

Neutral Citation: [2019] NICH 1

Ref: McB10880

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 21/02/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF A SOLICITOR

BETWEEN:

EVELYN DONAGHY

Plaintiff;

-and-

J J HAUGHEY SOLICITORS LTD

Defendant.

McBRIDE J

Introduction

[1] This is an application whereby the plaintiff seeks an order for delivery up of papers and files held by her former solicitors in circumstances where the solicitors have refused to deliver them up, on the basis of a lien for payment of their costs.

[2] I have given a written judgment in this matter to provide some guidance to the profession in respect of the court's supervisory jurisdiction over the exercise of a solicitor's lien, as this is an important issue and because there are a number of similar applications before this court.

[3] The plaintiff was represented by Mr Hopkins of counsel. The defendant was represented by Mr Orr QC and Mr McEvoy of counsel. I am grateful to all counsel for their extremely helpful skeleton arguments and submissions which proved to be of invaluable assistance to the court.

Background

[4] The background to this application is largely uncontentious as appears from the affidavits filed by the plaintiff on 15 November 2018 and 15 January 2019 and the affidavits filed on behalf of the defendant on 11 December 2018 and 4 February 2019.

[5] The following facts were agreed by the parties:

- (a) The defendant prepared a Will for Philomena Grew, deceased (“the deceased”) in 2010.
- (b) The plaintiff was the Executrix and sole beneficiary under the last Will and Testament of the deceased, dated 9 August 2010 (“the 2010 Will”).
- (c) In or around 2014 Southern Area Hospice Services Ltd (“the Hospice”) sought to challenge, via High Court proceedings (“the 2014 proceedings”), the validity of the 2010 Will on the grounds that the deceased lacked testamentary capacity and asserted the legitimacy of an earlier Will made by the deceased dated 23 January 2006 (“the 2006 Will”).
- (d) The defendant was retained by the plaintiff to act in respect of the administration of the estate and in respect of her defence of the 2014 proceedings.
- (e) During the course of the 2014 proceedings the plaintiff sold her home and moved to the deceased’s former home at 44 Dukes Grove, Armagh (“the property”). The property was the main asset owned by the deceased at the date of her death.
- (f) The 2014 proceedings were settled by Terms of Settlement dated 9 June 2017. These provided, inter alia, that the property was to be sold and after payment of both parties’ reasonable costs and costs of the administration of the estate, each party was to receive 50% of the net estate. These terms were conditional upon the plaintiff obtaining an order granting Probate in Solemn Form for the 2010 Will.
- (g) After the Terms of Settlement were entered into, Mr Haughey, solicitor, gave evidence before the court and Horner J then pronounced the Will in Solemn Form.
- (h) It further appears from the evidence presented to this court that:
 - (i) The plaintiff had the benefit of experienced senior and junior counsel in respect of the 2014 proceedings.

- (ii) There was competing expert medical evidence regarding the deceased's capacity to make the 2010 Will.
- (iii) The deceased's GP had indicated that he was unable to give evidence that the deceased had capacity to make a Will in 2010.
- (iv) The plaintiff informed Mr Haughey prior to the hearing as appears from paragraph 11 of her affidavit sworn on 15 November 2018:-

"Only one of my three witnesses could come to trial, but he did not want to come ..."

- (v) The plaintiff, was an unregistered carer for the deceased and was in receipt of payment for the care she provided to the deceased.
- (vi) This was a small estate comprising approximately £100,000.
- (vii) The trial was likely to last 2-3 days and therefore the costs were likely to be significant in proportion to the size of the estate.
- (i) The plaintiff lodged a complaint against Mr Haughey on 7 August 2017.
- (j) On 10 August 2017 the defendant wrote to the plaintiff outlining that she had been uncooperative in respect of the sale of the property and then stated as follows:-

"In light of your complaint you should now instruct another firm of solicitors to apply for a Grant of Probate to enable you to administer the deceased's estate."

- (k) On 10 October 2017 the defendant again corresponded with the plaintiff enclosing their Bill of Costs and advised the plaintiff to make arrangements to instruct another solicitor to administer the deceased's estate.
- (l) On 15 February 2018 the defendant lodged a complaint against Mr Haughey with the Law Society for Northern Ireland in relation to the advice he had given her in respect of the 2014 proceedings.
- (m) On 16 April 2018, the Hospice issued a Writ of Summons seeking specific performance of the Terms of the Settlement ("the 2018

proceedings"). These proceedings are pending before the court and are now the subject of case management.

- (n) On 26 September 2018 the plaintiff instructed Hool Law solicitors to act on her behalf in respect of the 2018 proceedings.
- (o) By letter dated 17 October 2018 Hool Law requested relevant papers from the defendant.
- (p) The defendant by letter dated 22 October 2018 advised that the papers would be made available for collection when its costs were discharged or when a satisfactory undertaking was given for the discharge of its costs.
- (q) At the beginning of this hearing Mr Hopkins informed the court that if the defendant provided the relevant files and papers, the plaintiff's solicitors would undertake to retain them for 4-6 weeks for inspection by solicitor and barrister, for the sole purpose of advising the plaintiff and would thereafter return the papers to the defendant, uncopied and would further undertake not to provide the papers to the plaintiff.

Solicitor's Lien

[6] Counsel referred the court to the following cases which considered the court's supervisory jurisdiction over a solicitor's lien:- *QTF Ltd v Kieran Connolly and Seamus Connolly practising as SC Connolly, Solicitors* [2011] NIQB 23, *Robins v Goldingham* [1872] LR 13 Eq 440, *Ismail v Richards Butler (a Firm)* [1996] 2 All ER 506, *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 All ER 1049 and *Slatter v Ronaldsons* [2001] All ER 251.

[7] I extract the following legal principles from this jurisprudence:

- (i) As noted by Moore-Bick J in *Ismail* at page 514 (e):

"It has long been recognised that, subject to any agreement to the contrary, a solicitor is entitled to exercise a general lien in respect of his costs on any property belonging to his client which properly comes into his possession in his capacity as a solicitor ...

The basic rule is that a solicitor has the general right to embarrass his client by withholding papers in order to force him to pay what is due and the court will not compel him to produce them at the instance of his client."

- (ii) Solicitors as officers of the court are subject to its supervisory jurisdiction and the court can therefore interfere with the enforcement of the common law lien on equitable principles.
- (iii) The law in relation to the exercise of the solicitor's lien has been developed through a number of decided cases. In the 1800s there were a number of cases in which a practice developed whereby, if a solicitor discharged himself in the course of ongoing litigation the court *usually* ordered the solicitor to hand over to the new solicitors the papers which he held, on the undertaking of the new solicitors to preserve his lien on the papers for costs and to redeliver the papers to him at the end of litigation. This approach was classically expressed by Malins VC in *Robins*, when he was giving judgment on a client's application for delivery up of papers at page 442, when he stated:-

“Now it is well settled that where a solicitor is discharged by the client he has a lien for his costs upon the papers in his hands, and can retain them till he is satisfied; but it is different where the discharge is by the solicitor ... it is clear that a solicitor is not entitled to stop litigation, because he cannot obtain funds to enable him to carry it on. ... Being, therefore, of opinion that the case is clear and that I have only to apply the rules laid down by Lord Eldon in *Colegrave v Manley* which was followed in *Heslop v Metcalfe* and on which I acted in *In re Faithful*, the order must be to deliver up the papers to (new solicitors), on their undertaking to receive and to hold them without prejudice to any right of lien, and to return them undefaced and also to allow (the old solicitor) access to them for the purpose of his action.”

- (iv) This practice was carefully considered by the English Court of Appeal in *Gamlen*. Whilst Goff LJ refused to overrule *Robins*, it appears that he did so, on the basis that he regarded “the overriding principle being that a solicitor who has discharged himself is not allowed so to exert his lien as to interfere with the course of justice.” (page 1057(j) to 1058 (a)). Templeman LJ agreed and at page 1058 (g) – 1059 (a) stated:

“Where the solicitor has himself discharged his retainer, the court then will 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.

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 solicitors to hand over the papers to the new solicitors. An automatic order is inconsistent with the inherent, albeit judicial discretion of the court, to grant or withhold a remedy which is equitable in the character. It may be, therefore that in exceptional cases the court might impose terms where justice so required. ... Much would depend on the nature of the case, the stage which the litigation had 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."

It is clear from these passages that he recognised that the court, in the exercise of its equitable jurisdiction, had adopted this practice, "in order to save the client's litigation from disaster". Consequently, he accepted that, "when justice so demanded", the court could impose terms on any order it made for files to be handed over.

[8] As appears from the dicta of Goff LJ and Templeman LJ the overriding principle is that the court should make the order which best serves the interests of justice. The fact a solicitor has determined the retainer does not mean the court will automatically make a *Robins* type order. Rather, this is but one factor the court will take into account. The fact the solicitor has determined the retainer however is usually a factor which weighs heavily in favour of making a *Robins* type order, although much will depend on the particular factual circumstances of any given case.

[9] Similarly, notwithstanding the existence of some jurisprudence which indicates that the court will automatically refuse a client's application for files to be delivered up in the absence of costs being paid or secured in circumstances where the client has terminated the retainer (see *Re Rapid Road Transit Company Limited* [1909] 1 Ch 96), I consider that there is no reason in principle why, in appropriate circumstances, a court could not interfere in the enforcement of a common law lien on equitable principles, even when it is the client who terminates the retainer. This is because the court in the exercise of its supervisory jurisdiction can make such order as to delivery up as it thinks fit having regard to the overall interests of justice;

- see *Slatter v Ronaldsons* [2001] All ER (D) 251 in which Patton J stated at paragraph [21]:

“... I am prepared to accept, on the authorities, that there is no reason, in principle, why, in appropriate circumstances, the court should not be able to interfere in the enforcement of the common law lien, on equitable principles, even where it is the client rather than the solicitor who has terminated the retainer.”

[10] The fact the client has terminated the retainer is usually a weighty factor in favour of not interfering with the solicitor’s lien although much will depend upon all the factual circumstances of the case including the circumstances in which the retainer was terminated and the reasons for the termination.

[11] In assessing the nature of the order which best serves the interest of justice, Leggatt J in *A v B* [1984] 1 All ER 265 observed at page 274- 275 that the court should weigh the following two matters:

“(a) That a litigant should not be deprived of material relevant to the conduct of his case and so driven from the judgment seat, if that would be the result of permitting the lien to be sustained, and

(b) That litigation should be conducted with due regard to the interests of the court’s own officers, who should not be left without payment for what is justly due to them.”

[12] In the exercise of its discretion therefore the court must have regard to all the factual circumstances of the case. Whilst recognising each case is fact specific, the following is a non-exhaustive list of factors which the court may consider relevant to the exercise of its discretion:

- When, why and who ended the solicitor/client relationship?
- The nature of the case.
- The stage litigation has reached.
- The conduct of the solicitor and client respectively.
- The balance of hardship which might result from the order the court is asked to make.

- The fact the value of the solicitor's lien is likely to be considerably diminished if the papers required for pending litigation are handed over – see *Ismail* at page 524C-D.

Submissions of counsel

[13] Both counsel accepted that the appropriate test for the exercise of the court's jurisdiction was the overall interests of justice and the question of whether the solicitor or client terminated the retainer was but one of the relevant factors the court had to take into account in the exercise of its overall discretion.

[14] Mr Hopkins submitted that the balance tipped in favour of making a *Robins* type order in this case because:

- (a) the plaintiff was seeking the papers for a limited purpose;
- (b) the solicitor had terminated the retainer, and
- (c) the papers were required to properly advise the plaintiff in on-going litigation.

[15] In reply Mr Orr QC submitted that the making of a complaint by the plaintiff was tantamount to her terminating the retainer and the solicitor treated her complaint as the act which ended the relationship.

[16] He further submitted that the court in the exercise of its discretion should take into account the fact the plaintiff was able to pay costs or at least give security for costs as she was a beneficiary under the deceased's Will. He further submitted that the plaintiff did not require the papers to enable her to conduct her defence of the 2018 proceedings as she had never challenged the Terms of Settlement. In addition he submitted that she did not require the papers to determine whether she should issue a Third Party Notice in the on-going litigation as no grounds existed for the issuing of such a Notice.

Discussion

[17] In the exercise of my discretion, I intend to take into account all the factual circumstances of this case. In determining the order which best serves the interests of justice I intend to weigh these factors, balancing the plaintiff's right "not to be driven from the judgment seat" against the right of the solicitor to be paid what is justly due to him.

[18] In respect of the factual circumstances of this case, I find based on the correspondence sent by the defendant to the plaintiff that it was the defendant who terminated the retainer. This termination however took place however in a context where the plaintiff was not co-operating in the enforcement of the Terms of the

Settlement and had made a complaint against the solicitor. Thereafter, the solicitor sent his bill of costs and I find these costs remain unpaid. There is now on-going litigation before the court relating to the enforcement of the Terms of Settlement.

[19] I have carefully considered whether permitting the lien to be sustained would deprive the plaintiff of relevant material in her defence of the 2018 proceedings.

[20] The affidavit evidence and indeed Mr Hopkin's submissions before the court make clear that the plaintiff is not challenging the Terms of Settlement. Counsel further accepted that he did not require the papers for the purposes of defending the 2018 proceedings. Rather, he submitted the papers were sought to enable the plaintiff to be advised about the issuing of a Third Party Notice against the defendant.

[21] The grounds upon which a plaintiff can issue Third Party proceedings are set out in Order 16 Rule 1(1). The relevant provision is Order 16 Rule 1(1)(c) which states:

"A question or issue relating to or connecting the subject matter of the action and which should be determined not only between the plaintiff and the defendant but also between either or both of them and the third party."

[22] Mr Hopkins submitted that there were three strands for making such a claim namely:

- (a) The defendant acted for the plaintiff in the 2014 proceedings when there was a clear conflict of interest in that he was a key witness in respect of the testamentary capacity of the deceased.
- (b) The defendant failed to advise the plaintiff as to the terms and effect of the terms of settlement.
- (c) The defendant failed to properly advise the plaintiff in respect of the sale of her home and the risks involved with her intention to reside at the property.

[23] Having regard to all the factual circumstances in this case, I consider that this is a case where the plaintiff would not be "driven from the judgment seat" if the lien is sustained. This is because:

- The plaintiff does not require the papers to defend the 2018 proceedings. This position was accepted by the plaintiff and by her counsel.

- The plaintiff has sufficient information available to her from the papers already in her possession to enable her and her legal advisors to make an informed decision about whether to issue a Third Party Notice.
- Even if the absence of papers prevents the plaintiff making an informed decision about issuing a Third Party Notice she is not driven from the judgment seat as she can bring a separate claim against the defendant for negligence and or breach of contract.
- To direct the delivery of the papers at this stage would be tantamount to giving pre-action discovery and therefore would place the plaintiff in an advantageous position viz a viz other litigants.

[24] On the other side of the balance I consider that an order requiring the solicitor to hand over the papers on the terms suggested by the plaintiff would substantially diminish the value of his lien. In terms of hardship I note that although the plaintiff is on benefits she is the sole beneficiary under the deceased's Will and on foot of the Terms of Settlement will receive a substantial payment in due course. I therefore consider that an order for delivery up of the papers on the basis of an undertaking by the plaintiff to give security for costs would not cause financial hardship to her.

[25] In all the circumstances I consider that the order which best meets the interests of justice is as follows:

- (i) An order that within 14 days of the plaintiff executing a charge over her interest in the property at 44 Dukes Grove, Armagh, in favour of the defendant up to the value of £28,461.50 ("the Charge") as security for payment by the plaintiff to the defendant of all costs due to the defendant, either as agreed between the parties or as assessed by the court on taxation, on foot of its bill of costs dated 9 October 2017, the defendant shall deliver up to the plaintiff's solicitors the plaintiff's papers and the file held by the defendant relating to the following matters:
 - (a) the estate of Philomena Grew (Deceased);
 - (b) proceedings between Southern Area Hospice Services Limited and Evelyn Donaghy bearing Court Reference 2014 No. 52579; and
 - (c) proceedings between Southern Area Hospice Services Limited and Evelyn Donaghy bearing reference 2018 No. 40482.

[26] Costs are hereby reserved.