[2020] IEHC 162

THE HIGH COURT

2019 No. 51 SA

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IN THE MATTER OF SECTION 7(13) OF THE SOLICITORS (AMENDMENT) ACT 1960 (AS AMENDED)
AND IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

DANIEL COLEMAN

APPLICANT/APPELLANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 April 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for an extension of time within which to bring an appeal. The application is brought by a solicitor, Mr Daniel Coleman ("*the Solicitor*"), against whom findings of professional misconduct were made by the Solicitors Disciplinary Tribunal. The Solicitor now wishes to appeal those findings to the High Court. The time-limit prescribed for the bringing of an appeal has long since expired. The High Court does, however, have a discretion to extend time having regard to all of the circumstances of the case.

2. The extraordinary feature of the present case is the inordinate length of time which has elapsed since the making of the impugned decisions of the Disciplinary Tribunal. The two decisions which the Solicitor seeks to appeal were made a decade ago, in the first quarter of 2010. Yet, the motions seeking an extension of time only issued on 17 May 2019. It is submitted on behalf of the Solicitor that most of the delay is referable to the period of time which it took for a *separate* appeal, which the solicitor had taken to the Supreme Court, to be heard and determined. This appeal was not finalised until 1 May 2019. It is said that there has been no "culpable" delay on the part of the Solicitor.

3. It has been conceded that the Solicitor had not formed an intention to appeal within the original twenty-one day period, and that the failure to bring an appeal within time had not been the result of any mistake on the part of the Solicitor. Counsel submits, however, that the principal consideration for the court in determining whether to grant an extension of time should be the *strength* of the intended grounds of appeal. The very recent judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 is cited in this regard.

PROCEDURAL HISTORY

4. To assist the reader in understanding the issues which arise on this application for an extension of time to appeal, it is necessary first to explain the nature of the appeal which the Solicitor now wishes to pursue. (A fuller explanation will be provided at paragraphs 36 *et seq*. below). In brief outline, there are two options open to a solicitor against whom findings of misconduct have been made, and in respect of whom the Law Society is seeking a "strike off" order. First, the solicitor may choose simply to make submissions in

response to the formal application which the Law Society must make to the High Court seeking an order striking the solicitor's name off the Roll of Solicitors. Such submissions will, generally, be confined to the question of whether a "strike off" order is an appropriate and proportionate sanction, but, as will be explained presently, can also be directed to the question of whether the findings of misconduct are legally sustainable. Secondly, the solicitor may choose, instead, to invoke their statutory right of appeal against the decision of the Disciplinary Tribunal. Such an appeal will be by way of a full rehearing (unless the parties otherwise agree, and the High Court so directs).

5. On the facts of the present case, findings of misconduct were made against the Solicitor by the Disciplinary Tribunal following two hearings in February 2010, and two reports recommending that his name be struck off the Roll of Solicitors were then submitted to the High Court in March 2010. The Solicitor did not exercise his statutory right of appeal against the decisions of the Disciplinary Tribunal. The matter thus came before the High Court solely on the basis of the Law Society's application seeking *inter alia* an order striking off the Solicitor, i.e. there was no parallel appeal by the Solicitor before the High Court. The consequence of this is that the ambit of the submissions which the Solicitor would have been entitled to make to the High Court were more limited than had he brought an appeal.

6. When the matter appeared before the (then) President of the High Court (Kearns P.) on 26 July 2010, the Solicitor applied for an adjournment in order to instruct counsel. The President refused the application for an adjournment, and, having heard submissions, made an order striking the name of the Solicitor off the Roll of Solicitors. An order was also made directing the Solicitor to pay the sum of €320,000 in restitution to St. Jarlath's Credit Union, Tuam.

7. The Solicitor then brought an appeal to the Supreme Court against the order striking him off. This appeal was filed on 24 August 2010. (To avoid confusion, the reader should bear in mind that the Supreme Court appeal is separate and distinct from the statutory appeal which the Solicitor now wishes to bring to the High Court against the findings of misconduct by the Disciplinary Tribunal).

8. The appeal to the Supreme Court had been made prior to the establishment of the Court of Appeal, and at a time when the Supreme Court, being the only appellate court, had a very heavy case load. The appeal was ultimately heard and determined in 2018. (The order of the Supreme Court was perfected on 1 May 2019). The Solicitor has been successful in his appeal, and the order striking his name from the Roll of Solicitors has been vacated. The "strike off" application has been remitted to the High Court for rehearing. See *Law Society of Ireland v. Coleman* [2018] IESC 80.

9. The Solicitor issued two notices of motion on 17 May 2019 seeking an extension of time within which to bring an appeal to the High Court against the findings of misconduct of the Disciplinary Tribunal. The application for an extension of time was listed for hearing before the High Court together with the Law Society's remitted application for an order striking off the Solicitor.

10. Both matters came on for hearing before me in the first week of March 2020. It had been agreed that the application for an extension of time would be heard first, and that the court would deliver a written judgment on that application in advance of any judgment in respect of the "strike off" application. It was further agreed that, to make efficient use of court time, the two applications would be heard back-to-back in a single hearing scheduled over three days. Put otherwise, rather than break off the hearing to prepare a written judgment on the application for an extension of time to appeal, the court moved directly to hearing the Law Society's application. At the request of the parties, separate judgments are to be delivered in respect of the two applications. This is to allow the parties to consider their options following the delivery of the (first) judgment on the application for an extension of time to appeal.

11. The intention had been that the hearing of both applications would be concluded before the (first) judgment would be delivered. Unfortunately, matters were overtaken by events, and, as a result of the restrictions on court sittings imposed as part of the measures designed to contain the spread of the coronavirus disease, it was not possible to complete the hearing of the second application. The parties subsequently agreed, however, that the court should deliver its judgment on the extension of time application, notwithstanding that the reply on behalf of the Solicitor has not yet been completed in the "strike off" application.

DETAILED DISCUSSION

OVERVIEW OF DISCIPLINARY PROCEDURES

12. A decision to strike a solicitor's name from the Roll of Solicitors involves the administration of justice within the meaning of Article 34 of the Constitution of Ireland. (See *In re The Solicitors Act 1954* [1960] I.R. 239). For this reason, the final decision on the imposition of such a sanction on a solicitor in disciplinary proceedings is exclusively a matter for the High Court (rather than for the Disciplinary Tribunal). Save in circumstances where the Disciplinary Tribunal propose to deal with a disciplinary breach by the imposition of what might be described as "minor" sanctions under section 7(9) of the Solicitors (Amendment) Act 1960, the Disciplinary Tribunal is required to bring the matter before the High Court. More specifically, a report in prescribed form is to be delivered to the President of the High Court by the Registrar of the Disciplinary Tribunal. On the facts of the present case, the Disciplinary Tribunal had recommended that the Solicitor's name be struck off the Roll of Solicitors.

13. Thereafter, the Law Society is obliged to bring an application before the High Court pursuant to section 8 of the Solicitors (Amendment) Act 1960. I will refer to this application by the shorthand "*the 'strike off' application*", in circumstances where that is the actual order sought by the Law Society in this case. This shorthand would not be appropriate in all cases, however, in that a section 8 application will not always seek a "strike off" order, but might seek a lesser form of sanction instead.

14. The "strike off" application pursuant to section 8 of the Solicitors (Amendment) Act 1960 was the procedural mechanism by which the disciplinary proceedings against the Solicitor had initially come before the High Court in July 2010.

15. There is, however, a second procedural mechanism by which disciplinary proceedings can come before the High Court. More specifically, a respondent solicitor, against whom a finding of misconduct has been made by the Disciplinary Tribunal, has a statutory right of appeal to the High Court against that finding. The appeal is provided for under section 7(13) of the Solicitors (Amendment) Act 1960, as follows.

> (13) A respondent solicitor may appeal to the High Court against a finding of misconduct on his part by the Disciplinary Tribunal pursuant to subsection (3) of this section, and the Court shall determine such appeal when it considers the report of the Disciplinary Tribunal in accordance with the provisions of section 8 (as substituted by the Solicitors (Amendment) Act, 1994) of this Act, or as part of its determination of any appeal under subsection (11) of this section, as the case may be.

16. Such an appeal is to be by way of a full rehearing of the evidence laid before the Disciplinary Tribunal. (This is so unless the respondent solicitor contends for, and the Law Society concurs in, a less than full rehearing). The appeal is brought by notice of motion returnable to the President of the High Court.

17. In practice, therefore, where a respondent solicitor has elected to exercise their right of appeal, there will be two parallel motions before the High Court. First, a motion on behalf of the Law Society seeking such order under section 8 of the Solicitors (Amendment) Act 1960 as may be deemed by the Law Society to be appropriate and reasonable having regard to the report and recommendation of the Disciplinary Tribunal. Secondly, a motion on behalf of the respondent solicitor grounding their appeal.

18. The sequencing of the two motions is regulated as follows by Order 53, rule 9(a) of the Rules of the Superior Courts.

> 9.(a)(i) Where the respondent solicitor is appealing to the Court against such finding or findings of misconduct on his or her part, the President shall not thereupon enter upon a hearing of the motion of the Society but shall first direct that the appeal shall proceed as a full rehearing of the evidence laid before the Disciplinary Tribunal, unless a less than full rehearing is contended for by the respondent solicitor and concurred in by the Society and (if applicable) concurred in by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal and unless agreed to by the President.
>
> (ii) Where an appeal before the President proceeds as provided for in sub-paragraph (i) of this paragraph of this rule, the President shall thereafter proceed to deal with the motion of the Society having regard to the outcome of such appeal.

19. As appears, it is expressly provided that the respondent solicitor's appeal shall proceed first, ahead of the Law Society's application. The Law Society's application will then be dealt with having regard to the outcome of the appeal.

20. The interaction between the two types of motions, i.e. the appeal and the section 8 application, has recently been considered by the Court of Appeal in *Law Society of Ireland v. O'Sullivan* [2018] IECA 228. In particular, the Court of Appeal addressed the implications of a respondent solicitor having failed to bring an appeal.

21. The issue is first addressed in the judgment as follows (at paragraph 10).

> "At this stage, I should say that Mr O'Sullivan did not avail of his statutory right of appeal to the High Court against the Tribunal's findings, as provided for in s. 7(13) of the 1960 Act, as substituted by s. 17 of the Solicitors (Amendment) Act 1994. His failure to appeal against the findings of the Tribunal means that he could not challenge them thereafter and, in particular, when the Society's application to the High Court for the imposition of the recommended sanctions came before the High Court. In the event that Mr O'Sullivan had chosen to lodge an appeal, that appeal would have been determined ahead of the Society's application for the imposition of the recommended sanctions."

22. The judgment then turns to address the specific consequences of the failure to appeal (at paragraphs 25 and 26). The gravamen of the respondent solicitor's complaint had been that it was incumbent upon the High Court to make its own findings of misconduct by hearing oral evidence, rather than simply accepting the Disciplinary Tribunal's findings of professional misconduct. The Court of Appeal rejected this argument as fundamentally flawed.

> "There is a fundamental flaw in [the respondent solicitor's] argument in this regard. It is that he failed to avail of his entitlement to a statutory appeal against the findings of misconduct by the Tribunal in accordance with s. 7(13) of the 1960 Act. His failure to adopt that course means that the findings made by the Tribunal are final and conclusive. They may not be challenged on the merits. Had [the solicitor] sought to appeal the findings as he was entitled to do, that re-hearing before the High Court would have taken place ahead of the Law Society's present application. [The solicitor] could on that appeal have cross-examined any witnesses called by the Society. By not bringing such an appeal, [the solicitor] cannot now be heard to complain that on the Society's application to the High Court for an order imposing sanctions, he had had no opportunity to cross-examine witnesses. […]".

23. The Court of Appeal summarised the legal position as follows (at paragraph 28 of the judgment).

> "When the High Court hears the Society's application for sanctions to be imposed pursuant to s. 7(9) of the 1960 Act its function is limited to the question of sanction. By that time, the merits of the complaint of misconduct and the findings of the Tribunal or the High Court (in the event of an appeal) have been determined. The High Court is not obliged to impose the sanctions that the Tribunal has recommended in its Report, and may impose whatever

sanction available under the legislation that it considers appropriate to the misconduct found."

24. The nature of the High Court's jurisdiction in disciplinary proceedings has been considered even more recently by the Supreme Court in *Law Society of Ireland v. Coleman* [2018] IESC 80. This judgment is directly relevant in that it has been delivered in the context of these very proceedings. This is the judgment on the Solicitor's successful appeal against the order of the High Court (Kearns P.) of 26 July 2010 striking his name off the Roll of Solicitors.

25. It should be reiterated that the Solicitor had still not indicated any intention to bring an appeal against the Disciplinary Tribunal's findings as of the date of the Supreme Court hearing, and thus the Supreme Court's judgment is addressed primarily to the Law Society's application under section 8 of the Solicitors (Amendment) Act 1960. See paragraph 13 of the judgment as follows.

"It is important to note that the High Court became engaged with the findings of the Disciplinary Tribunal in both cases via the Law Society's application for the orders above outlined: at no point did the appellant exercise his right to appeal either decision made by the Tribunal. Those decisions therefore stand un-appealed to this date."

26. The Supreme Court, *per* McKechnie J. delivering the unanimous judgment, emphasised that the decision to strike a solicitor's name off the Roll of Solicitors involves the administration of justice. It is essential, therefore, that the High Court must conduct an independent adjudication of the application before it. The fundamental role of the High Court is explained as follows, at paragraph 58 of the judgment.

> "As noted above, the Law Society is obliged to bring before the High Court, the report and order of the Tribunal, its findings and the entire material upon which these were arrived at. The legislature so ordained in order to ensure that the judicial arm and not the administrative agency would ultimately be responsible for any findings of misconduct and the resulting sanction which followed. Otherwise, as is evident from the decision in In *Re Solicitors Act 1954* [1960] I.R. 239, the entire regime could be constitutionally impaired. Therefore, the role of the court in this overall process is fundamental. This in my view applies, at the level of principle, whether the court is simply considering the Society's application or is in addition adjudicating upon an appeal taken by the respondent solicitor."

27. The Supreme Court, at a later point in its judgment, rejected an argument on the part of the Law Society that the absence of an appeal by a respondent solicitor relieved the High Court of its obligation to ensure that the findings of misconduct have a "sustainable basis". See paragraph 90 of the judgment as follows.

"This submission in my view starts from an incorrect premise and fails to appreciate the fundamental role which the court must play on a referral application by the Society. Disregarding any question of appeal, the High Court, as pointed out, must satisfy itself that the findings of misconduct have a sustainable basis and secondly, must form an independent view as to what sanction is appropriate to such findings. In so doing, particularly with sanction, regard will be had to the circumstances giving rise to such findings, the factors offered in mitigation (if any) and the personal circumstances of the subject solicitor (if known): all viewed within the background of the court having to be satisfied that its decision will reflect public confidence in the solicitor profession and overall will not negatively impact on the administration of justice."

28. McKechnie J. drew an analogy with a sentencing hearing in criminal proceedings (at paragraph 90 of the judgment).

"[…] The overall disciplinary procedure is not one which can be looked at, as a single process or event within which fair procedures at any stage are a sufficient compliance with the requirement of justice. The situation at hand is much more akin to a finding of guilt to be followed by a sentencing hearing. The subject person is entitled to fairness on both occasions."

29. The Supreme Court judgment, having referred to *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48; [2015] 1 I.R. 516, makes the following observations on the nature of a respondent solicitor's right of appeal (at paragraph 56).

"With regard to a solicitor's right of appeal, as provided for in s. 7(13) of the 1960 Act and as referred to in O. 53, r. 12 above, I expressed doubts as to whether in all circumstances such was by way of a fully fledged 'de novo' hearing. This view was formed against a statutory background within which a preliminary investigation of the complaint would have already taken place by the CCRC, and would have been followed by a full, unrestricted inquiry by the Disciplinary Tribunal. However, at para. 66 of my judgment [in *Fitzgibbon v. Law Society* [2014] IESC 48] I made a point of general application: -

> 'I [am] perfectly satisfied that the High Court has full jurisdiction to regulate the manner in which issues before it are dealt with: this must follow from the mandatory obligation on every court to ensure that constitutional justice and fair procedures are applied to any justiciable controversy determined by it. This duty takes effect once the court has seisen of the issue and continues until that court becomes functus officio … this means that in any given case the court can and will respond to what is necessary to ensure the integrity of a person's rights.'

As can thus be seen, the obligation referred to applies almost irrespective of the precise wording of the appeal provision in question, or the rule of court giving effect to it."

30. There was some discussion at the hearing before me as to whether there is any disharmony between the judgment of the Supreme Court in *Coleman* and that of the Court of Appeal, some six months earlier, in *O'Sullivan*. In particular, the parties addressed me on whether the latter judgment treated the failure of a respondent solicitor to appeal as imposing much *greater constraints* on the arguments which could be raised in opposition to the Law Society's section 8 application.

31. Counsel on behalf of the Solicitor suggested that there was no disharmony between the judgments in circumstances where the Court of Appeal judgment had been concerned with findings of primary fact (which can only be set aside on appeal), whereas the Supreme Court judgment is concerned with the separate question of whether findings are legally sustainable.

32. Having carefully considered the judgments, I am satisfied that there is no inconsistency between the two. Both judgments acknowledge that the High Court will have a wider remit in cases where the respondent solicitor has brought an appeal against the findings of misconduct. The Supreme Court in *Coleman* expressly refers to the wording of Order 53, rule 9 of the Rules of the Superior Courts, and to its own judgment in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48; [2015] 1 I.R. 516. There is nothing in the judgment in *Coleman* which seeks to assimilate an application by the Law Society with an appeal by a respondent solicitor, nor to collapse the distinction between the two. Rather, the import of the judgment in *Coleman* is that, even in the context of its more limited function on an application by the Law Society, the High Court must satisfy itself that the findings of misconduct have a "sustainable basis". This language is indicative of a form of judicial review, and one which falls far short of a full appeal of the type provided for under section 7(13) of the Solicitors (Amendment) Act 1960 and Order 53, rule 9 of the Rules of the Superior Courts.

33. The type of complaint which may only be raised by way of statutory appeal is illustrated by the facts of *O'Sullivan*. The respondent solicitor there wished to cross-examine before the High Court witnesses who had given evidence before the Disciplinary Tribunal. The Court of Appeal held that this could only be done in the context of an appeal against findings of misconduct made by the Disciplinary Tribunal.

34. A judgment delivered by the Court of Appeal last month, *Sheehan v. Law Society of Ireland* [2020] IECA 77, confirms that the type of argument which may be advanced to the High Court in solicitors disciplinary proceedings will depend on the precise procedure invoked. On the facts of *Sheehan*, the Court of Appeal held that a challenge to the *jurisdiction* of the Disciplinary Tribunal to entertain a complaint should have been brought by judicial review, and not by way of appeal under section 7(11) of the Solicitors (Amendment) Act 1960. This judgment is not directly on point, as it concerns a different form of statutory appeal (an appeal against a minor sanction under section 7(11)), but it is nevertheless indicative of the general principle that the manner in which a matter comes before the High Court will influence the range of arguments which may be made.

35. Finally, for the sake of completeness, it should be noted that one possible distinction between (i) an appeal under section 7(13), and (ii) a section 8 application, concerns the status of *admissions* made by a respondent solicitor at a hearing before the Disciplinary Tribunal. In particular, it has been suggested that an earlier admission may not necessarily be binding in the context of a subsequent statutory appeal. See the judgment of Clarke J. (as he then was) in *Fitzgibbon*, [106].

> "Likewise, it is always possible to place before any adjudicative body evidence of previous admissions made by any party against whom an adverse finding on appeal might be made. In the law of evidence as applied in the courts, previous admissions amount to a well recognised exception to the hearsay rule. It seems to me that the default position, in the absence of any rule to the contrary, must be that an admission, made by a party at a first instance hearing or otherwise made during the first instance process, can be the subject of evidence at a de novo appeal. It is not that the party concerned is, necessarily, bound by an admission previously made. It is, on a *de novo* appeal, a matter for the appellate body to make its own mind up based on the evidence and materials before it. However, just as an admission made by a party against its own interest outside the context of hearings altogether can be the subject of evidence, so also can a similar admission made at first instance be the subject of evidence. The weight to be attached to that evidence in the overall assessment of the issues before the appeal body will, of course, be a matter for it."

PRINCIPLES GOVERNING AN EXTENSION OF TIME

36. The principles governing an application for an extension of time have very recently been reaffirmed by the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 ("*Seniors Money Mortgages*"). The judgment reiterates that, in exercising its discretion to extend time, the underlying obligation upon a court is to balance justice on all sides, and that all the circumstances of the case must be taken into account.

37. Counsel on behalf of the Solicitor placed particular emphasis on what the Supreme Court had to say about the criteria identified in the well-known case of *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170 ("*Eire Continental*"). There, counsel for the respondent had submitted that the following three conditions must be satisfied before a court would allow an extension of time.

> "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 and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
>
> 3, He must establish that an arguable ground of appeal exists."

38. The Supreme Court, *per* Lavery J., accepted that these three conditions were proper matters for the consideration of the court in determining whether time should be extended, but went on to state that they must be considered in relation to all the circumstances of the particular case.

39. In its recent judgment in *Seniors Money Mortgages*, the Supreme Court has reiterated that the *Eire Continental* criteria are guidelines only, and do not purport to constitute a check-list, according to which a litigant will pass or fail. The judgment goes on to emphasise, however, that the rationale that underpins the guidelines will apply in the great majority of cases. In this regard, the judgment in *Seniors Money Mortgages* endorses the approach taken in *Goode Concrete v. CRH plc* [2013] IESC 39 *("Goode Concrete").*

40. As explained by the Supreme Court in Goode Concrete, a court, in exercising its discretion to grant or refuse an extension of time to appeal, must seek to balance a number of competing interests.

> "3.3. The reason why the *Éire Continental* test applies in the vast majority of cases is clear. The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides. Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of those matters will interact on the facts of an individual case may well require careful analysis. However, the specific *Eire Continental* criteria will meet those requirements in the vast majority of cases."

41. The relevant legal principles have been summarised as follows in *Seniors Money Mortgages.*

> "62. The rationale for holding parties to the stipulated time limits for appeals is, as Clarke J. observed [in *Goode Concrete*], that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time. Further, in most cases, the parties will be aware of all the evidence called, the submissions made and the reasoning of the judge – they have, therefore, all the information necessary for the purposes of making a decision. *Goode Concrete* was an exception because the appeal was based on information that had come to the attention of the appellants only after the conclusion of the High Court process. It is notable that in granting an extension of time the Court did not permit the appellants to appeal in respect of any aspect that was known to them in the ordinary course.

63. While bearing in mind, therefore, that the *Éire Continental guidelines* do not purport to constitute a check-list according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.

64. It should also be borne in mind that, depending on the circumstances, the three criteria referred to are not necessarily of equal importance inter se. As Clarke J. pointed out in *Goode Concrete* it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.

65. By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. 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."

42. The reason that counsel for the Solicitor has placed such reliance on the judgment in *Seniors Money Mortgages* is that it has (belatedly) been conceded by the Solicitor that he does not meet the first of the two criteria identified in *Eire Continental.* The application for an extension of time is, instead, largely predicated on what is said to be the arguablity of the grounds of appeal.

43. Counsel also relied on the judgment of the Supreme Court in *Tracey v. McCarthy* [2017] IESC 7. On the facts of that case, the Supreme Court had granted an extension of time to appeal an order of the High Court some eight to nine years after the order had been made. To this extent, the judgment might *appear* at first blush to offer some support to the Solicitor's application, in that the scale of the delay is similar. In truth, however, the two cases are entirely distinguishable. The proceedings in *Tracey* exhibited what are described in the judgment as a number of "highly unusual features". First, the formal order of the High Court, as drawn up by a court registrar, was irregular in that its date of perfection had been *backdated*. As a consequence, by the time the (putative) appellant obtained a copy of the order, the time-limit for bringing an appeal had already expired. The appellant was thus deprived of the opportunity of bringing an appeal in time, in a manner which was not only completely outside of his control, but was outside of the control of any person acting on his behalf. Secondly, the appellant was a litigant in person, without the benefit of legal advice, and had been suffering from significant ill

health during much of the relevant period. Thirdly, the grant of an extension of time would not cause any prejudice to the respondent to the intended appeal. The appeal involved a net point of law, and the relevant facts had already been established on affidavit. The judgment of the Supreme Court states that there was no reason to believe that that court would be impaired, in any way, in coming to a fair and just resolution of the appeal as a result of the delay.

44. The facts of the present case are very different. The intended appellant, the Solicitor, is legally qualified; has conceded that he had not formed an intention to appeal within the time-limit; there would have been no impediment to his bringing an appeal within time; and the ability to conduct an appeal has been impaired by the delay. In particular, the recollection of the witnesses of events which occurred some fifteen years ago in 2004 and 2005 will be diminished.

45. Clarke J. (as he then was) made the following general observation as to the risk of prejudice arising after a lengthy delay (at paragraph 4.13 of the judgment in *Tracey*).

> "In the main parties are entitled to assume, once the period for appeal has passed, that the litigation is at an end. They are entitled to order their affairs accordingly. An extension of time, and particularly an extension of time at a significant remove, inevitably runs the risk of prejudice. I would suspect that very many respondents, faced with an application for an extension of time at the remove of the eight years which is present in this case (or even significantly lesser periods), would very easily be able to persuade a court that it would be fundamentally unfair to allow proceedings which had been allowed lie as if finished for such a period to be reopened."

46. The circumstances of the present case give rise to precisely the same type of concerns identified in this passage.

CONSIDERATION OF ALL THE CIRCUMSTANCES OF THE PRESENT CASE

47. I turn next to apply the principles identified by the Supreme Court in the various judgments discussed above to the present case. This requires consideration of *all* of the circumstances of the case. For ease of exposition, I have broken down the relevant considerations under a number of sub-headings.

(i). No intention to appeal formed within time

48. As explained by the Supreme Court in *Goode Concrete v. CRH plc* [2013] IESC 39 ("*Goode Concrete*"), the discretion to grant an extension of time to appeal will generally only be exercised where a party had made a decision within time to bring an appeal, but for some reason the appeal was not filed within time.

> "3.5 Likewise, in most straightforward cases, a party will be aware of the time limit within which an appeal should be brought (or if not, ought to be so aware) and should not be allowed an extension of time unless a decision to appeal was made in time and there is a good reason for the appeal not having been filed within the time

limit. In the vast majority of cases the only materials which any party will need to consider in deciding whether to appeal will be the materials which were before the judge deciding the case at first instance. A party who has participated in proceedings before the High Court (or who ought to have so participated) will or ought to be aware of all of the evidence called, of the legal submissions made and of the reasoning of the trial judge in coming to whatever conclusion it might now be sought to appeal against. Such a party has available to it all of the information necessary to make its mind up as to whether it wishes to appeal. In that context it is not unreasonable to require the party, in the interests of the overall administration of justice and the balance of justice as and between the parties, to come to a decision within the time specified and to bring the appeal either within that time or such further period as the Court might, exceptionally, allow if there is some excuse for the notice of appeal not being filed in time. Thus the specific *Éire Continental* criteria will, in the vast majority of cases, be likely to be the only test applied by the Court."

49. This rationale has been expressly reaffirmed by the Supreme Court in *Seniors Money Mortgages* (at paragraph 62 of the judgment).

50. In the present case, the Solicitor has, belatedly, conceded that as of 2010 he had not intended to bring an appeal against the findings of misconduct. This position is confirmed in an affidavit sworn during the course of the hearing before me in the first week of March 2020. See affidavit of Daniel Coleman sworn on 5 March 2020, as follows.

> "2. I beg to refer to paragraph 4 and 34 of my grounding affidavit sworn on the 27th day of May 2019 and say that the reference to my intention to file an appeal against the findings of the Tribunal was in error and I retract the content of the averments. I should say that the reference ought to have been to an intention to challenge the findings of the Tribunal and I wish to clarify that I intended to do so at the hearing of the Law Society's application for strike off."

51. The decision not to appeal is entirely consistent with the Solicitor's approach to the disciplinary proceedings in 2010. (This approach is set out in detail at paragraphs 94 *et seq.* below). In brief, the Solicitor had instructed his (then) barrister to make a number of admissions of fact at the hearing before the Disciplinary Tribunal in respect of the conveyancing transactions the subject-matter of the first complaint, and then sought to rely on his co-operation in support of a plea in mitigation. The Solicitor chose not to attend the hearing before the Disciplinary Tribunal in respect of the second complaint, i.e. the alleged breach of undertaking.

52. It is not unreasonable to require that a party, in the interests of the overall administration of justice and the balance of justice as and between the parties, to come to a decision to appeal within the time specified. This is especially so where, as in the present case, that party had not only had the benefit of legal representation at the time of the first-instance decision, but is actually qualified as a solicitor himself. No proper explanation has ever been afforded as to why the appeal which the Solicitor now wishes to make could not

have been brought in 2010. Indeed, until the first week of March 2020, the position adopted by the Solicitor is that he had, in fact, formed an intention to appeal in 2010. This incorrect averment was only retracted during the course of the hearing before me. It is a cause of concern to the court that such an incorrect averment should have been made on an issue of central importance to the application for an extension of time.

(ii). Inordinate delay

53. The most striking feature of the present case is the sheer scale of the delay. The two decisions of the Disciplinary Tribunal from which it is now sought to appeal were made in February 2010, and the formal orders drawn up in March 2010. Yet, the notices of motion seeking an extension of time within which to appeal were not filed until 17 May 2019.

54. Counsel on behalf of the Solicitor submits that, in analysing the delay, regard should be had to the fact that almost all of the time is referable to the processing of the Supreme Court appeal against the order of the High Court (Kearns P.) of 26 July 2010. The appeal to the Supreme Court had been lodged on 24 August 2010, but was not heard and determined until December 2018. The formal Supreme Court order was subsequently drawn up on 1 May 2019.

55. Counsel draws an analogy with the analysis of delay which is carried out by a court in determining whether criminal proceedings should be prohibited on the grounds of delay. A distinction is drawn in that context between "culpable" and "systemic" delay. It is submitted that, on the facts of the present case, the period of any "culpable" delay on the part of the Solicitor ended on 26 July 2010 when the High Court (Kearns P.) made his order. The lapse of time between that date and the order of the Supreme Court of 1 May 2019 allowing the appeal is characterised as "systemic" delay, for which the Solicitor bears no blame.

56. Counsel further submits that it was not open to the Solicitor to seek an extension of time to bring an appeal under section 7(13) of the Solicitors (Amendment) Act 1960 until such time as the Supreme Court appeal had been heard and determined, and the "strike off" order of 26 July 2010 had been vacated. This was said to follow from the prescribed sequencing of the hearing of (i) an appeal against findings of misconduct pursuant to section 7(13), and (ii) an application by the Law Society pursuant to section 8. (See Order 53, rule 9 of the Rules of the Superior Courts, discussed at paragraph 18 above).

57. Counsel cites the ruling of the High Court (Kelly P.) on 10 June 2016 to the effect that the order of 26 July 2010 could only be set aside by way of appeal. As discussed in more detail at paragraph 65 *et seq.,* the parties in the present case had sought a ruling from the High Court as to whether the "strike off" order might be set aside on consent, and the section 8 application re-entered for a fresh hearing. Kelly P. ruled that the High Court does not have jurisdiction to set aside an earlier order of a different High Court judge which had been made following an *inter partes* hearing. If a party is dissatisfied with

such an order of the High Court, then the appropriate remedy is by way of appeal to the Court of Appeal or the Supreme Court.

58. More generally, counsel referred to the judgment of the Court of Appeal in *Danske Bank A.S. (t/a Danske Bank) v. Macken* [2017] IECA 117, [11].

> "There is a clear public interest in the finality of a judicial determination, subject only to an appeal. It is, moreover, generally understood and accepted that where a High Court judge has pronounced judgment in a given matter, that judgment is final and the only remedy open to the disappointed litigant is to appeal. This point is so firmly embedded in our system of civil procedure that it is actually difficult to find direct authority on the point."

59. The logic underlying this overall submission appears to be as follows. Order 53, rule 9(a) of the Rules of the Superior Court stipulates that, where an appeal is brought by a respondent solicitor, then that appeal is to be heard first. The hearing of the Law Society's application is deferred, pending the outcome of the respondent solicitor's appeal.

60. In the present case, the fact that no appeal was brought in 2010 meant that matters had proceeded immediately to the Law Society's "strike off" application, and an order was made by the High Court on that application on 26 July 2010. The gist of the argument now made on behalf of the Solicitor is that it had not been possible to rewind the process, and to bring an appeal, for so long as the "strike off" order of 26 July 2010 remained in existence. It was only when the Supreme Court vacated that order on 1 May 2019 that a window opened which would allow for the possibility of an appeal against the findings of misconduct being heard and determined *first*, ahead of any rehearing of the section 8 application. (The section 8 application had, it will be recalled, been remitted to the High Court by the Supreme Court).

61. Put otherwise, the fact that matters had proceeded as far as the making of an order pursuant to section 8 in July 2010 striking off the Solicitor was said to have foreclosed the possibility of bringing an appeal against the findings of misconduct under section 7(13).

62. This analysis may, strictly speaking, be accurate. It does not, however, reflect the entirety of the options which were open to the Solicitor. The first and most obvious point to be made is that—had he chosen to do so—the Solicitor could have brought an appeal against the findings of misconduct in 2010. As discussed under the previous heading, the Solicitor has, in effect, conceded that the reason an appeal had not been brought at that time is because, as of 2010, he did not intend to appeal.

63. This then leads to the second point, namely that, following on from his change of mind, it would have been open to the Solicitor thereafter to alert the Law Society, and, indeed, the Supreme Court, that his ultimate ambition was to seek to appeal against the findings of misconduct. Put otherwise, even if the Solicitor is correct in saying that the continued existence of the High Court order of 26 July 2010 precluded him from formally applying

for an extension of time, the Solicitor should nevertheless have articulated his new intention.

64. Instead, the Supreme Court had been left with the clear impression that the findings of misconduct were not being appealed. In this regard, it is worth repeating paragraph 13 of the Supreme Court's judgment as follows.

> "It is important to note that the High Court became engaged with the findings of the Disciplinary Tribunal in both cases via the Law Society's application for the orders above outlined: at no point did the appellant exercise his right to appeal either decision made by the Tribunal. Those decisions therefore stand un-appealed to this date."

65. Thereafter, the Supreme Court judgment is principally directed to explaining the function of the High Court on an application by the Law Society pursuant to section 8 of the Solicitors (Amendment) Act 1960. The Supreme Court's approach may well have been very different had the Solicitor made known to the court that he now wished to appeal the findings of misconduct. In this regard, it is to be noted that the Supreme Court had previously put it to the appellant, at a directions hearing on 4 June 2015, that there would be a "*real difficulty in allowing the Law Society's proceedings against him to be heard on a de novo basis, as he seemingly wished for".* (See paragraph 20 of the Supreme Court judgment).

66. This led to an attempt by the parties to compromise the proceedings. This compromise appears to have been contingent on the High Court allowing the "strike off" application to be re-entered. On 10 June 2016, Kelly P. refused to re-enter the application in circumstances where he regarded the High Court as *functus officio*. More specifically, Kelly P. ruled that the High Court does not have jurisdiction to set aside an earlier order of a different High Court judge which had been made following an *inter partes* hearing. If a party is dissatisfied with such an order of the High Court, then the appropriate remedy is by way of appeal to the Court of Appeal or the Supreme Court.

67. It is apparent from this procedural history that the Supreme Court had expressly drawn the Solicitor's attention to the limitations of a strike off application under section 8 of the Solicitors (Amendment) Act 1960. In particular, it would not allow for a *de novo* hearing of the disciplinary proceedings.

68. One of the values which the imposition of time-limits on the bringing of appeals seeks to protect is the proper administration of justice in an orderly fashion *(Goode Concrete*, [3.3]). It would be destructive of this value to allow a party to pursue litigation on a very particular basis, only to change tack at the *conclusion* of the proceedings. Put bluntly, the matter should not have been pursued all of the way to the Supreme Court without informing that court that the Solicitor intended to seek to invoke the statutory right of appeal under section 7(13) of the Solicitors (Amendment) Act 1960.

69. The third point to be made is that, notwithstanding his reticence to flag an intention to invoke the statutory right of appeal, the Solicitor had no compunction in launching a collateral attack on the Disciplinary Tribunal's findings. Specifically, the Solicitor instituted plenary proceedings against the Law Society and the Disciplinary Tribunal (High Court 2014 No. 4143 P.). Relevantly, the following declaratory reliefs were sought in those proceedings (as per the Statement of Claim).

> "(l) A declaration that the hearing and recommendation of the Solicitors Disciplinary Tribunal dated the 10th February 2010 in proceedings bearing reference number 8347/DT20/09 and consequent order of the Honourable President of the High Court dated 26th July 2010 in proceedings bearing the record number 2010 65 SA are invalid by reason of the failure of the Solicitor's Disciplinary Tribunal to *inter alia* discover documents in a timely manner, secure the attendance of witnesses essential to the Plaintiff and/or adjourn the proceedings to allow for same to occur.
>
> (m) An order directing that the proceedings bearing reference number 8347/DT20/09 be remitted to the Solicitors Disciplinary Tribunal for a full re-hearing.
>
> (n) A declaration that the hearing and recommendation of the Solicitors Disciplinary Tribunal dated the 25th February 2010 in proceedings bearing reference number 837/DT89/09 and consequent order of the Honourable President of the High Court dated 26th July 2010 in proceedings bearing record number 2010 66 SA are invalid by reason of the failure of the Solicitor's Disciplinary Tribunal to afford due process to the Plaintiff inter alia by its reliance on patently false evidence, failure to properly or at all consider, relevant documentation provided to it and to otherwise conduct the hearing in accordance with law.
>
> (o) An order directing that the proceedings bearing reference number 8347/DT89/09 be remitted to the Solicitors Disciplinary Tribunal for a full re-hearing.
>
> (p) A declaration that the plaintiff is entitled to be enrolled as a solicitor on the Roll of Solicitors and is entitled to practice subject to statutory regulation."

70. As appears, in the case of each of the two findings of misconduct, it is expressly pleaded that the recommendation of the Disciplinary Tribunal and the "consequent order of the Honourable President of the High Court dated 26th July 2010 … are invalid".

71. These proceedings thus involved a collateral attack upon the findings of misconduct, and upon the High Court's order. (Such a collateral attack upon disciplinary decisions is impermissible for the reasons set out in *Murphy v. Law Society of Ireland* [2019] IEHC 724).

72. No satisfactory explanation has ever been provided as to why the Solicitor did not take the—much more obvious—step of seeking an extension of time within which to avail of the statutory right of appeal against findings of misconduct provided for under section 7(13) of the Solicitors (Amendment) Act 1960. It cannot be an answer simply to say that

the making of a formal application for an extension of time would be inconsistent with the continued existence of the "strike off" order of 26 July 2010. Precisely the same type of inconsistency exists in the bringing of the plenary proceedings, which represent a collateral attack upon the High Court order, but that did not stop the Solicitor from purporting to institute those proceedings. If he was prepared to institute those proceedings notwithstanding that they constituted an impermissible collateral attack, he could and should have taken the lesser step of *flagging* an intention to seek an extension of time within which to appeal.

73. The Solicitor also made a complaint against the solicitors employed by the Law Society who had been involved in the processing of the disciplinary proceedings against him. (This complaint has been dismissed). Further, the Solicitor instituted proceedings before the European Court of Human Rights.

74. In summary, therefore, the suggestion that most of the inordinate delay of nine years can be explained away as "systemic" delay, referable to the hearing and determination of the Supreme Court appeal, is an oversimplification. The manner in which the Solicitor prosecuted that appeal is not a *neutral* factor. Rather, as explained above, the Supreme Court had been left with the clear impression that the findings of misconduct were not being appealed. This is a factor which weighs heavily against the grant of an extension of time to appeal those findings now.

(iii). Law Society's application remains outstanding

75. Counsel on behalf of the Solicitor draws attention to the fact that, even if the application for an extension of time to appeal is refused, it will still be necessary for the High Court to hear and determine the Law Society's "strike off" application. The refusal of an extension of time will not, therefore, bring the disciplinary proceedings to an end. Irrespective of whether an extension of time is granted or not, the High Court will have to consider certain aspects of the disciplinary proceedings. This is so notwithstanding that a period of almost ten years has elapsed since the original order of the High Court on 26 July 2010.

76. The implication here being that any prejudice caused to the orderly administration of justice in granting an extension of time to appeal will be less in the present case than in most other cases. The effect of a refusal of an extension of time in most cases will bring the litigation to a complete halt. That will not happen here.

77. This submission is correct insofar as it goes. It does, however, tend to overlook the distinction between the function of the High Court in determining a "strike off" application, and the broader function it exercises when determining a statutory appeal against findings of misconduct. The latter appeal entitles a respondent solicitor to a full rehearing. The prejudice caused by delay in that context will, obviously, be greater. This is because the recollection of witnesses of events—which, on the facts of the present case, took place principally during the years 2004 and 2005—will be diminished by the passage of time. This form of prejudice is less in the context of a "strike off" application, wherein oral evidence will generally not be called.

78. Counsel is correct, however, to bring attention to the fact that the "strike off" application will remain outstanding even if an extension of time to appeal is refused. This is significant but not in the manner in which counsel suggests. Rather, the true significance of the "strike off" application is that it mitigates the risk of an injustice being caused by the refusal of an extension of time to appeal. The Supreme Court in Seniors *Money Mortgages* emphasised that the objective is to do justice between the parties, and that long delays require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. In most cases, the court will be faced with a binary choice: appeal or no appeal. The position is more nuanced in the present case because, even in the absence of an appeal, the High Court will have to consider, in accordance with the judgment of the Supreme Court in *Coleman*, whether there is a "sustainable basis" for the findings of misconduct. This residual jurisdiction, which falls short of a full appeal, allows for any injustice to be brought to the court's attention even in the absence of an appeal.

79. Moreover, and again as explained in *Coleman*, the High Court must conduct its own independent adjudication of the appropriate sanction to be imposed. There is no question of the High Court being bound by an opinion expressed, or by a recommendation made, by the Disciplinary Tribunal. As discussed presently, many of the points raised on behalf of the Solicitor are, in truth, directed to the *gravity* of the misconduct, rather than to a refutation of the finding of misconduct. To take just one example, the Solicitor now accepts that he did not comply with the *express* terms of an undertaking to hold a land certificate to the order of a credit union, but seeks to characterise the breach as a technical breach and asserts that no financial loss had been caused to the credit union. These are factors which are more immediately relevant to the form of penalty or sanction to be imposed.

80. In summary, as a result of the outstanding section 8 application, the Solicitor in the present case enjoys a safeguard which is not available to intended appellants in other statutory contexts who have been refused an extension of time to appeal.

(iv). Prejudice caused by delay

81. It has been submitted on behalf of the Solicitor that, by reason of its institutional status and statutory function, there can be no prejudice to the Law Society if an extension of time is granted. This is advanced as a factor in favour of the grant of an extension of time. The implication here seems to be that, unlike most litigants, the Law Society has no personal or proprietary interest in the outcome of the disciplinary proceedings.

82. This submission is not well-founded for the following reasons. First, as explained by the Supreme Court in *Tracey v. McCarthy* [2017] IESC 7, [4.12], it is not necessary for a respondent to establish prejudice in order to resist an application for an extension of time.

> "[…] I should emphasise that, in mentioning this point, I do not seek in any way to depart from the well established jurisprudence which makes clear that it is not necessary for a respondent to establish prejudice in order to be able successfully to resist an

application for an extension of time. Ordinarily appeals should be brought in time and if they are not, without good and sufficient reason, brought within the time specified then the right to appeal will be lost irrespective of any question of prejudice. However, the presence of prejudice can, in my view, make it unjust to extend time even in a case where the broad criteria might suggest that an extension should be granted. The presence of prejudice is not, therefore, a necessary basis for opposing an extension of time. Prejudice may, however, quite properly be relied on by a party to suggest that an extension of time, which might otherwise be granted, should be refused."

83. Secondly, the delay in the present case is so inordinate that prejudice can be assumed. In this regard, the next passage from *Tracey*, [4.13] (which has been cited earlier at paragraph 45 above) bears repeating.

"In the main parties are entitled to assume, once the period for appeal has passed, that the litigation is at an end. They are entitled to order their affairs accordingly. An extension of time, and particularly an extension of time at a significant remove, inevitably runs the risk of prejudice. I would suspect that very many respondents, faced with an application for an extension of time at the remove of the eight years which is present in this case (or even significantly lesser periods), would very easily be able to persuade a court that it would be fundamentally unfair to allow proceedings which had been allowed lie as if finished for such a period to be reopened."

84. What the Solicitor is, in effect, seeking is a re-hearing (in part at least) of the disciplinary proceedings. Were this to be done, it would be at a remove of some fifteen years from the key events. It is inevitable that the recollection of witnesses of events which, on the facts of the present case, took place principally during the years 2004 and 2005 will be diminished by the passage of time.

85. Thirdly, there is a public interest in the proper regulation of the solicitors profession. This public interest requires that disciplinary proceedings should be brought to a conclusion, one way or another, within a reasonable period of time. This public interest is undermined by allowing a respondent solicitor to change their mind belatedly and to seek to bring an appeal well out-of-time.

(v). Whether arguable grounds of appeal

86. An intended appellant will normally have to demonstrate arguable grounds of appeal in order to obtain an extension of time. This is because, as reaffirmed by the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3, [65], it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside time in the absence of arguable grounds of appeal. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.

87. The judgment goes on to suggest that the "arguable grounds" threshold may rise in accordance with the length of the delay. A distinction is drawn between "technical" grounds of appeal and those grounds that "go to the justice of" the decision sought to be appealed. It is stated that not every error causes injustice.

88. I turn now to apply these principles to the facts of the present case. The Disciplinary Tribunal made findings of misconduct in respect of two separate matters. The first decision was in respect of a complaint made by former clients of the Solicitor, Fairview Developments Ltd. This complaint arose out of certain conveyancing transactions. The second was in respect of the complaint by a credit union that the Solicitor had failed to comply with an undertaking which he had given to Tuam Credit Union.

89. Each of these will be addressed under separate headings below.

90. It should be noted that, strictly speaking, a reference to "grounds of appeal" is not accurate in the context of an appeal under section 7(13) of the Solicitors (Amendment) Act 1960. This is because the appeal is by way of full rehearing. The shorthand *"grounds of appeal"* should be understood in this context as referring to the grounds upon which the Solicitor maintains that the decision is in error.

(1). CONVEYANCING TRANSACTIONS

91. The hearing in respect of this complaint took place on 10 February 2010, and the formal order of the Disciplinary Tribunal is dated 18 March 2010.

92. The findings of professional misconduct made by the Disciplinary Tribunal were to the effect that the Solicitor had:

(a) Caused or allowed the name of Michael O'Donnell, solicitor, to be written on a contract for sale dated 19 May 2004 without the authority of Michael O'Donnell.

(b) Caused or allowed a fictitious contract dated 19 May 2004 to come into existence and purportedly made between the Complainant's clients and Michael O'Donnell solicitor in trust for the purpose of misleading ACC bank into advancing monies to Fairview Construction Limited knowing that the sale of the land from Fairview Construction Limited had not closed and that the dwelling units had not been constructed.

(c) Destroyed a file, consisting of merely three contracts, relating to the contested contract dated 19 May 2004 without the express or implied instructions of both parties and in particular the Complainant's clients, Shuan Heffernan and Sean Rowlette.

(d) Acted for both the vendor/builder, Fairview Construction Limited, and purchasers of thirteen newly constructed houses at Shramore, Galway Road, Tuam, Co. Galway, involving himself in a possible conflict of interest contrary to the provisions of Article 4 (a) of the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997 S.I. No. 85 of 1997.

93. (It should be noted that the lettering used in the formal order is slightly different than that above (the sub-paragraphs are lettered (b), (c), (d) and (g) in the formal order). The formal order retains the original lettering as *per* the affidavit setting out the complaints, and the "gaps" in the sequence of lettering reflects the fact that certain additional complaints, which had been made against the Solicitor, were either withdrawn, or, in one instance, dismissed).

94. Before turning to consider the grounds upon which it is said that the decision is in error and that an appeal should be allowed, it is necessary first to examine the approach actually taken by the Solicitor at the hearing before the Disciplinary Tribunal in February 2010. In particular, it is necessary to examine the *admissions* of fact made by the Solicitor, through his then barrister, at the hearing.

95. The first three of the findings of misconduct relate to a conveyancing transaction whereby at least two contracts for sale were produced which purported to bear the signature of another solicitor, Mr. Michael O'Donnell, as purchaser "in trust". (It appears that the original contracts for sale have been destroyed, but copies had been retained by the former clients). It is common case that Mr. O'Donnell did not, in fact, sign either contract for sale. Nor did he authorise anybody to place or sign his signature on the contracts for sale. Mr. O'Donnell gave evidence to this effect at the hearing before the Disciplinary Tribunal. The transcript of the hearing before the Disciplinary Tribunal indicates that his evidence was unequivocal, notwithstanding that he had been cross-examined on it at length by the barrister then representing the Solicitor. (See transcript of hearing before Disciplinary Tribunal on 10 February 2010, pages 59 to 84).

96. The evidence also indicated that Mr O'Donnell, when he first learnt that these contracts for sale had purportedly been signed by him, was so concerned about this that he immediately wrote to the Solicitor by letter dated 6 April 2005 in the following terms.

> "The above named has handed me copies of a purported contract with my name appearing on it as purchaser in Trust and what purports to be my signature appended to same. I have no knowledge whatsoever of this transaction and it was quite a surprise to me when Mr Rowlett attended at my office this morning in a very aggressive and abusive manner.
>
> He maintains that he is at a considerable financial loss arising from these transactions. It appears from my meeting with Mr Rowlett that he is going to take matters further on the issue regarding the contract which was purportedly signed by me on Trust for a third party.
>
> On reading the contract and comparison of the signatures I had no involvement therein and did not sign on behalf of any third party or on Trust for anybody. I explained to him I know nothing about what was going on and that I did not sign the contracts.

It appears that all the contracts emanated from your office and bore my name as purchaser in trust. This is most serious and it is a matter of urgency. I will seek an explanation from you regarding the contracts which were purported to be signed by me."

97. I pause here to note that the Solicitor fully accepts that it was he who put Mr O'Donnell's signature on the contracts for sale. The Solicitor also accepts that he had no written authority to do so.

98. Evidence was then called from another witness (Helene Blayney). Thereafter, the barrister acting for the Solicitor indicated that his client wanted to "deal with certain of the issues" but had a difficulty with the language used in some of the complaints. The barrister further explained that the Solicitor accepted where "responsibility rests" in this matter. It was submitted that the language in the complaints was "poor", and that the Solicitor would be interested in taking a certain course. At a later point, the barrister states that the Solicitor wanted to deal with the matter in "a particular way", and did not want to be "wasting" the Disciplinary Tribunal's time.

99. The chairman of the Disciplinary Tribunal, in response to this submission, distinguished between an admission of fact, and a finding of misconduct, which he described as the responsibility of the Disciplinary Tribunal. The chairman also acknowledged that it is the right or privilege of a respondent solicitor to dispute facts, but that certain things could be agreed. (Transcript at page 106). At a later point, the chairman reiterated that the Solicitor was not under any pressure to make admissions, and should not feel that the Disciplinary Tribunal wanted to save time. The barrister responded by saying as follows.

Barrister: No, we are not succumbing to pressure. What we are trying to do is to limit it as much as possible what needs to be traversed.

100. The position of the Solicitor was that he would accept the facts as stated but would deny that same constitute misconduct. See transcript at page 108, as follows.

Chairman: You take the position that you accept the facts stated but you deny that it is misconduct.

Barrister: Absolutely.

Chairman: That then removes the necessity for evidence and it is a question of presentation of the Law Society's view on it and your perspective on it and our decision on it.

Barrister: Yes.

101. A process thereby followed whereby the Solicitor made admissions of fact in respect of each of the complaints which now represent the four findings of misconduct. In some instances, the wording had first been modified from the complaint as originally formulated. For example, the wording of the complaint that the Solicitor had "destroyed

a file relating to the contested contract" had been amended to add the qualifying words "consisting of merely three contracts". The amendment was to reflect the submission that the only documents within the file were the contracts which had been destroyed. The Solicitor himself is recorded on the transcript as having intervened to say that he would accept that he "destroyed 4ft of paperwork". (Transcript, page 113).

102. No admission of fact was made in respect of a separate complaint alleging a breach of an undertaking. (This is a different complaint than the credit union undertaking discussed under the next heading). It was necessary, therefore, to hear evidence on this complaint, and the Disciplinary Tribunal then made a ruling *dismissing* that complaint.

103. The admissions of fact having been made, the Disciplinary Tribunal then proceeded to hear submissions on whether those admitted facts constituted professional misconduct. (Transcript, pages 175 to 186).

104. Relevantly, the concept of "misconduct" is defined under the Solicitors (Amendment) Act 1960 as including conduct tending to bring the solicitors' profession into disrepute. (It also includes the contravention of a provision of regulations).

105. The approach taken on behalf of the Solicitor was for his barrister to make an ad *misericordiam* plea. The plea began by conceding that the Solicitor had a "difficulty" in persuading the Disciplinary Tribunal that the "very serious and significant" matters to be adjudicated upon did not amount to misconduct. Attention was drawn to the personal circumstances of the Solicitor, and that his prospects were bleak. It was submitted that during the Celtic Tiger [years] the "whole standard, the whole benchmark, the whole bar was lowered in peoples' desire and ambition to build properties and make monies".

106. Particular emphasis was placed in the ad misericordiam plea on the Solicitor's co-operation in the disciplinary process.

> "If Daniel Coleman [the Solicitor] had behaved at any point throughout any of these proceedings whether it was before the Committee or in his dealings with Ms. Blayney or in his dealings with the High Court or anybody else that he had come in contact with if he was to have behaved in a belligerent, difficult, arrogant, or obstructive and unhelpful manner and fashion that, in my submission, would amount to misconduct that would tend to bring the profession into disrepute.
>
> On the other hand what he has demonstrated out of the adversity that he finds himself in is a true sense of integrity and honour and I think that is to be applauded. […]".

107. The submission described the Solicitor's conduct as having been "*stupid*"; the signing of the other solicitor's name on the contracts was acknowledged to be "*the most serious of offences*" and "*entirely improper*"; and the destruction of the file or the destruction of the contracts was referred to as "*a matter to be properly frowned upon*".

108. The members of the Disciplinary Tribunal then withdrew, and subsequently returned to deliver their ruling. The Solicitor was found guilty of misconduct.

109. The hearing than moved to submissions on the appropriate sanction, with each side again addressing the Disciplinary Tribunal. The following extract from the transcript indicates the nature of the approach taken on behalf of the Solicitor by his barrister. (See page 192 of the transcript).

> "I am asking that some light, some comfort be given to him that falls short of him being struck off. It is not for me I think to suggest and if I did I would be very careful about how I did as to what you might consider by way of alternative but it is open to you, Chairman, notwithstanding what [counsel for the Law Society] has said.
>
> To be honest there is no real basis on which I could refute the vast majority of what he has said except ask you to say fine. Ordinarily, yes, but there is a basis on which he can be distinguished and differentiated.
>
> If you accept that that is the case and you accept that, perhaps, in the fullness of time, not immediately, but in time he is someone who could be embarrassed [*recte*, embraced] by the [Law Society] and in the interim that he be restricted or hugely limited in what he could or could not do so that, at least, that opportunity is open to him. I would ask that that be considered because short of that I will go back again to what I said at the start, what does he do. It is a simple and straightforward as that. Thank you, Chairman."

110. The Disciplinary Tribunal then withdrew to consider the submissions of the parties, and, ultimately, made a recommendation that the Solicitor's name should be struck off the Roll of Solicitors.

111. In summary, therefore, the approach taken by the Solicitor at the hearing before the Disciplinary Tribunal was, in effect, to make a series of admissions of fact; not to seriously contest that the conduct admitted to constituted professional misconduct; and to rely on his co-operation in the disciplinary process, and his personal and family circumstances, in support of a plea for leniency.

Volte face by Solicitor

112. The approach which is *now* taken by the Solicitor represents a *volte face* on his part. The Solicitor now wishes to challenge each and every of the four findings of misconduct. The principal grounds on which he seeks to do so can be summarised as follows. First, insofar as the contracts for sale are concerned, whereas it is still accepted that the other solicitor's signature was put on the contracts for sale without authority, it is now said that this had been done in the honest—but mistaken—belief that the Solicitor had oral authority from the other solicitor (Mr O'Donnell) to sign his name. Secondly, it is denied that the contracts for sale were "fictitious". It is said that the contracts for sale were ultimately completed, and that ACC Bank could not therefore have been misled. Objection is made that the letter of 14 July 2004 to ACC Bank had never been adduced in evidence before the Disciplinary Tribunal. Thirdly, it is said that the contract for sale had been destroyed by a solicitor employed by the Solicitor, on the clients' instructions, and replaced with a new contract for sale. Finally, it is said that the Solicitors (Professional

Practice, Conduct and Discipline) Regulations 1997 do not apply to sales of property "off the plans".

113. For the reasons which follow, the Solicitor has failed to make out any arguable grounds that "go to the justice of" the decision sought to be appealed within the meaning of *Seniors Money Mortgages.* The first and most obvious difficulty for the Solicitor is that he made, with the benefit of legal advice, a series of admissions of fact. The Solicitor has sought to overcome this difficulty by reliance upon the following two arguments. First, it is said that the Disciplinary Tribunal did not properly observe the distinction between (i) an admission of fact, and (ii) an admission of misconduct. Secondly, it is said that the complaints as formulated by the Law Society did not allege "dishonesty". A complaint of dishonesty must, it is said, be pleaded with pitiless particularity. No one should be found to have been dishonest on a side wind; rather, dishonesty is an issue that must be articulated, addressed and adjudged head-on. The judgments of the High Court of England and Wales in *Fish v. General Medical Council* [2012] EWHC 1269 (Admin), and *Williams v. Solicitors Regulatory Authority* [2017] EWHC 1478 (Admin), are cited in support of these propositions.

114. A related objection is made to the effect that the Disciplinary Tribunal did not identify any test for dishonesty; did not apply any such test; and made no explicit finding of dishonesty.

115. With respect, none of these submissions disclose arguable grounds of appeal in the sense that this phrase is used in *Seniors Money Mortgages*. It is evident from the transcript of the hearing before the Disciplinary Tribunal in February 2010 that the Solicitor made a strategic decision, with the benefit of legal advice, to make admissions of fact with a view to relying thereafter on his co-operation as a mitigating factor in a plea for leniency.

116. It is, of course, correct to say that the formal admissions were confined to admissions of fact (as opposed to admissions of misconduct). However, this distinction is wholly artificial in the context of the wording of the complaints, and the submissions made by his barrister. By admitting to the conduct in the terms described in the complaints, the Solicitor was, in effect, admitting misconduct. The conduct as set out in the complaints could not be characterised as other than professional misconduct.

117. The first two admissions of fact were to the effect that the Solicitor had caused the name of another solicitor to be written on a contract for sale "without authority"; and that the contract was a "fictitious contract" for the purpose of "misleading" a financial institution into advancing monies to a development company. This was not contested by the Solicitor at the time. His own barrister acknowledged at the hearing in February 2010 that the signing of the other solicitor's name on the contracts was "*the most serious of offences*" and "*entirely improper".* This acknowledgment was well made.

118. There is a vital public interest in ensuring that solicitors carry out conveyancing transactions with integrity and probity. It would undermine faith and trust in the solicitors profession were individual solicitors to engage in "fictitious" transactions for the

purpose of "misleading" financial institutions. Where conduct of this type is engaged upon by a solicitor, it is self-evidently conduct which is likely to bring the profession into disrepute.

119. The third admission is to the effect that the Solicitor had destroyed a file relating to the contracts for sale without express or implied instructions. It had been clearly explained by counsel then acting for the Law Society (the late Paul Anthony McDermott, SC) that there is a difference between destroying a contract and destroying a file, and that the allegation was that the *file* had been destroyed. (Transcript, page 49/50). The distinction is reflected in the modified wording of the complaint as agreed to by the Solicitor. Again, the destruction of a client's file without instructions is self-evidently conduct which is likely to bring the profession into disrepute. The Solicitor's own barrister acknowledged at the time that the destruction of the file or the destruction of the contracts was "*a matter to be properly frowned upon".*

120. Insofar as the fourth admission of fact is concerned, it expressly refers to the Solicitor, by having acted for both vendor/builder and purchasers, as involving himself in a possible conflict of interest contrary to the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997.

121. For similar reasons to those just discussed, the suggestion that the Solicitor had not been on notice that it was being alleged that he had engaged in "dishonesty" is untenable. The complaint which was put to the Solicitor, *via* the affidavit of Helene Blayney grounding the section 7 inquiry, alleged *inter alia* that he had produced a "fictitious contract", and that this had been done for the purpose of "misleading" a financial institution. It is obvious that such conduct on the part of a solicitor represents dishonest conduct. Indeed, counsel at the hearing before me ultimately conceded that the use of the language "fictitious contract" and "misleading" did connote dishonesty.

122. Moreover, the Solicitor has averred in his affidavit of 27 May 2019 (at paragraph 28 thereof) that he was made aware of an allegation of dishonesty in relation to Mr O'Donnell's signature by Helene Blayney's affidavit (at paragraph 5 thereof).

123. On behalf of the Solicitor it is submitted that a complaint of misconduct must be determined by reference to the criminal standard of proof, i.e. beyond reasonable doubt. It is said to follow as a corollary that not only must the Law Society prove the acts of the offence and that those acts constitute misconduct, but the Law Society must also negative any defence of the respondent solicitor and to *negative* any reasonable hypothesis consistent with the innocence of the solicitor. The judgment of the High Court (Finnegan P.) in *Law Society of Ireland v. Walker* [2006] IEHC 387; [2007] 3 I.R. 581 is cited in this regard. The judgment in Walker, in turn, relied on the judgment of the High Court in *O'Laoire v. Medical Council, unreported*, High Court, Keane J., 27 January 1995 (upheld on narrower grounds by the Supreme Court).

124. Neither of these judgments supports the proposition that the Law Society is obliged to prove, to a criminal standard, facts which are admitted by a respondent solicitor. The status of admissions is addressed as follows in *O'Laoire v. Medical Council*.

> "For these reasons, I was satisfied that the onus lay upon the [Medical Council] to prove beyond reasonable doubt every relevant averment of fact which was not admitted by Mr. O'Laoire and to establish beyond reasonable doubt that such facts, as so proved or admitted, constituted professional misconduct."

125. Leading counsel for the Law Society submits that no tribunal, no court or no jury is obliged by law to disregard an admission of fact made by a party which has the effect of saving time, and instead to invest itself in deciding whether that admission was well made. Counsel draws an analogy with the criminal justice system and, in particular, the provision made under section 22 of the Criminal Justice Act 1984 for parties to make formal admissions of facts. The prosecution, having been offered admissions by the defence, is not then required to go through all the admitted facts in any event in order to see whether the admission can be undermined. It is said that this would be a completely artificial and unrealistic view of the obligation upon the prosecution in a criminal trial. Similar principles are said to apply, by analogy, to admissions of fact tendered in disciplinary proceedings.

126. These submissions are well-founded. At the risk of belabouring the point, the approach taken by the Solicitor to the hearing before the Disciplinary Tribunal was to rely on his co-operation in support of a plea *ad misericordiam*. A central part of this approach was to make the admissions of fact, and thereafter not to contest seriously that the admitted facts disclosed professional misconduct. The Disciplinary Tribunal was entitled to take these admissions at face value, and did not have to search out evidence which might undermine those admissions.

127. It is not now open to the Solicitor, some ten years after the event, to attempt an entirely different approach. In particular, his criticism of the alleged failure on the part of the Disciplinary Tribunal to interrogate or seek to undermine the admissions which the Solicitor made on legal advice is unjustified.

128. The Solicitor also alleges that the hearing in February 2010 was unfair. This allegation is not borne out by the facts. Indeed, one of the principal instances of alleged unfairness cited is now conceded to have been factually incorrect. More specifically, at a number of points in the written legal submissions filed on behalf of the Solicitor, it had been incorrectly stated that the Disciplinary Tribunal "refused to adjourn the hearing" so as to allow a particular witness to attend. (See for example §15, §16, §20 and §38 of the written legal submissions). The written legal submissions reflect an inaccurate averment in the Solicitor's affidavit to the effect that his then barrister had requested an adjournment such that necessary witnesses that would establish his innocence would be called; and that the adjournment application was summarily refused by the chairperson of the Disciplinary Tribunal.

129. Counsel at the hearing before me conceded, however, that there is no reference in the transcript of the hearing before the Disciplinary Tribunal to an adjournment having been sought or refused. (See High Court transcript, Day 2, 5 March 2020, at page 54; pages 85/86; and pages 199/200).

130. What actually happened before the Disciplinary Tribunal is as follows. The Solicitor had previously submitted two affidavits to the Law Society in response to the complaints made against him. These affidavits were submitted under cover of letter dated 27 February 2008. One of these affidavits had been sworn by a solicitor who had been employed in his office, Hillary O'Connor ("*the solicitor employee*"). In this affidavit, the solicitor employee had stated that she had destroyed the contract for sale. The barrister representing the Solicitor objected to the fact that the Law Society had not called the solicitor employee as a witness at the hearing. The position adopted on behalf of the Solicitor was to the effect that there was an obligation on the Law Society to call oral evidence from the solicitor employee. The chairman of the Disciplinary Tribunal indicated that it was open to the Solicitor to call the solicitor employee as a witness. The barrister acting on behalf of the Solicitor indicated that it was not a matter for his client to call witnesses. The upshot of this was that the solicitor employee was not ultimately called to give oral evidence. Her affidavit remained before the Disciplinary Tribunal.

131. This sequence of events at the hearing had, initially, been mischaracterised as comprising a refusal on the part of the Disciplinary Tribunal to grant an adjournment to allow the solicitor employee to be called as a witness. It is evident from the transcript that this is not what happened. Moreover, it is also evident from the transcript that not only did the Solicitor make an express admission that he had destroyed the file, but the wording of the complaint was specifically amended so as to reflect a distinction between the destruction of a client's *file* and the destruction of a *contract for sale*. (See transcript at pages 112 to 114).

132. It is now submitted that there is a "causal link" between the making of the admissions, and the approach of the Disciplinary Tribunal in not insisting that the Law Society call evidence from the deponents of the two affidavits filed on behalf of the Solicitor. It is submitted that the (improper) effect of this was to require the Solicitor to prove a hypothesis which was consistent with his innocence.

133. It should be observed, however, that there is no averment on the part of the Solicitor which supports the submission that there was a "causal link" between the two. In particular, the Solicitor has not stated that his decision to make admissions had been informed by the earlier exchange. Moreover, the logic of the submissions now being made is that, as a consequence of the Law Society not calling the witness and of the Solicitor declining to call the witness himself, the Solicitor decided to make a factual admission which was untrue. In this regard, it will be recalled that the Solicitor himself actually intervened at the hearing to make an admission himself, i.e. as opposed to leaving it to his barrister to do so. The barrister also expressly confirmed to the Disciplinary Tribunal that his side did not feel under pressure to make admissions.

134. For the Solicitor to have made an express admission that he carried out a specific act, knowing this to be an untruth, would have been an extraordinary thing to have done. If this argument is now to be pursued before the High Court, then the Solicitor should have set all of this out on affidavit. This has not been done. There is nothing in his affidavit which even hints at his will having been overborne, or that he made a false admission.

135. The state of the evidence before the High Court indicates that the Solicitor made an admission of fact to the effect that he had destroyed a client's file without instructions, and that in making this admission he implicitly accepted the distinction, which had been drawn from the very outset of the hearing by counsel then acting for the Law Society, between the destruction of a *client's file* and the destruction of a *contract*. This distinction underlies the amendment which the Solicitor had expressly sought to the wording of the relevant complaint.

136. This does not represent an arguable ground of appeal; still less does it indicate that there has been any injustice. The Solicitor chose not to call evidence from the solicitor employee. Further, during the course of the hearing the Solicitor expressly accepted that he bore responsibility for the destruction of the client file. (See transcript of hearing before Disciplinary Tribunal, pages 112/113).

(2). UNDERTAKING TO CREDIT UNION

137. The second decision made by the Disciplinary Tribunal was in respect of the complaint by a credit union that the Solicitor had failed to comply with an undertaking which he had given to Tuam Credit Union ("*the Credit Union*"). The hearing took place on 25 February 2010, and the formal order of the Disciplinary Tribunal is dated 16 March 2010.

138. The formal findings of professional misconduct made by the Disciplinary Tribunal were as follows.

(a) Failed in a timely fashion or at all to comply with an undertaking given by him in a letter dated 6th February, 2004 to the Complainant whereby he undertook to hold the title deeds in respect of Folio 63100F Co. Galway in trust to the order of Tuam Credit Union Limited.

(b) Failed to adequately respond to the Complainant's correspondence and in particular the Complainant's letters dated 31st January 2008 and 1st September 2008.

(c) Failed to reply adequately to the Society's correspondence in particular letters dated 30th January 2009, 3rd March 2009 and 6th April, 2009.

139. Given the nature of the proposed grounds of appeal which the Solicitor seeks to advance, it is necessary to consider the precise terms of the undertaking. The undertaking is set out in a letter of 16 February 2004 from the Solicitor to the Credit Union. The letter bears the reference "Patrick Kavanagh and Michael Kavanagh Folio 63100F County Galway", and it reads as follows.

"We act on behalf of the above named and further to our telephone conversation we hereby undertake to hold the title deeds in respect of folio 63100F, County of Galway in trust to the order of Tuam Credit Union Limited. Kindly note that registration is being completed in the Land Registry."

140. As appears, the undertaking is unqualified and unequivocal. The Solicitor had undertaken to hold the title deeds, i.e. the land certificate, of certain lands "to the order of" the Credit Union. The undertaking is given on behalf of two named individuals, Patrick Kavanagh and Michael Kavanagh. The undertaking is not referable to any particular loan or borrowings on the part of either of those two individuals.

141. The Solicitor did not attend at the hearing of the Disciplinary Tribunal in February 2010. The Solicitor had, however, participated to an extent at the earlier stages of the disciplinary process. Relevantly, the Solicitor confirmed in correspondence to the Law Society dated 9 July 2009 that he had "*now obtained the relevant information to answer the complaint of Saint Jarlath's Credit Union*". (In a second letter of the same date, the Solicitor stated that he was now in "*a position to fully respond to the allegation*" that he was in breach of the undertaking).

142. The explanation offered at the time is that the undertaking was to be discharged out of the payment of a policy of life insurance. More specifically, it seems that Mr Michael Kavanagh had died as a result of a tragic accident in October 2005, and that certain monies would be paid pursuant to a death gratuity. This is set out in the first letter of 9 July 2009 as follows.

"The sale of the property in Folio 63100F County Galway was completed. The Contract for the Sale was dated the 30th September, 2005 and all closing documents were executed by Mr Michael Kavanagh on that date. The purchasers … went into possession and they were represented by Daniel McGrath and Company Solicitors, Tullamore. At that point monies were outstanding to Saint Jarlath's Credit Union Limited. It is acknowledged that we did not hand over the sales monies to Saint Jarlath's Credit Union Limited. We explain this by the fact that Michael Kavanagh died tragically in October, 2005 and a death gratuity was in place. Part of the loan was covered by a death gratuity to an amount of what I believe €120,000. The balance was subsequently paid by his estate to the Credit Union. Therefore no monies are due and owing to Saint Jarlath's Credit Union Limited by Michael Kavanagh or his estate.

We would contend that the Undertaking related to the property in folio GY 63100F only and all moneys payable thereon were payable by Michael Kavanagh. The reference to Pat Kavanagh was inadvertent. Further, it was disclosed to Mr. Creaven that Mr. Pat Kavanagh had no legal interest in the property."

143. The Solicitor seeks to amplify his original response by putting forward *additional* documentation as part of his intended appeal. In particular, reliance is now placed on a

letter dated 6 December 2006. This is a letter from Concannon and Meagher Solicitors on behalf of the Credit Union to the Law Society, and the relevant part reads as follows.

"We can confirm that the monies owing to our Client, St. Jarlath's Credit Union Ltd., Tuam have now finally been paid on foot of the Life Policy paid out on the Late Mr. Michael Kavanagh. We are now in the process of clearing up related issues so that our files can be closed on same.

Insofar as the amounts owing have been paid, our Client no longer wishes to pursue the Complaint against Mr Coleman on foot of his Undertakings to our Client."

144. It is said that any breach of the undertaking was, in all of the circumstances, a technical breach only. In particular, it is submitted that once the loan had been paid off, the Solicitor had a contractual right to be released from his undertaking.

145. Insofar as the reference in the undertaking to Patrick Kavanagh is concerned, it is now said that this was referable to a specific loan in the sum of €50,000; that the loan had been discharged by a cheque in the sum of €270,000 sent to the Credit Union by the Solicitor on 10 May 2005; and that the letter requested confirmation that the undertaking was discharged. Reliance is also placed on a further letter of 29 July 2005 enclosing a cheque in the sum of €109,000.

146. An affidavit has been sworn by Patrick Kavanagh dated 15 May 2013 stating that all undertakings granted by Coleman and Company Solicitors on his behalf to the Credit Union have been discharged in full by payment.

147. The reason given for not pursuing this line of defence in February 2010 is that the letter seeking to be released from the undertaking only came to the attention of the Solicitor subsequently. The letter was, seemingly, obtained by way of discovery in proceedings taken as between the Credit Union and the Solicitor (High Court 2009 No. 8378 P.).

148. No issue has been raised as to the appropriateness of relying on discovery from other proceedings by either the Law Society or the Credit Union (who held a watching brief on the hearing before me). I propose to have regard to this document, by reference to the principles in *Cork Plastics (Manufacturing) Ltd v. Ineos Compounds UK Ltd* [2007] IEHC 247; [2011] 1 I.R. 492.

149. Counsel on behalf of the Solicitor was critical of what he characterised as a failure on the part of the Disciplinary Tribunal to search out and obtain this correspondence as part of its inquiry in February 2010. The Disciplinary Tribunal is said to have been under an obligation to do so notwithstanding that the Solicitor chose not to participate at the hearing, and had indicated in correspondence that he had "*now obtained the relevant information to answer the complaint of Saint Jarlath's Credit Union"*, and that he was in "*a position to fully respond to the allegation*". (See paragraph 141 above).

150. In response, counsel on behalf of the Law Society submits that this letter does not confirm the discharge of the undertaking. It is said that nowhere in any of the

documentation upon which the Solicitor seeks to rely is he in a position to point to a letter of discharge from the Credit Union releasing him from the undertaking.

151. It is further said that Mr Patrick Kavanagh's views as to the scope of the undertaking are not in accordance with the actual terms of the undertaking. In any event, for obvious reasons, a solicitor is bound to comply with the actual terms of the undertaking to a financial institution, and not the views of the borrower as to when and in what circumstances the undertaking is to be discharged. The Law Society also makes the point that Mr Kavanagh would have been available to give evidence on behalf of the Solicitor at the hearing before the Disciplinary Tribunal in February 2010.

152. Notwithstanding the careful and cogent submissions made by counsel on behalf of the Solicitor, I am not satisfied that an arguable ground of appeal, within the meaning of *Seniors Money Mortgages*, has been made out.

153. First, the undertaking is unqualified and unequivocal in its terms. Conveyancing practice relies heavily on the binding nature of solicitors' undertakings. Same must be taken at their face value. The importance of ensuring compliance with a solicitor's undertaking has been explained as follows by the Court of Appeal in *Law Society of Ireland v. Tobin* [2017] IECA 215, [26].

> "The solicitor's undertaking is part of the hard currency of the solicitors' profession. The trust and faith reposed in such undertakings are an indispensable part of the conduct of legal business and transactions, without which the profession and the public it serves would be the poorer. The undertaking is based upon the absolute honesty and integrity expected of a solicitor in his dealings with his clients, other parties to a transaction, and the courts. A solicitor is an officer of the Court. His/her word must be his/her bond. If a solicitor undertakes to do something it must be done. If there is any tolerance allowed for slippage in the traditional approach to such undertakings and the respect to be accorded to them, the hard currency of the profession is irreparably damaged to the point where other solicitors will not - indeed, should not - accept an undertaking. It should not be thought that the serial failure to honour undertakings such as occurred in this case may not be considered to be at the same level of seriousness as misconduct that results in a financial loss to clients or third parties. This is particularly so where as yet some of the undertakings are still outstanding even though serious efforts have been made to rectify the problems involved."

154. There is nothing in the undertaking given to the Credit Union which suggests that it is referable to any particular loan. Prior to the amendments introduced under the Registration of Deeds and Title Act 2006, it was common for lending institutions to rely upon the deposit of a land certificate to create an equitable mortgage in respect of registered lands. Such equitable mortgages were often for present and *future* advances to the registered owner of the lands. An undertaking by a solicitor to hold a land certificate to the order of the lending institution might be thought to provide a similar type of security in that, absent the release of the land certificate, the registered owner

would not normally be able to transfer ownership of the lands without the knowledge of the financial institution.

155. Secondly, even if the Solicitor is correct in asserting that the undertaking had been referable to a particular loan, the Solicitor would not have been entitled unilaterally to treat himself as released from the undertaking. Rather, it was a prerequisite that an application to be released be made to the beneficiary of the undertaking, namely the Credit Union, and that the release be granted. Indeed, the Solicitor appears to have tacitly accepted this insofar as reliance is sought to be placed on a letter dated 10 May 2005 to the Credit Union seeking to be released. The difficulty for the Solicitor, however, is that there is no evidence before the court that a release had been given. The explanation for this, as provided in oral evidence to this court at the hearing on 6 March 2020, is that the request had not been made in proper form. More specifically, Mr. Culkeen on behalf of the Credit Union was examined at the request of the Solicitor. (Transcript of High Court hearing, Day 3, 6 March 2020, pages 156 to 172). Mr. Culkeen gave evidence to the effect that a formal request for a discharge of an undertaking would identify the undertaking by reference to the date upon which it had been given, and would request a formal discharge.

156. Thirdly, an important part of the finding of misconduct was that there had been a failure to respond adequately to correspondence from the Credit Union, and, thereafter, from the Law Society. This aspect of the finding is not affected by the new arguments which the Solicitor seeks to make in his intended appeal.

157. Fourthly, in assessing whether there is a risk of injustice of the type described by the Supreme Court in *Seniors Money Mortgages*, it is important to note that the Law Society is no longer seeking an order for restitution. More specifically, although it had not been recommended by the Disciplinary Tribunal in its report, the Law Society had sought and obtained, as part of its "strike out" application on 26 July 2010, an order directing the Solicitor to pay the sum of €320,000 to the Credit Union. This claim for restitution has recently been abandoned by the Law Society. This occurred subsequent to the compromise of proceedings which had been taken by the Credit Union against the Solicitor. The significance of this is that the financial loss, if any, caused by the breach of the undertaking does not now form part of the application before the High Court. All that remains is the consideration of whether the breach of the express terms of the undertaking constitutes misconduct such as would justify an order striking a solicitor's name off the Roll of Solicitors.

158. Finally, in carrying out this assessment of the grounds of appeal, I have, as requested by the Solicitor, had regard to the pleadings in the proceedings between the Credit Union and the Solicitor. The terms of the reply to a notice for particulars does not detract from the express terms of the undertaking. The precise terms of the contractual arrangement between Messrs Kavanagh and the Credit Union cannot change the obligations of the Solicitor viz-a-viz the Credit Union created by the wording of the undertaking. Any

dispute as to whether a release of undertaking was being improperly withheld would, in the first instance, be a matter between Messrs Kavanagh and the Credit Union.

SERVICE OF REPORT OF THE DISCIPLINARY TRIBUNAL

159. For the sake of completeness, it is necessary to refer briefly to an argument which was flagged, but not ultimately pursued with any force, by the Solicitor. This argument centred on the question of whether the report of the Disciplinary Tribunal had been properly served on the Solicitor. If not, it was suggested that the time-limit for the bringing of an appeal has not yet run against the Solicitor.

160. The statutory right of appeal against a decision of the Disciplinary Tribunal is subject to a twenty-one day time-limit. This is the time-limit in respect of which the application for an extension of time is made. The twenty-one day time limit is not set out under section 7(13) of the Solicitors (Amendment) Act 1960, but rather is prescribed under Order 53, rule 12(b) of the Rules of the Superior Courts, as follows.

> (b) Every appeal to the Court other than an appeal referred to in paragraph (a) of this rule from a finding or order of the Disciplinary Tribunal, whether the appeal is by the respondent solicitor or by the Society or (if applicable) by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal (or any one or more of them), as the case may be, brought under section 7 (as substituted by section 17 of the Act of 1994 and as amended by section 9 of the Act of 2002) of the Act of 1960 shall be brought by the appellant within the period of 21 days beginning on the date of the service by the Tribunal Registrar on the appellant of a copy of the order or of the report, whichever date is the later, and shall be by notice of motion returnable to the President on a date to be assigned by the proper officer in the Central Office and shall be entitled in the matter of the respondent solicitor and in the matter of the Acts."

161. As appears, the twenty-one day time-limit runs from the date of the service by the Tribunal Registrar on the (intended) appellant (in this case, the respondent solicitor) of a copy of the order or of the report, whichever date is the later.

162. Section 30 of the Solicitors (Amendment) Act 1960 provides as follows.

> 30.—Where any document is required or authorised by or under the Principal Act or this Act or any regulations made thereunder to be served on any person, the following provisions shall apply in relation to the service of that document—
>
> (a) it may be served—
>
> (i) by delivering it to that person, or
>
> (ii) by sending it by registered post in an envelope addressed to that person at his last known place of business or residence in the State or, if he is a solicitor, at the last address appearing in the register of practising solicitors,

(b) where that person is absent from the State or his whereabouts is unknown and cannot be ascertained by reasonable inquiries, or where the notice or document, having been sent by registered post in the manner specified in subparagraph (ii) of paragraph (a) of this subsection, has been returned undelivered, the High Court may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just.

163. It seems that as of March and April 2010, two postal addresses formerly used by the Solicitor, namely his office address and home address, were no longer in use. More specifically, the offices of his former practice had been closed by order of the High Court, and the Solicitor had subsequently surrendered the premises to his lending institution; and the Solicitor had moved out of his former dwelling house and was residing elsewhere.

164. At the opening of the hearing before me, counsel on behalf of the Solicitor suggested that the report and order may not have been properly served on the Solicitor. This mirrored his written legal submissions which raised the same issue as a "preliminary matter".

165. It was next submitted that if there had been a failure to comply with the service requirements as *per* Order 53, rule 12(b), then the twenty-one day period might not yet have begun to run against the Solicitor. It is worth pausing here to consider the enormity of this suggestion. The Disciplinary Tribunal had submitted its two reports to the High Court in March 2010. The suggestion now is that, notwithstanding all of the proceedings in the intervening decade—including the appeal to the Supreme Court—the time-limit has not yet begun to run.

166. On instructions, counsel for the Solicitor, very sensibly, did not press these submissions. Counsel confirmed that the principal application before the High Court was the application to extend time within which to bring an appeal.

167. Any suggestion that the time-limit has not expired is simply unstateable, for the following reasons. First, it was accepted on behalf of the Solicitor that the onus of proof in relation to the issue of service lay with him, as the party *asserting* the proposition that the papers had not been received. The Solicitor was unable to state on affidavit that he had not received the papers. In his affidavit of 27 May 2019, he avers that he cannot say at this point in time whether he had been served with the order or report prior to receiving same as exhibits to the Law Society's application. He further avers as follows.

> "If the order or report were served on the 16th March 2010, the time within which to appeal expired on the 6th April 2010, at this juncture in time I cannot assist this Honourable Court as to when the Order/Report were actually served. […]"

168. Accordingly, the onus of proof has not been discharged.

169. Secondly, it is evident that, at the very latest, the Solicitor had received a copy of the order and report by 26 July 2010. More specifically, the Solicitor acknowledges in his affidavit of 27 May 2019 that he had received the order and report of the Tribunal as part

of the exhibits to the Law Society's application on 26 July 2010. Had the Solicitor indicated in July 2010 that he intended to exercise his statutory right of appeal against the findings of misconduct, then there might, in principle, have been an argument to be had as to whether the twenty-one day period only ran from July, as opposed to from the earlier date in March 2010 relied upon by the Law Society. In the event, the Solicitor did not seek to appeal at that time, and thus the issue of whether time ran from March 2010 or July 2010 is immaterial in the context of an application first made in May 2019 to extend time. Put bluntly, it matters little whether time ran from March or July 2010 in the context of a delay of nine years.

170. Thirdly, and more fundamentally, any suggestion that the time-limit has not expired is entirely inconsistent with the procedural history. Counsel properly conceded that the logic of the argument on service is not only that the matter was not properly before the High Court on 26 July 2010, but, equally, that the subsequent appeal was not properly before the Supreme Court. With respect, a party cannot approbate and reprobate. It had never been suggested to the Supreme Court that there had been a difficulty with service, still less that the appeal was not properly before the Supreme Court.

171. Fourthly, the suggestion that the time-limit has not run is entirely inconsistent with the application brought before the court by way of notice of motion. By definition, a party making an application for an extension of time must accept that the time-limit has expired. If this were not the case, then, obviously, an extension of time would not be required.

172. Finally, it appears from the affidavit evidence filed on behalf of the Law Society that there may, in fact, have been compliance with the requirements of section 30 of the Solicitors (Amendment) Act 1960 in any event.

CONCLUSION

173. The judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately [*2020] IESC 3 reiterates that, in exercising its discretion to extend time, the underlying obligation upon a court is to balance justice on all sides, and that all the circumstances of the case must be taken into account.

174. On the facts of the present case, it is now accepted that no intention to bring an appeal had been formed within the twenty-one day period allowed, and that there had been no mistake on the part of the intended appellant. It is not unreasonable to require that a party, in the interests of the overall administration of justice and the balance of justice as and between the parties, to come to a decision to appeal within the time specified. This is especially so where, as in the present case, that party not only had the benefit of legal representation at the time of the first-instance decision, but is actually qualified as a solicitor himself. No proper explanation has ever been afforded as to why the appeal which the solicitor now wishes to make could not have been brought in 2010.

175. The approach taken by the Solicitor at the hearing before the Disciplinary Tribunal into the first complaint was to co-operate, and then to rely on his co-operation in support of a

plea for leniency. A central part of this approach was to make admissions of fact, and thereafter not to contest seriously that the admitted facts disclosed professional misconduct. The Disciplinary Tribunal was entitled to take these admissions at face value, and did not have to search out evidence which might undermine those admissions.

176. By admitting to the conduct in the terms described in the complaints, the Solicitor was, in effect, admitting misconduct. The conduct as set out in the complaints could not be characterised as other than professional misconduct. There is a vital public interest in ensuring that solicitors carry out conveyancing transactions with integrity and probity. It would undermine faith and trust in the solicitors profession were individual solicitors to engage in "fictitious" transactions, involving signing contracts in another person's name without authority, for the purpose of "misleading" financial institutions. Where conduct of this type is engaged upon by a solicitor, it is self-evidently conduct which is likely to bring the profession into disrepute.

177. The solicitor chose not to attend the hearing in respect of the second complaint.

178. The most striking feature of the present case is the sheer scale of the delay. The two decisions of the Disciplinary Tribunal from which it is now sought to appeal were made in February 2010, and the formal orders drawn up in March 2010. Yet, the notices of motion seeking an extension of time within which to appeal were not filed until 17 May 2019.

179. The suggestion that most of the inordinate delay of nine years can be explained away as "systemic" delay, referable to the hearing and determination of the Supreme Court appeal, is an oversimplification. The manner in which the Solicitor prosecuted that appeal is not a *neutral* factor. Rather, as explained earlier, the Supreme Court had been left with the clear impression that the findings of misconduct were not being appealed. This is a factor which weighs heavily against the grant of an extension of time to appeal those findings now.

180. The inordinate delay would impair the ability of the High Court to conduct a proper appeal hearing. The solicitor is, in effect, seeking a re-hearing (in part at least) of the disciplinary proceedings. Were this to be done, it would be at a remove of some fifteen years from the key events. It is inevitable that the recollection of witnesses of events which, on the facts of the present case, took place principally during the years 2004 and 2005 will be diminished by the passage of time.

181. The fact that the Law Society's "strike off" application will remain outstanding, even if an extension of time to appeal is refused, also tells against the grant of an extension of time. Even in the absence of an appeal, the High Court will have to consider, in accordance with the judgment of the Supreme Court in *Law Society of Ireland v. Coleman* [2018] IESC 80, whether there is a "sustainable basis" for the findings of misconduct. This residual jurisdiction, which falls short of a full appeal, allows for any injustice to be brought to the court's attention even in the absence of an appeal.

182. The criticisms made of the findings of misconduct by the Disciplinary Tribunal do not disclose any arguable grounds of appeal. Certainly, there is no basis for saying that the refusal of an extension of time would result in an injustice.

183. Accordingly, the application for an extension of time within which to bring an appeal against the findings of misconduct by the Disciplinary Tribunal is refused.

PROPOSED FORM OF ORDER

184. The application for an extension of time within which to bring an appeal pursuant to section 7(13) of the Solicitors (Amendment) Act 1960 against the findings of misconduct by the Disciplinary Tribunal is refused. The costs of the application are reserved pending the outcome of the Law Society's application pursuant to section 8 of the Solicitors (Amendment) Act 1960.

185. The formal order of the High Court will not be drawn up until the first week of the new legal term, which commences on 20 April 2020. This is to ensure that no part of the twenty-eight day period for the bringing of an appeal will fall during the Easter vacation.

186. As explained earlier, the hearing of the Law Society's application pursuant to section 8 of the Solicitors (Amendment) Act 1960 has not yet been completed. (The parties estimate that there are less than two hours remaining). The parties are requested, in the first instance, to discuss amongst themselves whether they wish to complete this hearing now, or alternatively, whether same should await an appeal, if any, to the Court of Appeal in respect of the refusal of an extension of time.

187. If the parties are agreed that the hearing should be completed, then the next issue to be considered is the form of hearing. A conventional hearing may not be possible if the emergency measures necessitated by the coronavirus disease pandemic remain in force. In such a contingency, the parties are invited to consider whether the hearing might be concluded on the papers. The parties would be afforded an opportunity to file supplemental written submissions in this regard.

188. The parties are requested to indicate their respective views on these procedural issues by email and letter to my Registrar by Friday 22 May 2020.

Appearances

Paul Comiskey O'Keeffe for the Applicant instructed by John P. O'Donohoe Solicitors

Shane Murphy, SC and Neasa Bird for the Respondent instructed by A & L Goodbody