APPROVED **[2020] IEHC 381**

THE HIGH COURT

2010 No. 65 SA
2010 No. 66 SA

IN THE MATTER OF SECTION 8 OF THE SOLICITORS (AMENDMENT) ACT 1960 (AS AMENDED)

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

DANIEL COLEMAN

RESPONDENT

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

NO REDACTION NEEDED

INTRODUCTION

1. This matter comes before the High Court by way of an application to strike a solicitor's name off the Roll of Solicitors. The application is brought at the instance of the Law Society pursuant to section 7(3)(c)(iv) of the Solicitors (Amendment) Act 1960 (as amended). The High Court's jurisdiction is set out at section 8 of the same Act. The "strike off" application is made on foot of two separate recommendations of the Disciplinary Tribunal of the Law Society. These recommendations had been made in the first quarter of 2010. The explanation for the lapse of time between then and now is as follows. An earlier order of the High Court (Kearns P.) striking off the solicitor in July 2010 has since been overturned by the Supreme Court by order dated 1 May 2019, and the "strike off" application has been remitted to the High Court. The application had been assigned to me by the then President of the High Court (Kelly P.) for hearing in March 2020. The hearing had been disrupted by the public health restrictions introduced in respect of the coronavirus disease pandemic.

2. The "strike off" application had been heard immediately after a related application by the Solicitor seeking an extension of time within which to bring a statutory appeal against the findings of the Disciplinary Tribunal. The application for an extension of time has been refused for the reasons set out in detail in a judgment delivered on 7 April 2020, *Coleman v. Law Society of Ireland* [2020] IEHC 162. Given the significant overlap between the issues which fall for determination as part of the "strike off" application, and the earlier application for an extension of time, the present judgment should be read in conjunction with the earlier judgment of 7 April 2020.

3. The present judgment is structured as follows. First, the procedural history will be summarised. Secondly, the precise role of the High Court under section 8 of the Solicitors (Amendment) Act 1960 will be considered. Consideration of this issue is

necessary in circumstances where there is some disagreement between the parties as to the extent to which the High Court is required to review the findings of the Disciplinary Tribunal. This disagreement turns, to an extent, on the distinction between (i) a "strike off" application under section 8, and (ii) a statutory appeal under section 7(13) of the Solicitors (Amendment) Act 1960. Thirdly, the question of whether there is a sustainable basis for the findings of the Disciplinary Tribunal will be examined. Finally, the question of the appropriate sanction will be addressed.

PART I

PROCEDURAL HISTORY

4. The procedural history has already been set out in detail in my judgment delivered on 7 April 2020, *Coleman v. Law Society of Ireland* [2020] IEHC 162. Insofar as relevant to the "strike off" application, the relevant procedural steps can be summarised as follows.

5. Findings of misconduct were made against Mr. Daniel Coleman (***"the Solicitor"***) by the Disciplinary Tribunal following two hearings in February 2010. In each instance, the Disciplinary Tribunal recommended that the Solicitor's name be struck off the Roll of Solicitors. The Law Society made application to the High Court pursuant to section 7(3)(c)(iv) of the Solicitors (Amendment) Act 1960 in July 2010.

6. The Solicitor had not exercised 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 was more limited than had he brought an appeal.

7. 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.

8. 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* against the findings of misconduct by the Disciplinary Tribunal in respect of which the Solicitor has since applied for—but has been refused—an extension of time).

9. 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.

10. 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.

11. 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.

12. 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 coronavirus, it was not possible to complete the hearing of the second application in March 2020. The parties subsequently agreed, however, that the court should deliver its judgment on the extension of time application, notwithstanding that the submissions had not yet been completed in the "strike off" application.

13. The application for an extension of time within which to bring a statutory appeal was refused for the reasons detailed in a written judgment delivered on 7 April 2020, *Coleman v. Law Society of Ireland* [2020] IEHC 162.

14. Thereafter, the parties agreed that the outstanding issues in respect of the "strike off" application could be addressed by way of supplemental written submissions. Both parties agreed that there was no necessity for any further oral submissions. The court should, instead, determine the application on the basis of the oral submissions made in March 2020, and the supplemental written submissions filed. The Solicitor filed his submissions on 12 June 2020, and the Law Society filed its submissions on 3 July 2020.

PART II

ROLE OF THE HIGH COURT

15. The next issue to be considered is the precise role of the High Court under section 8 of the Solicitors (Amendment) Act 1960. In particular, it is necessary to consider the extent to which the High Court is required to review the findings of misconduct made by the Disciplinary Tribunal.

16. The parties are in broad agreement that there is a distinction between (i) the role of the High Court in the context of a "strike off" application under section 8, and (ii) its role in the context of a statutory appeal under section 7(13) of the Solicitors (Amendment) Act 1960. There is disagreement, however, as to the precise demarcation between the two roles. It may assist the reader in understanding this disagreement to pause here, and to provide an overview of the disciplinary procedures.

OVERVIEW OF DISCIPLINARY PROCEDURES

17. 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 proposes 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.

18. Thereafter, the Law Society is obliged to bring an application before the High Court. The application is brought pursuant to section 7(3)(c)(iv) of the Solicitors (Amendment) Act 1960. The High Court's jurisdiction is prescribed under section 8 of the same Act. 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 an application pursuant to section 7(3)(c)(iv) will not always seek a "strike off" order, but might seek a lesser form of sanction instead.

19. The "strike off" application pursuant to section 7(3)(c)(iv) 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.

20. 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.

21. 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.

22. 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.

23. 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.
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> (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.

24. 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.

25. 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.

26. 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."

27. 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. […]".

28. 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."

29. 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.

30. 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 paragraphs 58, and 60 to 61, 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.
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> […]
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> It is not necessary for the purposes of this decision to review the precise parameters of the High Court's powers or function when determining the Society's application. It is sufficient to say that on the material which it ultimately has, it must be satisfied that the Tribunal was entitled, as a matter of law to reach the findings which it did. Precisely how and in what way it conducts this evaluation is not germane to this appeal. When it comes to sanction or penalty however, the Tribunal has no power to make any findings: it simply

> makes a recommendation. Similarly so, with a person's fitness to practice as a solicitor: in which case it simply offers an opinion. Arguably therefore the court's scrutiny must be even greater when exercising this aspect of its role.
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> As set out at paras. 51 and 53 above, the court, having considered the matter may give any decision or make any order it thinks fit, including of course exercising the powers contained in s. 8 of the 1960 Act. There is no question of being bound by an opinion expressed or by a recommendation made by the Tribunal. In addition, of course, the Law Society is expressly entitled to make submissions as to what its position is on the sanction front as is the respondent solicitor. As the case law shows, the High Court has on several occasions departed from the recommendations made and/or have refused to endorse the reliefs sought, by the Society. Even where granting such relief however, it is clear that in all cases the ultimate arbiter is the court."

31. 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."

32. McKechnie J. drew an analogy with a sentencing hearing in criminal proceedings (at paragraph 92 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."

33. 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 of Ireland* [2014] IESC 48] I made a point of general application: -
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> > '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.'
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> 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."

34. 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.

35. 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.

36. 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.

37. 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 a statutory appeal against findings of misconduct made by the Disciplinary Tribunal.

38. A recent judgment delivered by the Court of Appeal, *Sheehan v. Law Society of Ireland* [2020] IECA 77 (unreported, 26 March 2020), 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.

SUBMISSIONS ON BEHALF OF THE SOLICITOR ON HIGH COURT'S ROLE

39. The Solicitor's position is summarised as follows in the written legal submissions filed on his behalf. The Solicitor does not seek a *de novo* hearing or a fresh adjudication on the alleged misconduct. Nor does he seek to set aside any findings of primary fact. Rather, he submits that the findings of misconduct have no "*sustainable basis*" by reason of errors of law and/or fact.

40. Counsel on behalf of the Solicitor places much emphasis on the judgment in *Law Society of Ireland v. Coleman* [2018] IESC 80. It is said that the appropriate test is whether the findings of the Disciplinary Tribunal are sustainable in law. Counsel also draws attention to passages in the Supreme Court judgment where McKechnie J. appears to envisage that additional evidence can be adduced on a "strike off" application. (See, in particular, paragraphs 58, 60 and 92 of the judgment).

41. Counsel also seeks to rely, by analogy, on case law from England and Wales. In particular, the following passages from the judgment of the English High Court in *Solicitors Regulatory Authority v. Dar* [2019] EWHC 2831 (Admin) are cited.

> "An appeal is by way of review, not a rehearing (CPR rule 52.21(1)): it follows that the court will only allow an appeal where the decision is shown to be 'wrong' (CPR rule 52.21(3)(a)). This can encompass an error of law, an error of fact or an error in the exercise of

> discretion; but it is by now well-established that an appellate court must exercise particular caution and restraint in interfering with findings of fact, particularly where the court or tribunal has seen and evaluated the evidence of the witnesses and/or where such findings have been made by a specialist tribunal (*AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678 at [30] per Baroness Hale of Richmond). Specifically in the context of an appeal against a decision of the Solicitors Disciplinary Tribunal, in *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin) at [64]-[68], this court recently reviewed many of the relevant authorities, culminating in the citation of the following passages in *Henderson v Foxworth Investments Limited* [2014] UKSC 41; [2014] 1 WLR 2600 at [62] and [67] per Lord Reed in support of the proposition that the court will only interfere with a finding of fact where the court or tribunal below has gone 'plainly wrong':
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> > 'It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached….'
> >
> > 'It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.'"

42. Counsel submits that this passage sets out clearly the dichotomy, which is said to exist under section 8, between the setting aside of primary findings of fact, on the one hand, and a challenge against errors, on the other. The Solicitor contends that the findings of the Disciplinary Tribunal ought not to be upheld on the latter basis.

43. Counsel also cites a decision of the Upper Tribunal (Immigration and Asylum Chamber), namely *M.M. v. Secretary of State of the Home Department* [2014] UKUT 105 (IAC) at paragraph 15) as follows.

> "The law reports and texts are replete with formulations and manifestations of this right. For present purposes, and bearing in mind the doctrine of precedent, we focus upon two of the leading

decisions of the superior courts. The first of these is *R – v – Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344. It may be observed that, in both the reported cases and the leading text books, this decision has not received the prominence it plainly merits. This might be attributable to its appearance in one of the minority series of law reports. Having said that, *Cotton* has been recently quoted with approval and applied by Moses LJ in *McCarthy v Visitors to Inns of Court and Bar Standards Board* [2013] EWHC 3253 (Admin) and by Underhill J in *R (Hill) v Institute of Chartered Accountants* [2013] EWCA Civ 555. In *Cotton*, the issue, in a nutshell, was whether the decision of the Chief Constable to dismiss a police officer was vitiated by procedural unfairness on account of inadequate disclosure to the officer of the case against him. We distill the following principles from *Cotton*:

(i) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the merits of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.

(ii) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.

(iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.

(iv) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred."

44. Counsel also cites *Williams v. Solicitors Regulatory Authority* [2017] EWHC 1478 (Admin) (at paragraph 55).

"This appeal proceeds by way of review, and not rehearing. The Tribunal was a specialist tribunal, which had the particular advantage of hearing and seeing all of the evidence over many days. Interference with its findings will not be made lightly, and will be justified only if those findings are 'plainly wrong', or there has been some serious procedural irregularity – see *Barnett v SRA* [2016]

> EWHC 1160 (Admin) at [17]; and *Law Society v Salsbury* [2008] EWCA Civ 1285; [2009] WLR 1286 at [30]."

45. Finally, counsel for the Solicitor drew attention to the statutory powers of the High Court under section 8(1)(b) of the Solicitors (Amendment) Act 1960, as follows.

> (b) the High Court may, if it thinks fit, remit the case to the Disciplinary Tribunal to take further evidence for submission to it and to make to it a supplementary report, and the Court may adjourn the hearing of the matter pending the submission to it of such further evidence and the making of such supplementary report;

FINDINGS OF THE COURT: SECTION 8 JURISDICTION

46. It is evident from the judgments in *Coleman*, *O'Sullivan* and *Sheehan*—discussed in detail at paragraphs 25 to 38 above—that there continues to be a distinction between the High Court's role under section 8 and its role in the context of a statutory appeal under section 7(13) of the Solicitors (Amendment) Act 1960. There is nothing in the judgment in *Coleman* which seeks to collapse the distinction between the two forms of procedure. Rather, the import of the judgment in *Coleman* is that, even in the context of its more limited function under section 8, 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 which falls short of a full appeal by way of rehearing.

47. In order to set aside a finding of misconduct in the context of a "strike off" application, as opposed to a statutory appeal, a respondent solicitor must demonstrate that the finding does not have a sustainable basis. If and insofar as a respondent solicitor seeks to question the *merits* of the decision of the Disciplinary Tribunal, it will be necessary to satisfy the High Court that no tribunal, acting reasonably and applying the correct legal principles, could have reached the finding on the basis of the materials before it. It is not enough that the High Court, had it been determining the matter *de novo*, might have

reached a different decision. The actual findings of misconduct must be such that they lie outside the range of reasonable or rational decisions which could have been reached by the tribunal. The Disciplinary Tribunal will have had the benefit of hearing the oral evidence of the witnesses and will have been in a position to assess their demeanour. It will only be in exceptional cases that the High Court will set aside findings of primary fact.

48. A respondent solicitor might, alternatively, seek to challenge findings of misconduct on the basis of an alleged unfairness or on the basis of an error of law. This is the approach adopted by the Solicitor in the present case. Counsel has disavowed any attempt to challenge primary findings of fact. Rather, it is asserted that the Disciplinary Tribunal erred in law in attaching too much weight to admissions made by the Solicitor, and failing to reconcile these with what is said to be uncontroverted evidence to the opposite effect. It is also asserted that the findings of misconduct in the second set of disciplinary proceedings are vitiated by procedural unfairness, and, in particular, a failure to have regard to all relevant documentation.

49. In principle, the High Court has jurisdiction under section 8 of the Solicitors (Amendment) Act 1960 to set aside findings of misconduct if a respondent solicitor can establish that the disciplinary proceedings had been unfair or that the tribunal misdirected itself in law. This is subject to the caveat that the unfairness or error of law alleged must have been material, i.e. such that it was *capable* of affecting the ultimate outcome of the disciplinary proceedings. This does not mean that the respondent solicitor must prove that the outcome would have been different but for the unfairness or error of law. Rather, it means that a respondent solicitor cannot seek to set aside the findings on the basis of procedural missteps or legal errors which are not likely to have affected the outcome. This limitation on the section 8 jurisdiction does not cause any injustice to the respondent

solicitor: they have a full right of appeal against the findings pursuant to section 7(13) and this provides a full remedy against any such procedural missteps or legal errors.

50. Separately, the parties are also in disagreement as to whether it is open to a respondent solicitor to introduce further evidence in the context of a "strike off" application. The general rule is that if a respondent solicitor wishes to introduce evidence or to cross-examine witnesses, then they should invoke their statutory right of appeal. (See, for example, *O'Sullivan*). For the purposes of section 8 of the Solicitors (Amendment) Act 1960, the High Court's review of the sustainability of findings of misconduct will normally be carried out by reference solely to the materials which had been before the Disciplinary Tribunal. This is one of the essential differences between a review and a full appeal by rehearing.

51. However, the High Court will, in exceptional circumstances, permit the introduction of further evidence in the context of its review, but only where that evidence goes to the narrow issue of the sustainability of the findings of misconduct. One example of circumstances where further evidence will be allowed is where relevant evidence, which could not have been obtained by the respondent solicitor, exercising reasonable diligence, prior to the hearing before the Disciplinary Tribunal, has emerged subsequently. By contrast, it will rarely, if ever, be open to a respondent solicitor to adduce further evidence from a witness who actually gave evidence before the Disciplinary Tribunal. All relevant evidence should be adduced from the witness at the time, and a second bite at the cherry will not normally be allowed. I will return to discuss the question of further evidence in context. (See, in particular, paragraphs 145 to 153, and paragraphs 211 to 216, below).

52. Finally, whereas the case law from England and Wales cited on behalf of the Solicitor is certainly of interest, my conclusions above are premised on the detailed case law from the Supreme Court and Court of Appeal. The statutory regime governing disciplinary

proceedings in the neighbouring jurisdiction is very different from that under the Solicitors (Amendment) Act 1960. Given these very real differences, it is, I hope, not unnecessarily jingoistic to say that it is preferable to rely on domestic case law.

PART III

CONVEYANCING TRANSACTION / FAIRVIEW CONSTRUCTION LTD

53. 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.

54. 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, Shaun 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.

55. (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).

56. The findings of misconduct relate to the purported sale of lands at Tuam, County Galway in May 2004. The lands in sale had the benefit of planning permission for residential development, and the purported sale related to thirteen units to be constructed on the lands. The lands had recently been purchased by a company known as Fairview Construction Ltd. The directors of this company were Shaun Heffernan and Sean Rowlette ("***the directors***"). Fairview Construction Ltd had obtained a loan facility from ACC Bank to allow it to complete its purchase of the lands. The Solicitor had been providing legal assistance to the company in respect of its dealings with ACC Bank.

57. The letter of sanction from ACC Bank is dated 21 April 2004. (It is referred to as being dated 26 April 2005 in the Solicitor's affidavit of 12 June 2009, but this appears to be in error and is inconsistent with the dates on the exhibited documents). The loan facility was subject to a number of special conditions. Relevantly, special condition 11 provided as follows.

> "11. Prior to drawdown of any funds from Facility B (€27,000 for Servicing i.e. 70% of total servicing cost and €340,000 to build Block 1, comprising nine units i.e. 100% of build cost) solicitor must confirm in writing that unconditional and irrevocable contracts with deposits paid, are in place for 5 units totalling min. Net €665,000 for units in Block 1."

58. The findings of misconduct centre on a letter dated 14 July 2004 sent by the Solicitor to ACC Bank on behalf of Fairview Construction Ltd confirming that five houses "*have been sold*".

59. The Solicitor maintains the position that an enforceable contract for the sale of the lands had been entered into between Fairview Construction Ltd, as vendor, and a solicitor acting on behalf of an undisclosed principal as purchaser. Three contracts for sale, in accordance with the Law Society's General Conditions of Sale, had purportedly been entered into in respect of the lands on 19 May 2004. It appears that the *original* contracts for sale have all been destroyed, but photocopies of two of the three contracts had been

retained by the directors of Fairview Developments Ltd., and had been exhibited before the Disciplinary Tribunal.

60. The vendor is identified under the contracts for sale as Fairview Construction Ltd. The identity of the purchaser is not disclosed. Instead, the contracts for sale had, purportedly, been signed by another solicitor, Mr. Michael O'Donnell, as purchaser "*in trust*".

61. The Solicitor now maintains that the intended purchaser of the lands was to have been Mr. Mark Devaney. However, Mr. Devaney's involvement had not been disclosed to the directors until much later. (Mr. Devaney had, in fact, been the person who had originally sold the lands to Fairview Construction Ltd).

62. The Solicitor's position is that he had been acting on behalf of the vendor of the lands in sale, namely Fairview Construction Ltd. The Solicitor had also been acting, for a time, on behalf of the purported purchaser, Mr. Devaney. The Solicitor maintains that thereafter he had arranged for Mr. O'Donnell to act on behalf of Mr. Devaney.

63. At a meeting of the Complaints and Client Relations Committee on 12 September 2007, the Solicitor had initially explained his involvement in the signing of the contracts for sale as follows.

> "Mr. Coleman [the Solicitor] was questioned on the contract for the sale of the property on behalf of Fairview Construction Limited. He agreed that he had drawn up three contracts for sale relating to the portion of the site itself, and two subsequent contracts relating to the sale of the services and amenities. The solicitor was asked who were the purchasers. Mr. Coleman replied that Behy Downs and Mr. Devany together with other purchasers. Mr Coleman was asked in connection with the contract which was signed by Michael O'Donnell whether he witnessed the signature. He informed the Committee that he had witnessed it. Mr Coleman then informed the Committee that he had asked Mr O'Donnell if he would ask (*sic*) as agent for Mr. Devany and the solicitor subsequently signed Mr McDonald's (*sic*) name with this gentleman's consent which he received over the phone. When Mr Coleman was asked why he had asked Mr O'Donnell to sign the contract he said he did so because he knew he could not act for both parties."

64. It is now common case that Mr. O'Donnell did not, in fact, sign any of the contracts 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).

65. Mr. O'Donnell indicated that he would not have consented to acting in a property transaction without having had sight of the title.

> "No, in fairness Mr. Coleman, he may have asked me, not in this book, that if he was caught in a situation where he was acting for developers would I act as agent or could he make a referral of clients if there was a conflict of interest and, of course, I would have said yes if there was no issues or any problems involved in. I didn't know anything at all got to do about this particular property or transaction and I would never give permission to someone unless I had a Booklet of Title or was doing my own investigation into what was going on. In fact, I don't think that I have ever given carte blanche authorisation to anyone to do anything which would commit people to very serious transactions."

66. 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."

67. 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.

68. As explained earlier, it had been a condition precedent to the second drawdown of funds under the loan agreement between Fairview Construction Ltd and ACC Bank that the company's solicitor must confirm in writing that "*unconditional and irrevocable contracts with deposits paid*" were in place for five units.

69. The Solicitor has averred in his affidavit of 12 June 2009 that he sent a letter to ACC Bank advising that the development had been sold. See paragraph 13 as follows.

> "13. The loan offer required confirmation that pre sales were in existence to enable drawdown of funds. I confirm that I sent a letter to ACC Bank, Ballina, County Mayo advising that the development had been sold which from Sean Heffernan and Sean Rowlette point of view had been the position. Sean Heffernan and Sean Roulette (*sic*) put your deponent herein under pressure to create the contract of sale and to confirm to ACC Bank that the sales were in place by means of enforceable contract for sale."

70. The record of the file review carried out on behalf of the Law Society refers to a letter from the Solicitor dated 14 July 2004 which confirmed that five houses "*have been sold. There are enforceable contracts for Sale and Building Agreements in place*". (See page 100 of the exhibit to Ms Helene Blayney's affidavit of 27 February 2009).

71. The Solicitor, in his affidavit sworn on 23 May 2019, is highly critical of the fact that this letter of 14 July 2004 had not been adduced in evidence at the hearing on 10 February 2010. The Solicitor also avers that there was no evidence that the letter existed or was

authored or signed by him or sent to ACC Bank. The Solicitor fails, however, to explain how this averment is consistent with paragraph 13 of his affidavit of 12 June 2009 (above) where he expressly confirms that he had sent a letter to ACC Bank, Ballina, County Mayo advising that the development had been sold.

72. The Solicitor explains the purported involvement of Mr. O'Donnell in the sale of the lands as follows in his affidavit of 12 June 2009.

> "14. I advised Sean Heffernan and Sean Roulette (*sic*) that it was against Law Society Regulation that the one solicitor should act for all parties in a development of houses such as this one. I advised that another solicitor should be retained. At this juncture, title was not in a manner which could be perfected as the following remained outstanding, namely,
>
> a) engineering certificates were outstanding,
> b) Premier Guarantee Certificates
> c) Bonds and Council levies
>
> 15. I say that I was advised by Sean Heffernan and Sean Roulette (*sic*) that a purchaser was available and would purchase the entire estate from the plans. Sean Heffernan and Sean Rowlette were not made aware of the purchaser details but was advised that the purchaser had come through Mark Devaney.
>
> 16. In accordance to regulation, I advised that I could not act and that a solicitor would have to be retained to act for the purchaser. I was asked by Mark Devaney, to obtain a new solicitor and one that would accept the title as it stood at that time with a view to being perfected in the course of the transaction.
>
> 17. I say that your deponent was put under pressure from Sean Heffernan and Sean Rowlette to make such contracts.
>
> 18. In this regard, this writer asked a colleague, Mr Michael O'Donnell of Rathkeal in the County of Limerick would he be willing to act in the purchase of 13 units at Tuam in the County of Galway. I advised Mr O'Donnell that title would be perfected in due course but that it would take some time. Mr O'Donnell gave his consent to act in the purchase and authorised this writer to sign his name to the contract which I duly did.

> 19. I say that Mr O'Donnell never obtained title from this office. I say that Mr O'Donnell never met Sean Heffernan, Mr Sean Rowlette or Mr Mark Devaney prior to the initial contract for sale being entered into. I say that Mr Michael O'Donnell never saw any contract or booklet of title."

73. As appears, the Solicitor accepts that, as of May 2004, the title to the lands in sale could not be perfected because a number of matters remained outstanding. The Solicitor also accepts that Mr. O'Donnell had neither met Mr. Devaney nor seen any contract or booklet of title prior to his (Mr. O'Donnell) having allegedly authorised the Solicitor to sign the contracts for sale. Against this factual background, it is impossible to understand how Mr. Devaney could be said to have been bound by the purported contracts for sale of 19 May 2004. In particular, he could not be bound by the signature on the contracts for sale. The Solicitor had no written authority to put Mr. O'Donnell's signature on the contracts, and, in any event, Mr. O'Donnell could not be said to be the lawfully authorised agent of Mr. Devaney in circumstances where they had never even spoken to each other, still less entered into a retainer.

ADMISSIONS OF FACT

74. Before turning to consider the grounds upon which it is said that the findings of the Disciplinary Tribunal are legally unsustainable, 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.

75. Following on from the evidence of Mr. O'Donnell to the Disciplinary Tribunal and that of another witness (Helene Blayney from the Law Society), 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.

76. 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.

77. The position of the Solicitor was that he would accept the facts as stated but would deny that same constituted 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.

78. 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).

79. 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.

80. 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).

81. 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).

82. 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".

83. 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 his true sense of integrity and honour and I think that is to be applauded. […]".

84. 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*".

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

86. The hearing then 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] again 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 as simple and straightforward as that. Thank you, Chairman."

87. 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.

88. 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

89. 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 one 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 contracts 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*".

FINDINGS OF THE COURT: FAIRVIEW CONSTRUCTION LTD

Solicitor bound by admissions of fact

90. The starting point for the court in assessing the sustainability of the findings of misconduct must be to consider the status of admissions which have been made voluntarily and with the benefit of legal advice. More specifically, the issue which arises in the context of the "strike off" application now before the court is whether the *sustainability* of the findings of the Disciplinary Tribunal can be impugned by contending that the tribunal was not entitled to rely on the admissions made.

91. The reason that it is necessary to emphasise the precise issue which falls for determination in this judgment is because admissions might have a different status in the context of a statutory appeal under section 7(13) of the Solicitors (Amendment) Act 1960. The judgment of Clarke J. (as he then was) in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48; [2015] 1 I.R. 516 suggests that, in the context of a *de novo* appeal, a party is not necessarily bound by an admission previously made. See paragraph 106 of the judgment as follows.

> "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."

92. By contrast, this court is currently concerned with a "strike off" application—as opposed to a statutory appeal—and is exercising its narrower jurisdiction under section 8 of the Solicitors (Amendment) Act 1960.

93. For the reasons which follow, I am satisfied that the Solicitor is bound by his admissions of fact.

94. Counsel for the Law Society referred the court, by analogy, to the judgments of the Supreme Court in *People (Director of Public Prosecutions) v. Redmond* [2006] 3 I.R. 188 ("***Redmond***") and *Keating v. Crowley* [2010] IESC 29 ("***Keating***"). The facts of *Redmond* were highly unusual. An accused had earlier entered a plea of guilty to an offence. At the subsequent sentencing hearing, the judge had a concern as to the capacity of the accused. The Circuit Court stated a case to the Supreme Court on whether the Circuit Court should have declined to accept a plea of guilty, and should instead have entered a plea of "not guilty" on behalf of the accused, and then sought to ensure that the issue of the accused's possible insanity be fully investigated in the course of his trial. The Supreme Court by a majority (Denham J. dissenting) held that a judge should not intervene to set aside a guilty plea unless there are quite exceptional circumstances arising in the particular case.

95. The judgment in *Keating* concerned the question of whether a party, who had conceded liability in the High Court, should be entitled to amend its grounds of appeal to contest liability for the first time before the Supreme Court. The Supreme Court held that, absent fraud, or some fundamental issue of justice arising from the conduct of the proceedings, it was difficult to contemplate circumstances in which a party would be permitted, in an appeal or otherwise, to impugn a determination by the High Court of an issue, such as liability, which had been expressly conceded by the party concerned.

96. The circumstances of the present case are, self-evidently, very different from those under consideration in this case law. The analogy is, therefore, far from perfect. Nevertheless, the case law is of some assistance in that it highlights the autonomy of a party to determine whether or not to make admissions, and the limited discretion of a decision-maker to refuse to accept such an admission. The judgment in *Keating* also emphasises the public interest in the finality of proceedings, which would be undermined if parties were entitled to resile from earlier concessions.

97. A decision-maker, such as the Disciplinary Tribunal, must be entitled to accept and act upon admissions which have been made voluntarily and with the benefit of legal advice. Save in the context of a statutory appeal by way of a rehearing, a party will only be entitled to resile from such an admission in exceptional circumstances.

98. On behalf of the Solicitor it is submitted, correctly, that a complaint of misconduct must be determined by reference to the criminal standard of proof, i.e. beyond all 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).

99. 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."

100. 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.

101. 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 admissions 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.

102. 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.

Alleged failure to plead dishonesty

103. The Solicitor has sought to overcome the very real difficulties presented by his admissions by advancing 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. A finding of dishonesty in the absence of a pleading deprives that finding of a sustainable basis in law. 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. Counsel also relied on the judgment of Mostyn J. in *Malins v. Solicitors Regulatory Authority* [2017] EWHC 835 (Admin), but this has been reversed by the Court of Appeal [2018] EWCA Civ 366; [2018] 1 W.L.R. 3969.

104. 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.

105. With respect, none of these submissions serve to undermine the sustainability of the findings of misconduct. It is evident from the transcript of the hearing before the Disciplinary Tribunal on 10 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.

106. 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 own 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 anything other than professional misconduct.

107. 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.

108. 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.

109. 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*".

110. 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. This admission is consistent with the approach which the Solicitor had adopted in his affidavit of 12 June 2009. See paragraph 60(g) of the affidavit as follows.

> "(g) Acted for both the Vendor/Builder, Fairview Construction Limited, and purchasers of thirteen newly constructed houses at Shramore, Galway Road, Tuam, County 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.
>
> I admit that I acted contrary to the aforementioned regulation and undertake to the Honourable Law Society not to breach the said regulation in the future."

111. As noted earlier, the concept of "*misconduct*" as defined under the Solicitors (Amendment) Act 1960 includes the contravention of a provision of regulations.

112. 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, indeed, connote dishonesty.

113. 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).

114. A further objection is made to the effect that there had been a failure to put the Solicitor's lack of credibility to him by way of cross-examination, citing *Browne v. Dunn* (1893)

6 R 67. In that case, the House of Lords held that, if in the course of a case, it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him. This is so unless it is otherwise perfectly clear that the witness has had full notice beforehand that there is an intention to impeach the credibility of his story, or the story is of an incredible and romancing character.

115. This judgment has been considered by the High Court (Baker J.) in *Director of Public Prosecutions v. Burke* [2014] IEHC 483; [2014] 2 I.R. 651.

116. Counsel also cited *Commissioners of Her Majesty's Revenue and Customs v. Dempster* [2008] EWHC 63 (Ch) at paragraph 26.

> "[…] Secondly, it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross examination."

117. With respect, this principle cannot be said to have been breached in circumstances where, as in this case, a party to proceedings, who has the benefit of legal advice, makes a series of admissions. These admissions were, with one exception, made through counsel. Other than one intervention from the floor, the Solicitor himself did not give evidence and thus there had been no cross-examination. It is difficult to understand how the Law Society can be criticised for failing to put an allegation to the Solicitor on cross-examination when the necessity for oral evidence had been obviated precisely because the Solicitor had made admissions in respect of that allegation.

Submission that there had been procedural unfairness

118. The Solicitor in the present case has made no suggestion that his admissions were not made voluntarily, nor has the Solicitor pointed to any exceptional circumstances, such as

mistake, which explains why he now seeks to withdraw those admissions. Instead, the most that the Solicitor does is to point to an alleged unfairness on the part of the Disciplinary Tribunal at an earlier stage of the hearing.

119. This allegation of unfairness 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 numerous points in the written legal submissions filed on behalf of the Solicitor, it had been incorrectly stated that the Disciplinary Tribunal had refused to adjourn the hearing so as to allow a particular witness to attend. (See for example §15, §16, §20, §38, §43, §69 and §70 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. (See Mr. Coleman's affidavit of 23 May 2019, paragraphs 44 to 48).

120. 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).

121. What actually happened before the Disciplinary Tribunal is as follows. The Solicitor had previously submitted a number of affidavits to the Law Society in response to the complaints made against him. In particular, three 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, Hilary O'Connor ("***the solicitor employee***"). In this affidavit, the solicitor employee had stated that she had destroyed the contracts for sale in 2005, and that this had been done on the insistence of the directors of Fairview

Construction Ltd. Both directors had denied this in their joint affidavit of 14 January 2009.

122. 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, and could have been relied upon by the Solicitor had he wished to do so.

123. 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.

124. The case made at the hearing before me in March 2020 had been that there had been 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 affidavits filed on behalf of the Solicitor. (In addition to the solicitor employee's affidavit, two affidavits sworn by Mr. Devaney had also been filed). It had been submitted that the (improper) effect of this ruling was to require the Solicitor to prove a hypothesis which was consistent with his innocence. In support of this argument, counsel had placed reliance on the judgment in *M.M. v. Secretary of State of the Home Department* [2014] UKUT 105 (IAC). (The relevant passage is cited in full at paragraph 43 above). That judgment indicates that if the reviewing or appellate court identifies a

procedural irregularity or impropriety which, in its view, made no difference to the outcome of the proceedings, then the appropriate conclusion is that there was no unfairness to the party concerned. Applying this logic, if the alleged unfairness on the part of the Disciplinary Tribunal had been overtaken by events, i.e. the making of admissions by the Solicitor, then the alleged procedural irregularity or impropriety did not affect the outcome. It is only if the earlier ruling had been causative of the subsequent admissions that the analogy with the principles in *M.M. v. Secretary of State of the Home Department* relied upon would hold good.

125. The Solicitor's position has shifted somewhat in his supplemental written submissions of 12 June 2020. Having again cited the passage from *M.M. v. Secretary of State of the Home Department*, it is then submitted at §12 that there is no requirement to prove causality between the unfairness and the admissions made by the Solicitor.

126. It should be observed that there is no averment on the part of the Solicitor which supports the (original) submission that there was a causal link between the ruling on the calling of witnesses, and the subsequent admissions. 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 submission 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 series of factual admissions which were 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.

127. 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 were 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. The Solicitor has not averred that the admissions were other than voluntary.

128. The state of the evidence before the High Court indicates that the Solicitor made an express admission that he had destroyed the file. 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*. Indeed, the wording of the complaint was specifically amended so as to reflect this distinction between the destruction of a client's *file* and the destruction of a *contract for sale*. (See transcript at pages 112 to 114).

129. The admission has also to be viewed in the context of the procedural history. The Complaints and Client Relations Committee had served a statutory notice under section 10 of the Solicitors (Amendment) Act 1994 seeking documents. As appears from the note of the meeting of the Complaints and Client Relations Committee on 17 October 2007, the Committee had specifically requested that any attendance memorandums which supported the assertion that Mr. O'Donnell had consented to the Solicitor signing his name on the contracts be provided. By letter dated 11 December 2007, it was confirmed to the Law Society that the file had been destroyed.

130. In summary, there is nothing in this sequence of events which discloses any unfairness. The Solicitor chose not to call evidence from the solicitor employee. Further, during the course of the hearing on 10 February 2010, the Solicitor expressly accepted that he bore responsibility for the destruction of the client file. More recently, as part of his submissions to the High Court on the appropriate sanction, the Solicitor now says that he

accepts responsibility for the destruction of the file as principal of the firm. (See §20(xiii) of the supplemental written submissions).

131. For the sake of completeness, it should be noted that the submission that "[*N*]*o witness evidence*" exists which contradicts the solicitor employee's affidavit is incorrect: the directors of Fairview Construction Ltd have denied in their joint affidavit of 14 January 2009 that they had instructed her to destroy the contracts for sale. Ms O'Connor's evidence did not, therefore, represent "*uncontested evidence*" as suggested in the written legal submissions.

Mr. Devaney as a witness

132. Separately, the Solicitor had also alleged initially that he required an adjournment of the hearing before the Disciplinary Tribunal in order to call Mr. Devaney as a witness. Mr. Devaney had sworn two affidavits on behalf of the Solicitor as part of the disciplinary proceedings, on 15 October 2007, and 25 February 2008, respectively. As explained earlier, Mr. Devaney is purported to be the undisclosed principal for whom Mr. O'Donnell had allegedly been acting. The Solicitor has admitted to having acted, for a period of time, on behalf of Mr. Devaney, and has admitted that this had represented a conflict of interest in circumstances where his existing client, Fairview Construction Ltd, was to be the vendor of the lands.

133. Leaving aside the fact that the Solicitor never actually requested an adjournment of the hearing of the Disciplinary Tribunal, it is not at all clear what exculpatory evidence it is now being suggested that Mr. Devaney would have been in a position to give. The Solicitor made an express admission that the purported contracts for sale had been "*fictitious*" and for the purpose of "*misleading*" a financial institution into advancing monies to a development company, i.e. Fairview Construction Ltd. The condition precedent to the drawdown of part of the funds from ACC Bank had been that the

company's solicitor must confirm in writing that "*unconditional and irrevocable*" contracts with deposits paid were in place for five of the units. The Solicitor, in his affidavit of 12 June 2009, expressly confirms that he had sent a letter to ACC Bank, Ballina, County Mayo advising that the development had been sold. In the same affidavit, the Solicitor explains that, as of May 2004, the title to the lands in sale could not be perfected because a number of matters remained outstanding. The Solicitor has also explained that Mr. O'Donnell had neither met Mr. Devaney nor seen any contract or booklet of title prior to his (Mr. O'Donnell) having allegedly authorised the Solicitor to sign the contracts for sale. Mr. O'Donnell did not authorise anybody to place or sign his signature on the contracts for sale. The Solicitor has also averred that he had been "*under pressure*" from the directors of Fairview Construction Ltd to make such contracts.

134. Against this factual background, it is impossible to understand how Mr. Devaney could be said to have been bound by the purported contracts for sale of 19 May 2004. In particular, he could not be bound by the signature on the contracts. The Solicitor had no authority to put Mr. O'Donnell's signature on the contracts, and, in any event, Mr. O'Donnell could not be said to be the lawful agent of Mr. Devaney in circumstances where they had never even spoken to each other, still less entered into a retainer. The fact—if fact it be—that Fairview Construction Ltd *subsequently* entered into a different contract for the sale of the lands a year later cannot affect the legal position as of May 2004. The letter to ACC Bank had been sent on 14 July 2004, that is, at the very earliest, eleven months prior to the new contract for sale. (The new contract for sale is said to have been entered into in October 2005, but possibly backdated to June 2005). As of 14 July 2004, therefore, there was no "*unconditional and irrevocable*" contract for the sale of the lands.

Hearing on 26 November 2009

135. There had been an earlier hearing scheduled for 26 November 2009. This hearing had to be adjourned in circumstances where the Solicitor did not attend personally. The application for the adjournment had been moved on behalf of the Solicitor by another solicitor, Mr. Sean Sexton. Mr. Sexton had been on record but had to withdraw during the course of the hearing in circumstances where the Solicitor had sent a fax to the Law Society stating that he did not now have instructions. (For the avoidance of any doubt, it should be noted that the Disciplinary Tribunal accepted that Mr. Sexton had acted entirely properly in appearing before it). Mr. Sexton was then permitted to come off record.

136. There was next a suggestion that a named barrister would attend before the Disciplinary Tribunal that afternoon and make an application for an adjournment on behalf of the Solicitor. Rather than delay further and await this application, the Disciplinary Tribunal instead decided that, in circumstances where as a result of the delay in its starting, the hearing would not finish within the day as scheduled, the interests of justice would be best served by adjourning the hearing there and then. The chairman indicated that the events of that day, including the confusion about representation, might have to be dealt with at the resumed hearing.

137. It is suggested in the written legal submissions filed on behalf of the Solicitor that these comments would cause a reasonable bystander some concern that the Disciplinary Tribunal would fetter its discretion at the resumed hearing.

138. I have carefully considered the transcript of the hearing of 26 November 2009. There is nothing in the transcript which supports such a concern. The Disciplinary Tribunal had adjourned the hearing in ease of the Solicitor. The reference to the events of the day being dealt with again would be understood by the reasonable bystander as referring to the issue of costs. It would clearly be relevant in any application for costs to have regard

to the chaotic circumstances in which the hearing on 26 November 2009 had had to be adjourned. Indeed, the barrister then acting for the Law Society took the sensible precaution of asking that the details of the witnesses who had travelled on behalf of the Law Society be formally recorded in anticipation of a subsequent costs application. (See pages 43/44 of the transcript of the hearing on 26 November 2009). In the event, an order was made on 10 February 2010 directing that the Solicitor pay both the costs of the adjourned hearing and the substantive hearing on 10 February 2010.

139. The Solicitor has also suggested that the hearing on 26 November 2009 had been adjourned with a "*jaundiced view*". Again, this is not borne out by the transcript. As appears at page 43, the chairman, in response to an application by the Law Society to fix the resumed hearing date on a peremptory basis, had expressed a "*jaundiced view*" about fixing hearings on a peremptory basis.

> "I always have a jaundiced view about preemptory (*sic*), because preemptory (*sic*) is final until somebody gets hit by a train or loses a close relative or get struck by illness, and sometimes it puts a hex on things, I think. You can take it, however, that this Tribunal sits the next time to hear this case."

140. No one reading this passage could interpret it as meaning that the Disciplinary Tribunal had taken a "*jaundiced view*" of the merits of the case. Rather, the chairman was simply indicating that there are practical difficulties in fixing a hearing date on an absolutist basis, which rules out the possibility of a further adjournment in any circumstances.

Manuscript notes

141. Counsel on behalf of the Solicitor has drawn attention to an extract from the manuscript notes apparently taken by a member of the Disciplinary Tribunal at the hearing on 10 February 2010. These manuscript notes have been exhibited as part of Mr. Coleman's affidavit of 10 December 2019. The relevant extract appears at internal page 107.

142. At this point in the manuscript notes, the member is, apparently, recording the submission made on behalf of the Solicitor on the question of whether the facts as admitted constituted misconduct. Counsel for the Solicitor had just invited the Disciplinary Tribunal to acknowledge that the Solicitor had acted with integrity. The words "*What about his false Affidavits?*" then appear in the notes, seemingly by way of comment on the submission.

143. The argument advanced at the hearing before this court is that any allegation that the Solicitor had sworn false affidavits should have been put to him by way of cross-examination.

144. With respect, this submission reads too much into the manuscript notes. The Disciplinary Tribunal made no finding against the Solicitor to the effect that he had sworn any false affidavit. It simply does not feature as part of the findings of misconduct. As correctly submitted by counsel on behalf of the Law Society, in the absence of such a finding, no evidential weight can be attached to this part of the manuscript notes. They could, as counsel suggests, simply be musings or jottings. For this court to rely on these notes to make a finding of unfairness would be to engage in unwarranted speculation.

RELIANCE ON ADDITIONAL AFFIDAVITS

145. Counsel for the Solicitor has submitted that it is permissible, in the context of a hearing under section 8 of the Solicitors (Amendment) Act 1960, for a respondent solicitor to introduce *additional* evidence which goes to the issue of whether findings of misconduct are sustainable. I have decided, having regard to the very particular circumstances of this case, to consider the content of these affidavits *de bene esse*. The fact that this case has already involved an appeal to the Supreme Court has had the practical consequence that these disciplinary proceedings have been delayed and remain unresolved some ten years

after the findings of the Disciplinary Tribunal were first made. Rather than run the risk of the additional delay which would be caused were there to be a further appeal and remittal to the High Court on the procedural issue of whether the affidavit evidence is admissible, it seems more sensible to admit the affidavit evidence *de bene esse* and to consider the implications, if any, of same for the outcome of the case.

Affidavit of Mr. Michael O'Donnell

146. The Solicitor has sought to rely on an affidavit of Mr. O'Donnell sworn on 31 May 2016 in support of an argument that the Solicitor may have had an honest but mistaken belief that he had Mr. O'Donnell's spoken authority to sign the contracts.

147. Mr. O'Donnell, very properly, avers that he cannot assist the High Court as to the Solicitor's actual belief, and states that only the Solicitor can do that. The most that Mr. O'Donnell says is that he cannot dispute that the Solicitor may have formed an honest, but mistaken, genuine belief that he (Mr. O'Donnell) had given him consent. The matter is put as follows at paragraph 9 of Mr. O'Donnell's affidavit.

> "I cannot and did not dispute that we had a telephone conversation about a transaction in Tuam. I cannot dispute that Mr. Coleman may have formed an honest but mistaken genuine belief that I had given him consent. I say this having regard to the fact, which I cannot dispute, that we discussed the transaction the subject of the complaint and that I agreed to act on behalf of the purchaser together with the general tenor of the discussion about the contract."

148. There is nothing in Mr. O'Donnell's affidavit which undermines the sustainability of the finding of misconduct 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. In particular, Mr. O'Donnell has not disavowed his sworn evidence to the Disciplinary Tribunal which, it will be recalled, had been that he did not authorise any one to place his signature on the contracts for sale.

149. Moreover, it is difficult to understand how, on even the widest interpretation of the High Court's jurisdiction to review the sustainability of findings of misconduct, a respondent solicitor could be entitled to rely on additional affidavit evidence from a person who had actually appeared as a witness before the Disciplinary Tribunal. The Solicitor had been legally represented at the hearing in February 2010, and his barrister had cross-examined Mr. O'Donnell at length. The Solicitor, accordingly, had every opportunity to elicit such evidence as he wished to rely upon from Mr. O'Donnell.

150. Crucially, it never formed part of the Solicitor's defence to say that his conduct had been excusable because he had an honestly held belief that he had authority to sign Mr. O'Donnell's signature on the purported contracts for sale. Rather, the Solicitor made an express admission that the contracts had been "*fictitious*", and 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*".

151. Finally, for the sake of completeness, it should be noted that counsel acting on behalf of the Solicitor at the hearing before this court in March 2020 was unable to identify any case law which suggested that one solicitor would be entitled to sign the name of another solicitor on a contract for sale without written authority and without giving any indication that the signature was not that of the second solicitor. Given the requirement that a contract for sale be evidenced in writing and signed by the person or their authorised agent, it must be doubtful whether this can be done.

Affidavit of Mr. Patrick Kelly (formerly of ACC Bank)

152. The Solicitor has sought to rely on an affidavit of Mr. Patrick Kelly sworn on 14 March 2018 in support of an argument that ACC Bank had not been misled by the Solicitor arising out of his dealings with Fairview Construction Ltd.

153. Most of the content of Mr. Kelly's affidavit consists of speculation. Mr. Kelly avers that he has no recollection of a letter confirming presales from Coleman and Company to ACC Bank, and that he cannot, for the purpose of his affidavit, confirm or deny that the letter was so issued or received by ACC Bank. In the circumstances, Mr. Kelly's evidence is of no assistance to the Solicitor. This is especially so where the Solicitor has averred in his affidavit of 12 June 2009 that he sent a letter to ACC Bank advising that the development had been sold.

SUMMARY

154. For the reasons set out above, I am satisfied that the findings of misconduct in respect of the conveyancing transaction are legally sustainable in the sense that that phrase is used in *Law Society of Ireland v. Coleman* [2018] IESC 80.

UNDERTAKING TO CREDIT UNION

155. The second decision made by the Disciplinary Tribunal was in respect of a complaint made by a credit union to the effect that the Solicitor had failed to comply with an undertaking which he had given to it. More specifically, Tuam Credit Union had complained that the Solicitor had allowed certain lands to be sold in breach of an undertaking to hold the title deeds in trust to the order of the credit union.

156. The history of the proceedings before the Complaints and Client Relations Committee, and the Disciplinary Tribunal, respectively, have been set out in detail in affidavits sworn on behalf of the Law Society by Mr. David Irwin and Mr. John Eliot on 7 July 2010 and 2 July 2019, respectively. Mr. Irwin has exhibited an earlier affidavit of Ms Linda Kirwan which had been before the Disciplinary Tribunal at its hearing on 25 February 2010.

157. The formal order of the Disciplinary Tribunal is dated 16 March 2010. 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 16th 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.

158. The Disciplinary Tribunal made no recommendation in respect of the payment of compensation. Notwithstanding this, the Law Society in its application to the High Court in July 2010 expressly sought an order requiring the Solicitor to pay the sum of €320,000 in restitution to the credit union. The explanation for seeking this relief is stated as

follows in the affidavit of Mr. David Irwin of 7 July 2010 grounding the application to the High Court.

> "9. I beg to refer to the evidence given by the Complainant, Mr. Mick Culkeen, Chief Executive Officer, of St. Jarlath's Credit Union Limited, Hermitage, Dublin Road, Tuam, Co. Galway. At the hearing of this matter, the Complainant gave evidence as to the effect of the Respondent Solicitor's misconduct on the Credit Union. I specifically refer to page 22 of the transcript in which the Complainant stated that the Credit Union had lost approximately €320,000.00 as a result of the Respondent Solicitor's conduct. The Society respectfully submits that the Tribunal should have made allowance for this and made a recommendation in its report for restitution in the sum of €320,000.00 against the Respondent Solicitor and in favour of St. Jarlath's Credit Union Limited. I respectfully request that this relief be granted by the Court as set out in the accompanying Notice of Motion."

159. The terms of the undertaking itself are 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 for 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."

160. 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.

161. In the event, the lands the subject of the undertaking had been sold in alleged breach of the undertaking. Although not entirely clear from the papers before the Disciplinary Tribunal, it appears to have been accepted by the Solicitor in correspondence that the contract for the sale of the lands had been completed on 30 September 2005. The change in registered ownership of the lands had subsequently been recorded on the folio in

February or March 2006. (See Mr. Flanagan's evidence to the Disciplinary Tribunal on 25 February 2010, at page 27 of the transcript).

162. The credit union made a formal complaint to the Law Society on 22 January 2009. The complaint was made by Mr. Michael Culkeen. Thereafter, during the period February 2009 to February 2010, the Solicitor offered various explanations as to what had occurred in respect of the undertaking.

163. By letter dated 18 February 2009, it had been suggested that the undertaking had been confined to the net proceeds of the sale of the relevant lands, but that there had been no net proceeds.

> "In any event, from this writers recollection, and from clarification from Mr. Patrick Kavanagh it appears that there were no net proceeds from this transaction.
>
> The reason being, the Kavanagh's loan with their principal lending institution had been called in and therefore to obtain a discharge from the primary charge holder, all monies from the sale had were remit to the bank.
>
> Therefore whilst this writer gave an undertaking over the net proceeds, we confirm there were none."

164. Thereafter, on 24 April 2009, the Solicitor, through counsel, informed a meeting of the Complaints and Client Relations Committee that he thought that he had transferred the undertaking to another firm of solicitors, namely Chambers & Flanagan Solicitors. This proved to be incorrect, and the principal of that firm, Mr. Brendan Flanagan, gave evidence confirming this to the Disciplinary Tribunal on 25 February 2010.

165. The Solicitor send two further letters to the Law Society on 9 July 2009. His first letter confirmed that he had "*now obtained the relevant information to answer the complaint of Saint Jarlath's Credit Union*". The second letter stated that he was now in "*a position to fully respond to the allegation*" that he was in breach of the undertaking.

166. The explanation offered at that time was that the undertaking had been 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 were paid out pursuant to a death gratuity. This explanation 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 of September, 2005 and all closing documents were executed by Mr Michael Kavanagh on that date. The purchasers John and Kelly Swinhoe went into possession and they were represented by Daniel McGrath and Company Solicitors, Tuam. At that point monies were outstanding to St. Jarlath's Credit Union Limited. It is acknowledged that we did not hand over the sales monies to St. 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 St. 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 monies 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.
>
> Pat Kavanagh never owned lands of 63100F County of Galway. I therefore respectfully submit that I cannot be in breach of an undertaking over title documents where the money raised on foot of the undertaking has been discharged. The undertaking has been discharged by funds from the estate of Michael Kavanagh.
>
> Secondly, I cannot be held to account for title documents to a third party who does not own the property.
>
> I have not dealt with the title of 63100F in any way inconsistent with the undertaking.
>
> Patrick Kavanagh never owned the property. I understand however that he is indebted to St. Jarlath's Credit Union Limited and has made an application to the High Court for Protection under the Bankruptcy Act 1988."

167. As appears, the Solicitor was maintaining at that time that the undertaking did not extend to any debt incurred by Mr. Patrick Kavanagh.

168. The Law Society responded, by letter dated 7 September 2009, and confirmed that the letters would be exhibited by the Law Society, and, further, that the Solicitor would have an opportunity to put his view fully on record in a replying affidavit to the Society's application to the Disciplinary Tribunal.

169. In the event, the Solicitor did not file a replying affidavit. Nor did the Solicitor attend at the hearing of the Disciplinary Tribunal on 25 February 2010. The sequence of events in the immediate lead up to that hearing are as follows. The Solicitor wrote to the Law Society on 22 February 2010. The Solicitor made complaint that monies from his practice were being withheld from him. The letter then stated as follows.

> "In the interest of natural justice, I have the right to be heard and represented, which right has been taken away from me in the method and manner in which you, your servants or agents have withheld my money.
>
> I cannot be expect (*sic*) to travel to Dublin and attend a hearing, let alone instruct legal representation without sufficient funds to do so.
>
> In this regard, I would ask that you would confirm that you will move an application for an adjournment on consent in the interest of natural justice such that I may be afforded the right to defend myself and further, have the right to be heard. You may remember that such rights are Constitutional Rights."

170. The Law Society responded by letter dated 23 February 2010. The relevant part of the letter reads as follows.

> "I would point out that the Society varied the Freezing Order on 7th December 2009 and since that time, you have been permitted to go back into your practice for the purpose of winding down your practice. I also note that you had ample notice of the hearing of this matter. The Society received the Form DT5 with notification of the original hearing date of 28th January 2010 on 10th December 2009 and you would have received notification at the same time. You will recall that that date was not suitable for the Society's deponent, Ms. Kirwan, and that I wrote to you on 16th December 2009 advising you of the need to obtain a different hearing date. An application was

made by the Society on 28th January 2010 (*recte* 12 January 2010) and the matter was relisted for hearing on 25th February 2010. The Society was notified of the new hearing date by letter dated 14th January 2010 and you would also have been notified at the same time. It is the case that you have known of the hearing of this matter since in or around 10th December 2009 (some ten weeks) and the current hearing date since in or around 14th January 2010 (five weeks). Hence, you have had a total period of ten weeks in which to prepare for the above hearing.

I put you on notice that the Society will be calling both the Complainant, Mr. Mick Culkeen, and also a professional witness and subpoenas have been issued and served for this purpose. I recall that you attended Dublin on 11th February 2010 and you were represented by Mr. Alan Toal B.L. in the Society's first application to the Tribunal against you. I am therefore surprised at your statement that you cannot be expected to travel to Dublin and attend a hearing or instruct legal representation without sufficient funds to do so.

If you wish to seek to adjourn this matter, please note that the Society will strenuously oppose such an application. It is also not the Society's place to make an application for an adjournment. It is up to you to make an application for an adjournment and if you wish to do so, you should do this ideally before the actual hearing date. It is up to you to move the application and if you wish to do so, this should be done before the hearing date i.e. today or tomorrow. If you intend to make such an application, then the Society will need to be put on notice so that it can oppose that application.

Please note that in the absence of the application to adjourn the matter, the Society intends to proceed with the hearing on Thursday 25th February 2010."

171. The Solicitor replied by letter dated 24 February 2010. The relevant part of the letter reads as follows.

"Whilst Mr. Irwin is correct, he fails to detail the fact that his nominee holds all my funds.

I am not in a position to retain legal representation and would be at an unfairly disadvantage in this regard. Further, I wish to maintain my right to be heard and call witness, to defend the matter in full.

This cannot happen when any and indeed all limited funds available are required to maintain my wife and two children.

I therefore seek an adjournment so that I may defend the matter in full in accordance with natural and constitutional justice."

172. In the event, the Solicitor did not make an application to the Disciplinary Tribunal for an adjournment and did not attend at the hearing on 25 February 2010. The transcript of the hearing has been exhibited in these proceedings. As appears from the transcript, at the commencement of the hearing, counsel acting on behalf of the Law Society expressly referenced the relevant correspondence. The chairman of the Disciplinary Tribunal confirmed that the members of the tribunal had been furnished with copies of the correspondence. Counsel for the Law Society made a detailed submission as to why the proceedings should not be adjourned. Counsel referred, in particular, to the history of the disciplinary process to date; to the fact that the Solicitor had not filed a replying affidavit; and to the fact that the Solicitor had, in his correspondence of 9 July 2009, expressly confirmed that he was now in "*a position to fully respond to the allegation*" that he was in breach of the undertaking.

173. The chairman of the Disciplinary Tribunal expressly stated that the points made on behalf of the Law Society were accepted, and ruled that the matter should proceed.

174. Mr. Culkeen gave evidence at the hearing on 25 February 2010. Mr. Culkeen confirmed that the credit union never received the title deeds or value in place of them.

175. Evidence had also been given by a solicitor, Mr. Flanagan, who confirmed that he had been instructed by Mr. Michael Kavanagh's widow, but had not received a file or undertaking in respect of the lands under folio 63100F.

SOLICITOR'S POSITION

176. The Solicitor explains that (i) having had an opportunity to review documents which he obtained by way of discovery in High Court proceedings taken against him by the credit union (*St. Jarlath's Credit Union Ltd v. Coleman*; High Court 2009 No. 8378 P.), and (ii) having located his original files, he is now in a position to establish that the

undertaking in respect of Mr. Patrick Kavanagh had been discharged at the date of the complaint. (See, in particular, Mr. Coleman's affidavit sworn herein on 23 May 2019).

177. The position now adopted by the Solicitor is that, insofar as Mr. Patrick Kavanagh is concerned, the undertaking of 16 February 2004 had been confined to a single loan in the sum of €50,000. It is said that Mr. Kavanagh subsequently drew down two loans from Irish Nationwide Building Society in April 2005 for the express purpose of refinancing his loans with the credit union and to release equity on a principal private residence. Two payments, in the sum of €270,000 and €109,000, respectively, were then made on behalf of Mr. Patrick Kavanagh by the Solicitor. A copy of the relevant covering letters dated 10 May 2005, and 29 July 2005, have been exhibited. The letter of 10 May 2005 reads as follows.

> "We enclose herewith cheque in the sum of €270,000.00 to clear account no. 21126 on behalf of our client Patrick Kavanagh.
>
> You might kindly acknowledge safe receipt and confirm that our Undertaking is discharged."

178. A copy of an account statement in respect of Mr. Patrick Kavanagh's account with the credit union (Member No. 21126) has been exhibited. As appears therefrom, the account is, in effect, a rolling account, whereby loan repayments and advances are all recorded on the one ledger, with the cumulative balance being shown after each transaction. This is to be contrasted with the approach taken by other financial institutions which tend to assign separate account numbers to different loans.

179. The account exhibited indicates that even after the sums of €270,000 and €109,000 had been credited to Mr. Kavanagh's account, there was a cumulative balance of €341,532.65 outstanding as of 4 August 2005.

180. An affidavit has been sworn by Patrick Kavanagh dated 30 August 2019. (This affidavit is exhibited at "DC13" of Mr. Coleman's affidavit of 10 October 2019 sworn in

proceedings 2010 No. 65 SA). Mr. Kavanagh sets out his understanding of the circumstances leading up to the issuing of the undertaking on 16 February 2004 as follows.

> "6. I required working capital for the two building projects and I attended with Tom Creaven, Manager of St. Jarlath's Credit Union Limited on the 16th day of February 2004. I told Tom Creaven that I was building two house, one for myself in Kilcoona and one for my brother in Kilbannon and that both houses were in the course of construction. I asked for a loan of €50,000.
>
> 7. Tom Creaven asked for security for the loan of €50,000. I telephoned Daniel Coleman and asked him to fax over an undertaking to Tom Creaven over the house at Kilbannon which was folio 63100F County Galway. I was due €120,000 from the building works and it was usual practice for us to sell properties by way of a contract for sale for the site and building agreement for the house. Daniel Coleman faxed over the undertaking for the attention of Tom Creaven which referred to folio 63100F County Galway which was Michael Kavanagh's site."

181. At a later point in his affidavit, Mr. Kavanagh expresses the opinion that the undertaking had not been relied upon by the credit union in respect of further borrowings.

> "12. The undertaking of the 16th February 2004 was never relied upon by Tom Creaven or St. Jarlath's Credit Union Limited in the application for or approval of any of my eight subsequent loans detailed at paragraph 11. Tom Creaven approved each of the eight subsequent loans which were granted without any discussion, mention or reliance on the undertaking of 16th February 2004. For the avoidance of any doubt, the 8 subsequent loans were approved without any reliance on the lands of folio 63100F County Galway or in the alternative without reliance on a property known as Kilbannon, Tuam, County Galway."

SOLICITOR'S CHALLENGE TO THE FINDINGS OF MISCONDUCT

(a). Failure to grant an adjournment

182. The first error of law alleged on behalf of the Solicitor is that the Disciplinary Tribunal acted in breach of fair procedures and constitutional justice in "*summarily*" refusing his application to adjourn the hearing scheduled for 25 February 2010.

(b). Alleged failure to submit points of defence

183. It is submitted on behalf of the Solicitor that while he might have been answerable for his failure to attend the hearing, this did not excuse the due process obligations of the Disciplinary Tribunal. Rather, it is said, it enhanced them. In particular, it is submitted that the Disciplinary Tribunal should have put the content of the Solicitor's letter dated 19 November 2008 to the witness from the credit union, Mr Culkeen. This is a reference to a letter written by the Solicitor to the credit union in response to the latter's ongoing enquiries in respect of the undertaking. The Solicitor had requested that the credit union furnish the following documents by return: (1) a copy of the undertaking; (2) a copy of the loan agreement duly signed; (3) the amount of monies advanced; (4) the amount of repayments made (if any); and (5) details of any special conditions. It does not appear that this letter was ever replied to.

(c). Alleged failure to adequately investigate the complaint

184. The third alleged error is closely related to the second above. It is alleged that had the investigation of the complaint included consideration of a matter as "*rudimentary*" as the loan account statements, then the Complaints and Client Relations Committee would have been put on enquiry as to the repayments.

(d). Alleged material non-disclosure led to errors of fact that became errors of law

185. The statement of account had not been before the Disciplinary Tribunal at the hearing on 25 February 2010. The statement of account, which has since been exhibited as part of these proceedings, records the crediting of the payments of €270,000 and €109,000 on 12 May 2005, and 4 August 2005, respectively. It is also alleged that the credit union failed to disclose a *previous* complaint which had been made by it to the Law Society. This complaint had been made in respect of the account of the late Michael Kavanagh, and bore the reference "S8347/27/C/3/2".

186. Reliance is placed in this regard on a letter dated 5 December 2006. (The letter is stamped as having been received on 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."

187. The Solicitor describes the effect of this letter as follows in his affidavit of 23 May 2019.

> "39. Also when going through what was discovered by St Jarlath's Credit Union I saw that the file copy of the letter of the 6th December 2006 had been altered to conceal the release of all undertakings on behalf of Michael Kavanagh. This had the effect that anybody looking at the file would not realise that the alleged undertaking that I stood accused of breaching (and actually at this stage had been convicted and struck off the Roll of Solicitors for so breaching) had in fact been discharged. I beg to refer to a copy of the altered letter from Concannon and Meagher (the then solicitors for the Credit Union) dated 6th December 2006 […]. I can only presume that the letter was altered to hide the payment and the compliance with the undertakings.
>
> 40. It can be seen from the foregoing that all undertakings granted to St. Jarlath's Credit Union by my office for Patrick Kavanagh were discharged on 10th May 2005. All undertakings granted to St.

> Jarlath's Credit Union for Michael Kavanagh had been discharged by 6th December 2006. This was confirmed by the (unaltered) letter of 6th December 2006 from Concannon and Meagher to the Law Society releasing all undertakings found at DC 14. For completeness, I confirm that a separate loan of Patrick Kavanagh was paid off by my office. Therefore there can be no doubt that any possible liability of my office to St Jarlath's Credit Union in respect of Michael and Patrick Kavanagh and the undertaking of 16th February 2004 had all been discharged by 6th December 2006."

(e). Alleged failure to apply any test for reliance on the undertaking

188. It is submitted, on the basis of "*first principles and common sense*", that a court or tribunal in determining whether there has been a breach of an undertaking must be satisfied beyond a reasonable doubt (a) that the undertaking was granted by the solicitor concerned, and (b) that the undertaking was relied upon by the relevant financial institution. Whereas it is accepted that the Solicitor granted the undertaking, it is disputed that the undertaking had been relied upon by the credit union. The Solicitor also maintains that the undertaking had been discharged. It is submitted that the relevant records, e.g. the loan promissory notes, demonstrate clearly that there had been no reliance on nor requirement for security in the form of an undertaking save for the loan of €50,000 granted on 16 February 2004.

(f). Alleged failure to quantify the loss in making an order for restitution

189. The Law Society, in its application to Kearns P. in July 2010, had sought—and obtained—an order that the sum of €320,000 be paid in restitution to the credit union. No equivalent order is sought as part of the remitted application to the High Court.

190. The Solicitor queries whether the Law Society is entitled to "*select*" which findings it pursues before the High Court, and further suggests that the Law Society might not be pursuing the application for restitution from a "*tactical perspective*", and to avoid cross-examination of Mr. Culkeen.

191. 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 165 above).

FINDINGS OF THE COURT RE: UNDERTAKING TO CREDIT UNION

192. The findings of misconduct in respect of the alleged breach of the undertaking to the credit union are not sustainable, in the sense that that term is used in *Law Society of Ireland v. Coleman* [2018] IESC 80, for the following reasons.

193. The hearing before the Disciplinary Tribunal on 25 February 2010 was unsatisfactory in that the members of the Disciplinary Tribunal had not been provided with all relevant documentation. The case presented to the Disciplinary Tribunal by the Law Society—and reprised before this court—is superficially attractive. The undertaking is said to be in very straightforward and simple terms: the Solicitor was to hold the title deeds on trust to the order of the credit union. The fact that the lands were sold on 30 September 2005 is said to represent a breach of these terms.

194. In truth, the position is more nuanced. It is now apparent from the documentation which has been made available to the Solicitor subsequently, as part of the discovery process in the proceedings taken as between the credit union and the Solicitor (*St. Jarlath's Credit Union Ltd v. Coleman*; High Court 2009 No. 8378 P.) that the Solicitor had, in fact, written to the credit union seeking to be discharged from the undertaking. More

specifically, the Solicitor had written to the credit union on 10 May 2005 in the following terms.

> "We enclose herewith cheque in the sum of €270,000.00 to clear account no. 21126 on behalf of our client Patrick Kavanagh.
>
> You might kindly acknowledge safe receipt and confirm that our Undertaking is discharged."

195. Mr. Culkeen, on behalf of the credit union, in his evidence to this court confirmed that he had not come across any documentary evidence to demonstrate that the undertaking had been released. Mr. Culkeen expressed his "*opinion*" that whoever had dealt with the letter of 10 May 2005 may have said that, as Mr. Kavanagh's account was not being cleared in full by the payment of €270,000, there was no question of the undertaking being discharged.

196. (It should be explained that Mr. Culkeen had not been employed in the credit union at the relevant time, and only took up his position as chief executive some years later in 2007. The witness was thus not in a position to give *direct evidence* as to the events of 2005).

197. Mr. Culkeen very fairly accepted, in response to a question from counsel for the Solicitor, that he could not say with certainty that a document which released the Solicitor from the undertaking might not exist. The witness had earlier confirmed that there was no copy of a reply to the letter of 10 May 2005 on the credit union's file.

198. Neither the letter of 10 May 2005 nor the letter of 29 July 2005 enclosing a further payment in the sum of €109,000 had been put before the Disciplinary Tribunal at its hearing on 25 February 2010. The witness on behalf of the credit union had been asked whether there was anything on the file to suggest that the Solicitor had been released. His reply was as follows.

> "Q. And from your knowledge of the Credit Union file was there anything there to suggest the Credit Union had ever released

> Mr. Coleman from the undertaking or consented to anybody else stepping in?
>
> A. No, we would formally deal with both. If there was such request, there would be a letter there either discharging it or giving permission for someone else to take it over."

199. (See transcript of hearing before the Disciplinary Tribunal, page 17).

200. No explanation has been provided as to why it is that this correspondence of May and July 2005 between the Solicitor and the credit union had not been put before the Disciplinary Tribunal. The correspondence was relevant and should have been made available. The correspondence must, presumably, have been in the possession of the credit union in that it has subsequently been made available by the credit union to the Solicitor by way of discovery in proceedings taken by the credit union to seek to enforce the undertaking.

201. (For the sake of completeness, it should be noted that 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 documentation, by reference to the principles in *Cork Plastics (Manufacturing) Ltd v. Ineos Compounds UK Ltd* [2007] IEHC 247; [2011] 1 I.R. 492. It has since been confirmed by the Solicitor in his supplemental written submissions of 12 June 2020 that the parties had reached express agreement as to the admissibility of the discovery documentation).

202. There is no evidence before this court as to what response, if any, the credit union made to the letter of 10 May 2005. In particular, the credit union cannot say with certainty whether the undertaking might, in fact, have been released. This is not a fanciful possibility. As set out earlier, Mr. Patrick Kavanagh has averred, in his affidavit of 30 August 2019, that the credit union had granted each of the eight subsequent loans without any discussion, mention or reliance on the undertaking of 16 February 2004. Mr.

Kavanagh has also averred that the payment of 10 May 2005 had been preceded by a telephone call between the Solicitor's office and Mr. Creaven in which it was stated that the proposed payment of €270,000 was to clear the loan of €50,000 and to release the undertaking. (See paragraph 16 of the affidavit). If all of this be correct, then the credit union might well have released the undertaking once the initial borrowings of €50,000 had been paid off, as is now asserted on behalf of the Solicitor.

203. It is also to be recalled that the credit union itself had expressly withdrawn an earlier complaint against the Solicitor in respect of an alleged breach of an undertaking in respect of Mr. Michael Kavanagh. See the letter of 5 December 2006 cited at paragraph 186 above. The fact that no reference is made in the letter to an alleged breach of the undertaking insofar as Mr. Patrick Kavanagh is concerned is consistent with a decision having been taken by the then management of the credit union that all issues in respect of the undertaking had been resolved. In this regard, it will be recalled that the alleged breach of the undertaking, i.e. the sale of the lands under folio 63100F, had occurred more than a year earlier in September 2005, and was relevant to both of the Kavanagh brothers. If, as now maintained by the credit union, there was an outstanding breach, then it is surprising that it is not mentioned in the letter of 5 December 2006, and that the complaint only surfaced in January 2009, i.e. some two years later.

204. It is neither necessary nor appropriate for this court to resolve these various issues now. This is because this court's function, on this application, is confined to assessing whether the findings of misconduct have a sustainable basis. It is sufficient for this purpose to hold that the allegation that the Solicitor breached the undertaking has not been established beyond a reasonable doubt. The state of the evidence is such that it cannot reasonably be excluded that the credit union did, in fact, release him from his undertaking in response to the letter and payment of 10 May 2005.

205. Counsel for the Law Society submits that the Solicitor cannot point to any proof of a release of the undertaking, only to a request to be released. It is said that this is a central gap in the proofs to be put forward on behalf of the Solicitor.

206. With respect, if and insofar as this court is being asked to infer that no discharge ever issued or that the Solicitor has failed to "proof" his case, this is inconsistent with the burden of proof which lies on the Law Society. The onus is upon the Law Society to establish beyond a reasonable doubt that the alleged misconduct occurred. For the reasons detailed above, the state of the evidence admits of a reasonable interpretation which is consistent with the Solicitor's innocence.

207. The findings of misconduct must, therefore, be set aside on the grounds that there is no sustainable basis for same. The position can also be analysed from the perspective of procedural fairness. The hearing on 25 February 2010 was unfair in that not all relevant material had been put before the Disciplinary Tribunal. In particular, the details of (i) the correspondence and payments of May and July 2005, and (ii) the withdrawal of the previous complaint on 5 December 2006, should all have been put before the members of the Disciplinary Tribunal.

208. The failure to adduce evidence as to the payments on the account was all the more serious in circumstances where the Law Society subsequently sought—and initially obtained—an order requiring the Solicitor to make restitution in the sum of €320,000. The factual basis for this order was never properly established. There was, for example, no evidence as to the value of the lands the subject of the undertaking. Mr. Kavanagh has averred that the lands were sold for €160,000 in September 2005. On the authority of *Allied Irish Banks plc v. Maguire* [2016] IESC 57; [2016] 3 I.R. 85, it is difficult to understand how the credit union could have been entitled to compensation *greater* than the market value of the lands. It may also be the case that the credit union had already received value for

the undertaking insofar as it recovered monies in respect of Mr. Michael Kavanagh's insurance policy.

209. In making this finding of unfairness, I have not lost sight of the fact that much of the difficulties in this case could have been avoided had the Solicitor attended at the hearing on 25 February 2010. The Solicitor should have attended at the hearing, and it was wrongheaded of him not to do so, if even only for the purpose of seeking an adjournment. Given his failure to attend, the Disciplinary Tribunal acted within its jurisdiction in refusing to adjourn the proceedings for the reasons detailed by counsel for the Law Society and cited with approval by the chairman of the Disciplinary Tribunal. The Solicitor had been on notice of the hearing date for a number of weeks. More importantly, the Solicitor had, in his correspondence of 9 July 2009, expressly confirmed that he was now in "*a position to fully respond to the allegation*" that he was in breach of the undertaking. The Solicitor had also been in a position to obtain legal representation at the hearing in respect of the first complaint less than two weeks earlier. No proper explanation had been provided as to why it was that he now claimed to be unable to obtain representation. Insofar as the Solicitor has sought to criticise the decision not to adjourn, I reject that submission.

210. Nevertheless, having pushed to proceed with the hearing *in absentia*, the Law Society were obliged to ensure that all relevant material was put before the Disciplinary Tribunal. The Law Society should have sought out more information in respect of the payments on the credit union account. It should also have put the withdrawal of the previous complaint before the Disciplinary Tribunal.

ADMISSION OF MR. KAVANAGH'S AFFIDAVIT

211. As appears from the discussion above, in assessing the sustainability and fairness of the findings of misconduct, I have had regard to the affidavit evidence of Mr. Kavanagh and to other material which had not been before the Disciplinary Tribunal. Counsel had been allowed to refer to this evidence *de bene esse* at the hearing before me in March 2020, with a ruling on its admissibility to be made as part of the reserved judgment on the application.

212. Both sides referred to the principles governing the admission of fresh evidence on an appeal as set out by the Supreme Court in *Murphy v. Minister for Defence* [1991] 2 I.R. 161. Counsel for the Solicitor, however, emphasised that the principles apply by analogy only, in that the application currently before the court is not an appeal as such. Counsel also draws attention to passages in *Law Society of Ireland v. Coleman* [2018] IESC 80 where McKechnie J. appears to envisage that additional evidence can be adduced on a "strike off" application.

213. The principles in *Murphy* were summarised as follows by Finlay C.J. (at page 164 of the reported judgment).

> "1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;
>
> 2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;
>
> 3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

214. Even allowing that these principles are not directly applicable to the function being exercised by the court under section 8 of the Solicitors (Amendment) Act 1960, they nevertheless provide useful guidance as to the type of considerations to be taken into

account. I am satisfied that it is in the interests of justice to admit the new evidence in this case. The Solicitor had been at a significant disadvantage in defending the allegations against him given that, by the time the complaint came to be made, the relevant client files had been transferred to other law firms. The Solicitor did not have access to the files. Moreover, he did not have access to the files held by the credit union, including copies of the accounts, recording the payments made in the summer of 2005, and the copy correspondence. It does not appear that the credit union ever responded to his letter of 19 November 2008 requesting copies of the relevant documentation.

215. It should also be noted that there had been considerable delay in making the complaint. The complaint was submitted to the Law Society in January 2009, which is some four and a half years after the undertaking had been given, and more than three years after the event said to constitute the breach, i.e. the sale of the lands in September 2005, had occurred. The Solicitor cannot be criticised for not having an immediate recollection of events of such a vintage, without sight of the documentation. For this reason, the findings that he failed to adequately respond to correspondence from the Law Society and the credit union are not sustainable.

216. The evidence now sought to be relied upon could not have been obtained by due diligence by the Solicitor prior to the hearing in February 2010. The Law Society should have used its statutory powers to secure the evidence. The two other criteria under *Murphy* are also met: the evidence would have had an important influence on the outcome of the case, and is credible.

INCONSISTENCY WITH EARLIER JUDGMENT

217. The above conclusion, i.e. to the effect that the findings of misconduct in respect of the undertaking to the credit union are unsustainable, has the consequence that there is some

inconsistency between this judgment and the earlier judgment delivered in respect of the application for an extension of time to appeal. More specifically, in determining whether or not to grant an extension of time to appeal, this court had to assess the strength of the proposed grounds of appeal. As set out at paragraphs 152 to 158 of the judgment of 7 April 2020, this court concluded that arguable grounds of appeal, within the meaning of *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3, had not been made out.

218. However, this court has now held that the findings of misconduct are unsustainable. The threshold for setting aside findings of misconduct as unsustainable is higher than that for an appeal. (See discussion at paragraphs 46 *et seq*. above). It must follow, therefore, that had the arguments advanced on behalf of the Solicitor in the context of the "strike off" application been made instead in the context of a statutory appeal under section 7(13) of the Solicitors (Amendment) Act 1960, then such an appeal would inevitably have been successful. The conclusion in the earlier judgment that there were not strong grounds of appeal has thus transpired to be incorrect.

219. The explanation for the discrepancy between the two judgements lies in the fact that the affidavit of Mr. Patrick Kavanagh of August 2019, which is central to this court's determination, had been submitted in the context of the "strike off" application as opposed to the application for an extension of time. Moreover, different functions were being exercised by the court upon the two applications. It does not automatically follow that a more positive assessment of the strength of the appeal would have resulted in the grant of an extension of time. As discussed in detail in the judgment of 7 April 2020, the judgment of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 requires a number of other considerations to be taken into account.

220. Nevertheless, and with the benefit of hindsight, it would have been preferable had I delivered a single omnibus judgment on both applications. This would have ensured that the was an appropriate crossover between the matters considered in each of the applications. As noted earlier, however, the parties' preference had been that two separate judgments would be delivered.

221. Crucially, the discrepancy between the two judgements does not cause any injustice to the Solicitor. This is because the Solicitor has achieved his objective in having the findings of misconduct in respect of the credit union undertaking set aside. The fact that, procedurally, this has been achieved in the context of the "strike off" application, rather than in the context of a statutory appeal, does not make any substantive difference. The same result has eventuated. Of course, the Solicitor will be entitled to make submissions, if he so wishes, in respect of the consequence of this in terms of the appropriate costs order to be made.

SERVICE OF REPORT OF THE DISCIPLINARY TRIBUNAL

222. The supplemental written legal submissions filed on behalf of the Solicitor seek to put in issue the question of whether the motion papers in respect of the "strike off" application had been properly served upon him in July 2010.

223. This is not an argument which had previously been advanced at the hearing of the "strike off" application in March 2020. As the Law Society correctly point out in their written submission, the oral hearing in respect of the Fairview Construction Ltd matter had been concluded without any reference to the issue of service.

224. At all events, the issue of service has been ruled upon in the judgment on the application for an extension of time to appeal, *Coleman v. Law Society of Ireland* [2020] IEHC 162. See paragraphs 159 to 172 of the judgment. This finding applies *mutatis mutandis*. In

particular, it is entirely artificial to suggest that the Solicitor had not been served with the motion papers in circumstances where he had actually appeared before the then President of the High Court on 26 July 2010. Moreover, the Solicitor has since filed detailed affidavits in response to the Law Society's application, and participated fully in the hearing under section 8 of the Solicitors (Amendment) Act 1960. Having done so, the Solicitor must be taken to have acquiesced in any alleged failure to serve the papers within time.

PART IV

APPROPRIATE SANCTION

225. Section 8 of the Solicitors (Amendment) Act 1960 (as substituted by the Solicitors (Amendment) Act 1994 and as further amended by the Solicitors (Amendment) Act 2002) provides as follows.

> (a) the High Court, after consideration of the report—
>
> (i) may by order do one or more of the following things, namely—
>
> (I) strike the name of the solicitor off the roll;
>
> (II) suspend the solicitor from practice for such specified period and on such terms as the Court thinks fit;
>
> (III) prohibit the solicitor from practising on his own account as a sole practitioner or in partnership for such period, and subject to such further limitation as to the nature of his employment, as the Court may provide;
>
> (IV) restrict the solicitor practising in a particular area of work for such period as the Court may provide;
>
> (V) censure the solicitor or censure him and require him to pay a money penalty;
>
> and, in making any such order, the Court shall take account of any finding of misconduct on the part of the respondent solicitor previously made by the Disciplinary Tribunal (or by their predecessor, the Disciplinary Committee) and not rescinded by the Court, and of any order made by the Court under the Solicitors Acts, 1954 to 2002, in respect of the respondent solicitor;

226. The judgment in *Law Society of Ireland v. Coleman* [2018] IESC 80 emphasises that in all cases the ultimate arbiter of the appropriate sanction to be imposed is the High Court. There is no question of the High Court being bound by the recommendation made by the Disciplinary Tribunal or by the submissions of the Law Society.

227. The appropriate factors to be taken into account include the following (at paragraph 91 of the judgment).

> "[…] 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."

228. Further guidance as to the approach to be taken in determining the appropriate sanction is to be found in the judgment of the Supreme Court in *Carroll v. Law Society of Ireland* [2016] IESC 49; [2016] 1 I.R. 676. McKechnie J. had summarised the principles governing admission to the Roll of Solicitors towards the end of his judgment. The following observations are relevant, by analogy, to an application to strike a solicitor's name from the Roll. (See paragraph 71, page 705 of the reported judgment).

> "From the foregoing it appears:–
>
> […]
>
> (vi) that one common strand permeates all levels of the profession: it is trust, integrity, probity and, in a nutshell, honesty; violations of these principles will differ as to degree and seriousness, as will the sanction imposed in response;
>
> (vii) that substandard behaviour not reaching the misconduct level, such as moments of neglect or carelessness, can be differentiated from that which does. The former can attract a range of sanction options, up to and including suspension and conditionality of further practice. The latter, when established, may well involve a consideration of dismissal from the profession. Where proven dishonesty is involved, with or without the oft associated features of misrepresentation, concealment and deceit, such misconduct will almost always feature at the highest level of the scale which I have referred to: therefore, in such circumstances, the sanction of dismissal will be a front line consideration;
>
> (viii) *O'Laoire v. The Medical Council* (Unreported, High Court, Keane J., 27 January 1995) and so many other cases show how established misconduct of a serious nature is regarded both by the professional body and by the courts: despite the personal devastation which a strike off may have for most

individuals and their families, the same must be regarded as a likely result of such a finding;

(ix) however, such an outcome should not be regarded as a certainty and should not be applied in some mathematical or formulistic way. The sanction imposed may, if appropriate, have a punitive and dissuasive element to it; it will always be influenced by the necessity to maintain the public policy considerations underpinning the regulatory and judicial approach to the solicitors' profession. In addition, however, given the constitutional dimension involved, the penalty must be proportionate both to the misconduct as established and to the considerations as mentioned;"

229. In *Law Society of Ireland v. Herlihy* [2017] IEHC 122, Kelly P. observed that where dishonesty is established on the part of a solicitor, then no matter how strong the mitigation is, a strike off will almost invariably follow. The President emphasised the need to maintain trust in the solicitors profession.

230. Counsel for the Solicitor has placed particular emphasis, in his supplemental written legal submissions of 12 June 2020, on the judgment of the High Court (Kelly P.) in *Law Society of Ireland v. D'Alton* [2019] IEHC 177. In that judgment, particular weight had been attached to the respondent solicitor's chronic health condition at the time the disciplinary offences occurred. It is submitted on behalf of the Solicitor, by analogy, that the "strike off" recommendation should not be followed having regard to the Solicitor's personal circumstances as disclosed in his replying affidavit.

FINDINGS OF THE COURT ON APPROPRIATE SANCTION

231. The findings of misconduct in the present case involve dishonesty. The Solicitor has admitted to causing or allowing a "*fictitious contract*" to come into existence for the purpose of "*misleading*" a financial institution into advancing monies to a development company. The circumstances of the offence have been set out in detail earlier, and can be summarised as follows. It had been a condition precedent to the release of part of the

funds under a loan agreement that the borrower's solicitor confirm in writing that "*unconditional and irrevocable*" contracts with deposits paid were in place. The Solicitor has admitted, in his affidavit of 12 June 2009, that he sent a letter to ACC Bank advising that the development had been sold.

232. In truth, there were no "*unconditional and irrevocable*" contracts in place at that time. The contracts for sale which had purportedly been signed in trust by another solicitor could not have been enforced against the purchaser. The signature of the other solicitor had been improperly placed on the contracts for sale by the Solicitor. This was done without the authority of the other solicitor, Mr. O'Donnell. There are no circumstances in which it would be proper for one solicitor to place another solicitor's name on a contract without the written authority of the latter, and without indicating on the contract that the signature was not that of the other solicitor.

233. It is essential to conveyancing practice that all stakeholders, e.g. purchasers, vendors, and financial institutions, can have the utmost trust in the integrity and probity of solicitors. A solicitor's word is his or her bond. If a solicitor confirms that a particular state of affairs exists, then the recipient is entitled to rely on that confirmation. (Although not directly relevant to this case given my conclusions on the second set of disciplinary proceedings, the beneficiary of a solicitor's undertaking is similarly entitled to rely on the express terms of that undertaking).

234. The Solicitor in the present case failed to live up to these high standards. His conduct was dishonest, rather than merely negligent or careless. In the circumstances, the sanction of dismissal will be a front line consideration (*Law Society of Ireland v. Coleman*).

235. There are a number of mitigating factors which must be considered. First, it has not been alleged that the conduct of the Solicitor resulted in any loss being incurred by the

financial institution. It seems that an agreement for the sale of the lands was subsequently reached between the parties some eleven months later, and that the loan to ACC Bank has been paid off. Secondly, this is a first offence by the Solicitor. Thirdly, the Solicitor had, initially, co-operated in the disciplinary proceedings, and had made a number of admissions of fact at the hearing on 10 February 2010. Of course, the weight to be attached to this mitigating factor is greatly reduced by the subsequent conduct of the Solicitor in attempting to resile from these admissions. Finally, as noted earlier, reliance is placed on the Solicitor's personal circumstances as disclosed in his replying affidavit, citing the judgment in *Law Society of Ireland v. D'Alton* [2019] IEHC 177.

236. Having given all due weight to these mitigating factors, I have nevertheless concluded that the appropriate sanction in this case is an order striking the name of the Solicitor off the Roll of Solicitors. There is a public interest in ensuring that the integrity of the solicitors profession is maintained. This is especially so in respect of conveyancing transactions. Here, the making of a strike off order is necessary to advance this public interest. It would undermine trust in the profession were a solicitor, who has been found guilty of dishonesty in a conveyancing transaction, to be allowed to continue in practice. The sanction imposed may, if appropriate, have a punitive and dissuasive element (*Carroll v. Law Society of Ireland*).

237. I have carefully considered whether a lesser sanction, such as a temporary suspension or the imposition of restrictions on the right to practice, might be imposed instead. I am satisfied that such a lesser sanction would not be proportionate to the gravity of the misconduct in this case. The misconduct involved a cavalier disregard of the importance of ensuring that contracts for sale are properly executed and can be relied upon by all parties. The admitted purpose had been to mislead a financial institution into advancing funds to the clients of the Solicitor. If unchecked, conduct of this type runs the risk of

undermining the efficacy of lending in respect of development projects. More generally, it undermines confidence in the role of a solicitor in conveyancing transactions.

238. Finally, insofar as the Solicitor's personal circumstances are concerned, these do not justify the imposition of a lesser sanction. Whereas the Solicitor had been faced with difficult personal circumstances, including serious health issues affecting close family members, this does not ameliorate the gravity of his misconduct. Difficult personal circumstances might, at most, provide context for misconduct consisting of inattention to the detail of practice management, but such difficulties cannot excuse dishonest behaviour of the type at issue here. Further, it is to be noted that the health issues arose at a date *subsequent* to the key events (which it will be recalled, occurred during the period April 2004 to July 2004). This distinguishes the facts of the present case from those at issue in *Law Society of Ireland v. D'Alton* [2019] IEHC 177.

CONCLUSION AND PROPOSED FORM OF ORDER

239. An order will be made in the first set of proceedings (2010 No. 65 S.A.) striking Mr. Daniel Coleman's name off the Roll of Solicitors, pursuant to section 8 of the Solicitors (Amendment) Act 1960 (as substituted by the Solicitors (Amendment) Act 1994 and as further amended by the Solicitors (Amendment) Act 2002).

240. The Law Society's application in the second set of proceedings (2010 No. 66 S.A.) will be dismissed.

241. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other

> direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

242. The parties are requested to correspond with each other on the question of the precise form of order, and on the question of legal costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office. The first set of submissions should be filed by the Law Society by 9 October 2020; the Solicitor is then to file his replying submissions by 30 October 2020. A copy of the submissions is to be uploaded to the designated ShareFile folder.

Appearances

Shane Murphy, SC and Neasa Bird for the Law Society instructed by A & L Goodbody
Paul Comiskey O'Keeffe for the respondent solicitor instructed by John P. O'Donohoe Solicitors