Neutral Citation No. [2014] NICh 27

Ref: **DEE9454**

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

Delivered: **01/12/2014**

2014 No 61531

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF A SOLICITOR AND IN THE MATTER OF THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

BETWEEN:

HAMILTON AND DIXON GROUP SIPP

Plaintiff;

and

HASTINGS AND COMPANY (SOLICITORS)
(SUED AS A FIRM)

Defendant.

MR JUSTICE DEENY

[1] This application raises a point of general interest regarding the disclosure of solicitor's files, albeit arising from unusual facts. The solicitors acting for the putative plaintiff herein issued an originating summons on 11 June 2014, pursuant to Article 71C of the Solicitors (NI) Order 1976 and the inherent jurisdiction of the court, seeking that "the defendant deliver up to the plaintiff all papers, documents and title deeds in the possession and custody of the defendant relating to the property transaction in respect of Hamilton and Dixon Group SIPP property at 85 Ballylumford Road, Islandmagee, Larne."

[2] The application arose in the following way. Hastings and Co had been instructed by Sippdeal Trustees Ltd in connection with a transaction. This involved the sale to the 'Hamilton and Dixon Group Self Invested Personal Pension' of Folio 23927 County Antrim. Hastings and Company acted for the vendor as well as the purchaser. No criticism is made of them for so acting. The interest of the purchaser was registered on 29 December 2011. The entry reads as follows:

> "Maynard Hector Hamilton of (address) is full owner as a tenant in common of an undivided 66.6% share.

> Barbara Elizabeth Dixon of (address) is full owner as a tenant in common of an undivided 33.34% share".

Trusts are not expressed on land registry titles in Northern Ireland, pursuant to s. 54 Land Registration Act (N.I.) 1970. It is common case between the parties to this application that Mr Hamilton and Mrs Dixon were trustees for their own SIPP. They were then in business together. Since then a dispute has arisen between them and they are not on good terms. The vendor of the property was a Mr Roy Dixon whom, I was told, was a brother-in-law of Mrs Barbara Dixon.

[3] In 2013 Mr Maynard Hector Hamilton had inquiries made about this land and was advised by the leading estate agents, Colliers, that in their opinion the land was worth some £7,500 in contrast to the purchase price of £75,000 which his SIPP had paid for it in 2011. Furthermore he had been advised by the earlier valuer/surveyor that the extent of the land, which was agricultural but believed to have planning potential, was 1.34 acres whereas Colliers said that in fact it was only 2 roods and 19 perches. As this clearly impacted on the value of his pension scheme Mr Hamilton sought to inquire further with a view to bringing proceedings against those who had acted for him at that time, particularly the valuer/surveyor but conceivably the solicitors as well.

[4] The matter was heard by me on Friday 21 November 2014. The court had the assistance of submissions from Mr Keith Gibson for the plaintiff and Mr Mark McEwan for the defendant. Mr McEwan was alert, as the court was, at an earlier review of this matter to the identity of the plaintiff. A self-invested personal pension does not sound like a legal entity. Mr Gibson now accepts this and he applied at the opening of the hearing on 21 November to amend the title of the proceedings to the following:

> "Maynard Hector Hamilton as Trustee of Hamilton and Dixon Group SIPP and Maynard Hector Hamilton in his own right Plaintiff."

Later in the hearing he also applied to amend the relief sought to include the words "or for a copy of the above named papers, documents and title deeds" at the end of paragraph 1 of his summons. This latter amendment addressed an important point raised by Mr McEwan in his submissions to which I will turn in a moment. He did not object to the amendments subject to his right to comment and to costs.

[5] The plaintiff in the light of these amendments and clarifications, for which I now give leave, advances good reason for seeking a copy of the file. His counsel candidly admits that they will examine the file to see if he has any just cause for complaint against the defendant herein as well as the valuer/surveyor. He relies on

my decision in The Mortgage Business plc and Bank of Scotland plc v Thomas Taggart & Sons [2014] NICh 14.

[6] The defendant raised a number of grounds justifying him in declining to accede to the request to hand over his conveyancing file to the solicitors for, Mr Hamilton as it is now, or Hamilton and Dixon Group SIPP as it was before. They can all be dealt with quite shortly. First of all, the form of authority which Andrew Walker and Company sent made no reference to Mr Hamilton's role as a trustee of the SIPP. The subsequent proceedings were in the name of the SIPP and made no reference to Mr Hamilton. I consider that Hastings and Company were justified in awaiting a proper form of authority. If that is now provided in the light of the amendments which I have permitted that will no longer be a bar to either the provision of the documents as set out below or an Order of the court.

[7] Mr Hastings in his correspondence pointed out that Mr Maynard Hamilton had been made bankrupt, and contended that any such property was vested in his trustee in bankruptcy and therefore Mr Hamilton had no interest in it. However, since 29 May 2000, almost all pension arrangements will fall outside of a bankrupt's estate. See Gowdy and Gowdy Individual Insolvency: The Law and Practice in Northern Ireland; 8.28. At the hearing before me the registrar was able to produce the bankruptcy order, which neither side had sight of before, showing that Mr Hamilton had been made bankrupt on 25 April 2012. The parties then accepted that he was discharged from his bankruptcy on 25 April 2013. Mr McEwan nevertheless raised the point in aid of justifying the caution on the part of his client in simply handing over his conveyancing file to Mr Hamilton.

[8] His third and most substantial point is of general application. Should a solicitor where he had acted for trustees, asked for his file by one only of several trustees, without the assent of the other trustees, deliver it to that trustee? The answer to that involves two stages.

[9] The first stage is to consider the role of an individual trustee. He is under a duty of care to the interests of those who were entitled to the income but also to the interests of those who will take in the future. Carswell, Trustee Acts (NI), 1964 at page 17. "The duty is rather to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." Re Whiteley [1886] 33 Ch. D 347, 355, *per* Lindley LJ. A trustee who has behaved dishonestly, but also one who has behaved imprudently may be held liable for something more than mere errors of judgment. See ss.1, 2 and Sch.1 Trustee Act (NI) 2002 on the trustee's duty of care.

[10] It seems to me to follow that a trustee is entitled to such information from the solicitors for the trust as relate to the affairs of the trust as he thinks proper to discharge his duties. The duty to act with care on behalf of the trust has the concomitant right, in Hohfeldian terms, to be kept informed of the affairs of the

trust, to protect both himself and the beneficiaries, present or future. A solicitor acting for a trust is, subject possibly to exceptional circumstances not arising here, such as a situation of criminal misconduct on the part of a trustee, to provide information in his possession relating to the conduct of the trust's affairs which a trustee reasonably requires for the discharge of his role.

[11] But, moving to the second stage, the plaintiff here erred in seeking not merely information but the delivery of all the papers, including the original papers, in the possession of Hastings and Company without the authority of his fellow trustee. If the defendant had handed over his entire file including original documents without taking copies he would not be in a position to discharge his duty to the other trustee or trustees in the future if they sought information. But even taking copies he would run the risk that examination of an original document, particularly as to the conveyance of property, may prove of importance in the future and it would be in the hands of a single trustee without the agreement of his fellow trustees. But I can see no good reason why he should not allow Mr Hamilton to examine the file and request copies to be made of relevant documents, at Mr Hamilton's expense, although that may be recoverable by him in due course. The fact that Mr Hamilton is a beneficiary of the trust as well as a trustee does not deprive him of his rights as a trustee.

[12] This approach accords with a document relied on by Mr McEwan at the hearing on the 21st. It was Annex 12A to The Guide to the Professional Conduct of Solicitors (8th Edition) written for the benefit of the solicitors profession in England and Wales before the changes to regulation in that jurisdiction. It was dealing with the case of who owns the file where there has been a joint retainer. The Law Society of England expressed the opinion that the various documents, akin to those sought here, "can only be disclosed to third parties with the consent of both or all of the clients and the original papers can only be given to one client with the authority of the other(s). Each client is entitled to a copy of the relevant documents at their own expense." It seems to me that this is a correct and succinct statement of the position. It accords with the view I have formed. See also Underhill& Hayton, Law of Trusts and Trustees, 18th Ed., 82.6. It is consistent with the broad discretion given to the court under Article 1C of the Solicitors (NI) Order 1976. I conclude therefore that I should make an order granting the relief sought in the amendment to the originating summons i.e. a copy of the documents sought, when a form of authority reflecting the amended title of the proceedings is served.

[13] I am not minded to grant the relief sought in paragraph 2 of the originating summons i.e. that the defendant pays the plaintiffs their costs. Mr Keith Gibson has not yet addressed me on this topic, and I will hear him but I am minded to direct that Mr Hamilton must bear the costs of Hastings and Company. I say this because of a number of factors including the following. There was no reply to the perfectly reasonable letter of Hastings and Company of 14 April 2014. Rather proceedings were issued some 4 months later without such a reply. There was no letter before

action, a matter consistently deprecated in these courts. Proceedings should be issued only when necessary and a more thoughtful approach here in advance may have obviated the need for them. As can be seen by this judgment the plaintiff's case only emerged properly at the hearing of the application and after receipt of counsel for the defendant's skeleton argument.

{Costs awarded to Defendant on standard basis to be taxed in default of agreement}