Neutral Citation No: [2018] NICA 12 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **STE10595** ***Delivered:*** **5/3/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PAUL MURPHY

Appellant;

-v-

INSTITUTION OF CIVIL ENGINEERS

Respondent.

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Before: Stephens LJ and Treacy LJ

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by Paul Murphy ("the appellant") from the decision of Mr Justice McCloskey dated 23 October 2017 refusing to grant the appellant leave to apply for judicial review of a decision of the Institution of Civil Engineers dated 7 March 2012. By that decision the proposed respondent dismissed an allegation of professional misconduct made by the appellant, who is an engineer, against another engineer ("SW"). The dismissal of the allegation by the Institution of Civil Engineers was on the grounds that there was no case to answer of improper conduct on the part of SW had been disclosed.

[2] The appellant appears in person. Prior to the hearing of this appeal, the potential assistance of a McKenzie Friend was brought to the attention of the appellant but he has not availed of that assistance. Ms Herdman appears on behalf of the respondent, the Institution of Civil Engineers. SW is obviously a party interested in the outcome of the proceedings, but the appellant has taken no steps to serve SW.

[3] We give this ex tempore judgment and direct that it should be transcribed.

Failure to comply with the Practice Direction 1 of 2016 and with the court's directions

[4] Under the Practice Direction the obligation was on the appellant to provide a Book of Appeal and to provide a skeleton argument within the appropriate time periods. At reviews before this court the respondent indicated that it would prepare the Book of Appeal given that the appellant appeared in person. This was in accordance with what the respondent considered to be the appropriate degree of latitude permitted to litigants in person. In our view the appellant was quite capable of preparing the Book of Appeal as evidenced by his ability to write letters and e-mails by the number of e-mails that he has sent to the parties and to the court office, together with evidence of his professional qualifications and his ability to run his own engineering practice. Accordingly we consider that the proposed respondent's agreement to prepare the Book of Appeal was one that this court would not have imposed being an unnecessary latitidue to a litigant whom we assess had the ability to perform this task. However we consider that the only impact of the failure of the appellant to take on the task of preparing the Book of Appeal is that if there is anything missing from it upon which the appellant wishes to rely then that is a matter of his own creating. We would also observe that we have considered the Book of Appeal and we are satisfied that all the documents were documents which were already in the possession of the appellant.

[5] The appellant has also failed to submit any skeleton argument which is in breach of both the Practice Direction and the directions of this court. It is essential for the proper preparation of appeals that skeleton arguments are submitted so that the opposing party and the court are aware of the arguments being advanced. A failure to submit a skeleton argument is a matter of concern with a potential impact on the other party and on the court's ability to deal with cases expeditiously and fairly. If any prejudice is caused to the respondent by that failure then this court will consider the appropriate steps to be taken including potentially dismissing the appeal on that ground alone.

Adjournment application

[6] At the outset of the hearing of this appeal today we refused to grant the appellant's application for an adjournment. The response of the appellant to that ruling was to inform the court that he could not proceed with his appeal and proposed to take no part in it. However, in the event he has made submissions to the court.

[7] In relation to the reasons why we refused the adjournment application we have already given an earlier ex tempore judgment.

Background

[8] The appellant Paul Murphy a consulting engineer was engaged by a client to prepare structural designs for a new dwelling house at Kilfaddy Road, Armagh. The

design was complete in 2006. It specified a category 1 sheeting material to both faces of some external walls and to the faces of some internal walls in order to provide racking resistence.

[9] The appellant initially refused to certify completion of the house on the ground that the client had allegedly deviated from the design specification by using an unapproved proprietary sheeting material, Fermacell, in some internal walls. Fermacell did obtain certification in April 2008, but at the time that it was used and at the time that the appellant refused to certify until remedial works were carried out it did not have that certification.

[10] The client did not pay all of the appellant's professional fees contending that the appellant was charging unnecessarily for additional works in relation to the issue of the unapproved material. Accordingly the appellant brought proceedings against the client claiming unpaid professional fees of just short of £3,000. The client engaged an engineer SW to give expert evidence in the case brought by the appellant. SW gave evidence in those proceedings. After he had done so the appellant made a complaint to the Institution of Civil Engineers about SW which was acknowledged as long ago as 31 August 2011.

[11] The nature of that complaint can be discerned from the various documents including the appellant's letter dated 15 August 2011 to the Clerk of the respondent's Professional Conduct Committee. The appellant in that letter asserts that SW acted as an expert for the defence and contested the approach adopted by the appellant and argued that the appellant should have accepted the Fermacell material regardless of the manufacturer's explicit statement confirming that it could not. He referred to the fact that another independent engineer Duffy Chartered Engineers provided a report and opinion which was supportive of the attitude adopted by the appellant. He refered to the case being heard over two full days in court and that the court recommended that the appellant seek an additional independent expert's opinion. This was obtained from a Mr Ivor Armstrong who was also was supportive of the position adopted by the appellant. Thereafter the matter came back before the court and the client no longer contested the matter. The appellant recovered a decree for the entirety of his fees plus an order for costs against his client.

[12] The response from SW to the complaint is set out in his letter dated 21 November 2011. He states that he totally and absolutely refutes all the allegations of professional misconduct and he made a number of observations. We will not set all of them but the following give a flavour of the nature of his response.

(a) From information provided it appears that the structural package for the building control application was prepared in early 2004 and that work on the site started in mid 2005. Mr Murphy explains that during April 2006 he was continually highlighting what he seen as breaches to

his specification. By the end of that year the matter was developing to an impasse.

(b) Relationships clearly deteriorated from this point onward with a considerable volume of technical literature being exchanged between the parties. Mr Murphy refers to Mr Walsh as a lay client. I would suggest that in light of the dossier he compiled and the arguments he put forward that he was a knowledgable client with considerable experience in construction.

(c) The letter from Fermacell that both Messrs Murphy and McGuiness referred to was written in September 2007.

(d) While this letter does not claim to hold compliance with BS 5268-6.1, a point accepted in my report, it did not state that the product was unsuitable as a sheathing material or that it would not supply the required racking resistence. Rather it explained that the standard did not include a classification for gypsum fibreboards. It then compares the results of Fermacell tests (reference MT1079a) with plasterboards that are classified and suggests that these test values be used calculating racking resistence in accordance with Section 5 when the tested figures should be used.

(e) All parties involved in the technical assessment of this matter agree that a BBA Certificate was awarded at the end of April 2008.

(f) My report was written and released on 16 December 2009. The DCE report was issued on 3 September 2009 by Mr McGuinness after a briefing meeting with Mr Murphy's solicitor. How then can Mr Murphy claim that his solicitor was forced to engage another engineer as a result of my doing?
This at its mildest is unfair. References to his solicitor's correspondence demonstrates where the pressure was coming from in relation to expert's reports.

[13] We have read the entirety of that document which was before the Institution of Civil Engineers. We would add that during the hearing of the proceedings brought by the appellant against his client the appellant was at liberty to challenge the professional conduct of the expert witness SW and the judge hearing those proceedings could have commented adversely on that expert witness if that was considered to be appropriate.

The decision at first instance

[14] McCloskey J in a judgment dated 23 October 2017 which was reserved after hearing the application on 13 October 2017 refused leave to apply for judicial review on the following grounds.

(i) Want of prosecution by the appellant of his application for judicial review. The proceedings were commenced on 14 June 2012. The learned judge found that there was a period of inertia until early 2017 a period of some 4 years. The learned judge considered that there was no sensible distinction between expeditious initation of judicial review proceedings and expeditious prosecution of those proceedings. On that basis he refused the application for leave to apply for judicial review.

(ii) The second ground was on the basis of the merits of the application. Assuming that the decision of the proposed respondent was justiciable then it was only justiciable on *Wednesbury* grounds. The learned judge held that the evidence assembled by the appellant duly supplemented by his arguments fell measurably short of establishing an arguable case of irrationality.

The grounds of appeal

[15] The first ground is the one word "bias". It is not clear what is being alleged by way of bias and against whom the bias is alleged. We consider that this ground of appeal lacks any degree of particularity. It does not disclose any ground of appeal and given its lack of particularity it is obviously unsustainable. This ground of appeal in our opinion amounts to nothing more than that the appellant says the court reached the wrong decision on unspecified grounds and that the only explanation possible is that there was bias.

[16] We have noted the submissions made by Ms Herdman in reply that far from being biased the learned judge disagreed with the submissions that had been made on behalf of the proposed respondents about delay and promptness. Also that the learned judge did not accept the contentions made on behalf of the proposed respondent that the decision of the Institution was justiciable.

[17] It is quite clear that the learned judge did engage with the submissions from both sides and did not adopt all the submissions of the proposed respondents. We consider that there is absolutely no evidence of bias and we dismiss the appeal in relation to that ground.

[18] The second ground of appeal is as follows:

> "Unfair treatment and prejudice/discrimination by the courts against the appellant acting in person while

> ignoring the merit, significance and public interest/importance of their applications."

[19] This appears to be a general allegation in relation to all the courts so as to infer that the learned judge was prejudiced against the appellant. There is no evidence to support that proposition, but rather the judgment of McCloskey J shows that he conscientiously and carefully analysed the case being made by the appellant. We would observe that disappointment by the appellant as to the result is not evidence of bias. There is no evidence that the learned judge ignored the merits of the appellant's application and there is no evidence that the learned judge ignored any public interest or any matter of importance or of any significance. We would also observe that the application before it came on for hearing in the High Court was adjourned on a number of occasions out of latitude towards a personal litigant to allow him to prepare for the hearing. We dismiss the appeal in relation to that ground of appeal.

[20] The third ground of appeal is:

> "Malfeasance in public office by court officials and members of the judiciary."

[21] This is also a sweeping and unparticularised ground of appeal and it suffers from exactly the same defects as the first ground. In our opinion it does not disclose any ground of appeal and given its lack of particularity it is obviously unsustainable. We dismiss the appeal in relation to that ground of appeal.

[22] We do not consider that there is any substance in any of the grounds of appeal advanced by the appellant. It is a feature of the Notice of Appeal that there is no express challenge to the judge's ruling that leave should be refused on the basis of delay and there is no express challenge to the judge's ruling that there was no arguable case that the decision of the proposed respondent was *Wednesbury* unreasonable. Out of caution we have also considered whether an appeal could be mounted against either of those rulings. We do not consider that it can. The obligation on a party bringing an application for judicial review is to do so within three months and also promptly. It is a necessary corollary of that requirement that there is a corresponding obligation on the applicant to proceed with expedition. The delay in this case was inordinate and inexcusable. The appellant acknowledges that there was a delay of some 4½ years but contends that the passage of time is not a bar to public law proceedings. We fundamentally disagree. Public law proceedings should be disposed of promptly not only as a general proposition but also in relation to the facts of this case. We agree with the conclusions of McCloskey J for the reasons that he has given.

[23] We have also considered the conclusion of McCloskey J that there was no arguable case. We have considered some 213 pages of documents contained in the

Book of Appeal. We note the response from SW dated 21 November 2011. Judicial review is not an appeal process. For there to be an arguable case it has to be arguable that the decision of the proposed respondent is so outwith the range of rational decision-making as to be *Wednesbury* unreasonable. We agree with the conclusions of McCloskey J again for the reasons that he has given.

Conclusion

[24] We dismiss the appeal.