

THE HIGH COURT**[2013 No: 62SA]****IN THE MATTER OF THE SOLICITORS ACTS 1954 - 2011****BETWEEN****LAW SOCIETY****APPELLANT****AND****JOHN G. HAYES****RESPONDENT****JUDGMENT of Kearns P. delivered on the 9th day of December, 2013**

By notice of motion returnable 24th June, 2013 the Law Society ("the appellant") is appealing against a finding of the Solicitors Disciplinary Tribunal ("the Tribunal") of 8th May, 2013 that there is no misconduct on the part of the respondent solicitor John G. Hayes in respect of the complaint that he failed to file his accountant's report for the year ended 31st October, 2009 within six months of that date in breach of Regulation 21(1) of the Solicitors Accounts Regulations 2001 S.I. 421 of 2001.

There is no affidavit on file on behalf of the Solicitors Disciplinary Tribunal.

BACKGROUND

The respondent solicitor John G. Hayes carried on a solicitor's practice for a period of sixteen years and ceased practise in early 2010 primarily due to the increase in professional indemnity insurance. The respondent was referred to the Tribunal by the Regulation of Practice Committee ("the Committee") by reason of his failure to file his accountant's report for the year ended 31st October, 2009 within six months of that date and for his failure to file his closing accountant's report having ceased practice in early 2010. The matter came before the Tribunal on 23rd August, 2011, a separate division of the Tribunal on 15th November, 2011, and 25th September, 2012. On 11th April, 2013 another division of the Tribunal met and granted leave to the applicant Society to withdraw the second complaint regarding the closing accountant's report in respect of the Solicitor's former practice. The solicitor filed his accountant's report for year ended 31st October, 2009 18 months late on 13th October, 2011 and the Tribunal in its decision of 8th May, 2013 found that the respondent solicitor's failure to file this report on time did not constitute misconduct.

The Tribunal found that there was no misconduct on the part of the respondent in relation to the complaint for the following reasons:

- i) the absence of the relevant judgment of the High Court or a note thereof, referred to by Ms. Fenelon, Law Society Solicitor, to support the legal point she was making in her submissions when urging the Tribunal to make a finding of misconduct; and
- ii) the Tribunal viewed the particular circumstance of this case as unusual as they were of the view that the respondent solicitor had made reasonable attempts to comply with the Regulation, however, he was unable to do so because he did not have sufficient money to pay his accountant to produce the Accountant's Report.

AFFIDAVIT OF THE APPELLANT

In the affidavit of John Elliot for the Society which was filed on 23rd May, 2013, Mr. Elliot avers that the facts were admitted and proven. He points out that in June 2004 the Regulatory Review Task Force published a report into its investigation of the regulatory regime of the Society. Part 5 of the Report addresses the failure of solicitors to comply with the accountant's report requirement as something that needs to be "tackled vigorously as a matter of urgency (5.3)" and that the requirement that a report be filed within six months of the accounting year be "enforced strictly (5.6)". Mr. Elliot states that effective regulation of the financial regularity of solicitors' practices, particularly through Regulation 21 (relating to the reporting accountant's report), is a key element in the protection of clients and in the public interest in the protection of clients. Since the Publication of the report, Mr. Elliot states that there has been considerable improvement in the level of compliance by solicitors in filing accountant's reports and that 99% of firms now submit their reports on time. He avers that the Society takes a serious view of the conduct of any solicitor in failing to comply with their obligation to file the accountant's report.

AFFIDAVIT OF THE RESPONDENT

In the affidavit of the respondent which was filed on 18th June, 2013 Mr. Hayes avers that he has always been diligent in complying with Regulation 21. In relation to filing the report for the year ending 31st October, 2009 he avers that in accordance with his normal practices his books and accounts were fully prepared and in order, however, he was under considerable pressure in both his personal and professional life which led to his decision to wind down his practice. He goes on to detail these personal issues as follows: in June 2009 his brother with whom he was close died of cancer; in August 2009 his partner's daughter was killed in a road traffic accident; in October 2009 his elderly mother had a serious fall in which she broke her arm; and in November 2009 she was diagnosed with the early stage of Alzheimer's. However, he cites the significant increase in his indemnity premiums as the main reason for the eventual closure of his practice.

While the respondent was aware of his obligations to file an accountant's report he avers that he now found himself in an entirely new set of circumstances in that he was closing his practice. He claims that he was uncertain of what procedures to follow in going about the proper and orderly wind down of his practice and adds that he needed assistance. The respondent outlines his concerns regarding his responsibility towards his clients and staff redundancies. He avers that he spoke to colleagues but none of them had experience of an unplanned closure, he also rang the Solicitor's Helpline, and was referred by a colleague to a local Law Society representative who

gave him considerable help but the applicant did not discuss his year-end report with him as he did not think it necessary. In late January 2010 he rang the Law Society to inform them of his decision to close his practice and subsequently wrote to the Society by letter dated 2nd February, 2010 to advise of same.

The Society responded by letter of 29th January, 2010 and at para. 3 refer to a Closing Accountants Report. Mr. Hayes avers that this was the only reference to any accountant's report and that he believed that the accountant's year end report was not necessary and that only a closure report was necessary. The first notification from the Society informing him that he needed to file an annual reporting accountants report for year ending 31st October, 2009 was the letter of 15th July, 2010. The respondent solicitor replied to the Society on 3rd August, 2010 to inform them of his position that he owed he accountant fees of almost €8,000 and that he did not have the means to discharge these fees. At the time he was not working and he was (and still is) in receipt of a weekly allowance payment from the Department of Social and Family Protection. In addition, his son was commencing his first year of college and this added to the financial pressure.

He avers that he felt that the Society was adopting a defensive attitude towards him rather than engaging with him and comments that the society was telling him what he could not do rather than advising him. He was called before the Regulation of Practice Committee of the Society on 9th September, 2010 which he attended and a stay was placed on the referral and he was given three months to file a report. On 15th November, 2011 he represented himself before the Tribunal as he could not afford a solicitor. A sum of €5,000 had become available to him which he used to pay his accountant, who in turn prepared the necessary report which was filed on 13th October, 2011 in advance of the hearing.

The applicant avers he has remained in direct contact with the Society throughout and has always been co-operative. He states that he technically filed his accounts report outside the time but that it was neither intentional, nor reckless but arose out of a situation of exceptional circumstances – his inability to discharge his accountant's fees. He asks the Court to take into consideration his personal circumstances and to hold that the finding of no misconduct by the Tribunal is correct.

DECISION

Regulation 21(1) of the Solicitors Accounts Regulations 2001 S.I. 421 of 2001 provides that:

"A solicitor shall ensure that there is furnished to the Society not later than six months after his or her accounting date in each practice year, or within such further period as the Society may in writing permit, a report signed by the solicitor's reporting accountant in the form set out in the Second Schedule to these Regulations or in such other form as may be expressly approved in writing by the Society in particular circumstances (in these Regulations referred to as a "reporting accountant's report")."

The Court has been asked to enforce Regulation 21(1) strictly in light of the Task Force Report and states that a finding of misconduct should have been made given the solicitor's admission. Mr. Eliot, in his affidavit, draws attention to the Regulatory Review Task Force Report of 25th June, 2004 which highlights the importance of the obligation to file an accountant's report within six months of the end of the accounting year. While the Report does state that the requirement to submit an accountant's report within six months of the end of the accounting year should be "enforced strictly", one must remain cognisant of the fact that this report was published in 2004 at a time when according to the report itself 10% of firms failed to meet the deadline. Mr. Elliot avers that the situation has since changed with 99% of firms nowadays submitting their reports on time. The Court does not disagree that this obligation should be "tackled vigorously". The issue is and must be taken extremely seriously, however, regard is to be given to the particular circumstances of each case especially in a situation where the filing of a report has been rendered extremely difficult and where every reasonable effort has been made on the part of the solicitor to comply with his or her obligation. In the present case, I am satisfied that the respondent has made every effort to comply with his obligation under Regulation 21(1). Despite the numerous difficult personal issues faced by the respondent he endeavoured to seek advice and keep the Society informed of this progress as is evidenced from the correspondences exhibited. Moreover, the respondent was faced with an unfortunate situation where he owed almost €8,000 in accountant fees and in spite of his difficult financial situation he appears to have prioritised the payment of these monies in order to allow for the filing of the report. He avers that when fees in the sum of €5,000 became available to him he used them to pay his accountant. This demonstrates to the Court that the respondent was attempting in earnest to comply with his obligations and that his failure to file the accountant's report within the period allowed was neither intentional nor reckless.

Having carefully reviewed all of the papers before me, including the affidavits, transcripts of evidence and the finding of the Tribunal inquiry, I am of the opinion that the appellant has not made out a sufficient case as to why the Court should allow the appeal against the findings of the Tribunal. I cannot, therefore, go as far as finding from the evidence before me that the Tribunal erred in its findings. Consequently, I am satisfied that the findings of the Tribunal of no case of misconduct on the part of Mr. Hayes were entirely appropriate and that the within appeal fails.

I therefore dismiss the appeal with no order as to costs.