

THE HIGH COURT**[2007 No. 53 S.A.]**

**IN THE MATTER OF SEAN M. SEXTON A SOLICITOR
AND
IN THE MATTER OF AN APPLICATION BY DERMOT CONNOLLY
AND
IN THE MATTER OF THE SOLICITORS ACTS 1954 TO 2001
THE HIGH COURT**

[2007 No. 30 S.A.]

**IN THE MATTER OF JOAN PASSI
AND
IN THE MATTER OF AN APPLICATION OF BY DERMOT CONNOLLY AND
IN THE MATTER OF THE SOLICITORS ACTS 1951 TO 2002**

Judgment delivered by Ms. Justice Irvine on the 29th day of January, 2008

1. By notices of motion dated the 25th October, 2007 and the 29th March, 2007 the applicant has sought to appeal two findings of the Disciplinary Tribunal ("the Tribunal") of the Incorporated Law Society dated the 12th October, 2007 and the 15th March, 2007. The Tribunal in each case concluded that the applicant had failed to establish a *prima facie* case for an inquiry into the conduct of the two solicitors referred to in the title hereof.
2. The applicant had applied to the Incorporated Law Society to conduct an inquiry into alleged misconduct on the part of Sean Sexton, a partner in the firm of P.J. Walsh & Company, Solicitors of 12 Fitzwilliam Street, Dublin 2 on the 31st October, 2006. The inquiry was sought pursuant to s. 7 (as substituted by s. 17 of the Solicitors (Amendment) Act, 1994 and as further amended by s. 9 of the Solicitors (Amendment) Act, 2002) of the Solicitors (Amendment) Act, 1960. The alleged misconduct on the part of Mr. Sexton was set out in the applicant's DT2 application form and also in two affidavits dated the 31st October, 2006 and 19th December, 2006.
3. A like application for an inquiry into the conduct of Ms. Joan Passi, a solicitor in the firm of P.J. Walsh & Company, was also made by the applicant on the 12th June, 2006. The grounds relied upon by the applicant were set out in his DT2 application form and in his affidavits sworn on the 16th June, 2006, 27th September, 2007, 28th September, 2006 and 6th December, 2006.
4. In respect of all of the allegations set out in both application forms, the Tribunal held that the applicant had not established a *prima facie* case against the named solicitors.
5. It is against the aforementioned decisions of the Tribunal that these appeals relate.
6. The notices of motion by way of appeal from the decisions of the Tribunal are supported by further affidavits delivered by the applicant, in which he has exhibited additional documentation which was not before the Tribunal at the time it made its decisions.

Historical background

7. Prior to dealing with the substance of the within appeals there are some historical background facts which do not appear to be greatly disputed by the relevant parties and I will refer to these in the hope that the same will assist when referring to the outcome of this appeal.
8. The applicant and his late wife, were, in the early 1990s, the owners of a house situated at 63 Clonard Drive, Dundrum, Dublin.
9. At all relevant times, Mr. Sean Sexton was a partner in the firm of P.J. Walsh & Company, Solicitors of 12 Upper Fitzwilliam Street, Dublin 2 and Ms. Joan Passi was a conveyancing solicitor working for the same firm.
10. The applicant fell into arrears with mortgage repayments in respect of his home and the Educational Building Society obtained an order for possession of the property. Eviction was initially scheduled to take place on the 14th March, 1994.
11. The applicant, prior to 1994 had had some professional dealings with Mr. Sexton. At his appeal in the High Court, Mr. Connolly suggested that he had received some very informal advice from Mr. Sexton in 1989 regarding a potential claim against his employers. Further, the applicant had carried out some gardening work for Mr. Sexton in 1993. For these reasons the applicant gave instructions to Mr. Sexton on the 2nd March, 1994 to act as his solicitor in relation to the sale of his premises at 63 Clonard Drive, Dundrum, Dublin.
12. In his DT2 application form the applicant advised the Tribunal that he personally made contact with an auctioneer known to him namely Mr. Lawrence McCabe to act on his behalf in relation to the sale of his premises. The applicant stated that together with his late wife Meave, he discussed with Mr. McCabe the potential sale of his property and on the basis of his advice was convinced to sell his property by "private tender".
13. In relation to the EBS it is clear that their solicitors, P.C. Moore, were insistent on pursuing the recovery of all monies outstanding to their clients and by letter dated the 16th March, 1994 the said solicitors indicated that eviction would take place on the 24th March, 1994 unless unconditional contracts were executed and exchanged and a firm closing date agreed. Subsequently this deadline was extended and by letter dated the 8th June, 1994 Mr. Sexton wrote to the applicant advising him that the EBS would proceed to evict on the 15th June, 1994 unless a similar position pertained.
14. The property was advertised for sale by Mr. Lawrence McCabe of Goddard Smith McCabe, Estate Agents and was stated by them to be exceptional value at £60,000. An offer was received from a Ms. Deirdre Dineen on behalf of herself and a Mr. Gaidoni offering £61,050 for the property subject to an Architects Certificate. A booking deposit was paid. However, following upon a survey of the premises which suggested that repairs costing approximately £8,000 were needed to the property, the offer was reduced to the sum of £55,000. Mr. Sexton's correspondence demonstrates considerable concerns regarding the threats of the EBS to evict the applicant and his wife and accordingly consideration appears to have been given to recommending the offer of £55,000. This offer was later increased to £57,000.
15. At the applicant's request, Mr. Olaf Maxwell, Quantity Surveyor, was asked to value the house at 63 Clonard Drive, Dundrum, and this he duly did on 13th May, 1994. In his report, Mr. Maxwell confirmed that the initial offer of £61,050 represented the true value of the property. Mr. Maxwell advised against acceptance of the offer of £55,000 stating that the property would sell quickly at £60,000 and should attract £61,050. He suggested that if the purchasers were not prepared to offer such a sum that he would strongly

recommend that the property be readvertised. Mr. Maxwell advised that in his opinion the placing of the property on the market at £60,000 by the Estate Agent Mr. McCabe had been correct and that in his opinion £61,050 reflected the value of the property in its given state at the time of his valuation. He further stated that had the property been in excellent order it might have attracted something in the region of £75,000 but pointed out that the property required complete redecoration and a number of other stated repairs.

16. Subsequent to Mr. Olaf Maxwell's report Ms. Dineen and Mr. Gaidoni withdrew their offer of £57,000 and sought the return of the booking deposit.

17. In the face of threatened eviction on the 15th June, 1994 Mr. Connolly himself found a purchaser for the aforementioned premises. A Mr. Anthony Walsh, agreed to purchase the property for £63,000, a sum marginally above the valuation placed on the property by Mr. Maxwell. Accordingly, the applicant requested Mr. Sexton to prepare contracts, which were duly signed on the 15th June. The closing date was fixed for the 14th November, 1994 and this was later postponed by agreement to the 16th November, 1994.

18. The applicant in his affidavits stated that he personally agreed with Mr. Anthony Walsh that he would have five weeks to vacate the premises after the final closing of the transaction. This assertion, if correct, was at best a "gentleman's agreement" and not what was provided for in the written agreement between the parties.

19. There is much dispute as to what happened in the days leading up to the closing of the sale. Ms. Passi stated that she had taken over responsibility for the closing of the sale from Mr. Sexton. In her affidavit she stated that she attended at the applicant's home on the 11th November, 1994 for the purposes of having the final documentation signed by the applicant and his wife and to obtain the keys to hand over to the purchasers on closing i.e. on the 16th November, 1994. On the other hand the applicant in his affidavit stated that Ms. Passi attended at their home without invitation, bullied them into signing documents, took the keys of the house from them and handed them over to the purchasers prior to the closing of the sale. It is alleged by the applicant that as a result of this behaviour on the part of Ms. Passi that they returned to their home following dinner at the applicant's sister's house to find their property dumped unceremoniously on the front lawn.

The Appeals and the Relevant Procedure

20. The procedure of this court on appeal is as set out in S.I. No. 701 of 2004 which amended O. 53 of the Rules of the Superior Courts. Order 53, r. 12 provides that an appeal under s. 7 (as substituted by s. 17 of the Act of 1994 and as amended by s. 9 of the Act, 2002) of the Act of 1960 shall be dealt with by way of notice of motion and grounding affidavit. The Rule provides that the papers in respect of the appeal shall be read by the President of the High Court or his nominee in chambers in the first instance and then be listed for hearing in open court for the purposes of hearing submissions.

21. Following the consideration by the President or his nominee of the papers and the hearing of submissions, the court may then, as in the instant case, either confirm the finding of the Tribunal or alternatively make a finding that there is a *prima facie* case in relation to the allegation of misconduct.

22. Misconduct, is defined in s. 3 of the Solicitors (Amendment) Act, 1960 as amended by s. 24 of the Solicitors Amendment Act, 1994. It states:-

"misconduct" 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 Solicitors Act, 1954 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.

23. The appeals of the applicant against the decisions of the Tribunal were heard by this court on the 11th January, 2007. On that date the court permitted the applicant to be represented by his nephew Mr. Jennings who made the submissions on his behalf.

24. It must be recorded that at the hearing of the appeal, Mr. Jennings made no reference to the decisions of the Tribunal in relation to either of the named solicitors but sought to make a new case in respect of professional misconduct against Mr. Sexton arising from alleged facts which were never before the Disciplinary Tribunal. These additional complaints were directed entirely towards Mr. Sexton. These will be referred to later in this judgment.

25. Because the applicant is a lay litigant, notwithstanding the fact that Mr. Jennings made no submissions in relation to the findings of the Disciplinary Tribunal, the court, has taken upon itself to consider whether the Tribunal fell into error in determining that no *prima facie* case had been made out by the applicant in relation to the conduct of both solicitors having regard to the evidence before it.

Ms. Passi

26. The Tribunal extracted the major complaints made by the applicant regarding Ms. Passi's conduct. These were seven in total. In relation to each complaint of misconduct the Tribunal concluded that the evidence did not disclose a *prima facie* case of professional misconduct.

27. The first four allegations of misconduct pertained to Ms. Passi's attendance at the applicant's home on the Friday prior to the date fixed for closing. The complaints made against Ms. Passi were that she attended unannounced, stood over the applicant's wife for the purposes of her having sign the contract documents and took a set of keys to hand over to the vendors at a time when she had been informed by the applicant that the purchaser had agreed to give him five weeks to move out of the house.

28. The court agrees with the decision of the Solicitor's Disciplinary Tribunal that none of the above actions, even if true, constitute the type of behaviour that could be considered to fall within the definition of professional misconduct particularly when these complaints are placed against the backdrop of the undisputed facts pertaining to the sale. It is accepted that the date fixed for closing was the 16th November, 1994. All documentation had to be completed on that date and the keys handed over. Even if Mr.

Connolly did advise his solicitor that he was promised a further five weeks to vacate the premises by the purchaser and his solicitor handed over the keys of the premises on the closing date without taking steps to ensure compliance with this promise, the same would be a matter potentially that might, depending on all of the circumstances, constitute a breach of a solicitor's duty of care to his client, but which could not be considered to amount to professional misconduct. The applicant has chosen to ignore that, having found a purchaser, he asked his solicitors to prepare the contracts, agreed to the closing date and in so doing, must have realised that unless there was another binding agreement that the premises could be possessed on the 16th November, 1994.

29. Regarding the allegation that in some way Ms. Passi forced his sick wife to sign away their home, there is simply no credible evidence to this effect. The applicant himself found the purchaser for this premises as per his affidavits. He instructed his solicitors to prepare contracts to sell to Mr. Walsh and agreed the date upon which the sale would be closed. Contracts were signed by Mr. Walsh on the very date which had been fixed by the EBS for the eviction of the applicant and his wife. Hence, even if the applicant was correct in his assertion that some pressure was placed upon Mrs. Connolly to sign the formal documentation for the completion of the sale on the 11th November, 1994 this court concludes that the same could not be construed as providing a *prima facie* case for professional misconduct against Ms. Passi.

30. Two other complaints made by the applicant had nothing to do with Ms. Passi whatsoever and related to actions on the part of the purchaser in relation to his property and which therefore could never form the basis of a complaint for professional misconduct against Ms. Passi.

31. The final complaint made against Ms. Passi was to the effect that the applicant always wanted his house to be auctioned rather than sold by private treaty. Once again, the Tribunal was entitled to conclude that even if this fact had been made known to Ms. Passi that it was a matter for the auctioneer to agree with the applicant as to how the property should be sold. Any failure on the part of Ms. Passi to procure a sale by public auction could not form the basis of any complaint of professional misconduct against Ms. Passi.

32. For the aforementioned reasons this court concludes that the applicant's appeal in relation to the finding of the Disciplinary Tribunal dated the 5th March, 2007 must fail.

Mr. Sexton

33. The complaints against Mr. Sexton which were the subject matter of the decision of the Tribunal dated 12th October, 2007 were revisited by the court prior to the hearing of submissions on this appeal.

34. For the purposes of reaching its decision in relation to the applicant's complaints against Mr. Sexton, the Tribunal in its determination dated the 12th October, 2006 broke down the allegations of professional misconduct into eleven complaints. Two of the complaints related to Ms. Passi's conduct when she attended the applicant's house on the 11th November, 1994 and the Tribunal concluded that the events of that date had been explained sufficiently well to them in the replying affidavits so as to render any complaint of professional misconduct without foundation.

35. Six of the remaining complaints by the applicant were based upon allegations of collusion between Mr. Sexton and Mr. McCabe to sell the applicant's property below value. In respect of those complaints the Tribunal concluded that there was simply no sustainable evidence to support any such collusion. Neither was there any evidence to support a sale at a purported undervalue. Further, insofar as the auctioneer selected the method of sale and advised on the value of the property that those were not matters which could be visited upon the solicitor having carriage of the sale. The Court having reviewed all the evidence available to the Tribunal in relation to these complaints concludes that the findings of the Tribunal were entirely in accordance with the evidence.

36. A further complaint was made that Mr. Maxwell's survey had been hidden from the applicant and in this regard the Tribunal concluded that no evidence had been tendered to the effect that the applicant had sought a copy of the survey. The court concludes that the Tribunal was correct in its conclusions having regard to the evidence before it on this issue. In this regard it is to be noted that on the hearing of this appeal that Mr. Jennings suggested on behalf of the applicant that had the report of Mr. Maxwell been made known to the applicant and the other parties that the same would have resulted in an increased purchase price being obtained for the property. I conclude that this argument is fundamentally unstable in circumstances where the valuation carried out by Mr. Maxwell supported the valuation initially placed on the premises by Mr. McCabe and indeed the report sits comfortably with the ultimate purchase price achieved from Mr. Anthony Walsh which was £63,000.

37. Two final miscellaneous complaints were made of potential misconduct. One allegation concerned the payment of a booking deposit and the other an allegation that Mr. Sexton failed to appreciate the content of expert reports received from two valuers, namely Peter Roberts and Ken O'Brien. In the first case the Tribunal concluded that there was no evidence of the fraud alleged and in the latter case decided that the charge was not relevant to the role of the solicitor and therefore could not constitute professional misconduct. This court and find no fault with the reasoning of the Tribunal in this regard.

38. For the aforementioned reasons the applicant's appeal against the decision of the Disciplinary Tribunal dated the 12th October, 2007 cannot succeed.

39. As already referred to in this judgment Mr. Jennings on behalf of the applicant made a number of complaints in the course of the appeal which related to matters not the subject matter of the initial complaints before the Incorporated Law Society. Briefly stated these complaints were as follows:-

1. That Mr. Sexton charged a fee of £605 for work which had nothing to do with the sale of his premises and in respect of which he had received no written advice. Mr. Jennings alleged that these monies were effectively fraudulently taken from the applicant's sale monies and related to informal advice furnished by Mr. Sexton to the applicant in 1989.
2. The applicant alleged that Mr. Sexton should not have paid to "McCabe & Company" a sum of £1,836.78 which is referred to in the cash account of the 18th November, 1996. The applicant alleges that the fee was excessive and should not have been paid to the auctioneer given that he had found the purchaser himself. The applicant submitted that it was misconduct on Mr. Sexton's part to have paid more than 2% of the offer made by Ms. Dinneen and Mr. Gaidoni who were the purchasers found by Mr. McCabe i.e. 2% of £57,000 rather than 2% of £63,000.
3. The invoice sent by P.J. Walsh and Company dated the 18th November, 1994 is alleged by the applicant to be fraudulent, insofar as he states the same

- (i) was not signed by Mr. Sexton,
- (ii) gives no dates in respect of the services billed for in the said invoice,
- (iii) represents itself as covering services from October, 1985 to November 1994, when on the applicant's account of events he only had his first business dealing with Mr. Sexton in 1989.

40. It is not open to the court on this appeal to hear complaints of alleged professional misconduct which were not dealt with by the Tribunal. The misconduct alleged by Mr. Jennings on the applicant's behalf and referred at points 1 – 3 inclusive were not the subject matter of any determination by the Tribunal. Nonetheless the court has listened to the applicant's submissions in relation to these new matters and whilst it clearly lacks any jurisdiction to make any determination regarding these issues it may be of assistance to the applicant to note that it is the view of this court that it is highly unlikely that any of these matters, even if raised with the Tribunal would result in the Tribunal finding a *prima facie* case of misconduct against Mr. Sexton.

41. Clearly the court has insufficient evidence to consider at all the issue raised at 1 above. In relation to the second complaint, in order to lend any credibility to this assertion, the applicant would firstly have to prove that he had an agreement with Mr. McCabe which restricted Mr. McCabe, in the event of the purchaser being introduced by the applicant, to a fee of 2% of the best offer received from a willing purchaser found by the auctioneer himself. Thereafter the applicant would have to be in a position to prove that he made known the terms of this specific contract to his solicitor and therefore be in a position to contend that the solicitor behaved wrongfully in paying beyond the agreed fee structure. Even if the applicant was in a position to establish all of these matters, such conduct would be more likely to be categorised as a potential breach by the solicitor of his duty of care to the client, rather than professional misconduct which requires an applicant to prove that the alleged wrongdoing was of a nature that would bring the solicitor's profession in general into disrepute.

42. In relation to the third of these new complaints, once again Mr. Sexton has not been in a position to challenge the allegation. However, even in the absence of Mr. Sexton's response to the allegation it appears to this court that these complaints are not matters of substance but are rather matters of form and are not matters which could be categorised or construed as either fraud or professional misconduct.

Conclusion

43. The court therefore concludes that for the purposes of these appeals that the applicant has failed to establish that the respondent was in error in reaching its conclusions on the 12th October, 2007 and 15th March, 2007 to the effect that the applicant had failed to establish a *prima facie* case for an inquiry into professional misconduct as against either Mr. Sexton or Ms. Passi. The court has reviewed the conclusions reached by the Tribunal to assess whether it was in error in reaching its conclusions notwithstanding that fact that no challenge was made by Mr. Jennings on behalf of the applicant to those findings.

44. Insofar as new allegations were made in the course of the appeal this court confirms that it has no jurisdiction to embark upon an adjudication of such complaints and has chosen merely to comment upon the same in the hope that the same may be of assistance to the parties. The only jurisdiction held by this court is to either affirm the findings of the Tribunal in relation to the matters considered by it or alternatively conclude that it was an error and substitute its own findings that a *prima facie* case was made out by the applicant in relation to either or both solicitors.

45. It is regrettable that the sale of the applicant's house which occurred over thirteen years ago is still causing immense distress to the applicant and that he has not found himself capable of relinquishing his belief that the loss of his home and/or the value of the same occurred by reason of professional wrongdoing on the part of those whom he retained to protect his interests. It is clear to this court that the applicant's problems are a direct consequence of his inability to meet the mortgage payments in respect of his family home and that this failure on his part led to the EBS obtaining an order for possession. This order for possession in turn brought about a forced sale of the family home in the face of a threatened eviction. The applicant's home was ultimately sold through the agency of individual professionals selected by the applicant himself and was sold at a price in excess of the valuation placed on his home by the valuer chosen by the applicant to value the premises namely Mr. Olaf Maxwell.

46. In the foregoing circumstances the court rejects the applicant's appeal in each case.