AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No. S:AP:IE:2022:000030
Court of Appeal Record No. 2021/56
High Court Record No. 2004/19212P

[2023] IESC 28

Charleton J.
O'Malley J.
Baker J.
Woulfe J.
Murray J.

BETWEEN/

JOHN COLM MURPHY

APPELLANT

- AND -

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Brian Murray delivered 29th November 2023

1. This appeal arises from an application for extension of time for the bringing of an appeal pursuant to the provisions of s. 7(11) of the Solicitors (Amendment) Act 1960, as amended, (*'the 1960 Act'*). Before both the High Court ([2021] IEHC 148) and the Court of Appeal ([2021] IECA 332), the Law Society met the application on the assumption that time could be so extended, but it did not concede the point and, thus, neither the High Court nor Court of Appeal decided the issue. The question, accordingly, was not before this Court. However, following oral argument in this appeal, this Court heard the case of *Kirwan v. O'Leary and ors* ('*Kirwan*') in which the question of whether it was possible to extend time for an appeal under s. 7(12B) of the 1960 Act was fully argued. The Court is today delivering judgment in that case ([2023] IESC 27). In my judgment in that appeal (with which Dunne and O'Malley JJ. agreed, Charleton and Woulfe JJ. dissenting), I conclude that time for an application under s. 7(12A) and 7(12B) (which regulate an appeal against a decision of the Solicitors Disciplinary Tribunal ('*the SDT*') that a complaint against a solicitor did not disclose a *prima facie* case) could be extended.

2. Sections 7(11) and 7(12B) of the 1960 Act are differently worded: s. 7(11) provides that a solicitor in respect of whom certain orders has been made by the SDT '*may, within the period of 21 days beginning on the date of the service of a copy of the order or of the report, whichever date is the later, appeal to the High Court'*. Section 7(12B) provides that the appeal to which that provision applies '*shall be made within 21 days of the receipt by the appellant of notification in writing of the finding'*. The provisions, also, address different types of appeal. However, they appear in the same section of the 1960 Act, and

if (as the Court has found to be the case) the time for bringing an appeal under s. 7(12B) can be extended, then it is difficult to see why the appeal period fixed by s. 7(11) would not be similarly capable of extension. Given the slight difference in language ('*may*' in s. 7(11) and '*shall be made'* in s. 7(12B)), and given that the former provision is concerned with a decision whereby a solicitor has been the subject of a finding of misconduct, if anything, the case for the period in s. 7(11) being capable of extension might be said to be stronger than it is for s. 7(12B).

3. The reasons for the conclusion that time for an appeal under s. 7(12B) can be extended are explained in some detail in the course of my judgment in *Kirwan*, but it is helpful to cross reference them here to the provisions of s. 7(11):

(i) The language used in s. 7(11) is consistent with the proposition that the Oireachtas did not intend to enable an extension of time where a would-be appellant failed to appeal within the period fixed by the provision. The section confers no express right to extend that time, as it could easily have done had this been the legislative intent. However, and at the same time, the section is not necessarily *inconsistent* with an entitlement to seek an extension of time in an appropriate case. It is amenable to the construction that it prescribes the period within which an appellant may appeal *as of right*, it being open to the Superior Court Rules Committee to promulgate rules that enable an extension of that period to be sought from and, in an appropriate case granted by, the High Court.

(ii) Even if one accepts that the argument that s. 7(11) prescribes an absolute period for the bringing of an appeal is stronger than the case that it does not, it is a well established principle of law that statutory curtailments on the right to litigate will be strictly construed (para. 87 of the judgment in *Kirwan*). That the right of appeal granted by s. 7(11) is purely statutory does not preclude the engagement of the constitutional right to litigate: the Oireachtas having granted a right by statute to appeal a decision under s. 7(9) should be presumed not have intended to allow it to be completely extinguished by a short limitation period which is incapable of extension without saying so in the clearest possible terms ('*shall not be brought after the expiry of ...*') or without this being otherwise clear from the statutory purpose or context (paras. 89 and 93 of the judgment in *Kirwan*).

(iii) In this case, the most striking feature of that statutory context is that the decision which the applicant seeks to appeal was made in relation to the regulation of the conduct of members of the solicitors' profession. This is a jurisdiction, important aspects of which have, historically, been vested in the High Court and there are good reasons why this was so. Although since hived down to statutory tribunals, the President of the High Court retains an interest in all aspects of the regulation of this profession: I outlined the relevant provisions at paras. 94-97 of my judgment in *Kirwan*. Restrictions on that jurisdiction must, also, be clearly provided for.

(iv) Therefore, the language of s. 7(11) will bear the construction that time can be extended if appropriate provision is made elsewhere, and a combination of the engagement of the constitutional right to litigate, the very short limitation period prescribed for the bringing of a statutory appeal, the absence of any feature of the relevant context pointing to an intent that the time is not capable of extension, and the fact that this legislation operates in the arena of the regulation of the conduct of members of the solicitors' profession, require that it be so construed.

4. Notwithstanding that the issue was not argued in this appeal, I stress this conclusion – and the reason for it – not merely because it is important that there be clarity going forward as to the consequences of the decision in *Kirwan*, but because I do not believe it possible to properly adjudicate on this application to extend time without fully understanding the legal basis on which time may be extended in the first place. The decisions in *Éire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] IR 170 ('*Éire Continental'*), *Goode Concrete v. CRH Plc* [2013] IESC 39 ('*Goode Concrete'*) and *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] 2 IR 441, [2020] IESC 3 ('*Gately*') prescribed a '*test'* governing the grant or refusal of extensions of time to appeal, but each of these cases was concerned with the applicable provisions governing the grant of an extension of time for an appeal from the High Court to this Court or (as will now be more usually the case) the Court of Appeal. Even in that context – as the decision in *Gately* emphasises (see para. 63 of the judgment of the Court and para. 67 of the reported judgment) – the three criteria identified in those cases – *bona fide* intention to appeal, mistake and arguable grounds of

appeal – are guidelines, not a prescriptive test to be rigidly applied in all cases. Instead, the focus must be on the particular facts and circumstances attending each application, and that obviously includes a consideration of the statutory provision pursuant to which an extension is sought. So, while the *Éire Continental* '*test'* is both useful and of general application, it cannot be applied in an individual case without regard to reason for both the provisions of the law which fix the time for an appeal, and the justification for the requirement that this time can be extended.

5. Insofar as s. 7(11) is concerned, the first of these factors is obvious and the second clear from my analysis in *Kirwan* as summarized above. From the point of view of the professional against whom allegations of misconduct are made, the persons making those complaints, the profession as a whole and, for that matter, the general body of consumers of legal services there is an interest in ensuring a process of inquiry into the conduct of, and if appropriate imposition of a disciplinary sanction upon, a solicitor which operates efficiently and which, when it has apparently run its course, can be judged to be and be relied upon as, final. In the context of the particular provisions in issue in this case, the fact that the legislative scheme (ss. 7(13) and 8 of the 1960 Act) envisages that appeals against those findings of misconduct that are accompanied by the most severe of sanctions will be dealt with very promptly, and in conjunction with a confirmation application by the Law Society, strongly reinforces the impression that the time limits are a very important feature of the regulatory landscape (and see my discussion of these issues in *Kirwan* at paras. 99-100). At the same time, the reason I have concluded that it must in some circumstances be possible to

extend time follows from the presumption that neither the constitutional right to litigate nor the jurisdiction of the High Court in the superintendence of the professional conduct of officers of the Court will, without the clearest of language or context, be unreasonably constrained by an absolute time limit, and that the interests of the professional and of the complainant may require that it be possible to extend time where an injustice would otherwise arise. In balancing that requirement against the legislative scheme as I have described it, a number of features of the jurisdiction to extend time follow.

6. In particular, a Court faced with an application to extend time under the provisions contained in s. 7 of the 1960 Act must start from the proposition that the legislative stipulation that an appeal will be brought within a specified period must be given very great weight, and that there be some clearly identified exigency which both explains the failure to bring an appeal within that period, and provides sufficient justification for exceptionally extending it. The categories of cases in which those exceptional circumstances will present themselves are not closed, but they should be understood as most usually arising where the appellant has by his or her actions demonstrated an intention to appeal, but who has by reason of a genuine and reasonable mistake, or on account of reasons beyond their control, been unable to do so. By definition, these are circumstances that will generally become apparent within a short time of the expiry of the limitation period. So, the reason I concluded in *Kirwan* that s. 7(12B) should be construed as enabling an extension of time does not only justify the jurisdiction, but also constrains it (at para. 98):

'if it wished to allow the constitutional right it thus triggered to be extinguished in the context of this very particular regulatory regime by misunderstanding, bad luck or other happenstance, and to deprive the courts of the jurisdiction to remedy an injustice that might thus arise consequent upon the operation of the extremely short limitation period thereby imposed, it was incumbent on parliament to do so clearly, or for there to be a feature of the legislative scheme, purpose or context that could have left no room for doubt but that this was the parliamentary intent.'

(Emphasis in original).

7. Applying these considerations to this appeal, I agree with the conclusion of Charleton, Baker and Woulfe JJ. that this is not a case in which it is appropriate to extend the time for an appeal against the decision of the SDT of September 1999. I would stress two factors in particular.

8. First, it follows from what I have said earlier that the statutory facility for the extension of time in issue here is primarily directed to those who genuinely intended to appeal within the relevant limitation period but were precluded by circumstances beyond their control from doing so. It is in that particular situation that the demands for finality must most obviously bend to the requirements of justice. These two interests can be reconciled by ensuring that the jurisdiction to extend time is one that will most usually fall to be exercised within a very short period of the effluxion of the limitation period that has been

fixed by the Oireachtas. To extend that facility so as to allow a solicitor to petition the Court more than two decades after the finding in question to seek to upset a final determination by reference to fresh evidence, new insights or subsequent experience would make a nonsense of the public interest in the finality of the process that underpins the limitation period in the first place. To be clear, and as Woulfe J. rightly observes in his judgment, this is a factor recognized in all of the cases dealing with extension of time applications: they stress that one important aspect of the *'balance of justice'* that is central to that case law is the entitlement of parties who have obtained final orders to rely upon them thereafter, and the avoidance of the uncertainty that attends the unravelling of those orders many years after they were made (*Goode Concrete* at para. 3.3, *Havbell v. Flynn* [2020] IECA 303 at para. 54 and *Larkin v. Brennan* [2022] IECA 212 at para. 61). It has, however, a particular edge in a statutory context such as that under consideration here where a short period for appeal has been prescribed (and see in this regard *Law Society v. Tobin* [2016] IECA 26).

9. Second, that the appellant believes he had (or for that matter, has) a strong, very strong or unanswerable case does not alter this. Obviously, those who are considering an appeal against any form of order have to make a judgment as to the prospects of success enjoyed by such an appeal. Necessarily factored into that judgment is the possibility of a change of circumstances between the bringing of an appeal and its determination or the emergence in evidence in the course of an appeal of new information that is helpful to the appellant's case. This is a particularly substantial factor in a context in which the appeal is a complete re-hearing, and thus unfettered by a requirement to prove identified

errors of law by the original decision-maker. Once made, the policy of the law strongly favours keeping the appellant to the conscious and informed decision they have reached. In this case, the appellant made precisely such a judgment: he discussed the prospect of an appeal with his advisors, and appears to have decided against such an appeal because of the attitude of the Law Society. That was his decision. He could have equally chosen to appeal in the hope that he could convince the High Court that this attitude was erroneous.

10. Similar considerations were alluded to by Clarke J. in *Goode Concrete* when, addressing the consequences of a change in the law following the expiry of a statutory appeal period, he said the following (at para. 6.3):

> *'Next, it needs to be emphasised that the fact that there may be a development in relevant jurisprudence after a decision of the High Court does not, of itself, provide a legitimate reason for extending time for an appeal. A party who loses a case or a particular application in the High Court has to make a decision, at that time, as to whether it wishes to appeal. Doubtless, at least in some cases, the possibility that there may be an evolution or clarification in relevant jurisprudence should an appeal be brought is a factor which a party ought to properly take into account. Parties, in their assessment of the chances of successfully appealing, must take a view on the possibility of this Court analysing the relevant jurisprudence in a way which might involve an evolution of same to their advantage. Likewise, a party who feels that a decision of the High Court involves a departure from existing jurisprudence has to*

assess the likelihood of this Court agreeing with the departure in question. But in all such cases the party has to make its mind up, at the time of the decision of the High Court, whether it wishes to appeal. If the party decides not to appeal it cannot then complain if it is deprived of the benefit of some subsequent evolution in the jurisprudence which it could have urged on the Supreme Court in its own case but chose not to.'

11. These observations might have been apposite to the situation that presented itself in *MO'S v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 ILRM 149 (*'MO'S'*). The remarks were not referred to by the Court in its judgment in that case, presumably because they were directed to an extension of time for appeal rather than the extension of time for seeking judicial review, as was the issue in *MO'S*. Even then, however, as Baker J. explains in her separate judgment, the decision in *MO'S* should under no circumstances be understood as deciding that a party establishing that they will succeed in their proceedings if time for either bringing an appeal or seeking judicial review is extended will, alone, be reason enough to entitle them to such an extension. It is, as she explains, a relevant factor, but it is not and never has been, in itself a decisive one.