

## THE HIGH COURT

[2012 No. 11 S.A.]

## IN THE MATTER OF THE SOLICITORS ACTS 1954- 2008

## BETWEEN

GRACE JONES

APPELLANT

AND

MICHAEL O'BRIEN

RESPONDENT

JUDGMENT of Kearns P. delivered on the 23rd day of April, 2012

This is an appeal by Grace Jones ("the appellant") against a decision of the Solicitors Disciplinary Tribunal ("the Tribunal") dated 23rd January, 2012 that there was no misconduct on the part of Michael O'Brien of Barry C. Galvin & Son, 91 South Mall, Cork ("the respondent").

On 16th December, 2010 the appellant herein applied for an inquiry into fourteen counts of alleged misconduct of the respondent solicitor. Over the following months, affidavits were submitted by the appellant and the respondent. On 13th July, 2011 the Tribunal found that there was no *prima facie* evidence of misconduct in relation to twelve of the complaints, but that there was a *prima facie* case of misconduct for inquiry in respect of two of the complaints, namely

(i) from the respondent's correspondence to the appellant, the respondent led the appellant to believe that she would recover all of her costs arising out of her personal injuries litigation, and not a partial amount of them; and

(ii) the appellant wrote to the respondent on 18th June, 2007 asking him to commence the execution of her late mother's will which was with the respondent's firm. The respondent did not respond to this request until 4th February, 2008. The appellant states that this eight month delay in probating her mother's will was a contributory factor in her mother's home being vandalised, and resulted in the property being more difficult to sell because of the collapse in the property market.

On 1st December, 2011 the Tribunal held an inquiry into the two complaints, which the appellant and respondent attended. On 23rd January, 2012 the Tribunal issued its decision in relation to the matter. In relation to the costs issue, the Tribunal found that the evidence adduced did not support a finding of misconduct against the respondent. Regarding the execution of the appellant's late mother's will, the Tribunal found that the conduct of the respondent did not meet the standard required to be deemed misconduct.

By notice of motion and grounding affidavit dated 13th February, 2012 the appellant seeks to appeal the findings of the Tribunal. In the appellant's grounding affidavit the appellant states that, in addition to the Tribunal decision of 23rd January, 2012, she wishes to appeal the Tribunal finding of no misconduct in relation to the other twelve complaints against the respondent made on 15th July, 2011. As the appellant is outside the timeframe permitted to appeal the Tribunal decision of 15th July, 2011 the Court cannot give specific consideration to these complaints. However, in the interests of completeness I have thoroughly examined all documentation and correspondence submitted in arriving at my decision in this ruling.

**AFFIDAVIT OF GRACE JONES**

On 30th May, 2005 the appellant was involved in a road traffic accident. The appellant initially instructed Nora Gallagher & Company Solicitors regarding personal injuries litigation as a result of the accident. On 30th April, 2007 the respondent solicitor took over the appellant's file from Nora Gallagher & Company Solicitors. The appellant discharged all fees for professional services rendered by Nora Gallagher & Company Solicitors prior to instructing the respondent.

Firstly the appellant avers that the statement in correspondence from the respondent solicitor to her dated 22nd January, 2009, that costs incurred in pursuing the defendant would be recovered, led her to believe that this included the costs of Nora Gallagher & Company Solicitors, previously discharged by her.

Secondly, the appellant alleges misconduct on the part of the respondent solicitor in his handling of her late mother's will (Cecilia Ward). On 18th June, 2007 the appellant wrote to the respondent solicitor asking that probate commence to be taken out in connection with her late mother's estate. In that letter she also stated that "there is a will on file with yourselves regarding this", referring to the firm of Barry C. Galvin, and she attached her mother's death certificate. The appellant received no response from the respondent solicitor in relation to her mother's will until 4th February, 2008 when, following a file review, the respondent wrote to the appellant stating that they had no record of ever receiving a will of Cecilia Ward and asking the appellant to clarify. On 5th February, 2008 the respondent located the will of Cecilia Ward and passed it to another solicitor in the firm, Rosemary Cremen, who commenced to probate it. Probate for the will of Cecilia Ward was issued in May, 2009.

The appellant's late mother's house was vandalised in April, 2008 which the appellant attributes to the delay in probating her mother's will, as it was known locally that the house was vacant for an extended period of time. The appellant also believes that had the will of her late mother been processed expeditiously, she would have been able to sell the house more quickly in early 2008, prior to the economic downturn.

**AFFIDAVIT OF THE MICHAEL O'BRIEN**

In the respondent solicitor's affidavit sworn on 1st March, 2012, he avers that he did not at any time suggest to the appellant that she would be entitled to recover the professional fees paid by her to her previous solicitor from the insurers of the defendant to her personal injuries litigation.

Regarding the respondent's delay in dealing with the appellant's late mother's will, the respondent states that, following receipt of the appellant's instructions on 18th June, 2007 he checked the appellant's personal injuries file and no will was enclosed. The respondent avers that no enquiry was made by the appellant over the next seven and half months despite twelve letters being engaged by them. On 4th February, 2008 further to a file review, the respondent noted the reference to the will of the appellant's late mother and wrote to her enquiring into this issue. On 5th February, 2008 the will of Cecilia Ward was located and proceeded to probate.

## **RULING**

Following careful examination of all the correspondence and documentation submitted the Court finds as follows.

In relation to the appellant's allegation that the respondent led her to believe that costs paid to Nora Gallagher & Company Solicitors would be recovered, the Court notes the letter from the respondent to the appellant dated 22nd January, 2009 wherein he states

"...in due course when we recover damages from the defendant, we will also recover the costs incurred in pursuing the defendant. You will therefore not be liable to pay this firm any legal costs at the conclusion of this case."

The letter specifically states that the appellant will not be liable to pay legal fees "to this firm" *i.e.* Barry Galvin & Son. Whilst legal costs paid to Nora Gallagher & Company are not expressly excluded, it not reasonable to infer, that these costs would be included in costs recovered. In the letter the respondent referred only to the costs of his firm. The Court does not accept this letter as sufficient evidence to ground the appellant's belief that fees paid to Nora Gallagher Solicitors would be included in legal costs recovered. I therefore make no finding of misconduct against the respondent solicitor on this count.

The Court acknowledges the appellant's complaint against the respondent solicitor regarding the delay in probating her late mother's will. In the appellant's letter to the respondent solicitor dated 17th June, 2007 the appellant issued a clear request that probate commence to be taken out in connection with her late mother's estate. The appellant also stated that there was a will on file "with yourselves" regarding this, meaning the firm of Barry C. Galvin.

The Court does not accept, in the respondent solicitor's defence, that the appellant did not make enquiries in relation to the issue over the following months. Having issued instructions, the respondent solicitor should have pursued the matter immediately and made further enquiries within his own firm or from the appellant. However, the Court is satisfied that once the respondent became aware of his error, he acted immediately to rectify it. The conduct of the respondent in this regard was an oversight, and does not amount to misconduct.

In relation to the other 12 complaints, having reviewed all of the correspondence and documentation I make no finding of misconduct against the respondent solicitor.

I therefore dismiss the appeal with no order as to costs.