THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 217

Record No. 2015/237

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

THE LAW SOCIETY OF IRELAND

APPLICANT/

RESPONDENT

- AND –

PATRICK E. CALLANAN

APPELLANT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st day of July 2017

1. When the High Court entertains an application to confirm a decision of the Disciplinary Tribunal of the Law Society under the provisions of the Solicitors Acts 1954-2011, does that Court have the jurisdiction to make an order restraining the solicitor in question from practising for a specified period? While that, in essence, is the principal issue presented on this appeal from the *ex tempore* decision of Kearns P. on the 13th April 2015 who had made an order to this effect in respect of the appellant in this case, it is also contended that inadequate reasons were given by the judge for this decision.

2. The appellant, Mr. Callanan, was admitted as a solicitor on 31st March 1995. He is now aged 51. He subsequently carried on practice with another solicitor in a solicitor's firm in the border regions from 2001 until March 2009. After ceasing to be a partner he remained in employment as a solicitor in that firm until the 3rd November 2009, but he has not, however, practiced as a solicitor since that date.

3. On the 22nd June 2010 the Solicitors Disciplinary Tribunal ("the Tribunal") received an application for an inquiry into the conduct of the appellant from his former partner who was the complainant. On the 20th October 2010, the Tribunal found a *prima facie* case of misconduct on the part of the appellant in relation to five separate grounds of complaint. The appellant admitted the allegations in their entirety and it was at all times admitted that the actions complained of constituted professional misconduct.

4. The first four grounds of complaint (complaints (a) - (d)) related to the provision by the appellant of certificates of earnings and confirmation of employment in respect of his sister to certain financial institutions. This was done to enable the appellant's sister, who had recently returned from the United States, to obtain a mortgage on a home which she intended to purchase. These certificates of earnings and confirmations of employment were false: the appellant's sister had never worked for the appellant. The appellant's sister subsequently obtained a mortgage from a financial institution. At the time of the Tribunal hearing there were no arrears on this mortgage, which has been fully serviced since drawdown.

5. The fifth ground of complaint (complaint (e)) was that the appellant gave or caused to be given multiple undertakings to named lending institutions to register a first charge in their favour in respect of a particular property. The appellant had purchased the property in 2004 and the said property was already subject to a prior charge, namely, a mortgage to Ulster Bank. On three separate occasions in 2005, 2006 and 2007, the appellant placed solicitors' undertakings before his former partner in respect of the property and had the partner sign those undertakings. The appellant used this money in order to fund an investment in a property development in Shanghai. When, however, the appellant's wrongdoing was uncovered in early 2010, he immediately admitted his guilt and requested time to sell the properties in Shanghai so that the undertakings could be discharged.

6. After the Tribunal had found a *prima facie* case of misconduct in respect of these complaints, a separate division of the Tribunal commenced hearing the case on the 22nd March 2011. The matter was heard before the Tribunal over approximately three and a half years, with the hearing taking place on the 21st October 2012, 10th April 2013, 29th June and 27th July 2014. These adjournments were given in order to allow the appellant time within which he could discharge the outstanding undertakings.

7. As it happens, the appellant was ultimately able to achieve a position where the undertakings were discharged and there was no loss to any party, including the complainant. He took all possible steps to sell the property in Shanghai and he signed all necessary documentation to enable his former partner to have carriage of the sale. He co-operated fully with his former partner and the Society in order to ensure – and did in fact ensure - that neither the complainant, nor the Society's Compensation Fund was exposed to any loss by his actions.

8. There is no question but that Mr. Callanan engaged in conduct which was dishonest and which in other circumstances might have had extremely serious consequences for his erstwhile professional partner. Had he had not managed to unwind his Chinese property investments without loss, his partner would have been left exposed to the obligation to honour the solicitors' undertakings which Mr. Callanan had given to the financial institution in question. This might well have had disastrous consequences for his entirely innocent erstwhile partner.

9. While appropriate credit must be given to Mr. Callanan for the fact that he promptly accepted that he was guilty of professional

misconduct, there is equally no question but that his conduct merits serious sanction. As I have already indicated at the outset of the judgment, the principal legal issues which arise on this appeal relate rather to the jurisdiction of the High Court to impose the particular sanction which it did in fact impose and the adequacy of the reasons given.

The disciplinary regime under the 1960 Act
10. The present disciplinary regime for solicitors is set out in the Solicitors Act 1954 (as amended). The system involves the Solicitors Disciplinary Tribunal ("the Tribunal") conducting an inquiry into the conduct of a solicitor following a complaint in that behalf. If the Tribunal determines that there has been such misconduct then, save in the case of the lesser sanctions set out in s. 7(9) of the 1960 Act, it must set out these findings in a report for the High Court. The report must include an opinion from the Tribunal as to the fitness of the solicitor to be a member of the profession and its recommendation as to the sanction which should be imposed by the High Court.

11. Section 8(1) of the 1960 Act sets out the role and powers of the High Court following the transmission of such a report by the Tribunal by providing that the Court may by order do or more of the following things, namely,

> "(I) Strike the name of the solicitor off the roll;
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> (II) Suspend the solicitor from practice for such specified period and on such terms as the Court sees fit;
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> (III) Prohibit the solicitor from practicing on his own account as a sole practitioner or in partnership for such period, and subject to such further limitation as to the nature of his employment, as the Court may provide;
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> (IV) Restrict the solicitor practicing in a particular area of work for which a period as the Court may provide;
>
> (V) Censure the solicitor or censure him and require him to pay a monetary penalty…"

The report of the Disciplinary Tribunal
12. In the present case the Tribunal had ultimately concluded – albeit with misgivings – that Mr. Callanan should not be struck off, but rather that he should not be permitted to practice as a sole practitioner; that he should be allowed only to practice as an assistant solicitor in the employment and direct control of another solicitor of at least ten years' standing (to be approved by the Society) and that be prohibited from having any dealings in relation to the payment of monies from client accounts.

13. In its report the Tribunal had described the case as "a difficult case…to decide." The Tribunal observed that Mr. Callanan had admitted that the actions complained of were wrong. It also found that when the conduct was discovered Mr. Callanan:

> "immediately admitted his guilt and took all steps possible to sell the property in Shanghai by signing all necessary documentation to enable his partner have carriage of sale. The properties were both sold, albeit that the second property caused considerable more difficulty and it was not until early 2014 that this property was finally disposed of and the mortgage which was utilised to purchase the property was discharged, thus "rendering the respondent's solicitor's [former] partner free from liability in respect of that mortgage."

14. The Tribunal further accepted that without Mr. Callanan's co-operation his partner would have been placed in a very difficult position. The Tribunal considered that credit should be given to Mr. Callanan for his early admission of guilt and the fact that he had co-operated with the Law Society and with his former partner. In relation to the allegations concerning the appellant's sister, it took into account that there appeared to be little or no financial risk in respect of that particular issue.

15. While the Tribunal observed that it was not stating that there may not be circumstances where such conduct "so outrageous that the only possible recommendation is strike off", it nonetheless did not consider that the present case quite came within that particular category. It rather decided – albeit not "not without considerable misgivings" -against recommending to the President of the High Court that Mr. Callanan be struck off the roll of solicitors. The Tribunal commented that Mr. Callanan's actions had placed:

> "… his partner in the invidious position in which he found himself [amounted to] misconduct of the most serious kind and deserves severe punishment. However, the Tribunal is of the view that this punishment can be achieved with resorting to the ultimate sanction thus encouraging solicitors in similar circumstances to co-operate fully with the Law Society and other complainants to ensure that their misconduct is remedied insofar as it can be."

16. In a subsequent letter to the Society, Mr. Callanan fully accepted the findings and recommendations of the Tribunal. He also indicated in that letter that he was, in addition, prepared to undertake not to practice as a solicitor in any capacity (whether with a limited practicing certificate or otherwise) without a further order of the High Court to be made on notice to the Society. Mr. Callanan further indicated that he was prepared to undertake work only under the control of any supervising solicitor employing him, again subject to the approval of the Society.

The ruling of the High Court
17. The Society's motion was ultimately heard by Kearns P. on the 13th April 2015. Mr. Callanan had submitted that the High Court should affirm the recommendations of the Tribunal. Mr. Callanan had also proposed that he would undertake not to practice as a solicitor without further court order. The Society sought an order striking off Mr. Callanan from the roll of solicitors and to that extent went further than the Tribunal had recommended. The submission of the Society was to the effect that Mr. Callanan's dishonesty undermined the entire system of trust in the undertakings system vis-à-vis financial institutions and that to that extent, therefore, Mr. Callanan's conduct was so reprehensible that it merited the ultimate sanction of a strike-off.

18. In his ruling Kearns P. did not, in fact, endorse the report of the Tribunal but neither did he go as far as the Society had requested. The President rather made an order in the following terms:

> "1. That the respondent be prohibited from practising as a solicitor or from holding himself out as a solicitor entitled to practice for a period of 10 years from the date of the making of this order.
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> 2. That the respondent at the expiration of the 10 year prohibition period apply to the Court should he wish to resume practice as a solicitor.

3. In the event of the respondent applying to the Court to resume practise as a solicitor that he not be permitted to practise as a sole practitioner or in partnership. 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 to be approved in advance by the Law Society of Ireland.

4. That the respondent never be given cheque signing rights over any client account."

19. How was it, therefore, that Kearns P. took such a different approach from that of the Tribunal? Some clue may be found in the affidavit of Mr. Callanan sworn on the 11th March 2015 where he stated that he was not then working as a solicitor and that it was not his intention to work as a solicitor in practice or to hold himself out as a solicitor for this purpose. Mr. Callanan then continued thus:

> "Even though it is not my intention to practice as a solicitor, any decision to strike me off as a solicitor is likely to have an impact on my future employment prospects and expose me to significant public opprobrium. In that regard…I am prepared and do so undertake to this Honourable Court that I will not act as a solicitor in any capacity, whether by way of a limited practising certificate or otherwise pending further order of this Court."

20. It was against this background that the ruling of Kearns P. must be understood. It is probably fair to say that the President was under the impression from that affidavit – and, let it be said, from the submissions advanced by counsel on behalf of Mr. Callanan – that he did not intend to work as a solicitor for the foreseeable future. There then followed exchanges with counsel for both sides in the course of which the President indicated that he proposed to make an order restraining Mr. Callanan from practising for a period of 10 years and thereafter only with leave of the Court.

21. Counsel for the Society indicated that an order in those terms would meet its concerns. Counsel for Mr. Callanan submitted that no temporal period of this kind should be incorporated into the order, albeit that it does not then at least appear to have been suggested that the High Court had no such jurisdiction to make an order of that kind. The President then indicated that he would not accept such a temporal restriction on the scope of the order:

> "No, I'm going to fully restrain him from practicing as a solicitor for 10 years and thereafter he may, if he wishes, seek the leave of the Court to reassess the situation in terms of a possible limited practising certificate."

22. No further reasons were given by the President for this decision and, in particular, no reasons were given as to why he was departing in such a material way from the earlier recommendations of the Tribunal.

The jurisdiction of the High Court to make a general order restricting a solicitor from practising as such

23. At the hearing of the appeal in this case the principal focus was whether the President had jurisdiction to make an order of this kind under the 1960 Act. As I have already observed, it is true that in the High Court this jurisdictional issue does not appear to have been brought to the President's attention. Since, however, it was a major issue on this appeal, this Court has now alternative but to confront the jurisdictional question since it is clear that an *entirely new jurisdiction* cannot be created by estoppel: see, *e.g.*, *Re Greendale Properties Ltd.* [1977] I.R. 254.

24. The High Court's jurisdiction in respect of such applications under s. 8 of the 1960 Act is, of course, an entirely statutory one. In these circumstances the Court cannot look behind the contours and parameters of the statutory jurisdiction in order to invoke some form of inherent jurisdiction, since the effect of this would be "to trespass on the legislative role of the Oireachtas": see *Mavior v. Zerko Ltd.* [2013] IESC 15, [2013] 3 I.R. 268, 275, *per* Clarke J.

25. What, then, are the limits of the jurisdiction conferred by s. 8(1) of the 1960 Act? It seems to me that, assuming the findings of misconduct are in fact upheld by the High Court, then the function of the Court is confined simply to exercising one of the five options conferred by s. 8((1)(a)(i) of the 1960 Act. These options range from strike-off (I); suspension (II); prohibiting the solicitor practising as a sole practitioner or in partnership for such limited period and subject to such "further limitations as to the nature of his employment" as the Court may provide (III); restricting the solicitor practising "in a particular area of work for such period as the Court may provide" (IV) and censure the solicitor and requiring him to pay a monetary penalty (V).

26. The order as made would seem to suggest that Mr. Callanan would at all times remain a solicitor, even though he would be prevented for a period of ten years from either practising or holding himself out as entitled so to practice. What is striking, however, is that the High Court has been given no statutory power to restrain a solicitor from practising as such for a period of years, even though it is, of course, given an express power to restrict a solicitor from practising in certain areas or as practising as a sole practitioner or in partnership: see s. 8(1)(IV) of the 1960 Act (The separate issue of whether such an order is akin in substance to a suspension order is dealt with later in the judgment).

27. The fact, moreover, that the High Court has been expressly invested only with a limited power to impose restrictions on solicitors practising is in itself a strong indication that the Oireachtas haver contemplated or envisaged that the High Court would enjoy a general power to restrict a solicitor from practice.

28. It should also be recalled that s. 10(1) of the 1960 Act (as amended by s. 19 of the Solicitors (Amendment) Act 1994) expressly vests the High Court with the power to order that a solicitor "whose name has been struck off the roll by an order made by the High Court under s. 8 of this Act…shall be restored to the roll." In *Law Society v. Enright* [2016] IEHC 151 Kelly P. rejected the argument that a strike off had the consigning the solicitor in question to "unemployability in his chosen profession in perpetuity." He added:

> "That is not necessarily so. In some circumstances it is possible for a solicitor who has been struck off to successfully apply for a restoration of his name to the roll. It would be unwise to indicate the circumstances in which such an order might be made, but normally a passage of time would occur subsequent to the strike-off order and other conditions would have to be me. A strike-off order is not in all cases one which continues in perpetuity."

29. In the present case, however, the effect of the order of the High Court restricting the solicitor from practising as such is, in substance, impliedly to freeze the discretion vested in the High Court by s. 10 of the 1960 Act. It has this effect because during the currency of this ten year period Mr. Callanan may not practice or hold himself out as a solicitor, but he nonetheless cannot seek to have the High Court exercise its s. 10 jurisdiction to restore him to the roll of solicitors because he actually remains on the roll of solicitors, albeit that he is restricted from practicing as such.

30. It may be that the High Court would not lightly exercise this statutory discretion – whether in this or in any other case – to

restore a solicitor who had been struck off and perhaps certainly not within a ten year period. That, however, is not quite the point because if the effect of the order made by the High Court was to preclude the future exercise of a statutory discretion by that Court, then such an order would have to be regarded as an error in principle. This in its own way is a further indication that an order of this kind cannot accommodate itself comfortably to the disciplinary structures provided in ss. 8 and 10 of the 1960 Act.

Can the order made by the High Court be equated with an order suspending the solicitor for the purposes of s. 8(1)(II) of the 1960 Act?

31. In fact, the only sub-section which might appear to provide a legislative foundation for the order actually made is sub-section (II) which, as has already been noted, enables the High Court to "suspend the solicitor for such specified period and on such terms as the Court sees fit." It is true, of course, that in many respect an order restricting a solicitor from practice can amount in substance an order suspending a solicitor. In both instances the solicitor remains on the roll of solicitors, but is not free to practice.

32. There are, however, critical differences between the power to suspend under s. 8(1)(II) and the order actually made in the present case. First, it is clear from the wording of s. 8(1)(II) that the suspension order takes effect for a defined period of time so that the end of that defined period of time the solicitor is free to resume practice and to apply for a practising certificate. In the present case, however, Mr. Callanan was required to seek the leave of the High Court before resuming practice even after the ending of the ten year period. A requirement of this kind is inconsistent with the power to suspend as enumerated by s. 8(I)(II).

33. Second, the egregious nature of the admitted offending might well, of course, justify a suspension from practise for a specified period and on terms in accordance with s. 8(1)(II). However, it seems to have been accepted by the Society in the course of argument that to date there has been no order made which has suspended a solicitor for more than two years. Certainly, no such case was referred to.

34. Given the scheme of the Acts and, in particular, the hierarchy of sanctions set forth in s. 8(1)(II) of the 1960 Act, an order of suspension ought to represent a sanction less than a strike off order. The scheme of the Acts suggest that the Oireachtas did not intend that to be the case or that the temporal duration of such a suspension order might approach that of a strike-off order. In such circumstances a suspension order for a ten year duration must be adjudged to be in excess of that which is implicitly permitted by s. 8(1)(III).

35. For all of these reasons, therefore, I consider that the High Court had no jurisdiction to make an order of this kind. To repeat, therefore, the range of options open to the High Court in a disciplinary matter of this kind is confined to those expressly enumerated by s. 8(1) of the 1960 Act. While the order as made might in substance be regarded as a form of suspension order, yet for the reasons stated it cannot be regarded as such for the purposes of s. 8(1)(II) of the 1960 Act. Since an order prohibiting a solicitor from practising for a period of years is not one of these enumerated options, it must follow, therefore, that the High Court had no jurisdiction to make an order of this nature.

The reasons for the decision

36. In these circumstances it is, perhaps, not strictly necessary to address the second ground of objection at any great length. The contemporary case-law is, however, clear that a judge must give sufficient reasons for his decision such that the parties will understand the basis of that decision. As Kelly J. explained when delivering the decision of this Court in *Bank of Ireland Mortgage Bank v. Heron* [2016] IECA 66:

> "For many years the Superior Courts have held that administrative bodies making judicial or quasi-judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 where he said in the context of a decision given by the Planning Board that it:
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> > ". . . must be sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse to the Tribunal that it has directed its mind adequately to the issues before it."
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> ….Given that administrative bodies are required to give reasons for their decisions, no lesser standard can be required of courts exercising judicial functions. [In] *English v. Emery Reimbold and Strick Limited* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409……Lord Phillips M.R. put it succinctly when he said:-
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> > "The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."
>
> The majority of judgments in the High Court are delivered ex tempore. Such judgments cannot be expected to include anything like the same degree of detail as might be expected in a reserved judgment. They do not have to be discursive. But even an ex tempore judgment must comply with the essential requirement identified by Lord Phillips namely, that it should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.
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> The court is sympathetic to the predicament of a High Court judge faced with a lengthy motion list on every Monday of the legal term. The present case was just such a motion listed on Monday the 1st December 2014. But a judge cannot be relieved of the obligation to set out briefly the principal reasons underlying a decision on that account. If a judge is unable to deliver a judgment ex tempore because of the complexity of the facts or legal issues, then judgment should be reserved. But it is never sufficient to do as was done in the present case and merely announce a decision without giving any reasons for it."

37. This reasoning is also apt to capture the facts of the present case. This Court is, just like Kelly J. in *Heron*, sympathetic to the difficulties which doubtless confronted the President when facing a heavy list of professional disciplinary cases on a Monday afternoon. But the obligation to give reasons identified by Kelly J. in *Heron* is fundamental to the proper and fair administration of justice. This is perhaps especially so where, as here, the Court was not only departing in a material way from the considered approach which had been embodied in a careful report from the Tribunal, but it was also making an order which, in itself, was an usual order (quite independently of its jurisdiction to do so). All of this called for the Court to give at least some reasons – however brief and succinct – for its decision.

Conclusions

38. In summary, therefore, I am of the view that the President fell into error in making an order which he had no jurisdiction to make under s. 8(1) of the 1960 Act. He also failed to give adequate reasons for his conclusion, particularly when by making the order which

he did he was departing in a material fashion from the recommendation of the Tribunal itself.

39. In these circumstances, I consider that the Court has no alternative but to allow the appeal and to remit the matter to the High Court for a fresh decision.