THE HIGH COURT

[2023] IEHC 303

2013 No. 2708P

BETWEEN

GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS and

SCOTCHSTONE CAPITAL FUND LIMITED

PLAINTIFFS

AND

IRELAND, THE ATTORNEY GENERAL and THE MINISTER FOR FINANCE.

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 7 June 2023

Introduction

1. This judgment relates to an application by the solicitors on record for the fourth named plaintiff to come off record.

2. The motion ran for one day before this court on 15 March 2023. Six affidavits (with extensive exhibits) were filed by the parties. I refused an application on the morning of the hearing for the solicitors on record to be permitted to introduce a further affidavit and the hearing therefore proceeded on the basis of the papers filed.

3. The proceedings themselves were instituted by way of plenary summons on 14 March 2013. They comprise a constitutional challenge to certain provisions of the Credit Institutions (Stabilisation) Act 2010. The first and second named plaintiffs have settled their claim. Accordingly, the only two remaining plaintiffs are the third named plaintiff,

Mr Skoczylas, and the fourth named plaintiff, Scotchstone Capital Fund Ltd (the "**Company**").

4. Mr Skoczylas is a director of the Company and, although authorised by the Company's Memorandum of Association to represent the Company in judicial proceedings, he cannot do so in Ireland as he is not a solicitor on the role of solicitors in Ireland. Mr Skoczylas was previously refused his application to represent the Company in these and other proceedings before the Irish courts. It is therefore necessary for the Company to be represented by a solicitor in these proceedings.

5. Up until October 2022 the Company had solicitors on record who were engaged to represent the Company in what has been described to the court as a "*technical/limited*" capacity whereby the solicitor on record adopted in full on behalf of the Company the submissions of Mr Skoczylas, who is representing himself.

6. The present application relates to a notice of change of solicitor dated 7 October 2022 which was filed in these proceedings by Doran W. O'Toole & Co solicitors on behalf of the Company on 10 October 2022. Two days later, the solicitors indicated that they intended to come off record. The motion before this court issued on 26 October 2022 and seeks an order allowing the solicitors for the Company to come off record.

7. A similar notice of change of solicitor was filed in the same time period by the same solicitors for the Company in related proceedings before the Court of Appeal in *Scotchstone Capital Fund Ltd v Ireland* [2023] IECA 129. The application by Mr O'Toole of Doran W. O'Toole to come off record for the Company in those proceedings was heard on 2 February 2023. Given the similarities between the applications before this court and the Court of Appeal, I reserved judgment in these proceedings to await the judgment of the Court of Appeal. The Court of Appeal

delivered its judgment on 25 May 2023 and I now deliver this judgment in relation to the virtually identical application before me noting that the decision of the Court of Appeal is binding on this court.

The Evidence before this court

8. The evidence before this court was that Mr O'Toole, the principal of Doran W O'Toole & Co Solicitors was contacted by Mr Skoczylas on 3 October 2022 and asked to come on record for the Company "*immediately*". A telephone call took place to discuss the background to the proceedings and some case files were sent by Mr Skoczylas to Mr O'Toole.

9. There is a dispute regarding the extent of the information provided and as to precisely what was discussed on the call. Mr O'Toole says he was told that his role would be "*more an administrator*" and that Mr Skoczylas "*would do everything*". He says that the background to the cases provided by Mr Skoczylas was "*vague and evasive*". He says he "*was pressured due to the urgency to file the notice of change of solicitor as drafted by Piotr Skoczylas*" (para 3, grounding affidavit of Doran W O'Toole sworn 26 October 2022). Mr Skoczylas says he provided significant information to Mr O'Toole and that access to the case files was not limited, as alleged.

10. There is a dispute as to whether the financial arrangements were agreed before Mr O'Toole agreed to act. Mr Skoczylas says he was clear at all times that the solicitors would take on the case on a "*no foal no fee*" basis and that this extended to outlay as well as to professional fees. He says he advised Mr O'Toole on the initial call that he would not be paid by the Company unless a costs order was made in the Company's favour while Mr O'Toole was on record. Mr O'Toole disputes this. Mr Skoczylas says that the Company cannot afford legal representation.

11. There is also a dispute regarding whether Mr Skoczylas has complied with a request for anti-money-laundering documentation made by Mr O'Toole. It is agreed that no engagement letter issued to the Company under s. 150 of the Legal Services Regulation Act 2015.

12. Counsel for Mr O'Toole argued that there was a complete breakdown of trust and confidence between the parties and that in those circumstances there was no basis for a solicitor client relationship to persist. He said this was evident from the complaint advanced by Mr Skoczylas to the Legal Regulatory Services Authority about Mr O Toole which complained of misconduct and dishonesty. It was also argued that Mr O'Toole had limited access to documents and was not in a position to accept instructions on this basis or to brief counsel properly. This, it was said, would create a professional difficulty for Mr O'Toole as a solicitor on record. An argument was also advanced that, in the immediate aftermath of 12 October 2022, Mr Skoczylas had agreed that Mr O'Toole could come off record but was now seeking to backtrack on that agreement. It was also argued that Mr O'Toole should not be required to continue to act for a party who was not providing the required anti-money laundering documentation. Counsel for Mr O'Toole said that Mr O'Toole would be prejudiced if he was compelled to stay in this unworkable relationship.

13. Mr Skoczylas does not dispute that the relationship between him and Mr O'Toole has broken down. However, he says that Mr O'Toole is obliged to stay on record until a new solicitor is found. He denies that there is any basis for Mr O'Toole to come off record – he says the basis of instructions and the costs arrangements were agreed before the notice of change of solicitor was filed. He denies that he has not complied with anti-money-laundering requirements or that he ever agreed that Mr O'Toole could come off record.

14. Mr Skoczylas says that to date he has been unable to find another solicitor who would represent the Company. He says there would be very significant prejudice both to him and to the Company if it were not legally represented at the hearing of this action which is now listed for June 2023 (having been adjourned in January 2023 as a result of Mr O'Toole's motion). Apart from the prejudice that adjournment caused the Company, Mr Skoczylas says that if the Company is not legally represented at the trial he may not have standing to establish any loss as almost the entirety of the damage sustained was by the Company as Mr Skoczylas invested through the Company. He fears that the case may collapse if the Company is not legally represented at the hearing. He says that all of the written submissions have been submitted on behalf of the Company and there is therefore no further work required to prepare the matter for hearing by the solicitors on record for the Company. They do however need to continue to stay on the record so that the Company is represented at the trial.

15. Mr Skoczylas referred to the Solicitors Guide to Professional Conduct (4th ed) issued by the Law Society and to appendix 1 to that Guide which states that "*A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client*". He also refers to Chapter 2 of that Guide which states (at page 30) that "*A solicitor should not terminate the solicitor/client relationship without good cause and without reasonable notice*". Mr O'Toole also relied on that Guide in support of his application.

The Court of Appeal Judgment

16. In its judgment in *Scotchstone*, the Court of Appeal set out a very detailed analysis of the affidavits and evidence offered both by Mr O'Toole and Mr. Skoczylas. This

evidence mirrors the evidence which was adduced before me and which is summarised above. As is clear from its judgment, the Court of Appeal received and considered additional materials post the hearing in the Court of Appeal on 2 February 2023, which reflected the additional submissions and materials relied upon by Mr Skoczylas at the hearing before the High Court. This is confirmed by the Court of Appeal judgment at para 71 and 72 in the following terms: –

> "*On 16 March 2023, Mr. Skoczylas emailed the Office of the Court of Appeal requesting that the Court would take account of certain case law and other materials he had relied on in response to the application by Mr. O'Toole in the High Court in proceedings bearing record no. 2023/2708P to come off record. The case law to which the Court was directed comprised the following: Dowling & Ors v. Ireland [2023] IEHC 38, Allied Irish Bank plc v. Aqua Fresh Fish Ltd [2018] IESC 49, 1 I.R. 517, Law Society of Ireland v. Doocey [2022] IECA 246, Law Society v. Tobin [2017] IECA 215, Bolton v. The Law Society [1993] EWCA Civ 32, In re Burke [2021] IESC 13 and Eastern Health Board v. M.K. [1999] 2 I.R. 99. (The High Court has not yet ruled on Mr. O'Toole's application in proceedings 2013/2708P and is awaiting this Court's ruling on the application Mr. O'Toole now makes in the within proceedings).*
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> *The Court was satisfied to receive both the materials relied on by Mr. Skoczylas and the ruling of Feeney J. in Dowling & Ors v. Minister for Finance (2011/239) delivered ex tempore on 1 February 2012, upon which Mr. O'Toole placed reliance in the post-hearing submission he made to the Court on 21 March 2023. The case law and materials relied on, respectively, by Mr. Skoczylas and Mr. O'Toole have been duly considered by the Court and reference to same has been made where considered necessary or appropriate*."

17. There is therefore a symmetry between the materials considered by the Court of Appeal and by this court in respect of the application by Mr O'Toole to come off record as solicitor for the Company.

18. The Court of Appeal recognised at para 74 of its judgment that "*a great many of the contentious issues raised in the affidavits are not capable of being resolved by the Court*." This includes whether there was an agreement to charge on a no foal no fee basis, whether there has been Anti money laundering compliance or what in fact is the financial position of the Company. The Court of Appeal was satisfied it did not need to resolve or determine those issues for the purposes of dealing with Mr O'Toole's application.

19. Recognising that the solicitor-client relationship has irretrievably broken down between the parties, the Court of Appeal considered each of the bases on which Mr Skoczylas nevertheless argued that Mr O'Toole should not be entitled to come off record for the Company.

20. The Court of Appeal took into consideration the requirement for the Company to be legally represented in litigation and its alleged impecuniosity and failed application for legal aid. The court also considered the arguments advanced by Mr Skoczylas regarding the technical/limited capacity in which Mr O'Toole would be required to act, and his arguments that same was not resource intensive for Mr O'Toole. At para 97 of its judgment, the Court of Appeal noted that:

> "*Given Mr. O'Toole's now fundamental objection to the role envisaged for him by Mr. Skoczylas, even if it is the case that Mr. O'Toole did not demur when initially apprised by Mr. Skoczylas of the Solicitors' "technical/limited" role in the litigation, it is difficult to see how Mr. O'Toole can be shoehorned into acting*

only in a "technical/limited" capacity in view of his now concern that in acting in such capacity he may not be able to perform his obligations both to the Court and in respect of general professional practice requirements. In the view of the Court, Mr. O'Toole's concerns in these regards must attract considerable weight".

At para 98 the Court of Appeal stated that

"*.. as an officer of the court, Mr. O'Toole cannot be forced into a position where he is bound to abide by submissions canvassed by Mr. Skoczylas, or directions given by him, even if he, Mr. O'Toole, does not agree with them.*"

21. The decision reached by the Court of Appeal is summarised in para 105 of it judgment where it held that :

"*In light of the total breakdown in the solicitor-client relationship here, the Court is strongly of the view that it is impermissible for Mr. Skoczylas to seek to tether Mr. O'Toole to the Company. In all the circumstances of this case, the Court cannot endorse the continuation of the relationship, even on the basis of a so-called "technical/limited" arrangement, or indeed on any other basis. The fact that the Company may be without the financial resources to obtain other legal representation and is not able to seek or obtain legal aid are not, in all the circumstances of this case, sufficiently weighty factors such that Mr. O'Toole should be forced to stay on record for the Company*."

22. The Court of Appeal also found on the evidence before it that Mr. Skoczylas was ready to part company with Mr O'Toole on 11 October 2022. The Court held at para 118 that

"*..on any reading of the email sent by Mr. Skoczylas at 1.49pm on 11 October, and Mr. Skoczylas' later email correspondence on 11 October (to which reference has already been made), it is impermissible for Mr. Skoczylas to now seek to contend*

that he was not intent on parting company with Mr. O'Toole on 11 October 2022. He quite clearly intimated to Mr. O'Toole at 1.49 pm on 11 October that there was unlikely any basis for a continuing solicitor client relationship between Mr. O'Toole and Scotchstone, an intimation that was compounded by the later requests made to Mr. O'Toole to return the case file and destroy personal information with which he had been supplied. Furthermore, there is no gainsaying Mr. Skoczylas' email to Mr. O'Toole at 2.16pm on 11 October wherein he stated:

> *"...please do not file anymore the Notice of Change of Solicitor in the case rec. no. 2012/116MCA. As far as the other two cases are concerned, i.e. the cases rec. nos. 2019/29991 P [the Köbler proceedings] and 2013/2708P, please withdraw the two Notices of Change of Solicitor that you have just filed, or, alternatively, please file the Notices informing the Court that you are off the record in those two cases" (emphasis added)."*

23. It should be noted that the proceedings referred to in the above quote, namely 2013/2708P, are in fact the present proceedings the subject of this court's judgment.

24. The Court of Appeal also considered the alleged prejudice going forward to the Company arising from Mr O'Toole's application to come off record.

25. At para 125 of its judgment the Court of Appeal held that

> "*…when the time comes to hear the parties on the issue of costs the Company may be without legal representation, the Court will nevertheless have an indication of the Company's approach to the question of costs from the joint written submissions. Indeed, even if a legal representative is found for Scotchstone who is willing to act in the "technical/limited" capacity ordained by Mr. Skoczylas, it is unlikely that that will add anything of substance to the costs*

hearing: the most the Court can expect from such a legal representative at any costs hearing (if the previous history is anything to go by) is that they would simply say they are adopting Mr. Skoczylas' submissions. It is in this context that the Court is constrained to find that the alleged prejudice going forward for Scotchstone by Mr. O'Toole coming off record cannot surmount the reasons already identified by the Court as to why it should exercise its discretion in favour of permitting Mr. O'Toole to come off record."

26. This extent of any ongoing litigation is perhaps the only point of distinction between the present proceedings and those before the Court of Appeal. I do not believe however that it is a sufficient point of difference or factor to depart from the decision and rationale of the Court of Appeal, which is of course binding on this court. In the present case the evidence is that all the legal submissions for trial have already been filed on behalf of the Company. Mr Skoczylas of course remains free to source alternative solicitors willing to take on this matter for the Company on the terms he seeks.

Decision

27. I respectfully adopt the careful analysis and decision of the Court of Appeal in *Scotchstone* and accede to Mr O'Toole's application that he be permitted to come off record as solicitor for the Company.

28. The parties should file any written submissions in respect of the costs of this application within 28 days of receipt of this judgment.