Neutral Citation: [2014] IEHC 549

THE HIGH COURT

Record No. 2014/108/SA

IN THE MATTER OF MURIEL WALLS, A SOLICITOR OF MCCANN FITZGERALD

IN THE MATTER OF AN APPLICATION BY CYNTHIA MAHARAHJ TO THE SOLICITORS DISCIPLINARY TRIBUNAL

AND IN THE MATTER OF THE SOLICITORS ACTS 1954 TO 2011

MURIEL WALLS, A SOLICITOR OF MCCANN FITZGERALD

A SOLICITOR

ON THE APPLICATION OF CYNTHIA MAHARAJ

APPELLANT

Judgment of Kearns P. delivered on 3rd day of November, 2014

By notice of motion dated 13th October, 2014 the appellant appeals against the decision of the Solicitors Disciplinary Tribunal ('the Tribunal') dated 16th July, 2014 that there is no prima facie case for inquiry into the conduct of the respondent solicitor.

Background

The respondent solicitor works for McCann Fitzgerald Solicitors who acted for the appellant in judicial separation proceedings which commenced in late 1999. The proceedings were heard in the High Court in 2002 and O'Sullivan J. delivered his decision on 16th May 2002. The appellant was awarded a lump sum of €489,000.00 which O'Sullivan J. subsequently reduced by €25,000 as a result of an issue which arose regarding the conduct of the appellant. Following this, difficulties arose in relation to how the appellant's former husband would finance this payment and on 11th July 2003 the Supreme Court granted him an extension of time to serve a notice of appeal against the High Court ruling. It was also directed that the appellant's former husband pay her a lump sum of €250,000, with the balance of the High Court order stayed pending the outcome of the appeal. A bank draft in this amount dated 5th September 2003 was made payable to the respondent solicitor's firm, McCann Fitzgerald.

In her application to the Tribunal dated 28th June 2012 and her affidavit of the same date the appellant states that "*at all times throughout these proceedings and in particular on the 11.07.03 when the Supreme Court order was made, I was expecting to receive the sum of €250,000…To my utter alarm, disbelief and annoyance, this money was taken by McCann Fitzgerald to discharge further fees allegedly due to them by me. This was without my knowledge or consent. I was under the impression at all times that this money would be given to me and indeed that the bank draft would be made payable to me*". The appellant also contended that at no time did she receive a bill of costs and was never made aware that such substantial fees would be due. She also maintains that she was not made aware of VAT payable in respect of fees or of her right to have the costs subject to taxation. She informed the Tribunal that at that time the separation proceedings were in their fourteenth year and that the actions of the respondent solicitor and her firm have contributed considerably to her ill health. Her complaint to the Tribunal also alleged that the respondent solicitor had failed to reply to correspondence dated 17th January 2012 in which the appellant had raised a number of concerns and queries.

The respondent solicitor submitted a lengthy affidavit to the Tribunal in which she refers to her initial letter to the appellant dated 2nd March 2000. She states that this letter "*was designed to and I believe does satisfy the requirements of section 68 of the Solicitors Act*". The respondent's affidavit outlines the background to the judicial separation proceedings, the level and nature of the professional work up to the date of the trial and delivery of the High Court judgment, a number of hearings before the Master of the High Court, and the extent of work involved after the judgment was delivered and the matter came before the Supreme Court. The Court has given careful consideration to all of the documents exhibited and it is neither necessary nor appropriate to set out the sensitive details of this familial dispute herein.

The respondent states that at all times the appellant was aware of her obligation to discharge legal fees and gave regular assurances that they would be paid. In addition to her initial letter of 2nd March 2000, three bills of costs were sent to the appellant dated 31st July 2000, 27th October 2000 and 28th June 2002. A further letter from Ms. Jennifer O'Brien, solicitor in McCann Fitzgerald, to the appellant on 25th April 2002 states that "*your estimated legal costs to date are approximately €250,000*". The appellant was also asked to lodge money on account on a number of occasions, which she did with the assistance of her mother. A breakdown of fees dated 28th June 2002 gives a total of €254,438.57. On 8th November 2002 the appellant filed an affidavit in which she states she has "*incurred extensive legal fees of the order of €280,000*". By letter dated 20th August 2003 the respondent informed the appellant that the total costs in respect of McCann Fitzgerald's professional fees, counsels' fees, witnesses' expenses, other outlaid costs and VAT amounted to €289,786.29 of which €122,708.55 had been received.

The respondent solicitor states that on 5th September 2003 when the aforementioned bank draft for €250,000 issued to McCann Fitzgerald it was used to part pay outstanding legal costs and to make a payment to the appellant's bank (AIB) in respect of monies advanced to her pending the payment from her former husband. The respondent solicitor's affidavit to the Tribunal deals with this issue in considerable detail. On 18th August 2003 the appellant wrote to the respondent solicitor's trainee asking him to ensure that a payment was made to an AIB bank account once the money was received. An attendance note prepared by the respondent on 22nd August 2003 details ongoing correspondence with the appellant's brother, whom the respondent states was heavily involved in the process throughout, in relation to arrangements to be made in respect of the payment of legal fees and repayments of AIB loans. The respondent states that "*he authorised me to take the amount of €167,000 from the proceeds of the cheque when it comes through from [appellant's husband] and that the balance is to go to the bank in Kilkenny. Robin Maharaj is transferring some of his own funds to clear the overdraft that Cynthia has with the bank so at least she will be starting with a clean slate*."

Ms. Jennifer O'Brien, the solicitor who had been responsible for much of the work in relation to the appellant's case left McCann Fitzgerald in 2004 to take up an offer of partnership in Arthur O'Hagan & Sons Solicitors. That firm subsequently acted for the appellant in the Supreme Court appeal. The Supreme Court issued its decisions on 12th July 2005 and did not follow the approach of the High Court in measuring the lump sum payment to the appellant. The respondent states that it can be inferred from the documents exhibited that the appellant has never received any further lump sum beyond the €250,000 which issued in September 2003. She also states that further fees remaining outstanding to McCann Fitzgerald in relation to work completed between June 2002 and August 2004.

Decision of the Tribunal

By decision of 16th July 2014 the Tribunal found that there was no prima facie case of misconduct on the part of the respondent solicitor in respect of each of the allegations made by the appellant.

As set out in the decision of the Tribunal, in relation to the appellant's complaint that she never received an estimate of costs or a section 68 letter, it was found that the Tribunal was "*satisfied that a section 68 issued – see paragraph 5 of the letter of 2 March 2000 from the respondent solicitor to the applicant*"

In relation to the allegation that the appellant never received an interim or final bill of costs the Tribunal found that "*from the evidence adduced it would appear that bills of costs were furnished on an on-going basis by the respondent solicitor to the applicant*". The Tribunal also rejected the appellant's arguments that a failure to advise her of the right to have costs taxed amounts to misconduct.

The Tribunal also found that when the bank draft of 5th September was issued the appellant "*was on full notice that fees were outstanding and due to the respondent solicitor and that they would have to be paid.*"

The Tribunal was satisfied that the respondent solicitor had no obligation to reply to the appellant's letter of 17th January 2012 as all of the issues raised had been adequately dealt with in previous correspondence.

The present appeal
The appellant's appeal is based on the following grounds:

> *1. "Paragraph 5 of the letter of 5th March, 2000 does not mention client's liability for VAT and does not comply with Section 68(1). Furthermore, it fails to say anything about the right to taxation of costs and is inadequate as a section 68 letter.*
>
> *2. It is a serious breach of Section 68 (3), (4) and (5) of the Solicitors (Amendment) Act 1994 to deduct a sum of money from the client's monies recovered in a contentious litigation claim without there being an agreement in writing signed by the client that such a sum may be deducted.*
>
> *3. [The respondent] shows nowhere that there was such a written agreement between solicitor and client to allow her firm to deduct any such monies.*
>
> *4. Furthermore, it appears that Ms. Walls discussed and settled my affairs with a third party (Robin Maharaj) although she had never met him and she did not secure my agreement to these actions. At the very least, that was not part of the retainer between me and her firm.*
>
> *5. It was not part of the Retainer that Ms. Walls should discharge monies to AIB without my prior written authority to do so.*
>
> *6. With respect to the advice about taxation issue, the reason given at b(iii) by the Tribunal is inadequate as it does not give details as to why it was decided that Ms. Walls' conduct could 'not be construed as misconduct'. Nowhere in McCann Fitzgerald's correspondence is there mention of the option that a Bill of Costs may be taxed in the event of a dispute.*
>
> *7. It appears that there is a clear conflict between my account and the solicitor's account about many of the issues, including particularly those surrounding €250k expropriated by the firm.*
>
> *8. Ms. Walls had not dealt adequately or at all in previous correspondence with those issues raised in my complaint of 17th January 2012.*
>
> *9. Because of the many conflicts of evidence between the parties, there should have been a full, oral hearing and by way of appeal, I hereby seek a plenary hearing from the High Court." [sic]*

The respondent solicitor responds to each of these issues in her replying affidavit. In respect of the section 68 letter, she states that section 68(1) does not require that a letter written for the purposes of that section should contain any reference to taxation of costs. She contends that her letter of 2nd March 2000 is sufficient for the purposes of section 68. The respondent states that issues 2-4 of the appellant's appeal all relate to the deduction of fees. She refers to her affidavit of 27th September wherein she deals with this issue in detail. She further states that the appellant requested her to discuss these matters with her brother Mr. Robin Maharaj. The respondent states that the issue of paying the money to AIB was not raised before the Tribunal. In any event, the respondent refers to written instructions from the appellant to her trainee to make the payment to AIB when monies were received from her former husband.

In relation to the duty to advise her client of the right of taxation of costs, the respondent contends that the provisions of section 68(8) arise only when there is a dispute in relation to costs. It is submitted that the evidence clearly shows there was no dispute in relation to costs at any stage and that the appellant gave numerous assurances that all costs would be paid. She also referred to these costs in affidavits relevant to the separation and maintenance proceedings.

Finally, the respondent accepts the findings of the Tribunal in relation to her alleged failure to reply to the appellant's letter of 17th January 2012. She also explains that she never actually received the letter as it had been addressed to an office building which her firm had left five years previously. She says she only became aware of the letter in July 2012 when it was forwarded to her by the Registrar of the Tribunal along with the appellant's application.

Discussion
I have carefully considered all of the affidavits, documents, exhibits and the decision of the Tribunal dated 16th July 2014 and am satisfied that the Tribunal has given sufficiently detailed and clear reasons for its finding that there is no *prima facie* case for inquiry into the conduct of the respondent.

As stated by the appellant, the litigation in which she was involved was highly contentious and lengthy. It is not for this Court to issue any opinion or determination as to whether or not the fees charged by the respondent in respect of this litigation represented good value for money or were excessive. What is clear from the evidence is that the respondent's initial letter of 2nd March 2000 informed the appellant of her hourly rate and of her obligation to discharge counsel's fees and various other expenses. Various bills of

costs were sent to the appellant over the course of the litigation and were never disputed. The appellant was informed that the total fees were likely to be in the region of €250,000 and her knowledge of this is reflected in affidavits sworn by the appellant. The matter of the payment to AIB was not raised before the Tribunal. However, I am satisfied that the appellant gave a written instruction for a payment to be made to AIB when the lump sum payment from her former husband was received by the respondent's firm. Clear instructions were also received from the appellant's brother in this regard. No fresh evidence has been adduced which would warrant a departure from the decision of the Tribunal.

The Court is satisfied that the letter of 2nd March 2000 is sufficient for the purposes of section 68 of the Solicitors Acts and that in light of the evidence submitted there was no obligation on the respondent to refer to VAT charges in this letter. Furthermore, the Court accepts the finding of the Tribunal that the failure by the respondent to inform the appellant of her right to taxation does not amount to misconduct on the facts of this case.

The Court is also satisfied with the explanation offered by the respondent for failing to reply to the appellant's letter of 17th January 2012. While it is unfortunate that frustration was undoubtedly caused to the appellant by the failure to receive a reply, it is clear that this was due to an administrative error rather than misconduct on the part of the respondent.

Decision
For the reasons stated herein I would therefore dismiss the appeal.