APPROVED **[2020] IEHC 674**

THE HIGH COURT

2010 No. 65 SA
2010 No. 66 SA

IN THE MATTER OF SECTION 8 OF THE SOLICITORS (AMENDMENT) ACT 1960 (AS AMENDED)

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

DANIEL COLEMAN

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 December 2020

INTRODUCTION

1. This judgment addresses the allocation of costs in disciplinary proceedings taken by the Law Society of Ireland against a solicitor. The central issue for determination is whether what is said to have been the previous practice, whereby costs were not normally awarded against a regulator in professional disciplinary proceedings, has survived the introduction of a new costs regime under the Legal Services Regulation Act 2015.

PROCEDURAL HISTORY

2. These disciplinary proceedings have a complex history (involving an appeal to the Supreme Court and remittal to the High Court), and have been in existence now for some ten years.

3. The proceedings have their origin in two complaints of professional misconduct made against a solicitor, Mr. Daniel Coleman ("***the respondent solicitor***"). The detail of the complaints has been set out exhaustively in two earlier judgments delivered by me in these proceedings, *Coleman v. Law Society of Ireland* [2020] IEHC 162 and *Law Society of Ireland v. Coleman* [2020] IEHC 381. It is sufficient for the purposes of this costs ruling to summarise the complaints as follows. The first complaint concerned the conduct of the respondent solicitor in respect of the (alleged) sale of a number of residential units, and, in particular, the provision of confirmation to a lending institution that sales had been completed. The second complaint concerned whether there had been non-compliance with an undertaking to hold the title deeds of certain lands to the order of a lending institution.

4. The Disciplinary Tribunal made findings of misconduct against the respondent solicitor in respect of both complaints in the first quarter of 2010. The Law Society, as it is obliged to do so, subsequently brought the matter before the then President of the High Court (Kearns P.) on 26 July 2010. The respondent solicitor applied for an adjournment in order to instruct counsel. The President refused the application for an adjournment, and, having heard submissions, made an order striking the name of the solicitor off the Roll of Solicitors.

5. The respondent solicitor then brought an appeal to the Supreme Court against the order striking him off. This appeal was filed on 24 August 2010. The appeal

to the Supreme Court had been made prior to the establishment of the Court of Appeal, and at a time when the Supreme Court, being the only appellate court, had a very heavy case load. The appeal was ultimately heard and determined in 2018. (The order of the Supreme Court was perfected on 1 May 2019). The solicitor had been successful in his appeal, and the order striking his name from the Roll of Solicitors had been vacated. The "strike off" application had been remitted to the High Court for rehearing. See *Law Society of Ireland v. Coleman* [2018] IESC 80.

6. (The shorthand "***the 'strike off' application***" will be used to describe the remitted application in circumstances where that had been the actual order sought by the Law Society in this case. This shorthand would not be appropriate in all cases, however, in that an application pursuant to section 7(3)(c)(iv) of the Solicitors (Amendment) Act 1960 (as amended) will not always seek a "strike off" order, but might seek a lesser form of sanction instead).

7. The respondent solicitor issued two notices of motion on 17 May 2019 seeking an extension of time within which to bring an appeal to the High Court against the findings of misconduct of the Disciplinary Tribunal. The application for an extension of time was listed for hearing before the High Court together with the Law Society's remitted application for an order striking off the respondent solicitor.

8. Both matters came on for hearing before me in the first week of March 2020. It had been agreed that the application for an extension of time would be heard first, and that the court would deliver a written judgment on that application in advance of any judgment in respect of the "strike off" application. It was further agreed that, to make efficient use of court time, the two applications would be

heard back-to-back in a single hearing scheduled over three days. Put otherwise, rather than break off the hearing to prepare a written judgment on the application for an extension of time to appeal, the court moved directly to hearing the Law Society's application. At the request of the parties, separate judgments were to be delivered in respect of the two applications.

9. The intention had been that the hearing of both applications would be concluded before the (first) judgment would be delivered. Unfortunately, matters were overtaken by events, and, as a result of the restrictions on court sittings imposed as part of the public health measures designed to contain the spread of coronavirus, it was not possible to complete the hearing of the second application in March 2020. The parties subsequently agreed, however, that the court should deliver its judgment on the extension of time application, notwithstanding that the submissions had not yet been completed in the "strike off" application.

10. The application for an extension of time within which to bring a statutory appeal was refused for the reasons detailed in a written judgment delivered on 7 April 2020, *Coleman v. Law Society of Ireland* [2020] IEHC 162.

11. Thereafter, the parties agreed that the outstanding issues in respect of the "strike off" application could be addressed by way of supplemental written submissions. Both parties agreed that there was no necessity for any further oral submissions. The respondent solicitor filed his submissions on 12 June 2020, and the Law Society filed its submissions on 3 July 2020.

12. Judgment was delivered on the "strike off" application on 7 September 2020, *Law Society of Ireland v. Coleman* [2020] IEHC 381. The findings in respect of the first complaint were found to have a "sustainable basis" (in accordance with the principles laid down by the Supreme Court in *Law Society of Ireland v.*

Coleman [2018] IESC 80), and an order was made directing that the respondent solicitor's name be struck off the Roll of Solicitors, pursuant to section 8 of the Solicitors (Amendment) Act 1960 (as substituted and amended).

13. By contrast, the findings of misconduct in respect of the second complaint were found not to have a "sustainable basis", and the Law Society's application was dismissed. As acknowledged at paragraphs 217 to 221 of the judgment on the "strike off" application, my conclusion that the findings of misconduct were unsustainable had the consequence that there is some inconsistency between that judgment and my earlier judgment delivered in respect of the application for an extension of time to appeal. Specifically, the conclusion in the earlier judgment that there were not strong grounds of appeal has transpired to be incorrect.

14. The explanation for, and implications of, this discrepancy were set out as follows at paragraphs 219 to 221 of the judgment on the "strike off" application.

> "The explanation for the discrepancy between the two judgements lies in the fact that the affidavit of Mr. Patrick Kavanagh of August 2019, which is central to this court's determination, had been submitted in the context of the 'strike off' application as opposed to the application for an extension of time. Moreover, different functions were being exercised by the court upon the two applications. It does not automatically follow that a more positive assessment of the strength of the appeal would have resulted in the grant of an extension of time. As discussed in detail in the judgment of 7 April 2020, the judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 requires a number of other considerations to be taken into account.
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> Nevertheless, and with the benefit of hindsight, it would have been preferable had I delivered a single omnibus judgment on both applications. This would have ensured that the was an appropriate crossover between the matters considered in each of the applications. As noted earlier, however, the parties' preference had been that two separate judgments would be delivered.

> Crucially, the discrepancy between the two judgements does not cause any injustice to the Solicitor. This is because the Solicitor has achieved his objective in having the findings of misconduct in respect of the credit union undertaking set aside. The fact that, procedurally, this has been achieved in the context of the 'strike off' application, rather than in the context of a statutory appeal, does not make any substantive difference. The same result has eventuated. Of course, the Solicitor will be entitled to make submissions, if he so wishes, in respect of the consequence of this in terms of the appropriate costs order to be made."

15. As discussed presently, one of the primary matters to be considered in allocating the costs of civil proceedings is the extent to which a party can be said to have been "entirely" or "partially" successful in the proceedings. The tally in this regard as between the Law Society and the respondent solicitor is as follows.

16. The Law Society succeeded in one of its two "strike off" applications, and successfully resisted the respondent solicitor's two applications for an extension of time within which to bring a statutory appeal to the High Court. The soundness of one of these latter victories is, however, open to doubt given the discrepancy identified above.

17. The respondent solicitor succeeded in resisting the second of the Law Society's two "strike off" applications.

DETAILED DISCUSSION

CASE LAW ON THE COSTS OF DISCIPLINARY PROCEEDINGS

18. The submissions of both parties approach the question of costs by reference to Part 11 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***"). This pragmatic approach makes it unnecessary for the court to make a formal determination on the extent, if any, to which the new costs regime has retrospective effect, i.e. applies to costs incurred prior to the commencement of

the relevant provisions on 7 October 2019. As it happens, most if not all of the costs the subject of this judgment were incurred after this date: the three-day hearing took place in March 2020; and thus the issue of retrospective effect might well be academic in this case.

19. Before turning to consider the provisions of the LSRA 2015, it is necessary first to review the earlier case law. There were two schools of thought on the approach to be taken to the costs of disciplinary proceedings. One line of authority held that the general rule applicable to ordinary civil litigation, i.e. that costs follow the event, should not apply to proceedings taken by a regulatory body such as the Law Society. This is because a regulatory body pursues disciplinary proceedings in the public interest. In some instances, an application for interim measures (such as the suspension of a professional from practice, pending full investigation of a disciplinary complaint) has to be made as a matter of urgency and on the basis of limited information. The case law expressed a concern that it would have a "chilling effect" on the exercise of the regulatory body's functions were it to be liable for costs by reference to the general rule. Instead, the proper approach was that the making of a costs order against a regulatory body would fall to be considered only in circumstances where the application was improperly brought for whatever reason, such as a malicious intent, dishonesty, or gross negligence in the preparation of the application. The leading judgment on this first approach is that of the then President of the High Court (Kelly P.) in *Teaching Council of Ireland v. M.P.* [2017] IEHC 755; [2018] 3 I.R. 249.

20. The second line of authority draws a distinction between (i) the costs of first instance proceedings before the relevant disciplinary tribunal, and (ii) the costs

of any subsequent appeal to the courts. Insofar as the latter is concerned, the general rule applies, i.e. costs follow the event. The leading judgment on this approach is that of Ní Raifeartaigh J. (then sitting in the High Court) in *Dowling v. Bord Altranais agus Cnáimhseachais na hÉireann* [2017] IEHC 641. The court held that there is no clearly established practice or firm line of jurisprudence to the effect that costs should not be awarded against a regulatory body in respect of court proceedings successfully brought by way of statutory appeal. The court went on to state that if the intention of the Oireachtas had been to circumscribe the discretion to award costs in respect of appeal proceedings brought by the body regulating the nursing profession in such a "fundamental manner", then this would have been explicitly stated in the legislation.

21. At an earlier point in her judgment, Ní Raifeartaigh J. noted that even in respect of criminal proceedings, the prosecuting authorities do not enjoy a general immunity from costs following the acquittal of an accused. There is no *prohibition* on the awarding of costs against the Director of Public Prosecutions. It is certainly not the case that, where an applicant is successful against the Director in judicial review proceedings, no order for costs is made simply by virtue of the fact that the Director is *bona fide* discharging public interest functions pursuant to statute (see paragraph 16 of the judgment).

22. I turn next to consider the position under the LSRA 2015.

LEGAL SERVICES REGULATION ACT 2015

23. Part 11 of the LSRA 2015 draws a distinction between a party who is "entirely successful" in proceedings, and a party who has only been "partially successful".

The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings *unless* the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).

24. No such default position applies in respect of a party who has only been "partially successful". As explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

> "[…] it is particularly important to bear in mind that whether a party is 'entirely successful' is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is 'entirely successful' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If 'partially successful' the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is 'partially successful' may still succeed in obtaining all of his costs, in an appropriate case."

25. Murray J. goes on in his judgment in *Higgins* to explain that in determining whether a party has been "entirely successful" for the purposes of section 169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues.

26. The Court of Appeal has confirmed in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 that even where a party has not been "entirely successful", the court should still have regard to the matters set out in

sub-section 169(1) when deciding whether to award costs. That sub-section reads as follows.

> 169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
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> (a) conduct before and during the proceedings,
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> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
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> (c) the manner in which the parties conducted all or any part of their cases,
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> (d) whether a successful party exaggerated his or her claim,
>
> (e) whether a party made a payment into court and the date of that payment,
>
> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
>
> (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

27. As appears, there are two broad categories of considerations which a court may take into account in determining costs: (i) the particular nature and circumstances of the case, and (ii) the conduct of the proceedings by the parties. The criteria enumerated at subparagraphs (a) to (g) appear to be directed principally to the second of the two categories, that is, the conduct of the proceedings. The criteria provide examples of what might be described as litigation misconduct, such as, for example, the unreasonable pursuit of issues in the proceedings. The use of the introductory words “including” indicates that

the criteria enumerated at subparagraphs (a) to (g) are not intended to be exhaustive; rather, they are illustrative.

28. The issue of principle which falls for determination in the present case is whether the default position, i.e. that a party who is "entirely successful" in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, is displaced where the proceedings are disciplinary proceedings taken by a regulatory body in the public interest.

29. As appears from the case law discussed earlier, even prior to the commencement of Part 11 of the LSRA 2015, there had been no consistent rule to the effect that the costs associated with court applications in disciplinary proceedings were to be treated differently from other forms of civil litigation. Rather, the high-water mark seems to have been that it would not be appropriate to apply the "costs follow the event" principle to particular types of applications. Thus, for example, a court might decline to make an order for costs against a regulatory body where an application to suspend a professional from practice pending a full investigation had to be made as a matter of urgency, and, for that reason, had to be made on the basis of incomplete information.

30. The costs regime under the LSRA 2015 is more clear-cut. The default position is that a party who is entirely successful is entitled to an award of costs unless the court otherwise directs. The default position applies to all "civil proceedings". The only express exceptions to this are the special rules applicable to certain forms of environmental litigation under section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011. (See section 169(5) of the LSRA 2015). Pointedly, the special costs rules applicable to enforcement proceedings under the Environment

(Miscellaneous Provisions) Act 2011 do not extend to proceedings instituted by a statutory body or a Minister of the Government. (See section 4(3)(b), E(MP)A 2011). The fact that express provision is made in this regard for proceedings taken by a public authority suggests that where the Oireachtas wishes to differentiate, for costs purposes, between ordinary proceedings and those taken in the public interest it does so expressly. This militates against the reading into Part 11 of the LSRA 2015 of an implied exemption for other such proceedings.

31. I am satisfied, therefore, that the default position on costs applies to disciplinary proceedings taken by a regulatory body such as the Law Society. Of course, the nature of the proceedings may nevertheless be relevant to the exercise of the court's *discretion* to depart from the default position. For example, in assessing whether it was "reasonable" for a party to raise, pursue or contest one or more issues in the proceedings, it may be relevant to have regard to the fact that the Law Society was acting in the public interest and thus may have to take a broader view than a litigant in private law proceedings. However, the starting point is that a solicitor who has entirely succeeded against the Law Society is generally entitled to his or her costs unless the court orders otherwise for stated reason.

32. Applying these principles to the facts of the present case, the respondent solicitor has been "entirely successful" in resisting the Law Society's application in the proceedings in respect of the alleged breach of the undertaking to the credit union. The Law Society had sought to have the solicitor's name struck off the Roll of Solicitors by reference to this complaint. The application was refused in circumstances where the findings of misconduct were held by this court to be unsustainable.

33. The default position is that the solicitor is entitled to his costs of those proceedings. Having carefully considered the criteria under section 169(1) of the LSRA 2015, and having all due regard to the fact that the Law Society is acting in the public interest in pursuing disciplinary proceedings, I find no reason to exercise my discretion so as to depart from the default position. This is not a case where, for example, the Law Society had to make an *urgent* application to court seeking interim relief pending the completion of disciplinary proceedings. Rather, the Law Society's application had been a considered application, made on the basis of a formal determination of the Disciplinary Tribunal. The Law Society chose, as it is perfectly entitled to do, to pursue an application for a form of relief over and above that recommended by the Disciplinary Tribunal. More specifically, an order directing the solicitor to pay compensation to the credit union had initially been obtained by the Law Society in July 2010, only for that order to be overturned on appeal to the Supreme Court. The Law Society continued to pursue that relief when the matter was remitted to the High Court. The Law Society only formally abandoned this relief in its written legal submissions.

34. The Law Society pursued its application to strike off the solicitor to the very end, notwithstanding that the solicitor had brought to its attention certain relevant documentation which had not been before the Disciplinary Tribunal.

35. These were all things which the Law Society was entitled to do, but the fact that the Law Society chose to fully contest the proceedings is relevant to the exercise of the court's discretion.

36. Some weight should also be attached to the responsible manner in which the proceedings were conducted by counsel and solicitor representing the

respondent solicitor. Counsel presented his client's case forcefully but fairly. In particular, counsel discharged his obligations to his client and to the court in a thoroughly professional manner.

37. The respondent solicitor did not insist on a resumption of the oral hearing—as would have been his entitlement—following the logistical difficulties presented by the covid-related restrictions, but instead agreed to the matter being determined on the basis of the hearing to date and supplemental written submissions. This very reasonable approach resulted in a saving in costs for both sides.

CONCLUSION AND FORM OF ORDER

38. Having regard to all of the foregoing, I am satisfied that the solicitor is entitled to his costs in respect of one of the Law Society's two applications, i.e. the application in respect of the alleged breach of the undertaking to the credit union (High Court 2010 No. 66 SA). However, the Law Society is entitled to its costs in respect of the other of the two applications. The Law Society was "entirely successful" in those proceedings (High Court 2010 No. 65 SA).

39. These two costs orders should be set off against each other, with the net result that each side should bear its own costs. This is because much of the three-day hearing in March 2020 was expended on issues common to both applications, i.e. the appropriate test to be applied by a court in considering whether findings of misconduct are legally sustainable within the meaning of *Law Society of Ireland v. Coleman* [2018] IESC 80. The time dedicated to each individual application was broadly equal.

40. Insofar as the two applications for an extension of time within which to bring an appeal to the High Court pursuant to section 7(13) of the Solicitors (Amendment) Act 1960 are concerned, again the appropriate order is that each party should bear its own costs. Whereas the respondent solicitor did not succeed in either application, the correctness of this court's decision to refuse one of the applications is open to question for the reasons set out at paragraphs 13 to 15 above.

41. There was a considerable overlap between the submissions made on the two "extension of time" applications and the "strike off" applications given that one of the criteria to be considered in deciding whether to allow an extension of time is whether there are arguable grounds of appeal (*Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3). Having regard to this overlap, the costs should be treated in a similar manner, i.e. each side should bear its own costs.

42. The order of the court is, therefore, that for the reasons set out in detail in this written judgment, each party should bear their own costs.

Appearances

Shane Murphy, SC and Neasa Bird for the Law Society instructed by A & L Goodbody
Paul Comiskey O'Keeffe for the respondent solicitor instructed by John P. O'Donohoe Solicitors

Approved Gerrit Simons