



THE COURT OF APPEAL

**The President
Finlay Geoghegan J.
Peart J.**

LAW SOCIETY OF IRELAND

AND

JOHN TOBIN

AND

LAW SOCIETY OF IRELAND

AND

PATRICK E. CALLANAN

Appeal No. 2015/143

APPLICANT/RESPONDENT

RESPONDENT/APPELLANT

Appeal No. 2015/237

APPLICANT/RESPONDENT

RESPONDENT/APPELLANT

JUDGMENT of the Court delivered on the 10th day of February 2016 by

Ms. Justice Finlay Geoghegan

1. This first issue with which this judgment is concerned is an identical issue in motions relating to appeals sought to be brought by the appellants against orders of the High Court. Neither appellant lodged the notice of appeal within 21 days of the date of either the making of the order in the High Court or the date of perfection of the order.

2. Section 12 of the Solicitors (Amendment) Act 1960 as inserted by s. 39 of the Solicitors (Amendment) Act 1994 provides:

"The Society or the solicitor concerned may appeal to the Supreme Court against an order of the High Court made under s. 8 (1) (as substituted by the Solicitors (Amendment) Act, 1994) or s. 9 or 10 (as amended by the Solicitors (Amendment) Act, 1994) of this Act within a period of 21 days beginning on the date of the order, and unless the High Court or the Supreme Court otherwise orders, the order of the High Court shall have effect pending the determination of such appeal."

3. In the case of Mr. Tobin the order sought to be appealed is an order of the High Court (Moriarty J.) made on the 13th February, 2015, on application by the Law Society. The order was that his name be struck from the roll of solicitors and for costs. It then provided:-

- That the Respondent do have leave to Appeal the within order and to lodge such appeal within such period as is provided for in order 58 or 86A of the Rules of the Superior Courts (as the case may be) and in the event of execution be further stayed until the further determination of such appeal.

4. It also provided a stay on the order for costs and for further applications to be made to the Court of Appeal. The order was perfected on the 24th February, 2014 and the notice of appeal was lodged on the 23rd March, 2015, in the Court of Appeal being within 28 days of the date of perfection of the order. It is the period referred to in O. 86A, r. 13(1) but "Subject to any provision to the contrary in any enactment which applies to the particular category of appeal . . .".

5. In the case of Mr. Callanan he seeks to appeal against an order of the High Court (Kearns P.) made on the 13th April, 2015 and perfected on the 16th April, 2015, in which it was ordered *inter alia* that he be prohibited from practicing as a solicitor for a period of ten years; apply to the High Court if he wished to resume practice at the expiration of the ten years and certain further consequential orders. A notice of appeal was lodged on his behalf on the 13th May. An attempt had been made to file the notice of appeal on the 7th May, but by reason of the absence of respondent's details it was not accepted.

6. Motions have been issued in each by the Law Society seeking to dismiss the appeal as out of time. In Mr. Callanan's case he has brought a motion to extend time and in Mr. Tobin's case it is accepted the Court should also deal with his application to extend time upon the basis of the affidavits sworn in the Law Society motion, the notice of appeal and High Court judgment.

7. Each of the intended appellants has put evidence on affidavit before the court in relation to when they formed the intention to appeal and other matters relevant to the exercise by the court of a discretion to extend time if such exists.

8. However, the first issue which requires to be addressed is the submission made on behalf of the Law Society in relation to each intended appeal that s. 12 of the 1960 Act imposes an absolute time limit within which an appeal to the Court of Appeal must be lodged in default of which each appellant is precluded from pursuing an appeal. It forms part of the submission that s. 12 excludes any jurisdiction in the Court of Appeal to extend the 21 day period referred to therein. Each of the intended appellants contests this submission in reliance upon Article 34.4.1 of the Constitution; case law relating to the former Article 34.3 in relation to the appellate jurisdiction of the Supreme Court; constitutional and other principles applicable to the construction of the statute; insofar as necessary Article 6.1 of the European Convention on Human Rights and ss. 2 and 3 of the Human Rights Act 2004 and the inherent

jurisdiction of the courts.

9. The Court has had the benefit of written and oral submissions made on behalf of all parties which I have fully taken into account in reaching my decision on the proper construction of s. 12 of the 1960 Act. The constitutional context in which s. 12 of the 1960 Act applies in this application is Article 34.4.1 which provides:-

"1. The Court of Appeal shall –

(i) save as otherwise provided by this Article, and

(ii) with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

10. Prior to the 33rd Amendment of the Constitution Act and at the time of the enactment of the current version of s. 12 of the 1960 Act, in 1994 Article 34.4.3 similarly provided insofar as relevant:-

"... the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decision of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

11. It is not in dispute that section 12 must in accordance with the presumption of constitutionality be construed insofar as "is reasonably open" in a manner consistent with the Constitution: *McDonald v Bord na gCon* [1965] IR 217. Further that in a series of decisions since at least *People v. Conmey* [1975] I.R. 341, the Supreme Court has adhered to and repeated the principles set out by Walsh J. therein at p. 60 where he stated:-

"Before turning to deal specifically with these provisions I wish to express my view that any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous [emphasis added]. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action."

12. As appears and has been subsequently explained on more than one occasion by the Supreme Court legislation such as s.12 is a limitation by the Oireachtas of the scope of a constitutionally conferred right of litigants to appeal decisions of the High Court to the Supreme Court (and now the Court of Appeal) and as such must be expressed in clear and unambiguous terms. (See *A.B. v. Minister for Justice and Equality and Law Reform* [2002] 1 I.R. 296, per Keane S.J. at 303 and *Clinton v. An Bord Pleanála* [2007] 1 I.R. 271, per Fennelly J. at 293.)

13. The Supreme Court in 2015, in *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13 restated these principles in considering whether or not s. 28(3) of the Equal Status Act 2000, excluded an appeal from the High Court to the Supreme Court. Clarke J. delivered a majority judgment (with whom Murray J. and O'Donnell J. concurred) and Hardiman J. delivered a minority judgment with whom McKechnie J. concurred. Notwithstanding a difference of opinion on the applicability of the principles to the construction of s. 28 of the Act of 2000, both judgments applied the principles set out above. In applying the principles to the construction of s. 28(3) of the 2000 Act, Clarke J. at para. 6.13 stated:-

"If this were simply a matter of straightforward construction of the relevant statute, then I might well have come to the conclusion that the proper interpretation of subs. (3) was such as would have excluded a right of appeal to this Court. However, as is clear from the authorities to which I have referred, the constitutional status of the right to appeal to this Court is such that an exception to that right requires clear and unambiguous wording. On balance I have come to the view that the wording of subs. (3) is insufficient to meet that high constitutional test. It is not free from ambiguity."

14. The submission of the Law Society in these appeals is not that s. 12 purports to exclude a right to appeal *ab initio*, but that properly construed it excludes an appeal and any jurisdiction of this Court in relation to an intended appeal unless a notice of appeal is filed within 21 days from "the date of the order".

15. Pursuant to s. 74(1) of the Court of Appeal Act 2014, the reference to the Supreme Court is now the Court of Appeal. The parties to each proceeding have a right to appeal to this Court pursuant to Article 34.4.4 of the Constitution and such right is not required to be conferred by statute. The question in accordance with the principles set out above must be whether the Oireachtas in expressly providing that the parties may appeal within a period of 21 days is to be construed as clearly and unambiguously restricting or limiting or excluding the parties from exercising their constitutional right to appeal outside such 21 day period, and that it has excluded a jurisdiction of the Court of Appeal to permit an appeal to be pursued if commenced outside the 21 day period.

16. None of the parties referred the Court to any similar statutory provision in relation to an appeal from the High Court to the Supreme Court or the Court of Appeal. The Court is not aware of any similar provision. It is in its express terms a permissive provision, but of an existing constitutional right. The explanation for what appears to be an unusual provision expressly permitting by Act of the Oireachtas for what is already a constitutional right to appeal albeit within a specified time is possibly the prior legislative history of s. 12 of the 1960 Act. As originally enacted, it provided:-

"(1) Subject to subsection (2) of this section, an order of the High Court under section 8 of this Act, under that section as applied by section 11 of this Act or under section 9 or section 10 of this Act shall be final and not appealable.

(2) By leave of the High Court, an appeal, by the Society or the (sic) section 8 of this Act, under that section as applied by section 11 of this Act or under section 9 or section 10 of this Act shall lie to the Supreme Court on a specified question of law."

17. That provision clearly and unambiguously excluded an appeal to the Supreme Court unless the High Court granted leave and it was on a specified question of law.

18. There were a number of other statutes drawn to the Court's attention where the Oireachtas has excluded or limited the right of appeal to the Supreme Court unless there is compliance with a specified condition. Counsel for Mr. Callanan referred, by way of distinction to s.77(2) of the Medical Practitioners Act 2007 which similarly relates to professional regulation and provides:

"(2) The decision of the [High] Court on an appeal under section 75 (1) or an application under section 76 (1) is final except that the Council or the medical practitioner to whom the decision relates may, by leave of the Court or Supreme Court, appeal against the decision to the Supreme Court on a specified question of law."

19. Section 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, similarly provides that:-

"The determination of the High Court . . . shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court . . . except with the leave of the High Court which leave shall only be granted . . ."

20. Section 16(11) of the European Arrest Warrant Act 2003 (as substituted by s. 10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, provides for an appeal from the High Court "if and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance . . ."

21. The submission of the Society in essence seeks to have this Court construe s. 12 of the 1960 Act as if the Oireachtas had provided that "no appeal shall lie to the Supreme Court unless a notice of appeal is lodged within 21 days of the date of the High Court order". The submission is that the Oireachtas in expressly providing for a right to appeal within 21 days must by implication have intended to exclude any appeal outside that time. Were it not for the pre-existing constitutional right to appeal such a construction might be correct. However the constitutional right, and consequent necessity for "clear and unambiguous" words to limit or exclude it require a different conclusion.

22. In seeking to give meaning to the words used by the Oireachtas in s. 12 in the constitutional context it appears that they should be construed as the Oireachtas both expressly indicating an appeal now lies without leave of the High Court (as was previously required) and also regulating by law, rather than leaving to Rules of Court, the time within which a party may bring an appeal as of right. This is probably intended in the interests of proximate legal certainty. The 21 day period in 1994 was the relevant time period (from the date of perfection of an order) under O. 58 of the Rules of the Superior Courts for appeals to the Supreme Court, which also had a well established jurisdiction to extend such time period. Basic interpretive principles include an assumption that the Oireachtas is fully aware of all relevant law and the interpretive criteria (See Dodd, *Statutory Interpretation in Ireland*, (Dublin, 2008) p.27).

23. In reaching its conclusion the Court has taken into account the submissions which were made in relation to the judgments which held that limitation periods are a matter for the Oireachtas. However, the decisions to which we were referred relate to limitation periods which clearly exclude the pursuit of a particular application or proceeding after the specified period and are clear limitation periods. One such example is *Tuohy v. Courtney* [1994] 3 I.R. 1. That concerned a challenge to the constitutionality of sections of the Statute of Limitations Act 1957, as amended. Those sections provided that certain actions "shall not be brought after the expiration of . . . years". Such statutory provisions are true limitation sections in that they expressly or clearly and unambiguously preclude the bringing of an action after the specified period. For the reasons outlined above, our view is that s. 12 of the 1960 Act, as amended is not a section which clearly and unambiguously precludes a person at least applying to exercise his constitutional right of appeal after 21 days or the jurisdiction of this Court to consider such an application. Section 12 by the words used does not expressly exclude the bringing of an appeal after the specified time as do the provisions of the statute of limitations and other statutory provisions with time limits to which we were referred.

24. Unless excluded by s.12 the Court has an inherent jurisdiction to consider an application to extend time to pursue an appeal to which s.12 of the 1960 Act applies. Such jurisdiction derives from the implied constitutional principles of basic fairness of procedures which underlie the well known decisions in relation to the court's inherent jurisdiction to dismiss for delay. In this instance, the jurisdiction exists in order that a party who by mistake or other justifiable reason misses the 21 day period, may not be unfairly precluded from pursuing a constitutional right of appeal against an order of the High Court of the type to which s. 12 of the 1960 Act applies. Such orders may interfere with the right of persons to earn a livelihood or viewed from the perspective of the Society, the discharge of its obligations to protect members of the public.

25. Accordingly, the Court has concluded that it has jurisdiction to consider an application to extend time to issue a notice of appeal beyond the 21 days specified in s. 12 of the 1960 Act. In exercise of its jurisdiction, the Court must of course, have regard to the legislative intent that any such notice of appeal be issued within 21 days from the date of the High Court order. There is a lack of clarity as to whether the 21 days is from the making of the order by the High Court or the date of perfection of the order. In submission it was contended that as a notice of appeal cannot be issued until such time as the written perfected order is available from the High Court, the Oireachtas must have intended the date of perfection of the order. If not, the 21 day period might expire before a perfected order necessary to lodge an appeal became available. Whilst on the facts of these two cases it is not material and therefore my view must only be *obiter* it is perhaps appropriate to indicate that such a construction appears necessary in order to give practical effect to the provision.

26. The remaining issues are how the Court should exercise its jurisdiction on the application to extend time in each of the two appeals. Neither Mr. Tobin or Mr. Callanan lodged within 21 days of the perfection of the relevant order.

Extension of time

27. The applicable principles appear to be those set by the Supreme Court in relation to extensions of time under the Rules of Court subject to one addition. Having regard to the legislative intent in s.12 of the 1960 Act that an appeal be lodged within 21 days, it appears that the Court should consider carefully the extent to which that time period has been exceeded by an applicant. Subject to giving consideration to that, it appears that the Court should have regard to the matters identified in *Eire Continental Trading Limited v. Clonmel Foods Limited* [1955] I.R. 170, taking into account the flexibility indicated by the Supreme Court in decisions such as *Dalton v. Minister for Finance* [1989] I.R. 269, and *Brewer v. Commissioners of Public Works in Ireland* [2003] 3 I.R. 539.

28. On the facts deposed in the affidavits each of Mr. Tobin and Mr. Callanan have shown that they had formed a *bona fide* intention to appeal within 21 days from the making of the order and that there was a mistake made in relation to the relevant time period caused primarily by the relatively recent change to 28 days for an appeal to the Court of Appeal pursuant to the Rules of Court.

29. In the case of Mr. Tobin, the grounds of appeal seek to rely upon the principles identified by the Supreme Court in the *Law Society v. Carroll and Another* [2009] IESC 41 and a number of steps allegedly taken by Mr. Tobin subsequent to the misconduct which grounded the application to submit that the trial judge was in error in exercising his discretion to make the orders which he made. The Court considers the grounds set out in the notice of appeal meet the relatively low threshold of being arguable grounds.

30. In the case of Mr. Callanan, the grounds include an alleged failure of the trial judge to give sufficient weight to mitigating factors, a significant departure from the recommendations as to sanction of the Solicitors Disciplinary Tribunal and the failure to give reasons for such departure. Again the Court has concluded that the grounds in the notice of appeal meet the threshold of arguable grounds.

31. The conclusion that the grounds advanced in each draft notice of appeal meet the threshold of arguable grounds is not intended in any way to indicate a view as to the merits of the appeal. As the conclusion reached means the appeals will proceed it does not seem desirable to give any more precise reasons than has been done.

32. In each case the notice of appeal was lodged within 28 days of the perfection of the High Court order and thus within a relatively short period of the statutory time limit of 21 days.

33. Accordingly, the Court will extend the time for the issue of a notice of appeal in each case to the date upon which the notice of appeal was filed. In the case of Mr. Tobin, that was the 23rd March, 2015 and in Mr. Callanan's case, the 13th May, 2015.