Neutral Citation [2015] IEHC 453

THE HIGH COURT

[2015 No. 5 SA]

IN THE MATTER OF PAUL LAMBERT SOLICITOR PRACTISING AS MERRION LEGAL, SOLICITORS AND COMMUNITY TRADE MARK AGENTS, SUITE 12 BUTLERS COURT, 77 SIR JOHN ROGERSONS QUAY, DUBLIN 2.

IN THE MATTER OF THE SOLICITOR ACTS 1954 – 2011

BETWEEN

LAW SOCIETY OF IRELAND

APPLICANT

AND

PAUL LAMBERT

RESPONDENT

JUDGMENT of Kearns P. delivered on the 17th day of July, 2015.

This is an application brought by the applicant in respect of the report of the Solicitors Disciplinary Tribunal proceedings S8776/DT62/11 following an inquiry by the Tribunal into the professional conduct of the respondent which was heard on successive dates between July 2012 and July 2014. On the 5th July, 2012 the Tribunal made findings of professional misconduct against the respondent in the following respects:-

> (a) Failing to ensure compliance with Merrion Legal Services undertaking dated the 17th November, 2006 to register a first legal charge in favour of ICS Building Society over the respondent's property at 9, Dunbo Hill, Howth, Co. Dublin;
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> (b) failing to reply adequately to correspondence from the ICS dated the 30th September, 2009, 8th March, 2010 and 16th February, 2010;
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> (c) failing to reply adequately to the solicitor for the Complaints and Client Relations section of the Law Society in relation to the matter;
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> (d) being in breach of s.3(d) of the Solicitors (Amendment) Act as substituted by s.7(d) of the Solicitors Act 2002 when he allowed a solicitor to engage in practice as a solicitor in Merrion Legal Services (the respondent's firm) when he knew or ought to have known upon reasonable inquiry that a practising certificate was not in force in respect of the solicitor in breach of s.56 of the Solicitors (Amendment) Act 1994.

While the findings of the Disciplinary Tribunal were made in 2012, the issue of penalty was not finally dealt with until July 2014 because of numerous adjournments sought by the respondent on the basis of his assertion that he would be shortly coming into money from which losses suffered by the ICS could and would be made good. This never happened.

The applicant submitted at the hearing in July 2014 that the respondent be struck off the roll of solicitors. It did so having originally submitted that it would be appropriate for the Tribunal to recommend a lesser sanction. However, as the inquiry progressed in this case, the Society formed the view that the respondent solicitor should not be permitted to engage in practice and was on notice that this was the applicant's view prior to the imposition of sanction on the 22nd July, 2014.

As matters transpired, the Tribunal issued a lesser sanction, directing that the respondent be not permitted to practise as a sole practitioner or in partnership, but that he be permitted to practise only 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. The respondent was also directed to pay the costs of the Law Society.

It should be noted, that in making its recommendation as to sanction, the Tribunal had regard to findings of misconduct previously made by the Tribunal in respect of the respondent in January 2014 for failing to furnish an accountant's report in relation to his practice for the year ended the 31st December, 2011, in respect of which said offence he had stood "admonished and advised".

While the respondent is content to accept the sanction imposed by the Tribunal, the applicant contends that, having regard to all of the circumstances of this case, the appropriate sanction is an order striking the respondent from the roll of solicitors.

The applicant has accordingly made submissions to that effect pursuant to s.37 of the Civil Law (Miscellaneous Provisions) Act 2008, which amended s.8 of the Solicitors (Amendment) Act 1960 by providing that the applicant could make submissions to the High Court in relation to:-

> "(a) the opinion of the Disciplinary Tribunal as to the fitness or otherwise of the solicitor to be a member of the solicitors' profession, having regard to the findings of the Disciplinary Tribunal,"

BACKGROUND FACTS

The respondent solicitor was admitted and enrolled on the roll of solicitors on the 29th October, 1999 and practises as the Principal of the solicitors firm "Merrion Legal, Solicitors and Community Trade Mark Agents" at Sir John Rogerson's Quay in Dublin. He is the sole member of that firm though one David Linehan, a qualified solicitor, who intermittently held a practising certificate, also worked in the practice. While neither side furnished precise information as to the respondent's age or circumstances, the respondent appears to be

a single man in his early 40's and the eldest of his siblings. The respondent resides with his mother at 7, Dunbo Hill in Howth.

The applicant received a complaint regarding Merrion Legal by letter dated the 30th April, 2010 from the legal department of ICS Building Society. The complaint related to a solicitor's undertaking dated the 17th November, 2006 provided by Merrion Legal in respect of an advance of €450,000 made to the respondent, and the subsequent failure by the respondent to complete the registration of a first legal charge in favour of the ICS on a property at 9, Dunbo Hill, Howth, Co. Dublin adjoining the private residence of the respondent solicitor's mother. The letter of undertaking was signed by David Linehan and stated bluntly that Mr. Linehan was a partner in the respondent's firm. However, and this is not in dispute, Mr. Linehan did not hold any practising certificate in 2006, nor was he named as a partner in the firm of Merrion Legal in the 2006 Law Directory. Mr. Linehan is not named as an employee in the firm of Merrion Legal Services in the law directories for either 2006 or 2007.

ICS referred the matter to the Complaints and Client Relations section of the Regulation Department of the Law Society who wrote seeking observations from Merrion Legal Services in relation to the complaint. All of this correspondence was opened to the Court and can only be described as an exercise by the respondent in leading both the ICS and the committee on a "merry dance" over a prolonged period of time. For example, by letter dated the 12th July, 2010 the respondent offered the spurious excuse for the non-compliance with the undertaking the false assertion that a boundary dispute affecting the property and involving "four separate neighbours" had arisen. Correspondence also took place between the committee and Mr. Linehan who in August 2010 had to state that he no longer worked for Merrion Legal Services and that any correspondence should be addressed to the firm.

Under the terms of the undertaking in question ICS had advanced to the respondent the sum of €450,000 and the respondent had undertaken to effect a mortgage on 9, Dunbo Hill in Howth as security for the said advance by way of first legal mortgagor charge over the property in question. The respondent further undertook to discharge any existing mortgage balance against the property from the loan monies being advanced. There was at the time a prior mortgagor charge in favour of First Active which under these arrangements was to be "cleared" by the respondent. On the 22nd July, 2014 the respondent indicated to the Tribunal that the entirety of the monies advanced by ICS had been used to purchase investment properties in Ballymun and Balbriggan, but as these purchases were financed by further mortgages from the ICS, the true explanation for what happened to the advance remains even now unclear. What is indisputable, however, is that ICS have suffered the complete loss of the €450,000 advanced to the respondent.

Circuit Court proceedings were commenced against the respondent in October 2010 by ICS claiming possession of 9, Dunbo Hill (which the respondent had bought as an investment; he was residing at the time in 7, Dunbo Hill, his mother's house).

In defending those proceedings, the respondent maintained that the bank had not afforded him the mandated protection of the code of conduct for mortgage lenders to 'residential' owners; were aware that he was awaiting a "substantial payment" in respect of outstanding fees and argued that the matter should simply be adjourned. The bank was successful in the Circuit Court and obtained an order for possession, from which the respondent appealed to the High Court. That appeal was dismissed by O'Malley J. (*I.C.S. Building Society v. Paul Lambert* [2014] IEHC 581) on the 2nd May, 2014. It is interesting to note that the learned High Court Judge (at para. 88) noted that the respondent repeatedly failed to give to the plaintiff a full picture of his financial situation.

This Court has been also advised that separate proceedings have been brought by ICS claiming judgment for the said sum of €450,000 which, as already noted, remains due and owing by the respondent.

The only excuse now offered on behalf of the respondent is that he suffered as a result of the economic downturn in that the property in question, and other properties, were in positive equity and he had hoped that the mortgage would have been paid off as soon as possible had the economic and property crash not taken place. As a result of the crash, the respondent was left in considerable negative equity and was then unable to discharge the mortgage and comply with his undertaking. He admits he did not convey those intentions to the complainant or his failure to clear a prior mortgage over the property in Howth.

The respondent also accepts that it was "wrong" of him to allow David Linehan, "the employee or agent concerned", to sign the undertaking by way of mitigation and in his own defence he states that he has accepted full responsibility for complying with the undertaking and that the complainant suffered no loss which could be attributable either directly or indirectly to the fact that the undertaking was signed by the employee concerned, rather than some other person. On the hearing before this Court, the further explanation offered as to Mr. Linehan's rather odd circumstances was that Mr. Linehan had "disappeared" to France for a year prior to the execution of the undertaking and had not been in touch in any shape or form with the respondent during the period of his absence. This was the 'reason' why the respondent was unaware of the fact that Mr. Linehan had not renewed his practising certificate or kept it up to date. The Court found this purported explanation quite bizarre, given the fact that at all material times the only two solicitors working in the practice were the respondent and Mr. Linehan.

Counsel on behalf of the respondent has submitted to this Court that it should extend deference to the recommendations of the Disciplinary Tribunal and not go further than the Tribunal had recommended in terms of sanction. The Disciplinary Tribunal spent a number of days at hearing and a great deal of further time in deciding the case and had access to all the oral, affidavit and documentary evidence which enabled them to come to a decision which was proportionate and reasonable. What the Society were seeking in the instant case was over and above what was required in upholding the disciplinary system and in striking the correct balance between the reputation of the profession and the rights of the respondent.

RELEVANT LEGAL PRINCIPLES

As previously indicated, the Law Society have brought this recommendation before the Court seeking an order diverging from the recommendation of the Disciplinary Tribunal and seeking instead that the respondent be struck from the roll of solicitors.

Two appeals were in turn brought by the respondent, one raising an issue of alleged bias on the part of the Tribunal, and the second relating to a refusal by the Tribunal to consent to the granting of an adjournment. However, on the hearing before this Court, counsel on behalf of the respondent effectively conceded that the respondent's two appeals were subsumed in the application brought by the Law Society. For his part, the respondent accepts the findings and recommendations of the Tribunal and suggests that the same deference be extended by the Court to the recommendation of the Tribunal as was held to be appropriate in the case of the Medical Council by Charlton J. in the case of Hermann v. Medical Council [2010] IEHC 414. In elaborating why such deference was appropriate in that case, Charlton J. stated:-

> *"Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to relevant precedents and the expert nature of the task undertaken, the High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect. An independent view should be taken as to what ought to be done. Where an error has been made in the context of a sanction which is otherwise appropriate, then it should be corrected. If,*

however, the level of sanction is one which is justified by the material before the Medical Council, then the court would need to find a specific reason for altering it on the evidence presented on the appeal."

In the instant case it was urged on behalf of the respondent that there was no "specific reason" for altering the sanction on the evidence presented.

In terms of severity of sanction, the respondent submitted that four principles for assessing severity of sanction for professional negligence were outlined by Finlay P. in *The Medical Council v. Dr. Michael Murphy* (Unreported, High Court, 29th June, 1994, Finlay P. at p.5) where he said:-

> *"First, I have to have regard to the element of making it clear by the order to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to deter him from being likely, on resuming practice, to be guilty of like or similar misconduct. Secondly, it seems to me to be an ingredient though not necessarily the only one that the order should point out to other members of the medical profession the gravity of the offence of professional misconduct. And thirdly, and this must be to some extent, material to all these considerations, there is the specific element of the protection of the public which arises where there is misconduct and which is, what I might describe as the standard of approach in the practice of medicine. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances."*

It was submitted on behalf of the respondent that in this case reliance can be placed on at least three of these principles. The respondent has been clearly deterred by the lengthy investigation and the recommendations of the Tribunal. He is agreeable to the recommendations which would prevent any further example of such misconduct. The protection of the public is not a major issue in the case and no client funds were misappropriated. The requirement that the respondent practise only under the supervision of an experienced solicitor was in itself a serious sanction and necessarily imposed grave limitations on his future employment prospects.

Turning to the submissions made on behalf of the applicant, the case of *Law Society v. Tobin* [2013] 104SA was referred to as a case in which a solicitor was struck from the roll of solicitors for failing to comply with undertakings that he had provided in his capacity as solicitor in transactions in which he was also the borrower. As this judgment is under appeal to the Court of Appeal, this Court cannot regard it as determinative of the appropriate level of judicial intolerance for such actions by reference to the four principles enumerated in *Medical Council v. Dr. Michael Murphy*.

More relevant is the decision of the Supreme Court in *Law Society v. Carroll and Colley* [2009] IESC 41.

In that case the Law Society was also dissatisfied with the recommendation of the Disciplinary Tribunal, being of the view that the solicitors ought to have been struck off the roll and as a consequence brought a motion in similar terms to the present case. In that case, the complaints involved mixing personal and client accounts, operating undisclosed bank accounts under the name of a company and committing other irregular practices in relation to the requirements of the statutory regulations for the keeping of books and accounts. As found by Geoghegan J. in the Supreme Court, these activities were not carried out with a view to defrauding clients but were a deliberate and elaborate scheme of tax evasion. As in the instant case, the respondents in the latter stages of the investigation made full admissions and settled their affairs with the Revenue Commissioners.

In determining the overall approach of the Supreme Court to the appeal from the decision of the High Court (which converted into a final order the recommendations of the Disciplinary Tribunal), Geoghegan J. stated that the role of that court was confined to considering whether it was open to the High Court Judge to take the view which he did. He noted the factors which the High Court had taken into account which I will here summarise as follows:-

> (a) The ultimate full admissions of the allegations of misconduct;
>
> (b) the retention by the respondents of professional assistance to unravel the events which preceded the discovery of the misconduct;
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> (c) complying with a request to provide interim financial security;
>
> (d) settling their account with the Revenue Commissioners;
>
> (e) taking into account the view of the Disciplinary Tribunal that the two solicitor members were very senior and experienced members of the profession;
>
> (f) the age of the respondents and the unlikelihood of a repetition of the events;
>
> (g) most critically, the consideration that no monies were found wanting in terms of the solicitors being unable to meet their liabilities;
>
> (h) the passage of time between the decision of the tribunal and the hearing in the High Court during which time one of the respondents had continued practising with a practising certificate.

At the conclusion of that case in the High Court McKechnie J. stated as follows:-

> *"The ultimate test is whether or not, I feel, that if this court were to impose by way of final and order and sanction the recommendations of the Disciplinary Tribunal, would that be sufficient in terms of maintaining public confidence in the solicitors' profession as well as doing justice to the solicitors in question and also upholding the good name of the Law Society. I think on balance it would."*

Counsel for the applicant states that while many of the factors enumerated above are also present in the instant case, the critical difference is that €450,000 has "gone missing", that is to say, the sum advanced by way of loan to the respondent. Not only is the money gone, but ICS do not have a first legal charge over 9, Dunbo Hill in Howth.

CONCLUSION

While the decision of the High Court in the case of *Law Society v. Carroll and Colley* was ultimately a "marginal call", it is undeniable that McKechnie J. was of the opinion that if client funds had gone missing, he would have struck both solicitors off.

In this instance funds were advanced by way of loan by the ICS to the respondent on foot of an undertaking which has been totally dishonoured. Undertakings are critical to the proper functioning of the solicitors' profession. They are outward manifestations of its probity, honesty and reliability. They are the currency of the professions integrity. For this reason the Court regards breaches of undertakings as being matters of the utmost gravity, as they put public trust in the solicitors' profession at serious risk. This is such a case, all the more so as the solicitor was borrowing on his own behalf and was solely and exclusively to blame for the breach. This is not a case of a solicitor being "let down" by a client in an unexpected manner.

Furthermore, the manner in which the undertaking was executed gives rise to other serious concerns. The person who executed the undertaking in the respondent's practice had no practising certificate. The Court finds the explanation for the manner of the execution of the undertaking in such circumstances by Mr. Linehan to be totally lacking in credibility. Whatever about a larger firm, it is in the view of this Court inconceivable that in a two person firm, the principal would not know either the whereabouts of his so-called partner over the period stated or that that person had failed to renew his practising certificate. Indeed it is hard to believe that he had been totally out of contact with the office until virtually the time when he reappeared and saw fit to append his name to this document. It is an aggravating factor in this case which was lacking in the *Carroll and Colley* case. Furthermore, and this is not disputed by counsel for the respondent, the solicitor in question was in default of his other obligations as a solicitor in that he failed to furnish to the Society an accountants report for the year ended the 31st December, 2011.

The Court has taken into consideration all of the mitigating circumstances relied upon by Mr. McCarthy, senior counsel for the respondent, including the 'personal matters' alluded to in the affidavits sworn by the respondent. However, the circumstances outlined above when considered in conjunction with the manner of his response to correspondence from the ICS and with the Complaints and Client Relations section of the Law Society, exacerbated by his failure to honour promises made to the Disciplinary Tribunal to make good the shortfall in funds, are further aggravating features which ultimately leave the Court, notwithstanding the deference which it extends to the Tribunal, to accept the recommendations of the Law Society in this matter and to direct that the respondent be struck from the roll of solicitors.