Neutral Citation No: [2017] NIQB 91 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC10443** **JR 2012 No 065645/01** ***Delivered:*** 23**/10/17**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PAUL MURPHY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW [v ICE]

McCloskey J

The Impugned Decision

[1] On 15 March 2012 the Chairman of the Professional Conduct Panel of the Institution of Civil Engineers ("ICE") wrote to the Applicant, who is a Civil Engineering Graduate and a Consulting Engineer by profession, in the following terms:

> "*At its meeting on 07 March 2012, the Professional Conduct Panel considered the allegations you have made against* [SW]. *It is the decision …… in accordance with Disciplinary Regulation 14 to dismiss your allegations against* [SW]. *This is because, after a full examination of the allegations and evidence and observations submitted by you together with the evidence and observations submitted by* [SW]*, the Panel decided that a case to answer of improper conduct in accordance with the Institution's By-Laws and Rules of Professional Conduct had not been disclosed and that the matter should therefore be concluded without recourse to further action …*
>
> *Under the Disciplinary Regulations, the Panel is not empowered to refer allegations to the Disciplinary Board unless it is satisfied that a case to answer of improper conduct has been disclosed and it was not so satisfied in this case.*"

[The name of the person concerned has been removed and substituted with initials]

The Applicant seeks leave to apply for judicial review in order to impugn this decision (hereinafter "the impugned decision").

[2] In very brief compass, the impugned decision was generated by the Applicant's complaint to ICE that SW, a Chartered Engineer, had acted in dereliction of the duties imposed upon him by the ICE rules of professional conduct when giving expert evidence in a civil case brought by the Applicant against a client for unpaid professional engineering fees. The Applicant, who had been engaged by the client to prepare the design for a new dwelling house, had refused to certify completion on the ground that the client had allegedly deviated from the design specification by using an unapproved proprietary sheathing material in some internal walls. The Applicant asserted, *inter alia*, that the manufacturer of the unauthorised product had itself acknowledged that it did not comply with the requirements of the design specification. With reference to the expert evidence of SW in the Court proceedings which ensued, the Applicant complained to ICE that:

> "*No professional, competent engineer could have accepted that product as satisfying the design requirements without first completing the full suite of tests necessary to obtain that product's accreditation under the relevant British Standard. It was wrong, misleading and extremely unprofessional of* [SW] *to suggest (to his client, his legal team and to the Court) that I could accept it when the product manufacturers themselves clearly stated that I couldn't ….*
>
> [SW] *decided to tailor his professional opinion to reinforce the Defendant's argument, in spite of his professional obligations and the requirement for him to exercise sound judgement. [SW]'s approach served to give credence to the Defendants otherwise unjustifiable position but, in doing so, he secured his own appointment and his expert fee ….*
>
> [SW] *abused his position as expert and deliberately misled the Court.*"

While the amount of unpaid professional fees at stake was just short of £3,000, the Applicant asserted that SW had been responsible for the improper and unnecessary generation of legal costs of approximately £13,000.

Delay and want of prosecution

[3] Proceedings were commenced on 14 June 2012, three days before the expiry of three months after the impugned decision. The Applicant, who has at all times

represented himself, had clearly invested considerable time and effort in assembling the papers and preparing his formal pleading and grounding affidavit. I note further that he complied with the Pre-Action Protocol. I am satisfied that there has been compliance with the promptness requirement enshrined in RSC Order 53, Rule 4.

[4] The failure to prosecute these proceedings, expeditiously or at all, is stark. Over five years have elapsed since their initiation. In a written submission, with some supporting documentary evidence, the Applicant explains this on the grounds of serious injuries suffered by him, resulting periods of ill health and his primary carer responsibilities for his disabled wife. He further asserts that he has been involved in other protracted and stressful legal proceedings. In addition, he recounts the initiation of two separate judicial review challenges against the PPS and PSNI. He further claims he has been proactive and studious in his co-operation with the Court since these proceedings were resurrected in early 2017. I shall assume, in his favour, that the period of inertia on his part was four years

[5] In the abstract it is highly unlikely that a court will find sufficient justification for a failure to prosecute a judicial review claim during a period of some four years. While there is no challenge to the Applicant's claims of injury, ill health and carer responsibilities, there is no evidence that these were so overwhelming as to be all consuming. Furthermore, it is clear that he chose to invest time and resources in bringing various other legal proceedings. That of course was his prerogative. However, he was not entitled to do so at the expense of prosecuting this judicial review challenge expeditiously. Both the ICE and the professional concerned, SW, were entitled to certainty and finality, each of which should have been achieved long ago.

[6] I consider that the Applicant's explanations for his protracted inertia provide only a partial justification. They fall measurably short of justifying a delay of such enormous proportions. While I acknowledge that there was at no time an application by the proposed Respondent, ICE, to strike out the Applicant's case for want of prosecution, I consider that this counts for very little in all the circumstances. While I also take into account that a previous judge allowed these proceedings to continue by devising a case management programme and allocating a date for the hearing of an oral *inter-partes* leave application, I consider that this factor also qualifies for the attribution of little weight and certainly gave the Applicant no enforceable assurance of absolution of his inertia.

[7] The long established principle that judicial review is designed to provide swift, expeditious and final resolution in disputes belonging to the domain of public law is undiminished. I quote from venerable authority:

> "*The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority*

has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

(O'Reilly v Mackman [1983] 2 AC 237 at 280H – 2801A per Lord Diplock.)

Statements of this *genre* are, of course, most commonly encountered in the context of issues relating to delay in initiating proceedings. However, in my view there can be no sensible distinction between the expeditious initiation and the expeditious prosecution of judicial review proceedings. The present case is a paradigm illustration that there is no distinction in substance between these two types of default in certain instances. In a jurisdiction which traditionally has placed a heavy emphasis on judicial discretion, I am unaware of any bar in principle to the refusal of leave to apply for judicial review on the ground of a failure to prosecute the proceedings with reasonable expedition, whether as a stand-alone factor or in tandem with others.

[8] For the reasons elaborated I consider that leave to apply for judicial review must be refused on the ground of the Applicant's inordinate and unjustified delay in prosecuting his case with reasonable expedition.

Justiciability

[9] On behalf of ICE Ms Herdman submits that the impugned decision is not amenable to challenge by judicial review. She contends that the impugned decision was made in the context of an internal disciplinary process belonging to the realm of private law. The Applicant's riposte is that ICE is a regulator; it was incorporated by Royal Charter in 1828, modified by a new Charter in 1975; its by-laws are made under the Charter; any amendments require the approval of the Queen's Privy Council and pursuant to its code of ethics and code of professional conduct, it regulates the professional behaviour of its members throughout the world. While the Applicant repeatedly describes ICE as a "*statutory*" agency, no statutory underpinning has been identified.

[10] There is a range of interlocking and overlapping tests to be applied when an issue of this kind arises for determination. Is there any public law element in the impugned decision? In making the impugned decision, was ICE subject to any public law duties? Fundamentally, the question is whether the subject matter of the Applicant's challenge belongs to the ambit of public law. See, for example, Sheridan Millennium [2007] NIQB 27 at [19].

[11] There is no doubt that the Applicant is not seeking to enforce a private law right. Nor is he pursuing the quintessential private law remedy of damages. Furthermore, certain public law grounds can be distilled from the terms in which his

challenge is formulated. However, while these factors incline towards a public law framework, they are not determinative of the tests noted above.

[12] There is a broad array of reported decisions in which issues of this kind have been considered and determined. Some of the respondents have included the Disciplinary Committee of the Jockey Club, the Panel on Takeovers and Mergers, the National Greyhound Racing Club, the Chief Rabbi and the Institute of Chartered Accountants of England and Wales. Furthermore, some contribution to issues of this kind can now be found in the growing jurisprudence relating to what constitutes a public authority under section 6 of the Human Rights Act 1998.

[13] The correct resolution of this issue is not immediately obvious and would undoubtedly benefit from considerably more detailed argument. Accordingly, I decline to rule definitively on it.

Merits

[14] The main tenets of the Applicant's challenge are identifiable through a process of interpretation of his printed case supplemented by what emerged from some judicial probing at the leave hearing. In short, the central core of the Applicant's challenge against ICE is that there was a failure to conscientiously and thoroughly investigate his complaint against SW. This contention must be rejected as it is underpinned by no supporting evidence, direct or inferential. It is clear that there is a strong difference of professional opinion between the Applicant and ICE. However, if and insofar as there is no justiciability hurdle, this, in public law terms, is to be viewed through the prism of Wednesbury irrationality. This engages a notoriously elevated threshold. The evidence assembled by the Applicant, duly supplemented by his arguments, falls measurably short of establishing an arguable case of irrationality.

[15] The Applicant further complains that ICE failed to take into account certain facts and factors – for example the Applicant's own professional opinion and that of another engineer engaged by him to give evidence in the underlying civil proceedings. This resolves to nothing more than bare, unsubstantiated assertion: see Re SOS' Application [2003] NIJB 252 at [19]. While the Applicant also complains that ICE took into account certain matters which he characterises as "irrelevant", the fallacy here is that ICE cannot conceivably be criticised for considering all of the material put forward by both the Applicant and SW and, indeed, would probably have acted unlawfully in failing to do so. Finally, the Applicant's grounds include a discrete complaint that he was denied the opportunity to consider SW's response. This is confounded by the Applicant's letter dated 26 January 2012 to ICE, which begins:

> "*I write in reply to the letter/response provided by* [SW] *dated …..*

> *I completely disagree with* [SW's] *repeated (groundless) insinuation ….* (etc)".

This is followed by seven pages of dense type in which the Applicant sought to demolish *seriatim* SW's response to the complaint.

CONCLUSION

[16] In summary, I refuse leave to apply for judicial review on the grounds of want of prosecution and no arguable case, without deciding whether the impugned decision of ICE is amenable to judicial review.