[2020] IEHC 520

THE HIGH COURT

[2020 No. 21 SA]

IN THE MATTER OF MK OF FM SOLICITORS
AND IN THE MATTER OF THE SOLICITORS ACTS, 1954 TO 2011

AND

IN THE MATTER OF THE SOLICITORS DISCIPLINARY TRIBUNAL MATTER 2018/DT/21

BETWEEN

DK

APPELLANT

– AND –

MK

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 15 October 2020

Introduction

1. This is an appeal pursuant to s. 7(12A)(b) of the Solicitors (Amendment) Act 1960 (as substituted by s. 17 of the Solicitors (Amendment) Act 1994 and as inserted by s. 9(g) of the Solicitors (Amendment) Act 2002), which permits an appeal against a finding of a Disciplinary Tribunal that a solicitor has not been guilty of misconduct. The appeal is not a de novo hearing, unlike an appeal where a solicitor is found guilty of misconduct.

2. Here, Mr DK barrister (the "appellant") initiated a complaint against Mr MK, solicitor (the "respondent") on 27 February 2018 in respect of the non-payment of fees. On 28 May 2019 a division of the Solicitors' Disciplinary Tribunal ("the Tribunal") determined there was a *prima facie* case of misconduct on the part of the respondent for inquiry by the Tribunal in respect of three allegations, the first being that the respondent failed and continues to fail to use his best endeavours to recover the appellant's fees in respect of 125 cases, the second being that he failed to pass on the portion of fees due to the appellant in respect of the 125 cases and the third being that he failed to provide a satisfactory explanation as to whether he has made any efforts to recover the appellant's fees in respect of the 125 cases. By the time the case was heard, the number of cases in question had reduced to 93.

3. The Tribunal gave its decision on 9 March 2020 and delivered its report on 29 April 2020. The Tribunal did not find the respondent was guilty of misconduct on any of the allegations. By this appeal, the appellant seeks to challenge that decision.

Jurisdiction of the Court

4. Under s.7(12A), where a person appeals to the High Court against a finding of the Disciplinary Tribunal that there has been no misconduct, the High Court may either confirm the finding concerned or may rescind or vary any finding and may sanction the solicitor under s.8(1)(a), which sets out the available sanctions against a solicitor. There is no explicit power to remit to the Tribunal although both parties agree that such a power may be implied.

Remittal

5. Counsel for the appellant urged me not to remit the matter back to the Tribunal but to rescind the findings and vary them to hold that the respondent was guilty of professional misconduct in respect of all three allegations.

6. Counsel for the respondent asked me to confirm the finding but, if I was to rescind any finding, to consider remitting it to the Tribunal. He gave two reasons for this: first, that if I did not remit it, then the respondent would be deprived of the right of a full appeal against the decision following remittal; and second, that I should not take a view on credibility and if any findings were to be made on credibility grounds, the matter should be remitted.

7. I have made no findings on credibility and for that reason, the point does not arise. In respect of the right to a full appeal, this point was not developed at hearing and no authority was cited. Given that the legislation does not provide for remittal, and expressly gives the High Court the power to vary and, in relation to the solicitor, do one or more of the things specified in s.8(1)(a), I am satisfied there is an explicit statutory basis for me to make a finding in relation to professional misconduct.

8. Accordingly, for the reasons I set out below:

   - I rescind the Tribunal's finding on Allegation 1 and vary it to make a finding of professional misconduct against the respondent.

   - I confirm the finding of the Tribunal in respect of Allegations 2 and 3 that the respondent was not guilty of professional misconduct.

9. My reasons for deciding upon the question of professional misconduct in respect of Allegation 1 instead of remitting it to the Tribunal are threefold.

10. First, I do not consider that it is necessary that any additional evidence, including expert evidence, is required to decide whether there has been professional misconduct. No expert evidence was called before the Tribunal in this respect. When an application for a direction was sought by counsel for the respondent on Day 1 of the hearing before the Tribunal on the basis that no expert evidence had been called in respect of professional misconduct, the Tribunal rejected that application without hearing the appellant on the basis it was could decide that matter without expert evidence. Similarly, given the supervisory jurisdiction of the High Court over solicitors, the nature of this dispute, and the explicit guidance in respect of the matters the subject of Allegation 1 from the Law Society (identified below), I consider I can adjudicate upon professional misconduct.

11. Second, this is not a case where there are significant factual disputes that need to be resolved. The factual matters in Allegation 1 are not, in the main, controverted: the real question is whether, in the circumstances of this case, they constitute professional misconduct. It seems to me that I am in as good a position to resolve this question as a differently constituted body of the Tribunal, who would have to immerse themselves in this issue afresh.

12. Third, it is highly desirable in the interests of finality that this matter be concluded as soon as possible. The matter first came before the Tribunal in 2018 but a complaint was made to the Complaints and Client Relations Committee on 2 October 2014, which was adjudicated upon on 9 May 2017. The appellant first wrote terminating his relationship with the respondent because of non-payment of fees in 2012. Moreover, the cases the centre of the allegations range back over 15 years. The necessity for finality is made greater by the fact that this is a dispute between two brothers. Remitting it back to the Tribunal will unnecessarily prolong matters.

13. Finally, in relation to the question of sanctions under s.8(1)(a), as suggested by the parties, I propose to hear them on this issue before making any finding.

Nature of Review

14. Both parties agreed that this is an appeal against error, with elements of an appeal on the record and I should apply the test identified by Clarke J. in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48 i.e. that I should only overturn the Tribunal's decision where the appellant has persuaded me as a matter of probability that the decision of the Tribunal was vitiated by a serious and significant error or series of errors (see *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323). I accept that as per the appellant's written submissions, the threshold for overturning a decision of a specialist tribunal is relatively high but that, as identified in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34:

> *"Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected".*

15. Finally, I am conscious I should exercise curial deference towards decisions made by specialist tribunals, albeit modified somewhat in the case of solicitors given the supervisory jurisdiction this Court exercises over them.

Appellant's Submissions

16. In respect of Allegation 1, the appellant submits that it is clear from the respondent's affidavit of discovery that he did not issue any fee notes, the subject of this allegation, to the respective clients. This, he says, flies in the face of the minimum obligations identified by the Law Society in its Practice Note. The appellant refers to the observation of the Tribunal that the respondent was in a privileged position in receiving nearly all work for counsel from the appellant's firm, and that this was in the knowledge there would be a cohort of cases for which the respondent would not receive payment. The appellant submits that this does not reflect the actual relationship between barristers and solicitors. He acknowledges that he had undertaken work on the understanding he would not be paid in some 60 cases and he did not issue fee notes for these particular cases. However, he did expect to be paid for other cases and therefore issued fee notes. The Tribunal failed to consider evidence that the respondent did not pass the appellant's fee note to the clients or that the respondent had received fees in some cases and had not paid the appellant a portion of the fees.

17. The appellant disputes the Tribunal's reasoning with respect to the respondent not being guilty of misconduct on the basis that the appellant delayed in submitting his fee notes, and that some fee notes were issued after the breakdown in relations between the parties. The appellant submits the Tribunal's decision has a basic and fundamental error insofar as it lists the date of the breakdown of that relationship as November 2011 instead of April 2012. The appellant also submits that there was an agreement between the parties to issue fee notes when it was clear that a particular matter had come to an end or if fee notes were sought.

18. In relation to Allegation 2, i.e. that the respondent failed to pass on fees to the appellant, the appellant pointed to a number of identified cases in which some payment had been received by the respondent and the respondent failed to pass on a portion of these fees to the appellant. The appellant submits that the Tribunal's failure to find misconduct does not accord with the Practice Note.

19. In respect of Allegation 3, the appellant submits that the Tribunal failed to consider the failure of the respondent to address queries raised in correspondence by the appellant prior to the breakdown of the parties' relationship. The respondent never addressed certain questions which the appellant raised with him in correspondence.

20. Overall, the appellant submits that the findings of the tribunal in respect of the three allegations are vitiated by a serious of serious and significant errors and asks the court to rescind the findings of the tribunal.

Respondent's Submissions

21. The respondent submits that the Tribunal did not fall into error (either of law or of unsustainable finding of fact) and that the determination of the Tribunal should not be disturbed. He submits that the appellant is looking for the broader context of the decision to be removed and is inviting this court to look at discrete elements of the decision in isolation. The respondent also argues that the appellant has the onus in proving that the Tribunal failed to consider/ignored evidence, and this onus was not discharged.

22. The respondent maintains that the Tribunal carefully made a decision, weighing conflicting evidence, and although the Tribunal was at times critical of the respondent, it ultimately decided not to proceed in making a finding of misconduct in the circumstances.

23. The respondent also submits that the long-standing relationship and familial history between the parties must be taken into account, and the time period while the relationship was breaking down is relevant. During the period of November 2011 to April 2012, while the relationship had not broken down, it was in the process of breaking down and relations were strained. The respondent also considers that the delay in issuing fee notes was a significant factor contributing to the appellant not being paid.

Allegation 1

That the Respondent solicitor is guilty of misconduct in his practice as a solicitor in that he failed and continues to fail to use his best endeavours to recover the Appellant's fees in

respect of any, some or all of the case listed at DK11 of the Affidavit of the Appellant of 27 February 2018

24. It is frankly conceded by the respondent that in respect of the 93 cases now at issue in these proceedings, identified in DK11 to the Affidavit of DK sworn 27 February 2018, none of the fee notes provided to him by the appellant were ever sent to clients. This may be seen from the affidavit of discovery of 22 October 2019 sworn by the respondent, where he avers that he has explained since the commencement of the proceedings and for the duration of the Law Society investigation that no correspondence exists in respect of fees between him and any clients relating to the cases listed in DK11. He confirmed this position in oral evidence before the Tribunal.

Law Society guidance in respect of the payment of counsel's fees

25. Two publications issued by the Law Society in respect of the payment of counsel's fees have been relied upon by the appellant - the Guide to Good Professional Conduct for Solicitors (3rd Ed.) (the "Guide") and a Practice Note of the Law Society on "Payment of Counsel's fees" of 2010 (the "Practice Note").

26. Paragraph 8.4 of the Guide provides as follows:

> "…
>
> *A solicitor who has received a fee from a client payable to counsel should pay such fee immediately. A solicitor who instructs counsel should use his best endeavours to ensure that counsel receives fees that are due and owing to him at the earliest opportunity.*
>
> *If a fee is marked on a brief and has been agreed with counsel, the fee is payable to counsel. In the absence of any express agreement, a reasonable fee should be paid to counsel".*

27. The Practice Note notes that there has been a significant increase in complaints received from the Bar Council in relation to claims for outstanding fees. It goes on as follows:

> *"The Society has always taken the view that a solicitor is not personally responsible for the discharge of counsel's fees but equally it is recognised that solicitors have a duty to use their best endeavours to recover fees that are properly due to counsel. At the very least, solicitors should be able to demonstrate that they have written to their clients requesting payment, followed up any such requests and alerted clients to the possibility of issuing proceedings for the recovery of the outstanding fees and where there is a reasonable prospect of recovery, issuing and prosecuting such proceedings.*
>
> *Further it may well be held to be misconduct in situations where solicitors have utilised any money received towards their own fees, to the exclusion of counsel".*

28. Before considering the approach of the Tribunal, it seems uncontroversial to observe that by failing to send on any fee notes or to identify the fees being sought by counsel in any of the cases identified in DK11, *prima facie* the respondent failed to observe both the Guide and the Note, leaving aside the moment the justifications given by the respondent for this failure.

29. In respect of the Guide, it could not be said that the respondent had used best endeavours to ensure that the appellant received fees due and owing to him at the earliest opportunity. Indeed, by failing to alert the client to counsel's fees in any way, the respondent had made it much less likely that the appellant would receive the entirety or even a portion of fees due and owing.

30. The Practice Note fleshes out what is expected where there is an obligation to use best endeavours to recover fees. The first step is that solicitors can demonstrate they have written to their clients requesting payment and followed up any such requests. This was not done in any of the cases the subject of this complaint.

Approach of Tribunal

31. At page 7 of its Decision, the Tribunal identified that the primary motivating factor in the appellant bringing the matter was his feelings of anger and betrayal regarding the respondent and it stated that this was relevant in determining whether there was misconduct on the part of the appellant.

32. At page 9 of its Decision, the Tribunal refers to the acknowledgement of the respondent in his Affidavit that he did not furnish any fee notes to clients but notes that the respondent has furnished an account as to why as follows:

> *"…for the most part this relates to the delay in furnishing the fee notes and respondent solicitor's assertion that it was too late and no purpose would be served by furnishing such fee notes by the time same were received.*
>
> *This might seem an unsatisfactory explanation and certainly is not accepted by the applicant. However, there is no evidence that the respondent solicitor received fees with regard to these matters but failed to account for applicant's fees in respect of same, save and except with regard to the cases in respect of which evidence was presented in support of allegation 2 which will be separately dealt with."*

33. The Tribunal goes on to say that some fees were discharged in 2015 and that the respondent has said he will continue to use best endeavours to recover and discharge fees when cases are concluded. The Tribunal identifies three cases where it says there is an air of unreality in the appellant's expectation of discharge of fees on the basis that one client had emigrated and his whereabouts may be unknown (SC), another had become unemployed (JB) and in the third, the respondent had managed to obtain some fees for both himself and the appellant (Estate of HF) (p. 10-12).

34. The Tribunal makes various findings relevant to delay. At page 11, the Tribunal notes that the matter of fee notes issued a long time after the work was concluded is problematic. It notes that although the appellant was complying with his ordinary practice in the issue of fee notes, there is no doubt that the simultaneous and timely issue of fee notes serves the cause of their recovery enormously.

35. At page 12, the Tribunal notes that it was unfortunate that there was an arrangement in place where fee notes were not furnished until matters had clearly come to an end or fee notes were sought.

36. At page 13, the Tribunal notes that subsequent to the severing of the relationship between the parties, a very substantial volume of cases were identified many of which went back many years.

37. Moving away from delay, at page 12, the Tribunal identified aspects of the appellant's evidence of significance. The first was that he was owed a large body of fees by other solicitors and, with the exception of one, had taken no action in respect of same. The second was that the appellant acknowledged he had not been paid in all matters when he did work for his late father, who was the principal of FM Solicitors.

38. The Tribunal observed as follows:

> *"It is impossible for the Tribunal not to conclude that the applicant has been treated professionally by the respondent solicitor no less differently than he was by the respondent solicitor's colleagues and indeed, by his late father. concluding that the appellant had been treated no differently."*

39. The Tribunal concluded as follows in respect of Allegation 1:

> *"Accordingly, the Tribunal considers that the respondent solicitor has not failed to use his best endeavours to recover the applicant's fees in circumstances where these fees were for the most part furnished long after the works carried out and where the Tribunal has no evidence to dispute the contention made by the respondent solicitor in respect of the recovery of such fees. Accordingly, the Tribunal makes no finding of misconduct in respect of this allegation."*

40. At the hearing, there was a debate as to what the Tribunal meant by the reference to the "*contention made by the respondent solicitor in respect of the recovery of such fees*". Counsel for the appellant thought it was a reference to the impact delay had on the recovery of fees, whereas counsel for the respondent thought it was a reference to the character of those disputed fees as being ones where recovery was not possible, whether for reasons of delay or other reasons. Having regard to the totality of the evidence given by the respondent, recorded on the transcript, I am satisfied the Tribunal were referring to the impossibility of recovering fees generally.

41. In summary, the Tribunal appear to have accepted the factual situation as identified above i.e. that no fee notes were sent but found this was not misconduct.

Review of Tribunal decision

42. Applying the agreed test as to whether there were serious and significant errors vitiating the decision of the Tribunal, I start from the premise that, having regard to the Law Society documents identified above, there is a *prima facie* obligation on a solicitor to send out counsel's fee notes in respect of work done. Where that is not done, as in the instant case, it would be necessary for the Tribunal to be satisfied there were good reasons justifying the departure from normal practice as set out in the Law Society documents identified above.

Delay

43. I have summarised above the Tribunal's findings on delay. It noted that the appellant was complying with his usual practice of sending fee notes only when the matter was resolved or he was requested to provide one and that this was the arrangement in place. It then criticises the approach, noting that the simultaneous and timely issue of fee notes serves the cause of their recovery enormously. It noted that many of the cases went back many years. Delay was clearly a core justification for the Tribunal's rejection of Allegation 1.

44. However, given that the Tribunal had accepted there was an arrangement between the parties whereby fee notes were not provided until matters were at an end or fee notes sought, it is difficult to see why the provision of fee notes at this point should absolve the respondent of his obligation to seek to recover counsel's fees, in the first instance by simply sending out the fee notes to the client. Had the respondent indicated he had sought fee notes at earlier points in the case but could not obtain them from the appellant, that might justify a decision not to send them when they were received after the case had resolved. But no such case was made by the respondent.

45. Moreover, it was not the case that the Tribunal carried out a detailed analysis of the cases in DK11 and identified the time lag between the work being done and the fee note being provided. No such exercise was done. In certain cases, the evidence showed that the appellant had submitted a fee note either before the case concluded or before the respondent had been paid. Thus, delay was not a factor in every one of the 93 cases.

46. Nor did the Tribunal consider the relevance of the respondent failing to inform the appellant that fee notes would not be submitted if only submitted at the end of the case or when requested. Indeed, the evidence of the appellant was that he only became aware that no fee notes were submitted in respect of any of the cases in DK11 when he received the affidavit of discovery of the respondent. It is difficult to imagine that the appellant would not have altered his practice in relation to the submission of fee notes had he been aware that they were not being submitted to clients because of the timing of their provision to the respondent.

47. Nor was delay in receiving fee notes identified in the Law Society guidance as a reason for absolving a solicitor from his or her obligation to submit fee notes. Given the clear and unambiguous guidance in this respect, the Tribunal ought to have carefully analysed the precise parameters of the delay alleged, to have identified the extent to which the respondent contributed to that delay and have explained why adherence to an accepted

way of working between the appellant and respondent in respect of the submission of fee notes nonetheless absolved the respondent of his obligation to submit fee notes. That was not done.

48. In those circumstances, in my view, the Tribunal made a serious and significant error in treating delay in submitting fee notes in this case as justifying, at least in part, the wholescale failure of the respondent to submit fee notes.

Cases where no fees would ever be recovered

49. The second leg of the Tribunal's decision was that the fees would never be recoverable, either because of delay or the circumstances of the clients, and therefore there was no point in pursuing their recovery. Neither the Guide nor the Note identify an exception to the obligation to use best endeavours to seek recovery of counsel's fees on the basis that recovery is unlikely. The likelihood of success might influence what degree of persistence is required after the sending out of the initial fee note. But to allow pessimism about the chances of success to prevent the very submission of a fee note to the client is hard to reconcile with the Guide.

50. The Tribunal considered three cases to support a finding that the appellant was being unrealistic about the discharge of fees. Even leaving aside the question as to whether, in principle, the likelihood of recovery absolves a solicitor from using best endeavours, that is a very small sample where 125 cases were initially at issue. Moreover, ironically, one of those cases was a case where the respondent had chased fees and had secured a sum for the appellant with the Tribunal noting that in that case, he had used best endeavours to discharge a portion of the appellant's fees. That was the case of In re HMF Estate, where the appellant issued a fee note for €10,744 and on 31 January 2017 he was paid €5,000 after the respondent obtained €80,000 including VAT and outlays in the same month. There, efforts by the respondent to recover fees paid dividends: it is difficult to see why this case should have been used by the Tribunal to justify the respondent's argument that he was entitled not to seek to recover fees on the basis they would not be recovered.

51. In any case, the evidence did not establish that the respondent had concluded in respect of all the cases in DK11 that recovery would be impossible. On Day 3, while the respondent was being cross examined, the following exchange took place:

> *"Q. 377 Do I understand correctly that it was not your practice to ask counsel to submit a fee note?*
>
> *It was my practice to ask him to submit a fee note on cases where he understood he was getting paid, where I understood we were getting paid. It was not my practice to ask him for fee notes that he understood no fees were being charged by my office. And in all of the those matters I got no fees either.*
>
> *Q. 378 And you're not suggesting, are you, that of the 120-something cases on DK11 that each of those cases was a case in which you were never going to receive payment?*

No I am not making that point. "

52. In fact, there were a number of cases where the evidence showed that fees had been recovered in cases identified in DK11 but that the appellant had either not been paid or been paid fees lower than expected. Some of these cases are dealt with in the context of Allegation 2. Here, however, they are examined simply to consider the reasonableness of the Tribunal's conclusion that the respondent was justified in failing to send out fee notes or seek to recover fees on the basis that it was a pointless exercise.

53. In G v. G, the appellant pointed to a fee note for €968 submitted in October 2004. The ledger card discovered shows that on 14 April 2004, €6,134.70 was paid by the client to the respondent. In G v. M, the appellant issued a fee note for €1,107 on 24 November 2011. The discovery records that the respondent received €6,000 from the client on 6 February 2013. Thus, in both those cases, monies had been received, undermining the defence of impossibility of receiving fees, as acknowledged by the respondent in his evidence to the Tribunal quoted above.

54. In summary, I conclude that the Tribunal had before it an insufficient factual basis for accepting the argument of the respondent there was no point in sending out fee notes at all as none of counsel's fees were recoverable.

55. Nor did the Tribunal consider whether a belief on the part of a solicitor that a client would be unlikely to pay, absolves him or her from complying with their best endeavours obligation having regard to the terms of the Guide or the Practice Note. It is true that those documents had been referred to by the Tribunal in its introductory section, but their content was not discussed in the context of Allegation 1 (or indeed the other two Allegations). Given the very explicit terms of the Practice Note in particular, where it states that solicitors should be able to demonstrate that they have written to their clients requesting payment, followed up and alerted them to the possibility of issuing proceedings, in my view the Tribunal ought to have explained why an assumed impossibility of recovering fees justified a departure from the terms of the Law Society's guidance. After all, the Practice Note makes no reference to the obligation to collect counsel's fees arising only where the solicitor believes the client has sufficient means to do so. One only needs to reflect on the implications of such an approach to see the frailties in it.

56. Nor was there any attempt by the respondent to identify consent to this approach on the part of the appellant. The Tribunal was not presented with any correspondence from the respondent to the appellant at any stage indicating that those fee notes would not be sent on due to lack of ability on the part of clients to pay, or identifying in advance of briefing the appellant on any given matter that he would not be paid, although the respondent did give evidence that they spoke on the phone in this respect (see Booklet C, p 150).

57. In conclusion, I consider the Tribunal erred in law in interpreting a solicitor's obligation to use best endeavours to collect counsel's fees as not applicable where that solicitor, unilaterally and without reference to the counsel concerned, decides that the client is

unlikely to be in a position to pay fees, given the Law Society Guide and Practice Note, particularly where this approach was taken, not on a once off basis, but across a very significant number of cases.

Agreement that some cases would be done on a no fee basis

58. At page 5, the Tribunal had held as a matter of fact that all work requiring counsel from the respondent's office was sent to the appellant save for occasional cases and this privileged position carried it with it the knowledge and understanding that there would be a cohort of cases and work done for which there would be no payment received. The *quid pro quo* was that effectively all work was being allocated to the appellant. Although the appellant had given evidence that this did not in fact reflect the state of affairs, the Tribunal were entitled to accept the evidence of the respondent in this respect. However, importantly, there was no finding by the Tribunal that the respondent was justified in not sending out fee notes because there was an agreement, either implicit or explicit to this effect. This is borne out by the evidence in DK11 where, from 2001, one sees the appellant consistently sending fee notes and reminders.

59. Insofar as the Tribunal implicitly took this into account in respect of their finding on Allegation 1, given the express obligation on solicitors under the Guide to recover fees, they were incorrect as a matter of law to conclude that any understanding that there was a group of cases for which fees would not be recovered absolved the respondent of his obligation to use best endeavours to collect fees for counsel, starting with the very basic obligation to send counsel's fee notes to the client.

Irrelevant evidence taken into account

60. It is well established that if an expert tribunal takes into account irrelevant matters, that will constitute an error of law. I have identified above that the Tribunal identified as relevant that fact that the appellant had been treated professionally by the respondent solicitor no less differently than he was by the respondent solicitor's colleagues and indeed, by his late father. The appellant in fact had strongly controverted the assertion that his father had operated in the same way as his brother in relation to fees, although he had accepted that at times he did not get paid for work by the firm when his father was the principal. But even accepting that the Tribunal was entitled to prefer the respondent's evidence in this regard over that of the appellant, it is impossible to see the relevance of either his father's practice in relation to the collection of counsel's fees or the practice of other solicitors for whom he worked.

61. The comment by the Tribunal of the decision by the appellant not to make a complaint about other solicitors for whom he worked is particularly difficult to understand as it appears to relate back to its finding that the appellant's motivation for bringing the complaint was his feelings of anger and betrayal. Given that a division of the Tribunal had found there was a *prima facie* case of misconduct on the allegations sent forward, the appellant was entitled to have his case heard by the Tribunal. The Tribunal were not entitled to permit their perception of his motivation in complaining his brother to the Tribunal as opposed to other solicitors (including his father) for whom he worked to affect their evaluation of whether the respondent had failed to use best endeavours to recover

counsel's fees. I find that their decision to take the above matters into account in arriving at their conclusion on Allegation 1 was an identifiable error of law and constituted a serious and significant error.

Factual error by Tribunal

62. Finally, the question of an error made by the Tribunal in respect of the date of the breakdown of relations between the parties was raised by the appellant in respect of all three allegations but it is convenient to deal with it here. In its decision, the Tribunal identified the relevant date as being November 2011 whereas it was not until 2 May 2012 that the appellant wrote to the respondent indicating that he no longer wished to work with him and that he was returning all his papers. Counsel for the appellant indicated that the significance of the error was that, because the Tribunal thought the relationship had broken down in November 2011, they treated any fee notes sent after that date as being motivated by the breakdown, thus supporting a narrative that up until the breakdown the appellant never expected to get paid for a wide variety of cases, and that the fee notes sent after the breakdown should not be treated as evidence that he had an expectation of being paid for those cases.

63. It is well established in law that a factual mistake on the part of a decision-making body will not vitiate its decision: it must be a serious and significant error. Here, the error as to the date may have lead the Tribunal into treating certain the fee notes between November 2011 and May 2012 as being sent purely because of the breakdown: but this does not seem terribly significant, because the evidence discloses it was clear in any case by November 2011 that things were becoming very difficult between the parties (the issues with the case of C v. D having arisen by then) and, whatever their previous relationship had been, it was now altered. I should add that the Tribunal's description of reminders sent on 8 November 2011as being sent in a "period during which the relationship between the parties was breaking down" seems to me to be an accurate reflection of the state of play in November. For those reasons I do not consider this error was serious or significant.

Conclusion on Tribunal's finding on Allegation 1

64. As identified above, I have found a number of serious and significant errors on the part of the Tribunal, which, taken in combination, vitiate their decision in respect of Allegation 1. I therefore rescind their finding of no professional misconduct on the part of the respondent in respect of Allegation 1.

Was the respondent guilty of professional misconduct in respect of Allegation 1?

65. I turn now to consider whether in my view, there was professional misconduct on the part of the respondent in respect of Allegation 1.

Factual Breach

66. As explained above, there was a widespread failure on the part of the respondent to submit any fee notes at all in respect of the cases at issue over a sustained period. The obligation under the Guide is to use best endeavours to ensure counsel receives fees due and owing to him or her at the earliest opportunity. The Practice Note is very explicit in this regard. It interprets best endeavours in this regard as requiring

> *"at the very least, solicitors should be able to demonstrate that they have written to their clients requesting payment, following up any such requests, and alerted clients to the possibility of issuing proceedings for the recovery of the outstanding fees, and, where there is a reasonable prospect of recovery, issuing and prosecuting such proceedings".*

67. It is of interest that the likelihood of recovery only comes in at the stage where consideration is being given to the issuing of proceedings. In this case, that consideration appeared to mitigate against even sending fee notes on to the clients. The respondent clearly took the view that there was little or no obligation on him at all to collect fees on behalf of counsel in respect of the cases the subject of this complaint. This may be explained by the fact that he appeared to have believed that the arrangement was that the appellant would only recover fees in respect of some of the cases he did and the cases at DK11 fell into the category of those where fees would not be recovered. But he must have been aware that his brother did not share that understanding in respect of the identified cases given that fee notes were being submitted, as well as numerous reminders. Nor does he appear to have made this position clear to the appellant. Nor, for the reasons set out in detail above, was delay or the respondent's estimation of the likelihood of recovering fees a justification for not sending out fee notes.

68. Moreover, as identified above, certain of the cases where he did not submit fee notes were cases where he knew he would be paid or had been paid. In those circumstances, even on the basis of the arrangement he believed he had with the appellant, at that point in time he ought to have submitted the appellant's fee notes and/or recovered his fees for him.

69. In my view, having regard to the circumstances, the factual elements of Allegation 1 are proved: the respondent failed and continues to fail to use his best endeavours to recover the appellant's fees.

Professional misconduct

70. I turn now to consider whether this is professional misconduct, including whether it met the criteria in relation to seriousness identified in *Corbally v. Medical Council and Others* [2015] 2 I.R. 304.

71. Counsel for the respondent made forceful arguments to the effect that the appellant failed to establish the question of professional misconduct at the hearing and had not addressed the question of whether a breach of the Guide constituted misconduct. He argued that in this case, from the point of view of public perception, it would not bring the solicitor's profession into disrepute if they knew that a solicitor had not sent out fee notes in the circumstances of this case.

72. Counsel for the appellant countered that the Tribunal itself had accepted that such a breach would result in professional misconduct in its conclusion in respect of Allegation 1 where, after concluding that the respondent had not failed to use his best endeavours to recover fees, it stated:

> *"Accordingly, the Tribunal makes no finding of misconduct in respect of this allegation".*

73. The appellant lays particular stress on the word "accordingly", submitting this must mean that the Tribunal were adopting the position, albeit implicitly, that a failure to use best endeavours would, ipso facto, amount to misconduct. Viewed in isolation, this formula of words might have the meaning contended for; but it could also simply mean that since the appellant had not persuaded them of the factual basis, no decision could be made on Allegation 1, i.e. that the respondent is guilty of misconduct in his practice by failing to use best endeavours to recover fees. A similar form of words is used by the Tribunal in its conclusion in respect of Allegation 2 at page 18. However, also at page 18, just before the conclusion, the Tribunal states in respect of O'R v. K that the circumstances of the case:

> *"though worthy of criticism of the respondent solicitor, do not reach a threshold of severity and seriousness and failure to do what ought to have been done that would warrant a finding of misconduct against the respondent solicitor".*

74. That does in my view suggest that Tribunal was of the view that the conduct in question would have resulted in a finding of misconduct had the necessary threshold been reached. On balance, there is some evidence that the Tribunal considered that a breach of Allegations 1 and 2 would, if made out as a matter of fact, constitute misconduct.

75. In any case, I am now deciding whether I consider whether the conduct the subject of Allegation 1 constitutes professional misconduct and the views of the Tribunal in this respect are not especially significant. I am guided as to what constitutes professional misconduct in the circumstances of this case by the explicit guidance in respect of the matters the subject of Allegation 1 in the Law Society Guide and the Practice Note, as well as the more general definition of professional misconduct as being as being "*conduct tending to bring the solicitors' profession into disrepute*" (see s.3(1)(d)). In my view, breach of the Code and/or the Practice Note is certainly capable of constituting professional misconduct, though I accept that is not an ineluctable conclusion, as submitted by counsel for the respondent, and that all the circumstances require examination.

76. Here, this was not a once off incident. Rather it was a widespread practice which significantly undermined the prospect of the appellant recovering all or some of his fees from the client. Not even making the client aware of counsel's fees (including at a time when there may have been some prospect of recovering those fees), let alone seeking to recover those fees from the client, meant that the respondent was preventing any possibility that the client might pay fees identified as those from counsel. The unusual triangular arrangement between a solicitor, client and counsel means that counsel have no direct access to clients to present their fees and are therefore wholly dependent upon the solicitor to present those fees on their behalf. If the solicitor never presents those fee notes, counsel has no way of stepping in and ensuring the client receives the fee note.

77. The extent of the obligation on a solicitor in this respect is clear from the Guide and the Note referred to above. In the circumstances of this case, those obligations were comprehensively ignored. Counsel for the respondent posited the question as to whether a member of public would consider a failure to submit fee notes as professional misconduct.

78. I am not convinced that the only prism through which one can measure whether an action brings a profession into disrepute is that of a member of the public. However, in this case, I imagine most members of the public would be concerned about a practice where one professional prevents bills issued by another professional from even reaching the client. Where a solicitor disregards the obligation to use best endeavours to recover fees, it adversely affects not only counsel but also clients, as solicitors who do not attempt to recover counsel's fees will soon find it impossible to obtain good counsel who will properly represent their clients' interests. In my view, a failure to comply with obligations in respect of counsel's fees on a widespread and enduring basis, as was the case here, will ultimately bring the profession into disrepute.

79. Finally, as will be seen below, the failure to present fee notes and to seek to recover same, makes it more difficult to understand whether solicitors have complied with other obligations in respect of fees, in particular the obligation not to pay themselves to the exclusion of counsel. If a client is not presented with counsel's fee note, and makes part payment in a case, it may make it significantly more difficult to identify whether the solicitor has kept fees intended for counsel, as no part of the payment from the client is identifiable as being in respect of counsel's fees.

80. I am conscious of the reasons given by the respondent for the non-presentation of the fee notes. But delay in submitting the fee notes could have been remedied by the respondent simply asking the appellant for fee notes, as indeed he did on occasion as per the evidence. It is not enough to abstain from requesting fee notes and then use delay in furnishing them as justification for not presenting them. Equally, in relation to the non-recoverability of fees, that ought to have been tested by the presentation of fee notes and the reaction of the client to same. As the Practice Note notes, when it comes to a decision re issuing and prosecuting clients for fees not paid, the reasonable prospect of recovery becomes relevant. But the respondent allowed that consideration to extinguish his obligation of actively seeking to recover fees; and there is no suggestion from either the Guide or Practice Note that that is permissible.

81. Accordingly, for those reasons, I conclude that in the particular circumstances of this case, given the number of fee notes not presented (93), the length of time over which the fee notes were not presented, the fact that fee notes and reminders had been provided by the appellant indicating a belief that he expected to be paid, the failure of the respondent to inform the appellant that fee notes had not been presented, and the likely financial consequences of same for the appellant, that the respondent was guilty of professional misconduct by not presenting any of the appellant's fee notes to clients and thus failing to use his best endeavours to recover the appellant's fees.

Allegation 2

That the Respondent Solicitor is guilty of misconduct in his practice as a solicitor in that he failed to pass on the portion of fees due to the Appellant in respect of any, some or all of the cases listed at DK11.

82. It is asserted that the respondent was guilty of professional misconduct by reason of his failure to pass on a portion of fees due to the appellant in respect of some or all of the cases at DK11. The Tribunal had noted that five cases had been identified where the respondent had listed cases where he had received payment but had failed to discharge fee notes and that counsel for the appellant had identified three additional cases where payment was either not made at all or in a lower amount. The Tribunal went through the explanations for each of those cases. (At the hearing before me it was identified by counsel for the appellant that only six cases were now at issue). The Tribunal noted that for the allegation to succeed it would be necessary for the Tribunal to accept that the respondent solicitor had received monies which ought, or some of which ought, to have been paid to the appellant but that he failed to do so.

83. There is one case that warrants consideration before dealing with the remainder, being O'B v. R, a case from 2002 where a fee note had been submitted by the appellant on 18 December 2007 in the amount of €4,235. This case was adjourned to allow the implementation of a settlement in the sum of €39,500 inclusive of legal fees. The case was subsequently struck out. The appellant gave evidence to the effect that, because the case had been struck out, the respondent must have been paid. The respondent gave evidence that he had lost the ledger card (after indicating to the CCRC that he would not get paid) and that he could not recall the matter and so did not know the position in relation to payment. The Tribunal observed in this respect:

> *"This is entirely unsatisfactory and leads to a conclusion that there could have been monies so received and not paid but in the absence of the ledger and having regard to the length of time that has elapsed, it is impossible to conclude with any reasonable certainty that this did occur and it would be wrong to make a finding of misconduct absent of such proof that monies had indeed been paid into the respondent solicitor".*

84. The appellant submits that the Tribunal erred in that, given the appellant was not challenged on his evidence that the respondent was paid, the failure of the Tribunal to make a finding of fact that the respondent had been paid was a clear error of fact and law. He says an inference ought to have been drawn that the respondent received the monies because the case was settled on the basis that it would be struck out if an all-in sum was payable, including costs, and the case was indeed struck out.

85. I accept the submission of counsel for the respondent here that there is an insufficient basis to overturn the decision of the Tribunal in this respect. The Tribunal's finding, above, amounts to a finding that there was insufficient evidence that the respondent had received and retained the entirety of fees in this case. Absent any proof of payment to the respondent, (given the absence of the ledger), and bearing in mind that allegations of

professional misconduct must be proved beyond a reasonable doubt, I do not consider this was an unsustainable finding by the Tribunal.

86. Turning now to the remainder of the cases, there were essentially two different categories identified by the Tribunal. The first category of case is where the amount paid is said to be less than that owing. Two cases fall into this category, Estate of HMF (referred to above), where the allegation is that a fee significantly less than what had been claimed was paid. The Tribunal concluded that this was not a case where there could be any claim of misconduct in failing to discharge due fees from monies received, although it was cavalier of the respondent to adjudicate as he did in respect of the appellant's fees. I agree. It does not come within Allegation 2 since it is in substance a dispute about the amount recovered rather than a case of non-recovery.

87. Similarly, in O'R v. K, the Tribunal characterised this case as one where there was a genuine dispute between the parties re the appropriate level of fees. The Tribunal noted that the respondent accepts that €280 was owing, although the appellant claimed the amount owing was in fact greater, but that due to error the sum had not been paid. The Tribunal noted that the circumstances, while "worthy of criticism" of the respondent, did not reach a threshold of severity and seriousness and failure to warrant a finding of misconduct against the respondent. Again, I can see no basis to interfere with this finding of the Tribunal given the level of fees unpaid.

88. The second category of cases is where it was alleged money had been paid to the respondent but no portion of it had been paid to the appellant. In one of those cases, G v. M, the appellant issued a fee note for €1,107 on 24 November 2011. The discovery records that the respondent received €6,000 from the client on 6 February 2013. €1,845 was paid on 12 February 2013 to another counsel to ensure representation after the appellant sent his papers back following the breakdown in relations. The Tribunal notes that the respondent solicitor confirmed the matter was ongoing and the appellant's fees would be discharged at the conclusion.

89. In G v. G, the appellant raised a fee note for €968 in October 2004. The ledger card discovered shows that on 14 April 2004, €6,134.70 was paid by the client to the respondent. At the hearing before this court, Counsel for the appellant made the point that the work was done between 18 December 2003 and 20 December 2003, including a brief fee on an interlocutory injunction and therefore although no fee note had been submitted when the money came in, fees had been incurred.

90. Similarly, in M v. C, the Tribunal found €292 was owing in circumstances where it appears from G1064 DK11 that a payment on account was made in 2006.

Professional misconduct

91. The overall conclusion of the Tribunal was to the effect that no finding of misconduct would be made, despite the Tribunal explicitly acknowledging that the respondent's solicitor's handling of some of the matters was unsatisfactory. Although the Tribunal did not make explicit whether as a matter of fact the allegation was not proven, or whether it

did not consider same to be misconduct (apart from in OR v. K where it explicitly said the circumstances did not reach a threshold of severity and seriousness), it seems to me that given the factual description given by the Tribunal of the various cases, it had concluded as a matter of fact that, in a number of the cases, monies had been received by the respondent without any payments being made to the appellant and it had characterised same as unsatisfactory. However, its decision not to make a finding of misconduct demonstrates that it did not consider the behaviour in question sufficiently serious to warrant a finding of misconduct.

92. In considering whether the Tribunal erred in its appreciation of whether professional misconduct was established, I must assume that the Tribunal had considerable experience in the discharge of counsel's fees and the appropriate course of action where a portion of fees are paid up front to a solicitor. I am also conscious that the Tribunal heard this case over the course of two days, receiving evidence from each party in *extenso*, including in respect of the detail of the cases the subject of this allegations, and the documentation in respect of same.

93. As identified above in the context of Allegation 1, the terms of the Guide and Practice Note confirm that that in certain circumstances, a failure to pass on the portion of fees due to counsel will constitute professional misconduct. Indeed, the Practice Note expressly states that where solicitors have utilised any money received towards their own fees to the exclusion of fees, it may be misconduct. But as noted above a breach of the Law Society guidance is not automatically professional misconduct: it will depend on the circumstances. In my view, the Tribunal's finding that the failure to pay over some portion of the fees received to counsel in 4 out of 93 cases ultimately identified in DK11 was insufficiently serious to warrant a finding of misconduct does not disclose either an identifiable error of law or an unsustainable finding of fact. In my view, the following facts support such a conclusion.

94. First, the Tribunal correctly concluded that certain of the complaints did not come within the terms of Allegation 2, being concerned with the proportion of fees paid to counsel and not the withholding of any fees payable.

95. Second, of those where the solicitor had been paid, some of them concerned very small amounts of money owing to counsel, in two cases being less than €300.

96. Third, at least partly because the appellant's fees notes had not been sent out to the clients, in no case had money provided to the respondent expressly to discharge counsel's fees been withheld by the respondent. The failure to send out fee notes made it more difficult to ascertain the proportion of monies received owing to counsel. But it also made it impossible to identify an intention on the part of the respondent to withhold fees that had been paid expressly in satisfaction of counsel's fees. In G v. G and M v. C, the amounts paid to the respondent were at or near the start of the case, and in neither case had a fee note actually been received at that point in time from the appellant. For the respondent to take those monies as fees for himself might be considered reasonable if he was of the view that ultimately, at the end of the case, there would be sufficient funds to

pay counsel, given the practice of the appellant sending fee notes at the very end of the case.

97. The Tribunal accepted that in the case of G v. M the case is ongoing and further fees will be received. Moreover, in that case, although there was a fee note outstanding when monies were received that ought to have been paid, the Tribunal took into account that some of those monies were used to retain another counsel where the appellant had sent his papers back. In my view, they were entitled to do so when evaluating the seriousness of the conduct.

98. Finally, given the number of cases the subject of the complaint – over 125 at the start – and given that the complaint finally resolved down to six cases, the respondent clearly did not take a systemic approach to holding onto counsel's fees, unlike his approach in respect to sending out fee notes to clients, discussed above.

99. For all these reasons, it seems to me that the Tribunal were entitled to take the view that the behaviour of the respondent in respect of the specific allegations in this case did not constitute professional misconduct and that their conclusion in this respect could not be characterised as a significant and serious error.

Allegation 3

That the Respondent Solicitor is guilty of misconduct in his practice as a solicitor in that he failed to provide a satisfactory explanation as to whether he has made any efforts to recover the Appellant's fees in respect of any, some or all of the cases listed at DK11.

100. The Tribunal concluded in respect of Allegation 3 that for the reasons set out in grounding the decision in respect of Allegations 1 and 2, the respondent was not guilty of professional misconduct. It noted it was impossible to divorce the difficulties that arose from the breakdown of the relationship as brothers on the one hand and as persons carrying out business together on the other. The Tribunal acknowledged what it described as "significant shortcomings" but took the view that having regard to the very extensive volume of fee notes furnished after the breakdown of the relationship and after the appellant severed ties with the respondent's office, the respondent did engage with and sought to address matters, some of which were extremely old and where relevant documentation was no longer available. It concluded as follows:

> *"The Tribunal is again cognisant of the fact that the respondent solicitor is a sole practitioner with limited staff and believes that he genuinely engaged with the applicant's concerns and sought to answer those as best he could in difficult circumstances".*

101. During the hearing, counsel for the respondent submitted that on an appeal such as this, I should not make a decision on the credibility of the respondent, not having heard the evidence and referred to *Fitzgibbon* in support of that submission. At paragraph 120, Clarke J. notes in relevant part:

> *"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."*

102. The appellant accepted in his written submissions that it is not open to this court to assess questions of pure credibility (paragraph 14). In relation to credibility findings, I must simply assess whether there was a sufficient basis disclosed on the basis of the material before me for such findings of fact.

103. At various points in the written and oral submissions, counsel for the appellant identified occasions where information had been provided to, variously, the CCRC and the Tribunal by the respondent in respect of cases which were subsequently shown to be incorrect, either by the averments in the affidavit of discovery sworn or by the material exhibited to that affidavit, notably the ledger cards. That material is relied upon heavily by the appellant in respect of Allegation 3. Essentially, I was being invited by the appellant to make findings that there was a lack of veracity in the approach of the respondent to the provision of information to the CCRC and/or the Tribunal, and to take those findings into account in relation to my review of the Tribunal's findings.

104. I do not think this is a correct approach. The Tribunal's conclusion that the respondent genuinely engaged with the appellant's concerns and sought to answer those as best he could in difficult circumstances should be treated as a credibility finding. I should therefore only interfere with it if there is a sufficient basis disclosed on the basis of the material before me for such findings of fact. In my view, having carefully read the transcripts of the evidence and considered the material identified by the Tribunal, I am not satisfied that there was an insufficient basis upon which the Tribunal could come to that conclusion.

105. Accordingly, in reviewing the finding of the Tribunal in respect of Allegation 3, I will not take into account any alleged inconsistencies between explanations and/or information given by the respondent throughout the course of the inquiry as evidence of a failure to provide a satisfactory explanation. For the sake of completeness, I should add that I have not taken any alleged inconsistencies into account when considering Allegations 1 and 2.

106. Leaving aside the question of credibility, the principal argument of the appellant was that the following questions had not been answered at any time by the respondent:

"(1) what date did you send my fee note to the client; (2) what efforts have you made to recover the fees; (3) have you or your firm received any payment in respect of the fees in any of these cases".

107. The Tribunal did not address that issue head on but, as noted above, concluded that "*the respondent was a sole practitioner with limited staff and that he genuinely engaged with the applicant's concerns and sought to answer those as best he could in difficult circumstances*". There was certainly evidence before the Tribunal that the respondent had sought to address certain of the queries raised by the appellant (though not in anything like the level of detail that the appellant sought).

108. I can understand why the appellant thought it was unreasonable for the respondent not to answer the questions that he posed and felt frustrated that, from his point of view, the information he was being provided with was incomplete. But the wording of the allegation here is important. The Tribunal was not being asked to consider whether full answers to all the questions posed by the appellant had been provided. Rather, it had to consider whether the respondent had failed to provide a satisfactory explanation. The Tribunal was entitled to take into account all the surrounding circumstances when deciding whether the explanation given was satisfactory. It placed heavy reliance upon the status of the respondent as a sole practitioner with limited assistance. A different Tribunal might have reached an alternative conclusion as the question of whether a response to queries is "satisfactory". The answer to that question involves a considerable element of discretion. My role is not to substitute my opinion on this question for that of the Tribunal but rather to consider whether there was no sustainable basis for the finding in question. Given the evidence of engagement by the respondent, including the correspondence exhibited at DK7 and DK8 to the Affidavit of 27 February 2018 of the appellant, I cannot agree there was no sustainable basis for the finding.

109. The Tribunal do not distinguish in their decision between their factual finding and their evaluation of whether facts found constitute professional misconduct. From its conclusion that there had been genuine engagement by the respondent and that he sought to answer queries as best he could, I infer the Tribunal found that the factual allegation had not been made out. Because the Tribunal found the facts were not made out, and I consider there was a sustainable basis for that conclusion, I do not need to consider the issue of professional misconduct in respect of Allegation 3.

Conclusion

110. For the reasons set out above:

- In respect of Allegation 1, I rescind the decision of the Tribunal to the effect that the respondent was not guilty of professional misconduct and vary it to conclude that the respondent was guilty of professional misconduct. I will give the parties an opportunity to make submissions on sanction under s.8 and the parties might seek to agree an appropriate time and revert.

- In respect of Allegation 2, I confirm the finding of the Tribunal.

- In respect of Allegation 3, I confirm the finding of the Tribunal.