APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/273

Noonan J.
Haughton J.
Allen J.

Neutral Citation Number [2023] IECA 103

BETWEEN

ERIC JOHN SOMERS

PLAINTIFF/APPLICANT

AND

WILLIAM KENNEDY

DEFENDANT/RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 20th day of April, 2023

1. This is an application by an unsuccessful plaintiff for an extension of time to appeal against the judgment and order of the High Court striking out his action. On his own case, the applicant decided at the time that he would not appeal. Moreover, he accepts that his action should have been struck out. And, he says, if the time for an appeal is extended and the appeal is successful, he will immediately discontinue the action.

2. On 7th September, 2018 the applicant was convicted by the District Court sitting in Clifden of an offence of trespassing on a property belonging to his former partner in a

manner which caused or was likely to cause fear, contrary to s. 13 of the Criminal Justice (Public Order) Act, 1994 and sentenced to three months' imprisonment, suspended for two years. The applicant appealed to the Circuit Court, where the appeal was conducted on behalf of the Director of Public Prosecutions by the respondent, who is the State solicitor for County Galway. The applicant's appeal was heard at the Circuit Court in Clifden on 23rd July, 2019 when the Circuit Court judge found that the charge had been proved beyond reasonable doubt but deferred the disposition of the appeal until 22nd October, 2019, when the applicant was again convicted and his sentence was increased to six months, suspended for five years.

3. On 25th November, 2019 the applicant applied to the High Court for an order of *certiorari* by way of judicial review of the order of the Circuit Court. The Director of Public Prosecutions did not oppose the application and on 22nd July, 2020 the High Court (Meenan J.) quashed the applicant's conviction and sentence and remitted the matter to the Circuit Court. When the matter came back before the Circuit Court on 28th April, 2021, the applicant's appeal was allowed, by consent.

4. In the meantime, by plenary summons issued on 2nd November, 2020 the applicant commenced proceedings against the respondent claiming damages for various alleged breaches of duty arising from his prosecution, conviction and sentencing and on 17th December, 2020 delivered his statement of claim. In his defence, delivered on 1st April, 2021, the respondent raised a preliminary objection that the proceedings did not reveal a cause of action recognised by law. The defence went on to plead that the action was misconceived; that the applicant's complaints did not relate to an actionable wrong; and that the matters complained of occurred in circumstances of privilege, namely that all of the statements alleged to have been made had been made in the course of criminal proceedings

presided over by the judge exercising functions and powers of a judicial nature in accordance with Article 37 of the Constitution.

5. The applicant's action came on for hearing before the High Court (Butler J.) on 14th December, 2021. At the conclusion of the opening, counsel for the respondent made an application that the proceedings be struck out on the ground that the claims made were not justiciable or were subject to absolute privilege. On 8th February, 2022, for the reasons previously given in a written judgment delivered on 21st January, 2022 ([2022] IEHC 27) Butler J. made an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court striking out the applicant's proceedings in full. For the reasons given in a separate written judgment delivered on 8th February, 2022 ([2022] IEHC 78) an order was made for the respondent's costs of the action, to be adjudicated as the costs of a motion rather than of a plenary trial. That order was perfected on 17th February, 2022.

6. By notice of motion issued on 7th December, 2022 the applicant applied to the Court of Appeal for an extension of time to file an appeal *"seeking to set aside"* the order of 8th February, 2022 – which the notice of motion suggested was an order which *"Dismissed for want of prosecution"* – or, in the alternative to vary the judgment of 21st January, 2022.

7. The applicant's motion was grounded on an affidavit sworn on 6th December, 2022 which is not altogether easy to follow. At para. 2 the applicant averred that he accepts the Judgment of Butler J. of 21st January, 2022 *"as it related to"* the plea of privilege *"and that the above titled proceedings should have been struck out"* but at para. 4 that:-

> *"I say that it has only recently become apparent, that various sections of Ms. Justice Butler's January 21st 2022 Judgment comments, have had detrimental consequences for the applicant, which the applicant believes Ms. Justice Butler may not have intended, but should have foreseen."*

8. At paras. 24 and 25 of his affidavit, the applicant deposed, correctly, that the High Court order was perfected on 17th February, 2022 and that the final date for an appeal was 17th March, 2022.

9. At the time the applicant's action was listed for hearing before the High Court he had a pending complaint against the respondent before the Legal Services Regulatory Authority *("LRSA")*. As I will come to, this was referred to by the High Court judge in the course of her judgment.

10. In his affidavit grounding this application, the applicant suggests that Butler J. was told:- *"... that the respondent would cooperate with the LRSA process, regarding the applicants pending complaint to the LRSA. The applicant was therefore, expecting to receive a letter from the LRSA, along with a letter from the respondent, outlining a detailed substantive response to the applicants specific allegations, alleging prosecutorial misconduct by the respondent."*

11. It seems to me that the applicant's declared expectation that the respondent would engage with the substance of the complaint to the LRSA by no means follows from the suggestion that the respondent indicated to the High Court that he *"would cooperate with the LRSA process."* Moreover, any such expectation is quite at variance with what the judgment of the High Court – which is quoted in the applicant's affidavit – shows was the respondent's position. Butler J., at para. 45 of her judgment of 21st January, 2022, said:-

> *"Insofar as the proceedings concern matters which are also the subject of the plaintiff's complaints about the defendant to the LRSA or to the defendant's response to that complaint, counsel correctly points out that this complaint is still live before the LRSA and that all relevant issues will, in due course, be determined by that body. <u>This includes the DPP's submission that a complaint by an accused in</u>*

a criminal trial against the prosecution lawyers should not be regarded as an admissible basis for a complaint." [Emphasis added.]

12. The applicant has deposed that although he disagreed *"with certain sections"* of the High Court judgment, he felt that it would have been *"premature"* for him to have appealed within the permitted twenty-eight days, as he *"... expected that the [respondent] was going to cooperate with the LRSA regarding the applicants misconduct complaint."* From this it is clear that the applicant decided not to appeal. From the sentence which I have highlighted in para. 45 of the judgment of the High Court, it is clear that there was no basis for any belief on the part of the applicant that the respondent would not object to the admissibility of the complaint.

13. In his affidavit grounding this application, the applicant referred to and exhibited some correspondence in relation to the complaint which was pending at the time of the High Court hearing. From this it is evident that the applicant had made at least one previous complaint which had been withdrawn and replaced by a new or revised complaint in 2021 and that there may have been some confusion as to the status of both complaints.

14. In a letter of 12th April, 2022 the LRSA told the applicant that they had not heard from the respondent in response to their enquiries; expressed the hope that a review of the file would be completed shortly; and invited any final comments within twenty-one days. In a letter to the respondent of 19th May, 2022 the LRSA *inter alia* allowed the respondent a final opportunity to provide a substantive response to the complaint, if he wished to. In a letter of 1st July, 2022 the respondent referred to a complaint said to have been made on 3rd May, 2020, to which he had responded on 22nd June, 2020 to convey his *"understanding"* that the LRSA had previously concluded that a similar complaint – in another case, by an unidentified complainant – was not admissible and his *"belief"* that the same principle would apply to the 2021 complaint. The respondent's position as set out in his letter of 1st July, 2022 was that

the only issue before the LRSA was the admissibility of the new or revised complaint and that the complaint was inadmissible, first, because it arose out of a criminal prosecution which, it was said, the prosecution must be free to deal with as it thought appropriate, and secondly, by reason of s. 58(4)(b) of the Legal Services Regulation Act, 2015 as it had been the subject matter of a determination in these proceedings in favour of the respondent. In a formal determination which appears to be undated but was sent to the applicant under cover of a letter of 19th October, 2022, the LRSA decided that the complaint was inadmissible.

15. I mention for completeness that the complaint was determined by the LRSA to be inadmissible on the basis that the issues the subject matter of the complaint had been examined, considered and determined by Butler J. and, on the one hand, that Butler J. had *"deferred to the LRSA in matters relating to adjudicating on professional misconduct"* and on the other *"that the judgment in no way found that any actions of Mr. Kennedy could represent misconduct."* However, if there is any basis for the applicant's disappointment or dissatisfaction with the determination of inadmissibility, it is not to be found in the judgment of the High Court.

16. With his motion to extend the time for an appeal, the applicant filed a printed form of notice of appeal which did not set out any grounds of appeal and a ten-page document called *"Intended notice of appeal"* which commences – as did his grounding affidavit – with a statement accepting that the proceedings should have been struck out and immediately thereafter proposing that if his appeal – if permitted – is allowed, he will within seven days file a notice of discontinuance.

17. It is not necessary or useful to dwell on the proposed grounds of appeal because they were effectively abandoned by a further motion issued by the applicant on 14th March, 2023, by which he seeks *"Leave to Amend the Grounds for his Motion"* and *"Leave to Amend the Grounds for his Intended Notice of Appeal."*

18. In response to the motion an affidavit of Ms. Sandra Manthe, a solicitor in the office of the Director of Public Prosecutions, was filed on behalf of the respondent. Ms. Manthe correctly identified the focus of the applicant's argument as being the decision of the LRSA and suggested that any belief on the part of the applicant that the respondent was not entitled to put whatever arguments he wished before the LRSA as misconceived.

19. The affidavit of the applicant filed on 14th March, 2023 in support of his second motion runs to fifteen pages, the first nine of which mirror his earlier affidavit: including his acceptance that the proceedings should have been struck out.

20. At para. 36, the applicant makes the case that the High Court order and several identified paragraphs of the High Court judgment *"essentially and unintentionally provided the respondent with a safe haven in respect of the LRSA having jurisdiction to consider the [applicant's] misconduct complaint."* He then makes a number of complaints as to the conduct of the hearing in the High Court: first, that he was not given the books until two minutes before the High Court sat, when they were *"plonked"* on the desk in front of him; secondly, that of the seven booklets said to have been submitted on behalf of the respondent, he can only recall receiving two – not that he only got two but that he can only recall getting two; thirdly, that he did not have time to assess the contents of the book of authorities – which comprised nine cases and ran to 323 pages. The applicant suggests that there was a failure to comply with Practice Direction HC 97 or HC 68, but not that the proceedings in the High Court were proceedings to which either practice direction applied.

21. The applicant suggests that by reason of the late delivery to him of the books on which the respondent – and later the judge – relied, he was knowingly deprived of a fair hearing. Referring to – without citing – the judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 the applicant suggests that while the factors identified in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170

should be considered, the primary basis on which the application should be considered is whether his constitutional rights have been infringed or the court agrees that he has arguable or compelling grounds. He suggests that counsel for the respondent should have applied for an adjournment and that the only equitable remedy is to extend the time and *"quash"* the judgment and order of the High Court.

22. With the papers filed on 14th March, 2023 was a form of *"Draft of Amended Notice of Appeal"* the substance of which is that although Butler J. clearly – and correctly – found that the High Court did not have jurisdiction to decide the allegations of professional misconduct against the respondent, her identification of the nature of the applicant's complaints of professional misconduct against the respondent and her comments on some of those complaints infringed upon the exclusive jurisdiction of the LRSA to deal with allegations of professional misconduct against a solicitor. In effect, what is suggested is that Butler J. should have anticipated that the LSRA would, or might, later misunderstand her analysis of the case which the applicant sought to make in the High Court as a decision on the merits of issues which she had unambiguously found that the High Court had no jurisdiction to deal with.

23. The *"Draft of Amended Notice of Appeal"* goes on to suggest – without any evidential basis and without any suggestion of complaint at the time – that the High Court judge erred in allowing counsel to speak before him and not allowing him the opportunity to respond. The applicant recalls that the judge did ask counsel to be mindful of the fact that he was a litigant in person but suggests – baldly – that this was not a consideration which she afforded to him. Acknowledging that he does not expect preferential treatment, the applicant would suggest that he *"found the manner and tone of [the judge] to be impatient, dismissive, frustrated, argumentative and confrontational"* and that he had difficulty hearing some of what she was saying but *"felt"* that he could not ask her to repeat herself *"for fear of further*

antagonising her." [My emphasis.] The applicant would make the case that the High Court judge evidenced bias or an appearance of bias by reprimanding him for pointing at counsel and by the language used in her judgment.

24. From there the *"Draft of Amended Notice of Appeal"* moves to the points made in the affidavit of 14th March, 2023 as to the provision of the book of authorities and other books shortly before the court sat, and to an allegation of error on the part of the judge in dealing with the legal issue before hearing the evidence.

25. At paras. 21 and 22, the applicant would add two grounds of appeal against the costs order, the first, that there should have been no order as to costs and the second that the order for costs should have been limited to the point at which the respondent was in a position to file a motion pursuant to O. 19, r. 28 – which, of course, was more or less what the judge did. Butler J. took the view that the respondent ought not to have allowed the action to be set down for trial but to have applied by motion to have it struck out and limited the order for costs accordingly.

26. The legal principles applicable to an application for an extension of time for an appeal were recently restated by the Supreme Court in *Seniors Money.* O'Malley J. emphasised that the power to extend the time for an appeal was within the discretion of the court, to be exercised in the light of the facts and circumstances of the particular case. That said, the court acknowledged that the three factors identified in *Éire Continental* – whether the applicant could show that he had a *bona fide* intention to appeal formed within the permitted time, whether the applicant could show the existence of something like mistake, and whether the applicant could establish that an arguable ground of appeal exists – were , if not rigid rules or conditions for the exercise of the power, nevertheless, proper matters for the consideration of the court in determining whether time should be extended.

27. In *Seniors Money* the central issue to be determined by the Supreme Court was identified as being whether it should extend time if it was satisfied that there were arguable grounds of appeal, even if not satisfied either that there was a *bona fide* intention to appeal formed within the prescribed period or that there was something in the form of a mistake to excuse delay in bringing forward the appeal. O'Malley J. recalled the observation of Clarke J. in *Goode Concrete v. CRH plc* [2013] IESC 39 that it is difficult to envisage circumstances in which it could be in the interests of justice to allow an appeal to be brought outside the time if the court is not satisfied that there are arguable grounds.

28. The application in this case was brought on 7th December, 2022, just short of nine months after the expiration of the time allowed and at least that long after the applicant decided not to appeal. There is a well-established public interest in the finality of litigation. In my view it would be inimical to the administration of justice as well as unjust to the respondent to allow the applicant to revisit a decision made long ago and to belatedly seek to revive a case which he was previously reconciled to having lost and for that reason alone, I would refuse the application.

29. That apart, I am satisfied that the applicant has failed to identify any arguable ground of appeal.

30. The judgment of the High Court was that the applicant's case disclosed no reasonable cause of action and should be struck out. If – as he does – the applicant accepts that the judge was correct to strike out his case, he cannot sensibly suggest that she erred in doing so.

31. As Ms. Manthe observed in her replying affidavit, there is nothing in the applicant's grounding affidavit to suggest that he takes issue with the finding of the High Court that his pleadings disclosed no reasonable cause of action, or that his claim was bound to fail because of the defence of absolute privilege. As Ms. Manthe put it:-

"Insofar as the applicant now seeks to take issue with the LRSA deeming his complaint inadmissible, that is not a matter for this court. The whole tenor of the respondent's case before the High Court was that the jurisdiction to make a finding of misconduct against a legal practitioner had been devolved from the original jurisdiction of the High Court to the LRSA, by the Oireachtas."

32. A further affidavit of the applicant filed on 30th January, 2023, was largely argumentative but at para. 5 he averred that:-

"To be clear, the [applicant] accepts that the respondent had absolute privilege and that his action was not justiciable and that Ms. Justice Nuala Butler was correct in striking out the proceedings on that basis."

33. In the bundle of correspondence exhibited by the applicant to his affidavit of 14th March, 2023 is a copy letter sent by him to the registrar of the High Court on 26th January, 2022 in which he indicated that he was strongly considering an appeal alleging that Butler J. deprived him of his right to fair procedures under Article 40.3 of the Constitution, specifically his right to a decision maker who was not biased or appeared to be biased, and his right to an adequate opportunity to present his case and to comment on the material put forward by the other side. There was no reference at that time that the book of authorities or other books having been furnished at the last minute but it is clear from his letter that within a week of the delivery of the judgment the applicant was considering an appeal on the grounds that his right to fair procedures had been infringed and it is clear from the fact that he did not appeal that he then decided that he would not appeal.

34. If the judge was frustrated in her efforts to identify what documents in the nine books which had been handed in were relevant, or by the fact that the LRSA correspondence to which the applicant made repeated reference was not in any of them, she was, in my view, entitled to have been. If the judge was critical of the applicant's conduct – for example, his

tendency to attribute fraudulent and criminal motives to all of those who have acted against him and his spurious allegations of fraud against the solicitor and counsel – the applicant does not suggest that she was wrong. If the applicant believes that his entitlement to a fair hearing means that he is entitled to say anything he wants, or to insist that he is entitled to dictate the conduct of the proceedings, he is mistaken. If – as he has belatedly suggested, and which, by the way, I doubt – he was cowed by the firmness of the judge in keeping him on point and ensuring that he behaved himself, that, in my view, is not a cause for criticism but goes to show the effective management by the High Court judge of the business of the High Court.

35. If it was not clear from the papers filed in support of the applications, it certainly was at the conclusion of the hearing that the applicant's objective in seeking an extension of time to appeal against the judgment and order of the High Court is not to challenge the correctness of that decision but to revive the complaint which he made to the LRSA. That is not a proper purpose.

36. For these reasons I am satisfied that both motions must be refused.