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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
ON APPEAL TO THE LADY CHIEF JUSTICE

FROM THE DECISION OF THE SOLICITORS' DISCIPLINARY TRIBUNAL FOR NORTHERN IRELAND

IN THE MATTER OF IAN MALLON, A SOLICITOR

and

IN THE MATTER OF THE SOLICITORS (NORTHERN IRELAND) ORDER 1976 AS AMENDED
ON APPEAL FROM THE SOLICITORS' DISCIPLINARY TRIBUNAL PURSUANT TO ARTICLE 53(2)(a) OF THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

LAW SOCIETY OF NORTHERN IRELAND

Appellant

v

IAN MALLON

Respondent

Michael Egan KC (instructed by Francis Hanna & Company Solicitors) for the Appellant
Frank O'Donoghue KC (instructed by Fisher & Fisher Solicitors) for the Respondent

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KEEGAN LCJ

Introduction

[1] This case concerns an appeal brought against an order of the Solicitors' Disciplinary Tribunal handed down on 12 April 2024. It concerns how Mr Mallon billed clients in the past for fees over and above scale costs pursuant to a Contentious Business Agreement ("CBA"). The appellant, the Law Society of Northern Ireland ("the appellant"), made three allegations of misconduct against Mr Mallon ("the respondent"), a solicitor and principal in Ian Mallon Solicitors Ltd, Newry. On 12 April 2024 the Solicitors' Disciplinary Tribunal ("the Tribunal") dismissed the

complaint by the appellant against the respondent. The appellant appeals against the order of the Tribunal pursuant to Article 53(2)(a) of the Solicitors (Northern Ireland) Order 1976.

[2] Specifically, the Society alleged breaches of regulation 8(1) of the Solicitors Practice Regulations 1987 (as amended) ("1987 Regulations") - duty to carry out work and conduct his practice to the highest professional standards; and/or regulation 12 - acting in a manner that as likely to or did compromise or impair his integrity, duty to act in the best interests of his client, the good repute of solicitors in general, his proper standard of work. The Tribunal applied the criminal standard of proof and found none of the allegations were established.

[3] The Tribunal considered the matter by reference to the affidavit evidence of Catherine McKay (deputy Secretary and head of Professional Conduct in the Law Society) - sworn on 19 May 2020; rejoinder Affidavit of John Mackell (then head of Professional Conduct in the Law Society) – sworn on 5 November 2020; and Ian Mallon (respondent) – sworn on 17 September 2020. The Tribunal concluded that none of the allegations were made out and dismissed the application.

[4] Both parties agreed that I should proceed on the basis of the appellate test set out in *Murtagh v Law Society of Northern Ireland* [2024] NICA 49 at paras [30] to [35] which notes that the High Court has jurisdiction to intervene in circumstances where the Tribunal's decision was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings before the lower court."

Decision of the Tribunal

[5] I summarise the core parts of the ruling as follows with references made to paragraphs of the said decision. First the Tribunal noted the background to the proceedings and the allegations made with reference to six specific client files as follows. The Tribunal noted the appellant appointed Messrs DWF (NI) LLP to supervise the respondent's client bank accounts and appointed Mr Andress (solicitor) to make further enquiries (para [16]).

[6] The Tribunal recorded Mr Andress found it was hard to justify additional costs, particularly in straightforward road traffic accident matters where a settlement figure was reached at a pre-proceeding stage (paras [25], [30], [32]). Mr Andress found the CBA would have been very difficult for a lay person to understand and "appears to give licence to the solicitor to charge what he wishes without showing time he has spent" (para [26]). Further, clause 5.6 of the CBA was concerning in that it "gives control and power over the client who will have limited knowledge of costs" (para [27], [31]). Mr Andress noted the files he reviewed did not support the respondent's claim that all clients were clearly advised of their settlement figure and the shortfall figure (para [28]).

[7] The Tribunal also referred to litigation history in relation to these issues as follows. This is material as on 4 July 2017 the respondent commenced judicial review proceedings to challenge the appellant's interventions which included, among other things that DWF Solicitors continue to supervise the respondent's client account. On 5 January 2018 the judicial review proceedings were resolved after the appellant agreed to end the intervention and the respondent withdrew the judicial review proceedings and undertook to remove clause 5.6 from the CBA and to properly advise clients of their full settlement figure and any shortfall in costs.

[8] Specifically in his correspondence of 10 January 2018 the respondent states that, "clause 5.6 of the Contentious Business Agreement will be amended accordingly. We can confirm that on settlement all damages cheques (pursuant to client written instructions/authorisations) are now made payable to Ian Mallon Solicitors Client Account."

[9] On 19 July 2019 the Council of the Law Society of NI resolved to refer the respondent to the Tribunal.

[10] This case was not about the existence of the CBA *per se*. It was accepted by all parties that the CBA did specify the hourly rate and mark up to be applied. The respondent submitted "it was not unusual for a solicitor to agree a composite fee for all work carried out." The respondent submitted that the relevant clients agreed the fees, and none had raised a query in respect of costs charged (page 15-16 of the Tribunal decision).

[11] The Tribunal noted it is good practice that a solicitor should:

> "(i) Record clearly on their file confirmation of the exact figure for damages along with clear evidence that the client has been made aware of that figure and accepted same subject to the payment of any costs due.
>
> (ii) Provide a breakdown as to how the costs have been accrued in terms of time spent.
>
> (iii) Provide an itemised bill, although the Regulations do not make provision to require this." (page 17)

[12] The Tribunal stated that it is not their purpose to determine if costs charged were fair and reasonable; there is a remedy in contract if a client wishes to challenge costs. Although the Tribunal agreed with the evidence of Mr Andress that many of the cases comprising the complaint were straightforward and would not warrant extra costs, it found that no breach of the 1987 Regulations occurred as "there is nothing in the Regulations that make the requirements for an itemised bill, although this would be good practice." (page 17)

[13] The Tribunal acknowledged that clause 5.6 of the CBA by which cheques payable only to the payee may be paid by the solicitor into the client account gave the respondent "complete control of the client account which could lead to an abuse of position placing the client in a very vulnerable position." However, it said that no evidence was produced that such a practice occurred, "no abuse of the clients account actually occurred" and the potential for abuse is "insufficient to show a lack of integrity." The Tribunal further noted "this practice has now ceased by the respondent." (page 18)

[14] The Tribunal noted the standard of proof in the Tribunal was the criminal standard. Overall, the Tribunal concluded no evidential basis "has been made out to support the allegations against the respondent in relation to any of the three allegations." (page 18).

Grounds of appeal

[15] The appellant's grounds of appeal are, the Tribunal erred as follows:

(a) In finding that, although the respondent's practice of charging, communicating and obtaining payment of solicitor/client costs was not "good practice", it was nonetheless compliant with regulation 8(1) of the 1987 Regulations (which imposes a duty on solicitors to carry out their work and conduct their practice to the highest professional standard) because the precise itemisation of solicitor/client costs was not mandated by Regulation.

(b) In finding the practice of deducting solicitor/client costs from a client's damages before paying the damages to the client did not, or was unlikely to, compromise or impair the duty imposed by regulation 12 of the 1987 Regulations (a duty to act with integrity, in the best interests of the client and in a manner consistent with the good repute of solicitors generally). Further, where the Tribunal considered the respondent's work did not warrant the extra charges imposed, it erred relying on the facts that (i) no clients had complained, (ii) clients enjoyed private law remedies against the respondent in respect of any disputed bill and (iii) it was not the Tribunal's function to tax solicitors' bills of costs.

(c) In concluding the respondent's requirement that clients sign a CBA did not, or was unlikely to, compromise or impair the duty imposed by regulation 12 of the 1987 Regulations. The CBA gave the respondent the authority to lodge damages cheques payable to the client into his office account which facilitated the process of taking additional fees if he wished to do so. The Tribunal erred in deciding that such actions would be unlawful if carried out, but the appellant did not prove to the criminal standard that the respondent had carried out such actions.

(d) The Tribunal erred by failing to consider or have regard to the relevant authorities regarding the approach to be adopted when considering complaints about a solicitor's professional conduct and in particular a solicitor's duty of integrity, to act in the best interest of his client and uphold the good repute of the solicitors' profession.

Summary of the case on appeal

[16] The appellant relied upon the fact that in nine specified cases, the respondent obtained authority from each client for damages at a sum which was less than the figure agreed with the insurer for that client. The difference is accounted for by solicitor/client costs charged by the solicitor. These costs are in addition to the "scale costs" agreed to be paid by the insurer. The documentation sent by the solicitor to relevant clients refers to the actual, higher damages figure paid by the insurer." The skeleton argument filed by the appellant also notes the documentation sent to the insurer makes no reference to the (lower) damages authority provided by the client.

[17] It was also claimed that there was disparity in fee advice notes; the fee advice note to the insurer references "scale costs" however the fee advice note to the client references a higher level of costs and notes costs deducted from the damages received. The respondent submits clients were aware of costs and payment of portion of same from damages awarded.

[18] Specifically, the appellant submitted that in six specified cases the respondent obtained authority from each client for damages at a sum which was less than the figure agreed with the insurer for that client. The difference is accounted for by solicitor/client costs charged by the solicitor. However, the appellant pointed out that the documentation sent to each client does not refer to the sum of the damages paid by the insurer. The documentation to the insurer does not refer to the damages authority provided by the client.

[19] The appellant also referred to disparity in fee advice notes in these six cases; the fee advice note to the insurer records the settlement figure and claims solicitors' costs by reference to "scale costs", however, the fee advice note to the client does not record the settlement figure but notes a composite figure for damages and costs received.

[20] Reference was made to the fact that the letter to each client in this category requesting authority to settle records a lower sum for damages than that actually awarded. There is no record of the client having been advised in writing of:

(a) the true damages settlement figure;

(b) the fact there is a shortfall in costs;

(c) how that shortfall arises or is calculated; or

(d) that shortfall is being deducted from the client's true damages.

[21] The appellant submits that statements apparently signed by four of the clients in this category in which they acknowledge they were:

(a) advised of the true sum of damages;

(b) advised they would receive a lesser sum; and

(c) received a Bill of Costs

were drafted retrospectively and provided by the respondent. Further, the case was made that these statements do not explain why the clients were not given this advice in writing contemporaneously.

[22] Finally the appellant submitted that the CBA used by the respondent makes provision for:

(a) Charging clients at an unspecified hourly rate and an unspecified mark-up on costs and liability for unspecified solicitor client costs (clause 4).

(b) Permission for the solicitor to endorse third party cheques payable to the client and so lodge to the solicitor's client account, an account not held in the client's name (clause 5.6).

Relevant legislation and rules

[23] The following Articles of the Solicitors (Northern Ireland) Order 1976 are relevant:

Article 44(1)(e)(i):

> "44. **Applications and complaints to Tribunal**
>
> (1) The following applications and complaints shall be made to and heard by the Tribunal—
> …
>
> (e) a complaint by the Society or any other person—
>
> (i) that a solicitor has been guilty of professional misconduct or of other conduct tending to bring the solicitors' profession into disrepute;…"

Article 53(1) and (2):

> "53. **Appeals against orders of the Tribunal**
>
> (1) A person aggrieved by—
>
> (a) an order of the Tribunal dismissing an application made by him under Article 44(1)(a), (b) or (c); or
>
> (b) an order of the Tribunal under Article 51(4) restricting him from practising on his own account, whether in partnership or otherwise,
>
> may appeal to the Lord Chief Justice who may
>
> (i) affirm the order of the Tribunal; or
>
> (ii) make any order which could have been made by the Tribunal on its inquiry.
>
> (2) An appeal against any other order made by the Tribunal (except an order under Article 51(3)) shall lie to the High Court—
>
> (a) at the instance of the solicitor or the Society or any person directed by the order to make any restitution or satisfaction;
>
> (b) by leave of the High Court, at the instance of any other person appearing to the High Court to be affected by the order…

Article 51(1) – Orders of the Tribunal and hence orders the appellate court may make under Article 53(1):

> "51. **Orders of the Tribunal on Inquiry**
>
> (1) Where the Tribunal hold an inquiry, they may make an order providing for one or more than one of the following—
>
> (a) the dismissal of the application or complaint;
>
> (b) the admonishing of the solicitor and, if they think fit, the imposing on him of a fine not exceeding £3,000

to be paid to and applied for the purposes of the Society;

(c) the restricting of the solicitor from practising on his own account, whether in partnership or otherwise;

(d) the removal of a restriction on the solicitor from practising on his own account, whether in partnership or otherwise;

(e) the suspension of the solicitor from practice;

(f) the termination of the solicitor's suspension from practice;

(g) the striking off the roll of the name of the solicitor;

(h) the replacement on the roll of the name of a former solicitor whose name has been struck off the roll;

(i) the lifting of a prohibition on the solicitor providing civil legal services or criminal defence services funded by the Department of Justice;

(j) the payment by any party to the inquiry of the costs of any other party to be measured by the Tribunal, or of a stated sum as a contribution towards such costs;

(k) the payment by any party to the inquiry of a sum to be measured by the Tribunal for the costs incurred by the Tribunal, or of a stated sum as a contribution towards such costs;

(l) the making by any party of such restitution or satisfaction to any aggrieved party as the Tribunal think fit."

Article 64(1) – Contentious Business Agreements

"64. **Contentious Business Agreements**

(1) Subject to paragraph (2), a solicitor may make an agreement in, or evidenced by, writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him providing that he shall be

remunerated by a gross sum, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.
…"

The Solicitors Practice Regulations 1987

Regulation 8(1):

"A solicitor shall at all times carry out his work and conduct his practice to the highest professional standards and shall observe in relation thereto any decisions or directions which may be adopted, issued or promulgated by the Council either to the solicitor personally or to the profession at large."

Regulation 12:

"A solicitor shall not, except where he is expressly permitted so to do by these regulations or any waiver thereof, directly or indirectly obtain or attempt to obtain, or permit to be obtained, instructions for professional work in any manner which compromises or impairs, or is likely to compromise or impair the client's freedom to instruct a solicitor of his choice or the solicitor's independence and shall not in any circumstances take any action which compromises or impairs, or is likely to compromise or impair:

(a) his integrity;

(b) his duty to act in the best interests of the client;

(c) the good repute of the solicitor or of solicitors in general;

(d) his proper standard of work."

Consideration

[24] This case proceeded before the Tribunal on the basis of the written evidence put before it and without any oral evidence. I am therefore in a similar position to the Tribunal in assessing that evidence in order to determine whether the Tribunal was wrong in reaching the outcome that it did. The factual allegations in this case are founded upon documentary evidence (client files, affidavits) and are largely undisputed. It follows that the Tribunal did not have to (nor appellate court does not

have to) consider competing accounts and weigh evidence to a particular standard; the documentary evidence speaks for itself.

[25] At the outset I observe that following the judicial review the respondent did correct his practices and so this case really relates to past failings and must be seen as such. In addition, I record that there is no evidence of client complaints, dishonesty or shortfalls and in fact the respondent produced subsequent statements from some of his clients which raised no concerns.

[26] In terms of applicable authority *Wingate & Ors v The Solicitors Regulatory Authority* [2018] EWCA Civ 366 refers to the fact that the solicitors' profession holds its members to a higher standard due to their privileged and trusted role. Para [97] of *Wingate & Ors* states:

> "In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from their own members … the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards."

[27] The 1987 Regulations require a solicitor to carry out his practice to the "highest professional standards," (regulation 8(1)) and with "integrity" to "a proper standard" (Regulation 12). These are broad provisions which do not specifically define those standards. However, given the wide variety of circumstances which arise further definition is unnecessary. Each case will depend on its own factual circumstances. In this case there is a degree of overlap between the three charges, but all relate to practice which it is alleged fell below professional standards.

[28] The Tribunal correctly recognised failings on the part of the respondent's past practice. That finding was inevitable to my mind based upon the written evidence which is recorded in the judgment. In particular, as Mr Egan said, there was evidence that the respondent obtained authority from each client for damages at a sum which was less than the figure agreed with the insurer for that client.

[29] The respondent submitted that clients were aware of costs and payment of portion of same from damages awarded. However, there was a disparity in fee advice notes; the fee advice note to the insurer references "scale costs" however the fee advice note to the client references a higher level of costs and notes costs deducted from the damages received. In six specified cases the respondent obtained authority from each client for damages at a sum which was less than the figure agreed with the insurer for that client. The difference is accounted for by solicitor/client costs charged by the solicitor. The documentation sent to each client does not refer to the sum of the damages paid by the insurer. The documentation to the insurer does not refer to the damages authority provided by the client.

[30] Undeniably, there was also disparity in fee advice notes in these six cases; the fee advice note to the insurer records the settlement figure and claims solicitors' costs by reference to "scale costs", however, the fee advice note to the client does not record the settlement figure but notes a composite figure for damages and costs received.

[31] The appellant has retained the allegation that the respondent charged clients at an unspecified hourly rate and an unspecified mark up on costs. The skeleton argument of the appellant does not pursue this allegation, and I note the Tribunal decision indicates it was accepted by all parties that the CBA did specify the hourly rate and mark up to be applied. Thus, it appears that this element of the appeal can be dismissed.

[32] However, having effectively accepted the evidence of the appellant in large measure the Tribunal reached its conclusion that a breach of regulation 8(1) was not made out for the reason that the regulations do not specifically provide for an itemised bill although that would be recognised good practice. I do not think this approach was correct. Allowing due respect to the specialist Tribunal, I think it was wrong to dismiss the complaint on that basis and a finding should have been made.

[33] I also agree with the appellant that the Tribunal erred in its reasoning because it appeared to substantially rely on three factors namely that, no clients had complained, the clients enjoyed private law remedies and that it was not the Tribunal's function to tax costs. These are not factors which can excuse practice which falls below professional standards.

[34] Furthermore, I agree with Mr Egan that the Tribunal has misquoted the evidence of the Society on page 18 of the ruling when it recorded that, "the Society have accepted that no breach of the Regulations has occurred in the circumstances." While some of the individual cases may not have established a breach, the Society has also highlighted evidence where breach was clearly established. And so, I accept Mr Egan's submission that the Tribunal was wrong on this.

[35] Also, as to the CBA, the wording of the complaint made by the appellant to the Tribunal does not assert that the practice permitted by the CBA was implemented but rather asserts the terms of the CBA facilitated the taking of additional fees which could lead to an abuse of position. The respondent neither confirmed nor denied if he implemented the impugned terms of the CBA. Rather he remained silent as to how the relevant client's damages cheques were dealt with. In addition, there was unchallenged evidence in one case that a crossed cheque was lodged.

[36] The affidavit of Ian Huddelston, then President of the Law Society refers to this as an unlawful practice (see his judicial review affidavit paras 85(iii) and paras 146, 147, 150). The Tribunal agreed. The former President also averred that damages cheques would usually be crossed from the insurance companies and so good practice dictated that these be sent to the client rather than lodging these cheques to their client account.

[37] Of course, the respondent's point that his clients signed a CBA which included clause 5.6 permitting payment of damages cheque in the name of the client to be lodged into the solicitor's client account is now overtaken as he wisely changed that practice after the judicial review. Overall, I consider that a breach of regulation 12 was also made out and that the Tribunal was wrong not to find so.

Conclusion

[38] There is much to be commended in the decision of the Tribunal which comprehensively set out the evidence in this case. However, based on that evidence I find that the charges were made out to the criminal standard and so I reverse the Tribunal's decision which dismissed the complaints made. As an aside, and reflecting the additional joint written submissions I received, I note that remittal to the Tribunal is not an option open to me under this form of statutory appeal although it is available in England and Wales by virtue of section 49 of the Solicitors Act 1974.

[39] To the respondent's credit, he settled the judicial review, he has altered his practices since these failings occurred and no issues of concern have arisen over the last six years. He probably thought that the judicial review would be the end of the matter. Therefore, whilst I will hear from the parties if required, my provisional view is that the lowest end of the penalty scale applies (ie admonishment) exercising the powers of the Tribunal pursuant to section 51(1)(b) of the 1976 Order read with section 53(1)(b)(2) and that there should be no order as to costs in relation to the Tribunal hearing or this appeal. I will hear the parties if anything further arises.