Neutral Citation No.: [2008] NIFam 15

Ref: **STE7347**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **8/12/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

BETWEEN:

MARGARET MARY BOYLAN – TOOMEY

Petitioner/Respondent:

-and-

EAMON SEAN BOYLAN-TOOMEY

Respondent/Appellant:

STEPHENS J

[1] A point has arisen in this case which also arose in *SIE Limited v. University of Ulster* [2006] NIQB 64. It relates to the procedure to be followed where one of the parties is not legally represented. This case involves an appeal from a decision of Master McCorry in relation to ancillary relief. The appellant, Eamon Sean Boylan-Toomey, does not have any legal representation. The respondent, Margaret Mary Boylan-Toomey, is represented by Mr. Toner QC and Ms Suzanne Simpson. The point is whether I should "invite" Mr Toner to

> "assist the court by making sure that it is informed of all relevant facts and arguments on the facts … which a barrister acting for the unrepresented litigant would raise".

That if Mr Toner declined to accept that invitation whether the court could, as it did in *SIE Limited v University of Ulster*, require counsel to assist in that way requiring him to open, in this case, the appeal for the appellant in relation to both the facts and the law.

[2] The relevant professional obligations on a barrister are set out in paragraphs 8.01-8.03 and 8.08 of the Code of Conduct of the Bar of Northern Ireland. Those paragraphs are in the following terms:-

> "8.01 A barrister must not misstate the law knowingly nor conceal from the court any authority known or believed to be relevant to the matter in hand.
>
> 8.02 A barrister must not misstate any fact or state as a fact any matter which there are not reasonable grounds for believing can be proved or cross any witness upon a basis which is known to be untrue.
>
> 8.03 In any ex parte matter a barrister must exercise the utmost good faith and must not withhold from the court any matter of fact or law which may be relevant to the issues.
>
> 8.08 In civil cases a barrister must ensure that the court is informed of all relevant decisions and legislative provisions of which the barrister is aware whether the effect thereof is favourable or unfavourable towards the contention for which the barrister argues."

[3] In this case the professional obligation on Mr Toner is to inform the court of the correct legal principles and authorities regardless as to whether they assist or undermine the case of the litigant whom he represents. However the professional obligation on Mr Toner in relation to facts in paragraph 8.02 is circumscribed. This is not an ex parte application. There is no professional obligation on Mr Toner to bring to the attention of the court any factual matter which undermines the case of the litigant whom he represents, provided that he complies with the obligations in paragraph 8.02. There is no professional obligation to draw to the attention of the court adverse inferences which could potentially be drawn from primary facts which are established in evidence. Indeed if there was a requirement on Mr Toner to assist in the manner suggested in *SIE Limited v. University of Ulster* in respect of the facts then the potential arises for him to be in breach of either his professional obligations

under paragraph 8.12 of the code of conduct or of his duty to assist the court. Paragraph 8.12 is in the following terms:-

> "If at any time before judgment is delivered in a case a barrister is informed by a lay client that that client has committed perjury or has otherwise been guilty of fraud upon the court a barrister may not so inform the court without his client's consent. The barrister may not, however, take any further part in the case unless authorised by the client to inform the court of the perjury statement or other fraudulent conduct and the barrister and so informed the court."

It can be seen that under his professional code if Mr Toner is informed by his lay client that that client has committed perjury in relation to a fact then Mr Toner may not inform the court as to the fact in relation to which his client's evidence was incorrect without his client's consent. However if Mr Toner was required to assist the court by making sure that the court is informed of all relevant facts and arguments on the facts … which a barrister acting for the unrepresented litigant would raise then Mr Toner would be obligated to the court to inform it as to the incorrect fact. This leaves open the potential that Mr Toner would be in breach of either his professional code of conduct on the one hand or of his obligations to the court on the other.

[4] There has been an interaction for many years between substantive and procedural laws on the one hand and the professional code of conduct of the bar on the other. Substantive and procedural laws inform the code. The code is a reflection of those laws. On that basis the codes have in the past been called in aid to determine the extent of a barrister's obligation to the court in respect of substantive or procedural law. One example of that was the decision at trial of Carswell J in *McCartney and Boal v. Sunday Newspapers Limited* unreported on this point but reported on a separate issue at [1988] NI 565. This was a libel action tried by a judge and jury. Senior counsel for the plaintiff had opened the case to the jury. Carswell J was minded to direct that junior counsel for the plaintiff had the obligation to close the case to the jury. He was referred to paragraph 8.22 of the Code of Conduct of the Bar of Northern Ireland which provides that the decision as to who closes the case for a litigant is for leading counsel and not for the court. Having been referred to the code Carswell J held that he had no jurisdiction to give such a direction.

[5] No support is obtained from the Code of Conduct of the Bar of Northern Ireland for the proposition that a barrister should assist in the manner suggested in *SIE Limited v. University of Ulster*. That is not necessarily determinative of the matter. Such a procedure necessarily has the advantage that a legally trained advocate explains the respective factual cases to the judge. However one should also consider whether there are any reasons why the

procedure should not be adopted. I consider that there are a number of difficulties with such a procedure.

[6] The adversarial system requires the parties to set out their respective cases and then for an independent judge to adjudicate. An advocate for one party should not be called upon to perform the role of being an advocate for the other party in relation to the facts. If an advocate for one party is asked to perform the role of being an advocate for the other party then this would not only create a perception on behalf of his lay client that he is being deprived of the services of his barrister but in fact he would be so deprived.

[7] It is difficult to conceive how the advocate can maintain his confidence with his own client if he is required to assist the court in the manner indicated. In advance of trial and during the course of trial the lay client should not be inhibited from explaining the strength and weaknesses, real or imagined, of his own case to his own barrister. The lay client may very well be under such an inhibition if he understood that the barrister would then be under an obligation to the court to draw all those factual weaknesses to the attention of the trial judge despite the confidential circumstances in which that knowledge was obtained by the barrister.

[8] The judge for his part is to maintain his role in an adversarial system as an independent tribunal. There is a risk where, as here, a party is unrepresented that if a judge assists the unrepresented litigant by requiring special measures to be adopted which favour the litigant in person that this will lead to a perception on the part of the represented lay client that the judge is unfairly assisting the unrepresented litigant. That perception would be enhanced in view of the fact that the special measures apply only to one party and are not to be reciprocated with an equivalent obligation on the litigant in person. Furthermore the perception could be further enhanced if the judge for instance conducts cross examination on behalf of the unrepresented litigant of the represented party's witnesses either instead of or before the personal litigant does so.

[9] I consider that the procedure of requiring counsel to act in the way suggested is inconsistent with the adversarial system. That inconsistency is highlighted in situations where from the pleadings or bundles of documents it is unclear what factual case is being made by the litigant in person. For a barrister for the represented party then to be obliged to "conceive" of the best possible factual scenario for the unrepresented party and to draw together all the strands of evidence supporting that case and to lay out all the potential factual inferences in favour of his opponent is an abrogation of the adversarial system.

[10] The unrepresented party knows the facts which he wishes to establish. A true factual sequence may initially appear to be highly improbable. I do not

consider that an unrepresented party should be deprived of the opportunity to put forward that true sequence in the way in which he wishes to do so. His own credibility can be enhanced if he remains with what initially appears to be an unlikely factual scenario and it subsequently transpires to be correct. Conversely the represented party should not be deprived of the opportunity of testing the credibility of an unrepresented party by having the factual allegations described to the court by that party. Furthermore if the judge waits it might become apparent that the unrepresented litigant "proved perfectly capable of presenting (his) case and did so in an impressively succinct and effective manner making every point that could have been made on (his) behalf."

[11] Further practical difficulties in respect of the procedure suggested in *SIE Limited v University of Ulster* can be illustrated by considering how the barrister for the represented party can perform the task of setting out the factual scenario to the court on behalf of the unrepresented litigant. He has no opportunity to, and is prevented from, consulting with the unrepresented litigant. He has no opportunity to determine what the unrepresented litigant asserts to be true. He should not be asked to "conceive" of a factual scenario on behalf of any party let alone a party whom he does not represent.

[12] If it is envisaged, as it was in *SIE Limited v. University of Ulster*, that there could be an advantage to the represented party in getting his case before the judge at the beginning of the trial then that is a forensic advantage which should not be given to the represented litigant.

[13] In *Abraham v Jutsun* [1963] 2 All ER 402 Lord Denning MR made observations on the duty of an advocate in regard to the taking of doubtful points of law. Those observations given in respect of a somewhat different area do however emphasise the demarcation of the respective roles of advocates and judges in the adversarial system and the duty on a barrister to promote the interests of *his* lay client. Lord Denning stated:-

> "But I think it only fair to the appellant to say that his evidence on affidavit, which is not challenged, makes it quite plain that he was not in the least degree guilty of any misconduct. The points which he took were fairly arguable. The one point on the word "brought" had a good deal to be said for it. The other point on the word "laid" had much less to be said for it; and the appellant said much less. The long delay gave merit to points which would otherwise appear unmeritorious. As it turned out, both points were bad points; but the appellant was not the judge of that. The magistrates had their clerk to advise them on the law. He was to advise them whether the points were good or bad. It was not for the advocate to do so.

> Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court. Nothing of that kind appears here."

[14] It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side. The unrepresented litigant has the benefit of adversarial proceedings and is able to argue his case within the concept of a fair hearing before an independent tribunal of fact. All the evidence must be produced at a public hearing, in the presence of the litigants, with a view to adversarial argument. All the parties are given an adequate and proper opportunity to challenge and question witnesses against them. Litigants in person who bring or contest an action are undertaking what can be a strenuous and burdensome task. The work required of litigants in person at trial may be very considerable and has to be done in an environment which, at least initially, could be unfamiliar to them. However plaintiffs or defendants, appellants or respondents with great resources are entitled to bring complicated cases against unrepresented litigants of slender means. A degree of latitude should be allowed to litigants in persons dealing with the complexities of cases. The exact degree of latitude will depend on the circumstances of each individual case. For instance an unrepresented litigant can be allowed a greater degree of time for preparation. In view of the lack of legal training assistance can be given by the trial judge by reformulating questions for witnesses, by not insisting on the usual procedural formalities, such as limiting the case to that pleaded. No doubt there can be other ways by which a trial can be conducted fairly where there is a lack of legal skills. However the essential nature of the proceedings is adversarial and that should not be changed.

[15] I decline to impose the procedure suggested in *SIE Limited v. University of Ulster* on the basis that there is no jurisdiction to impose it. I consider it to be unsupported by the professional code of conduct, and to be unsupported by authority. I consider that it creates a number of fundamental difficulties and that it is inconsistent with the demarcation suggested in *Abraham v Jutsun* and the concept of the adversarial system. I consider that a trial without such

a procedure is compliant with the European Convention on Human Rights. That it is not a requirement to make the proceedings convention compliant.

[16] Alternatively if I am incorrect in that conclusion and there is jurisdiction to adopt the procedure I decline, as a matter of discretion, to impose it in this case. I so decline on the basis of the practical difficulties that the procedure would present to counsel, the amount at issue in this appeal and my assessment of the ability of the respondent to present his own case.