Neutral Citation No: [2010] IEHC 52

THE HIGH COURT

JUDICIAL REVIEW

2008 903 JR

BETWEEN

JOHN F. CONDON

APPLICANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Kearns P delivered on the 23rd day of February, 2010

The applicant is a solicitor who qualified in 1976 and who practices under the name or style of McMahon and Tweedy. He was appointed executor and trustee of the last will of Reginald Joseph Moorhead, a client of the applicant, who died on 5th August, 2002 having made his last will on 15th October, 1998.

By the terms of his will the testator devised his entire estate to his executor and trustee upon trust for sale with power to postpone sale upon trust for such of his five named children as should survive him in equal shares as tenants in common. In addition to the power arising under the Settled Land Acts, the will conferred extensive powers on the trustee, including *"the fullest power of retention, sale, realisation, management, superintendents and control in all respects as if they (i.e. the trustee) were the absolute owners thereof"*. Under clause 9 of the will, the applicant was entitled and empowered to charge for professional services provided by him during the course of the administration of the estate.

The principle asset of the testator was a residential property at Wainsfort Road in Terenure in Dublin. Four of the five children have resided in the house, and three continued to reside there at the time of death and asserted to varying degrees that they had expended monies on the property.

It is not really in dispute but that relations between the beneficiaries were not always harmonious and there was some considerable delay in dealing with the administration as efforts were made to achieve consensus amongst the children. Eventually it was agreed that the house would be sold and the proceeds distributed in an agreed manner between the various beneficiaries.

Prior to that time one of the beneficiaries, Brian Moorhead, had lodged a caveat in the Probate Office in 2005 and this was not removed until July 2007. The grant of Probate issued to the applicant as sole executor on 18th July, 2007. The sale of the property at Wainsfort Road was closed on 24th July, 2007 for the sum of €975,000. Brian Moorhead remained in occupation of the house until mid 2007.

An initial complaint of delay against the applicant was made to The Law Society by Neil Moorhead in June, 2005. This was dealt with by the respondent's Complaints and Client Relations Committee which concluded in February 2006 that the complaint did not disclose evidence of inadequate professional services. That particular complaint and investigation is not the subject of any challenge in the present proceedings, but is relevant in that the applicant at that time submitted that the respondent Committee lacked jurisdiction to adjudicate upon the particular complaint having regard to the terms of the Solicitors (Amendment) Act, 1994 and in particular s.8 thereof.

Section 8 of the Act of 1994 provides:-

> *"—(1) Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, alleging that the legal services provided or purported to have been provided by that solicitor in connection with any matter in which he or his firm had been instructed by the client were inadequate in any material respect and were not of the quality that could reasonably be expected of him as a solicitor or a firm of solicitors, then the Society, unless they are satisfied that the complaint is frivolous or vexatious, shall investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if they think fit, following investigation of the complaint, do one or more of the following things, namely—*
>
> *(a) determine whether the solicitor is entitled to any costs in respect of such legal services or purported services, and if he is so entitled, direct that such costs in respect of such services shall be limited to such amount as may be specified in their determination;*
>
> *(b) direct the solicitor to comply, or to secure compliance, with such of the requirements set out in subsection (2) of this section as appear to them to be necessary as a result of their investigation;*
>
> *(c) direct the solicitor to secure the rectification, at his own expense or at the expense of his firm, of any error, omission or other deficiency arising in connection with the said legal services as the Society may specify;*
>
> *(d) direct the solicitor to take, at his own expense or at the expense of his firm, such other action in the interests of the client as the Society may specify;*

(da) direct the solicitor to pay to the client a sum not exceeding €3,000 or the prescribed amount, whichever is the greater, as compensation for any financial or other loss suffered by the client in consequence of any such inadequacy in the legal services provided or purported to have been provided by the solicitor, provided that any such payment made in compliance with the direction shall be without prejudice to any legal right of the client;

(e) direct the solicitor to transfer any documents relating to the subject matter of the complaint (but not otherwise) to another solicitor nominated by the client or by the Society with the consent of the client, subject to such terms and conditions as the Society may deem appropriate having regard to the circumstances, including the existence of any right to possession or retention of such documents or any of them vested in the first-mentioned solicitor or in any other person."

The gravamen of the applicant's submission in respect of the 2005 complaint was to the effect that as the "client" was the applicant as executor, and not the complainant, the particular statutory provision did not give jurisdiction to the Committee to adjudicate upon the complaint.

While this complaint was rejected by the Committee a second complaint was made to The Law Society by Brian Moorhead by letter dated 28th April, 2007. This complaint raised issues about the applicant's proposed costs, the choice of auctioneer, and the asking price for the sale of the house. In the ensuing correspondence between the various parties, there were further generalised complaints advanced on behalf of the Moorhead family to the effect that the applicant had been unhelpful.

By letter dated 27th June, 2007, Ms. Daragh Buckley a solicitor for the Committee requested that the applicant furnish a copy of the "Section 68" letter and his bill of costs.

That Section provides:-

(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of—

(a) the actual charges, or

(b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges…"

On this point the applicant also argued in correspondence that the beneficiaries were not "clients" to whom an obligation under s.68 of the Solicitors (Amendment) Act, 1994 was owed.

On 7th September, 2007 the applicant was notified of a third complaint which had been sent to the Committee by Mr. David Moorhead, another son of the deceased, and requested the applicant's comments in relation thereto. It was indicated that this matter would be placed before the Committee on 26th September, 2007, along with the complaint raised by Mr. Brian Moorhead.

The Committee met on 26th September, 2007 and, in the absence of the applicant or any legal representative, the Committee heard oral complaints from Brian and David Moorhead in relation to the alleged lack of information provided by the applicant about the estate, the alleged lack of advice as to the sale price of the house and the further complaint that communication with the applicant was proving very difficult.

The applicant did, however, attend the meeting later in the day and was represented by counsel. The chairman expressed the view that the complainants were "clients" under the 1994 Act and that the applicant owed the obligation to furnish information and details in relation to charges and monies held and when they were likely to be distributed, and that if the applicant did not accept that interpretation he would have to take his challenge elsewhere. The applicant did not accept that the complainants were "clients" and maintained the stance taken in correspondence to the effect that the Committee lacked jurisdiction to deal with complaints from beneficiaries as opposed to clients. Nonetheless, notwithstanding this disagreement, the applicant did provide information regarding his costs and the projected timescale for administering the estate. He informed the Committee of the sale price which had been realised, and further explained that there were outstanding CGT and CAT issues to be resolved. He also felt that the estate in any case could not be distributed until six months had elapsed from the date of the grant so as to obviate any possibility of any child of the testator making a claim pursuant to s. 117 of the Succession Act, 1965.

Thereafter the Committee wrote to the applicant requesting certain detailed information regarding the estate, the sale, the tax issues and the estimated costs and directed him to write to the beneficiaries and the Committee providing such information.

Further complaints were filed with the Committee in October, 2007 by Brian Moorhead who claimed that the applicant had asked him to withdraw his complaints and had further suggested that if he was required to hand over his files to another solicitor this could escalate the costs to a sum of over €100,000 – a suggestion which I should note is strongly denied by the applicant.

There was a further meeting of the respondent Committee at the end of November, 2007 when the case was adjourned until January 2008. Further queries arose during that month and at a meeting of the Committee held on 23rd January, 2008, the Committee were advised by the applicant that he was now in a position to distribute the estate as the six months referred to earlier had elapsed. However, Mr. Condon advised the Committee that he could not "sign off" until the tax issues were resolved but advised the Committee that he would be in a position to furnish a final account subject to those issues within four weeks and confirmed that he would furnish a copy of that final account to The Law Society as well as to the beneficiaries. On this basis the matter was adjourned generally.

Mr. David Moorhead raised further complaints with regard to the administration of the estate to which the applicant responded on 14th April 2008.

In a follow up letter of 29th February, 2008 the Committee treated the four weeks as a definite time limit and requested

"the final account". Reminders were sent by the respondent on 10th March, and 18th March, the latter giving seven days for a response. On the 9th April, 2008 Ms. Daragh Buckley, solicitor for the Committee, wrote to the applicant saying, inter alia:-

> *"…that I am now arranging to place this matter before the next meeting of the Complaints and Client Relations Committee which takes place on the 16th April, 2008."*

The applicant maintains that he only received the letter in question on 14th April and, as he was out of his office during the morning of that particular day, the letter only came to his attention in the afternoon. On 15th April the applicant received a further faxed letter from the Committee enclosing letters from both the complainant and their solicitor Joan O'Mahony. The applicant responded to these communications by email and post dated 15th April, 2008 stating:-

> *"I am not in a position to attend a meeting next Wednesday because of a prior commitment and neither is Giles Kennedy to whom I gather you copied that letter."*

The applicant further stated that he was not in a position to deal with the letter from the complainant's solicitor, Joan O'Mahony, and objected strongly to their circulation before he had an opportunity to respond.

Notwithstanding the applicant's protest about the short notice of the meeting and his stated inability to attend, the Committee proceeded in his absence on 16th April, 2008 and made certain findings, which were duly notified to the applicant by letter dated 18th April, 2008, as follows:-

> *"The committee reviewed the matter and decided as follows:-*
>
> *1. The committee made a finding of inadequate professional services.*
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> *2. The committee directed that within 21 days you hand over, pursuant to s.8(1)(e) of the Solicitors (Amendment) Act, 1994, the entire file in relation to this matter, together with any monies in the client account to another solicitor to be nominated by the Society, without prejudice to your rights to recover any costs that may be properly due to you.*
>
> *3. The committee further directed pursuant to s.12(1)(a)(i) of the Solicitors (Amendment) Act, 1994, as amended, and that you should make a contribution towards the costs of the Society in the sum of €1,500.*
>
> *You will be aware that under s.11(1) of the Solicitors(Amendment) Act, 1994 you have a right to appeal the committee's directions to the High Court within 21 days of notification. If you do not appeal within 21 days the decision shall become absolutely binding on you immediately on the expiration of that period."*

The applicant by letter dated 7th May, 2008 set out what he saw as the compelling reasons why he was unable to produce a final account, and again protested that the Committee had acted without jurisdiction and had further failed to observe fair procedures, by, in particular, failing to afford the applicant sufficient time to respond to Ms. O'Mahony's email and other correspondence and in failing to afford him a reasonable opportunity to be heard. The letter indicated that judicial review would be sought if it was not confirmed that the decision was rescinded.

It is important to record that between January and April of 2008 the applicant was in correspondence with the Revenue and succeeded in persuading the Revenue that the sale of the property in Terenure should be seen as a sale by the beneficiaries, thereby saving a potential CGT liability of over €75,000.

The Committee listed the matter for mention at its meeting of 4th June, 2008 when it noted that its directions had not been appealed on the one hand, nor had they been complied with. However, the Committee noted that the applicant's solicitor had been in touch with Ms. O'Mahony in a effort to resolve all matters and thereupon listed the matter further for its meeting on 11th July, 2008 with a request that the applicant attend.

By letter dated 7th July 2008 the applicant's solicitor notified the Committee that the applicant was in a position to distribute the estate and expressed the hope that the matter could be resolved without recourse to litigation. The applicant repeated his position at the meeting which was held on 11th July, 2008. While some progress was made in discussions between the applicant, his solicitor, and the Committee with a view to reconsidering part, at least, of its directions, the directions were not in fact rescinded and the present judicial review proceedings were thereafter launched, leave being granted by the High Court (O'Higgins J.) on 18th July, 2008.

As I have already indicated the two principal grounds upon which relief is sought by the applicant, namely, the suggested lack of jurisdiction of the Committee to deal with this matter and the failure to provide the applicant with an oral hearing and an opportunity to cross examine witnesses, I do not propose to recite in any further detail the reliefs sought or the grounds which the applicant was given leave to argue. In terms of reliefs, he was granted leave to seek reliefs (a) – (d) and was allowed to argue grounds 1 – 3 and ground 7 (except (e) and (f)) in the Statement grounding the application for judicial review. These grounds included a ground which permitted the applicant to argue that by its decision the Committee had effectively tried to remove him as executor of the estate.

SUBMISSIONS

On behalf of the applicant it was submitted that the definition of "client" in s.2 of the Solicitors (Amendment) Act, 1994 required to be understood both in terms of that section and also by reference to s.8(1) of the 1994 Act.

Section 2 of the Act provides:

> *"2.—In this Act, unless the context otherwise requires—*
>
> *"client" includes the personal representative of a client and any person on whose behalf the person who gave instructions was acting in relation to any matter in which a solicitor or his firm had been instructed; and includes a beneficiary to an estate under a will, intestacy or trust;"*

Gerard Haughton, senior counsel for the applicant, pointed out that the "context otherwise requires" when one tries to

interpret s.8(1) of the 1994 Act, because s.8(1) specifically grants jurisdiction to The Law Society to investigate a complaint against a solicitor only in connection with a matter in which he or his firm *have been instructed* by the client. Notwithstanding the special definition of client in s.2 which includes beneficiaries, the plain fact of the matter was that the beneficiaries in this case simply did not instruct the applicant as a solicitor. Accordingly, this was a situation in which "the context otherwise required", so that the wider s.2 definition does not apply.

This interpretation was fortified by a reading of s.9 of the Act which confers jurisdiction on The Law Society to investigate complaints about excessive costs. Unlike s.8 there is no requirement under s.9 that the complainant be a client who has instructed the solicitor in question. There is no context preventing the s.2 definition of "client" applying. Thus in the case of a solicitor who presents a bill of costs relating to work done in the administration of an estate, a beneficiary may under s. 9 complain that charges are excessive, regardless of the fact that the solicitor was providing the services to another party viz. the personal representative.

Mr. Haughton submitted that the distinction between s.8 and s.9 is clear on the face of the statute. The intention of the Oireachtas was to give wider powers to the respondent to consider complaints of overcharging than in respect of other complaints. He submitted that the wording was clear and unambiguous and that accordingly the ordinary rules of statutory interpretation applied: *see Howard v. Commissioners of Public Works* [1994] I.R. 101.

The applicant in the present case was both executor and solicitor. As executor he decided to engage himself to provide all the legal services required in the administration of the estate and this he was entitled to do. It was not uncommon for a solicitor to fulfil both roles. Furthermore, this was the wish and intention of the testator. He submitted that in all the circumstances The Law Society was acting *ultra vires* in entertaining and investigating the complaints of the beneficiaries.

Mr. Haughton further relied on s.68 as an aid to interpretation. This is the provision which creates an obligation on a solicitor to provide a fee estimate to a client from whom he is taking instructions. Mr Haughton argued that the plain meaning of s.68 can only be that it extends no similar obligation on solicitors to provide fee estimates to beneficiaries generally. To construe s.68 otherwise would lead to what he described as "an absurd situation" whereby a solicitor engaged by a personal representative would have to furnish a fee estimate to every possible beneficiary, even though they could be numerous, and even though some might not be ascertained or yet capable of identification.

In the alternative, Mr. Haughton submitted that the decision of the respondent was made in breach of the principles of natural and constitutional justice because the applicant was not present at the meeting at which the decision was made. Given that he had advised the secretary of the Committee beforehand that he would be unable to attend, Mr. Haughton submitted that the Committee should have adjourned matters so as to give the applicant a reasonable opportunity to defend himself. A finding of "inadequate professional services" was a significant adverse finding against the applicant, both because he vehemently denied that his services were inadequate, but also because it would thereafter be on his record. Also, in imposing the costs contribution order, which was for the maximum amount then authorised by statute, the Committee gave the applicant no opportunity to argue against such an order or the amount. Further, the decision of the Committee effectively sought to remove the applicant from his position as executor of the last will of the deceased.

Mr. Paul Coffey, senior counsel for the respondent, opposed the application for relief both on the merits and on the basis of the conduct of the applicant.

He submitted that the Society did not act *ultra vires*. He submitted that it was quite clear from s.2 of the Act that the beneficiaries were giving him instructions and that they are to be treated as his clients in this regard. He submitted that the whole point of the definition in s.2 was to ensure that a solicitor could not argue that he was non-accountable to beneficiaries in respect of services provided to them. If the applicant's arguments were correct, the obvious consequence would be that, although the Act defined the beneficiaries as clients, they would have no recourse to his professional body were he to provide inadequate services. That would produce the bizarre outcome that the applicant would be the only person who could make a complaint under s.8 about the services he was himself providing as a solicitor. That, Mr. Coffey submitted, would be an absurd interpretation of the statutory provisions and would entirely defeat the whole point of defining beneficiaries as clients in s.2 of the 1994 Act.

In addition, the fact that in law the beneficiaries are entitled to apply to have the applicant removed as executor simply copper-fastens the fact that he is acting on their behalf and the fact that he asserts that he is instructing himself cannot alter that. The logic of defining beneficiaries as clients is that, for the purposes of the 1994 Act, the solicitor must be treated as though he were taking instructions from them.

Mr. Coffey further contended that there was no want of fair procedures in the case of the applicant. The applicant fully participated in the procedures that were in place notwithstanding that he had adverted to the jurisdictional point on multiple occasions prior to the decision made on 16th April, 2008. He had attended previous meetings and was represented at some of these meetings. It was clear he made a deliberate decision not to show up, or have a legal representative present, when the Committee met on 16th April, 2008. He had been put on full notice of the meeting and had failed to attend or to send anyone to attend on his behalf.

Insofar as the applicant made complaints that he was unable to cross-examine the complainants, Mr. Coffey pointed out that he never requested to cross-examine the complainants or requested to be present at any hearing by the Committee at the same time as the complainants appeared before it. There was no obligation on the respondent committee to adjourn the proceedings in the particular circumstances which had arisen.

DECISION

It is a basic principle of statutory construction that a statute be construed purposively and not in a manner which leads to an absurd outcome. The Solicitors (Amendment) Act, 1994 requires to be read and interpreted as a whole. It is an Act which, under s.1 thereof, is to be construed together with the Solicitors Acts, 1954 and 1960. The long title of the Act of 1954 provides that it is an Act to provide for, *inter alia*, the "*control of Solicitors of the Courts of Justice*".

The definition of "client" in s.2 of the Act of 1994 not only addresses the usual position of a person who by giving instructions to a solicitor becomes a 'client', but, much more significantly, extends the definition to include a beneficiary to an estate under a will, intestacy or trust. This provision, in my view, is deliberately framed to cover situations where

solicitors are acting in the dual capacity of executors and solicitors, because, absent such a provision, a definition confined to the 'normal client' would mean that an executor solicitor could not be held accountable to beneficiaries in respect of services which he provides to them. As has been pointed out, the logic of the applicant's argument would lead to the consequence that beneficiaries would never have recourse to a solicitor's professional body in situations where he provided inadequate services. This in my view would entirely defeat the whole point of defining beneficiaries as clients in s.2 of the 1994 Act.

However counsel for the applicant has argued that the words in s.2, namely, "*unless the context otherwise requires*" do not apply to any interpretation of s.8, because the content of the section is clear and the context does not otherwise require.

He has alluded to ss. 9 and 68 of the Act as indicating that, in framing this legislation, it was the intention of the Oireachtas to give wider powers to the respondent to consider complaints of overcharging (under s.9) than in respect of other complaints. Similarly, it was argued that the plain meaning of s.68 is that it does not extend the obligations to provide fee estimates to beneficiaries generally.

I think the wider definition of "client" as contained in s.2 must necessarily be the correct one. The sole purpose of the work which the applicant was doing was to benefit the beneficiaries. In my view the clear and obvious purpose of s.2 - and the fact that a beneficiary is therein defined as a client - is to ensure that a beneficiary obtains all the protections under the Act which any other client of a solicitor would obtain. I am also satisfied that the purpose of the 1994 Act is not to create two classes of clients, namely those who can make a complaint about inadequate services and those who cannot make a complaint about inadequate services.

It would be absurd to have a situation whereby the beneficiaries would be entitled to have the applicant removed as executor on application to the Court, but were powerless to advance a complaint to the solicitors' professional body. They are the persons for whose benefit the professional services are provided. In my view, on the interaction of s.2 and s.8, the definition of client contained in s.2 must prevail. I simply do not accept that the Act is designed to ensure that where a solicitor is acting both a executor of the will and solicitor that he is in consequence to enjoy an immunity from the provisions of s.8 of the Act of 1994.

While a complaint was also advanced that the decision of the Committee was flawed because it impermissibly interfered with his role as executor, I am satisfied that the respondent sought merely to regulate his conduct as a solicitor and not qua executor. I am satisfied that the respondent is neither attempting to distribute or regulate the distribution of the estate of Reginald Moorhead. The direction made by the society herein did not direct any distribution of the estate to the beneficiaries. Any directions made or given by the respondent against the applicant were made against him in his capacity as solicitor.

I am also satisfied that the arguments advanced in support of the applicant's contentions that he was denied fair procedures are misconceived. Whatever reservations the applicant may have had about the procedures that were in place, he did nonetheless co-operate and participate in those procedures. I am satisfied he was duly and properly notified of the meeting due to take place on 16th April, 2008 and that his failure to attend or to send a representative does not give rise to any relief by way of judicial review.

Further, the respondent was not obliged to hear the complainants in the presence of the applicant. At no stage did the applicant ask to be so present, nor did he at any stage in the process ask to cross-examine the complainants. Nor did the Committee purport to act on any information conveyed to it orally by any of the complainants.

It is unnecessary for me to make any finding as to the degree to which the applicant may have been in default in this case. The court was not addressed on any basis of new law created by the decision of the Supreme Court in *Meadows v The Minister for Justice Equality and Law Reform* (Unreported, Supreme Court, 21 October 2009) to suggest that the findings of the respondent were disproportionate. These are simply judicial review proceedings which challenge the manner whereby the decision was arrived at.

Even if I were mistaken in the views already expressed herein, I would in any event have refused to grant judicial review on discretionary grounds. I would exercise that discretion by reference to the following:-

> *(a) The applicant had a right of appeal to the High Court but did not avail of it.*
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> *(b) While the applicant raised the jurisdiction issue as far back as 2005 and then repeatedly in 2007, he never sought prohibition. In my view the point was therefore spent or waived: see Corrigan v. Irish Land Commission [1977] I.R. 317*
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> *(c) The applicant was given a further chance in July 2008 to comply with the requirements of the respondent but nonetheless failed to avail of same.*
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> *(d) Finally, even though the applicant had given an undertaking to complete the distribution within four weeks from 23 January 2008 this did not happen, not withstanding that a large number of letters and reminders were sent to the applicant by the respondent. Nor did the applicant appear or send a representative to the crucial hearing on 16th April, 2008.*
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> *(e) In reaching its decision, the respondent Committee expressly ruled out relying on any oral communication which they had received from any of the complainants.*

In all of these circumstances I find it impossible to see how the applicant was disadvantaged in any way or how the respondent body may legitimately be stated to have acted unlawfully or improperly in this case. I would therefore dismiss the applicant's claim.