Neutral Citation: [2014] IEHC 432

THE HIGH COURT

[2014 No. 79 SA]

IN THE MATTER OF THE SOLICITORS ACTS 1954 – 2011 AND IN THE MATTER OF GERALD KEAN (A SOLICITOR) OF KEAN SOLICITORS

BETWEEN

GERALD KEAN

APPELLANT

AND

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

JUDGMENT Kearns P. delivered on the 23rd day of September, 2014

This is an appeal brought by the appellant in respect of three findings of professional misconduct made against him by the Solicitors Disciplinary Tribunal on the 14th May, 2014.

The decision followed an application by Christopher O'Neill of Drumsna Village, Co. Leitrim, who in March 2012, applied for an inquiry into the conduct of the appellant in respect of his handling of certain litigation on Mr. O'Neill's behalf. Mr. O'Neill advanced 17 grounds of alleged misconduct on the part of the appellant.

On the 27th February, 2013, a Tribunal of first instance of the respondents considered affidavit material lodged by both sides, together with multiple exhibits referred to therein and concluded that there was a *prima facie* case of misconduct on the part of the appellant in respect of six of the grounds advanced. Those allegations against the appellant were:-

> *"(a) he failed to submit a notice of intention to defend civil proceedings brought against Mr. O'Neill in the District Court.*
>
> *(b) He knowingly misled Mr. O'Neill into believing a Notice of Intention to Defend those proceedings had been lodged.*
>
> *(c) He failed to lodge an appeal against a judgment summarily obtained against Mr. O'Neill.*
>
> *(d) He knowingly misled the applicant into believing an appeal had been lodged and accepted in regard to the summary judgment.*
>
> *(e) He failed to inform the applicant that he would not act for him.*
>
> *(f) He failed to uphold a duty of care to Mr. O'Neill."*

Thereafter the matter was heard by the respondents over a three day period earlier this year. Mr. O'Neill represented himself and the respondent was represented by Mr. Richard N. Kean, S.C. and junior counsel, Mr. Fran O'Rooney. The applicant represented himself.

It is common case that the complaints against the appellant had to be proved to the criminal standard of proof, namely, beyond a reasonable doubt (as opposed to the civil standard of balance of probabilities). At the conclusion of the hearing, the Tribunal took time for consideration and delivered a detailed written decision on the 14th May, 2014, in which the Tribunal found misconduct on the part of the respondent in that he:-

> *"(a) Knowingly misled the applicant into believing a notice of intention to defend had been submitted.*
>
> *(b) Failed to lodge an appeal against the decree obtained summarily*
>
> *(c) Knowingly misled the applicant into believing an appeal had been lodged and accepted with regard to the summary judgment."*

Following that decision the sanction recommended was a fine by way of censure of €20,000 together with restitution to Mr O'Neill in the sum of €500 together with €750 expenses.

RELEVANT STATUTORY PROVISIONS

The appellant appeals to this Court from the findings under s. 7 (as substituted by s. 17 of the Act of 1994 and as amended by s. 9 of the Act of 2002) of the Solicitors Act 1960.

The parameters of such an appeal are detailed in the Rules of the Superior Courts (Solicitors (Amendment) Act 2002, 2004) SI No. 701 of 2004. Rule 12(h)(i) provides:-

> *"Where the respondent solicitor is appealing to the court against the finding or findings of misconduct on his or her part, the President shall direct that the appeal shall proceed as a full rehearing of the evidence laid before the Disciplinary Tribunal, unless a less than full rehearing is contended for by the respondent solicitor and concurred in by the Society and (if applicable) concurred in by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal and unless agreed to by the President."*

Despite the existence of a provision permitting the respondent to seek a full rehearing on the facts, the appellant has elected to

confine his appeal to an appeal on the record.

The implications of limiting an appeal in this way were identified by the Supreme Court in *Fitzgibbon v. Law Society* [2014] IESC 48, when at para. 6 of his judgment Clarke J. stated as follows:-

> *"6.1 The critical distinction between an appeal against error and either a de novo appeal or an appeal on the record is that the appellate body does have regard to the determination of the first instance body and must, in order for the appeal to be allowed, be satisfied that the first instance body was in some way in error.*
>
> *6.2 The default position is, therefore, that the appellate body considers the record of the proceedings at first instance (and in the absence of any rules permitting further evidence or materials to be produced only that record) and considers whether the first instance body came to a correct or sustainable decision on the basis of that record. So far as facts involving an assessment of the credibility of witnesses are concerned, then the role of the appellate body is to decide whether there was a sufficient basis disclosed on the record for such findings of fact. The appellate body cannot, of course, reassess questions of pure credibility for it will not, ordinarily, have had the opportunity to assess evidence given by witnesses."*

"Misconduct" in the context of solicitors is defined in s. 3(1) of the Solicitors Act 1954 – 2011 (as amended) as including:-

> *"(a) The commission of treason or a felony or a misdemeanour.*
>
> *(b) The commission, outside the State, of a crime or an offence which would be a felony or a misdemeanour if committed in the State.*
>
> *(c) The contravention of a provision of the Solicitors Act 1954 – 2011, or any order or regulation made thereunder.*
>
> *(d) In the course of practice as a solicitor –*
>
> > *(i) having any direct or indirect connection, association or arrangement with any person (other than a client) and the client knows or upon reasonable inquiry should have known, is a person who is acting or has had acted in contravention of ss. 55, 56 or 58, as amended by the Act of 1994, of the principal Act, or s. 5 of the Solicitors (Amendment) Act 2002, or*
> >
> > *(ii) accepting instructions to provide legal services to a person from another person whom the solicitor knows, or upon reasonable inquiry should have known is a person who is acting or has acted in contravention of those enactments.*
>
> *(e) Any other conduct tending to bring the solicitors profession into disrepute."*

It is not in dispute in the present case but that the last mentioned paragraph is that which is relevant to the present appeal, it being alleged on behalf of the appellant that any want of due care on his part fell well short of constituting "misconduct" as same is defined in the Act.

It is also contended on behalf of the appellant that the sanction recommended by the Tribunal to this Court is disproportionate and excessive.

BACKGROUND FACTS AS FOUND BY THE TRIBUNAL

Mr. Christopher O'Neill, the applicant herein, had instructed Kean Solicitors (of which the respondent is the principal) in relation to a dispute about boatyard repairs carried out to his boat called the "Windrift". Arising from his instructions proceedings were issued against the boatyard. In the course of those proceedings, it was deemed necessary that the services of a marine surveyor be engaged to carry out a survey of the boat and prepare a report to be subsequently used in court if necessary. The expert retained, Mr. Michael Connolly, carried out a survey and provided a report, but thereafter had a difference with Mr. O'Neill following which he advised Mr. O'Neill he was not prepared to continue in the case. He did, however, send an invoice for his fees which Mr. O'Neill declined to pay, writing to the surveyor stating that if he wished to pursue any claim, Mr. O'Neill would place the matter with his solicitors who would "*defend it vigorously and counterclaim accordingly*".

On the 1st August, 2005, the surveyor's solicitor issued a court civil summons which was subsequently served on the applicant. The sum claimed was €1,009.53 made up of the cost of the report and legal costs. The summons had a return date of 26th October, 2005. On the 22nd September, 2005, Mr. O'Neill contacted Mr. Kean by telephone about the summons and explained the issue which he had with the surveyor. Before the Tribunal, the respondent confirmed that he advised Mr. O'Neill to send him on the proceedings and that he would file a Notice of Intention to Defend in the local District Court offices. He also required from Mr. O'Neill a "*standard fee of approximately €385 plus VAT*". Mr. O'Neill forwarded a cheque in the sum at €500 which was lodged to the respondent's office account. In his affidavit before the Tribunal, The respondent stated that this payment was a "*payment on account*".

Thereafter the applicant furnished a letter to the respondent setting out in considerable detail the facts and circumstances surrounding the issues that the applicant had with the surveyor.

Mr. O'Neill told the Tribunal he had a further conversation with the respondent on the 25th October, 2005, in which he said that Mr. Kean advised him that he was not required to attend court on the 26th October, 2005 and that a Notice of Intention to Defend the proceedings had been submitted. While the respondent agreed that he spoke with Mr. O'Neill after getting the summons, he could not recall saying that a Notice of Intention to Defend had been filed, but stressed instead that his recollection was that the case should not be fought.

A considerable amount of time before the Disciplinary Tribunal was taken up with the analysis of the merits or otherwise of the claim advanced by the marine surveyor. The Tribunal however concluded that no reasonable solicitor could come to the view, based on even a cursory examination of the correspondence, that Mr. O'Neill had no defence whatsoever to the proceedings. Indeed Mr. O'Neill vigorously rejected Mr. Kean's account of the exchanges and offered notes of telephone conversations with Mr. Kean in support. He wrote to the respondent in February 2006, asking for an update on the proceedings. The Tribunal noted that there was no evidence of any response from the respondent to this request.

Thereafter on the 20th March, 2006, Mr. O'Neill received a registered letter from the surveyor's solicitor advising him that judgment had been obtained against him and enclosing the order of the court. He phoned the respondent's office several times that day and kept handwritten notes of those conversations, one of which recorded that he asked the respondent "*what the bloody hell was going on*". Mr. O'Neill further told the Tribunal that Mr. Kean got back to him later that day to say "*somebody at the courts screwed up*". According to Mr. O'Neill, Mr. Kean also said that he was not to worry, that he would lodge an appeal.

On the following day, according to Mr. O'Neill, Mr. Kean rang him in the afternoon to say he had lodged an appeal and notified the solicitor on the other side. He said that "*somebody misplaced the file in the court*".

On the 4th April, 2006, the respondent informed Mr. O'Neill that he had told the claimant's solicitor that his client intended to fight the case. He also told Mr. O'Neill that he had offered half the sum demanded.

The court has dwelt in some detail on these exchanges principally to emphasise the attention to detail given to this case by the Disciplinary Tribunal. The Tribunal noted that the decision was not appealed and that the decree was sent to the County Registrar for enforcement. By May 2006, the applicant was six weeks out of time for filing an appeal.

Thereafter, and without instructions from Mr O'Neill to that effect, the respondent wrote to the claimant's solicitors enclosing his own cheque for €1048.17 in full discharge of the judgment. He paid this sum – this is not disputed – out of his own funds. According to Mr. O'Neill, Mr. Kean paid this sum "*because he realised he'd screwed up*".

Thereafter on the 31st May, 2006, the respondent wrote to the surveyor's solicitor saying that he was "*in funds*" and his instructions were to lodge same in court and to appeal for an extension of time for leave to appeal. The solicitors for the marine surveyor responded by letter dated the 2nd June, expressing their perplexity at the content of this letter - hardly surprising as they had been furnished with a cheque in full and final settlement by letter dated the 24th May.

Thereafter Mr. Kean pursued the course of inquiring from the solicitors of the marine surveyor whether or not they had authority to accept service of proceedings for breach of contract to be brought on the part of their client against the surveyor. Thereafter Mr. O'Neill wrote to Mr. Kean on the 27th July, 2006, in the following terms:-

> *"Following advice of our Barrister to pay the sum of €1067.17 as demanded by the civil summons and then to sue the marine surveyor for breach of contract please find enclosed cheque in the sum of €1067.17."*

This letter is two months after the respondent paid off Mr. O'Neill's judgment debt from his own funds and makes no reference to the fact that the appellant had already paid the judgment debt, a fact which, had it been known to Mr. O'Neill, would surely have been mentioned in his letter.

At the conclusion of the hearing in which both Mr. O'Neill and Mr. Kean gave evidence, the Tribunal considered detailed submissions, including legal submissions advanced on behalf of the respondent.

It is perhaps worth noting *en passant*, that at no stage during this process did the respondent suggest that the facts alleged against him, if established, could not constitute misconduct which is the essential point advanced during the appeal before this Court.

Moving to its conclusion, the Tribunal noted (at para. 70):-

> *"The Tribunal therefore had to proceed with caution and looked, wherever possible, for corroboration of the applicant's evidence. . . While there are some discrepancies that arose in cross examination however, by and large, the key events alleged by the applicant . . . was consistent throughout with the evidence given in both his affidavits and direct evidence. He also gave evidence of documenting his conversations and exhibited what he said were 'verbatim diary' or 'logbook entries'."*

The existence, integrity and provenance of these diaries was in no way challenged before the Tribunal by or on behalf of the respondent, although he did not accept as necessarily accurate the accounts of the conversations described in the diaries.

The Tribunal noted the total absence of any notes or memoranda on the respondent's file. Even with regard to such correspondence as existed, the Tribunal noted that the respondent seemed at times "*and to a remarkable extent*" to be unsure of what exactly was in this correspondence.

Having reviewed the facts and the correspondence in great detail, the Tribunal concluded that much of the correspondence in May 2006 was brought into being for the purpose of misleading Mr. O'Neill into thinking that the case was still alive when it was not. This contention, in the view of the Tribunal was supported by:-

> *"(a) The payment by the respondent of the applicant's judgment debt out of his own pocket and without any instructions.*
>
> *(b) The delay by the respondent in the recovering of money from the applicant until two months later, at which time the applicant was advised by the respondent to pay the judgment debt in favour of bringing separate proceedings for breach of contract against the marine surveyor (which proceedings incidentally were never in fact brought) and*
>
> *(c) The evidence given by the applicant."*

The Tribunal stated clearly its view that the evidence adduced by the applicant was more credible. At para. 74 the Tribunal stated:-

> *"The clear inference of this was that the applicant believed that the respondent, for whatever reason, failed to file the Notice of Intention to Defend and he covered it up by misleading the applicant into believing that he had filed the notice of intention to defend and, after judgment had been given, misled the applicant into believing he had filed an appeal. Finally, when the County Registrar threatened to levy judgment against the applicant, the respondent, to avoid having to disclose that he had not filed an appeal, paid the judgment out of his own pocket."*

At para. 76, the Tribunal posed for itself the question whether the failure to submit the Notice of Intention to Defend amounted to misconduct on Mr. Kean's behalf:-

"If a solicitor is given clear instructions to do something by his or her client and fails to comply with those instructions it is not necessarily misconduct. For example the solicitor may have forgotten or simply overlooked the instructions. Mere oversight of forgetfulness, while amounting to negligence for which the solicitor could be sued by the client, may not necessarily amount to misconduct. To amount to misconduct there must be some additional factor such as gross negligence or wilfulness on the part of the solicitor. In this case it was accepted by the respondent that the notice was not submitted, but there is no evidence that the respondent was anything more than negligent in his failure to submit the notice, albeit that he subsequently acted in a reprehensible manner. Consequently the Tribunal does not make a finding of misconduct in this regard.

77. In relation to the allegation of failure to lodge an appeal against the District Court judgment, in this instance the Tribunal finds that it is not merely an oversight, but there was a wilfulness on the part of the respondent in that he led his client into believing that he had or was intending to file an appeal, but did not do so."

Based on the foregoing, the Tribunal concluded that there had been misconduct on the part of the respondent in:-

"(a) Knowingly misleading the applicant into believing a notice a notice of intention to defend had been submitted.

(b) Failing to lodge an appeal against a decree.

(c) Knowingly misleading the applicant into believing an appeal had been lodged and accepted with regard to the summary judgment."

No findings were made in relation to the other three allegations.

DISCUSSION AND DECISION
It goes without saying that any solicitor can make a mistake and overlook the requirement to file a document, in this case a Notice of Intention to Defend District Court proceedings, without such a lapse amounting to professional misconduct. Indeed, no such finding was made against the respondent on this account in this case. Further there are options available to a solicitor guilty of such an omission whereby such a matter can be addressed, not least by writing to his opponent solicitor admitting his mistake and asking for consent in setting aside the order. The Court may be asked to set aside a judgment obtained by mistake or error and another option is to lodge an appeal without delay. None of these options were pursued by the respondent who instead, as found by the Tribunal, embarked on an elaborate course of action to avoid the exposure of his mistake. In short, the Tribunal found there had been a 'cover up'.

The comprehensive ruling delivered by the Tribunal distinguished between what might be described as negligence on the one hand and misconduct on the other. The arguments advanced on this appeal focus very much on the credibility of the witnesses and the supposed lack of corroboration of Mr. O'Neill's account. For the first time, making a point that was not made before the Tribunal itself, the argument is raised that the facts, even if correctly found by the Tribunal, cannot in law amount to misconduct.

In my view it is not now permissible to advance any such contention when it was never advanced before the tribunal of first instance. This argument should have been advanced to the Tribunal in accordance with the principles laid down in *Henderson v. Henderson* [1843] 3 Hare 100 and *A. v. The Medical Council* [2003] 4 IR 302. Mr. Remy Farrell, S.C. for the respondents, also pointed to the decision of the Supreme Court in *DPP v. Cronin* [2006] 4 IR 329 as emphasising that it is only in a situation where a real risk of an injustice arises that an appellant should be allowed advance a case that was not advanced at the first instance hearing.

Even if I am mistaken in applying the rule in *Henderson v. Henderson* on the facts of the instant case, I am satisfied there was more than sufficient evidence to enable the Tribunal find, as it did, that the evidence, documentation and exhibits before it were such as to comprehensively demonstrate beyond reasonable doubt that the respondent in effect tried to mislead his own client in a misguided attempt to cover up what initially was an omission which, if addressed in a proper way, would not have led to a finding of professional misconduct. This was not a small untruth designed to explain why the respondent could not, for example, take a call or turn up for a meeting, but instead related to the fundamental trust which a client places in his solicitor when that solicitor is instructed. It is not difficult to imagine Mr. O'Neill's feelings on learning that a judgment had been marked against him in default of defence when his belief was that the claim against him was being fully defended. Honesty is a fundamental requirement that every solicitor must bring to bear on dealings with his own or her own client. It is a one line statement in the Law Society's *'Guide to Good Professional Conduct'*. No solicitor needs, or should need, any reminder of this obligation.

It was the "cover up" of the true facts in this case which ultimately drove the Tribunal to conclude as it did. In the view of this Court the Tribunal had ample evidence to support its conclusion and that conclusion, insofar as the findings of fact are concerned, could not be in any way considered irrational, speculative or in any other way lacking a proper foundation. It is one of the more detailed and comprehensive rulings of the Solicitors Disciplinary Tribunal to come before this Court in the last number of years. The appeal against the findings of misconduct is therefore dismissed.

PENALTY
It is submitted on behalf of the respondent that the fine and sanction recommended by the Tribunal and the Law Society to this Court are disproportionate and excessive in all the circumstances, having regard to the nature and the findings of misconduct and having regard to the levels of fines imposed by the Tribunal in other cases.

Considerable stress is placed on the fact that the applicant was not left out of pocket as a result of the appellant's actions. It is therefore submitted that the findings in this case are at the lower end of the scale of wrongdoing by solicitors and that the Tribunal erred in determining that the findings were "very serious".

In the course of an able submission, Ms. Fiona Gallagher, counsel for the respondent, referred to a number of cases (including *In the matter of James Dennison and In the matter of the Solicitors Acts 1954- 2002* (7883/DT/54/07) where financial loss had been suffered by a client as a result of unprofessional conduct giving rise to a fine of €10,000); *In the of Christopher B. Walsh and In the matter of the Solicitors Acts* 1954-2011 [4940/DT54/12], a case where following a finding of misconduct for failing to prosecute a case and being guilty of delay, no fine was imposed; *In the matter of Anne Fitzgibbon and In the matter of the Solicitors Act 1954 – 2008* [5626/DT10/09] in which the solicitor was found guilty of misconduct in failing to advise of a settlement proposal, a fine of only €2,500 was imposed; *In the matter of Michael O'Loughlin and In the matter of the Solicitors Act 1954 – 2002* a solicitor again was found guilty of misconduct in saying he had received an offer in settlement of a claim when in fact he had not done so and also lost the client's papers, a fine of only €7,500 was imposed).

Against this background, Ms. Gallagher argued that, having regard to her client's unblemished record over many years as a solicitor, the imposition of a fine of the magnitude contended for would be disproportionate and excessive. It was in addition contended during the course of the hearing that the amounts of money involved in this case were small so that the offences, if any, could be viewed as relatively trivial or minor in nature.

Unfortunately, the court cannot agree with this last mentioned contention. The failure to act on express instructions is one thing, but the deception of one's own client with regard to the marking of a judgment has to be regarded as a grave matter not least as it may affect the reputation and credit worthiness of the client. The issue turns not on the amount of money involved, in this case quite a small sum, but on the breach of the obligations of honesty and trust between solicitor and client which must be maintained in the interests of both the public and the solicitor's profession.

The finding of misconduct will undoubtedly be sorely felt by the applicant, particularly as he is an extremely well known solicitor and when, perhaps for that reason, these proceedings have been followed with more than ordinary interest by the media. This case does not rank with the most serious cases of misconduct to come before the Court, though misconduct it undoubtedly was. As that finding is not being disturbed I believe the conclusion to that effect arrived at by the Court, will be a harsh enough penalty in itself for the respondent

In the circumstances, I do not propose to impose the fine of €20,000 on the respondent, but otherwise would uphold the findings of the Tribunal and the recommendations made by it.