Neutral Citation No: [2024] NIKB 8	*Ref:* **McB12391**
	ICOS No: **22/93060/01**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **08/02/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

COMMERCIAL DIVISION

_____

DANIEL McATEER

Applicant/Appellant

v

SOLICITORS' DISCIPLINARY TRIBUNAL
BRENDAN FOX
MICHAELA DIVER
DECLAN MAGEE

Defendants/Respondents

_____

The Applicant, Mr McAteer, appeared as Litigant in Person
Mr Coghlin KC with Mr Dunlop (instructed by Carson McDowell, Solicitors) for the Respondents

_____

McBRIDE J

Introduction

[1] On 26 October 2022, Daniel McAteer, applicant/appellant issued a notice seeking the following relief:

> "(i) Permission granting leave pursuant to Order 55/or the inherent jurisdiction of the court to appeal a decision of the Solicitors' Disciplinary Tribunal dated 16 August 2021 in which the Tribunal concluded that there had been no misconduct by the three solicitors complained about.
>
> (ii) An extension of time within which to lodge an appeal against the said decision.

(iii) Such further or other relief as the court may deem appropriate.

(iv) An order providing for the costs of and incidental to this application."

[2] Mr McAteer appeared as a litigant in person. The defendants, Brendan Fox, Michaela Diver and Declan Magee are all solicitors who were the subject of a complaint by Mr McAteer to the Solicitors' Disciplinary Tribunal ("SDT"). The solicitors were represented by Mr Coghlin KC and Mr J Dunlop of counsel.

[3] Under Article 53(4) of the Solicitors (Northern Ireland) Order 1976 the Law Society is entitled to appear and be heard on the hearing of an appeal against a decision of the SDT. At a case management hearing the Law Society was invited to appear and to make representations. Subsequently the Law Society advised the court that it did not intend to participate in the proceedings.

Evidence supporting the application

[4] The application was grounded on the affidavit of Mr McAteer sworn on 25 October 2022. In his affidavit he avers that the present application was made following the dismissal of judicial review proceedings brought by him against the SDT. Scoffield J refused leave to apply for judicial review and at para [75] of his judgment he stated:-

> "[75] However, if and insofar as the applicant is now seeking to challenge the substantive conclusions of the Tribunal, this again is an area where he plainly has or had an alternative remedy by way of appeal under Article 53 of the 1976 Order. In fact, in his preliminary submission filed in response to the court's initial case management directions order, Mr McAteer said that he could see that an appeal to the High Court "might be more appropriate" in relation to the findings of the SDT that there was no misconduct. He indicated that he would issue an application for leave to the High Court and issue a notice of appeal. … Alternatively, Mr McAteer asked that the court give leave so that the notice of appeal could be lodged. However, such an application should be made in the proper manner in accordance with Part II of RCJ Order 55 and RCJ Order 106."

Further, at para [83] Scoffield J stated:

> "[83] Nonetheless, for the detailed reasons given above I refuse leave to apply for judicial review. This is principally

> on the basis that the Tribunal's decision-making in late 2017 should have been challenged by way of appeal and, in any event, should have been challenged at that time, years before these proceedings were eventually commenced. The complaint about delay in the Tribunal issuing its determination is now academic. Any complaint on the substance of the Tribunal's decision on the aspects of the complaints which it considered should also have been pursued by way of appeal."

[5] Following the dismissal of his application for judicial review Mr McAteer issued the present proceedings pursuant to Article 53 of the Solicitors' (Northern Ireland) Order 1976 ("the 1976 Order"). Although these proceedings bore the same title as the judicial review proceedings the court office treated it as a separate application, and it has been given a different ICOS number.

Background

[6] Mr McAteer is a chartered accountant and businessman. Throughout his career he has been involved in several property transactions and has worked with a number of business partners. In or around 2003 former business partners, the Gurams, issued proceedings in the High Court against Mr McAteer relating to a sale and lease back of the Roebuck Inn. The judgment given in the Roebuck Inn case in 2008 has spawned an unprecedented level of litigation involving Mr McAteer and includes proceedings brought by and against him involving former partners, banks, the PSNI, the Legal Services Agency and a number of former solicitors. In addition, Mr McAteer is the subject of a complaint by his own professional body arising out of comments made by Deputy Judge Smyth in the Roebuck Inn judgment.

Complaints against the three solicitors

[7] Initially Mr Fox, then a solicitor in Cleaver Fulton Rankin, acted on behalf of Mr McAteer and some of his business associates. Subsequently, Mr Fox and Ms Diver, a trainee solicitor in Cleaver Fulton Rankin acted on behalf of Mr McAteer's former business associates in litigation against Mr McAteer. Arising out of the course of this litigation Mr McAteer issued High Court proceedings against Mr Fox and Ms Diver claiming, inter alia, negligence, breach of contract and conspiracy to destroy his business and reputation ("conspiracy action"). Mr Magee, a solicitor in Carson McDowell, acted on behalf of Mr Fox in the conspiracy action, being instructed by the insurers who provided professional indemnity insurance to solicitors in Northern Ireland.

[8] During the course of the conspiracy action Mr McAteer made a number of complaints to the Solicitors' Disciplinary Tribunal in respect of Mr Fox, Ms Diver and Mr Magee. The complaints were made in October 2012 and in October 2013 the Solicitors' Disciplinary Tribunal (SDT) decided not to investigate the complaints. This

decision was judicially reviewed, and the Tribunal's decision was quashed by the High Court in June 2014. The matter was not remitted back to the SDT. Mr McAteer then issued updated and comprehensive complaints against Mr Fox and Ms Diver in and around September 2017 and also initiated complaints against Mr Magee in October 2017 to the SDT. The complaints are of a wide ranging nature and include complaints of wrongdoing and misconduct in respect of all three solicitors. The complaints against Mr Fox and Ms Diver include allegations of fraud, unlawfully interfering in the SDT process, intimidation, false accounting, acting with a conflict of interest, prolonging litigation, misconduct in litigation, conspiracy, interference with experts, misconduct in personally serving a statutory demand and failing to provide discovery and running up unnecessary legal costs. In respect of Mr Magee, the complaints include a complaint that he abused the proper process of the court including by obtaining judgment against Mr McAteer and his wife in their absence; wrongly trying to claim costs against him and his wife; giving false information to the Legal Services Commission; breaching confidence, providing false information in relation to discovery and wrongly continuing with litigation thereby incurring unnecessary legal costs.

The conspiracy action

[9] The conspiracy action was heard by Weatherup J over a protracted period of time. It was adjourned to allow the SDT to deal with the complaints made by Mr McAteer against Mr Fox and Ms Diver. Due to the length of time involved in dealing with those complaints, the conspiracy action resumed. During the course of the action, Mr McAteer made an offer to settle the litigation, but this was rejected by Mr Fox and the case therefore proceeded to hearing. Ultimately, Mr McAteer was unsuccessful but Weatherup J who had been asked to determine costs ordered Mr McAteer to pay only 10% of Mr Fox's costs. Weatherup J ruled that Mr Fox's failure to engage with Mr McAteer in September 2012, when agreement was reached with the other parties, meant that he was responsible for the prolongation of the legal proceedings resulting in the use of 28 days of the court's time which was unnecessary, and resulted in the unnecessary accumulation of substantial legal costs. There are a number of judgments by Weatherup J and also the Court of Appeal in respect of the costs issue and in the course of these judgments Weatherup J and Gillen LJ made comments about the conduct of Mr Fox.

Proceedings before the SDT

[10] After the complaints were lodged by Mr McAteer against the three solicitors, the SDT sent an email to Mr McAteer dated 21 December 2017 at 17:12 stating as follows:

> "… I attach copies of the correspondence to those solicitors which sets out the Tribunal's decision following its consideration of your complaints. As had already been indicated to you, the Tribunal decided that there was a

> prima facie case in relation to parts of your complaint and you will note those parts which are to be answered by the solicitors in question. In relation to the other aspects of your complaint, you will see that the Tribunal decided that a prima facie case had not been shown. Accordingly, matters are proceeding only in relation to the specific allegations as set out in each of the letters to each solicitor."

[11] The attached correspondence to each of the solicitors advised that the Tribunal had considered the complaint made by Mr McAteer and had decided that "a prima facie case has been shown in relation to part of the complaint (see further below). The panel of the Tribunal which considered the complaint were unanimous in their view that many of the matters raised by Mr McAteer had been considered and adjudicated upon in the decisions of Weatherup J which were included in the papers furnished by Mr McAteer."

[12] The Tribunal indicated in respect of Mr Fox that they were going to proceed and investigate and determine the following complaints:

> "That you, pursuant to Article 44(1)(e)(i) of the 1976 Order have been guilty of professional misconduct or of other conduct tending to bring the solicitors profession into disrepute in that:
>
> (a) On or about 18 September 2007 in the course of legal proceedings you wrote to an expert witness in an inappropriate manner and in so doing attempted to and sought to influence the terms in which the expert's opinion was expressed and with the outcome that the report was changed in part as a result of the comments (see paras [47]-[48] and [50] of the decision of Weatherup J dated 15 July 2015); and
>
> (b) By your failure to engage with the opposing party in litigation in or around September 2012 when agreement had been reached between the parties on a form undertaken to resolve the litigation, that you were responsible either wholly or in part for the prolongation of the legal proceedings resulting in the use of 28 days' court time which were considered and ruled as unnecessary by Weatherup J and also resulting in the unnecessary accumulation of substantial legal costs."

[13] In respect of Ms Diver, the Tribunal advised that it was going to proceed and investigate and determine the following complaints:

> "That you, pursuant to Article 44(1)(e)(i) of the 1976 Order have been guilty of professional misconduct or of other conduct tending to bring the solicitors' profession into disrepute in that on or about 10 August 2007 in the course of legal proceedings, you wrote to an expert witness in an inappropriate manner and in so doing attempted to and sought to influence the terms in which the expert's opinion was expressed and with the outcome that the report was changed in part as a result of the comments (see paragraphs 45-46 and 60 of the decision of Weatherup J dated 15 July 2015."

[14] In respect of Mr Magee the Tribunal indicated that it was going to proceed and investigate and determinate the following:

> "That you, pursuant to Article 44(1)(e)(i) of the 1976 Order have been guilty of professional misconduct or of other conduct tending to bring the solicitors professions into disrepute in that, by your failure to engage with the opposing party in litigation in or around September 2012, when an agreement had been reached between the parties in a form of undertaking to resolve the litigation, that you were responsible either wholly or in part for the prolongation of the legal proceedings resulting in the use of 28 days court time which were considered and ruled as unnecessary by Weatherup J and also resulting in the unnecessary accumulation of substantial legal costs."

[15] On 22 December 2017, Mr McAteer wrote to the Secretary of the Tribunal expressing surprise at their decision. He concluded his email by stating:

> "For the avoidance of doubt and in the interests of transparency, I should put you on notice that in the event that the SDT has decided that it is going to ignore all the other complaints, I will have no option but to apply for a judicial review of that decision."

[16] The Tribunal then proceeded, having found a prima facie case in relation to limited elements of the complaints to require a response from each of the three solicitors concerned. The three solicitors swore affidavits in April, May and June 2018. Initially, these were not disclosed to Mr McAteer or the Tribunal as Mr Magee, in particular, sought redaction of certain parts of his affidavit as a result of ongoing litigation between the various parties. At this time the conspiracy action was ongoing,

and Mr Magee took the view that the contents of his affidavit, or at least parts of it, should not be disclosed to Mr McAteer as they were covered by litigation privilege. This issue was not resolved until January 2019 and at that stage the Tribunal then received the affidavits by the three solicitors.

[17] Having considered these affidavits the Tribunal decided in July 2019 that there was a cause for an inquiry in relation to the matters in respect of which it had previously determined there was a prima facie case. They advised the parties that they had now determined there was a cause for inquiry and listed the case for hearing in September 2019.

[18] On 19 September 2019, the Secretary to the Tribunal, circulated a summary of the allegations to be determined.

[19] At the hearing on 20 September 2019, Mr McAteer applied for an adjournment, and further asked the Tribunal to give him reasons for its earlier decision that it was not investigating all his complaints. The proceedings before the Tribunal were recorded and after substantial efforts were made by Mr McAteer, he succeeded in obtaining a copy of the CD, the transcript of which I have read, and which confirms that the Tribunal did not give reasons for the earlier decision of the SDT to only allow some of his complaints to proceed to the next stage of the process. At that stage the panel sitting was differently constituted from the panel which made the earlier decision, as a number of the former panel members had retired.

[20] After lodging his complaints Mr McAteer engaged in regular correspondence with the Tribunal. In this regular email correspondence he expressed dissatisfaction with the course adopted by the SDT and stated that he had lost confidence in their integrity, effectiveness and efficiency. He further engaged in correspondence with the President of the Law Society; made a complaint to the Office of the Lord Chief Justice regarding the SDT and on 6 May 2019 made a complaint to Ms Cree, the Legal Services Oversight Commissioner designate.

[21] The correspondence spans several years. I have carefully read and considered the body of correspondence referred to the court by Mr McAteer and I am satisfied that the first time he asked the SDT for reasons in writing why the SDT had determined that a prima facie case had not been shown in respect of some of his complaints was in an email dated 24 September 2019. In this email he stated:

> "I refer to the narrow list of complaints that I was provided with on the eve of the hearing. It is clear to me from my attendance at the SDT that the many other complaints are, for one reason or another, not going to be dealt with. I would be extremely grateful if this could now be confirmed in writing together with the reasons as to why the complaints are not being acknowledged."

[22] The hearing before the SDT was adjourned on 20 September and the hearing resumed on 11 January 2020. After the hearing the panel reserved its decision.

[23] Thereafter Mr McAteer continued to regularly correspond with the Tribunal. In particular on 20 March 2020, he emailed the Secretary and Mr L Edgar, the Chairman and for the first time alluded to his rights of appeal under the Solicitors' (Northern Ireland) Order 1976. He stated as follows:

> "Section 53(2)(b) Solicitors' (Northern Ireland) Act 1976 does provide that leave to appeal a decision can be sought from the High Court. However, in the present case there has not been a formal order not to investigate the matters complained of. It occurs to me that I need such an order so that I can lodge the appropriate application. It also occurs to me that in keeping with past performance, the Chairman/Tribunal will ignore/disregard my requests. Nevertheless, I will be grateful if you, as Chairman , can now issue a formal order, confirming that you have taken the decision not to investigate (sets out the complaints)
> This matter has been raised and is alive issue in the context of other High Court litigation that I am involved in. I would therefore be grateful for a prompt reply by no later than Friday 27 March 2020. In the event that I do not hear from you, I shall conclude that the position is as I have put it, and that the order is made, and I shall proceed accordingly."

[24] By July 2021 the Tribunal still had not produced its decision and Mr McAteer made a complaint regarding this to the Office of the Lord Chief Justice and the Legal Services Oversight Commissioner designate. He further sent a pre-action protocol letter threatening judicial review proceedings on the grounds of delay on 31 July 2021.

[25] The SDT issued its decision on 16 August 2021.

SDT decision

[26] The SDT decision is formally entitled "Findings and Order of the Solicitors' Disciplinary Tribunal Constituted under the Solicitors' (Northern Ireland) Order 1976." The preamble sets out that Mr McAteer had lodged complaints against the three solicitors alleging that each was guilty of professional misconduct. At para [B] it states:

> "The Tribunal, pursuant to Article 46(1)(b) of the Solicitors' (Northern Ireland) Order 1976 (as amended) decided that a prima facie case has been shown in relation to some of

> the allegations contained in the complaint (as set out below) and thereafter held an inquiry."

After setting out the complaints against the three solicitors and referring to the authorities dealing with the meaning of professional misconduct the SDT determined that the allegations were not made out and dismissed all the complaints made against each of the three solicitors. In the course of its ruling the SDT referred to and relied on comments made by Weatherup J and Gillen LJ in the course of High Court proceedings relating to the solicitors' actions in respect of the alleged interference with an expert witness, the failure to resolve litigation resulting in prolongation of the case and the incurring of unnecessary court time and legal costs.

Judicial review proceedings

[27] In the judicial review proceedings Mr McAteer challenged two decisions of the SDT, namely:

(i) its decision to limit the scope of its investigations in relation to complaints made by him against Mr Fox, Ms Diver and Mr Magee; ("scope decision") and

(ii) its failure to issue a timely decision.

[28] The grounds of judicial review included illegality including a failure to apply a proper definition of misconduct; the leaving out of account material considerations and, in particular, what Mr McAteer considered to be evidence of misconduct in respect of the wide variety of complaints he had made; procedural unfairness; irrationality; improper motive; bad faith and/or bias; breach of a variety of provisions of the 1976 Order; breach of the substantive legitimate expectation that he would be afforded an effective remedy in breach of a variety of his Convention rights.

[29] The SDT resisted the application for leave on the basis that Mr McAteer's grounds of judicial review did not have any realistic prospect of success and further on the grounds his application was out of time and there was an alternative remedy.

[30] After giving a detailed judgment, Scoffield J refused leave to apply for judicial review. He indicated in his judgment that this was principally on the basis that the SDT's decision on scope made in late 2017, should have been challenged by way of appeal provided for under the Solicitors (NI) Order 1976 ("the 1976 Order") and further stated that any complaint in respect of the Tribunal's decision to dismiss the complaints should also have been pursued by way of appeal under the 1976 Order.

[31] Mr McAteer has appealed the decision of Scoffield J and has also issued the present proceedings.

Statutory framework

[32] Part 3 of the Solicitors' (Northern Ireland) Order 1976 ("the 1976 Order") entitled "Professional Practice Conduct and Discipline" provides for the creation of the SDT and the procedures to be followed in respect of complaints made against solicitors. Article 44(1) set out the applications and complaints which shall be heard and determined by the SDT, and these include as per paragraph (e):

> "(e) a complaint by the Society or any other person—
>
> (i) that a solicitor has been guilty of professional misconduct or of other conduct tending to bring the solicitors' profession into disrepute; …"

[33] Where an application of complaint is made under Article 44(1)(e) by a person other than the Society or lay observer, Article 46 provides that the Tribunal:

> "(a) if they decide that a prima facie case has not been shown, shall so notify the applicant or complainant and the solicitor and take no further action; or
>
> (b) if they decide that a prima facie case has been shown shall serve on the solicitor—
>
> (i) a copy of the application or complaint;
>
> (ii) a copy of the affidavit;
>
> (iii) copies or, at the discretion of the Tribunal, a list of the relevant documents; and
>
> (iv) a notice requiring the solicitor to send to the Tribunal, within a specified period, an affidavit by him in answer to the application or complaint, together with any documents, or duly authenticated copies thereof, on which he may rely in support of his answer."

[34] Article 46(4) further provides that after the expiration of the relevant period the SDT shall consider the affidavits and other documents furnished by the solicitor and decide whether there is a "cause for inquiry." If the SDT decide there is no cause for further inquiry they shall notify the solicitor and complainant and take no further action. If the SDT decides there is a cause for inquiry it shall hold an inquiry.

[35] Article 46(5) then provides that where a complainant or solicitor is notified that either a prima facie case has not been shown or that there is no cause for inquiry, the SDT "shall, if so required, in writing by the complainant or the solicitor, make a formal order embodying their decision."

[36] Article 53 provides a right of appeal and in accordance with Article 53(2)(b) Mr McAteer's right of appeal to the High Court is with leave. Article 53(6) provides a time limit for appeals and states:

> "An appeal under this Article shall be brought within 21 days from the date of the making of the order or refusal appealed against."

[37] As appears from these provisions there is a three-stage complaint process. After a complaint is received the SDT decides whether a "prima facie" case has been shown. If the SDT determines a prima facie case is not shown it will notify the parties and take no further action. In accordance with Article 53 this decision can be appealed to High Court with leave. If the SDT determines a prima facie case has been shown it will then ask for a response from the solicitor. At this second stage, after considering the response and papers provided by the solicitor, it decides whether there is a cause for further inquiry. If there is no cause for further inquiry it will advise the parties accordingly and take no further action. Again, there is a right of appeal in respect of this decision. If the SDT determine there is a cause for inquiry it will move to the third stage which is a hearing or inquiry.

Preliminary Issue

[38] Mr McAteer seeks leave to appeal 2 decisions by the SDT namely: -

(a) Decision made in 2017 that a prima facie case had not been shown in respect of some of his complaints – "scope decision" and

(b) Decision dated 16 August 2021 dismissing all his complaints.

[39] It was agreed at a case management hearing that the court should hear and determine as a preliminary issue whether the proceedings should be struck out on the grounds they were lodged out of time.

Time Limit

[40] Article 53(6) is written in mandatory terms and provides that the appeal "shall be brought within 21 days from the making of the order or refusal appealed against."

When does time commence?

[41] Mr McAteer submitted that time runs from the date the SDT provides a formal order with reasons. Although Article 53(6) does not expressly state the order should provide reasons the court should read the words "with reasons" into Article 53(6) so

that it reads an "appeal shall be brought within 21 days from the making of the order giving reasons." He submitted that he had still not received a reasoned decision in respect of either the scope decision or the SDT's decision to dismiss his complaints and accordingly time had not begun to run. In the alternative he submitted that Article 53(6) provides that time runs from the date the formal order issues. He submits that no formal order was issued by the Tribunal in respect of its scope decision. He accepts that he received notification of the scope decision by email dated 21 December 2021 but submits that this email is not an order and therefore time does not begin to run in respect of the scope decision until the SDT formally notified him on 16 August 2021 that it had determined that a prima facie case had not been shown in respect of some of his complaints. Accordingly, time in respect of the scope decision and the decision to dismiss his other complaints runs from the date of the order dated 16 August 2021. He conceded that even if the court accepted time runs from this later date his application was still out of time but submitted the court should extend time.

[42] In contrast Mr Coghlan submitted that there was no basis for the court to read the words "with reasons" into the 1976 Order. In respect of an appeal from a SDT's decision on scope he submitted that time runs from the date the SDT notifies the party of this decision. This is a decision which is subject to a right of appeal and time runs from the date of notification as under the provisions of the 1976 Order the SDT is mandated once it decides there is no prima facie case to take no further action. In this case Mr McAteer was notified of the scope decision on 21 December 2017 and accordingly time runs from this date.

[43] In the alternative, if the court considered an order was required in respect of the scope decision, Mr McAteer in his email 20 March 2020 treated the notification email as an order when he stated after requesting a formal order and expressing doubts about receiving such an order, "In the event I do not hear from you I shall conclude that the position is as I have put it and that the order is made and I shall proceed accordingly." Accordingly, time at the latest runs from the date of this email.

[44] In respect of a decision by the SDT after a hearing to dismiss complaints, he accepted that time runs from the date of the order. In this case the date of the SDT order is 16 August 2021 and all parties (subject to Mr McAteer's arguments about need for reasons) accepted time runs from this date in respect of the SDT decision to dismiss his complaints.

Consideration of question when does time begin to run

1. ***Should the court read the words "with reasons" into the statute?***

[45] Article 53(6) does not expressly state that the SDT must provide reasons before time runs. Rather it provides that time runs from the date of the order. There is no ambiguity in the words of the statute, and I do not consider it necessary or appropriate

to read the words "with reasons" into the statute. Time limits are important to bring finality to litigation and I do not consider that reading the statute in this way impairs a party's article 6 rights. This is because, a complainant can issue an appeal and subsequently obtain reasons as Order 106 rule 13, which sets out rules relating to proceedings relating to solicitors, provides that the court can direct the Tribunal to furnish the court with a written statement of their opinion on the case which is the subject of appeal. The existence of this provision, I find, further indicates that the statute does not require the order to set out reasons because if there is a need to consider reasons that can be dealt with subsequently by the Tribunal being asked to provide a written statement. Accordingly, I am satisfied that the provision should not be interpreted to mean an order with reasons.

2. Does time run from date of notification or date of order?

[46] Under Article 46 when the Tribunal decides a prima facie case has not been shown, the Tribunal is required to notify the applicant. Article 46(5) provides that where a complainant has been notified of a decision by the Tribunal that a prima facie case has not been shown that person or the solicitor can request in writing and the Tribunal is required to make a formal order embodying their decision. Article 53(6) states that an appeal from the decision that there is no prima facie case shall be brought within 21 days from the date of the making of "the order." Article 53(6) makes no reference to the date of notification. Having regard to all the provisions of the 1976 Order I am satisfied that time for appeal runs from the date of the service of a formal order and not the date of notification.

[47] In respect of the decision on scope I do not consider the notification given by the SDT to Mr McAteer dated 21 December 2017 can be considered an order. It was simply an informal email lacking any formality or features normally associated with an order. I am therefore satisfied that the first time an order was issued in respect of the decision on scope was the order dated 16 August 2021.

[48] I also reject the argument made by Mr Coghlin that Mr McAteer treated the notification as a formal order because of his statement in his email dated 20 March 2020, "I shall conclude …the order is made." It is my view that Mr McAteer cannot change the interpretation of the 1976 Order simply by saying that he will consider that an order is made when, in fact, no order was issued by the Tribunal until 16 August 2021.

[49] Mr Coghlin submitted that it could not have been the intention of the legislature that the 21 days would run from the date of the issue of a formal order in circumstances where neither party requested the order as this would go against the principle of finality. I reject this submission on the basis that the wording of the statute is unambiguous that time runs from the date of the order. Further, in circumstances where neither party requests an order, and the consequent delay affects a party's ability to defend proceedings that party could argue that leave to appeal be refused or proceedings be struck out as an abuse. I, therefore, do not consider that interpreting

the legislation as meaning time runs from the date the order is issued is contrary to the principle of finality.

[50] Accordingly, I am satisfied that time in respect of the scope decision and the decision to dismiss Mr McAteer's complaints runs from 16 August 2021.

[51] In respect of both decisions of the SDT, time expired on 22 September 2021. The present application seeking leave to appeal both decisions was not issued until 26 October 2022. Accordingly, the appeal in respect of both decisions is substantially out of time.

3. Can/should the court extend time?

Relevant Jurisprudence

[52] In *Davis v Northern Ireland Carriers* [1979] NI Lowry LCJ stated:

> "Where a time limit is imposed by statute it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power, such as that found in Order 64 Rule 7 the court must exercise its discretion in each case …"

[53] Order 55 of the Rules of the Court of Judicature (Northern Ireland) 1980 governs appeals, references and applications under statutory provisions and rule 14 specifically sets out time the limit for bringing an appeal. Order 55 does not, however, confer a dispensing power upon the court and rule 13(3) specifically provides that Order 55 shall take effect "subject to any provision made in relation to that appeal … under any statutory provision." Thus, insofar as Order 55 rule 14(2) imposes a time limit requiring an appellant bringing an appeal under a statutory provision to do so within 21 days from receiving notice of the decision, which time limit can be extended under Order 3 rule 5, the time limit set out in Order 55 rule 14(2) is subject to the statutory time limit which time limit cannot be extended under Order 3 rule 5.

[54] The time limit set out in the 1976 Order is 21 days and the 1976 Order does not contain a dispensing power. Early authority regarded statutory prescribed time limits for appeal which contained no dispensing power as absolute. Valentine in *Civil Proceedings in the Supreme Court* at paras 1801 and 1802 summarises the position as follows:

> "Many statutes confer jurisdiction on the High Court by action, appeal, application reference or otherwise … If a statute confers jurisdiction on a court and lays down unqualified time limits for application, the court has no jurisdiction to hear a late application. … The High Court

> has original inherent jurisdiction, inherited from the pre-1877 courts, but there is no such thing as inherent appellate jurisdiction. Jurisdiction to hear the appeal depends upon strict compliance with the procedure for appealing laid down by statute, save insofar as the statute contains a dispensing power."

[55] This position however changed with a line of authority commencing with *Tolsky Miloslavsky v UK* [1995] 20 EHRR 442 which recognised that any limitation on a person's access to a court must not breach article 6(1) of the Convention. At para 59 the court stated:

> "The court must be satisfied that the limitations applied do not in any way restrict or reduce the access left to the individual in such a way or to such an extent that the ***very essence of the right*** is impaired."

[56] This decision led to the Supreme Court decision in *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20 in which the court departed from the earlier line of domestic authority. Lord Mance giving the majority judgment stated:

> "33. In so far as the proceedings involve under the Statute a right of appeal…Article 6(1) also requires that it be free from limitations impairing 'the very essence' of the right…
> …
>
> 39. …the statutory provisions concerning appeals can and should be read subject to the qualification that the court must have a discretion in exceptional cases to extend time both for filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6…The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent it would do so, it must have power to permit and hear an out of time appeal…"

[57] In *Adesina v Nursing and Midwifery Council* [2013] WLR 3156 a case involving an appeal from a professional disciplinary body, the Court of Appeal considered that the reasoning in the immigration case of *Pomiechowski* applied, notwithstanding the differences between an immigration case and a regulatory appeal. The court held that the statutory time limit for appeal set out in the Nursing and Midwifery Order 2001 was not absolute and in exceptional cases, where to do otherwise would deny the very essence of appeal, the court should extend time to the minimum extent necessary to

secure compliance with the Convention. *Stuewe v Health and Care Professions Council* [2022] EWCA 1605 accepted that the law was now settled, and Carr LJ suggested that the *Adesina* principle was a duty, not a power or discretion to extend time to the minimum extent necessary, where to deny a power to extend time would impair the very essence of the right of appeal – paras [48], [49] and [54].

[58] In determining whether the operation of the statutory time limit would have this effect in any given case the court must look at all the circumstances. This will include consideration of the steps taken by the appellant and whether he has done everything he can to bring the appeal timeously or whether there were circumstances beyond his control which prevented him bringing the appeal. *Adesina* sets out some examples where the court would extend time – namely where the person is unaware of the decision, or where he is so seriously ill, he is unable to issue proceedings. Each case will ultimately turn on its own facts, but the existing case law demonstrates that difficulties in securing legal representation, or funding are rarely sufficient. The test is one of exceptionality and as a general rule therefore the test is only met in a small number of cases.

[59] I am satisfied that this is a case in which the statute has set an absolute time limit without a dispensing power. In those circumstances, in accordance with section 3 of the Human Rights Act, I must read down the statutory provision as conferring a power to extend time in circumstances in which an absolute time limit would impair the "very essence" of the right to appeal conferred by statute and I must extend time by the minimum extent necessary to ensure compliance with the Convention.

Submissions by Mr McAteer to extend time

[60] Mr McAteer set out his reasons for an extension of time at paragraph 83 in his skeleton argument as follows:

> "In relation to the *Adesina* principle I respectfully say that the court can and should take into account the relevant circumstances in relation to my engagement with the SDT. These include the resources of the parties, the seriousness of the conduct complained about, the repeated request to be provided with the order/decision over a 4½ year period, referrals to the Law Society, the Office of the Lord Chief Justice, Mrs Marion Cree and others, the refusal by Mr Edgar to provide a copy of the audio recording and finally, the 17 month delay in the production of the omnibus order. In short:
>
> (a) I had done everything reasonably possible to have the matter dealt with promptly; and

(b) It was the conduct of the SDT itself that denied me "a meaningful opportunity" to file the appeal notice."

[61] Mr McAteer in his skeleton argument and in his oral submissions, further submitted that the court should extend time because he was delayed in making his appeal as he was pursuing another remedy, namely judicial review. Secondly, the failure of the SDT to provide him with reasons meant that he did not know what he was appealing, and he needed to understand the reasoning of the SDT to launch an appeal. Thirdly, he submitted that the solicitors knew that he intended to bring an appeal, and this was made known to them in the correspondence as far back as March 2020 and, therefore, there is no prejudice to them. Fourthly, he submitted there was a disparity of resources and, finally, he submitted that the overarching principle of fairness necessitated an extension of time so that the complaints he was making could be properly investigated. Finally, he submitted that the entire professional regulatory process and the existence of the SDT itself is based on promotion of public confidence in the legal profession and the maintenance of high standards. Given that Scoffield J in his judgment described Mr McAteer's experience as being "not particularly well served by the SDT process" the court should extend time on the grounds of public interest.

[62] In reply, Mr Coghlin submitted that there were no exceptional circumstances to extend the absolute time limit imposed by statute and that there was no good reason given by Mr McAteer why he did not bring his appeals within the time limit and, accordingly, the court should refuse to extend time and strike out the proceedings.

Consideration – Should time be extended?

Did the actions of SDT impair Mr McAteer's ability to appeal?

[63] I have carefully considered the conduct of the SDT and note, in particular, the significant delay in the process and the significant delay before it issued its decision. I also note the failure to provide timely responses to queries raised by Mr McAteer and the protracted process Mr McAteer had to follow to obtain the CD recording of the hearing. I agree with Scoffield J's view that Mr McAteer was not particularly well served by the SDT process. Mr McAteer had to waste time and energy contacting other bodies in an attempt to get a decision for the SDT and, ultimately, had to issue judicial review proceedings to obtain the decision dated 16 August 2021. I am satisfied however that none of the complaints made by Mr McAteer in respect of the SDT process and the existing system of regulation of solicitors, in any way impaired his ability to bring an appeal. There was nothing done by the SDT after 16 August 2021 which impaired his ability to appeal and I, therefore, reject the argument that the conduct of the SDT itself denied him the meaningful opportunity to file the appeal notice.

Has Mr McAteer done everything in his power to appeal?

[64] As was stated by Carr LJ in *Stuewe* at para [54]

> "The central question and only question for the court is whether or not "exceptional circumstances" exist, namely, where to deny the power to extend time would impair the very essence of the right of appeal. Any gloss is unhelpful. Answering that question may or may not include consideration of whether or not the litigant had done everything possible to serve within time, depending on the facts of the case."

I am satisfied from the chronology set out earlier that as of 21 December 2017, Mr McAteer knew that the Tribunal had decided that a prima facie case had not been made out in respect of a number of his complaints. Secondly, as of 20 March 2020 he knew that he had a right of appeal to the High Court in respect of this decision by the SDT. For the reasons already set out I have found that time to appeal did not begin to run until 16 August 2021 in respect of the both the scope decision and the SDT's decision to dismiss his complaints. As of 16 August 2021, therefore he knew the SDT had found against him and that he had a right to appeal the decisions of SDT as to scope and dismissal of his complaints. There is no evidence before the court that since 16 August 2021 Mr McAteer took any steps to initiate an appeal, he knew he had and which he had the ability to issue within the prescribed time limit. On the basis of the evidence before the court he took no steps to initiate an appeal he knew he had. He has failed to give any explanation why he simply did not issue an appeal on time. There is no evidence of exceptional difficulties and there appears to be no good reason why he did not lodge the appeal on time.

[65] Accordingly, I am not satisfied that he did everything within his power to initiate an appeal within the prescribed period.

Did pursuit of JR act as impediment to appeal?

[66] Mr McAteer is an experienced litigator. I am satisfied that he did not believe the ongoing JR proceedings prevented him bringing an appeal especially as this was raised by Scoffield J at initial case management directions and in his preliminary submission filed in response Mr McAteer said he could see that an appeal to the High Court "might be more appropriate" in respect of SDT scope decision and indicated he would issue an application for leave to the High Court and issue a Notice of appeal. In the course of submissions, he again accepted he may have a remedy of appeal in relation to the part of his complaint which the SDT did determine. (see paragraph 75 of Scoffield J judgment) Notwithstanding his knowledge of his right to appeal and his acceptance of the merits of appeal in respect of both decisions by the SDT he failed to issue an appeal notice at that date and delayed doing so until 26 October 2022. Further, he has brought the present appeal application notwithstanding the fact the JR proceedings are not yet concluded as they are under appeal and, accordingly, I am satisfied that he did not believe he could not bring the present application until the

conclusion of the JR proceedings. I, therefore, do not consider the existence of judicial review proceedings impaired his ability to appeal.

Did Mr McAteer need reasons before he could appeal?

[67] Although the order of 16 August 2021 did not set out reasons for the decision on scope, I am satisfied that that is not an impediment to the essence of the right to appeal. Mr McAteer could have issued an appeal and in the course of that appeal he could have applied under Order 106 to have a statement from the Tribunal which would have enabled the court to look at the Tribunal's reasons. Indeed, in his email to the President on 20 March 2020, he was threatening to proceed to appeal in the absence of any further information being provided by the Tribunal and, therefore, I am satisfied that the option of appeal was open to him when the order was issued and that there was no impediment or any circumstance which denied him the essence of appeal.

Is there prejudice to solicitors?

[68] In relation to Mr McAteer's argument that the solicitors knew that he was going to appeal, I do not accept that this knowledge amounts to exceptional circumstances preventing him bringing an appeal within time. In this case the delay by SDT does not fall at the door of the three solicitors involved. It falls at the door of the SDT. They are also entitled to have finality and a fair hearing which could be impaired if there is such delay that it affects their ability to defend the complaints. Accordingly I find, even if there was no prejudice to the solicitors, this alone does not constitute exceptionality and is not therefore a basis for extending time.

Lack of resources

[69] Although Mr McAteer alludes to the resources of the parties he has not provided any particulars about resources he lacked or why a lack of resources affected his ability to bring this appeal. Mr McAteer is an experienced personal litigant who has issued numerous applications to this court. He has experience in conducting litigation and at times has had the benefit of legal aid. I therefore do not accept a lack of resources prevented him issuing an appeal.

Fairness and public interest

[70] The test for extending the statutory time limit is exceptionality. The statutory prescribed scheme of regulation provides a means for the public to issue complaints which are then considered by the SDT, and the statute then provides a right of appeal. I consider this scheme is suitable to serve the public interest in respect of regulation of solicitors' conduct. Whilst there were shortcomings in respect of the SDT process and in particular significant delay I do not find that exceptionality is made out having regard to fairness or the public interest. Firstly, the delay occurred before the time started to run for appeal. Further, I consider the principle of fairness involves fairness

to all parties. The existence of a time limit for appeal I consider is necessary in the interests of fairness. Solicitors must be able to adequately defend allegations against them and accordingly complaints need to be made in a timely manner before memories fail or witnesses retire or die. Further they are entitled to finality. Mr McAteer has not shown how the time limit has caused any unfairness to him and has not therefore established exceptionality on this basis.

[71] I am satisfied that since 16 August 2021 there was nothing exceptional in the sense that the essence of the right of appeal of Mr McAteer was impaired and, accordingly, I do not consider that the court is required to extend the statutory time limit. Further, even if the court did extend time, it must only do so to the minimum extent necessary. I do not consider that there is any basis for the court to extend the time limit by over 12 months in this case.

Conclusion

[72] Accordingly, I refuse to extend time to lodge the appeal and I strike out the application as it is out of time.

[73] I will hear the parties in respect of costs.