[2020] IEHC 688

THE HIGH COURT

[2019 No. 62 SA]

IN THE MATTER OF THE SOLICITORS ACTS 1954 – 2011
AND IN THE MATTER OF JAMES WATTERS AND STEVE ROY STEER SOLICITORS OF JAMES WATTERS & CO SOLICITORS

RESPONDENT SOLICITORS

AND

IN THE MATTER OF AN APPLICATION BY DEBRA EDNEY JAMES

APPELLANT

JUDGMENT of Mr. Justice O'Connor delivered on the 18th day of December 2020

Introduction

1. The appellant is a person who made a complaint described on affidavit with exhibits, about the conduct of the respondent solicitors to the Solicitors Disciplinary Tribunal ("SDT"). The SDT notified the appellant by letter dated 2 August 2019 that her various allegations up to that date:

   (1) Did not disclose conduct which could be construed as misconduct;

   (2) Have been adequately rebutted; or,

   (3) Are unsupported by evidence.

2. Effectively, the SDT decided not to hold an inquiry pursuant to s. 7 of the Solicitors (Amendment) Act 1960 ("the 1960 Act") as substituted by s. 17 of the Solicitors (Amendment) Act 2002 ("the 2002 Act").

3. The appellant represents herself. She explains that she has lived in the State for some 24 years and that she awaits results of an exam from a business law school in the United Kingdom, having recently completed a three year course compressed into nine months of study.

Scope of this appeal

4. Finnegan P. in *Law Society of Ireland v. Walker* [2007] 3 IR 581 at paras. 29 to 31 described the function of the SDT in an application like that made by the appellant:

   ". . . is to consider all matters on affidavit before it. While at this stage of the procedures the Tribunal is not the fact finding body it may for the purposes of deciding on whether a prima facie case is disclosed make findings of fact where the facts are clear for example where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the Tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held.

   [30] The purpose of this stage of the regulatory process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of.

[31] As to standard of proof at an inquiry I have regard to the dicta in *O'Laoire v. Medical Council* (Unreported, Supreme Court 25 July 1996). The standard is the criminal standard of proof beyond reasonable doubt. Notwithstanding reservations expressed by O'Flaherty and Murphy JJ. this remains and will remain so unless and until the Supreme Court directs otherwise. This is a factor to which regard may be had in determining whether a *prima facie* case is disclosed".

Position of respondents

5. During the hearing of this appeal on 1 December 2020, counsel for the respondents having taken instructions following an exchange about the jurisdiction of the court in this area, acknowledged without prejudice to the strenuous denial of any misconduct on the part of the respondents, that applying the principles enunciated by Finnegan P., the court could without objection from the respondents, direct the SDT to proceed to hold an inquiry given the dispute as to facts about the alleged now compliance with s.68 of the Solicitors (Amendment) Act 1994 which emerged through the following affidavits: -

Before the SDT:

1. The appellant's ten – page affidavit in Form DT 2 sworn on 16 November 2018;
2. The seven – page replying affidavit of the first named respondent sworn on 1 March 2019;
3. The fifteen – page replying affidavit of the appellant sworn on 1st May 2019.

After the decision of the SDT:

4. The appellant's four – page "further affidavit" sworn in February 2020;
5. The nine – page affidavit of the first named respondent sworn in February 2020;
6. The short affidavit of the second named respondent sworn in February 2020.

6. A complicating issue at the hearing of this appeal was the reference to another affidavit of the appellant sworn on 1 July 2019 which was filed in plenary proceedings instituted by the appellant. She explains that she has claimed relief in those proceedings for alleged fraud, deceit and conspiracy against the first named respondent and the barrister who he instructed. That barrister is not a party to this appeal and this court cannot and does not place any reliance on that affidavit.

***De novo* appeal hearing**

7. Macken J. in *O'Reilly v. Lee* [2008] IESC 21 under the heading "Preliminary" was satisfied that this type of appeal: -

> " . . . is a hearing de novo in the High Court in which the matters contended for by the appellant as constituting grounds for the holding of an inquiry into the respondent's alleged misconduct, and the respondent's reply, may be exposed again and argued afresh before the High Court, which decides the appeal on the basis of the materials which were before the Disciplinary Tribunal, but having regard to the arguments made before it, the High Court, exercising an independent

jurisdiction in the matter. It is for this reason that the respondent is the correct respondent, and equally, that the Solicitors Disciplinary Tribunal is a proper Notice Party to the proceedings, bound by any order which the High Court might make on the appeal…

…Having regard to the fact that this is not a judicial review of the decision of the Solicitors Disciplinary Tribunal, the arguments and complaints of the above nature and those of an analogous type which the appellant makes on its findings, all fall, once there is a full appeal to the High Court, at which appeal both parties are heard again at an oral hearing in open court, where both can make legal and other relevant submissions on all matters, with a fresh determination of the issues, and where a judgment is delivered on that appeal".

Chronological background

8. Due to the presentation style adopted by the appellant, it is necessary for the court to extrapolate from the papers lodged in this appeal details for a chronological summary in order to place the appellant's complaints in context. This summary does not purport to determine facts but merely to outline the facts alleged or not in dispute.

31.10.2017

The appellant (according to para. 11 of her affidavit of 19 February 2020) applied for the Irish State Pension (contributory) "on the basis of [her] false impression that [her] UK national insurance contributions constituted qualifying "periods of insurance" equivalent to Irish "paid full rate" contributions, which would oblige the Irish authority "under Article 6 of Regulation EC 883/2004 ["The 2004 regulation"] to "aggregate" the UK contributions in the calculations for eligibility for said pension".

16.11.2017

The appellant was notified that her application had been refused with an acknowledgment of the appellant's "UK national insurance contribution (periods of insurance) as required under Article 6" of the 2004 regulation.

04.12.2017

The appellant was informed that her application for State pension (contributory) had been refused.

06.01.2018

The appellant appealed the refusal of her application for the said pension

25.05.2018

The appellant attended the offices of the first named respondent having identified him from his website that he was a specialist in social welfare. The appellant

exhibits contemporaneous notes taken by the solicitor who attended together with a letter which she wrote and handed over at the consultation. The appellant alleges that the letter shows that she "…had failed to consult the relevant Irish statute wherein 'qualifying' contributions are defined as those obtained by employment or self-employment or appreciate that this requirement was a…special national condition for the opening of a right, and that the Irish authorities had, therefore, correctly applied EU law in my application . . ..".

In summary, the appellant is aggrieved that the respondent solicitor had not corrected her false impression at the consultation when presented with the facts set out in her letter dated 25 May 2018 which specifically requested the respondent firm to represent her and to engage a named barrister to pursue judicial review proceedings on her understanding that she may not "recover any cost in a judicial review" of the adverse appeal determination. The appellant sets out in her affidavits a lot of detail of the facts and law as she now understands the situation.

07.06.2018

The respondent firm wrote to the chosen barrister, setting out the background and enclosing a booklet of papers with instructions that the appellant wishes to judicial review the adverse appeal decision, while requesting his opinion.

12.06.2018

The barrister advised the respondents that the appeal should be processed and concluded before embarking on a judicial review. In addition he advised that the appellant should obtain her contribution records from the UK.

14.06.2018

The respondents requested the social welfare appeals office ("SWAO") to grant an oral hearing pursuant to the appellant's letter of authority. This followed a consultation with the barrister in the presence of the second named respondent. The appellant alleges that the false impression already given was reinforced at the consultation. At the hearing of this appeal she adduced an expert opinion that a page had been omitted from the agenda and minutes of her meeting on 14 June 2018. This evidence was not available at the hearing before the SDT. The respondents reserve their position and rights in relation to the adducing of that expert opinion if it is pursued by the appellant by way of complaint or otherwise.

At the consultation on 14 June, the appellant advised the barrister that she had also initiated proceedings in the High Court to recover damages in a medical negligence claim. The appellant now alleges that she was advised by another firm of solicitors that no solicitor could act on her behalf in that medical negligence case because the professional indemnity providers for solicitors require solicitors to draft and institute the proceedings in order to maintain their cover. The appellant did not

adduce any evidence of such a view in writing or by way of affidavit from that other firm of solicitors.

16.06.2018

The appellant forwarded a letter to the respondent firm with details which she had obtained under the general data protection regulation.

28.06.2018

The appellant delivered papers in the medical negligence case and paid €1,230 to the respondent firm in respect of her appeal and the sum of €1,845 towards anticipated costs for her medical negligence claim. The latter was refunded to the appellant on the 17 December 2018, albeit following the appellant's complaint to the SDT in November 2018 concerning the absence of a s. 68 letter relating to the medical negligence claim.

19.09.2018

The respondent firm in accordance with counsel's suggestion wrote to the SWAO advising that proceedings would issue without further notice unless a decision on the appeal was made. The appellant at para. 37 of her affidavit sworn on 19 February 2020 complains that this fails to take account of the reasonable expectation for a delay to consider the "added EU dimension". She suggests that the respondents were expediting matters to start a judicial review.

15.10.2018

The SWAO wrote to the appellant "regrettably" disallowing her appeal.

18.10.2018

The appellant emailed the respondent firm and attached a "draft written submission in the defamation action, as discussed with a copy of the impugned medical record" along with a copy letter describing her daily pain for the medical negligence claim. The second named respondent telephoned the appellant that day. The appellant claims in para. 40 of her affidavit sworn on 19 February 2020, that she took what is now a rather indecipherable manuscript contemporaneous note which is exhibited.

22.10.2018

The appellant avers that she re-examined her decisions after she discontinued medication which she claims caused her cognitive impairment. The appellant describes how she concluded around this time that "there was no possibility that legal services in the matter [social welfare] could have been of any benefit whatsoever". Significantly, the appellant alleges deception contrary to s. 2(2) of the

Criminal Justice (Theft and Fraud Offences) Act 2001 on the part of the respondents and counsel.

02.11.2018

Counsel emailed the respondents with a draft letter to the chief appeals office seeking "a s. 318 revision of decisions" on the basis that the appeals office erred in law which the respondent firm engrossed and sent.

05.11.2018

The appellant wrote to the respondents that the 21 – day deadline to initiate a statutory appeal had now passed and requested counsel's advice. She also requested invoices for "end of year accounting purposes".

08.11.2018

The respondents emailed the appellant enclosing copies of various documents including a s. 68 letter for the social welfare matter. A copy of the request dated 7.11.2018 from the chief appeals officer to refrain from issuing judicial review proceedings was also enclosed.

09.11.2018

On this date, according to the appellant, she started to write a complaint to the SDT. [Para. 52 of the affidavit sworn on 11.11.2019].

14.11.2018

Counsel wrote a letter addressed to the appellant expressing regret that she was dissatisfied with the services which he provided to date. He wrote: "Kindly note that, to date, the only fees that I have ever sought (and received) was an initial fee of €500 plus VAT in respect of the social welfare matter. I have not at any point, sought any other fee in respect of this matter. Nor do I intend seeking any other fees for this matter in the future. In respect of the medical negligence matter, I agreed to review the case on what I understood to be a *pro bono* basis . . .if I believe that your case had merit and that I could assist, I would continue with the case on a *pro bono* basis.

In respect of the progressing of the social welfare matter, the final decision always rests with the client, it is my practice to thoroughly review all aspects of the case, prior to the institution of proceedings. Having done that, I would advise the client of the relative merits and strengths of the case. I would also advise a client of the costs implications where a case is not successful. I have not yet had an opportunity to review your case, but I was planning on carrying out the review early next week and issue advices and a consultation thereafter".

Counsel then referred to the decision of the Administrative Commission and cited three specific cases in the European Court Reports to support his conclusion: "The decision is not binding and may be challenged or subsequently overturned or reinterpreted in proceedings before the Court of Justice, which considers such decisions as being capable of providing guidance to competent institutions of member States". You will understand from the foregoing that the existence of an administrative decision does not mean that a case will not succeed. If, following a review, I remained of the opinion that the social welfare case was stateable and had a reasonable prospect of success, I would take the case on without requiring any fees from you. This remains my position. I would only receive the fees if the case was successful (and these would be discharged by the respondents in the case, not you) . . .".

17.11.2018

In a two – page densely typed letter addressed to the respondent firm the appellant sought €75,000 ". . . in exchange for my signature on a legally binding agreement not to send the complaints, a binding declination of prosecution, and a comprehensive non – disclosure agreement". Curiously, the appellant continued on to inform "I have lodged an envelope with my solicitor with instructions that it be opened in the event of my death in unexpected, unexplained or suspicious circumstances. It contains copies of the complaints and a copy of this letter. My solicitor has not been given details of the complaints". She then proceeded to identify her solicitor.

19.11.2018

The appellant was sent a copy of the five – page review of the appeal officer's decision dated 16 November 2018 which found no error of fact or law in the appeal officer's decision. The same letter from the respondents gave an appointment for the appellant to attend their offices on 23 November 2018. The appellant at para. 55 of her affidavit sworn on 11 November 2019 alleges "the reason an existing client is required to attend a solicitor in person, other than for a personal consultation with counsel, is to produce the credit card for payment: everything else is now done by email; as no mention was made of any such consultation, it was apparent to me that the above mentioned letter constituted the culmination of the conspiracy: all appeals procedures had now been exhausted and it was now appropriate for them to take judicial review proceedings, for which services I would be required to pay the retainer on 23 November 2018.

19.11.2018

The appellant emailed the second named respondent (which she also omitted to exhibit in her affidavit for the SDT). This email would naturally cause great distress to any professional. She alleged that the respondents and counsel "violated the fundamental ethical principle. . thou shalt not tell the client he has a good case

where . . .” there is “no arguable case”. She stated that she looked forward to “. . . reporting the fraud to the Gardai on Friday, posting the complaints, and seeing the story in the media. Eventually, I’ll enjoy the civil case to get repaid what you robbed plus aggravated and exemplary damages”.

23.11.2018

The appellant consciously did not attend this scheduled consultation.

23.11.2018

The respondent firm sent to the appellant a copy of counsel’s letter dated 14 November 2018 along with advice that they would be in contact about the medical negligence matter upon hearing further from counsel.

28.11.2018

The respondent firm emailed the appellant asking specific questions in the context of the social welfare matter. The appellant complains at para. 58 of her affidavit sworn on 11 November 2019, that this information “. . . would already have been fully disclosed to the social welfare services when I applied for State pension (contributory), and seems to be a desperate attempt to scrape the bottom of a social insurance contribution barrel washed up on the shore of some ‘forgotten’ five – year long period of employment to arrive at the required total of 520 employment – based contributions, and clearly demonstrates the abandonment by the respondents [and counsel] of the “principle of abrogation” grounds of appeal, with no stateable case made out in the alternative”. By this date, the appellant had sworn her ten – page affidavit in Form DD2 to start the process before the SDT.

The second named respondent in his affidavit sworn on 19 February 2020 explains that no work was carried out on the medical negligence file after the complaint made by the appellant.

18.12.2018

The second named respondent drafted a final fee note for the work done in relation to the social welfare matter and an amended s. 68 letter which he dated 28 June 2018 to reflect the date on which the appellant made the second payment of €1,230 for the social welfare matter. Para. 7 of the second named respondent’s affidavit of 19 February 2020 avers “My reasoning for this was that I was preparing a final fee note of €1,845 in the social welfare matter whereas the original s. 68 letter of 14 June 2018 referred to €615.00 in respect of solicitor’s fees. I understand that it may not have in fact been necessary to prepare an updated or “amended” s. 68 letter but I did so at this time”. He proceeds to apologise for any inconvenience caused and that inexperience led him to backdate the s. 68 letters. Interestingly, the appellant during an oral submission to the court, stated that she would have no claim for damages to pursue in her proceedings (in which she filed

the already mentioned affidavit on 1 July 2019), if all of the monies which she had paid were refunded. The respondent solicitors taking account of the €500 plus VAT paid to counsel have recovered modest fees for all of the work undertaken by them and particularly given the refund made in December 2018 for the medical negligence matter.

Submissions

9. The appellant, following the outline of the process to date by counsel for the respondents, opened this appeal by comparing the conduct of the respondents to the misconduct and multi-million euro fraud perpetrated by convicted barrister Patrick Russell. When commencing, the appellant also requested a copy of the Digital Audio Recording of the appeal hearing on the grounds that she expected to appeal whatever decision was made by this court.

10. The appellant expects her understanding of the law and applicable ethics to be accepted at this stage in the investigation process without any evidence. The appellant refers to fraud, deceit and conspiracy on the part of the respondents and the barrister engaged in order to recover fees in a judicial review action which she maintains had no prospect of success if the facts presented by her were assimilated properly.

11. The appellant also refers to advice which she received from another firm of solicitors that no solicitor can act for a claimant in proceedings alleging medical negligence which were drafted and commenced by a lay litigant.

12. Para. 14 of the appellant's affidavit sworn on 1 May 2019 summarises another submission made to this court: -

> "What is 'not credible' is that a solicitor (or barrister) professing expertise in Irish social welfare law investigating the said matter would fail to find, in the course of a simple online search, publicly available documents (of which judicial notice is taken) in the form of written answers by a succession of Government Ministers given in response to questions presented by TD's in the Dáil on this precise issue".

The appellant demonstrates that she has spent considerable time researching her pension issue through the Oireachtas database and other databases. Regrettably she does not appreciate the law of evidence in this State.

13. Mr. Savage, counsel for the respondents, submits that the appellant makes the most serious allegations about fraud, deceit and conspiracy based on her own opinion and beliefs. In fact, the complaint concerns the adequacy of the legal services provided. He maintains that the SDT and this court are asked by the applicant to accept her interpretation of certain legislative measures.

14. Apart from asking the tribunal and this Court to accept her interpretation of the relevant legislation, the appellant does not offer any evidence of the standard expected of solicitors. She overlooks the onus of proof which rests with her, albeit in the context of

what Finnegan P. said in *Law Society v. Walker* [2007] 3 IR 581 concerning the standard of proof at this stage.

15. In the alternative, Mr. Savage submits that the complaint made relates to the adequacy of services and cannot be misconduct. In this regard, he refers to s. 7 of the Solicitors (Amendment) Act 2002 and identifies the relevant subsections as follows: -

> "(c) the contravention of a provision of the Solicitors Acts, 1954 to 2002, or any order or regulation made thereunder,
>
> . . . .
>
> (e) any other conduct tending to bring the solicitors' profession into disrepute".

In other words, the appellant expects this court to conclude based on her opinion that there is a *prima facie* case that three lawyers got together to defraud the appellant as opposed to being mistaken as to the law if that is established.

16. Mr. Savage correctly submits that the reliance by the appellant on the principles deriving from the *Hedley Byrne & Company Ltd v. Heller & Partners Ltd*. [1964] AC 465 is misplaced because that concerns an issue of liability which does not arise here.

17. Most significantly, despite the lack of objection to refer any issue about alleged non-compliance with s. 68, Mr. Savage requests the court to consider the standard which is ultimately going to have to be applied and that is the criminal standard of proof beyond reasonable doubt for the allegations of fraud, deceit and conspiracy.

Conclusions

18. The presentation of the papers for this appeal by the appellant leave a lot to be desired. The appellant, representing herself, has shown a lack of discernment in placing the relevant facts before the SDT and this court by way of appeal. The chronological summary set out earlier in this judgment had to be undertaken in order to assist anyone considering the seriousness of the misconduct alleged. Suffice to say that the analogy drawn by the appellant in her oral submissions to the conviction of former barrister Patrick Russell is an utter exaggeration.

19. It is worth noting the self-professed enjoyment which the appellant takes from pursuing this complaint to the nth degree. I am confined when determining this appeal to identifying facts and disputes as to facts before proceeding to decide whether there is any real prospect of a finding of misconduct at an inquiry, "any doubt being resolved in favour of an inquiry being held".

Threats from appellant

20. The threats of the appellant prior to commencing the complaint process as described in the above summary border upon, if not transgress, the line of vexatiousness. The respondents have been subjected to a torrid litany of unsubstantiated complaints and threats from the appellant. The effort and time consumed by the appellant, the

respondents, the SDT and in this court in eliciting that which is relevant has been enormous.

21. The introduction of a claim that the respondents disposed of a page to the attendance note for a consultation on 14 June 2018 was not considered at first instance by the SDT. Therefore, following Macken J. for the Supreme Court in *O'Reilly v. Lee* [2008] IESC 21 I refuse to consider this new claim.

S 68 complaints

22. The complaint relating to whether the appellant ought to have been furnished with s. 68-type letters prior to when she was actually given them, is potentially, according to Peart J.:

> ". . . something which the disciplinary tribunal of the Law Society can have regard to in an appropriate case and indeed has done so in recent times, resulting in the censure and fining of a solicitor who was found to have failed to comply with the obligations imposed upon solicitors by s. 68". *(A&L Goodbody Solicitors v. Charles Colthurst and Tenips Ltd*. [2003] IEHC 74).

It does not follow that a solicitor who delays in giving a s.68 letter contravenes s.68 because the phrase "as soon as practicable" after taking instructions is used in the legislation.

Medical negligence claim

23. The appellant also appears to believe that her opinion is sufficient to support her claim of misconduct in relation to taking on her medical negligence case. I am not satisfied that there is a *prima facie* case of misconduct on the part of the respondent solicitors in the medical negligence matter. No evidence to support this serious allegation was adduced.

Summary

24. There may be a *prima facie* case for an inquiry into the conduct of the respondents concerning compliance with s. 68 of the Solicitors (Amendment) Act 1994. I make no determination as to the issue of facts in setting out the chronology earlier in this judgment. It is about time that some structure was brought to the appellant's account and complaints. The dates used in the above chronology are taken from the voluminous affidavits filed and augmented by the exhibits to those affidavits listed at the beginning of this judgment.

DAR

25. The appellant when commencing her appeal, asked for the court to hear her motion seeking a transcript of the Digital Audio Recording of the hearing of this appeal. Rather than bring the parties back to court for an oral hearing in the middle of the COVID19 pandemic and without objection from the respondents, I make an order giving the appellant liberty to take up the transcript of the recording on the 1 December 2020 from about 11 a.m. to when the matter concluded around 4: 40 p.m. on 1 December 2020 on condition that she pay all costs charged by Epiq Global Service Providers and that she

furnishes immediately upon receipt a copy of the transcript to the solicitors on record for the respondent solicitors. The appellant acknowledged to the court that she would that.

Costs

26. The appellant also sought to address the issue of the costs of this appeal and submitted that the costs should be reserved both in respect of the hearing of the appeal and of the motion seeking a copy of the Digital Audio Recording. The appellant was unable to identify when the opportunity will arise in the future for the awarding of costs. As far as this court is concerned, the appeal is now determined. In deference to the acceptance by the parties to minimise appearances in court, I direct the appellant to file and serve outline written submissions as to why she should not be ordered to pay the costs of the respondent solicitors in this appeal relating to all matters other than the s. 68 letters issue. Those submissions should be filed and served by 3pm on 11 January 2021 and I direct the solicitors for the respondents to file and serve any replying submission within three weeks thereafter, by 3pm 1 February 2021. The submissions should identify the grounds for any application requesting a further oral hearing in respect of the issue of costs.

27. Sections 168 and 169 of the Legal Services Regulation Act 2015 together with O. 99 of the Rules of the Superior Courts provide that costs follow the event. Subject to considering the submissions of the parties, it appears to the court that the appellant has failed in her appeal in all respects save for the s. 68 issue. At an early stage of the appeal hearing, the respondents accepted that the s. 68 issue could be remitted back to the solicitors' disciplinary tribunal when the principles enunciated by Finnegan P. in *Law Society of Ireland v. Walker* [2007] 3 IR 581 applied. Most of the time expended on prosecuting this appeal related to matters which do not concern s. 68. The court will make a decision about the issue of costs in February 2021 and notify the parties of its order about costs then. That will be a separate order for perfecting.

Order

28. In the meantime, I dismiss the appeal save in respect of the s.68 issue. The order should be perfected as soon as possible so that the SDT can proceed with an inquiry into the alleged non – compliance during the period from 25 May 2018 to 18 December 2018 by the respondents with s. 68 of the Solicitors (Amendment) Act 1994 in respect of the appellant's pension and medical negligence claims. The court requests that the SDT determine that focussed complaint in early course.