



THE HIGH COURT

[2018 No. 126 SA.]

IN THE MATTER OF THOMAS D'ALTON, A SOLICITOR PREVIOUSLY PRACTISING AS JAMES J. KEARNS & SONS, SOLICITORS,  
PORTUMNA, CO. GALWAY

AND

IN THE MATTER OF THE SOLICITORS ACTS 1954 - 2015

BETWEEN

LAW SOCIETY OF IRELAND

APPLICANT

AND

THOMAS D'ALTON

RESPONDENT

**JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 26th day of March, 2019**

**Introduction**

1. The Law Society of Ireland ("the Society") seeks to have the name of the respondent (Mr. D'Alton) struck off the Roll of Solicitors. It does so in circumstances where findings of misconduct were made against Mr. D'Alton by the Solicitors Disciplinary Tribunal ("SDT"). The SDT concluded that that was the appropriate sanction to seek against Mr. D'Alton.

**The findings**

2. The SDT heard two separate complaints against Mr. D'Alton. The first resulted in him, on his own admission, being found guilty of professional misconduct for failure to file an accountant's report for the year ended 31st January, 2017 within six months of that date in breach of regulation 26(1) of the Solicitors Accounts Regulations 2014.

3. The second and more serious finding of professional misconduct related to eight separate allegations of wrongdoing all of which were admitted by Mr. D'Alton.

4. They were:

a) that he allowed a deficit of €54,860 on his client account as of 30th April, 2016 which was subsequently reduced to €46,860 by the introduction of €8,000 in June 2016;

b) used €10,000 of clients' money on 9th March, 2015 to help discharge a personal Revenue liability;

c) took client monies of €10,000 in September 2014 and €7,800 in July 2006 from the Larkin Estate which monies were used to reduce the office account overdraft;

d) took client monies of €8,000 from the estate of Anthony Power, deceased, in September 2015 which monies were used to reduce the office account overdraft;

e) took client monies of €15,813.57 from the Killeen Estate in June 2014 which monies were used to reduce the office account overdraft;

f) took client monies of €5,000 from the client account to the office account in July 2016;

g) created a debit balance on the account of W. Walsh of €5,002;

h) failed to comply with anti-money laundering legislation in the sample of clients' files examined.

5. In considering the question of penalty the SDT said as follows:-

*"To the credit of the respondent solicitor, the Tribunal has noted that he did admit the facts and further admitted that the facts constituted misconduct. He has also made good the deficits and eventually filed the outstanding accountant's report.*

*However, the Tribunal has also noted that the respondent solicitor has a significant prior disciplinary record."*

6. The prior disciplinary record involved five different findings adverse to Mr. D'Alton. The first involved him being censured in respect of a failure to comply with a direction from the relevant Law Society committee to refund three payments made from the client account in respect of the estate of Joseph Clossick. In addition to being censured he was ordered to pay a sum of €14,145 as restitution to the estate of Mr. Clossick and to pay a sum of €1,500 as a contribution towards the whole of the costs of the Society.

7. The second matter involved a finding of misconduct because Mr. D'Alton failed to comply with part or all of an undertaking and to respond adequately or at all to correspondence sent to him by the complainant in that case as well as a finding of failing to respond adequately or at all to some or all of the correspondence sent to him by the Society. On this occasion the Tribunal recommended that Mr. D'Alton not be permitted to practise as a sole practitioner or in partnership but that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least 10 years standing. He was also ordered to pay a sum of €1,000 as a contribution to the whole of the costs of the Society.

8. The third matter related to multiple findings of misconduct in respect of multiple complaints of failure to comply with undertakings and to respond to correspondence. A similar penalty involving a limited practising certificate was recommended together with an obligation to pay a sum of €6,500 as a contribution towards the costs of the Society.

9. The fourth matter involved a finding of failure to comply expeditiously with an undertaking and to reply to correspondence. This resulted in a similar recommendation concerning a limited practising certificate and an obligation to pay €1,000 as a contribution towards the costs of the Society.

10. The final matter involved a failure to ensure the furnishing of an accountant's report for the year ended 31st January, 2016. This resulted in a censure together with an obligation to pay €500 to the Compensation Fund and a further contribution of €500 towards the costs of the Society.

#### **SDT recommendation**

11. Having regard to the findings made against Mr. D'Alton in respect of the current complaints, and his previous disciplinary record and without the evidence in mitigation which was adduced in this application, it is hardly surprising that the SDT recommended that he be struck off the Roll of Solicitors. Neither is it a surprise that the Society supports the making of such an order.

#### **Evidence in mitigation**

12. Two affidavits have been sworn in mitigation of penalty. One was sworn by Mr. D'Alton and the other by Mr. John O'Dwyer, (Mr. O'Dwyer) solicitor. I will deal with each separately.

#### **Mr. D'Alton's affidavit**

13. Mr. D'Alton in the course of his affidavit set out his entire academic and professional career to date. He said that while his legal practice was not large or very profitable it afforded him and his family a comfortable but modest lifestyle. Prior to these disciplinary matters he believes that he had built up a very good reputation with clients and fellow practitioners and that he was regarded as an honest and reliable solicitor who did his best to help clients.

14. He initially ran into difficulties with the Law Society in 2010. That was because of his failure to discharge undertakings. He points out that all of those undertakings were ultimately discharged by him together with the associated costs. He also points out that the findings of professional misconduct to which I have already referred were all ultimately resolved as were issues which arose in relation to undertakings to other financial institutions in or about 2010. He points out that he does not dispute any of the facts in relation to the Tribunal's decision before me today but he does dispute the Tribunal's recommendation. He points out that the remainder of the deficit on the client account which had been reduced to €46,860 was cleared on 14th August, 2016. He says there was no client account deficit nor was one identified at the time of completion of the closing accountant's report for the period ending 30th November, 2017, being the date upon which he closed down his practice.

15. He offers an unreserved apology to the court for his misconduct and accepts full responsibility for it. However, he asks that he not be struck off the Roll of Solicitors for reasons which he then explains. He makes it clear that he does not seek to justify his conduct but he does contend that he has provided an explanation as to why he deviated from a previously unblemished career.

16. A major part of his case on mitigation relates to his health. Curiously this was not mentioned at all to the SDT when it was considering the question of penalty. He says that his difficulties began when he suffered injury to his right ankle as a result of a fall in June 2007. A medical report from his general practitioner verifies that. This report is dated 14th January, 2019 and was not before the SDT. The report points out that this fall resulted in a substantial injury to his right foot. He was seen in the Galway clinic in August 2007 and was found to have a significant fracture and dislocation of the calcaneum bone. He was prescribed a boot in the hope that the fracture would improve but the pain and difficulties with the ankle continued over the next year. He had surgery in November 2009 which appeared to be satisfactory. The doctor points out that during all of this time he was taking a large amount of pain killers and had significant loss of function and mobility. Further surgeries were carried out in May and June 2010. The pain continued to accelerate and he was unable to walk on his foot. He saw an orthopaedic surgeon in 2011 and had an ankle fusion carried out. He was advised to have complete bed rest but because of pressure of work he was unable to comply with that advice. He developed what is described as a "very nasty wound infection" requiring daily dressings whilst at the same time he was trying to work full time.

17. He then went on to have a series of surgeries and at one stage had approximately eleven general anaesthetics in one year. The report continues:-

*"Between 2014 and 2016 his experience was catastrophic. Apart from all of the surgeries he developed osteomyelitis, a very serious bone infection, and came close to requiring an amputation. He obviously had to work all through this and was relying on his colleague in the practice to support him but I know on one occasion when I did a domiciliary call instead of being on bed rest he was in a chair with his foot elevated surrounded by charts trying to do work. During these years Thomas was on high doses of pain killers and, intermittently, high doses of antibiotics. Tom suffered from significant anxiety and depression because of his prolonged hospital admission time and challenging recuperation period as outlined above. The medication he was taking made his situation worse as he was sedated with great difficulty concentrating, making decisions and having capacity to handle the required workload.*

*In the middle of all this he had a total right hip replacement in 2015 as he was taking all his weight on his right side. Unfortunately, the prosthesis used was not long enough and subsequently he had a fractured femur on the new hip. He had to have the new hip replaced and the femur pinned. This was all during May to September 2015.*

*I was very concerned about his mental health. He was attempting to run a practice with no appropriate help while experiencing great physical and mental incapacity.*

*I hope this gives you some idea of the extensive medical history that Thomas has suffered. He was certainly in no position to run a practice during this time."*

The contents of this report were not put in issue by the Society.

18. Whilst Mr. D'Alton had misgivings concerning the assistant solicitor in his practice, his counsel made it clear that he was not seeking to visit the assistant with any blame in respect of his own shortcomings. Mr. D'Alton ultimately decided to close the practice and all of the Society's requirements were complied with in that regard.

19. The affidavit then goes on to provide explanations in relation to the findings made against him on the current complaints. He

acknowledges his bad behaviour and expresses his regret for it. He also says that he has let both himself and his family down and sincerely apologises for what has occurred.

20. He points out that no client has been out of pocket and that no claim has or will be made on the Compensation Fund in that he has discharged all of the obligations and all of the undertakings.

21. He exhibits a number of references from solicitors in his locality all of whom have known him for upwards of 30 years. They speak very highly of him and regard him as an honourable man and a good professional colleague. Two of them have said that if they had a vacancy for an assistant solicitor they would have no difficulty in employing him in that capacity.

22. A further solicitor who says that she operates a busy and fast growing practice in west Mayo has a vacancy and she would be willing to employ Mr. D'Alton. In fact, she says she would be delighted to have his assistance and expertise and that she can offer part time or consultancy work to him. A difficulty presents itself concerning this solicitor in that she herself is the subject of an investigation by the SDT and the results of that will not be known for a number of months. Meanwhile she continues to practise under the supervision of Mr. O'Dwyer pending the outcome of that inquiry.

23. Mr. D'Alton's affidavit also deals with his personal circumstances both family and financial. He accepts that the only real prospect of obtaining gainful employment would be with the solicitor who has made the offer to him. He also points out that if he is struck off the Roll of Solicitors he will be incapable of earning a living for the remainder of his life in circumstances where he has what he describes as "a stark economic necessity to earn money". It is not necessary for me to go into the details of his financial position which are fully disclosed in the affidavit nor need I recount his family circumstances concerning his wife and children. It is sufficient if I record that I accept that he has ongoing family responsibilities and that it is necessary that he be in a position to earn an income with a view to meeting them.

#### **Mr. O'Dwyer's affidavit**

24. Mr. O'Dwyer is a solicitor in practice for over 50 years. He is already supervising the principal of the practice which has offered Mr. D'Alton employment. He believes that her practice would be in a position to provide employment for Mr. D'Alton on terms to be fixed by the court if it decides not to make the order sought.

25. Mr. O'Dwyer has represented Mr. D'Alton for a number of years and encouraged him to close his practice in November 2017. If the court were to sanction the employment of Mr. D'Alton, Mr. O'Dwyer would continue to supervise both the existing principal in that firm and Mr. D'Alton.

26. At present, the principal of that firm is unable to transact any financial business as that is subject to the supervision of Mr. O'Dwyer. No funds may be paid out of her firm save by cheque and he is the signatory on the cheques. There are no online accounts held by the firm. He points out that Mr. D'Alton, who is primarily a conveyancer and probate practitioner, would have the necessary skills to assist in this growing practice and that it would be of benefit to the current principal. He believes it would be of immense help to her. Her practice is in a remote area and she provides a very significant service to people in the locality. Because of its location he believes it unlikely that anybody would be prepared to work there as a solicitor but it is Mr. D'Alton's intention to go and live in that locality in the near future.

27. If the court were to sanction this arrangement it would all be subject to Mr. O'Dwyer maintaining a supervisory role over both solicitors. Mr. D'Alton would have no access to any funds of the practice and would confine himself to conveyancing and probate work.

#### **Discussion**

28. The question of the appropriate sanction to be applied against solicitors who are found guilty of professional misconduct has been considered by the Superior Courts over the last few years.

29. In *Carroll v. Law Society of Ireland* [2016] IESC 49 the Supreme Court considered the observations of Sir Thomas Bingham M.R. in *Bolton v. Law Society* [1994] 2 All E.R. 486. In that case the Master of the Rolls said:-

*"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty has been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will involve a fine and a difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind will the Tribunal be likely to regard as appropriate any order less severe than one of suspension.*

*It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and*

*entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."*

30. McKechnie J. in Carroll's case said of the judgment in *Bolton*:-

*"69. The learned Master of the Rolls identified proven dishonesty, whether attended by a criminal conviction or not, as the most serious such conduct. Where established, 'no matter how strong the mitigation is', a strike off will almost invariably follow. Furthermore, even where the solicitor in question has, over the following several years, made every effort to rehabilitate himself, and has even done so honourably and is in a position of trust and responsibility, a restoration to the Roll will be very rare indeed. He described why this approach, which may seem harsh, was necessary: it was to maintain the reputation of the solicitors' profession in general, and to sustain unreserved public confidence in its integrity."*

*70. There can be little doubt about the general correctness of these and the other remarks made by Bingham M.R. in Bolton. There is therefore placed on the regulatory body, at first instance, a high level of public responsibility to this end. Equally so, however, there is a corresponding obligation on that body to be ever so discerning in its evaluation of the facts and in the findings arrived at. In all cases the sanction imposed, if any, must be proportionate as determined by the principles of Irish law, which, perhaps unlike in England, contain a constitutional dimension. This is because any sanction akin to a disqualification or a suspension will impact upon one's declared but qualified right to practise his or her profession. Therefore, the strictness of the presumptive approach, as evident in Bolton, may not be altogether appropriate in this jurisdiction. Consequently, until the issue directly arises, I will prefer to offer no definitive opinion on the circumstances, limited as they may be, in which an individual who has been struck off could properly be readmitted to the Roll."*

31. In *Law Society of Ireland v. Enright* [2016] IEHC 151, I had to deal with a solicitor who had a criminal penalty imposed upon him and had served a term of imprisonment. By so doing he had paid his debt to society. I pointed out that it would be unjust to punish him again. I also regarded as highly unlikely that there would be any repetition of any offence of dishonesty on his part. Nonetheless I still made an order that he be struck off because as I said:-

*"Echoing the words of Sir Thomas Bingham M.R., the purpose of the sanction sought by the Law Society appears to be 'the most fundamental of all'. In order to maintain the reputation of the solicitors' profession and to sustain public confidence in the integrity of that profession, I share its opinion that it is necessary that Mr. Enright's name be struck from the Roll of Solicitors. A suspension from practice would not be adequate."*

32. After the passage of some years I subsequently restored Mr. Enright to the Roll of Solicitors having regard to the quite extraordinary circumstances which obtained in his case.

33. In approaching the question of penalty I have to have regard to:

(a) the protection of the public;

(b) the maintenance of the reputation of the solicitors' profession "as one in which every member of whatever standing, may be trusted to the ends of the earth (per Bingham M.R.)";

(c) the punishment of the wrongdoer;

(d) the discouragement of other members of the profession who might be tempted to emulate the behaviour of the wrongdoer; and (e) the concept of proportionality. The sanction must be proportionate and appropriate.

34. The application of those considerations to a case where a solicitor is found guilty of dishonesty or wrongfully taking funds from a client account will almost invariably result in an order that his or her name be struck from the Roll of Solicitors.

35. Whilst not dissenting from that approach, counsel on behalf of Mr. D'Alton (who did not appear before the SDT) nonetheless submits that the facts and circumstances of this case are such as to warrant a different form of order. He suggests a period of suspension from the Roll and then a restoration with a limited and conditional practising certificate being granted. The conditions would include an ability on the part of Mr. D'Alton to practise only in the area of probate and conveyancing, never to have any control over monies and on the assumption that he is employed as a solicitor as mentioned at para.22 of this judgment that he would at all times be under the supervision of Mr. O'Dwyer.

### **Decision**

36. In the unusual circumstances of this case I have come to the conclusion that the usual sanction which would be applicable namely an order striking Mr. D'Alton's name from the Roll of Solicitors would be disproportionate and inappropriate. Instead, I propose to fashion a proportionate sanction which will protect the public, maintain the reputation of the solicitors' profession, punish Mr. D'Alton and discourage other solicitors from behaving as he did.

37. I have come to this conclusion having regard in particular to the effects of the dreadful ill health that Mr. D'Alton was suffering during the relevant times as described earlier in this judgment.

38. I am astonished that none of that medical evidence was put before the SDT when it was considering the case. In fact, Mr. D'Alton's health situation does not appear to have been mentioned to it at all. Had it been, the SDT might have made a different recommendation. In any event the medical evidence is before this court and is not controverted.

39. I also bear in mind that Mr. D'Alton has subsequently ensured that no client was out of pocket as a result of his dishonesty and that no claim has or will be made on the Compensation Fund. I am also satisfied that the risk of any repetition of these wrongdoings is virtually nil but the conditions which I propose will ensure that such risk is zero.

40. In fashioning the penalty which I propose, I do not believe it appropriate that Mr. D'Alton's future should be in any way dependent upon employment with a specific employer and in particular one who is already herself the subject of an investigation by the SDT, the results of which are not yet known. Nor do I believe that he should be subject to the supervision of a particular named solicitor but

rather that an element of discretion should be given to the relevant Law Society committee as to who his supervisor should be. This does not imply any criticism at all of Mr. O'Dwyer but rather is designed to give maximum flexibility to Mr. D'Alton's circumstances over the next period of years.

41. In these circumstances, therefore, I direct that in lieu of the penalty recommended by the SDT that:

(i) Mr. D'Alton should be suspended from the Roll of Solicitors until 1st April, 2020;

(ii) that upon the cessation of that suspension he may be issued with a practising certificate subject to the following conditions:

(a) He will not be permitted to practise as a sole practitioner or in partnership but only as an employed solicitor;

(b) He must act under the control and supervision of a solicitor who will be approved of in writing in advance by the Law Society;

(c) He will not be permitted to give undertakings of any sort save with the written consent obtained in advance from the supervising solicitor;

(d) He will not be permitted to have any drawing rights on the client or other accounts of the practice in which he may be employed.

42. Those conditions will apply to every practising certificate granted to him for a period of seven years following his restoration to the Roll of Solicitors in 2020.

43. In the event of Mr. D'Alton breaching any of those conditions these proceedings may be re-entered on 48 hours' notice to him with a view to the court making an immediate order striking him off the Roll of Solicitors.

44. These conditions, framed as they are, permit of the arrangement suggested in Messrs. D'Alton and O'Dwyer's affidavits but do not confine Mr. D'Alton to that particular arrangement which, for all I know, may not be possible or feasible depending upon the result of the investigation into the solicitor in question.

45. This sanction is fashioned as a proportionate response to Mr. D'Alton's wrongdoing having regard to the unusual mitigating facts of his case which were first disclosed on this application and were not before the SDT. The sanction is not and should not be interpreted as any relaxation of the courts obligation to continue to ensure that public confidence in the integrity of the solicitors' profession is maintained.