Neutral Citation No.[2005] NIQB 51

Ref:	**KERC5320**

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

Delivered:	**28/06/2005**

IN THE MATTER OF A SOLICITOR AND IN THE MATTER OF AN APPLICATION UNDER ARTICLE 17A OF THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

KERR LCJ

Introduction

[1] The petitioner, W M, was admitted and duly enrolled as a solicitor of the Supreme Court of Judicature in Northern Ireland in 1976. He practised on his own account in Lisnaskea, County Fermanagh until 8 March 1988 when he was adjudicated bankrupt. His practising certificate was suspended. By order of the disciplinary committee of the Law Society on 21 November 1989 he was found guilty of misconduct, including conduct tending to bring the solicitors' profession into disrepute. It was also found that he had contravened Solicitors' Accounts Regulations in a number of respects. The disciplinary committee ordered that the petitioner be admonished and restricted from practice on his own account until authorised by the committee.

[2] On 27 February 1991 the petitioner was convicted on his plea of guilty of thirteen offences under the Theft Act (Northern Ireland) 1969. This related to the conduct of his clients' affairs. Seven of the offences involved theft of clients' property. On 31 March 1992 the Disciplinary Tribunal of the Law Society ordered that the petitioner be struck off the roll of solicitors.

[3] On 12 March 2004 the petitioner applied to the Disciplinary Tribunal to have his name restored to the roll of solicitors. A hearing of the application took place on 21 September 2004 and on 22 October 2004 the Disciplinary Tribunal refused the application. It accepted that the petitioner was 'personally rehabilitated'. It found, however, that he had failed to demonstrate that the original offences occurred in exceptional circumstances and since it considered that this had to be established before restoration to the roll could be contemplated, it refused his application.

Statutory background

[4] Article 44 (1) (b) of the of the Solicitors (Northern Ireland) Order 1976, as amended, provides that an application by a person whose name has been struck off the roll for an order for the replacement of his name on the roll shall be heard by the Disciplinary Tribunal. Article 53 deals with appeals from decisions of the Disciplinary Tribunal. It provides:-

> "**53.** – (1) A person aggrieved by –
>
> (a) an order of the Tribunal dismissing an application made by him under Article 44 (1) (a), (b) or (c); or
>
> …
>
> may appeal to the Lord Chief Justice who may—
>
> (i) affirm the order of the Tribunal; or
>
> (ii) make any order which could have been made by the Tribunal on its inquiry."

[5] The petitioner has been employed by two different firms of solicitors since being convicted of committing the offences. It appears that he was employed as a law clerk in both firms. Employment of a person who has been struck off the rolls requires the permission of the Council of the Law Society under article 29 (1) of the 1976 Order which provides:-

> "**29.** — (1) A solicitor shall not, in connection with his practice as a solicitor, without the written consent of the Council, which may be given for such period and subject to such terms and conditions (if any) as the Council think fit, employ or remunerate any person who to his knowledge is disqualified from practising as a solicitor by reason of the fact that his name has been struck off the roll, or that he is suspended from practising as a solicitor or that he has been refused a practising certificate or that his practising certificate is suspended while he is an undischarged bankrupt."

[6] It appears that permission for neither employment was obtained. This matter was raised by John Bailie, Chief Executive and Secretary of the Law Society of Northern Ireland, in an affidavit filed for the purposes of the hearing before the Tribunal. At that time Mr Bailie was aware of only one such employment. It was not until the contents of a reference produced to

this court for the petitioner sparked an inquiry about his employment that it emerged that he had in fact been employed by two firms of solicitors. The petitioner did not address the issue raised by Mr Bailie. For the first time in the course of the hearing of this appeal it was claimed that he understood that both firms of solicitors had sought and obtained the permission of the Council. No evidence to support that claim was produced. While the statutory obligation rests with the firms of solicitors who employed him rather than the petitioner himself, I find it surprising that he did not ensure that the requirements of the Order were strictly complied with and that he failed to address the issue until it was raised during the hearing of the appeal. One may also observe that, if it is correct that neither firm of solicitors obtained the leave of the Council as required by article 29, that this is a most reprehensible failure which, I am sure, the Law Society will wish to address.

The principles relating to restoration to the roll

[7] In *Bolton v Law Society* [1994] 1 WLR 512, 518 Sir Thomas Bingham MR made these observations about how dishonesty on the part of a solicitor is to be regarded:-

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation."

[8] These comments remain unquestionably relevant to the position of solicitors today, eleven years after they were made. I happily adopt them as setting the benchmark for dealing with lapses by solicitors in this jurisdiction from the high standards expected of them and which, I am glad to say, are almost universally to be found among this branch of the profession in Northern Ireland.

[9] Two aspects of this passage from the judgment of the Master of the Rolls are of particular relevance to the present case. Firstly, the petitioner's case clearly falls into the most serious category discussed *viz* proven dishonesty. It must be remembered that this petitioner was convicted of stealing money belonging to his clients. Such behaviour strikes at the very root of the solicitor/client relationship which should be founded on complete trust based on the confidence that a client can repose in the utter integrity of his solicitor. That in turn is grounded on the fact that the solicitor belongs to a profession that prizes and cherishes its commitment to absolute honesty. And it is for that reason that the lapse of an individual solicitor has an impact on the reputation of the profession as a whole. It is precisely because of this consideration that, in order to protect the profession, the professional penalty on a solicitor who fails to uphold the high standards required of him must be severe.

[10] This consideration also informs the second aspect of Bingham MR's observations. Where someone against whom serious dishonesty has been established is struck off the roll of solicitors it will be exceptional for that person to be restored to the roll. Circumstances which might justify such an exceptional course were examined later in *Bolton* in the following passage where the Master of the Rolls discussed the various purposes of orders of suspension or striking off:-

> "The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission."

[11] In considering whether an applicant for restoration to the roll had satisfied this essential requirement, Bingham MR expressed the view that 'glowing tributes from his professional brethren' or the tragic consequences for him and his family, while relevant and worthy of consideration, did not touch 'the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.' While I can quite understand and accept that the privations that a petitioner and his family may have had to endure cannot sound on the issue of public confidence I have a little difficulty with the view that tributes from other members of the profession as to a petitioner's behaviour after striking off are not relevant to this issue.

The scope of the appeal

[12] In *Bolton,* Bingham MR adopted the following principle set out by the Judicial Committee of the Privy Council in *McCoan v General Medical Council* [1964] 1 W.L.R. 1107, 1113, regarding the role of the appellate court in respect of the decision of the disciplinary committee:-

> "… [I]t would require a very strong case to interfere with sentence in such a case, because the disciplinary committee are the best possible people for weighing the seriousness of the professional misconduct."

[13] That this principle requires modification in light of the Human Rights Act 1998 was recognised in *Langford v The Law Society* [2002] EWHC 2802. In that case Rose LJ referred to the following statements of Lord Millett giving the judgment of the Privy Council in *Ghosh v General Medical Council* [2001] 1 WLR 1915 in an appeal under the Medical Act 1983:-

> 'The Board's jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is fully entitled to substitute its own decision for that of the committee. … It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past. … For these reasons the Board will accord an appropriate measure of respect to the judgment of the committee … But the Board will not defer to the committee's judgment more than is warranted by the circumstances."

[14] Rose LJ suggested that these observations should apply equally to appeals by solicitors from the decisions of disciplinary tribunals. I respectfully agree. A less exacting approach was also adopted by Lord Cooke of Thorndon in *Preiss v General Dental Council* [2001] 1 WLR 1926 and by Lord Gill in *MacMahon v Council of the Law Society of Scotland* SLR 36. I propose, therefore, to deal with this appeal on the basis that it is a rehearing in which I am required to reach my own judgment as to its disposal while recognising that considerable respect is due the tribunal, not least because it is composed of solicitors who may be considered to be best placed in making a judgment

as to the impact that the petitioner's restoration to the roll might have in the minds of those who are clients of that profession.

The appeal

[15] Mr O'Kane who appeared for the petitioner referred to the difficulties that the petitioner and his family had endured since he had been struck off. They have been living in straitened circumstances and the petitioner has been obliged to take a succession of menial jobs in order to provide for his family. One of his children suffers Down's syndrome and is in need of constant care. The petitioner, said Mr O'Kane, had accepted the justness of the punishment imposed and the correctness of the decision to strike him off the roll of solicitors. He had lived an exemplary life since that time. The public, if properly informed, would accept that he had expiated his wrongdoing and that he was deserving of the opportunity to practise once more in the only profession for which he was qualified. There was no warrant for the view that the public would harbour a lingering concern about the propriety of the petitioner's return to practice as a solicitor or that there would be a loss of confidence or trust in the integrity of the solicitors' profession generally by the restoration of the petitioner to the roll of solicitors. In this context Mr O'Kane referred to a comment by His Honour Judge Smyth QC, when sentencing the petitioner, that the imposition of a sentence of imprisonment should not preclude the possibility of his return to practice eventually.

[16] In relation to the petitioner's employment by the firms of solicitors, counsel pointed out that the primary obligation to obtain written consent from the Council did not lie with the petitioner but rather with the solicitors firms which employed the petitioner. While this is unquestionably true, it appears to me that someone in the petitioner's position, aware as he has conceded he was of the requirements of article 29, would have been scrupulous to ensure that the necessary permission had been obtained and would have produced evidence to counter the averments in Mr Bailie's affidavit that the necessary authority had not been obtained from the Council. As I have said already, this matter was not addressed until it was raised in the course of the appeal and although it was claimed that permission had in fact been obtained, no evidence was forthcoming to support that assertion.

[17] Mr O'Kane challenged the conclusion of the Tribunal that, in order to demonstrate that exceptional circumstances justifying restoration existed, it was necessary to show that the original offences occurred in exceptional circumstances. He accepted, however, that the burden was on the petitioner to establish that the existence of the circumstances that he asserted were exceptional. Those were, Mr O'Kane contended, that the petitioner had endured considerable hardship as a result of being struck off and that he had refrained from making his application for a suitable number of years. He suggested that these constituted exceptional circumstances to be taken into

account when considering the impact on public's confidence in the integrity of the solicitors' profession. The petitioner's contrition and his impeccable behaviour since he had been convicted also qualified as exceptional circumstances.

[18] Mr O'Kane was invited to consider whether any of the petitioner's rights under the European Convention on Human Rights were engaged. He did not consider that the circumstances of the case engaged any of the provisions of ECHR.

[19] On behalf of the Law Society, Mr Daly submitted that there was no error of principle in the Disciplinary Tribunal's decision to confine the category of exceptional circumstances to those surrounding the commission of the original offence. In advancing this argument he relied on paragraph [1708] Section 9 of *Cordery on Solicitors*:-

> "In clearing the second hurdle it will be necessary to demonstrate that there are exceptional circumstances relating to the original offences (as opposed to exceptional rehabilitation), which would result in any reasonably minded member of the public knowing the facts, concluding that any profession would be proud to readmit the applicant as a member. This is a heavy burden."

[20] That there should be a close circumscription of the circumstances that might qualify as exceptional was supported, Mr Daly argued, by the general tenor of a number of unreported decisions of Lord Donaldson MR, set out in paragraph [1702] of *Cordery* as follows:-

> "There is considerable public interest in the public as a whole being able to deal with the members of those professions knowing that, save in the most exceptional circumstances, they can be sure that none of them have ever been guilty of any dishonesty at all."
>
> …
>
> "It should be quite sufficient that somebody says, 'I am a barrister' or 'I am a solicitor' and, upon that being said, for the member of the public dealing with him to say 'That is quite sufficient for me, anything he says will be truthful and will be honest and I need enquire no further."

…

> "Since dealing with this case I have begun to wonder seriously whether Parliament ever did contemplate restoration in a case of fraud. It may be that in a very exceptional case it did – something which really could be described as a momentary aberration under quite exceptional strain, the sort of strain which not everybody meets with but some people do meet in the course of their everyday lives."

[21] Relying on Bingham MR's statements in *Bolton*, Mr Daly argued that factors such as impeccable behaviour since the original offences should be considered together with the circumstances of the original offences as both were relevant but that rehabilitation factors did not go to the core issue of the public's trust and confidence in the solicitors' profession and, in this respect, should be disregarded.

[22] Citing an extract from another decision of Lord Donaldson set out in paragraph [1706] of *Cordery*, Mr Daly argued that the petitioner's failure to show that there had been exceptional circumstances relating to the original offences was fatal to his application. Lord Donaldson had suggested in that case that before restoration to the roll could be contemplated, the public, in the knowledge of whatever explanation and mitigation was available to explain why the solicitor committed the original offence, would say 'that does not shake my faith in solicitors as a whole'. In the present case the explanation given by the petitioner was unlikely to inspire such a reaction. Such explanation as was available had been supplied by the petitioner to the probation officer who had summarised it in a report dated 27 February 1991 as follows:-

> "The offences appear to have occurred over a relatively short period of time and generally involve the defendant using client monies for personal use in the purchase of his present accommodation. The defendant would say that he had begun negotiations to buy this property, having made initial arrangements with the Bank of Ireland to get a bridging loan pending the sale of his own home. Having given a commitment to the purchase, difficulties apparently emerged regarding him acquiring the loan, as a result of which he then used clients' money to make a deposit on the property. The defendant says that while fully appreciating that his actions were

> wrong he was concerned about the risks of losing the opportunity to buy, apparently affecting his decisions. He strongly insists that he considered himself to be borrowing this money, which he felt he was in a position to repay."

Conclusions

[23] One must begin with the proposition that where serious offences such as fraud have been committed, it will be wholly exceptional for a restoration to the roll of solicitors to occur. The reasons for this are clear. In a profession whose relationship with its clients depends critically on trust, those who betray that trust, particularly by the theft of clients' money, must be seen to be dealt with severely. The readmission to the profession of those guilty of theft of clients' property inevitably carries the risk of a substantial loss of public confidence in the profession as a whole.

[24] The second general principle that should be recognised is that, broadly speaking, solicitors as represented by their disciplinary tribunal are best placed to judge the impact that restoration to the roll of solicitors of a convicted former member will have on the perception of the public. While therefore it is necessary that I should reach my own judgment on the petitioner's application, unconstrained by the determination of the Tribunal in this case, it is right that I should acknowledge the particular expertise that they will have brought to the consideration of that issue.

[25] I do not consider that exceptional circumstances justifying the restoration of a solicitor to the roll can be confined exclusively to circumstances surrounding the original offences and inasmuch as decisions in England suggest that they should be so confined, I would not be disposed to follow them. It appears to me, as a matter of logic and common experience, that public concerns may be assuaged by considerations other than those intimately connected to the circumstances that prompted the striking off in the first place. Of course the history of the offences and the reasons that the solicitor became involved in the matters that led to his being struck off are important and will inevitably play a part in the assessment whether there are exceptional circumstances justifying his restoration to the roll but these cannot be the only matters in every instance that will determine the outcome of that evaluation. A solicitor who has led a blameless life since being struck off and who has established his atonement for his wrongdoing by, for instance, valued work in other fields, cannot be shut out from the possibility of restoration to the roll simply because there was nothing exceptional about the circumstances in which he committed the original offences.

[26] It is clear that the Tribunal considered that it could only contemplate the restoration of the petitioner to the roll of solicitors if it found that there were

exceptional circumstances surrounding the original offences. For the reasons that I have given, I consider that this view was wrong and that the Tribunal should have approached this question on a wider perspective. It does not follow, however, that because I have concluded that the Tribunal adopted a wrong approach the petitioner must succeed in his appeal. Mr O'Kane submitted that I should remit the matter for reconsideration by a differently constituted tribunal. Mr Daly, on the other hand, argued that I had no power to do so and that I was constrained by the terms of article 53 either to affirm the order of the Tribunal or to make an order that the Tribunal could have made. I find it unnecessary to resolve this argument or to decide finally whether there is an inherent power to remit the matter to the Tribunal or whether such a power should be implied from the statutory provisions. I am of the clear view that the application of the petitioner should be dismissed and in those circumstances, even if I had power to do so, it would not be appropriate for me to remit the matter to the Tribunal.

[27] While one must naturally have sympathy with the plight of the petitioner and his family, this case does not come near to the exceptional quality that is required before restoration to the roll could be considered. In particular, the fact that a long time has passed since the petitioner was struck off the roll cannot, in my opinion, qualify as an exceptional circumstance. If it is the position that such applications should only be considered exceptionally, it could not be the case that the mere passage of time would give rise to exceptional circumstances. Put bluntly, the petitioner must expect to be permanently struck off; he cannot claim that because an application to be restored has been delayed exceptional circumstances arise.

[28] Likewise the hardship that the petitioner has suffered, although regrettable, cannot make this an exceptional case. It is an almost inevitable consequence that striking off and the loss of career that a solicitor suffers as a result will bring about a severe reduction in the standard of life that he might maintain. There is nothing exceptional, or even unusual, about that circumstance.

[29] The observations attributed to Judge Smyth cannot prompt a different outcome. It was not accepted by the Law Society that such remarks were actually made by the judge but, even if they were, they must be viewed in the context in which they were made. The learned judge could only be taken as having referred to the theoretical position that the imposition of a custodial sentence was not inevitably incompatible with return to practice. He is bound to have understood that, once struck off, the petitioner would have to apply for restoration to the roll and that this could not be in any way guaranteed.

[30] Having carefully considered all that has been said on the petitioner's behalf, I find that no exceptional circumstances exist that would warrant a

departure from the virtually inevitable outcome in a case such as this. I consider that his restoration to the roll of solicitors would inevitably erode the confidence of the public in the solicitors' profession. The fact remains that he stole clients' money for purely selfish reasons. That money has never been repaid. There has been nothing remotely unusual about the manner in which the petitioner has comported himself since he was struck off. There is simply no basis on which this case could be regarded as in any sense exceptional. The petition is dismissed.