Neutral Citation No. [2015] NIQB 41 | *Ref:* **WEA9545**

Judgment: approved by the Court for handing down | *Delivered:* **11/02/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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JAMES FRANCIS FITZPATRICK

(practicing as JAMES F FITZPATRICK and COMPANY Solicitors)

Plaintiff

and

ALLAN ASSOCIATES ARCHITECTS LTD

---------- **Defendant**

WEATHERUP J

[1] The plaintiff's claim is for the payment of solicitor's professional fees and outlay for services rendered in the defence of legal proceedings brought against the defendant in the Queen's Bench Division of the High Court in 2005 in which the plaintiff acted as solicitors on record for the defendant. Mr Lunny appeared for the plaintiff and Mr Cush for the defendant.

[2] The plaintiff is a solicitor practicing in a firm in Belfast and claims to have been instructed to act on behalf of the defendant in October 2003 in the action which concerned a housing development construction dispute in Co Fermanagh. The action was listed for hearing in May 2005 and was ultimately settled. After the conclusion of the action the plaintiff, on 24 June 2005, submitted to the defendant's insurer via the insurer's nominated English solicitors, a Bill of Costs for £64,894.87. Payment was received by the plaintiff of some £40,874.72. The present claim is for the shortfall of £24,020.15.

[3] The defendant raised two preliminary issues. The first preliminary issue was whether the plaintiff had sued the correct defendant. That matter was ultimately

resolved and is not an issue. The second preliminary issue was whether any contractual nexus existed between the plaintiff and the defendant.

[4] The defendant contends first of all that the defendant did not enter into any agreement with the plaintiff in respect of fees to be paid in the defence of the action and no such agreement was entered into by anyone on behalf of the defendant; secondly that the plaintiff is not entitled to claim against the defendant in respect of any monies allegedly due, given that the same were the responsibility of the defendant's insurer; thirdly that the plaintiff is estopped from bringing a claim by virtue of the plaintiff's acceptance of the first payment.

[5] When the defendant first notified the potential claim to the broker the defendant received a letter from English solicitors, Park Nelson, later Lester Aldridge, stating "We are instructed by your professional indemnity insurers in relation to the above notification. We would be grateful if you could contact us upon receipt of this letter …." This was said to be the first contact which the defendant had with solicitors. The defendant did not instruct any solicitors nor were they permitted any input into the choice of solicitors who were instructed by the insurers on their behalf. On 11 July 2002 Park Nelson wrote to the plaintiff to enquire whether his firm would be prepared to act as agent on behalf of the defendant and on 17 July 2002 the plaintiff confirmed that the firm would act. There then followed correspondence by which it was reiterated that the plaintiff was acting as agent for the English solicitors and the defendant had no input in relation to the conduct of the proceedings.

[6] What the defendant described as a significant exchange of correspondence occurred in October 2002. By letter of 3 October 2002 the plaintiff wrote to the defendant stating that "…. we have been instructed by Park Nelson, Solicitors" and asking for information. That letter was forwarded by the defendant to Park Nelson and prompted a letter from Park Nelson to the plaintiff of 9 October 2002 stating "Please note that in this instance you are our Agents. All requests for documentation and information should be made via us and not direct with Allan Associates".

[7] In the course of the correspondence reference was made to another firm of solicitors in England, Fishburns, who were also involved between Park Nelson and the insurers, although their role was not actually examined in the course of the hearing. It is the defendant's case that there was no contract between the plaintiff and the defendant and any contract was between the defendant and Park Nelson.

[8] The further issue raised on behalf of the defendant is that the defendant had the benefit of an insurance policy and was entitled to an indemnity under the policy in respect of all damages and costs payable to a claimant, and secondly an indemnity for defence costs, which were described as all costs and expenses incurred with the prior written and continuing consent of the insurers in the investigation, defence or settlement of any claim. The defendant therefore contends that under the policy the

defendant had no liability to the plaintiff for any defence costs and that all such costs are payable by the insurer.

[9] The defendant's position is that Park Nelson was at all material times instructed by insurers to act on behalf of the defendant in the defence of the litigation and that in turn the plaintiff was instructed as agent by Park Nelson. Reference was made to *Bowstead and Reynolds on Agency* in relation to the nature of agency and in particular to paragraph 9-001 which states -

> "In the absence of other indications, when an agent makes a contract purporting to act solely on behalf of a disclosed principal, whether identified or unidentified, he is not liable to the third party on it. Nor can he sue the third party on it."

[10] The defendant recognises the standard position stated in *MacGillivray on Insurance Law* 12th Edition at paragraph 29-050 -

> "If insurers assume the conduct of the defence of an action brought against the assured and appoint solicitors to act therein, the solicitors so appointed are the solicitors of the assured."

[11] However the defendant contends that this standard position does not apply where, as in the present case, the solicitors appointed to act for the assured (Park Nelson) then appoint other solicitors (the plaintiff) to act as their agent in the conduct of the defence of the action brought against the assured.

[12] The defendant further relies on correspondence where the plaintiff is described as an agent and where the plaintiff sought fees from the English solicitors and from the insurer rather than from the defendant. The plaintiff relies on correspondence that refers to the defendant being liable for VAT and to the defendant as the client.

[13] Ms Keegan, solicitor, had conduct of the original action and gave evidence for the plaintiff. She regarded the English solicitors as 'middlemen' and the solicitor's duty of care as being owed by the plaintiff to the defendant as the client. It is clear that the plaintiff should have established more clearly the relationship and the fee arrangements in relation to the engagement of the services of the plaintiff. Brian Fee QC was Counsel on behalf of the defendant in the original action and he similarly regarded the defendant as the client and the duty of care as being owed to the defendant and the defendant being bound by the settlement of the action.

[14] I accept the evidence of Ms Keegan and Mr Fee as to their beliefs as to the position of those involved in the original action. However I do not regard the beliefs of the solicitor and Counsel as being determinative of the issue. The nature of the

contractual relationships, while depending on the intention of the parties, is an objective matter to be deduced from all the circumstances.

[15] The defendant's analysis of the relationships was in terms of agency, with the plaintiff being the agent and the English solicitors being the principal. I prefer to consider the matter in terms of the solicitor/client relationship, which may include agency arrangements. In Adams v London Improved Motor Coach Builder's Ltd [1921] 1 KB 495 the plaintiff was a member of a Trade Union which provided, amongst other benefits, legal aid for members in connection with their employment. When the plaintiff was wrongfully dismissed and the Union had decided to provide legal aid they instructed a firm of solicitors to act for the plaintiff. The plaintiff gave no written retainer to the solicitors and there was no agreement with the solicitors that the plaintiff was not to be liable to them for costs. The plaintiff recovered judgment and on a dispute about entitlement to recover the legal costs of the solicitors engaged by the Union it was held that the plaintiff was entitled to recover the costs.

[16] Objection to the payment of costs was on two grounds. First, that the solicitors involved were not solicitors for the plaintiff but were solicitors for the Union and their only instructions were to act as solicitors for the Union. Second, that assuming the Union instructed the solicitors to act as solicitors for the plaintiff, the instructions were upon the terms that the solicitors would look solely to the Union and not the plaintiff for payment of their costs.

[17] It was decided on the first ground that the solicitors were engaged by the Union to act as solicitors for the plaintiff and that in so engaging the solicitors the Union were acting as the agents of the plaintiff. In respect of the second ground it was found that there was no arrangement, either by the Union or by the solicitors or by the plaintiff, that the solicitors should not under any circumstances look to the plaintiff for payment of their costs.

[18] Three questions were asked. First, who engaged the solicitors? The answer was the Union. Next, for whom did the Union engage the solicitors to act, as solicitors for the Union or as solicitors for the plaintiff? Banks LJ stated it to be impossible on the facts to come to any other conclusion than that the Union engaged the solicitors to act as solicitors for the plaintiff. The third question was, upon what terms were the solicitors employed? Banks LJ stated that it was essential for the defendant's case that they should establish that the terms upon which the solicitors were engaged included the term that under no circumstances should they look to the plaintiff for costs. Once it was established that the solicitors were acting for the plaintiff with his knowledge and consent the plaintiff became liable to the solicitors for costs and that liability for costs would not be excluded merely because the Union also undertook to pay the costs. To resist successfully liability for costs it was stated to be necessary to prove that there was a bargain either between the Union and the solicitors or between the plaintiff and the solicitors that under no circumstances was the plaintiff to be liable for costs.

[19] The defendant contends that Adams applies to the primary solicitor and not to a secondary solicitor and describes the English solicitors as the primary solicitor and the plaintiff as the secondary solicitor. The plaintiff's response is that the secondary solicitor is in the same position as in Adams and refers to De Bussche v Alt [1878] 8 Ch. D. 286. In 1868 the plaintiff consigned a ship to G in China for sale and fixed a minimum price. G employed the defendant in Japan to sell the ship on the same terms. This was done with the knowledge and consent of the defendant. The ship did not sell and the defendant, as the report puts it, 'took her himself for the minimum price' and at the same time resold her to a Japanese prince for $160,000 which was $70,000 more than the reserve price. The defendant then paid the reserve price to G who remitted it to the plaintiff. The plaintiff then filed a bill in Chancery to compel the defendant to account for the profit which he had made on the resale of the ship.

[20] It was held that the relationship of agent and principal was established between the defendant and the plaintiff and that the defendant was liable to account to the plaintiff for the profit he had made in the transaction. The plaintiff relied on a sub-agency, the plaintiff having consigned the ship to G who in turn consigned the responsibilities to the defendant. That chain of agency did not make any difference to the responsibility of the sub agent. The present plaintiff seeks to translate this approach into the present relationships. As the cases turn on their facts it is not possible to translate this approach automatically to the solicitor/client relationship although there is no reason in principle why there should not be, in the relationship of solicitor and client, a chain of agency.

[21] *Bowstead on Agency,* at paragraph 9-001, above states that when an agent (in this case the plaintiff) makes a contract purporting to act solely on behalf of a disclosed principal (which the defendant says applies between the plaintiff and Park Nelson) the plaintiff cannot sue the third party (the defendant). This is the position "in the absence of other indications". One must look to whether on the facts of the particular case there are contra indications. It seems to me that the circumstances of the present case are awash with other indications. Look to the solicitor/client relationships and the defendant as the ultimate client and party who may be liable to meet the claim being made; look to the presence of the insurer of the defendant to provide indemnity if the policy applies to the basis on which the defendant may be found liable; look to the insurer assuming the conduct of the defence of the action; look to the engagement of a solicitor by the insurer rather than by the defendant; look to the defendant yielding up conduct of the action to the insurer; look to the insurer giving authority to the solicitor to conduct the defence; look to the chain of solicitors engaged, ultimately to conduct the defence of the action assumed by the insurer; look to the defendant agreeing to be bound by the arrangements made; look to the solicitor with day to day conduct of the defence of the action owing a duty of care to the defendant; look to the defendant recovering the legal costs of the defence of the action if the defence is successful.

[22] The present defendant does not appear to dispute the standard position in respect of claims made against insured defendants but there is said to be an additional element that arises in the present case. The additional element is that instructions were issued by the English solicitors to render the plaintiff the agent of the English solicitors. I take an objective view of the relationships that arose in the present case. I conclude that the involvement of the English solicitors does not make any difference to the realty of the arrangements which were as described in Adams. I ask the same questions that were asked by Banks LJ in Adams -

> (i) Who engaged the plaintiff solicitors? The insurers engaged all three sets of solicitors, that is, Fishburns, Park Nelson and the plaintiff. To say that Park Nelson engaged the plaintiff is artificial. The plaintiff was engaged by the insurer to conduct the defence of the action as surely as any other solicitor instructed by insurers in the defence of legal proceedings. The practicalities of activities in the different jurisdictions required the insurers to engage the plaintiff.
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> (ii) For whom did the insurers engage the plaintiff to act? Again it seems to me clear that the insurers engaged the plaintiff to act for the defendant. The defendant was the insured and the client. Again to say that the plaintiff was to act for the English solicitors or was to act for the insurer is artificial. The plaintiff acted for the defendant.
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> (iii) Upon what terms was the plaintiff employed? The terms in relation to costs included the defendant being liable for the plaintiff's costs as is the position in any other triangulation of interests between a client and insurer and solicitor engaged by the insurer to act on behalf of the defendant client. The issue of costs was not excluded from the terms simply because the insurer had agreed to pay the plaintiff's costs. There was no agreement that the defendant would not be liable for the plaintiff's costs, being the approach taken in Adams as the approach to excusing liability for costs.

[23] The defendant contends that the plaintiff did not look to the defendant for fees when the dispute arose but looked to the English solicitors and to the insurers. I do not doubt that the plaintiff would look to the chain that existed through the English solicitors and other solicitors to the insurer for recovery. However while the solicitor may not have looked initially to the defendant client for fees, but rather to the insurer, the legal reality was that the defendant was liable for those fees although he was entitled to an indemnity from the insurer. There was an implicit retainer or an implicit agreement between the plaintiff and the defendant.

[24] An updated example of the legal position appears in Ghadami v Lyon Cole Insurance Group [2010] 6 Costs LR 903. The matter concerned the liability of the claimants for costs following the dismissal of their claim against the defendant insurance broker. On that dismissal the claimants were ordered to pay the defendant's costs on an indemnity basis. The defendant had a professional

indemnity insurance policy which extended to the costs of the proceedings, subject to an excess of £1,000. The defendant paid the £1,000 and the remainder of the bill was paid by the insurers. The claimants contended that under the order for costs they were only liable to pay the £1,000 that the defendant had paid. This approach was rejected. At paragraph 27 it was stated that there was an implicit agreement that the solicitors would act as the defendant's solicitors in relation to the claim but without any express terms as to charging rates. The solicitor's failure to comply with the Client's Care Code in that regard did not prevent the recovery of their fees and disbursements.

[25] The defendant's further argument is that the defendant has no liability for the fees because of the defendant's indemnities under the insurance policy for damages and costs paid to a claimant and for the defence costs of the defendant's own legal representation in the proceedings. The indemnities are a matter of contract between the defendant and the insurer. The indemnities do not take away from the implied retainer or implied agreement that exists between the defendant and the plaintiff. As between the plaintiff and the defendant the implied retainer or implied agreement renders the defendant liable for the costs. The defendant has contractual indemnity from the insurer in respect of those costs and that indemnity does not diminish the plaintiff's entitlement to recover costs from the defendant.

[26] The defendant proposes to rely on estoppel, a matter that requires further particulars from the defendant.

[27] If it became necessary to determine the amount of the plaintiff's recoverable costs I would propose to refer the matter to taxation. The makeup of the Bill of Costs is disputed. Under Article 71A of the Solicitor's (Northern Ireland) Order 1976 a solicitor or a client may tax the Bill of Costs. This Bill of Costs, insofar as it is disputed, would be referred to taxation. Subject to such further matters as may be raised and if it becomes necessary to do so I will direct that the plaintiff should tax the bill and will order that the plaintiff be entitled to recover whatever amount is allowed on taxation.