

BETWEEN

PATRICK O'DONOVAN JR

APPLICANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 9 July 2019**SUMMARY**

1. The Law Society is required by the Solicitors (Amendment) Act 1960 to maintain a fund to provide compensation for losses sustained by clients in consequence of dishonesty on the part of a solicitor. This fund is referred to under the Act as "*the Compensation Fund*". The Applicant in these proceedings had submitted a claim against the Compensation Fund arising out of alleged dishonesty on the part of his former solicitor in respect of a conveyancing transaction in which the solicitor had acted for the Applicant.

2. The claim arose in the following circumstances. The Applicant had arranged a loan from Allied Irish Banks plc ("*the Bank*") to finance the purchase of certain lands. The Applicant alleges that the solicitor improperly drew down the loan monies and misappropriated same for his own use.

3. The Applicant contends that he personally remains liable to the Bank to repay the *entire* of the mortgage loan, and that this represents the quantum of the "loss" which he has sustained as a result of the solicitor's dishonesty. The mortgage loan was in the amount of €190,000.

4. The Law Society, conversely, has drawn a distinction between (i) monies which have already been repaid pursuant to the mortgage loan, and (ii) the outstanding balance of the mortgage loan. The Law Society has measured the loss sustained in the amount of the monies actually paid. This figure is €18,822.63.

5. The Applicant has sought to challenge the Law Society's decision by way of an application for judicial review. The principal argument advanced is to the effect that the distinction drawn between (i) monies actually paid pursuant to the mortgage loan, and (ii) the outstanding balance, is arbitrary, unreasonable or irrational. A secondary argument is advanced to the effect that the Law Society erred in its interpretation of the legislation and, in particular, it incorrectly introduced a test of whether a "demonstrable loss" had "crystallised". It is said that neither of these terms appear in the legislation.

6. For the reasons set out herein, I am satisfied that the Law Society's decision should be upheld. The threshold for reviewing the merits of a decision of a statutory body, such as the Law Society, is that posited by the legal test of administrative "unreasonableness" or "irrationality". This requires consideration of whether the materials which were before the decision-maker are capable of supporting its decision. On the facts of the present case, I am satisfied that on the limited material which had been placed before the Law Society by the Applicant, it was not unreasonable or irrational for the Law Society to conclude that the Applicant had not yet sustained a loss in respect of the remaining unpaid balance of the mortgage loan. In particular, the Law Society was entitled to attach some significance to the fact the Bank had not progressed its proceedings against the Applicant. (The Bank had issued summary proceedings in August 2015, but same had not been progressed beyond the issuing and serving of the summons).

7. The Law Society's decision makes it clear that the Applicant is entitled to re-engage should matters move on. Accordingly, if the Bank does re-activate its proceedings against the Applicant, then the Applicant would be entitled to reapply to the Law Society.

8. In all the circumstances, the Law Society's approach was lawful.

FACTUAL BACKGROUND

9. The claim for statutory compensation arises out of what can only be described as a most unusual conveyancing transaction. It seems that in 2008 the Applicant intended to purchase lands from Mr Alexander Gibbons. Mr Gibbons had been a solicitor at the time but was subsequently struck off the Roll of Solicitors on 21 May 2012. For ease of exposition, I will refer to Mr Gibbons as "*the solicitor*".

10. The parties to the sale were under the—mistaken—impression that the lands were in the ownership of the solicitor, and that he had acquired title to same from the Applicant's own parents a number of years earlier. The solicitor subsequently carried out the development of a dwelling house on the lands, and then purported to sell same to the Applicant in 2008. No written agreement was ever entered into between the parties.

11. Notwithstanding that the solicitor himself was to be the vendor of the lands in sale, he nevertheless purported to act as solicitor for the purchaser, i.e., the Applicant, in the conveyancing transaction. This was, self-evidently, a conflict of interest and should not have happened. See, by analogy, *Carroll v. Carroll* [1999] 4 I.R. 241.

12. It appears from the Applicant's affidavit of 27 July 2018 that the solicitor had advised him to apply for loan facilities from Allied Irish Banks plc ("*the Bank*") in the sum of €190,000 to assist with the purchase of the property. The Applicant avers that he signed all of the relevant documentation, and that the solicitor then negotiated the release of the loan monies into his firm's client account by offering a solicitor's undertaking to the Bank by letter dated 29 September 2008. The sale of the property did not proceed in circumstances where it transpired that the solicitor never held proper title to same. The loan monies were never returned to the Applicant.

13. The Applicant thus finds himself in a position whereby he has a potential liability to the Bank pursuant to the mortgage loan in the order of €190,000.

14. The Bank issued summary proceedings against the Applicant on 28 August 2015. These proceedings have not, however,

progressed past the service of the summons.

APPLICATIONS TO LAW SOCIETY

15. The Applicant has made a series of applications to the Law Society for the payment of statutory compensation pursuant to the Compensation Fund. The application the subject-matter of these proceedings is, in fact, the *third* application. The first two applications had each initially been refused by the Law Society, but following the institution of judicial review proceedings in each instance, the Law Society subsequently consented to an order setting aside its decisions and the matter was reconsidered.

16. Ultimately, the Law Society made a decision dated 5 July 2018 to allow a partial payment in respect of the claim. In effect, the Law Society made a payment in respect of as much of the mortgage loan as had been repaid to date by the Applicant (€18,822.63). The Law Society refused to make any payment in respect of the outstanding balance of the mortgage loan.

17. The rationale for the decision is set out as follows in the letter sent by the Head of Financial Regulation to the Applicant's solicitors on 5 July 2018.

"The Committee decided that it was not satisfied there was sufficient evidence to substantiate that a demonstrable loss of €190,000 (or €200,000 as originally claimed) had crystallised with respect to the balance of the mortgage monies, and has thus decided to refuse this part of your client's claim.

The Committee noted that, subsequent to issuing a High Court Summary Summons dated 28 August 2015, AIB Mortgage Bank issued a letter of 5 June 2017 to your client, advising of the current amount due on the mortgage. The Committee noted, however, that there was no indication of AIB Mortgage Bank's proceedings having been pursued since being instituted on 28 August 2015 and judgement marked against your client.

Should your client wish to make any further submissions in support of his claim, the matter may be referred back to the Law Society's Regulation of Practice Committee for reconsideration. However, you might please note a matter can only be referred back to the Committee in light of new evidence being raised."

18. It should be noted that the Law Society had made an initial decision a year earlier in May 2017 in similar terms. This decision was communicated by letter dated 27 July 2017 as follows.

"The Committee was not satisfied that there was sufficient or indeed any evidence to substantiate that a loss of €190,000 (or €200,000 as originally claimed) had crystallised with respect to the balance of the mortgage monies, and has thus decided to refuse this part of the claim. The Committee noted that the documentation provided in support of your client's claim gave no indication of any demand or liability arising whatsoever on your client by the bank in respect of the drawdown of these mortgage monies.

In accordance with the decision, please find enclosed a cheque for €18,822.63. You might kindly acknowledge receipt.

Should your client wish to make any further submissions in support of his claim, the matter should be referred back to the Law Society's Regulation of Practice Committee for reconsideration. However, you might please note a matter can only be referred back to the committee in light of new evidence being raised."

19. As appears, the Applicant had been afforded an opportunity to submit additional materials to the Law Society. The Applicant availed of this opportunity. The materials submitted included, *inter alia*, a copy of the Summary Summons issued by the Bank and a copy of the standard letter dated 5 June 2017 which the Bank is required to send to a debtor in accordance with the Code of Conduct for Mortgage Arrears.

20. The content of these additional materials had been summarised in a report which had been prepared for the Committee by one of its officers. This report has been exhibited as part of the affidavit of Andrew O'Brien.

"Conclusion

19. The Committee is requested to consider if it is satisfied that a loss has crystallized in respect of €171,177.37 balance of the mortgage funds of €190,000.

20. If it is satisfied that a loss has crystallized in respect of the balance of the mortgage moneys, the Committee may wish to admit a grant for a further €171,177.37."

STATUTORY CONTEXT

21. The decision of the Law Society, the subject-matter of these judicial review proceedings, was made pursuant to section 21 of the Solicitors (Amendment) Act 1960 (as amended by section 29 of the Solicitors (Amendment) Act 1994). The relevant provision reads as follows.

"(4)(a) Where it is proved *to the satisfaction* of the Society that any client of a solicitor has sustained loss in consequence of dishonesty on the part of that solicitor or any clerk or servant of that solicitor arising from that solicitor's practice as a solicitor within the jurisdiction of the State, then, subject to the provisions of this section, the Society shall make a grant to that client out of the Fund.

(b) Subject to the provisions of this section, the amount of the grant referred to in paragraph (a) of this subsection *shall be such as represents in the opinion of the Society reimbursement of the amount or value of the loss sustained with, where appropriate in the opinion of the Society, interest (at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, as varied from time to time pursuant to section 20 of the Courts Act, 1981) on the whole or any part of the amount or value of such loss in respect of the whole or any part of the period between the date when such loss was sustained and the date of the making of a grant, but excluding damages or any other form of loss consequent on the client of a solicitor being deprived of the amount or value of the loss sustained.*"

*Emphasis (italics) added.

22. As appears, whereas the obligation to make a grant to a client who has sustained loss in consequence of dishonesty on the part

of a solicitor is mandatory ("*shall make a grant*"), the statutory function of assessing whether a client has sustained loss and of quantifying same has been entrusted to the Law Society. The loss must be proved to the satisfaction of the Law Society. The Law Society's decision is, of course, amenable to judicial review.

23. The Law Society also has discretion to make deductions for what might be described as "contributory negligence" on the part of a client, under section 21(9)(b) as follows.

"(9) Notwithstanding the provisions of subsection (4) of this section, the Society shall have a discretion to make or refuse to make a grant—

(b) in a case in which the Society are of opinion that there has been dishonesty or negligence on the part of the client of the solicitor or of any person for whom that client is responsible which has contributed to the loss in question,

and, where the Society decide to make a grant in any such case, they shall have a discretion to make it only to a limited extent."

24. Whereas this particular provision had not been relied upon by the Law Society in the decision impugned in these proceedings, it is nevertheless of some relevance in that it indicates the breadth of the statutory discretion conferred upon the Law Society.

DISCUSSION

25. The principal ground of challenge advanced on behalf of the Applicant is that the distinction drawn by the Law Society between (i) monies which have already been repaid pursuant to the mortgage loan, and (ii) the outstanding balance of the mortgage loan is arbitrary, irrational and unreasonable.

26. The threshold for reviewing the *merits* of a decision of a statutory body, such as the Law Society, is that posited by the legal test of administrative "unreasonableness" or "irrationality". This legal test is set out in a well-established line of case law including *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642; *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39; and *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701.

27. As appears from this case law, one of the matters to be considered by the High Court on review is whether the material before the decision-maker is capable of supporting the finding actually made.

28. See *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 72.

"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

29. See also *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 at 656 (*per* Finlay C.J.).

"It is quite clear on all the authorities that this Court has no function to express any view as to whether, presented with the same evidence as the Tribunal was presented with and accepting as the Tribunal did the particular standards and legal propositions in accordance with which they should assess these claims, this Court would have come to the same view as the Tribunal has done. All this Court can or should do is to reach a conclusion as to whether the decision reached by the Tribunal was open to it on the evidence before it and having regard to the matters which it is bound to take into consideration. I have no doubt that it was and that therefore the order of the High Court should be affirmed and this appeal should be dismissed."

30. On the facts of the present case, the material before the Law Society indicated that whereas the Bank had instituted proceedings against the Applicant, those proceedings had not, seemingly, been progressed since August 2015. It will be recalled that the mortgage loan had been drawn down in 2008. On the basis of this material, it was reasonable for the Law Society to have a concern that the Applicant might not ultimately be liable to repay the *full amount* of the mortgage loan. It could be the case, for example, that the Bank would seek to enter into some sort of compromise with the Applicant whereby a sum *less than* the full amount owing would be accepted in full and final settlement.

31. There is no evidence as to the precise position which the Bank has adopted in this regard, but at the hearing before me counsel on behalf of the Applicant confirmed that there had been more recent correspondence from the Bank in the last number of months. This correspondence has not, however, been exhibited in the proceedings.

32. Whereas the distinction sought to be drawn by the Law Society between monies paid pursuant to the mortgage and the contingent liability for the balance is certainly a fine one, I do not think that it can be said that it is wholly irrational or unreasonable. The rationale seems to be that there is a possibility that at least part of the debt might be written down. This is not irrational or unreasonable.

33. Crucially, the Law Society have not closed the door on the Applicant, and have expressly indicated that it is open to him to reapply on the basis of fresh evidence. (See letter set out at paragraph 17 above). Accordingly, if the Bank were to re-activate the proceedings against the Applicant, or, indeed, if the Bank offer to accept a smaller sum in full and final settlement, then the Applicant could properly reapply to the Law Society to have the additional claim considered at that stage.

34. A secondary argument has been advanced on the part of the Applicant to the effect that the Law Society erred in its interpretation of the legislation and, in particular, that it incorrectly introduced a test of whether a "demonstrable loss" had "crystallised".

35. It would have been preferable had the Law Society's decision employed the statutory language. As appears from paragraph 21 above, a grant pursuant to the Compensation Fund should be such amount as represents in the opinion of the Law Society reimbursement of the amount or value of the "loss sustained".

36. The use in its decision-letter of the more colloquial term "crystallised" does not, however, disclose any error of law on the part of the Law Society. Rather, it seems to me that the Law Society were seeking to explain in layman's terms why the distinction was

being drawn between the monies which had been paid pursuant to the mortgage loan and the outstanding balance thereof. The term "crystallised" was intended to differentiate between a "sustained loss" and a contingent loss or liability. It is clear both from the terms of the decision-letter of 5 July 2018 itself, and from the various reports prepared for the Committee that the Law Society was fully aware of the statutory context against which the decision has been made. It cannot be said, therefore, that the Law Society misinterpreted the legislation or applied an incorrect legal test.

PROPOSED ORDER

37. For the reasons set out herein, I am satisfied that the application for judicial review cannot succeed. The decision of the Law Society is not unreasonable or irrational, and does not disclose any error of law in either the interpretation or the application of section 21 of the Solicitors (Amendment) Act 1960 (as amended in 1994).

38. Accordingly, I propose to dismiss the application for judicial review its entirety. PROPOSED ORDER

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