Neutral Citation Number: [2007] IEHC 375

THE HIGH COURT

[2006 No. 14 S.A.]

IN THE MATTER OF THE SOLICITORS (AMENDMENT) ACT 1960

SECTION 7 THEREOF

IN THE MATTER OF MARK EDMUND DOYLE SOLICITOR

AND IN THE MATTER OF AN APPLICATION BY PADDY POWER

BETWEEN

PADDY POWER

APPELLANT

AND
MARK EDMUND DOYLE

RESPONDENT

Judgment of Mr. Justice Birmingham delivered 19th day of October, 2007.

The Nature of the Proceedings
1. This matter comes before the Court by way of an appeal from a decision of a Disciplinary Tribunal established under the provisions of the Solicitors Acts dismissing a number of complaints of professional misconduct made by Mr. Paddy Power (the complainant/appellant) against Mr. Mark Edmund Doyle (the respondent). It should be noted that throughout the papers the complainant/appellant is referred to and refers to himself as Paddy rather than Patrick and I follow this approach.

Provision for an appeal to the High Court in such circumstances is made by s. 7 of the Solicitors (Amendment) Act 1960 as substituted by s. 7 of the Solicitors Amendment Act 1994, and as amended by s. 9 of the Solicitors (Amendment) Act 2002. The procedure to be followed on the appeal is set out at O.53, r.3 of the Rules of the Superior Courts, 1986. In essence the procedure laid down is that the transcript of the disciplinary proceedings is read in chambers by the judge to whom the appeal is assigned and thereafter oral submissions are made by the parties in open court.

The background to the present appeal
2(1) The background to the present appeal is a lengthy one and it must be said a somewhat tortuous one. It appears necessary to refer to that history at least in outline.

The starting point is that in 1991 the appellant and his daughter Blaithnaid acquired a property comprising of approximately 65 acres at Aillencally, Roadstone, County Galway. The property is a very attractive one enjoying significant seashore access and on it is located a derelict village. There is no doubt that the property is potentially a very valuable one. A Galway firm of solicitors acted on behalf of the appellant and his daughter in relation to the acquisition.

2(2) In 1995 the appellant was anxious to sell the property but at that stage it emerged that there were difficulties in relation to title. The details of those difficulties and the extent to which the difficulties identified were capable of being remedied are not directly relevant to the current appeal, but do nevertheless provide the backdrop.

2(3) In January, 2001 the appellant and his daughter Blaithnaid Muireann Power issued proceedings against the solicitors who had acted for them in relation to the acquisition of the property. Initially the complainant/appellant was representing himself in this litigation. However, when the case was mentioned in a call over the High Court Judge taking the list told him that he would be well advised to consult a solicitor. It seems that the appellant was reluctant to do this as he felt, to quote his own words, "…that no solicitor could be trusted to sue another solicitor" (Transcript, 12th June, 2007 at p.6). However, while reluctant to do so, he felt it unwise to ignore the views expressed by the judge and decided to reconsider his position.

2(4) In these circumstances the appellant decided to discuss the situation with a particular solicitor, Mr. Brian Gardiner.

Indeed, it seems that he had discussed the case previously on an informal basis with Mr. Gardiner with whom he had a social relationship through their respective daughters who are friends. Mr. Gardiner told Mr. Power that he had recently amalgamated his practice with that of another firm and was now practising as Actons Solicitors at Lower Mount Street, Dublin.

One of the partners in Actons Solicitors was Mr. Mark Doyle, the respondent in the present proceedings, and Mr. Gardiner suggested to the appellant that he should meet with Mr. Doyle. In fact a number of meetings followed. Mr. Power has observed that Mr. Doyle, the respondent, was not the kind of man he could trust as he was "the most plausible man [he had] ever met" (Transcript Book 2, Solicitors Disciplinary Tribunal, 25th October, 2005 at p.179).

2(5) Mr. Power was concerned that he risked incurring a substantial exposure in respect of costs and he sought and obtained assurances in that regard. The assurances in relation to his exposure for costs, which were set out in two letters dated the 10th and the 11th July, 2002, are of central significance in the context of the present proceedings.

In addition to anxieties in relation to costs, Mr Power states that he also had a concern, as he puts it, that the Solicitors Mutual Defence Fund (SMDF) as the indemnifier of the defendant solicitor would lean heavily on his solicitors and get them to settle for a very low figure. He discussed these concerns with Actons and was assured that he had nothing to worry about. (Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005, at p.34).

2(6) The hearing began in November 2002 and ran for eleven days. During the course of the hearing Mr. Power was represented by senior and junior counsel who were instructed by his solicitor. He is very critical of aspects of the manner in which the case was conducted.

However at this stage it is not necessary to consider to what extent, if at all, there is any substance in these criticisms. Judgment was given on the 17th January, 2003 by Murphy J. The outcome of the case was a bitter disappointment to Mr. Power and no doubt to his legal team also.

A very extensive claim for damages amounting to in excess of €1.4 million had been advanced. Elements of the claim included a sum

of €850,000 said to arise as the amount lost when a would-be purchaser decided not to proceed, €200,000 for trauma, worry and inconvenience., €100,000 damages to the second named plaintiff Blaithnaid, for interference and depravation of her teenage life and loss of one year as a practising veterinary surgeon together with an amount for the additional cost and expense of maintaining a home in Connemara, and a sum for the legal costs that would be incurred in rectifying the title, together with a sum for expenses required for advertising and publicity.

In his judgment Murphy J. rejected most of these heads of claim and decided that the measure of damages was the costs that would be incurred in righting the title defects. It seems implicit in the judgment that Murphy J. was of the view that the defects were capable of being readily remedied.

2(7) On the 17th January, 2003 Murphy J. did not finalise his judgment and order but rather adjourned matters until February 13th, 2003 so that he could be provided with certain additional information.

2(8) On the 13th February, 2003 Murphy J. finalised his award and measured damages at €7,000. From the point of view of Mr. Power, this outcome was a disaster. The outcome was also very unfortunate for Mr. Power's legal team by virtue of O.99, r. 8 of the Rules of the Superior Courts, 1986 since the amount of legal costs that could be awarded was now capped at €7,000, being the amount of the damages. The level of the award also brought into play the provisions of the Courts Act 1981 s.17, as amended by the Courts Act 1991, s.14 giving rise to concerns about the possibility of an application by the defendant in the proceedings that the plaintiff should be ordered to pay to them the additional costs to which they were exposed by reason of being brought unnecessarily to the High Court. The existence of this sanction had a particular relevance to any possible appeal in that it facilitated the defendants in dissuading the plaintiffs from appealing and also greatly increased the risks associated with an appeal.

2(9) In the immediate aftermath of the ruling "discussions" ensued, to use a neutral term, between Mr. Power and his legal team, and between both legal teams. (Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p. 109). It is these discussions that are at the heart of the complaints now made by Mr. Power. On the evening of the 13th February, 2003, in the course of discussions that were taking place between the plaintiff's legal team and the legal team representing the Solicitors Mutual Defence Society, an offer was put forward whereby the Society agreed to pay to the plaintiffs the sum of €75,000 inclusive of costs. The offer envisaged that a sum of €65,000 out of this would be paid to Actons Solicitors. From this figure Actons would have significant disbursements to make before receiving any fees themselves. The plaintiffs were to take responsibility for the fees of a particular expert conveyancing witness who had given evidence at the hearing. On the 18th February, 2003 an agreement was signed reflecting the discussions that had taken place in the aftermath of the court hearing, though somewhat modified, in that the amount payable to the plaintiffs was increased to €12,000 from the original figure of €10,000 and the amount payable to Actons was correspondingly reduced. Again, the details of the discussions and contacts between Actons and their clients are at the core of the complaints.

2(10) Mr. Power felt, and clearly still feels, a deep sense of grievance at how he and his daughter were treated in the aftermath of the decision of the High Court.

2(11) At this stage, Mr. Power initiated a complaint to the Incorporated Law Society. The complaints were not only against Mr. Doyle, the solicitor who was principally involved in the proceedings, but also against two other named solicitors who were practising in Actons, one of them being Mr. Brian Gardiner to whom reference has already been made.

2(12) A Solicitors Disciplinary Tribunal was duly convened. On the 5th November, 2002, the Tribunal ruled that none of the complaints against any of the solicitors were made out and rejected all allegations of professional misconduct.

2(13) Mr. Power appealed to the High Court against the decision of the Solicitors Disciplinary Tribunal dismissing his complaints. On the 17th January, 2005, the then President of the High Court, Finnegan P. dismissed the appeal in respect of two other named solicitors, but in the case of Mr. Mark Doyle he allowed the appeal but only to the extent that the Solicitors Disciplinary Tribunal should consider whether five specified factual matters alleged by Mr. Power were correct and if so, whether they amounted to misconduct.

2(14) A Solicitors Disciplinary Tribunal was duly convened, comprising as is usual a solicitor chairman, in this case Mr. Michael Carrigan, another solicitor and a lay member (the Carrigan Disciplinary Tribunal).

2(15) The Carrigan Disciplinary Tribunal sat over two very full days on the 13th September, 2005, and the 25th October, 2005, and sat again on the 6th December, 2005, to deliver judgment. The Tribunal found that there was no professional misconduct on the part of Mr. Doyle.

2(16) Mr. Power once more determined to appeal. On this occasion, an issue arose as to whether Mr. Power's appeal was out of time and if so whether the High Court had any jurisdiction to extend the time within which an appeal could be brought.

2(17) On the 8th May, 2006, Finnegan P. concluded that the appeal was out of time, and that he had no jurisdiction to extend the time. From this decision Mr. Power appealed to the Supreme Court. Mr. Power's appeal in this regard was successful and that court on the 8th December, 2006, permitted Mr. Power to proceed with his appeal.

2(18) Mr. Power's appeal came before me on the 12th day of June, 2007, I having being assigned by the President of the High Court to deal with the appeal. Having heard submissions from Mr. Power and Mr. Patrick Hunt S.C. on behalf of the solicitor respondent, I invited the parties to make written submissions on the role of the High Court, hearing an appeal based on a reading of the transcript and also inviting them to refer in these submissions to the particular passages in the transcript which supported the propositions for which they were contending. The parties were then afforded on opportunity to elaborate orally on their arguments following on exchange of submissions.

The Five Allegations

3(1) It is convenient to set out here the five allegations as they appeared in the schedule to the order of Finnegan P.

> 1. On 13th February, 2003, he [Mr. Paddy Power] was informed by the respondents [now Mr. Mark Doyle] that he was indebted to them [Mr. Doyle and his partners] in the sum of €350,000 for costs.
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> 2. He, [Mr. Paddy Power] was informed by the respondents [now Mr. Doyle] that the letters of the 10th July, 2002 and 11th July, 2002 meant nothing.
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> 3. He was informed by the respondent [now Mr. Doyle] that they could take over the premises [the Connemara property]

and sell them in a "fire sale" for €350,000.

4. Later the respondents [now Mr. Mark Doyle] informed him, of the offer to settle for €75,000 and that he would have to give the respondents €65,000 of this or the settlement would not happen. They would however, accept the €65,000 in settlement. If he did not agree to this they would take over the premises.

5. At the time of the discussions in relation to the agreements of the 18th February, 2003 the appellant [Mr. Paddy Power] did not have available to him copies of the letters of the 10th July, 2002, and the 11th July, 2002, and notwithstanding requests, copies were not furnished to him by the respondents [now Mr. Doyle].

3(2) The significance of each of these disputed matters of fact and the context in which the allegations are advanced will emerge more clearly when one comes to examine the case made to the Solicitors Disciplinary Tribunal by the parties and more specifically the case that was advanced by the complainant, Mr. Paddy Power.

Complaints advanced by Mr. Power

4(1) I have already referred to the fact that Mr. Power was initially reluctant to be legally represented in the prosecution of his case against his original Galway solicitors and that this hesitancy was based, to a significant extent on a concern, lest he incur an exposure to onerous legal costs if he was represented.

These concerns were the subject of discussions between Actons Solicitors and Mr. Power and arising from these discussions Actons furnished two letters dated respectively the 10th and the 11th July, 2002. Mr. Power states that had Actons Solicitors not furnished these letters he would never have instructed them.

4(2) Given the significance of these letters to the proceedings it is appropriate to quote them in full. The letter of the 10th July, 2002 reads as follows:

"Dear Paddy,

Further to our discussions over the 9th and 10th day of July we confirm that we will come on record and represent you in your forthcoming High Court negligence action against McDermott and Allen, Solicitor[s] in Galway. You know our feelings in relation to costs but in the circumstances acknowledge that if you are awarded less than €1 million we will leave it to your discretion as to what costs you should pay us in addition to any costs awarded."

(Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p.34)

The letter of the 11th July, 2002 reads as follows:-

"Dear Paddy and Bláhinn, Note spelling as in Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p.35)

Further to our discussions over the 9th and 10th days of July we confirm that we will come on record and represent you in your forthcoming High Court negligence action against McDermott and Allen Solicitor[s] in Galway.

We confirm that should you be unsuccessful in your High Court action, we will not pursue you for legal costs. In addition, we confirm that if you are awarded less than €1 million we will leave it to your discretion as to what costs you should pay us in addition to any costs awarded to us."

(Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p.35)

4(3) It appears that Mr. Power was not entirely content with the letter of the10th July, 2002, believing that it left some loose ends and it was for this reason that he required a further letter, which was duly issued.

4(4) The letters are of significance on two fronts. Firstly they show very clearly the extent to which concerns in relation to the costs were to the forefront of Mr. Power's mind. Secondly, they show Mr. Power as someone who will not simply accept whatever is put before him but will insist on documents being in a form that are entirely acceptable to him.

4(4) Mr. Power is, as has been referred to, critical of the way the High Court case was conducted, and indeed goes further and questions the extent to which his solicitor was committed to the case. In particular he is perturbed by a remark which he alleges Mr. Doyle made to the effect that if the case was won "every solicitor in the country would have to pay an extra €5,000 to the Solicitors Mutual Defence Fund". (Transcript, 12th June 2007, at p.10) Mr. Doyle denies making this remark.

However, the period with which the Solicitors Disciplinary Tribunal was primarily concerned, and with which this court is now concerned, is the hours and days after Murphy J. finalised the case on the 13th February, 2003.

4(5) Mr. Power's grievances, relating to what he claims transpired over this period, are conveniently and concisely set out in an affidavit sworn by him on the 8th March, 2004. These grievances were repeated and amplified during the oral hearing. The summary which follows is designed to reflect the language used by Mr. Power, though for reasons of clarity, it has sometimes been necessary to alter tenses used, to put the narrative in the third person and to refer to documents fully which were referred to by exhibit number or tab number from the book of documents.

4(6) Mr. Power says that when Murphy J. gave his decision, Actons immediately went "beserk" [sic] and he and his daughter were brought into a side room and were told that they owed Actons €350,000 and that Actons wanted their money now. (Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p.39) The attitude of their solicitors towards them had changed completely and their behaviour was "more like a Mafia gang than a reputable firm of solicitors. They were aggressive and ferocious in their demands." (Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at p.40).

4(7) Mr. Power told his solicitors that they had an agreement that was contained in two letters dated the 10th and the 11th July, 2002. The solicitors told him that these letters meant nothing and that he could tear them up. The letters were in Connemara at that time and were not available to him. He repeatedly called for the production of the letters but that was refused.

4(8) The solicitors then threatened to take over the Connemara property and sell it for €350,000 in what they referred to as a "fire

sale". They said that as they had the deeds there was nothing that either he, Mr. Power, or his daughter could do to stop them. He was told that as he had won the case there was no possibility of an appeal.

4(9) Later, he and his daughter were told that the SMDF were prepared to pay them €75,000 if they agreed not to appeal and they would have to give Actons €65,000 of this or it would not happen. If he and his daughter agreed to this proposal, Actons would not look for more but otherwise Actons would take their property in Connemara. In these circumstances he was forced to agree to sign two agreements. Mr. Power says that it was now 7.30 p.m. on Thursday the 13th February, 2003, and that apart from themselves only the cleaners remained in the Law Library where the discussion had been taking place. There was nobody to type the agreements and signing had to be put off until the following day.

4(10) There were difficulties which arose and there were meetings on Friday 14th February, Saturday 15th February and Monday 17th February, 2003. There were abusive phone calls to his daughter who was doing her exams in UCD Veterinary College and to himself, including an allegation that he and his daughter had secretly sold the property in Connemara for over €1 million and that because of this the agreement was no longer valid.. This suggestion was, of course, totally untrue. Eventually the agreements were signed on the evening of Tuesday 18th February, 2003.

4(11) He then went to Connemara and got the July, 2002 letters and found that they said exactly what he thought they said and that Actons had lied to him. They had obtained his signature and his daughter's signature to the agreement by giving them, their clients, advice that was fraudulent and untrue.

4(12) Insofar as it has been necessary to set out the complaints made by Mr. Power in some detail in order to put in context the matters which were before the Tribunal it is only right to say at this stage that all allegations of wrongdoing have throughout been vehemently denied and not just by Mr. Doyle but also by the other two solicitors against whom complaints were originally made.

4(13) At the Tribunal hearing on 13th September, 2005 the Tribunal heard an opening statement by Mr. Power followed by the evidence of Mr. William Bradshaw, Solicitor and Mr. Michael Murphy, Barrister-at-Law, both of whom were witnesses called by the complainant and their cross-examination by Mr. Hunt S.C., as well as the evidence of Mr. Power and the cross-examination of him by Mr. Hunt. In the course of the evidence of Mr. Power, the evidence of Mr. Frank Callanan S.C. who was called as a witness by the respondent solicitor was interposed with the agreement of all parties as was the evidence of Mr. Brian Gardiner, Solicitor who was called as a witness by the complainant and the cross-examination of this witness by Mr. Hunt, S.C. I will return to the question of how Mr. Gardiner came to be called as the complainant's witness and to be cross-examined by Mr. Hunt S.C. On the 25th October, 2005, the Tribunal heard the direct evidence of Mr. Doyle followed by his cross-examination by Mr. Power and then heard closing submissions from Mr. Power followed by closing submissions by Mr. Barra Faughnan, Barrister-at-Law on behalf of Mr. Doyle. Further, on this occasion Mr. Power made a number of complaints of procedural nature to the Tribunal in relation to what had transpired at the first day of the hearing.

The evidence summarized

5(1) The evidence of the first two witnesses called, Mr. William Bradshaw, solicitor and Mr. Michael Murphy, Barrister-at-Law, related to their efforts to remedy the difficulties in title was not really directly relevant to the five specific issues before the Tribunal. However the evidence of Mr. Bradshaw, the first witness to be called was not without significance. It very quickly emerged that there was disagreement between Mr. Power and the witness that he had called in relation to certain conversations that they had. Given that these disciplinary proceedings were going to turn on issues of credibility, a fact which was repeatedly emphasised by Mr. Power, the fact that he was found to be in conflict with his own first witness cannot have been advantageous for him.

5(2) In effect, this meant that there were four witnesses who were in a position to give evidence on the matters most directly in dispute. The complainant and the respondent and in addition Mr. Gardiner and Mr. Callanan, he being the senior counsel who had represented Mr. Power during the High Court proceedings.

5(3) Of the four witnesses who are in a position to give direct evidence on the interaction between the parties over the critical period Mr. Power gave evidence, in accordance with a summary that has been set out above. As might be expected, Mr. Doyle gave evidence, which contradicted that of the complainant in every material respect. Mr. Power was also flatly contradicted by the evidence of Mr. Gardiner and Mr. Callanan. Mr. Power would suggest that no particular significance is to be attached to the fact that Mr. Gardiner and Mr. Callanan contradicted him. He would not view them as independent witnesses but would suggest they should be seen as having been party to the pressure to which he was subjected. That is a view which has to be borne in mind. Nonetheless, it remains the case that on the central issues Mr. Power stands alone while three witnesses contradicted his position. The significance of this will have to be considered when one comes to address the question whether the conclusion of the Tribunal was one that was open to it.

5(4) An examination of the transcript would suggest that Mr. Power was aware of the significance of the fact that his account was unsupported. So whereas Mr. Power initially stated that Mr. Callanan and his junior counsel were "of course" present when he was told by his solicitor that he owed them €350,000 he later in his evidence commented that Mr. Callanan may not have heard this conversation, that he did not know how Mr. Callanan's hearing was, although going on to observe that Mr. Callanan's hearing seemed fine in court. (Transcript Book 1, Solicitors Disciplinary Tribunal, 13th September, 2005 at pp.99, 117). This would seem to me to have been an attempt to allow himself a degree of wriggle room.

5(5) Faced with a situation where the weight of evidence, at least in terms of the number of witnesses, was stacked against Mr. Power, he has nonetheless repeatedly asserted that all the circumstantial evidence is one way, i.e. in his favour and that only the account that he has given is coherent and consistent.

5(6) While Mr. Power has spoken, throughout, of circumstantial evidence I do not think he is dealing with circumstantial evidence as normally understood. Rather, the point that he makes is that the circumstances in which he came to sign the document of the 18th February, 2003, are only consistent with the five allegations of misconduct that he makes. This is a contention that requires close examination.

The decision of the Solicitors Disciplinary Tribunal

5(7) Dealing with allegation number one, the Tribunal recorded that Mr. Power gave oral evidence in respect of the allegation and went on to observe, that Mr. Doyle, in his evidence, denied that he had ever informed Mr. Power that he was indebted to him or his firm to the sum of €350,000 for costs. Mr. Doyle went on to state that if there was a reference to a figure of €350,000 it could have been a reference to the amount of costs which Mr. Power could be faced with if he had either to pay the difference between the costs which the defendants had incurred in having to defend the proceedings in the High Court rather than the Circuit Court or the costs of appealing Mr. Justice Murphy's High Court decision to the Supreme Court and losing the appeal. The Tribunal records that

they found Mr. Doyle's explanation a credible explanation and were satisfied that if a reference to €350,000 was made by Mr. Doyle, then Mr. Power was mistaken in his understanding of it. Accordingly it was the decision of the Tribunal that that allegation had not been proved and that accordingly the allegation of misconduct failed.

Allegation 2
6. In relation to allegation number two, the Tribunal observed that a key question is what the letters of the 10th July and the 11th July, 2002, were intended to mean by Mr. Doyle and understood to mean by Mr. Power. The Tribunal records Mr. Doyle confirming that in relation to the High Court proceedings that he had no entitlement to look to Mr. Power for legal costs over and above any costs awarded to him unless the amount of the award was in excess of €1 million. Referring to the question of Mr. Power's liability to Actons for costs immediately following the award of €7,000 by Murphy J. on the 13th February, 2003, they record Mr. Doyle as stating the following:

> "Mr. Power, can we take it very, very slowly on this particular day. When Mr. Justice Murphy awarded you the sum of 7,000 in damages you owed us nothing. Okay. Throughout the rest of the day you owed us nothing. For the following number of days you owed us nothing. When you agreed to accept a sum of 75,000 you owed us money."
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> (Transcript Book 2, Solicitors Disciplinary Tribunal, 25th October, 2005 at p.72).

The Tribunal records Mr. Doyle's evidence as stating that the letters of the 10th July, 2002 and the 11th July, 2002 applied only to the High Court proceedings and as acknowledging that he told Mr. Power that the letters were not relevant in the event of an appeal. From these circumstances the Tribunal concluded that this allegation had not been proved and that accordingly the allegation of misconduct failed.

Allegation 3
6(1) Regarding allegation number three, the Tribunal identified Mr. Doyle's evidence as being that he discussed the risks which Mr. Power was facing i.e. the possibility of having to pay the difference between the very substantial costs which the defendants actually incurred in having to defend the proceedings in the High Court rather than the Circuit Court, or alternatively those which Mr. Power would be liable for were he to appeal the High Court decision and lose. Furthermore the risk that this could result in Mr. Power having to sell his property to pay the defendants' costs and his own costs were made clear to him. The Tribunal was of the view that any such comments by Mr. Doyle were not only reasonable but justified and necessary and could not amount to misconduct.

Allegation 4
6(2) Regarding allegation number four, the Tribunal observes that as the defendants in the High Court action had lost their case they would have expected to have a liability to Mr. Power for legal costs and that the Tribunal regarded it as perfectly normal that these legal costs would be the subject of the terms of any settlement agreed between Mr. Power and the defendants. The Tribunal summarises Mr. Power's submission as having been that he and his daughter were put under unjustified pressure following Mr. Justice Murphy's award that they should sign the agreement with Actons simultaneously with the settlement agreement with the defendants and that this was to ensure that Mr. Doyle was paid legal costs to which he was not entitled having regard to the letter of the 11th July, 2002. The Tribunal did accept that Mr. Power may well have felt under considerable pressure to sign the two agreements but was of the view that if that was so, it was not as a result of any pressure by Mr. Doyle to recover fees to which his firm was not entitled but rather that it was a consequence of the low award which exposed Mr. Power to certain serious risks. Firstly, the risk of having to pay the defendants' costs for having brought the proceedings in the High Court rather than the Circuit Court and secondly, the costs of an appeal to the Supreme Court which Mr. Power was being advised by Mr. Doyle and his counsel that he was unlikely to win.

6(3) In dealing with this allegation the Tribunal makes the observation that in the aftermath of the award of the 13th February, 2003, Actons would have been entitled to be paid their costs by the defendants. In this regard, the Tribunal concluded that on the basis of the evidence furnished they were satisfied that Mr. Doyle had properly advised Mr. Power of the risks that he was running were he not to reach settlement terms and that accordingly the requirement that the appellant and his daughter sign the agreement with Actons simultaneously with the settlement agreement with the defendants in the action did not amount to misconduct on the part of Mr. Doyle. So far as the allegation that Mr. Doyle said that he and his colleagues would take over the premises was concerned, this was not accepted by the Tribunal.

Allegation 5
6(4) This allegation presented a situation where oral evidence in relation to the allegation had been given by Mr. Power, contrary to evidence given by Mr. Gardiner and Mr. Doyle. The Tribunal decided to accept the oral evidence of Mr. Gardiner and Mr. Doyle.

The role of the High Court on appeal
7. Mr. Power asks this court to reverse the findings of fact made by the Tribunal and to substitute a conclusion that each of the matters alleged had been made out and each amounted to misconduct.

It is important to consider the constraints under which the High Court operates when hearing an appeal. The appeal is conducted on the basis of the judge reading the transcript and there is no provision for oral evidence.

7(1) There may well be cases where there will be little disagreement between the parties in relation to the primary facts and the issue will turn on the inferences that are to be drawn from essentially agreed facts and indeed there may be cases where a course of conduct is admitted and the issue is whether that conduct amounts to professional misconduct.

However, this is very far from such a case. Here, there is a stark conflict between the evidence offered by both sides. The factual matters alleged by Mr. Power have been vehemently and trenchantly denied. This was a case that turned on credibility or, as Mr. Power put it on a number of occasions, on "veracity".

7(2) The role of a court, in that case the Supreme Court, in dealing with an appeal on the transcript was discussed by the Supreme Court in the much quoted case of *Hay v. O'Grady* [1992] 1 I.R. 210. McCarthy J. stated the role in these terms.

> 1. "An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
>
> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact.... I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon the oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.
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> 4. [– not directly relevant.]
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> 5. These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follow."

7(4) The reasons for the reluctance of an appeal court to overturn a finding of fact is summarised by McCarthy J. in the memorable phrase "the arid pages of a transcript seldom reflect the atmosphere of a trial." In my view the role of a judge of the High Court hearing an appeal under the Solicitors Acts is precisely that identified by the Supreme Court. Indeed, the contrary was not really argued and instead Mr. Power relies on the statement "in the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

The Notice of Appeal and the appeal to this court

7(5) It is clear from the Notice of Appeal that there are, as it were, two legs to Mr. Power's appeal. He has a number of criticisms of a procedural nature and he says that these procedural issues would lead to a conclusion that the Tribunal was biased against him. Mr. Power also takes issue with many of the findings of fact by the Carrigan Tribunal which he categorises as erroneous. While the emphasis in the course of oral submissions in the proceedings before me has been very much on the substantive rather than the procedural, apparently because Mr. Doyle feels that if he were to succeed on procedural grounds the outcome of this would be a further hearing before a Solicitor's Tribunal, I feel it proper to address both aspects of the appeal as submitted, particularly given the allegation of bias against the Solicitors Disciplinary Tribunal.

Procedural issues

8. Three procedural issues are raised. He criticises the Tribunal for interrupting him excessively and contrasts the many interruptions that he faced with the far fewer occasions upon which Mr. Doyle's legal team was interrupted.

8(1) I accept, in principle, that excessive interruptions may render a hearing unsatisfactory, and that particular circumstances may give rise to a perception that a judge, or in this instance a Tribunal, has sacrificed objectivity by entering the fray. In *People v. McGuinness* [1978] I.R. 189 the Court of Criminal Appeal had to consider whether a conviction for rape should be quashed due to the nature and extent of the trial judge's interruption in the examination and cross examination of witnesses. In that case the court quashed the conviction, taking the view that the extent of the interruptions by the trial judge rendered the trial unsatisfactory. While the court was undoubtedly influenced by the particular nature of the proceedings, a rape trial where consent was an issue, its approach is of general application. The court approved the following passage at page 192 from Denning L.J. (as he then was) in *Jones v. The National Coal Board* [1957] 2 Q.B. 55.

> Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return.

Jones v The National Coal Board [1957] 2 QB 55 was a civil action for damages in which somewhat remarkably both sides appealed on the grounds that the constant interruption of counsel by the trial judge rendered the trial unsatisfactory.

8(2) The concerns expressed by Mr. Power clearly mirror the observations of Denning L.J. I am also very conscious that Mr. Power was a lay litigant before the Tribunal and conscious that interruptions which experienced professional advocates would take in their stride may be extremely off-putting for a lay litigant.

8(3) I have read the transcripts with care. The transcript is an imperfect tool for this exercise because it does not give any indication of the tone, nor does it fully illustrate the pace and flow of the dialogue. The remarks of McCarthy J. about the "arid pages of a transcript" come immediately to mind. Having said that, I am satisfied that there is no substance in the criticism. The interjections were for the most part designed to focus attention on the five allegations which remained live following the decision of the President of the High Court. Undoubtedly the fact that the range and scope of his original criticisms had been cut down by the High Court gave rise to difficulties for Mr. Power and this difficulty is at the root of many interjections. Reading through the transcript the impression one gets is that Mr. Power was dealt with in a courteous and indeed patient manner. Far from the Tribunal being unduly restrictive, the sense one has is that Mr. Power was afforded a considerable degree of latitude.

8(4) The second procedural issue arises from the decision of Mr. Power to call Mr. Gardiner, the partner of Mr. Doyle, as a witness. Mr Gardiner was present at the hearing and was the solicitor gainst whom Mr. Power had earlier made allegations of professional misconduct which had been rejected by an earlier Solicitor's Disciplinary Tribunal which was upheld by the High Court. Not surprisingly, the evidence given by this witness did not support the complainant's case. In these circumstances Mr. Power sought to cross examine Mr. Gardiner, his own witness. Following objection to this attempt by counsel for the respondent solicitor he was prevented from doing so. Mr. Power contended that the witness that he had called was hostile and that accordingly he should be permitted to cross examine. The concept of a hostile witness in the law of evidence is a term of art, applicable to a situation where a witness called by a party, gives evidence which is inconsistent with a statement previously furnished. The law governing the treatment of witnesses as hostile was reviewed in the case of *People v. Taylor* [1974] 1 I.R. 97.

8(5) The situation that had developed before the Solicitors Disciplinary Tribunal was very similar to that considered by McGuinness J.

in the High Court in *McMullen v. Clancy No. 2* [2005] 2 I.R. 445. In that case, the plaintiff had called as his witnesses two solicitors whom he had previously sued for negligence. McGuinness J. commented at page 455 that:-

> "The plaintiff describes them [the two solicitors] as "hostile witnesses". This was not so as that term was understood in the normal context. They were merely witnesses who gave answers which the plaintiff did not like. Since they were his witnesses he was bound by their answers."

8(6) A reading from the transcript makes clear that, as one would expect, counsel for the respondent solicitor were very alive to the possible advantages for them if Mr. Power proceeded to call the witness in question. In these circumstances the Tribunal might have considered it appropriate to intervene and explain to Mr. Power the situation in which he would find himself. On the other hand, one can see why a Tribunal would take the view that each party must take its own course. A formal disciplinary hearing, such as this was, has many of the characteristics of a criminal trial. A judge, who in the course of a criminal trial intervened to prevent the prosecution making a tactical error would be subject to criticism.

8(7) The third procedural issue related to the restrictions imposed on Mr. Power pursuing a topic in relation to the contents of a mobile phone text message which had been saved on his phone.

8(8) As a result of questions put to Mr. Doyle, it emerged that Mr. Power was saying that he had received a text message from him, seven days after the events which form the subject matter of the proceedings. Objection was taken to this line of questioning by junior counsel for Mr. Doyle. I am of the view that this objection was misplaced and that the Tribunal erred in its treatment of this topic.

8(9) Mr. Power was entitled to keep his powder dry in relation to the contents of the phone call and was under no obligation to refer to it as part of the complainant's case. However, taking that position had consequences for him. The issues sought to be raised were not specific to any of the allegations under consideration but were raised as going to credit, or as Mr. Power put it, the relevance is that Mr. Doyle has been telling "a cock and bull story to the Tribunal and this proves that he is telling cock and bull stories." (Transcript Book 2, Solicitors Disciplinary Tribunal, 25th October, 2005, at p.154)

8(10) While objection was taken to the question being asked, and the Tribunal made its ruling in that context, the reality is that the questions were asked and were answered. The real constraint imposed on Mr. Power was that he was, at least implicitly, precluded from putting the contents of the message before the Tribunal. I am of the view that the Tribunal was justified in imposing such a constraint. It appears, as I have said, that the text message was not directly relevant to any of the five issues before the Tribunal but rather was relevant to questions of credibility. Ordinarily, this would mean that the questioner was bound by the answers that he got. Even if it was to be accepted that the topic was sufficiently closely related to the central facts that the question would not be regarded as a collateral one, it is my view that the Tribunal would have been justified in precluding Mr. Power from seeking to re-open the complainant's case by way of rebuttal in a situation where a decision had been made by Mr. Power not to refer to this issue when he had an opportunity to do so.

The substantive appeal

9. Mr. Power asks the court to reverse the findings of fact made by the Tribunal and to substitute therefore, a finding that each of the allegations he had made were made out and that each amounted to misconduct.

9(1) Mr. Power does not seek to point to any particular facts which he says the Tribunal got wrong, nor did he point to any items of evidence which he says were significant but were overlooked, but rather the challenge he put forward was a more fundamental one, adopting a root and branch approach. He says that the Tribunal was wrong not to believe him and instead to have believed Mr. Doyle and the witnesses who supported Mr. Doyle. Having regard to the role of an appellate court, it would be immediately obvious that his task is a truly formidable one. In asking this court to reverse the findings of fact of the Tribunal he advances two major arguments.

9(2) Firstly, he says that no explanation other than the one he has offered, i.e. that he and his daughter were subjected to improper pressure in the manner particularised in the five allegations, makes sense and that it is just not open to the Tribunal to consider that any other explanation was possible.

9(3) It was undoubtedly the case that the position of the appellant's legal team improved considerably in the hours after Murphy J. finalised his decision. It is also the case that the position of the appellant and his daughter did not improve to the same extent. Indeed, Mr. Power suggests that his situation actually disimproved by some €1000, making the point that he was originally awarded €7,000 and ended up with only just over €6,000, having discharged the fees of the conveyancing expert engaged by him. However, I do not think that is to compare like with like. The obligation in respect of the conveyancing expert was a constant and would have existed with or without the agreement of the 18th February, 2003. Comparing like with like, the position of Mr. Power and his daughter improved from €1000 to €6,000.

9(4) It seems to me that whatever strength there might be in the argument made by Mr. Power if this were a civil proceeding seeking rectification of the contract or declarations in relation to oppressive conduct or undue influence, that force is much reduced when the issue is whether five specific allegations have been established. Even if the actions of the solicitors had wrongfully disadvantaged their clients it would require a further leap to establish that the result was achieved by the five acts alleged. In making that observation I am not to be understood as saying or hinting that it was likely there was improper conduct of some sort.

9(5) Secondly, Mr. Power has placed considerable emphasis on drawing a contrast between his own steadfast consistency and what he claims to be a major inconsistency which is to be found in the position adopted by the solicitor respondent.

9(6) I do not think that it is seriously in dispute that Mr. Power has been clear and consistent in his approach since initiating his first contact with the Law Society. In suggesting inconsistency on the part of Mr. Doyle, Mr. Power has repeatedly focused on a suggestion that when he asked the same question a significant number of times that he received a large number of different responses.

9(7) The question that he has in mind, which he undoubtedly asked a large number of times, was "How did he and his daughter, who enjoyed the protection of the July, 2002 letters come to sign the agreement of February 18th?"

9(8) Mr. Power has stated that Mr. Doyle initially offered an explanation to Mr. Bradshaw, the solicitor engaged to work on the ratification of the title. The explanation offered was that the changes that came about were because Mr. Doyle had been misled by Mr. Power as to the status of the deeds. However Mr. Power says this would be improbable as it would be unlikely that a layman would be in a position to mislead a solicitor on such an issue.

9(9) The difficulty for Mr. Power is that, while he asserts that this was said to Mr. Bradshaw, there was no evidence to that effect before the Tribunal as Mr. Bradshaw was never asked about this conversation when called as a witness by Mr. Power.

9(10) While the matter was not put formally before the Carrigan Tribunal, it has been stated that the first Solicitors Disciplinary Tribunal had concluded that the payment was a voluntary one. Therefore it seems an obvious inference that this was the case that was being made at that stage by Mr. Doyle.

9(11) If that is so, then there is undoubtedly some deviation between that and the argument advanced to the Carrigan Tribunal which may be summarised in the quotation from Mr. Doyle's evidence at page 72 of the Transcript Book 2, Solicitors Disciplinary Tribunal, October 25th, 2005, which has been set out above. While that deviation requires consideration, it does not seem to me to lead to a conclusion that the account now advanced by Mr. Doyle is untrue and that the truth is to be found in the allegations made by Mr. Power.

9(12) There is no doubt that at the Tribunal hearing Mr. Power pressed Mr. Doyle on many occasions to explain how he had freed himself from the constraints imposed by the July agreements. I do not believe it is correct to categorise the responses to these questions as inconsistent but rather what emerges from the transcript is that Mr. Doyle seeks to engage with the question and to respond to the question as formulated.

9(13) What is absolutely clear is that Mr. Power and Mr. Doyle viewed matters from an entirely different perspective and no matter how many times Mr. Power asked the question he was never going to get the answer he wanted.

9(14) Giving full consideration to the arguments advanced by Mr. Power, I am in no doubt that there was evidence before the Tribunal on the basis of which it could have come to the conclusion it did and that being so that is sufficient to dispose of the appeal.

Issues to support the Solicitors Disciplinary Tribunal's conclusions

10. Given the criticisms which have been directed at the Tribunal, I feel that in fairness to the members of the Tribunal and indeed in fairness to Mr. Doyle, it is proper to draw attention to some elements that are present which would seem to support the conclusion to which the Tribunal came.

10(1) Mr. Power's case is that he and his daughter were subjected to outrageous pressure and coerced to enter into the agreement with the SMDF and Actons Solicitors. If such pressure was being applied it would seem essential, if it was to succeed, that the agreement would be signed off on before the parties dispersed. Otherwise, there would be an obvious risk that Mr. Power and his daughter would have second thoughts and regain their capacity for independent judgment.

10(2) Mr. Power has explained the fact that no agreement was signed on the 13th February, 2003, by the fact that there was no-one available to type up the agreement at 7.30 p.m. in the Four Courts. However, that ignores the fact that it is quite normal for settlement agreements to be signed in handwritten form or alternatively for the terms of settlements to be endorsed on counsel's brief. If undue pressure, was being applied it would seem very strange if the absence of a typist would result in the pressure being lifted.

10(3) The fact that the agreement was not actually signed for five days after the events of the 13th February, 2003, does not seem at all consistent with a suggested determination on the part of Actons and Mr. Doyle to have his clients commit themselves to an agreement against their will.

10(4) Mr. Power has made it clear that he always attached enormous significance to the two letters of July, 2002. Indeed, he says that immediately he had access to the letters on his return to Connemara after the 18th February, 2003, that he realised that he had been wronged.

10(5) Mr. Power has alleged that he was seeking copies of these letters and was being refused them during the period between the 13th and the18th February, 2003. One would have thought that if he was being refused access this would only have served to heighten the significance of the letters in his mind and that accordingly Mr. Power would have made it his business to access the originals even if this meant travelling to Galway for that purpose. Again, the fact that a five-day window was left open during which the documents could have been accessed and examined does not seem at all consistent with the suggested determination on the part of Mr. Power to read the letters and the corresponding determination on the part of Mr. Doyle to prevent that happening.

10(6) In conclusion I am satisfied that there was evidence before the Tribunal which could have led them to the rejection of the allegations and that being so I would dismiss this appeal.