

## THE HIGH COURT

RECORD NO. 1101P/2005

BETWEEN

SUSAN MARTIN

PLAINTIFF

AND  
NIAL P. COLFER

DEFENDANT

AND

BY ORDER, THE LAW SOCIETY OF IRELAND

NOTICE PARTY

**Judgment of Finnegan P. delivered on the 27th day of April 2006**

1. The Plaintiff and the Defendant are solicitors who practised in partnership. On the 2nd December 2004 the Defendant undertook to the Notice Party not to practice as a solicitor. In separate proceedings under the Solicitors Acts the High Court on the 20th December 2004 received an undertaking from the Defendant not to practice as a solicitor and an undertaking from the Defendant not to reduce his assets below a certain amount. On the 22nd December 2004 the undertaking was varied by increasing the amount below which the Defendant was not to reduce his assets. On the 4th July 2005 the High Court approved the sale of the Defendant's family home and which he owned jointly with his spouse the Defendant undertaking to lodge half the net proceeds of sale with the Notice Party.

2. In the present proceedings the Plaintiff claimed a lien over the title deeds to the Defendant's family home. By agreement between the parties the sale of the family home was completed on terms that the Plaintiff should be secured on the proceeds of sale to the like extent as secured by her solicitor's lien if any. The issue before me is whether the Plaintiff enjoyed a lien, either a general or retaining lien or a special lien over the title deeds to the Defendant's family home.

3. In late November 2004 the Notice Party's investigating accountant inspected the solicitors practice and discovered a significant shortfall in clients' funds. The investigation was prompted by the Plaintiff alerting the Notice Party to her concerns. The Plaintiff contends that the partnership terminated on the 2nd December 2004 upon the Defendant undertaking to the Notice Party that he would not practise or attend at the firm's premises: see Partnership Act 1890 section 34. For the purposes of determining the issue before me and without prejudice to the entitlement of the parties to litigate the question at the hearing of the action should that be necessary I accept that the partnership was so dissolved. At that date there were a large number of files in respect of which fees had been paid on which a great deal of work remained to be done. The Plaintiff claims that the Defendant instructed her to complete the work on these files and that she did so at her own expense. Further the Plaintiff was appointed by the Notice Party to administer the practice pursuant to the Solicitors Act 1960 section 19 as substituted by the Solicitors (Amendment) Act 1994 section 27 and in that capacity incurred very considerable expense in terms of costs and outlay. In respect of these expenses she claims reimbursement by the Defendant and/or the Notice Party. She claims to be entitled to a general or retaining lien or a special lien on the title deeds to the Plaintiff's family home in respect of the amounts which she claims for costs and expenses.

4. The circumstances in which it is claimed the lien arose are as follows. In 1999 the Defendant's family home was the subject of a mortgage in favour of the Irish Civil Service Building Society upon which approximately IR£100,000 was outstanding. On the 29th September 1999 the Building Society issued an offer of advance in respect of a top up loan in the amount of IR£20,000. At that time the Plaintiff was a solicitors apprentice to the Defendant and was instructed to collect the title deeds to the family home on accountable receipt from the Building Society and did so. The accountable receipt was in the following terms –

"Received the documents as set out hereunder from Esmond Reilly Solicitors, Dargan House, Fenian Street, Dublin 2 to whom we undertake to return the documents on demand and we further hereby undertake to hold the documents in trust for the ICS Building Society and not to do any act which would enable the above property to be dealt with without the Society's consent or which would endanger or prejudice the Society's security. In default of our undertaking we hereby agree to pay to ICS Building Society the full amount of their claim in respect of the documents."

5. The loan was drawn down in December 1999. The title deeds however remained in the possession of the Defendant on terms of the accountable receipt which I have quoted. The Defendant obtained a further offer of loan from the Building Society dated 9th June 2004. The loan transaction proceeded in accordance with the Building Society's standard procedure. A Solicitors Pack was issued. The loan cheque was made available upon the completion and return to the Building Society's solicitor of a solicitor's undertaking and compliance with certain other requirements. The solicitor's undertaking provided that pending stamping registration and lodgement of title deeds with the Society the solicitor should hold all title documents in trust for the Society. The undertaking was duly completed on the 24th May 2004 and returned to the Society and the cheque drawn down.

6. In the circumstances insofar as the title deeds were held in the office of the solicitor's practice they were held on the terms of the accountable receipt of 1999 and the solicitor's undertaking of 24th May 2004.

7. The loan offer of 17th May 2004 contains a number of special conditions. Special Condition (v) provides as follows –

"(v) In view of the purpose of this loan, solicitors are required to confirm in writing that you have both availed of independent legal advice in relation to the transaction."

8. "Both" refers to the Defendant and his spouse who was a joint owner of the family home. In order to comply with the special condition the Plaintiff states that she advised the Defendant and the Defendant's spouse independently and for this purpose came into possession of the title deeds. After the dissolution of the partnership she was again in possession of the title deeds in her sole right. The defendant denies that the Plaintiff so advised him or his spouse. By letter dated 24th September 2004 on the firm's stationery addressed to the Building Society and signed by the Plaintiff the Plaintiff confirmed that she had consulted with the Defendant and his spouse independently as required by the special condition.

9. Arising out of the foregoing circumstances the Plaintiff raised a Bill of Costs in relation to the independent advice and a Bill of Costs in respect of work done on the completion of work outstanding on files at the request of the Defendant. In respect of these costs she claims that she had a general or a special lien over the title deeds to the Defendant's family home and pursuant to the agreement which I mention that the same now extends to the proceeds of sale of the family home.

10. In *Re Galdan Properties Limited (In Liquidation)* 1988 IR 213 the company's solicitors had taken up the title deeds to the

company's property for the purpose of a sale on accountable receipt from the Industrial Credit Corporation Limited the mortgagees of the premises and which accountable receipt acknowledged that the title deeds were held in trust for the ICC. The Supreme Court held that as the solicitor held the title deeds expressly as trustee for the Industrial Credit Corporation Limited his possession was inconsistent with the existence of any lien over the deeds. In the course of his judgment McCarthy J. at p. 216 said -

"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 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 ICC, their possession of the title deeds was entirely conditional and, expressly, as trustees for ICC. No doubt ICC 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; in no sense did the case resemble the facts in *Caldwell v Sumpters* (1972) Ch 478 where the original solicitors who had established their lien handed over the deeds to new solicitors with a unilateral reservation. For these reasons it seems to me the liquidator's second proposition is correct in fact and sound in law. In the *Caldwell* case the new solicitors received the deeds as agents for the original solicitors and the unilateral reservation was upheld; here ICC received the title deeds not as agents or trustees for Haughtons, but as of right as the body entitled to possession."

11. The general rule is that the solicitors retaining lien extends to any deed or other papers which come into his possession in the course of his employment and in his capacity as a solicitor with the client's sanction and which is the client's property.

12. The decision of the Supreme Court is consistent with the authorities: see *Re Clarke, Ex p Newland* (1876) 4 Ch.

13. In *Barratt v Gough Thomas* 1951 1 Ch 243 the position was as follows. The Plaintiff purchased property and the Defendant acted as his solicitor the Defendant retaining the title documents. Some years later the Plaintiff mortgaged the property the Defendant acting for both the Plaintiff and the mortgagee and again the title documents remained in the Defendant's possession. Evershed MR held that the Defendant's retention of the mortgage deed and title documents was exclusively referable to his agency for the mortgagee and that the Plaintiff on execution of the mortgage ceased to have any right or title to documents from which any lien could be derived. The lien had ceased because the conditions necessary to support it had ceased to exist. On redemption of the mortgage it was the mortgagee's duty to hand back the deeds to the Plaintiff and that duty the Defendant as the mortgagee's solicitor was bound to perform; he could not discharge that duty by handing the deeds to himself on the Plaintiff's behalf unless he had the authority of the Plaintiff to do so. In the course of his judgment Evershed MR at p. 250 said -

"When the characteristics of the lien have been stated, serious difficulties at once appear in the way of Mr. Cross's contention. In my judgment the capacity by reference to which the documents are held are essential. The absence at any time of any right to or property in the documents on the part of the client seems, as a matter of principle, fatal to the continued existence of the lien. The fact that the mortgagee's solicitor is able to assert a lien against his client the mortgagee postulates a deposit of the deeds with the solicitor by the mortgagee which appears necessarily inconsistent with the conception of a continuing deposit of the same deeds by the mortgagor. Since Mr. Cross admits that loss or possession in fact by the solicitor will (save in special circumstances) operate to determine the lien, its existence must to some extent be capricious and hazardous."

14. Reference is made by Evershed MR in the judgment to *Colmer v Ede* 40 L.J. (Ch) 185 an Irish case where the facts were essentially the same and it was held that the solicitor's lien had not been lost: insofar as a different conclusion appeared to have been reached in that case Evershed MR overruled the same.

15. In *Re Nicholson* 53 L.J. (Ch) 302 Bacon VC overruled without referring to the same his decision in *Re Messenger* 3 Ch. D. 317. In the course of his judgment he said -

"A solicitor's right to a lien on deeds and papers depends on his possession and on the question for whom the deeds are held. There was a time when these deeds belonged to Nicholson; but the time came when he wanted money, and the Appellants were requested to procure him an advance on these deeds, which they did, obtaining the money from another client. In so doing they undertook duties of a twofold character. It was their duty to deduce a good title to the mortgagee, and, when the money was paid to hand the mortgagor's deeds to him. If they had declined to hand them over, the mortgagee could have compelled them to do so; and his right to compel the handing over of these deeds is totally inconsistent with any right being left in the mortgagor to continue to hold them. The title deeds, on payment of the mortgage money, became the mortgagee's, and the mere fact that they remained in the hands of his solicitors who happened also to be solicitors for the mortgagor cannot alter the rights of the parties."

16. Again in *Re Snell* 6 Ch. D. 105 Jessel MR held to the like effect.

17. There are several other cases in which it has been held that the capacity in which a solicitor holds title deeds is of the essence of the matter and that agency for a mortgage is incompatible with agency at the same time for the mortgagor: see for example *Sheffield v Eden* 10 Ch. D. 291.

18. In these circumstances I am satisfied that at the time the Plaintiff claimed a lien on the Defendant's title deeds the deeds were held by her subject to the trust created by the accountable receipt of 1999 and not as agent of the Defendant. No lien in these circumstances could have arisen. The deeds did not after redemption of the mortgage come into possession of the Plaintiff and it is unnecessary to consider whether a lien could have arisen had they done so. Pursuant to the agreement between the parties the rights of the Plaintiff pursuant to her lien if one existed attached to the purchase money: as no such lien existed the purchase money is not affected by the agreement. Accordingly I find that the Plaintiff had no lien on the Defendant's title deeds in respect of costs due to her and whether by way of a general or retaining lien or a special lien.