on record within seven days, the plaintiff stated that the matter would be placed before the Law Society.

16. On 18th February, 2015, the plaintiff lodged a complaint with the Law Society alleging that the defendant was in breach of contract in coming off record in the personal injury proceedings and she requested that her file be released to her without any payment. She appeared personally before the Law Society's Complaints and Client Relations Committee on 13th October, 2015. On 15th December, 2015, the Complaints and Client Relations Committee determined that the defendant was entitled to payment of outlay (previously advised as being the sum of €1,337.50) on the transfer of the plaintiff's file. It also determined that subject to receipt of the outlay incurred by the firm and a satisfactory undertaking in relation to the costs incurred to date, that the plaintiff's personal injury file should be handed over to her.

17. On 27th January 2016, the defendant's firm wrote to the plaintiff advising her of the Law Society's decision. Reference was also made to the High Court Order of 9th February, 2015. The plaintiff was advised that the defendant no longer represented her in relation to her personal injuries action and that consequent on the Law Society directions she was entitled to her file on payment of the defendant's outlay on the transfer of the file and an undertaking from her new solicitors in relation to the costs incurred to date.

18. In the within proceedings, the plaintiff asserts that it was "an express term or condition of the contract of engagement under which the plaintiff engaged the defendant that she would not be responsible for any costs". In this regard, the plaintiff relies on the contents of the letter of 3rd January, 2012 already quoted above.

19. In her endorsement of claim, she goes on to contend, *inter alia*:

> "…the Defendant applied to come off record and stated on affidavit before the Court in the context of his application that same related to Plaintiff's unwillingness to provide a payment on account. The Defendant's application to the Court was granted on 9th February 2015. The Court put a stay on the Order for one month. The application was granted under Order 7 r 3 of the rules of the Superior Courts. Order 7 r 5 states "Any order made under the provisions of rule 3 shall not affect the rights of the solicitor and the party as between themselves".
>
> Section 2.3 of the Solicitors Guide to Professional Conducts prescribes that "a solicitor cannot terminate a retainer without good cause and without reasonable notice where the retainer is for work from which the client will derive no benefit until the work is completed". It is provided also within this section 'if instructions had been accepted on a

contingency fee basis, it can be implied in the arrangement that it was a term of such arrangement that the solicitor would continue to have prosecution of the case'.

In the circumstances where the Defendant has stated in Affidavit before the Court in the context of his application to come off record unwillingness to provide a payment on account, it cannot logically constitute good cause when the Defendant and Plaintiff expressly agreed at the outset of this retainer that he would act on the Plaintiff's behalf on a 'no foal no fee' basis. This is not to say that the Defendant is not entitled to terminate such a retainer in other circumstances but the circumstances which he has purportedly relied upon in this instance clearly cannot constitute 'good cause'.

Section 2.3 of the Solicitors Guide to Professional Conduct prescribes 'if a solicitor terminates his retainer for good cause, and has given reasonable notice to his client, he is entitled to be paid for the work done'. Accordingly, he is not entitled to be paid for work done if he terminates without good cause."

20. In oral argument, the plaintiff submits that what the defendant represented in the letter of 27th January, 2016 was in breach of the contract entered on 3rd January, 2012. She asserts that while it was open to the defendant to come off record, that did not alter his contractual obligation to her, as set out in the letter of 3rd January 2012, and as provided for in the Rules of the Superior Court.

21. In his replying affidavit, the defendant addresses the plaintiff's reliance on the letter of 3rd January, 2012 by stating, *inter alia*, that in January, 2012 he did not envisage circumstances where the Plaintiff would interfere with running of her file.

22. Counsel for the defendant submits that the kernel of the present case is the Order of the High Court of 9th February, 2015 granting the defendant's application to come off record in the plaintiff's personal injury proceedings. He contends that as the defendant no longer represents the plaintiff, and as per the Law Society's direction, the plaintiff is entitled to her file upon payment of the defendant's outlay on the transfer of the file and an undertaking from her new solicitors in relation to costs incurred to date. Counsel points to the fact that the plaintiff did not appeal the High Court Order of 9th February, 2015, nor seek to challenge the Law Society's ruling on her complaint.

23. It is submitted that the plaintiff's reliance on the contents of the 3rd January, 2012 letter is misconceived. What the defendant is seeking is merely outlay and not costs incurred to date. This outlay represents monies already expended on the plaintiff's behalf. The outlay is clearly set out in the defendant's replying affidavit as comprising monies spent on stamp duty on court documents, three medical reports obtained between October, 2012 and 13th February, 2013 and a hospital administration fee.

24. Counsel also submits that not all of the matters which gave rise to the breakdown in the solicitor/client relationship were set out on affidavit grounding the application to come off record, because, as explained by the defendant in correspondence to the Law Society on 3rd March, 2015, he did not wish to prejudice the plaintiff's personal injury proceedings. The details of the solicitor/client breakdown were expressly set out in the letter of 20th March, 2015 to the Law Society.

25. The defendant contends that insofar as the plaintiff relies on the contents of the letter of 3rd January, 2012, to wit, "in short all of your legal costs will be recovered from the Insurance Company and if that changes I will advise", the fact of the matter is that the position did change. This came about because of the plaintiff's own actions, leading to the breakdown in the solicitor/client relationship.

26. In her replying affidavit of 5th December 2016, the plaintiff avers that the defendant's "retainer to act in an uncontroversial personal injury litigation is an ENTIRE contract so that the entitlement to payment attaches to completion of the retainer and the Defendant has simply refused to continue to perform the ENTIRE agreement half way through". She further avers that "the Common Law position has been altered by termination provisions in the retainer and the retainer entitled the Defendant to payment only in circumstances where he terminated the retainer because of some wrongdoing by the client and did not permit them to terminate the retainer at will. So when the Defendant repudiated the retainer the Plaintiff did not owe him any money." She contends that the defendant did not have an existing entitlement to fees and wrongfully terminated his retainer and that "the defendant is obliged to relinquish her file (in its entirety) to her forthwith ...without requiring a corresponding payment of any fees."

27. The plaintiff also makes the case that the defendant's counsel glosses over the contents of the letter of 27th November, 2014, wherein a specific demand was made for €5,000 in default of payment of which the defendant threatened to come off record. The plaintiff submits that she had no option but to let the defendant to come off record; however, that did not take from the defendant's obligation to her. She asserts that while the Law Society has expressed an opinion in the matter, it is not the High Court and it did not take account of the seminal case of *Underwood, Son and Piper v. Lewis* [1891-94] All ER Rep 1203 on the issue of termination of the solicitor/client relationship without good cause.

28. She submits that the fact that she did not appeal the Order of 9th February, 2015 is not relevant factor for this court as she seeks only to remedy the damage done to her by the defendant's wrongful retention of her file. She asserts that it is "magical thinking" for the defendant's counsel's to suggest that anything in the 3rd January, 2012 letter gives the defendant leeway to recover his fees or outlay. The plaintiff's position is that had she paid €5000 to the defendant there would have been no irretrievable breakdown.

Considerations

29. Essentially, the plaintiff's case in seeking the return of her personal injuries file is that the defendant wrongfully terminated his retainer and, moreover, she contends that that her arrangement with the defendant was on a "no foal no fee" basis. In effect, the plaintiff contends that she owes the defendant no money given his repudiation of the contract. Furthermore, she disputes that there was any reason for the defendant to come off record in her personal injury proceedings.

30. The plaintiff asserts that any allegation of a breakdown in the solicitor client relationship is not borne out by the contents of a letter from Ms Tracy O'Brien of the defendant's firm to her on 8th March, 2013 wherein, *inter alia*, reference is made to a "most productive" meeting with the plaintiff in relation to her personal injury action. However, I am satisfied that the letter of 8th March, 2013, upon which the plaintiff relies as evidencing her good standing with the defendant, reflects the position in March 2013 which was some two years before the defendant applied to come off record.

31. Although the plaintiff believes that the retainer was terminated without good cause, clearly the learned Moriarty J. did not agree given that the defendant was allowed to come off record. Ms Browne's affidavit grounding the application to come off record clearly points to the difficulties in the solicitor/client relationship as of 2014. It is also clear that the defendant's correspondence with the plaintiff throughout 2014 (which this Court has seen) was before the High Court on 9th February, 2015. From a perusal of the 2014

correspondence, it is apparent that the application to come off record was as a result of the irretrievable breakdown of the solicitor/client relationship and the plaintiff's failure to put the defendant in funds for outlay. Thus, I do not accept the plaintiff's central premise that the defendant's application to come off record was solely because the requested sum of €5,000 was not forthcoming from her.

32. In the letter of 20th March, 2015 to the Law Society, Ms Browne stated:

> "Trust and confidence is an integral part of the Solicitor Client relationship and these cornerstones of the Solicitor Client relationship had been completed undermined in the manner, as outlined above. We were entitled to seek payment of outlays in circumstances where a full and robust defence was lodged [in the personal injury proceedings]…We had serious concerns with the approach taken by [the plaintiff] in how she dealt with the proceedings and engaged with us.
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> …
>
> To summarise, the sole reason that [the plaintiff] has made this complaint is because this firm successfully applied to the High Court to come off record. [The plaintiff's] complaint completely ignores the fact that the main reason for her application to come off record was because the Solicitor Client relationship had irretrievably broken down."

The factors which led to the breakdown of the plaintiff's and defendant's relationship are set out in that letter and also in the defendant's response on 10th August, 2015 to the observation made by Ms Linda Kirwin, Head of Complaints and Client Relations Law Society, on 21 April 2015, that the defendant's letter of 3rd January, 2012 "did not contain [any] provisos or caveats about the circumstances whereby [the defendant] would be entitled to seek monies on account".

33. While it is undoubtedly the case that a solicitor cannot terminate a retainer without good cause and without reasonable notice where the retainer is for work from which the client will retain no benefit until the work is completed, the Law Society guidelines state that "a solicitor may be compelled to cease to act for a client because the client refuses to accept and act upon the advice which the solicitor has given him and the circumstances are of such importance as to destroy the basis of the relationship of solicitor and client". This is also the position in law. I am satisfied that this threshold has been met in this case.

34. I turn now to the defendant's response to plaintiff's assertion that no monies are due to the defendant on the basis that he wrongfully terminated his retainer. In her letter of 10th August, 2015 to the Law Society, Ms Browne states:

> " As a direct result of [the Plaintiff's] actions, a substantial amount of professional time, over and above what would be regarded as the norm, was expended on the file. Additionally we incurred direct outlays in the sum of €1337.50 …"

The letter continued:

> "It is our contention that no other firm would expect to receive a file where the direct outlays were not discharged. For example, when Sweeney McGann Solicitors took over this file from Holmes O'Malley Sexton Solicitors, they were duly reimbursed outlays by Sweeney McGann prior to obtaining the file from them.
>
> We would respectively suggest that Ms Carr's new firm of Solicitors disburse our direct outlays, as detailed above, and we will accept an undertaking from them that they will include the costs relating to the work carried out by us, and our other outlays, as part of any settlement, or award made by a Court, to furnish such sums to us if an when received by them."

35. In aid of her argument that she owes the defendant no money, the plaintiff relies on *Underwood, Son and Piper v. Lewis*. In that case, Esher M.R. stated:

> *"It was the view taken by judges in former days that in the case of an ordinary retainer of a solicitor in a lawsuit without any specific terms, the implication of law was that the contract was to carry on the litigation to its conclusion. That is what was held by Lord Eldon, and was acted on by him when he was Chief Justice of the Court of Common Pleas. In Cresswell v Byron (1), he used the words (14 Ves. At p.273):*
>
> > *"The Court of Common Pleas, when I was there, held that an attorney having quitted his client before trial could not bring an action for his bill."*
>
> *Those words are exactly in point with the present case. It is true that it might be argued that Lord Eldon's words mean that under no possible circumstances could a solicitor bring an action successfully for work done and disbursements made before quitting his client. If that be the meaning of Lord Eldon's words I may say that the law has since been modified but the engrafting of a modification upon a rule is not the same thing as setting the rule aside.*
>
> *I will not go through all the cases that have been cited. It seems to me that the effect of them is that ever since Lord Eldon's time a retainer of a solicitor in a common law suit has always been held to be one entire contract, so that, unless some recognised exception to the rule arises, the solicitor cannot sue for his bill of costs until his obligation under the contract has been entirely fulfilled. One of those recognised exceptions, if they can rightly be called exceptions, is that a solicitor cannot reasonably be asked to pay out of his own pocket disbursements which he may possibly never recover. Therefore, if he asks his client to provide money for immediate disbursement, and the client refuses to do so, the solicitor is entitled to refuse to act further for the client in the litigation. In addition to this, lest the solicitor, by throwing up his retainer suddenly at a critical moment should ruin his client, it has been decided that the client is entitled to have reasonable notice of the solicitor's intention not to act any more for him."*

36. Esher M.R. went on to summarise that the plaintiff was employed as a solicitor to three actions of which none had been finished. As to the solicitor's contention that he was entitled to put an end to the retainer as long as reasonable notice was given and then bring an action to recover costs incurred, Esher M.R. rejected that argument on the basis that there was no authority that would justify him holding this to be the law. Ultimately, he held that:

> *"… Grantham J was wrong in his ruling, and that the trial ought to have gone on in order to find out whether the solicitor had any reasonable ground for refusing to carry on the three actions to their termination. What are reasonable grounds for such a refusal I am not at present able to say. I doubt whether anything which may happen to the solicitor without any fault on part of the client would be a sufficient ground for his suing for costs before he has completed a litigation as he had agreed to do*

…

The obligation of the client is to pay his solicitor at the end of the action, unless he does something which justifies the solicitor in putting an end to the retainer and suing for a quantum meruit."

37. A.L. Smith L.J. addressed the matter in the following terms:

"… the prima facie obligation which a solicitor undertakes when he accepts a retainer from a client in a common law action is this. He has entered into an entire contract on that litigation to the end he cannot sue his client for costs … but, on the other hand, it seems to me upon the cases that a solicitor may be put into a position by a client in which he may withdraw from the retainer. The point which we have to decide in this case is whether a solicitor can for no reason whatever, in the middle of a common law action, throw up the retainer provided that he gives his client due notice that he is going to do so and then sue the client for a bill of costs which has been incurred up to that date. That is the point of law which we have to decide… There may be [cases] in which a client may put his solicitor into such a position that it would only be right that the solicitor should have an option of refusing to act any longer under the retainer. Under those circumstances, it appears to me, the solicitor would be entitled to sue for his costs out of pocket and his costs up to that date."

38. I am not persuaded that Underwood assists the plaintiff in any great regard since the decision in that case was reached on the basis that the solicitor had thrown up the retainer for no reason whatsoever and had then sued his client for his bill of costs. In the present case, this Court is constrained, for the reasons already set out in this judgment, and by virtue of the Order of 9th February, 2015 permitting the defendant to come off record, to find that the defendant did not terminate his retainer without good cause. This is a case where the defendant was put in a position "*in which he may withdraw his retainer*", to quote Smith L.J. in *Underwood*.

39. Contrary to what the endorsement of claim alleges, this is not a case where the defendant is retaining the file in the plaintiff's personal injury file until his "fees" are discharged by the plaintiff. Nor is the defendant seeking his costs or fees in these proceedings. Rather he is refuting the plaintiff's claim for breach of contract on the basis that he was allowed to come off record in the plaintiff's personal injury action by Order of the High Court and in circumstances where the Law Society has set out an adequate resolution of matters as between him and the plaintiff. The defendant however contends that his demand that the plaintiff discharge outlay of €1,337.50 does not breach the terms of the agreement reached in January, 2012.

40. The issue for this court is whether the defendant can reasonably claim that before the plaintiff's personal injury file is released, she must provide a satisfactory undertaking as to the defendant's costs and discharge specific outlay of €1,337.50.

41. In *Ahern v. Min for Agriculture* [2008] IEHC 286, Laffoy J. quoted Hodson L.J. in *Hughes v. Hughes* [1958] P 224 when addressing the situation where a solicitor has terminated the retainer with a client. She stated:

"Hodson L.J. in Hughes v. Hughes … went on to deal with the situation in which it is the solicitor, rather than the client, who discharges the retainer stating as follows:-

> *'The solicitor himself may determine his retainer during an action, for reasonable cause, such as the failure of the client to keep the solicitor in funds to meet his costs and disbursements; but in that case the solicitor's possessory lien, i.e. his right to retain the client's papers of any intrinsic value or not, is subject to the practice of the Court, which, in order to save the client's litigation from catastrophe, orders the solicitor to hand over the client's papers to the client's new solicitors, provided the new solicitors undertake to preserve the original solicitor's lien and to return the papers to the original solicitors, for what they are worth, after the end of the litigation.'*

As Templeman L.J. pointed out, the practice of the Court to which he referred was well settled, being traceable from a judgment of Lord Cottenham L.C. in Heslop v. Metcalfe (1837) 3 My & G 183. Indeed, it would appear that the practice was of even greater antiquity because Lord Cottenham referred to it as 'the law as laid down by Lord Eldon'.

As I pointed out in Mulheir v. Gannon, Templeman L.J. summarised the position as being that where the solicitor has discharged his retainer, the Court will then normally make a mandatory order obliging the original solicitor to hand over the client's papers to the new solicitor against an undertaking by the new solicitor to preserve the lien of the original solicitor. However, he went on to qualify the general principle somewhat in the following passage:-

> *'I wish to guard myself against possible exceptions to this general rule. The Court in fact is asked to make a mandatory order obliging the original solicitors to hand over the papers to the new solicitors. An automatic order is inconsistent with the inherent, albeit judicial discretion of the Court, to grant or withhold a remedy which is equitable in character. It may be, therefore, that in exceptional cases the Court might impose terms where justice so required. For example, if the papers are valueless after the litigation is ended and if the client accepts that he is indebted to the original solicitor for an agreed sum and has no counter claim, or accepts that the solicitor has admittedly paid out reasonable and proper disbursements, which must be repaid, the Court might make an order which would compel the original solicitor to hand over the papers to the new solicitor, on the usual terms preserving the lien but providing that in the first place the client pays to the original solicitor a sum, fixed by the Court, representing the whole or part of the monies admittedly due from the client to the original solicitor. Much would depend on the nature of the case, the stage which the litigation had reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the Court is asked to make.'"*

42. On 9th February, 2015. Moriarty J. declared that the defendant ceased to act for the plaintiff; there was no direction given that the plaintiff's personal injury file be handed over to new solicitors for the plaintiff, presumably because there were no new solicitors about to be retained by the plaintiff in February, 2015. Equally, this Court has not been advised as of the date of hearing of any new solicitors coming on record for the plaintiff. Presumably, however, the plaintiff intends to retain new solicitors.

43. Therefore, insofar as the plaintiff seeks the release of her file in these proceedings it seems to me that the court should direct, in similar terms to how the Law Society dealt with the plaintiff's complaint, that the defendant hand over the plaintiff's personal injury file to whatever new solicitors are retained by the plaintiff, on those solicitors' undertaking that they will seek to recover the defendant's costs and outlay (including the specific outlay of €1,337.50) relating to the work carried out by the defendant on behalf

of the plaintiff and that they will transmit those funds to the defendant if and when received.

44. As can be seen, this Court is not adopting the Law Society's approach to the specific outlay of €1,337.50. Given the bald language of the letter of 3rd January, 2012, it seems to me that the justice of the case is met by the lien the defendant presently has over the file and by the provision of an anticipated undertaking from the plaintiff's new solicitors, once retained. Furthermore, I note that in the letter of 10th August, 2015 to the Law Society, the defendant was clearly prepared to accept an undertaking from any new solicitors retained by the plaintiff that they would include the defendant's costs and "other outlays" "as part of any settlement, or award made by a Court, and to furnish such sums to [the defendant's firm] if and when received by them." It has not been suggested by the defendant that he has any particular apprehension that an undertaking in respect of the sum of €1,337.50 would not be forthcoming from any new solicitors retained by the plaintiff.

45. In arriving at my decision in this matter, I have adopted the dictum of Lord Cottonham L.J. in *Heslop v. Metcalfe*, (quoted by Laffoy J. in *Ahern*):

> *"I then take the law as laid down by Lord Eldon, and, adopting that law must hold that [the solicitor] is not to be permitted to impose upon the plaintiff the necessity of carrying on his cause in an expensive, inconvenient and disadvantageous manner. I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause."*

Summary

46. In so far as the plaintiff seeks the release of her personal injury file from the defendant, the Court directs that same be released subject to the provision of an undertaking from the plaintiff's new solicitors to include the defendant's costs, the specific outlay of €1,337.50 and other outlay as part of any settlement or award made by a Court, and to furnish such sums to the defendant's firm if and when received by them.