THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 971 JR]

BETWEEN

JOHN F. CONDON

APPLICANT

AND

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

AND

LAW SOCIETY OF IRELAND

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 27th day of April, 2012

In these proceedings the applicant seeks to judicially review a decision of the Solicitors Disciplinary Tribunal (hereinafter "the Tribunal") made on 3rd May, 2011 whereby the Tribunal decided to recommend to the High Court that the applicant, a solicitor, be not permitted to practise for six months and thereafter be not permitted to practise as a sole practitioner or in partnership and ordered him to pay a fine of €2,000.

The background facts are not really in dispute. Mr. Condon had acted on behalf of Mr. Sandy Perceval who had decided in 2000 to gift a site at Ballymote in Co. Sligo to Mr. Paul Gunton and his wife Mrs. Cicely Gunton, who is a sister of Mr. Perceval. A deed of conveyance was drawn up for that purpose and, following its execution by the Guntons, was returned to the applicant's firm for stamping and registration. Despite repeated requests by the Guntons for the stamped deed, it took Mr. Condon nine years to deal with the matter and his delay, for which he accepts responsibility and blame, caused significant distress to the Guntons. They ultimately made complaint to the Law Society through their solicitors, Messrs. Johnson & Johnson, in respect of the applicant's failure to stamp and register the deed.

On 24th March, 2009 the Law Society informed the applicant of its intention to refer the matter to the Complaint and Client Relations Committee and later, when it felt the applicant was not being co operative, informed the applicant of its intention to apply to the High Court for an order directing the applicant to respond to correspondence from the Society. This Court made such an order on 20th April, 2009.

At all times the applicant maintained that the complainants were not his clients. Although at its meeting on 4th September, 2009, the Committee appeared to accept that the Guntons were not and never had been clients of the applicant, there was further discussion at the meeting of 9th October, 2009 as to whether in fact they were clients. In any event the Committee decided on 9th October, 2009 to refer the applicant to the Disciplinary Tribunal and wrote to the applicant setting out the issues it had determined to be referred to the Tribunal for an inquiry.

The issues referred for inquiry amounted to seven complaints made by the notice party as follows:-

> "(a) The applicant failed to respond to repeated letters and calls from Mr. and Mrs. Gunton in a timely manner or at all;
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> (b) He misled the Guntons by allowing them to believe that they were his clients and failing to advise them that this was not his view of the matter;
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> (c) He failed to take any steps to disabuse the Guntons of their belief that he was dealing with the matter for them and on their behalf since 19th April, 2000;
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> (d) He allowed the complainants' solicitors to think that he was proceeding with the stamping of the documentation when he was taking no steps to do so;
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> (e) He failed to reply satisfactorily to the Society's correspondence and in particular the Society's letters of the 19th February 2009, 4th March 2009, 11th March 2009, and 15th May 2009 in a timely manner or at all;
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> (f) He failed to respond satisfactorily to numerous letters from the complainant."

It should be noted at this point that the various complaints do not contain an allegation of failure to provide adequate professional services to clients. On the contrary, the clear import of the second complaint was that the Committee did not regard the Guntons as being clients of the applicant. Indeed it is difficult to see how they could have done so, given that the Guntons had their own separate firm of solicitors.

Following a preliminary hearing at the end of September 2010, the Disciplinary Tribunal proceeded to hear the case on 14th April, 2011, making its order on 3rd May, 2011. In the course of his remarks at the conclusion of the hearing before the Tribunal, the chairman stated as follows:-

> *"This is one of the worst cases of misconduct that has come before the Tribunal and is exacerbated by the apparent*

total lack of concern by the respondent towards the treatment meted out by him to Mr. and Mrs. Gunton over the nine years they were unfortunately involved with him. There is no excuse for his callous behaviour towards his clients."

At all material times during the hearing before the Tribunal the applicant maintained that the Guntons were never in fact clients of his. That said, it is important to acknowledge the applicant's admission in the lengthy affidavit placed before this Court that he fell well short of the standards he himself believed appropriate for a solicitor dealing with the Guntons as members of the public with a particular interest in the matter which they had been pressing him about.

In its report dated 3rd May, 2011, the Tribunal found that there had been no misconduct on the part of the applicant in respect of the second complaint because the Tribunal found as a matter of fact that Mr. and Mrs. Gunton were clients of the applicant. Rather oddly, the report went on to state that *"if the respondent solicitor was of genuine belief that they were not* [clients] *he was under a positive duty to so inform them that they were not his clients"*.

The Tribunal found there had been misconduct on the part of the applicant in respect of all the other complaints by reason of the evidence adduced at the hearing before it and made the following recommendations:-

"(i) That the respondent solicitor be suspended from practice for a period of six months;

(ii) that the respondent solicitor not be permitted to practise as a sole practitioner or in partnership and 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 ten years standing to be approved in advance by the Law Society of Ireland after the expiration of his period of suspension;

(iii) that the respondent solicitor pay the sum of €2,000 as restitution to Mr. and Mrs. Gunton;

(iv) that the respondent solicitor pay the whole of the costs of the Law Society of Ireland, including witness expenses, to be taxed by a taxing master of the High Court in default of agreement."

In making its recommendation as to sanction, the Tribunal had regard to a previous finding of misconduct made against the applicant solicitor on 18th May, 2010.

Thereafter in June 2011 the applicant issued a notice of appeal against the decision but did not serve it on the Law Society. Later in the same month the Law Society issued a motion to this Court by way of confirmation proceedings in respect of the recommended penalties. This prompted the applicant to serve his notice of appeal on the Law Society. Both matters were then adjourned to 10th October, 2011.

On that date the applicant indicated that he intended to bring a judicial review in respect of the determination of the Tribunal made on 3rd May, 2011.

While counsel for the Law Society has objected to the lateness of the judicial review application, I am satisfied it was brought within the outer limits of the time then available under O. 84 for bringing such an application. That said, the lateness of the application, particularly in the context where an appeal has been brought by the applicant, must bear heavily with the Court in terms of how it should exercise its discretion to grant relief of any sort to the applicant in this case.

In the context of his appeal, the applicant contended that the findings of the Tribunal were not reasonable on the basis of the evidence adduced and further that the penalties recommended were excessive.

In an earlier notice of motion seeking to rescind the finding and decisions of the Tribunal, the applicant also relied on grounds, *inter alia*, that the Tribunal had wrongly held that persons not clients of the applicant were in fact clients of his in contradiction of the statement of charge before the Tribunal. He further contended that the Tribunal misdirected itself in holding that the applicant was obliged to disabuse persons who had never stated that they considered themselves to be clients of the notion that they were clients. He further submitted that the Tribunal wrongfully took into account an irrelevant consideration in deciding on penalty, namely, that there has been a previous finding against the applicant on 18th May, 2010. He contended that the finding in question was also under appeal.

The grounds of complaint in the context of the judicial review application are more fully elaborated in the submissions made before this Court.

SUBMISSIONS

Counsel on behalf of the applicant submitted that his case was essentially a very simple one, based on the proposition that a person who is subjected to a disciplinary process on specific charges should not at the conclusion of the process be convicted and penalised on the basis of some other charge not specified.

In the instant case the charges had been formulated on the basis that Mr. and Mrs. Gunton were not in fact clients of the applicant but had been allowed to believe that they enjoyed such a relationship with him, notwithstanding that they had their own firm of solicitors.

The remarks of the chairman at the conclusion of the hearing and the sanction imposed demonstrated that in the course of the hearing the Tribunal had switched tack and had in its final resolution and decision treated the applicant as though the Guntons were his clients and imposed an extremely severe penalty on the basis of that finding. The applicant had no prior notice that such a case would be made and to conduct and conclude the inquiry in the manner which had occurred was thus tantamount to a breach of fair procedures.

The applicant was essentially operating a one man solicitors practice and the penalty which had been imposed would put him out of business. Through counsel, the applicant indicated that if the Tribunal decision were to be quashed and the matter remitted back to the Tribunal for consideration of penalty on the basis that the Guntons were not in fact clients then the applicant would be content with such an outcome. Contrary to suggestions advanced on behalf of the Law Society, the applicant had no wish to engage in endless litigation and appeals.

While this was a telescoped hearing of the leave application for judicial review, an anticipatory statement of opposition was filed on behalf of the Law Society in which it was stated at para. 7 (ii) that, regardless of the issue as to whether the persons were or were

not formally his clients, the manner in which he treated them was below an acceptable standard and it was that conduct that formed the allegations of misconduct that he faced.

On behalf of the respondent it was submitted that the applicant lacked any merits in the context of what had occurred. He had been asked on very many occasions by Mr. Gunton to expedite matters and had failed to respond to those requests, ultimately only arranging to have the deed stamped after extensive intervention by the Law Society.

While accepting that it was a well established requirement of natural and constitutional justice that a person brought before a decision making body is entitled to prior notice of the case made against them, the applicant had received details in writing of the precise charge being made and the basic facts alleged to constitute the alleged offence. He was allowed to be represented by someone of his choice and was informed in sufficient time to enable him to prepare his defence. He was fully aware of the rules governing the procedure of the Disciplinary Tribunal, was able to hear the evidence against him, to challenge that evidence on cross examination and to present his own evidence.

In the context of its decision making process the Tribunal arrived at the view that it was necessary for it to make a finding of fact in respect of the question as to whether or not the Guntons were clients of Mr. Condon's practice. They found that they were indeed clients of the practice.

It was accepted that this question was not one of the complaints made against the applicant for the very simple reason that it could, of itself, never have been the subject of a complaint. The Tribunal's conclusion that the Guntons were the applicant's clients was not a finding on a complaint. The Tribunal was entitled to decide what matters they needed to decide in order to adjudicate upon the complaint. Furthermore, the applicant was given an opportunity to respond in respect of that particular issue on a number of occasions. In the course of the present hearing, he had not identified with particularity any manner in which he was prejudiced by the fact that the status of the Guntons was not put to him as a complaint or by the fact that he was not given express notice that the Tribunal intended to make a finding of fact in this regard. He had made reference to not bringing his conveyancing file with him to the hearing and had claimed that, if he had known that his relationship with the Guntons was an issue, he would have done so. However, the applicant had not identified any document in that file that would have been of relevance in terms of demonstrating any prejudice.

Furthermore, insofar as the granting of relief is a matter for the court's discretion, it should be noted that the applicant had accepted in his lengthy affidavit that the length of time which he took to deal with this simple matter was unacceptably long.

In conclusion counsel for the respondent submitted that no breach of fair procedures had been made out such as to warrant the intervention sought on behalf of the applicant.

DECISION
For the purpose of dealing with this matter, I am satisfied that I need only refer to several decisions which seem to me to be of particular relevance. In *Flanagan v. UCD* [1988] I.R. 724, a decision by a university disciplinary committee to suspend a student for one year on the ground of plagiarism was quashed by the High Court and in the course of his judgment Barron J. stated:-

> *"The applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence. She should equally have been allowed to be represented by someone of her choice, and should have been informed, in sufficient time to enable her to prepare her defence, of such right and of any other rights given to her by the rules governing the procedure of the disciplinary tribunal. At the hearing itself she should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence."*

The importance of this entitlement in the context of a solicitors disciplinary hearing was emphasised by Herbert J. in *McMahon v. Law Society of Ireland and The Solicitors Disciplinary Tribunal* [2009] IEHC 339 when he stated:-

> *"... the applicant remained entitled as a matter of fair procedures not to be put to the hazard before the Solicitors Disciplinary Tribunal without receiving the very minimum basic protections which I have identified, that is, be informed that the committee proposed to look into the question of possible general misconduct on his part; to be advised of any matter which the Committee perceived as constituting misconduct on his part, to be permitted reasonable time to consider and to take advice and, to be permitted - orally or in writing at the discretion of the Committee - to address the matter or those matters, before a decision was taken by the Committee whether or not to seek an inquiry by the Solicitors Disciplinary Tribunal."*

O'Sullivan J. in *Banks v. Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416 held that *"[i]n order to make meaningful representations, the claimants had to be told what concerns they had to answer".*

Similarly, in *Mooney v. An Post* [1998] 4 I.R. 288, Barrington J. held that a person against whom charges are made is at *"the minimum ... entitled... to be informed of the charge against him and to be given an opportunity to answer it and make submissions"*.

This case was cited with approval by Clarke J. in *Atlantean v. Minister for Communications and Natural Resources* [2007] I.E.H.C. 233 in which he stated as follows:-

> *"That any party who is entitled to the benefit of procedures complying with the rules of constitutional justice is entitled to know the case against him cannot be doubted. However it is also well settled that the precise application of the rules of constitutional justice depends on all the circumstances of the case under consideration. In that context the Minister places particular reliance on* Mooney v. An Post *[1988] 4 I.R. 288. While Mooney was concerned with a purported dismissal from employment, the general principles are, in my view, also applicable to a case such as that with which I am concerned.*
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> *Barrington J. (speaking for the court) indicated the following general approach:-*
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> > *'The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with all the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable at all in certain cases. As the learned trial judge has pointed out the principle of* nemo iudex in sua causa *seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the*

principle of audi alteram partem *which implies the existence of an independent judge who listens first to one side and then to the other.'*

Barrington J went on to note that it was certain that 'the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and circumstances surrounding his proposed dismissal. The minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and make submissions'."

It is clear from the case of *O'Laoire v. The Medical Council* (Unreported, High Court, Keane J., 27th January, 1995) that there is a difference between acts and omissions which would be infamous or disgraceful, no matter who was responsible, and those acts and omissions that would not be infamous or disgraceful if the responsible person was not a registrant, but which would be regarded as infamous or disgraceful if a registrant does them. In other words, a "professional specific" ground of misconduct reflects the reality that professional persons must, if the profession itself is to be trusted and well regarded, be held to a higher standard than non-professionals. The issue therefore as to whether or not the complainants were or were not clients of the applicant seems to me to be critical in determining whether or not there was professional misconduct and, if so, the extent of such misconduct. It is also critical in my view to determine the appropriate sanction.

I do not believe it is acceptable for any prosecuting authority to adopt an approach of retro-fitting charges and sanctions depending on the manner in which the evidence plays out. By way of illustration, a charge of driving without due care and attention could on some such basis morph into a charge of dangerous driving, or a charge involving an unlawful killing could become murder instead of manslaughter. Having regard to the significance of the penalty imposed upon the applicant in this case (and in this regard I accept the submissions of counsel for the applicant that the penalty actually imposed will put him permanently out of practice) it seems to me that fair procedures necessarily involved a clear formulation of charges in advance of the presentation and hearing of the case. I appreciate that the status of the Guntons as clients or otherwise could not be a ground of complaint in itself, but the consequences of a finding of fact to the effect that they were clients was something which forseeably would resonate in any sanction imposed. It was also foreseeable that any sanction to be imposed in such circumstances would be significantly greater.

It seems to me undeniable that the applicant went into this process on one particular basis and emerged from it at the other end on a completely different basis, that is to say, being punished on the basis that the Guntons were in fact his clients. I do not agree with the proposition implicit at certain points in the affidavit of Ms. Linda Kirwan filed on behalf of the Society which effectively elided the difference in the status of the Guntons as clients or non-clients on the basis that the applicant was not found guilty of anything that went beyond the precise allegations of which he was on notice.

I have the impression that the Tribunal felt an understandable degree of impatience and frustration with Mr. Condon's delays and non cooperation, perhaps because of past experience in their dealings with him, which in turn produced the outcome of which complaint is now made.

I think a valid complaint has been made out, but a difficult question still remains as to whether or not the Court should intervene by way of judicial review to quash the decision of the Tribunal or to grant relief to the applicant in the particular circumstances of this case. On one view of things, the applicant might be said to be entitled *ex debito justitiae* to certiorari on the basis that the Tribunal acted without jurisdiction to order as it did, but on another view of the case I believe I should have regard to an express statement made by counsel on behalf of the applicant at the conclusion of the hearing which points to a practical solution to the difficulties which have arisen, and which remain to be resolved, in this case.

REMEDY

Counsel for the Law Society has in the course of written submissions referred to a campaign of litigation conducted by the applicant against the Society which, he says, "shows no sign of abating". While this contention was the subject matter of a strong protest and denial from counsel for the applicant, it is indeed the case that Mr. Condon has previously engaged in litigation with the Law Society. He has brought both an appeal and a judicial review application in respect of the matter before this Court. The very lateness of the present application strongly suggests that the Court should not intervene, particularly when that consideration is added to the consideration that the applicant himself admits that his dilatory approach to the simple matter of stamping a document was, even by his standards, quite unacceptable.

The newly revised Order 84 rule in respect of judicial review applications reduces the time for an application of this nature to the period of three months. The rule became effective a few short weeks after the applicant brought his present application. But for that fortuitous circumstance, this judicial review application could never have been brought.

However, as I indicated to the parties at the outset of the hearing before this Court, I do not intend to refuse relief on this ground, but rather I propose to take it into consideration in the overall context of considering whether or not to grant relief.

Having regard to the 'hands up' approach adopted by the applicant in admitting to his own gross delay in dealing with this matter, I do not believe it is beyond the ingenuity of the Court to fashion a remedy which would enable this matter to be finalised without further recourse to the courts, be that either this Court or the Supreme Court.

I am minded to dispose of this matter by remitting it back to the Disciplinary Tribunal for further consideration on penalty only. This would, perforce, have to mean the imposition of a penalty based on the proposition that the Guntons were *not* clients of the applicant but rather connected parties to whom the applicant did of course owe certain duties in his capacity as a solicitor, such as to reply to correspondence and to conform to standards of behaviour appropriate to the profession generally.

In adopting this view I am fortified by the express statement made by counsel for the applicant that the applicant would abide and comply with such a course. It would necessarily involve his acceptance of the various complaints of delay but would not preclude him from making a further appeal to this Court if a view was taken afterwards that the penalty imposed was disproportionate or excessive. Such a course would also preclude the Law Society or Disciplinary Tribunal from taking a previous offence into account when assessing sanction if it be the case that the previous 'conviction' is, as stated, under appeal.