

THE HIGH COURT

[Record No. 2005 154 Sp.]

BETWEEN

KAY CONROY

PLAINTIFF

AND
FRANCIS MC ARDLE

DEFENDANT

Judgment of Ms. Justice Dunne delivered on the 16th day of December, 2005.

1. The plaintiff in the proceedings seeks an order compelling the delivery by the defendant to the plaintiff of title deeds to the plaintiff's property at Windwood Lodge, otherwise Brighton Villa, Carrick Road, Dundalk, Co. Louth.

2. The defendant acted as solicitor for the plaintiff in the period from September, 1988 until January, 2001. During that period he acted for her in a number of matters, contentious and non contentious. Around February, 1994, the plaintiff arranged to re-mortgage her property known as Windwood Lodge with I.I.B. Home Loans and the defendant acted for her in connection with that transaction and for that purpose obtained the title deeds to the said property from I.I.B. Home Loans on accountable receipt.

3. The solicitor client relationship between the plaintiff and the defendant came to an end in January, 2001. A meeting took place between them on the 29th January, 2001. In the course of the meeting the plaintiff signed a letter agreeing to pay the defendant in the current year the sum of £3,000 in respect of all outstanding fees, costs and outlay. For the sake of completeness, it would be useful to set out in full the said letter:

"Dear Kay,

I set out herein by way of confirmation our agreed position in relation to outstanding costs and all matters relative to the files held in this office and which it is now proposed that I hand to you the correspondence file relating to the Ardee Rd. lands today – the remaining files to be scheduled and signed for by Mary Cotter.

Your signature on the copy of this letter acknowledges the position. It is intended to resolve all matters and acknowledges on my part an acceptance that the balance of fees due and owing in the sum of £3,000 will be paid by you as soon as is reasonably possible during the course of the current year.

I do not propose to refer to each individual matter. However you can take it that the payment of the outstanding sum will discharge all costs and outlay due to this firm in respect of all and every matter dealt with to date. As part of this arrangement I am attaching a separate letter covering the position in relation to the conveyance of your lands at Ardee Rd., Dundalk, your signature on a copy of which confirms your agreement in that regard.

Yours sincerely,

McArdle and Associates,

Signed Kay Conroy."

4. Both parties to the agreement contained in that letter signed the letter.

5. The person referred to in that letter, Mary Cotter, the sister of the plaintiff, apparently called for the files some days later. They were not ready. She called on a number of occasions for the files and was told that the files were not ready. On the 18th May, 2001, the plaintiff made a complaint to the Law Society in respect of the failure of the defendant to hand over the files.

6. The defendant herein contends if the said letter amounts to an agreement it was repudiated by the plaintiff in that she failed to furnish the sum of £3,000 or any sum in the course of the then current year. He added in his affidavit that the complaint to the Law Society referred to by the plaintiff in her affidavit was dismissed by the Law Society. He specifically averred that the Law Society held that he was entitled to hold on to the plaintiff's file by way of solicitors lien in respect of fees due and owing to him for services rendered to the plaintiff in his capacity as her solicitor. He further states that a sum of €61,710.24 is due by the plaintiff to him by way of fees. He has brought summary proceedings against the plaintiff in an action entitled "The High Court, record no. [2004] 609 F. Between Francis Mc Ardle Plaintiff and Kay Conroy Defendant" seeking to recover that sum. He has asserted his right to retain the title deeds, the subject matter of these proceedings, until such time as he is paid all costs due to him in his professional capacity.

7. By way of rejoinder, the plaintiff has stated that following the making of the agreement between the plaintiff and the defendant on the 29th January, 2001, it became apparent to her that the defendant notwithstanding the terms of the said agreement was not going to deliver up possession of her files and documents and accordingly she decided to withhold the sum of £3,000 and she referred the matter to the Law Society. There was a dispute as to the effect of the decision of the Law Society and in relation to that aspect of the matter she exhibited a letter dated the 19th April, 2004, from the Law Society to her. The position appears to be as set out in a letter of the 21st May, 2004, from the Law Society to the defendant to the effect that if proceedings in the summary matter had been served then in those circumstances the Law Society would not continue to deal with the matter. It would appear from the correspondence exhibited in a supplemental affidavit sworn by Francis Mc Ardle that the Law Society made proposals to resolve the dispute between the plaintiff and the defendant but the proposal was unacceptable to the defendant herein.

8. Accordingly the key issue to be determined in these proceedings is the status of the lien claimed by the defendant in respect of the title deeds of the plaintiff's property.

9. Three points have been raised by the plaintiff in relation to the lien claimed by the defendant.

1. That the defendant was not and never was entitled to a retaining lien over the plaintiff's title deeds.
2. Any lien that the defendant had was waived by the agreement of the 29th January, 2001.
3. That the plaintiff had before issuing these proceedings offered adequate alternative security in respect of the

defendant's claim for costs.

10. Mr. Senan Allen SC on behalf of the plaintiff referred to a number of legal principles which he contended applied to the circumstances of this case. He referred to Halsbury (4th Edition 1995 reissue) volume 44 (1) para. 245 which states as follows:

"The general rule is that the retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property.

Moreover, where documents are delivered to a solicitor for a particular purpose under a special agreement which does not make express provision for a lien in favour of the solicitor, as perhaps the raising of money, or monies paid to the solicitor for a particular purpose so that he becomes a trustee of the money, no lien arises over those documents or that money unless subsequently left in the solicitor's possession for general purposes. Otherwise the lien extends to the property whatever the occasion of delivery, except that where a solicitor acts for both mortgagor and mortgagee and the mortgage is redeemed, the solicitor cannot set up a lien on the deeds against the mortgagor."

11. He then referred to the decision of Laffoy J. in the case of *Ring v. Kennedy* [1999] 3 I.R. 316 at p. 319 where she stated:

"The nature and extent of a solicitor's retaining lien is well settled. At common law, he has a right to retain property already in his possession until he is paid costs due to him in his professional capacity by his client against whom the lien is claimed. The retaining lien is general in the sense that it extends to all costs due to the solicitor from the client, whether or not the property was acquired in connection with the matter for which the costs were incurred."

12. He also referred to the decision of the Supreme Court in *Galdan Properties Limited (in liquidation)* [1988] I.R. 213. *Galdan* was the owner of the property which was mortgaged to I.C.C. who had the title deeds. *Galdan* instructed a firm of solicitors to act in connection with a planned sale. For that purpose, the solicitors obtained the title deeds on accountable receipt. Work was done by the solicitors but the property did not sell and the company went into liquidation. The solicitors claimed a lien over the deeds in respect of their fees. It was ruled in the High Court by Carroll J. that no lien had been created in favour of the solicitors and the Supreme Court upheld that decision. McCarthy J. at p. 216 of the judgment stated:

"I am satisfied, not without regret, that the claim of lien fails. In my view, a lien, general or otherwise, ordinarily only arises by operation of law in circumstances appropriate to create such a lien. This is so whether or not the lien be that of a solicitor or a broker or a craftsman; a lien may be waived even in advance but, in the absence of any such agreement, implied or otherwise, a lien is not created by unilateral act but rather by operation of law. It is true that the solicitors did the work, did so at *Galdan's* request and were entitled to be paid their proper charges at a time when they had possession of the title deeds. Their problem is that their possession was a highly qualified one. Quite apart from the very rigorous requirement on a solicitor to comply to the letter with an undertaking of the kind given to I.C.C., their possession of the title deeds was entirely conditional and, expressly, as trustees for I.C.C."

13. Mr. Allen also referred to the decision in *In re Llewellyn, a Solicitor* [1891] 3 Ch. 145 in which Chitty J. said at p. 148:

"From these cases it follows that when the mortgagor has paid to the mortgagee all that is due to him for principal, interest, and costs, and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds on payment on principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee."

14. Mr. Allen also referred to a number of other decisions which I don't propose to refer to at this stage and finally he referred to O'Callaghan on the *Law on Solicitors in Ireland* where it is stated at paragraph 9.28 as follows:

"A practice which is detrimental to the existence of a lien is where a solicitor grants a period of credit to the client within which to pay his indebtedness. It has been held that the right to a lien is inconsistent with the grant of credit, for a lien is only available where the debt is due. In support of this comment O'Callaghan cites the case of *Hewison v. Guthrie* [1836] 2 Bing. NC 755.

15. Having referred to the authorities cited above, Mr. Allen pointed out that the defendant had obtained the title deeds for the sole purpose of dealing with the re-mortgage of the property. He argued that that purpose was inconsistent with the existence of a retaining lien. He also relied on the fact that the title deeds came into the possession of the defendant from Irish Life Home Loans (which later became known as I.I.B. Home Loans) upon terms that he would "hold the title documents in trust for the lender". He argued that such a trust was inconsistent with any lien. Equally he pointed out that the plaintiff was liable to I.I.B. Home Loans until the 2nd January, 2004, when she discharged her mortgage. Accordingly, he makes the point that it can hardly be said that when he had the title deeds in January, 2004, he did not have them as the plaintiff's solicitor given that the relationship of client and solicitor had ended on the 29th January, 2001. The point was made by Mr. Allen that the plaintiff was entitled as against I.I.B. Home Loans to the return of her deeds on the discharge of the mortgage. The defendant had possession of the title deeds at that time from I.I.B. Home Loans on accountable receipt. Accordingly, Mr. Allen made the point that the defendant cannot have any better right to possession than I.I.B. Home Loans from whom his possession derived. Finally, Mr. Allen referred again to the agreement of the 29th January, 2001. Apart from being a statement and settlement of account, he argued that as the defendant had agreed that they to hand over the file in relation to other lands Ardee Road that day and to schedule the remaining files and deliver them to the plaintiff his agreement to do so amounted to a waiver of any lien he had. He conceded that the plaintiff failed to pay the agreed sum of £3,000 but states that the plaintiff failed to pay that sum by reason of the failure of the defendant to deliver up the papers. He then added that if the lien was waived and he contends that it was, it cannot have been revived by reason of non-payment. He also made the point that the granting of time for payment of the sum of £3,000 until the end of 2001 was inconsistent with any lien.

16. Mr. Gavin Ralston SC appeared on behalf of the defendant in these proceedings. He agreed with much of what had been said by Mr. Allen as to the applicable law. He accepted that a lien arises by operation of law and not by the intention of the parties. So far as it was contended that there was a waiver of any right to a lien he argued that there was nothing in the documentation that gave rise to such a conclusion. He then referred to the fact that there had been a conscious decision on the part of the plaintiff not to live up to her side of the bargain contained in the letter dated 29th January, 2001, and in this regard he referred to paragraph 3 of the supplemental affidavit of the plaintiff in which she stated that it was only when it became apparent that Mr. Mc Ardle would not keep his end of the bargain that she decided to withhold the sum of £3,000. It was Mr. Ralston's contention that in fact both sides resiled from the bargain. Indeed he added that the reference of a complaint to the Law Society was like a red rag to a bull. It was his

contention that the lien in this case arose at the point in time when the plaintiff decided not to pay.

17. Mr. Ralston sought to distinguish the facts of this case from the facts of the *Galdan Properties Limited (in liquidation) case*. He pointed out that in that case the solicitor obtained the title deeds from I.C.C. on accountable receipt "to hold the... documents on trust for" I.C.C. He referred to the solicitors undertaking signed by the defendant herein under which the defendant solicitor herein undertook and agreed with the lender at paragraph 3 thereof-

"as soon as practicable to complete and lodge with the lender a report and certificate of title in the lenders standard form... together with all documents constituting the lenders security pursuant to 2 above and also all the title documents for other documentary evidence evidencing the borrowers title to the property..."

18. Accordingly, Mr. Ralston distinguishes the facts of this case from the facts in the *Galdan* case on the basis that there is no indication in the present case that the title documents were obtained on foot of the undertaking. Thus it is argued that the defendant simply undertook to hold the title deeds. Mr. Ralston then referred to the decision in the case of *Barratt v. Gough-Thomas* [1951] Ch. 242 on which he relied in particular on the first part of the headnote in that case to the following effect:

"When a client for whom a solicitor holds deeds mortgages the property comprised in them to another client of the same solicitor who acts for both parties, then, even though the deeds before and after the mortgage remain continuously in the solicitor's possession, he, after the completion of the mortgage, holds them exclusively in the right and on behalf of the mortgagee. The character and legal basis of his possession is precisely the same as if the deeds had been handed over to the mortgagee on completion of the mortgage and thereafter returned by him to the solicitor to hold on his behalf. In such a case a solicitor loses any lien he previously had on the deeds as against the mortgagor."

19. Mr. Ralston also referred to the decision *re Llewellyn* referred to above. He referred to the judgment of Chitty J. at p. 147 as follows:-

"I will assume in favour of the respondent, that among the documents he holds there are some which relate to the title to the mortgaged property, and that though he received them originally from the applicant the custody was changed; that he afterwards held them as solicitor for the mortgagee. The lien claimed on the documents of title is thus a lien in virtue of the right of the mortgagee to hold such documents.

It appears from the evidence that the applicant has settled all accounts with his mortgagee: this statement is not denied or challenged by the respondent. It thus appears that the mortgagee has no claim against the applicant, the mortgagor, for the costs included in the bill in question, and consequently no lien as against him on the documents of title nor any rights to withhold them from *Sanders*. There is no suggestion in the evidence that the settlement of accounts between the applicant and his mortgagee (who was mortgagee in possession) was come to for the purpose of defeating any lien of the respondent; and it is therefore unnecessary to consider what might have been the effect of such evidence if given.

The question then is, whether the respondent has any lien on the documents of title as against the applicant. The nature of a solicitor's lien is so well established that it is scarcely necessary to state its nature, or on what grounds it is founded. It is not the result of contract; it is not an equitable charge; it is not an encumbrance affecting the estate itself.... It does not confer on the solicitor any higher right to retain deeds than the client himself has.... The nature of a solicitor's lien is stated clearly in the judgment of the court delivered by Lord Cranworth in *Pelly v. Wathen* 1 D.M.G. 23. He says: 'the general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied. It is derived entirely through the client, and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands the solicitor.' And again he says (in effect) that the right to hold title deeds in virtue of a solicitor's lien is subject to all rights legal and equitable affecting them in the hands of the person from whom he received them. These principles are illustrated by numerous authorities which it is unnecessary to cite. From these, it follows, that when the mortgagor has paid to the mortgagee all that is due to him for principal, interest and costs and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has not right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgage property pending the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds, on payment of principal interest and costs prevails against the solicitor's lien claimed in respect of the mortgagee."

20 Mr. Ralston went on to say that insofar as there is a dispute in respect of the standing of the agreement contained in the letter of the 29th January, 2001 as to the amount now alleged to be due by the plaintiff herein as defendant in the summary proceedings that these are matters that can be dealt with either in taxation or in the summary proceedings.

21. In reply Mr. Allen pointed out that at paragraph 3 of the first affidavit sworn by the plaintiff herein she stated that in February, 1994, when she arranged to re-mortgage her property the defendant obtained for that purpose the title deeds to the property on accountable receipt. He pointed out that that averment was not contradicted.

22. Finally, he stated that the suggestion by Mr. Ralston that the lien arose in May, 2001, when the plaintiff indicated that she would not pay the sum of £3,000 was expressly precluded by the terms of the undertaking at paragraph 1 subparagraph b.

Conclusions

23. The defendant's solicitor in this case acted on behalf of the plaintiff alone in relation to the re-mortgage of the plaintiff's property. In this way the facts of this case are somewhat different to a number of the cases which were cited to me in relation to the status of a solicitor's lien where the solicitor had acted for both the mortgagor and the mortgagee, e.g. *In re Long*, *In re Llewellyn* and *In re Snell*, all referred to above.

24. As solicitor for the plaintiff, the defendant came into possession of the title deeds having obtained them from the mortgagee, I.I.B. Home Loans. It seems to me to be immaterial whether the title deeds were held on "accountable receipt" or on foot of the letter of undertaking furnished by the defendant to I.I.B. Home Loans. In fact, as referred to above, the plaintiff averred that the title deeds were obtained on accountable receipt and in support of this contention she then exhibited the letter of undertaking. Mr. Ralston on behalf of the defendant had suggested that there was a distinction between the title deeds obtained by a solicitor on accountable receipt and the title deeds obtained in this case on foot of the letter of undertaking. In the present case, the letter of undertaking required the solicitor for the borrower to do certain things, namely: "pending compliance with paragraph 3 hereof to

promptly furnish to the lender any information reasonably required by the lender concerning the borrower's title or the lender's security and to furnish to the lender copies of any documents in relation thereto required by the lender and to hold the title documents in trust for the lender."

25. In the case of *In re Galdan Properties Limited (in liquidation)* referred to above, McCarthy J. in the course of his judgment referred to the title deeds in that case which had been in the possession of I.C.C. as mortgagees but had been obtained from them by a firm of solicitors on foot of an accountable receipt "to hold the said documents in trust for the said I.C.C. and not to do any act which would enable the property dealt with by it to be mortgaged or assigned without the I.C.C.'s consent or its lien thereon to be in any way postponed or prejudice." It was argued in that case on behalf of the liquidator that the undertaking in the accountable receipt created an express trust; possession as a trustee is absolutely inconsistent with lien by a solicitor. In the course of his judgment, McCarthy J. said as follows:

"a lien may be waived even in advance but, in the absence of any such agreement, implied or otherwise, a lien is not created by unilateral act but rather by operation of law. It is true that Haughtons did the work, did so at Galdan's request and were entitled to be paid their proper charges at a time when they had possession of the title deeds. Their problem is that their possession was a highly qualified one. Quite apart from the very rigorous requirement on a solicitor to comply to the letter with an undertaking of the kind given to I.C.C., their possession of the title deeds was entirely conditional and, expressly, as trustees for I.C.C. No doubt I.C.C. knew the purpose for which Haughtons held the deeds and in a sense, did benefit from the work being done, but Haughtons did not hold the deeds in any sense as agent or trustee for Galdan."

26. In those circumstances McCarthy J. accepted the argument made by the liquidator that the lien did not arise as being correct in fact and sound in law.

27. A number of points of assistance can be gleaned from the judgment of McCarthy J. referred to above. The first point is that the lien arises by operation of law. Two, the defendant in this case held the title deeds on terms which created an express trust in favour of I.I.B. Home Loans. The question then has to be considered at what point in time does the lien come into effect by operation of law. If, in accordance with the principle laid down in *Galdan Properties (in liquidation)* to the effect that possession as trustee is inconsistent with the existence of any lien over the deeds, is it possible for the lien to come into operation at a later stage, namely at the point in time at which the mortgage was discharged by the plaintiff herein.

28. In dealing with the question as to when by operation of law a right to a lien could have arisen the passage quoted from O'Callaghan, the *Law on Solicitors in Ireland* at para. 9.28 is of assistance:

"A practice which is detrimental to the existence of a lien is where a solicitor grants a period of credit to the client within which to pay his indebtedness. It has been held that the right to a lien is inconsistent with the grant of credit, for a lien is only available where the debt is due."

29. On the basis of that passage one could argue for two points in time at which a lien could have arisen in this case having regard to the facts. The first point at which it could be argued that the lien could have arisen would have been in May, 2001, when it became clear that the sum of £3,000 was not going to be paid by the plaintiff. As an alternative it could be argued that the lien could have arisen at the end of that year in accordance with the terms of the agreement contained in the letter of the 29th January, 2001, which provided for payment within the "current year". Indeed it was argued in this case by Mr. Ralston that the lien arose at the time the plaintiff decided not to pay the sum of £3,000. That being the case, it seems to be clear having regard to the principles set out in the case of *In re Galdan Properties Limited* that as the defendant held the title deeds at that point in time expressly as trustee for I.I.B. Home Loans, that possession was inconsistent with the existence of any lien over the title deeds.

30. Finally I should refer briefly to the decision in the case of *Ring v. Kennedy* [1999] 3 I.R. 316 a decision of Laffoy J. which was referred to in the submissions of counsel for the plaintiff herein. Having referred to the general nature of a solicitor's lien, Laffoy J. went on to say at p. 319 of her judgment:

"As a matter of law, the extent of the defendant's general lien on the title deeds to the premises had crystallised on the termination of the defendants' retainer in July, 1989, and in my view, nothing which occurred after that date could have varied the extent of the defendant's general lien."

31. As already set out above the relationship of solicitor and client between the plaintiff and the defendant in this case came to an end in January, 2001. A figure in respect of what was due by the plaintiff to the defendant was set out in the letter dated the 29th January, 2001. I do not wish to express any view on the validity or otherwise of the solicitor's claim for fees against the plaintiff herein in the summary proceedings referred to in which he claims a sum of €61,710.24 from the plaintiff in these proceedings by way of professional fee. However, it does seem clear to me that having regard to the decision of Laffoy J. in the case of *Ring v. Kennedy* that at the point in time when the defendant's retainer was terminated in January, 2001, a lien could only have extended to the figure of £3,000. In other words as Laffoy J. stated:

"the extent of the defendants general lien on the title deeds to the premises had crystallised on the termination of the defendant's retainer in July, 1989... and nothing which occurred after that date could have varied the extent of the defendant's general lien."

32. It seems to me that considering the basis upon which a lien arises, namely by operation of law, the lien could only have arisen during the currency of the mortgage. I cannot see any basis for a lien to come into existence by operation of law at a date after the date of discharge of the mortgage and, of course, counsel for the defendant did not make that case. Accordingly, it is clear from the authorities that no lien could have come into existence by operation of law when the dispute arose between the plaintiff and the defendant herein by reason of the fact that the Defendant then held the title deeds subject of an express trust in favour of I.I.B. Homeloans. Therefore the plaintiff is entitled to the return of the title deeds herein.