

**THE HIGH COURT**

**[2015 No. 75/SA]**

**IN THE MATTER OF MR. COLIN MONAGHAN, A SOLICITOR**

**AND IN THE MATTER OF AN APPLICATION BY MR. EUGENE McCOOL TO THE SOLICITORS DISCIPLINARY TRIBUNAL WITH  
RECORD NUMBER 9831/DT91/14**

**AND IN THE MATTER OF THE SOLICITORS ACTS 1954 TO 2011**

**BETWEEN:**

**EUGENE McCOOL**

**APPELLANT**

**AND**

**COLIN MONAGHAN**

**RESPONDENT**

**JUDGMENT of Kearns P. delivered on the 9th day of November, 2015**

This is an appeal against the decision of the Solicitors Disciplinary Tribunal dated 22nd June, 2015 that there is no prima facie case for inquiry into the conduct of the respondent solicitor.

**BACKGROUND**

The appellant, Mr. Eugene McCool, is the Managing Director of McCool Controls and Engineering Ltd. In or around August 2005 legal proceedings, bearing the High Court record number 2005/2747P, were issued by solicitors acting on behalf of the company against Honeywell Control Systems Ltd. The respondent solicitor is a partner in the firm of Arthur Cox Solicitors and acted as solicitor for Honeywell in this litigation.

On the 22nd June, 2012, during the course of this litigation, which both parties to the present proceedings accept experienced delay for a variety of reasons, the appellant issued a motion pursuant to Order 56A, rule 2, of the Rules of the Superior Courts seeking to have the matter referred to mediation, conciliation, or some other dispute resolution process. This motion was made returnable for 23rd July, 2012 when it was adjourned by Gilligan J. to 27th July, 2012. For reasons which are in dispute between the parties, the motion was adjourned once again to 30th July, 2012, and again to 31st July, 2012, when the application was heard and refused by Gilligan J.

It is the respondent solicitor's conduct in relation to this application which formed the primary basis of the appellant's initial complaint to the Society. By complaint form dated 3rd July, 2014, the appellant alleged that the respondent solicitor gave false and misleading information to the plaintiff, the plaintiff's legal team, and to the court. It was submitted that the respondent engaged in deliberate misconduct by attempting to prevent the Order 56A application from coming before the court. Additional lengthy reports from Mr. McCool, Ms. Mary McDonnell, director of the plaintiff company, and Mr. Eoin McCool, sales manager with the plaintiff company, were attached to the complaint form.

These documents place particular emphasis on matters surrounding the listing of the Order 56A application between the 23rd and 31st July, 2012 and the manner in which various adjournments were sought or communicated to the plaintiff. It is suggested that the respondent solicitor, and perhaps the plaintiff company's own solicitor, engaged in some sort of dishonest and deceitful behaviour in order to preclude the appellant and his associates from moving the application in the normal way, with the apparent aim of having the matter struck out due to non-attendance of the plaintiff.

Replying affidavits were filed in response to the complaint by the respondent solicitor and a Mr. Peter Woods, who at the time was a trainee solicitor with Arthur Cox and assisted the respondent in relation to the aforementioned litigation. These affidavits set out the respondent solicitors' version of the events surrounding the Order 56A motion. It is submitted that the application was a relatively straight forward one and was initially adjourned by the court in order to allow the parties time to seek to resolve the matter through settlement discussions. The respondent states that the matter was again adjourned on 27th July, 2012 as Gilligan J. was at hearing and unable to take up the case. The respondent solicitor informed the Tribunal that the issues surrounding the listing of the case on 30th and 31st July arose due to a simple breakdown in communications after Mr. Woods had contacted the High Court Central Office on the morning of 31st July when the matter failed to appear in the High Court Legal Diary for that day.

Mr. Woods explained in his affidavit to the Tribunal that, at the request of the respondent solicitor, he contacted either the High Court Central Office or the Courts Service switchboard early on the morning of 31st July, 2012 and advised a staff member he spoke with that the motion did not appear in the Legal Diary despite having been adjourned by Gilligan J. the previous day. He queried as to what time it was listed for and contends that he was advised the matter would be heard at 2pm that afternoon. Emails from Mr. Woods informing the defendant's counsel of this are exhibited. The respondent solicitor avers that, as a matter of courtesy, he informed the plaintiff's solicitor of what Mr. Woods had been advised. Later that morning, the plaintiff's solicitor contacted the respondent and informed him that the matter had in fact been listed for 10.30a.m and both legal teams immediately made their way to the court where the matter was adjudicated upon shortly after midday.

By decision dated 22nd June, 2015 the Tribunal found that there was no prima facie case of misconduct on the part of the respondent solicitor. In relation to the allegation that the respondent gave false and misleading information to the plaintiff, its legal team, and to the court in an effort to prevent the case from going before the court, the Tribunal held that –

*"The Respondent Solicitor's affidavit sworn 28 August, 2014 and that of Peter Woods sworn 20 August 2014, provide a full explanation of what occurred in regard to the Order 56A motion between 23 July and 31 July 2012. The events described in relation to the various adjournments of the motion are not unusual in the operation of the High Court motion lists and there is no sustainable evidence of misconduct on the part of the Respondent Solicitor."*

The Tribunal decision further states that –

*"The respondent solicitor's affidavit sworn on 28th August 2014 and that of Peter Woods sworn 20th August 2014, provide a full explanation of what occurred in regard to the Order 56A motion between 23rd July and 31st July 2012. The events described in relation to the various adjournments of the motion are not unusual in the operation of the High Court motion lists and there is no sustainable evidence of misconduct on the part of the Respondent Solicitor."*

#### **SUBMISSIONS OF THE APPELLANT**

The appellant has filed a number of lengthy affidavits in this matter along with hundreds of pages of exhibits and supporting documentation. Much of the content of these affidavits simply reiterates, albeit in greater detail, the initial allegations made against the respondent solicitor to the Tribunal.

Insofar as it is submitted that the Tribunal erred in any respect in arriving at its final determination, the appellant contends in his grounding affidavit that *"the main issue is that the Tribunal has limited its decision to the issue of an email sent by Peter Woods... relating to a telephone call he made to someone in the Courts Service on the last day of the Court sitting 31st July, 2012 and who he claims gave him incorrect information."* The appellant goes into comprehensive detail as to what he believes actually happened in relation to the listing of the Order 56A motion. It is quite clear that by the time this motion was issued, relations between the plaintiff company and the defendant's legal advisors had become extremely fraught and distrustful. The appellant attributes this to several years of "serious abuse, delay tactics and frustration" by the defendants.

A number of exhibits are relied upon by the appellant which he contends support his contention that Mr. Woods did not receive any information from the High Court Central Office which indicated the matter was to be listed for 2pm on 31st July, 2012. These include emails from the Chief Registrar indicating that he was unable to identify who might have spoken with Mr. Woods or given him misleading information as to the correct time the matter would be heard. The appellant contends that there is a high level of uncertainty and inconsistency in the respondent solicitor's affidavits and in that of Mr. Woods. The clear implication is that no such phone call ever took place between Mr. Woods and any person in the High Court Central Office and that the respondent was attempting to deceive the plaintiff.

In his second affidavit the appellant expresses his *"shock and surprise at the decision of the Tribunal given the evidence that was presented, including the supporting documentation from the Courts Service."* He submits that the Tribunal failed to carry out any form of investigation into the totally opposing submissions of the McCool staff and the respondent solicitor regarding what transpired in court on the dates in question. It is further contended that the Tribunal erred by failing to *"look behind the events of that week to examine the documents that showed the history of the conduct of the defendant's legal team during the litigation process."* A large portion of this lengthy affidavit reiterates once again the initial allegations against the respondent and the appellant carries out an exhaustive analysis of what he believes transpired in relation to almost every aspect of the Order 56A motion.

A third replying affidavit was filed by the appellant on 28th September, 2015 along with further exhibits. In this affidavit the appellant restates his belief that the Tribunal erred in its decision having regard to the evidence which was before it. He complains that the Tribunal determination is *"extraordinary"* and *"very brief and ignores the sworn evidence of the three members of McCool's staff and that of the Courts Service."* While the appellant accepts that the Tribunal is an expert body attracting some degree of deference, it is submitted that *"there are issues in [my] evidence that are outside the scope of the expertise of the Tribunal."* He states that critical issues in the case require *"further technical examination"* and complains that the emails exhibited by Mr. Woods before the Tribunal *"do not appear to be original emails"* and that *"forwarded emails can be edited"*. The appellant submits that he gave evidence to the Tribunal regarding the editing of emails and that *"there is an onus of responsibility on the Tribunal to have this email issue referred to an external expert to resolve."* The appellant states that the issue of how the High Court motion lists normally operate is also a matter which required the input of an external expert.

The appellant filed a fourth replying affidavit on 12th October without the leave of this Court. However, for the sake of completeness and in the interests of allowing the appellant every opportunity to present his case in full, the Court will consider the content of this affidavit also. The appellant states his intention to make a complaint to the Society regarding McCool's solicitor in the Order 56A motion also. Much of this affidavit repeats earlier averments and simply restates the appellant's beliefs as to what occurred between 23rd and 31st July in relation to the Order 56A motion and his frustration with the manner in which the litigation has been conducted over a period of ten years.

The appellant offers a list of questions which he feels this Court should answer in determining this appeal and goes on to make a number of fresh allegations regarding the defendant's conduct in the ongoing High Court case which have no relevance to his initial complaint to the Tribunal. Finally, the appellant contends that a new division of the Tribunal should reconsider this matter and carry out a full inquiry involving the use of third party experts and oral evidence.

#### **SUBMISSIONS OF THE RESPONDENT**

The respondent solicitor submits in his first replying affidavit that the Tribunal considered a large amount of documentation before arriving at its final reasoned determination. He states that the various affidavits before the Tribunal were voluminous and detailed and that a large amount of exhibits were also filed. The respondent refers the Court to his replying affidavit before the Tribunal and offers a brief synopsis of his versions of the events surrounding the Order 56A motion.

The respondent contends that the appellant's affidavits in this appeal are repetitive and also stray far beyond the scope and subject matters of his original complaint to the Tribunal. He submits that there is nothing in the final determination which suggests that the Tribunal somehow limited its considerations of the complaints and the appellant has adduced no evidence of this.

In his second replying affidavit the respondent solicitor responds to the appellant's averment that he made a complaint to An Garda Síochána regarding the conduct of the respondent. The respondent utterly rejects and denies that his conduct surrounding the Order 56A motion was in any way criminal. He states that, as found by the Tribunal, the procedural and administrative matters involved in progressing the motion were not unusual in the operation of High Court motion lists and submits that the appellant's actions in involving the Gardaí provides a stark demonstration of how his entire approach to this matter is fundamentally misconceived.

A third affidavit was filed by the respondent solicitor on 5th October 2015. Attached to this affidavit was a detailed table which cross-references almost every paragraph of the appellant's third affidavit with averments made in earlier replying affidavits of the respondent which the respondent contends have already addressed the appellant's latest averments. There is also further repetitive argument as to what occurred in the context of the Order 56A motion each day it appeared before the court.

The respondent solicitor has also filed a booklet of written legal submissions and authorities. Reliance is placed on the Supreme Court decision in *Fitzgibbon v Law Society* [2014] IESC 84 as authority for the proposition that appeals of this kind are to be dealt with as a review of a specialist tribunal and not as a de novo hearing. It is submitted that the standard of review to be applied to the Tribunal's determination is whether the decision was "*vitiated by a serious and significant error or series of such errors*", which the respondent contends the appellant has failed to establish.

## **DISCUSSION**

The Court has carefully considered the voluminous documentation in this case in its entirety, which includes six lever arch folders containing seven lengthy affidavits and hundreds of pages of supporting documentation and exhibits. Much of the documentation is highly repetitive and the tone and content is, in the Courts view, indicative of the level of ill-will which has regrettably developed between the parties.

The appellant's initial complaint to the Tribunal relates almost exclusively to the conduct of the respondent solicitor in the context of a motion which the company of which the appellant is managing director sought to move pursuant to Order 56A of the Rules of the Superior Courts between 23rd and 31st July, 2012. This occurred during the course of long running High Court proceedings against a company which the respondent solicitor acted for. By his own admission, the appellant's initial complaint to the Society was made at a time when relations between the parties had significantly soured and the appellant and his colleagues had grown extremely distrustful of the defendant and its legal team.

The most serious allegation against the respondent solicitor is that he deliberately misled representatives from the plaintiff company, including the appellant, as well as their legal advisors, Courts Service staff, and the presiding judge. It is alleged that the respondent and or persons associated with him attempted to prevent the motion from being heard by circulating misinformation to various persons as to when the matter was listed before the court. It is noteworthy that much of the appellant's discontent in this regard appears to be directed at his own solicitor also, who it is clearly implied was some way involved in this alleged subterfuge, and indeed in his later affidavits the appellant indicates that he intends to issue a separate complaint to the Society in respect of this.

I have carefully considered the sequence of events as set out in exhaustive detail in the various affidavits and exhibits and am satisfied that there is nothing unusual or suspicious about the manner in which the motion was adjourned on the dates in question. The final week of the legal term before the long vacation is a notoriously busy time, and it is not out of the ordinary for a presiding judge to communicate to the parties, through the court registrar, that a matter should be put back to the following morning due to the judge being required to deal with an ongoing matter. This appears to be what occurred on 30th July, 2012, the penultimate day of legal term. The appellant takes issue with the fact that the judge was not on the bench when this information was received from the registrar. However, court registrars play a vital role in the efficient administration of court lists and it was not necessary for the judge to be sitting in this instance.

Previously, on 23rd July, 2012 the matter was adjourned to allow the parties an opportunity to engage in meaningful discussions which might resolve the matter out of court. Given that the plaintiff was seeking to refer the matter to mediation, this does not seem to be an unusual course for a court to adopt having regard to the high costs incurred by parties when litigation proceeds over lengthy periods. There is no evidence of wrongdoing on the part of the respondent solicitor in relation to this brief adjournment.

It is clear that on the final day of the court term, 31st July, 2012, something occurred which caused the plaintiff and his colleagues from McCool's to attend court in the morning while the respective legal teams operated under the misapprehension that the matter was to be heard at 2 p.m. I have carefully considered the various versions of these events, as set out in the affidavits before the Tribunal and the lengthy and detailed affidavits in this appeal. The Court accepts the finding of the Tribunal that there is no prima facie evidence of misconduct on the part of the respondent solicitor in relation to the confusion which arose. Undoubtedly, a breakdown in communications did occur and it is possible that the respondent or his trainee are not entirely blameless in this regard. However, there was no compelling evidence before the Tribunal that this communications breakdown was deliberately orchestrated by the respondent solicitor or that any other persons were engaged in a conspiracy to prevent the motion from proceeding. The Court is satisfied that the Tribunal did not err by failing to have any or adequate regard to any of the information before it in relation to what transpired on the 31st July, 2012.

In this regard, the Court finds that the Tribunal was entitled to give due regard to the emails which Mr. Woods sent to the defendant's counsel involved in the case on the morning in question which misstated the time. It is not accepted however that the Tribunal limited its decision to these e-mails and the Court is satisfied that the Tribunal considered all of the materials before it. Furthermore, the Court does not accept that some sort of forensic analysis of these emails is required in order to arrive at a lawful determination. It is also a relevant consideration that when the erroneous information communicated in the emails was discovered, both parties promptly made their way to court and the plaintiff company was represented by highly experienced senior counsel.

In his fourth replying affidavit the appellant poses a number of questions which he contends the Court should consider in this appeal, including – "*Did the defendant have a strong motive to conduct the type of activities that are the subject of complaint?*" and "*Did the defendant stand to gain from the blocking of the ADR motion?*" The answer to both of these questions is, primarily, in the negative. In certain circumstances, it is not unusual for an application to be made to reinstate an application that was struck out due to non-attendance. While such applications will be determined on their own particular facts, the consequences of the alleged elaborate conspiracy succeeding are not as beneficial to the defendant and as devastating to the plaintiff as the appellant seems to believe.

## **DECISION**

For the reasons outlined above, I would dismiss the appeal and affirm the decision of the Tribunal.