Neutral Citation [2015] IEHC 402

THE HIGH COURT

[2015 No. 3 SA]

IN THE MATTER OF THE SOLICITORS ACTS 1954-2008 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 7(13)A OF THE SOLICITORS AMENDMENT ACT 1960

BETWEEN:

SEÁN SHEEHAN

APPELLANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

AND

THE SOLICITORS DISCIPLINARY TRIBUNAL

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 26th day of June, 2015

The appellant seeks an order pursuant to Order 53 of the Rules of the Superior Courts rescinding the finding and decision of the notice party made on 6th January, 2015 in respect of a complaint made by the respondent on 30th January, 2012 to the effect that the applicant had been guilty of misconduct.

BACKGROUND

The appellant is a practising solicitor and partner in the practice of Aaron Kelly & Co., Drogheda, Co. Louth. In February 2010 Ms. Mary Devereux, a chartered accountant employed in the respondent's Regulation Department, was appointed to conduct an inspection of the appellant's practice. The appellant was notified of the inspection and was required to have his books of account written up to 28th February 2010.

Following a short delay, the inspection took place in May 2010 and Ms. Devereux prepared a report dated 8th July 2010 for the respondent's Regulation of Practice Committee. The report found that there was a shortfall of €66,528 on the client account as at 31st March 2010, part of which was due to a bank error and debit balances which were later cleared. The report also found that proper books of account were not maintained in accordance with the Solicitors Accounts Regulations and that the accounting system was written up in arrears, that there was no compliance with section 68 of the Solicitors (Amendment) Act 1994, that costs were transferred in bulk to the office account and then allocated to the relevant files, that debit balances were created in breach of Regulation 7 and that interest was left in the client account in breach of the Solicitors Accounts Regulations.

Following an application made by the respondent, an application into the applicant's conduct was convened before the Solicitors Disciplinary Tribunal. On 19th March 2013 the Tribunal found that there was a prima facie case for inquiry in respect of the following allegations –

> *"…that the respondent solicitor in the title hereof Sean R. Sheehan has been guilty of professional misconduct in his practice as a solicitor in that he:*
>
> *a) "breached Regulation 7(2)(a) of the Regulations by allowing debit balances to arise on the client account"*
>
> *…*
>
> *b) "breached Regulation 12(1) by failing to maintain proper books of account.""*

An inquiry into the alleged misconduct was held on 26th September 2013. On completion of the inquiry the Tribunal found the respondent guilty of misconduct in respect of both allegations. This decision was challenged by the solicitor by way of judicial review and by order dated 24th June, 2014 this Court ordered that the matter be remitted to a sitting of the Tribunal comprised of the same members, without the need for a fresh hearing, but with the Tribunal furnishing reasons for its findings in accordance with law.

Consequently, on 10th December, 2014 the inquiry resumed before the same division of the Tribunal and it was found that the solicitor was guilty of misconduct in respect of the following complaints –

> *a) "breached Regulation 7(2)(a) of the Regulations by allowing debit balances to arise on the client account"*
>
> *b) "breached Regulation 12(1) by failing to maintain proper books of account."*

The Tribunal recommended the following sanctions –

> a) an order advising and admonishing the respondent solicitor
>
> b) an order directing the respondent solicitor to pay the sum of €5,000 plus VAT as a contribution towards the whole of the costs of the applicant

STATUTORY PROVISIONS AND THE REGULATIONS

Section 24 of the Solicitors (Amendment) Act 1994 states that the meaning of 'misconduct' as it appears in the statutory provisions includes –

> *(a) the commission of treason or a felony or a misdemeanour,*

(b) the commission, outside the State, of a crime or an offence which would be a felony or a misdemeanour if committed in the State,

(c) the contravention of a provision of the Principal Act or this Act or the Solicitors (Amendment) Act, 1994, or any order or regulation made thereunder,

(d) conduct tending to bring the solicitors' profession into disrepute;

Regulation 7(2)(a) of the Solicitors Accounts Regulations provides as follows –

(2) For the avoidance of doubt, it shall be a breach of these Regulations—

(a) for a debit balance to arise on any clients' ledger account in respect of any client of a solicitor, other than a debit balance which is totally offset by a credit balance arising on another clients' ledger account in respect of the same client;

Regulation 12(1) relates to the books of account to be maintained by a solicitor and states –

12 (1) A solicitor shall, at all times in the course of and arising from his or her practice as a solicitor, maintain (as part of his or her accounting records) proper books of account and such relevant supporting documents as will enable clients' moneys handled and dealt with by the solicitor to be duly recorded and the entries relevant thereto in the books of account to be appropriately vouched.

SUBMISSIONS OF THE APPELLANT

In his grounding affidavit, the appellant solicitor acknowledges the role of the Law Society and the value of inspections in ensuring that solicitors' accounts are properly maintained. He states that since the initial inspection he has implemented the recommendations of the Society and that, as a result, two subsequent inspections of his accounts went "much more smoothly". He accepts that there were errors in relation to his accounts but states that no client suffered any loss as a result of any breaches of the Regulations and that there is no allegation of deliberate fraud, exploitation, or misleading of clients. It is submitted that at no time was clients' money put at risk. He attributes his failure to immediately rectify errors in his accounts to the busy nature of his practice and an administrative error whereby a legal executive tasked with certain responsibilities in relation to the accounts was working from a laptop on which accounts were not regularly updated.

Counsel on behalf of the appellant submits that the decision of the Tribunal ought to be rescinded on three grounds. Firstly, the facts as admitted and as found by the Tribunal do not amount to misconduct. Secondly, it is contended that the breaches of the Regulations as conceded by the solicitor were relatively minor in nature and arose partly due to accidental oversight and partly due to a significant error on the part of the solicitor's bank. Thirdly, it is submitted that the facts as found by the Tribunal in respect of a breach of Regulation 7(2) did not constitute a breach of Regulation 12(1).

Counsel submits that the misconduct was brought about by errors of duplication or oversight and in one instance a debit balance occurred due to Ulster bank accidentally lodging a sum of €50,000 as €5,000. However, it is accepted that the appellant neglected to lodge cheques to correct the debit balances in a timely fashion. Nonetheless, it is submitted that there is no suggestion of any fraud or *mala fides* on the part of the appellant solicitor and there was no ulterior motive.

The appellant submits that it as been accepted by the Society that not every breach of an Order or Regulation amounts to misconduct under s.24 of the 1994 Act. It is submitted that this position is consistent with an application of the principle of interpretation *noscitur a sociis*, which says that the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it. In the case of McCabe v Governor of Mountjoy Prison (No.1) [2014] IEHC 309 Hogan J. referred to this principle in the following terms –

"17. More fundamentally, this is another classic example where the principle of noscitur a sociis ("known by its companions") comes into play. This principle reflects the fact that in the English language words do not always have fixed meanings, but they take their meaning from the context in which they appear. As Stamp J. famously observed in Bourne v. Norwich Crematorium Ltd. [1967] 1 W.L.R. 691, 696:-

> *"English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which one has assigned to them as separate words."*

18. This principle is also illustrated by the classic judgment of Henchy J. in Dillon v. Minister for Posts and Telegraphs , Supreme Court, 3rd June, 1981. In that case an election candidate sought to avail of the free postage facilities available to such candidates. Objection was, however, taken to his electoral literature on the ground that it was "grossly offensive" within the meaning of Inland Postal Warrant 1939 because it claimed that "Today's politicians are dishonest because they are being political and must please the largest number of people".

19. Henchy J. pointed out that the words "grossly offensive" did not appear in isolation, as the statutory prohibition was rather against "any words, marks or designs of an indecent, obscene or grossly offensive character."He continued:-

> *"That assemblage of words gives a limited and special meaning to the expression 'grossly offensive' character… Applying the doctrine of noscitur a sociis …the expression must be held to be infected in this context with something akin to the taint of indecency or obscenity. Much of what might be comprehended by the expression of it if it stood alone is excluded by its juxtaposition with the words 'indecent' and 'obscene'. This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it to be denigratory of today's politicians, is far from bring of a 'grossly offensive character' in the special sense in which that expression is used in the [Inland Postal Warrant].""*

In *Law Society of Ireland v Michael Curneen* [2012] IEHC 358 the Society challenged a decision of the Tribunal that no prima facie case of misconduct had been established to warrant an inquiry into the conduct of a solicitor. Kearns P. upheld the finding of the Tribunal that there was no *prima facie* case and stated as follows –

> *"Having carefully considered all of the papers in this matter, I am satisfied that the issues raised by the investigating accountant were not of a serious nature and have been satisfactorily clarified by the respondent in his comprehensive affidavit sworn on 9th February, 2012 and his letter to the Regulation Department of the appellant on 18th May, 2012. I am satisfied from all of the exhibited correspondence reviewed that there was and is no danger to the public posed by the respondent, that he operated within permissible margins in his dealings with client monies, and was not conspiring in any untoward financial practices."*

Counsel on behalf of the appellant submits that in the instant case there equally was or is no danger to the public posed by the solicitor. While it is accepted that errors arose and should have been addressed in a much more timely fashion, it is submitted that this falls short of professional misconduct. Counsel contends that a breach of the Regulations is not of itself sufficient to constitute misconduct and that a finding of misconduct must be made by the court based on the facts an individual case.

In the case of *In Re a Solicitor* 1972 2 AER 811 Denning MR addressed the issue of misconduct in the following terms –

> *"In my opinion negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession… The negligence of the solicitor was reprehensible. He failed for three tears 1967 to 1970 to see that the books were written up. Then when the Law Society's accountant drew his attention to the failure in September 1970, he still failed to get them written up. Then when proceedings were taken against him and constant pressure brought on him, even after two hearings of the disciplinary committee, he still failed to do it to their satisfaction. This failure and delay was so reprehensible that the committee were entirely justified in finding him guilty of professional misconduct."*

In the present case it is submitted that, although the impugned decision states that the breach of Regulation 12(1) tends to *"bring the solicitors profession into disrepute"*, this merely restates the statutory definition of misconduct and does not amount to an attempt to analyse why the acknowledged and unintended breach would bring the profession into disrepute. Furthermore, although the Tribunal state that regard was had to the decision in *In Re a Solicitor*, there is no attempt to address the ratio of his decision on the misconduct issue and whether, in addition to the breach, there had been 'deplorable' or 'reprehensible' conduct. It is submitted that this amounts to an error on the part of the Tribunal.

In *Bolton v Law Society* (1994) 1 WLR 512 a solicitor, Mr. Bolton, was found to have paid out funds belonging to his client, a Building Society, to his wife before security was put in place. The court held –

> *"However the matter concerned in allegation (b) was of a far more serious nature. It concerned the misuse of clients' moneys. In essence the respondent had paid money belonging to a client Building Society to his wife. That was wholly unacceptable."*

The Court of Appeal in that case repeatedly emphasised the need for solicitors to observe the principles of "*integrity, probity and trustworthiness*".

In *Carroll v The Law Society* [2005] IEHC 199 Finnegan P. cited Bingham MR in *Bolton*, stating that –

> *"…any solicitor who is shown to have discharged his professional duties with anything less than complete honesty, probity and trustworthiness must expect severe sanctions…"*

Counsel for the appellant submits that in the present case it is important to note that clients' funds were never at risk. When the errors were identified corrective action was decided upon and commenced but was not completed due to an oversight by the appellant. There was no 'deplorable' or 'reprehensible' behaviour as identified by Denning MR in *In Re a Solicitor*. While it is accepted that mistakes were made, the solicitor's integrity, probity, and trustworthiness have not been found wanting. It is submitted that the solicitor's conduct in the present case, including genuine mistakes and errors which he accepts, fell below what was appropriate, but did not amount to professional misconduct. In this regard, counsel reiterates the decision of this Court in Curneen where it was stated –

> *"…there was and is no danger to the public posed by the respondent…he operated within permissible margins in his dealings with client monies, and was not conspiring in any untoward financial practices."*

Counsel for the appellant submits that it is not correct for counsel for the respondent to suggest that the Tribunal was unimpressed with the client. By order of this Court the Tribunal was required to furnish detailed reasons for its decision and there is nothing in the reasons which indicates that the Tribunal was not impressed with the attitude of the appellant solicitor. Indeed, it is evident from the decision that large parts of the investigating accountant's report were not accepted by the Tribunal and no findings in relation to certain concerns raised in the report were made against the solicitor. It is further submitted that the solicitor's attitude and cooperation in the present case should be taken into account and that in all the circumstances the appeal should be allowed.

SUBMISSIONS OF THE RESPONDENT

Counsel for the respondent submits that the meaning of professional misconduct includes any conduct tending to bring the solicitor's profession into disrepute and the contravention of a provision of the Solicitors Acts or any Order or Regulation made thereunder. It is not contended that each and every breach of the Regulations will amount to professional misconduct and the respondent accepts that there is a range of seriousness attaching to such breaches. The respondent submits that while minor or technical breaches should not necessarily amount to misconduct, it is not necessary on the other hand for there be a finding of dishonesty before a breach of the Accounting Regulations can amount to professional misconduct. Provided a breach is more than minor or technical, it is submitted that such a breach can and should amount to professional misconduct notwithstanding that the conduct fell short of being dishonest or for material gain.

In the English case of *Weston v. The Law Society* (Court of Appeal, 15th July 1998) the Lord Chief Justice considered the Solicitors Accounts Rules in the following terms –

> *"They [the Tribunal] were at pains to make the point, which is in my judgment a good point, that the Accounts Rules exist to afford the public maximum protection against the improper and unauthorised use of their money and that,*

because of the importance attached to affording this protection and assuring the public that such protection is afforded, an onerous obligation is placed on solicitors to ensure that the Accounts Rules are observed. That is a duty which binds solicitors, quite apart from a duty to act honestly and in accordance with the duties of a trustee…

… It is important to appreciate that in speaking of "trustworthiness" in that passage the court [In Bolton v the Law Society] had in mind, of course, honesty, but also had in mind the duty of anyone holding anyone else's money to exercise a proper stewardship in relation to it."

Counsel submits that this case demonstrates that a solicitor who fails to ensure that proper books of account are kept may be struck off following a finding of professional misconduct, notwithstanding the absence of a finding of dishonesty.

The respondent submits that the Tribunal in the instant case is a statutory body tasked with performing the disciplinary function in respect of the solicitors' profession and it came to the conclusion that the appellant's breaches of the Regulations were sufficiently serious to amount to professional misconduct. Counsel submits that this Court should be slow to interfere with the findings of the Tribunal where such findings are within the Tribunal's legitimate remit and where the Tribunal was making a qualitative assessment of the seriousness of regulatory breaches. It is submitted that unless there is a significant and serious departure from what could be regarded as reasonable, this Court should not trespass on the Tribunal's legitimate exercise of part of its function.

It is submitted that the seriousness of the applicant's breaches of the Regulations can be seen from the amounts, frequency and duration of the accounting errors. It is accepted by the applicant that there was a shortfall of more than €65,500 on the clients account for a number of months before any effort was made to remedy the situation. These debit balances were allowed to accrue because of the failure to keep proper books of account and that, far from be a simple and single error, the failures persisted over a considerable period of time. It is asserted that the solicitor's conduct was symptomatic of prolonged disorganisation and neglect of proper accounting practices.

Counsel submits that Regulation 12(1) exists to ensure that it would be possible, at any given time, to ascertain the financial situation pertaining to a firm's clients. The books of account must properly and truly reflect the manner in which client monies are transacted and any entries in the records must be appropriately vouched. This was not the case in relation to the appellant's accounts.

The respondent contends that the appellant's reliance on the Curneen case, both before the Tribunal and in the present proceedings, is misplaced. It is submitted that the factual background in that case was quite different and that the books of account were maintained up to date and balanced regularly. The level of deficit in that case was limited to €159.82 and there were no misleading entries in the solicitor's records. Counsel submits that the *Curneen* case does not establish a precedent to the effect that, in order for a breach of regulations to amount to professional misconduct, there must be danger posed to the public or a conspiracy to engage in untoward financial practices. While the Court referred to "*permissible margins*" in *Curneen*, no such margins were drawn and the decision can be viewed as being founded on its own particular facts.

In any event, the respondent submits that there are a number of factors which show that the instant case concerns far more serious matters than in *Curneen*. The deficit in the present case is much higher and the appellant failed to remedy the defects promptly once they were identified. Furthermore, it cannot be said ion the appellant's case that the books of account were maintained up to date and balanced regularly.

It is submitted that in all of the circumstances the appellant's conduct was sufficient to come within the meaning of 'misconduct' and the decision of the Tribunal should not be interfered with.

DISCUSSION

The primary matter which this Court is required to consider is whether or not the appellant's conduct was sufficiently serious to amount to a finding of professional misconduct. A preliminary issue arises however in relation to the decision of this Court in *Law Society of Ireland v Curneen* [2012] IEHC 358 which apparently requires clarification at the outset.

Counsel for the respondent indicated that a situation has arisen whereby the Court's decision in *Curneen* is now frequently relied upon by and on behalf of solicitors who find themselves before the Tribunal as authority for the proposition that in order for there to be a finding of professional misconduct there must be a finding of some element of deliberate fraud or conspiracy on the part of a solicitor, or a finding that the solicitor acted in a dishonest way. However, counsel was unable to refer the Court to any specific cases before the Tribunal where the decision of the Court in *Curneen* was cast in this light. He ultimately confessed that he only had 'anecdotal accounts' to this effect. Nevertheless, for the sake of clarity, the Court considers it appropriate to indicate that no such meaning or intention on the part of the Court can be gleaned or inferred from any reading of the *Curneen* decision and any suggestion to the contrary is unwarranted. That case turned on its own particular facts and the Court, in all of the circumstances of that case, found that the conduct complained of was not sufficiently serious to come within the definition of professional misconduct.

As per section 24 of the 1994 Act, the meaning of professional misconduct includes any conduct tending to bring the solicitor's profession into disrepute and the contravention of a provision of the Solicitors Acts or any Order or Regulations made thereunder. It is accepted by both parties to this dispute that there is a range of behaviour which falls within the meaning of misconduct and that some forms of misconduct are more serious than others. The Court is required to consider, in all the circumstances of a particular case, if the solicitor committed some breach or breaches of the Acts and/or associated Regulations and Orders or whether or not the conduct tends to bring the solicitor's profession into disrepute.

Counsel for the appellant in the present case has referred the Court to a number of UK authorities which it is submitted indicate that in order for a breach of the accounting regulations in and of itself to constitute misconduct, the solicitors behaviour must be 'deplorable' or 'reprehensible'. It is submitted that in each of the UK cases relied upon, where a finding of misconduct was made in relation to a breach of accounting requirements there was an element of recklessness to the solicitor's conduct which cannot be applied to the appellant herein. However, the Court does not accept this submission.

I have carefully considered all of the documentation in this case, including the accountants' reports and the transcript of the hearing before the Tribunal, and I am satisfied that the appellant's complete disregard for the requirements of the Solicitors Accounts Regulations over a prolonged period of time, coupled with his tardiness in rectifying the defects when they were brought to his attention, amounts to conduct which tends to bring the solicitors' profession into disrepute. The duties imposed on solicitors under the Regulations in relation to accounting procedures are of paramount importance for a number of reasons. The solicitor-client relationship is one which is largely based on trust, and clients are entitled to expect that the professionals they instruct will adhere to proper accounting practices so that any money involved will be in safe hands.

While the appellant solicitor may at all times have been able to derive comfort from the notion that his practice was in a healthy financial position such that no client's funds were at risk, this does not justify apathy or inattention towards the requirements of the Solicitors Accounts Regulations. The work of a solicitor can often involve dealing with large sums of money in relation to unpredictable matters and it is imperative that sound accounting practices are adopted. Furthermore, while fraud is not suggested in the present case, the Regulations play a vital role in helping to prevent fraud and misappropriation or concealment of funds. A client should be able to ascertain the status of their client account at any given time. Owing to the appellant's haphazard approach to accounting, this would not have been possible in the present case.

The Court is satisfied that, while there was no dishonesty or any attempt to defraud, conspire, mislead, or to personally benefit by engaging in untoward accounting practices, the conduct of the appellant is sufficiently serious to amount to professional misconduct. In arriving at this finding the Court has also had regard to the principle of curial deference in relation to the decisions of specialist bodies such as the Tribunal.

It is appropriate for this Court to make a finding in relation to an additional aspect of this case which is that the Tribunal, despite being requested to do so, failed to publish details of the sanction imposed on the appellant. This left the decision open to the interpretation that the misconduct engaged in by the appellant was of grave seriousness, which could be severely damaging to his reputation. While a finding of misconduct has been made, the appellant's behaviour was at the lower end of the scale of seriousness and this is reflected in the sanction imposed, namely, advice and admonishment and a direction that a payment of €5,000 plus VAT be made towards the Society's costs of the Tribunal proceedings. The Court indicated during the course of the submissions that publication of details of the sanction would perhaps render challenges to such decisions less likely.

DECISION
In light of the foregoing I would dismiss the appeal.