

THE HIGH COURT

CHANCERY

[2014 No. 127SP]

IN THE MATTER OF A SOLICITOR

AND

IN THE MATTER OF A SOLICITOR'S UNDERTAKING

BETWEEN:

EBS LIMITED

PLAINTIFF

-AND-

GERALD KEAN (No. 2)

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 15th June, 2017

Introduction

1. The post-judgment hearing in this case took place on 26th May 2017 and 30th May, 2017 regarding the costs and other orders to be made arising from this Court's judgment in *EBS Limited v Kean* [2017] IEHC 295.

Costs

2. As is clear from *Veolia Water v Fingal County Council* [2006] IEHC 240 the overriding starting position in all cases regarding costs is that costs should follow the event, such that the party that has lost the case should pay the costs of the other party. In this regard, EBS has clearly won its case as set out in the Special Indorsement of Claim, since in that Indorsement of Claim it is stated that the reliefs sought by EBS are as follows:

"An order directing the Defendant to comply with two Accountable Trust Receipt undertakings given by him and on his behalf as principal of **"Keans Solicitors"** dated 2 April 2008 in respect of the properties identified in the schedule hereto (**"the Properties"**) and to return to the Plaintiff forthwith the documents provided by the Plaintiff to the Defendant on foot of the Accountable Trust Receipt undertakings.

Further or in the alternative an Order directing that the Defendant do compensate the plaintiff for the losses suffered as a result of his failure to comply with the two Accountable Trust Receipt undertakings given in respect of the Properties.

Such further or other Order as this Honourable Court shall deem appropriate.

Interest pursuant to the Courts Acts.

An Order providing for the costs of these proceedings."

Relief sought by EBS

3. Despite the fact that EBS has been successful in relation to the primary relief sought by it, namely that Mr. Kean comply with his undertaking to return the title deeds to EBS and also despite the fact that at the costs hearing, counsel for Mr. Kean has described this Court's judgment as one that finds that Mr. Kean *'had not acted with probity'*, counsel for Mr. Kean has nonetheless argued that as this Court did not find Mr. Kean guilty of misconduct under the Solicitors Acts, there should be no order as to costs in this case.

4. It is clear that this Court has found that Mr. Kean failed to honour his undertaking to EBS and made a false statement in a solicitor's letter that that he had instituted proceedings against EBS. However, this Court did not find that Mr. Kean's conduct amounted to an act of misconduct under the Solicitors Acts, since, as the Court noted in its judgment, it did not have jurisdiction to make a finding of misconduct against Mr. Kean under the Solicitors Acts, as misconduct under the Solicitors Acts is a matter at first instance to be considered by the Solicitors' Disciplinary Tribunal.

5. However it is also relevant to note that the Special Indorsement of Claim issued by EBS did not seek any declaration that Mr. Kean was guilty of misconduct. Accordingly, while this issue did arise during the hearing, it was not part of the relief sought by EBS. In deciding on the costs issue, it is therefore of significance that this Court granted the primary relief sought by EBS, since it found that Mr. Kean was not entitled to give the title deeds of the relevant properties to PTSB and that the title deeds should be returned to EBS and it is also significant that there is no reference in the Special Indorsement of Claim to EBS seeking a declaration that Mr. Kean was guilty of misconduct.

The substance of the case

6. In addition to considering whether the primary relief as set out in the Special Indorsement of Claim was granted, it is also important to bear in mind what this case was really about. It was about the failure of Mr. Kean to return the title deeds to EBS and his decision to give those title deeds to PTSB. It is clear that it is this Court's view that Mr. Kean should have returned the title deeds to EBS, but he failed to do so despite being requested by EBS to do so over many years. The only reason that there were legal proceedings, and therefore legal costs to apportion, is because Mr. Kean failed to return the title deeds to EBS. Mr. Kean lost his argument that he was not obliged to return the title deeds to EBS and he lost his argument that he was entitled to hand the title deeds over to PTSB. In addition, since Mr. Kean's own counsel has characterised the judgment as one that finds that Mr. Kean *'had not acted with probity'*, in no sense could it be said that there was any significant victory for Mr. Kean in these proceedings.

Misconduct issue was ancillary

7. It is clear to this Court that the 'event' in this case was whether Mr. Kean should have returned the title deeds to EBS and he lost this 'event'. Since costs follow the event, the general principle applicable to this case is that the costs of the proceedings should be awarded against Mr. Kean. This is because the 'event' is not whether Mr. Kean was guilty of an act of misconduct, since this was a relatively minor and ancillary issue that was not part of the Special Indorsement of Claim but that arose during the hearing. The main issue of the proceedings and the main issue at the hearing was whether Mr. Kean should return the title deeds to EBS.

8. The 'misconduct issue' was a minor ancillary issue at the trial since the question of whether Mr. Kean was guilty of misconduct did not have an existence independent of the failure of Mr. Kean to hand back the title deeds. This is because without the failure of Mr. Kean to hand back the title deeds there would have been no act of alleged misconduct by Mr. Kean. The ancillary nature of the 'misconduct issue' is also clear from the fact that even if there had been a finding of misconduct *per se* against Mr. Kean, this would have been of no benefit to EBS, without an order that he should have returned the title deeds to EBS. EBS was only interested in a return of its title deeds and that is why the order it sought and the order it obtained was one regarding those title deeds. This Court does not accept the suggestion by Mr. Kean that because, for jurisdictional reasons, he was not found guilty of an act of misconduct under the Solicitors Act that he won so much of the case as to justify there being no order as to costs.

Time spent considering nature of failure of solicitor to comply with undertaking

9. It is of course true to say that a limited amount of time during the hearing was spent by EBS dealing with the fact that the failure of a solicitor to comply with an undertaking to return title deeds was such a serious matter that it could amount to a finding of misconduct, *albeit* in a different forum - the Solicitors' Disciplinary Tribunal, and in certain cases it could even lead to a solicitor's right to practice being affected. This was a legitimate line of argument for EBS to pursue in its desire to convince this Court of the gravity of a failure by a solicitor to comply with his undertaking and to convince this Court that the failure in this case was not an accidental oversight but a deliberate and conscious act by Mr. Kean and therefore deserving of a Court Order directing Mr. Kean to comply with his undertaking. This is particularly so since Mr. Kean was claiming that no such Order should be made because the alleged breach of undertaking was of little or no consequence since, *inter alia*, there was no financial loss suffered by EBS by his failure to comply with the undertaking.

Was a declaration of misconduct under the Solicitors Acts sought?

10. However, it is also true to say that on a few occasions the manner in which the case was presented by EBS led this Court to believe that EBS was seeking an order from this Court that Mr. Kean was guilty of an act of misconduct under the Solicitors Acts, even though this relief was not contained in the Special Indorsement of Claim. It was because this Court was led to believe that such an order was being sought that this Court dealt with this issue in its judgment at paragraphs 96 *et seq.* Counsel for EBS referred to misconduct in his submissions and his examination of witnesses on a number of occasions in terms which led this Court to believe that EBS was seeking such an order of misconduct under the Solicitors Acts, since he stated:

- "And that was a decision which we'll be submitting to the Court in due course constituted a breach of undertaking which he had given to EBS and thus constituted misconduct."
- "It is I suggest, Judge, extremely difficult to see how the Defendant can ask this Court to conclude that anything other than an act of misconduct is taken here when, firstly, no expert on their side has given evidence on their side that it hasn't, and secondly, when the solicitor whose conduct is at issue in the case, Mr. Kean, has chosen not to given evidence to explain his conduct."
- "There is an allegation of misconduct against Mr. Kean which has been there right from the very start."
- 'Thus, the Defendant's refusal to comply with the two accountable receipt trust undertakings is inexcusable and I say and believe amounts to misconduct'

And when cross-examining Ms. Coghlan, counsel for EBS stated:

- "I'm referring to the misconduct that we have sworn on oath which we say took place here, which is that of Mr. Kean not yourself. Do you understand what I've just said to you?"

It is relevant that this Court was not alone in interpreting the submissions of EBS in this manner, since Mr. Kean's counsel also interpreted them in this way. This is evident from the fact that counsel for Mr. Kean, in his legal submissions at the end of the hearing dealt with *ACC Loan Management Ltd v. Barry* [2015] IECA 224. It is that case which establishes the principle that the High Court does not have jurisdiction to find a solicitor guilty of misconduct under the Solicitors Acts, without there first being a finding of the Solicitors Disciplinary Tribunal. As is clear from this Court's judgment, it was this principle which was ultimately relied upon by this Court in its decision not to find Mr. Kean guilty of misconduct under the Solicitors' Acts.

Inappropriate conduct justifying Order v. Order that Mr. Kean guilty of misconduct

11. It is however important to note that there is a very fine, but significant, line between time spent during the hearing on the issue of whether this Court should make a finding of misconduct under the Solicitors Acts against Mr. Kean on the one hand and on the other hand time spent during the hearing on the issue of whether Mr. Kean's failure to comply with his undertaking was a very serious matter and could amount to misconduct and so was deserving of a court order requiring him to comply with his undertaking. The time spent on the latter argument was an entirely legitimate argument for EBS to make, just as it was legitimate for Mr. Kean to make the ultimately unsuccessful argument that, since EBS had allegedly suffered no loss such an order should not be made. The latter legitimate argument took up some of the Court's time. The former argument took little of the Court's time at the hearing since at no stage did EBS formally seek a declaration of 'misconduct under the Solicitors Acts' either in the relief it sought or during its submissions. Nonetheless, since this Court (and indeed counsel for Mr. Kean) took the view that EBS was seeking such a declaration and since some limited amount of court time was spent on this issue, which this Court estimates at no more than 5% of the hearing, it is necessary to have regard to this fact when considering the costs order to be now made.

Partial costs order

12. The conclusion which this Court now reaches is that the issue of whether Mr. Kean should be found by this Court to be guilty of misconduct was an issue which was implicitly raised by EBS, *albeit* without formally seeking such a declaration. This issue was lost by EBS and won by Mr. Kean. It was won by Mr. Kean on the grounds that, while he should have complied with his solicitor's undertaking and he should not have made a false statement in his solicitor's letter, the High Court has no jurisdiction at first instance to find Mr.

Kean guilty of misconduct under the Solicitors Acts. As regards the effect of this conclusion, it is clear from the judgment of Clarke J. in *Veolia Water v Fingal County Council* [2006] IEHC 240 at paragraph 14, that a winning party should be refused costs attributable to issues which were lost and which lengthened the trial and should instead be obliged to pay the unsuccessful party the costs attributable to those issues. This Court has already concluded that no more than 5% of the hearing was attributable to the issue of whether this Court should make an order of misconduct against Mr. Kean under the Solicitors Acts. Accordingly, rather than awarding 5% of the total costs to Mr. Kean and reducing the costs award to EBS by 5%, this Court will reduce the overall costs award in favour of EBS by 10%. On this basis, this Court will order that Mr. Kean pay 90% of the legal costs of EBS.

Order

13. As regards the final form of the Orders in this case, counsel for EBS sought a period of 21 days from the date of perfection of the Order within which Mr. Kean must comply with the Court's Order. Counsel for Mr. Kean did not suggest an alternative timeframe but he did indicate that he was seeking a stay on the Order pending an appeal, which is dealt with below. Having heard from both counsel therefore, the Orders to be perfected in this case will be as follows:

Within 21 days of the perfection of this Order,

- a. Mr. Kean will notify PTSB that he was not entitled to give PTSB the title deeds to 2 Hunters Way, Castlegrange, Williamstown, Co. Waterford and the title deeds to Portnahully, Carrigeen via Waterford, County Waterford
- b. Mr. Kean will take such steps as to retrieve those title deeds from PTSB and upon receipt he will return those title deeds to EBS.

Mr. Kean will pay 90% of EBS' costs of these proceedings, including reserved costs, to be taxed in default of agreement.

Stay

14. Counsel for Mr. Kean sought a stay on the Orders pending the appeal by Mr. Kean of this judgment and the determination of that appeal. The Court was referred by both sets of counsel to the relevant caselaw, including *Redmond v Ireland* [1992] 2 IR 362, *Danske Bank v McFadden* [2010] IEHC 119 and *C.C., A.P. C.C.C. and C v Minister for Justice* [2016] IESC 48.

15. In reliance on this caselaw, this Court considered first whether the proposed appeal is *bona fide*. Based on submissions of his counsel, it seems that Mr. Kean feels strongly that the conclusions of this Court were incorrect on the conflicts of evidence. As his professional reputation is at stake, counsel for Mr. Kean submits that the appeal of this Court's judgement is not tactical but is an appeal where Mr. Kean hopes and believes that a different court will come to a different conclusion. On this basis, this Court concludes that the proposed appeal is *bona fide*. This Court is also of the view that it could not say with certainty that this very hard fought case over 10 days, with all the evidence, the expert testimony, the inferences made on the facts and the decisions on the law, will be analysed and assessed by the Court of Appeal in the exact same fashion as was done by this Court. In particular, counsel for Mr. Kean has argued that this Court wrongly based its conclusion, that the -243 letter was received on time, on what he terms 12 reactive matters, rather than on the sworn evidence provided on behalf of Mr. Kean. While this Court does not agree with this contention, it does accept that the point is not so ridiculous as to be unarguable.

Potential injustice by staying or not staying the Order?

16. On this basis the next issue to consider is whether there is any potential injustice which may result from granting a stay or not granting a stay, when one considers the possibility that the appeal could be won or lost.

17. As regards a stay on the costs element of the Order, it is likely that the costs of a ten day hearing in the High Court will be a six figure sum, which would be out of the reach of most individuals. Mr. Kean is a principal in a relatively small solicitor's firm and no evidence is before the Court regarding his current financial circumstances, so this Court must assume that he is a solicitor of average means. On the other hand, EBS is a large financial institution. For this reason, this Court is of the view that for cashflow reasons it could result in an injustice to Mr. Kean, if he was required, in the short term, to come up with this significant amount of money for EBS, and then in two years time the Court of Appeal was to find in his favour and conclude that there was never any need for him to have paid EBS' legal costs. For this reason, this Court will put a stay on the costs element of the Order pending the appeal of this judgment and the determination of the appeal.

18. As regards the remainder of the Order, sworn evidence was provided to the Court during the costs hearing that Ms. Corcoran owes €632,753.09 to EBS on the relevant loan account, for which the title deeds to Portnahully and Hunters Way are security (along with Henrietta Street). Sworn evidence was also provided to the effect that there are arrears of €212,187.97 on this loan and that recent valuations were obtained by EBS which valued Portnahully at €320,000, Hunters Way at €190,000 and Henrietta Street at €175,000. The combined value of the security is therefore €685,000 for a loan of €632,753.09 which has arrears of €212,187.97

19. Crucially a figure of €510,000 is the value of Portnahully and Hunters Way, the title deeds to which properties are in the possession of PTSB, but which belong to EBS. In addition of course, it is relevant that EBS has a first legal charge over Portnahully and Hunters Way, while PTSB has a second legal charge over these two properties. This is one of the peculiarities of this case, and of course the reason for the proceedings in the first place, namely that the financial institution with the second charge is the one that has possession of the title deeds.

20. In addition, counsel for EBS advised this Court that it is currently taking 18 months for appeals to the Court to Appeal to be heard at present. It seems clear to this Court therefore that if it grants a stay on the Order regarding the retrieval of the title deeds and EBS was to win its appeal, EBS could suffer an injustice, since for about two years or more it would not be able to enforce its security over loans that are significantly in arrears. During that period, the arrears could continue to mount and the security might no longer exceed the value of the loan by the time the appeal is finalised. In this regard, EBS indicated in open court a willingness to give an undertaking to hold the proceeds of any sale of Hunters Way and Portnahully, pending the outcome of any appeal of this matter and pending any order arising from the appeal regarding such funds.

21. On the other hand, refusing a stay on the Order does not in this Court's view risk an injustice to Mr. Kean. This is because, this Court has found that he is subject to double undertakings, one in favour of PTSB and one in favour of EBS and whichever financial institution this Court favours, by refusing or granting a stay, it leaves Mr. Kean exposed to the other financial institution. Significantly, if no stay is granted and Mr. Kean wins on appeal after EBS has obtained the title deeds, then the title deeds *may* have to be handed back by EBS to PTSB or the sale proceeds from the two properties *may have to be* paid over by EBS to PTSB (if the properties have been sold at that stage). However, the handing over of the title deeds or proceeds to PTSB seems unlikely since EBS has a first

charge over Hunters Way and Portnahully while PTSB has a second charge over those properties. Accordingly, refusing a stay on the Order and requiring Mr. Kean to seek the title deeds from PTSB immediately does not, in this Court's view, risk any potential injustice to Mr. Kean, nor indeed does it risk any potential injustice to PTSB since even if EBS was to lose the appeal EBS would still have a first charge on the two properties.

22. Therefore, on the basis of the aforesaid undertaking offered by EBS this Court would not put any stay on the Order, other than in relation to costs.