Neutral Citation No. [2013] NICh 15

Ref: **DEE9065**

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

Delivered: **19/12/2013**

08/117678

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

THE LAW SOCIETY OF NORTHERN IRELAND

Plaintiff;

-v-

JOHN BOGUE

Defendant.

_____

DEENY J

[1] By summons of 26 June 2013 The Law Society of Northern Ireland (the Society) applied for an order discharging the Order of this Court made 11 March 2009 appointing the Society attorney for the defendant, John Bogue. The matter came on for hearing before me on 26 and 27 November 2013, having previously been adjourned to facilitate the instruction by the defendant of Mr William Sinton of counsel. The court had the benefit of written and oral submissions from him and from Mr A J S Maxwell for the Society.

[2] The defendant opposes the plaintiff's application, which arises in the following way. On 14 June 2007 a special meeting was held of the Council of the Law Society. This followed an investigation on their behalf arising out of a complaint against the firm of Bogue & McNulty from another firm of solicitors involved in the Post-Traumatic Stress Disorder Group Action. On considering this matter the Council resolved as follows:

> "1. The Council have reasonable cause to believe that, in consequence of the acts or defaults of John Bogue, G. C. and William J McNulty practising as Bogue & McNulty of 3 Carlisle Circus, Belfast BT14 6AT, or those of any clerk, apprentice or servant of theirs, that sums of money due from them or their firm to, or held by them or their firm on behalf of,

> their clients or subject to any trust of which they are sole trustee or co-trustee as aforesaid are in jeopardy while in control or possession of the said solicitors or their firm.
>
> 2. As by virtue of the foregoing resolution and the provisions of Article 36(1)(b)(ii) of the Solicitors (Northern Ireland) Order 1976, Schedule 1 of the said Order now applies to the said John Bogue, G.C. and William McNulty and the other persons mentioned in that Schedule, the Society shall take control, pursuant to the provisions of paragraph 10 of the said schedule of all sums of money due from the said solicitors or their firm to, or held by them or their firm (in whatever manner or in whatever account and whether received before, or after the date of this resolution) on behalf of their firm's clients or subject to any control trust, as defined in the said Schedule."

[3] The resolution went on to empower the Acting Secretary Ms Suzanne Bryson or her deputy to take the necessary steps pursuant to Schedule 1.

[4] It transpired that Ms G.C. was not an equity partner in the firm and no proceedings were brought against her. With regard to Mr William J McNulty no order against him issued from the court, partly in consideration of an input on his behalf of £150,000 into the firm which he then continued to conduct with the agreement of the Society until his subsequent bankruptcy.

[5] In September 2007 the defendant gave an undertaking not to engage in the affairs of the firm and Ms C. and Mr McNulty gave undertakings to exclude John Bogue.

[6] Article 36 of the Solicitors (NI) Order 1976 ('the 1976 Order') deals with the powers of the Council of the Society to deal with property in the control of solicitors and certain other persons. Three grounds exist for intervening pursuant to Article 36: dishonesty, undue delay in connection with client matters and, as can be seen above, the ground relied on here, that sums of money due to clients are in jeopardy.

[7] Paragraph 10 of Schedule 1 to the 1976 Order empowers the Society to "take control of all sums of money due from the solicitor or his firm to … or on behalf of his or his firm's clients and to give notice of that to third parties". There are supplementary provisions in paragraphs 11, 12 and 13. The most important of these is at paragraph 13(1) (b) (ii) which gives the High Court discretion to "appoint the Society to act as the attorney of the solicitor named in that paragraph [10]". The Society operated on foot of paragraph 10 of the Schedule without a court order until

11 March 2009. On that date this Court made an Order appointing the plaintiff as attorney and applying Schedule 1 to the 1976 Order to this defendant. The defendant, then the first defendant to the proceedings, consented to that order being made, pursuant to paragraph 22A to Schedule 1 of the 1976 Order. That paragraph of the Schedule empowers the Court to make such an order pursuant to a resolution passed by the Council under Article 36.

[8] Paragraph 22A of Schedule 1 to the 1976 Order added to the powers of the High Court and the Society already found at paragraphs 10-13. It reads as follows:

> "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 (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."

[9] Paragraph 23, which was to be found in the original 1976 Order, then gives a very extensive range of powers to the Society as attorney to act in the place of the

solicitor. That runs to some 21 paragraphs envisaging all the actions that one can readily contemplate might be required of a solicitor or his attorney.

[10] I do not think that it can be realistically doubted that the court which made an order appointing the Law Society also has the power to vacate or to discharge its original Order appointing the Society as attorney. The Society brings the application within the inherent jurisdiction of the court. It would seem an example of that jurisdiction's typical operation in filling a lacuna in statutory provisions. In the alternative it might be thought a necessary implication to the power to appoint in the first place. The original Order is not time limited. This is to be expected as the Society when applying would not know how long their task of intervention was likely to take.

[11] Counsel were unable to find any express authority on how the power to discharge should be exercised. In those circumstances I feel it is appropriate to say something on this topic, especially as the parties dispute what the outcome should be here.

[12] As the application is made to the court without reliance on an express statutory provision entitling the applicant as of right to the discharge it must logically follow that the court does have a discretion in the exercise of this power. If the reason for which the original order appointing the Society as attorney has ceased to apply the logical implication would be that the Society is entitled to its discharge. For example, the Society's resolution could be based on having a reasonable cause to believe that, as here, sums of money belonging to clients are in jeopardy. It may be, however, that having become attorney the Society ascertains that there was an innocent explanation for the cause for concern and the client's funds are not in fact in jeopardy. It would be absurd if the Society were not able to come into court and seek its discharge. Indeed it would be quite wrong if the solicitor, having been vindicated in the conduct of his practice, the subject of such of an order, were not able to apply to the court for such a discharge himself if the Society failed to do so.

[13] Mr Maxwell referred to Bennion on Statutory Interpretation, 5th Edition, at Division Five (Interpretative Presumptions). It is not only the presumption against absurdity which would assist him here. The mischief which this statute seeks to address is the misuse of his position by a solicitor. In the case of sums in jeopardy that mischief has been remedied once the sums have been preserved or, as the Society contends here, there are no further sums of money in jeopardy to be protected or recovered. A purposive construction would lead to a similar outcome.

[14] It is clear that in a broader sense there is a public interest in ensuring the honesty and competence of the solicitors' profession. It performs a vital role in society. Our system of conveyancing, by which the solicitor for the vendor receives the proceeds of sale in return for passing on title, is dependant to a significant degree on the honesty of the vendor's solicitor passing those proceeds on to the vendor,

after such deductions as are proper. The purchase price is normally conveyed by way of a cheque from the purchaser's solicitor, who has been put in funds by his client, to the vendor's solicitor. There are strict provisions regarding the keeping of accounts by solicitors which are of importance as ensuring, inter alia, some early warning if solicitors are getting into difficulty or are misusing client's funds. I agree with the view expressed in Re Brangam [2008] NIQB 11 that the manner in which the Law Society exercises its powers under Article 36 in Schedule 1 is a matter of legitimate and profound public concern. Once the power in a particular case has been fully exercised it would be logical to seek a discharge of the attorneyship. I leave to one side for the moment the arguments relied on by the Society in this particular case and turn to the area where dispute occurs. Mr Sinton for the defendant acknowledges there is an issue of public concern but argues that the Society also owes a duty to the solicitor, in this case Mr Bogue, which it should discharge before the Society is entitled to obtain its discharge.

[15] His first submission rests on the wording of paragraph 22A-(2) (a) of the first Schedule to the Order. He submits that as the Society is to do all or any of the acts "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)" it is obliged to pay attention to the particular interests and attitude of the solicitor whose role it is taking over as attorney. I do not accept that submission. First of all the words relied on by him are a reference to the "power" of the Society set out in that paragraph. It is how they may exercise that power. It does not in itself purport to impose a duty on the Society. It is rather to stress that the Society has the power "to do all or any of the acts and things mentioned in paragraph 23". I have already commented on the very wide nature of paragraph 23.

[16] Secondly, stress on the words "as if they were done by the solicitor present in person" in the way that Mr Sinton advances could produce absurd results. A reason for the intervention by the Society might be the dishonesty or mental illness of a solicitor. It would be absurd in those circumstances for the Society to behave as if the matters to be attended to were being done by that solicitor. The duty of the Society is to prevent dishonesty or client's money going astray and the reputation of the solicitor's profession being damaged thus or by undue delay.

[17] Mr Maxwell submits that the duty of the Society is akin to that of a receiver. He characterises that as a duty of reasonable care but leaving a margin of appreciation to the receiver. Mr Sinton says that the duty owed by the Society to his client is a fiduciary duty. He advances no authority for that proposition but relies on the use of that phrase by the Society itself in correspondence.

[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 [2004] 4 All ER 484; [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).

[20] Further observations of his Lordship are of assistance here. I quote from page 315b-c.

> "The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. Cuckmere Brick Co. Ltd v Mutual Finance Limited [1971] Ch. 949, Court of Appeal, is authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but there is no authority for any wider proposition."

[21] His Lordship rejected a general duty to use reasonable care in dealing with the assets of the company. The Privy Council found there to be no duty in negligence. However, if there was, as in that case a breach of good faith, damages would be approached in the same basis as if it was a breach of duty of care.

[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, i.e. 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 quasi-judicial 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.

[25] As indicated above I have taken into account the further exchanges between the parties. Mr Sinton does not submit that a defendant in the position of this defendant is always entitled to an account from the Society. I observe that I ordered such an account in Law Society v Monteith [2012] NICH 13. However, it should be borne in mind that in that case the Society had recovered a third of a million pounds which it believed belonged to Mr Monteith, after a long attorneyship. The extent of any such account and whether it is needed will reflect the factual context.

[26] However, not only do I reject the suggestion that the Society has to act as if it were the particular solicitor concerned but I would also reject any notion that the extent of its duty of good faith and rationality with a margin of appreciation towards the solicitor should take priority over its primary duty to prevent dishonesty, preserve client's funds and the Society's compensation fund which might meet any such losses and to preserve the standing of the profession.

[27] I will now turn to consider that general approach in the light of the particular facts put before the court, taking into accounts the affidavits and the exhibits lodged on both sides. I have borne in mind all the arguments of counsel even if not expressly referred to by me.

[28] The principal submission of the Society, as it emerged in argument, was based on the affidavits of Ms Suzanne Bryson, Deputy Chief Executive, as she now is, of the Law Society i.e. there are no client funds still extant in jeopardy; they have been recovered or they are gone In her affidavit of 14 June 2013 at paragraph 11 she says the following.

> "There are no further client issues about which the plaintiff needs be concerned."

At paragraph 16 she states the following.

> "The plaintiff believes that the client funds due by the defendant's former practice have been recovered and secured as far as possible and there is no continuing public interest to be served or benefit for the plaintiff to continue the attorneyship."

[29] I observe that on foot of that affidavit and the application of the Society and in the absence of any appearance by Mr Bogue I made an Unless Order on 26 June 2013 granting discharge unless the defendant notified the Chancery Office and the plaintiff in writing that he objected to the discharge and/or the order for costs within 14 days of the service of this order upon him. Mr Bogue, on his own account, then did serve such a notice on 9 July 2013. Subsequently he lodged on 15 August 2013 an affidavit in reply to that of Ms Bryson.

[30] I find the objections of Mr Bogue to be without foundation. I will attempt to deal with them as concisely as possible.

[31] Firstly, I note there is no basis for attacking the Society for any failure in exercising a sale. The offices of Bogue & McNulty at Carlisle Circus were sold but at a figure that fell short of a pre-existing mortgage. This brought no benefit to the Society.

[32] Secondly, I note that the Society has expended some £123,000 on accountants and solicitors costs in connection with this attorneyship and has not recovered anything and is most unlikely to do so. I consider that in the papers served on him Mr Bogue has had a sufficient account of the attorneyship.

[33] Thirdly, the Society sought to recover monies on its own behalf and those of others by obtaining an order for sale of Mr Bogue's home. The Deputy Secretary of the Law Society deals with this at paragraphs 4 and 5 of her affidavit of 14 June 2013:

> "4. The only remaining capital asset of the Defendant of which the Plaintiff was aware was his share in the matrimonial home at 18 Harberton Park, Belfast. This is referred to by the Defendant at paragraph 24 of his affidavit of 2nd December 2009.
>
> 5. The Plaintiff commenced proceedings against the Defendant's wife for possession of the matrimonial home. On the third day of the hearing of that application, Mrs Bogue made the case, for the first time, that in consideration of her consent to the Defendant drawing down the second mortgage on the property, the Defendant had agreed that his interest in the matrimonial home had transferred to her. The court found in favour of Mrs Bogue."

(I do not see in the judgment of McCloskey J a reference to the earlier averments of Mr Bogue to the contrary.)

[34] Fourthly, Her Majesty's Commissioners of Revenue and Customs brought bankruptcy proceedings against Mr Bogue while the Law Society was his attorney. The Society persuaded HMRC to consent to the striking out of those proceedings. It is common case that that was as Mr Bogue wished it at the time. The court was informed that HMRC have now issued a fresh statutory demand with the intention of bringing a fresh bankruptcy petition. Mr Bogue wishes to seek to set aside that statutory demand to avoid subsequently being made bankrupt. I consider that it is verging on the absurd for him to suggest that the Society's funds, that is the funds of the honest and competent solicitors in Northern Ireland, be expended in seeking to defend him against a bankruptcy petition. He can decide whether such a course is or is not contrary to his interests. He knows what his own means are. It seems to me quite misplaced to force the Society to defend such proceedings as his attorney when, as I accept from their averments, there are no sums left to be protected let alone be paid to Mr Bogue.

[35] Fifthly, there was a careful analysis, which Mr Sinton accepted, by Mr Maxwell with regard to the sums of money which Mr Bogue seeks to suggest were not collected on his behalf. It is clear that they were largely covered by the draft accounts of 2008 prepared by Harbinson Mulholland. If there were some monies in work in progress still outstanding at the time that Mr Bogue agreed to

withdraw from the practice they would stand to be accounted for. But there is not the slightest indication from me that Mr Bogue is entitled to those. On the contrary it is Mr William McNulty who has issued proceedings against Mr Bogue for the losses he suffered as his partner. If Mr Bogue considers that he is entitled to any of these monies he can defend those proceedings of Mr McNulty and bring a counterclaim. At least he can do that if this attorneyship ends as I conclude it should end.

[36] Sixthly, Mr Bogue speaks of money that he says may be owing to him but when analysed it can be seen that this is the money which Mr McNulty, or a relative of his, introduced into the practice which assisted in persuading the court that Mr McNulty should be permitted to carry on the practice and the Society should not be made his attorney. On the present state of accounts, in draft but against which there is no convincing evidence, it is Mr Bogue who owes about £750,000 to the firm and not vice versa.

[37] Seventhly, I have set out the date of the attorneyship above as 11 March 2009. As I pointed out there were significant developments as early as June 2007 and Mr Bogue gave an undertaking to withdraw from the firm on 30 September 2007. At that stage the current account of the firm was overdrawn to the extent of £908,674. Its net liabilities were estimated to be £1,391,787.

[38] There was some tentative suggestion from counsel for Mr Bogue that some money that properly belonged to clients might have in some way been applied to Mr McNulty's new firm. No doubt this point was made on instructions. Leaving aside the issue of that being established on the taking of a partnership account if the parties want to engage in that, the plaintiff called Mr Adam Curry, the partner in Mills Selig, Solicitors, acting for the Law Society. He gave sworn evidence before me that he supervised the accounts of this firm from June 2007 i.e. under the initial paragraph 10 of Schedule 1 powers. He looked at the files. He reported to the Society. The Society controlled the client account in effect from then on as their assent was required before the First Trust Bank, the firm's bankers, honoured any cheques on the client account. Mr Curry satisfied the court that any fees that came in that were due to clients or other third parties were paid over to them. Money had not "gone astray".

[39] Eighthly, these last points draw attention to the fact that there was a period from June 2007 until March 2009 when Mr Bogue had the opportunity to take any proceedings that he wished if he genuinely thought that his interests were being prejudiced. He did not do so. The Society reserves its rights under the Limitation Order.

[40] Ninthly, Mr Curry was cross-examined by counsel for Mr Bogue. I am satisfied in the light of his responses and the evidence before the court that it was within the Society's margin of appreciation and reasonable discharge of their duties

in a proportionate way to allow Mr McNulty to operate the practice as best he could (until his own bankruptcy).

[41] These are all convincing reasons but the ultimate one does, I hope, put paid to this misconceived opposition to the Society's application. Counsel for the Society accepts that the discharge is not a bar to any claim that Mr Bogue might have. If, contrary to the indications presently before this court, he had some just cause for complaint, he may, once this attorneyship is discharged and he is his own man again, pursue that claim.

[42] For all these reasons I grant the application of the Law Society to the discharge of the Attorneyship Order made by this court on 11 March 2009.

Conclusions

[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 i.e. 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.

[44] In this particular instance applying those principles here there is no good reason to refuse the application of the Law Society to be discharged as attorney of Mr Bogue. In any event such a discharge does not act as a bar to any claim that might conceivably be brought against the Society.

[The Society was awarded its costs against Mr Bogue]