THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 215

Record No.: 2015/143

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

THE LAW SOCIETY OF IRELAND

APPLICANT / RESPONDENT

- AND–

JOHN TOBIN

RESPONDENT / APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 21ST DAY OF JULY 2017

1. By Order of the High Court (Moriarty J.) made on the 13th February 2015 the appellant ("Mr. Tobin") was declared to be not a fit person to be a member of the solicitors' profession, and his name was ordered to be struck from the roll of solicitors. In addition, he was ordered to pay the costs of the proceedings, limited to a two day hearing, and the costs of the proceedings before the Solicitors Disciplinary Tribunal, to include witness expenses, when taxed or ascertained.

2. Mr. Tobin appeals to this Court against that finding, and against the order that his name be struck from the roll of solicitors. He submits essentially that in a number of respects the trial judge failed to properly exercise his discretion under s. 8(1)(a) of the Solicitors (Amendment) Act, 1960 (as substituted by s. 18 of the Solicitors (Amendment) Act, 1994 and as substituted by s. 10(a) of the Solicitors (Amendment) Act, 2002 and s. 37(a) of the Civil Law (Miscellaneous Provisions) Act, 2008. For convenience I shall hereafter refer to those provisions simply as "s. 8 (1)(a) of the Act". Following a number of amendments it now provides as follows:

> "8(1) Where the Disciplinary Tribunal, after holding an inquiry into the conduct of a solicitor, makes a report to the High Court under section 7 (as substituted by the Solicitors (Amendment) Act, 1994) of this Act which is brought before the Court by the Society under the said section 7, the following provisions shall have effect:
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> (a) the High Court, after consideration of the report and the submissions (if any) made to it by the Society under subsection (1A) of this section:
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> (i) may by order do one or more of the following things, namely:
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> (I) strike the name of the solicitor off the roll;
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> (II) suspend the solicitor from practice for such period and on such terms as the Court thinks fit;
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> (III) prohibit the solicitor from practising on his own account as a sole practitioner or in partnership for such period, and subject to such limitation as to the nature of his employment, as the Court may provide;
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> (IV) restrict the solicitor practising in a particular area for such period as the Court may provide;
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> (V) censure the solicitor or censure him and require him to pay a money penalty; and, in making any such order, the Court shall take account of any finding of misconduct on the part of the respondent solicitor previously made by the Disciplinary Tribunal (or by their predecessor, the Disciplinary Committee) and not rescinded by the Court, and of any order made by the Court under the Solicitors Acts, 1954 to 2002, in respect of the respondent solicitor;
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> (ii) may by order direct that a specified bank shall furnish any information in its possession that the Society may require relating to any aspect of the financial affairs of the practice of the solicitor;
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> (iii) may by order direct that the solicitor shall swear an affidavit disclosing all information relating to or contained in any accounts, held in his own name or in the name of his firm or jointly with third parties, with any bank within a specified duration of time, to be fixed by the Court;
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> (iv) may make such order as to the costs incurred in the proceedings before it and the Disciplinary Tribunal as the Court thinks fit;
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> (v) may make any ancillary order in relation to the matter which the Court thinks fit."

3. It is clear that in the hierarchy of sanctions listed in s. 8(1)(a) of the Act that which has the most serious consequences for the solicitor concerned is of striking him from the roll of solicitors, subject to any application he may subsequently make to be restored to the roll of solicitors pursuant to other provisions of the Acts. It is, if you like, the ultimate sanction, and as such, and given the principle of proportionality, appropriate by way of sanction in a very serious case, where it is considered necessary not only to protect the public, but to protect also the public's confidence in the solicitors' profession, and to protect and preserve the integrity of that profession.

4. Mr. Tobin submits that while the Court undoubtedly has power under the section to order his name to be struck from the roll of solicitors, being one of the suite of orders that may be made, the nature of the misconduct complained about, which he acknowledged, and the efforts that he has made to remedy the consequences of that misconduct, including his ongoing efforts, as well as other factors such as his age, all indicate that this case does not fall within that most serious category meriting the ultimate sanction of his name being struck off the roll. In particular he points to the fact the complaints made against him in the present proceedings (comprising in total some 31 separate allegations of misconduct) in the main relate to his failure to honour nine undertakings that he gave between 2000 and 2007 to three separate financial institutions, either in a timely fashion, or, in some cases as yet, at all, despite his best efforts as he sees it. Those undertakings facilitated drawdown of the substantial borrowings from the banks in question. Pursuant to them he was, *inter alia*, to register his borrower clients' titles to the properties following their purchase with the borrowings, and to put in place the banks' security by way of a first charge on the properties. In some of the transactions Mr. Tobin himself was the purchaser/borrower. In another, he was acting for his brother. In the remainder of the transactions he was acting for clients in the normal way. He points to the fact that none of these banks have suffered any financial loss, that he has honoured and been discharged from some of the undertakings, and that he is even yet strenuously engaged upon trying to honour the remainder which he believes to be still possible. In these circumstances he submits that the complaints are less serious than cases where clients have suffered a financial loss as a result of a solicitor's misconduct, and where the ultimate sanction of strike off would be necessary, proportionate and appropriate.

5. The nine complaints made to the Law Society against the appellant were considered initially by the Complaints and Client Relations Committee of the Regulation Department ("the Committee") of the Law Society. Before a decision was made by the Committee to refer each of the complaints to Solicitors Disciplinary Tribunal ("the Tribunal") for further inquiry pursuant to s. 7 of the Act of 1960 as substituted and amended, the Committee notified Mr. Tobin of the details of each complaint and gave him opportunities to respond. In many instances he failed to respond to the Committee's communications in a timely manner. This tardiness and neglect required the Committee to write a number of reminder letters to him, and in some instances necessitated the making of applications to the High Court for orders directing him to respond and to attend meetings of the Committee. He eventually did so, but this behaviour itself constituted further misconduct which was considered by the Tribunal, and, therefore, the trial judge, as part of the overall complaints being considered.

6. Each complaint came before the Tribunal, which sat for the purposes of its s. 7 inquiry into these complaints on the 15th January 2013, 7th March 2013, 2nd May 2013 and the 18th June 2013. Oral evidence and oral submissions were made on behalf of the Society, and on behalf of Mr. Tobin who attended in person and was represented by a solicitor. In each case the Tribunal found, by decisions each dated 4th September 2013, that the appellant was guilty of misconduct (which misconduct was admitted by him), and having determined in respect of each complaint that it would not use its powers under s. 7(9) of the Act of 1960 as amended (*i.e.* to advise and admonish or censure the appellant, and/or direct him to make a payment either to the Society's Compensation Fund or by way of restitution to any party, and/or to pay costs) the Tribunal ordered the Society to bring its findings before the High Court as provided by s. 7 of the 1960 Act as amended, together with its Report. Its Report contained the Tribunal's opinion that Mr. Tobin was not a fit person to be a solicitor, as well as its recommendation to the High Court that his name be struck from the roll of solicitors under s. 8(1) of the Act.

7. By the time the Tribunal came to its decision in September 2013 only two of the complaints had been resolved, leaving seven of the nine undertakings the subject of the complaints outstanding. As pointed out by the Society in its written submissions to this Court these seven outstanding undertakings related to loan facilities with a redemption value of some €6.5 million, of which over €3 million were in respect of borrowings by Mr. Tobin himself.

8. It is unnecessary to set forth the full detail of each of the nine complaints and the details of the particular undertakings which formed the subject of those complaints. They are comprehensively described in the affidavits of Catríona O'Mara of the Law Society which were filed to ground the Society's application to the Tribunal for an inquiry into the appellant's conduct. They are also apparent from the many affidavits filed in the High Court following the issue by the Society of its notice of motion dated the 3rd December 2013 as directed by the Tribunal, seeking an order striking the name of the appellant from the roll of solicitors. The extensive, though belated, efforts made by the appellant to mend his hand by fulfilling his obligations under these undertakings, or in some cases to be discharged from them, are described in some ten affidavits sworn by him on dates between January 2014 and February 2015. The order finally made by the High Court (Moriarty J.) on the 13th February 2015 indicates that prior to that date the Society's application was listed before the High Court on nine separate dates between the 16th December 2013 and the 15th February 2015, the matter being adjourned from time to time.

9. These adjournments were permitted to provide yet more time to enable the appellant to resolve the various problems that he submitted were frustrating his compliance with the outstanding undertakings. The various affidavits filed by him ahead of some of the adjourned dates were for the purpose of explaining his ongoing efforts in this regard, and to provide the High Court with details of the up to date position. Considerable indulgence was extended to Mr. Tobin in this regard.

10. Following numerous adjournments, and having heard submissions from both sides in relation to the complaints and as to the appropriate penalty or sanction that the complaints merited, the trial judge delivered an *ex tempore interim* judgment on the 7th March 2014 following the final hearing before him on the 24th February 2014. His purpose in doing so was to indicate his view at that stage, and to provide one last final opportunity to try and resolve all matters which Mr. Tobin had maintained at all times was still possible. The matter was put back until the 25th July 2014 with a mention date in May 2014 for a progress report. In fact, on the 25th July 2014 having heard submissions in relation to further progress being made, the trial judge put the matter back still further until the 17th December 2015.

11. In his *interim* judgment the trial judge referred in a general way to the numerous complaints and the property transactions to which they related. He referred to the considerable indulgence that had been afforded to the appellant so that progress could be made to resolve the matters. He acknowledged that some progress had been made in relation to some of the undertakings, but that in others there had been none. The trial judge noted also that in 2012 and 2013 the appellant had been refused his practising certificate by the Law Society because of the number of complaints that were outstanding. He noted also that, while the Law Society accepted that no client had suffered any financial loss arising from the appellant's misconduct, it was of the view nevertheless that his default was not trivial insofar as lending institutions had been left without the security they required for the facilities advanced, including facilities to the appellant himself.

12. The trial judge then referred to the applicable jurisdiction vested in the High Court in matters of this kind, and to authorities to which he was referred by each party, including In the Matter of *Frank Burke and Lorna Burke v. The Law Society of Ireland* [2001] 4 IR 445, and *Law Society v. Carroll and Colley* [2009] 2 ILRM 77. Having considered the parties' submissions he expressed his conclusions as follows:

"I have considered the position carefully. It is undeniably a serious matter and like McKechnie J. in the Carroll and Colley case I find the position to be a finely balanced one. Without diminishing the gravity of the respondent's position, the distinction between his defaults towards banks and occasioning direct financial losses to clients is a significant one. Further, although some of his dealings with both the applicants and personnel involved in the transactions disclosed a lack of candour, the matter overall is not tainted with the degree of dishonesty and deception that was found in the judgment of Geoghegan J. [sic] to apply to the two solicitors then under consideration. The 1992 matter as evidenced by Costello P's order [this was a complaint against Mr. Tobin in 1992 which came before the High Court (Costello P.] which I have been furnished with, does seem essentially to relate to the non-handing over of the file and is both remote and not of comparable gravity. Any fresh matters remain undetermined, even if they remain to haunt the respondent and ought really not to have been ventilated at the hearing as guilt cannot be assumed. Indeed, the frantic efforts by the respondent and his advisers in recent weeks to address this matter, amongst others, could more usefully have been applied to further unscrambling of the outstanding undertakings.

Mr. Tobin is in his mid-50's and if immediately struck off, future prospects of re-establishment within his chosen profession are bleak. There is some argument in favour of outstanding undertakings being rectified. I also bear in mind that he accepted full responsibility for all 31 matters alleged, promptly.

I have already referred to the care and eminence brought to this protracted matter by persons of the calibre of Ms. Clarke and Mr. Deane [2 members of the Tribunal].

On balancing all, I have come to the view that the aggregate of all the matters in issue are such that in principle the sanction of a striking of cannot be viewed as unwarranted that, in the light of all that I have referred to, I am disposed to give the respondent one final, slightly longer but peremptory, opportunity to rectify the mess he has created, by adjourning until the penultimate Friday of July next. This slender window of light I am thereby disposed to keep open will avail Mr. Tobin, in the context of the ultimate sanction, only if the most [fulsome] and definitive measures have by then been concluded. I am conscious that there is both a public and private interest in the position vis-a-vis those still affected by these unfortunate transactions.

What I am disposed to do is to take the second last Friday of July and deliberately allowing, rather than any piecemeal adjournment, one relatively substantial matter. But I stress, Mr Stewart [counsel for Mr. Tobin] that it is only a window that I'm opening and unless matters are very, very substantially addressed I see myself as having very little leeway on that occasion." [emphasis added]

13. Some further discussion took place regarding the possible benefit of putting the matter in for mention on a date in May for a progress report, and during the course of that discussion the trial judge reiterated that by the adjourned date there would have to have been *"very significant movement"*, and that *"it is a very much – to all intents – it is a strike off unless the one-off opportunity is availed of in a wholly fulsome and committed way"*.

14. On the 10th February 2015 the trial judge heard of further updates as to progress being made by the appellant, and further submissions. On the 13th February 2015 he gave his final decision in another *ex tempore* judgment. Just prior to doing so he received yet another update in relation to what was submitted to be "a development" in relation to one of the transactions. The Society did not consider it to be as positive a development as was contended for by the appellant. It related to a proposal made to one of the banks (ACC Bank) that it would accept a payment of €130,000 being the net proceeds of sale of one of the folios of land which was the subject of one of the transactions and undertakings, and that the bank would discharge Mr. Tobin from that particular undertaking. The borrowing in that transaction was in the sum of €260,000, so, according to the Law Society, the bank in question was to suffer a loss. The trial judge having listened to these submissions stated that he "would bear it in mind for what it is worth". He then delivered his judgment.

15. Having referred to the sorry history of the matter, and the many adjournments and deferrals which had been afforded to Mr. Tobin to enable him, as best he might, to fulfil his obligations under these outstanding undertakings. He commented that these deferrals had unhappily not yielded much tangible fruit. He went on to comment on Mr. Tobin's past disciplinary record which included a less serious complaint in the past, but nevertheless one which had resulted in what he described as a "serious reprimand" from Costello P. That complaint had related to a failure to hand over a client's file. He referred also to the fact that two further complaints had been referred to by the Law Society, but indicated that it would be improper to have any regard to them. They were ongoing, though he had been informed that one of them had already been resolved. At any rate, he had no regard to these when making his final decision.

16. The trial judge did, however, refer to a judgment of Laffoy J. dated 27th July 2012 (*ACC Bank Plc v. Tobin* [2012] IEHC 348) whereby ACC Bank was awarded compensation in the sum of €266,374 for breach of one of the undertakings which was not honoured by Mr. Tobin. This was a transaction in which he himself was the borrower. I will refer to it as the "ACC transaction". During the course of her judgment on that matter she expressed scathing criticism of Mr. Tobin in relation to his giving an undertaking which he could never comply with. The trial judge referred to the judgment quite extensively. I will just refer to her final comments on Mr. Tobin's conduct:

> *"23. As regards the averment which I have interpreted as meaning that the Court should take into account the current value of the Secured Property, there is no doubt that there are cases in which it is appropriate to have regard to what the security would be worth to the lending institution, if a solicitor complied with the undertaking. In my view, this is not such a case. In the circumstances which prevailed here, there is no factor, other than the egregious default of the defendant, both in his personal capacity as borrower and in his capacity as a solicitor and as an officer of the Court, which has contributed to the plaintiff's loss. To form any other view would be to ignore the importance of the maintenance of the integrity of the system whereby third parties rely on solicitors' undertakings. It would also be an abdication of the Court's right and duty to supervise the conduct of solicitors, as was recognised by the Supreme Court in the Coleman case."*

17. I have set forth some detail from that judgment because in arguing that the trial judge erred in arriving at his conclusion that the appellant is not a fit person to be member of the solicitors' profession and, in the exercise of his discretion under s. 8 of the Act that his name should be struck from the register, the appellant has submitted that the trial judge placed too much reliance upon the comments made by Laffoy J. in the judgment just referred to, and ought not to have been influenced by it. He argues also that insufficient credit was given by the trial judge for the efforts, including ongoing efforts, which were made to rectify matters. It is argued that the trial judge failed to appreciate and make allowance for the obstacles which stood in the way of sorting out some of the difficulties encountered by the appellant – one example being that even though stamp duty was eventually discharged to the

Revenue Commissioners on one of the conveyances for one of the transactions, by way of transferring a credit for a forestry grant to which the client was entitled, the Revenue Commissioners failed to issue a certificate showing the receipt of that payment, and this held matters up significantly, and was outside the control of the appellant.

18. The appellant argued also that the trial judge had failed to take proper account of the fact that Mr. Tobin's practice had undergone a risk assessment audit by an outside firm in February 2011, and had scored well in most of the risk areas examined, when deciding that he was not a fit person to be on the roll of solicitors.

19. Finally it is urged that the trial judge failed to take into account a number of relevant matters:

(a) the penalty already imposed on the appellant by the suspension of his practising certificate since 2012;

(b) the cooperation and work of the appellant including after ceasing practice, and transferring files and funds without difficulty and at a substantial loss and cost to the appellant;

(c) the age of the appellant;

(d) his an admission of liability;

(e) his cooperation with the investigation and his long history and career in the legal profession;

(f) the non-likelihood of recurrence;

(g) the fact that no clients were left without funds;

(h) that a lesser sanction would serve to maintain confidence in the solicitors' profession in the circumstances of the case, particularly where the appellant had already suffered a severe and public penalty and sanction, and could not practice his life choice and career for almost 3 years.

20. The Law Society argue on this appeal that the sanction chosen by the trial judge, namely a strike off, was lawfully open to him in the exercise of his discretion, and that his selection of the ultimate sanction was not clearly wrong on the facts and in the circumstances of this case. It urges that this Court cannot simply decide again the merits of the case, and reach a different conclusion, but must look at the decision arrived at, and the reasons for it, and unless a clear error of principle can be identified, ought not to interfere with it.

21. The Law Society submits that in circumstances where the finding that the appellant was not a fit person to be on the roll of solicitors and that his name should be stricken off from it was in accordance with what was recommended to the High Court by the Solicitors' Disciplinary Tribunal, and in such circumstances the conclusions of the trial judge could not be considered an error in principle.

22. The Law Society submits also that it is clear that the trial judge did not fail to give due regard to the matters about which the appellant complains such as his age, his efforts to put things right, and the difficulties which he has encountered. In fact it points to the almost endless indulgence that was afforded to him by way of deferral and adjournment. It submits that the trial judge was fully entitled to have regard to the limited progress that was in fact made despite the opportunities afforded to him in this regard.

23. I am satisfied that the trial judge did not fall into error in the manner in which he reached his conclusions, and determined firstly that the appellant is not a fit person to be a member of the solicitors' profession, and that his name should be removed from the roll. He was, in my view, on the facts of this case, and allowing for the efforts made and continuing to be made by the appellant to rectify matters, to regard this case as being very serious and warranting the ultimate sanction. He was entitled to take account of the great level of indulgence afforded to the appellant in this regard, and to regard the progress made as limited in all the circumstances.

24. There is no doubt that where a client has suffered a financial loss, even where it is ultimately made good, as a result of a solicitor's misconduct, it may attract the most serious sanction, namely a strike off the roll of solicitors. It must not be thought that a large number of complaints of failure to honour a solicitor's undertaking, as in this case, is not within the very serious category of misconduct. It is a cardinal rule of the solicitors' profession that an undertaking must not be given where it is not already within the solicitor's control to fulfil. A solicitor may well consider, even with justification, at the time he is giving the undertaking, that although one or two matters will have to be attended to by some other party, perhaps even the client before the undertaking can be honoured and he can obtain a discharge, there will be no difficulty in doing so. That is not a proper basis for giving an undertaking. The solicitor must know that he is at the time the undertaking is given in a position to honour it, and is in complete control of it being honoured. A simple example will suffice to demonstrate what I mean. Suppose in order to draw down a loan from a bank a solicitor is required, as frequently happens, to stamp the purchase deed, but has not yet done so. If he is already in funds for the full amount of the stamp duty, he can be certain that he is in a position to stamp the deed and thereby undertake to do so, rather than delay drawdown of the loan for the few days it might take to actually stamp the deed. In those circumstances he may give the undertaking. If he has yet to be put in funds by his client, he may not give the undertaking even though he may have no reason to believe that his client will not put him in funds straightaway. In that situation he does not have absolute control over the honouring of his undertaking.

25. That simple example serves to illustrate the source of complaint against Mr. Tobin. For one reason or another when he gave all the undertakings about which complaints have been made, he ignored this cardinal rule of the profession because in each case, however unlikely he thought it would be that he would be unable to honour the undertakings in question, the fact is that he was not in control of what had to be attended to. This is demonstrated vividly by the fact that in most instances it took a considerable time to resolve those matters which have been resolved. In those that are still outstanding, there are still obstacles in the way of a final discharge of the undertakings. If he was in total control of each situation, there would be no difficulty in honouring the undertakings. He was not.

26. The solicitor's undertaking is part of the hard currency of the solicitors' profession. The trust and faith reposed in such undertakings are an indispensable part of the conduct of legal business and transactions, without which the profession and the public it serves would be the poorer. The undertaking is based upon the absolute honesty and integrity expected of a solicitor in his dealings with his clients, other parties to a transaction, and the courts. A solicitor is an officer of the Court. His/her word must be his/her bond. If a solicitor undertakes to do something it must be done. If there is any tolerance allowed for slippage in the traditional approach to such undertakings and the respect to be accorded to them, the hard currency of the profession is irreparably damaged to the point where other solicitors will not - indeed, should not - accept an undertaking. It should not be thought that the serial

failure to honour undertakings such as occurred in this case may not be considered to be at the same level of seriousness as misconduct that results in a financial loss to clients or third parties. This is particularly so where as yet some of the undertakings are still outstanding even though serious efforts have been made to rectify the problems involved.

27. On the significance of undertakings, Kearns P. expressed it thus in *Law Society v. Lambert* [2015] IEHC 453:

> *"They [undertakings] are outward manifestations of its probity, honesty and reliability. They are the currency of the profession's integrity. For this reason the Court regards breaches of undertakings as being matters of the utmost gravity, as they put public trust in the solicitors' profession at serious risk."*

I agree entirely with that statement.

28. Even the most careful and efficient solicitor will slip up during the course of years of practice. Errors will occur and sometimes events amounting to *force majeure* will intervene in a most unexpected and unforeseeable manner. They are, perhaps, an unavoidable part of any professional life. But it is rare that a mistake cannot or is not rectified given a reasonable opportunity to do so. In the present case, albeit during a limited number of years of a lengthy practice as a solicitor, the appellant was guilty of giving out a great number of undertakings which he did not honour for one reason or another in a timely fashion. It was only after long periods of delay and complaints being made to the Law Society that any serious effort was made to address the appalling situation that he had led himself into. He appears to accept that he had buried his head in the sand, so to speak, until he could do so no longer after the Law Society began to look into the complaints. He paid little or no attention to his obligation to honour his undertakings. Once given so as to facilitate the completion of the particular transaction, they were given little thought thereafter.

29. It cannot be overlooked also that he failed to cooperate fully and in a timely fashion with the Law Society during the course of the investigation of the complaints. That was also misconduct to compound the misconduct in relation to the undertakings.

30. The sanctions available to the trial judge under s. 8 of the Act serve the dual purpose. There is a punitive element as well as the necessary protection of the public and its confidence in the solicitors' profession, and the upholding of the integrity and good name of the profession. Each case has to be considered on its own facts and circumstances. In addition the trial judge must consider proportionality and what the justice of the case requires.

31. The role of this court on appeal in the case of this kind has been set out authoritatively by the Supreme Court in *Law Society v. Carroll and Colley* [2009] IESC 41. In his judgment, Geoghegan J. stated the following:

> "I return now to the question of what is the role of this court on appeal. I am satisfied that the test is the simple one which I suggested. As in any appeal to the Supreme Court including factual matters, the key question is whether as a matter of law it was open to the judge of the High Court to arrive at the decision made by him or her. In my view, it is all the more important to maintain this principle in relation to solicitors' matters for the resolution of which the Oireachtas specially provided for a qualified disciplinary tribunal and an ultimate decision of the High Court with the express intent that that decision would normally be made by the President of the High Court himself or herself. If, however, the President, as he or she is entitled to do, assigns a different judge, that's judge in every way must stand in the same position as the President as far as dealing with the case is concerned."

32. Geoghegan J. went on to state:

> *"Supreme Court judges, therefore, cannot simply substitute their own views for the views of the President of the High Court or the delegated judge … in this case. The decision of the High Court can only be reversed if as a matter of law it was clearly incorrect. This would, of course, as usual include the situation where even though there might have been no particular question of law involved as such, a decision of the High Court was one which it was not open to the judge to make on the basis of the evidence."*

33. I am satisfied that the trial judge took into account such mitigating factors as there are in this case when one considers the overall run of this case and the manner in which she expressed themselves in his two ex tempore judgments to which I have referred. He permitted ample and sufficient opportunity to the appellant to take such steps as he might be capable of taking in order to rectify matters, and in the hope that the ultimate sanction could be avoided. He made it very clear in his interim judgment that the final opportunity being afforded was just that – final. Unfortunately it was not possible for the appellant to rectify the outstanding matters. The fact that he still believes that he may yet be in a position to do so does not mean that further and ongoing opportunities should be afforded to him in that regard before imposing what was the ultimate sanction, and which was, in my view, open to the judge to impose in an appropriate exercise of his discretion on the evidence before him and in all circumstances of this case.

34. I consider the sanction to have been proportionate. It takes account of the serious gravity of the misconduct, and its impact on the banks concerned, some still continuing. As in many cases there are some mitigating factors which must be taken into account in considering what is the appropriate sanction. But taking them into account must not be equated to having to decide that they are of sufficient weight to tip the scales away from the most serious end of the scale, and mandating something less than the most severe sanction. In the present case, while Moriarty J. did not discuss the principle of proportionality in his judgment in any specific way, it is clear in my view that his approach to the case was one where clearly he was conscious that his approach should be proportionate. It is clear that he wanted to give the appellant every possible opportunity to avoid having the most severe penalty imposed. In the end, in view of the ongoing failure to rectify matters, despite some efforts made in that regard, the trial judge was entitled to conclude that the ultimate sanction could not be avoided. In this manner it is clear that the principle of proportionality had regard to and was given due consideration.

35. It should not be overlooked also that even though I would uphold the decision of the High Court, it is still open to the appellant in the future to make an application for restoration of his name to the Roll of Solicitors. Clearly any progress made between now and whenever such an application might be made by the appellant, could properly be taken into account when deciding whether or not such an application should be granted.

36. For the reasons which I have expressed, I would dismiss this appeal.