Neutral Citation Number [2006] IEHC 274

THE HIGH COURT

2005 NO. 608 SP

BETWEEN

MICHAEL MULHEIR AND MARIE ARNOLD

PLAINTIFFS

AND

GERARD GANNON,
PRACTISING UNDER THE STYLE AND TITLE OF
CLAFFEY GANNON SOLICITORS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 17th July, 2006

The proceedings

1. There are some unsatisfactory procedural aspects of these proceedings, which were initiated by special summons which issued on 9th December, 2005 and which are being prosecuted by the plaintiffs in person. I will deal with those aspects at the outset.

2. First, each of the plaintiffs is a former client of the defendant who practises as a solicitor in Castlerea, County Roscommon. When this matter was first before the court on 8th May, 2006, the plaintiffs' claim was set out in the special endorsement of claim on the special summons as follows:

> "The plaintiffs' claim is for the delivery by the defendant(s) of all files, documents, papers, exhibits, including all originals held in the possession of the defendant(s) relating to the plaintiffs in all matters, including the proceedings before the court(s) and any matters in which items are held and which are not before any court.
>
> The plaintiffs seek an order from the court that the defendant(s) shall deliver all such items within seven days, or such period of time as the court feels is reasonable."

3. The special summons, as filed in the Central Office, did not disclose the grounds on which the plaintiffs were pursuing the relief they sought.

4. At the hearing on 8th May, 2006 counsel for the defendant argued that the application should be refused on the basis that the claim was not properly pleaded and cited two authorities: *Caulfield v. Bolger* [1927] I.R. 117; and *Bond v. Holton* [1959] I.R. 302. The plaintiffs represented to the court that grounds of claim had been included on a separate page in the summons. The first plaintiff handed into court a document which he represented was a replica of the page in question. Frankly, I believe that the plaintiffs misrepresented the position to the court on that occasion and that the special summons as filed and served on the defendant did not contain grounds of claim. In any event, the plaintiffs were given leave to serve an amended special endorsement of claim. When the matter was before the court on 3rd July, 2006 counsel for the defendant made no further objection to the sufficiency of the pleading and dealt with the matter on the merits.

5. Secondly, on the amended endorsement of claim the plaintiffs invoke O. 3(19) of the Rules of the Superior Courts as entitling them to bring the proceedings by way of special summons. That category of application which may be brought by special summons covers:

> "Applications for taxation and delivery of bills of costs and for the delivery by any solicitor of deeds, documents and papers where there is no pending proceeding in which the application may be made."

6. While the affidavit evidence as to the number and status of actions which are pending in this Court at the suit of the plaintiffs is anything but clear, there is no doubt, on the basis of the first plaintiff's response to a question put to him on 3rd July, 2006 which I had verified, that there are proceedings pending in the court in which this application could have been brought. However, as no objection was taken on behalf of the defendant to the invocation of O. 3(19), I propose dealing with this matter on the basis that the defendant accepts that the court has jurisdiction to deal with it by way of special summons. However, in adopting this approach I am not overlooking a submission made by counsel for the defendant at the hearing on 3rd July, 2006 that the matter should be remitted to plenary hearing, the intention of the defendant being to bring an application for security for costs. Having regard to the approach I propose adopting to the controversies which have arisen between the parties, I do not consider that it is necessary, in the interests of justice, that this matter go to plenary hearing.

7. Fourthly, in his written legal submissions the defendant, who claims to have a common law lien on the files in issue, submitted that, if the court were minded to order the defendant to effect delivery of the files to the plaintiff in spite of the existence of the lien, he would seek to rely on O. 53, r. 22 of the Rules, which I understand to be intended to be a reference to O. 53, r. 17 (as substituted by the Rules of the Superior Courts (Solicitors) (Amendment) Act, 2002) 2004 (S.I. No. 701 of 2004). That provision permits an application for the delivery by a solicitor to an applicant client or former client of a cash account, or the payment of monies or securities, which the respondent solicitor has or had in his custody or control, to be made to the President of the High Court by notice of motion. As the plaintiffs have not pursued an application under that provision, in my view, it is of no relevance. In any event, it would appear not to apply to files. Further, the jurisdiction thereby conferred is vested in the President of the High Court. This Court was not asked to transfer this matter to the President. In any event, I understood the defendant's position to be that he did not require the amount of the costs which he alleges is owed by the plaintiffs to him to be lodged in court.

The Relevant Facts

8. I found it very difficult to extract the relevant facts from the affidavits filed on this application. They raise matters which are irrelevant to the issue before the court, which is whether the defendant should be ordered to deliver the plaintiffs' files to them and, if so, on what terms. As regards that issue, the evidence is disjointed and incomplete. Having said that, the relevant facts appear to be as follows:

- In November, 1998 both plaintiffs instructed the defendant to initiate proceedings on their behalf against State authorities arising out of a search of their home on 5th November, 1998. On foot of those instructions, High Court proceedings were initiated by the defendant on their behalf. However, the proceedings have not gone beyond plenary summons stage.

- In May, 2003 the defendant recommended to the plaintiffs that they retain alternative legal representation,

thereby effectively terminating his retainer. The defendant has averred in these proceedings that the plaintiffs' relationship with his office deteriorated due to the manner in which they behaved and that he had no alternative but to adopt that course. The plaintiffs refute that last contention. Obviously, it is impossible to resolve that conflict on affidavit evidence.

- The issue of the outlay incurred by the defendant during, and the costs due to the defendant in respect of, his retainer arose after May, 2003. The plaintiffs have exhibited the second page only of a letter of 17th July, 2003 from the defendant to the plaintiff in the penultimate paragraph of which the defendant made the following offer to the plaintiffs:

> "In ease of you however and despite our unhappy experiences with you to date we are prepared to release the papers in exchange for reimbursement of all outlays incurred on your behalf or on behalf of Marie Arnold to date and the payment on account of costs and which we would assess at the sum of 4,000 euros with VAT thereon at 21%. Release of papers will involve an amount of photo-copying the cost of which will require to be met over and above at the rate of 20c per page."

Around that time the plaintiffs retained a Dublin firm of solicitors, Keans, to act for them. On 6th August, 2003 Keans requested a detailed bill of costs from the defendant. The defendant's response dated 25th August, 2003 has not been exhibited. However, it was referred to in the next letter from Keans to the defendant, a letter dated 28th August, 2003, in which Keans confirmed to the defendant that he should expect to receive no further communication from the first plaintiff. Keans asked to be contacted as soon as the defendant had a date for taxation of costs. No detailed bill of costs was furnished, nor have the costs been referred to taxation.

- The plaintiffs complained to the Law Society of Ireland in relation to the defendant's conduct of their business. Apparently the complaint of each plaintiff was dealt with separately by the Registrar's Committee on 18th February, 2004 and two separate decisions were communicated to the plaintiffs by letter dated 23rd February, 2004. The letter to the second plaintiff has been exhibited. It communicated a decision of the Registrar's Committee that the defendant should release the second plaintiff's file to her on payment of outlay, which the defendant had measured at €121.89. Although it is asserted in the special summons that this sum has been paid, the evidence on the point is confused and I am assuming that it was not paid. The second plaintiff was invited to effect the transfer through the Law Society. The first plaintiff has quoted the letter to him in an affidavit sworn by him in on this application, although he has not exhibited the letter. The quotation indicates that the Registrar's Committee noted that he had not received an itemised bill up to that time and, accordingly, it had indicated to the defendant that, on payment of the defendant's outlay, the first plaintiff's file in the matter was to be released to the first plaintiff "without prejudice to [the defendant's] rights to pursue his legal remedies for any further recovery of any fees he claims are due to him". The defendant subsequently informed the Law Society that his outlay amounted to €891.16.

- Although the position of the plaintiffs is that they do not agree with the decision of the Law Society, they reopened correspondence with the defendant in September, 2005 and intimated that, in an attempt to conclude the matter once and for all, they were prepared to pay the sum suggested by the Law Society in return for the entire original file, including all original documents and exhibits. They further stated that, although the Law Society made no mention of any undertaking, they would also undertake to pay all costs "at the conclusion of the cases". The defendant's response has not been exhibited. However, Keans came back into the picture about a week later and their principal, in his capacity as solicitor for the first plaintiff, gave an undertaking that the defendant's costs were to be paid "on the successful outcome of this case by my office". As I understand it, "this case" refers to the proceedings initiated by the defendant on behalf of the plaintiffs. The defendant's response was that the letter did not constitute "an enforceable undertaking" and that the costs were due irrespective of the outcome of the litigation. It was indicated that Keans' undertaking should be worded accordingly. A further letter from Keans dated 21st September, 2005 undertaking "to discharge your costs and outlay on the successful outcome of the case and the same to be taxed in default of agreement" was not acceptable to the defendant.

- At some point during 2005 the first plaintiff remitted a bank draft in the sum of €1,005.44 to the defendant in respect of the outlay incurred by the defendant. However, the defendant did not encash the bank draft, which he held pending receipt of an undertaking as to costs. The bank draft was returned to the first plaintiff following a request from him. The defendant's dealing with the bank draft does not in any way act as an estoppel against him.

- The current position is that the defendant retains the files in relation to the plaintiffs' proceedings. He has not submitted a bill of costs to the plaintiffs. The outlay incurred by the defendant on behalf of the plaintiffs has not been reimbursed, although it was proffered. The plaintiffs have not paid the costs due to the defendant, nor has an enforceable solicitor's undertaking to pay the costs irrespective of the outcome of the proceedings been given to the defendant.

- Finally, I am unclear as to the current status of the plaintiffs' complaints to the Law Society. The first plaintiff told the court that they are effectively in suspense pending the hearing of this application.

The law

9. The position adopted by the defendant is that this application is an attempt by the plaintiffs to avoid discharging the defendant's outlays and costs and that, if they are granted the relief they seek, it will effectively nullify the lien he holds in respect of their files.

10. Insofar as it is the plaintiffs' case that the defendant is not entitled to costs, or, alternatively, does not have a lien for costs, I consider that it is not possible to determine those issues in these proceedings. Those matters and, in particular, the impact of the defendant's failure to comply with s. 68(1) of the Solicitors' (Amendment) Act, 1994 and the plaintiffs' arguments on the invocation of O. 99, r. 7 of the Rules are matters to be addressed in the first instance to the Taxing Master in due course. However, at this juncture, I reject the plaintiffs' contention that the existence of a lien is dependent on a taxed bill of costs. Therefore, for present purposes I am assuming that the defendant is owed costs by the plaintiffs and that he has a lien for those costs. This approach

obviates the necessity of a plenary hearing.

11. The court has had the benefit of helpful comprehensive legal submissions both in writing and orally from counsel for the defendant as to the status of a solicitor's retaining lien at common law in relation to the client's file where the solicitor client relationship terminates in the course of litigation. Counsel correctly submitted that the determining factor is whether the solicitor is discharged by the client or, alternatively, the solicitor discharges himself from the case. This distinction, the genesis of which is to be found in an authority dating from 1837, was recognised by the Court of Appeal of England and Wales in *Gamlen Chemical Limited v. Rochem Limited* [1980] 1 W.L.R. 614. The basic principles were explained in the following passage from the judgment of Templeman L.J. in his judgment (at p. 624) where he stated:

> "… This appeal illustrates the difficulties which arise when a client and a solicitor part company in the midst of litigation. A solicitor who accepts a retainer to act for a client in the prosecution or defence of an action engages that he will continue until the action is ended, subject however to his costs being paid. …
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> If before the action is ended, the client determines the retainer, the solicitor may, subject to certain exceptions not here material, exercise a possessory lien over the client's papers until payment of the solicitor's costs and disbursements. …
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> The solicitor himself may determine his retainer during an action for reasonable cause, such as the failure of the client to keep the solicitor in funds to meet his costs and disbursements; but in that case the solicitor's possessory lien, i.e. his right to retain the client's papers of any intrinsic value or not, is subject to the practice of the court which, in order to save the client's litigation from catastrophe, orders the solicitor to hand over the client's papers to the client's new solicitors, provided the new solicitors undertake to preserve the original solicitor's lien and to return the papers to the original solicitor, for what they are worth, at the end of the litigation.
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> This practice was settled many years ago, and as Goff L.J. has shown, … there are convincing reasons why the practice should be followed, and it has been followed …"

12. In his judgment, Goff L.J. referred to the case dating from 1837 (at p. 622), stating as follows:

> "… we have been referred to … *Heslop v. Metcalfe* (1837) 3 My. & C. 183 which seems to me to be of the utmost significance in this case, and to afford conclusive reasons why we should not at this late stage reverse the decision in *Robins v. Goldingham* because *Heslop v. Metcalfe* shows quite clearly that in those days the court had fully adverted to the factual effect upon the lien of the making of such an order, and to the hardship which it would impose upon a solicitor. Lord Cottenham L.C., giving judgment, said at pp. 188 – 190:
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> > 'Undoubtedly, that doctrine may expose a solicitor to very great inconvenience and hardship, if, after embarking in a cause, he finds that he cannot get the necessary funds wherewith to carry it on. But, on the other hand, extreme hardship might arise to the client, if, – to take the case which is not uncommon in the smaller practice in the country, – a solicitor who finds a poor man having a good claim, and having but a small sum of money at his command, may go on until that fund is exhausted, and then, refusing to proceed further, may hang up the cause by withholding the papers in his hands. That would be great grievance and means of oppression to a poor client who, with the clearest right in the world, might still be without the means of employing another solicitor. The rule of the court must be adapted to every case that may occur, and be calculated to protect suitors against such conduct … I then take the law as laid down by Lord Eldon, and, adopting that law, must hold that Mr. Blunt is not to be permitted to impose upon the plaintiff the necessity of carrying on his cause in an expensive, inconvenient and disadvantageous manner. I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause.'"

13. In *Robins v. Goldingham* (1872) [L.R.] 13 Eq. 440 Sir R. Malins, V.C., followed the rule laid down by Lord Eldon and followed *Heslop v. Metcalfe*, holding, in circumstances where a solicitor applied to his client for funds to carry on a suit, and, upon the client not furnishing any, declined to continue to conduct the litigation, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the client had appointed the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to the former solicitor's lien and to return them undefaced within twelve days after the conclusion of the suit, and to allow him access to them for the purpose of carrying on an action for his costs.

14. Returning to the judgment of Templeman L.J. in Gamlen Chemical Limited v. Rochem Limited, following the extract which I have quoted in part earlier, Templeman L.J. summarised the position as being that where the solicitor has discharged his retainer, the court will then normally make a mandatory order obliging the original solicitor to hand over the client's papers to the new solicitor against an undertaking by the new solicitor to preserve the lien of the original solicitor. He then went on to qualify the general principle somewhat in the following passage:

> "I wish to guard myself against possible exceptions to this general rule. The court in fact is asked to make a mandatory order obliging the original solicitor to hand over the papers to the new solicitor. An automatic order is inconsistent with the inherent, albeit judicial, discretion of the court to grant or withhold a remedy which is equitable in character. It may be, therefore, that in exceptional cases the court might impose terms where justice so required. For example, if the papers are valueless after litigation is ended and if the client accepts that he is indebted to the original solicitor for an agreed sum and has no counterclaim, or accepts that the solicitor has admittedly paid out reasonable and proper disbursements, which must be repaid, the court might make an order which would compel the original solicitor to hand over the papers to the new solicitor providing that in the first place the client pays to the original solicitor a sum, fixed by the court, representing the whole or part of the monies admittedly due from the client to the original solicitor. Much would depend on the nature of the case, the stage which the litigation has reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the court is asked to make."

15. To a twenty-first century observer the jurisprudence established in the early 19th century seems to be remarkably enlightened for that era, because it maintains a fair and just balance between the proponents. It vindicates such rights as a solicitor's client has under the Constitution and under the European Convention on Human Rights, which has been invoked by the plaintiffs, to have access to the courts. On the other hand, it protects the solicitor's property in his lien. Accordingly, I have no doubt that it should be followed.

Application of law to facts

16. The first question which arises for consideration here is whether the defendant discharged himself for reasonable cause. As I have

already indicated, the factual conflict on this point cannot be resolved in the absence of oral evidence and there has been none on this application. However, I am of the view that the proper approach for the court to adopt is to assume, for the purposes of this application, that the defendant discharged himself for reasonable cause. This approach obviates the necessity of a plenary hearing.

17. What the established jurisprudence lays down is that, subject to such conditions as the court considers necessary to be imposed in the interests of justice, the client is entitled to a mandatory order directed to his former solicitor to hand over the file to his new solicitor on an undertaking by the new solicitor to preserve the former solicitor's lien. It is necessary to emphasise that the former solicitor is not entitled to an unconditional undertaking from the new solicitor to discharge the former solicitor's costs and outlay. To the extent that the defendant contends that he is entitled to such an undertaking, his contention is not correct.

18. In this case, the defendant has incurred outlay and the plaintiffs, however reluctantly, have recognised that they must reimburse the defendant in respect of the outlay. On the evidence the outlay lay in respect of both plaintiffs aggregates €1,013.05. As regards costs, the defendant claims that he is entitled to his costs of representing the plaintiffs until he discharged himself. However, although over two and a half years elapsed between the time he discharged himself and the initiation of this application, he never submitted a detailed bill of costs, nor did he take any steps to have the costs taxed. That default is a factor to be weighed against the defendant. The defendant's contention that he is at risk in relation to the costs because the plaintiffs now reside outside the jurisdiction, in my view, is not a factor to be weighed in his favour, given the ease with which judgments can be enforced in other Member States of the European Union.

19. The strongest point which the defendant has made is that delivery of his file directly to the plaintiffs will destroy his common law lien. Under the established jurisprudence, the lien, for what it is worth, is protected by the undertaking from the new solicitor retained by the client. This case is complicated by the fact that, apart from the plenary proceedings initiated by the defendant on their behalf, in which I understand the plaintiffs are now being represented by Keans, the first plaintiff has initiated other proceedings by way of judicial review and plenary proceedings, arising, I understand, out of the November, 1998 incident or events which flowed from it, which he is prosecuting in person.

20. The rationale of the decision in *Heslop v. Metcalfe* is that where litigation is in progress that litigation should not be stymied by the refusal of a solicitor, who has discharged himself, to hand over the papers in relation to the litigation, provided that his lien is secured. I think it doubtful that the first plaintiff can invoke the principle in *Heslop v. Metcalfe* in support of the progress of litigation which he himself has initiated after the defendant discharged himself and which he is prosecuting in person. What is clear, in my view, is that the plaintiffs are not entitled to an order directing the delivery of the files maintained by the defendant in a manner that would destroy the defendant's lien, for example, by ordering delivery directly to them.

21. Therefore, in my view, in general terms, the proper order in this case is an order directing the defendant to deliver the file to plaintiffs' new solicitors in the proceedings initiated by the defendant on the following conditions:

> (a) that prior to such delivery there is reimbursement of the outlay incurred by the defendant;
>
> (b) that the new solicitors give an undertaking to the defendant to hold the files subject to the defendant's lien and to return them to the defendant on the conclusion of the proceedings; and
>
> (c) that the delivery of the files is without prejudice to the defendant's claim for costs against the plaintiffs.

Order

22. With a view to ensuring that the order made on foot of this application is accurate and precise, with the assistance of the Registrar, I have verified the particulars of the pending proceedings in this Court given by the first plaintiff on 3rd July, 2006. The following two actions, which have been initiated by the defendant on behalf of the plaintiffs, are pending:

> (1) proceedings by the first plaintiff against the Minister for Justice, Equality and Law Reform and Others (Record No. 1999/7236P), which were initiated by plenary summons which issued on 13th July, 1999; and
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> (2) proceedings by the second plaintiff against the Minister for Justice, Equality and Law Reform and Others (Record No. 2001/15716P), which were initiated by plenary summons which was issued on 23rd October, 2001.

23. There are also pending in this Court the following proceedings initiated by the first plaintiff in person:

> (a) plenary proceedings by the first plaintiff against the Minister for Justice, Equality and Law Reform and Others (Record No. 2003/13230P), which were initiated by plenary summons which issued on 27th November, 2003; and
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> (b) judicial review proceedings by the first plaintiff against the D.P.P. and Others (Record No. 2006/509 J.R.) in which leave to proceed by way of judicial review was granted by this Court (Peart J.) on 3rd July, 2006.

24. There will be an order directing the defendant to deliver the files and all documents, including originals, in his possession in relation to the actions referred to at (1) and (2) above to Keans or such other firm of solicitors as comes on record in said proceedings in accordance with O. 7, r. 2 of the Rules, subject to the following conditions:

> (a) that the plaintiff pay the sum of €1,013.05 to the defendant by way of reimbursement of the outlay incurred by him;
>
> (b) that Keans, or such other firm as comes on record for the plaintiffs in the said proceedings, gives an undertaking to the defendant to hold the said files and documents subject to the defendant's lien and to return them to the defendant on the conclusion of the said proceedings; and
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> (c) that the delivery of the said files and documents is without prejudice to the defendant's claim for costs against the plaintiffs;

25. such delivery to be effected within two weeks of compliance with conditions (a) and (b).