

THE HIGH COURT

[2013 No. 61 SA]

IN THE MATTER OF THE SOLICITORS ACTS 1954 - 2011

BETWEEN

SEAN CAWLEY

APPELLANT

AND

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

JUDGMENT of Kearns P. delivered on the 15th day of July, 2013

By notice of motion returnable 17th June, 2013 Sean Cawley ("the appellant") is appealing against a finding of the Solicitors Disciplinary Tribunal ("the Tribunal") of 1st May, 2013 that there is no *prima facie* case of misconduct on the part of the solicitor Robert Ashe.

BACKGROUND

Maureen Regan died in January 2002 a widow without issue whose next of kin were her sister Mrs. Cawley, mother of the appellant, and twenty nephews and nieces (including the appellant). Mrs. Regan had made a will appointing the appellant as executor and sole beneficiary of her estate which consisted of a house and items valuing a total of €141,218.99. On 23rd April, 2003 two of Mrs. Regan's nephews, Michael Cawley and Niall Cawley, issued a summons claiming that the will was not properly executed as the deceased lacked testamentary capacity and did not know or understand the contents of the will and that the appellant exercised undue influence over the deceased at the time the will was made. Initially, the appellant represented himself but then asked the solicitor Mr. Ashe to act on his behalf in October 2004 and Mr. Ashe in turn instructed Brian Sperin S.C. in relation to the matter in June 2005. The plaintiffs delayed matters throughout and refused to consent to allowing a substituted defence to be entered for the existing defence. A motion to allow this was brought and they finally conceded. Then a motion to dismiss for want of prosecution was issued and after two adjournments the plaintiffs agreed to withdraw the case on the basis that each party would bear their own costs. The appellant has succeeded to the entirety of Mrs. Regan's estate.

AFFIDAVIT OF THE APPELLANT

In the affidavit of the appellant which was filed on 23rd May, 2013, Mr. Cawley avers that the Tribunal found that 10 out of 53 claims did not disclose conduct which could be construed as misconduct and in the remaining 43 claims it found that the solicitor's rebuttal was adequate. Mr. Cawley claims that his solicitor, Mr. Ashe, advised him to produce a replacement defence which Mr. Cawley avers was "unnecessary, could be deceitful and could only serve the purpose of delay." According to Mr. Cawley, this amended defence was advised in 2005 but was not filed until 2010 and during this period Mr. Cawley avers that he was led to believe that the amended defence was being revised. It is claimed that Mr. Ashe allowed amended affidavits to be filed which contained errors, and erased reference to the essence of his defence and that the process was deliberately delayed (and the other party's solicitor was facilitated in omitting to act). He also claims that he was deliberately misled by the solicitor and denied Senior Counsel's opinion.

At para. 5 of his affidavit Mr. Cawley sets out in more detail the allegations against the solicitor. It is claimed, *inter alia*, that Mr. Ashe

- i) perverted the course of justice by delaying the hearing between October 2004 and November 2011;
- ii) avoided complying with Superior Court Rules and the solicitors Act, *inter alia*, by not providing an estimate of costs at the outset and by removing crucial evidence from the appellant's filed defence and affidavit of scripts;
- iii) misled his client as to the proper law applying to the administration of the estate;
- iv) caused his client to feel coerced to consider settlement by alluding to 'large costs' and improperly blamed the delay on the other side;
- v) ignored his clients instructions for an early trial, to seek the approval of the High Court to sell the property, to serve a motion to set the matter down for trial, and used a fear of being burdened with costs to dissuade him;
- vi) issued dishonest replacements for his clients filed defence, pretended to comply with due process and sought more monies, by July 2011 he demanded €18,540 when no trial date was being set; and
- vii) acted in an oppressive manner and misled his client in relation to his rights and interests.

The respondent avers that the solicitor's replies to the allegations are confusing and unclear and fail to rebut the 43 items to an adequate extent. He also refutes the assertion that Mr. Ashe advised him to run a motion to dismiss for want of prosecution and asserts that Mr Ashe knew of the plaintiff's solicitor's wrongful delays from March 2002 until October 2004 and permitted the plaintiff's solicitor to continue until November 2011. He maintains throughout that no action was taken to settle in a timely manner.

There is no replying affidavit on file on behalf of the Solicitors Disciplinary Tribunal.

DECISION

From the appellant's affidavit the appeal may be summarised under the following headings:

- (1) delay which includes the issues regarding the validity of the will;
- (2) refusal to supply the appellant with the advice of senior counsel;
- (3) failure or refusal to supply the appellant with an estimate of costs;
- (4) misleading the appellant as to the awarding of costs and coercing him into considering settlement by alluding to large costs;
- (5) ignoring the appellant's instructions, initially, in not bringing the case for hearing and later in refusing or failing to agree a motion to dismiss; and
- (6) causing a defence to be filed with errors on it and with crucial evidence missing from the affidavit of scripts.

DELAY

In the affidavit of Robert Ashe, sworn 5th November, 2012, it is averred in relation to delay that he had significant concerns regarding the outcome of the hearing, that while Mrs. Regan had been certified as being of sound mind and the will appeared to have been properly executed he formed the clear view that the circumstances in which the will was made gave rise to a real concern in relation to the allegation of undue influence. These included the fact that the testatrix was residing with the appellant and his wife and that the appellant had introduced her to the solicitor who made the will. Mr Ashe claims that he was concerned from the outset regarding the risk to the assets in the estate and conveyed this to the appellant. On 25th August, 2008 he wrote to the appellant informing him that a full hearing was best avoided and explaining the reasons for the delay.

In relation to the allegation that he failed to go on record until 2010, Mr. Ashe states that there were many difficulties that contributed to this delay: there were problems in assembling information (difficulties were encountered in obtaining the full notes and papers from solicitor John O'Sullivan relating to the making of the will despite repeated requests - upwards of 50 faxes and numerous phone calls - and these were not received until late in 2007); the appellant refused to allow a replacement senior counsel to be instructed in the matter; and the plaintiffs refused all requests to consent to substitution of pleadings.

Finally, Mr. Ashe avers that when it became clear that the plaintiffs were not intending to progress the case he advised his client that a motion should be brought to have the case dismissed for want of prosecution but Mr. Cawley did not want to follow this course of action preferring instead to proceed.

From the foregoing it seems clear that Mr. Ashe in no way attempted to delay the proceedings. On the contrary he appears to have made every effort to obtain the information required and advised his client accordingly.

REFUSAL TO SUPPLY THE APPELLANT WITH THE ADVICE OF SENIOR COUNSEL

In relation to the allegation that the appellant was refused the advice of counsel the respondent solicitor states in his affidavit that these advices were expressed in a letter which contained short references to difficulties which may be encountered in the handling of the matter and the respondent solicitor did not consider this to be of assistance in progressing the matter and so did not forward these to the appellant. I find no other option but to agree with the decision of the Tribunal that this allegation has been adequately rebutted by Mr. Ashe.

FAILURE OR REFUSAL TO SUPPLY THE APPELLANT WITH AN ESTIMATE OF COSTS

Mr. Ashe avers that in relation to the estimation of costs he advised the appellant throughout about the costs involved and it is for this reason that he advised settlement. This is reflected in the letters exhibited to his affidavit and again I can find no reason to depart from the finding of the Tribunal on this issue.

MISLEADING AND COERCING THE APPELLANT REGARDING SETTLEMENT BY ALLUDING TO LARGE COSTS

The claim by the appellant that Mr. Ashe referred to items relating to fees and costs is admitted by the solicitor but he denies that he misled the appellant as to the awarding of cost or that costs were used to coerce the appellant into considering settlement. He avers that referring to costs and fees was done for good reason as the estate stood to suffer at hearing unless the case was without fault. As already stated, Mr. Ashe was of the opinion that there were significant risks in bringing the matter for hearing. Furthermore, the plaintiff's solicitor had a very strong opinion that costs would be awarded out of the estate.

IGNORING THE APPELLANT'S INSTRUCTIONS

Mr Ashe avers that the assertion that he ignored instructions by failing to set the case down for hearing is untrue and the efforts he made in progressing the case can be seen in the above paragraphs relating to delay. He also describes the assertion that he failed to agree a motion to dismiss as completely untrue and that it was his suggestion that such a motion be brought and that this motion was then resisted by the appellant. Once again I can see no reason to interfere with the decision of the Tribunal in finding that this allegation has been adequately rebutted by the solicitor.

CAUSING A REPLACEMENT DEFENCE TO BE FILED WITH ERRORS ON IT AND WITH CRUCIAL EVIDENCE MISSING FROM THE AMENDED AFFIDAVIT OF SCRIPTS

The issues relating to the replacement defence are dealt with under allegations 22 (failure to make material corrections to the replacement defence) and 33 (failure to advise that in replacing the appellant's defence and affidavit of scripts crucial professional certification on which the defence depended would be excised) of the decision of the Tribunal dated 1st May, 2013 and the Tribunal found that these allegations had been adequately rebutted. Mr. Ashe in his affidavit avers that Mr. Sperin S.C. directed that the defence filed by the appellant needed to be replaced by a revised defence and associated affidavits. He continues that there was a delay in receiving papers from solicitor John O'Sullivan relating to the making of the will and that he then interviewed the solicitor, his assistant and the appellant before forwarding papers to Junior Counsel to draft a defence and other required documents. This suggests to the Court that every effort was made on the part of Mr. Ashe to ensure that a complete and thorough defence along associated affidavits were prepared for hearing.

Having carefully reviewed all of the papers before me, including the affidavits of the appellant and the solicitor Mr. Ashe and the transcript of the Tribunal inquiry, I am of the opinion that the appellant has not made out a sufficient case as to why the Court should allow the appeal against the findings of the Tribunal. The appellant in his affidavit, filed 23rd May, 2013, has merely repeated the claims made in his earlier affidavits before the Tribunal and has offered no explanation as to why the findings are incorrect. From Mr. Ashe's affidavit I find his responses to be clear and unambiguous and adequate in the circumstances. He has addressed the

allegations made by the appellant in a coherent and satisfactory manner. The appellant has failed to furnish any evidence before the Court that would warrant allowing the appeal against the Tribunal. I cannot, therefore, go as far as finding from the evidence before me that the Tribunal erred in any way in its findings. Consequently, I am satisfied that the findings of the Tribunal of no case of misconduct on the part of Mr. Ashe are correct.

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