NO REDACTION NEEDED

THE COURT OF APPEAL

SUPPLEMENTAL JUDGMENT – UNAPPROVED

Appeal Number: 2021/13

Neutral Citation Number [2022] IECA 277

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

LAW SOCIETY OF IRELAND

APPLICANT/
RESPONDENT

- AND -

DANIEL COLEMAN

APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 7th day of December 2022

1. Following upon the conclusion of the hearing of this appeal, a different division of this Court, on 11th January of this year, handed down a decision in proceedings entitled *Law Society of Ireland v. Doocey* [2022] IECA 2. In fact, there were two decisions of the Court handed down in that appeal, the principal judgment being delivered by Donnelly J. and a concurring judgment being delivered by Collins J.

2. It appeared to me that these judgments addressed a significant issue that had also been raised by these proceedings, specifically whether or not the High Court may make a finding of dishonesty in the conduct of a solicitor where the allegations made by the Law

Society of Ireland (the "Society") in the course of disciplinary proceedings against a solicitor do not expressly allege dishonesty. Secondly, the Court also addressed the question as to whether or not the test for establishing dishonesty in the context of disciplinary proceedings is one based on a subjective or objective assessment of the conduct involved.

3. Since these issues were of direct relevance to certain grounds of appeal raised by the appellant in these proceedings, the Court decided to afford the parties the further opportunity to make written submissions regarding the potential impact of the decision in *Doocey* to a determination of a number of issues arising in this appeal. The parties were afforded fourteen days within which to do so. That period ended on 4th July. A hard copy of the submissions of the Society was received and stamped in the office on 4th July. A soft copy was also delivered by the Society on that date.

4. The appellant did not file a hard copy of his submissions, but instead attempted to file them in soft copy form only. He attempted to do so on 5th July, one day after the deadline, but regrettably, owing to the fact that the Courts Service was at the time in the course of changing software, electronic receipt of some e-mails was delayed, and included in these e-mails was an e-mail from the appellant of 5th July enclosing his submissions.

5. Both the Court and the Court office were wholly unaware of this state of affairs until 19th July, when the Court office belatedly received delivery by e-mail, of the appellant's said submissions, and the Court was then notified of this development. In the meantime, however, not having heard anything at all from the appellant, the Court proceeded to finalise its judgment (the "Principal Judgment") which was delivered on 11th July. Even though 5th July was one day after the deadline set for submissions, it is fair to say that the Court would nonetheless have received them and taken them into account in arriving at its decision, had it received the submissions on that date, or indeed on any day prior to

delivery of the Principal Judgment. Thus, in the circumstances that arise here, the court is of the view that it is appropriate to give the submissions of the appellant due consideration and to reconsider the Principal Judgment in light of those submissions which it hereby does.

6. In his submissions, the appellant seeks to distinguish *Doocey*. It is submitted that the trial judge in this case determined that the conduct of the appellant was dishonest by reference to a test of strict liability, without any analysis of the appellant's understanding or belief as to the facts. In this regard the appellant refers to the statement of the trial judge at para. 232 of his judgment (quoted at para.160 of the Principal Judgment):

> *"There are no circumstances in which it would be proper for one solicitor to place another solicitor's name on a contract without the written authority of the latter, and without indicating on the contract that the signature was not that of the other solicitor."*

7. The appellant also points out that in *Doocey* the appellant/respondent had admitted misconduct in the High Court, whereas in this case the appellant had, in the High Court, contended that the admissions that he had made to the Tribunal had been made in circumstances of procedural unfairness, which rendered his admissions unsafe and unreliable.

8. The appellant submits that where liability for misconduct is in issue, due process requires an identified test for dishonesty to be satisfied. The appellant contends that as a result of the approach taken by the trial judge in these proceedings, there was no conclusion as to the appellant's understanding of the circumstances, such as there was in *Doocey*, where the Court concluded that Ms. Doocey has knowledge of the facts which she admitted constituted misconduct. There was no equivalent finding by the trial judge in these proceedings.

9. The appellant further submits that in *Doocey* the Court found that dishonesty was *"clearly signposted"* in the pleadings and it was therefore a live issue before the Tribunal and the High Court. In contrast, it is submitted that dishonesty was not clearly signposted in these proceedings and arose for the first time during the hearing before the Tribunal when the parties were making submissions on the question of sanction.

10. While distinguishing *Doocey*, and submitting that there is nothing about the decision in *Doocey* that is inconsistent with the submissions made by the appellant in this appeal the appellant further submits that the Court should not apply, retrospectively, a test for dishonesty laid down subsequent to the conduct in issue. In this regard the appellant relies upon *Prendiville v. Medical Council* [2008] 3 IR wherein the Court stated:

> *"The notion of professional misconduct can change from time to time because of changing circumstances and new eventualities. It would be unreasonable to expect the Council to publish a catalogue of the forms of professional misconduct which may lead to a disciplinary action. But if a new test is to be applied or a new species of conduct is to be regarded as amounting to professional misconduct, then one would expect the Council to notify its members of that."*

11. The appellant submits that the law of dishonesty as it applies to solicitors' disciplinary matters has been settled by *Doocey*, and for the first time in this jurisdiction, a test for dishonesty has been approved. The appellant further submits that the fundamental finding of the trial judge in these proceedings, which in his submission isto be found at para. 232 of the trial judge's judgment (quoted above) is inconsistent with *Doocey*. The appellant also submits that the test in *Doocey* recognises a subjective element and the availability of the defence of mistaken belief. It is submitted that *Doocey* itself was not concerned with such a defence, and that the reliance in these proceedings on such a

defence is *"terra nova"* that extends beyond what the Court was required to consider in *Doocey*.

12. The Society on the other hand submits that the decision of this Court *Doocey* supports the conclusions of the High Court in the judgment under appeal. *Doocey*, the Society submits, affirms the entitlement of the SDT, and in turn, the High Court, to rely on admissions made by a solicitor. Moreover, it also makes it clear that where admissions are made to specific allegations, the question as to whether or not the admitted conduct is dishonest falls to be assessed objectively, and not on the basis of a subjective assessment of the solicitor's belief as to whether or not the admitted conduct is dishonest.

13. The Society submits that in *Doocey*, the appellant attempted to offer the Court a subjective assessment of the nature of her admissions, and this Court rejected such an approach. Likewise, it is submitted that in this appeal the Court should reject the appellant's argument that the Court should assess his admitted conduct on the basis of his asserted belief that his conduct was not dishonest. It is submitted that the subjective element of the test articulated by Donnelly J. in *Doocey* does not permit a claim to be advanced of "*an absence of knowledge or belief that the acts she was doing were in fact dishonest i.e. there was a lack of conscious dishonesty*." Such a test has been rejected, and this is significant in circumstances where the appellant sought to advance before the High Court a claim that he had an honest but mistaken belief that he had oral authority to sign the contracts on behalf of Mr O'Donnell. Apart altogether from the fact that the appellant did not proceed with that defence before the Tribunal, it is untenable to suggest that he could have had an honest belief that he had authority to sign Mr O'Donnell's signature to a contract which the appellant admitted was fictitious and created for the purpose of misleading a bank.

14. The Society further submits that this Court in *Doocey* accepted that the findings of the Tribunal in that case amounted to dishonesty, notwithstanding that dishonesty was not expressly alleged. Moreover, in reaching that conclusion and in agreeing that "*certain language connotes dishonesty*", the Court in *Doocey* relied on the High Court decision in *this* case.

Conclusion

15. I have carefully considered the supplemental submissions of the parties, and I am satisfied that the submissions of the appellant must be rejected, and the decision handed down on 11th July 2022 affirmed. I am of this opinion for the reasons hereafter indicated.

16. Firstly, in the Principal Judgment I rejected the argument that the trial judge had erred in failing to find that the admissions made by the appellant to the Tribunal were in any way tainted by a procedural unfairness, as the appellant had claimed. Having thus found, I went on to hold further that the trial judge was correct in concluding that the Tribunal was entitled to rely on the appellant's admissions in arriving at its decision on misconduct. The decision in *Doocey* is in no way relevant to these conclusions. I mention this because, through no fault of his own, the appellant would not have been aware of these conclusions in the Principal judgment when submitting (in his supplemental submissions) that *Doocey* may be distinguished from this case because there were matters raised by these proceedings that extend "*far beyond the limited issue of admission of fact*". Those matters have been determined against the appellant, and the appeal falls to be determined having regard to his admissions of fact before the Tribunal, which unlike in *Doocey*, the appellant here did not accept amounted to misconduct.

17. Secondly, insofar as the appellant argues, as he did during the hearing of this appeal, that there was no allegation of dishonesty made against him, it must be remembered that he acknowledged through his counsel (in the High Court) that certain of the allegations

against him (nos.33(b) and (c)) are phrased in language which his counsel accepted in the High Court connotes dishonesty. For ease of reference, these allegations were are set out in the Principal Judgment, as follows:

> *"33(B) caused or allowed the name of Michael O'Donnell, solicitor, to be written on Contracts for Sale dated 19 May 2004 without the authority of Michael O'Donnell; and Sub Paragraph "C" caused or allowed a fictitious (my emphasis) contract dated 19 May 2004 to come into existence and purportedly made between the complainant's clients and Michael O'Donnell, Solicitor, in trust, for the purpose of misleading (my emphasis) ACC Bank into advancing monies to Fairview Construction Limited knowing that the sale of the land to Fairview Construction Limited had not closed and that the dwelling units had not been constructed."*

18. In the Principal Judgment, at para. 155, I stated:

> *"Moreover, there was no suggestion as to any lack of clarity as regards the facts referred to in these allegations. So at least as far as allegations 33(b) and (c) are concerned, the Solicitor could have been under no illusion that, in admitting the facts of those matters he was admitting to dishonest conduct. Not only that, as the trial judge observed, the Solicitor averred in his affidavit of 27th May 2019 that he was made aware of an allegation of dishonesty in relation to Mr. O'Donnell's signature, by the affidavit of Ms. Blayney."*

19. In *Doocey*, Donnelly J. referred, with approval, to the decision of the trial judge in these proceedings when he stated that:

> *"...the use of the language "fictitious contract" and "misleading" did, indeed, connote dishonesty".*

20. It appears to me that the appellant in advancing the argument that dishonesty was not adequately pleaded, is really repeating the argument that he already made at hearing before

this Court, as distinct from relying upon *Doocey* to advance this argument further. There is nothing in *Doocey*, in my opinion, that assists the appellant's case under this heading. On the contrary, *Doocey* endorses the decision of the trial judge that the use of the language *"fictitious contract"* and *"misleading"* in the allegations made against the appellant was sufficient to put him on notice that he was been accused of conduct that involved dishonesty.

21. The appellant places heavy reliance upon what he describes as the subjective aspect of the test laid down by Donnelly J.. He refers to para. 76 of her judgment in which she states:

> *"Case law from the UK demonstrates that although the test is an objective test of dishonesty, there must however be subjective knowledge or belief as to the facts amounting to dishonesty (as distinct from knowledge that they are dishonest)."*

22. He also refers to para. 79 of the judgment of Donnelly J. where she states:

> *"…The requirement that there be knowledge or belief as to the issue is nonetheless a sensible one."*

23. The appellant submits that the trial judge made no finding as to the solicitor's understanding of the circumstances that have been found to constitute both misconduct and dishonesty.

24. However, this is simply not the case. The trial judge deemed the admissions made by the appellant to the Tribunal to be admissible and ruled that the solicitor was bound by those admissions for the reasons set forth in his judgment, and, as already mentioned, I upheld the decision of the trial judge in this regarding the Principal Judgment (at para. 141). So, there is no doubt at all that the appellant had knowledge of the facts that the Tribunal, the High Court and this Court considered to be misconduct. It is that knowledge

– of the facts – to which Donnelly J. was referring when she referred to the requirement of subjective knowledge on the part of the accused person in *Doocey*.

25. Donnelly J. made it very clear however that whether or not the conduct concerned constitutes dishonest conduct is a matter to be determined objectively. At para.79 of her judgment she stated that there is:

> *"no basis for the argument that dishonesty in the context of disciplinary proceedings in this jurisdiction must be judged on a standard that leaves it to the individual solicitor's understanding of dishonesty. The rationale of the disciplinary code would be shaken if the amoral solicitor, who simply does not advert to the possibility of dishonesty, can escape severe sanction for their otherwise deliberate actions which are objectively dishonest….it is a standard to be assessed objectively. The requirement that there be knowledge or belief as to the facts at issue is nonetheless a sensible one."*

26. The appellant places much reliance upon a statement within para. 232 of the judgment in the High Court in these proceedings that " *There are no circumstances in which it would be proper for one solicitor to place another solicitor's name on a contract without the written authority of the latter, and without indicating on the contract that the signature was not that of the other solicitor*." He contends that in thus concluding, the trial judge applied a test of strict liability of a kind which was rejected by Donnelly J. At para.84 in *Doocey* where she rejected an approach (in the context of the facts in that case) premised on the question as to "*whether one could ever honestly teem and lade*". However, in the Principal Judgment (at paras.161-163), I rejected this same submission on the basis, *inter alia,* that the trial judge had in any event concluded that it had never formed part of the appellant's defence to say that his conduct had been excusable because he had an honestly held belief that he had authority to sign Mr. O'Donnell's signature on the

purported contracts for sale, and that being the case the trial judge's general observation at para.32 upon which the appellant relies might reasonably be regarded as *obiter*.

27. Finally, the argument that any reliance upon *Doocey* involves the impermissible retrospective application of a test of dishonesty may readily be rejected. While *Doocey* brought clarity to the approach to be taken by the courts when considering an allegation of dishonesty, and how dishonesty might be identified, it did not create new law in the sense that conduct that was not previously deemed dishonest pre-*Doocey* could be construed as dishonest conduct thereafter. This is not a circumstance, such as that referred to in *Prendiville*, (relied upon by the appellant) where medical practitioners were, in the words of Kelly J. (as he then was), "*to be subjected to a test of professional misconduct, which the [Medical] Council had not promulgated or notified to the profession until years after the event*".

28. Finally, while the appellant also seeks to distinguish *Doocey* on the basis that in this case the appellant claims that he had an honestly held belief that he had the consent of Mr. O'Donnell to sign the fictitious contracts on his behalf, this defence simply did not arise in circumstances where not only is it at odds with the admissions made by the appellant to the Tribunal , but it cannot arise in circumstances where he did not give evidence at all to the Tribunal to either dispute or contradict the testimony of Mr. O'Donnell, still less to tender evidence as his relevant belief.

29. In summary:

(i) The appellant admitted certain facts, the knowledge of which meets the subjective element of the test in *Doocey*;

(ii) The facts admitted by him were in terms of allegations that he himself accepted "connoted dishonesty";

(iii) The trial judge did not conclude that the appellant was guilty of dishonest conduct on the basis of a test of strict liability. As I observed in the Principal Judgment, the general observation he made at para. 232 of his judgment was arguably *obiter*, but in any case his conclusion on the issue of dishonesty was correct, was grounded on the specific facts of the case and having regard to the admissions made by the appellant, and is consistent with the test for dishonesty articulated by Donnelly J. in *Doocey*.

(iv) There is no question of retrospective application of a new test of dishonesty. The criteria for dishonesty identified by *Doocey* always represented the law in this jurisdiction. Nor is there any question of a "*new species of conduct…amounting to professional misconduct*", per *Prendiville v Medical Council.*

30. Whelan and Faherty JJ. concur with the above supplemental judgment.