THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 395

Finlay Geoghegan J.
Peart J.
Hogan J.

2015/430

BETWEEN

GERARD WILLIAM SANDYS AND BRYAN C. BROPHY

APPLICANTS/APPELLANTS

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of the Ms. Justice Finlay Geoghegan delivered on the 20th day of December 2016

1. The appellants are solicitors who practice together under the style and title of Sandys & Brophy Solicitors. They were also the executors appointed by Maureen O'Connell - who died in 1998 - in her last will and testament dated 20th March 1996 and in respect of which a grant of probate issued to them on the 7th October, 2004.

2. The Society of St. Vincent de Paul was the residuary beneficiary named in the last will and testament of the deceased. The estate ultimately realised in excess of €14 million.

3. The administration of the deceased's estate was not straightforward. The appellants were obliged to prosecute two sets of legal proceedings (in the High Court and Circuit Court respectively) and to undertake work in relation to the conveyance of two properties (one of which was a licensed premises) in respect of which the Circuit Court proceedings were taken and which ultimately sold for €14 million.

4. The appellants raised five separate bills of costs in relation to the professional services they provided and their fees were discharged out of the deceased's estate. On the 23rd February, 2011, a complaint was made on behalf of the Society of St. Vincent de Paul ("the Society") to the respondent alleging (i) the deceased's estate was charged excessive fees for the professional services given and (ii) no letter was issued at any stage to the Society with an estimate of fees to be charged by the appellants in breach of s. 68 of the Solicitors (Amendment) Act 1994 ("the 1994 Act").

5. The respondent referred the complaint to its Complaint and Client Relations Committee on the 5th September, 2011 ("the Committee"). Thereafter correspondence commenced between the Committee and the appellants in which the Committee sought detailed schedules to the bills of costs and details of the nature of the work undertaken and the basis upon which the appellant's fees were calculated. The matter was before the Committee and adjourned from time to time. In January 2012, the Committee suggested that the parties might resolve their differences by agreeing to be bound by the decision of an independent legal cost accountant in relation to the alleged overcharging. No agreement was reached on this proposal. Ultimately in July 2012, the Committee engaged Mr. Noel Guiden of Behan & Associates, Legal Costs Accountants, to advise the Committee in relation to the complaint of overcharging. The Committee wrote to the parties on the 12th September, with that decision and stated that the respondent would bear the cost of Mr. Guiden's report.

6. In October, 2012, the appellants' solicitors furnished the appellants' files to the Committee so the Mr. Guiden could prepare his report.

7. Mr. Guiden furnished a report dated the 9th November, 2012. He concluded that three of the bills of costs were excessive by significant amounts.

8. Mr. Guiden's report was furnished to the appellants on the 21st November, 2012 and their files returned shortly thereafter. They indicated that a response would be submitted when matters had been considered. On the 6th December, 2012, the appellants were informed that the matter would be considered by the Committee at the meeting to be held on the 6th February, and were advised that any submissions were to be furnished by the 23rd January, 2013. No submissions were lodged by that date. However, by letter of the 5th February, 2013, from the appellants' solicitors the Committee was informed for the first time that the appellants wished to obtain and submit their own cost accountant's report. At the meeting on the 6th February, the appellants' solicitors sought an adjournment for that purpose. The Committee at that meeting indicated that it would not consider a separate report from another firm of legal cost accountants. The Committee permitted the appellants to lodge submissions which could be informed by advice from their own cost accountant and adjourned the matter on a peremptory basis to the 30th April, 2013.

9. The appellants obtained a report from a cost accountant and through their solicitors made submissions on the 29th April, 2013, taking issue with Mr. Guiden's approach and challenging his conclusions. Thereafter the Committee sent those submissions to Mr. Guiden and asked him to comment thereon. He replied by letter of the 7th June indicating that there was nothing contained in the appellants submissions which in any way altered his opinion.

10. The Committee met again on the 3rd July, 2013 and adjudicated on the complaints before it against the appellants. By letter of the 8th July, 2013, the appellants' solicitor was notified of the determinations which in summary and as relevant to the issues on appeal were:-

> "1. The issue of the appellants' failure to send letters in accordance with s. 68(1) of the Solicitors (Amendment) Act 1994, to the residuary beneficiaries/complainant was to be referred to the Solicitors' Disciplinary Tribunal for further inquiry into their conduct.

> 2. The Committee found that there was evidence of excessive charging in three of the bills submitted to the complainant and the complaint made to the Society under s. 9 of the above Act was therefore upheld. The letter set out the detail in relation to each bill of the amount of the overcharge determined by the Committee by reference to the higher reasonable sum recommended by Mr. Guiden and which amounted in aggregate to €340,070 and the letter then stated: "The Committee have directed your clients to reimburse that sum in full plus VAT at the rate charged no later than the 31st January, 2014."
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> 3. Given the extent of the overcharging found by the Committee under s. 9 of the Act, the Committee directed that the extent of the overcharging also be referred to the Solicitors Disciplinary Tribunal for further inquiry into the appellants' conduct.

11. The letter referred to the right of appeal pursuant to s. 11(1) of the Solicitors (Amendment) Act 1994, within 21 days in default of which the decision became binding.

12. There was then further correspondence between the solicitors for the appellants and the Committee, during which the appellants were furnished with the minutes of the meeting of the Committee of the 3rd July, 2013. These set out in some detail the discussion which took place amongst the members of the Committee prior to it reaching its decision.

Judicial review
13. On the 21st October, 2013, leave granted by the High Court (Keane J.) granting leave to seek orders of *certiorari* of the determinations of the Committee of the 3rd July, 2013. The principal grounds upon which leave was granted and the claim for *certiorari* pursued were

> "1. The Committee denied the appellants fair procedures by refusing to permit them to adduce expert evidence in their defence of the allegation of overcharging;
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> 2. The Committee unlawfully delegated its decision making power to its appointed legal cost accountant.
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> 3. The Committee failed to give any or any adequate reasons for its decision.
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> 4. The Committee was in error in deciding that the appellant was obliged to furnish an estimate of costs to the Society pursuant to the provisions of s. 68(1) of the 1994 Act."

14. In the notice of opposition the respondent in addition to denying each of the above contended that the appellants were not entitled to relief by way of judicial review by reason of the availability of the adequate alternative remedy of an appeal pursuant to s. 11(1) of the 1994 Act.

High Court judgment
15. By written judgment of the 12th June, 2015, (Kearns P.) upheld the entitlement of the appellants to apply by way of judicial review, but found against them on each of the grounds advanced and dismissed the application for *certiorari*.

Appeal
16. On the appeal to this Court the same five issues which were before the High Court arise for determination. It is proposed to deal with them seriatim insofar as necessary to decide the appeal.

Judicial review – appeal
17. Kearns P. succinctly stated his conclusion on this issue raised by the respondent at p. 36:-

> "While, as stated by Charleton J. in *Doherty v. South Dublin County Council,* a right of appeal can be a bar to remedy by way of judicial review, the Supreme Court decisions in *Stefan* and *Abenglen* as outlined above, as well as the recent High Court decision in *Cash v. Judge Halpin*, make clear that, in certain circumstances, where a decision in the first instance was arrived at following a procedure which was unfair or breached natural justice, the fact that an appeal is available is immaterial. A person against whom some form of wrongdoing or misconduct is alleged is entitled to a fair hearing and determination in the first instance and to a fair appeal on foot of that decision. Having regard to these decisions and the nature of the applicants' objections, I am satisfied in all the circumstances of this case that the applicants are entitled to challenge the decision of the Committee by way of judicial review and that leave was sought within three months of the decision."

18. The principle identified by Kearns P. as following from the Supreme Court decisions in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 and *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381 is correct. In the latter O'Higgins C.J. at p. 393 stated:-

> "If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right to appeal or a failure to avail of such should be immaterial."

19. In *Stefan*, Denham J. (as she then was) stated at p. 218 :-

> "The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold *certiorari*. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

20. In these proceedings the principal ground relied upon to quash the finding of excessive charging is that the Committee reached its decision in breach of fair procedures as it did not permit the appellants to adduce evidence from its own cost accountant to contest the evidence against them obtained by the Committee.

21. On appeal, the respondent sought to rely upon the judgment of Denham C.J. in *Fitzgibbon v. The Law Society* [2014] IESC 48, [2015] 1 I.R. 516. That appeal was against a decision of Kearns P. on a preliminary point regarding the scope of an appeal from decisions of the Committee pursuant to s. 11(1) of the 1994 Act. Kearns P. had determined that the appeal fell to be dealt with as a review of a specialist tribunal and not as a *de novo* hearing with the burden of proof on the Law Society. However, he also held that the court may, if it deems necessary during the course of an appeal hearing, receive oral evidence.

22. Denham C.J. at para. 21(2) setting out her reasons for affirming the decision of the High Court in relation to each ground of appeal stated:-

> "(ii) It is a ground of appeal that the President failed to have adequate regard to 'the lack of procedural safeguards.' The Committee is bound to conduct fair procedures. They may be subject to judicial review. There is no reason to consider that the form of appeal envisaged by the President, with oral evidence if necessary, is not such as to protect the appellant's right to fair procedures."

23. In my view, that statement by Denham C.J. is not intended to and does not derogate from the more general principle set out by the Supreme Court in *Abenglen* and *Stefan* referred to above. In a challenge such as this to a decision taken by the Committee where one of the principal grounds of challenge is a failure to observe fair procedures by failing to permit the appellants to adduce evidence to contest evidence to be relied upon which was adverse to them, I am in agreement with the Kearns P. that the alternative appeal remedy does not preclude their entitlement to seek *certiorari* of the decision. They are entitled to a fair hearing by the Committee at first instance and thereafter an appeal to the High Court.

Fair Procedures

24. Kearns P. concluded that the Committee in the exercise of its statutory powers under s. 9 of the 1994 Act "afforded both parties fair procedures by commissioning, at its own expense, a report from a suitably qualified expert and allowing both parties the opportunity to make comprehensive submissions in relation to it". The appellants submit that having regard to the statutory power being exercised by the Committee and the consequences for the appellants of its determination that such a conclusion should not be upheld upon the facts herein.

25. Section 9 of the 1994 Act insofar as relevant provides:-

> "(1) Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor, the Society, unless they are satisfied that the complaint is frivolous or vexatious, shall investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if they are satisfied that the bill of costs is excessive, direct the solicitor to comply or to secure compliance with one or both of the following requirements, namely –
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> > (a) a requirement to refund without delay, whether wholly or to any specified extent, any amount already paid by or on behalf of the client in respect of the solicitor's costs in connection with the said legal services;
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> > (b) a requirement to waive, whether wholly or to any specified extent, the right to recover those costs.
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> . . .
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> (7) The Society, with the concurrence of the President of the High Court, may make rules of procedure in relation to complaints received by the Society under this section."

26. No rules of procedure have been made by the Society under s. 9(7) of the 1994 Act. The absence of such rules may have contributed to the lack of clarity for the Committee as to the appropriate procedures which were required to be followed on the facts herein.

27. In relation to the complaint that the amount of the bills of costs was excessive, it is not in dispute that the Committee was exercising the statutory powers conferred on the Society by s. 9(1) of the 1994 Act. There was also an allegation of misconduct and the Committee in relation to that was exercising a different power namely considering and deciding whether it warranted a referral to the Solicitors Disciplinary Tribunal. This part of the judgment is concerned with the claim of a breach of fair procedures in exercising the statutory powers conferred by s. 9(1) of the 1994 Act in relation to overcharging or excessive bills of costs.

28. In *O'Driscoll v. Law Society of Ireland* [2007] IEHC 352, McKechnie J. in the High Court identified the procedure prescribed in s. 9(1) as a threefold process:-

> (1) Investigation of the complaint;
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> (2) Taking all appropriate steps to resolve the matter by agreement and
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> (3) If satisfied that the bill of costs is excessive may issue a direction to the solicitor.

29. He further pointed out that the first two steps appear to be mandatory under s. 9(1), whereas the third is discretionary. I am in agreement with this analysis of the statutory power being exercised by the Committee once it was satisfied that the complaint was not frivolous or vexatious, subject to the additional comments as to what is involved in the third step.

30. The difficulty created by the absence of any relevant rules is that the point in time when the Committee moved from the second phase in the procedure envisaged by s. 9(1) - which McKechnie J. likened to acting as a mediator "either by achieving an agreed settlement or by imposing a just solution" - to the third phase is not clearly identified. In the third phase the Committee is required to reach a decision on the complaint made namely, whether or not the disputed bill of costs is excessive and, if it so, to consider and decide upon the direction, if any, which it should issue. The issuing of a direction under s. 9(1) is clearly dependent on the Committee reaching a decision that it is satisfied that the bill of costs is excessive. Where that is disputed the Committee is required to make a decision on the dispute between the parties namely, whether or not the bill of costs is excessive.

31. On the facts herein it appears probable that the Committee moved from the second to the third phase in the summer of 2012. It had by that time failed to get the agreement of both parties that the dispute could be resolved by both agreeing to be bound by the decision of an independent cost accountant. Having failed to achieve a resolution, the Committee then determined that it would obtain for the purpose of advising it an expert report from a cost accountant. That advice was for the purpose of the Committee taking a decision on the dispute.

32. Having obtained the report, the contents of which, in relation to three of the five bills of costs at issue, clearly upheld the complaint made and was adverse to the appellants, the Committee acted appropriately in furnishing it to the solicitors of the

appellants. There is no doubt that having received the report, the appellants delayed in responding to the report. They were informed in December 2012 of a proposed hearing date on the 6th February, 2013 and their request for an adjournment to enable them obtain a report from another cost accountant was only made on the 5th February, 2013.

33. The Committee in exercising the statutory power to take a decision on a dispute between the complainant and the solicitors concerned in relation to excessive charging with potential significant financial consequences for the solicitors is obviously bound to act in accordance with the principles of constitutional justice and fair procedures. That is not in dispute.

34. Kearns P. summarised his conclusion that they had so acted thus (at p. 37):-

> "In relation to the section 9 aspect and the alleged overcharging, the applicants' primary challenge is that the Committee imperilled a fair hearing by refusing to allow them to submit its own independent expert report. However, before this request was made by the applicants in February 2013, the matter had come before the Committee on numerous occasions and, despite the Committee's best efforts, had dragged on for over two years with no realistic prospect of an amicable agreement between the parties. It was in those circumstances that the Committee had decided to seek the view of an independent legal costs accountant and it is noteworthy that the applicants acquiesced to this process and forwarded their files once the burden of the associated costs was borne by the Committee. The applicants received Mr. Guiden's report in November 2012 and then, on the eve of a Committee meeting in February, sought permission to submit their own expert report to controvert the findings of Mr. Guiden. In my view, having regard to the role of the respondent in disputes of this kind as set out by McKechnie J. in O'Driscoll, the Committee was entitled to refuse this eleventh hour request and to instead adopt the course it did in an effort to arrive at a 'fair solution'. It is perfectly clear from the correspondence exhibited that the applicants were in no way prohibited from using their own expert to inform their submissions on Mr. Guiden's report and they did in fact do so in lengthy submissions filed in April 2013. The minutes of the 3rd July meeting also make clear that these lengthy submissions were considered in detail by the Committee and the Court does not accept that the applicants were prevented in any way from submitting their best defence.
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> In those circumstances I am satisfied that the Committee afforded both parties fair procedures by commissioning, at its own expense, a report from a suitably qualified expert and allowing both parties the opportunity to make comprehensive submissions in relation to it."

35. I cannot agree with this conclusion reached by the trial judge.

36. First, the trial judge appears to have considered that in February 2013, when the application for an adjournment to submit their own cost accountants report was made on behalf of the appellants that the Committee was still at the second stage of the statutory process envisaged, namely of attempting to resolve the matter by agreement. This appears to follow from his reference to what was stated by McKechnie J. in *O'Driscoll* of "imposing a just solution". That comment is made by McKechnie J. at para. 43 of his judgment in *O'Driscoll*. The issue in *O'Driscoll* which he was addressing was the alleged failure of the Committee in that case prior to issuing a direction to take all appropriate steps to resolve the matter by agreement. Having referred to s. 9 and in particular subss. (3) and (4) in relation to taxation of costs McKechnie J. stated:-

> "These provisions strongly suggest that the section, when invoked, treats a complaint of overcharging as primarily being a matter between the client and his solicitor with the Law Society acting as a mediator either by achieving an agreed settlement or by imposing a just solution. In my view, therefore, the power to issue a direction is conditioned upon the implementation of that preceding step and that step proving unsuccessful."

37. On the facts of that case, McKechnie J. found that the mandatory procedure of attempting to resolve the complaint or dispute by agreement between the parties had not been adhered to and accordingly the directions given under s. 9 were made without jurisdiction and unlawful. McKechnie J. was not addressing the procedure which had to be followed by the Committee in the event that they failed to achieve an agreed settlement. I do not consider that the reference to the Committee "imposing a just solution" was intended to be a reference to anything which had to be done at the third stage of the procedure envisaged by s. 9 in the event that they failed to resolve the matter by agreement between the complainant and the solicitors in question. Rather it formed part of what they should strive to do in the second phase.

38. Where the Committee, as happened in this case, attempts to resolve the matter by agreement but having taken appropriate steps, fails to do so, it then moves into the third phase when it becomes a decision making body in relation to the dispute between the complainant and the solicitors. The complainant alleges that the bill of costs is excessive, the solicitor denies this. The Committee must decide whether or not it is satisfied that the bill of costs is excessive before it may issue a direction. A direction to refund may have serious financial consequences for a solicitor. In this case the amount was €340,070, plus VAT. In addition under s. 11(5) of the 1994 a failure to comply with a s. 9(1) direction is a criminal offence which obviously has serious consequences for a solicitor.

39. As already stated, in my view, the Committee had moved into the third phase when it decided to commission the report from Mr. Guiden, the cost accountant. The purpose of that report was to advise the Committee. The Committee was by then a decision making body. That report was therefore expert evidence upon which the Committee proposed to rely in deciding the dispute between the complainant and the solicitors. The fact that it was commissioned or requested by the Committee cannot alter its character of being expert evidence. Unless the Committee had procured in advance the agreement of both parties to a procedure whereby there would be only one report from a cost accountant, which they did not do, then the report which when obtained was adverse to the solicitors is in terms of its evidential status no different to a report which had been obtained by the complainant.

40. I have no doubt that if the complainant had procured this report and furnished it to the Committee, the Committee would have realised that fair procedures required that it permit the solicitors to obtain their own report from a cost accountant. It is a basic rule of fair procedures that evidence adduced by one party to a dispute must be capable of being tested by the other party to the dispute and the other party must also be entitled to adduce its own relevant expert evidence.

41. Where the Committee proposes to admit and take into account expert evidence adverse to one party to the dispute before it, regardless of the person by whom that expert evidence was obtained, ie. the Committee itself or a party to the dispute, I consider that in the context of s.9 of the 1994 Act fair procedures requires that the other party be given a reasonable opportunity of procuring and presenting its own expert evidence. It cannot be considered to be a sufficient discharge of the obligation to decide a dispute in relation to a complaint under s.9 of the 1994 Act in accordance with fair procedures simply to permit such other party make submissions in relation to the adverse expert evidence. That is not giving each party a fair hearing before the Committee.

42. It is only necessary for the purposes of this appeal to consider whether or not fair procedures required that the appellants be

given a reasonable opportunity of obtaining and submitting their own relevant expert evidence, i.e., a report from a cost accountant. It is not necessary to consider on the present facts whether if a Committee has before it two competing reports from cost accountants cross examination must be permitted before it determines the dispute. In not addressing the issue I do not wish to imply that such might not be a requirement of fair procedures where there is a clear dispute on the written reports. It is a matter which the relevant Committee would have to determine on the facts before it in accordance with the general principles in relation to fair procedures which normally include the entitlement of parties to test conflicting evidence by cross examination.

43. The final aspect of this ground of appeal is therefore whether the Committee gave the appellants a reasonable opportunity of procuring and presenting their own expert evidence from a cost accountant. The trial judge had particular regard to the prolonged procedure and the fact that the appellants had been furnished with the report of Mr. Guiden in December 2012 with a clear indication that the matter would be taken up by the Committee on the 6th February, 2013 and that any submission should be furnished in advance of that date. Whilst I recognise that the procedure had become protracted and there were delays on the part of the appellants, it does not appear to me, in circumstances where the Committee did not specifically indicate that they could if they wished obtain their own cost accountants report and submit same, that they were given a reasonable opportunity of doing this such that the Court should regard them as having been given fair procedures prior to the decision to refuse to admit any such report made on the 6th February, 2013.

44. Accordingly on this ground, I would allow the appeal against so much of the order of the High Court of the 25th June, 2015, as refused the orders of *certiorari* in relation to the determination of excessive charging in respect of three bills and the directions for reimbursement of specified amounts as claimed at paras. (d)(ii), (iii), (iv), (v) and (vi) of the statement of grounds.

Delegation and reasons

45. It is unnecessary to consider these issues in any detail by reason of the above conclusion. It is sufficient to say that I am in agreement with the trial judge having regard to the minutes of the meeting of the 3rd July, 2013, that the Committee did not unlawfully delegate its decision making power to the cost accountant. It did consider the complaint made in the context of the expert evidence before it and take its own decision. Nevertheless as the expert evidence or advices as they perceived it was then being considered by them in breach of fair procedures the decision taken cannot stand. Similarly, I am in agreement with the trial judge that the reasons given by the provision of the minutes of the meeting of the 3rd July, 2013, were sufficient and, accordingly, I would not have allowed the appeal on either of these grounds.

Section 68 of the 1994 Act

46. Section 68(1) of the 1994 Act provides:-

> "(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of –
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> (a) the actual charges, or
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> (b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or
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> (c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made,
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> by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties).
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> . . .
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> (7) Nothing in this section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill of costs for taxation, whether on a party and party basis or on a solicitor and own client basis, or shall limit the rights of any person or the Society under section 9 of this Act."

47. Section 2 of the 1994 Act, provides that:-

> "In this Act, unless the context otherwise requires –
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> . . .
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> "client" includes the personal representative of a client and any person on whose behalf the person who gave instructions was acting in relation to any matter in which a solicitor or his firm had been instructed; and includes a beneficiary to an estate under a will, intestacy or trust."

48. As appears from the wording of s. 2 of the 1994 Act, a "client" when used in the 1994 Act includes a beneficiary to an estate under a will, intestacy or trust "unless the context otherwise requires".

49. The trial judge set out and considered the opposing submissions as to whether the context of s.68 did or did not oblige the appellants as solicitors to issue a letter to the complainant as a beneficiary under the will of the deceased. He concluded:

> "The Court also accepts the submissions of the respondent in relation to the correct interpretation of "client" under the 1994 Act and the requirements of section 68. As this Court noted in *Condon*, the definition of client in the 1994 Act extends to a beneficiary to an estate under a will, intestacy, or trust. The applicants in the present case contend that while St. Vincent de Paul, as a beneficiary, is a 'client', it did not give instructions to the applicants and therefore it was not necessary to issue a section 68 letter. The Court does not accept this proposition. As submitted by counsel for the respondent, if the applicant is correct this would lead to an absurd situation whereby solicitors tasked with administering an estate were not in receipt of instructions from anybody and therefore free to proceed without having provided an estimate of costs to the estate from which fees will be withdrawn. Such a situation is entirely at odds with the intention

of the legislature in relation to section 68 of the Act.

50. Regrettably it appears to me that the trial judge did not give due consideration to the opening words of s. 68(1) which imposes the obligation on the solicitor to provide the client with particulars in writing. This obligation only arises "on the taking of instructions to provide legal services to a client" and the solicitor is then to provide "to the client", - i.e., the one to whom the legal services are to be provided - the relevant particulars of the proposed charges or the basis thereof for such legal services. The appellants do not dispute that a residuary beneficiary is included in the definition of client for the purposes of the 1994 Act. However, they rely upon the fact that the definition is subject to the provision "unless the context otherwise requires". More particularly, they submit that the obligation in s. 68 is only to a client to whom the requested legal services are to be provided. They submit that in relation to the administration of the estate of the deceased and related litigation and conveyancing the legal services are provided by the solicitors of the firm Sandys & Brophy to the appellants as executors and not to the Society as residuary beneficiary.

51. It cannot be in dispute that the legal services provided by Sandys & Brophy, solicitors were to the executors as personal representatives of the deceased. On the facts of this application it would appear that at the relevant time the two executors were the only partners in Sandy & Brophy, the firm. That is clearly a matter which had been taken into account by Kearns P. in his judgment in *Condon v. Law Society of Ireland* [2010] IEHC 52, to which he makes reference. That judgment, however, concerned the meaning of "client" for the purposes of s. 8 of the 1994 Act and a complaint made in respect of the manner in which legal services were provided. The obligation of the solicitor under s. 68 was not directly in issue, but it was referred to in submission and I recognise that Kearns P. at p. 19 of his judgment in *Condon* reached a very broad conclusion in relation to the inclusion of a beneficiary in the definition of "client" in s. 2 where he stated:-

> "In my view the clear and obvious purpose of s. 2 – and the fact that a beneficiary is therein defined as a client – is to ensure that a beneficiary obtains all the protections under the Act which any other client of a solicitor would obtain."

52. I am not intending to express any view adverse to the conclusion reached by Kearns P. in *Condon* that a beneficiary under a will may be a "client" for the purposes of s. 8 of the 1994 Act. It is also the position that no objection has been pursued by the appellants to the respondent entertaining the complaint by the Society (which must be as a client) under s. 9 of the 1994 Act. I cannot, however, agree that the definition of "client" in s. 2 means - as stated by Kearns P. in Condon - that "a beneficiary obtains all the protections under the Act which any other client of a solicitor would obtain". After all, s. 2 expressly provides that the definition is to apply "unless the context otherwise requires" and had the Oireachtas intended that a beneficiary should be equated with the position of a "client" for all purposes, this critical proviso would have been unnecessary

53. I have concluded that, applying the well established principles of statutory interpretation and considering the plain meaning of the words used in s.68 of the 1994 Act, the Society was not a client to whom the appellants were obliged to issue a letter. First, in construing s. 68(1) it does not appear to me that one can distinguish between the obligations thereunder of solicitors who are also the executors or personal representative of the deceased from a situation where solicitors are acting on the instructions of an executor who is a stranger to them. If the construction contended for by the respondent is to be upheld, then it must mean that where solicitors receive instructions from an executor, who is a stranger, they must issue the s. 68 letter not only to the executor, but also to every beneficiary under the will who could be numerous and, in a limited number of cases, at least, not also easy to identify at that initial juncture prior to the very administration of the estate. It would be also the case that many beneficiaries with specific legacies who might not be affected in any way by the proposed charges of the solicitors would have to be notified. The wording of s. 68 does not admit of any method of distinguishing between beneficiaries who might be affected by the proposed charges and those who might not.

54. Second, on the plain meaning of the words used by the Oireachtas it is a client from whom or on whose behalf instructions are taken and to whom legal services are to be provided is the person to whom a solicitor must issue a s. 68 letter. It is that person alone (i.e., the person who gave instructions to the solicitor and to whom the legal services are to be provided) who is the "client" to whom obligations are owed pursuant to this section. Any other wider construction of that word in this particular statutory context would be inconsistent with the language, meaning and structure of s. 68 itself. Undoubtedly, the services which are given by a solicitor to executors in either extracting a grant of probate or administering the estate whether by realising assets, settling disputes with third parties or representing the executors in necessary litigation may be services which are also for the benefit of the beneficiaries entitled under the estate. It is, however, the executors who give the instructions to the solicitors and to whom the services are being provided. It is the responsibility of the executors to administer the estate and the legal services are being provided to them for that purpose. The executors in turn owe duties *qua* executors and trustees to the beneficiaries. These duties may include disclosure of information to beneficiaries: see, inter alia, *Chaine-Nickson v Bank of Ireland* [1976] I.R. 393.

55. Part of the reasoning of Kearns P. as appears from the above was that if the appellants' submission was correct it would lead to "an absurd situation whereby solicitors tasked with administering an estate were not in receipt of instructions from anybody and therefore free to proceed without having provided an estimate of costs to the estate from which fees will be withdrawn". I cannot agree with this. Whilst on the facts of the present case there may have been an identity of persons who are both the executors and the only partners in the firm of Sandys & Brophy, they were, nevertheless, carrying out duties in relation to the estate and providing legal services in two quite different capacities. They were the executors and in that capacity owed duties to the beneficiaries in the administration of the estate. As the firm of Sandys & Brophy, they were to be "employed to act as solicitors for the purpose of proving my will and for the executions of the directions contained therein and generally winding up the administration of my estate" in accordance with the express provisions of para. 15 of the will of the deceased. In such circumstances it appears to me that insofar as they were acting as solicitors in the firm of Sandys & Brophy, and providing legal services they were obliged pursuant to s. 68(1) on the taking of instructions to act as solicitors and provide legal services to the executors (albeit themselves) in the administration of the estate (or in separate contentious matters that arose thereafter) to issue a letter or letters to the executors qua instructing client with the particulars described by s. 68(1). I recognise that such a letter might well be a letter from the firm addressed to each of the partners as executors of the estate. Nevertheless, insofar as solicitors who are appointed executors are permitted to retain their own firm or a firm in which they are a partner or an employee to provide legal services for them in the administration of an estate, this does seem to be required by s. 68(1). The solicitor or his firm is taking instructions to act for a client qua executor, albeit that it may be him or his partners *qua* solicitors who must issue the s. 68 letter in such circumstances.

56. This construction also appears to me to accord with the general intention of s. 68 that a solicitor who is retained to provide legal services to a client will provide that client with the particulars in relation to the charges specified in s. 68(1)(a) to (c). It also precludes the mischief or absurdity envisaged by Kearns P. If such a letter is issued to the executors at the commencement of the relevant work, it is then available subsequently if any beneficiary affected by the fees charged seeks to contest the fees actually charged as excessive and to assist in the resolving of any such dispute.

57. If, in accordance with this construction, a firm of solicitors provides a s. 68 letter to executors, or in the case of a sole

practitioner, perhaps to himself at the commencement of the administration of an estate, there may be a separate question as to what obligation he or she owes as executor to furnish the s.68 letter at the time it is issued to any beneficiary who will ultimately in reality be paying those costs in the sense that they will come out of that person's entitlement under the estate. That is a separate issue which does not fall for consideration in this appeal.

58. In summary, s. 68(1) does not impose an obligation on a solicitor to issue a letter to all persons who may come within the definition of "client" in s.2 of the 1994 Act. Rather it imposes an obligation to issue a letter to a client to whom the relevant legal services are to be provided. On the facts of this appeal the Society was not such a client, but the appellants as executors were such a client.

59. The only basis upon which it was contended that the appellants were in breach of s.68(1) of the 1994 Act was their failure to send a letter to the complainant –the Society of St. Vincent de Paul. It was not contended before the Committee that they were obliged to issue one to themselves as executors. Accordingly, it appears to me to follow that this Court must grant an order of *certiorari* of the decision of the Committee to refer to the Disciplinary Tribunal the failure of the appellants to send a letter in accordance with s. 68(1) of the 1994 Act to the residuary beneficiary.

Conclusion
60. For the reasons set out in this judgment I would allow the appeal; set aside the order of the High Court of the 25th June, 2015; grant to the appellants orders of *certiorari* as sought in paragraphs d(i), (ii), (vii) of the statement of grounds and remit the complaints made by the Society to a differently constituted Complaint and Client Relations Committee of the respondent for further consideration in accordance with law and this judgment.

Final observation
61. Nothing in this judgment should be taken as in any way expressing a view on the merits of the complaint. It is clearly desirable that the appellants and the complainant co-operate with the Committee in attempting to reach an agreed solution. This matter is being remitted to a differently constituted Committee and it is not intended that this judgment preclude it from engaging in phase two of the procedure envisaged by s.9 of the 1994 Act and continue to seek to reach an agreed resolution of the matters in dispute.