



THE COURT OF APPEAL

**Irvine J.
Sheehan J.
Hogan J.**

Appeal Record No.: 2015/292

[Article 64 Transfer]

ALAN P. TOAL

APPELLANT/PLAINTIFF

- AND -

THE HONOURABLE SOCIETY OF KINGS INNS BARRISTERS DISCIPLINARY TRIBUNAL

1ST NAMED RESPONDENT/DEFENDANT

- AND -

THE GENERAL COUNCIL OF THE BAR COUNCIL OF IRELAND

2ND NAMED RESPONDENT/DEFENDANT

- AND -

THE PROFESSIONAL PRACTICES COMMITTEE OF THE BAR COUNCIL

3RD NAMED RESPONDENT/DEFENDANT

- AND -

THE BARRISTERS PROFESSIONAL CONDUCT TRIBUNAL

4TH NAMED RESPONDENT/DEFENDANT

DECISION [RULING] of the Court delivered by Ms. Justice Irvine on the 22nd April 2016.

1. This judgment relates to three motions listed for hearing before this Court on 18th April 2016. Those notices of motion, which were issued by the respondents, sought directions from the Court concerning the conduct by the appellant ("Mr. Toal") of an appeal which he lodged against a judgment and order of the High Court (Keane J.) made on 6th May 2015. The High Court had dismissed Mr. Toal's action after it was indicated that the plaintiff would not be opening his case or taking part in the proceedings. Mr. Toal had alleged objective bias on the part of the High Court judge due to his status as a Bencher of the Honourable Society of the King's Inns. The respondents now seek to dismiss the appeal for want of prosecution.

2. In his notice of appeal dated 8th June 2015 Mr. Toal appealed, inter alia,:-

(i) the failure of the High Court judge to recuse himself from hearing his claim;

(ii) the dismissal of his proceedings following his withdrawal therefrom, and

(iii) his refusal to make reference to the European Court of Human Rights (the "ECtHR") pursuant to Article 267 of the Treaty on the functioning of the European Union.

3. The background to the High Court proceedings and this appeal are canvassed extensively in the affidavits sworn in support of the respondents' motions. Hence, it is not necessary, for the purposes of this Court's ruling, to engage with anything more than a skeletal account of the relevant background facts. These are as follows.

4. Mr. Toal was admitted to practice as a barrister in October 1992. In March 2010 a complaint was made to the Bar Council concerning his conduct by a former client. That complaint was referred by the Bar Council to the Barristers Professional Conduct Tribunal ("the Conduct Tribunal"). Following a significant number of applications and procedural difficulties, the Conduct Tribunal made its decision on 9th February 2012. It determined that Mr. Toal had breached certain provisions of the Code of Conduct of the Bar of Ireland.

5. Consequent upon the aforementioned decision the Bar Council was required by the Disciplinary Code for the Bar of Ireland to prefer the complaint to the Barristers Disciplinary Committee ("the Disciplinary Committee") which was established pursuant to the Disciplinary Rules of the Honourable Society of the King's Inns for the purpose of enquiring into complaints of professional misconduct presented to it by the Bar Council.

6. The proceedings before the Disciplinary Committee were not without complication. However, following a hearing in April 2014, the Disciplinary Committee delivered its decision on 23rd June 2014. It concluded that Mr. Toal had behaved in an intemperate manner, had behaved unprofessionally and had failed to co-operate with the enquiry.

7. In the interlude between that the decision of the Disciplinary Committee and the hearing which it had scheduled to deal with the sanction to be imposed upon Mr. Toal, he commenced proceedings in the High Court in connection with the disciplinary process. Those proceedings engaged with the lawfulness of the inquiry which had been conducted by the Conduct Tribunal and that which was then still under consideration by the Disciplinary Committee. Mr. Toal sought a myriad of reliefs including injunctive relief against the Disciplinary Committee in an attempt to restrain the Disciplinary Committee from delivering its decision on sanction. He also sought a range of declarations in respect of the validity of the proceedings before both the Disciplinary Committee and the Conduct Tribunal.

8. Mr. Toal's proceedings came before the High Court on a significant number of occasions between the date upon which they were issued, *i.e.*, 1st October 2014 and 5th May 2015, that being the date fixed for their hearing. At no time in the course of any hearing or application, did Mr. Toal seek to argue that he could not obtain a fair and impartial hearing from a High Court judge on the grounds of apprehended bias by reason of the status of any such judge as a Bencher of the Honourable Society of the King's Inns. In this regard it is not contested that the proceedings were before the Court on some fifteen occasions prior to 5th May 2015 when, for the first time, such an assertion was made based upon the fact that the High Court judge was a Bencher of the Honourable Society of the King's Inns ("the Society").

9. On the day of the hearing, the proceedings were listed before Mr. Justice Keane. After the case was called, Counsel for Mr. Toal sought an adjournment on the basis that the case was not ready for hearing, an application which was refused. Counsel then made an application that the High Court judge recuse himself on the grounds that the reasonable man might apprehend that Mr. Toal might not obtain a fair and impartial hearing as the judge was a Bencher of the Society. That application, which was refused, was one of relevance only to the first named defendant.

10. In the afternoon of 5th May 2015 the Court's attention was drawn to the fact that Mr. Toal had just served a motion on the Disciplinary Committee challenging a claim to Public Interest Privilege that it had made in an affidavit of discovery sworn on its behalf. This fact notwithstanding the High Court judge ruled that Mr. Toal would have to proceed with his case the following morning. In doing so he indicated that, in his view, justice could be served by dealing with any such challenge in the course of the proceedings. Having ruled against Mr. Toal on each of the aforementioned applications the High Court judge adjourned the proceedings until the following day and in so doing advised Mr. Toal that he would have to proceed with his claim in default of which it would be dismissed.

11. On the following day, counsel for Mr. Toal made a further application to Mr. Justice Keane to recuse himself. He submitted that his client was being denied a hearing that was in conformity with Article 6 of the European Convention on Human Rights and he asked the judge to refer a number of questions concerning this issue to the ECtHR, an application which the High Court judge refused stating that he would give his reasons at a later date. This he duly did on 28th July 2015.

12. Counsel then informed the Court that his client would not be taking any further steps in the proceedings lest he be seen to be participating or acquiescing in proceedings which he considered to be unlawful.

13. As a result of Mr. Toal's failure to proceed with his claim, notwithstanding repeated invitations that he do so, the High Court judge acceded to the application then made by the defendants to dismiss his claim. In doing so he awarded the costs of the proceedings, including reserved costs, to the defendants.

14. By notice of appeal dated 8th June 2015 Mr. Toal sought to challenge each of the orders made by the High Court judge on 5th and 6th May 2015.

15. It is not necessary to detail the steps taken by the Disciplinary Committee following the dismissal of Mr. Toal's claim in May 2015 as the same are not material to the present applications.

16. Insofar as Mr. Toal's appeal to this Court is concerned, the same was the subject matter of an application for Directions on 10th July 2015 on which occasion the date of 7th June 2016 was provisionally fixed for the hearing of the appeal. On that date Ms. Justice Finlay Geoghegan directed Mr. Toal's solicitors to advise the respondents by 2nd October 2015 as to whether he would be proceeding with his appeal in circumstances where all of the judges of the Court of Appeal were also Benchers of the Society.

17. By letter dated 2nd October 2015 Mr. Toal's solicitors advised the respondents that he was in the process of submitting a claim to the ECtHR and that he did not wish to pursue his appeal until the conclusion of those proceedings. In reply, by letter of 12th October 2015, Mr Toal's solicitors were advised that having regard to Article 35 of the ECtHR that any such application was misconceived as the same could only be made after he had exhausted all domestic remedies and that he had not done in circumstances where his appeal to this Court remained outstanding.

18. At a further directions hearing on 16th October 2015 counsel for Mr. Toal sought to adjourn his appeal on the terms advised in his solicitor's letter of 2nd October 2015. That application did not meet with the approval of the respondents or the Court which duly gave liberty to the respondents to issue a motion to strike out Mr. Toal's appeal for want of prosecution.

19. As already stated, the aforementioned motions were listed for hearing before this Court on 18th April 2016. When the same were called for hearing, counsel on behalf of Mr. Toal, Mr. Fergal Kavanagh S.C., advised the Court as a matter of courtesy that his client did not wish to engage with the motion or indeed with his appeal in circumstances where he considered that to do so would be a waste of the court's time and valuable resources. He advised the Court that, in circumstances where all of its members were also Benchers of the Society, that it was not in a position to vindicate his client's rights as it could not afford him an independent and impartial hearing.

20. Prior to withdrawing from the hearing of the motions, Mr. Kavanagh advised the Court that his instructing solicitor had written to the Minister for Justice to make known the difficulty faced by Mr. Toal arising from the fact that the members of the Court of Appeal were all members of the Society. In response, the Minister, by letter of 31st March 2016, indicated that it would not be appropriate for her to comment upon or intervene in relation to the proceedings.

21. In response to some questions posed by members of the Court Mr. Kavanagh conceded that if his client's claim, which had yet to be finalised, were to succeed before the ECtHR that Mr. Toal's appeal would not be capable of being heard by the Court of Appeal. Some legislative intervention would have to occur to provide him with an alternative forum in which he might pursue his complaints about the disciplinary process to which he had been subjected. In these circumstances Mr. Kavanagh accepted that the date fixed for the appeal was, in truth, illusory.

22. Following the withdrawal of Mr. Kavanagh and his instructing solicitor, counsel on behalf of each of the respondents applied in turn for the relief which they had sought in their respective notices of motion. Each submitted that the Court, in the absence of any contest on the part of Mr. Toal, ought to exercise its discretion and dismiss the appeal. In particular, Mr. de Blacam S.C. on behalf of the fourth named respondent reminded the Court that insofar as Mr. Toal had requested the High Court judge to make a reference to the ECtHR on 6th May 2015, on the grounds of perceived bias, that claim could only be material or relevant to his claim against the first named respondent. It had nothing to do with his discrete claims made against the fourth named defendant with whom the trial judge had never had any connection. Thus, he submitted Mr. Toal's appeal as against his client should be dismissed as vexatious, an abuse of process and one which was doomed to fail.

Decision

23. As a result of orders earlier made by Finlay Geoghegan J. this Court has had the benefit of extensive legal submissions delivered on behalf of the respondents. These are directed to establishing the Court's inherent jurisdiction to dismiss an appeal such as the one presently under consideration, for want of prosecution or by reason of the appellant's failure to comply with any such directions or orders as might be made by this Court. That the Court enjoys the jurisdiction to make such an order cannot be disputed having regard to the long line of well established jurisprudence rehearsed in those submissions.

24. As to when such discretion ought to be exercised, it is customarily for the respondent to an application to dismiss their proceedings or appeal on the grounds of delay to contest their opponents right to the relief sought and oftentimes they will only escape the draconian relief "on terms" or subject to the furnishing of an undertakings to pursue their claim with all due expedition.

25. However, none of these matters arise for consideration on the present applications. Mr. Toal does not dispute the Court's jurisdiction to grant the relief sought. Neither does he seek to resist the same. To the contrary, and indeed with the benefit of legal advice, he has indicated that he perceives the further pursuit of his appeal as futile as well as being a waste of time, money and court resources. He does so having regard to his stated belief that the Court of Appeal, comprised as it is of judges who are Benchers of the Society, cannot provide him with a hearing that might be considered free from apprehended bias or one which is in compliance with his rights under Article 6 of the ECtHR. That this will remain so, regardless of what may happen to any such proceedings as Mr. Toal may seek to advance before the ECtHR, is apparent from Mr. Kavanagh's exchange with the Court which has earlier been referred to in the course of this ruling.

26. Accordingly, the Court views the submission made by Mr. Kavanagh as a de facto indication of Mr. Toal's desire to withdraw or otherwise bring to an end an appeal which he perceives to be redundant. That being so, the administration of justice and the interests of the respondents can only be served by the Court dismissing Mr. Toal's appeal in accordance with the relief sought.

27. There are just two final matters of some concern that need to be addressed albeit in the briefest of terms. The first is to record that at no stage did Mr. Toal or counsel on his behalf make an application that any member of this Court recuse themselves from hearing either his appeal or the current motions on the grounds of apprehended bias. The second is that insofar as Mr. Toal indicated his intention to pursue his complaint before the ECtHR, the Court notes that no such proceedings have as yet been commenced notwithstanding the fact that the commencement of an application to the ECtHR was itself indicated in the course of his High Court proceedings almost a year ago.

28. It was in the foregoing circumstances that the Court, on 18th April 2016, dismissed the plaintiff's appeal. In so doing it ordered Mr. Toal to pay to the respondents the costs of the appeal, the costs of the motions and any reserved costs, the same to be taxed in default of agreement.