Neutral Citation [2008] IEHC 286

THE HIGH COURT

1990 No. 4509P

BETWEEN

JOHN AHERN AND OTHERS

PLAINTIFFS

AND

THE MINISTER FOR AGRICULTURE AND FOOD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss. Justice Laffoy delivered on the 11th day of July, 2008.

1. The applicant on this application, James Kavanagh, is the fortieth named plaintiff in these proceedings. I will refer to him as "the client".

2. On the notice of motion initiating this application the client seeks an order that Alan Donnelly & Co., referred to as his former solicitors, do deliver forthwith his files to David McAvin and Co., described as his current solicitors of record. He also seeks an order that payment of the taxed costs and outlay of the former solicitors "be deferred to the successful outcome of" his claim, subject to an undertaking being given by his current solicitors "to discharge the same following that outcome".

3. These proceedings, which were commenced in 1990, were brought by 98 individual plaintiffs seeking declarations and damages arising out of the implementation of the milk quota regime prior to 1990. The client was originally represented by Lavelle Coleman solicitors. In 1997 the former solicitors came on record for him. The uncontradicted evidence of Andrew J. O'Donnelly, a partner in the former solicitors firm, in an affidavit sworn by him on 24th June, 2008, is that at that time the client paid a sum of IR£2,000.00, of which IR£1,200.00 was paid to Lavelle Coleman to discharge their costs and outlay and the balance of IR£800.00 was retained by the former solicitors as their retainer. The former solicitors continued to act for the client and remained on record in the proceedings until April, 2008.

4. As regards the client's claim in the proceedings, a preliminary issue between the client, on the one hand, and the defendants on the other hand was listed for hearing on 18th April, 2008. On 14th April, 2008, the former solicitors were given leave by the Court to issue a notice of motion returnable for 17th April, 2008 seeking an order permitting them to come off record on behalf of the client and another of the plaintiffs for whom they acted. On 17th April, 2008, there being proof of service on the client, that application was heard as regards the client. It was grounded on an affidavit of Patrick Cosgrave, a partner in the former solicitors' firm. The ground on which the order to come off record was sought was put as follows in that affidavit:-

> "I say and believe that unfortunately, notwithstanding the fact that this office has been acting on behalf of the thirteenth and fortieth named plaintiffs in these proceedings for a considerable number of years, relations between the parties have irretrievably broken down subsequent to a detailed consultation that took place on Friday last. While I have been in communication with my clients subsequent to the said consultation, I am absolutely satisfied that the unfortunate state of affairs that now exists is such that our clients no longer wish to retain the services of Alan Donnelly & Co., Solicitors, to act on their behalf in respect of these proceedings."

5. The client did not file any affidavit in response to that affidavit and there was no appearance by or on behalf of the client when the application was heard. An order was made in the terms sought in relation to the client. The Court had jurisdiction to make that order under Order 7, Rule 3(1) of the Rules of the Superior Courts, 1986.

6. On the day following the making of that order, the current solicitors appeared and informed the Court that they were coming on record for the client. The hearing of the preliminary issue did not proceed. It is intended that it will be given a date for hearing on 29th July, 2008.

7. The current application is grounded on the affidavit of the client sworn on 5th June, 2008, which, apart from containing some comments in relation to advice received by the client which, in my view, should not have been included, contained very little else of relevance except that it exhibited a letter dated 29th May, 2008 from the former solicitors. In that letter the former solicitors intimated that they were not prepared to defer payment of their costs and outlay pending the determination of the proceedings. They pointed out that, when they took over the file, the previous solicitors' costs had to be discharged. They also referred to the Law Society's Practice Direction in relation to transferring files to other solicitors, although that document was not invoked in the submissions made to the Court on this application. The client averred that he had not received any bill for legal costs from the former solicitor nor any fee note of counsel for payment.

8. Mr. Donnelly's affidavit to which I have referred earlier was made in response to this application. Mr. Donnelly averred that the client's file and papers had been submitted to a cost drawer for the purpose of having a solicitor and client bill of costs drawn. It was averred that the estimate of the solicitors' fees, estimated to exceed €40,000.00, had been conveyed to the client via the current solicitors. As I understand it, that figure related to the solicitors' costs alone and not to outlay. The position adopted by the former solicitors in that affidavit and maintained by them at the hearing was that they were "reluctantly" prepared to accept an unqualified undertaking from the current solicitors "to pay in full our agreed costs or taxed costs before or by 1st December, 2008", as I understand it, in return for which they would release the client's files to the current solicitors.

9. The Court was informed by counsel for the former solicitors at the hearing of the application that the bill of costs had been drawn by the cost drawer as recently as 4th July, 2008, and had been furnished to the current solicitors. The total amount claimed therein for fees and outlay was in the region of €120,000.00, a sum of €44,000.00 together with VAT representing what was due to the former solicitors. The Court was told by counsel for the client that, while the client owned a farm of land, he does not have the means to discharge that sum. Neither of the matters referred to in this paragraph was put on affidavit.

10. Counsel for the client moved the application in reliance of the decision of this Court in *Mulheir and Anor. v. Gannon* [2006] I.E.H.C. 274, in which I delivered judgment on 17th July, 2006. As I understand the submissions made on behalf of the client, notwithstanding the relief sought on the notice of motion, what he is seeking now is an order of the type made in *Mulheir v. Gannon*

11. Counsel for the former solicitors cited the following authorities in support of the position of the former solicitors:-

> • The decision of the Supreme Court *In re Galdan Properties Limited* (in liq.) [1988] 1 I.R. 213, which is helpful in explaining the nature of a solicitor's general or retaining lien but does not address the issue which arises on the client's application.

- The decision of the Court of Appeal of England and Wales in *Hughes v. Hughes* [1958] P 224.

12. He also referred the Court to the commentary in the Law on Solicitors in Ireland by O'Callaghan (Butterworths) at para. 9.44.

13. In the passage in *Hughes v. Hughes* relied on by counsel for the former solicitors, Hodson L.J. stated (at p. 227):-

> "There is no doubt that a solicitor who is discharged by his client during an action, otherwise than for misconduct, can retain any papers in the cause in his possession until his costs have been paid…. This rule applies, as the authorities show, whether the client's papers are of any intrinsic value or not, although it would seem that so far as the solicitor's working papers are concerned, where the work has not been paid for by the client, the solicitor would not be compelled to hand over his work unless it had been paid for, apart altogether from the lien."

14. That principle was reiterated by the Court of Appeal in *Gamlen Chemical Company v. Rochem Limited* [1980] 1 All E.R. 1041. However, in the later case the Court of Appeal took a broader view of "the difficulties which arise when a client and a solicitor part company in the midst of litigation", as Templeman L.J. characterised the problem (at p. 1058). He pointed out that a solicitor who accepts a retainer to act for a client in the prosecution or defence of an action engages that he will continue to act until the action is ended, subject however to his costs being paid. He reiterated the principle stated by Hodson L.J. in *Hughes v. Hughes*, quoting with approval a passage which I have quoted. He then went on to deal with the situation in which it is the solicitor, rather than the client, who discharges the retainer stating as follows:-

> "The solicitor himself may determine his retainer during an action, for reasonable cause, such as the failure of the client to keep the solicitor in funds to meet his costs and disbursements; but in that case the solicitor's possessory lien, i.e. his right to retain the client's papers of any intrinsic value or not, is subject to the practice of the Court, which, in order to save the client's litigation from catastrophe, orders the solicitor to hand over the client's papers to the client's new solicitors, provided the new solicitors undertake to preserve the original solicitor's lien and to return the papers to the original solicitors, for what they are worth, after the end of the litigation."

15. As Templeman L.J. pointed out, the practice of the Court to which he referred was well settled, being traceable from a judgment of Lord Cottenham L.C. in *Heslop v. Metcalfe* (1837) 3 My & G 183. Indeed, it would appear that the practice was of even greater antiquity because Lord Cottenham referred to it as "the law as laid down by Lord Eldon".

16. As I pointed out *in Mulheir v. Gannon*, Templeman L.J. summarised the position as being that where the solicitor has discharged his retainer, the Court will then 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. However, he went on to qualify the general principle somewhat in the following passage:-

> "I wish to guard myself against possible exceptions to this general rule. The Court in fact is asked to make a mandatory order obliging the original solicitors to hand over the papers to the new solicitors. An automatic order is inconsistent with the inherent, albeit judicial discretion of the Court, to grant or withhold a remedy which is equitable in character. It may be, therefore, that in exceptional cases the Court might impose terms where justice so required. For example, if the papers are valueless after the litigation is ended and if the client accepts that he is indebted to the original solicitor for an agreed sum and has no counter claim, or accepts that the solicitor has admittedly paid out reasonable and proper disbursements, which must be repaid, the Court might make an order which would compel the original solicitor to hand over the papers to the new solicitor, on the usual terms preserving the lien but providing that in the first place the client pays to the original solicitor a sum, fixed by the Court, representing the whole or part of the monies admittedly due from the client to the original solicitor. Much would depend on the nature of the case, the stage which the litigation had reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the Court is asked to make."

17. In *Gamlen Chemical Company v. Rochem Limited*, the issue between the original solicitors and the client was the failure of the client to discharge costs as they fell due. That was the type of issue which was addressed in the passages from the judgment of Lord Cottenham in *Heslop v. Metcalfe* quoted by Ormrod L.J. in *Gamlen Chemical Company v. Rochem Limited* (at p. 1056).

18. The issue between the plaintiff client and the defendant solicitor in *Mulheir v. Gannon* was put forward by the defendant solicitor as a deterioration in the relationship between the client and the solicitor, which was ascribed to the client's behaviour, to the extent that the defendant solicitor had no alternative but to adopt the course of recommending to the client that he retain alternative legal representation. However, that was contested by the client. It was impossible to resolve the resulting conflict on affidavit evidence. That being the case, the approach I adopted was to assume, for the purposes of the application, that the defendant had discharged himself for reasonable cause.

19. On this application, counsel for the former solicitors submitted that in this case it was the client who discharged the former solicitors and not the former solicitors who terminated the retainer. On the basis of the affidavits of Mr. Cosgrave and Mr. Donnelly, and taking into account the conduct of the client both in relation to the application by the former solicitors to come off record and this application, I can not conclude that it was the client who discharged the former solicitors' retainer. There is no evidence of an express discharge by the client of the former solicitors' retainer. Whether there was an implied or a constructive discharge is not something which can be determined on the basis of the affidavit evidence, no more than, if it were an issue, the Court could determine whether the former solicitors terminated the retainer for reasonable cause. Affidavit evidence of the type which is before the Court is not an appropriate foundation for the non-exercise by the Court of the equitable jurisdiction identified in *Gamlen Chemical Company v. Rochem Limited*, which I have no doubt the Courts in this jurisdiction enjoy. Therefore, I am constrained to adopt the approach I adopted in *Mulheir v. Gannon* and deal with the matter on the basis that it was the former solicitors who terminated the retainer, but that they did so for reasonable cause.

20. Accordingly, I propose to make an order which, in broad terms, is similar to the order made in *Mulheir v. Gannon*, that is to say, an order directing the former solicitors to deliver to the current solicitors the client's files provided that the current solicitors give to the former solicitors an undertaking in writing to hold the said files subject to the former solicitors' lien and to return them to the former solicitors on the conclusion of the plaintiff's claim in these proceedings, the delivery of the said files to be without prejudice to the former solicitors' claim for costs against the client, such delivery to be effected within two weeks of the current solicitors giving such undertaking to the former solicitors.

21. It is crucial that the client, the former solicitors and the current solicitors understand the purpose and effect of the order I propose to make. It is an order which will facilitate the client in prosecuting his claim in these proceedings, while at the same time

preserving the former solicitors' lien on the files, for what it is worth. It will not in any way affect the liability of the client for costs which have accrued in the conduct of the litigation to date by the former solicitors or the entitlement of the former solicitors to pursue recovery of costs, embracing their own fees and the disbursements which they have made or are committed to making. The former solicitors' entitlement to recover costs from the client and the client's liability there for 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. Accordingly, so much of the client's application as sought deferral of the payment of the former solicitors costs to the successful outcome of the client's claim in the proceedings is totally misconceived and is dismissed.

22. Having explained the limits of the order which I intend making, I think it is apposite to quote a passage from the judgment of Lord Cottonham L.J. in *Heslop v. Metcalfe*, which was quoted by Ormrod L.J. in *Gamlen Chemical Company v. Rochem Limited* (at p. 1057) in which the Lord Chancellor stated:-

> "I then take the law as laid down by Lord Eldon, and, adopting that law must hold that [the solicitor] is not to be permitted to impose upon the plaintiff the necessity of carrying on his cause in an expensive, inconvenient and disadvantageous manner. I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause."

23. I remarked in *Mulheir v. Gannon* that to the twentieth first century observer the jurisprudence established in the nineteenth century seems to be remarkably enlightened for that era, because it maintains a fair balance between the proponents. I am still of that view. The order made in this case will preserve the former solicitors' lien, while at the same time enabling the client to prosecute his claim. As I understand it, his claim arises out of the same circumstances as the claims of the plaintiffs in *Duff v. Minister for Agriculture and Food* (No. 2) [1997] 2 I.R. 22 and at this juncture involves an assessment of the compensation to which he is entitled following the decision of the Supreme Court in *Duff* and the remittal of that case to the High Court.