[2017] IEHC 451

THE HIGH COURT

2010 No. 5214S

BETWEEN

HUGH A CARTY, JOHN P CARTY, H GAVAN CARTY, SHANE CARTY PRACTISING UNDER THE STYLE AND TITLE OF KENT CARTY SOLICITORS

PLAINTIFFS

– AND –

MR H

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

1. Kent Carty Solicitors are seeking summary judgment for the payment of taxed fees that arose in family proceedings, the taxation process having previously been reviewed and upheld by the court in *Carty & ors v. Mr H* [2016] IEHC 617. Mr H considers that the issue of the un-paid fees ought not to be dealt with by summary judgment and ought instead to be sent to plenary hearing.

2. It is not disputed that Kent Carty Solicitors were engaged by Mr H. The bases on which Mr H makes objection to the matter being decided echo those which were raised and considered when the court reviewed and upheld the decision of the Taxing Master in its decision of last year. The court does not propose to re-visit those issues in detail; it would respectfully refer the parties to its previous judgment and note simply that none of the issues raised or addressed therein appear to it raise an arguable defence to the within application for summary judgment.

3. When one reduces Mr H's very many contentions to their essence, the court has to decide whether allegations of conspiracy and/or deceit and/or professional misbehaviour and/or professional negligence and/or breach of contract by Kent Carty Solicitors suffice to justify the within matter now being sent to plenary hearing. The court must admit to being somewhat uncertain, following Mr H's submissions at the hearing of the within application, as to whether all of the allegations aforesaid are now being made; so, for example, it is not clear whether Mr H is alleging any professional negligence on the part of Kent Carty. However, it seems safest to proceed on the basis that allegations of conspiracy and/or deceit and/or professional misbehaviour and/or professional negligence and/or breach of contract continue to be made, if only to close out the possibility that an allegation made is not now being addressed by the court.

4. In fairness to Kent Carty Solicitors, the court must note that whatever allegations are being made by Mr H of them are but allegations and have never been proved. Indeed, a striking feature of the within proceedings is that despite all the 'shoddy' behaviour that Mr H alleges of Kent Carty Solicitors, behaviour which appears to have occurred, if it occurred, some years in the past, it appears that Mr H has never commenced any claim or counterclaim in respect of same.

5. As regards any issue as to alleged professional misbehaviour on the part of Kent Carty, this can be swiftly addressed: if Mr H has a complaint in this regard he should make complaint to the Law Society; it does not offer a defence to the debt claim against him. There is nothing in the evidence before the court that would support any claim for conspiracy or deceit against Kent Carty arising from such alleged misbehaviour.

6. So far as Mr H's allegations of professional negligence against Kent Carty are concerned (if allegations there be), they arise in connection with the manner in which the family law proceedings were conducted. But here Mr H hits an insurmountable obstacle in terms of progressing any such claim: Kent Carty engaged competent senior counsel and acted on his advice as regards the ongoing conduct of the family law proceedings. In this respect, the court would but recall the observation of Henchy J. in the now long-ago case of *Millard v. McMahon* (Unreported, High Court, 15th January, 1968) that, even by that time, it was *"well settled that where a solicitor lays his client's claim fully before competent counsel and acts on counsel's advice, he is not liable for negligence."* There is no suggestion here that counsel was negligently selected. There is no suggestion that there was blind adherence to the rogue advice of patently negligent counsel. There have been no proceedings commenced against the counsel engaged by Kent Carty. Any professional negligence claim against Kent Carty in this regard therefore appears doomed to fail.

7. As to breach of contract, Mr H claims that there was an oral fee-capping arrangement in place between him and his solicitor. Beyond claiming this to be so, there is nothing to suggest that this was so. In point of fact, Mr H was sent 'section 68' correspondence outlining such fees as would be chargeable and without any mention of a cap. Nonetheless, Mr H claims that his solicitor has acted in breach of contract in seeking fees of him that exceeded the alleged cap. The obvious difficulties which accompany any purported oral contract present in this regard: being oral, typically there will be little or nothing that supports the contention as to its existence – and here there is nothing. Unfortunately for Mr H, it does not suffice in applications for summary judgment for debt for an alleged debtor to make bare averments as to the alleged existence of a purported oral contract and to expect that that will suffice to require that an application for the recovery of debt will be sent to plenary hearing. If that were the law, the law in this regard would be peculiarly vulnerable to abuse. More is required before a court could accept an arguable defence to present by reference to a purported oral contract. If that 'more' is not forthcoming, for example (and by way of but one example only) in the form of historical behaviour consistent with the purported oral contract, an affected defendant will fail, as Mr H has failed, in terms of having a case referred to plenary hearing, because (to borrow from the terminology employed by McKechnie J. in *Harrisrange* (considered later below)), a court could not properly conclude in this regard, as this Court cannot properly conclude in this regard, that there is a real or *bona fide* defence or that what the defendant debtor has to say is credible.

8. The hurdle to be surmounted by Mr H as regards having the within application sent to plenary hearing is a low one. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623, "[T]*he 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 defendant's affidavits fail to disclose even an arguable defence?"* In *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of*

each individual case…

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…

(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

9. Notwithstanding the various arguments that Mr H has raised, and which it has been sought in the within judgment to address, the court must respectfully conclude, by reference to the judgment of Hardiman J. in *Aer Rianta*, that (i) it is very clear that Mr H has no case, (ii) such points as Mr H has raised either yield no issue to be tried or only issues which are simple and easily determined, and which have been determined by the court, and (iii) Mr H's affidavit evidence fails to disclose even an arguable defence. Notwithstanding that "*discernible caution*" to which McKechnie J. refers in his judgment in *Harrisrange*, and which the court has brought to its consideration of the within application, the court considers itself coerced as a matter of law into granting now to Kent Carty Solicitors the summary judgment for debt that they have come seeking, plus interest.