**Neutral Citation No: [2014] NIQB 103** | *Ref:* **HOR9368**

*Judgment: approved by the Court for handing down* | *Delivered:* **18/08/2014**
*(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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**COMMERCIAL LIST**

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**2011 20048**

**BETWEEN:**

**COLIN STEWART**
**GEOFFREY FALCONER**
**MICHAEL CROOKS**
**T/A FALCONER STEWART, ACCOUNTANTS**

**Plaintiffs;**

**-and-**

**COLIN PATTERSON**
**CLAIRE DONNELLY**
**P/AS PATTERSON AND DONNELLY, SOLICITORS**

**Defendants;**

**-and-**

**SUSAN WARMINGTON (FORMERLY KNOWN AS SUSAN STEVENSON)**

**Third Party.**

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**HORNER J**

[1] Falconer Stewart ("the Accountants") claim the full amount of their fees from Patterson and Donnelly ("the Solicitors") for work done in acting as expert witness in family proceedings relating to the breakdown of the marriage between Susan Warmington (formerly known as Susan Stevenson) ("SW") and Adrian Stevenson ("AS"). The Solicitors have joined SW as a third party and have

also sued her for their own fees and that of the Accountants. SW has counterclaimed in the third party proceedings and alleges that the Solicitors were guilty of negligence and breach of the terms of their retainer causing her a substantial loss. At the outset I must record my thanks to counsel on both sides for the quality (and quantity) of their submissions which have been made both orally and in writing.

[2] The issues before this court are twofold, namely whether the Solicitors were negligent and/or in breach of the terms of their retainer ("breach of duty") and, if so, the amount which SW should recover for such breach of duty. It is necessary to set out, albeit briefly, the circumstances giving rise to these claims.

[3] The background to the claim for breach of duty by the Solicitors and for compensation can be briefly summarised. There was a long running matrimonial dispute between SW and AS which had commenced in 1999. The ancillary relief hearing had started before the trial judge on 12 March 2007 having been referred to him by the Master because of its complexity and difficulty. On 23 May 2007, a business associate of AS, Olivia Moore ("OM"), obtained a judgment for £230,000 against AS. On 27 April 2008 judgment was given by the trial judge in the ancillary relief application. In his judgment, the trial judge concluded that:

(i) There had been a campaign by AS to hide assets from SW and this had contributed to the "length and expense of these proceedings".

(ii) A finding of established dishonesty had been made in respect of AS. His conduct in seeking to "dissipate and hide assets, had been outrageous".

(iii) The court had no jurisdiction over the title to Spanish properties purchased with the assistance of funds from ASK Electrical Limited, the company controlled by AS.

(iv) SW was entitled to 50% of the matrimonial assets of AS, save for the property at Chimera Wood, Helen's Bay, which the judge concluded should be split 55/45 in the favour of AS.

(v) The trial judge was particularly concerned that some of the valuations he had were out of date and he gave a further 14 days for each party to submit any further valuation evidence in writing in relation to the properties. He then proposed in light of those up-to-date valuations to make an order and invited SW and AS to prepare proposed draft orders. He also wanted to be addressed on the issue of costs given the behaviour of AS.

[4] However the final order was only made on 19 September 2008. This provided for payment of a lump sum of £455,000, payable in two instalments of £250,000 on or before 1 September 2008 and a balance of £205,000 payable on or before 1 February 2009. This represented SW's share of the matrimonial assets calculated on up to date valuations. The judge also held that SW was entitled to recover 40% of her costs from AS. In the meantime OM's solicitors had sent a letter on 4 July 2008 confirming that a statutory demand had been served on AS. A bankruptcy petition was presented on 1 August 2008. AS proposed an IVA on 2 October 2008 but this did not proceed. The consequence of the bankruptcy proceedings was to render nugatory the ancillary relief obtained by SW. There is no real dispute that the Solicitors had breached their duty to SW by failing to ensure that a final order was promulgated and a decree absolute obtained before the presentation of the bankruptcy petition.

[5] It is common case that SW is neither a secured or unsecured creditor in the bankruptcy. Furthermore there is no prospect of SW being able to obtain relief under Article 257 of the Insolvency (NI) Order 1989 which provides:

> "(1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this Article applies is void except that it is or was made with the consent of the High Court, or is or was subsequently ratified by the court."

[6] Both sides agreed that the legal position is as follows:

Article 25(1)(b) of the Matrimonial Causes (NI) Order 1978 ("the Order") provides:

> "On granting a decree of divorce, a decree of nullity of marriage or decree of judicial separation or at any time thereafter (whether, the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say –
> …
> (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such a term as may be so specified in the order;"

Article 25(5) provides:

> "Without prejudice to the power to give a direction under Article 32 for the settlement of an instrument by conveyancing council, where an order is made under (1)(a), (b) or (c) on or after granting a decree of

> divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute."

No property right in favour of SW can therefore be created by a secured payment order until a decree absolute has been obtained. No final order was granted until after the bankruptcy proceedings were initiated on 1 August 2008. Consequently the failure to agree a final order and extract a decree absolute before 1 August 2008 meant that the judgment is worthless to SW because, and this is common case as I have already stated, she is neither a secured nor unsecured creditor in the bankruptcy of AS.

[7] I had the opportunity of hearing SW give evidence. No oral evidence was called by or on behalf of the solicitors on the issue of breach of duty. I have read the experts' reports prepared by and on behalf of SW and the Solicitors and the minutes of their final meeting. I have no hesitation in concluding that:

(i) Given the behaviour of AS, a final Order should have been agreed and a decree absolute extracted as soon as possible and certainly before 1st August.

(ii) The solicitors were on notice of the threat posed by the judgment in favour of OM by the latest on 4 July 2008.

(iii) The agreement of OM as to the final order was not required.

(iv) Solicitors, exercising the requisite degree of care and skill, would have obtained a final order and a decree absolute and thus achieved the benefits of the judgment for SW before 1 August 2008.

As the experts recorded in their minute "… between 7 July and the date of the presentation of the Bankruptcy Petition the defendant ("the Solicitor") had failed to take any steps to secure the third party's (SW's) agreement and in failing to do so the conduct of the Solicitor in dealing with the case fell below the standard of competence that would be expected." I agree. I conclude that the solicitors by failing to act, to obtain a final order and a decree absolute and to secure the lump sum provision for SW were in breach of their duty to her.

[8] There has been no evidence of any delay on the part of the Solicitors in the general conduct of these ancillary relief proceedings. The court is unable to conclude that the Solicitors' conduct in prosecuting these proceedings fell below the standard of care to be expected from a careful and competent solicitor, save as is outlined above. Rather SW's case exclusively reflects what was agreed in the minutes between the experts and which I have referred to above, and which I find has been proven.

[9] Accordingly, having reached the conclusion that the Solicitors were in breach of duty as set out above, it is necessary for the court to consider what loss flows from this breach of duty to SW. It is on this issue, namely how the assessment of damages should be carried out that the parties really did join issue. Mr O'Donoghue QC for SW said that the loss should be calculated at the date of the breach, namely that period up to when the decree absolute could have been obtained. Under the final order made on 19 September 2008 the sum of £455,000 would have been secured on the matrimonial assets, which represented the value of SW's entitlement to share in the matrimonial assets determined by the trial judge. Mr Ringland QC for the Solicitors argues that the assessment of compensation must be based on what SW would have obtained had she been able to realise her "secured order" because (and there is no dispute on the facts):

(a) There was no ready cash to fund any settlement;

(b) AS had shown that he was not prepared to assist in the funding of any settlement.

[10] Both parties agreed that the starting point for the assessment of damages was the statement of Lord Blackburn in Livingstone v Raywards Coal Co (1980) 5 App Case 25 at 39 where he defined the measure of damages as:

> "That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[11] Of course, what Lord Blackburn said is subject to the limits imposed by, inter alia, causation, remoteness and mitigation. Further in Banque Bruxelles Lambert v Eagle Star Insurance Co (hereinafter referred to as "SAAMCO") (1997) AC 191, Lord Hoffmann specifically stated in respect of this statement by Lord Blackburn, with which he disagreed:

> "I think this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled to as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation."

McGregor on Damages (18th Edition) 1-0022 states:

> " …the principle enunciated by Lord Hoffmann in SAAMCO should be seen as a limitation on the recoverable damages, a limitation which is to be imposed after the invocation of Lord Blackburn's

> formulation rather than before it. As will be seen in a moment, there are many limits to be placed on that formulation – causation, remoteness, mitigation and certainty are the principal ones – and SAAMCO should be looked at as presenting us, as do other cases, with what may be the first of these limitations. There is no doubt that Lord Hoffmann would be in full agreement with Lord Blackburn's statement as to what, subject to limitations, damages seek to do, but if one started with Lord Hoffmann one would never get to Lord Blackburn. Yet his is the ground rule and it is appropriate to start with it as long as one does not stop with it."

[12] It is correct that damages are usually assessed as at the date of breach unless justice requires that some other date be used. However, Bingham LJ said in County Personnel Limited v Alan R Pulver Co (1987) 1 WLR 916 at 917 that this principle will not be applied mechanistically in circumstances where assessment on another date may accurately reflect the overriding compensatory principle. In the Golden Strait Corp v Nippon Yusen Kubishika Kaisha ("The Golden Victory") (2007) 2 AC 355 a majority of the House of Lords preferred the overriding compensatory principle over commercial certainty and relied on the principle in Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v Pontypridd Waterworks Co (1903) AC 246 that the courts should not conjecture on a matter which had become an accomplished fact. As Sir Thomas Bingham MR said in Reeves v Thrings and Long 1996 PNLR (at 278):

> "The assessment of damages is ultimately a factual exercise, designed to compensate, but not over-compensate the plaintiff for a civil wrong he has suffered. While this is not an area free of legal rules, it is an area in which legal rules may have to bow to the peculiar facts of the case."

[13] In the present case the trial judge took into account the then value of the capital assets of AS in fixing the lump sum at £455,000 in his final order in September 2008, payable in two instalments. Whether the property market rose or fell was of no moment because that is the sum that had been fixed as being payable to SW by AS. What the Solicitors had failed to do by exercising reasonable care and skill was to secure the assets of AS so as to ensure payment of the two instalments awarded by the trial judge so far as the value of the securities made this possible. But this is not a case in which their actions or inactions had failed to secure a sum of £455,000 which was available immediately for payment. What they were not required to do (and what no reasonable competent Solicitor would have been expected to do), was to guarantee payment of those two instalments amounting to £455,000. It is common case that SW could not have realised the security before

February 2009 unless AS had co-operated. Given the obdurate and hostile behaviour of AS up to the date of the final Order, it is inconceivable that he would have acted in any way to assist the realisation of SW's share of the assets if they had been secured with the payment of the lump sum. Whether one looks at the issue of compensation on the basis of the kind of loss for which SW is entitled to be compensated or one looks at it as putting SW in the position she would have been in if the Solicitors had not been negligent, both approaches necessarily involve calculating what would have been realised by SW if her Solicitors had secured the payment of £455,000 to her by obtaining a decree absolute. The error in the position put forward on behalf of SW is that she is trying to obtain from her Solicitors compensation for the inadequacy of the secured assets and not compensation that flows from her Solicitors' negligence. To place SW in the position she should have been in if she had not sustained any wrong requires payment of damages measured by what she would have recovered in February when she realised the security that should have been in place but for the Solicitors' breach of duty. This is the proper measure of damages and compensates SW in full for the Solicitors' breach. It will be less than £455,000 but this reflects the inadequacy of the security.

[14] I do not consider that this is a case in which a court has to consider the loss of a chance of compensation. SW was not deprived of a chance or opportunity of securing a better result. She had achieved the result she was entitled to, but her Solicitors had failed to secure it in the way that competent Solicitors would and should have secured it. There is no dispute that a court would have made the necessary order for a decree absolute.

[15] The quantification of SW's loss should not present a problem in respect of the properties owned by AS. I consider that the fair way to value the shares in ASK Electrical Limited is on a straight line basis. If the parties cannot agree a final figure for damages, I will hear further evidence and argument.

**Further points**

[16] I do require to be addressed on the following issues which were not explored in detail:

(i) SW was awarded 40% of her costs (and outlay) from AS. In circumstances where this contribution was not recovered from AS would the Solicitors (and the Accountants), on the balance of probabilities, have sought to recover this sum from SW.

(ii) Should the court make an order for the balance due after payment of any costs to the Solicitors (and the Accountants) as Deeny J did in Neeson v Agnew (2009) NIQB 10.

(iii) Should interest be awarded, and, if so, at what rate(s) and for what period(s) on the various sums in question.

[17] If these issues cannot be resolved by agreement, I will hear further argument from counsel. I will also hear counsel on the issue of costs.