

*Solicitor – Solicitors (Northern Ireland) Order 1976 – claims for possession of house – Convention right to home – interference with property rights – whether making order proportionate – ECHR Article 8 and Article 1 Protocol 1*

**Neutral Citation no. [2004] NICH 2**

Ref: **GIRF4068**

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

Delivered: **23/01/04**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**  
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**IN THE MATTER OF A SOLICITOR**

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

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**GIRVAN J**

**SYNOPSIS**

Application by Law Society a statutory attorney of the solicitor appointed by the court under the Solicitors (Northern Ireland) Order 1976 for possession of the solicitor's dwelling house. The solicitor owes very substantially sums to clients and no other asset was presently available to meet the shortfall which is likely to be in excess of £205,000. The Law Society as attorney was entitled under paragraph 23 of the relevant schedule to the 1976 Order to take possession of the solicitor's assets and was empowered to pay his liabilities. The solicitor and his children resisted the claim for possession on the ground that it premature, unreasonable and unnecessary to recover possession of the property pending finalisation of the question of his total indebtedness. He sought to rely on Article 8 and Article 1 Protocol 1 of the Convention. He also challenged the regularity of the proceedings contending that the proceedings had not been properly commenced by the assistant secretary of the society who was acting beyond the authority conferred by the relevant resolution of the society. It was contended that the Law Society Council had not addressed the question of how to balance the applicant's Convention rights and the Law Society's claim for possession. The solicitor contended that it was open to

clients to pursue claims against his partner under insurance indemnity and that the Law Society could pay the debts out of the compensation fund.

### Held

(1) Even if the proceedings had been irregularly instituted (which the court did not rule upon) the society on 26 November 2003 by resolution validly ratified the proceedings and by necessary implication had addressed the question of whether they should pursue the claim in the light of the Convention rights of the solicitor.

(2) It was for the court to determine the question whether the making of an order for possession was proportionate and necessary and whether it would be compatible with the Convention in the circumstances.

(3) The making of an order for possession was proportionate and necessary. The house was the only asset available for the payment of the debts of the solicitor to clients as they fell due. The making of the order was not arbitrary but was pursuant to law. The order was not an expropriation of the solicitor's property. It merely enabled the society to liquidate his only available asset to meet the client's debts the interference with his property was for a legitimate purpose.

(4) The solicitor's contention that clients should pursue claims under the insurance policy against the solicitor's former partner or that the society should pay the money out of the compensation fund without initially resorting to the solicitor's assets was misconceived.

(5) The Law Society agreed to a stay until the end of July in order to enable the solicitor's son to complete his examinations without interruption. Granting a stay took account of the family interests in a balanced and reasonable way.

### Judgment

[1] In these proceedings at this stage the Law Society ("the Society") seeks, firstly, an order against the solicitor that he grant to the Law Society vacant possession of his dwelling house at 16 Castlehill Road, Belfast ("the premises"). In the amended originating summons the Society' seeks additional relief to which I shall refer later in this judgment.

[2] Following an investigation into the affairs of the solicitor's practice a shortfall in client funds was discovered. A special meeting of the Council of the Society was called on 8 August 2002. A resolution was passed pursuant to the provisions of Article 31(1)(b)(ii) of the Solicitors (Northern Ireland) Order 1976 that the council had reasonable cause to believe that client monies in the

practice were in jeopardy. Shortly before the close of business on 8 August 2002 the solicitor signed a power of attorney in favour of the Society. Mills Selig solicitors were instructed to act as agents for the Society for the purposes of intervention and investigation into the affairs of the practice of the solicitor further investigations brought to light seriously irregularities. Forensic accountants were instructed and I shall refer later to the figures emerging from their investigation. The court on the hearing of the originating summons on 22 May made an order that the Society be appointed attorney under the provisions the 1976 Act.

[3] The examination of the affairs for the solicitors have revealed that the solicitor was engaged in highly irregular activities. The forensic accounts concluded that on a regular basis bills were issued without the client's knowledge and were often unjustifiably high. Money was transferred from the client account to the office account to cover the bills and when matters were closed to enable proper accounts to be paid out to the client monies were often injected from other unrelated client accounts. There is no suggestion that the solicitors working in partnership at the time were privy to the solicitor's wrongdoing.

[4] The 1976 Order as amended confers various powers on the Law Society when it is appointed as a statutory attorney of a solicitor. Article 22A(2) provides that where as here the Society is appointed as attorney:

“(a) The Society shall have power either in their (sic) 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 in person ...”

Amongst the various powers set out in paragraph 23 the power exercisable pursuant to Article 22A(2) includes the power to demand, sue for and recover all property belonging to the solicitor and the power to pay and settle any debts and liabilities of the solicitor. The Society seeks to rely on its statutory right to recover the premises which it would propose to sell to raise funds to meet the liabilities of the solicitor to his clients. The house is occupied by the solicitor and his two children. The solicitor's son is facing examinations in May and June 2004 and the Law Society through counsel informed the court that if an order for possession were made in its favour it would seek to market the premises from in or about April 2004 but would not give vacant possession of the premises until the end of July 2004 by which stage the son should have completed his examination.

[5] In resisting the prima facie statutory right of the Society to recover possession of the premises Mr McCloskey QC argued that there is currently no proper basis for making the order sought. He contends that the relief is unnecessary, unreasonable, disproportionate, premature and is unsupported by the evidence. He says it would infringe the solicitor's Convention rights and those of the children. Relying on Harrow London Borough Council v Qazi [2003] 4 All ER 461 he argues that Article 8 is directed to the individual's right to be left alone to live a normal family life without arbitrary interference by the public authorities. Questions of legitimate purpose, justification and proportionality under Article 8.2 arise. The interference must be in accordance with law and it must also be justified. Article 8.2 calls for a balance to be struck between the applicant's right for respect to his home and some competing public interest, for example where it is necessary for the protection of the rights and freedoms of others. Any order of possession must be proportionate and necessary. An order for possession he argues is not necessary and would not be proportionate. The proportionality requirement pointing to minimal intrusion. Article 1 of Protocol 1 protects the right to peaceful enjoyment of one's property. Here, says counsel, the order for possession would extinguish the solicitor's entitlement to peaceful enjoyment of his property. He argues that the Society has at no stage actually given any consideration to the Convention rights of the solicitor and his children. He says the Society is attempting to expropriate the solicitor's home and such a draconian remedy does not satisfy the tests of legitimate purpose, fair balance and proportionality. So far as it is relevant, he argues that the Society is clearly a public authority for the purpose of functions material to the present case.

[6] Mr McCloskey also took a vires point. The power to bring the claim is exercisable only if it appears to the Society to be necessary for the purpose or purposes of the order. Here he says the Society has not properly decided that it is necessary to bring the claim for possession. It was the Assistant Secretary who gave the instructions to bring the claim and it was she who made the decisions in respect of the necessity and propriety of pursuing the claim for possession. He contends that the Society thus has not established that it has found it necessary to bring the proceedings for possession.

[7] At the conclusion of the arguments on 18 November I adjourned the matter further and gave the Society an opportunity to file further affidavits dealing with the issue of the authorisation in respect of the bringing of the proceedings and to expand upon the current financial position in respect of the liabilities of the solicitor to clients.

[8] In the light of the further evidence in relation to the validity of the proceedings I am satisfied that the proceedings are currently correctly instituted and that the Society has properly come to the conclusion that it is necessary to bring the proceedings. The resolution of 26 November 2003

makes clear that the Society is fully satisfied that the present proceedings are properly constituted if there was any question in the past of the regularity of the proceedings arising. I am satisfied that, applying the ordinary principles of ratification, it has ratified the bringing of the proceedings if there was past irregularity. Accordingly, the solicitor's arguments that the proceedings are not properly constituted falls to the ground. In coming to the conclusion that the present proceedings are properly constituted the Society was live to the human rights issues to which counsel referred in the course of the argument. The present proceedings, accordingly, are not instituted or pursued incorrectly. Whether a possession order should be made remains a matter for the court which itself must take into account the Convention rights of the solicitor and his family.

[9] The additional affidavit evidence indicates that the Society is facing very substantial claims from former clients of the solicitor. To date the liquidated assets available from the solicitor amounts to £359,915.69. Total payments to date out of the compensation fund amount to £216,831.40. A further £57,850.64 in approved claims is currently due. There are in addition expenses and costs amounting to £81,553.68 and there is an estimated further £50,000 in respect of costs incurred but not yet paid. It is clear that by the time the matter is concluded forensic costs and solicitors' costs will be substantially in excess of that. The current shortfall is £16,320.03. But claims from a number of clients are anticipated in excess of £205,000 and the Society has received preliminary communication from other potential claimants. It is clear that in the absence of the solicitor producing other funds (and none have been identified by him) the house is the only asset available to meet the shortfall or to meet the debts due to clients as they are currently falling due.

[10] Mr McCloskey's argument that the shortfall can and should be recovered from the professional indemnity insurers in ease of the solicitor is fallacious. As attorney of Mr Dowd pursuant to a voluntary power of attorney signed by Mr Dowd on 9 August 2002 the Society has been notifying his insurers of claims made against the practice of Nurse and Jones. If the Society awaited determination of each claim by the professional indemnity insurers the Society would allow the value of the claims to increase by the running of interest. There would be an increase in the costs. The Society as an attorney of Mr Dowd would be required to seek reimbursement from the solicitor in any event. As is apparent from the affidavit of the President of the Law Society no practical effect would be secured other than to require Mr Dowd to be exposed to a claim which could otherwise be avoided, to require Mr Dowd to pay any excess on the claims for which he would be liable, to increase the costs and interest on claims and adversely affect the insurance position of solicitors generally in Northern Ireland. To this I would add that it would bring the solicitors' profession into disrepute. The solicitor's conduct to date has done enough damage to the standing of the profession. A moment's analysis of Mr McCloskey's attractively presented argument

reveals how unattractive and unmeritorious the point is. Nor is it right to argue that the Law Society is bound to have to resort to the Compensation Fund in the meantime.

[11] The statutory purpose behind the right in article 23 of the 1976 Order to recover possession of property of the solicitor and to sell it for the purpose of paying the debts due to the solicitor's clients is clear and entirely unobjectionable under Convention law. While the consequence of an order of possession will be that the plaintiff's right to property and his right and that of his family to enjoy their home will be affected that is a consequence that is justified in the interests of the client creditors and in the public interest for clients must be able to rely on a satisfactory and fair system that ensures that liabilities due are promptly met. I am satisfied that the making of an order is necessary in the interests of justice. The exercise of the power to order possession is not an arbitrary intrusion by the State or public authority into a citizen's home life. It is in accordance with law and in balancing the right to respect for home and property rights and the competing interests of clients whose interests the Society must advance the court comes to the conclusion that the scales come down in favour of granting the relief. Clearly the court in exercising its powers will temper any order it makes so far as possible to mitigate the impact of the order on family life. The Law Society agreed to stay execution until the end of July 2004. This is fair in the circumstances and the order which I propose to make will stay execution until the end of July 2004. I will add a further proviso that if between now and the end of July the solicitor produces sufficient additional funds from other sources to meet his liabilities then he will be at liberty to apply to the court to modify, vary or discharge the order for possession appropriately. It is highly unlikely that he will be able to do so. In arriving at this conclusion I have taken into account the property rights of the solicitor having regard to article 1 protocol 1. By parity of reasoning in relation to article 8 I conclude that nothing in the circumstances assists the solicitor in resisting the order. The order for possession does not in any way expropriate the asset. It enables the Society to liquidate the only real available asset to meet the clearly due legitimate debts of the solicitor currently falling due for payment. The interference with the solicitor's property right is accordingly for a legitimate purpose and strikes a fair balance in all the circumstances.

[12] Turning to the claims for additional relief set out in paragraphs 5A, B, C and D and 6 in the originating summons I will deal with each of these in turn.

(a) In paragraph 5A the Society seeks an order requiring the defendant to verify upon oath the nature and type of documents which were seized by the Police Service of Northern Ireland from his house in or about August-September and further to verify on oath if there remains in his possession custody or power documents and records relating to the practice of Nurse

and Jones including any document relating to any client of the firm. Since the Society as attorney is entitled to inspect the documents currently held by the police as they are documents in which the Society has a statutory interest as attorney the Society should exhaust its remedy on that front before the question of making an order in terms of paragraph 5A would arise. Such an order may be wholly unnecessary. The court has power to direct the solicitor to verify on oath if there remains in his possession custody or power documents and records relating to the practice of Nurse and Jones. The court's power lies in its inherent jurisdiction over the solicitor as solicitor and it is an implied power under the Solicitors (Northern Ireland) Order 1976. Since the solicitor has omitted to provide full information to the Society I consider it appropriate to so order the solicitor. He must swear and file an affidavit dealing with these matters within 21 days.

(b) The police tape is in the control of the solicitor in that it would have been provided to the defendant or the defendant is entitled to call on the police to provide him with a copy. The tape will contain information which is relevant to the Society's investigation of the solicitor's affairs. I consider it appropriate to require the defendant to disclose and produce the copy of the tape within 21 days. The court's power to do so at the suit of the Society lies under paragraph 23(4). The tape is property in the control of the solicitor. What is contained on the tape can provide no further evidence of an incriminatory nature over and above whatever the police already have in the original tape.

(c) Under paragraph 5C the Society seeks an order that the defendant does disclose and produce to the plaintiff documents relating to any arrangement for payment by any third party of the defendant's liabilities to the Progressive Building Society including any written requests made by the defendant for any advance and any arrangement by which any advance made to the plaintiff was or is to be repaid by the plaintiff. This documentation again is relevant to the issues involved in the administration of the affairs of the solicitor and again the Society is entitled to seek possession of that documentation under paragraph 23(4) and the court can enforce that right. An order accordingly in the terms of paragraph C will be made and an affidavit verifying the documents and exhibiting them must be filed within 21 days.

(d) In 5D the Society seeks an order that the defendant does verify on oath the whereabouts of the sums of money identified as missing from the practice of Nurse and Jones and as identified in the reports of the accountant set out in the supporting affidavit of Miss Bryson. What is being sought goes very much to the heart of the investigation being carried out by the police. It is inevitable that to make an order would impact on the right of the solicitor against self incrimination and I do not consider it appropriate at this stage to make an order as sought.

(e) In paragraph 6 the Society seeks a permanent injunction restraining the defendant from disposing of any of his assets until such time as the court shall permit him to do so. There is in place a Mareva injunction which remains effective and that injunction will remain in place.

[13] I shall hear arguments on the question of costs.