THE COURT OF APPEAL

Neutral Citation Number [2020[IECA 77

Record Number: 2017/573

The President
Costello J.
Haughton J.

IN THE MATTER OF BARRY SHEEHAN, A SOLICITOR

IN THE MATTER OF THE SOLICITORS ACTS 1954-2015

IN THE MATTER OF THE SOLICITORS DISCIPLINARY TRIBUNAL

BETWEEN/

BARRY SHEEHAN
PRACTISING UNDER THE STYLE OF BARRY SHEEHAN, SOLICITOR

APPELLANT

SOLICITORS DISCIPLINARY TRIBUNAL, BERNARD BINGHAM, VIOLA BINGHAM

RESPONDENTS

- AND -

LAW SOCIETY OF IRELAND

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 26th day of March 2020

1. On 5 July 2016, the Solicitors Disciplinary Tribunal ("the Tribunal") found that the appellant solicitor ("the appellant") was guilty of misconduct in respect of a complaint made by the second and third named respondents ("the Binghams") relating to the appellant's threat to destroy their entire file unless they settled the appellant's bill of costs ("the misconduct finding"). The appellant appealed to the High Court under s.7 of the Solicitors (Amendment) Act 1960 (as amended) and Order 53 of the Rules of the Superior Courts, in respect of the misconduct finding. The appellant contended that the Tribunal lacked jurisdiction to entertain the complaint of the Binghams and also challenged the finding of misconduct on its merits. The High Court delivered judgment on 14 December 2016, rejecting the appellant's appeal on the merits and directed that there be a separate hearing of the appellant's jurisdictional challenge with the Tribunal and the Law Society of Ireland ("the Law Society") participating in this more technical argument, as the trial judge was of the view that it was not appropriate for the Binghams, who were not legally represented, to be the sole respondents to arguments which were of relevance to the solicitors' profession as a whole. On 31 October 2017, the High Court dismissed the appeal on the grounds that the appellant failed to pursue the jurisdictional challenge by way of an application of judicial review, and that the appellant had acquiesced in and

waived his entitlement to raise, or rely upon, his jurisdictional challenge. The appellant appealed the judgments and order of the High Court, and this is my judgment on this appeal.

Background

2. Between January 2006 and February 2008, the appellant acted on behalf of the Binghams in respect of a medical negligence claim arising from the death of their son (High Court Record No. 2002/15811SP). The appellant's retainer was an oral one and the case was taken on a contingency fee basis. On 18 February 2008, the appellant sought to vary the contract of retainer and he enclosed a letter, written pursuant to s.68 of the Solicitors (Amendment) Act 1994, setting out the basis upon which he proposed continuing to act for the Binghams. He proposed charging a fixed hourly rate, though the retainer remained on a contingency fee basis. The Binghams declined to sign the contract and the appellant treated his retainer as, thereby, terminated. He applied to the High Court to come off record in the proceedings, which he was prosecuting on their behalf, and he was granted leave to do so.

3. The appellant served a bill of costs, dated 6 May 2008, on the Binghams in the sum of €37,725.44 for professional fees and reimbursement of certain outlays previously paid by the appellant on behalf of the Binghams. The Binghams refused to pay him anything on the grounds that, in accordance with their retainer, no fees were due to him. He retained their files on foot of a solicitor's retaining lien at common law while his fees remained outstanding. The appellant sued the Binghams in the Circuit Court to recover the unpaid legal fees and outlays. The Binghams counterclaimed in professional negligence and breach of contract, seeking damages and for the delivery up of their files so that they might continue to prosecute their medical negligence proceedings as lay litigants. On 24 May 2012, the Circuit Court (Her Honour Judge Flanagan) dismissed the action for reasons which were not recorded and are now unclear. The order states that the appellant "failed to prove his claim" and dismisses the counterclaim.

4. The Binghams did not appeal the decision of the Circuit Court. The appellant did. However, when the matter came on for hearing before the High Court, he withdrew that appeal and the order of the Circuit Court was, therefore, affirmed by Hanna J. As a result, the Binghams say that they do not owe the appellant any fees and that the appellant is, therefore, not entitled to exercise a lien over any file arising from his former retainer. The appellant believes that the fees still remain due and owing and, accordingly, that he is entitled to exercise a lien over all of the files.

5. After the termination of the retainer, the Binghams made a series of complaints against the appellant to the Complaints and Client Relations Section of the Regulation Department of the Law Society ("the CCRS"). On 13 January 2009, they filed a complaint alleging misconduct under a number of headings. On 27 May 2009, this first complaint was rejected by the CCRS and no finding of misconduct was made. The Binghams appealed this determination to the Independent Adjudicator of the Law Society and this appeal was rejected on 17 July 2009.

6. Following the conclusion of the Circuit Court proceedings, on 27 May 2013 the Binghams made a second complaint to the CCRS concerning the appellant which was referred to the Complaints and Client Relations Committee of the Law Society ("the CCRC"). The CCRC referred this complaint to a formal misconduct inquiry as it considered that it was arguable that the appellant's lien over the files had been extinguished in light of the outcome of the Circuit Court proceedings.

7. On 11 March 2014, the appellant objected to the investigation of the second complaint on the basis that it was identical to the first complaint and, therefore, *res judicata*. However, the CCRC determined that a solicitor's lien over a client's file cannot be maintained by a solicitor following a court order dismissing a debt recovery claim in relation to the relevant fees. The CCRC then directed the appellant to hand over the relevant files to the Binghams. The appellant declined to hand over the files on the basis that the relevant direction was made *ultra vires*, in circumstances where the second complaint was *res judicata*. He was ultimately called before a special sitting of the CCRC on 10 June 2014. Submissions were made on behalf of the appellant which resulted in the second complaint being rejected, with no finding of misconduct on 10 June 2014, on the undertaking of the appellant to return any medical records – as opposed to files – which he had belonging to the Binghams. It was the appellant's case that he no longer had such records as the Binghams had retrieved them directly from counsel instructed by the appellant, who had the original and only set of medical records ever furnished to the appellant by the Binghams. It is a matter of dispute whether the appellant had one or three copies of the medical records relating to the medical negligence suit.

8. In June 2014, there was correspondence concerning the intended destruction of the Binghams' file by the appellant which is at the heart of this appeal. On 6 June 2014, while the second complaint was still pending before the Tribunal, the appellant wrote to the CCRC indicating that he intended to destroy the Binghams' file in accordance with the provisions of Chapter 9.12 of *A Guide to Good Professional Conduct for Solicitors* (3rd Edition, Law Society of Ireland, 2013) unless the CCRC could demonstrate a basis upon which he was obliged to retain same. The letter stated:-

> *"…following an extensive, and time consuming, trawl of the writer's archived files I write to confirm that I have since located [the Binghams'] original voluminous litigation files…[h]owever, in accordance with the provisions of chapter 9.12 of A Guide to Good Professional Conduct for Solicitors (3rd edn., Law Society of Ireland, 2013), I will be proceeding to destroy the said files, so as to free up much needed filing space, unless the Committee can demonstrate, by reference to the Solicitors Acts 1954 to 2011 and/or the orders and the regulations made thereunder, the precise legal basis upon which I am obliged to retain the same in the particular circumstances of this complaint."*

9. On 9 June 2014, the appellant confirmed to the CCRC that the files would not be destroyed until such time as the complaint has been dismissed by the Committee, the High Court or the Supreme Court, as appropriate.

10. On 11 June 2014, the CCRC wrote to the appellant noting that at its meeting on 10 June 2014 he had agreed to return "any medical records" held by him to the Binghams, and that the Committee had made no finding on the complaint and was now closing the Society's file.

11. On 15 June 2014, the Binghams emailed the appellant:-

> *"For the avoidance of any misunderstanding, please note that under no circumstances do we permit you to destroy our file. This applies to both the legal and medical content of the file."*

12. On 19 June 2014, the appellant emailed the Binghams regarding the files. I quote it in full as it is at the core of these proceedings:-

> *"Dear Mr & Mrs Bingham*
>
> *Thank you for your email dated 15 June 2014.*
>
> *As you know, your last complaint against the writer was, finally, dismissed by the Complaints and Client Relations Committee of the Law Society of Ireland on 10 June 2014.*
>
> *As indicated in my email to the (sic) Cathy O'Brien, Solicitor, Complaints and Client Relations Section dated 9 June 2014, I will shortly be arranging for your voluminous files to be destroyed so as to free up much needed storage space.*
>
> *In the circumstances, I am prepared to afford you one final opportunity to make an offer to the writer in respect of my outstanding bill of costs dated 6 May 2008.*
>
> *I look forward to hearing from you by return.*
>
> *Regards*
>
> *Barry Sheehan"*

13. By email dated 19 June 2014 (sent three hours after the appellant's email) the Binghams emailed the CCRC stating:-

> *"We request **urgent clarification** regarding the Law Society's position in respect of the destruction of the files and if the Law Society realise the consequences that the destruction of the files would have on the appeal pending in the Supreme Court…*
>
> *Again, for the purpose of clarity we advise the Law Society and their member, Mr Sheehan, that **we forbid the destruction of the files.**"*

14. The CCRC forwarded this email to the appellant under cover of a letter dated 23 June 2014. By email dated 25 June 2014, the appellant wrote to the CCRC in relation to the outcome of the second complaint on 10 June 2014. The letter concluded:-

> *"Finally, as outlined in my email to you dated 9 June 2014 I will shortly be arranging for the [Binghams'] voluminous files to be finally destroyed so as to free up much needed storage space."*

The email correspondence ended there, the Binghams did not offer to discharge any fees and the appellant did not destroy the files.

15. On 15 September 2014, the Binghams lodged a third complaint against the appellant, this time directly with the Tribunal, alleging misconduct contrary to s.3 of the Solicitors (Amendment) Act 1960 (as amended) on the part of the appellant. The third complaint set out twenty-three grounds of complaint relating to the retainer of the appellant, the s.68 letter of contract, his application to come off record and other matters associated with the conduct of the litigation and the retention of the file. Complaint 22 was:-

> *"Mr Sheehan is abusing his position by threatening to destroy the entire file unless we settle his alleged bill of costs, despite a Circuit Court order dismissing his claim."*

16. The complaint was forwarded to the appellant under cover of a letter dated 23 September 2014 from the Tribunal. The appellant replied on 10 October 2014 objecting to the jurisdiction of the Tribunal to hear the matter. He referred to the fact that the first complaint had been dismissed by the Law Society, and the independent adjudicator, in accordance with the provisions of s.15 of the Solicitors (Amendment) Act 1994 and the Solicitors (Adjudicator) Regulations 1997 to 2005 and, therefore, the Binghams were statutorily precluded under s.7(1) of the Act of 1960 from making the within application to the Tribunal. The Tribunal replied on 4 November 2014 pointing out that s.15 of the Act of 1994 never came into operation and had been repealed by s.37 of the Legal Service Ombudsman Act 2009, and informed the appellant that it was proceeding to deal with the application of the Binghams.

17. In response, the appellant swore an affidavit on 12 November 2014 where he argued that the Binghams were not entitled to make the complaint, that the Tribunal would be acting ultra vires if it proceeded to hold an inquiry in respect of the complaint, that the alleged grounds of misconduct were *res judicata* and that there had been no finding by the CCRC that the appellant had committed an act of "misconduct" within the meaning of s.3 of the Act of 1960 (as amended).

18. On 1 April 2015, the Tribunal identified twenty-nine separate allegations of misconduct advanced by the Binghams and determined that there was a *prima facie* case of misconduct made out in relation to two allegations:

    (1) the allegation that the appellant was "abusing his position by threatening to destroy the entire file unless [the Binghams] settle his alleged bill of costs, despite a Circuit Court Order dismissing his claim; and

    (2) the appellant's "refusal to return the file or grant access to the file for the purpose of the Supreme Court Appeal."

19. The other allegations were found not to be made out on the evidence, rather than on the basis of *res judicata*.

20. By letter dated 13 July 2015, addressed to the Tribunal, the appellant confirmed that he would be raising a preliminary objection to the jurisdiction of the Tribunal to hold the inquiry on the basis previously advanced. At the hearing on 15 July 2015, the objection was raised and the Tribunal chairman rejected the argument, holding that the Tribunal's jurisdiction was properly grounded and proceeded to hear the substantive issue. The hearing did not conclude and was adjourned to a date in October 2015. On 20 July 2015, the appellant emailed the Tribunal reserving his right to proceed by way of judicial review in respect of the Tribunal's ruling on its jurisdiction. In the event, he did not bring judicial review proceedings and the Tribunal continued to deal with the merits of the two matters before it. The Tribunal gave its decision on 13 May 2016. It was of the view that the email of 19 June 2014 was a clear and unambiguous threat that if the Binghams did not make an offer to pay the costs of the appellant that he would destroy the files. At para. 66 of the decision they held:-

> *"In the Tribunal's view the respondent solicitor, having been frustrated by his claim for costs being dismissed by the Circuit Court, being reported on two occasions to the Law Society and knowing that the threat to destroy the files would cause the applicants considerable anguish, wrongly threatened the applicants with the destruction of their files. This was a deliberate act to try to force the applicants to give him some money for the work he did on their behalf even though the Circuit Court had dismissed his claim for costs. The Tribunal also infers from the fact that the respondent solicitor, despite his threat to destroy the file, did not actually do so because he knew perfectly well that the file, other than the working papers, belonged to the applicant. As such the respondent solicitor's conduct was morally culpable or otherwise of a disgraceful kind which tended to bring the solicitors' profession into disrepute and therefore he was guilty of professional misconduct."*

21. The Tribunal found that the appellant was not guilty of misconduct in relation to the second allegation, withholding the files from the Binghams, because they were unsuccessful in their counterclaim in the Circuit Court proceedings seeking the return of the files.

22. On 5 July 2016, the Tribunal made an order finding the appellant guilty of misconduct and censured the appellant, ordering him to pay a sum of €5,000 to the Compensation Fund within twenty-one days from the perfection of the decision, and to pay the Binghams a sum not exceeding €750, in respect of their attendance before the Tribunal, to be taxed in default of agreement.

23. On 28 July 2016, the appellant appealed against the order of the Tribunal pursuant to O.53, r.12(i) of the Rules of the Superior Courts and s.7(11)(b)(i) of the Solicitors (Amendment) Act 1960 (as amended).

Proceedings before the High Court

24. The notice of motion, grounding the proceedings before the High Court, raised six grounds of appeal:-

> *"1. The Respondent acted ultra vires the statutory powers conferred upon it by the applicable provisions of the Solicitors Acts 1954 to 2011 and/or the various orders and regulations made thereunder in proceeding to embark upon the Inquiry;*
>
> *2. The Respondent breached the twin precepts of constitutional and natural justice nemo iudex in sua causa and audi alteram partem during the course of the Inquiry;*
>
> *3. The Respondent abused the discretionary powers conferred upon it by the Solicitors Acts 1954 to 2011 and/or the various orders and regulations made thereunder;*
>
> *4. The Respondent failed to vindicate, or properly vindicate, the Appellant's unenumerated personal right to fair procedures in decision-making under Article 40.3 of the Constitution of Ireland 1937;*
>
> *5. The Respondent failed to vindicate, or properly vindicate, the Appellant's right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November 1950 and ratified in this jurisdiction by the European Convention on Human Rights Act 2003; and*
>
> *6. The Appellant reserves the right to plead further grounds of appeal and to amend the within Notice of Motion."*

25. The Tribunal was released by the trial judge from the misconduct challenge on 24 October 2016 and the Tribunal did not, therefore, participate in the misconduct challenge. Only the appellant and the Binghams participated in that part of the appeal. At the hearing on 14 December 2014, the appellant indicated to the trial judge that he wished to pursue his jurisdictional challenge to the Tribunal and to argue that the Tribunal was estopped from proceeding with the hearing in question. The trial judge was concerned that the Tribunal was not before the court on that occasion and that if it had been aware of the far-reaching arguments which the appellant wished to make, that it might have attended. He said it was also apparent that to require the Binghams, who were not legally represented and not legally qualified, to deal with detailed, technical and legal arguments would not be a fair procedure to follow. He, therefore, decided to hear the appeal on the merits and to leave to one side the jurisdictional and estoppel arguments. He held that if necessary, depending upon the result of the appeal, the appellant would have the opportunity if he wished to advance those arguments at a further hearing. No issue was taken on appeal with his decision in this regard.

26. The trial judge held that the email of 19 June 2014 amounted to a threat to destroy the files and it was a threat which the appellant had not been entitled to make because, by the time the email was sent, his alleged entitlement to be paid costs had already been definitively determined by the decision of the Circuit Court, as affirmed by the High Court.

His claim for costs had been dismissed and there were no costs outstanding due to him at the time the email was sent. He held that it amounted to a threat to destroy the property of the Binghams as the file contained documents which were the property of the Binghams.

27. The trial judge then went on to consider whether this amounted to misconduct. He noted that misconduct is defined in the Solicitors Disciplinary Tribunal Rules 2003. Paragraph 1(5) refers to "any other conduct tending to bring the solicitors' profession into disrepute." The trial judge found that the Tribunal was correct in coming to the conclusion that the appellant was seeking, by means of the threat of the destruction of the documents, to obtain from the Binghams an offer for the payment of some, at least, of the sums which were the subject of the bill of costs which he had issued, and in respect of which he had unsuccessfully sued, and that this amounted to misconduct as defined under the Regulations. He, therefore, held against the appellant, insofar as the merits of the appeal were concerned.

28. The appellant then indicated that he wished to pursue the jurisdictional aspect of his appeal. The trial judge directed that the Tribunal should be a respondent to this aspect of the appeal and also joined the Law Society as a notice party. They both raised preliminary objections to the appellant's entitlement to pursue jurisdictional issues in the context of the statutory appeal before the High Court. They each contended that his complaints as to jurisdiction could not be pursued in the appeal because such matters ought to have been pursued by way of judicial review. Such jurisdictional issues could not be accommodated in a statutory appeal which envisaged a *de novo* hearing on the merits. Secondly, it was said that the appellant acquiesced and participated in the proceedings before the Tribunal and, therefore, waived his entitlement to pursue the jurisdictional complaint at this later stage.

29. The trial judge held that both preliminary objections were well-founded. There was no jurisdiction to accommodate judicial review type jurisdictional arguments in the context of the statutory appeal created by the Solicitors Acts. In any event, even if there were such a jurisdiction, the appellant had precluded himself by acquiescence and waiver from subsequently raising such issues.

The appeal on the finding of misconduct

30. The appellant argued that the trial judge erred in holding that his lien over the relevant files had been extinguished on the facts of this case. He argued that it is well-established that a solicitor is entitled to be paid for his work and he is entitled to exercise a lien, at common law, over a client's file. He relied upon the decision of the High Court (Laffoy J.) in *Ring v. Kennedy* [1999] 3 I.R. 316 where she held that:-

> *"At common law, [a solicitor] has a right to retain property already in his possession until he is paid costs due to him in his professional capacity by his client against whom the lien is claimed."*

31. He also cited the decision in Re Galdan Properties Limited (In Liquidation) [1988] I.R. 213 where the Supreme Court held:-

> *"The lien entitles the solicitor to retain the documents, or other personal property, till payment of the full amount of his bill, subject to taxation if required and if the bill is still liable to taxation."*

32. He relied upon the English decision of *Richard Buxton (A firm) v. Mills-Owens* [2010] 1 WLR 1997 for the proposition that a solicitor is entitled to be paid for all work he has done prior to the termination of his retainer if he terminates for good reason. Where a client repudiates a retainer and a solicitor accepts the repudiation by termination "[t]he solicitor may then elect to claim the fees due (if any) under the agreement **or on a quantum meruit**." (emphasis added)

33. The appellant argued that, notwithstanding the dismissal of his Circuit Court proceedings and the withdrawal of his appeal to the High Court, nonetheless he was entitled to be paid for his work on a *quantum meruit* basis. Secondly, he said that there was a bill of costs in relation to work he carried out for the Binghams after 6 May 2008 which was not included in the Civil Bill and that this would support the lien he relied upon. Thirdly, he said that the Circuit Court proceedings were predicated upon a claim for payment for legal services rendered and, alternatively, on foot of an account stated and settled. Finally, he argued that the Circuit Court had rejected the application of the Binghams for the return of the files and, thereby, "tacitly" upheld his retaining lien at common law.

34. The appellant further contended that the trial judge erred in upholding the Tribunal's finding of misconduct. Misconduct is defined under s.3(1) of the Solicitors (Amendment) Act 1960, as amended by s.7 of the Solicitors (Amendment) Act 2002, as including:-

> *"(e) any other conduct tending to bring the solicitors' profession into disrepute."*

35. He referred to *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 22 January 1995) in relation to the concept of professional misconduct in the context of the Medical Practitioners Act. In *Carroll v. Law Society of Ireland* [2016] 1 I.R. 676 it was held that this analysis applied to the term "misconduct" in the context of the solicitors' profession. Keane J. held that:-

> *"(1) Conduct which is "infamous" or "disgraceful" in a professional respect" is "professional misconduct"…*
>
> *(2) Conduct which would not be "infamous" or "disgraceful" in any other person, if done by a [professional] in relation to his profession… may be considered as "infamous" or "disgraceful" conduct in a professional respect."*
>
> *(3) "Infamous" or "disgraceful" conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.*

(4) The fact that a person wrongly but honestly forms a particular opinion cannot of itself amount to infamous or disgraceful conduct in a professional sense.

(5) Conduct which could not properly be characterised as "infamous" or "disgraceful" and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute "professional misconduct" if it is conduct connected with his profession in which the [professional] concerned has seriously fallen short, by omission or commission, of standards of conduct expected among [professionals]."

36. The appellant referred to the decision of the High Court in England *R (Remedy UK Ltd.) v. The General Medical Council* [2010] EWHC 1245 (Admin) where Elias L.J. held that misconduct involved "*…conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession*." In addition, it included conduct which is "*…dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession of medicine into disrepute. It matters not whether such conduct is directly related to the exercise of professional skill."*

37. He argued that in light of these legal principles, and the professional guidance provided by the Law Society regarding the Retention or Destruction of Files and Other Papers and Electronic Storage, and the Law Society's Guide to Good Professional Conduct for Solicitors, that the trial judge erred in upholding the finding of professional misconduct. Firstly, the appellant argued that he was at all times exercising a valid solicitor's lien over the files, and, apart from the lien, the Binghams were not entitled to any work product produced by the appellant which was on the files if they did not intend to pay for it. Secondly, the Binghams had made it clear that they were never going to pay any outstanding fees. Thirdly, it followed from this that the appellant could not be obliged to retain their files indefinitely, or to return their files to them without having been paid. He argued that he was following the guidelines from the Law Society in relation to the destruction of files and that it cannot be the case that a professional person can be found guilty of misconduct where he relied, in good faith, on relevant guidance provided by his professional regulator, prior to proceeding with the impugned conduct. It could not be said that he fell "seriously below" the standards of conduct expected of solicitors by following the Law Society's own guidance documentation. He submitted that disposing of a voluminous file, in accordance with the guidance, cannot amount to conduct which is "dishonourable or disgraceful or attracts some kind of opprobrium" in the sense outlined in *Remedy UK Ltd.* Finally, he submitted that he had expressed an intention to destroy the files to the Law Society on 6 June 2014, before he sent the email at issue in the proceedings. It followed that it was incorrect to construe his email of 19 June 2014 as a clear and unambiguous threat that if the Binghams did not make an offer to pay his costs, then the files would be destroyed. The appellant submitted that he was merely affording the Binghams an opportunity to make a proposal to address their outstanding legal fees prior to him proceeding with the intended destruction of their file. It was submitted that this was not acting in a dishonourable or disgraceful way.

Discussion

38. The fundamental flaw in the appellant's submission is his failure to appreciate the legal import of the dismissal of his Circuit Court proceedings, and the withdrawal of his appeal before the High Court. In the Circuit Court, the appellant sued the Binghams in the following terms:-

> *"The Plaintiff's claim is to recover against the Defendants the sum of €37,725.44 for services rendered by the Plaintiff to the Defendants at the Defendants' request, within the past six years. Alternatively, the Plaintiff claims payment of the said sum on foot of an account stated and settled, detailed particulars of which have already been supplied to the Defendants prior to the institution of this proceeding, and which said sum the Defendants have failed, refused or neglected to pay."*

39. The appellant did not seek to recover any sums in the alternative based on *a quantum meruit* basis, which he could have, had he so wished. Having failed in the claim he brought, he cannot seek to collaterally attack the judgment by asserting a claim for payment on a *quantum meruit* basis. In my judgment, it follows, inexorably, that the appellant is no longer entitled to recover fees or outlays from the Binghams in respect of the legal services provided by him while he was retained as their solicitor up to the date of the issue of the civil bill on 11 June 2009.

40. In my judgment, the trial judge was correct when he stated at p.3 of the *ex tempore* judgment:-

> *"[A] lien can only be exercised in circumstances where there is a debt outstanding. At the time of sending [the email of 19 June 2014], there was no debt outstanding because [the appellant] had failed in his claim to recover the costs of the Circuit Court and that order had been affirmed by the High Court."*

In this regard, it is important to note that the appellant had not argued in the High Court that there were fees due to him in respect of work carried out on behalf of Binghams after he issued the bill of costs on 6 May 2012 which were not included in his Circuit Court proceedings and which, accordingly, remained due and owing to him. It follows that it is not open to him to raise this point in the appeal to this court, as no case for the introduction of an argument not advanced in the court below has been advanced, much less made out.

41. The trial judge endorsed the views of the Tribunal as correctly stating the law:-

> *"The ability to deprive a party of their lawful possessions is based on the fact that fees are due and owing to the other party. If the fees are paid or are no longer due, then the lien evaporates. Once the Court dismissed the respondent's claim for fees, then he ceased to be entitled to any lien."*

I, too, agree. The appellant was not entitled to exercise a lien over the files when he sent the email of 19 June 2014. That being so, was the trial judge correct to hold that the email amounted to a demand to be paid fees which were not due to him, and to an

assertion of a lien without a lawful basis? Was the appellant entitled to destroy the files without the consent of the owners of the files?

42. The true meaning of the email of 19 June 2014 must be viewed in light of the fact that the appellant was not, in fact, entitled to any fees from the Binghams, and was not entitled to exercise a lien over the files of the Binghams. Thus, if the appellant wished to free up the much needed space to which he made reference, he could return the files to the clients or, with the consent of the clients, destroy the files. Certainly, he is not entitled to destroy the files in circumstances where the client expressly forbids him to do so.

43. The appellant wrongly conflated his alleged right to a lien over the files with an entitlement to destroy the files. By definition, if a party is asserting a lien, he is accepting that he does not own the property over which the lien is ascertained. Therefore, I agree with the observations of the trial judge that, absent of the consent of the client, there is no basis in law which will enable, or entitle, a solicitor to destroy the elements of a file which are not his property, but are rather the property of a client, regardless of whether the solicitor is owed fees from the client or not.

44. There are two critical paragraphs in the email of 19 June 2014. The first paragraph says that the appellant will shortly be arranging to destroy the files "so as to free up much needed storage space". However, the email continues to say, **"[i]n the circumstances, I am prepared to afford you one final opportunity to make an offer to the writer in respect of my outstanding Bill of Costs dated 6 May 2008.**" (emphasis added)

45. By using the phrase "in the circumstances", the appellant was clearly linking this paragraph with the immediately preceding one, referring to the destruction of the files. The email means that if an offer is made to pay the outstanding bill, then maybe the files will not be destroyed, regardless of the fact that such payment will have no impact on the freeing up of much needed storage space. The only reasonable reading of this email is: make me an offer and I will return the files to you, if you do not, I will destroy them shortly. This is stated in the context where the writer is due no fees and has no right to withhold the files from the former clients. The opportunity to make an offer to the appellant is in respect of the bill of costs, which was the subject matter of the Circuit Court proceedings and which was dismissed. In the circumstances, I agree with both the trial judge and the Tribunal that the email of 19 June 2014 was a clear and unambiguous threat that if the Binghams did not make an offer to pay his costs, he would destroy the files.

46. The trial judge held that the Tribunal was correct to conclude that the issuing of the email of 19 June 2014 in its terms, and by reference to the background facts, amounted to misconduct. He held that the solicitor in question was seeking, by means of the threat of the destruction of documents, to obtain from the Binghams an offer of payment of at least some of the sums which were the subject of the bill of costs he had issued, and in respect of which he had unsuccessfully sued them. This amounted to misconduct, as defined under the Regulations.

47. In my judgment, the trial judge was correct in so finding. This is not a case of a solicitor being required to follow the guidelines of his regulatory authority in relation to the destruction of files. The clients wanted the files returned to them. It was always open to the solicitor to do so. He was not required to follow any guidelines regarding the destruction of files in the circumstances. The provisions of the Law Society's Guide to Good Professional Conduct for Solicitors, in relation to the retention or destruction of files, does not provide for threatening clients with the destruction of their files unless they make an offer to pay fees which have been found by a competent court not to be due and owing to the solicitor. In my judgment, this is conduct which amounts to misconduct as outlined by Keane J. (as he then was) in *O'Laoire* and, for these reasons, I would reject the appeal in relation to the judgment on the merits.

The appeal on the jurisdiction of the Tribunal to hear and determine the third complaint

48. The High Court delivered a written judgment on 31 October 2017 in relation to the preliminary issues raised in respect of the appellant's jurisdictional challenge to the Tribunal in these proceedings. The appeal was under the relevant provisions of the Solicitors Acts and is, therefore, a statutory appeal. The scope of a statutory appeal is to be determined by reference to the particular statutory provisions; see *Dunne v. Minister for Fisheries* [1984] I.R. 230 and *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516.

49. The notice of motion grounding the appeal, pursuant to O.53 of the Rules of the Superior Courts, set out six grounds of appeal, as quoted above. The Tribunal and the Law Society each raised preliminary objections to these challenges to the jurisdiction of the Tribunal to engage with the third complaint of the Binghams. They submitted that the appellant could not raise complaints about the jurisdiction of the Tribunal in the statutory appeal brought pursuant to s.7 of the Solicitors Acts. The statutory scheme envisages a de novo hearing between the complainant, in this case the Binghams, and the respondent, the appellant, but does not accommodate challenges to the jurisdiction of the Tribunal.

50. The trial judge referred to the decision of the Supreme Court in *O'Reilly v. Lee* [2008] 4 I.R. 269, at paras. 5-8, and he concluded that the observations:-

> *"…support the view that the appeal provided for under the relevant statutory provisions of the Solicitors Acts is not to be regarded as one which provides a forum for dealing with issues which are appropriate for judicial review. The appeal contemplated under the Solicitors Acts is not a substitute for, nor does it provide a parallel jurisdiction to deal with issues such as jurisdiction which properly fall to be litigated in, judicial review proceedings."*

51. The trial judge also considered his own judgment in *Mallon v. Law Society of Ireland* [2017] IEHC 547 which was a case in which he struck out in limine a purported appeal brought by a solicitor, Mr. Mallon, in circumstances where none of the necessary statutory preconditions for the bringing of such an appeal had been satisfied. He rejected the contention that there was a jurisdiction vested in the President of the High Court to entertain "unenumerated" appeals. He contrasted the jurisdiction in the High Court to

regularise the conduct of an ongoing inquiry if there is a breach of natural justice or some misbehaviour on the part of the Tribunal, which "lies within the purview of the judicial review jurisdiction of the High Court" and the appellate mechanism established under the Solicitors Acts. At para. 57 in that judgment, he held:-

> *"A challenge to the jurisdiction, behaviour or conduct of the SDT prior to the completion of its statutory mandate cannot be made by means of a purported appeal under s.7 but only by way of judicial review."*

52. He held that this judgment was supportive of the view that a statutory appeal provided for under the Solicitors Acts does not accommodate issues which properly fall to be dealt with by way of judicial review. He held that the jurisdictional issues raised by the appellant ought to have been litigated by means of judicial review, and he held that there is no jurisdiction on the statutory appeal to entertain the appellant's contention as to a lack of jurisdiction on the part of the Tribunal to have dealt with the complaints of the Binghams.

53. Separately, he agreed with the submissions of the Tribunal and the Law Society that the appellant had acquiesced to the Tribunal conducting the inquiry and had waived his entitlement to raise the arguments he now sought to advance as to the want of jurisdiction of the Tribunal. The trial judge noted that as far back as October 2014, at the very outset of the complaints, the appellant wrote to the registrar of the Tribunal indicating that the Binghams were "statutorily precluded" from making the application which they did. He repeated same in his affidavit of 12 November 2014. On 1 April 2015, the Tribunal reached a conclusion that there was a *prima facie* case of misconduct against the appellant in respect of two matters. Notwithstanding his contention that there was no jurisdiction on the part of the Tribunal to entertain the complaint, he failed to apply for judicial review of this decision. He purported to reserve his right to proceed by way of judicial review in an email dated 20 July 2015 and again in his affidavit sworn on 25 July 2016. But again, he took no steps to seek judicial review. Finally, when a decision was reached, adverse to him, he exercised his statutory right of appeal to the High Court.

54. The trial judge considered the cases of *R (County Council of Kildare) v. Commissioner of Valuation* [1901] 2 I.R. 215, *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 and *Corrigan v. Irish Land Commission* [1977] I.R. 317. He held at para. 50 of his judgment:-

> *"I am of opinion that the conduct of Mr. Sheehan in the present case bars him from proceeding to seek to question the jurisdiction of the tribunal. That ought to have been done at the outset and by means of judicial review. By failing to timeously apply for relief by way of judicial review [the appellant] effectively waived his entitlement to raise these jurisdictional issues."*

55. At para. 54 of his judgment he held:-

"That jurisdictional argument is and was at all material times par excellence an issue to be tested by judicial review. Having failed to embark upon the course which he self-identified in his email of July 2015 he cannot now be heard on that topic."

56. He concluded that even if there were a jurisdiction to deal with the preliminary issues, the appellant had precluded himself by acquiescence and waiver from raising such issues now.

Discussion

57. The issue for consideration is the scope of the statutory appeal provide by s.7(11) of the Solicitors Acts. If it is open to the appellant to argue on appeal that the Tribunal lacked subject jurisdiction, then, the argument goes, he was entitled to reserve these arguments to the appeal to the High Court and thus, there can be no issue of estoppel, acquiescence or waiver which would debar him from arguing the points he now advances.

58. To consider this aspect of the appeal, it is necessary to look at the statutory provisions. Section 7(3) of the Solicitors (Amendment) Act 1960, as substituted by s.17 of the Solicitors (Amendment) Act 1994 and as amended by s.9(a) of the Solicitors (Amendment) Act 2002 provides that:-

"(3) If the Disciplinary Tribunal find that there is a prima facie case for inquiry, the following provisions shall have effect:

(a) they shall proceed to hold an inquiry…

(b) when holding the inquiry the Disciplinary Tribunal shall –

(i) consider each allegation of misconduct made against the respondent solicitor, and

(ii) make a separate finding in respect of each such allegation."

59. Pursuant to s.7(11) of the Act 1960, as substituted by s.17 of the Act of 1994 and as amended by s.9(f) of the Act of 2002, a solicitor has a statutory right of appeal to the High Court in respect of the finding of misconduct by the Tribunal. This section provides:-

"(11)(a) A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under subsection (9) of this section…

…may, within the period of 21 days beginning on the date of the service of a copy of the order or of the report, whichever date is the later, appeal to the High Court to rescind or vary the order in whole or in part, and the Court, on hearing the appeal, may –

(i) rescind or vary the order, or

(ii) confirm that it was proper for the Disciplinary Tribunal to make the order."

60. Order 53, r.12(b) and (d) of the Rules of the Superior Courts provide that an appeal under s.7(11) should be brought by notice of motion, supported by affidavit. Rule 12(h)(i) provides that where the respondent solicitor is appealing against a finding of misconduct, the President can direct that the appeal shall proceed as a full rehearing of the evidence laid before the Tribunal, unless a less than full rehearing is contended for by the respondent and concurred in by the person who made the application to the Tribunal, and unless agreed by the President.

61. The nature and scope of a statutory appeal is a matter of construction of the relevant statute. See *Dunne v. Minister for Fisheries* [1984] I.R. 230; and *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516 where McKechnie J. stated at para. 72:

> *"In any event and as stated, the key issue is to ascertain what the Oireachtas intended by the provisions in question."*

Clarke J. stated at para. 95:-

> *"Within that broad spectrum of appeals, there are, in reality, very many differences both at the broad level of principle and in relation to detail between the types of appeal which may be contemplated. In the vast majority of cases, there is no overarching legal reason why any particular form of appeal may be required. The form of appeal allowed will, in most cases, therefore, be a question of the proper interpretation of the relevant legal measures whether private or public. If those legal measures are sufficiently clear, then it is unlikely that any difficulty will arise. Any court called on to review the actions of relevant bodies or to consider the scope of a right of appeal to or within the courts system itself will simply consider what the rules or statute concerned actually says. However, regrettably, it is all too frequently the case that such rules or statutes are far from clear and often leave any court charged either with reviewing the decisions of outside bodies or considering the scope of its own jurisdiction with a difficult task of interpretation."*

62. In *O'Reilly v. Lee* [2008] 4 I.R. 269 the Supreme Court considered the scope of the statutory right of appeal set out in s.7 as amended:-

> *"5. I have set out the above statutory provision in some detail because it seems to me that the appellant is under a misapprehension as to the precise nature of an appeal from the Solicitors Disciplinary Tribunal to the High Court. He has, for example, drawn this court's attention to his concern that the Solicitors Disciplinary Tribunal is not itself the respondent to the appeal, as he believes would be the case in respect of the professional body regulating his profession. Rather it is the respondent solicitor. He submits that it is difficult to understand how the Solicitors Disciplinary Tribunal, against whose decision he has sought to appeal, is merely a notice party to the proceedings in the High Court, and that in reality this has precluded him from bringing the type of appeal which he would wish to bring. He suggests further that the members of the tribunal could, for various reasons, be thought to be biased.*

6. *I am satisfied that the correct interpretation of the Solicitors Acts 1954 to 2002, as amended in the manner referred to above, is that the appeal from a decision of the Solicitors Disciplinary Tribunal, in this case from its decision dated the 20th March, 2006, 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.*

7. *A different situation would of course arise if the appellant sought to challenge the Solicitors Disciplinary Tribunal in respect of matters dealt with, or failed to be dealt with in an appropriate case, such as would lend themselves to an application for judicial review. In support of his contention that the Solicitors Disciplinary Tribunal should be a respondent to his appeal and not a mere notice party, the applicant invokes the decision of this court in The State (Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51, where that tribunal was the respondent to the applicant's claim. That was not however an appeal, but rather an application for judicial review, and it was both legally appropriate and in accordance with the applicable rules of court governing such proceedings, that the relevant tribunal in that case would be the named respondent. The appellant invokes the same case for an additional purpose, namely, to support his contention that a tribunal against whose decision he is appealing is obliged to provide appropriate and adequate reasons for its decision and he argues that the Solicitors Disciplinary Tribunal did not do so.*

8. *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."*

63. Macken J. made a clear distinction between, on the one hand, matters properly within the scope of the statutory appeal, to which the decision maker is not a party, and on the other, those more properly determined by judicial review, in which case the decision maker is a party to the proceedings. At para. 8 of the judgment she held that arguments that could substantiate grounds of judicial review "all fall, once there is a full appeal to the High Court".

64. In *EMI Records (Ireland) Ltd. V Data Protection Commissioner* [2013] 2 I.R. 669, the Supreme Court endorsed the following passage from the High Court in *Koczan v Financial Services Ombudsman* [2010] IEHC 407 in relation to the scope of statutory appeals:-

> *"There are, doubtless, certain categories of cases where the legal argument raised falls properly to be canvassed by means of judicial review rather than by way of a statutory appeal. As indicated in Square Capital, an argument directed towards a total lack of subject matter jurisdiction is perhaps one such case…."*

65. In oral submissions, the appellant argued that the scope of the appeal provided in s.7(11) of the Acts encompassed his jurisdictional challenge to the Tribunal. The High Court may rescind, or vary, the order of the Tribunal or "confirm that it was proper" for the Tribunal to make the order. The argument was that the High Court could not confirm that it was proper for the Tribunal to make the order appealed against if the Tribunal had no jurisdiction to make the order. Therefore, the statutory appeal required the High Court to be satisfied that the Tribunal had jurisdiction, and it followed that it must be able to adjudicate on any challenges to that jurisdiction within the scope of the statutory appeal.

66. This argument all hinges on the use of the word "proper" in the subsection. Counsel pointed out that the decision in *O'Reilly* predated the amendment of subs. (11) and, therefore, did not address the current statutory scheme. However, in *Mallon v Law Society of Ireland* [2017] IEHC 547 the amended section was considered and the trial judge held that the distinction identified in *O'Reilly* applied to the amended section. This is hardly surprising given the difference, in principle, between proceedings challenging the jurisdiction of a decision maker (to which the decision maker is a necessary party) and an appeal on the merits from a decision maker (whose participation in the appeal would be inappropriate) which applies regardless of the terms of the statutory appeal. The issue remains, therefore, whether this court ought to follow the decision of the High Court in *Mallon*.

67. The appellant was not able to cite any authority where the word "proper", in the context of a statutory appeal, was given the expansive construction he contended for. In my view, the argument strains the statutory language too far. The Oireachtas is presumed to know the law when enacting legislation. This means that it knew of the distinction between matters that fell within, and without, the scope of the statutory appeal when it substituted subs. (11) by the Act of 2002. If it had intended to alter the scope of the appeal to allow for challenges to jurisdiction, to my mind, it would have stated so directly.

68. The word "proper" as used in the subsection does not necessarily refer to the jurisdiction of the Tribunal; it could just as easily refer to the appropriateness or correctness of the decision under appeal. This is more consistent with the other options set out in subs. (i). A more natural reading of the subsection is that in subs. (i), the High Court must consider whether to allow the appeal or not, and subs. (ii) applies where the High Court upholds the order. If this is not so, on a strict reading of the section, it is not open to the High Court to reject an appeal and affirm the decision of the Tribunal. In my view, the

Oireachtas cannot have intended such a result, and thus, should not be taken to have amended the statute in the manner contended.

69. In this case, the jurisdictional challenge alleged a total lack of jurisdiction and did not concern an alleged error within jurisdiction. The appellant has not advanced any arguments which alter this conclusion. It follows that the appropriate remedy, if he wished to raise these arguments, was to seek judicial review, not to pursue the appeal under the Solicitors Acts. Accordingly, the trial judge was correct to dismiss the appellant's jurisdictional challenge on this ground.

70. This conclusion also disposes of the appeal in relation to acquiescence and waiver. The basis for his appeal against this part of the decision of the High Court was the assertion that it was open to the appellant to raise a jurisdictional challenge in his statutory appeal and it, therefore, followed that he had not waived his entitlement to raise these issues. As the premise of this argument has been rejected, this ground of appeal also falls away.

Conclusion

71. The files of the Binghams were their property and, as such, the appellant had no right to destroy the files, particularly in circumstances where they sought their return and forbid the destruction of the files. A solicitor may exercise a lien over the files of a client and refuse to return the files to a client where there are fees due to the solicitor from the client. The appellant had sued the Binghams for fees due to him, his claim had been dismissed in the Circuit Court and he had withdrawn his appeal to the High Court. It followed that there were no fees due to him by the Binghams in respect of the services, the subject of his Circuit Court proceedings. There were no fees due to the appellant and he was no longer entitled to assert a lien over the Binghams' files after the conclusion of the appeal to the High Court.

72. In the email of 19 June 2014, the appellant sought proposals from the Binghams to pay fees that were not, as a matter of law, due to him. He linked the demand for payment with a threat to destroy files over which he had no lien, and where the client objected and sought the return of the files. He would never have been entitled to destroy the files in the circumstances. The email was a threat to destroy the property of a client with a view to extracting payment which was not, in fact, due to him. This is professional misconduct on the part of a solicitor.

73. The challenges raised to the jurisdiction of the Tribunal to entertain the third complaint of the Binghams were not arguments which could be brought within the scope of the appeal to the High Court, established under the Solicitors Acts, and ought to have been brought by way of judicial review. Further, the appellant had acquiesced to the Tribunal conducting the inquiry and, thereby, waived his entitlement to challenge the jurisdiction of the Tribunal subsequently, whether in his appeal or in a belated judicial review.

74. For these reasons, I would dismiss the appeal.