



**THE COURT OF APPEAL**  
**UNAPPROVED**  
**NO REDACTION NEEDED**

**Record Number: 2021/56**  
**High Court Record Number: 2004/19212P**  
**Neutral Citation Number [2021] IECA 332**

**Whelan J.**  
**Noonan J.**  
**Barniville J.**

**BETWEEN/**

**JOHN COLM MURPHY**

**APPELLANT**

**-AND-**

**THE LAW SOCIETY OF IRELAND**

**RESPONDENT**

**Judgment of Mr. Justice Noonan delivered on the 9th day of December, 2021**

1. The appellant (“Mr. Murphy”) appeals against the refusal of the High Court to extend the time for the bringing of an appeal by Mr. Murphy against the determination of the Solicitors Disciplinary Tribunal (“the SDT”) made on the 28<sup>th</sup> September, 1999. As the latter date suggests, this and related matters have been the subject of protracted and complex litigation between Mr. Murphy and the respondent (“the Society”) spanning over two decades.

## **Background Facts**

2. The facts are set out in detail in the written judgment of the High Court (MacGrath J.) of the 10<sup>th</sup> February, 2021. Mr. Murphy was a solicitor practising in Kenmare, County Kerry. For a period of time, he employed another solicitor, Mr. Tim Healy, who left to set up his own practice in Killarney in the mid-1990s. It would seem that by 1996, Mr. Healy's practice in Killarney had got into some difficulties which attracted the attention of the Society.

3. Mr. Murphy entered into an agreement with Mr. Healy to acquire the Killarney practice and he did so with effect from the 16<sup>th</sup> August, 1996. Mr. Murphy was aware of the difficulties in the Healy practice before he agreed to acquire it. In the following year, 1997, it came to the attention of the Society that Mr. Murphy had failed to file the requisite accountant's report for the Killarney practice. Accordingly, the Registrar of Solicitors, Mr. Patrick J. Connolly, wrote to Mr. Murphy advising him that he was late in filing an accountant's report for the year ending the 31<sup>st</sup> March, 1997. Mr. Murphy was not responsible for the practice during the period from the 1<sup>st</sup> April, 1996 until the 15<sup>th</sup> August, 1996 when Mr. Healy was still in charge.

4. This has become the crux of much of the subsequent litigation with Mr. Murphy claiming that he was only in a position to provide an accountant's report for the approximately 8 month period between the 16<sup>th</sup> August, 1996 and the 31<sup>st</sup> March, 1997 whereas, on Mr. Murphy's case, the Society sought to make him liable in respect of the practice's accounts for an approximately 4 month period during which he had no control over them.

5. Mr. Murphy responded to the letter from Mr. Connolly indicating that he would contact his accountant and instruct him to prepare a report. Further correspondence ensued during the course of 1998 with the Society again drawing Mr. Murphy's attention to the failure to file an accountant's report. Mr. Murphy instructed his accountant, Mr. Kevin O'Reilly, to prepare the relevant report and Mr. O'Reilly also corresponded with the Society, furnishing accounts for the Kenmare practice on the 20<sup>th</sup> April, 1998.

6. In the affidavit sworn by Mr. Connolly on the 16<sup>th</sup> December, 1998, referred to further below, he avers at paragraph 8 that Mr. O'Reilly wrote to the Society on the 24<sup>th</sup> March, 1998 indicating that he was in the process of completing the solicitor's financial statements for the year ended 31<sup>st</sup> March, 1997 and they would be furnished in early April. The Kenmare accounts were furnished on the 20<sup>th</sup> April, 1998 but not those for Killarney. In related plenary proceedings before the High Court (2004/19212P), a witness statement of Mr. Connolly dated the 28<sup>th</sup> November, 2017 states the following: -

“19. I note that Kevin O'Reilly, in his Witness Statement, dated 20 September 2017, states that he had at least two telephone conversations with me in early 1998 wherein he claims he indicated to me an intention to issue a qualified certificate and further claims that I stated that such a Certificate would not be acceptable. I do not recall any such telephone calls and I wish to make it clear that the Society would never refuse the suggestion to put in a qualified Accountant's Report. I am aware that accountants have been reported to their professional body for failing to file such Certificates. In fact I should point out that it was the qualified report which was submitted by Mr. Healy's accountant on 23 June 1995... that led me to appoint [an investigating accountant] on 26 June 1995, to carry out the first investigation of Mr. Healy's practice.”

**7.** This conflict of evidence between Mr. Connolly and Mr. O'Reilly is referred to in some detail in the judgment of the High Court herein.

**8.** On the 15<sup>th</sup> May, 1998, Mr. Murphy attended a meeting of the Society's Compensation Fund Committee during which he advised the Committee that there were some discrepancies in the accounts of the Killarney office that required to be resolved before a report could be filed. Following the Committee meeting, Mr. Connolly again wrote to Mr. Murphy on the 8<sup>th</sup> June, 1998 advising him to file an accountant's report for the year ended 31<sup>st</sup> March, 1997 and informing him that the Committee's next meeting was scheduled for the 19<sup>th</sup> June, 1998 and he should attend. Mr. Connolly further advised that a decision may be made by the Committee to refer the matter to the SDT. In a reply of the 16<sup>th</sup> June, 1998, Mr. Murphy told the Society that the reason for not filing the report was "due to matters that arose before we took over the practice", but he expected to be able to file it before the end of the following week.

**9.** The Committee meeting was deferred peremptorily to the 17<sup>th</sup> July, 1998 because Mr. Murphy was not able to attend the proposed June meeting. However, on the 16<sup>th</sup> July, 1998 Mr. Murphy again wrote to Mr. Connolly saying he could not attend for various reasons, repeated the same reason for the delay in filing the report and assured the Society that it would be ready by the end of the following week at the latest. It was not. At the 17<sup>th</sup> July meeting, the Committee referred the matter to the SDT for inquiry. On the 21<sup>st</sup> October, 1998, Mr. O'Reilly corresponded with the Society referring to his earlier phone conversation and offering various reasons for the delay. He indicated that the report would be finalised by early December. Again, no report was filed.

**10.** It is of relevance to note that despite Mr. O'Reilly's evidence concerning telephone conversations with the Society in early 1998 about the possibility of filing a qualified report

for the 8 month period only, none of the written correspondence noted above refers to this alleged difficulty. In particular, Mr. O'Reilly's letter of the 21<sup>st</sup> October, 1998 is silent on the issue and does not purport to suggest that the filing of a report for the 12 month period was impossible or that the Society had refused to accept a qualified report for the 8 months. Instead, the letter refers to the fact that the delay in filing was due to the mislaying of documents and the fact that the associate in the office who dealt with Mr. Murphy's accounts was on holidays.

**11.** Having not received the report by early December, on the 16<sup>th</sup> December, 1998, the Society applied to the SDT for an inquiry into Mr. Murphy's conduct grounded upon the affidavit of Mr. Connolly of the same date. Two complaints were articulated in Mr. Connolly's affidavit. First, that Mr. Murphy was guilty of misconduct in failing to file the accountant's report for the year ending 31<sup>st</sup> March, 1997 in a timely manner or at all in breach of Regulation 21(1) of the Solicitors Accounts Regulations No. 2 of 1984 and, second, that Mr. Murphy misled the Society by stating in his letter of the 16<sup>th</sup> June, 1998 that the report would be filed the following week and then failing to file it.

**12.** Ultimately, the report was in fact filed on the 12<sup>th</sup> January, 1999.

**13.** The report filed by Mr. O'Reilly was a qualified accountant's report in respect of the Killarney practice confined to the 8 month period from August 1996 to 31<sup>st</sup> March, 1997. It was accepted as such by the Society and there is nothing in the evidence before the High Court to suggest why or when the change of heart by the Society towards the filing of such a report occurred, if Mr. O'Reilly's evidence is correct.

**14.** The SDT inquiry proceeded on the 28<sup>th</sup> September, 1999 when Mr. Murphy represented himself and did not call any witnesses. In particular, he did not call Mr. O'Reilly to give evidence. As subsequently emerged, Mr. O'Reilly was willing and available to give

evidence if requested. Although there is no transcript of the hearing available, it appears not to be in dispute that Mr. Murphy did not raise in his defence the fact that it was impossible to comply with the demand for a 12 month report and further, that the Society had refused to accept a qualified report of the kind that was ultimately filed and accepted.

**15.** On the same date, the SDT determined that Mr. Murphy was guilty of misconduct in failing to file an accountant's report for his Killarney practice in respect of the year ending 31<sup>st</sup> March, 1997 in a timely manner or at all, in breach of the relevant regulations. He was acquitted of the second charge. The SDT made an order that Mr. Murphy be censured and that he pay the Society's costs.

**16.** Mr. Murphy did not appeal this decision as he was entitled to under the provisions of s. 7(11) of the Solicitors (Amendment) Act, 1960, as substituted by s. 17 of the Solicitors (Amendment) Act, 1994, which provided at that time as follows: -

“(11) A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under subsection (9) of this section may, within the period of 21 days beginning on the date of the due service of the order, appeal to the High Court to rescind or vary the order in whole or in part, and the Court on hearing such an appeal may —

- (i) rescind or vary the order, or
- (ii) confirm that it was proper for the Disciplinary Tribunal to make the order.”

### **Subsequent Events**

**17.** Following the SDT determination the subject of this application, over the following decade or so a number of other unrelated complaints were made against Mr. Murphy which resulted in various findings of misconduct being made by the SDT against him. As appears from the High Court record number in the title to this judgment, Mr. Murphy instituted plenary proceedings against the Society in 2004 in which he claimed damages for, inter alia, misfeasance in public office and other remedies.

**18.** In 2006, the Society brought proceedings (2006/371SP) against Mr. Murphy under s. 18 of the Solicitors (Amendment) Act, 2002 seeking to prohibit Mr. Murphy from practising and for the winding up of his practice. In 2009 Mr. Murphy was struck off the Roll of Solicitors and between 2009 and 2011, Mr. Murphy made 15 applications to the SDT alleging misconduct against various employees of the Society.

**19.** After a number of procedural exchanges, in 2011 the High Court directed that the plenary proceedings should proceed to hearing. That hearing commenced on the 8<sup>th</sup> March, 2012 before the High Court (Hanna J.) and the court delivered judgment on the 30<sup>th</sup> March, 2012 striking out Mr. Murphy's proceedings as an abuse of process. Mr. Murphy appealed to the Supreme Court and an *ex tempore* judgment was delivered on 22<sup>nd</sup> March, 2015 in which Mr. Murphy's appeal was allowed and the plenary proceedings were remitted to the High Court.

**20.** A very lengthy trial ensued before MacGrath J. in mid-2018. Mr. Connolly gave evidence both orally and in a written statement. In the course of his evidence, Mr. Connolly accepted that the Society's demand to Mr. Murphy to file an accountant's report for the year ending the 31<sup>st</sup> March, 1997 should properly have related to the 8 months ending on that date.

21. A long and detailed judgment was delivered by MacGrath J. on the 31<sup>st</sup> July, 2019, some of which is relevant to the within appeal.

22. In particular, during the course of Mr. Murphy's cross-examination of Mr. Connolly, a letter came to light ("the Healy letter") which Mr. Murphy claimed he had not seen before. On the 9<sup>th</sup> December, 1997, Mr. Connolly wrote to Mr. Healy saying: -

"I also take the opportunity to advise you that a closing Accountant's Report has not been filed by you. The last Accountant's Report filed with the Society covered your financial year ended 31<sup>st</sup> August 1995. A closing Accountant's Report should have been filed covering the period 1<sup>st</sup> September 1995 up to the date of acquisition of your practice by Mr. Murphy in 1996."

23. At the foot of the letter it states "cc. Mr. Colm Murphy".

24. Mr. Murphy attaches huge significance to the Healy letter because, he says, it shows that the Society was seeking to make him liable for a 4 month accounting period which it knew was Mr. Healy's responsibility. Mr. Murphy suggests that had this letter been available to him at the time of the original inquiry by the SDT, it would have afforded him a complete defence. He alleges that it was wrongfully withheld from him by the Society.

25. A similar allegation was advanced by Mr. Murphy in the plenary proceedings which was considered by MacGrath J. in the section entitled "Observation on the Healy matter" at paras. 342 – 350 of his judgment ([2019] IEHC 724) delivered in the plenary proceedings on the 31<sup>st</sup> July, 2019. Although the letter was stated to be copied to Mr. Murphy, the court was not satisfied on the totality of the evidence that he received it (at para. 344). In the same paragraph, the judge noted conversely that it was not clear that the Society was aware, or ought to have been aware, that Mr. Murphy did not receive it.



26. Having considered all the evidence concerning the sending of the letter and subsequent events, the court concluded (at para. 347): -

“... I am not satisfied that the evidence establishes that a decision was taken by the Society not to provide Mr. Murphy with a copy of that letter at that time, or that it was reckless in failing to do so. Having considered the evidence of the witnesses and their demeanour on this issue, I am also not satisfied that any ulterior motive has been established for this omission.”

27. While there were some communication failures, the judge was not satisfied that there was evidence of *mala fides* involved (para. 348). He was further not satisfied that the Society was or ought to have been aware of any frailty in the order made by the SDT, which had not been appealed or set aside (para. 349).

### **The Motion to Extend Time**

28. On the 13<sup>th</sup> July, 2020, Mr. Murphy issued a motion in these proceedings seeking an extension of time within which to bring an appeal from the order of the SDT of the 28<sup>th</sup> September, 1999 grounded upon an affidavit sworn by Mr. Murphy on the 12<sup>th</sup> May, 2020. Mr. Murphy deals with a number of issues in this affidavit including those relating to an undertaking given by him concerning the institution of proceedings in 2011 and certain allegations by him concerning the Society’s attitude towards solicitors acting for him. These matters are not directly relevant to this appeal and I do not propose to consider them further.

29. The gravamen of the complaint in the affidavit is an allegation by Mr. Murphy that the Society failed to disclose the Healy letter to him or the SDT and this resulted in a wrongful finding of professional misconduct against him. He avers that this letter provided him with a complete defence to the charge. He avers that since the hearing of the plenary

proceedings, he was put in touch with Mr. Healy who agreed to file an affidavit. In an affidavit sworn on the 8<sup>th</sup> June, 2020, Mr. Healy avers that he had not been in touch with Mr. Murphy since October 1996 until their paths crossed by chance in March 2020. He confirms that it was the Society's position that Mr. Healy at all times was responsible for the accounts of his practice until August 1996 when Mr. Murphy took over.

**30.** These affidavits were replied to by John Elliot, the Registrar of Solicitors and the Director of Regulation of the Society, sworn on the 24<sup>th</sup> September, 2020. Mr. Elliot refers to the legislative provisions regarding appeals being brought within 21 days and avers at para. 17 that it is for Mr. Murphy to satisfy the court that it has jurisdiction to extend the statutory time limit and if such jurisdiction exists, whether it should be exercised in this case. The jurisdiction point is considered further below.

**31.** He avers that it is clear that Mr. Murphy did not form any intention to appeal within the 21 day period nor was he labouring under a mistake concerning his right to appeal. This is not disputed in this appeal. Mr. Elliot refers to extracts from the evidence given by Mr. O'Reilly in the plenary proceedings which make clear that Mr. O'Reilly was at all times endeavouring to prepare an accountant's report for the 8 month period but the difficulty which presented was because of irregularities in the accounts kept by Mr. Healy. Mr. O'Reilly was having difficulty reconciling the balances in those accounts on the date on which Mr. Murphy took over the practice.

**32.** He also notes Mr. O'Reilly's evidence to the effect that the report for the 8 month period, when finally filed, was subject to the qualification that the opening balances brought forward per Mr. Healy's client ledger did not reflect the balance in the practice's bank accounts as transferred to Mr. Murphy's client bank accounts. Mr. Elliot further refers to

Mr. O'Reilly's evidence to the effect that at the time of the SDT enquiry in 1999, he was available and would have been willing to give evidence had he been asked.

**33.** Mr. Elliot refers extensively to the findings of the High Court in the plenary proceedings concerning the allegation that the Healy letter had been withheld by the Society saying (at para. 43 of the affidavit) that the court rejected Mr. Murphy's claims of breach of duty, malice, recklessness or ulterior motive on the part of the Society and specifically rejected the claim that a decision had been made to withhold the Healy letter.

**34.** He makes the point that there is no evidence that the "sticking point" was as to whether a report for 12 or 8 months would be filed. He emphasises the fact that no report was filed and when it was filed, it had undoubtedly not been filed in a timely manner. He suggests that Mr. Murphy is trying to re-litigate issues already determined by the court.

**35.** Mr. Elliot further says that insofar as Mr. Murphy suggests in his grounding affidavit that the accounts for the 8 month period had been prepared and there was no difficulty about them, this is contradicted by the evidence given by Mr. O'Reilly to the court to the effect that the accounts being prepared were only for the 8 month period and the delay in preparing and submitting the accounts was in respect of those accounts. He, therefore, disputes the suggestion by Mr. Murphy that if he had been asked only for 8 month accounts by the Society, he would have had no difficulty and there would have been no charge against him.

**36.** Mr. Elliot disputes that, referring to Mr. Connolly's evidence that no accounts were filed, despite repeated assurances that they would be. He says the Society submits that if there is any frailty in the finding of the SDT, it could only be regarded as being of the most technical nature and not one giving rise to an arguable ground of appeal at this remove.

37. In a subsequent affidavit sworn by Mr. O'Reilly on the 5<sup>th</sup> October, 2020, he takes issue with some of Mr. Elliot's averments and says that the difficulty for him was that he was asked to prepare accounts for a one year period and that there was no issue with the accounts for the 8 month period. Mr. O'Reilly avers (at para. 7) that "[e]ventually, the Law Society agreed to accept a 'qualified report' ". When, or in what manner, this agreement was arrived at is not specified by Mr. O'Reilly beyond an averment that the Society agreed to accept the qualified report just before the accounts were filed.

### **Judgment of the High Court**

38. Having referred to a number of issues that do not arise for consideration in this appeal, MacGrath J. noted the statutory provisions for appeal as I have set them out above. He said that Mr. Murphy accepted that he did not form an intention to appeal within the time nor was there any element of mistake on his part. Rather his case is that he has arguable grounds of appeal and as a matter of justice, time should be enlarged because evidence was concealed from him and the SDT.

39. The judge referred to the fact that the Society raised an issue as to whether there is a jurisdiction to extend the time given that it is provided for by primary legislation. He goes on to say that the Society had conceded for the purposes of the application that in principle, the court has a jurisdiction to extend the time and therefore, the judge proposed, without determining that point, to proceed on the basis that such jurisdiction arises. This issue is considered further below.

40. The judge proceeded to summarise the evidence as it appeared in the affidavits and the parties' submissions. He noted (at para. 32) Mr. Murphy's concession that there had been an exceptional delay and that he was therefore required to meet a high threshold of arguability in an application to extend time. The judge carried out a careful analysis of the

relevant authorities, to which I will refer further, and summarised the applicable principles emerging from those authorities.

**41.** In dealing with the length of the delay in bringing this application, now over twenty years, the judge noted that not only had Mr. Murphy not appealed within time but according to his draft affidavit in support of the appeal exhibited in the affidavit grounding the extension of time application, Mr. Murphy says that he discussed the possibility of an appeal with his accountant and a legal team. While they all agreed that the decision seemed perverse, as long as the Society were confirming that he was responsible for the accounts period from the 1<sup>st</sup> April, 1996 to 31<sup>st</sup> March, 1997, there was no point in appealing.

**42.** Thus, rather than a failure to appeal within time, a positive decision was taken not to appeal. The judge said (at para. 34) that even if one were to discount a considerable portion of the 20 year period on the basis that Mr. Murphy might have believed he was precluded from appealing by virtue of an undertaking he gave in 2011 or that the evidence might have emerged much earlier if the matter before Hanna J. in 2012 had gone to full hearing, that still left the delay in excess of 10 years.

**43.** The judge also noted the Society's submission that even when Mr. Murphy became aware of the Healy letter in April 2018, more than a further two years elapsed before he brought this application. The court considered that some allowances should be made for that period of delay on the basis that it was not unreasonable for Mr. Murphy to await judgment in the plenary proceedings, the pandemic had intervened and the 2011 undertaking may have made Mr. Murphy reticent to make the application. Accordingly, while he took account of that additional period of delay, he did not consider it determinative.

**44.** The judge turned to consider the continuing allegation by Mr. Murphy concerning the alleged suppression of evidence, in particular the Healy letter, by the Society. In that regard,

I note that in the draft affidavit supporting the appeal mentioned above, Mr. Murphy continues to allege that Mr. Connolly and the Society deliberately withheld the Healy letter from him. The judge considered that this continuing allegation by Mr. Murphy constituted an attempt to request the court to revisit its finding in the plenary proceedings that there had been no such deliberate suppression.

**45.** The judge then looked at the threshold of arguability and the prejudice arising from the delay. The judge referred in this context to the witness statement of Mr. O'Reilly in the plenary proceedings concerning the alleged telephone conversations in early 1998 with Mr. Connolly about the acceptability of a qualified accountant's report. In this statement, Mr. O'Reilly alleged that Mr. Connolly confirmed that the Society would not accept a qualified report. However, Mr. O'Reilly went on to say that he did not have a clear recollection of the matter.

**46.** The judge pointed to the fact that nothing in the written documentary evidence expressly referred to such conversations having taken place. He noted Mr. Connolly's evidence in the plenary proceedings that he had no recollection of these alleged conversations with Mr. O'Reilly but that he would not have said that a qualified report would be unacceptable. He referred to a passage from the cross-examination of Mr. Connolly in this respect when Mr. Connolly's evidence was to the effect that not only would the Society not have refused a qualified report, but rather Mr. O'Reilly would have been obliged to submit such a report as a dim view would have been taken of one filed without qualification.

**47.** The judge highlighted this difference of recollection on what he considered to be an important issue. He noted that had Mr. O'Reilly been called to give evidence in 1999, he may have been in a position to inform the SDT of any conversations he then recalled having had with Mr. Connolly. This could have been explored at the time. Similarly, Mr. O'Reilly's

contention that if the Society had said from the outset that it was looking for an 8 month account, he could have completed it immediately, could have been fully explored at the time. On this issue, the judge concluded that the passage of time gave rise to a real risk of prejudice in relation to a matter of potential significance to the appeal.

**48.** With respect to the Healy letter, the judge said: -

“48. On one view the letter of 9<sup>th</sup> December, 1997 may be said to provide the applicant with the basis for an arguable ground of appeal. On another, it may be said that it is not relevant to the important contention of both Mr. O’Reilly and Mr. Murphy that the respondent would not accept a qualified report. Whether Mr. Healy was requested to provide accounts for a portion of the period in respect of which Mr. Murphy was also being requested to provide accounts does not appear to me to go to the heart of a significant issue of whether the respondent was offered and refused to accept a qualified report. The report which was filed in January 1999 was qualified and was prepared subject to the difficulties which pertained from an early stage regarding the closing balances of Mr. Healy’s accounts.”

**49.** Taking all these matters into account, MacGrath J. (at para. 50) was not satisfied that the threshold of arguability had been crossed. He was further satisfied that the arguability of the appeal was outweighed to a significant degree by factors such as the length of delay, the findings in the plenary proceedings regarding the allegation of concealment, that Mr. O’Reilly could have been called to give evidence to the SDT but was not, and the importance and relevance of the new evidence to the misconduct charge. He was satisfied that the risk of prejudice to the Society was such that it would be unjust to extend the time and that the balance of justice lay against granting the application.

## **The Appeal**

**50.** In his notice of appeal, Mr. Murphy advances 31 separate grounds, the first of which contains six sub-grounds. Mr. Murphy confirmed during the course of this appeal that ground 1 is not being pursued, in this appeal at any rate.

**51.** The balance of the grounds are largely concerned with the contention that the trial judge incorrectly analysed the salient facts in concluding erroneously that the threshold of arguability had not been met by Mr. Murphy. Further, Mr. Murphy contends that the judge was in error in addressing the balance of prejudice that arose in the circumstances. Mr. Murphy also contends that the judge was incorrect in concluding that he was seeking to revisit the judge's findings on the issue of suppression of documents and in particular the Healy letter. In his submissions, Mr. Murphy places considerable emphasis on what he describes as the Society's failure to produce the letter to him and the SDT at the relevant time.

**52.** In both written and oral submissions, Mr. Murphy cavils with the judge's description of his claim as being one of suppression of the letter and he relies on authority for the proposition that whether the court was misled deliberately or inadvertently is not relevant. In that regard, Mr. Murphy seems to resile somewhat from the statement in his draft affidavit to which I have already referred suggesting that Mr. Connolly deliberately withheld the letter.

**53.** He relies on the provisions of O. 84C as grounding the court's jurisdiction to extend the time for appealing. Mr. Murphy refers to a number of well-known authorities, also considered by the High Court, following on the seminal judgment in *Eire Continental*



*Trading Company Limited v Clonmel Foods Limited* [1955] 1 IR 170. He places particular emphasis on the judgment of the Supreme Court in *Goode Concrete v CRH Plc. & Ors* [2013] IESC 39 which he submits is on all fours with his case because the basis for the late appeal in *Goode* was also material that emerged after the time for appealing had expired. He also relies on *Keon v Gibbs* [2015] IEHC 812 (discussed below) and the recent judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3, [2020] 2 ILRM 407.

**54.** Mr. Murphy emphasises the fact that the onus of proof on the Society as prosecutor before the SDT was the criminal standard beyond reasonable doubt. He again stresses that had the Healy letter been made available to the SDT, there could not have been a finding of misconduct against him. In his written submissions, Mr. Murphy accepts (at para. 50) that “he must meet a very high threshold of arguability in relation to his appeal” and submits that he has done so.

**55.** He places reliance on a number of authorities concerning the duty of prosecuting authorities and regulatory bodies to put all relevant information before the court in criminal or quasi-criminal proceedings. He suggests that no issue of prejudice has been identified in relation to the Society and says that the original affidavits are all still available.

### **A Preliminary Point**

**56.** Prior to the commencement of this appeal, the court raised with the parties the issue of jurisdiction under s. 7(11) above with particular reference to the decision of the High Court in *Noone v Residential Tenancies Board* [2017] IEHC 556, [2019] 1 IR 205. In that case, the issue arose as to whether the court had jurisdiction to extend the time for bringing an appeal under s. 123 of the Residential Tenancies Act, 2004 which provided for an appeal

being brought from the Tenancy Tribunal to the High Court on a point of law. Subsection 3 of the 2004 Act provided that: -

“(3) Any of the parties concerned may appeal to the High Court, within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law.”

**57.** The “relevant period” referred to is the period of 21 days beginning on the date that the determination order concerned is issued to the parties. The appellant tenant did not appeal within the 21 day period and sought an extension of time in which to do so. The Board contended that the court had no jurisdiction to grant an extension of time, despite an earlier decision of the High Court in *Keon v Gibbs* (op. cit.) in which the High Court, in similar circumstances, had in fact extended the time but without any consideration of whether there was jurisdiction to do so, the point not being raised by the parties. In the latter case, the court held that the application failed on the merits in any event. The court in *Noone* reached the opposite conclusion, holding that there was in fact no jurisdiction to enlarge the time for appealing.

**58.** *Keon* was appealed to this court where judgment was delivered by Hogan J. with whom the other members of the court agreed- *Keon v Gibbs* [2017] IECA 195. He noted that the jurisdictional issue was not directly raised in the High Court. Hogan J. noted that at the outset of the appeal, the court (Finlay Geoghegan J.) gave an *ex tempore* ruling that the court would proceed with the merits of the appeal to extend time and that it would only finally determine the jurisdictional issue in the event that it proved necessary to do so.

**59.** Hogan J. concluded that as the appeal in any event failed on the merits, it was unnecessary to reach any concluded view on the jurisdictional issue. However, he considered it briefly in circumstances where it may become relevant in a future case. He

distinguished the earlier judgment in *Law Society of Ireland v Tobin* [2016] IECA 26 and considered that the case under consideration was quite different because, unlike *Tobin*, the right of appeal to the High Court from the Tribunal is entirely dependent on statutory vesture.

**60.** He was of the view that the provisions of O. 84C with regard to extensions of time were not applicable for the reasons he explained. Hogan J.'s reasoning in that regard was applied by the High Court in *Noone* in coming to the conclusion that there was in fact no jurisdiction under the statute or the Rules to extend time.

**61.** As noted earlier, the High Court in the present case did advert to this point and submissions were made by the Society dealing with it. In its written submissions in the High Court, the Society said: -

“20. In the circumstances it is not clear that the court does have jurisdiction to extend time. The Society is however, for the purposes of this appeal, prepared to assume that the court would in principle have jurisdiction to extend time ...”

**62.** In those circumstances, in my view the trial judge was correct to proceed as he did to determine the merits of the application without determining the jurisdiction issue. I believe it is appropriate for this court to proceed in similar fashion and to adopt a like approach to that taken by the court on appeal in *Keon*.

**63.** Subsequent to the hearing of this appeal, Mr. Murphy drew the court's attention to a recent decision of this court in *James v Watters* [2021] IECA 327 which concerned a complaint to the SDT. In that case, the SDT found that there was no prima facie basis for the complaint and dismissed it. The complainant, a litigant in person, appealed to the High Court who also dismissed the appeal. The complainant appealed to the Supreme Court who refused leave for a “leapfrog” appeal. The complainant then sought to appeal to this court

but was now out of time to do so by about two months and sought an extension of time. In a judgment delivered by Haughton J. with whom the other members of the court agreed, he found that the complainant satisfied the first two of the *Éire Continental* criteria but not the third. As there was no arguable ground of appeal, he refused the extension of time.

**64.** While the court is grateful to Mr. Murphy for drawing our attention to this case, it is not particularly relevant to the preliminary point as it concerned the undoubted jurisdiction of this court to extend time for bringing an appeal from the High Court. The jurisdiction was exercised there in accordance with the wellsettled principles that are discussed in this judgment.

### **Legal principles**

**65.** The High Court considered a number of authorities including *Éire Continental*, *Goode Concrete*, *Gately*, *Brewer v Commissioner of Public Works* [2003] 3 IR 539 and *Coleman v The Law Society of Ireland* [2020] IEHC 162 and, at para. 29 of the judgment, he provided a succinct summary of the applicable principles which I think would be hard to improve on and are not in dispute: -

“29. ... The criteria outlined in *Éire Continental* are not to be regarded as if they are set in stone but will apply in the great majority of cases. Their relative importance is likely to vary from case to case. The underlying obligation of the court is to balance justice on all sides. The applicant must have an arguable ground of appeal. The threshold of arguability may rise in accordance with the length of the delay. The proper administration of justice and finality of litigation require to be considered, as it seems to me, does the nature of the proceedings, being disciplinary, where the criminal standard of proof applies. Although the sanction might to be said to be at the minor end of the scale (censuring) a finding of misconduct is a matter of

importance to the reputation of the solicitor and to the respondent in the exercise of its regulatory powers over members of the solicitors' profession. Prejudice must be considered. Even where arguable grounds might be established and/or where, as Clarke J. stated, 'the broad criteria might suggest that an extension should be granted', relief may be refused on the grounds of prejudice. As a matter of principle, it is not necessary for a responding party to positively establish prejudice to successfully resist an application. The longer the delay the more likely it is that the risk of prejudice will be a significant factor in the court's determination. This is particularly so where any appeal may depend on the memories and recollections of the participants and is not based exclusively or substantially on records or documents."

**66.** The three criteria set out in the *Éire Continental* case which are, by now, extremely well-known, are: -

- (1) The applicant must show that he had a bona fide intention to appeal formed within the permitted time.
- (2) He must show the existence of something like mistake. Mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant Rule is not sufficient.
- (3) He must establish that an arguable ground of appeal exists.

**67.** Many of the subsequent decisions on extensions of time proceeded on the basis that these criteria constituted a test that must be satisfied before an application can be granted. Recent authorities have shown that this approach was incorrect. Indeed, a careful reading of *Éire Continental* itself demonstrates that these were never absolutes. Rather, Lavery J.

described them (at p. 173) as “matters for the consideration of the court” but “they must be considered in relation to all the circumstances of the particular case”. He referred to earlier authority emphasising the court’s discretion in this respect.

**68.** As Geoghegan J. pointed out in *Brewer* at para. 29, the fulfilment of these criteria does not automatically mean that an extension must be granted, and the converse is equally true.

**69.** In *Goode Concrete*, Clarke J. (as he then was) suggested that the *Éire Continental* test, as he describes it, would apply in the vast majority of cases and he identified factors to be considered in balancing justice in each case. These included the importance of finality in litigation and the administration of justice in an orderly fashion. They also include a consideration of the risk of injustice from excluding a party from a potentially meritorious appeal on the one hand, and prejudice to successful parties who have operated on the basis that the proceedings are at an end, on the other. Importantly, he noted that it would be difficult to envisage circumstances where it could be in the interests of justice to allow an extension of time for an appeal which was wholly unmeritorious and lacked arguable grounds. This reflects the third *Éire Continental* criterion, subsequently considered by the Supreme Court in *Gately* to be the most important .

**70.** It follows therefore that the court, when having regard to the circumstances of the particular case, must engage in some analysis of the merits of the appeal in order to determine whether, and to what extent, arguable grounds may be said to exist. As *Gately* makes clear, this threshold requirement increases with the passage of time.

**71.** Mr. Murphy places significant reliance on *Goode Concrete* which he suggests presents an exact analogue of his case. *Goode Concrete* was, as described by Clarke J., an unusual case to the extent that the late appeal was sought on grounds including a reasonable

apprehension of objective bias on the part of the trial judge. The appeals in that case were brought between 19 and 22 months late which Clarke J. described as being “out of time by a very significant margin indeed” (para. 6). It is perhaps worth noting that the delay in the instant case between the relevant information becoming available to Mr. Murphy in April 2018 and the bringing of this application in itself exceeds the delay in *Goode Concrete*.

**72.** In the latter case, the trial judge had disclosed to the parties at the outset that he was a shareholder in one of the defendant companies. The plaintiff took no objection and the case proceeded. However, it came to the plaintiff’s attention subsequently that the trial judge’s shareholding was considerably more substantial than had been assumed, a fact of which the trial judge himself was broadly unaware without making further enquiry. The Supreme Court held in the circumstances that those facts, discovered after the trial in the High Court, did give rise to an arguable ground of appeal. Accordingly, the Supreme Court extended the time but notably, confined the grounds of appeal, of which there were many, to the sole issue of objective bias.

**73.** The threshold issue was one that was central to the Supreme Court’s decision, delivered by O’Malley J., in *Gately*. Having said that the threshold of arguability may rise in accordance with the length of the delay, O’Malley J. went on to say (at. para. 65): -

“... It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice.”

**74.** The existence of prejudice to the respondent is an equally important consideration. As Clarke J. in the Supreme Court noted in *Tracey v McCarthy* [2017] IESC 7, the presence of

prejudice may make it unjust to extend time, even where an extension might otherwise be granted and the relevant criteria are satisfied.

### **Discussion**

**75.** A delay of over 20 years in seeking to bring an appeal may not be unique, but it is certainly extremely rare. A delay of such magnitude, in my view, requires the applicant for an extension of time to establish to a high degree of probability that the appeal is likely to succeed. Even where that is established, the question of prejudice to the respondent after such a delay is likely to be a significant factor in the exercise that the court must undertake in calibrating the appropriate balance of justice.

**76.** I accept that it is at least arguable that the Healy letter might have had an impact on the hearing before the SDT had it been available. Mr. Murphy says that it proves that the Society was seeking to make him responsible for a four month accounting period while at the same time acknowledging that Mr. Healy was responsible for that period. I do not however accept the contention advanced by Mr. Murphy that the Healy letter presented a total defence to the first charge or that, as he suggested, the case might never have been brought.

**77.** As the Society submits, the charge was not simply one of failing to file a report for the 12 month period, but of failing to file any report. On one view of the matter, it might be said that the reference to 12 months instead of 8 months by the Society, subsequently admitted by Mr. Connolly to be incorrect, was at best, a somewhat technical point when the gravamen of the complaint was that Mr. Murphy, despite repeated assurances that he would file a report, failed to do so.



**78.** Mr. Murphy has throughout maintained that his complaint is that the Society was insisting on a 12 month report which he simply could not furnish as he was only responsible for the 8 months. However, as I have noted already, it is difficult to understand what prevented Mr. Murphy from advancing precisely this point by way of defence at the original hearing before the SDT. His ability to do so was unaffected by the availability or otherwise of the Healy letter.

**79.** Indeed, had he done so, there is no reason to think that the Society's response would not have been to the same effect as that given by Mr. Connolly in evidence 19 years later, namely that it was simply a mistake and should have referred to 8 months which may, or may not, have resolved the complaint in Mr. Murphy's favour. On the other hand, it is equally possible that the SDT might have taken the view that the real issue was the failure to file any report, irrespective of the period it covered.

**80.** That gives rise to the next issue. Mr. O'Reilly claimed that Mr. Connolly had refused on more than one occasion to accept a qualified report for the 8 months. Ignoring for the moment the alleged inconsistencies in Mr. O'Reilly's evidence concerning this point and the fact that it is unsupported by any documentary evidence, it would have been open to Mr. Murphy in answer to the complaint that he had failed to file any report to respond that the Society had precluded him from doing so by refusing to accept the qualified 8 month report. As has been said, Mr. O'Reilly could have been called to give evidence to this effect before the SDT. That in turn would have given rise to the right of the Society to challenge Mr. O'Reilly's evidence in this respect on the various grounds to which I have already alluded.

**81.** The conflict of evidence between Mr. O'Reilly and Mr. Connolly on this important issue is, as MacGrath J. found, potentially of central relevance to the proposed appeal herein. Were the appeal to now proceed, the resolution of the conflict between Mr. Connolly and

Mr. O'Reilly would become central to the outcome. The court would have to adjudicate on a conflict between the undocumented recollections of each witness in circumstances where Mr. Connolly has already said that he has no recollection of the alleged telephone conversations with Mr. O'Reilly, and Mr. O'Reilly, in his witness statement in the plenary proceedings, has said that he does not have a clear recollection of the matter and would leave it to Mr. Murphy to deal with, contrary to what he stated over two years later in his affidavit in the extension of time application.

**82.** The position is exacerbated by the fact that no transcript of the SDT proceedings is available, it not being a requirement at that time, which precludes the possibility of exploring any inconsistencies that might arise between the evidence given in 1999 and that in any future appeal. These are clearly matters giving rise to potentially significant prejudice against the Society in the event that an appeal were now to proceed.

**83.** I have already referred to the fact that even when the Healy letter was made available to Mr. Murphy in April 2018, it took until July 2020, a period of 27 months, for him to bring this application. In my view, that is, in and of itself, a very significant period of delay and, as I have said, considerably longer than the period described as "very significant indeed" by Clarke J. in *Goode Concrete*.

**84.** While the trial judge took the view that there were excusing factors for this delay which meant that it ought not be regarded as determinative, I would be inclined to a less benign view of the matter. It seems to me that the factors referred to by the trial judge do not adequately explain this delay, nor has Mr. Murphy himself sought to explain it. However, as there is no cross-appeal against the judge's findings in this respect, I do not propose to determine this appeal on that basis.

**85.** Another aspect of the proposed appeal that is directly relevant to the arguability threshold is the continuing allegations by Mr. Murphy concerning suppression of the Healy letter. In his judgment, the High Court judge came to the view that in seeking to appeal from the original SDT finding, Mr. Murphy was attempting to revisit the finding of the High Court in the plenary proceedings on this important issue. In this regard, it is worth setting out in full ground 2 of Mr. Murphy's notice of appeal: -

“The Judge erred in fact and in law in repeatedly categorising the Appellant's application as one that was based on his allegation in which evidence was ‘suppressed’ (paragraphs 35, 38, 39, 42) or ‘concealment’ (paragraph 50). The Appellant's application was based on the fact that *‘evidence was withheld from the Tribunal and your deponent (the Appellant) at all material times’*. It was not part of his application that the withholding of the evidence was deliberate.”

**86.** I find this assertion, repeated in oral argument by Mr. Murphy, to be somewhat surprising. As previously noted, in the affidavit grounding this application before the High Court, Mr. Murphy exhibited a draft notice of appeal and draft grounding affidavit in support of that appeal. The last ground of appeal appearing in the draft is the following: -

“(m) That there was a breach of candour, non-disclosure and/or breach of good faith by Mr. Patrick Joseph Connolly, the then Registrar of Solicitors.”

**87.** This ground of appeal, drafted a year after the judgment of the High Court was delivered in the plenary proceedings, is directly in the teeth of the court's findings in that judgment that;

(a) It was not satisfied that the Society was aware, or ought to have been aware, that Mr. Murphy had not received a copy of the Healy letter;

(b) The court was satisfied that the evidence did not establish that the Society decided not to provide Mr. Murphy with a copy of the letter;

(c) The Society was not reckless in failing to provide the letter to him and;

(d) There was no evidence of an ulterior motive for the omission.

**88.** Despite these findings, Mr. Murphy continues to assert in his draft affidavit supporting the appeal as follows: -

“40. It can also be seen from Day 5 that I refer to the fact that the letter to Tim Healy suggests that a copy was sent to me. I knew this wasn't so. I drew the Court's attention to the memo from P.J. Connolly to Seamus McGrath which says he had sent me a letter also of the 9<sup>th</sup> December 1997 but without the enclosure which was the letter of the letter of (*sic*) the 9<sup>th</sup> December 1997 to Tim Healy. This suggests that Mr. Connolly deliberately kept the letter to Tim Healy from me. His subsequent actions in not disclosing this letter to the various meetings of the Law Society at the time, the Tribunal and his Witness Statement for the civil hearing would indicate a deliberate decision by him not to show me the letter.”

**89.** I therefore reject the contention advanced by Mr. Murphy in oral argument that he was not suggesting that the letter had been deliberately concealed from him. On the contrary, it is clear that this continues to be a central plank of his appeal and one that cannot succeed for the reasons explained by the trial judge, with which I fully agree.

**90.** I am prepared to accept, for the purposes of this appeal, that Mr. Murphy has raised a ground of appeal that can properly be regarded as arguable. He is correct in saying that he was found guilty of misconduct for failing to file an accountant's report for the year ended the 31<sup>st</sup> March 1997 and that this is factually and technically incorrect. However, I am not

satisfied that this error has resulted in injustice to Mr. Murphy. Even if it has, any such injustice is far outweighed by the countervailing factors to which I have referred.

**91.** I agree with the conclusion of the trial judge that Mr. Murphy has fallen far short of surmounting the threshold of arguability in relation to his appeal that such extraordinary delay demands. Even were the appeal arguable, or arguable to a sufficient degree, that is in my view again far outweighed by countervailing prejudice. The fact that the original affidavits are still available, as Mr. Murphy submits, is really a factor of no moment. The court in this appeal, were it allowed to proceed, would be faced with having to resolve a conflict of recollection between witnesses who have already, several years ago, said that they do not remember the relevant events.

**92.** Even absent that, the courts have repeatedly said that lapses of time of a far lesser order than arise here can be presumed to give rise to prejudice insofar as the memory of witnesses is concerned. An appeal now would, to borrow a well-known phrase, be a facsimile of justice.

**93.** Accordingly, I agree with the trial judge's conclusion that the balance of justice lies against the grant of an extension of time and that no error has been demonstrated in that conclusion.

#### **Jurisdiction of the Compensation Fund Committee**

**94.** For completeness, I should refer briefly to this point. Subsequent to the swearing of his first affidavit grounding the application for an extension of time, Mr. Murphy swore a further affidavit on the 5<sup>th</sup> October, 2020. In this affidavit, he raises for the first time the contention that an essential proof in his prosecution for misconduct was evidence that the

Society delegated its powers to the Compensation Fund Committee to refer matters to the SDT.

**95.** The trial judge considered that any complaint in that regard ought to be pursued by way of judicial review, relying on the judgment in this court in *Sheehan v Solicitors Disciplinary Tribunal & Ors.* [2020] IECA 77.

**96.** He also was of the view that the late emergence of this ground of appeal was not sufficient to disturb the determination of the SDT made over 20 years earlier.

**97.** Subsequent to the High Court judgment herein, the *Sheehan* case was appealed to the Supreme Court who allowed the appeal- *Barry Sheehan Practising Under the Style of Barry Sheehan, Solicitor v Solicitors Disciplinary Tribunal* [2021] IESC 64. While one of Mr. Murphy's grounds of appeal is that the judge erred in concluding that he could only challenge the jurisdiction issue by way of judicial review proceedings, I can see no conceivable basis upon which this alleged ground of appeal could be entertained by the court at this stage.

**98.** Unlike the emergence of the Healy letter, there is nothing to suggest that this challenge to the jurisdiction of the organs of the Society was one which could not have been advanced at the time of the original hearing. It is far too late to do so now.

### **Conclusion**

**99.** In the result, I am satisfied that no error has been demonstrated in the approach of the trial judge to Mr. Murphy's application for an extension of time. I agree with his reasoning and his conclusions and would accordingly dismiss this appeal.

**100.** With regard to the question of costs, my provisional view is that as the Society has been entirely successful in this appeal, it should be entitled to its costs. If Mr. Murphy wishes

to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within 14 days of delivery of this judgment for a short supplemental hearing on the costs issue. If such a hearing is requested and it results in the order proposed herein, Mr. Murphy may be responsible for the costs of such supplemental hearing.

**101.** As this judgment is delivered electronically, Whelan and Barniville JJ. have indicated their agreement with it.