

Solicitor – order to pay money into court – order not subject to appeal – whether solicitor has lien over money – whether lien exercisable

Neutral Citation no. [2003] NICH 8

Ref: **GIRF4024**

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

Delivered: **14/10/2003**

2001 No. 1676

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF A SOLICITOR

**IN THE MATTER OF THE SOLICITORS (NORTHERN IRELAND)
ORDER 1976**

BETWEEN:

CONAIL LIAM McGINN

Plaintiff;

-and-

**OLIVER J KELLY PRACTISING AS OLIVER J KELLY AND CO,
SOLICITORS**

Defendant.

GIRVAN J

[1] By a summons issued on 1 June 2001 the plaintiff sought an order that the defendant deliver a cash account to the plaintiff, that the defendant deliver to the plaintiff a list of the monies or securities which the defendant

had in his possession or control on behalf of the plaintiff and an order that the defendant pay into court or lodge in court such monies or securities. According to the plaintiff's uncontradicted affidavit the plaintiff was a shareholder in a limited company called Antrim Arms Hotel formerly known as Ballycastle Hotel Limited which in 1994 bought the Antrim Arms Hotel Ballycastle. By 1996 there were only two shareholders left in the company namely the plaintiff and a Mr Greer who died in 1998. According to the plaintiff he was anxious to acquire the late Mr Greer's shares in the company and a provisional agreement was reached in the sum of £68,000. According to the plaintiff the defendant was authorised to debit £20,000 from the plaintiff's First Trust account in February 1999. Earlier in September 1998 £54,000 was transferred to Mr Kelly by cheque. Thus by early 1999 Mr Kelly had in his possession £74,000 belonging to the plaintiff. In his affidavit the plaintiff stated that on 2 April 2001 his new solicitor asked the defendant to furnish a statement of account for work done on a number of transactions over the years but no bill of costs was furnished.

[2] On 11 October 2001 the court made an order in the following terms:

"IT IS ORDERED that -

(1) The Defendant shall deliver to the Plaintiff a cash account within 10 days.

(2) The Defendant shall deliver to the Plaintiff a list of the moneys or securities which the defendant has in his possession or control on behalf of the plaintiff within 10 days.

(3) The Defendant shall pay into court such moneys or securities within 14 days.

(4) The Defendant shall pay the Plaintiff's costs of this application."

The defendant did not appeal against the Order.

[3] On 26 June 2003 the defendant furnished a cash account together with five bills of costs in respect of legal work carried out by the defendant. The defendant claims costs of £78,737.50. The defendant has not paid the sum of £74,000 which was admitted in the statement of account furnished by the defendant to be moneys belonging to the plaintiff.

[4] The plaintiff issued a summons on 10 June 2003 asking for an order that the defendant should be examined on oath as to why he had not

complied with the order and to show cause why he should not be committed for default.

[5] On the hearing of the application Mr Orr QC on behalf of the plaintiff argued that the defendant held the sum of £74,000 initially for a specific purpose namely to acquire the shares in the company and that purpose never having been carried into effect (since the contract never came to fruition) the defendant was bound to repay the money to the plaintiff. He contended that the money in these circumstances was received for a particular purpose which had failed and was repayable. He relied on Stumore v Campbell [1892] 1 QB 314. In that case the plaintiff an execution creditor applied to attach money in the hands of the defendants a firm of solicitors. The defendants were the garnishees. The money had been deposited by the judgment debtor with the defendants for a special purpose that had failed. The defendants claimed that the judgment debtor was indebted to them for law costs in a larger sum than that deposited with them and that they would be entitled to counterclaim for the amount due. It withheld that since on the failure of the special purpose for which it was deposited with the defendants the money remained in their hands subject to a trust to repay it to the judgment debtor they could not have set up their claim in costs in answer to a demand for the return of the money and that therefore it was a debt due from them to the judgment debtor which could be attached.

[6] Counsel for the defendant has sought leave to put in a replying affidavit. She sought to argue that the defendant would contend that the money was not received subject to a specific purpose trust but had been received for general purposes and that the solicitor had a lien on such a fund for unpaid costs.

[7] There are a number of factual aspects of the matter which are unclear. According to the plaintiff from his affidavit the contract sum which it was envisaged would be the price to be paid for the shares was £68,000 not £74,000 which appears to be the amount of money currently held by the defendant. It is not clear when the provisional sum of £68,000 was agreed. The £54,000 was paid by cheque on 29 September 1998 to Mr Kelly and then £20,000 by agreement was debited to the account. It is not clear why it was agreed that £20,000 should be debited.

[8] Whatever the true facts of the situation the position is that the court order of 11 October 2001 was not complied with. The defendant was required on the face of the order to pay monies held for the plaintiff into court within 10 days. When that matter was before the court the defendant did not assert a lien or set-off and had not served any bills of costs. An order of the court which has not been appealed is enforceable and binding (see now Mulkerrins v Pricewaterhouse Coopers (a firm) [2003] 4 All ER1 at 7d-f) The defendant remains in breach of the order of 11 October 2001 which as indicated has not

been the subject of any appeal and effect must be given to the court order. Accordingly if the defendant continues to fail to pay the sum of £74,000 into account as directed on foot of the order of 11 October 2001 he will continue to be in breach of the order and thus in contempt of court. I shall accordingly adjourn the matter for 14 days. If the defendant has not by then lodged the monies in court as directed by the order of 11 October 2001 the court might have no alternative but to commit the defendant to prison for contempt.