THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 129

Record No. 2016/5

Peart J.
Irvine J.
Hogan J.

IN THE MATTER OF THE SOLICITORS ACTS 1954 TO 2011

BETWEEN/

EUGENE McCOOL

APPELLANT

- AND -

COLIN MONAGHAN

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of May 2017

1. The complainant, Mr. McCool, in these proceedings is the principal of an engineering firm, McCool Controls and Engineering Ltd. ("McCools"). McCools have been engaged in major litigation with the major U.S. multi-national Honeywell Control Systems Inc. in this jurisdiction since as far back as 2005 ("the 2005 proceedings"). The dispute arises from an alleged breach of a 1998 exclusive trading agreement for Ireland between McCools and Honeywell. It is important to stress that this Court has but imperfect knowledge of these proceedings and nothing in this judgment should be taken to express any view of the matter which, in any event, is not presently before this Court.

2. The relevance of the 2005 proceedings is that they form the backdrop to this present complaint of professional misconduct. Mr. McCool is undoubtedly frustrated with the slow progress of the 2005 proceedings, but the present appeal relates to events which occurred in the last days of the summer term in 2012. In essence, Mr. McCool has come to believe that there were serious irregularities and lapses of professional standards on the part of the legal professionals involved in this litigation and it was for this reason that he saw fit to make a complaint to the Solicitor's Disciplinary Tribunal ("the Triubunal") against Mr. Monaghan, a partner in the firm of Arthur Cox, the solicitors acting for Honeywell. As I hope to show in this judgment, I believe that in this respect Mr. McCool is gravely mistaken and that he has allowed his – perhaps understandable – dismay and unhappiness with the slow progress of the 2005 proceedings to cloud his judgment and sense of perspective regarding certain events which occurred during the course of these few days in late July 2012.

3. Before narrating a summary of these events, it is necessary first to state that this complaint was rejected by the Tribunal.. Mr. McCool then appealed this decision to the High Court, where the appeal was dismissed by Kearns P.: see *McCool v. Monaghan* [2015] IEHC 700. Mr. McCool has now appealed to this Court.

Background to the complaint

4. On 16th November 2010 the provisions of the new Ord. 56A of the Rules of the Superior Courts came into effect: see Article 1(1) of the Rules of the Superior Courts (Mediation and Conciliation) 2010 (S.I. No. 502 of 2010). Ord. 56A, r.2(1) provides inter alia that the High Court may (of its motion, if necessary) invite the parties to engage in an ADR process. By Ord.56A, r.1 such a process is defined as "mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration."

5. On 22nd June 2012 McCools issued a motion seeking an order pursuant to Ord. 56A to have the 2005 proceedings adjourned to allow the dispute between the parties to be dealt with by means of the ADR process. That motion was returnable to 23rd July 2012. At the time, therefore, that the motion was issued it must be acknowledged that the entire Ord. 56A procedure was relatively new and in some respects unfamiliar. I mention this fact because at times many of Mr. McCool's complaints seem to be directed at what was suggested was the unfamiliarity of McCools' legal team with this new procedure.

6. On the 23rd July 2012 (which was a Monday) the Ord. 56A motion was called on before the High Court that morning. The motion was apparently put back to second calling due to the fact that Honeywell's counsel was unavailable as he was appearing in a different court on another matter. When the motion was actually called on and dealt with by Gilligan J. on that Monday afternoon, the judge adjourned the matter to Friday, 27th July 2012 in order to allow the parties some time to hold further settlement discussions with a view to resolving the matters in dispute between them. It appears that further without prejudice settlement negotiations took place on Wednesday the 25th July 2012, but these discussions did not lead to any resolution of the proceedings

7. The Ord. 56A motion was then listed for Gilligan J. again on the morning of the 27th July. Gilligan J. was informed by counsel that there had been no settlement or agreement to mediate. The judge expressed his disappointment at this and suggested that the parties should try to reach some further common ground. It appears that Mr. Justice Gilligan was not in a position to hear the motion on that Friday as he had another matter for hearing before him on that day. The motion was adjourned therefore to 2 p.m. on Monday the 30th July 2012. It is probably fair to say that Mr. McCool's principal complaints relates to the events of Monday, 30th July 2012 and Tuesday, 31st July 2012.

8. It seems that the adjourned motion did not appear in the Legal Diary for Monday, 30th July 2012 which is published on the Courts Service website. I would pause here to observe that, as all legal practitioners will know, this in itself is not particularly surprising. It is quite common for last minute changes of this kind not to appear in the Legal Diary and it may well have been that this particular adjournment came too late for inclusion in the Legal Diary. At all events, counsel for Honeywell together with Mr. Monaghan and a

trainee solicitor, Mr. Woods, attended in court on that day. It appears that due to the continuing non availability of Mr. Justice Gilligan it was necessary that the motion would again be adjourned on that occasion to 10.30 a.m. on the following day, Tuesday, 31st July 2012.

9. There then appears to have been some confusion as to what time the motion was due to be heard on that day. At some point it seems that the parties were under the impression that the motion was scheduled for 2pm. This was the time which Arthur Cox had originally understood the motion would be heard, as Mr. Woods had (at Mr. Monaghan's direction) queried the matter with the Chief Registrar's Office once the matter did not appear in the Legal Diary. Mr. Woods then sent an email to his own counsel to advise him of the 2pm time. Mr. Monaghan maintains that he contacted Messrs. McGeehin & Toale, the solicitors for McCools, to inform them that the motion was scheduled for 2pm, although this is disputed by Mr. McCool.

10. At all events, the motion was in fact scheduled to be heard at 10.30am on that day. It would appear that none of the legal professionals were present at that time and the judge plainly indicated that they should assemble as quickly as possible. At some point thereafter Mr. Monaghan contacted McGeehin & Toale to inform them of the correct time. Mr. McCool maintains that in seeking to explain his non-attendance when the matter was first called for hearing at 10.30am on the 31st July 2012 Mr. Monaghan had (falsely) informed the Court that his office had been contacted by the Central Office to change the time from to 10.30am to 2pm. Mr. Monaghan has denied that he put the matter in those terms: he said that his office had been in contact with the Courts Service that morning because the motion had not appeared in the Legal Diary and that he had been told that the matter would not be dealt with until 2pm.

11. What, however, is not in dispute is that the motion actually went ahead around 12.30pm on that day before Gilligan J. Both sides were represented by Senior Counsel and there was no suggestion that there had been any prejudice or disadvantage to either side by reason of the confusion. Gilligan J. ultimately ruled against McCools essentially on the ground that he could not make an order under Ord. 56A where one of the parties did not wish to engage with the process. Gilligan J. made no order as to costs. It does not appear that any appeal was taken against the decision of Gilligan J.

The decision of the Solicitors' Disciplinary Tribunal

12. By decision dated 22nd June 2015 the Tribunal found that there was no prima facie case of misconduct on the part of the respondent solicitor. In relation to the allegation that the respondent gave false and misleading information to the plaintiff, its legal team, and to the court in an effort to prevent the case from going before the court, the Tribunal held that:

> "The respondent solicitor's affidavit sworn 28 August, 2014 and that of Peter Woods sworn 20 August 2014, provide a full explanation of what occurred in regard to the Order 56A motion between 23 July and 31 July 2012. The events described in relation to the various adjournments of the motion are not unusual in the operation of the High Court motion lists and there is no sustainable evidence of misconduct on the part of the respondent solicitor."

The decision of the High Court

13. This finding of the Tribunal was upheld on appeal by Kearns P. In his judgment he stated:

> "The most serious allegation against the respondent solicitor is that he deliberately misled representatives from the plaintiff company, including the appellant, as well as their legal advisors, Courts Service staff, and the presiding judge. It is alleged that the respondent and or persons associated with him attempted to prevent the motion from being heard by circulating misinformation to various persons as to when the matter was listed before the court. It is noteworthy that much of the appellant's discontent in this regard appears to be directed at his own solicitor also, who it is clearly implied was some way involved in this alleged subterfuge, and indeed in his later affidavits the appellant indicates that he intends to issue a separate complaint to the Society in respect of this.
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> I have carefully considered the sequence of events as set out in exhaustive detail in the various affidavits and exhibits and am satisfied that there is nothing unusual or suspicious about the manner in which the motion was adjourned on the dates in question. The final week of the legal term before the long vacation is a notoriously busy time, and it is not out of the ordinary for a presiding judge to communicate to the parties, through the court registrar, that a matter should be put back to the following morning due to the judge being required to deal with an ongoing matter. This appears to be what occurred on 30th July 2012, the penultimate day of legal term. The appellant takes issue with the fact that the judge was not on the bench when this information was received from the registrar. However, court registrars play a vital role in the efficient administration of court lists and it was not necessary for the judge to be sitting in this instance.
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> Previously, on 23rd July 2012 the matter was adjourned to allow the parties an opportunity to engage in meaningful discussions which might resolve the matter out of court. Given that the plaintiff was seeking to refer the matter to mediation, this does not seem to be an unusual course for a court to adopt having regard to the high costs incurred by parties when litigation proceeds over lengthy periods. There is no evidence of wrongdoing on the part of the respondent solicitor in relation to this brief adjournment.
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> It is clear that on the final day of the court term, 31st July 2012, something occurred which caused the plaintiff and his colleagues from McCools to attend court in the morning while the respective legal teams operated under the misapprehension that the matter was to be heard at 2 p.m. I have carefully considered the various versions of these events, as set out in the affidavits before the Tribunal and the lengthy and detailed affidavits in this appeal. The Court accepts the finding of the Tribunal that there is no prima facie evidence of misconduct on the part of the respondent solicitor in relation to the confusion which arose. Undoubtedly, a breakdown in communications did occur and it is possible that the respondent or his trainee are not entirely blameless in this regard. However, there was no compelling evidence before the Tribunal that this communications breakdown was deliberately orchestrated by the respondent solicitor or that any other persons were engaged in a conspiracy to prevent the motion from proceeding. The Court is satisfied that the Tribunal did not err by failing to have any or adequate regard to any of the information before it in relation to what transpired on the 31st July 2012."

Whether there was any evidence of impropriety on the part of Mr. Monaghan

14. Many of these allegations were repeated by Mr. McCool in the course of his appeal to this Court. One may well understand that he was disappointed with the outcome of the Ord. 56A motion along with the general failure to secure any resolution of the Honeywell proceedings. But the essential subject matter of the complaint – confusion as to the precise time at which the motion would be heard

on 31st July 2012 – was in relation to a matter of no particular consequence. All legal professionals and all involved in the administration of justice – solicitors, counsel, registrars, court ushers and court staff – have frequently encountered instances of confusion of this nature, whether it be the date, time or venue for the hearing of particular court business.

15. It is, with respect, puzzling as to why Mr. McCool should be so exercised by an issue which, viewed objectively, cannot be regarded as other than trifling and mundane. The fact is that the motion was indeed heard on the day in question and it is of no consequence whether it was heard at 10.30am or 2pm or, whether through mischance and misunderstanding, some time after noon on that day.

16. I do not, of course, overlook the fact that Mr. McCool is convinced that what to many legal professionals is the not uncommon phenomenon of confusion regarding the precise timing of adjourned motions, was in reality part of some malign endeavour by Mr. Monaghan to frustrate the course of justice by ensuring that the motion was not heard. Here I feel obliged to say that Mr. McCool has unfortunately allowed his own sense of judgment and perspective to become distorted. There was, at worst, some form of breakdown of communications between the court, the Courts Service staff and the legal professionals concerned regarding the precise time at which the adjourned motion was to be heard on 31st July 2012.

17. While Kearns P. observed that it was "possible that the respondent or his trainee are not entirely blameless in this regard", I confess that I can find nothing which might suggest that either Mr. Monaghan or Mr. Wood behaved with anything other than complete propriety in this matter. Although there was clearly a misunderstanding and incorrect information was communicated, yet so far as I can see both Mr. Monaghan and Mr. Wood discharged all appropriate professional courtesies to all parties and they sought immediately to correct any incorrect information they had (inadvertently) communicated so far as possible thereafter.

Conclusions

18. I realise that this conclusion must be intensely disappointing for Mr. McCool whose complaint all members of the Court have considered with care. But Mr. Monaghan is also entitled to justice and fair dealing. Very serious allegations have been made against him and it is only fair that I should make the point – if needs be with some emphasis – that there is simply no evidence at all which has been adduced on the material before us upon which a complaint of this seriousness could properly be grounded.

19. It is accordingly sufficient for present purposes to say that Kearns P. cannot be faulted in any way for his conclusion that there had been no error on the part of the Tribunal in dismissing the complaint against Mr. Monaghan, I would accordingly dismiss the appeal.