Neutral Citation Number: [2010] IEHC 26

THE HIGH COURT

2009 671 SP

IN THE MATTER OF THE ATTORNEYS AND SOLICITORS (IRELAND) ACT 1849

BETWEEN

DAVID SYNNOTT PRACTISING UNDER THE STYLE AND TITLE OF

D. J. SYNNOTT SOLICITORS

PLAINTIFF

AND

PRINCE ADEKOYA

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 29th day of January, 2010.

The claim

In these proceedings, which were initiated by special summons which issued on 8th June, 2009, the plaintiff seeks either –

> (a) judgment in the sum of €57,431.80, which it is claimed is the amount due and owing by the defendant to the plaintiff for work done and professional services rendered by the plaintiff as the defendant's solicitors, or
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> (b) an order pursuant to s. 2 of the Attorneys and Solicitors (Ireland) Act 1849 (the Act of 1849) directing that a bill of costs for that amount presented by the plaintiff to the defendant be referred to the Taxing Master for taxation on a solicitor and own client basis together with an order directing the payment by the defendant to the plaintiff of the sum found due on such taxation.

The work done and professional services rendered in respect of which the claim is made arise out of the representation by the plaintiff of the defendant in personal injuries proceedings in this Court between the defendant, as plaintiff, and IBM International Irish Holdings Limited, as defendant, under Record No. [2006 No. 5252P] (the 2006 proceedings).

The factual background

In May 2004 the plaintiff took over the representation of the defendant in relation to the matters which were subsequently litigated in the 2006 proceedings from Gary Matthews, solicitors, which was a firm practising in Dundalk. The defendant had been referred to that firm in April 2002 by a company called "Claims Ireland". It is the contention of the defendant that Gary Matthews agreed to represent the defendant on a "no win, no fee basis". It is acknowledged by the plaintiff that the defendant's file was transferred to it by Gary Matthews "on the basis of no win, no fee".

No evidence has been put before the Court of compliance with s. 68 of the Solicitors (Amendment) Act 1994 (the Act of 1994).

The 2006 proceedings were listed for hearing before the High Court on 30th April, 2008. On 1st May, 2008, the case was assigned to Lavan J. The plaintiff has averred that, on that day, as a result of discussions which took place between senior counsel for both sides, it transpired that discovery was required from the defendant in the 2006 proceedings in relation to a matter which related to the issues in the 2006 proceedings. Accordingly, the 2006 proceedings were adjourned to allow time for discovery to be made. The plaintiff, in an affidavit grounding this application, which was sworn on 26th May, 2009, has averred that the situation was explained by senior counsel to the defendant and that he agreed to the adjournment.

Subsequently, the defendant alleged that he had not agreed to the adjournment. In his replying affidavit, which was sworn on 15th July, 2009, the defendant has exhibited a letter of 28th August, 2008 to the plaintiff complaining about the adjournment and the delay in bringing his action to finality. Later, the defendant discharged the plaintiff from acting for him. Notice of discharge dated 24th October, 2008 was filed in the Central Office on that day.

The plaintiff had a comprehensive bill of costs prepared by Innscourt Legal Cost Accountants, which set out the total fees due by the defendant to the plaintiff up to the time of discharge at €57,431.80. The bill of costs covers work done by Gary Matthews, as I understand it on the basis of a letter of 19th March, 2009 from the plaintiff to the defendant, which is exhibited in the plaintiff's affidavit, which states that the "fee entitlement" of Gary Matthews was contracted to the plaintiff.

The bill of costs was sent by the plaintiff to the defendant by letter dated 3rd March, 2009. The response of the defendant in an undated letter received by the plaintiff on 16th March, 2009 was that he did not owe the plaintiff any

money. He asserted that "any agreement that may exist or have existed has been frustrated by your inactions to advance my case and such agreement … has been dissolved by frustrations".

The Court was informed, although these facts are not on affidavit, that the 2006 proceedings were listed for hearing after the plaintiff was discharged and that the defendant appeared in person in those proceedings when they were heard in July 2009. The proceedings were dismissed. An appeal has been lodged in the Supreme Court.

The defendant's complaints

The defendant appeared in person on the hearing of these proceedings on 25th January, 2010.

In his replying affidavit already referred to, the defendant has made a number of complaints, apart from his complaint that he did not agree to the adjournment in May 2008. As I have recorded, he also contends that he has assumed no liability for costs unless the 2006 proceedings are successful. In that regard, he has averred that he would have no objections if the plaintiff obtains his costs from the defendant in the 2006 proceedings.

My observations on the complaints made by the defendant in the replying affidavit are as follows:

> (1) The defendant complains that a medico legal report obtained by the plaintiff from a medical consultant, which was supposed to relate to the defendant, was stated therein to relate to a person of a different name. Counsel for the plaintiff suggested that the name on the medical report (Mr. Adeyemi Adegoke) was merely a typographical error. The error seems to me to go beyond that, because the description of the accident contained in the medical report does not mirror the accident which forms the basis of the defendant's personal injuries claim. In any event, while there was an error, it was an error which obviously could be explained. I attach no significance to it.
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> (2) The defendant complains about a motion for discovery brought by the plaintiff against the defendant in the 2006 proceedings in May 2007. As I understand it, the basis of his complaint is that the motion was unnecessary having regard to the response of the solicitors for the defendant in the 2006 proceedings to the request for voluntary discovery. That is a matter which, in due course, can be adjudicated on by the Taxing Master.
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> (3) The defendant also complains that he was referred twice to a medical consultant nominated by the defendant in the 2006 proceedings – in June 2004 and in January 2008, contending that the second examination was unnecessary. As the plaintiff's solicitors informed the defendant at the time, the defendant in the 2006 proceedings was entitled to have him examined prior to the hearing.
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> (4) The defendant complains about a letter he received from the plaintiff's solicitors prior to the hearing in April 2008, in which he was advised to bring only one family member to Court. That is a trite complaint.

In general, none of the foregoing complaints has a bearing on the issues in these proceedings. The only complaint which would have a bearing, if it were true, is the complaint that the defendant did not agree to the adjournment in May 2008.

The issues

While there is a factual dispute as to whether the defendant consented to the adjournment on 1st May, 2008, there is no dispute that the defendant discharged the plaintiff in October 2008. Given that there is also no dispute that the plaintiff was retained on what is colloquially referred to as a "no foal, no fee" basis, the core issue is whether the consequence of the discharge of the plaintiff by the defendant entitles the plaintiff to be paid the costs incurred up to the date of discharge on a solicitor and client basis now. In the resolution of that issue, the factual dispute as to whether the defendant consented to the adjournment has to be resolved.

Counsel for the plaintiff did not rely on any authority, but informed the Court that, as a matter of practice, when the solicitor is discharged in circumstances where the discharge takes effect before the "foal" arrives, the solicitor is entitled to produce a bill of costs and, subject to the entitlement of the client to have the bill of costs taxed, he is entitled to be paid his costs.

The law

In *McHugh v. Keane* (High Court, Unreported, 16th December, 1994), Barron J. considered an issue similar to the issue with which the Court is confronted on this application. In that case, the defendant's solicitor had agreed to act on behalf of the plaintiff in a personal injuries action. However, after some intermediate "toing and froing", the plaintiff, in 1994, instructed different solicitors to act for him, who sought his file from the defendant and an itemised fee note. There was delay in producing the file and a motion was brought against the defendant seeking the file. The response of the defendant, so far as is relevant for present purposes, was to produce a bill of costs drawn by cost accountants and to indicate that he was prepared to hand over the file, provided he was paid his outlay together with half his professional fee to date and together with a sum in respect of the fee of the cost accountants. The position of the plaintiff, through his new solicitors, was that he was prepared to pay the outlay as appearing in the bill of costs, but not the fee payable to the cost accountants, and that his new solicitors would give an undertaking as to the remainder of the costs out of any damages received by the plaintiff.

As regards the legal position of the defendant solicitor vis-à-vis the plaintiff client, Barron J. stated as follows:

> "The rights of the parties in the present case depend upon contract. The normal contract between a solicitor and his client is that the solicitor will be remunerated by the client for his profession (sic) fees and outlays. It is, of course, open to the parties to negotiate other terms of such contract. In the present case it is common case that the retainer of the defendant on behalf of the plaintiff was upon

> the basis that he would be remunerated out of monies recovered in the action or not at all. Where a solicitor accepts instructions upon this basis, in my view there is a corresponding obligation upon his client based upon an implied term to that effect not to withdraw those instructions until the conclusion of the proceedings.
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> The implications of such a contract go further. If the solicitor breaches the terms of the agreement by failing to act with all due diligence and care on behalf of his client, then his client would no longer be bound not to withdraw his instructions. Likewise, if the client is dissatisfied with the solicitor without proper grounds and instructs another solicitor, he is in breach of his contract to retain his solicitor until the conclusion of the case and his former solicitor would no longer be bound to look only to damages and costs awarded against the other party for his remuneration."

On the facts of the case, Barron J. stated that there was no good reason why the plaintiff should have sought to leave the defendant, who had acted perfectly properly in the conduct of the proceedings. It followed, Barron J. held, that the plaintiff was in breach of contract to the defendant and that the defendant became entitled to "reasonable remuneration for work done on his behalf". On the basis of his assessment of the work which the defendant had done, Barron J. held that the amount claimed in the bill of costs did not represent reasonable remuneration.

Later in his judgment, Barron J. identified the issue as not whether the defendant should be paid for what he had done, but when he should be paid. He stated:

> "In determining the proper order to be made in the present case, it seems to me, that there are two matters which are material. The first is that the plaintiff is in breach of contract to the defendant in failing to remain with him until the conclusion of the proceedings. The second is that the defendant has issued an unreasonable Bill of Costs to the plaintiff."

Barron J. measured a sum on payment of which, and upon receipt of an undertaking to pay such further costs as might be taxed in default of agreement, the new solicitor would be entitled to the file. The sum measured was in the region of fifty per cent higher than the outlay and inclusive of VAT which had been claimed on the bill of costs.

While the decision in *McHugh v. Keane* pre-dated the obligations imposed by s. 68 of the Act of 1994, I have had regard to the fact that in *Boyne v. Bus Átha Cliath (No. 2)* [2008] 1 I.R. 92, it was held by the High Court (Gilligan J.) that, notwithstanding that s. 68 of the Act of 1994 was worded in mandatory terms, a failure by a solicitor to send an appropriate letter in compliance with s. 68 did not render the contract of retainer between the solicitor and client unenforceable and therefore did not deprive the solicitor of his right to recover his costs on a party and party taxation pursuant to the final order of the trial Judge. Therefore, I consider that it is open to the Court in this case to apply the principles applied by Barron J. in *McHugh v. Keane*, whether s. 68 was complied with or not.

Since the plaintiff has invoked the provisions of the Act of 1849, I think it is appropriate to record that in *State (Gallagher Shatter & Co.) v. de Valera* [1986] ILRM 3, the Supreme Court held that the Court has an inherent right to order taxation, a right which runs parallel to the statutory jurisdiction.

Application of the law to the facts

In this case, adopting the terminology used by Barron J., if the plaintiff was discharged by the defendant "without proper grounds", the defendant is in breach of his contract to retain the plaintiff until the conclusion of the case. If those circumstances prevail, then the plaintiff is no longer bound to look only to damages and costs awarded against the defendant in the 2006 proceedings for his remuneration, or, as counsel for the plaintiff more graphically put it, until the "foal" is produced.

I have already dealt with the various complaints against the plaintiff made by the defendant in his replying affidavit. However, there remains a conflict of fact between the plaintiff and the defendant as to whether the defendant agreed to the adjournment of the proceedings on 1st May, 2008 so that further discovery could be obtained. That conflict cannot be resolved on affidavit evidence, particularly, as I understand it, because the plaintiff, who has sworn the grounding affidavit, was not present in Court on the day.

Before this issue can be determined, that issue of fact will have to be tried on oral evidence. I would expect that either the solicitor having carriage of the 2006 proceedings at the time in the plaintiff's firm or the senior counsel involved on behalf of the defendant on the day or both should give evidence and that the defendant have an opportunity to cross-examine them. The defendant will also have the opportunity to give evidence. I will fix a date to deal with that factual issue.

I have no doubt that the determination of what constitutes reasonable remuneration for the work done by the plaintiff on behalf of the defendant should be referred to the Taxing Master for taxation. Further, I have no doubt that the Court has jurisdiction to direct taxation of reasonable remuneration. A point on which I have some difficulty, however, and which I feel it is necessary to raise because the defendant is not legally represented, is whether the plaintiff is entitled to have the costs taxed on a solicitor and own client basis, as he contends he is, or whether he is only entitled to have the costs taxed on a party and party basis. While this issue was not expressly addressed by Barron J. in *McHugh v. Keane*, the impression I get from his judgment, which may be erroneous, is that the bill of costs in that case was presented on a party and party basis and that what Barron J. was directing was taxation on a party and party basis. Having said that, in *Treacy v. Roche* [2009] IEHC 103, on the basis that the plaintiff's solicitors had discharged their retainer for good reason, this Court directed taxation of costs on a solicitor and client basis.

As the basis of taxation was not raised at the hearing of the plaintiff's application, I will hear further submissions on that point.