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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **13/01/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF AN APPLICATION UNDER THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

AND IN THE MATTER OF A SOLICITOR

THE LAW SOCIETY OF NORTHERN IRELAND

Plaintiff

and

[1] KATHY VIVIENNE SINCLAIR
[2] ROBERT GERARD SINCLAIR
[3] ROBERT G. SINCLAIR & CO. LIMITED
[4] EDMUND PAUL SEAN SINCLAIR

Defendants

Stephen Shaw KC with A.J.S. Maxwell (instructed by Mills Selig, Solicitors) for the Plaintiff
Peter Hopkins KC (instructed by Agnew Andress Higgins, Solicitors) for the first Defendant
Frank O Donoghue KC (instructed by Thompsons Solicitors) for the second Defendant
The third Defendant was not represented
John Coyle (instructed by JJ Rice & Co., Solicitors) for the fourth Defendant

SIMPSON J

Introduction

[1] The plaintiff is the Law Society of Northern Ireland (hereafter the Society"). Under the provisions of the Solicitors (Northern Ireland) Order 1976, as amended by the Solicitors (NI)(Amendment) Order 1989, it acts as the regulatory authority for

solicitors and is responsible for governing the education and continuing education of solicitors, the discipline and professional conduct of solicitors, and solicitors' accounts. The Council of the Society has the power to make, and has made, secondary regulations. The secondary regulations with which this case is concerned are the Solicitors Accounts Regulations 2014. The Society is also trustee of the Solicitors Compensation Fund which it administers for the purpose of making grants to compensate private clients of solicitors where those clients have suffered loss through their solicitor s default in circumstances where there is no insurance cover, for whatever reason.

[2] This case arises from the intervention by the plaintiff into a solicitor's firm, and the subsequent acts of the plaintiff as the solicitors' regulator.

[3] It is a pre-condition of the ability to practise as a solicitor that professional insurance cover must be in place. This is an additional client protection measure. Professional insurance cover is provided to all solicitors in Northern Ireland under the Master Policy of the Law Society for Solicitors Professional Indemnity Insurance in Northern Ireland. The lead insurers are Royal & Sun Alliance. Certain provisions of the Master Policy are relevant in this case.

[4] The third defendant solicitors' practice (the company") was incorporated in 2010, and since incorporation the company has carried on the solicitors practice formerly known as RG Sinclair & Co. The directors were the first, third and fourth defendants. Rather than continue to identify them in that way in this judgment I will, without intending any disrespect, call them Kathy, Robert and Edmund. There was a fourth director, who does not feature in this matter. Robert was the sole owner of the company, holding 100% of the shares. The company had a wide range of work, including (and germane to this case) remortgage work principally derived from four lending institutions, namely HSBC, Accord Mortgages, Bank of Ireland and Leeds Building Society.

[5] In October 2019, the Society carried out an inspection of the company s accounting records and concluded that client funds were in jeopardy. The accounts were some five months in arrears and the statutory accountant s report was overdue. On 23 October 2019, Mills Selig Solicitors were appointed to act as supervisors of the company s client bank payments. There was, at that date, no suspicion of dishonesty. The accountancy firm of Baker Tilly Mooney Moore had been instructed by Robert to bring the books up to date.

[6] Apparently unrelated to this, on 4 February 2020, Kathy resigned. She had been intending for some time to leave the company, and had not renewed her practising certificate in January 2020.

[7] On 20 May 2020, the Society was informed by the accountants that some £153,000 had been taken from the company s client account to pay a vat bill and that Edmund had admitted doing this. On 22 May the Council of the Society passed a

resolution that Edmund had been guilty of dishonesty and suspended his practising certificate. Robert excluded Edmund from the practice and undertook to make good the losses from his pension fund. Edmund resigned from the company on 1 June 2020.

[8] Investigations by the accountants continued. On 23 June 2020 they reported that the shortfall was much greater than earlier thought. On 24 June 2020 Robert issued proceedings against Edmund for a Mareva injunction. On 26 June 2020, in a report to the Society, the accountants identified a shortfall in excess of £2 million. They also reported that accounting records had been falsified to conceal the shortfall and that an account known as an Overflow Account had been used since March 2020 to misappropriate client money with the money being used in a teeming and lading manner — mortgage redemption money when received for a particular client was being used to settle the outstanding mortgage of an earlier client s mortgage which had not been redeemed due to cash shortage as a result of the prior misappropriation of funds.

[9] The Society obtained an Order of the court appointing it as attorney: of Edmund, on 1 July 2020; of Robert and the Company, on 17 July 2020; and of Kathy, on 14 September 2020. The skeleton argument of the Society in relation to its application in relation to Kathy stated that the appointment as attorney was for the purpose of making good, insofar as possible, the deficit in the client account" of the company. In each case the court s Order authorised the Society to exercise the powers in para 23 of Schedule 1 to the 1976 Act.

[10] Matters were reported to the Master Policy insurers, and the question of indemnity looms large in this case.

[11] The Society and insurers jointly appointed ASM, forensic accountants, to investigate further. That investigation, set out in a number of reports over time, has revealed that institutional clients of the company are owed £5,813,413 in respect of unredeemed mortgages and that the dishonest misappropriation of client funds may have begun as early as 2016.

[12] On 18 June 2020 Robert notified insurers that he intended to make a claim under the Master Policy. On 5 August 2020 Kathy did likewise. On 6 October 2020 the Society, as trustee of the Solicitors Compensation Fund and as attorney of the company notified insurers that it, too, sought indemnity under the Master Policy.

[13] Insurers rely on Clause 9 of the Master Policy and to date have refused to confirm indemnity. The position of insurers is that none of the three, Edmund, Robert and Kathy, is entitled to an indemnity on the grounds that Edmund was active in the fraudulent activity, Robert was complicit and Kathy condoned the fraud. As to Kathy, the Society s grounding affidavit (para 10) states that insurers have made additional allegations of an historic (sic) nature that they say taint Kathy." In addition, insurers say that there is suspicion that Robert and Kathy were aware of previous frauds perpetrated by Edmund They seek to rely on Condition 9E of the Master Policy.

[14] The position of the Society is set out in some detail in its grounding affidavit in this application. It is not necessary for the purposes of this judgment at this time to set out the detail.

[15] In exercise of its statutory powers and its powers of attorney the Society has recovered a total of just over £2.4 million. To the date of the settlement agreements referred to below, the Society has incurred costs of in excess of £1 million in winding up the practice, preparing the claim against insurers and realising the various assets which have to date been realised. In addition, the Society has made grants from the Solicitors Compensation Fund to private clients of £410,000. With the shortfall in the client account of £5.8 million, the total exposure is in excess of £7 million. Both HSBC and Accord Mortgages Ltd. have obtained default judgment against the company amounting in total to some £3.17 million. Interest on these judgments continues to accrue.

[16] Eventually, following a mediation in January 2024 and further protracted negotiations, two settlements were reached on 2 June 2025. The first was a settlement agreement between the Society and the insurers; the second was a settlement between five institutional lenders, the Society and the insurers. Both settlements are conditional on the court s approval, and it is by way of an application for that approval that this matter comes to be considered.

[17] The settlements are specifically stated to be confidential, so it would not be appropriate to set out the detail of the settlements in this judgment, but I have read both carefully in coming to my conclusion in this application. In brief, it is clear that the institutional lenders are settling for a sum which represents a significant reduction on the shortfall. Insurers are paying a substantial sum, but only a fraction of the overall liability. The Society is putting in the part of the moneys which it has recovered. The settlements would involve, inter alia, the Society taking possession of Robert and Kathy s home and selling it to realise further sums. Following a sale, there is provision for the retention by Kathy of some of the proceeds realised together with some other assets. The realisation of the sale proceeds of a holiday property is also involved.

[18] The principal orders sought by the Society are (1) an order that the Society may lawfully bind the defendants in the settlements which it has reached with the insurers and the institutional clients in compromise of the claims and cross claims of the parties" and (2) that it is entitled to take possession of the home shared presently by Kathy and Robert.

[19] It is clear from the statement of assets filed by the defendants that those assets will not be sufficient to meet the total shortfall. In the grounding affidavit to this application Ms Laura McCullough, Head of Professional Conduct for the Society, says, at para 27 that the full value of the defendants' property will bring the net fund to approximately 50% of the shortfall before considering costs of the intervention."

[20] I confirm that I have read all the affidavits in this case and all the materials specifically identified by counsel in their submissions. I do not seek to rehearse all the matters in this judgment which were raised in the submissions of counsel, but I confirm that I have considered those submissions carefully.

The relevant legislative provisions

[21] The original application brought by the Society against each named defendant was for an order declaring that Schedule 1 of the 1976 Order applies to him/her by operation of Article 36(1)(b)(ii) of the Order and to be appointed as each named defendant s attorney.

[22] Where material article 36 provides:

> **Powers of Council to deal with property in control of certain solicitors and other persons**
>
> 36.—(1) Where the Council have reasonable cause to believe and have passed a resolution stating that they have reasonable cause to believe, that—
>
> (a) …
>
> (b) in consequence of the act or default of a solicitor or of any of his employees—
>
> (i) …
>
> (ii) any sum of money due from the solicitor or his company to, or held by him or his company on behalf of, his clients or subject to a controlled trust is in jeopardy while in the control or possession of the solicitor or his company,
>
> the provisions of Schedule 1 shall apply in relation to that solicitor and the other persons mentioned in that Schedule.

[23] The relevant provisions of Schedule 1 are:

PART II

POWERS EXERCISABLE BY THE SOCIETY AS ATTORNEY

22A—(1) Without prejudice to paragraph 13(1)(b)(ii), the High Court may at any time, on the application of the Society, by order appoint the Society as the attorney of any solicitor named in a resolution passed by the Council under Article 36.

(2) Where the Society are appointed under paragraph 13(1)(b)(ii) or this paragraph to act as attorney of a solicitor—

(a) the Society shall have power, either in their name or in the name of the solicitor, to do all or any of the acts and things mentioned in paragraph 23 and all such other acts and things in relation to the solicitor's practice or property or assets as appear to the Society to be necessary for any of the purposes of this Order, as fully and effectively in all respects as if they were done by the solicitor present in person (irrespective of where he then may be); and

(b) the solicitor shall be precluded from doing any of the acts and things mentioned in head (a) which may be done by the Society as his attorney.

(3) The Society shall have a claim on the property of the solicitor for all costs (if any) incurred by the Society as his attorney."

[24] Paragraph 23 of Schedule 1 provide the Society with very extensive powers pursuant to para 22A(2) once appointed as attorney. They include sub-para (21):

(21) Generally to act in relation to the solicitor s practice and estate as fully and effectively as the solicitor could do."

[25] Articles 33, 34 and 35 of the 1976 Order, which appear under the rubric Accounts etc." are included in Part III of the Order entitled Professional Practice, Conduct and Discipline." Article 33 deals with regulations as to the keeping of accounts by solicitors, article 34 deals with interest on clients' money and article 35 with the requirement for accountants reports to be prepared once every year. The Solicitors' Accounts Regulations 2014 are made pursuant to those articles of the Order.

Thus they, with the 1976 Order, form part of the statutory regime which is designed to further the purposes which I refer to later in this judgment.

[26] Various parts of the 2014 Regulations were identified by counsel, and I refer to these below. Regulation 1.2 is the interpretation regulation and at regulation 1.2.1.20 principal" is defined. Regulation 2 sets out 10 principles which must be observed and regulation 3 identifies the persons governed by the Regulations. They include any principal. Regulations 4 and 5 provide:

> **Regulation 4 – Principals' responsibility for compliance**
>
> (4) All principals must ensure compliance with these Regulations. This duty also extends to directors of a recognised body which is a company, or to the members of a recognised body which is a limited liability partnership, and to the recognised body itself.
>
> **Regulation 5 - Duty to remedy breaches**
>
> (5.1) Any breach of these Regulations must be remedied promptly upon discovery. This includes the replacement of any money improperly withheld or withdrawn from a client account.
>
> (5.2) The duty to remedy breaches rests not only on the person causing the breach, but also on each principal. This duty extends to immediately replacing promptly and without delay missing client money or controlled trust money from the principals own resources, even if the money has been misappropriated by an employee or fellow principal, and whether or not recovery is available from a third party.
>
> (5.3) In the case of a recognised body, this duty falls on the directors of a recognised body which is a company, or to the members. Of a recognised body which is a limited liability partnership, and to the recognised body itself."

Relevant provisions of the Master Policy

[27] The Master Policy includes the following General Conditions relevant to this matter, where material:

1 Civil Liability

The insurers will indemnify the Insured in respect of claims or alleged claims against the Insured … provided that no indemnity will be given

A) to any individual committing or condoning any dishonest fraudulent criminal or malicious act or omission

B) to any partnership or incorporated Practice … in respect of any dishonest fraudulent criminal or malicious act or omission committed or condoned by all of the Partners directors officers or Members …

…

9 Dishonesty and Fraud

In respect of any claim made … arising out of any dishonest fraudulent criminal or malicious act or omission on the part of any former or current Partner Member director officer or Employee in the Firm

A) no person committing or condoning such dishonest fraudulent criminal or malicious act or omission shall be entitled to indemnity

…

E) the insurers will not be liable for any claim arising from any dishonest fraudulent criminal or malicious act or omission committed by any person after the discovery in relation to that person of reasonable cause for suspicion of fraud or dishonesty."

The Society s case

[28] Mr Shaw KC set out in the course of his submissions a chronology of events leading to the proposed settlements, some of which I have referred to above. He commends the settlements to the court and asks the court to approve them.

[29] As to the approach in a case such as this the Society relies on the decision of Deeny J in *Law Society v Bogue.* In submission, the court s attention was drawn to the following paragraphs in the judgment:

> [18] There is a paucity of authority on the duty owed by an attorney under a power of attorney let alone one in the position of the Society as here. What is the role of the Society? As I have said above it is seeking to recover sums of money in jeopardy here or, depending on the terms of

its appointment, more generally to protect sums of money in jeopardy or protect the interests of the clients of a solicitor who may be dishonestly or incompetently acting in breach of his duties. It seems to me therefore that there is merit in the argument by way of analogy that its duty is akin to although not, in my view, identical to that of a receiver. The duties in respect of the exercise of a power of sale by mortgagees and receivers have been held to be the same — *Silven Properties Ltd and another v Royal Bank of Scotland Plc* [2003] EWCA Civ 149. In *Silven* the court further held that the primary duty of a receiver was to bring about a situation where the secured debt was repaid and having regard to that the receiver had to be entitled as a matter of principle to sell the property in the condition in which it was in the same way as a mortgagee could, without waiting or effecting any increase in value or improvement in the property.

[19] These issues were considered by the Privy Council in *Downsview Nominees Limited v First City Corporation Ltd* [1993] AC 295). Lord Templeman delivered the judgment of the Judicial Committee in that case, which concerned very different facts from here. At page 312 he said as follows:

> 'The next question is the nature and extent of the duties owed by a mortgagee and a receiver and manager respectively to subsequent encumbrances and the mortgagor.
>
> Several centuries ago, equity evolved principles for the enforcement of mortgages and their protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and manager appointed by the mortgagee.

> It does not follow that a receiver and manager must immediately upon appointment seize all the cash in the coffers of the company and sell all the company's assets or so much of the assets as he chooses and considers sufficient to complete the redemption of the mortgage. He is entitled, but not bound, to allow the company's business to be continued by himself or by the existing or other executives. The decisions of the receiver and manager whether to continue the business or close down the business and sell assets chosen by him cannot be impeached if those decisions are taken in good faith while protecting the interests of the debenture holder in recovering the monies due under the debenture, even though the decisions of the receiver and manager may be disadvantageous for the company.' (p312f to p313a).
> …

[22] It is clear that the role of the Society as attorney for the solicitor with its very wide powers is not coterminous with that of a mortgagee or receiver selling a property to discharge a secured debt. The Society is a public body discharging a statutory function. But nevertheless, it seems to me that the principle expounded by Lord Templeman is applicable here. The Attorney must act in good faith. If it is necessary to hold premises it must keep them in repair, collect rents and is liable for waste. It should, if it is necessary to sell premises or indeed the practice, seek to get the best price obtainable. That is not to be extended to a general and wider duty of care. The categories of negligence are never closed but they are not, in my view, to be extended to the Society when appointed by the court to protect clients 'interests or sums of money in jeopardy.

[23] There was a brief reference to judicial review by counsel. As this was not fully argued before me I express an opinion with a degree of caution. As a public body discharging a statutory duty the Society may be amenable to proceedings by way of judicial review. If it did "something so absurd that no sensible person could ever dream that it lay" within its powers, per Lord Greene M.R.

in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1947] 2 All ER 680,683, I feel sure that that would be unlawful and any victim would be entitled to a remedy. But I would doubt if the second limb of Wednesbury unreasonableness is applicable, ie failure to take into account a relevant consideration or taking into account an extraneous consideration. I say that principally because the Society is performing an investigative, supervisory and managerial role – not one that is quasijudicial or quasi-legislative nor typically executive. I consider that it has a wide margin of appreciation in the discharge of its duties. The 1976 Order imposes no express duty on the Society here. By implication I find that it has, as it has acknowledged in correspondence, the duty to act in good faith and also to discharge the powers it enjoys as it sees fit so long as it does so rationally. Where managing property it does as a receiver would.

[24] What further seems clear to me is that the primary duty of the society, in this case, is to recover or protect sums of money in jeopardy and that takes priority over its duty to the solicitor, the subject of the attorneyship.
…

[43] In summary, therefore, the position at law of the Law Society of Northern Ireland acting as an attorney for a solicitor requires it to act in accordance with Article 36 of the Solicitors '(NI) Order 1976 and Schedule 1 to that Order, as amended. The primary duty is to address dishonesty or undue delay by a solicitor, his clerks, apprentices or servants or to protect or recover sums of money in jeopardy with the solicitor or his firm. That duty clearly takes priority over any secondary duty to the solicitor, the subject of the attorneyship. However, a duty is owed to such a person. There is a duty on the part of the Society to act in good faith. If their intervention causes them to be responsible for property they should discharge a similar duty as a manager or receiver ie to get in rents, avoid waste and keep property in repair. If selling property, they should seek to get the best price but need not expend money on the improvement of the property to do so. In discharging its duty, the Society has a discretion or margin of appreciation as to how to exercise its powers but it must do so rationally. It is not liable in negligence to the solicitor the subject of the Court Order."

[30] Mr Shaw describes this case as still being the most helpful of the authorities.

[31] Mr Shaw referred the court to regulation 5(2) of the 2014 Regulations contending that it creates a liability on all three (Edmund, Robert and Kathy) to make good the deficiencies. He says that it cannot be right, and would be absurd, if Kathy could successfully argue that although there was perpetration of fraud during her time as principal, because she had ceased to be a principal before its discovery, she should escape liability.

[32] The Society also relies on the duties of directors under sections 171 to 178 of the Companies Act 2006 to fix all three with liability. It also submits that the provisions of section 56(1) of the Trustee (Northern Ireland) Act 1958 provide the court with the ability to confer on the Society the power to enter into these settlements.

[33] It is the Society s case that it negotiated in good faith effectively a tripartite agreement involving the institutional lenders, who agreed to settle for a sum significantly less than the total shortfall. In doing so it was entitled to take into consideration and has taken into consideration, a number of matters. First, the importance of public protection in the exercise of its statutory duties. Secondly, the advices of a specialist counsel. Thirdly, reaching the settlements was preferable to the Society continuing to expend the moneys it had recovered in funding litigation against the insurers to try to obtain an indemnity. Fourthly, the expressed willingness of the clients to compromise. At para 5 of the affidavit sworn by Ms Hunt, the Society s solicitor, on 30 rep 2025, she says that the affected clients have expressed a desire to accept the sum offered rather than have it expended in pursuit of … arbitration. In short, the clients share the Society s view of the risks involved in such a process."

The respondents' cases

[34] I do not intend to set out every aspect of the respondents' cases, only the most germane. The settlements are severely criticised on behalf of their respective clients by Mr Hopkins KC and Mr O Donoghue KC. Both say, inter alia, that any acceptance by the Society that the insurers are correct in their assertion that neither Kathy nor Robert are entitled to be indemnified by insurers is untenable.

[35] Mr Hopkins says that there is no evidence whatsoever that his client, Kathy, was involved in any unlawful activity, and he points out that even the Law Society accepts this. As of the date when the dishonest behaviour was discovered, his client had left the practice. Relying on article 4 of the 1976 Order he says that as from January 2020 she was no longer a solicitor as she did not have in force a certificate issued by the registrar in accordance with the provisions of this Part authorising [her] to practise as a solicitor", having not applied for renewal of her practising certificate in January 2020. He prays in aid the provisions of the Solicitors Account Regulations 2014 to demonstrate that she could not be liable for making good any deficiency as she was no longer a principal in the company. In addition, he says the Society cannot point to

any actual figure of loss in the period after his client left up until May 2020, when the initial problem arose.

[36] As to regulation 5 of the 2014 Regulations, he makes the case that it clearly cannot apply to Kathy, who had left the company by the date of discovery of the breach and could not be considered to be a principal, on whom, per regulation 5(2) there fell a duty to remedy the breach. He says that the 2014 Regulations were made by the Society and in making them the Society did not include any provision for retrospective effect, ie they do not apply to a former director/principal. This leads him to the submission that, insofar as Kathy is concerned, the court could not approve the settlement.

[37] If he is wrong about that, then Mr Hopkins submits that Kathy can only be liable for losses accrued at 4 February 2020, when she left. Having gone through the figures he says that there is uncertainty, and it is not for his client (or the court) to guess what the figures might be. The Society cannot prove any figure which it says is the loss.

[38] Mr Hopkins took the court to a number of documents in which the society made clear that it did not accept that Kathy had been guilty of fraud or dishonesty, including an assertion in its position paper in the mediation in which it stated that it considers that Kathy did not commit or condone the fraud." He also urged me to read, and I did, Kathy s affidavit sworn on 20 December 2023 in which, between paras 27 and 63, she deals with her correspondence with the Society in relation to the issue of indemnity.

[39] Mr Hopkins then traced the actions of the Society. In November 2022 the Society indicated that it would refer the dispute about indemnity with insurers to arbitration, and took the court to correspondence from then to February 2023 dealing with arbitration, including the identification of potential arbitrators. He poses the question why, having seen no evidence of condonation on Kathy s part and having been prepared to go to arbitration, the Society has changed its attitude in such a material way. He notes that the Society also issued proceedings against BDO, the company s auditors/reporting accountant, seeking damages and against AIB, the company s bankers, seeking damages and postulates that such are the terms of the settlement that in certain circumstances insurers may even recoup more than they pay out.

[40] He noted the reference to the Society obtaining specialist legal advice, but says there is no evidence that such advice was ever obtained.

[41] I pause here to note that in his submissions in reply, Mr Shaw told me that in fact the Society had taken specialist legal advice, that such advice was privileged and the Society was not waiving its privilege, but that it was part of the material which played into the Society s deliberations and decision (as I have noted in para [35] above).

[42] Mr Hopkins also submits that the actions of the Society amount to a breach of Kathy s property rights under Article 1 of the First Protocol to the European Convention on Human Rights.

[43] Mr O Donoghue, for Robert, submits that the court is being asked to approve a settlement arrived at in June 2025 (at the date of hearing, some 6 months previously) when new evidence has come to light. Further, he says that there is no evidence that his client knew of or condoned in any way the dishonest actions which led to the losses and that there is no evidence that the Society has turned its mind to the tests which should be applied when considering issues arising under the Master Policy. He says that the height of the evidence against Robert appears in para 12 of the grounding affidavit of Ms McCullough of 4 June 2025, which itself is taken from the ASM report. It states:

> "… given the fact that our review shows that [Robert] has ultimately received or benefitted from the misappropriated client funds which we have identified to date…in our opinion it is not unreasonable to conclude that he knew or ought to have known about the misappropriation of client funds (particularly as he should have been aware that personal loan repayments or other personal expenses were not recorded in his directors current accounts.)"

[44] As to condonation of the fraud he relies on the decision in *Axis Specialty Europe SE v Discovery Land Company and ors* [2024] EEWCA Civ 7. At para [47] the court said:

> One cannot condone dishonest behaviour without having some knowledge or awareness of it. That does not necessarily mean that the condoner must know of the fraud or other dishonest act before or at the time it was committed. If he does, and fails to do anything about it, he might be more appositely described as an accessory to the other person s dishonesty, and thus as a party rather than a condoner. A person might condone another s dishonest behaviour after the event, by doing or saying something (such as assisting to cover it up, or lying about it to others) or by not taking the type of action that one would expect an honest person in their position to take. If a person has a duty to act on becoming aware of the behaviour in question, and fails to do so, they are more likely to be found to have condoned it than someone who has no such duty."

[45] He says that the court must look at the actions of Robert after discovery of the issues, which he took me through in some detail, and which, he says, show beyond

peradventure that Robert did nothing whatsoever by way of concealing anything — rather, all his actions point to the contrary. He submits that an examination of all the material which he took me through fails to show any evidence to support the stance taken by insurers in relation to Robert.

[46] Mr O Donoghue also sought to attack the authority of *Bogue*, submitting that it was of very little persuasive effect — it was a first instance decision, on wholly different facts and the remarks made by Deeny J may be considered to be obiter. He particularly takes issue with the remarks in para [24] of *Bogue* "that the primary duty of the society, in this case, is to recover or protect sums of money in jeopardy and that takes priority over its duty to the solicitor, the subject of the attorneyship." He says that the reality of the situation is that the Society as attorney assumes responsibility for the solicitor s affairs and that that responsibility sits alongside its duty to others. He did not accept that there was a hierarchy in the duties owed and, when pressed, he rejected the proposition in para [24] of *Bogue*. Further, he says that the suggestion that decisions cannot be impeached if taken in good faith is far too narrow an approach for the court to take; that because of the Society s duties owed to the solicitor, the actions of the Society cannot be protected simply by the Society s actions being in good faith.

[47] He considers that there remain other potential methods of recovering moneys, including the existing actions against AIB and BDO. Even the Society, he says, is vulnerable in its actions, as identified, he says, by the evidence of Mr John O Rourke, accountant in Baker Tilly Mooney Moore. There are, therefore, many outstanding issues which should lead the court not to approve the settlements. The Society is making this application effectively to protect itself from challenge, which it would be likely to face if it was to enter into the settlements without court approval.

[48] Edmund has filed an affidavit in which he expresses no objection to the Society s application. Mr Coyle simply referred the court to the affidavit and made no further submissions.

The purpose of the statutory scheme

[49] The scheme of the relevant part of the 1976 Order is to permit the Society to intervene in a solicitor s practice in a variety of circumstances. It seems to me that the purpose behind the entitlement to intervene is first, for the protection of the public, in particular the clients of a solicitor s practice and secondly, to limit claims on the solicitors' compensation fund. It is also important for the maintenance of public confidence in the solicitors profession as one in which every member of whatever standing, may be trusted to the ends of the earth" (per Lord Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512. Paragraph 22A(2)(a) of Schedule 1 provides the power to do all things as appear to the Society to be necessary for any of the purposes of this Order."

[50] In the case of *Re Brangam* [2008] NIQB 11 Gillen J was considering whether the Society was amenable to judicial review because it was exercising functions of a public nature. He said:

> [22] … The public has a legitimate concern as to how the Law Society deals with a compensation fund and protects clients who have been put in jeopardy by the activities of solicitors. This is the rationale behind the 1976 legislation which devolves powers to the Law Society for the protection of the public. Ultimately the manner in which the Law Society exercises those powers – whether it be the initial powers to control solicitors' property under Article 36 or the administrative exercise of those powers under Schedule 1 - is a matter of legitimate and profound public concern.
>
> [23] … I consider that the manner in which the Law Society exercises the powers granted to it under the 1976 Order, as in this instance, is a matter of public interest … It impacts on the public generally who will be anxious to ensure that they as a whole are properly protected by appropriate steps being taken by the Law Society. This is not simply a matter that generates interest or concern in the minds of the public but legitimately affects them in terms of their overall trust and confidence in the legal system and the protection which is afforded in the event of misdeeds by members of the legal profession."

[51] No less an authority than Sir Robert Megarry VC in *Buckley v Law Society (No. 2)* [1984] 3 All ER 313, 317b, in a wholly different set of factual circumstances, said of the similar powers of the Law Society in England & Wales:

> Statute has put the Law Society in a special position in relation to solicitors generally. The Law Society has many important powers which are exercisable in the public interest. In many ways the Law Society is the guardian not only of the profession but also the public in its relations with solicitors."
>
> And at 319b
>
> In any case, the public interest that is to be protected in this case is the effective functioning of the Law Society in protecting monies held by solicitors, as well as the probity and good repute of the solicitors profession…"

[52] In my view, what differentiates the attorneyship of the Society with the duties of eg a receiver is the dual public protection role which the Society performs; both the protection of the public, by protecting clients' money, and the protection of the reputation of the profession.

[53] Lord Steyn in *Re S* [2004] UKHL 47, memorably said of articles 8 and 10 of the European Convention on Human Rights, that neither article has, as such, precedence over the other." Accordingly, where those two articles appear to be in conflict the court must carry out a balancing exercise. I think, without specifically articulating it, this is what Mr O Donoghue says the court has to do in this case ie carry out a balancing exercise between the Society s public protection duties and the duties it owed to the defendants as their attorney.

[54] I cannot think that that is the proper approach. The whole purpose behind the statutory scheme set out in the relevant parts of the 1976 Order and in the 2014 Regulations is public protection; intervention by the Society is not done for the benefit of the solicitors or the firm. The Society s statutory powers and duties are specifically triggered either by dishonesty or an act of default, the consequence of which is to put clients' money in jeopardy.

[55] If that is correct then it follows in my view that the rights of the individual solicitor, for whom the Society acts as attorney, must be subordinated to the statutory duty of the Society to protect clients' money and protect the reputation of the profession. Any other approach, in my view, would severely dilute those protections. Accordingly, I am in respectful agreement with Deeny J when he said that the primary duty of the society, in this case, is to recover or protect sums of money in jeopardy and that takes priority over its duty to the solicitor, the subject of the attorneyship."

[56] What then is the approach which the court should take to decisions by the Society in the exercise of its statutory powers and duties, specifically the proposed settlements in this case? First, in my view, the Society has to exercise its powers in good faith and in furtherance of its duties, the principal of which is public protection. Secondly, the Society must exercise its powers in a way which is not irrational, or the equivalent of *Wednesbury* unreasonable. Notwithstanding Mr O Donoghue s criticism of this potential approach, as originally articulated by Deeny J, no other approach which the court might follow was identified in submissions.

Discussion

[57] It is common case that the decision I have to make is a binary decision. Either I approve the settlements in their entirety or I do not; there is no room for approval of a part or parts of the settlements. It is all or nothing.

[58] The submissions of the Society in this application (insofar as the settlement applies to Kathy) are as articulated by Mr Shaw and also expressed in the affidavit of

Catherine McKay dated 20 July 2020 in paras 13 and 14d — ie that the obligation to make good the deficit in regulation 5(2) is immediate, is a joint and several liability of all directors" and the directors are responsible for the reinstatement of the account. How they adjust the liability amongst themselves is not the [Society s] concern provided the full amount is reinstated." As noted above, Mr Hopkins meets this head on and submits that Kathy is not made liable by the provisions of regulation 5.

[59] Accordingly, the first matter which I need to decide is whether the Society is correct in its interpretation of the provisions of regulation 5 as the basis of liability of Kathy.

[60] Regulation 5 appears under the rubric Duty to remedy breaches."

[61] First, it seems to me from its wording that regulation 5 bites at a particular point in time. Regulation 5(1) requires that [A]ny breach of these Regulations must be remedied promptly upon discovery." It is therefore at the point in time when the breach is discovered that the duty arises. Secondly, the duty to remedy breaches only includes" replacement of moneys. There are other ways in which a breach of the Regulations may occur and will have to be remedied. Thirdly, the purpose behind regulation 5(2) is to ensure the identification of those on whom the immediate duty to remedy falls in any particular case, notwithstanding the identity of the person causing the breach. So, the duty not only falls on the person who caused the breach, but also on each principal. That duty extends to immediately replacing, promptly and without delay" any missing money from the principal s own resources" and that is to be done in circumstances where the money has been misappropriated" by someone else and whether or not recovery is available from a third party."

[62] There are 10 Principles" in regulation 2 which relate to money and accounting practices, and which can be the subject of a breach. In my view any breach of any of those principles could only be remedied, at the time of discovery of a breach by a principal in a solicitor s practice at that time. To give examples, regulation 2(2) requires that other people s money is kept separate from money belonging to the principal. Clearly if a breach of regulation 2(2) was discovered, it could only be remedied by those principals in the practice at the time of discovery by eg moving clients' money into the client account, as only those principals would have control of bank accounts. Someone who had left the practice would not be in a position to control bank accounts. Equally, the discovery of any breach of the duty under regulation 2(7) — to keep proper accounting records — could only be remedied by those principals in the practice at the time of discovery. Further, regulation 2(10) obliges the delivery of annual accountant s reports, a breach of which duty could only be remedied by those principles in the practice at the time of the breach. Clearly a former principal, who had left, would not be in a position to remedy such breaches.

[63] Therefore, I consider that the duty to remedy a breach of the Regulations where remedy involves replacement of any money improperly withheld or withdrawn from a client account" only arises at the time of discovery of the defalcation and the

duty to replace moneys promptly and without delay" only falls on those principals of the practice at that time. In my view such an interpretation of the regulations supports the dual purpose of public protection (of client money) and public confidence (in the profession), as the Society is able to point to those regulations as requiring the principals of a solicitor s practice to replace client money promptly and without delay" irrespective of liability. How, in due course, principals, including former principals, would sort out matters as between themselves is no part of the public s concern; it is a matter for the principals and, where relevant, anyone employed by them in the practice.

[64] I referred above to Mr Shaw s submission that it would be absurd if Kathy was to escape liability for a fraud perpetrated during her time as a principal merely because she had ceased to be a principal at the time of discovery. However, I think such a submission conflates two different matters — (1) the duty promptly and without delay" to replace missing client money (which falls only on those who are principals at the time of discovery) and (2) the liability for the missing money, which can subsequently be visited on any principal (or employee), including a former principal, by way of civil action between them or by use of the Society s powers.

[65] However, in my view for any such person, including a principal, to be liable for deficiencies in the client account that person has to be a guilty person — in the sense either that he has committed the actions which led to the deficiency in client money or that he has been complicit in or has condoned the actions which led to the deficiency.

[66] In all the circumstances, I do not consider that Kathy is rendered liable by the provisions of regulation 5, on which the Society relies to found liability, and there is nothing, on the Society s own case, to suggest that, as a former principal, she could subsequently be held responsible for the deficit because she was a perpetrator of any fraud or because she was complicit in or condoned any fraud. In those circumstances I cannot find that any hypothetical attorney for Kathy could ever advise her to enter into a settlement in the terms proposed and under consideration. Accordingly, on that basis, I decline to approve the settlements.

[67] The Society also relies on Kathy s duties as a director of the Company as contained particularly in sections 171 onwards in the 2006 Act; duty to act within powers (s.171); the duty to promote the success of the company (s.172); the duty to exercise independent judgment (s.173); and the duty to exercise reasonable care, skill and diligence (s.174).

[68] In order for a director to be liable it would have to be shown that he or she had failed to exercise reasonable care, skill and diligence, turned a blind eye or failed to challenge when aware of red flags" or the like. There would have to be a detailed investigation in court before I could decide that Kathy was guilty of any of those faults. This application is not the place for that.

[69] The Society also relies also on section 56(1) of the Trustee (Northern Ireland) Act 1958, which provides, where material:

> **56 Power of court to authorise transactions relating to trust property**.
>
> (1) Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

[70] In light of what I have said above, I could not regard it as an expedient transaction in the circumstances of this case and would not be prepared to confer upon the Society the necessary power as envisaged in section 56(1).

A1P1

[71] As noted above Mr Hopkins also relies on Kathy s rights pursuant to Article 1 of the First Protocol (A1P1). A1P1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[72] I note the decision in *Holder v The Law Society* [2003] EWCA Civ 39. The case involved the intervention procedure contained in the Solicitors Act 1974. The Court of Appeal recorded the submissions made by counsel for the solicitor setting out the principles identified by the ECtHR:

> "… the Court must determine whether a fair balance was struck between the demands of the general interest of the

> community and the requirements of the protection of the individual's fundamental rights." (*Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35, para 69)
>
> "There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions." (*Holy Monasteries v Greece* [1994] EHRR 1 para 4)

[73] At para [30] the Court of Appeal noted the all important" factor when considering issues of proportionality of the margin of appreciation permitted both to the legislature and the decision-maker. At para [31] the court said:

> "… the 'margin' arises at two stages: first, the discretion allowed to the legislature in establishing the statutory regime, and, secondly, the discretion of the Law Society as the body entrusted with the decision in an individual case."

[74] Although the Society has a margin of appreciation, I recognise that I have a separate duty to consider the merits of the case particularly, as here, where the consequences for the defendants are so serious.

[75] An interference with A1P1 rights must meet the requirements of lawfulness. In *Vistiņš and Perepjolkins v Latvia* [GC] App no 71243/01 the ECHR said:

> 95. The Court reiterates that Article 1 of Protocol No. 1 requires that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph of that Article authorises the deprivation of possessions subject to the conditions provided for by law." Moreover, the rule of law, one of the fundamental principles of a democratic society, is a notion inherent in all the Articles of the Convention (see *Former King of Greece and Others v Greece* [GC] (merits), no. 25701/94, § 79, ECHR 2000-XII, and *Broniowski v Poland* [GC], no. 31443/96, § 147, ECHR 2004-V).
>
> 96. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness. In this connection it should be pointed out that when speaking of law", Article 1 of Protocol No. 1 alludes to the very same

> concept as that to which the Convention refers elsewhere when using that term (see, for example, *Špaček v the Czech Republic*, no. 26449/95, § 54, 9 November 1999)."

[76] In view of what I have said about the interpretation of regulation 5 of the 20154 Regulations I think that Kathy has a cogent argument that the proposed deprivation is not provided for by law.

Conclusion

[77] In all the circumstances as outlined above, and as the decision for the court is, as I described in para [57], all or nothing", I refuse the Society s application for approval of the settlements. Since the remaining orders sought in the application are predicated on the approval of the settlements, I dismiss the Society s application.

[78] I will hear the parties on the issue of costs.