

Neutral Citation No. [2011] NIQB 23

Ref: **WEA8112**

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

Delivered: **1/3/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

QTF LIMITED

Plaintiff;

-and-

KIERAN CONNOLLY and SEAMUS CONNOLLY

practising as S C CONNOLLY, Solicitors

Defendants.

WEATHERUP J

[1] This is an Originating Motion against the plaintiff's former solicitors requiring delivery up of the files in respect of two High Court actions that are in the Commercial List for hearing in three weeks time. The first action is between the plaintiff and O'Hanlon and McSherry Limited as defendants and the second action is between the plaintiff and O'Hanlon and McSherry personally as defendants. The plaintiff seeks an injunction requiring delivery up of the files, an order for delivery under Section 4 of the Torts (Interference with Goods) Act 1977 and Order 29 Rule 1 of the Rules of Court and a declaration under section 23 of the Judicature Act (Northern Ireland) 1978 that the lien enjoyed by the defendants does not pertain during the currency of the litigation. Mr Coyle appears for the plaintiff and Mr Martin for the defendant.

[2] The grounding affidavit states that the defendants are solicitors who were formerly on record for the plaintiff in the two High Court actions and

have applied successfully to come off record. The former solicitors then levied a Bill of Costs on the plaintiff and the same is subject to challenge by way of taxation. By correspondence the plaintiff's present solicitors have sought recovery of the files and the defendant has not delivered up those files.

[3] The plaintiff's present solicitors have stated that they have authority to give an undertaking to the defendants to hold the files that are delivered up and to return them to the defendants at the conclusion of the hearings to allow any fee dispute to be pursued.

[4] The defendants replying affidavit states that the High Court actions relate to the construction of 42 timber framed houses in County Dublin and that the claim is for some €900,000 and there is a counterclaim for some €770,000. It is said that a very large amount of work was carried out by the defendants and that repeated requests to be put in funds were met with assurances from the plaintiff that the defendants would be put in funds but that no payments were received. The defendants state that they had no choice but to come off record and they were granted an Order by the Court on 11 February 2010. The Bill of Costs was then forwarded to the plaintiff on 4 March 2010 and it is stated that no payment has been received. The defendants point out that there is no allegation of any misconduct on their part.

[5] A notice of change of solicitors was served on 14 June 2010 and the plaintiff's present solicitors came on record. The defendants' state that the solicitors lien on the files currently held would be entirely worthless if the files were delivered up to the present solicitors and this is likely to result in the defendants and indeed Counsel not being paid for the very considerable work that was completed over a period in excess of three years. The Bill of Costs which is exhibited amounts to some £75,000.

[6] A rejoinder affidavit on behalf of the plaintiff exhibits a schedule of payments made by the plaintiff to the defendants in the sum of £14,000 which has not been referred to in the defendants' affidavit. A letter from the defendants seeks to allocate certain of the payments to other transactions although some payments relate to the High Court actions. The state of the fee account was not dealt with on affidavit in the proper manner by either side. An affidavit is to be filed on behalf of the defendants within 7 days explaining the account and the plaintiff will file an affidavit in reply within a further 7 days. For present purposes I am not proceeding on the basis that any payments have been hidden but certainly there are payments that have to be accounted for and should have been accounted for fully in the original affidavits.

[7] The features that should be noted are first of all that the dispute between the parties arises in circumstances where the former solicitors have

discharged themselves from the action. This is therefore not a case where the client has discharged the solicitor. Secondly the dispute between the client and the former solicitor is about the payment of fees. This is not a case where there are allegations in relation to the conduct of the former solicitor that have led to a breakdown in the relationship. The third matter is that there is on going litigation. This is not a case where the litigation has been concluded. The former solicitors came off record over a year ago in February 2010 and the actions are listed for hearing in a matter of weeks. Thus there is concern on the part of the plaintiff to secure the papers to the present solicitors in order to advance the actions on the date proposed for the hearing.

[8] The authorities were reviewed by Moore Bick J in Ishmael and another v. Richards Butler [1996] 2 AllER 506 which considered the solicitors retaining lien on files where there had been a dispute about the payment of fees. The new solicitors offered to pay a sum on account of fees pending taxation but the former solicitors refused to release the papers without discharge of their Bill of Costs in full. The former solicitors were required to hand over the papers to the new solicitors and the plaintiffs were required to provide security for the claim for costs by payment into court, bank guarantee or other acceptable means.

[9] A number of propositions may be stated -

First of all, 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 (page 514f of Ishmael and Volume 44(1) of Halsbury's Laws and Cordery on Solicitors para 933).

Secondly, the Court may decline to permit a solicitor who has discharged himself from the retainer to insist on his lien if to do so would prevent the client from proceeding with an ongoing action. As a general rule the former solicitor will be required to deliver the papers to the new solicitor to enable the client to continue the proceedings (page 515 b).

Thirdly, there will be no automatic Order for the handing over of the papers. The Court has a discretion to grant or withhold the remedy. The overriding principle is that the Court should make an Order as is most conducive to the interests of justice and in order to do so it is necessary to weigh up two matters (per Liggett J in A v B [1984] 1 AllER 265) -

- (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.

Fourthly, when papers are to be delivered up to the new solicitor, undertakings are generally to be given by the new solicitor. Cordery on Solicitors at paragraph 957 states the overriding principle that a solicitor discharging himself should not be allowed to exert his lien so as to interfere with the course of justice and he has therefore only a qualified lien on the papers. He is however entitled to the following undertakings from the new solicitors –

- (a) To hold all papers and documents delivered subject to his lien for costs.
- (b) To afford him reasonable access to the papers and documents for the purpose of preparing his Bill of Costs. [Which does not arise in this case because the Bill of Costs has been completed].
- (c) To prosecute or defend the action in an active manner. [Which has been achieved as the actions are listed for hearing very shortly].
- (d) To redeliver the papers and documents after the conclusion of the action.

Fifthly, in exceptional cases the Court might impose terms where justice so requires. "For example if the papers are valueless after the litigation is ended and if the client accepts that he is indebted to the original solicitor for an agreed sum and has no counterclaim, or accepts that the solicitor has admittedly paid out reasonable and proper disbursements which must be repaid, the court might make an order which would only compel the original solicitor to hand over the papers to the new solicitor, on the usual terms preserving the lien but providing that in the first place the client pays to the original solicitor a sum, fixed by the court, representing the whole or part of the moneys admittedly due from the client to the original solicitor. 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 in the order that the court is asked to make" per Templeman LJ in Gamlen Chemical Co (UK) Ltd v Rochem Ltd [1980] 1 AllER 1049 at 1058.

[10] The defendants in the present case seek not only the undertakings offered by the plaintiff but also that the plaintiff be required to lodge in Court or in an agreed account the amount claimed in the Bill of Costs. Otherwise the defendants are concerned that they will not recover their costs at the conclusion of the actions.

[11] I propose to Order that the defendants should deliver up the files to the plaintiff's new solicitors. Further the new solicitors will provide the undertakings first of all that the new solicitors hold all papers and documents delivered up subject to the former solicitors lien for costs and secondly that the new solicitors redeliver the papers and documents after the conclusion of the action.

[12] In addition there is the issue as to any additional terms that ought to be imposed in the interests of justice, balancing the interests of the client in the completion of the High Court actions and the interests of the former solicitors in obtaining those costs to which they are entitled. This is substantial case as is apparent from the amount claimed and counterclaimed. I accept that there has been considerable work undertaken by the former solicitors in the period they were on record for the plaintiff. The former solicitors have received some small payment relative to the overall amount of the Bill of Costs. The former solicitors have discharged certain outlays as listed in the Bill of Costs. There must be a question mark over whether payment has been made of a substantial fee for Counsel included in the outlays. I proceed on the assumption that the fee claimed for Counsel has not been paid to date but it is a potential outlay. The plaintiff's new solicitors have stated that the Bill of Costs seems to be excessive.

[13] Taking account of all the circumstances I propose to require a payment of £7,000 by the plaintiff to the plaintiff's solicitors to be held against the defendant's claim for costs, pending taxation of the Bill of Costs. In addition I propose to require the plaintiff's new solicitors to retain any amounts recovered in the High Court actions up to the amount of the defendant's Bill of Costs, allowing for the aforesaid sum of £7,000 and the payments already made for fees in the actions.

[14] Accordingly there will be an Order for the delivery up by the defendants to the plaintiff's new solicitors of the papers and documents relating to the plaintiff's High Court actions; the plaintiff's new solicitors will provide undertakings first of all to hold all papers and documents delivered up subject to the defendant's lien for costs and secondly that the new solicitors redeliver the papers and documents after the conclusion of the actions; the plaintiff will pay to the plaintiff's new solicitors the sum of £7,000 to be held against the defendant's claim for costs, pending taxation of the Bill of Costs; the plaintiff's new solicitors will retain any amounts recovered in the High Court actions up to the amount of the defendant's Bill of Costs, allowing for the aforesaid sum of £7,000 and the payments already made for fees in the actions.