

THE HIGH COURT

[2013 No. 12226 P]

BETWEEN

THOMAS TOUGHER

PLAINTIFF

AND

TOUGHER'S OIL DISTRIBUTORS LIMITED AND JOHN O'REGAN (NO.1)

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 15th day of May, 2014

Introduction

1. This is an application by the plaintiff, Mr. Tougher, to permit Mr. Vincent T. O'Donoghue, a former solicitor, to represent Mr. Tougher in court in an application by the first named defendant to strike out his proceedings and to vacate a *lis pendens* registered over property in the name of the first named defendant. The application was not simply that Mr. O'Donoghue would be permitted to act as a "McKenzie friend" but that Mr. O'Donoghue could have full rights of representation.

2. For the limited purpose of considering the application for a right of audience, I gave liberty to Mr. O'Donoghue to address the court on this issue. Mr. Tougher also made brief submissions on this point.

3. In response to a specific question from the court Mr. O'Donoghue confirmed that he was seeking an unrestricted right of audience before the court to represent Mr. Tougher in this matter.

4. Mr. O'Donoghue in his submission argued that Mr. Tougher had a right to a fair hearing; that Mr. Tougher had a right to appoint Mr. O'Donoghue to act on his behalf; and that Mr. O'Donoghue, on Mr. Tougher's behalf, had an untrammelled right of audience before the court. Mr. O'Donoghue also referred to a "Directive from Europe" (which he did not particularise any further, but which he indicated had not yet been ratified) which he sought to rely on. He also sought to rely on unparticularised provisions of the European Convention of Human Rights and also what he termed developing principles of natural justice and a right to a fair hearing.

5. The defendants submitted that they had no objection to Mr. O'Donoghue appearing as a McKenzie friend for Mr. Tougher, but they did object to him seeking a right of audience before the court.

Applicable Legal Principles

6. In *Coffey & Ors*, a decision of the Supreme Court of 26th February, 2013, the Supreme Court set out the appropriate legal principles to be applied in an application of this nature.

7. At para. 16 of his judgment Fennelly J. states as follows:-

"16. These paragraphs encapsulate the nature of the application being made by Mr. Podger on behalf of the appellants. The court is not confronted in this case with a litigant in person. Such litigants have become an increasingly common feature of litigation in our courts. The reasons are many and various. There can be no doubt that a major contributory factor has been that the difficult economic circumstances prevailing in recent years have made it difficult or impossible for many people to pay for their own legal representation. In these circumstances the courts of necessity are obliged to allow parties to present their own cases and, though it may be difficult for them, legal arguments. The courts have recognised the capacity of a McKenzie friend to assist a lay litigant usually by giving advice or organising papers. That procedure, however, must of necessity be carefully supervised. Only in the most limited circumstances will a court permit a McKenzie friend to address it. In the family courts in particular it is necessary to ensure that the admission of a McKenzie friend does not undermine the confidentiality of proceedings being heard in camera. Furthermore, any application in this regard must be made bona fide and must relate solely to the activities which, if admitted, such a friend may perform."

17. The notion of a McKenzie friend originates in the decision of the Court of Appeal in England in McKenzie v. McKenzie [1970] 1 P. 33. Davies L.J. recalled the following statement of Lord Tenterden C.J. in Collier v. Hicks [1831] 2 B & AD 663:

'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.'

18. That brief statement continues to represent an accurate description of the role of a McKenzie friend and is generally accepted by our courts. It was considered in the High Court by Macken J. in R.D. v McGuinness [1999] 2 I.R. 411, which were family-law proceedings. She concluded, at page 421, that "a party who prosecutes proceedings in person is entitled to be accompanied in court by a friend who may take notes on his behalf and quietly make suggestions and assist him generally during the hearing, but.....may not act as advocate". ...It will be noted, of course, that this is a description of the role of the McKenzie friend. This is not to say that a judge may not, on occasion, as a matter of pure practicality and convenience, invite the McKenzie friend to explain some point of fact or law, where the party is unable to do so or do so clearly. 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."

19. Here the court is asked to permit something utterly different.

21. Mr. Podger is neither counsel nor a solicitor, nor does he wish to act in the capacity of a McKenzie friend. He seeks an unrestricted right of audience before the courts. As I understand it, he wishes to be permitted to present the appeal on behalf of all of the appellants to the same extent as if he were a professionally qualified counsel or solicitor. He rejects the suggestion that he could act as a McKenzie friend. He is unwilling to accept the limited nature of that role. He considers it unduly restrictive that he should be limited to assisting the appellants without enjoying a right of audience. He seeks an unlimited right to appear and to argue the appeals but without any of the limitations which would apply either to a McKenzie friend or to a properly qualified legal practitioner. He submits that, in the absence of any provision of EU law prohibiting such a lay advocate as himself, that he is entitled to an unrestricted right of audience before the courts and that to deny him such a right of audience is to infringe the rights of the appellants to access justice in general, and specifically to access justice under the Aarhus Convention.

22. I am satisfied that the application of the appellants to be allowed to be represented by Mr. Podger and by him that he should be allowed to represent them must be rejected.

23. The fundamental rule is that the only persons who enjoy a right of audience before our courts are the parties themselves, when not legally represented, a solicitor duly and properly instructed by a party and counsel duly instructed by a solicitor to appear for a party..."

25. Thus, the right of audience is regulated by law. It is true that a party to proceedings (other than a corporation) has the right to appear for him or herself and to plead his or her own case. This is a matter of necessity as well as right. Regrettably it is a fact of life especially during the current economic difficulties in our country that many people are unable to afford the often high cost of professional representation and that the availability of legal aid is limited. There are other cases where litigants disagree with their lawyers or are unwilling to accept representation. Whatever the reason, there is an inevitable number of cases before the courts where litigants are unrepresented. In those cases, they have the right to represent themselves. It has to be accepted that this is sometimes unavoidable, which is not to say that it is desirable. There is no doubt that courts are better able to administer justice fairly and efficiently when parties are represented."

And at para. 29 Fennelly J. stated:-

"29. It would be inimical to the integrity of the justice system to open to unqualified persons the same rights of audience and representation as are conferred by the law on duly qualified barristers and solicitors. Every member of each of those professions undergoes an extended and rigorous period of legal and professional training and sits demanding examinations in the law and legal practice and procedure, including ethical standards. Barristers and solicitors are respectively subject in their practice to, and bound by, extensive and detailed codes of professional conduct. Each profession has established a complete and active system of profession discipline. Members of the professions are liable to potentially severe penalties if they transgress.

30. There would be little point in subjecting the professions to such rules and requirements if, at the same time, completely unqualified persons had complete, parallel rights of audience in the courts. That would defeat the purpose of such controls and would tend to undermine the administration of justice and the elaborate system of controls.

31. I wish to make it clear that there is no reason at all to suspect the integrity of Mr. Podger, his commitment to the cases he wishes to bring on behalf of the appellants or his knowledge of this particular area of environmental law. However, the fact remains that he is not qualified in law and does not have any right of audience.

37. 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."

8. In the same way here I wish to make it clear that there is no reason at all to doubt the integrity of Mr. O'Donoghue. Moreover, it is clear that Mr. O'Donoghue is a former solicitor, but he is not a solicitor currently in practice and, therefore, is not a solicitor who is subject to, and bound by, the extensive and detailed codes of professional conduct of the Law Society.

9. Moreover, although the courts have on rare occasions permitted exceptions to the strict application of that rule where it would work particular injustice, I am of the view that, just as in the Coffey case, the present case comes nowhere near justifying the making of such an exception. I am clearly bound by the Supreme Court decision in Coffey which, in my view, applies in this case.

10. Furthermore, Mr. O'Donoghue has sought to make very general and unparticularised submissions based on the European Convention on Human Rights and general principles of natural and constitutional justice and a vague reference to some unnamed and apparently unimplemented EU Directive. However, this matter was also addressed by the Supreme Court in the Coffey decision as follows:-

"39. Finally, Mr. Podger purports to demand that the Court provide some reference to a provision of EU law excluding him from representing the appellants. That would be to reverse the proper nature of the inquiry, which is whether there is any provision of EU law precluding the Court from applying the fundamental tenets of its legal system adopted in the interests of the protection of the integrity of the administration of justice. In fact, Article 19 of the Statute of the Court of Justice regulates the representation of parties in proceedings before the Court of Justice of the European Union. Member States and the Institutions of the Union must "be represented before the Court of Justice by an agent appointed for each case..." The agent "may be assisted by an adviser or by a lawyer." Most materially, the Article then provides:

"Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court."

...

It is clear, therefore, that there is no warrant for the claim that, in the application of EU law or the European Convention on Human Rights, specifically either by the Court of Justice or the European Court of Human Rights, there is any obligation on the court of a Member State to permit a litigant to be represented by a person other than a duly qualified lawyer."

11. Thus, in the present case, applying the principles as set out by the Supreme Court in *Coffey*, I hold that Mr. Tougher's application (and Mr. O'Donoghue's application) that Mr. O'Donoghue should have an unrestricted right of audience to represent Mr. Tougher must be rejected.