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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

PAUL KEARNEY

Proposed Applicant;

and

THE LAW SOCIETY OF NORTHERN IRELAND

Proposed Respondent.

**Mr Michael Potter (instructed by Kearney Law Group) for the Applicant
Mr Michael Egan (instructed by Francis Hanna, Solicitors) for the Proposed Respondent**

COLTON J

Introduction

[1] The applicant is the principal of Kearney Law Group, a solicitors practice registered in Northern Ireland. On 10 September 2020 an accounts inspection of the practice was carried out on behalf of the Law Society. The inspection identified numerous breaches of the Solicitors Accounts Regulations 2014 which were set out in an inspection report. The report was referred to the Professional Conduct Committee of the Society for its consideration. The Committee met on 24 September 2020 and agreed to recommend to the Council of the Law Society that the applicant be referred to the Independent Solicitors Disciplinary Tribunal in light of the evidence of breaches of the Accounts Regulations. At its next meeting on 21 October 2020 the Council accepted the recommendation and the matter was duly referred to the Tribunal. On 22 October 2020, the applicant was informed by letter of the decision to refer him to the Tribunal.

[2] On 24 October 2020, the applicant sought an appeal of the Society's decision to refer him to the Tribunal.

[3] Mr Mackell, Head of Professional Conduct of the Society, wrote to the applicant on 3 December 2020 informing him that there was no specific appeal process of a decision of the Committee to refer a solicitor to the Tribunal. The applicant was informed that the Committee could review its own decisions when any new information comes available which materially impacts the decision. Mr Mackell invited the applicant to produce any new information that he had to be made available to the Society without delay. The applicant was given until 12 January 2021 to provide any new evidence.

[4] Reminders were sent on 5 and 15 January 2021 regarding any new evidence and the applicant was told to provide any further submissions to the Society by no later than 19 January 2021. On 22 January 2021 the applicant wrote to the Society enclosing a letter from Corrigan Chartered Accountants, dated 20 January 2021, which was submitted to the Committee for their further consideration.

[5] At its meeting on 28 January 2021, the Committee again reviewed the facts of the case and the further submissions of the applicant to determine whether any new information was provided which materially impacted on the original decision. The Committee's decision to refer the applicant to the Tribunal was not changed and following the meeting Mr Mackell wrote to the applicant informing him of the Committee's decision.

[6] The applicant seeks to challenge the original decision of 22 October 2020 and the subsequent decision of 28 January 2021 to refer him to the Disciplinary Tribunal.

The Framework for the Regulation of the Solicitor's Profession in Northern Ireland

[7] At this stage it is useful to set out the relevant framework.

- (i) The statutory framework for the regulation of the solicitor's profession in Northern Ireland is contained in Part III of the Solicitors (Northern Ireland) Order 1976.
- (ii) Article 43(i) provides the power for the Lord Chief Justice (following consultation with the Law Society) to appoint a Tribunal, known as the Solicitors Disciplinary Tribunal (now Independent Solicitors Disciplinary Tribunal). Article 43(vii) and (viii) provides that the Tribunal governs its own procedures and makes rules regulating the conduct of complaints it receives. The Tribunal is independent from the Law Society.
- (iii) Article 44(i)(e) provides that complaints by the Law Society that a solicitor has been guilty of -
 - (1) professional misconduct or conduct tending to bring the profession into disrepute; or

- (2) has contravened a provision of the 1976 Order or any regulation made thereunder;

shall be made to the Tribunal.

- (iv) In this case the matter arises from alleged breaches (identified by the Law Society's accountant) of the provisions of the Solicitors Accounts Regulations 2014. The 2014 Regulations are made pursuant to Article 26 of the 1976 Order.
- (v) Article 73A provides that the Council of the Society has power to appoint committees for general or special purposes as in the opinion of the Council would be better managed by committee and exercise any of the functions of the Council.
- (vi) The Council has appointed a Professional Conduct Committee ("PCC") whose powers include the power to investigate or make complaints in respect of the regulation of the professional practice, conduct and discipline of solicitors as set out in Part III of the 1976 Order and to discharge the Society's statutory duties in this regard.
- (vii) The Council has issued a handbook for the guidance of members of committees, and which provides an Appendix for the express delegation of its powers in relation to conduct and discipline to the PCC. The handbook further provides, at Appendix D, matters to be taken into account when exercising its powers which provides for a two-fold test in respect of referrals to the Tribunal:
 - (1) by deciding whether there is sufficient evidence to bring disciplinary proceedings; and
 - (2) if so whether within the objectives of the Society, such proceedings should be brought, or some alternative action taken. Appendix B further provides a list of non-exhaustive factors which might be taken into account when considering the public interest considerations which fall to be considered in the second limb of the test.

[8] From this it can be seen that the Law Society has a power to refer complaints to the independent tribunal and that in exercising this power it should take into account the factors set out in Appendix B of the Handbook to which I have referred.

The Impugned Decisions

[9] Returning to the decisions under challenge in this case, at its meeting on 24 September 2020 the PCC had a copy of the accountant's inspection report along

with ancillary correspondence and documentation received post-completion of the report.

[10] The Committee noted numerous breaches of the Solicitors Accounts Regulations 2014 highlighted in the report. The most serious breach concerned the transfer of £40,000 from the client account to the office account on 12 May 2020 in respect of a “bounce back loan” which was not deposited to the practice’s client account until 19 May 2020. This resulted in a client account deficit of £40,000 on 12 May 2020 until 19 May 2020.

[11] In an email dated 23 September 2020 the applicant set out his position to the author of the inspection report.

[12] In his correspondence he commenced by saying:

“I wish to begin by making it absolutely clear that I am fully aware of the gravity of this situation and that I treat this matter with the utmost urgency and seriousness, and as an absolute priority matter.”

[13] He goes on to explain that the practice commenced business on 18 August 2019 and that he installed the Insight legal software package for case management and accounts management.

[14] He goes on to explain the circumstances in which he employed book-keepers whom he employed for a 6 month period. During this period he was assured that everything was in order in relation to his accounts. However it became apparent to him that the book-keepers were not competent and whilst he was unaware of the technical issues he knew that something was dramatically wrong and he terminated their contract.

[15] At this stage, like every other business, the practice was coping with the implications of the restrictions imposed as a result of the Covid-19 pandemic. He maintained his staffing levels but his search for a full-time book-keeper was unsuccessful.

[16] When approached for the accounts inspection he enlisted the assistance of his previous book-keepers.

[17] When he was advised that his accounts were far from compliant with the regulations he contacted Celine Corrigan of Corrigan Chartered Accountants whom he employed to rectify his accounts.

[18] In his response he indicated that the entire process had been extremely stressful and worrying for him. He emphasised that no client or any third party suffered any loss as a result of the breaches and that importantly he had taken

immediate steps to rectify the situation. Rectification included the employment of a full-time in-house accountant and oversight by Corrigan, Chartered Accountants. He concluded by saying:

“The situation arose from a continuation of errors in the midst of an exceptional time. I admit my mistakes. They should never have happened and they will never happen again. I respectfully and sincerely ask for the opportunity to demonstrate that I can and will conduct my business in accordance with the SARs and without any further breaches.”

[19] The relevant minutes from the PCC on 24 September 2020 confirm that the Committee considered the report and subsequent correspondence. The minutes set out the background and in particular focus on the £40,000 deficit in the client account. The minutes note that the committee considered the breaches demonstrated were serious. The minutes record that:

*“The Committee **resolved**:
To refer the solicitor, Mr Paul Kearney, to the Independent Solicitors Disciplinary Tribunal where there was evidence of breach of the Solicitor Account Regulations 2014 as amended, it being fair and proportionate so to do, the public interest engaged. The committee also directed further inquiries be made to obtain confirmation regarding the arrangements for the repayment of outlay monies. A further revisit inspection should take place as soon as practicable.”*

[20] After the indication from Mr Mackell that the Committee could review its decision the applicant wrote to the Committee on 22 January 2021 in which he enclosed a letter from Corrigan Chartered Accountants which confirmed their involvement in the matter after they were contacted on 24 July 2020 following communications with the Law Society’s inspector in relation to defective book-keeping. The letter from Corrigan Accountants indicated that all breaches identified were rectified with funds being transferred to cover shortfalls. The letter also confirmed that the applicant had recruited a new book-keeper who understands the accounting system and that *“his banks are now reconciled and as far as we are aware all client accounts maintained in correct order.”*

[21] The applicant’s letter stressed again the circumstances in which the substantial error relating to the £40,000 took place.

[22] He reiterated the following points:

“1. I immediately contacted Corrigan on the same day that Sandra McMahon alerted me to the defective book-keeping – (Sandra McMahon was the person

who carried out the inspection report for the Law Society.)

2. *I immediately contracted with Corrigan's at an enhanced rate of payment in order to urgently rectify the books.*
3. *I worked tirelessly and diverted all my staffing and financial resources to this matter as a priority above all other business matters for over 3 months.*
4. *I acted with absolute candour and integrity and I was personally and professionally determined to fix the issue.*
5. *I credited the client account with the amount of money directed by Corrigan's.*
6. *I now have a full-time legal book-keeper doing my books and I also have contracted with Attracta Brown to supervise and monitor same daily.*
7. *I have put in place robust safeguards and measures to ensure that this never happens again.*
8. *I have not reoffended since.*
9. *The books are in perfect order.*
10. *No client is owed a penny nor was ever owed any money.*
11. *No third party is owed any money nor was ever owed any money."*

[23] In light of all these matters he concluded his correspondence by saying:

"I sincerely and respectfully request that the committee consider withdrawing the matter for an informal caution or to defer any decision for 3/6 months in order to allow me to demonstrate my full compliance with SARs."

[24] The matter was reconsidered by the PCC on 28 January 2021. The relevant extract from the minutes records as follows:

"The committee reviewed the additional papers provided by the solicitor along with his further submissions following the

committee's decision to refer the solicitor to the Solicitor's Disciplinary Tribunal.

The committee noted that the actions that had been taken by the solicitor following the identified breaches of the Solicitors Accounts Regulations. The work in that regard is ongoing and the solicitor has employed new accountants to assist. The committee upon review of the available papers noted that the additional points raised by the solicitor were by way of mitigation and could be opened to the SDT in due course. The solicitor's submissions do not materially impact the decision of the committee to refer.

Resolved: *to proceed with the referral of the solicitor to the Solicitors Disciplinary Tribunal."*

Grounds of Challenge

[25] In his Order 53 Statement the applicant argues that the impugned decision is unlawful on both procedural and substantive grounds.

[26] Properly analysed the challenge is a rationality challenge. It is argued that the decision was disproportionate. Ancillary to this submission it is asserted that it is the "belief and understanding" of the applicant that other solicitors who have been guilty of much more significant financial mismanagement or worse conduct have not been referred to the Disciplinary Tribunal.

[27] Initially the applicant also sought urgent relief in the form of an interim injunction staying the disciplinary proceedings pending the leave hearing and also an interlocutory discovery order requiring the Law Society to provide "*discovery as regards comparable cases, ie, involving financial breaches of the Law Society's Regulations, which were not dealt with by way of a referral to the Solicitors Disciplinary Tribunal.*"

[28] The court has heard the matter on an emergency basis. I am obliged to counsel and their solicitors for attending to this matter at short notice and for their assistance. It was indicated that the matter would not proceed to the Disciplinary Tribunal pending the outcome of this application so no order for a stay was required. As regards discovery this was not really pursued by Mr Potter on behalf of the applicant. An order for discovery prior to leave in a judicial review application would be exceptional. The court recognises that in light of the House of Lords decision in **Tweed v Parades Commissioner for Northern Ireland** [2006] UKHL 53 that a Judicial Review Court should adopt a more flexible, less prescriptive approach than was traditionally the case in judicial review applications.

[29] In any event I consider that any order for discovery would be premature and unnecessary at this stage. This case differs significantly from that of **Tweed** where

the applicant was seeking disclosure of documents that were referred to in the respondent's affidavits after leave had been granted.

[30] Furthermore, in this case there is simply no evidential basis before the court for consideration of such a request. In submissions counsel referred to a "high profile" case which is the subject matter of a criminal investigation. It is the applicant's "understanding" that the circumstances surrounding this investigation did not result in a referral to the Disciplinary Tribunal. The court has no details about this matter although Mr Egan in response pointed out that the court may well understand that a referral would not be made in circumstances where a criminal investigation is ongoing.

[31] All of this is entirely speculative and I do not consider that any order for discovery is appropriate or necessary at this stage in the proceedings.

[32] I return to the substance of the leave argument. Mr Potter submits that the applicant's case is supported by the guidelines that are provided to the PCC as set out in Appendix B of the handbook published by the Law Society.

[33] The relevant section of the Appendix is as follows:

"The decision to refer to the Solicitors Disciplinary Tribunal

(1) *Following the investigation of suspected misconduct, the committee must firstly decide:*

(a) *whether there is sufficient evidence to bring disciplinary proceedings; and*

(b) *if so, whether within the objectives of the Law Society such proceedings should be brought or some alternative action taken.*

(2) *The second stage involves a consideration of various public interest factors consider various factors which may include (sic):*

- *the seriousness of the conduct complained of;*
- *whether there is a risk of repetition;*
- *whether the conduct has been remedied or is capable of being remedied;*
- *whether the solicitor presents a risk to members of the public;*
- *whether the need to uphold proper professional standards and public confidence in the individual and*

the profession would be undermined if proceedings were not brought;

- *whether a lesser sanction such as a letter or advice or caution would be appropriate;*
- *whether the respondent has relevant previous history of findings against him or her;*
- *other personal circumstances of the respondent.”*

[34] Mr Potter argues that a consideration of the various public interest factors referred to in Appendix B(2) supports the applicant’s contention that the decision was arguably irrational. He says that in fact the only factor which points to a referral is the first bullet point namely the seriousness of the conduct complained of. He says that all the other factors point in the opposite direction. In such circumstances he says that it must be arguable that the decision is disproportionate. To use the well-worn phrase he says that to refer the applicant to the Disciplinary Tribunal in this case is like “using a sledgehammer to crack a nut.” He says it is no answer for the Law Society to say that the Disciplinary Tribunal can take into account the factors which are in the applicant’s favour by way of mitigation at a hearing. These are factors which the Misconduct Committee must consider before deciding to refer the matter.

Consideration

[35] The decision-maker in this case is exercising a discretion as part of its important role in the regulation of the solicitors’ profession.

[36] The applicant challenges the exercise of that discretion in this case.

[37] The essence of the challenge is that the decision has been made irrationally in the Wednesbury sense and/or that the decision was disproportionate.

[38] On a conceptual level the court must consider what is the appropriate test for assessing the legality of the impugned decision? Mr Potter argues that the court should assess the matter through the prism of proportionality.

[39] Allied to this issue is the extent of the scrutiny that the court should apply to the impugned decision.

[40] It is correct to say that there is increasing judicial support for the development of a proportionality test as a separate ground of review and debate as to whether it should supplant unreasonableness as a ground of review. As Dyson LJ said in **British Civilian Internees v Secretary of State for Defence** [2003] EWCA Civ 473:

“The result that follows will often be the same whether the test that is applied is proportionality or Wednesbury unreasonableness.”

[41] In Kennedy v Charity Commission (Secretary of State for Justice intervening) [2014] UKSC 20 Mance JSC has expressed clear preference for the advantages of proportionality over the vagueness of irrationality. In De Smith's Principles of Judicial Review, 2nd Edition the author opines at paragraph 11-076:

“Nonetheless, the pervading orthodoxy is that (in the words of Lord Sumption JSC) ‘although English law has not adopted the principle of proportionality generally, it has stumbled towards a concept which is in significant respects similar’ – namely, variable intensity rationality review.”

[42] In assessing these issues and in determining the application I must consider the impugned decision in the context of the nature of that decision, the function of the power being exercised and the nature of the interests and rights at stake.

[43] There is no doubt that the Law Society performs a vital public function in ensuring the regulation of the solicitors' profession, particularly in relation to financial accounts. There can be no criticism of the framework or procedure by which this task is performed. The role of the Law Society for the purposes of this case is to investigate purported breaches and if it appears that breaches have been established to consider whether such matters should be referred to the Independent Disciplinary Tribunal. Clearly the PCC and the Council of the Law Society is a body with appropriate expertise in terms of making such a recommendation. The court should therefore give due deference to the expertise of the decision-making body.

[44] In this case focussing on the nature of the decision and the factors to be considered by the Law Society's guidance it cannot be disputed that there is “sufficient evidence” to bring disciplinary proceedings.

[45] The only issue therefore is whether or not “*within the objectives of the Law Society such proceedings should be brought or some alternative action taken.*” This stage involves a consideration of various public interest factors. These factors include the matters set out above.

[46] The decision here is a preliminary decision. It does not make any determination of the interests or rights of the applicant. It will be for the tribunal to decide firstly whether there has been a breach of the regulations and secondly what sanction if any is appropriate. The applicant will have the full opportunity before the Disciplinary Tribunal to make his case in relation to the breaches and the outcome. He will be able to argue for the outcome he urged on the Committee.

[47] These factors have to be balanced against the detriment to the applicant arising from the impugned decision. A referral to the Disciplinary Tribunal exposes him to the risk of sanction. It will undoubtedly be stressful, time consuming and

will in all probability result in the applicant incurring costs for representation at any hearing.

[48] As is clear from the minutes of the committee's decision and the letters to the applicant confirming the decision the Law Society was persuaded to refer the matter because of "*numerous breaches*" of the Solicitors Accounts Regulations and in particular the transfer of £40,000 from the client account to the office account in May 2020.

[49] In these circumstances it seems to me that the Law Society was lawfully entitled to conclude that the seriousness of the conduct complained of and the need to uphold proper professional standards and public confidence in the individual and the profession were such that it was justified in exercising its discretion to refer the matter to the Disciplinary Tribunal. In my view, whether one applies a *Wednesbury* or a proportionality test the court would come to the same conclusion in this case. The nature of the decision and the function of the power being exercised strongly point against judicial review. When balancing the interests and rights at stake it seems to me that the balance falls firmly on the side of the decision maker.

[50] It is undoubtedly true that there were other factors which could have persuaded the Law Society to come to a different decision. However, the factors are not such as require application in a mechanistic or formulaic way. In a particular case it seems to me the Law Society would be entitled to consider that one particular factor, if significantly serious outweighed all others. In this case the Law Society was clearly influenced by the seriousness of the irregularities identified.

[51] I do not consider that the decision of the Law Society in this case could be considered either irrational, unreasonable or disproportionate. In my view it was entirely within the lawful range of options open to it even if a different committee might have come to a different decision. I consider the case for judicial review of this particular decision is unarguable and has no reasonable prospect of success.

[52] For these reasons leave to seek judicial review is refused.