THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 35

Court of Appeal Record Numbers: 2019/322

2019/408

Faherty J.
Power J.
Collins J.

IN THE MATTER OF MR ADRIAN O'DOHERTY, A SOLICITOR

AND IN THE MATTER OF THE SOLICITORS ACTS, 1954–2015

BETWEEN

DAVID FENNELLY

APPELLANT

AND

ADRIAN O'DOHERTY

RESPONDENT

JUDGMENT of Mr Justice Maurice Collins delivered on 26 February 2020

1. These appeals[1] arise from the Judgment and Order of the President of the High Court dated 29 May 2019 whereby he dismissed the Appellant's appeal against the decision given by the Solicitors' Disciplinary Tribunal (the "*SDT*") on 4 July 2018, dismissing a large number of allegations of professional misconduct that had been made by the Appellant (on behalf of his uncle, Thomas Fennelly) against the Respondent ("*the Solicitor*")

2. For the purposes of this judgment, the relevant part of the President's ruling is as follows:

> "*The first question that arises, and it arises now, because the respondent has raised this issue and it is a perfectly legitimate issue to raise, is as to the entitlement or the standing of Mr Fennelly to bring this appeal. He has, at the very outset of his application to the tribunal, made it clear that he is bringing it on behalf of his [uncle] Thomas Fennelly and during the course of the affidavits that had been sworn here he has asserted that again, and in the course of this hearing this afternoon, when I asked him a question concerning Mr Thomas Fennelly and the [2]fact that he was appearing on his behalf, he said, absolutely, I am appearing on Thomas's behalf. The law in this jurisdiction is crystal clear, particularly as a result*

[1] In addition to the Appellant's appeal against the judgment and order of the President of 29 May 2019, there is a separate appeal before this Court against a subsequent order made by the President amending that order under the slip rule.
[2] Page 56 line 33 of the transcript. The President then went on to address the appeal on the merits. However, the Court is not concerned with the merits of the appeal to the High Court, or the further appeals to this Court, on this application. It was for that reason that the Court declined the Appellant's application to adjourn the hearing of the preliminary issue – made at the outset of the hearing – so as to allow a data access request made in relation to Thomas Fennelly's "casefile" held by the Solicitor to be processed.

of a decision of the Supreme Court in the case of Coffey & others, Appellants, which was decided on 26 February 2013 with a judgment being delivered by Fennelly J.

> *"Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The litigant himself, of course, may appear and may conduct his own case, but he cannot instruct somebody else to conduct a case on his behalf, unless that person is a qualified barrister or solicitor duly instructed."*

It follows that Mr David Fennelly has no standing to bring this appeal and never had any such standing, and that is fatal to the appeal from the very outset. Accordingly, insofar as this appeal is concerned, I dismiss it. First of all on the basis that Mr David Fennelly had no legal authority or entitlement to bring it, and that is sufficient to dispose of the appeal in its entirety. …"

3. This issue of "*standing*" is now before the Court for adjudication by way of preliminary issue.[3]

4. The *Coffey* decision referred to by Kelly P is a decision of the Supreme Court which is now reported as *Coffey v Environmental Protection Agency* [2013] IESC 31, [2014] 2 IR 125. The sole judgment in *Coffey* was given by Fennelly J (Denham CJ and McKechnie J concurring). In *Coffey*, the applicants in a large number of environmental law judicial reviews (including, in one case, a corporate applicant) sought to be represented by Mr Percy Podger. Mr Podger was an experienced environmental law litigant, but he was not a solicitor or barrister. In his judgment (at paras. 17-19 of the report), Fennelly J. discussed the *McKenzie friend* procedure and having emphasised the limited role of the *McKenzie* friend in Irish law,[4] stated that what was before the court in *Coffey* was, in his opinion, completely different. Mr Podger was seeking an unrestricted right of audience before the court, so that he would be permitted to present the various appeals on behalf of the appellants "*to the same extent as if he were a professionally qualified counsel or solicitor*." After a detailed discussion of the authorities, Fennelly J. concluded as follows:

> *"38 In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making of an exception. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of thirteen litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons."*

[3] On the initial directions hearing in respect of the appeal (on 11 October 2019), Peart J identified the locus standi of the Appellant as a preliminary issue and fixed that for hearing.
[4] By reference to the decision of the High Court (Macken J.) in RD v McGuinness [1999] 2 I.R.411, Fennelly J. noted that McKenzie friends may not act as advocate. He did, however, go on to note that, as a matter of pure practicality and convenience, a court might invite the McKenzie friend to address it though emphasising that "that must always be a matter solely for the discretion of the judge. The McKenzie friend has no right to address the court unless invited to do so by the presiding judge." (at para. 18)

5. It follows from *Coffey* that - at least in the absence of exceptional circumstances warranting a departure from the general rule - the Appellant here had no entitlement to represent his uncle before the High Court and has no entitlement to do so on appeal to this Court.

6. Even if that were not the case, and even if there were some exceptional circumstance or circumstances that warranted a departure from the general rule here, if the Appellant's real role in the proceedings before the High Court was *qua* representative of Thomas Fennelly, it would appear to follow that, as he was not (in that scenario) a party to the proceedings, he therefore had no entitlement to appeal against the Judgment and Order of the President, as he has purported to do.[5]

7. However, the above analysis does not necessarily dispose of the preliminary issue. The issue of the Appellant's standing in the High Court - the issue determined against him by the President - is dependent on his precise role in the proceedings before the SDT and I turn to that issue now.

8. If the Appellant was the applicant [6] before the SDT then, assuming always that he had had an entitlement in law to make an application in respect of the Solicitor in relation to the latter's alleged conduct *vis-à-vis* Thomas Fennelly, it would appear to follow that (i) the Appellant was entitled to appeal the decision of the SDT to the High Court, having regard to the provisions of Section 7(12A) of the Solicitors (Amendment) Act 1960 (as amended) ("*the 1960 Act*") and Order 53, Rule 12(a) of the Rules of the Superior Courts ("RSC") and (ii) that he is entitled to appeal the Judgment and Order of Kelly P to this Court.

9. The President, however, held that the application to the SDT was made by the Appellant not in his own right but on behalf of his uncle. In my view, that conclusion was amply supported by the material before the High Court and, indeed, no other conclusion was reasonably open on the evidence that was before the High Court and which this Court has also considered on this appeal.

10. Here, the prescribed *Form of Application* (DT1) completed by the Appellant on 29 September 2017 states very clearly that he is making the application "*on behalf of Thomas Fennelly*". It refers to the "*accompanying grounding affidavit sworn by me on behalf of Thomas Fennelly*." The *Form of Affidavit* (DT2) also clearly states that the affidavit (also sworn on 29 September 2017) was sworn by the Appellant on behalf of Thomas Fennelly and it attaches a letter from Thomas Fennelly (dated 19 September 2017) by which he provided authority to the Appellant "*to make a complaint on my behalf to the Solicitors Disciplinary Tribunal about the conduct of [the Solicitor]*."

11. These documents were in the form prescribed by the SDT Rules: see Rule 5(a). That Rule provides for an application to the Tribunal by the Law Society or "*by or on behalf of a*

[5] The Notice of Appeal to this Court clearly identifies the Appellant as David Fennelly.

[6] *Applicant*/*application* (rather than *complainant*/*complaint*) being the terminology used in relevant provisions of the Solicitors (Amendment) Act 1960 (as amended) and in the Solicitors Disciplinary Tribunal Rules 2017 ("*the SDT Rules*").

person" to be made in the form of Form DT1 and requires that Form to be accompanied by an affidavit in the form of Form DT2 "*sworn by or behalf of the applicant*."

12. Having regard to manner in which these documents (which formally initiated the application in the respect of the Solicitor) were completed, it is, in my opinion, clear that the actual applicant here was not the Appellant but his uncle Thomas Fennelly, It was on his behalf that the application was made: it was his application.

13. There is no doubt but that in some later documents, including affidavits subsequently sworn by him, the Appellant refers to himself/is referred to as the applicant and in the hearing before this Court the Appellant laid particular emphasis on the fact that the SDT decision itself refers in its title to the Appellant as the person who had made the application ("*And in the matter of an application by David Fennelly to the [SDT]"*). That may have been a shorthand reference or clerical error on the part of the SDT but, in my opinion, it does not and could not alter the position that, as is clearly established by the application documents I have referred to, the application by the Appellant was not made in his own right or on his own behalf but on behalf of his uncle, Thomas Fennelly.

14. In fairness to the Appellant, he accepted before the President of the High Court and before this Court that this was the case. His written submissions did, to an extent, seek to resile from the position adopted by him before the President, suggesting that when he had confirmed that he was making the complaint "*on behalf*" of his uncle, he did not mean it "*in the sense that Thomas Fennelly was somehow party to the High Court proceedings when he wasn't and that the appellant was representing the complainant like a solicitor might*."[7] A similar reservation was made before this Court. But I did not understand the Appellant to dispute that, as a matter of fact, the application to the SDT was made by him on his uncle's behalf. In any event, the application documents are perfectly clear on this issue.

15. Given that clear factual position, I do not think that it is necessary for the Court to reach any concluded view as to whether the Appellant would have been entitled to make an application to the SDT in his own right in respect of the alleged misconduct of the Solicitor. I note that the Solicitor's written submissions suggest that "*[a]ny person can make a complaint about a solicitor to the Tribunal"*.[8] That, on its face, appears to be a correct statement of the position pursuant to section 7 of the 1960 Act but given the President of the High Court's finding that the application here was made by the Appellant not on his own behalf but on his uncle's behalf - a finding with which I agree - that issue does not fall for determination in this appeal.

16. In any event, following the SDT's decision to the effect that no *prima facie* case of misconduct was disclosed by any of the very many allegations that that had been made to it, the Appellant purported to appeal that decision to the High Court. In my opinion, as the Appellant had not been the applicant to the SDT, he had no entitlement to do so.

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[7] Appellant's written submissions at p 5

[8] At para 12

17. The Appellant argues that he was in the position of a "*person other than the Society who made the application*" in relation to the Solicitor and that therefore he had an entitlement to appeal pursuant to Order 53, Rule 12(a) RSC. In fact, the right of appeal is given by section 7(12A) of the 1960 Act rather than by Order 53, Rule 12(a) RSC which simply makes procedural provision for such appeals. In the present context nothing turns on this as section 7(12A) uses similar language in that it refers to "*any person who has made an application*" to the SDT. Therefore, the issue is whether, for the purposes of section 7(12A), the Appellant is to be regarded as a "*person who has made an application*" to the SDT.

18. I cannot agree with the Appellant's submission to the effect that he is to be so regarded. The reference in section 7(12A) and in Order 53, Rule 12(a) to the person "*who [has] made the application*" can, in my opinion, only be construed as referring to the person who made the application or on whose behalf the application was made - here Thomas Fennelly. To suggest – as the Appellant suggested in argument – that it could be construed as referring either to the Appellant *or* to his uncle or to both of them makes no sense. There cannot be two persons with a right of appeal as, in such a scenario, an appeal could be brought against the wishes of the person on whose behalf the application was made. That such a scenario may not arise here as a matter of fact does not answer the issue of principle nor (as the Appellant suggests) can section 7(12A) and Order 53, Rule 12(a) be read as permitting the person who made the application on behalf of another to appeal against a decision of the SDT where that other person consents or acquiesces. The relevant statutory provisions simply do not support any such interpretation in my view.

19. The application here was made by Thomas Fennelly, albeit that the application was filed on his behalf by the Appellant. It was, therefore, a matter for Thomas Fennelly to decide whether to appeal the decision of the SDT and it was Thomas Fennelly alone that was entitled to bring any appeal against that decision. The position would be the same if (as the SDT Rules clearly permit) an application was made to the SDT by a solicitor on behalf of a client. In such a scenario, it is the client, not the solicitor, who would entitled to appeal or not and, even though the solicitor may have made the application on behalf of the client, the solicitor would have no entitlement to bring an appeal in his/her own right and/or in their own name. The Appellant is in no different or better position here.

20. The Appellant next says that there would be an unfairness should it be case that, having been able to make and prosecute an application on his uncle's behalf before the SDT, he cannot do so before the High Court or the Court of Appeal. In this context he has suggested that, for various reasons which I do not consider it necessary to rehearse, Thomas Fennelly would not have been in a position to present an effective application to the SDT or pursue an appeal to the High Court. However, the rules of representation before the SDT, on the one hand, and before the High Court (and this Court), on the other, are not - and are not required to be - the same. There are only very limited circumstances where *court* proceedings can be brought by one person on behalf of

another and appeals from the SDT do not, in general, come within any such exceptional category.

21. In any event, the essential issue before the Court is not one of representation or right of audience. Had Thomas Fennelly appealed to the High Court against the SDT decision (as was clearly his entitlement), an issue might then have arisen as to the extent (if any) to which the Appellant should be permitted to speak on his behalf and/or to assist him as a McKenzie friend in that appeal. In that context, there might well have been debate as to whether the considerations mentioned by the Appellant could be said to constitute exceptional circumstances such as to warrant a departure from the general position set out in *Coffey*,[9] However, those issues are different to the issue on which the President of the High Court decided against the Appellant here. As is evident from the passage set out in paragraph 2 above, the President held that the Appellant never had standing to bring any appeal (because the only person with standing was his uncle) and, in the words of Kelly P, "*that is fatal to the appeal from the very outset*." As will be evident from the discussion above, I agree with that conclusion.

22. For completeness, I should mention that in his written and oral submissions to this Court the Appellant states that he had been a client of the Solicitor in his own right. Even if that is so, and even if the Appellant is entitled to rely on that fact as a ground of appeal, it does not alter the fact that the application to the SDT with which we are here concerned was one made on Thomas Fennelly's behalf in respect of the Solicitor's alleged misconduct in relation to his retainer by Thomas Fennelly. The fact – if fact it be – that the Appellant was, separately, a client of the Solicitor at some point in time therefore has no bearing on the issue before the Court.

23. In summary, therefore, the position appears to me to be as follows:

- The application to the SDT was expressly made by the Appellant on behalf of his uncle, Thomas Fennelly. That is manifest from the application forms that the Appellant submitted to the SDT and the fact that the Appellant submitted a letter from Thomas Fennelly authorising the Appellant to make the application on his (Thomas Fennelly's) behalf as part of the application.

- The applicant was therefore Thomas Fennelly.

- Under Section 7(12A) of the 1960 Act (as amended) and Order 53, Rule 12(a) RSC it was Thomas Fennelly (and only Thomas Fennelly) that had an entitlement to appeal the decision of the SDT to the High Court. It was not open to the Appellant to bring such an appeal.

- No valid appeal was therefore brought to the High Court.

[9] And see also the subsequent decision of the Supreme Court in *Allied Irish Bank v Aqua Fresh Fish Limited* [2018] IESC 49, [2019] 1 IR 517 in which *Coffey* is considered

24. It follows that I would affirm the Order of the President of the High Court, hold that the Appellant has no standing to pursue an appeal against that Order and dismiss the Appellant's appeals to this Court.