Neutral Citation Number: [2009] IEHC 103

THE HIGH COURT

2001 16429 P

BETWEEN

PAMELA TREACY

PLAINTIFF

AND

LEN ROCHE AND HILARY ROCHE

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 27th day of February, 2009.

The substantive proceedings

The plaintiff is the daughter of Mary Josephine McDonagh (the testatrix) who died in August 2003. The defendants, who are solicitors, are the executors of the will of the testatrix and have been substituted as defendants in these proceedings in that capacity.

The primary relief sought by the plaintiff in the proceedings is a declaration that a purported deed of severance executed by the testatrix prior to her death purporting to sever the joint tenancy of the plaintiff and the testatrix in a licensed premises and dwelling in Baltinglass, County Wicklow was void and of no effect. The plaintiff also claims a declaration that she is entitled to the entire beneficial interest in the licensed premises and dwelling house in the events which have happened.

The application

The respondents on this application, which was initiated by notice of motion dated 9th December, 2008, which was issued on behalf of the plaintiff pursuant to an order made by this Court (MacMenamin J.) on 8th December, 2008, are Raymond Bradley and Frank Lanigan, both solicitors, who practise together as Malcomson Law, solicitors, who are the solicitors on record for the plaintiff in these proceedings. I will refer to the firm of Malcomson Law as "the former solicitors". On this application the plaintiff seeks an order directing the former solicitors to deliver all files, documents and papers in their possession relating to these proceedings to Liam Lysaght & Company, solicitors. I will refer to Liam Lysaght & Company as "the new solicitors".

In the notice of motion it is recognised that delivery of the documents should be conditional on the new solicitors undertaking to hold the documents subject to the former solicitors' lien and to return them to the former solicitors on the conclusion of the proceedings and on such delivery being without prejudice to the former solicitors' claim for costs against the plaintiff.

It emerged at the hearing that a notice of change of solicitor has not yet been filed by the new solicitors. I assume that this will be attended to immediately and so direct.

The law

The law distinguishes between two situations in which a solicitor may be discharged while proceedings are ongoing. The first is where the client terminates the solicitor's retainer, in which case the solicitor is entitled to rely on his lien until his fees and outlay have been discharged. The second is where the solicitor for good cause terminates the retainer. In that situation there is a long established equitable jurisdiction under which the Court, in order to enable the client's litigation to proceed, orders the solicitor to hand over the client's papers to the client's new solicitor, provided the new solicitor undertakes to preserve the former solicitor's lien and to return the papers to the former solicitor, for what they are worth, at the end of the litigation. I have considered the jurisprudence in two recent judgments: *Mulheir & Anor. v. Gerard Gannon* [2006] IEHC 274, in which judgment was delivered on 17th July, 2006; and *Ahern & Ors. v. The Minister for Agriculture and Food, Ireland and the Attorney General* [2008] IEHC 286, in which judgment was delivered on 11th July, 2008. As both parties referred to them, I do not consider it necessary to repeat what I have said in those judgments, which I am satisfied correctly sets out the law in this jurisdiction.

However, on this application, counsel for the former solicitors has referred the Court to, and placed particular reliance on, a decision of the High Court of England and Wales, to which I did not refer in either of those judgments. That is the decision of Moore-Bick J. in *Ismail v. Richards Butler* [1996] 3 W.L.R. 129. In that case, Moore-Bick J. applied the established jurisprudence as set out by the Court of Appeal in *Gamlen Chemical Company (U.K.) Limited v. Rochem Limited* [1980] I W.L.R. 614. Having found, on the facts, that it was the solicitors who had discharged the retainer for reasonable cause, by requiring payment of outstanding fees as a pre-condition to continuing to act, he outlined the position as follows (at p. 145):

> "In these circumstances the plaintiffs would in the ordinary way be entitled as of course to an order that papers required for the conduct of pending litigation be delivered to their new solicitors against an undertaking, which those solicitors are willing to give, to restore them at the end of the litigation and without being required to provide any further security in respect of the costs. However, it was recognised in *Gamlen Chemical Co. (U.K.) Ltd. v. Rochem Ltd.* that the Court can, and in exceptional circumstances will, attach conditions to such an order to meet the overall justice in the case."

Moore-Bick J. then posed the questions whether that case was an exceptional case and, if so, what conditions should the Court impose. He found it to be an exceptional case and directed that the plaintiff client provide security for the defendant solicitors' claim for outstanding costs, which were in the region of £450,000 and related to litigation, some of which had been completed and some of which was ongoing. The rationale for making that order was set out in the judgment (at p. 147) as follows:

> "I can see no basis for criticising [the solicitors'] conduct in this matter, and such indications as there are suggest that in some respects the plaintiffs' attitude may owe more to negotiating tactics than to a real sense of grievance. I accept that the plaintiffs require the immediate delivery of the papers in the three matters mentioned in their summons which remain fully live, but if [the solicitors] are required to hand over the papers on the usual terms their lien is likely to prove of little value when the papers are returned to them. It has not been suggested, on the other hand, that the plaintiffs are likely to suffer any real hardship if they are required to provide security of another kind other than the general effect on their cashflow of having to fund a payment into Court. That is a difficulty which can probably be largely overcome by providing security in some other recognised form. Taking all these matters into account I am satisfied that the interests of justice in this case require that the plaintiffs provide some security for [the solicitors'] claim."

The dispute between the client and the solicitors in the *Ismail* case related to the level of fees which the solicitors should be entitled to charge on a time cost basis in a context in which the solicitors had been acting for some time for the plaintiffs in commercial transactions and litigation in connection with their business of importing potatoes from Egypt, where the disputes involved shippers, owners, hauliers and others involved in the carriage and handling the potatoes, a context far removed from that of these proceedings.

Counsel for the former solicitors also referred the Court to a passage in Silvertown on *Law of Lien* (Butterworths, 1988) in which the author suggests that the equitable rule applied in the *Gamlen* case should be overruled, on the basis that with the advent of civil legal aid it was scarcely applicable. On the obligation of the new solicitor to return the papers to the former solicitor at the termination of the proceedings, the author states (at p. 47):

> "In practice, the second leg of this undertaking is almost worthless, because it removes from the client the need to pay the bill promptly, and virtually erases the strict security aspect of the solicitor's lien."

Because of the limited nature of entitlement to civil legal aid in this jurisdiction, in my view, Silvertown's first suggestion does not require any comment. As regards his second proposition, it contains a large element of truth.

Moore-Bick J. in the *Ismail* case characterised the significance of the solicitor's lien as being "the general right to embarrass his client by withholding papers in order to force him to pay what is due" (at p. 136). While I accept that, in reality, the entitlement to get the papers back at the end of the litigation may be worthless, as I emphasised in my judgment in the *Ahern* case, a direction to hand over papers on the basis of preserving a solicitor's lien does not in any way affect the liability of the client for the costs which have accrued to the former solicitor. Such costs are a matter of contract between the client and the solicitor, subject, of course, to material statute law, including:

> (1) the provisions in relation to taxation of costs on a solicitor and client basis as set out in the Attorneys and Solicitors (Ireland) Act 1849, (the Act of 1849) as amended, which were explained by the Supreme Court in *State (Gallagher, Shatter & Co.) v. de Valera* [1986] I.L.R.M. 3; and
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> (2) the powers conferred on the Law Society by the provisions of ss. 8 and 9 of the Solicitors (Amendment) Act 1994 (the Act of 1994).

The issues

On the basis of what I consider to be the correct legal principles, the issues which arise on this application, in my view, are the following:

> (a) who, as a matter of fact, terminated the former solicitors' retainer, whether it was the plaintiff or the former solicitors and, if the latter, whether the termination was for reasonable cause; and
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> (b) if it was discharged by the former solicitors for reasonable cause, are there any exceptional circumstances in this case on the basis of which the Court should require the plaintiffs to provide security for the costs which have accrued, as the former solicitors contend.

The course of events underlying both issues

The proceedings commenced in 2001. After the death of the testatrix they were reconstituted. By September 2007 the pleadings had got to the stage where the defendants had delivered their defence and counter-claim. The next steps were for the plaintiff to deliver a reply and defence to counter-claim and to consider what discovery was required. On 3rd September, 2007 the former solicitors held a consultation, which was attended by the senior counsel who was briefed in the matter, with the plaintiff and her husband.

Following that consultation, the former solicitors wrote to the plaintiff on 5th September, 2007 reiterating what she had been told at the consultation, that neither senior counsel nor the former solicitors could continue to act for the plaintiff in relation to the matter, because of the manner in which the plaintiff wished to advance the claim. In broad terms, the aspect of the matter which created difficulty for counsel and the former solicitors was that the plaintiff wished to pursue an allegation of professional negligence against the defendants, *qua* solicitors, in respect of the conduct of the circumstances in which the deed of severance was executed. As to the consequences of the former solicitors ceasing to represent the plaintiff, the former solicitors, in my view, adopted a reasonable approach in that letter. They pointed out that they had undertaken a considerable amount of work in relation to the advancement of the proceedings over a period of five years and had incurred outlay. They made it clear that they would be seeking to ensure that there was a methodology put in place to protect their financial exposure and to ensure the expeditious transfer of the file to the nominated new solicitors.

Because these proceedings are still pending, as are separate, but associated, proceedings taken by the plaintiff against the defendants, in which the plaintiff has been represented by the new solicitors from the time the proceedings were initiated in 2006, I consider that it would be inappropriate to express any view on the reasons advanced by the former solicitors for not wishing to proceed. However, an aspect of the matter was that they did not wish to be involved in an allegation of professional negligence against a firm of solicitors who practised in the same locality as they did. Indeed, at the end of the letter of 5th September, 2007, as I understand it, the former solicitors indicated that, even if the plaintiff was prepared to remove the allegations of inappropriate professional behaviour against the defendants, they would feel compromised in continuing to handle the file.

The plaintiff did not ask the new solicitors to take over her representation in these proceedings until July 2008, but in the interim period she sought advice from two other firms of solicitors. The first firm, William Fry, was in correspondence with the former solicitors from mid-September 2007 to the end of November 2007. At the beginning of December 2007 they decided not to continue to act for the plaintiff.

From the outset of that correspondence, the former solicitors continued to evince a reasonable attitude. In a response to a letter of 19th September, 2007 from William Fry seeking transfer of the files, having questioned whether the plaintiff would sign a requisition to tax costs, they stated as follows:-

> "Obviously, we will await the conclusion of the Hearing of the action for the purposes of receipt of any agreed costs or alternatively costs that have been taxed in default of agreement. Furthermore, we shall require an undertaking from your firm to the effect that the amount that is either agreed in respect of costs or, alternatively, taxed in default of agreement, shall be registered as a burden upon the public house premises, if not discharged within three months of the date of completion of the above mentioned proceedings. …..
>
> Obviously, there is merit associated with the above mentioned proposal, in that it allows the file to transfer in the interim period, and the issue of costs to be progressed contemporaneously with the advancement of the claim. In addition, we are prepared to await the conclusion of the action for the purposes of receipt of payment on the basis that this firm's position is adequately well protected."

In the subsequent correspondence, William Fry was seeking a bill of costs, while the former solicitors were advising that the file was with Cyril O'Neill & Co., Cost Accountants, and could be inspected there. They were also seeking suggestions as to the mode of substituting their lien by some other security. Eventually, in a letter of 22nd November, 2007, the former solicitors made it clear that, if William Fry could not give them an undertaking in relation to their costs, they would be seeking payment in advance of the transfer of the file. As I have stated, in early December 2007, William Fry decided not to continue to act for the plaintiff. On 12th December, 2007 they returned a bill of costs drawn by Cyril O'Neill & Co., which had been furnished to them by the first firm on 7th December, 2007.

On 20th December, 2007 the former solicitors furnished the bill of costs directly to the plaintiff. The total amount claimed on the bill in respect of counsel's fees and VAT and other outlays and solicitors' fees and VAT was €57,926.62. Having given the plaintiff credit for payments she had made on account in the sum of €12,442.68, the balance claimed by the solicitors was €45,483.94. The former solicitors furnished to the plaintiff a requisition to tax the costs on a solicitor and own client basis pursuant to Order 99, rule 14(e) of the Rules of the Superior Courts 1986 (the Rules) and requested the plaintiff to have it completed by her incoming solicitor.

The plaintiff's response was to make a complaint to the Law Society about the conduct of her affairs by the former solicitors. A considerable amount of documentation in relation to the processing of the complaint has been put before the Court on this application but it is not clear to me that the Court can get the full picture from that documentation. The Law Society's perspective, as disclosed in a letter of 15th January, 2009 to the former solicitors, is that it received two distinct complaints from the plaintiff between December 2007 and May 2008. The first complaint related to the manner in which the former solicitors acted for the plaintiff in connection with the issues arising in these proceedings. The second was treated by the Law Society as an additional complaint under s. 9 of the Act of 1994 in connection with the amount of the charges of the former solicitors, the complaint being that their fees were excessive, that there was duplication of certain charges and that the former solicitors had failed to give credit for payments previously made on account.

As regards the second complaint, it appears that the Complaints and Client Relations Committee (the Committee) to which both complaints were referred, at its meeting on 25th June, 2008 determined that the question of the fees should be taxed, if they could not be agreed. Accordingly, the Committee agreed with the former solicitors' submission that the bill of costs should be referred to taxation. That information was conveyed to the former solicitors by letter dated 1st July, 2008 from the Law Society. It is not clear to me whether it was ever directly communicated to the plaintiff. It appears that at that stage the plaintiff was not represented by a solicitor in the complaint process, which seems to have created some difficulty for the Law Society. According to the letter of 15th January, 2009, the plaintiff's original complaints were being investigated by the Committee and had been considered on a number of occasions, various directions had been made and they stood adjourned because of the existence of this application. The important point which emerges from the Law Society's involvement in the matter as regards this application, in my view, is that it was the Law Society's view that any issues in relation to the quantum of the bill of costs submitted by the former solicitors was a matter for a Taxing Master on taxation. That is what I would have expected.

The plaintiff has averred that around Easter 2008 she was becoming concerned that her complaint to the Law Society had not resulted in the transfer of her papers to her. At that stage she sought the advice of a second firm of solicitors with a view to making an application to Court for an order directing the transfer of the papers. However she decided to await the conclusion of the Law Society's intervention, which as regards her original complaint is still ongoing.

In any event, as I have stated, the new solicitors agreed to represent her in July 2008. They commenced correspondence with the former solicitors at the end of August 2008 seeking delivery of the documentation. From the outset they proffered an undertaking to preserve the former solicitors' lien and to return the documentation at the end of the litigation. They also proffered an undertaking to prosecute the proceedings in an active manner. The position adopted by the former solicitors in their letter of 3rd October, 2008 was that it was incumbent upon the plaintiff to make some proposal in a constructive manner to discharge the amounts outstanding and to ensure the preservation of the lien in relation to the documentation. In the course of subsequent correspondence, the new solicitors reiterated their willingness to furnish an undertaking that the handover of the documentation would be without prejudice to the former solicitors' lien, to preserve that lien, to notify the former solicitors at the end of the litigation or in the event of their retainer being withdrawn and at that time to return the documentation if so requested, and, finally, to prosecute these proceedings in an active manner. However, the plaintiff did not execute the requisition for taxation, nor was the plaintiff agreeable to furnishing any other security for the outstanding costs due to the defendants. That was the position when this application was initiated.

Who discharged the retainer?

The position adopted by the plaintiff in her grounding affidavit, which was sworn on 10th November, 2008, was that it was the former solicitors, and not her, who decided to discharge their retainer as her solicitors in these proceedings. Mr. Bradley, in his replying affidavit sworn on 16th January, 2009 took a different view. His position was that what transpired at the consultation on 3rd September, 2007 was that the plaintiff and her husband refused to accept the professional legal advice that was given to them. His characterisation of what ensued was that the solicitor/client relationship was "constructively terminated" by the plaintiff as she refused to accept the firm legal advice that the former solicitors and senior counsel provided and instead wished to take a different course. In her supplemental affidavit, which was sworn on 2nd February, 2009, the plaintiff reiterated her position that the former solicitors had discharged themselves from representation of her in these proceedings. She refuted the suggestion that she had constructively terminated their retainer. Moreover, she went on to assert that the former solicitors had no good reason for terminating their retainer as her solicitors and set out facts in support of that assertion. In his supplemental replying affidavit sworn on 9th February, 2009, Mr. Bradley repeated that the major problem was that the plaintiff would not accept the legal

advice given to her by the former solicitors and by counsel and instead appeared to be relying on legal advice that her husband was giving her. He stated his belief that, in such circumstances, no responsible law firm could continue to act.

Having regard to the state of the affidavit evidence, in my view, it is impossible to conclude that there was a constructive termination of the former solicitors' retainer, even if, contrary to the submission made on behalf of the plaintiff, the concept of constructive termination could be said to exist. What is clear is that it was the former solicitors who precipitated the termination of the retainer and, given that this action had not been set down, they gave reasonable notice as required by the Law Society "*Guide to Professional Conduct of Solicitors in Ireland*" (2nd ed.). I think the proper approach to this matter is the approach I adopted in both the *Mulheir* case and the *Ahern* case, that is to say, to assume that the former solicitors terminated the retainer for good reason. I do not accept as correct the submission made on behalf of the former solicitors that, once they had given advice in good faith, the quality of the advice was irrelevant, and failure to follow the advice amounted to constructive termination. On the other hand, having regard to the limited information which is available as to the issues in the substantive proceedings and in the associated proceedings which were instituted in 2006, it is not possible to form any view as to whether it was in the interests of the plaintiff and, consequentially, in the interests of the lawyers representing her, that she follow the advice given to her. Even if it was possible, one would be extremely reticent in expressing a view on the quality of the advice or the likely outcome of the proceedings, given that the substantive proceedings and the associated proceedings are ongoing.

For all of the foregoing reasons, I consider that the proper course is to approach this matter on the basis that the former solicitors terminated their retainer for good reason.

Conditions in relation to delivery of the documentation

The position adopted by the former solicitors is that the plaintiff should not be permitted to have possession of the documentation until the costs which the former solicitors have legitimately incurred have been paid or are at least secured. In the course of the exchanges between the parties, it was suggested, for instance, in the letter of 19th September, 2007 which I have quoted earlier, that the plaintiff could give security over her interest in the licensed premises and dwelling house.

It was not until the hearing of this application that the plaintiff conceded that she would execute the requisition to tax the costs, so as to enable the issues she has raised in relation to the bill of costs to be determined by a Taxing Master in the immediate future. The justification advanced for her failure to do so previously was that she was awaiting the determination of the Law Society on her complaints lest the Law Society might consider it appropriate to include in its determination a direction limiting the costs under s. 8(4)(a) of the Act of 1994, which could be submitted to the Taxing Master when the bill of costs was being submitted for taxation. Apart from that, in her final affidavit sworn on 2nd February, 2009, while acknowledging that she intended to pay to the former solicitors whatever costs are ultimately found to be due to them following the determination of her complaints by the Law Society and the taxation process, the plaintiff asserted that it was agreed by the former solicitors that she would not have to pay until the conclusion of the proceedings. The former solicitors denied that there was any such agreement. I think it significant that the concession made by the former solicitors to defer seeking their costs in the letter of 19th September, 2007 was made on the clear understanding that they would get security.

I consider that there was no justification in the plaintiff refusing to execute the requisition to tax in circumstances where she has disputed the amount of the bill of costs, has complained to the Law Society about the bill and the Law Society has determined that the costs should be taxed. I consider that she should have agreed to the costs being taxed on a solicitor and client basis when she was requested to do so. It is understandable that the former solicitors should perceive her conduct in the manner of her pursuit of her complaint to the Law Society and the prosecution of this application to Court as being a tactic to block them from suing for their fees.

The Court has been asked to afford the plaintiff an equitable remedy. In determining whether to grant that remedy, the crucial question is what terms, other than the giving of the undertaking proffered by the new solicitors, are required to be exacted as a pre-condition to compelling the former solicitors to deliver the relevant documents in the interests of maintaining a just balance between the plaintiff and the former solicitors.

There is one respect in which I regard this case to be exceptional. That is that, while having raised issues as to the quantum of the bill of costs presented to her by the former solicitors, the plaintiff had refused, until the hearing of this application, unconditionally to take the steps necessary to resolve those issues, that is to say, to consent to the matter going for taxation in the immediate future. Allied to that is the fact that the plaintiff by her own conduct has allowed the period within which she is entitled to demand and obtain taxation under the Act of 1849 (the period of twelve months following the expiration of one month after delivery of the bill, as explained by the Supreme Court in the *Gallagher Shatter* case) to elapse. To avoid any further unnecessary intervention of the Court on this point, I am going to treat the plaintiff's position as adopted at the hearing as an application for an order under Order 99, rule 15 of the Rules. On that basis, I will make an order referring the bill of costs for taxation on solicitor and own client basis. I will further direct that the plaintiff take all reasonable steps necessary to facilitate the taxation process in an expeditious manner.

The circumstances of this case, in my view, are not such that justice requires that the plaintiff give the former solicitors security for the costs which will be found due to them in due course as a pre-condition to obtaining an order directing delivery of the documents to the new solicitors. When the bill of costs has been finally taxed, the former solicitors can take whatever steps they consider appropriate to recover the amount due to them. The plaintiff has evinced an intention to discharge the costs, albeit at the conclusion of the proceedings. The equity of the situation will be met if she is prevented from postponing the discharge of her liability until the proceedings are concluded, as she proposed to do. While, in reality, the fact that the former solicitors' lien in its preserved form will not have the potentiality to "embarrass" the plaintiff which the retention of the documents by the former solicitors would have, that, in my view, does not outweigh the necessity for the plaintiff to obtain the documents to prosecute these proceedings, which are over seven years old. To put it another way, I am not convinced that the former solicitors' position in relation to the prospect of their fees not being paid in due course, which is the only prejudice they can possibly incur and which I am not satisfied is more likely than unlikely, is such as to merit an obstacle being placed in the way of the plaintiff prosecuting these proceedings.

Orders

In summary, the orders which the Court will make are as follows:

(1) There will be an order referring the bill of costs delivered by the former solicitors to the plaintiff on 20th December, 2007 for taxation pursuant to the Act of 1849 and the Court's inherent jurisdiction.

(2) There will be an order directing the plaintiff to take all reasonable steps to facilitate the taxation process in an expeditious manner.

(3) Subject to the new solicitors furnishing an undertaking to the former solicitors -

(a) to receive from the former solicitors all files, documents and papers in their possession relating to these proceedings without prejudice to the former solicitors' lien over the same,

(b) to preserve that lien over the said files, documents and papers,

(c) to notify the former solicitors when these proceedings are finalised and/or in the event of the new solicitors' retainer being withdrawn and at that time to return the said files, documents and papers to the former solicitors if so requested, and

(d) to prosecute these proceedings in an active manner, there will be an order directing the former solicitors to deliver the said files, documents and papers to the new solicitors within seven days of receipt of the said undertaking.

(4) As I have already indicated, I direct the new solicitors to file a notice of change of solicitor forthwith.