

THE HIGH COURT

[2010 No: 99 SA]

IN THE MATTER OF SECTION 7(12A) (a) OF THE SOLICITORS DISCIPLINARY TRIBUNAL ACT 1960

BETWEEN

WILLIAM CORKERY

APPELLANT

AND

MELANIE HOLMES

RESPONDENT

JUDGMENT of Kearns P. delivered on the 17th day of January, 2011

This is an appeal by William Corkery ("the appellant") against a decision of the Solicitors Disciplinary Tribunal ("the Tribunal") dated 29th October, 2010 that there is no *prima facie* case of misconduct on the part of Melanie Holmes, the respondent solicitor, of Holmes O'Malley Sexton, Solicitors, Bishopsgate, Henry Street, Limerick.

In the application to the Tribunal for an inquiry into the conduct of the respondent solicitor on the grounds of misconduct, the appellant alleged that: the respondent solicitor acted without his retainer, instruction or knowledge; engaged in conduct which was misleading and contrary to her position as a solicitor and an officer of the court; and failed to keep him and his retained solicitor informed on the progress of the matter and copy relevant correspondence. It was further alleged that the respondent solicitor failed to use her professional discretion to write to the appellant and his retained solicitor, when his retained solicitor had not responded to correspondence from her; that the appellant failed to adhere to proper procedure in respect of the conduct of the defence of the case including, obtaining his instructions to act on his behalf and deal with the appropriate notice of change of solicitor; and that the respondent solicitor failed to reply promptly and in detail to letters written to her firm. Finally, the appellant alleged that the respondent solicitor used her position to take advantage for herself and others; was not open and honest in her dealings with the appellant or his retained solicitor; and failed to deal with the appellant's personal expenses and professional fees/outlays in respect of his retained solicitors and others.

Each of the allegations made by the appellant against the respondent solicitor was rejected by the Tribunal because of absence of evidence to support the allegation or because in the circumstances of this particular case, the allegation, even if proven, could not amount to conduct which could be construed as misconduct.

AFFIDAVIT OF WILLIAM CORKERY

In the affidavit of the appellant sworn on 12th November 2010, the appellant describes how he and his brother Denis Corkery were named as "joint executors and trustees" in the will of their father, Patrick Corkery who died on 14th December, 1995. The appellant and Denis Corkery retained Maurice Power & Co Solicitors, Kilmallock, Co. Limerick for the provision of professional services in the administration of the will of Patrick Corkery.

In his will, Patrick Corkery bequeathed his dwelling to his wife, Lelia Corkery, for life. On 21st February, 2001, Lelia Corkery served an Equity Civil Bill on the appellant and Denis Corkery, for failure to advise her as to her rights, in particular her right of election/appropriation of the private dwelling house where she and the late Patrick Corkery resided. The appellant retained M.J. Horgan & Sons Solicitors, 50 South Mall, Cork to respond to the Equity Civil Bill, and an Appearance and Defence to the Circuit Court proceedings was entered on behalf of the appellant in or around March 2001.

On 8th April, 2003, Mr Gordon Holmes of Holmes O'Malley Sexton wrote to M.J. Horgan & Sons regarding the Circuit Court proceedings. In this letter Mr. Holmes stated *inter alia* the following:

"...it is quite accepted that the two executors of the will entrusted the administration of the Estate to Messrs. Powers and therefore should not be at any loss from whatever cause arising in the matter.

We have accordingly been instructed to take over the proceedings on behalf of both Denis and William Corkery which will be conducted at no cost to your Clients."

This letter was passed on to the appellant by M.J. Horgan & Sons by way of letter on 8th April, 2003. On 16th November, 2003, following consideration by the appellant of his counsel's opinion, he instructed M.J. Horgan & Sons *inter alia*, that no enquiries be made with Holmes O'Malley Sexton on his behalf.

During August 2008, the appellant was made aware by his brother Michael Corkery, that the Circuit Court proceedings were settled in May 2004. The appellant says that he was very concerned and perplexed as to how the proceedings were settled without his knowledge and that none of the solicitors involved advised him of the settlement of the proceedings.

On 22nd September, 2008, the appellant retained Cashin & Associates Solicitors, Ennis, Co. Clare to pursue his concerns. On 24th May, 2010, the appellant lodged an application with the Tribunal alleging primarily that the respondent solicitor's failure to serve the Notice of Change of Solicitor on the appellant's then solicitors, M.J. Horgan & Sons constitutes misconduct.

REPLYING AFFIDAVIT OF MELANIE HOLMES

In the replying affidavit of the respondent solicitor sworn on 29th November 2010, the respondent states that she worked as an associate solicitor with Holmes O'Malley Sexton Solicitors up to and including July 2008.

The respondent explains that as the matter of advising Lelia Corkery was the obligation of the solicitors handling the estate (*i.e.* Maurice Power & Co., Solicitors), they referred the matter of the Circuit Court proceedings to their insurers, Royal & Sun Alliance. She states that Royal & Sun Alliance advised Maurice Power & Co., Solicitors to take over the running of the action at no cost to the estate of William Corkery, and to discharge any legal costs that arose. Royal & Sun Alliance instructed Holmes O'Malley Sexton to represent Maurice Power & Co., Solicitors in the proceedings.

This offer to pay the appellant's costs was originally transmitted to the appellant's then solicitors, M.J. Horgan & Sons on 4th April, 2003. The respondent solicitor swears that Denis Corkery, the appellant's co-executor, was quite in agreement with this offer. The respondent states that due to an administrative error the Notice of Change of Solicitor was filed thereafter by Holmes O'Malley Sexton who then took over the running of the case on behalf of Denis Corkery and the appellant, from whom they had not received any instructions. The respondent says that this was done due to an oversight and at no stage was there any suggestion that there would be any costs to the appellant.

The respondent attended the hearing of the action on behalf of Holmes O'Malley Sexton in Clonmel Circuit Court on 4th May, 2004, when the matter was settled to the satisfaction of the plaintiff, Lelia Corkery. The respondent states that there can be no loss to the appellant as a result of the oversight, as the executors were being fully indemnified for their costs and expenses in the matter at all times. The respondent also states that the Notice of Change of Solicitor was filed following a letter from Holmes O'Malley Sexton to the appellant's solicitors on 4th April, 2003. The respondent says that she was not involved in the running of the file when the Notice of Change of Solicitor was filed. She also says that an apology for the error was transmitted to the appellant, as well as an offer to discharge any legitimate expense to which the appellant was put.

The foundation of the appellant's alleged misconduct case against the respondent is her failure to serve the Notice of Change of Solicitor on his then solicitors. In relation to this failure, the following points are pertinent to the charges leveled by the appellant:

(i) By letter from Holmes O'Malley Sexton to the appellant's solicitor dated 4th April, 2003, the appellant was made aware that Holmes O'Malley Sexton would be taking carriage of the Circuit Court proceedings. The appellant did not respond in any way to this letter, or raise any objections or concerns. If the appellant had a difficulty with the content of the letter, he should have raised this when the letter was received. Given the appellant's decision to do nothing when he was informed Holmes O'Malley Sexton would be representing him in the Circuit Court proceedings, it is difficult to say he would have reacted differently if the respondent had actually served the Notice of Change of Solicitor on his solicitors.

(ii) The appellant issued instructions to his solicitor on 16th November, 2003 that no enquiries be made with Holmes O'Malley Sexton on his behalf. There is a contradiction between the appellant's explicit instructions that no contact be made with Holmes O'Malley Sexton on the one hand, and his complaint that Holmes O'Malley Sexton failed to keep him and his retained solicitor informed of the progress of the matter on the other. By expressly instructing that no contact be made with Holmes O'Malley Sexton, the appellant himself contributed to the absence of communication between the parties.

(iii) The appellant states that on 15th April, 2004, his solicitor informed him that, as there had been no contact from any of the parties to the proceedings, his mother did not seem to have an interest in pursuing the claim. The fact that the proceedings were in fact settled without the appellant's knowledge, instead of being left in abeyance, did not effect the appellant's position. The proceedings were settled at no cost to the estate of Patrick Corkery and in real terms the appellant was in no different a position that proceedings were settled, than if the proceedings were in abeyance. The appellant does not demonstrate any prejudice suffered to him as a result of not being involved in the proceedings, or demonstrate any way which he would have influenced the proceedings, had he been involved.

The Court acknowledges that the respondent should not have filed the Notice of Change of Solicitor on behalf of the appellant without his instruction, or alternatively, should have served the filed Notice of Change of Solicitor on the appellant's then solicitor once effected. However, such failure does not meet the legal standard of misconduct. The respondent has apologised for the oversight and offered to pay any costs incurred to the appellant.

The Court is satisfied that the finding of the Tribunal of no *prima facie* case of misconduct on the part of the respondent solicitor was appropriate and that in consequence the within appeal can not succeed.

I therefore dismiss the appeal.