NO REDACTION NEEDED

THE COURT OF APPEAL - UNAPPROVED

Supplemental Judgment No. 2

Appeal Number: 2021/13
Neutral Citation Number [2023] IECA 108

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

LAW SOCIETY OF IRELAND

APPLICANT/ RESPONDENT

- AND -

DANIEL COLEMAN

APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of May 2023

1. This judgment is supplemental to two earlier judgments delivered by me on 11th July 2022 (the "Principal Judgment") and 7th September 2022 (the "first supplemental judgment") and should be read in conjunction with those earlier judgments.

2. All judgments are concerned with an appeal from a decision of the High Court (Simons J.) of 7th September 2020, on an application brought by the respondent pursuant to s.8 of the Solicitors Amendment Act, 1960 (the "Act of 1960") (as substituted by the Solicitors (Amendment) Act 1994 and as further amended by the Solicitors (Amendment) Act 2002)

whereby, in granting the orders sought by the respondent, the trial judge concluded, *inter alia*:

(1) That the appellant could not resile from admissions as to fact made by him before the Solicitors Disciplinary Tribunal ("SDT") in February 2010;

(2) That the conclusion of the SDT that the conduct admitted by the appellant constituted misconduct was "*legally sustainable*", as that term was used by McKechnie J. speaking for the Supreme Court in *Law Society of Ireland v Coleman* [2018] IESC 80;

(3) That the findings of misconduct on the part of the appellant involve dishonesty and

(4) That notwithstanding certain mitigating factors (considered at para. 235 of his judgment) the appropriate sanction to be imposed upon the appellant in respect of his misconduct was an order striking his name off the Roll of Solicitors.

3. The conduct in respect of which the appellant had made admissions before the SDT was to the effect that the solicitor had:

(a) Caused or allowed the name of another solicitor, Mr. Michael O'Donnell, to be written on a contract for sale dated 19th May 2004, identifying Mr. O'Donnell as a purchaser "in trust", without the authority of Mr. O'Donnell;

(b) Caused or allowed a fictitious contract dated 19th May 2004 to come into existence, purportedly made between clients of the appellant , as vendors, and Mr. O'Donnell (in trust), as purchaser, for the purpose of misleading ACC Bank into advancing monies to another client of the appellant, Fairview Construction Ltd, knowing that the sale of the land from Fairview, to third party purchasers had not closed, and that the dwelling units to be constructed thereon, had not been constructed. As explained in the Principal Judgment, the purpose of this

arrangement was to circumvent a condition of a loan approval issued by ACC Bank to Fairview.

(c) Destroyed a file consisting of three contracts relating to the contract of 19th May 2004, without the express or implied instructions of both parties thereto and

(d) Acted for both vendor/builder, i.e. Fairview, and the purchasers of 13 newly constructed houses thereby involving himself in a possible conflict of interest contrary to the provisions of Article 4(a) of the Solicitors (Professional Practice, Conduct and Discipline) Regulations, 1997.

4. While the appellant admitted the above matters of fact, he did not admit that they constituted misconduct or dishonesty on his part.

5. As mentioned above, the hearing before the SDT took place in February 2010. The reason that the proceedings came before Simons J. in 2020 may briefly be explained. Following the hearing before the SDT, the respondent made application to the High Court for an order striking the name of the appellant from the Roll of Solicitors. Those proceedings came on for hearing before the then President, Kearns P., who made such an order in July 2010. The appellant appealed that order. At the time, prior to the establishment of this Court, there was a very lengthy delay in the hearing of appeals to the Supreme Court, and the appeal did not come on for hearing until 2018. In a decision of the Supreme Court (McKechnie J.) of 1st May 2019 (being the decision referred to at para.2(2) above), the appeal was allowed, and the application of the respondent was remitted to the High Court for a rehearing.

6. As is recorded by the trial judge in his judgment of 7th September 2020, the position adopted by the appellant before the SDT was to make admissions as to fact with a view *"to relying thereafter on his cooperation as a mitigating factor in a plea for leniency"* (para.

105 of the judgment of Simons J.). However, before the High Court, the appellant took an approach described by the trial judge as a *"volte face"*. The appellant resiled from the admissions made before the SDT and decided to challenge the findings of fact made by the SDT, mainly on procedural grounds. The trial judge held against the appellant, and I upheld the conclusions of the trial judge in this regard in the Principal Judgment.

7. The appellant also contended in the High Court that the allegations made against him by the respondent did not allege misconduct on his part, and he further argued that his conduct did not constitute dishonesty. Here again the trial judge held against the appellant, concluding that, by admitting to the conduct in the terms described in the complaints made against him by the respondent, the solicitor was, in effect, admitting misconduct. At para. 106 of his judgment, the trial judge held: *"The conduct as set out in the complaints could not be characterised as anything other than professional misconduct"*, and later in his judgment, at paras. 231, and following, the trial judge concluded that the findings of misconduct against the appellant involved dishonesty. This conclusion too was upheld by me in the Principal Judgment, at para. 165. That conclusion was further affirmed in the first supplemental judgment, which was necessitated owing to a breakdown in communications between the Court office and the appellant, in circumstances where this Court had, prior to delivering the Principal Judgment, afforded the parties an opportunity to make submissions arising out of a decision handed down by another division of this Court in the case of *Law Society of Ireland v. Kathleen Doocey* [2022] IECA 2 following upon the conclusion of the hearing of this appeal.

8. Having concluded that the conduct to which the appellant had admitted involved dishonesty, the trial judge, having considered all relevant authorities, and having considered factors advanced by way of mitigation, concluded that he had no alternative but to impose the sanction of strike off upon the appellant. At para. 237, the trial judge stated:

> *"I have carefully considered whether a lesser sanction, such as a temporary suspension or the imposition of restrictions on the right to practice, might be imposed instead. I am satisfied that such a lesser sanction would not be proportionate to the gravity of the misconduct in this case. The misconduct involved a cavalier disregard of the importance of ensuring that contracts for sale are properly executed and can be relied upon by all parties. The admitted purpose had been to mislead a financial institution into advancing funds to the clients of the Solicitor. If unchecked, conduct of this type runs the risk of undermining the efficacy of lending in respect of development projects. More generally, it undermines confidence in the role of a solicitor in conveyancing transactions."*

9. The trial judge then proceeded to consider certain personal circumstances advanced on behalf of the solicitor by way of mitigation, but concluded that those circumstances did not ameliorate the gravity of his misconduct. Accordingly, he made an order in the terms sought by the respondent, striking the name of the appellant from the Roll of Solicitors pursuant to s.8 of the Act of 1960.

10. In the Principal Judgment, I also upheld the decision of the trial judge in respect of the sanction to be imposed upon the appellant. However, the appellant subsequently represented to the court that he had at all times understood that he would be afforded the opportunity to address the court on the question of appropriate sanction, if the Court held against him in relation to the findings of the trial judge as regards his admissions to the SDT, in relation to misconduct and dishonesty. While this was not the understanding of the Court, it was clear that there had been a misunderstanding and, having regard to the gravity of the matter, the Court agreed to hear further submissions from the parties directed exclusively to the issue of appropriate sanction having regard to the decision of the Court to uphold the conclusions of the trial judge, and in particular his conclusions that the appellant was bound

by his admissions to the SDT in February 2010 regarding his conduct, that that conduct amounted to misconduct (within the meaning of the Act of 1960) and that that misconduct involved dishonesty. This judgment follows upon the detailed submissions of the parties in this regard.

Standard of Review

11. The parties were in agreement that the standard of review to be applied by an appellate court to decisions of the High Court on applications under s.8(1) of the Act of 1960 has been laid down the Supreme Court in its judgment in *Law Society of Ireland v. Carroll and Colley* [2009] IESC 41 and [2009] 2 ILRM 77. In his judgment in those proceedings, Geoghegan J. held (at pp. 87/88 of the reported judgment):

> *"[…] The key question is whether as a matter of law it is open to the judge of the High Court to arrive at the decision made by him or her."*

And,

> *"[…] Supreme Court judges, therefore, cannot simply substitute their own views for the views of the President of the High Court or the delegated judge […]. The decision of the High Court can only be reversed if as a matter of law it was clearly incorrect."*

Submissions of the parties

12. The appellant contends that the trial judge erred in two respects:

1. Firstly, the trial judge failed to have any regard to the fact that the Law Society consented, in 2017, to the appellant acting as a personal insolvency practitioner ("PIP").
2. Secondly, the appellant contends that the trial judge erred in failing to adopt a contemporaneous perspective on sanction, in particular by failing to have regard

to the fact that the appellant had been without a practising certificate since the decision of Kearns P., a period (at the time of the decision of the trial judge) of more than ten years.

13. As to the first of these matters, it is the appellant's contention that, notwithstanding the finding of dishonesty in the conduct of the appellant as so found by the High Court, and upheld by this Court, the consent given by the respondent to the appellant acting as a PIP indicates an acceptance on the part of the respondent that there would be no recurrence of conduct, on the part of the appellant, of a kind that gave rise to the findings of misconduct and dishonesty made by the trial judge. Furthermore, it is submitted, this should be viewed in the light of an observation made by me in the Principal Judgment that this was not a case in which the appellant had set out deliberately to deprive a client or another party of their property or money.

14. The respondent submits that at the time it gave the consent that it did (to the appellant acting as a PIP), in 2017, this was prior to the judgment of the Supreme Court which was handed down in 2018, and at that time the appellant stood struck off the Roll of Solicitors. The respondent was not therefore resiling from or varying its view that the misconduct of the appellant necessitated an order of strike off.

15. The respondent further submits that the appellant placed no reliance in the court below on the respondent's approval to the appellant acting as a PIP. As such, this is a new argument that was not considered by the High Court and cannot now be raised by the appellant for the first time on appeal. In response to this, counsel for the appellant submitted that this is not a new argument but an issue of fact and a fact of which the trial judge was aware but failed to take into account when considering sanction. In doing so, the appellant submits, the trial judge erred.

16. While the appellant is correct in saying that the approval of the respondent to his acting as a PIP is a matter of fact, it is clear that he did not rely on this fact when making submissions to the trial judge as regards the appropriate sanction. While it is true that the trial judge should have regard to all relevant facts when considering the issue of sanction, if the appellant wished to place special emphasis on any particular fact then he should have done so, for two reasons. Firstly, so that the respondent would have had an opportunity to respond to the significance being ascribed to this approval by the appellant, and secondly, so that the trial judge could have an opportunity to weigh up the arguments advanced by both sides and to form a conclusion on those arguments. Not having done so, the appellant cannot now be heard to argue that the trial judge erred in failing to have regard to the respondent's approval. In placing the reliance that he now does upon this approval, the appellant elevates the significance of the issue in a way that it would be quite unreasonable to expect the trial judge, without his having heard more from the parties about the issue, to have formed a view as to whether or not it was an issue that had any bearing upon the question of appropriate sanction.

17. That this is so is clear from the decision of McKechnie J. in *Coleman* in which he says (at para.91) that there is an obligation on the High Court to have "regard to the factors *offered* in mitigation". Since the appellant did not offer this as a mitigating factor, the trial judge could not have been under any obligation to have regard to it, and therefore cannot be held to have been in error in not doing so.

18. The appellant also submits that the trial judge erred in failing to have regard to the period of twelve years since the proceedings before the SDT, during which he has been excluded from practice. It is submitted that this exclusion from practice for such a long period is a proportionate sanction in circumstances where there was a lack of any nefarious motive on the part of the appellant in his conduct. The appellant submits that in *Carroll*

and Colley, the Supreme Court had regard to the passage of time between the date of the decision of the SDT and the hearing in the High Court, and noted that during that period of time, the solicitor concerned had been continuing to practice with a practicing certificate, unlike in this case where the appellant has suffered the penalty of being excluded from practice over a much longer period. The appellant submits that the trial judge failed to have any regard to the period of time that the appellant has been excluded from practice, and that he erred in failing to have regard to the same.

19. The respondent submits that there was no error on the part of the trial judge, and that, on the contrary, the trial judge carefully considered, (at paras. 236 - 237 of his judgment) all of the mitigating factors relied upon by the appellant. These were: that the conduct of the appellant had not resulted in any loss to the financial institution (ACC Bank); that this was a "first offence" by the appellant, that the appellant had cooperated in the proceedings and had (initially, at least) made admissions of fact and the personal circumstances put forward by the appellant. Notwithstanding these considerations however, the trial judge concluded that the sanction of strike off was necessary to ensure the public interest in maintaining the integrity of the solicitors' profession, and that a lesser sanction would undermine the public confidence in the role of a solicitor in conveyancing transactions.

20. The respondent submits that, in considering the personal circumstances advanced by the appellant, the trial judge correctly observed that these circumstances might, at most, provide context for misconduct consisting of inattention to the detail of practice management, but they could not excuse the dishonest behaviour of the type at issue. Insofar as health issues were relied upon, they arose at a date subsequent to the key events.

21. The respondent submits that the trial judge properly identified and considered the material mitigating circumstances, in particular those offered by the appellant. The respondent also submits that there is no basis to suggest that the trial judge did not have

regard to the passage of time during which the appellant had not been practicing. It is submitted that the judgment of the court was given against the background of a detailed procedural history as set out by the trial judge at the outset of his judgment. The court was not obliged to recite every circumstance relating to the appellant which had been referred to over the course of the hearing.

22. Moreover, while the passage of time might be relevant in the context of an application for restoration to the Roll of Solicitors – as occurred in the case of *Enright v. Law Society of Ireland* [2018] IEHC 440, where full and unreserved insight and acceptance of responsibility was shown, this is not such an application.

Conclusion

23. While every case is different and offers its own unique facts, it has to be said that this is a most unusual case. Firstly, the acts engaged in by the appellant were most unusual. Secondly, having been struck off the Roll of Solicitors in 2010, the appellant had to wait an exceptionally lengthy period for the determination of his appeal to the Supreme Court – nine years – during the course of which he remained struck off the Roll of Solicitors. Thirdly, having been successful in the Supreme Court, at the subsequent re-hearing in the High Court the appellant purported to resile from the admissions that he made to the SDT. Moreover, this was not in the context of an appeal from the decision of the SDT to the High Court, as the appellant allowed the time for such an appeal to expire, but rather it was in the context of the application of the Society to strike the name of the appellant from the Roll of Solicitors. In any case, the upshot of all of this is that the appellant, at the time of the judgment of the High Court, had been without a practicing certificate for more than ten years.

24. I agree with the submissions of the appellant that such a lengthy period without a practicing certificate is a very significant factor to be taken into account in the consideration

of the appropriate sanction. If the appellant had, in the High Court, stood over his admissions in the SDT, and if he had further accepted that the admitted conduct constituted misconduct, then the trial judge might well have seen his response to the application of the respondent in a very different light. In those circumstances, the trial judge would have been faced with a plea for leniency from a solicitor who had acknowledged his wrongdoing, had shown insight into the nature of that wrongdoing and had suffered a very severe penalty for it in the form of more than ten years without a practicing certificate. Instead, the trial judge was faced with a solicitor who sought to resile from admissions freely made before the SDT and who said he thought that he had the authority of Mr. O'Donnell to endorse his signature on contracts which were in any case prepared with the fraudulent intent of misleading the lender, ACC Bank. In these circumstances, it seems to me, it can hardly be doubted that was it open to the trial judge as a matter of law to make the decision that he made in imposing the sanction of striking the name of the appellant from the Roll of Solicitors. Not only has the solicitor not admitted misconduct, he has withdrawn his admission of the conduct that has been found to be misconduct and he has shown no insight at all into the nature or character of that conduct, and the consequences that might have arisen as a result of it. While the appellant argued that the lender was at no loss on account of his conduct, this was entirely fortuitous and is in any case beside the point.

25. In the course of its submissions, the respondent relied upon the case of *Law Society v. D'Alton* [2019] IEHC 177, in which case Kelly P. summarised the factors to be considered in imposing penalty as follows:

(a) the protection of the public;

(b) the maintenance of the reputation of the solicitors profession as "one in which every member of whatever standing, may be trusted to the ends of the earth (per Bingham M.R.)";

(c) the punishment of the wrongdoer;

(d) the discouragement of other members of the profession who might be tempted to emulate the behaviour of the wrongdoer; and

(e) the concept of proportionality. The sanction must be proportionate and appropriate.

26. The trial judge considered *D'Alton* and other relevant authorities in the course of his judgment. However, having considered whether a lesser sanction that strike off might be imposed, he concluded that, having regard to the public interest in ensuring that the integrity of the solicitors' profession is maintained, in particular in conveyancing transactions, an order striking the name of the appellant from the Roll of Solicitors was required. In the Principal Judgment, I said at para. 181 that I considered the analysis and conclusions of the trial judge to be unimpeachable. Having since heard and considered the specific submissions of the appellant on the subject of sanction, I remain of that view.

27. The decision of Kelly P. in *Law Society v. Enright* [2016] IEHC 151 makes clear, at para. 44, that a strike off order is not *"to consign [a solicitor] to unemployability in his chosen profession in perpetuity."* Kelly P. noted that in some circumstances, it was possible to apply successfully for restoration to the Roll, as indeed Mr. Enright did two years later (see *Law Society of Ireland v Enright* [2018] IEHC 440). However, echoing what was said by the Supreme Court *in Re Burke* [2001] IESC 13, [2001] 4.I.R. 445 and also in *Carroll v. The Law Society of Ireland,* [2016] IESC 49, [2016]1 I.R. 676, Kelly P observed that the number of cases where an application for restoration to the Roll would be successful would be very limited, and that a party seeking such an order has something "*of a mountain to climb*".

28. Nonetheless, as *Enright* demonstrates, such applications can be successful. It is difficult, however, to see how the appellant in these proceedings could ever be successful

with such an application *for as long as* he continues to deny conduct which he previously admitted, and fails to understand that it constitutes misconduct of the most serious kind, which, in the words of the trial judge would, if left unchecked, undermine the public confidence in the role of solicitors in conveyancing transactions.

29. Since the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to an order for payment of its costs. If the appellant wishes to contend otherwise, he will have liberty to apply to the Court of Appeal office within 14 days of the date of this judgment for a short supplemental hearing on the issue of costs. If such hearing is requested and results in the order proposed herein, the appellant may additionally be liable for the costs of such supplemental hearing.

30. Since this judgment is being delivered remotely, Whelan J. and Faherty J. have authorised me to confirm their agreement with it.