Neutral Citation: [2013] IEHC 565

THE HIGH COURT

[2009 No.10958 P.]

BETWEEN

MATTHEW REILLY AND DERMOT KIDD

PLAINTIFFS

AND

RUAIRI O'CEALLAIGH, GRAHAM JONES AND CORMAC O'CEALLAIGH PRACTISING UNDER THE STYLE AND TITLE OF SEAN O'CEALLAIGH AND COMPANY SOLICITORS

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered the 6th December 2013

The question in this case is whether the court should order the plaintiffs' former solicitors, Sean McDonnell and Co., to hand over their files and documents relating to this action to the solicitors now acting for the plaintiffs, Giles J Kennedy and Co. The notice of motion also seeks directions so far as necessary as to the payment or security for McDonnell and Co.'s Costs and that firm's lien.

A solicitor can be held to have implicitly terminated the retainer where the circumstances give rise to the implication. One of those circumstances is where the solicitor has not carried out his work with due diligence on behalf of his clients. This is the ground on which the plaintiffs rely in this case. They say that Mr. McDonnell did effectively or indeed absolutely nothing in a period of sixteen months during which the case stagnated and that they were obliged to go to another solicitor in order to get the action moving again and bring it forward towards a conclusion. Mr. McDonnell denies lack of due diligence and explains how there was a particular complexity in the case and that the lack of progress was understandable until the situation clarified itself.

The following legal principles apply to the application.

1. "If before the action is ended, the client determines the retainer, the solicitor may, subject to certain exceptions not here material, exercise a possessory lien over the clients papers until payment of the solicitors costs and disbursements." - *Gamlen Chemical Limited v. Rochem Limited* [1980] W.L.R. 614 at 624 per Templeman L.J.

2. "Where the has himself discharged his retainer, the court then will 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."- ibid

3. "In exceptional circumstances, the court may impose terms where justice so requires, for example, if the solicitor has admittedly paid out reasonable and proper disbursements which must be repaid, the court might make an order for the handing over the papers to the new solicitor providing the sum paid out by the original solicitor was repaid. This is a discretionary matter for the court to consider when making an order."- ibid 624/5

4. "Applying those principles, the following questions arise in the present case: first, did the solicitor discharge the client or did the client discharge the solicitor? Secondly, if the solicitor discharged the client, was there reasonable cause for the solicitor to do so? Thirdly, if there was reasonable cause for the solicitor to discharge the client, and the solicitor did so, should the court impose terms on the delivery of the client's papers and documents by the solicitor to the new solicitor, other than the term which requires the new solicitor to undertake to preserve the lien of the original solicitor?" - ibid at 625

5. In *Mulheir v. Gannon* [2009] 3 I.R. 433, Laffoy J. followed *Gamlen v. Rochem* ordering delivery of the file to the new solicitors on conditions (a) that the plaintiffs reimburse the outlay incurred by the defendant (b) the new solicitors give an undertaking to hold the files subject to the original solicitor's lien and to return them to him on the conclusion of the proceedings (c) the delivery of the files was without prejudice to the solicitor's claim for costs against the plaintiffs. The court proceeded on the assumption that the defendant solicitor had discharged himself for reasonable cause. It was not in dispute in that case that the original solicitor had recommended that the clients retain alternative legal representation thereby, as the court held, effectively terminating his retainer. There was conflict as to whether or not the solicitor had good reason to terminate the retainer because of the behaviour of the plaintiffs.

6. In *Ahern v. Minister for Agriculture and Food and Others* [2008] IEHC 286 (Unreported Laffoy J., High Court, 11th July, 2008) the court made a similar order to *Mulheir v. Gannon* and rejected an application by the client applicant that payment of the taxed costs and outlay of the former solicitors should be deferred to the successful outcome of the claim, subject to an undertaking being given by the new solicitors to "discharge the same following that outcome". Laffoy J. said:

> "The former solicitors' entitlement to recover costs from the client and the client's liability therefore are matters of contract between the client and the former solicitors' which the Court has no jurisdiction to adjudicate on in an application of this nature."

7. The Court of Appeal in *Gamlen* and Laffoy J adopted the observations of Lord Cottenham LC in *Heslop v Metcalf* (1837) 3 My. & C. 183 in a part of his judgment at 188-190 that concluded "I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause."

8. "Once proceedings are under way, the claimant's solicitor has a duty to prosecute the action with reasonable

diligence."- Jackson and Powell on *Professional Liability* 7th Ed. citing as authority *The Flowerbole (a Firm) v. Hodges Menswear Limited*, the Times, June 14th 1988, CA.

9. If a solicitor fails to act with all due diligence and care on behalf of his client, the latter is no longer obliged to continue the retainer. When a dissatisfied client terminates the relationship without proper grounds and instructs a new solicitor, the original solicitor is not bound by any agreement to accept only such costs as may be recovered from the other party in the litigation. See *McHugh v. Keane*, (Unreported, Barron J., High Court, 16th December, 1994). In that case the court was concerned with a 'no foal no fee' agreement between solicitor and client and the question arose on the termination of the relationship by the client. The court held that where a solicitor accepted instructions on that basis, there was a corresponding obligation on the client not to withdraw his instructions until the proceedings concluded.

10. In a situation where the client unreasonably left the solicitor, but the solicitor had issued an unreasonable bill of costs to the plaintiff, the court (Barron J.) measured a sum which was in that case approximately 50% above the amount of the outlay that had been claimed in the bill of costs. - *McHugh v. Keane*. That case illustrates how the court will adopt a flexible attitude to what is just and reasonable in circumstances where the relationship of solicitor and client has broken down.

11. The court in *Gamlen* was careful to allow for exceptional cases where the application of a general rule would not be appropriate or just. The circumstances might call for special conditions to be applied to the transfer of papers depending on the nature of the case and other features of the relationship.

In this case the plenary summons was issued on the 3rd December, 2009 and the statement of claim was delivered on the 9th December, 2009. Following a series of demands for a defence and a motion for judgment, the defendants delivered their defence and counterclaim on the 24th May, 2010. The plaintiffs' solicitors, Messrs McDonnell and Co., served notice of trial on the 29th July, 2010.

The action brought by the plaintiffs arose out of an agreement made in November, 2007 by the plaintiffs to buy land in Co. Meath from the first named defendant in respect of which the plaintiffs paid a deposit of €400,000. The plaintiffs claim that they paid that sum to the defendant firm of solicitors as solicitors for the first named defendant, who was a member of the firm and that the money was paid to the firm as stakeholder. The defendants acted as solicitors for both the vendor and purchaser in the transaction. The sale did not proceed and the plaintiffs sought the return of their deposit and the action arose out of the plaintiffs' failure to recover the deposit that they had paid. The action originally sought the return of the money in the circumstances of the failure of the sale, but a subsequent amendment added claims for damages for breach of retainer and/or breach of agreement and for negligence and breach of duty. The amendments happened after the change of solicitors.

A month after notice of trial was served, on the 31st August, 2010, the High Court ordered the freezing of the accounts of the defendant firm. McDonnell and Co. applied to the High Court to be a notice party to the proceedings in respect of O'Ceallaigh's. That firm was wound up in October 2010.

The period of inactivity that the plaintiffs rely on runs from October 2010, until February 2012, when they contacted McDonnell and Co. seeking copies of the plenary summons and statement of claim and the firm seems to have treated that as a request for transfer of files. On the 201h March, 2012, the plaintiffs' new solicitors Giles J Kennedy and Co. wrote to McDonnell and Co. saying that they were now acting and requesting the file.

Mr. McDonnell had previously acted for the plaintiffs in other unconnected commercial court litigation in which they were defendants and which action was compromised. There are costs owing in respect of that action and a third case. When he was notified of the plaintiffs' intention to change to another solicitor, he had a bill of costs prepared and his claim is for the fees of this action up to the date of change of solicitor and of the previous cases. The total sum amounts to €72,296.67.

Ms Deirdre Byrne, Counsel for the plaintiffs, submits that McDonnell and Co. did nothing in the sixteen month period between October 2010 and February 2012. In this regard, she says that corroboration is to be found of the absence of any activity in the bill of costs that Messrs McDonnell furnished in April, 2013, where the last entry is dated the 22nd October, 2010. Mr. Reilly in his affidavits on behalf of himself and his co plaintiff says that he or Mr. Kidd was in regular contact with Mr. Sean McDonnell seeking information as to the progress of the case. The plaintiffs were badly in need of the money because their respective businesses were suffering severely from the recession and they were under pressure from creditors. Mr. McDonnell's response according to Mr. Reilly was that he was awaiting receipt of the O'Ceallaigh files in relation to the land sale contract and that nothing could be done until they were received. For his part, Mr. McDonnell does not substantially contest this account. He swore two affidavits in this motion. In his first affidavit, at para. 5 he refers to the Law Society moving against Sean O'Ceallaigh and Co. and the application to be joined as a notice party. He says that the plaintiffs were at all times kept up to date, but "during this period it was decided to wait and see what the outcome was with the Law Society proceedings".

When the matter first came before me I was not satisfied that I understood what had happened during the sixteen month period on which the plaintiffs rely in their criticism of Mr. McDonnell. I accordingly directed that further affidavits be filed dealing with this matter and as a result the situation was advanced, but not more than marginally. Messrs Reilly and Kidd deposed that they had been in regular contact with Mr. McDonnell by phoning him and asking what was happening. Mr. McDonnell agreed that they made phone calls and he had told them that he had been telephoning to see if he could get the file of papers, but without success.

In Mr. McDonnell's second affidavit, he accepts that he regularly spoke with the plaintiffs by telephone in respect of the progress of their case. "I also accept that I indicated to the plaintiffs that I needed a copy of the files associated with the transaction, the subject matter of the within proceedings in order to progress the proceedings". He then sets out reasons why the O'Ceallaigh files relating to the transactions were required, which is quite reasonable. He challenges the plaintiffs' assertion that October 2010 is the appropriate starting point. Paragraphs 9 and 10 contain the essence of Mr. McDonnell's explanation for the alleged delay and inaction during the period in question. He begins with a reference to the October starting point:-

"9. I say that this is simply not the case. The winding up of the practice did not immediately resolve matters in respect of the files. In fact, it made matters worse. As this Honourable Court will be aware, the winding up of a solicitors practice and the appointment of either a care taker or successor practice is a slow and difficult procedure, particularly in circumstances where there are issues with client monies and/or in the instant case, litigation in existence between the firm and current or former clients.

10. I say that I made repeated efforts to obtain the files but to no avail. As is recorded in Mr. Reilly's own affidavit, rather than contacting this office, the third named defendant contacted the plaintiffs directly in respect of certain deeds across

> the first half of 2011. As also appears from Mr. Reilly's affidavit, I spoke to the plaintiffs in relation to a road traffic case across the latter half of 2011. Again, I still had not received the files from the third named defendant and again it was indicated by the plaintiffs that these files were required. The plaintiffs never indicated any dissatisfaction with this approach."

Mr. McDonnell goes on to say that the plaintiffs never expressed any unhappiness or dissatisfaction with his professional conduct.

Mr. Oisin Collins, Barrister, for the solicitor points out that neither Mr. Reilly nor Mr. Kidd made any actual complaint to Mr. McDonnell. They did not say that they were consulting another solicitor or thinking of doing so or requiring that he make any particular progress or setting deadlines or anything of that kind. They did not make any written complaint and indeed did not actually write any letter during this period. The situation was difficult and Mr. McDonnell was doing his best. It is easy to understand what an unwelcome and complicating feature it was that the O'Ceallaigh firm was wound up. It was also a very unusual situation and one can well understand that the solicitor for the plaintiffs who had been suing the firm would have to give some thought how best to proceed. It is understandable that the files relating to the plaintiffs case would be retained for inspection and examination and if necessary for the purpose of application to the court by the Law Society pending the completion of its work in connection with the firm. Even if Mr. McDonnell had been the most diligent and professional in his work, it may be that there was little enough that he could do to get the relevant documents from the solicitors firm. He had been advised by counsel that the documents were required for the hearing.

Having made all the allowances one can, however, the fact remains that the only explanation that Mr. McDonnell offers is that he was waiting to get the O'Ceallaigh files. But what I find hard to understand is why he did nothing about it. He says vaguely that he made phone calls but does not say to whom or what the outcome was and obviously he was not successful in any of his calls. That left him with options to be considered as to how he was going to secure the documents he considered essential for the prosecution of the case. He could have written letters or he could have brought applications of court or he could have obtained advice of counsel as to the appropriate step to take. What seems to me to have been unacceptable was to do nothing and simply wait and hope as month followed month without any progress. It is accepted that the plaintiffs were in contact with Mr. McDonnell during this period and inquiring about the case, but he seems to have considered it a sufficient response to tell them that he was waiting for the O'Ceallaigh file and could make no progress until he got it. It is irrelevant that they did not challenge this inactivity.

It is possible that a delay of sixteen months during which nothing happened could be justified. It could be that there were indeed insurmountable difficulties in this case that led to the O'Ceallaigh files being out of commission or unavailable for one reason or another. But Mr. McDonnell offers no such explanation. The period of sixteen months that the plaintiff complains about between October 2010 and February 2012 came to an end because the plaintiffs requested the plenary summons and statement of claim and the solicitors assumed that that meant they were consulting alternative solicitors. The implication is that the period of inactivity might have continued further if the plaintiffs had not made that request. But whether that inference is reasonable or not, the fact is, in my view, that the period was excessive by a substantial margin and no adequate explanation has been provided for it. There is admittedly some mitigation in the complications that arose from the winding up of the O'Ceallaigh practice and the events that proceeded but that cannot explain or excuse the inept passivity of the solicitors.

In those circumstances, having regard to the delay and the utter inadequacy of Mr. McDonnell's response, the conclusion is irresistible that he was in breach of his duty of diligence. It follows that the plaintiffs are entitled to consider that he has by neglect implicitly terminated his retainer. In the result, there must be an order for the transfer of the file in this case to the plaintiffs' new solicitor. The question then arises as to the terms and conditions upon which the transfer should be directed.

There are exceptional circumstances in the case because of the outstanding fees due from the previous action in the Commercial Court. There was also another case in which the solicitors had a relatively minor involvement. It is true that there is a dispute as to how much is actually due and owing, but the solicitors have made out a *prima facie* case on the affidavits that there is a substantial sum in costs outstanding.

If the change of solicitor had never arisen, the case would have been brought to a hearing and the plaintiffs would have succeeded or failed. If they lost, Mr. McDonnell would have had another bill to add to his previous one and he would then look to Messrs Reilly and Kidd for payment. They might or might not be able to pay or they might be able to pay something towards the fees due to Mr. McDonnell.

Assuming that the plaintiffs won their action, still working on the assumption that Mr. McDonnell had continued to act for them, they would be expected to recover costs as well as an award of damages and that might well include the return of the sum of €400,000. They would be awarded damages and costs. It does not necessarily follow that because they were awarded them, they would actually recover them. But again, assuming that they were successful and recovered the deposit of €400,000 plus costs, there would be a costs fund for payment of Mr. McDonnell's costs of these proceedings and the plaintiffs would be in receipt of their award, from which they would be able to pay Mr. McDonnell's outstanding bill for the previous case. The likelihood is that everything would be paid up in the event of a successful outcome of the action, but not otherwise.

These considerations lead me to believe that the appropriate order in this case is one that takes account of the situation as it would have eventuated if Mr. McDonnell had continued on as the solicitor for the plaintiffs. He had no prospect of being paid for the previous case or for this one before the termination of the current proceedings, I do not think it is any injustice to put him in the same position as he would have been if his retainer had not been ended. How can that be done?

It seems to me that Mr. McDonnell's position will be protected to the same degree as if he remained solicitor to the plaintiffs if the following conditions are imposed in the order for the handing over of his files to the new solicitors:

> (a) The new solicitors are required as a condition of the handing over of the file by Mr. McDonnell to give an undertaking that they will retain out of the award of costs that is made in the event that the plaintiffs are successful, a sum sufficient to discharge Mr. McDonnell's bill of costs in respect of this action up to the point of termination, which is calculated by him in his bill.
>
> (b) The plaintiffs and their solicitors will be required to undertake to retain out of the amount of any award that is made to the plaintiffs in the action a sum sufficient to discharge Mr. McDonnell's costs of the previous proceedings in which he acted for these parties.
>
> (c) The plaintiffs will be ordered to pay Mr McDonnell's outlay to date in this current action.

By this means, the papers representing Mr. McDonnell's file will be handed over to the new solicitors who will then be able to progress

the action and except for such further fees as he might have earned in this case Mr. McDonnell will be in no worse a position than he would have been if he had continued to act.

These arrangements do not effect any injustice on the new solicitors or on the plaintiffs. And it seems to me that they would be justified even if I were mistaken in my conclusion as to the implicit termination of Mr McDonnell's retainer by reason of inactivity. The fact is that the relationship has broken down and the new solicitors are in place.

There is of course a question as to whether the plaintiffs may wish to dispute the amount of Mr. McDonnell's costs. They are entitled to seek taxation of such costs and although the period may have elapsed for them to make such a reference as of right, I think that this Court should be willing to make an order sending Mr. McDonnell's costs for taxation, unless they are agreed by Mr. Reilly and Mr. Kidd with the advice if necessary of their new solicitors.

The order will be for the handing over of the file subject to the undertakings of the solicitors and of the plaintiffs as I have outlined above.

If the plaintiffs wish me to do so, I will make an order for the taxation of Mr. McDonnell's costs, but it is also open to the parties to agree the amount or they can agree a variation of the terms of the undertakings that I am requiring. But that is a matter for the parties to this application. In the absence of any such agreement, the orders as I have outlined will be made.