

THE HIGH COURT

[2012 No: 31SA]

IN THE MATTER OF THE SOLICITORS ACTS 1954 - 2008

BETWEEN

LUKE HEFFERNAN

APPELLANT

AND

JOHN HUSSEY

SOLICITOR/RESPONDENT

JUDGMENT of Kearns P. delivered on the 18th day of June, 2012

This is an appeal by Luke Heffernan ("the appellant") against a decision of the Solicitors Disciplinary Tribunal ("the Tribunal") dated 20th March, 2012 that there was no *prima facie* case of misconduct for inquiry on the part of John Hussey of John Hussey and Co., 3 O'Rahilly Row, Fermoy, Co. Cork ("the respondent").

On 1st April, 2011 the appellant herein applied to the Tribunal for an inquiry into the alleged misconduct of the respondent solicitor. Over the following months, affidavits were submitted by the appellant and the respondent. On 20th March, 2012 the Tribunal found that there was no *prima facie* evidence of misconduct in relation to the complaints made by the respondent.

By notice of motion and grounding affidavit filed on 11th April, 2012 the appellant seeks to appeal the findings of the Tribunal on the basis that the decision was unfair and unjust, and that the respondent solicitor is in breach of the Solicitors Acts. The appellant alleged misconduct on the part of the respondent solicitor before the Tribunal on the following grounds:

- (i) that the respondent solicitor had multiple roles as solicitor, executor, administrator and defendant in relation to his late mother's estate;
- (ii) that the respondent solicitor knowingly swore 2 false affidavits of scripts in the Circuit Court proceedings;
- (iii) that the respondent solicitor withheld vital evidence and information in the Circuit Court proceedings;
- (iv) that the respondent solicitor had a conflict of interest representing himself as defendant in the Circuit Court proceedings; and
- (v) that the respondent solicitor failed to provide the appellant or his counsel with attendance notes of meetings with the appellant's late mother prior to typing up the draft will, and failed to acknowledge that Austin Heffernan was in the room when the appellant's mother signed her will.

The appellant expands on these grounds in his complaint to the Tribunal dated 1st April, 2011 and in his affidavits dated 30th June, 2011, 5th October, 2011 and 25th December, 2011.

BACKGROUND

Affidavit of John Hussey, respondent solicitor.

In the respondent solicitor's affidavit sworn on 19th May, 2011 he avers that he acted on behalf of the appellant's parents, the late Mr. John Heffernan and Mrs. Margaret Heffernan in the drafting of their respective wills. The respondent solicitor averred that on 17th July, 2001 when attending upon Margaret Heffernan and her son Austin Heffernan regarding the late John Heffernan's estate, Margaret Heffernan brought in a draft of her will, previously prepared, confirmed it was correct and duly executed it. In Margaret Heffernan's will dated 17th July, 2001 she left her property at 2 O'Connell Place, Fermoy, Co. Cork to the appellant. In the event that Mrs. Heffernan sold this property, she left the house she owned at the date of her death to the appellant. On 25th March, 2007 Margaret Heffernan inherited a property at 83 McCurtain Street, Fermoy, Co. Cork on the death of her sister.

In September, 2009 the appellant contacted the respondent solicitor to say that his mother had given him instructions that she wanted to make a new will, leaving the appellant the family property at O'Connell Place as well as the property at 83 McCurtain Street. At this time, Mrs. Heffernan was in the Mercy Hospital, Cork. The respondent solicitor avers that he went to see Mrs. Heffernan in hospital 3 times in order to obtain instructions regarding a new will but was informed by hospital staff each time that Mrs. Heffernan was either asleep or not conscious.

Mrs. Heffernan died on 26th September, 2009 without the respondent solicitor obtaining instructions from her regarding a new will. The will made by Mrs. Heffernan on 17th July, 2001 is therefore the only will in existence at the date of her death.

Following an exchange of correspondence between the respondent solicitor and the appellant's solicitor, Declan Carroll and Co. in November and December, 2009 and January, 2010 proceedings were issued and served on the respondent solicitor by the appellant alleging *inter alia* that the will of the deceased Mrs. Heffernan was obtained by the undue influence of the deceased's son, Austin Heffernan; that the deceased did not know or approve of the terms of the will; and/or that the will was not executed in accordance with the provisions of the Succession Act, 1965.

On 26th January, 2011 it was ordered by his Honour Judge Murphy in Cork Circuit Court that the will of Mrs. Heffernan dated 17th July, 2001 was her last lawful will and was to be admitted to probate. The Court held that the property at No.2 O'Connell Place,

Fermoy, Co. Cork was bequeathed to the appellant herein and that No. 83 McCurtain Street, Fermoy, Co. Cork formed part of the residue of the estate.

RULING

The Court has carefully considered the affidavits submitted by the appellant and the respondent and finds as follows:-

Firstly, the appellant's allegations that the respondent solicitor performed multiple roles and had a conflict of interest in connection with the administration of the late Mrs. Heffernan's estate and defence of the Circuit Court proceedings does not constitute conduct amounting to misconduct.

Secondly, the appellant alleges that the respondent solicitor knowingly swore two false affidavits of scripts in the Circuit Court proceedings, by the stating that no draft will ever came into his hand or knowledge. However, IN the affidavits of scripts sworn by the respondent solicitor on 11th May, 2010 and 18th June, 2010 the respondent avers that no will or testamentary disposition of the late Margaret Heffernan came into his hands save and except the true and original last will of the deceased dated 17th July, 2001 and also "the draft will of Margaret Heffernan dated 17th November 2000, attendance note of Corrie Sellers dated 17th July 2001 and attendance note of Corrie Sellers dated 5th July 2001 ...". The respondent solicitor's affidavits of scripts are not false therefore, and the Court makes no finding of misconduct against the respondent solicitor on this ground. The Court has noted the letter from Declan Carroll & Company to the appellant dated 27th April, 2011 in this regard.

Thirdly, the allegations that the respondent solicitor withheld vital evidence and information in the Circuit Court proceedings have not been proven by the appellant. The presence of Austin Heffernan in the room when the late Mrs. Heffernan executed her will in no way amounts to undue influence.

The Court is satisfied that the finding of the Tribunal of no *prima facie* case of misconduct on the part of the respondent solicitor was entirely appropriate and that the within appeal is without any legal basis.

I therefore dismiss the appeal with an order for costs in favour of the respondent solicitor.