

## THE HIGH COURT

[2014 No. 154 SA]

BETWEEN

TIMOTHY MAVERLEY

APPELLANT

AND

BRENDAN CLARKE

RESPONDENT

**JUDGMENT of Kearns P. delivered on 20th day of April, 2015**

The appellant appeals against the decision of the Solicitors Disciplinary Tribunal dated 4th November 2014 that there is no *prima facie* case of misconduct on the part of the respondent solicitor in respect of each of the allegations set out in the appellant's initial complaint of 18th June 2013.

**BACKGROUND**

The respondent solicitor acted for the appellant and two other plaintiffs in proceedings which were heard by this Court over a two week period in December 2011 and January 2012. The Court issued its decision in the case on 18th January 2012. It is not necessary to recount the precise nature of the claim or the reasoning of the Court in arriving at its final decision in any detail. It is sufficient to state that while the appellant and his co-plaintiffs were able to establish negligence and a breach of duty on the part of the defendants in those proceedings, the Court held that causation had not been established and the claim was dismissed.

During the trial an issue apparently arose whereby the appellant was eager to have certain travel documents brought to the attention of the Court and admitted as evidence which he believed could prove a significant flaw in the defendant's case and establish also that a defence witness had given false or incorrect evidence. Correspondence between the appellant and his legal team in relation to the relevance and importance of these documents is exhibited. Ultimately, it seems that the appellant believed the documents would be presented to the Court during his own oral evidence. However, it seems that Mr. Kilty, senior counsel for the plaintiffs, directed the respondent solicitor to remove them from the booklet of exhibits handed to the Court moments before the hearing resumed.

It is clear from the documentation available that following this further correspondence ensued between the appellant and the respondent solicitor as to when the travel documents would be introduced. Ultimately, the documents were not brought to the attention of the Court before the conclusion of the proceedings.

On 18th June 2013 the appellant made a complaint to the Tribunal in relation to the respondent solicitor. The appellant's allegations to the Tribunal can be summarised as follows –

- 1. The respondent solicitor disobeyed specific instructions and deceived him by wilfully and knowingly interfering with and removing documentation from one of a number of booklets of documents submitted in evidence during the trial*
- 2. The respondent solicitor misled him by assuring him that the documentation in question would instead be used in cross-examination of a defence witness.*
- 3. The respondent solicitor has presented him with an inaccurate bill of costs which fails to account for payments made by the applicant and leaves €83,813.02 unaccounted for.*
- 4. The respondent solicitor breached his privacy and confidentiality by engaging in a meeting with a co-director of the applicant without his permission to discuss his business affairs.*

The respondent submitted to the Tribunal that the decision to remove the documents was a strategic decision made by senior counsel and that as the appellant was already in the witness box at the time he did not have the opportunity to speak with him about the removal of the documents. He states that it was however explained to the appellant and his co-director on several occasions that his lawyers had a number of concerns in relation to the possible adverse effects of putting these documents into evidence. Furthermore, it was submitted that the decision had no detrimental effect on the plaintiffs' claim as the Court found the defendants to have been negligent. Mr. Kilty SC also submitted a letter to the Tribunal indicating that the decision to remove the documents was his own and that he would "direct the same today".

In his affidavit to the Tribunal dated 19th August 2013 the respondent solicitor states that in December 2012 he sent the appellant and his co-director a bill of costs and a detailed breakdown of incomings and outgoings. He further states that the appellant made separate payments directly to senior and junior counsel. In a third affidavit dated 10th July 2014 the respondent offers further explanation as to the monies received from the appellant and states that the toted listings of incomings furnished was in error by €500 due to a manual totting error but the ledger card is correct. He strongly denies any suggestion that there was any wrongdoing or errors in relation to costs or fees.

Regarding the meeting referred to in the appellant's complaint, the respondent solicitor states that he had three clients – the company and the two directors, Mr. Maverley (the appellant) and Mr. Morey. He states that while the appellant had stopped engaging in the process by this stage, he remained answerable to all three clients and was required to meet with Mr. Morey and to address his queries.

By decision dated 13th November 2014 the Tribunal found that there was no *prima facie* case of misconduct on the part of the respondent solicitor. In relation to the issue of withdrawing the travel papers from the booklet of documents, the Tribunal found that

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*"The travel papers were withdrawn by the respondent solicitor from the folder on the instructions of Mr Kilty SC. In the Circumstances this allegation does not disclose conduct that could be construed as misconduct..."*

In relation to the complaint that the respondent solicitor misled the applicant and engaged in deceit by informing him that the documents would be used later in the proceedings, the Tribunal held that –

*"The conduct of the cross examination was a matter for Senior Counsel. In the circumstances this allegation does not disclose conduct that could be construed as misconduct."*

In relation to the third facet of the applicant's complaint that the respondent solicitor was guilty of false accounting, the Tribunal found that –

*"This allegation has been adequately rebuffed by the respondent solicitor in his aforesaid replying affidavits and in particular the respondent solicitor has identified those payments which were made directly to counsel and then made to him."*

As to the final aspect of the appellant's complaint which alleged that the respondent discussed confidential matters with the appellant's co-director Mr Morey and a third party, the Tribunal found that –

*"From the information furnished Mr Morey was a director of the company involved. It was a matter for Mr Morey to decide who would accompany him to a meeting. The respondent solicitor was entitled to charge for the consultation with Mr Morey in his capacity as a director of the company."*

## **THE PRESENT APPEAL**

The appellant states that at the time he made his initial complaint to the Tribunal he had to obtain his client file from the respondent solicitor. He received the file on 27th April 2014 and states that it contains over 40,000 pages.

In relation to the complaint regarding the withdrawing of the travel documents from the exhibits handed to the court, the appellant states that the respondent misled the Tribunal. The appellant contends that there was a concerted effort to keep this evidence from coming to the attention of the court. He refers the Court to handwritten notes, presumably made by the respondent, on a document sent to the respondent wherein the appellant asks if the travel documents had been forwarded to an expert witness, Mr. Michael Tyrell, for comment. The note reads *"No they were not – we don't want Tyrell commenting on fraud."* The appellant submits that this is evidence of dishonesty on the part of the respondent solicitor in circumstances where he was assured a number of times that the documents would be presented to the court.

The appellant states that during while the case was at hearing he sent the respondent a number of messages asking that the travel documents be produced but the respondent did not reply. It is submitted that the respondent solicitor has been dishonest towards the appellant and to the Court.

In relation to the alleged false accounting the appellant contends that the respondent has failed to provide a list of payments which were made directly to him. It is submitted that despite being provided with an auditor's schedule of payments the respondent has failed to reconcile his accounts with this schedule.

In relation to the fourth aspect of the complaint, the appellant states that the respondent solicitor discussed his business with a third party without his knowledge or consent. The appellant contends that the Tribunal failed to adequately deal with this aspect of his complaint and that he does not dispute that Mr Morey brought a person with him to a meeting with the legal representatives. However, he states that he takes grave exception to his business affairs being discussed in his absence and exhibits two notes of the meeting which he contends are different in content.

## **THE RESPONDENT'S SUBMISSIONS**

The respondent submits that the decision to withdraw the documents was made by senior counsel on the relevant day of the hearing and he categorically denies that there was a concerted effort by anyone to keep these documents from coming to the attention of the Court. He states that it had always been the considered advice of the appellant's legal team that Mr. Tyrell would not be asked to comment on an allegation of fraud and there was no misleading of the appellant. It is submitted that the appellant and his co-director were informed of the legal team's concerns and reluctance to introduce the relevant travel documents.

In relation to the allegation of false accounting, the respondent states that he is not in a position to comment on payments which were made directly to counsel and that he has already accounted for all funds received through his office. These accounts were before the Tribunal.

The respondent solicitor submits that it would have been almost impossible for him to discuss the plaintiff company's business with Mr Morey without discussing the appellant's business as the appellant was a co-director and co-plaintiff in the proceedings. By the time this meeting occurred the appellant was not co-operating with his legal team. However, the legal team were obliged to do the best they could in the circumstances and to discuss matters in relation to the proceedings with Mr Morey.

As to the suggestion that there are two different records of what transpired at this meeting, the respondent solicitor states that this arose due to him dictating his notes of the meeting on two separate occasions as he temporarily mislaid the first tape. However, he submits that while the phraseology may be different and while he recalled some additional information on the second occasion, the notes are in no way contradictory.

## **DECISION**

I have carefully considered all of the relevant documentation in this appeal including the affidavits of both parties and the relevant exhibits and excerpts of transcripts. It is clear that the appellant continues to feel very strongly about certain aspects of the substantive proceedings in which the respondent acted as his solicitor and, in particular, the ultimate decision of the Court and the issue surrounding the removal of certain documents from the booklet of exhibits. This is perhaps understandable given the importance of the litigation to the plaintiffs and the monetary value of the claim. The proceedings were lengthy and complex, and it is an unfortunate reality that in such high stakes proceedings involving multiple parties, relations between solicitors and clients sometimes decline or even break down.

However, I am satisfied that the Tribunal gave careful consideration to the appellant's complaint and has presented clear reasons for

its decision. In relation to the first aspect of the complaint, the Court accepts that primary responsibility for the presentation of a case in the court room lies with counsel and, in the present case, the Court is satisfied that there was no wrongdoing on the part of the respondent solicitor arising from the decision of Mr. Kilty SC to remove the travel documents from the booklet of exhibits. The Court finds no evidence of there having been a concerted effort to keep these documents from the Court and to mislead or deceive the appellant. Rather, the decision was a strategic one made by experienced counsel.

In relation to the allegation of false accounting, the Court is satisfied that the Tribunal had due regard to the submissions and exhibits of both parties in arriving at its decision. No fresh evidence has been introduced by the appellant which suggests that the Tribunal erred in some way or which would warrant a departure from the finding of the Tribunal that the respondent solicitor has adequately rebutted this aspect of the complaint.

The final matter complained of is that the respondent solicitor discussed the appellant's business affairs with Mr Morey and a third party in his absence and without his consent. As noted previously, it is clear from the documents exhibited that relations between the appellant and his legal team were somewhat fraught by the time this meeting took place. However, the Court accepts the submission by the respondent solicitor that he also owed professional duties and obligations to the appellant's co-plaintiffs and there was nothing untoward about the meeting which took place. It is entirely understandable that in discussing the outcome of the case and the possibility of an appeal with the plaintiffs, the respondent solicitor was required to discuss certain matters related to the appellant, who was a co-director and co-plaintiff. No evidence of any wrongdoing in relation to this meeting has been presented to the Court and the Court is satisfied that the respondent solicitor's notes of the meeting accurately reflect what was discussed.

## **DECISION**

For the reasons outlined above, the appeal is dismissed.