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Judgment: approved by the Court for handing down | *Delivered:* **21/2/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

DONARD McCANN

Plaintiff;

-and-

KEVIN HIGGINS

Defendant.

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GILLEN J

Application

[1] This is an appeal against a decision of District Judge Keegan sitting as a Deputy County Court Judge when he made a decree in favour of the plaintiff for professional fees which had not been paid by the defendant/appellant ("the appellant").

Background

[2] The appellant was involved in a long running land dispute with a neighbour Mr Crawford who issued Civil Bill proceedings against him in 2003 alleging nuisance to which the appellant counterclaimed alleging trespass. In May 2008 His Honour Judge McFarland determined the matter in his favour with costs against the other party. However, the judge also dealt with the issue of a boundary between the lands of the two parties. It appears that in an attempt to resolve the matter the judge directed that engineers should agree a boundary line between the two parties and gave them until 25 November 2008 to complete this task. It further emerged that whilst the engineers had agreed such a boundary line, the appellant was not content

with that agreement on the part of his engineer. The Order of 20th May 2008 recorded:

> "The County Court Judge ordered that the claim for discharge of the injunction and nuisance (Crawford v Higgins) be dismissed on the merits plus costs on equity scale 5, the said Order as to costs not to be enforced without leave of the court or the Court of Appeal. The trespass case (Higgins v Crawford) the judge ordered a decree in the sum of £50 with a mandatory injunction that Mr Crawford will erect a stock proof fence along the centre line of the agreed hedge line and Mr Crawford to remove oil tank and all other property from Mr Higgins' land within 28 days from 20th May 2008. The fence to be erected within 58 days from 20th May 2008. …"

[3] The appellant at this time was represented by the firm of Doris & McMahon, Solicitors, until in or about September/October 2008. At that time he approached the respondent albeit that he had not discharged the professional fees of Doris & McMahon.

[4] It is the respondent's case that in or about September 2008 the appellant attended his office and informed him that the relationship with Doris & McMahon had broken down and that he wished Mr McCann to act for him. Mr McCann informed me that whilst he had reservations about the situation, he decided to send out to the appellant a letter of retainer setting out his hourly rates and bill of interim costs in the sum of £1,807.

[5] The appellant had also given Mr McCann some papers in the matter but clearly others were missing. Mr McCann requested Doris & McMahon to pass over the papers but that firm indicated they were not prepared to release the papers until their fees had been paid.

[6] Mr McCann then proceeded to write to the court office to ascertain the full nature of the decision taken by the County Court Judge and obtained a short adjournment until November 2008 when he appeared before the County Court Judge. Mr McCann requested the judge to make no order on the basis that the path adopted by the court of May 2008 directing the experts to meet and agree a boundary was not a relief which had been sought in the Civil Bill. Mr McCann on behalf of the appellant also submitted to the court that it was questionable whether the other party to the litigation was entitled to legal aid given that he had a small field and he sought leave to enforce the order and costs against him. The judge refused the application by Mr McCann on the issue of legal aid and made a decree in relation to the boundary limits.

[7] Mr McCann asserted that he then advised the appellant that the next step was to consider an appeal to the High Court and outlined his preliminary view that he felt that the appellant did have potential for an appeal. On 15 December 2008, on instructions, a Notice of Appeal was issued against the Order of Judge McFarland of November 2008. The appellant made a payment on account of £1,345.50. In December 2008, Mr McCann instructed counsel, Mr McBrien BL, to advise on the matter.

[8] Mr McBrien opined that the case seemed to "fall into a unique category whereby the judge has delegated power to the expert witnesses. However, the use of the word "agreed" in the Order of 20 May 2008 is important. Either something was agreed or it was not. If agreed, then it is hard to challenge. If not agreed, then the word agreed should not have appeared in the Order".

[9] The appeal was then fixed for hearing in May 2009. However, once this date had been fixed, Mr McBrien indicated that he had difficulties with other commitments on that date. Mr McCann asserted that he explained this to Mr Higgins and it was agreed that the papers should be passed to Mr Sharp BL.

[10] Mr Sharp directed proofs on 27 April 2009 and advised that in his opinion a County Court Judge hearing a land case in which trespass is pleaded and where an injunction is granted is entitled to determine where the boundary is between the parties. He went on to assert that where experts have been instructed by both parties to agree the boundary, it may be assumed that both experts have implied authority and that if there is agreement there is no appeal from that position. In short he concluded that this was an appeal of little merit and that careful consideration should be given to abandoning the appeal.

[11] Mr McCann thereafter took Mr Higgins through this opinion. According to the evidence of Mr McCann the appellant indicated that he felt this opinion was at odds with that expressed by Mr O'Brien and asserted he had no confidence in Mr Sharp. He appeared to question Mr Higgins' ability to proceed. It emerged at that meeting that unknown to Mr McCann, Mr Higgins or someone on his behalf had been attending reviews without letting Mr McCann know this was happening. He had also recorded meetings unknown to Mr McCann In all the circumstances Mr McCann concluded that the professional relationship had broken down and therefore applied to come off record. That application was granted by Higgins LJ.

[12] Thus two preliminary bills had been paid but the remaining sum together with that of the engineer remained unpaid and that had been the subject of the proceedings against which this appeal is now brought.

The Appellant's Case

[13] Mr Higgins cross-examined Mr McCann and also gave evidence himself. In the course of an extensive written skeleton argument, his cross-examination and his

evidence, all made with the assistance of a McKenzie Friend he made the following points:

- The Solicitors (Client Communication) Practice Regulations 2008 came into effect on the 1st of September 2008 together with a Code of Practice for the Regulations namely the Solicitors (Client Communication) Practice Regulations 2008.Mr McCann had been in breach of these in failing to inform him of a complaints procedure under the terms of the regulations.

- Whilst he had not been entitled to legal aid at the time he instructed Doris & McMahon, his circumstances had changed when he instructed Mr McCann, his income was low and he was receiving tax credit. Accordingly, Mr McCann ought to have applied for legal aid on his behalf.

- Mr Higgins failed to enforce the costs order against the former plaintiff Mr Crawford who had, according to Mr Higgins, a field adjacent to his house and was not entitled to legal aid. No formal application was made by way of a summons and affidavit to challenge the fact this man had been granted legal aid.

- Mr McCann had failed to make written submissions to Judge McFarland as he had requested.

- Mr McCann had unnecessarily invoked the assistance of a map and a mapping surveyor for the appeal when counsel had not directed such a step . He had not agreed to pay for such an expert. No attempt was made to price around for cheaper experts.

- No contact was made with him to affirm the choice of Mr Sharp BL as counsel.

- Mr McCann had informed him that there was a complete re-run of the case even though they were only appealing part of it, namely the aspect concerning the boundary.

- The solicitor had failed to keep a time record of matters such as preparing papers and briefing McBrien etc. He also suggested he did not receive the advice from Mr McBrien.

- The solicitor failed to indicate in the terms of engagement that fees would be required "upfront" for the barrister.

- The appellant was not properly advised that it was foolish to appeal against someone who was legally assisted in the County Court.

- The solicitor had advised him on the points of a possible appeal without informing him of his reservations about Mr Higgins as a client and the fact that he did not have all the papers. Moreover Mr McCann had failed to put these reservations in the terms of engagement.

- Mr McCann had told him in September 2008 that he thought he had a strong case and that the judge had had no authority to make a ruling on the boundary issue as it was not pleaded in the Civil Bill. His letter of 31st October 2008 to the client had indicated that he had serious concerns about the court order. If Mr McCann had not been so convincing about the appeal, the appellant would never have risked high legal costs over a strip of land worth about £50. Mr McCann had only voiced that he had had concerns all along once he received the opinion of Mr Sharp. In short the appellant had been misled on the merits of the appeal.

Conclusions

[14] I commence by making some general observations on the obligations of solicitors to clients and the concept of solicitors' negligence. Solicitors owe a concurrent duty of care to their clients independently of their contractual obligations. The nature of the solicitor's duty was explained in Henderson v Merrett Syndicates [1995] 2 AC 145 at 190B as follows:

> "The extent of his duties depends upon the terms and limits of the retainer and any duty of care to be implied must be related to what he is instructed to do. Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must be aware of imposing upon solicitors – or upon professional men in other spheres- duties which go beyond the scope of what they are requested or undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions but that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession. (See also National Home Loans Corporation v Giffen, Couch & Archer [1998] 1 WLR207 at 2136-H).

[15] As Bingham LJ said in Eckersley v Binnie [1988] 18 Con LR1 at 79:

> "A professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have awareness as an ordinarily competent practitioner would of the deficiencies in his knowledge and the limitations of his skill. … The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."

[16] In general it is a good answer to a claim for negligence that the defendant solicitor relied upon the advice of counsel. In general a solicitor is entitled to rely upon such advice if counsel is properly instructed. However, he must not do so blindly, but must exercise his own independent judgment. If he thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it. (See Locke v Camberwell Health Authority [1991] 2 Mad LR249 at 254. In Ridehalgh v Horsefield [1994] CH 205 at 237G, the Court of Appeal qualified the advice which it had set out in Locke by adding a fourth proposition:

> "A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable it is likely to be for a solicitor to accept it and act on it."

[17] Applying these principles to the instant case, my conclusions are as follows. First, I am satisfied that the 2008 Regulations which came into force in September 2008 applied in this case. Accordingly, albeit only coming into force a very short time before Mr McCann spoke to the appellant, there ought to have been a complaints procedure which should have been explained to the appellant. However, a breach of these regulations does not in any way affect the work that was done by the solicitor in question. I am certain that it should not have prevented the appellant taking the matter to the Law Society if he wished to do so. I do not believe that the fact that the Law Society insists that the in-house complaints system be used should be allowed to prevent a complaint being made to the Law Society if a solicitor was in breach of the Regulations and had not set up such an in-house complaints system. I consider this issue to be entirely separate from the question now before me and to have no effect on the bill of costs which the solicitor in this case seeks to obtain. It should not serve to dilute the value of the services which have been carried out.

[18] The appellant in this case has never sought to have his costs taxed. I find nothing about the figures before me or the time invested by the solicitor which suggests that these fees claimed are other than fair and reasonable. Two illustrations suffice to underline this conclusion. For a meeting on 28 April 2009 the appellant suggested that the meeting had only lasted 1½ hours rather than 2 hours as suggested by the solicitor concerned. However, this did not take into account that Mr McCann made up a note of the meeting thereafter which may have taken it towards the two hour period. Secondly whereas the appellant measured one meeting at 3 hours 40 minutes on the 29 of April 2009 the respondent has only charged for 3 hours. This is an illustration of the measured approach taken by this solicitor.

[19] I pause at this stage to record my views of both parties who gave evidence before me. Mr Higgins has approached this matter with all the accusatory fervour and blinkered certainty of the disappointed litigant. I fear he has become consumed by a misplaced sense of injustice in this whole matter which has served to cause him to view many of the actions of Mr McCann through a distorting mirror. I found his evidence on many occasions frankly implausible and resistant to logical thought. On the other hand I found Mr McCann's account of his encounters with Mr Higgins to be candid, impressively free of rancour and reassuringly direct. Whilst he is may not be free of some criticism e.g. in failing to invoke a compliant complaints system, overall I found nothing of substance which rendered his professional approach in this instance inadequate.

[20] I am satisfied that Mr McCann was entitled to form the view which he did originally as to the possibility of appeal in this case. He had obtained an opinion from Mr McBrien which at least in part served to underline the initial concerns he held about the decision of the judge. The fact that at a later stage another counsel took a different view does not render the exercise of his judgment on the law as negligent. The solicitor is perfectly entitled to form an initial view himself, to rely upon the first counsel's advice and, properly, to re-assess the matter when the second counsel took a different view. I am satisfied that the issues that were arising in this matter could properly lend themselves to differing views of solicitors and counsel and the fact that the solicitor and counsel eventually took differing approaches is most certainly not any evidence of negligence but rather of a conflict of views that regularly occurs in legal circles.

[21] Whilst I consider there is a duty on a careful solicitor to consider the possibility of legal aid being available, I am satisfied that Mr McCann in this case did give his consideration to legal aid in light of the background facts. The previous solicitor had acted for Mr Higgins for five years without him being legally aided and it was not unreasonable for the solicitor in this instance to assume the position remained the same in the absence of being given further information by the appellant. He was a fee paying client and never suggested the contrary. I believed Mr McCann when he asserted that he had no recollection of ever being told that the plaintiff was receiving tax credits and indeed he had continued to discharge fees in

the normal way. There is no evidence before me to satisfy the court that this man would have been entitled to legal aid in any event and I would have thought that if the appellant had been intending to make this as a valid point, some evidence would have been called on his behalf to prove that in fact legal aid would have been granted to him. In short therefore I find no breach of duty on the part of the solicitor and in any event even if there had been a failure on his part to advise him of the provisions of the legal aid legislation, there is no evidence that this would have been of any assistance to the appellant.

[22] I find no breach of duty on the part of the solicitor in failing to make written submissions to the County Court Judge. The judge's order had been made in May 2008 and it was not until the autumn of 2008 that the respondent was retained by the appellant. By that time the appellant's expert had already dealt with the question of the boundaries and all the respondent could do was make submissions on foot of that. In short the appellant had left the matter far too late to enable the respondent to make any written submissions.

[23] I do not accept that the map commissioned by the respondent was superfluous or unnecessary. It seems to me that there is much strength in the respondent's case that a new expert and a fresh map were essential when boundary lines were being discussed. A mapping surveyor had been retained in light of the fact that the appellant was unhappy with the former engineer, Mr Cosgrove. The land registry map was the first port of call but thereafter a map prepared by the surveyor seemed to me to be a basic necessity if any meaningful point was to be argued on behalf of the appellant in light of the earlier events. I am also satisfied that the choice of expert was appropriate in all the circumstances.

[24] There is nothing untoward about the approach of the respondent in choosing another barrister to act in the matter once Mr McBrien had indicated that he was unable to attend. What else was he to do? I am satisfied that Mr McCann was truthful when he told me that this problem was explained to Mr Higgins and that he was informed that a new counsel was to be obtained.

[25] I am satisfied that the respondent fully informed Mr Higgins that this was to be a part appeal and not a full re-hearing. I cannot understand any reason for him failing to do so. Why would he ever appeal a successful part of the hearing? Mr Higgins in his evidence failed to recognise that common sense dictates that the solicitor is bound to have told him that they were appealing only the unsuccessful part.

[26] The fact that the respondent made no time records of the time spent preparing papers and briefing Mr McBrien may have been unfortunate but I am satisfied that the bill was based on the reasonable time it would have taken to prepare such a brief for counsel. So far as the "upfront" money for a barrister is concerned, I am satisfied that the respondent set out the terms of his retainer and had instructions to retain Mr McBrien. He was entitled to ensure counsel was paid promptly.

Mr Higgins had ample opportunity to send this bill for taxation, chose not to do so and indeed had never questioned the bill up until the present proceedings.

[27] A solicitor of course would need to advise a client of the dangers of appealing against a legally assisted opposition party, but I accept the evidence of the respondent that when he obtained the opinion from Mr McBrien, the options were fully put before the appellant and he gave his instructions to proceed on.

[28] Finally, I am satisfied that whilst the respondent did harbour reservations about the fact that the earlier case had lasted a number of years, and that he had changed solicitors after such a period, nonetheless these were held by him at the outset of the case and in my view were reasonable. The respondent went on to tell me in evidence that he accepted the criticism of his former solicitors by Mr Higgins and despite the alarm bells, he was happy to represent him. I find nothing unusual or untoward about this approach and it would have been highly unusual for him to have referred to such personal concerns in any correspondence with the client. Similarly, his reservations about not having all the papers were made clear to the appellant as evidenced by the fact that he tried to obtain the papers from his former solicitors.

[29] In all the circumstances I find no reason to differ from the conclusion reached by the Deputy County Court Judge, I affirm his decision and I therefore dismiss this appeal.