THE SUPREME COURT

[RECORD NO.: SAP IE 2020 000068]

[Court of Appeal Record No. 2017/573]

[High Court Record No. 2016/82SA]

O'Donnell C.J.
Dunne J.
Charleton J.
Baker J.
Woulfe J.

IN THE MATTER OF BARRY SHEEHAN, AND IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2015, AND IN THE MATTER OF THE SOLICITORS DISCIPLINARY TRIBUNAL

BETWEEN:

BARRY SHEEHAN, PRACTISING UNDER THE STYLE OF BARRY SHEEHAN SOLICITOR

APPELLANT

AND

THE SOLICITORS DISCIPLINARY TRIBUNAL AND BERNARD BINGHAM AND VIOLA BINGHAM

APPELLANT

AND

LAW SOCIETY OF IRELAND

NOTICE PARTY

Ruling of the Court delivered on the 4th day of May, 2022

1. This ruling brings to an end the protracted litigation between the parties which culminated in two hearings before this Court, resulting in two judgments delivered on the 16th September, 2021, and the 17th February, 2022, ([2021] IESC 64 and [2022] IESC 9). It is not necessary to set out the background to these proceedings, as this is comprehensively dealt with in the two judgments referred

2. The outstanding issue between the parties at this stage is the question of costs following the conclusion of the proceedings. Agreement has been reached on this issue as between a number of the participants in the proceedings. For their part, the Law Society has indicated that there is agreement between the Law Society and Flynn O'Donnell, solicitors for the appellant, that, as between the appellant and the Law Society, there should be no order as to costs in respect of the proceedings in the High Court, the Court of Appeal and the Supreme Court. They propose that the appropriate order to be made by way of conclusion of the proceedings is an order dismissing the appeal and affirming the order of the Solicitors Disciplinary Tribunal dated the 5th July, 2016, and that there be no order as to costs in respect of the proceedings as between the appellant and the Law Society as set out above.

3. The position of the Binghams, respondents to the proceedings, is set out in a letter of the 4th March, 2022 from the solicitors for the Binghams, D.A.C. Beachcroft, from which it appears that agreement has been reached between the

appellant and the Binghams, to the effect that they are not seeking any costs in connection with the appeal to this Court, and likewise the appellant is not seeking any order as to costs against the Binghams in that respect. Accordingly, so far as the proceedings before the Supreme Court are concerned, and as between the Binghams and the appellants, there will be no order as to costs. This agreement between the Binghams and the appellants does not affect previous costs orders made in favour of the Binghams in the High Court or the Court of Appeal, and the orders previously made by those courts stand. (Mr. and Mrs. Bingham were lay litigants before those courts and it is understood that the orders for costs made in those courts relate to outlay only).

4. That leaves over the question of costs between the appellant and the Solicitors Disciplinary Tribunal. Both parties have furnished helpful written submissions in relation to this matter, and both are agreed that the question of costs can be determined on foot of the written submissions, and that a further oral hearing is not necessary.

5. In essence, the position of the appellant is that he should be awarded the costs of a number of hearings to date before the High Court and the Court of Appeal, and indeed the Supreme Court, save for the costs incurred in relation to the hearing which resulted in the final judgment of this Court delivered on the 17th February, 2022. He concedes that the costs of that hearing should be awarded to the Tribunal, as against the appellant. In turn, the Tribunal puts forward the position that it is entitled to the costs of the Supreme Court proceedings, and that

there should be no deduction in respect of the costs of the determination of its argument on the scope of the appeal in these proceedings. However, if that approach is not accepted, it suggests that the appropriate order would be that there should be no order as to costs in respect of the Supreme Court proceedings. Insofar as the costs of the Court of Appeal are concerned, it contends that it should be entitled to its costs arising from the proceedings before the Court of Appeal, but concedes that, if this Court does not agree, then it would be its position that no order as to costs would be more appropriate than an order for costs in favour of the appellant. A similar approach is taken in respect of the costs of the High Court.

6. Accordingly, the position of the appellant is that he should be awarded the costs of a number of hearings to date, with the exception of the costs of the hearing leading to the final judgment in these proceedings, given that he was unsuccessful at that stage of the proceedings. He conceded that the Tribunal was entitled to the costs of that hearing. He urged that there should be a set off between the costs incurred at that stage against the other costs which he claims to be entitled to.

7. The issues in these proceedings have at their origin a finding by the Tribunal of misconduct against the appellant in respect of certain of his dealings with the Binghams in relation to their file. It is not necessary to rehearse the issues in that regard which are fully described in the judgments referred to above. The appellant brought a statutory appeal in respect of the finding of misconduct, and

sought in the course of the statutory appeal to raise an issue as to the jurisdiction of the Tribunal to make a finding of professional misconduct against him in the circumstances of the case. As was pointed out in the judgment of the 16th September, 2021, the appeal concerned the breadth of the statutory appeal under the Solicitors (Amendment) Act, 1960, as amended, and whether a party seeking to appeal a decision could raise an argument that the issue is *res judicata*, and a further issue arose in relation to the jurisdiction of the Tribunal by reference to what has been described in the proceedings as a "gateway" provision under the 1960 Act. It was always contended against him that the appellant was not entitled to challenge the jurisdiction of the Tribunal in the course of the statutory appeal and further that any such challenge should have been brought, if relevant, by way of judicial review proceedings. In regard to the issue of the scope of the statutory appeal, the High Court and the Court of Appeal rejected the arguments of the appellant. Having done so, what has been described in the submissions of the Tribunal as the "*merits challenge*" was also considered by the High Court, and the appellant's appeal in that regard was rejected. He then appealed the matter to the Court of Appeal which in its turn rejected his appeal in relation to the merits of the finding of misconduct, and in relation to the scope of the statutory appeal under the 1960 Act. Subsequently, this Court granted the appellant leave to bring an appeal specifically related to the scope of a statutory appeal pursuant to the 1960 Act. Ultimately, this Court found in favour of the appellant, to the effect that he was entitled to raise an issue in relation to *res judicata*, and the issue in

relation to the gateway provision contained in s.7(1) of the 1960 Act. The Court then provided that it would proceed to consider the substance of the matters raised in respect of *res judicata* and the gateway provision. That lead to the second judgment referred to above in which the appellant was unsuccessful, thus leaving in place the finding of misconduct against him.

8. At all times the Tribunal contested the appellant's entitlement to raise the "*jurisdictional issue*". Having said that, the Tribunal has always maintained that the jurisdictional challenge could not succeed, because it lacked the necessary "*factual substratum*". (See the letter of the 19th May, 2017 from the Tribunal's solicitors to the appellant). Ultimately, when the matter came before this Court for the final hearing, the appellant had to accept that there was no basis for a contention that the subject matter of the complaint was *res judicata,* or that it did not fall foul of the gateway provision. In those circumstances, a somewhat different argument which had never been made before was relied on by the appellant. He was unsuccessful in that argument.

9. Accordingly, it is clear from the judgments that while the appellant should have been entitled to raise the arguments as to *res judicata* and the gateway provision in the course of his statutory appeal, ultimately, it was concluded that there was no merit in either of those grounds sought to be relied on by the appellant. Thus, while the appellant succeeded in his arguments as to the scope of the statutory appeal, he was ultimately unsuccessful in his appeal from the finding of the Tribunal in that the finding of misconduct remains.

10. The Court has had regard to the provisions of s.169(1) of the Legal Services Regulation Act, 2015, and to the helpful decision of the Court of Appeal in the case of *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, (Murray J.). Although the ultimate outcome of these proceedings is to dismiss the appeal, it could not be said that the Tribunal has been entirely successful in the proceedings. This Court in its first judgment in relation to this matter allowed the appellant's appeal insofar as the argument as to the scope of the statutory appeal was concerned. The consideration of those issues on the merits then proceeded, and, as has been seen, the appellant was unsuccessful on these issues.

11. In the circumstances as set out above, the appellant has sought costs of against the Tribunal, incurred after the 14th December, 2016 in respect of the matters which resulted in the judgment and order of the High Court of the 31st October, 2017. It does not appear to be appropriate to make such order given that the appellant has been ultimately unsuccessful in his arguments on the challenges to the jurisdiction of the Tribunal and, further, the finding of misconduct has never been displaced. It should be borne in mind that there was no factual basis for the actual challenges sought to be relied on by the appellant in relation to *res judicata* and the gateway provision as was finally accepted before this court in the course of the last hearing. It would appear to be appropriate to take the same course in respect of the proceedings before the Court of Appeal. However, given that orders for costs were made against the appellant in respect of those hearings,

the orders in favour of the Tribunal in those Courts should be vacated as the Tribunal had always contested the appellant's entitlement to raise those arguments, albeit that they turned out be unsuccessful.

12. So far as the proceedings before this Court are concerned, given that the appellant was successful in the first hearing and that the Tribunal was successful in the second hearing, it appears that the logical course would be to make no order as to costs as between the appellant and the Tribunal and it is so ordered.