

THE HIGH COURT
JUDICIAL REVIEW

2008 1349 JR

BETWEEN

JOHN F. CONDON

APPLICANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT delivered by Mr. Justice O’Keeffe on 31st day of July, 2009

1. On 1st December, 2008, the Applicant (who is a solicitor) was granted leave to apply for judicial review for an order of certiorari quashing the decision of the Respondent directing the Applicant to make a contribution towards the costs of the Respondent in the sum of €3,000.

2. The decision requiring the Applicant to pay a contribution towards the costs of the Respondent in the sum of €3,000 arises from a hearing of the Complaints and Client Relations Committee of the Respondent (“the Committee”) held on 4th June, 2008, whereby the Committee made the following decision:-

“That the Applicant had failed without reasonable cause to respond appropriately in a timely manner to the Society’s correspondence in particular, but not exhaustively, the Society’s letter dated 22nd February, 2007, 12th March, 2007, 26th March, 2007, 10th July, 2007. The Applicant was therefore required to make a contribution towards the costs incurred by the Society in the sum of €3,000.

In addition the Committee decided to impose a reprimand pursuant to the provisions of Section 12(1)(c)(ii) as substituted by Section 14 of the Solicitors (Amendment) Act 2002.”

This decision was communicated to the Applicant at the said meeting.

3. By letter dated 20th June, 2008 the Respondent confirmed the acting chairman of the Committee had advised the Applicant on the day of the meeting that he had 21 days from 4th June to appeal the Committee’s decision and the terms of the Committee’s decision were again set out.

4. The grounds upon which relief sought were that the decision of the Respondent was ultra vires for the reasons that:-

(a) The Applicant was directed to make a contribution to the costs of an investigation which had not taken place.

(b) The Applicant was only entitled under s. 12 of the Solicitors (Amendment) Act 1994 (as amended by s. 14 of the Solicitors (Amendment) Act 2002) to recover costs actually and reasonably incurred and only then up to a limit of €3,000.

(c) The Respondent directed the Applicant to make a contribution to costs as a punitive measure and not as a genuine estimate of the costs actually incurred by itself.

5. It was further claimed that the decision of the Respondent was in breach of natural and constitutional justice and fair procedures for the reasons:-

(a) The Respondent already having agreed and accepted its costs relating to the matters at issue, and led the Applicant to believe that the issue of costs had been decided, proceeded to further levy costs unilaterally on the Applicant.

(b) The Respondent made no attempt to ascertain the costs incurred, if any, and had no reasonable basis for arriving at the sum demanded.

6. In his affidavit grounding the application, the Applicant states that a notice dated 10th July, 2007, was served on him by the Respondent pursuant to s. 10 of the Solicitors (Amendment) Act 1994 requiring him to deliver to Linda Kirwan of the Respondent within 10 days all documents in his possession, under his control or within his procurement in connection with matters relating to the complaint of Joseph Bowe (whether or not they also relate to other matters).

7. Mr. Bowe was a solicitor in the firm of Solicitors, Beauchamps and was dealing with aspects of an estate of a deceased as the Applicant’s office had already dealt with some aspects of the administration of this estate. The Applicant stated that the order under s. 10 was not justified because there was no complaint against him under s. 8 or 9 of the Solicitors Act which empowered the Respondent to issue a notice under Section (sic) of the Solicitors Act. No challenge was made by the Applicant to this notice. The Respondent brought a motion before the High Court seeking to enforce the Section 10 notice and the motion was struck out on consent in the High Court. The Applicant agreed to pay the Respondent’s costs in an agreed sum of €600.

8. He claimed that no investigation was embarked upon by the Respondent against him. However, he does state that on 4th June,

2008, he attended a meeting of the Complaint and Client Relations Committee of the Respondent that he was informed that the Committee had decided that he had failed to respond in a timely manner to correspondence from the Respondent and that he was directed to pay a sum of €3,000 towards the costs thereby incurred by the Respondent.

9. He said that the costs of the High Court application (€600) had been discharged by 4th June, 2008 and that no evidence was mentioned of any other costs incurred and no basis was offered by which the costs of the Respondents were calculated. He stated that it was confirmed to him by the Respondent's Committee at a meeting on 11th November, 2008, that the €3,000 costs did not relate to the High Court motion, that they were the costs of the Committee and the staff of the Respondent and that there were no records kept by which the quantum of such costs were measured. He stated that the sum of €3,000 bore no relationship to any costs reasonably incurred by the Respondent in dealing with the subject matter.

10. Ms. Linda Kirwan who is the secretary of the Respondent's Committee stated in her affidavit that the Respondent's investigation commenced on 14th February, 2007 when Mr. Bowe's letter of complaint was received. This letter enclosed three copied letters sent to the Applicant dated 3rd February, 2006, 5th February, 2007 and 9th March, 2006 in respect of which Mr. Bowe stated no replies had been received from the Applicant. Ms. Kirwan stated that on 22nd February, 2007, a letter was sent to the Applicant seeking an explanation. A further letter was sent on 12th March, 2007 and again on 26th March, 2007 and this last letter said that if a reply was not furnished within 7 days from such date, the matter would be referred to the Committee at which the Committee might consider the original complaint made to the Respondent and the Applicant's failure to respond to the Respondent's inquiries. No reply was received of that letter and a further letter was sent by the Respondent on 10th July, 2007 indicating the matter would be considered by the Committee at its meeting on 2nd August, 2007. A leaflet explaining the powers of the Committee was also enclosed. A notice issued pursuant to Section 10 of the Solicitors (Amendment) Act 1994 was also enclosed requiring the Applicant to deliver to Ms. Kirwan the documents the subject matter of the complaint by Mr. Bowe.

11. On 2nd August, 2007, the Committee directed the Applicant to hand over all files within one month from failing which the Committee would direct the Respondent's solicitor to enforce compliance with the Section 10 notice which application was ultimately made to the High Court.

12. She stated that on 4th June, 2008, the Committee reconsidered the complaints and made the formal decision (which was communicated to the Applicant and his counsel at the hearing on 4th June, 2008).

13. The Applicant complains that no details were given as to the manner in which the contribution towards the Respondent's costs were computed and that the order directing him to make a contribution towards the Respondent's costs was made in the formal decision of the Committee and that there was no debate in relation to it in his presence.

14. No submissions were made by or on behalf of the Applicant to the Committee in relation to the powers of the Respondent's Committee to require the Applicant to pay to the Respondent a sum (that is not exceeding €3,000) by way of contribution towards the Respondent's costs under Section 12(1) (as substituted by Section 14 of the Solicitors (Amendment) Act 2002), in the event of an adverse finding by the Committee against him.

15. Section 14 of the Solicitors (Amendment) Act 1994 is amended by the substitution of Section 12 of Solicitors (Amendment) Act 2002. It is as follows:-

"(1)(a) Following an investigation of a complaint made to the Society against a solicitor under section 8(1) or 9(1) of this Act, the Society may—

(i) in case the Society have made a determination or given a direction under either of those sections, require payment by the solicitor of a sum not exceeding €3,000 to the Society by way of contribution towards the costs incurred by the Society in investigating the complaint, or

(ii) in any other case, if the Society have made a determination that the solicitor has in the course of the investigation refused, neglected or otherwise failed, without reasonable cause, to respond appropriately in a timely manner, or at all, to a written request from the Society and that the Society have incurred costs in consequence of the refusal, neglect or failure, require payment by the solicitor to the Society of a sum not exceeding €3,000 by way of contribution towards those costs,

and the solicitor shall comply with any such requirement.

(b) Paragraph (a) (other than subparagraph (i)) of this subsection shall apply in relation to a complaint made to the Society alleging misconduct by a solicitor as it applies in relation to a complaint referred to in that paragraph.

(c) Where, in relation to a complaint made to the Society alleging misconduct by a solicitor or a complaint under section 8(1) or 9(1) of this Act, the Society –

(i) are of opinion that the complaint is justified but is not of sufficient seriousness to warrant an application being made to the Disciplinary Tribunal under subsection (1) of section 7 (as substituted by section 17 of this Act) of the Act of 1960, or

(ii) have made a determination that the solicitor has in the course of the investigation refused, neglected or otherwise failed, without reasonable cause, to respond appropriately in a timely manner, or at all, to a written request from the Society and that the Society have incurred costs in consequence of such refusal, neglect or failure,

the Society may, in addition to or in substitution (in whole or in part) for requiring payment by way of contribution towards the costs incurred by the Society as provided for in subparagraph (i) or (ii) of paragraph (a) of this subsection, issue to the solicitor a reprimand in writing in such terms as the Society deem appropriate and reasonable and so notify the person from whom the complaint was received.

(2) Subject to any order made under section 11(1) of this Act, the Society may recover any sum the payment of which has been required by the Society by way of contribution under subsection (1) of this section as a liquidated debt payable to the Society."

16. In the course of his submissions, Mr. Tim Dixon, B.L. on behalf of the Applicant submitted that there was in reality no complaint made to the Respondent under Section 12 nor was there any investigation undertaken by the Respondent. He submitted there was not even a cursory attempt to engage in any formal process in order to determine the amount of the contribution that could be imposed under Section 12. He claimed that at best the costs that were attributed to the failure to respond in a timely manner to the Respondent's three letters were the only costs recoverable. He submitted that the payment of €600 following the High Court hearing to enforce the Section 10 notice was a separate matter and it encompassed much of the costs incurred by the Respondent. He submitted that natural justice required that a Bill of Costs should be presented by the Respondent setting out the costs it sought to recover by way of contribution under Section 12(1) of the Act. He referred to the statement by Ms. Kirwan that the €3,000 cost did not relate to the High Court motion but were the costs of the Committee and the staff of the Respondent and that there were no records kept by which the quantum of such costs were measured. He submitted that transparency required that details should be given.

17. The Applicant referred to three authorities:-

(i) O'Donnell v. Tipperary (South Riding) County Council [2005] IESC 18 on the appropriateness of judicial review in circumstances where there is an alternative remedy;

(ii) M.K. v. J.P. (otherwise) S.K. in the Supreme Court Appeal No. 302/00 as authority for the requirement that the Respondent's Committee should have set out the various factors which it considered in determining the contribution as to costs; and

(iii) O'Driscoll & Grattan v. Law Society of Ireland and the Solicitors Disciplinary Tribunal [2007] IEHC 352, a decision which sets out the factors which can be considered by the court considering the issue of whether there has been delay in initially seeking relief by way of judicial review.

18. In its Statement of Opposition, the Respondent asserted that the Applicant was not entitled to relief by reason of delay in circumstances where the proceedings did not commence until 1st December, 2008. The Respondent relied on Section 11(2) of the Solicitors (Amendment) Act 1994 which provides that where a direction given under Section 12(1) of the Act is not appealed within 21 days it shall become absolutely binding on the solicitor immediately upon the expiration of such a period and that no appeal was brought by the Applicant. It was submitted that the more appropriate remedy was by way of appeal pursuant to Section 11(2) of the Solicitors (Amendment) Act 1994. It was submitted that relief by way of judicial review which is discretionary in nature should not be granted in circumstances where there was an alternative remedy open to the Applicant. It was submitted that it was the Applicant's failure to cooperate with the Respondent which was the cause of such costs. Alternatively, it was submitted that if an error was made, it was made within jurisdiction.

19. In his submissions to the court on behalf of the Respondent, Mr. Paul Anthony McDermott, B.L., expanded upon the above grounds. He also referred to In the Matter of Timothy McEniry, a Solicitor (Unreported, High Court, 28th January, 2002) where the Applicant had been directed by the Registrars Committee to provide an indemnity bond at his own expense which he failed to provide and as a consequence a finding was made against him by the Disciplinary Tribunal which he unsuccessfully appealed against, as he had failed to apply to the High Court for an order rescinding or varying the direction within the time limit of Section 11(1). He also referred to a similar case where there was a failure to appeal an order requiring a refund of fees to be paid to a client which was decided by Laffoy J. in the Matter of Colm Murphy, a Solicitor (Unreported, High Court, 7th May, 2004). He relied on the decision in DeRoiste v. the Minister for Defence [2001] 1 I.R. 190 where the court emphasised the discretionary nature of judicial review.

Decision

20. Section 12(1)(a)(ii) of the Solicitors (Amendment) Act 1994 as substituted by Section 14 of the Solicitors (Amendment) Act 2002 provides that following an investigation of a complaint made to the Society against a solicitor under Section 8(1) or 9(1) of the Act, if the Respondent made a determination that the solicitor has in the course of the investigation refused, neglected or otherwise failed without reasonable cause to respond appropriately in a timely manner or at all to a written request from the Respondent and that the Respondent has incurred costs in consequence of the refusal, neglect or failure, require payment by the solicitor to the Respondent of a sum not exceeding €3,000 by way of contribution towards those costs. In addition, under Section 12(1)(c), the Respondent may issue to such a solicitor a reprimand in writing in such terms as the Respondent deems appropriate and reasonable.

21. The subject matter of review in this application is the contribution as to costs. The other conclusions of the Committee namely the failure to reply to the four letters without reasonable cause and the imposition of a reprimand which were imposed by the Committee following an investigation by the Respondent further to the complaint of Mr. Bowe are not being challenged. It follows from this that the only basis upon which the Applicant can challenge the contribution as to costs is on some distinct basis from the reprimand and the determination that he had neglected without reasonable cause to respond in a timely manner to the Respondent's correspondence. In other words, the complaint is that the quantum was unfairly or improperly calculated.

22. In relation to the Respondent's plea that the Applicant is not entitled to relief by reason of his delay in initiating the application just some days short of the six month period on 1st December, 2008, the Applicant claimed in his affidavit that it was only on 11th November, 2008, that he was informed by the Respondent that the costs of €3,000 did not relate to the High Court motion. No correspondence appears to have emanated from the Applicant during the period from 4th June, 2008 on this issue. Whilst the Respondent submits that the 21 day period provided for an appeal to the High Court and the provisions of Section 11(2) provide that a determination shall become absolutely binding on a solicitor following the expiration of such period and emphasised the requirement that an aggrieved solicitor who wishes to challenge a determination of the Respondent should act with dispatch if he decides to challenge by way of judicial review the determination of the Respondent's Committee, I am not convinced that the delay is such as to debar the Applicant in this case in particular having regard to the information that was given to him following the Respondent's Committee's meeting on 11th November, 2008. I am not impressed by his failure to correspond on the issue with the Respondent immediately after its decision in June 2008.

23. No evidence has been tendered by the Applicant to show the lack of reasonableness of the Committee in its conclusion that the Society had incurred costs in consequence of the refusal by the Applicant to respond to the correspondence, and as a result Section 12(1) was applicable.

24. In my judgment it is manifest that the Respondent and the Committee investigated the complaints made to it and monitored the Applicant's failure to correspond with it, it referred the matter to its specialised Committee to investigate such complaint and the matter was before such Committee on at least two occasions culminating in the decision of 4th June, 2008. The Committee considered the matter was of such gravity that a reprimand was imposed. I conclude that it was open to the Committee to come to the conclusion that all these matters flowed from the refusal by the Applicant to respond to the Respondent's correspondence in

relation to the original complaint.

25. The Committee is a specialised body comprising, I was informed, solicitors and some lay members and the number on the Committee could vary from time to time. In my opinion, it was not necessary for the Respondent's Committee to produce an itemised Bill of Costs either before or after its hearing. The statute imposed a limit to the Respondent's Committee's discretion to order a contribution towards costs. The Committee had costs arising in consequence of the Applicant's failure to respond to its correspondence as determined by it.

26. It was open to the Applicant in this Court to seek to demonstrate by appropriate evidence the unreasonableness or lack of rationality of the Respondent's Committee in the quantification of the contribution towards its costs. He has chosen not to do so.

27. Furthermore, the Applicant who is a solicitor and was represented by counsel at the hearings of the Committee must be taken to be aware of the powers of the Committee in this regard. Significantly no submissions were made on his behalf on this issue before the Committee gave its decision. The application to this Court is not an appeal and it is not the function of this Court to state what should be the appropriate figure.

28. The issue has also been raised as to the appropriateness of the relief of certiorari in this case where specifically an appeal is given to the Applicant. The Applicant complains that the High Court would be in no better a position not knowing the basis upon which the amount of the contribution towards the Respondent's costs was calculated. In my opinion, the Applicant's complaint which ultimately is one of quantum is best suited to being determined by way of appeal and if I were to consider that the Applicant had a good cause of action for judicial review, I would decline to exercise my discretion in his favour on this ground.

29. I find no assistance from the case of *M.K. v. J.P. (otherwise) S.K.* as this deals with the appellate function of the Supreme Court in reviewing a decision which required a consideration of various specified matters as set out in Section 20 of the Family Law (Divorce) Act 1996. In the instant case, there is no such requirement and in my opinion, the Committee can itself compute or measure the quantum of the contribution towards its costs, in a manner, similar to that which courts do from time to time without the necessity of a detailed Bill of Costs or other statement being furnished. In the instant case there was evidence in relation to the facts of the case, some of which I have outlined earlier from which the Committee could have arrived at its conclusion.

30. In each case the Committee must act in a reasonable and rational manner and this judgment is not authority for the proportion that the Committee may in any case impose a contribution representing the maximum amount provided for in the legislation.

31. Finally as the following matters were canvassed before me, I am satisfied there was a complaint and an investigation. No evidence was adduced that the €3,000 sum was a punitive measure. I dismiss the application.