THE HIGH COURT

[2016 No. 7SA]

IN THE MATTER OF FACHTNA O'DRISCOLL SOLICITOR PRACTISING UNDER THE STYLE AND TITLE OF FACHTNA O'DRISCOLL SOLICITORS AT 9, SOUTH MALL, CORK AND IN THE MATTER OF THE SOLICITORS ACT 1954 – 2011

BETWEEN/

FACHTNA O'DRISCOLL, RICHAEL O'DRISCOLL AND KIM WALLEY

APPLICANTS

AND

LAW SOCIETY OF IRELAND

RESPONDENT

***Extempore* Judgment of Mr. Justice Kelly, President of the High Court delivered on the 15th day of February, 2016**

On the 1st February of this year I made an order on consent. The terms of the order are as follows:-

> "By consent it is ordered that pursuant to section 48(3) of the Solicitors Act, 1954 as amended by section 55(2)(b) of the Solicitors (Amendment) Act, 1994 that the practising certificates issued by the respondent Law Society to Fachtna O'Driscoll and Richael O'Driscoll for the practice year 2013 and bearing the date of 11th February, 2013 be in force as and from the 1st January, 2013 and that the Registrar of Solicitors do enter in the register of practising solicitors a note of the 1st January, 2013 in respect of the practising certificates already issued to those solicitors."

Second, I ordered that the practising certificates issued by the respondent to Michael A. Barron for the practice year 2013 and bearing the date of 11th February, 2013 should be in force as and from the 1st January of that year and that the Registrar of Solicitors enter into the register of practising solicitors a note of the 1st January, 2013 in respect of the practising certificates already issued to Michael Barron.

Third, I ordered that the practising certificates issued by the respondent to Fachtna O'Driscoll and Richael O'Driscoll and Kim Walley for the practice year 2015 and bearing the date of the 13th February, 2015 be in force as and from the 1st January, 2015 and that the Registrar of Solicitors enter in the register of practising solicitors a note of the 1st January, 2015 in respect of the certificates issued to those solicitors.

Those orders were made by consent and the question of costs was stood over until today so as to allow me an opportunity to hear detailed submissions from both sides and to adjudicate upon that issue. Written submissions were in fact provided by both sides and I have had the opportunity of considering them.

The first thing to note is that the solicitors who made the application for these orders are by their own admission in default in relation to their obligations to apply for a practising certificate in timeous fashion. That is something that happens from time to time. It is accommodated by the various statutory provisions and the statutory instruments which have been made under the relevant legislation. It does not happen all that often because I am told that in excess of 99% of solicitors apply for their practising certificates on time. Thus they never have to make an application of this type. When such an application becomes necessary two statutory provisions fall to be considered on the question of costs.

The first is s.48 of the Solicitors Act 1954, as amended. That provides that the President of the High Court, formerly the Chief Justice, may on application made to him in that behalf, direct that on payment by the applicant to the Society a sum of such amount as may be fixed by the President of the High Court, a practising certificate which bears a date later than the 5th February, shall either unconditionally or subject to specified conditions, be in force as on and from a specified date. That subsection identifies a sum of money which can be fixed by the court as a condition of the concessionary order being made.

The second statutory provision is that contained in s.25 of the Solicitors Amendment Act 1960, as amended. That provides for a jurisdiction being exercised by the President of the High Court in respect of costs. It provides that an order made on any application or appeal to the President of the High Court under the principal Act as amended, may contain such provisions as to costs as the President considers proper. I read that as concerning itself with legal costs and I read the provision which is contained in s.48 of the 1954 Act, as amended, as dealing with something different, namely administrative costs which may be identified by the President of the High Court and require to be paid.

Over the years it is clear that applications of this sort are made on a fairly frequent basis despite the fact that in excess of 99% of solicitors never have to avail themselves of it. It seems clear that during the time of Mr. Justice Johnson's presidency of the High Court he fixed costs to be paid by an applicant at €350. He measured costs at €350 to be paid by each applicant in respect of each practising certificate which was sought to be backdated. From the sample order which was read to me by Ms. Fenelon it appears that that sum was attributable to the legal costs to be paid on such an application. In other words, the orders were made under the provisions of s.25 of the 1960 Act. Such orders do not appear to me to address the liability that may arise under s.48 of the Solicitors Act of 1954.

The practice of Mr. Justice Johnson continued throughout his presidency and was apparently continued by my immediate predecessor, Mr. Justice Kearns. The practice has been mentioned in various practice notes that have been issued by the Law Society over the years. For the first time ever it appeared as part of the Regulations made under the Solicitors Acts in 2014 in S. I. No. 561 of 2014. Under Rule 4(g) one finds the following:-

> *"If a solicitor's practising certificate is dated after the relevant date and that solicitor has provided legal services in that calendar year before the date of the practising certificate an application shall be made by that solicitor to the President of the High Court to have his or her practising certificate backdated to 1 January of that year, or the date on which the solicitor commenced providing legal services. The Society shall be entitled to seek €350 in costs from each solicitor who*

applies to have his or her practising certificate backdated in accordance with this Regulation 4(g).”

The applicants complain that there is no entitlement to specify that sum of €350 in the statutory instrument because there is no authority to do so. It elevates what has become the practice of the court into, in effect, a demand by the Law Society that that sum has to be discharged.

The second complaint which they make (and I think it is probably a combination of the two issues that gave rise to a feeling of some annoyance), is the way in which correspondence was dealt with by the Law Society. Particular complaint is made that the relevant committee of the Law Society, unknown to the solicitors, became involved. That matter is addressed in the affidavit of Fachtna O’Driscoll, particularly at paragraph 16 onwards.

I think it was unwise of the Law Society to specify the amount of €350 in the statutory instrument and in particular at Rule 4(g) thereof. It has to be said that the wording merely indicates an entitlement to seek the costs rather than an entitlement to the costs. However, perhaps it was unwise to specify a particular sum. The €350 was merely a sum fixed by the court which in practice has continued but it is not something that is written in stone. The court could, if it wished, measure the costs at a sum either in excess of or less than that in any particular case. So it would be better when the Law Society is contemplating the next set of regulations to merely indicate that it will be entitled to seek its costs without specifying a sum. It is contended by the applicants that the Law Society has incorrectly transmuted its entitlement to seek costs into an actual demand for €350 in respect of each solicitor for each practising certificate and that this is impermissible. That contention is correct.

I am not at all sure that this objection is going to be of general benefit to solicitors who are in default because this application has now focussed and brought the attention of the Law Society to the fact that it is under the relevant statutory provisions, entitled to apply for two sums of money. First are the costs provided for under the 1960 Act and s.25 in particular, and second the sum by reference to s.48(3), as amended. Heretofore the Law Society has been content with exclusively legal costs and has not sought any administrative costs by reference to section 48(3) of the Solicitors Act 1954.

The entitlement of the Law Society to seek €350 or indeed any other sum for costs is clearly established. I think a fixed €350 would in the sort of example that I raised with Ms. Fenelon give rise on occasions to an entirely disproportionate sum being payable by the Law Society. I took an example of a partnership of X number of solicitors, one of whom is charged with the responsibility of ensuring that the practising certificates are up to date. Default takes place and all X number of solicitors then find themselves as applicants for retrospection to be given to their practising certificates. It would, I think, result in some circumstances where the court could not possibly justify an order for €350 costs per solicitor per practising certificate. It could give rise to a possible injustice and a disproportionate sum being paid to the Law Society in circumstances where the amount of work is very limited and where a single appearance is called for. Indeed, Mr. Sreenan S.C., goes further and says that if there is no objection by the Law Society to the order sought then all that need be done is that a letter of consent be forthcoming and that the matter can be dealt with by the court on that basis. It is entirely a matter for the Law Society as respondent as to whether it wishes to appear or not but the practice to date has always been to appear in court on an application of this sort so as to indicate consent through its representative rather than simply through a letter being exhibited in an affidavit and put in evidence in that fashion.

Insofar as this case is concerned, I note that the application of the Law Society is for the sum of €350 costs per solicitor per practising certificate. It has not made any application for the payment of any moneys pursuant to s.48(3) in respect of administrative expenses.

Turning then to the facts of this case, I know that there are three solicitors who are named as applicants and that the order which I made was in favour of four, that is, Fachtna O’Driscoll, Richael O’Driscoll, Michael A. Barron and Kim Walley. So, there are four solicitors in all and the practising certificates are in respect of the years 2013 and 2015. I think that it would be disproportionate in this case to measure costs of €350 per solicitor per practising certificate. The work of ascertaining whether there is a basis for objecting, and the actual appearance in court is largely the same for each solicitor and practising certificate. I think that the appropriate order to make here is that there should be an entitlement to recover €350 in respect of each solicitor but not in respect of each practising certificate for each year. Consequently I will measure the costs at €350 per solicitor. That is the order that I propose to make.

I am sure the Law Society will take into account the observations that I have made concerning the inadvisability of specifying a specific sum in the statutory instrument. It is, I think, sufficient if it indicates that it will seek costs but without specifying a sum because that transmutes what has been a sensible practice of the court into a statutory demand. It could well be that in an individual case a sum either greater or less than that would be fixed by the court. The jurisdiction to do so is that of the court and not the Law Society.