



**THE SUPREME COURT**

**Record Nos. 2022/40 and 2022/41**

**2023 IESC 27**

**Dunne J.**

**Charleton J.**

**O'Malley J.**

**Woulfe J.**

**Murray J.**

**Between**

**BRENDAN KIRWAN**

**Applicant/Appellant**

**-and-**

**JOHN O'LEARY, BRIDGET O'LEARY, SEAMUS TURNER, PETER REDMOND,**

**CORMAC MULLEN, CATHERINE O'CONNOR, SEAN NOLAN, GERALDINE**

**O'LOUGHLIN AND WENDY SMITH, SOLICITORS**

**Respondents**

**-and-**

**SOLICITORS DISCIPLINARY TRIBUNAL**

**Notice Party**

**JUDGMENT of Mr. Justice Woulfe delivered on the 29<sup>th</sup> day of November, 2023**

**Introduction**

1. I have had the benefit of reading a draft of the judgment which Murray J. proposes to deliver herein, and I am happy to gratefully adopt the comprehensive account of the facts, and also the comprehensive account of the proceedings in the Court below, contained in his judgment.

2. I agree with the summary of the issues arising in this appeal as set out by Murray J. at para. 2 of his judgment, and as further elaborated upon by him at para. 36.

3. As regards the first issue, I agree with the conclusion arrived at by Murray J. that this appeal was “made” outside the 21 day period prescribed by s. 7(12B) of the Solicitors (Amendment) Act 1960 (“the 1960 Act”). I have reached a similar conclusion for the reasons carefully set out by Murray J. in his judgment, although I do so with considerable reluctance, given the background circumstances relating to the Covid-19 pandemic and the issuance of Practice Direction HC90.

**Power to Extend Time**

4. Where respectfully I part company with the majority of the Court, however, is when it comes to the second issue, *i.e.* whether s. 7(12B) of the 1960 Act, properly construed, enables the Court to extend the time for the bringing of the type of appeal referred to in s. 7(12A).

5. Sections 7(12A) and (12B) of the 1960 Act provide as follows:

“(12A) The Society or any person who has made an application under subsection (1) of this section may appeal to the High Court within the period specified in subsection (12B) of this section –

- (a) against a finding of the Disciplinary Tribunal that there is no *prima facie* case for inquiry into the conduct of the respondent solicitor...

(12B) An appeal against a finding of the Disciplinary Tribunal under subsection (12A) of this section shall be made within 21 days of the receipt by the appellant of notification in writing of the finding.”

6. At para. 73 of his judgment, Murray J. states that the first step in construing provisions of this kind involves ascertaining the meaning of the words used in the relevant section, that meaning being ascertained having regard to the place of the section in the statute as whole, both being viewed in the light of their relevant context, and discernible purpose. An alternative description of the starting point, but one which is probably very similar in substance, arises *via* the prism of s. 5 of the Interpretation Act 2005. That provision specifies four exceptions to a literal interpretation being the primary rule of statutory interpretation, one such exception arising when one is construing a provision of any Act that is ambiguous.

7. The question thus arising is whether the words used in s. 7(12B), in terms of the plain and ordinary meaning of the language used, are clear or alternatively whether there is any ambiguity. Do the words make it clear that an appeal must be made within a fixed period of 21 days, or are they ambiguous so that the Court can allow an appeal to be made outside that period? The language is only capable of bearing the latter construction if there is some ambiguity, in my opinion.

8. The trial judge gave a very definitive answer to the question arising, when she stated as follows (at para. 52):

“I am satisfied from my consideration of the various statutory provisions the subject matter of the decisions already referred to herein that the Oireachtas, in deciding to provide a complainant with a right of appeal to the High Court against a finding by the Solicitors Disciplinary Tribunal that no *prima facie* case had been made out, intended that any challenge to that determination would have to be made within the strict 21 day time limit provided. The wording of s. 7(12B) of the Act could not be clearer. There

are no words which permit of any equivocation. The word “shall” used in connection with the right of appeal provided for in the section could not be more definitive. Had it been the intention of the Oireachtas to permit the court to extend that time limit in any circumstances, it could have so provided by adding words to the section such as “or such further period as the High Court considers just and equitable in the circumstances” after the reference to the period of 21 days.”

**9.** I fully agree with the conclusion of the trial judge, with one slight qualification as to her reasoning, for the following reasons.

**10.** Firstly, at para. 74 of his judgment, Murray J. acknowledges that there is “without doubt a strong argument that the language used in s. 7(12B) implicitly rules out any extension of the time thus fixed: if a section states that an appeal ‘shall be made’ within a fixed period, then it is easy to see how it can be said to follow that it can *not* be made *outside* that period”.

**11.** In my opinion this argument is not merely strong but compelling. The natural corollary of stating that any appeal “shall be made” within the strict 21 day period is that it shall not be made outside that period. The second proposition is merely the opposite side of the same coin, and there is nothing else in the legislation to displace this natural corollary.

**12.** Secondly, my conclusion arising from the words used in s. 7(12B) is fortified by consideration of the words *not* used in that provision, as per the last point made by Irvine P. in the passage quoted above. She there highlighted the fact that had it been the intention of the Oireachtas to permit the court to extend the 21 day time limit in any circumstances, it could have so provided by adding words to the section such as “or such further period as the High Court considers just and equitable in the circumstances” after the reference to the period of 21 days.

**13.** One might even go further and say that not only *could* the Oireachtas have so provided by adding such words, but that is how in practice it *does* so provide when the legislative intent

is to permit the court to extend time. There are numerous examples of this legislative practice, some of which can be seen in the authorities cited in this appeal.

**14.** In *Noone v. Residential Tenancies Board* [2017] IEHC 556 (“*Noone*”), Noonan J. referred (at para. 21) to s. 88 of the Residential Tenancies Act 2004 (“the 2004 Act”) as “worth noting”, which provision gave express power to the Residential Tenancies Board to extend the time limited by the Act for referral of a dispute to it for resolution. He held that had the Oireachtas wished to provide for a similar power to extend on the part of the court in the case of an appeal to the High Court under s. 123 of the 2004 Act, it would presumably have done so in similar terms.

**15.** In his *ex-tempore* judgment in *Dada v. Residential Tenancies Board* [2018] IEHC 378 (“*Dada*”), McDonald J. viewed the reasoning given by Noonan J. as compelling, and he followed it in again finding that there was no power to extend the time for an appeal to the High Court outside the “relevant period” expressly stipulated in s. 123 of the 2004 Act. He contrasted s. 123 with a previous provision, *i.e.* s. 13(1) of the Housing (Private Rented Dwellings) (Amendment) Act 1993, which provided an express statutory power for the Court to extend time as follows:

“A landlord or tenant may appeal to the High Court on a question of law within three months, **or such longer period as that Court may allow**, after the determination by the Tribunal of the terms of a tenancy under section 5 or on appeal under section 11.”

(Emphasis added)

**16.** Another example of the legislative practice of expressly providing for an extension of time to appeal, where that is the true intention of the Oireachtas, can be seen in s. 79 of the Trade Marks Act, 1996, where the statutory provision expressly yields primacy to the Rules of the Superior Courts: see *Proctor & Gamble v. Controller of Patents* [2001] 2 I.R. 443.

**17.** Thirdly, I consider that my conclusion is consistent with virtually all of the authorities in this jurisdiction, including those listed by Murray J. at footnote 1 to his judgment. I mention in particular in this context the decision of Eager J. in *Curran v. Solicitors Disciplinary Tribunal* [2017] IEHC 2 (“*Curran*”), dealing with the same statutory provision as in this case, which decision Irvine P. was content to follow in the Court below; the decisions of Noonan J. in *Noone* and McDonald J. in *Dada* as referred to above; and the more recent decision of Barniville P. in *Property Services Regulatory Authority v. Dooley* [2023] IEHC 419 (“*Dooley*”), holding that there was no power to extend time for an appeal under s. 70(1) of the Property Services (Regulation) Act 2011.

**18.** As regards the two authorities in that list which may appear to point in a different direction, I might comment as follows. In *Re Varma, a Debtor* [2017] IEHC 218, Baker J. held that the statutory period for the lodging of a notice of objection to the coming into effect of a personal insolvency arrangement under s. 115A(3) of the Personal Insolvency Acts, 2012 – 2015 (“the Acts”) could be extended. However, that decision was based upon various special factors, including the express language of s. 115(A)(3), which differs from the express language of s. 7(12B) of the 1960 Act, the nature of the right of an objecting creditor, and because Baker J. was satisfied that constitutional rights are engaged at the hearing of an application under s. 115A. Baker J. felt that these special factors required a different consideration from her previous decision in *Re Hickey, a Debtor* [2017] IEHC 20, where she held that the statutory period for lodging an application by way of appeal under s. 115A(9) of the Acts was mandatory and could not be extended.

**19.** That brings me to the decision of the Court of Appeal in *Law Society of Ireland v. Tobin* [2016] IECA 26 (“*Tobin*”), which appears to be the major outlier among the authorities, and upon which a good deal of reliance appears to be placed by Murray J. in his judgment. I am

happy to adopt the careful account of *Tobin* contained at paras. 76-77 and 81-82 of his judgment, and will proceed to comment as follows.

**20.** The question set out by Finlay Geoghegan J., at para. 15 of her judgment for the Court in *Tobin*, was “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 the jurisdiction of the Court of Appeal to permit an appeal to be pursued if commenced outside the 21 day period”. Notwithstanding what she described (at para. 9) as the “constitutional context” in which the statutory provision at issue in *Tobin* applied, the test of “clearly and unambiguously” limiting the constitutional right of appeal outside the fixed 21 day period appears similar to, or the same as, the test set out by me at para. 7 above in the context of limiting a purely statutory right of appeal, *i.e.* whether the words used are clear or alternatively whether there is any ambiguity.

**21.** The real significance of the “constitutional context” in *Tobin* appears to me to lie not in the formulation of the above test, but in a very strict application of that test having regard to that specific “constitutional context”, stricter than how the same test might be applied in a case of ordinary statutory construction with no such “constitutional context”. In my opinion, this effect of the specific “constitutional context” can be seen in para. 21 of the judgment, where Finlay Geoghegan J. stated as follows:

“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.** I therefore do not find it surprising that *Tobin* has been distinguished in subsequent authorities, including all of the authorities mentioned by me at para. 17 above. In *Curran*, Eager J. (at para. 35) referred to the circumstances set out in *Tobin* as giving rise to “a different and distinguishable principle”. In *Noone*, Noonan J. adopted and agreed with certain observations made by Hogan J. in *Keon v. Gibbs* [2017] IECA 195, to the effect that the case before him was “quite different” from *Tobin*, since the right of appeal to the High Court from the Tribunal in question was entirely dependent on statutory vesture. In *Dada*, McDonald J. (at para. 18) also cited with approval the same observations of Hogan J..

**23.** In *Dooley*, Barniville P. also referred to *Tobin*, but went as far as to say as follows:

“71. As was fairly acknowledged by counsel for Mr. Dooley, this case is different. We are not concerned here with the constitutional right of appeal from the High Court to the Court of Appeal, but rather a statutory right of appeal from the Authority’s decision to impose a major sanction to the High Court. Unlike the constitutionally guaranteed right of appeal from the High Court to the Court of Appeal under Article 34.4.1 of the Constitution, there is no constitutionally guaranteed right of appeal from the decision of the Authority to the High Court. It is a right created purely by the relevant statutory provision, s. 70(1) of the 2011 Act. *Tobin* is, therefore, of no assistance to Mr. Dooley in this case.”

**24.** In the circumstances I cannot, with respect, agree with the reliance placed upon *Tobin* by the majority of the court in this case. I do think that it was the effect of the constitutional right of appeal to the Court of Appeal on the construction of the section that led to the finding that the legislative provision in question was capable of bearing the construction that it preserved the power to extend time. I agree with the trial judge (at para. 51) that the *obiter* comments of Finlay Geoghegan J. concerning the time limits for appeals not guaranteed by the Constitution (as quoted at para. 21 above) are consistent with the decision of Eager J. in *Curran*,



that the Court did not have the discretion to extend what appears to be a mandatory statutory time limit.

**25.** All of the authorities post-*Tobin*, in seeking to distinguish that decision of a higher court, relied upon the distinguishing feature referred to by Finlay Geoghegan J. in *Tobin* itself, *i.e.* the direct and specific “constitutional context” within which the section was limiting a pre-existing constitutional right of appeal from the High Court to the Court of Appeal.

**26.** Insofar as Murray J. is suggesting in his judgment that this case has a similar constitutional context, with respect I cannot agree that this is so, at least in the sense in which *Tobin* was describing the specific constitutional context arising in that case. As noted above, *Tobin* was dealing with the statutory limitation on a constitutionally guaranteed right of appeal from the High Court to the Court of Appeal. In the present case, however, we are dealing with a statutory limitation on a right of appeal created purely by statute. In his judgment Murray J. suggests that this case involves a situation in which the Oireachtas has conferred a cause of action in the High Court, and having conferred same, the constitutional right to litigate is immediately engaged. With respect, while there may be a *prima facie* constitutional right to litigate in general, albeit one which can be regulated and qualified in all kinds of ways, there is no constitutionally guaranteed right to appeal a decision of a regulatory body to the High Court. As per Barniville P. in *Dooley*, it is a right created purely by the relevant statutory provisions.

**27.** While every case has in a very general sense *some* constitutional context (*e.g.* Article 34; right to fair procedures *etc*), with respect I cannot accept that any general constitutional context which might be viewed as forming part of the backdrop to this case is similar to the specific constitutional context underlying the *Tobin* decision. I also do not think that an expansive approach to “constitutional context” is consistent with *Tobin* itself, and in

particular the express qualification by Finlay Geoghegan J. at para. 21 of her judgment regarding what the correct construction of the statute might be were it not for the pre-existing constitutional right to appeal which featured in that case.

**28.** Fourthly, I consider that my conclusion is also consistent with the approach in our neighbouring jurisdiction, at least prior to some more recent decisions applying the interpretative obligation imposed by the Human Rights Act, 1998 in that jurisdiction, as referred to at footnote 13 of the judgment of Murray J.. The pre-existing position is summarised in Glynn & Gomez, *The Regulation of Healthcare Professionals: Law, Principle and Process* as follows (at para. 30-026A):

“Where a primary statute such as the Medical Act 1983 s. 40(4A) provides a time limit for the lodging of a disciplinary appeal, the court has no power to extend the time beyond the period set out in the statute unless the statute provides an express power to do so (see *Mucelli v. Albania* [2009] UKHL 2; *Mitchell v. Nursing and Midwifery Council* [2009] EWHC 1045 (Admin.) and *R. (on the application of Harrison) v. GMC* [2011] EWHC 1741 (Admin.)).

**29.** Fifthly, I fear that the construction of s. 7(12B) of the 1960 Act favoured by the majority of this Court will cause a great deal of uncertainty in the area of professional regulatory law, where certainty and finality are important values. The invariable practice of the Oireachtas is to provide for a right of appeal from the more important decisions of the regulatory body to the High Court, but invariably within a fixed period of 21 days and without any express power to extend time. There will be particular uncertainty as to how the present decision will transfer across to the majority of regulatory regimes, where the right of appeal is connected with an obligation on the regulatory body to bring a confirmation application to the High Court at the expiration of the fixed period allowed for an appeal: see the comments of Barniville P. in *Dooley*, at para. 77.

## Qualification

30. At para. 9 above, I mentioned having one slight qualification as to the reasoning of the trial judge. This relates to her statement that the wording of s. 7(12B) of the 1960 Act “could not be clearer”, which I think may possibly overstate the position. It is often possible in theory that a provision could be expressed even more clearly. In this instance one could suggest that the provision could not only have expressly spelled out that any appeal “shall be made” within the strict 21 day period, but could also have spelled out what I described in para. 11 above as the natural corollary of this statement, *i.e.* that it shall not be made outside that period.

31. Dodd, *Statutory Interpretation in Ireland* addresses this issue as follows (at para. 2.68):  
 “The fact that a provision or meaning can be expressed in a different manner or is expressed differently (or more clearly) in other statutory provisions, does not necessarily demonstrate that a provision is ambiguous. In *EMS v. The Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 536, Hardiman J. rejected the view that ambiguity could be inferred merely from the existence of alternative wording:

‘I am however unable to agree that there is any ambiguity...Considerable ingenuity was deployed by counsel for the applicant in suggesting alternative forms of words but these all beg the question, is the form of words actually used ambiguous or such as leads to an absurd result? It is not disputed here that the relevant word, in its ordinary and natural meaning is clear and unambiguous. No basis has been advanced for giving the word anything other than its ordinary and natural meaning. In the circumstances, it is immaterial that another form of words might have more clearly expressed the same thought.’”

32. Irrespective of another possible form of words, the question remains whether the intention of the Oireachtas can be ascertained from the words actually used, and possibly also

from certain other words not used, in the sense referred to at para. 12 above. In my opinion, that intention can be ascertained, and the intention was that any appeal would have to be brought within the strict 21 day time limit provided. Again, I reach this conclusion with considerable reluctance, given the background circumstances.

### **Conclusion**

**33.** In conclusion, I would therefore dismiss the appeal.