THE HIGH COURT
COMMERCIAL

2005 No. 938P

BETWEEN

BALLA LEASE DEVELOPMENTS LIMITED

PLAINTIFF

AND
DAVID KEELING

DEFENDANT

Judgment of Mr. Justice Kelly delivered the 21st day of December, 2006

Background
1. This case was at hearing before me for four days between 7th and 10th November, 2006, inclusive. The case was settled between the parties prior to the commencement of the fifth day of the hearing.

2. The plaintiff sought specific performance of an agreement in writing for the sale of land in Co. Dublin by the defendant to it. The agreement was dated 3rd December, 2002 and the sale price was €2 million.

3. The principal defence to the action was that a collateral agreement was made between the parties to the effect that the sale agreement would lapse and be of no legal force or effect in the event that no changes to capital gains tax legislation were made in the budget which was to be announced by the Minister for Finance on 4th December, 2002. No changes in capital gains tax legislation were in fact announced and so it was contended that the agreement of 3rd December, 2002, lapsed and was of no legal force or effect.

4. This judgment is not concerned with the merits of the plaintiff's or defendant's respective cases since they settled their differences. Rather it is concerned with a matter which emerged in the course of testimony and which was so serious as to warrant me directing a hearing into the conduct of Mr. Robert Taylor, a solicitor and partner in the firm of McKeever Taylor Solicitors who acted both in the transaction and in the litigation on behalf of the plaintiffs.

Mr. Taylor's Conduct
5. Mr. Taylor qualified as a solicitor in 1998. His experience as a solicitor is almost exclusively confined to property and conveyancing transactions.

6. He acted for and advised the plaintiffs in relation to the contract of 3rd December, 2002. Subsequently relations between the parties soured and resulted in these proceedings being commenced on 11th March, 2005. It was quite clear from the evidence that prior to, around the time of, and subsequent to, the transaction of 3rd December, 2002, there were a number of meetings and telephone conversations involving Mr. Taylor. It is now accepted by Mr. Taylor that for most of these meetings and telephone calls he did not prepare contemporaneous attendances.

7. On 1st February, 2006, the defendant's solicitors sought voluntary discovery from the plaintiffs.

8. Prior to that request being made Mr. Taylor began creating attendances in respect of the events from November, 2002, onwards. The creation of those records took place between December, 2005 and March, 2006. For example, an attendance note of 27th November, 2002, was on Mr. Taylor's own evidence created on 8th January, 2006.

9. These attendance notes went into very considerable detail and were prepared in the majority of cases by Mr. Taylor reviewing his diary and his firm's electronic telephone log. He accepts that neither his diary nor the telephone log contained any record of the substance of the meetings or telephone calls but merely recorded the dates and in some cases the times thereof. The substantive content of these attendances was prepared from memory. The attendances were dated as of the date of the meeting or telephone call rather than the date of their creation. Mr. Taylor accepts that there was nothing on the face of the attendances to indicate that they were prepared years after the meetings they described.

10. It would require an extraordinary feat of memory to be able to recount the detail that is contained in these attendances. Having had the opportunity of listening to Mr. Taylor and observing his demeanour over the period of time that he was in the witness box I am quite satisfied that he is not possessed of extraordinary powers of recall.

11. There is no doubt but that on looking on these various attendances in the form in which they were created a reasonable person would assume that they were contemporaneous with the events which they described. Indeed, Mr. Taylor accepted, in the course of his evidence, that when one speaks of a date of a document one generally speaks of the date of its creation. Applying that yardstick it is clear that the documents created by Mr. Taylor gave the impression that they were created on the date of the events described in them and not years later, as was in fact the case.

12. Mr. Taylor also asked me to believe that he prepared these attendances as "a memorandum for myself, for the purpose of the file and just to recall my recollection of events". He denied that he prepared them because he knew that discovery was going to be required in the action and was creating a record for that purpose. He also denied that he prepared them to demonstrate that he was an efficient solicitor who kept a contemporaneous attendance of events as they took place.

The Request for Discovery
13. The defendant's solicitors' letter sought discovery of, *inter alia*, -

> "All notes, memoranda and documentation (whether in written or electronic form) relating to and comprising the plaintiff's file with McKeever Taylor, Solicitors, concerning the subject lands and the agreement of 3rd December, 2002 and to include all subsequent dealings including all communications, correspondence, advices, and meetings between the plaintiff and McKeever Taylor, Solicitors, concerning the lands the subject matter of these proceedings."

14. On 13th February, 2006 Mr. Taylor agreed that the plaintiff would make voluntary discovery in the terms sought stating "We are happy to confirm that our clients are consenting to make the discovery sought".

15. The plaintiff's affidavit of discovery was sworn by Donagh Higgins, a director of it. The affidavit was sworn on 3rd April, 2006. It disclosed the attendances which had been created by Mr. Taylor but drew no distinction between the small number that had been prepared contemporaneously and those which had been prepared long after the events they described. The only dates that were given in the relevant schedule were those of the meetings or telephone calls being described. To return again to the attendance of 27th November, 2002, as an example, nowhere in the affidavit was it disclosed that in fact that record was created on 8th January, 2006.

16. It is now accepted by Mr. Taylor that the affidavit created a misleading impression to the effect that all of the discovered attendances were prepared contemporaneously. That of itself is serious.

17. Matters became much more serious however, when on 21st April, 2006, the defendant's solicitors wrote and asked for confirmation that the attendances disclosed and furnished were contemporaneous with the events they described. They said:-

> "We note that all attendances of Robert Taylor are typed attendances. No original file notes have been discovered. Please furnish copies of the original file notes.
>
> With regard to the typed copy attendances furnished please confirm if these typed attendances are contemporaneous notes of the events. If they are not contemporaneous notes please advise when they were in fact typed."

18. This letter was replied to by Mr. Taylor on 10th May, 2006. In his response he clearly represented that the typed attendances were contemporaneous and said:-

> "We confirm that the typed attendances of Robert Taylor are contemporaneous notes of the events which it is the practice of Mr. Taylor to prepare from hand written notes which he does not retain. Accordingly no hand written attendances are available."

19. The defendant's solicitors sought clarification on whether the "typed attendances were typed after a significant time period had elapsed" (letter 19th May, 2006).

20. In response Mr. Taylor gave a description of the process by which the attendances were created and then clarified that all but two of them should not be regarded as contemporaneous. He said:-

> "In relation to the attendances on meetings, to the best of our recollection some of these were typed at around the time that the meetings took place, and therefore are contemporaneous. However, in relation to other meetings, the attendances were typed some time after the meetings took place and accordingly should not be regarded as contemporaneous. The relevant meetings for which there are contemporaneous attendances are the meetings on 21st May, 2003 and 30th June, 2004."

21. It is clear therefore that only in respect of two meetings were contemporaneous attendances discovered. All of the others were created long after the event.

22. In the response from which I have just quoted Mr. Taylor offered to swear a corrective affidavit of discovery clarifying the dates on which the attendances were created. He also consented to electronic discovery in terms which had been requested by the defendant. He also indicated that he had engaged a specialist to assist in ascertaining the dates on which the non-contemporaneous attendances were created.

23. A supplemental affidavit of discovery was sworn on 3rd July, 2006. It identified the approximate date of creation of the non-contemporaneous attendances.

24. Returning again, for example purposes, to the attendance of 27th November, 2002, this affidavit demonstrated that it had been created on 8th January, 2006, from memory and from an electronic telephone entry created on 27th November, 2002.

25. It is now accepted that Mr. Taylor's letter of 10th May, 2006, created a misleading impression that all of his attendances were contemporaneous. That clearly was not the case. It was wrong to write that letter and he now accepts that. The letter was misleading and it referred to attendances at meetings which were very much in issue in the proceedings.

26. Mr. Taylor was heavily cross examined by counsel for the defence and indeed was asked a number of questions by me in respect of this whole sorry episode. I did not find him to be an impressive witness.

The Court's Role

27. Despite the fact that the parties to this suit settled their differences I felt that I could not overlook the serious situation which emerged in relation to the making of discovery in this case. When the settlement was announced to me I informed counsel acting on behalf of the plaintiff that I was deeply troubled by the evidence that I heard and from what limited research I had been able to do, it appeared to me that Mr. Taylor had a case to answer in respect of his conduct which the court simply could not ignore. My research had suggested that the court had jurisdiction to deal with his conduct as part of its inherent jurisdiction to deal with contempt and/or to preserve the integrity of its process.

28. It is right that I should recall that at that stage Mr. Taylor readily apologised in respect of these matters. I advised him to retain the services of counsel and I afforded him a lengthy period to prepare for a hearing in respect of the matter which I conducted on 19th December, 2006.

Contempt

29. Mr. Collins S.C., on behalf of Mr. Taylor, argues that whatever the shortcomings of Mr. Taylor's behaviour, it did not amount to a contempt of court, criminal or civil.

30. In the event it is not necessary for me to decide such question because Mr. Collins accepts that, quite apart from the jurisdiction to deal with civil and criminal contempt, the High Court does exercise an overall disciplinary jurisdiction over solicitors. (See the observations in this regard of the Court of Appeal in *Weston v. Central Criminal Court Courts' Administrator* [1977] 1 Q.B. 32.) That jurisdiction can be exercised in the case of a solicitor who has been guilty of neglect or misconduct. It is that jurisdiction that I propose to exercise in this case.

Mr. Taylor's Approach
31. In the course of the hearing of the action Mr. Taylor admitted –

(a) That the format of the first affidavit of discovery did not describe the attendances created in an appropriate way. He accepted that he should have clarified that a number of the attendances disclosed were not contemporaneous,

(b) That it was neither ethical or proper to have his client swear the first affidavit in the form in which it was drafted,

(c) That the preparation of the first affidavit of discovery was in error although he said that he did not intend to mislead anyone, and

(d) That the contents of his letter of 10th May, 2006, were incorrect and that the representation contained therein could be regarded as a lie although it was not intended as such by him.

32. Mr. Taylor apologised at the conclusion of the substantive case and repeated that apology on the 19th December hearing through counsel.

Solicitors and Discovery
33. The court is entitled to expect the highest standards of probity and ethical behaviour on the part of solicitors. That is particularly so in the conduct of litigation.

34. Discovery of documents is a most useful process in the conduct of litigation. The making of accurate and correct discovery relies to a very great extent upon solicitors who advise clients on the topic. It is to solicitors that the obligation primarily falls to ensure that discovery is made in accordance with both the letter and spirit of the agreement made for such discovery or the court order which directs it. There is a considerable element of trust involved in the whole discovery process. The court must be entitled to look to its officers to ensure that the process is conducted honestly, ethically and is not abused.

35. In the present case there can be no doubt but that Mr. Taylor fell short of the conduct which the court is entitled to expect in the way in which he dealt with the discovery in this case. The creation of attendances by him from memory years after the event without the fact of such creation being disclosed until it was challenged was a serious departure from what the court was entitled to expect. More serious, however, was the representation which was contained in his letter of 10th May, 2006, to the effect that the typed attendances were contemporaneous with the events recorded in them.

36. This behaviour on the part of Mr. Taylor represented such a departure from what the court is entitled to expect that I was satisfied I could not simply ignore it, hence the necessity for a hearing on Tuesday last and this judgment.

Mitigating Factors
37. Mr. Taylor is a solicitor of comparatively little experience. He has been qualified for eight years. He had no prior experience of litigation. His practice was exclusively confined to conveyancing transactions. He accepts that it was a mistake to assume responsibility for the conduct of these proceedings given his lack of experience as a litigation solicitor.

38. I am satisfied that the whole affair has been an extremely embarrassing one for him and one which he sincerely regrets. I am also satisfied that there is little or no risk of any repetition of this sort of behaviour.

39. The action itself was settled on terms which the plaintiff perceives to have been disadvantageous to it. Mr. Taylor's relationship with his client is unlikely to have been improved by these events. He is involved in another commercial relationship with one of the directors of the plaintiff but I have no information as to whether that continues or not.

Remedies
40. If appropriate I could refer the papers in this matter to the Registrars Committee of the Law Society for investigation by it. I think there is little to be achieved by that course save delay which is undesirable. As Mr. Collins points out, I have had a much better opportunity of assessing Mr. Taylor's situation, because he gave evidence *viva voce* before me over two days, than a committee dealing with the matter months hence.

41. Mr. Collins also accepts that it would be open to me to impose a fine but urges me not to do so.

42. Embarrassing and all as these events have been for Mr. Taylor it would not be appropriate simply to treat the hearing which took place on Tuesday, with all that entailed for him, as a sufficient mark of disapproval by the court of what occurred. Something more is required.

43. That much is accepted by Mr. Taylor since at the conclusion of his submissions Mr. Collins S.C. indicated that Mr. Taylor is prepared to make a contribution of up to €10,000 to a charity. Such a payment would be preferable to a fine and would be a sufficient mark of the courts disapproval of what occurred.

44. On Mr. Taylor's undertaking to pay such a sum within 28 days I am prepared to make no further order in the matter.