THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Record No.: 2021/13

Neutral Citation: [2022] IECA 158

Whelan J.

Faherty J.

Binchy J.

BETWEEN/

THE LAW SOCIETY OF IRELAND

APPLICANT/RESPONDENT

AND

DANIEL COLEMAN

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 11th day of July 2022

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Introduction

1. This is an appeal from an order of the High Court (Simons J.) of 31st December 2020 whereby it was ordered that the appellant's name be struck off the Roll of Solicitors pursuant to s. 8 of the Solicitors (Amendment) Act, 1960 (as amended), and whereby it was further ordered that the respondent should recover its costs of the application. That order followed from a detailed judgment of Simons J. handed down on 7th September 2020. That judgment was the latest development in proceedings with a very long history.

Background

2. The appellant (whom I shall hereafter refer to as the "Solicitor") was admitted to the Roll of Solicitors on 17th September 1998 and established his own practice in November 1999 in Ballinrobe, County Mayo. According to an affidavit sworn in these proceedings by the Solicitor on 23rd May 2019, his practice grew, at one point employing up to nine staff including associate solicitors, apprentice solicitors, legal executives, secretaries and accounting personnel.

3. In May 2007, the respondent (hereafter the "Society") received a letter of complaint from a firm of solicitors (Damien Tansey & Co., hereafter referred to as the "Complainants") acting on behalf of a client of the Solicitor, namely Fairview Construction Limited ("Fairview"). The complaint arose out of an alleged conflict of interest on the part of the Solicitor in acting on behalf of both the vendor (Fairview) and the purchaser (Mr. Mark

Devaney) in the sale and purchase of lands owned by Fairview, contrary to Article 4(a) of the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997 (S.I. No. 85/1997) (the "1997 Regulations"). It was alleged that this conflict arose in circumstances where the identity of Mr. Devaney as purchaser was concealed by the Solicitor from Fairview and its directors, Mr. Shaun Heffernan and Mr. Sean Rowlette. It was further alleged that the Solicitor acted dishonestly and to the detriment and prejudice of the Fairview. The matters complained of were alleged to have occurred in 2004.

4. These complaints led to an investigation by the Society. That investigation was initially commenced by a solicitor in the Complaints and Client Relations section of the Society, namely Ms. Helene Blayney, who in due course referred the matter to the Complaints and Client Relations Committee (the "CCRC") of the Society. The matter was before the CCRC on five occasions between 12th September 2007 and 1st April 2008. From 17th October 2007, the Solicitor was represented by a solicitor experienced in the handling of such complaints, namely Mr. Sean Sexton of P.J. Walsh and Company, solicitors. During the course of the investigation of the complaint, both before and after the involvement of the CCRC, the Solicitor was afforded the opportunity to respond to the complaints made against him, and the Complainants in turn were afforded the opportunity to respond to the responses of the Solicitor. The Solicitor was required to produce all relevant files and documents to the Society.

5. As well as providing his responses by way of correspondence to the complaints against him, the Solicitor, in the course of the investigation process, delivered a statutory declaration made by him on 25th February 2008 and also procured and produced to the Society two affidavits from Mr. Devaney (dated 16th October 2007 and 25th February 2008) as well as an affidavit from a Ms. Hilary O'Connor, solicitor, dated 25th February 2008. Ms. O'Connor was employed by the Solicitor during the relevant period and had also worked during that

period on the matters giving rise to the complaints, although it must be stressed that neither her conduct nor her professionalism was in any way impugned. Ultimately, the CCRC at its meeting of 1st April 2008 concluded that the Solicitor's conduct warranted further enquiry by the Solicitors' Disciplinary Tribunal (the "Tribunal") and accordingly referred the matter to the Tribunal for that purpose.

6. The formal application to the Tribunal, dated 27th February 2009, was made by the Society pursuant to s. 7(3)(c)(iv) of the Solicitors (Amendment) Act, 1960 (as amended) and was grounded upon the affidavit of Ms. Blayney of the same date. In the concluding paragraph of her affidavit, Ms. Blayney states:

> "33. It is submitted that the respondent solicitor has been guilty of misconduct in his practice as a solicitor in that he:
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> (a) Failed to provide a copy of the deposit cheque in the sum of approximately €85,000 paid by the purchaser to the complainant's clients;
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> (b) Caused or allowed the name of Michael O'Donnell, solicitor, to be written on contracts for sale dated 19th May 2004 without the authority of Michael O'Donnell;
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> (c) Caused or allowed a fictitious contract dated 19th 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 to Fairview Construction Limited had not closed and that the dwelling units had not been constructed;
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> (d) Destroyed a file relating to the contested contract dated 19th May 2004 without the express or implied instructions of both parties and in particular, the complainant's clients, Shaun Heffernan and Sean Rowlette;

(e) Gave an undertaking to Tuam Hardware on behalf of the complainant's clients to pay €135,000 without the complainant's clients' written instruction or authority;

(f) Levied excessive fees on conveyancing files and specifically four properties in the aggregate amount of €6,160.00 where a review of the files indicated that no conveyancing service was provided by the respondent solicitor;

(g) 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 SI No. 85/1997."

7. The Solicitor provided an affidavit sworn on 12th June 2009 in reply to the affidavit of Ms. Blayney. This was very similar in content to his declaration of 25th February 2008, which he had delivered to the CCRC, and I will address the content of it, as appropriate, in due course. In turn, the Society replied to this affidavit by way of an affidavit from Mr. David Irwin, another solicitor in the Regulation Department of the Society, sworn on 23rd July 2009. The matter was then listed for hearing before the Tribunal on 26th November 2009 but was adjourned in circumstances which it is not necessary to set out here, save to observe that on that date the Solicitor withdrew his instructions from Mr. Sexton, and Mr. Sexton was given leave to come off record on behalf of the Solicitor.

8. The application was then adjourned to 10th January 2010, when it proceeded to conclusion before the Tribunal. On this occasion, the Solicitor was represented by counsel, but not by a solicitor. In the course of the hearing, the Society withdrew allegations (a) and

(f). The remaining allegations proceeded for determination by the Tribunal. Following the conclusion of the hearing, the Tribunal rose to consider its decision, which it then delivered (on the same day). By its decision, the Tribunal found the Solicitor guilty of misconduct in respect of the matters referred to at paras. 33(b), (c) (in slightly amended form), (d) (also in slightly amended form) and (g) of the affidavit of Helene Blayney of 27th February 2009 (see para. 6 above). It dismissed the allegation made in para. 33(e). The Tribunal concluded that the Solicitor was not a fit person to be a solicitor and ordered the Society to bring its report before the High Court, together with its recommendation as to sanction which was that the name of the Solicitor should be struck from the Roll of Solicitors. The Solicitor did not appeal the decision of the Tribunal, although much later he sought an extension of time to do so, which application was also heard by Simons J. and dismissed in a separate decision handed down by Simons J. on 7th April 2020.

9. Thereafter, the Society, as ordered by the Tribunal, caused the issue of a motion in the High Court dated 9th July 2010, seeking an order striking the name of the Solicitor from the Roll of Solicitors. This motion was grounded upon the affidavit of Mr. David Irwin, a solicitor in the Regulation Department of the Society, of 7th July 2010. It came on for hearing before Kearns P. on 26th July 2010. On that date, the Solicitor appeared in person before Kearns P. and applied for an adjournment on the grounds that he had not had an opportunity to instruct a solicitor or file an affidavit in response to the application. However, Kearns P. refused the application and proceeded to deliver an *ex tempore* ruling granting the reliefs sought by the Society.

10. The Solicitor appealed from the decision of Kearns P. to the Supreme Court. Owing to the very long back log of cases then under appeal to that court, the appeal did not come on for hearing before the Supreme Court until 2018. In a judgment delivered on 21st December 2018, McKechnie J. (*Law Society of Ireland v. Coleman* [2018] IESC 71) held

that the hearing in the High Court had lacked the essential features of fairness (for reasons that it is not necessary to consider in this appeal), and he therefore allowed the appeal and remitted the matter back to the High Court to adjudicate afresh on the application of the Society.

11. Following upon the decision of McKechnie J., the matter came back to the High Court and was heard by Simons J. in 2020, over a protracted period owing to the Coronavirus pandemic. In a detailed judgment handed down on 7th September 2020, Simons J., having considered, *inter alia*, the role of the High Court in such applications, assessed the sustainability of the findings of the Tribunal of misconduct. The trial judge concluded that the findings of the Tribunal were legally sustainable and, having considered in some detail the appropriate sanction, concluded that an order should be made striking the Solicitor's name off the Roll of Solicitors pursuant to s. 8 of the Solicitors (Amendment) Act, 1960 (as amended). It is against that decision that the Solicitor now appeals.

12. In the interests of completeness, it should be noted that there was also before Simons J. a separate application which the Tribunal had directed should be brought by the Society relating to a complaint brought by Tuam Credit Union against the Solicitor. Having analysed this complaint in detail, the trial judge concluded that findings of misconduct made by the Tribunal relating to this complaint were not sustainable, and he dismissed that application. The decision of the trial judge on that application is not under appeal.

The alleged misconduct

13. Before proceeding further, it is necessary to summarise in some detail the issues identified by Ms. Blayney in her affidavit that gave rise to her conclusions that the Solicitor was guilty of misconduct as regards those matters referred to in paras. 33(b), (c), (d) and (g) of her affidavit. Firstly however, it should be noted that central to those matters involving

allegations (b), (c) and (d) was a loan facility dated 21st April 2004 provided by ACC Bank to Fairview in connection with the acquisition and development of lands at Tuam, Co. Galway by Fairview. These were lands which Fairview had agreed to acquire from Mr. Devaney. While there is much disagreement between the directors of Fairview and Mr. Devaney, there does not seem to be any disagreement that they agreed on this transaction in early 2004. The Solicitor acted on behalf of both parties in this transaction. It is not suggested that in so doing he was acting contrary to any regulation as regards that transaction. Pursuant to the terms of the loan facility, ACC required, prior to releasing funds for the purpose of the construction of the development on the lands, a letter from Fairview's solicitor confirming that unconditional and irrevocable contracts had been signed, and deposits paid, for five of the units that were to be constructed by Fairview thereon (the development involved thirteen units in total), such units to have a minimum total value of €665,000.

14. It is common case that within a short period after the agreement to purchase the lands from Mr. Devaney, he approached the directors of Fairview and informed them that he had identified a purchaser for a portion of the lands, once developed by Fairview, comprising thirteen units. It is also common case that Mr. Devaney did not identify the purchaser, instead simply saying that it was an investor, whose identity was to remain confidential. However, the purchaser was in fact Mr. Devaney himself.

15. In the course of her investigation, and in particular, in examining the files provided by the Solicitor, Ms. Blayney avers that she saw a letter sent by the Solicitor dated 14th July 2004 to ACC bank, in which he stated that five houses had been sold. Ms. Blayney averred:

> "… This was simply not the case. The contract for sale of the lands on which the units were to be built did not come into existence until September 2004 and the only conclusion that can rationally be arrived at is that the respondent solicitor caused or

allowed fictitious 'contracts' to come into existence, the purpose and effect of which was to induce ACC bank to advance monies for the construction of units."

Ms. Blayney goes on to aver that while she recalled seeing a copy of that letter on the Solicitor's file, she did not keep a copy of it, but she says that the Solicitor has never denied the existence of the letter or that he was the author of it and that it was sent to ACC Bank. That letter has never been located or produced.

16. The reference to "fictitious contracts" is a reference to contracts dated 19th May 2004 (the "Contracts"). There were three contracts, the originals of which were destroyed in controversial circumstances, discussed below. Copies of two of the Contracts were retained by the Directors of Fairview and exhibited in the affidavit of Ms. Blayney. One of these is an agreement for sale between Fairview Construction Limited (vendor) and a Michael O'Donnell, purchaser (in trust, for an undisclosed principal) for a purchase price of €520,000 which was stated to relate to four two bedroomed ground floor apartments, and the other is an agreement for sale between Shaun Heffernan, as agent of Fairview, vendor, and Michael O'Donnell (in trust), purchaser, in the sum of €675,000 which was stated to be for five three bedroomed apartments. To be clear, the Contracts do not relate to the acquisition of the lands concerned by Fairview from Mr. Devaney; they purport to relate to the subsequent sale of a portion of those lands, as developed by Fairview, to Mr. O'Donnell, in trust.

17. The Solicitor has at all times acknowledged that he was acting on behalf on both the vendor and the purchaser in these transactions. It later transpired that the purchaser was not Mr. O'Donnell, but was in fact a company called Behy Downs Ltd., which was either owned or controlled by Mr. Devaney. In his declaration of 25th February 2008, the Solicitor states that, recognising that he could not act on behalf of both parties to the contract by reason of the 1997 Regulations, he asked another solicitor, namely Mr. Michael O'Donnell of Rathkeale, Co. Limerick, if he would act on behalf of the purchaser, and he (the Solicitor)

maintained that Mr. O'Donnell agreed to do so. The Solicitor had previously referred work to Mr. O'Donnell, and they were also well acquainted socially. In his declaration, the Solicitor states that Mr. O'Donnell authorised the Solicitor to sign the Contracts on his (Mr. O'Donnell's) behalf, and in his name, but upon trust for the real purchaser, Behy Downs Ltd/Mr. Devaney. However, Mr. O'Donnell who was contacted about the matter by Mr. Rowlette, as early as April 2005, denied any knowledge of the Contracts or that he had given any authority to any person to sign the Contracts in his name, and he provided a letter to this effect.

18. In the course of her investigation, Ms. Blayney asked for all of the Solicitor's files relating to these transactions. There were no files available in relation to the Contracts. In this regard, the Solicitor explained to the CCRC at its meeting of 6th February 2008 that both Fairview and Mr. Devaney had authorised the destruction of the file concerned, in light of the subsequent renegotiation of the contracts. This was denied by Mr. Heffernan and Mr. Rowlette in affidavits subsequently sworn by them.

19. For her part, Ms. O'Connor swore an affidavit (which the Solicitor provided to the CCRC) dated 25th February 2008. In this affidavit, Ms. O'Connor deposed that she began working for the Solicitor's firm at the beginning of May 2005, and that in her first few weeks she was given the file of Fairview relating to the purchase of the site in Tuam. She averred that at this time the Solicitor's wife was hospitalised as a result of which the Solicitor was frequently absent from the office. She addresses title issues relating to the site and avers that it was not possible to assemble a booklet of title because the deed of transfer had not yet been stamped or registered. There were also other issues relating to title that required attention. What is clear from this is that in mid-2005, Fairview still had not taken a transfer of title from Mr. Devaney.

20. Although it is not entirely clear, it would appear from the content of her affidavit that Ms. O'Connor was at this time unaware of the existence of the Contracts, which it will be recalled are dated 19th May 2004. However, it is implicit from her affidavit that this must have been mentioned to her by Mr. Rowlette or Mr. Heffernan because at para. 9 of her affidavit, Ms. O'Connor avers that she advised them that if they had already signed a contract for the sale of the thirteen units, then they could not now proceed to sell those apartments individually. In any case, she proceeds to describe how there was a negotiation in relation to the sale of the units in October 2005, involving Messrs. Rowlette, Heffernan and Devaney, and that this resulted in agreement in relation to the sale of the units in the development. She then avers:

> "I was then instructed to destroy the second contracts as having them around was not going to serve any purpose and would only confuse things. I reiterated that by stating that both parties had acknowledged that the contracts had been rescinded was sufficient and therefore there was no need to destroy the contracts. However, both Sean Rowlette and Shaun Heffernan insisted that the contracts be destroyed."

Then, at para. 14, she avers: "without thinking of the implications I destroyed the second contract". While the reference to the "second" contract is unclear, and the reference to the same is sometimes in the singular and other times in the plural, I think nonetheless that it is clear from this averment, and that it is accepted by all concerned, that it refers to the Contracts.

21. As earlier mentioned, the Solicitor also provided the Society, or, more specifically, the CCRC, with two affidavits from Mr. Devaney, the first of which was sworn on the 16th October 2007 and the second of which was sworn on the 25th February 2008. In his first affidavit, Mr. Devaney deposes that Fairview agreed to buy the site from him for the sum of

€520,000. He avers that the sale was closed in September 2004. He avers that Fairview intended developing the site which had planning permission for thirteen units.

22. Mr. Devaney goes on to say how he negotiated the purchase of the units with Mr. Heffernan on the pretext that he was acting for investors. He says that he advised the Solicitor that agreement had been reached for the sale of the entire development to investors and he avers:

> "However, I did not want Mr. Coleman to act on behalf of the investors. He advised me that the investors would have to get their own solicitor as he could not act for all parties. He stated that he would get a solicitor to act on their behalf. Mr. Mike O'Donnell, solicitor was acting on behalf of the investors. I say that a contract deposit of €85,000 was paid to Fairview Construction Limited."

23. He then goes on to deal with a dispute regarding the quality of workmanship in the development. He says that he disclosed to Messrs. Heffernan and Rowlette that he was the purchaser and they proceeded to renegotiate the contracts, and that a new contract was freely entered into by all parties. He avers:

> "In numerous conversations Mr. Heffernan has accepted that Mr. Coleman acted at all times in an honourable and professional manner on instructions received and further gave undertakings to creditors which he, Mr. Heffernan is aware and acknowledges must be honoured. I say that Mr. Heffernan has advised me that the sole purpose of this complaint is to extract monies from Mr. Coleman."

24. In his further affidavit of 25th February 2008, Mr. Devaney avers that Ms. O'Connor is correct in stating that "contract" (which I understand to refer to the Contracts) was destroyed on the express instructions of Mr. Devaney himself, Mr. Heffernan and Mr. Rowlette. This was subsequently denied by Messrs. Heffernan and Rowlette.

25. The Society provided a copy of the affidavits of Ms. O'Connor, Mr. Devaney and the Solicitor to Damian Tansey and Co., (being the solicitors acting on behalf of Messrs. Heffernan and Rowlette in the complaint to the Society), and on 14th January 2009 Mr. Heffernan and Mr. Rowlette swore joint affidavits in reply to the affidavits of Ms. O'Connor and the Solicitor, and Mr. Heffernan alone swore an affidavit, also on 14th January 2009, in reply to the affidavit of Mr. Devaney of 25th February 2008. Mr. Heffernan confirms that the contracts were renegotiated on the terms averred to by Mr. Devaney, but he says that Fairview was required to the pay the Revenue Commissioners €45,000 in VAT owing to the failure on the part of the Solicitor to furnish a certificate that Mr. Devaney was exempt from VAT. Mr. Heffernan denies ever saying that Mr. Coleman acted in an honourable and professional manner, and further denies stating to Mr. Devaney that the purpose of the complaint to the Society was to extract monies from Mr. Coleman. Both Mr. Heffernan and Mr. Rowlette "categorically" deny instructing Ms. O'Connor to destroy the "second contract" (which I again take to refer to the Contracts).

26. In his declaration of 25th February 2008, the Solicitor states (at para. 11) the following as regards the ACC loan offer to Fairview:

> "The loan offer required confirmation that pre-sales were in existence to enable draw down of funds. I confirm that I sent a letter to ACC Bank, Ballina, Co. Mayo advising that the development had been sold which from Shaun Heffernan and Sean Rowlette (sic) point of view had been the position. Shaun Heffernan and Sean Rowlette 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."

27. At para. 12 of the same declaration, the Solicitor says that he advised Messrs. Heffernan and Rowlette that it was contrary to Law Society Regulations for a solicitor to act for both sides of a transaction involving the development of houses. He says that he advised

that another solicitor should be retained. He goes on to say that Mr. Devaney asked him to obtain a new solicitor who would accept the title as it stood at the time, with a view to it being perfected in the course of the transaction. He says that he was put under pressure by Messrs. Heffernan and Rowlette to "make such contracts".

28. At para. 16 of his declaration, there is an important statement as follows:

> "In this regard, this writer asked a colleague, Mr. Michael O'Donnell of Rathkeale in the County of Limerick would he be willing to act in the purchase of thirteen 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."

29. In the following paragraph, the Solicitor says:

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

30. The Solicitor then goes on to deal with the renegotiation of the original contract and affirms what is stated by Ms. O'Connor in her affidavit in this regard. However, he says that he was away from the office during the course of the negotiations owing to the hospitalisation of his wife and child. He says that he did not meet Messrs. Heffernan or Rowlette during the negotiations at all. In spite of this, he says that: "It was clearly the intention of the parties that they did not wish to pursue the second contract and accordingly this contract was destroyed. All parties knew that the second contract was redundant and accordingly it was destroyed and for no other purpose."

31. Messrs. Heffernan and Rowlette swore an affidavit in reply to the Solicitor's declaration on 14th January 2009. In this affidavit they say they were aware that ACC bank required a letter from their solicitor regarding unconditional contracts being in place, prior to drawdown of funds, but they deny putting the Solicitor under any pressure to create contracts for sale.

32. The Solicitor swore an affidavit on 12th June 2009, in direct reply to the affidavit of Ms. Blayney of 27th February 2009. It is, in large measure, very similar in content to his statutory declaration of February 2008. In para. 13 of this affidavit, he again confirms that he sent a letter to ACC Bank "advising that the development had been sold which from Shaun Heffernan and Sean Rowlette (sic) point of view had been the position." He again confirms that Messrs. Heffernan and Rowlette had put him under pressure to create the contract for sale. This paragraph is referred to in the decision of the trial judge.

33. The Solicitor describes (in identical terms to his earlier declaration) how it came to be that the name of Mr. O'Donnell was placed on the contracts. At para. 60 of this affidavit, the Solicitor addresses the specific charges of misconduct set out at para. 33 of the affidavit of Ms. Blayney. The following are his replies to charges (b), (c), (d) and (g) (for convenience, I will set out the allegations first, with each of his responses immediately following):

> (b) Allegation: Caused or allowed the name of Michael O'Donnell, solicitor, to be written on contracts for sale dated 19th May 2004 without the authority of Michael O'Donnell;
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> Reply: Mr. O'Donnell authorised this writer to sign his name to the contract by oral instructions as is detailed in pleadings as filed by your deponent herein.
>
> (c) Allegation: Caused on allowed a fictitious contract dated 19th 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 to Fairview Construction Limited had not closed and that the dwelling units had not been constructed;

Reply: No reply is given by the Solicitor to the allegation that he caused or allowed a fictitious contract dated 19th May 2004 to come into existence.

(d) Allegation: [The Solicitor] destroyed a file relating to the contract dated 19th May 2004 without the express or implied instructions of both parties and in particular, the complainant's clients, Shaun Heffernan and Sean Rowlette,

Reply: The Solicitor replied that Ms. O'Connor was duly authorised to destroy the contract for sale.

(h) Allegation: Acted for both vendor (Fairview) and purchaser (Mr. Devaney/Behy Downs) of thirteen newly constructed units, contrary to the 1997 Regulations.

Reply: The Solicitor admits having acted contrary to the Regulations.

Proceedings before the Tribunal, 10th January 2010

34. When the proceedings opened before the Tribunal on 10th January 2010, counsel for the Solicitor inquired as to the witnesses that the Society intended to call to give evidence before the Tribunal. Counsel for the Society identified the witnesses that he intended to call namely, Ms. Blayney, Mr. Michael O'Donnell, Mr. Shaun Heffernan, Mr. Sean Rowlette, Mr. Damien Tansey and a staff member from Mr. Tansey's office, Ms. Sinead Roycroft. Counsel for the Solicitor expressed concern that the Society did not intend to call either Ms. O'Connor or Mr. Devaney, both of whom are mentioned in the affidavit of Ms. Blayney and

whose affidavits were exhibited by Ms. Blayney in her affidavit. He said he could not cross-examine affidavits, and, having identified Ms. O'Connor and Mr. Devaney in the grounding affidavit of the Society, it was not open to the Society to "cherry pick" the witnesses. He placed particular emphasis on the importance of Ms. O'Connor as a witness being the person who dealt with the file in the Solicitor's office. The transactions giving rise to the complaint were under Ms. O'Connor's management at a time when the Solicitor was not in the office owing to the illness of his wife and child.

35. In response to this, counsel for the Society submitted that it is a matter for the Society to call whatever witnesses it considers to be credible, and whose evidence is relevant to the allegations. He submitted that there is no obligation on the Society to call witnesses to support the Solicitor's case. He noted that the affidavits exhibited by Ms. O'Connor had been provided by the Solicitor himself, and insofar as the affidavits provided are supportive of the Solicitor, the deponents identified themselves as defence witnesses.

36. He distinguished the process from a criminal trial, in which a list of witnesses is included in the Book of Evidence and having done so the prosecution is under an obligation to tender those witnesses. In these proceedings, the Society never suggested that either Ms. O'Connor or Mr. Devaney were going to be called as witnesses in circumstances where they had made affidavits available on behalf of the Solicitor. He submitted it could not have occurred to anybody that Ms. O'Connor or Mr. Devaney would be called as witnesses for the Society.

37. Having heard submissions on this issue (and also on other preliminary objections) the Tribunal adjourned to consider the objections. It resumed shortly thereafter, and so far as this objection is concerned ruled that it was a matter for the parties to call such witnesses as they saw fit in support of their case. There followed an exchange between the chairman and counsel for the Solicitor on the issue who said that this placed him in a very difficult

situation. In response, the chairman said that it would be naïve to suggest that the Society should present a case in contradiction of the case that it came before the Tribunal to make. In reply, counsel for the Solicitor said that if it was not intended to call them as witnesses, then Ms. Blayney should not have referred to them in her affidavit, or exhibited the affidavits of Ms. O'Connor and Mr. Devaney. He protested that his hands were tied without the evidence of Ms. O'Connor and Mr. Devaney who he said had significant evidence to offer. He submitted that fair play required the attendance of the witnesses.

38. In reply, the chairman indicated that fair play was provided by para. 33 of the affidavit of Ms. Blayney that made the allegations against the Solicitor clear, and that common sense dictated that the Society would bring such evidence before the Tribunal as supports the case being made by the Society, and the Solicitor had the same opportunity to bring forward witnesses in opposition to that case. He noted that the affidavits of Ms. O'Connor and Mr. Devaney were provided by the Solicitor himself. Counsel for the Solicitor again expressed great concern about the matter proceeding in the absence of Ms. O'Connor and Mr. Devaney. Having made his objections, repeatedly, however, counsel for the Solicitor did not apply to the Tribunal for an adjournment of the proceedings with the intent of having Ms. O'Connor and Mr. Devaney available to give evidence on a later date. The hearing before the Tribunal then continued.

39. Counsel for the Society then proceeded to address each of the allegations in para. 33 of the affidavit of Ms. Blayney, and the response to each of the allegations provided in the replying affidavit of the Solicitor. When it came to the last allegation at para. 33(g), being the allegation that the Solicitor acted for both sides of a transaction contrary to the 1997 Regulations, to which it appeared the response of the Solicitor was an admission of that allegation, the chairman asked counsel for the Solicitor to clarify if that was indeed an admission. Counsel for the Solicitor confirmed that the Solicitor was admitting to the

conduct, but he did not accept that acting in contravention of the 1997 Regulations amounted to misconduct.

40. Having gone through the various allegations, counsel for the Society called the first witness on behalf of the Society, namely Mr. O'Donnell. Mr. O'Donnell confirmed that the signature on the contracts of 19th May 2004 was not his signature, and that he had not authorised anybody to place his signatures on the contract. He described how the matter had come to his attention, when Mr. Rowlette came to visit him, unannounced, on 5th April 2005. He kept copies of the contracts, and it transpired that there was a third contract which the Society had not previously seen. He described how he wrote, the following day both to the Solicitor and Mr. Rowlette about the matter. In his letter to the Solicitor, he expressed great concern about the fact that his signature and name appeared on the Contracts, which emanated from the office of the Solicitor, in circumstances where he had no knowledge at all of the transaction and did not sign the Contracts. He asked the Solicitor for an explanation. He gave evidence that he did not receive any reply. He also confirmed having written to Mr. Rowlette on the same day, denying any knowledge of the transaction. This letter had been exhibited by Ms. Blayney in her affidavit.

41. Mr. O'Donnell confirmed that he and the Solicitor had been friendly and remained friendly. He agreed that he had received work by referral from the Solicitor in the past, but he said that while he might well have been willing to act in the transaction, he would never have given permission to anybody to sign his name on a contract without doing his own investigation into the transaction in the first place.

42. In cross-examination he was asked had he had a telephone conversation with the Solicitor about this transaction. He said that he was unsure. On being pressed, he said it was possible but that if he was acting in the capacity as a purchaser in trust he would have required "to see what [he] was going to be doing". It was put to him that the Solicitor

maintained that such a conversation did take place and that Mr. O'Donnell was told that his name would be put on the contract, to which he replied that he did not have any recall of that, and that he wrote to the Solicitor on 6th April 2005 (in the terms mentioned above) and did not receive any reply. Later on in his evidence (under cross-examination) he again repeated that he knew nothing about the Contract(s) and did not authorise the endorsement of his signature thereon.

43. In a later exchange with the chairman of the Tribunal, counsel for the Solicitor said that it had always been accepted by the Solicitor that he was responsible for placing Mr. O'Donnell's signature on the Contracts, but the Solicitor's position is that he had the consent of Mr. O'Donnell to do so.

44. Ms. Blayney was then called in evidence and in the course of her evidence, she said that while she had requested all files relating to the transactions concerned from the Solicitor, she had received no file in respect of the transactions relating to the Contracts, on which Mr. O'Donnell's name was endorsed. She said that when the Solicitor appeared before the CCRC, his solicitor, Mr. Sexton, informed the committee that the file had been destroyed at the request of both clients "explicitly to Hilary O'Connor".

45. Under cross-examination, Ms. Blayney was asked if the Solicitor had adopted a consistent approach with the Society in terms of the allegations, and she confirmed that he had done so. She agreed that he had been open and candid with the CCRC and that he had never sought to distance himself from any sense of responsibility that he would have in respect of "these issues" i.e., the allegations against him. In reply to this question, Ms. Blayney answered: "There is just one item. He did say that Hilary O'Connor was instructed while asked about the destruction of files. He informed the committee that he had other matters on his mind at that stage…" The reference to other matters is a reference to the very serious health issues being suffered by the Solicitor's wife and newly born child at the time.

Counsel for the Solicitor then asked Ms. Blayney: "So that if he told you that Hilary O'Connor was looking after the affairs of the office you had no reason to dispute that?" Ms. Blayney replied: "Absolutely not." Counsel for the Solicitor then said: "I think you are very fair in the way in which you approach this."

46. After the conclusion of the evidence of Ms. Blayney, counsel for the Solicitor indicated that the Solicitor would be interested in taking a certain course in relation to certain of the allegations, but there was a difficulty in how some of the allegations were phrased. There followed a long exchange about precisely what it was the Solicitor was prepared to admit, and the matter proceeded on the basis that the Solicitor was prepared to admit certain matters of fact, but he was not prepared to admit that those facts constituted misconduct. The matters of fact which he admitted, so far as is relevant to this appeal, were:

(1) That he caused or allowed the name of Michael O'Donnell, solicitor, to be written on contracts for sale dated 19th May 2004 without the authority of Mr. O'Donnell (being the allegation set out at para. 33(b) of the affidavit of Ms. Blayney);

(2) That he caused or allowed a fictitious contract dated 19th May 2004 to come into existence and purportedly made between the Complainants' [i.e., Mr. Tansey'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 (para. 33(c)) of the affidavit of Ms. Blayney). This admission followed an exchange about the wording of this allegation resulting in a small change to refer to the sale of the land from Fairview Construction rather than the sale of the land to Fairview Construction. It also followed a direct intervention by the Solicitor from the body of the room

in which he confirmed that he was satisfied to admit the allegation, as so amended in the following terms: "Yes, definitely, no problem admitting that". This was followed by a comment from counsel for the Solicitor that: "Yes, that contract happened. It followed on from (b)".

(3) Paragraph 33(d) of the affidavit of Ms. Blayney comprised an allegation that the Solicitor had destroyed a file relating to the Contracts dated 19th May 2004. When this was mentioned, the Solicitor again intervened from the body of the room and stated: "The contract was destroyed, there was never a file". In answer to a question, he confirmed that the contract relating to the matter was a sub file within a file (which had been destroyed). Unprompted, he also said: "I will accept that I destroyed four feet of paperwork".

(4) Paragraph 33(g) of the affidavit of Ms. Blayney set out the allegation that the Solicitor acted on both sides of a transaction contrary to the 1997 Regulations. The Solicitor again confirmed that he admitted the facts i.e., that he had acted on both sides of a transaction contrary to the 1997 Regulations but denied that it constituted misconduct.

47. So far as other allegations are concerned, the Solicitor admitted the facts around allegation 33(a), allegation 33(f) was withdrawn, but allegation 33(e) concerning an undertaking given by the Solicitor to Tuam Hardware on behalf of Fairview proceeded to a full hearing, with Messrs. Heffernan and Rowlette giving evidence in respect of the matter. Having heard the evidence, the Tribunal concluded that there was insufficient evidence to support the allegation, and therefore no misconduct on the part of the Solicitor arose in respect of this matter.

48. The Tribunal then proceeded to hear submissions as regards allegations (a), (b), (c), (d) and (g). At this point however allegation (a) was withdrawn by the Society.

49. As regards the remaining allegations, counsel for the Society firstly referred the Tribunal to the definition of misconduct in s. 3 of the Solicitors (Amendment) Act, 1960. That section sets out a non-exhaustive list of behaviours amounting to misconduct, but the only one relevant to these proceedings, he submitted, was that set out in s. 3(d) which refers to conduct tending to bring the solicitors' profession into disrepute. Counsel submitted that, so far as allegation 33(b) is concerned, i.e., purporting to endorse the signature of another solicitor on a contract without that solicitor's authority, is self-evidently conduct that will bring the profession into disrepute, regardless as to the circumstances. Similarly, he submitted, that allegation 33(c) also describes conduct which would self-evidently bring the profession into disrepute i.e., creating a fictitious contract in order to mislead a financial institution into advancing monies.

50. Likewise, counsel for the Society submitted, allegation 33(d), involving the destruction of a file, with or without instructions of the clients, in circumstances where it must have been done in order to conceal the conduct described in paragraphs (b) and (c), must be misconduct.

51. Finally, as regards the allegation of breaching the 1997 Regulations, those Regulations are entitled the Professional Practice, Conduct and Discipline Regulations. Even as a matter of language, it was submitted, it must be the case that a breach of such Regulations would constitute misconduct. Additionally, the Solicitor had continued acting for both sides even after all of the difficulties associated with the Contracts of 19th May 2004 had been resolved through renegotiation. Given the nature of the conduct involved in allegations 33(b), (c) and (d) it must follow that acting on both sides in connection with that conduct would also amount to misconduct.

52. In reply, counsel for the Solicitor acknowledged that allegations 33(b), (c), (d) and (g) involved offences of the most serious kind. He accepted it was entirely improper for the

Solicitor to endorse the signature of Mr. O'Donnell on the Contracts. He accepted that the destruction of the file or the contract was a matter to be "properly frowned upon". He really did not dispute at all that the conduct described amounted to misconduct. Instead, he made submissions by way of mitigation of the conduct of the Solicitor, firstly, to the effect that the Solicitor was the only person involved in the offending transactions who had suffered a loss as a result. He submitted that this was the Solicitor's livelihood, and that of his wife and family and that he had no other way to make a living. He asked the Tribunal to take into account the cooperation of the Solicitor with the Society in the investigation of the complaints and submitted that the Solicitor had demonstrated integrity and honour in the manner in which he met the allegations made against him. In effect, counsel made a plea to the Tribunal, in the words of the trial judge, *ad misericordiam*.

Conclusion of Tribunal

53. Having heard the submissions of the parties, the Tribunal rose to consider its verdict. Having done so, the hearing resumed soon afterwards when the Tribunal delivered its decision on each of the allegations of misconduct. In each case, it found that the conduct to which the Solicitor had admitted constituted misconduct. The parties then addressed the Tribunal on the question of sanction.

54. Counsel for the Society submitted that the conduct of the Solicitor was conduct which no member of the solicitors' profession can engage in; that there are no circumstances in which a solicitor can, in effect, fake the name of another solicitor, fake a contract to mislead a financial institution and then destroy a file to "cover your tracks". Counsel for the Society argued that these are inherently dishonest things to do, and that no member of the public nor the Society could trust a solicitor who engages in such conduct, which merits only one sanction, being that of strike off.

55. Counsel for the Solicitor, in his own words said that he could not really refute most of what had been said by counsel for the Society, and, in effect, made a plea for leniency based on the catastrophic effect that an order for strike off would have on the Solicitor and his family. He suggested that this was not the worst kind of misconduct to come before the Tribunal. He suggested that some sort of sanction short of strike off would be appropriate, such as confining the Solicitor to practice in a supervised capacity only for an extended period.

56. Having heard the submissions, the Tribunal ruled that it did not consider this an appropriate case to make an order pursuant to s. 7(9) of the Solicitors (Amendment) Act, 1960 (as amended), and instead directed the Society to bring the report of the Tribunal before the High Court, with the opinion of the Tribunal that the Solicitor is not a fit person to be a member of the solicitors' profession, and the recommendation of the Society that the name of the Solicitor be struck from the Roll of Solicitors.

Application to the High Court

57. The ensuing application of the Society to the High Court was grounded upon a further affidavit of Mr. Irwin of 7th July 2010, whereby he exhibits the affidavit of Ms. Blayney, and the exhibits thereto, as well as the decision of the Tribunal. This affidavit serves the purpose of bringing the application of the Society, and no more. The evidence upon which the application is grounded is that set forth in the affidavit of Ms. Blayney, which of course includes the affidavits and other evidence provided by the Solicitor in the course of the proceedings before the CCRC and the Tribunal. I have already set out above the procedural history that gave rise to the delay in this matter returning before the High Court in March 2020. I now turn to the judgment of the High Court following that hearing, being the judgment under appeal.

Judgment of the High Court

58. The trial judge commenced his judgment with an analysis of the legislation governing appeals from decisions of the Tribunal to the High Court brought pursuant to s. 7(13) of the Act of 1960 on the one hand, and applications brought by the Society to the High Court, pursuant to s. 7(3)(c)(iv) of the same Act, seeking orders sanctioning the Solicitor consequent upon the findings of the Tribunal. He noted that an appeal brought by a solicitor under s. 7(13) of the Act of 1960 is by way of a full re-hearing, whereas an application brought by the Society under s. 7(3)(c)(iv) of the same Act proceeds on the basis of the findings already made by the Tribunal (subject to the outcome of any appeal in relation to those findings). He referred to recent authorities on the interaction between the two types of proceeding i.e., an appeal brought by a solicitor from findings of the Tribunal on the hand and an application brought by the Society seeking orders (of sanction) against the solicitor on the other, and specifically considered the decision of this Court in *Law Society of Ireland v. O'Sullivan* [2018] IECA 228, another recent decision of this Court in *Sheehan v. Law Society of Ireland* [2020] IECA 77, as well as the decision of the Supreme Court in these very proceedings, *Law Society of Ireland v. Coleman* [2018] IESC 80. The conclusions that the trial judge drew from his review of these authorities are not in dispute on this appeal and can be found at paras. 46 and 47 of his judgment as follows:

> "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 with 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."

59. As I have said above, this conclusion regarding the jurisdiction of the High Court on an application brought pursuant to s. 7(3)(c)(iv) of the Act of 1960 is not in dispute. However, the Solicitor contends that when the trial judge proceeded to consider whether or not the findings of the Tribunal had a sustainable basis, he erred in his approach, by testing the decision of the Tribunal by reference to its reasonableness, as distinct from whether or not it was tainted by any procedural unfairness. The Solicitor also argues that the trial judge erred in favouring the domestic authorities referred to above over authorities in the neighbouring jurisdiction that deal specifically with the issue of procedural fairness in enquiries of this kind, namely *M.M. v. Secretary of State of the Home Department* [2014] UKUT 105 (IAC), *Solicitors Regulatory Authority v. Dar* [2019] EWHC 2831 (Admin) and *Williams v. Solicitors Regulatory Authority* [2017] EWHC 1478 (Admin). I return later to these decisions and to the arguments made by the Solicitor before the High Court which it is claimed these decisions support.

60. The trial judge analysed the proceedings before the Tribunal and concluded, at para. 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."

61. The trial judge then proceeded to analyse the approach taken by the Solicitor to the application before him under the heading *Volte face by Solicitor*. It is helpful to quote para. 89 in full:

> "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 contract 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 client's 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*'."

62. The trial judge then analysed the admissions of fact made by the Solicitor before the Tribunal. He considered authorities in the criminal law sphere that have considered the circumstances in which a person may resile from a plea of guilty, in particular *People (DPP) v. Redmond* [2006] 3 IR 188 and *Keating v. Crowley* [2010] IESC 29. While noting that the facts in those cases were very different to those under consideration, nonetheless he considered that these authorities were of some assistance in highlighting 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. At para. 97, he stated:

> "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."

63. He referred to *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 27th January 1995) in which the learned judge stated, as regards the onus of proof upon the Medical Council when addressing a complaint of misconduct:

> "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."

64. The trial judge noted that this is not authority for the proposition that the Society must prove, to a criminal standard, facts which are *admitted* by a respondent solicitor [para. 100 of the judgment].

65. At para. 102, the trial judge held:

> "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."

66. The trial judge then went on to consider a submission that the Tribunal did not properly observe the distinction between (i) an admission of fact and (ii) an admission of misconduct. He also considered a submission that the complaints as formulated by the Society did not allege "*dishonesty*" and furthermore, that the Tribunal failed to identify any test for dishonesty. At para. 105, the trial judge concluded:

> "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."

67. The trial judge went on to state that by admitting the conduct in the terms described in the complaints of the Society, the Solicitor was, in effect, admitting misconduct. His own barrister acknowledged at the hearing before the Tribunal that the signing of Mr. O'Donnell's name on the contracts was "*the most serious of offences*" and "*entirely improper*".

68. At para. 108, the trial judge held:

> "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."

69. The trial judge then went on to consider the admission by the Solicitor that he had destroyed a file relating to the contract for sale, without the instructions of his client. He stated that such conduct is "self-evidently conduct which is likely to bring the profession

into disrepute." He noted that counsel for the Solicitor (before the Tribunal) had acknowledged that this was "a matter to be properly frowned upon".

70. As regards the fourth admission of fact i.e., the Solicitor admitted having acted for both vendor/builder and purchasers, contrary to the 1997 Regulations, the trial judge noted that the concept of "*misconduct*" as defined under the Act of 1960 includes the contravention of a provision of Regulations.

71. The trial judge then considered an argument that "*dishonesty*" had not been pleaded by the Society and that the Tribunal had failed to apply any test for dishonesty. The trial judge was satisfied that the complaint was put to the Solicitor through the affidavit of Ms. Blayney which expressly alleged that the Solicitor had produced a "*fictitious contract*" and that this had been done for the purpose of "*misleading*" a financial institution. At para. 112 he stated that:

> "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."

72. As regards the argument advanced on behalf of the Solicitor that the proceedings before the Tribunal were tainted by procedural unfairness, the trial judge noted that there was no suggestion that the Solicitor had not made his submissions voluntarily. While it was argued that there had been some unfairness on the part of the Tribunal prior to the Solicitor making admissions, the trial judge was of the view that that was not borne out by the facts. Moreover, one of the principal instances of alleged unfairness cited on behalf of the Solicitor in his written submissions to the High Court turned out to be factually incorrect. The submissions reflected what was an inaccurate statement in the affidavit of the Solicitor of 23rd May 2019 wherein he averred that his barrister had requested the Tribunal to adjourn the proceedings so that Ms. O'Connor and Mr. Devaney could be present and called in

evidence, but this was not so. The trial judge then summarises how the proceedings unfolded before the Tribunal, noting that the barrister representing the Solicitor had objected to the fact that the Society had not called Ms. O'Connor as a witness. He described the exchange that followed between the chairman of the Tribunal and counsel representing the Solicitor. He noted that while the upshot of the exchange was that Ms. O'Connor was not ultimately called, her affidavit remained before the Tribunal and could have been relied upon by the Solicitor, had he wished to do so.

73. The trial judge then went on to consider the argument advanced on behalf of the Solicitor (in written submissions) to the effect that there was a "*causal link*" between the making of the admissions and the decision of the Tribunal not to require the Society to call evidence from the deponents of the affidavits filed on behalf of the Solicitor i.e., Ms. O'Connor and Mr. Devaney. The trial judge noted a change in that argument in the oral submissions to the court, whereby counsel for the Solicitor, in reliance upon *M.M. v. Secretary of State of the Home Department,* submitted that there is no requirement to prove causality between the unfairness and the admissions made by the Solicitor.

74. The trial judge noted that the Solicitor had made no averment that there was any causal link between the ruling of the Tribunal and subsequent admissions. Moreover, counsel for the Solicitor expressly confirmed to the Tribunal that the Solicitor did not feel under any pressure to make admissions. Furthermore, if the Solicitor made an admission that he had carried out a specific act knowing that admission to be untrue, that would be extraordinary, and if the Solicitor wished to advance such an argument, he should have set that out on affidavit. The trial judge stated (at para. 127):

> "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."

75. The trial judge also considered the procedural history leading up to the hearing before the Tribunal. He noted that the CCRC had served a statutory notice requiring the Solicitor to produce any documentation that supported his assertion that Mr. O'Donnell had consented to the Solicitor signing the Contracts in the name of Mr. O'Donnell. However, by letter dated 11th December 2007, the Solicitor informed the Society that the file had been destroyed.

76. The trial judge concluded this part of his judgment by stating that there is nothing in the sequence of events that disclosed any unfairness of procedure to the Solicitor. He stated:

> "The Solicitor chose not to call evidence from [Ms. O'Connor]. 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."

(At the hearing of this appeal, it was submitted that this last sentence was an error on the part of the trial judge, and that it was in his submissions to the Tribunal, and not the High Court that this concession was made by the Solicitor, but in my view nothing of significance turns on this, for reasons that will later become apparent).

77. The trial judge then went on to consider the relevance of Mr. Devaney as a witness, and the impact of his not giving evidence. The judge was unable to identify what exculpatory evidence Mr. Devaney might have given to the Tribunal, in circumstances where the Solicitor had made an admission that the purported contracts for sale had been fictitious, and for the purpose of misleading ACC and against a background whereby the Solicitor himself explained that Mr. O'Donnell had neither met Mr. Devaney nor seen any contract or booklet of title prior to Mr. O'Donnell having allegedly authorised the Solicitor to sign the Contracts. The judge concluded that Mr. O'Donnell could not be said to be the lawful agent of Mr.

Devaney in circumstances where they had never spoken to each other, still less entered into a retainer. The fact that Fairview subsequently entered into a different contract for sale of the lands a year later could not affect the legal position as of May 2004.

78. Finally, so far as is relevant to this appeal, the trial judge agreed to receive and consider *de bene esse,* two affidavits that were sworn subsequent to the proceedings before the Tribunal. He agreed to do so having regard to the already very long history of the proceedings, and rather than run the risk of causing an additional delay by refusing to consider the affidavits, he thought it more sensible to admit them and to consider their implications, if any, for the outcome of the case.

79. The affidavits concerned were an affidavit of Mr. Michael O'Donnell sworn on 31st May 2016, and an affidavit of Mr. Patrick Kelly, formerly of ACC Bank, sworn on 14th March 2018.

80. In his affidavit of 31st May 2016, Mr. O'Donnell, while properly averring that he could not assist the court as to the actual belief of the Solicitor, also avers that he cannot dispute that the Solicitor may have formed an honest but mistaken belief that he had the consent of Mr. O'Donnell to sign the contracts. Mr. O'Donnell averred: "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."

81. The trial judge was of the view that this affidavit did not assist the Solicitor. In his opinion, it did not undermine the sustainability of findings of misconduct made by the Tribunal, to the effect that the Solicitor had signed the Contracts in the name of Mr. O'Donnell without his authority, and that the Contracts were fictitious contracts prepared for the purpose of misleading ACC.

82. In particular, the trial judge noted that Mr. O'Donnell had appeared as a witness before the Tribunal, and in this affidavit, he did not disavow the evidence that he had given to the Tribunal that he had not authorised the Solicitor to sign the Contracts in his name. Furthermore, the Solicitor, who did not give evidence, had been legally represented at the hearing of February 2010, and Mr. O'Donnell had been cross examined at length by counsel for the Solicitor. Accordingly, the Solicitor had every opportunity to elicit such evidence as he wished to rely upon from Mr. O'Donnell.

83. Furthermore, the trial judge noted, it had never formed part of the defence of the Solicitor to say that his conduct had been excusable because he had an honestly held belief that he had the authority of Mr. O'Donnell to endorse his signature on the Contracts. On the contrary, the Solicitor had made an express admission that the Contracts were fictitious.

84. As regards the content of the affidavit of Mr. Kelly, the trial judge concluded that most of the affidavit comprised speculation, because Mr. Kelly had no recollection of the letter confirming pre-sales i.e., the letter of 14th July 2004 referred to by Ms. Blayney, but which was never produced. Mr. Kelly was unable to confirm or deny whether or not any such letter had been received and/or relied upon by ACC Bank.

85. The trial judge then concluded that he was satisfied that the findings of misconduct made by the Tribunal in respect of the Fairview transaction were legally sustainable. In short summary, the trial judge was satisfied that the admissions made by the Solicitor to the Tribunal were not tainted by any procedural unfairness; that they could therefore be relied on by the Tribunal; that they were clearly admissions of dishonest conduct on the part of the Solicitor, and therefore they were admissions of misconduct.

86. Having found that the finding of misconduct of the Tribunal was sustainable, the trial judge proceeded to consider the appropriate sanction for the misconduct. He referred to s. 8 of the Solicitors (Amendment) Act, 1960 (as amended) which provides:

"(a) The High Court, after consideration of the report [of the Disciplinary Tribunal]—

(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 practicing 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 to practicing in a particular area of work for such a period as the Court may provide;

(V) censure the solicitor or censure him and require him to pay a money penalty; […]"

87. The trial judge then referred to the judgment of the Supreme Court in *Law Society of Ireland v. Coleman* [2018] IESC 80, wherein at para. 91 thereof the Supreme Court held:

"[…] 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."

88. The trial judge then went on the consider the decision of the Supreme Court in *Carroll v. Law Society of Ireland* [2016] IESC 49; [2016] 1 IR 676 in which McKechnie J. summarised the principles governing the admission to the Roll of Solicitors, which the trial

judge considered to be relevant by analogy to an application to strike the name of a solicitor from the Roll. At para. 71 McKechnie J. held:

> "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; violation 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 conduct as established and to the considerations as mentioned."

89. The trial judge also referred to *Law Society of Ireland v. Herlihy* [2017] IEHC 122 noting that Kelly P. observed in that case 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.

90. On the other hand, the trial judge noted that counsel for the Solicitor placed particular emphasis on the decision of Kelly P. in *Law Society of Ireland v. D'Alton* [2019] IEHC 177 in which case the court attached particular weight to the poor health of the respondent solicitor at the time the disciplinary offences occurred and submitted that by analogy, the recommendation of "strike off" should not be followed having regard to the personal circumstances of the Solicitor as disclosed in his replying affidavit.

91. At para. 231 the trial judge held:

"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 the 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."

92. The trial judge went on the observe that there were no such "'*unconditional and irrevocable*' contracts in place at that time." The Solicitor had purportedly signed the

Contracts on behalf of another solicitor, Mr. O'Donnell, without his authority. At para. 233 he stated:

> "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 information."

93. The trial judge went on to find that the Solicitor had failed to live up to these high standards and that his conduct was dishonest, rather than merely negligent or careless.

94. The trial judge considered the mitigating factors advanced on behalf of the Solicitor. These were:

(1) It had not been alleged that the conduct of the Solicitor resulted in any loss being occurred by that financial institution;

(2) This was the first offence by the Solicitor;

(3) The Solicitor had initially cooperated in the disciplinary proceedings and had made admissions and,

(4) The Solicitor had endured significant personal difficulties.

95. Notwithstanding the mitigating factors, the trial judge considered that it was appropriate to make an order striking the name of the Solicitor off the Roll of Solicitors, having regard to the public interest in ensuring that the integrity of the solicitors' profession is maintained. He expressed the view that it would undermine trust in the profession if a solicitor who had been found guilty of dishonesty in a conveyancing transaction were to be allowed to continue in practice. He noted that the admitted purpose of the conduct had been to mislead a financial institution into advancing funds, and stated that, if unchecked, such conduct runs the risk of undermining the efficacy of lending in respect of development projects. More generally, he said, such conduct undermines confidence in the role of a

solicitor in conveyancing transactions. While he had considered a lesser sanction, he did not think that any lesser sanction would be proportionate to the gravity of the misconduct in this case.

96. As to the personal difficulties experienced by the Solicitor, while they might provide context for misconduct consisting of inattention to the detail of practice management, such difficulties could not excuse dishonest behaviour of the type at issue. Moreover, the difficulties relied upon arose at a date subsequent to the key events, thereby distinguishing the case from the factual background at issue in *Law Society of Ireland v. D'Alton.*

Grounds of appeal

97. In his notice of appeal of 26th January 2021, the Solicitor raises fourteen grounds of appeal. In substance, these may be summarised as follows:

(1) The trial judge erred in failing to give sufficient weight to the unfairness of the procedure before the Tribunal on 10th February 2010, arising from the fact that the Society did not tender Ms. O'Connor or Mr. Devaney in evidence;

(2) The trial judge erred in failing to engage with the submission of the Solicitor that the findings of the Tribunal were unsustainable by reason of its failure to identify or apply a test for dishonesty;

(3) The trial judge erred in finding that the Solicitor could not honestly endorse the signature of another solicitor on the contract without his written authority to do so and without disclosing on the face of the contract that it was signed on behalf of that other solicitor;

(4) The trial judge erred in finding that dishonesty had been adequately pleaded;

(5) The trial judge erred in treating admissions of fact as equivalent to admissions of guilt or misconduct;

(6) The trial judge erred in applying an incorrect standard of review i.e., reasonableness, when he ought to have applied that of fairness. As a result, the trial judge did not consider whether, but for the alleged procedural unfairness, the outcome of the Tribunal hearing would have been different;

(7) The trial judge erred in imposing the sanction of strike off having regard to the lapse of time since the conduct complained of. Furthermore, the trial judge failed to have regard to the consent given by the Society to the Solicitor practicing as a personal insolvency practitioner, a position of trust requiring the control and administration of third-party property.

98. The Society, by its respondent's notice of 12th February 2021, rejected each and every ground of appeal. Specifically, it claims that:

(1) The court considered and correctly rejected the submissions of the Solicitor that there had been procedural unfairness in not requiring Ms. O'Connor or Mr. Devaney to be called by the Society, or in failing of its own motion to adjourn the proceedings to enable the Solicitor to do so;

(2) It was conceded by the Solicitor on affidavit that an allegation of dishonesty in relation to the signing of the Contracts was made, and it was specifically conceded to the High Court that the use of the language "fictitious contract" and "misleading" connoted dishonesty. Moreover, the court correctly concluded that the conduct of the Solicitor as found by the Tribunal was obviously dishonest;

(3) The court correctly held that it could not be proper for one solicitor to place the name of another solicitor on a contract for the sale of land without the written authority of the latter, and without indicating on the contract that the signature was not that of the other solicitor. In any case, the Solicitor in this case had no authority to write Mr. O'Donnell's name on the Contracts, whether written or

oral. Furthermore, in circumstances where the respondent admitted that he had no such authority, and that the contracts were fictitious and for the purpose of misleading, the conduct of the Solicitor was properly found to be dishonest;

(4) The Solicitor was aware that there was an allegation of dishonesty in relation to the signature of the Mr. O'Donnell and conceded that the language "fictitious contract" and "misleading" connoted dishonesty.

(5) The trial judge expressly acknowledged the distinction between admissions of fact and admissions of misconduct and did not apply a strict liability test. Having regard to the terms of the conduct described in the complaints, an admission of the conduct so described could not be characterised as anything other than professional misconduct;

(6) The trial judge did not apply the incorrect standard of review, and expressly accepted that a solicitor may challenge findings of misconduct by the Tribunal on the basis of unfairness of procedure, provided that the unfairness complained of was material to the ultimate outcome. The arguments of the Solicitor that findings could be set aside on the basis of procedural missteps or legal errors, themselves not capable of affecting the ultimate outcome, would collapse the distinction between an application under s. 8 of the Act of 1960 and an appeal against the decision of the Tribunal under s.7(13) of the Act of 1960;

(7) The trial judge did not err in imposing the sanction of strike off. He did so having reviewed the relevant authorities, in particular *Law Society v. Coleman* [2018] IESC 71 and *Carroll v. Law Society* [2016] I IR 676. The High Court having applied the correct principles, this Court should not interfere, having regard to the decision of the Supreme Court in *Law Society v. Carroll and Colley* [2009] IESC 41.

Submissions

Submissions of the Solicitor

99. The Solicitor does not dispute that the task of the High Court on an application brought by the Society pursuant to s.7(3)(c)(iv) of the Act of 1960 includes a determination as to whether or not the findings of the Tribunal are sustainable, but submits that the authorities relied upon by the Society do not address the issue of fairness of procedures before the Tribunal. That issue is addressed by the English authorities relied upon by the appellant i.e., *M.M.* and *Solicitors Regulatory Authority v. Williams,* and in failing to consider the question of fairness of procedures before the Tribunal in the light of the principles identified in those authorities, the Solicitor submits that the trial judge fell into error.

100. The Solicitor submits that this (error) led the trial judge to conclude, as he did, at para. 90 of his judgment, that the starting point for the court in assessing the sustainability of the findings of misconduct by the Tribunal was to consider the status of the admissions made by the Solicitor before the Tribunal.

101. The Solicitor submits that it is important to look at the sequence of events before the Tribunal. His counsel enquired as to whom the Society intended to call in evidence. It became apparent that neither Ms. O'Connor nor Mr. Devaney were to be called although (it is submitted) their affidavits were relied upon in the grounding affidavit of Ms. Blayney. Counsel for the Solicitor then objected, saying that this put him in a very difficult situation. While it is true that he did not request an adjournment, if, as the Solicitor contends, he had a right to have Ms. O'Connor and Mr. Devaney present to give evidence, then the fact that there was no application for an adjournment does not undermine the right. It was only following upon the ruling of the Tribunal to proceed in the absence of Ms. O'Connor and Mr. Devaney that the Solicitor made admissions. Counsel for the Solicitor submits that a further procedural flaw then arose insofar as, ideally at least, the Tribunal should have risen

briefly to require the admissions to be reduced to writing, although of course no application to do so was made by either party to the Tribunal.

102. It is further submitted that the trial judge fell into error in determining that the procedural error relied upon by the Solicitor would have to be causative of the admissions, before the court could consider that the findings of the Tribunal, based upon the admissions, are unsustainable. It is submitted that there is no authority for this proposition, and the court should have considered that issue of unfairness of procedure in accordance with the following principles referred to at paras. 15 (iii) and (iv) in *M.M.*:

> "(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."

103. It is further submitted on behalf of the Solicitor that if a *prima facie* case exists that there was cogent, reliable and contradictory evidence which undermined the admissions made by the Solicitor, and that that evidence existed prior to the making of the admissions, then caution must be exercised in accordance with the principle referred to in para. 15 (iv) of *M.M.*

104. The Solicitor also relies on *M.M.* as authority for the proposition that, in reviewing the decision of the Tribunal from the perspective of reasonableness, the trial judge erred, because the criterion required on review is fairness and not reasonableness. Reliance is placed on the following passage (para. 22) of *M.M.*:

> "We consider it important to emphasise that in appeals of the present kind the criterion to be applied is not that of reasonableness. In this respect, the present case is a

> paradigm of its type. Judge Levin's conduct of the hearing at first instance was beyond reproach. The irregularity which has been exposed is entirely unrelated to how the hearing was conducted. The judge cannot possibly be faulted for the non-emergence of the solicitor's letter. On any showing, the judge acted responsibly and reasonably throughout. However, as the authorities demonstrate clearly, the criterion to be applied on review or appeal is fairness, not reasonableness."

105. I pause at this juncture to summarise the facts in *M.M.*, which, it will be seen, *were* quite unusual and very different to the factual background to these proceedings. The proceedings involved a review of a refusal of an asylum claim by an immigration tribunal. A highly significant letter from the solicitors acting on behalf of the appellant was not before the first-tier tribunal and, as a result it did not form part of the evidence considered by the tribunal. The decision of the tribunal was expressly stated to be influenced by the fact that the appellant's solicitors had not written to the Home Office identifying a significant error in the appellant's interview, whereas in fact they had done so. The tribunal judge expressly stated that the absence of such a letter damaged the credibility of the appellant. The Upper Tribunal of the Immigration and Asylum Chamber considered the governing principles applicable to every litigant's right to a fair hearing, and having done so distilled four principles, the third and fourth of which are set out at para. 102 above. The conclusion of the Upper Tribunal was that, through no fault of the judge in the first-tier tribunal, the decision of that tribunal involved the making of a material error of law, brought about by the unfairness of the procedure whereby the critical letter had not been disclosed to the first-tier tribunal.

106. The Solicitor says that the process by which the trial judge excused the unfairness of which he complains, namely on the basis of his subsequent admissions, amounts to no more than circuitous logic on the part of the judge. He further submits that there are objective facts

that undermine the reliability of the admissions he made before the Tribunal. These, it is submitted, include the statement made by Ms. O'Connor (on affidavit) that it was she who destroyed the Contracts; the fact that the letter of 14th July 2004 relied upon by Ms. Blayney was never produced, and that its contents are uncertain; the absence of any evidence that ACC Bank was in fact misled; the fact that the Contracts were re-negotiated and the developed units sold and the possibility if not the likelihood that the letter sent to ACC Bank may have accurately recorded the position as regards binding contracts for sale.

107. The second substantive ground of appeal of the Solicitor is that the trial judge, having found no fault in the procedure leading to the admissions of the Solicitor, determined that the conduct to which the Solicitor had admitted could not be characterised as anything other than professional misconduct. This, it is submitted, amounts to a strict liability test for dishonesty. It is further submitted that while it was conceded by counsel in the High Court that two of the four charges used language that put the Solicitor on notice of dishonesty, the other two did not and that the language used in those other two charges was insufficient to sustain a charge for dishonesty. It was submitted that the Tribunal and then the trial judge failed to identify and apply any test for dishonesty, and that the failure to do should lead to a quashing of the decision of the Tribunal. The appellant relied upon the decision of *Williams v. SRA,* a decision of the High Court of England and Wales arising out of a decision of the Solicitors Disciplinary Tribunal in that jurisdiction.

108. It was further submitted that the trial judge fell into error in holding that, in order to sign the contract in the name of Mr. O'Donnell, he would first have needed the written authority of Mr. O'Donnell to do so. It was submitted that there was an exchange between the trial judge and counsel for the Solicitor on this issue, the thrust of which was that counsel for the Solicitor submitted that if the trial judge took the view that, as a matter of law, the Solicitor could not in any circumstances sign a contract for sale for another person without

the written authority of that person, then the effect of that was to hold the Solicitor responsible, as a matter of strict reliability, regardless as to his intention or state of mind. Counsel for the Solicitor submitted that trial judge responded to this submission by saying that he was not going to determine the issue i.e., whether written consent is always required in such circumstances – but then the trial judge went on to do so.

Submissions of the Society

109. It is submitted on behalf of the Society that there are three issues for determination on this appeal:

(1) Whether the court erred in finding that the findings of misconduct of the Solicitor were legally sustainable and in particular whether the trial judge was correct in rejecting the argument that the findings of the Tribunal were unsustainable by reason of procedural unfairness;

(2) Whether the decision of the trial judge to order that the Solicitor's name be struck off the Roll of Solicitors was one that was open to the trial judge to make;

(3) Whether, in reaching its decision of the appropriate sanction, the trial judge correctly identified that the findings of misconduct against the Solicitor involved dishonesty and in particular in circumstances where the Tribunal had not identified a test for dishonesty.

110. As to the first question, it is submitted on behalf of the Society that the trial judge, when assessing whether or not the findings of the Tribunal were legally sustainable, took an approach that was broad enough to encompass the arguments of procedural unfairness advanced by the Solicitor. The Society submits that the trial judge expressly applied the principles referred to in *M.M.*, and the Society refers to para. 124 of the decision of the trial judge:

> "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."

111. The Society submits that the Solicitor has changed his approach as regards the necessity to establish a causal link between the alleged procedural unfairness and his admissions. Before the High Court, the Solicitor contended there was such a causal link, but the trial judge rejected this argument, saying that the Solicitor had failed to advance any evidence to support such a contention. The Society refers to para. 127 of the judgment in the High Court:

> "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."

112. The Society rejects the argument of the Solicitor, in his written submissions to this Court, to the effect that there is no necessity to establish a causal link between the alleged unfairness and the admissions and in particular the suggestion that the admissions were a reaction on the part of the Solicitor to pressure "in the face of imminent personal and professional devastation" at the hearing before the Tribunal. The Society submits that such an argument is at odds with the transcript of the hearing before the Tribunal which demonstrates an ongoing and considered process during the course of which the Solicitor made admissions himself, directly to the Tribunal, and also through his counsel. Moreover,

the Society emphasises, counsel for the Solicitor assured the Tribunal that the Solicitor did not feel under pressure to make admissions.

113. The Society submits that it is indisputable that the Solicitor admitted the facts of the allegations, and that those admissions ended any contest on the admitted facts. Furthermore, insofar as the respondent admitted facts which, as the trial judge found, were of obvious dishonesty, the admissions determined any dispute on that issue also.

114. The Solicitor made the admissions having chosen not to give evidence himself or to call evidence in his defence, including Ms. O'Connor. It was open to the Solicitor to apply to the Tribunal to adjourn the proceedings so as to take evidence from Ms. O'Connor either for the purpose of disputing the charge relating to the destruction of files/contracts, or for the purpose of mitigation. The Solicitor chose not to do so and must take the consequences of that decision.

115. As to the phraseology of the charges, it is submitted that the obligation is not to draft charges to the standard of an indictment in criminal proceedings. The obligation on the Society was to make allegations that were clear, and it is clear from the affidavits filed by the Solicitor in response to the allegations and from the way he addressed the allegations before the Tribunal, that he knew and understood the charges against him. It is clear from the decision of the High Court in *O'Laoire v. Medical Council* that an analogy with criminal proceedings is only helpful to a degree, and that provided the requirements of natural justice are met, the obligation on the Society is not the same as that on the prosecutor in criminal proceedings. All that is necessary in proceedings such as these is that the Solicitor is clearly on notice of the case that he has to meet, and it is submitted that there is no doubt from the manner in which the Solicitor himself addressed the case against him that he fully understood the allegations.

116. It was unnecessary for the trial judge (or for that matter, the Tribunal) to identify or apply any particular test for dishonesty, in circumstances where, as found by the trial judge, it is obvious that the facts as admitted by the Solicitor represents dishonest conduct and where, in relation to the same charges, it was accepted that dishonesty had been pleaded. The Society places reliance in this regard on the decision of this Court, handed down after this appeal, in the matter of *Law Society of Ireland v. Kathleen Doocey* [2022] IECA 2. I address this decision below, in some detail from para. 166 onwards.

117. In relation to the issue of appropriate sanction, the Society refers the Court to the decision of Kelly P. in *Law Society of Ireland v. Thomas D'Alton* where the court held, that in deciding on the appropriate penalty in respect of a finding of misconduct, the following factors should be considered:

> "(a) the protection of the public;
>
> (b) the maintenance of the reputation of the solicitors' profession as '*one in which every member of whatever standing, may be trusted to the ends of the earth* (per Bingham M.R.)';
>
> (c) the punishment of the wrongdoer;
>
> (d) the discouragement of other members of the profession who might be tempted to emulate the behaviour of the wrongdoer; and
>
> (e) the concept of proportionality. The sanction must be proportionate and appropriate."

118. The Society also refers to para. 34 of the judgment of Kelly P. in *D'Alton*:

> "The application of those considerations to a case where a solicitor is found guilty of dishonesty or wrongfully taking funds from a client account will almost invariably result in an order that his or her name be struck from the Roll of Solicitors."

119. While the Solicitor deposed as to very difficult family circumstances in 2005 and onwards, and these were not disputed by the Society, it was not suggested by the Solicitor that the circumstances explained the occurrence of the misconduct, which pre-dated the personal circumstances referred to by the Solicitor.

120. Furthermore, since the Solicitor has effectively withdrawn his admissions, it cannot now be the case that he acknowledges or accepts responsibility for the misconduct. However, it does not appear that the Solicitor disputes that if the findings of the Tribunal are properly considered to involve dishonesty on his part, that it was open to the High Court to impose the sanction of a strike off from the Roll of Solicitors. Instead, the Solicitor submits that the trial judge erred in concluding that the findings of misconduct against him involved dishonesty. For the reasons given above, the Society contends that dishonesty was both adequately pleaded and that it was conceded by the Solicitor at the hearing before the High Court that the language used in respect of the creation of a fictitious contract for the purpose of misleading connoted dishonesty. It is submitted that the trial judge was entitled to conclude that such conduct on the part of a solicitor represents dishonest conduct, as he did at para. 112 of his judgment.

121. As to the standard of review by this Court, the Society referred to the decision of the Supreme Court in *Law Society of Ireland v. Carroll and Colley* [2009] IESC 41, [2009] 2 ILRM 77, where the Supreme Court (Geoghegan J.) held (at pp. 87/88 of the reported judgment) that:

> "[…] the key question is whether as a matter of law it was open to the judge of the High Court to arrive at the decision made by him or her."

and,

> "[…] Supreme Court judges, therefore, cannot simply substitute their own views for the views of the President of the High Court or the delegated judge […]. The decision of the High Court can only be reversed if as a matter of law it was clearly incorrect."

Discussion and Conclusions

122. The Solicitor advances two core arguments. The first of these is that the proceedings before the Tribunal were contaminated by a procedural unfairness such that the admissions made by the Solicitor are unreliable and/or unsafe, and therefore that the findings of the Tribunal are unsustainable. The trial judge, it is submitted, erred in his approach to this argument by failing to consider the fairness of the disciplinary process up to the point of the admissions and in proceeding instead on the basis that the starting point for the court in assessing the sustainability of the findings of the Tribunal was the admissions themselves. The trial judge, it is submitted, failed to have due regard to the relevant authorities of the United Kingdom to which he was referred, and in particular *M.M.*

123. The second core argument relied upon by the Solicitor relates to the finding of dishonesty, on the part of the Solicitor, by the Tribunal and by the High Court, which the Solicitor claims was flawed on three grounds: firstly, the pleading of dishonesty was inadequate, secondly, the Tribunal and the High Court made a finding of dishonesty without identifying any test for dishonesty, and thirdly, in finding dishonesty, the trial judge did so on the basis of strict liability.

The procedural unfairness argument — Discussion

124. This argument is mainly grounded on the proposition that the Solicitor was unfairly and wrongly disadvantaged by the fact that the Society neither called nor tendered in evidence Ms. O'Connor or Mr. Devaney, in circumstances where, it is submitted, the Solicitor was notified that their affidavits were among the evidence intended to be relied

upon by the Society. The argument is not that the absence of Ms. O'Connor and Mr. Devaney caused the Solicitor to make the admissions, but rather that in receiving the admissions, the Tribunal should have had regard to the fact that the admissions were (in some material respects) contradicted by the affidavit sworn by Ms. O'Connor. Therefore, the Tribunal needed to exercise caution before acting on the admissions and should have had Ms. O'Connor and Mr. Devaney available to give evidence.

125. Dealing first with Mr. Devaney, it was not contended either in this Court or in the High Court that the evidence that Mr. Devaney might have given, had he been in attendance, would have been of any assistance to the Solicitor. The affidavits that he had provided (at the behest of the Solicitor), while not unhelpful to the Solicitor, were of no particular relevance to the matters at issue in the proceedings. The trial judge expressly considered the potential relevance of Mr. Devaney as a witness at paras. 132-134 of his judgment, observing in the course of that consideration that "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 [to the Tribunal]."

126. The trial judge went on to consider the circumstances in which the Contracts were prepared by the Solicitor, noting that the Solicitor himself had explained that Mr. O'Donnell had neither met Mr. Devaney nor seen any contract or booklet of title prior to Mr. O'Donnell having allegedly authorised the Solicitor to sign the Contracts. At para. 134, the trial judge stated:

> "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 have been 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."

127. At the hearing of this appeal, the Solicitor took no issue with these observations and conclusions of the trial judge. In particular, it was not suggested that the alleged procedural unfairness prevented the Solicitor from adducing evidence *via* Mr. Devaney that would have been of any assistance to the Solicitor in his defence of the allegations before the Tribunal. Rather, the focus of the Solicitor at the hearing of this appeal was on the evidence of Ms. O'Connor, and in particular her averments on affidavit that it was she who destroyed the Contracts upon the express instructions of Mr. Rowlette and Mr. Heffernan. Thus, it can be seen that the procedural unfairness argument is mainly concerned, if not exclusively concerned, with just one of the four allegations admitted by the appellant, that being allegation 33(d), which in its amended form was that the Solicitor destroyed a file consisting of three contracts dated 19th May 2004 without the express or implied instructions of both parties thereto, and in particular Mr. Heffernan and Mr. Rowlette.

128. The appellant submits that the trial judge erred in holding that "[t]he 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." The Solicitor contends that this approach was erroneous, because it ignores the fact that the procedural unfairness resulted in excluding exculpatory evidence from the hearing before the Tribunal, in particular the evidence of Ms. O'Connor, which preceded the admissions of the Solicitor in time and contradicted and undermined his admissions. It is submitted that these were matters that the trial judge should have taken into account in his consideration of the reliability of the admissions and the sustainability of the findings of the Tribunal. Instead, the trial judge simply accepted the admissions and treated them as a "panacea" for the (alleged) unfairness.

129. This, however, is simply incorrect. In his consideration of the status of the admissions, the trial judge, at paras. 121-130 of his judgment, gave careful and detailed consideration to the procedures leading up to the admissions. I have already summarised this part of the judgment of the trial judge at paras. 72-76 above. Of particular note is that he referred to the affidavit of Ms. O'Connor, and her averment that it was she had destroyed the Contracts in 2005, on the insistence of the directors of Fairview. He noted that the directors had denied this in their joint affidavit of 14th January 2009. It is clear therefore that the trial judge *did* consider the exculpatory evidence of Ms. O'Connor. However, he also noted that the Solicitor did not apply for an adjournment to facilitate the attendance of Ms. O'Connor and nor he did he choose to call her in evidence himself. Moreover, and importantly, the trial judge observed, her affidavit remained before the Tribunal and could have been relied upon by the Solicitor had he wished to do so (as indeed could the affidavit of Mr. Devaney). That this is so is clear from the rules of the Tribunal, which provided at the time, and still in substance provide, that an enquiry before the Tribunal proceeds in the first instance on affidavit, together with such oral and documentary evidence tendered by the parties as the Tribunal considers relevant (see rule 12 of the Solicitors Disciplinary Tribunal Rules 2003 and 2017 respectively).

130. So, therefore, had the Solicitor wished to contest the allegations against him, and specifically the allegation regarding the destruction of files on the basis that they had been destroyed by Ms. O'Connor on the instructions of the client, he could still have done so on the basis of her affidavit. If he was in doubt about whether or not he could rely on her affidavit (or, for that matter, the affidavit of Mr. Devaney) he could have raised the issue with the Tribunal. Instead, he blames the Tribunal for not giving such a ruling. It is difficult, however, to see how the Tribunal can be blamed for not giving a ruling that was not requested. In any case, the Solicitor chose not to take this course and instead decided to make

the admissions, and, as the trial judge also observed, his counsel expressly confirmed to the Tribunal that the Solicitor did not feel under pressure to make the admissions. This is demonstrated (if demonstration were needed) by the decision taken by the Solicitor to contest, successfully, allegation 33(e) concerning an undertaking given by the Solicitor to Tuam Hardware.

131. Moreover, in his consideration of the procedures leading up to the admissions, the trial judge had regard to the principles in *M.M.*, observing that "[i]t 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." He observed, however, that there was no averment on the part of the Solicitor supporting any causal link between the ruling of the Tribunal on the calling of witnesses, and the subsequent admissions of the Solicitor. Furthermore, the trial judge observed that it would have been an extraordinary thing for the Solicitor to admit that he had carried out a specific act, knowing it to be untrue.

132. The trial judge further observed that the position of the Solicitor on this issue had changed, and he was now making the case that there was no requirement to prove causality between the alleged unfairness and the admissions. This submission was again made at the hearing of this appeal, and it was urged that this Court should consider the question of unfairness in accordance with principles 15(iii) and (iv) in *M.M.* For ease of reference, I set these out again:

> "(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."

133. In my view, para. 15(iii) of *M.M.* makes it abundantly clear that, for those principles to be engaged, it is necessary to establish, firstly, the existence of a procedural irregularity, and secondly that that irregularity was causative of the admissions in order to establish a basis upon which the admissions may be resiled from. While para. 15(iv) urges caution, this is in circumstances where a procedural irregularity has been identified. In this case, the trial judge concluded that the sequence of events which he analysed, leading up to the admissions of the Solicitor, disclosed no unfairness. For all the reasons identified by the trial judge and discussed above (in particular at paras. 130-132) I agree with that conclusion.

134. There is one other reason why I agree with that conclusion which I consider of some importance. It was repeatedly said in submissions on behalf of the Solicitor, both written and oral, that the Society "relied" on the affidavits of Ms. O'Connor and Mr. Devaney, and for that reason had an obligation to tender them as witnesses for cross-examination. I do not consider it correct to say the Society was in any way relying upon these affidavits. They were submitted by the Solicitor himself to the Society in the course of his response to the complaints of Mr. Rowlette and Mr. Heffernan, which was in the course of the appellant's engagement with the CCRC. It was *he* was relying upon them, not the Society, but it was absolutely correct for Ms. Blayney to exhibit them to her grounding affidavit to the Tribunal, as it could hardly be disputed that the Society has an obligation to include all material relevant to a complaint, including the response of a solicitor thereto (and all documents relevant to that response), when making an application to the Tribunal. A failure to do so would surely constitute a breach of fair procedures. However, the inclusion of such material by the Society does not place any obligation on it to arrange for the attendance of witnesses

whom the Solicitor may wish to call in evidence, and no authority was advanced for this proposition. If the Solicitor wished to call witnesses in his defence of the allegations, it was a matter for himself to have those witnesses present, and not the Society.

135. The Solicitor has also submitted that there was another procedural unfairness or irregularity in the proceedings before the Tribunal, which is that the letter of 14th July 2004 from the Solicitor to ACC Bank, referred to by Ms. Blayney in her affidavit, was never produced. However, that was an issue that the Solicitor could have pursued had he chosen to defend the allegations against him. The fact of it not having been produced or not being available in no way serves to undermine the admissions made by the Solicitor. It clearly does not amount to evidence of any kind, never mind cogent evidence, that the facts admitted by the Solicitor may not be true or accurate. In fact, this letter is not referred to at all in the allegations. Whether or not this complaint would have availed him had he contested the allegations is, at best, uncertain, not least in circumstances where the Solicitor took no issue with this when swearing an affidavit in reply to that of Ms. Blayney. On the contrary, he appeared to accept, both in his replying affidavit and in his earlier declaration, that the letter had been sent, although it is now argued (without any proof) that he may have been referring to a different letter to ACC Bank.

136. Furthermore, in the context of the allegations actually made against the Solicitor, the importance of this letter is over-stated, for the simple reason that none of the allegations refer to the letter at all. Obviously, the letter is the medium by which the Solicitor is alleged to have communicated the existence of the Contracts to ACC Bank, but the relevant allegations themselves relate only to the preparation (and destruction) of the fictitious contracts and make no reference to the letter.

137. In any case, this is all entirely speculative, and the letter fell away as an issue of any kind once the Solicitor admitted the allegations that he did. Simply put, the appellant

admitted the allegations against him before the proceedings ever got to the point where the fact that his letter was not available could become an irregularity of any kind. Furthermore, even taken at its height, the failure to produce the letter could never amount a procedural irregularity. If the case had proceeded to hearing, it might, or might not, have been a deficiency in the proofs of the Society, which the Solicitor could have sought to exploit, but that is entirely different in character to a procedural flaw.

138. In the absence of any such procedural unfairness, there can be no doubt as to the entitlement of the Tribunal to receive and act upon the admissions made by the Solicitor. In the course of an exchange with the Court at the hearing of this appeal, counsel for the Solicitor very fairly accepted that in a criminal trial, a defendant making admissions from the body of the court would be bound by such admissions, and that normally the same would apply to proceedings such as those at issue in this case. He further accepted that if the court receiving such admissions is satisfied that they are voluntarily made, it does not have to look behind the admissions. There is no doubt that the admissions were voluntary; counsel for the Solicitor stated this clearly to the Tribunal.

139. However, counsel submitted that this case is different, because the Society *relied* on the affidavits of Ms. O'Connor and Mr. Devaney and was therefore under an obligation to produce them as witnesses. I have already rejected that proposition above. It follows therefore that the Tribunal and the High Court were entitled to rely on the admissions of the Solicitor without any further inquiry.

140. More generally, the argument that a disciplinary tribunal of any kind has an obligation to subject admissions voluntarily made with the benefit of legal advice to some kind of evidential stress test before receiving those admissions and acting on them is, to my knowledge both novel and without authority. I agree with comments of the trial judge at paras. 97 and 102 respectively of his judgment that "[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" and "[t]he Disciplinary Tribunal was entitled to take these admissions at face value, and did not have to search out evidence which might undermine those admissions."

141. In conclusion on this issue, I can find no error at all on the part of the trial judge in his consideration of it. In my view he was correct in his findings that there was no procedural infirmity or unfairness of any kind in the procedures followed by the Tribunal, and that the Tribunal was entitled to rely as it did, on the admissions as to fact made by the Solicitor.

Finding of Misconduct by the Tribunal

142. At the outset of consideration of this issue, it is of some importance to observe that the Solicitor was found guilty of misconduct by the Tribunal, and there is no mention of dishonesty in the findings of the Tribunal. The first reference to dishonesty, as distinct from misconduct, appears to have been made by counsel for the Solicitor in his submissions to the Tribunal, during the course of which he argued that there had been no dishonesty on the part of the Solicitor, and that no party suffered any loss as a result of his actions. These submissions were made to the Tribunal both in the context of misconduct and in the context of penalty. It appears that counsel for the Solicitor was arguing that the admitted conduct did not constitute misconduct because it was not dishonest conduct, and in the alternative that, even if the conduct did constitute misconduct, it did not warrant the sanction of strike off because it was not dishonest and it did not give rise to any losses.

143. While the Solicitor declined to accept that the admitted facts constituted misconduct, nonetheless, as the trial judge observed, it is apparent that he did not actively contend before the Tribunal that the acts admitted by him did not constitute misconduct, and his approach was to rely on his admissions as a mitigating factor in his plea for leniency. At paras. 106 –

108 of his judgment, the trial judge had the following to say as regards the admissions by the Solicitor that he had prepared a "fictitious contract":

> "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 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."

144. At para. 109, the trial judge held that "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". As to the breach of the 1997 Regulations, the trial judge noted that the concept of misconduct as defined includes the contravention of a provision of regulations.

145. In his submissions to the Tribunal, counsel for the Society referred to the definition of misconduct in s.3 of the Act of 1960 (see para. 49 above) and to the non-exhaustive list of behaviours that constitute misconduct, referred to in that section. For the purpose of these proceedings, counsel submitted to the Tribunal that the only relevant behaviour referred to was that described in s.3(d) of the Act of 1960, being conduct tending to bring the solicitors' profession into disrepute.

146. At para. 103 of his judgment, the trial judge mentions that the Solicitor argued that the complaints as formulated by the Society did not *expressly* allege "dishonesty". That is correct. However, counsel for the Solicitor accepted that the use of language such as "fictitious" and "for the purpose of misleading" to describe the Contracts did connote dishonesty. While this is of relevance to consideration of the appropriate sanction, for the purpose of assessing the sustainability of the finding of misconduct by the Tribunal it is of no relevance, because the finding of the Tribunal was one of misconduct *simpliciter*. The Tribunal made no finding of dishonesty and gave no reasons for its findings other than that the conduct admitted by the Solicitor amounted to misconduct.

147. Accordingly, in considering the sustainability of the findings of misconduct of the Tribunal, the Court is concerned only with whether or not the impugned conduct constitutes misconduct as defined in s.3 of the Act of 1960, which in this case involves a consideration as to whether or not the admitted conduct is such as to bring the solicitors' profession into dispute. While on this appeal the Solicitor advanced elaborate arguments asserting an alleged procedural unfairness in the procedures of the Tribunal, which I have rejected above, with

the exception of one narrow argument regarding breach of the 1997 Regulations (which I address in the next paragraph) no other argument was advanced by the Solicitor impugning the sustainability of the findings of misconduct by the Tribunal, by which I mean that it was not contended that the conduct admitted by the Solicitor was not misconduct. Very likely, this is for the simple reason that the admitted conduct is, self-evidently, as the trial judge put it, conduct which is likely to bring the profession into disrepute. This is so for all of the reasons given by the trial judge himself at paras. 106-110 of his judgment. These reasons speak for themselves and in my view, they require no elaboration or discussion. The conduct admitted by the Solicitor as particularised in allegations 33(b), (c), (d) and (g) of the affidavit of Ms. Blayney is plainly conduct that would be likely to bring the solicitors' profession into disrepute, and the findings of the Tribunal to this effect are, as found by the trial judge, sustainable.

148. It was submitted both in the High Court and at the hearing of this appeal that in spite of the Solicitor's acknowledgement on affidavit *before* the Tribunal hearing, and again at the Tribunal hearing, that he had contravened the 1997 Regulations, this admission could not be correct as a matter of law because those regulations did not apply to sales "off the plans". I have already addressed, extensively, the entitlement of the Tribunal to rely on the admissions made by the Solicitor. However, there is an additional reason to reject this specific argument, and that is that there was no evidence at all before the Tribunal or the High Court regarding the stage of construction of the units in sale at the time that the Solicitor acted on behalf of both the vendor builder and the purchaser in at least some the transactions involved. In other words, as a matter of fact, it is anything but clear that the transactions involved were "off the plans" and not only was the issue not argued, but the Solicitor admitted a breach of the 1997 Regulations on at least two occasions, in his affidavit of June 2009 and again before the Tribunal. Beyond any doubt therefore, the Tribunal, and the High

Court, were entitled to rely on the admission of the Solicitor that he had contravened the 1997 Regulations, by acting on behalf of both vendor and purchaser in the sale of newly constructed residential units, contrary to Article 4(a) of the 1997 Regulations, and in so doing engaged in misconduct.

Dishonesty

149. While the Tribunal did not characterise the conduct of the Solicitor as dishonest, the trial judge did so, and, as I have said above, this is very relevant to the issue of the appropriate sanction to be imposed in respect of the misconduct identified.

150. The first submission advanced on behalf of the Solicitor under this heading is that dishonesty was not adequately pleaded by the Society. It is submitted that there is an obligation, where dishonesty is alleged, always to plead it with particularity. The Solicitor places particular reliance in this regard on *Williams* and also on *Malins v. Solicitors Regulation Authority* [2017] EWHC 835 (Admin). In the latter case (which, as the trial judge pointed out, was subsequently overturned by the Court of Appeal of England and Wales), Mostyn J., in a passage quoted in the submissions of the Solicitor stated:

> "It is elementary, and supported by abundant authority, that if you are accused of dishonesty then that must be spelt out against you with pitiless clarity."

151. As to *Williams,* the reliance placed on it chiefly relates to the manner in which the allegations against the solicitor in that case were framed. The judgment states that they followed a "standard pattern" for what was known at the time as a "Rule 5 statement" being the prescribed procedure at the time whereby the Solicitors' Disciplinary Tribunal in the United Kingdom brought forward allegations of misconduct against a solicitor. In *Williams,* it is apparent from the Rule 5 statement that the allegations involved: failing to act with integrity, failing to act in the best interests of Mr. Williams' client, failing to behave in a way that maintains the trust the public places in him in the provision of legal services, taking

unfair advantage of third parties in his professional capacity and deceiving or knowingly misleading the court. Each allegation referred to a relevant rule of the Solicitors' Code of Conduct, and principles published by the SRA (Solicitors' Regulation Authority). The Rule 5 statement stated that all the allegations were made on the basis of dishonesty. Particulars of each allegation are then provided later in the statement.

152. While there is little doubt that the rules governing the bringing forward of allegations of misconduct in the United Kingdom are more detailed than in this jurisdiction, it does not follow that the rules or procedures here are flawed. Of some interest is a paragraph in the judgment of Carr J. in *Williams*, para. 28, where he says:

> "In *SRA v Chan and others* [2015] EWHC 2659 (Admin), Davis LJ criticised the charges levelled against the solicitor respondents as being '*for the most part unduly and unnecessarily convoluted and prolix*' (at [23]). With such pleading, there was the '*real risk that a tribunal will lose sight of the larger picture and will treat the more and the less significant points alike*' (at [26]). It was desirable for charges to be limited to a minimum (at [27])."

153. The rules of the Tribunal in this jurisdiction, to which I have referred earlier, are both less detailed and less prescriptive than the equivalent rules in the United Kingdom. It does not follow however that allegations of misconduct should not be clearly stated; on the contrary it is a basic requirement of fair procedures that any professional person charged with professional misconduct should be aware of the allegations he or she has to meet, both in terms of fact and law, as well as the provisions of any code of conduct or other rules alleged to have been breached. However, it is clear from *O'Laoire v. Medical Council* the standard to be applied to the wording of charges in disciplinary proceedings is not to the same exacting standard as in criminal proceedings.

154. In my view, the trial judge was correct in concluding that the authorities in the neighbouring jurisdiction on this issue are of little assistance, given what he accurately described as the very real differences in the regulatory regimes applicable to solicitors in this country and in the United Kingdom. But in any event, a detailed consideration of the issue is unnecessary in this case, because as already mentioned, it was acknowledged (very properly) by counsel for the Solicitor both in the High Court and in this Court that allegations 33(b) and (c) are phrased in language that connotes dishonesty. Indeed, I would put it more strongly than that; the preparation of any "*fictitious*" document, not to mention a contract for sale, for the purpose of "*misleading*" any other party in order to induce that party to rely on it, is surely the very essence of dishonesty.

155. Moreover, there was no suggestion as to any lack of clarity as regards the facts referred to in these allegations. So at least as far as allegations 33(b) and (c) are concerned, the Solicitor could have been under no illusion that, in admitting the facts of those matters he was admitting to dishonest conduct. Not only that, as the trial judge observed, the Solicitor averred in his affidavit of 27th May 2019 that he was made aware of an allegation of dishonesty in relation to Mr. O'Donnell's signature, by the affidavit of Ms. Blayney.

156. While it is submitted that none of the Solicitor's admissions as to fact extended to *mens rea,* this submission is at odds, in my view, with the acknowledgment that the language used in the allegations made at paras. 33(b) and (c) of Ms. Blayney's affidavit connotes dishonesty. If the Solicitor admits to actions which he accepts are couched in language that allege dishonesty, how can he then plausibly assert that those actions did not have a dishonest intent?

157. As far as the other allegations are concerned, the Solicitor submits that the trial judge did not appropriate his findings of dishonesty to any particular allegation and in failing to do so he fell into error. For its part, the Society has acknowledged that a finding of misconduct

relating to allegation 33(g) (the allegation relating to a breach of the 1997 Regulations) would not, in its own right, merit the sanction of strike off. By implication, the Society accepts that this allegation does not involve dishonesty, and I do not understand the Society to claim that this allegation alleges dishonest conduct (as distinct from misconduct, *simpliciter*). Nor, I believe, did it do so in respect of allegation 33(d), the allegation relating to the destruction of the Contracts. However, the Society submits that the sanction of strike off was imposed in respect of all offences of misconduct, taken together.

158. It is true that, in considering the appropriate sanction, the trial judge did not expressly impose the sanction of strike off in respect of any specific allegation. However, I think nonetheless that it is very clear which conduct the trial judge considered to be dishonest and merited the sanction of strike off. At para. 237 of his judgment the trial judge stated:

> "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."

159. It is very clear from this paragraph and from the concluding part of his judgment generally (paras. 231-242) that the dishonesty found by the trial judge was the preparation of fictitious contracts for the purpose of misleading a financial institution. Neither the destruction of the Contracts nor the breach of 1997 Regulations is mentioned at all in this

part of the judgment. In my view it could not be more clear that the finding of dishonesty relates to allegations 33(b) and (c) in respect of which the Solicitor accepted that the allegations connoted dishonesty. That being so, the argument that dishonesty was not adequately pleaded must be rejected.

Strict liability argument

160. In discussions with the parties, the trial judge agreed that he would not decide a question (raised by the trial judge himself) as to whether or not a person could ever sign a contract on behalf of another without disclosing the identity of that other. This question arose in the context of a submission made on behalf of the Solicitor in the High Court that, notwithstanding that he had admitted that he had caused the name of Mr. O'Donnell to be placed on the Contracts without his authority, the Solicitor honestly believed that he had the consent of Mr. O'Donnell to sign the Contracts in his name (see paras. 80-83, above). Having said that he would not decide this issue, the trial judge then went on to decide it, against the Solicitor, at para. 232 of his judgment, holding that: "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."

161. Having said he was not going to decide that issue, I agree with counsel for the Solicitor that it would have been better if the trial judge had not done so. However, I do not believe this to be a material consideration on this appeal. The trial judge had considered the issue earlier in his judgment, at para. 150, and had observed:

> "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*'."

162. In making the argument that he had a sincerely held belief that he had the consent of Mr. O'Donnell to endorse his name on the Contracts, the Solicitor purports to introduce a very significant qualification to the admission, that he freely made at the time, that he did not actually have the consent of Mr. O'Donnell to do so. Moreover, as the trial judge observed, he purports to do so in the face of his other admission that the Contracts were "*fictitious*" and designed to mislead. So, it appears therefore that the Solicitor's submission is that he had an honestly held belief that he had the consent of Mr. O'Donnell to endorse the latter's name on fictitious contracts, in circumstances where the use of Mr. O'Donnell's name lay at the heart of that very same fiction.

163. This argument itself has all the appearances of another fiction, but in any case if the Solicitor wished to make such a significant qualification to the admission that he was making to the Tribunal (which qualification ran contrary to the description of this conduct given by his own counsel to the Tribunal — i.e. "the most serious of offences" and "entirely improper"), then the time to do it was at the time of the Tribunal hearing, and the way to do it was by giving evidence to the Tribunal upon which he could have been cross-examined. It was not acceptable for the Solicitor to purport to qualify his admission to the Tribunal in this way in the context of the Society's application in the High Court. Furthermore, the Solicitor has not argued that the trial judge fell into error in holding, at the commencement of para. 232 of his judgment, that "[i]n 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." This was the key conclusion in this paragraph. It was one which the trial judge was clearly entitled to

make on the evidence before him, and, as I have said, it has not been appealed. For that reason, the view expressed later in the paragraph that "[t]here 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 …" is arguably *obiter dictum* but is in any case of no relevance to the issue to be decided on this appeal. It is, in my view, incorrect to characterise any of the findings of the trial judge as having been made on the basis of imposition of strict liability, and I reject that argument.

Failure to apply a test for dishonesty

164. The Solicitor submits that the trial judge fell into error in failing to apply any test for dishonesty before concluding that the conduct of the Solicitor was dishonest. The Solicitor deliberately does not offer any test, his point being simply that the trial judge should have applied a test, whatever that test might be.

165. There is an air of unreality about this submission. The Solicitor has admitted that he engaged in the conduct described in allegations 33 (b) and (c), and while he has not admitted that this conduct constituted misconduct, he has accepted that these allegations, phrased as they are, connote dishonesty. Indeed, it is difficult to see how he could credibly say otherwise as the use of the words "fictitious" and "for the purpose of misleading" so plainly describe dishonest conduct as to render this argument entirely artificial. To suggest otherwise is to suggest that words do not mean what they say. Where a person has admitted to conduct that is in its own terms dishonest, what purpose could possibly be served by applying a test for dishonesty to that admission? In my view no useful purpose could be served by such an artificial exercise, and the trial judge was entitled to conclude that by admitting to allegations 33 (b) and (c), the Solicitor engaged in dishonest conduct, without applying any test for dishonesty.

166. This conclusion is supported by a decision handed down by this Court, subsequent to the hearing of this appeal, in the matter of *Law Society of Ireland v. Kathleen Doocey* [2022] IECA 2. The parties were each afforded an opportunity to make such further submissions as they considered appropriate, arising out of this decision. As I mentioned above, the Society made submissions placing reliance upon this decision for reasons that will become apparent. The Solicitor made no further submissions.

167. In *Doocey*, the solicitor had admitted to numerous occurrences of conduct involving teeming and lading, i.e., transferring funds held by the solicitor on behalf of one client to the account of another client for the purpose of concealing a shortfall in the latter. The solicitor had admitted that this conduct constituted misconduct but denied any dishonesty. The Tribunal directed the Society to bring the report of the Tribunal before the High Court for the purpose of determining the appropriate sanction, and in doing so the Tribunal expressed its opinion that Ms. Doocey's practising certificate could be issued subject to specified conditions.

168. However, the High Court (Irvine P.) concluded that the conduct of Ms. Doocey had been dishonest such that a sanction of anything less than a strike off from the Roll of Solicitors would be inappropriate. Ms. Doocey appealed from that decision arguing, *inter alia*, that the High Court erred in concluding that she had been guilty of dishonest conduct in circumstances where there had been no finding of dishonesty by the Tribunal.

169. In the course of her judgment, Donnelly J. considered the meaning of "misconduct", observing, at para. 65, that while s. 3 of the Act of 1960 does not provide for a definitive interpretation of misconduct, the courts have long accepted that dishonesty in the conduct of the practice of a solicitor amounts to misconduct. Donnelly J., having observed (at para. 65) that there is no definition of either honesty or dishonesty in the Solicitors Acts, went on to consider the meaning and assessment of dishonesty as misconduct. At para. 74 she stated

that "[i]dentifying what is honest and/or dishonest is not unduly difficult. It will be based upon shared values in a community. It is also true to say that certain language connotes dishonesty" (citing in that connection the judgment of the High Court in these proceedings). Donnelly J. went on to consider authorities in the United Kingdom, observing at para. 75 that "[…] on the civil and disciplinary side in England and Wales dishonesty is to be judged on a wholly objective standard, that is the standards of the community as regards dishonesty, rather than on a standard that also requires a subjective element *i.e*. knowledge on the part of the person that his or her conduct was dishonest."

170. At para. 76 Donnelly J. noted that the parties in those proceedings agreed that "while the objective test is the main requirement, there is still a subjective element to be assessed, relying upon *Ivey v. Genting Casinos (UK) Limited*. The subjective element is limited however to the actual state of the individual's knowledge or belief as to facts." The most important part of her judgment for present purposes is para. 79 where Donnelly J. stated:

> "I am satisfied that there is also no basis for the argument that dishonesty in the context of disciplinary proceedings in this jurisdiction must be judged on a standard that leaves it to the individual solicitor's understanding of dishonesty. The rationale of the disciplinary code would be shaken if the amoral solicitor, who simply does not advert to the possibility of dishonesty, can escape severe sanction for their otherwise deliberate actions which are objectively dishonest. In fairness to Ms. Doocey, I do not understand her to contend vigorously for such a standard of dishonesty to be accepted. For the avoidance of doubt however, I reject any such approach to judging the standards of dishonesty. **It is a standard to be assessed objectively. The requirement that there be knowledge or belief as to the facts at issue is nonetheless a sensible one**." (my emphasis)

Donnelly J. then went on to assess the conduct of the solicitor in that case to an objective standard having regard to the knowledge of the solicitor as to the facts, concluding that the solicitor had been objectively dishonest by reference to community standards. Donnelly J. held that the findings of misconduct by the Tribunal were consistent only with dishonesty on the part of the solicitor in that case, and accordingly the High Court was entitled to approach its decision as to appropriate sanction on the basis that there had been findings of serious misconduct of a dishonest nature.

171. As to sanction, Donnelly J. had regard to the decision of the Supreme Court in the case of *Law Society v. Carroll and Colley* in which Geoghegan J. held:

> "As in any appeal to the Supreme Court including factual matters, the key question is whether as a matter of law it was open to the judge of the High Court to arrive at the decision made by him or her. In my view, it is all the more important to maintain this principle in relation to solicitors' matters for the resolution of which the Oireachtas specially provided for a qualified disciplinary tribunal and an ultimate decision of the High Court with the express intent that that decision would normally be made by the President of the High Court himself or herself."

172. Donnelly J. then noted that Geoghegan J. further opined that appellate judges could not, therefore, simply substitute their own views for those of the President of the High Court, or the delegated judge, as the case may be. As Geoghegan J. said, a decision of the High Court in such proceedings can only be reversed if, as matter of law, it was clearly incorrect.

173. In *Doocey*, Donnelly J. held, (as did Collins J., in an assenting judgment) that Irvine P. in the High Court was entitled to find that the misconduct findings of the Tribunal amounted to proven dishonesty, and then to conclude that the appropriate sanction was one of strike off.

174. The decision of the trial judge in these proceedings is entirely consistent with the judgment of Donnelly J. (and, for that matter, the assenting judgment of Collins J.) in *Doocey*. The fact that the trial judge did not apply a test or expressly state that he was applying an objective test is *nihil ad rem*. It is clear that his approach to the matter was entirely consistent with the later decision of this Court in *Doocey*. Specifically, it is clear that he was satisfied that the Solicitor had knowledge of the facts constituting the dishonest misconduct. In arriving at the conclusion that the misconduct was also dishonest conduct, the trial judge expressly found that it was obvious that conduct involving the production of a fictitious contract for the purpose of misleading a financial institution represents dishonest conduct. This is an entirely rational and indeed unsurprising conclusion. Indeed, the trial judge could hardly have concluded otherwise in circumstances where the Solicitor (a) admitted the conduct before the Tribunal (although he did not admit it to be misconduct) and (b) admitted in the High Court that the words used to describe two of the allegations connoted dishonesty.

175. While the Solicitor has of course advanced an argument as to his belief as to facts i.e., that he had an honestly held belief that he had the consent of Mr. O'Donnell to endorse his name on the Contracts, I have already addressed and rejected that argument earlier in this judgment.

Appropriate Sanction

176. Perhaps because of the limitations on the jurisdiction of the appellate court as discussed by Geoghegan J. in *Carroll and Colley*, no submissions were advanced in relation to the sanction of strike off imposed by the trial judge. Counsel for the Solicitor acknowledged that, by reason of *Carroll and Colley*, this Court is bound by the determination of the High Court as regards the appropriate sanction, unless, as a matter of law, the sanction imposed was clearly incorrect. No argument was advanced to the effect

that this was so, and it follows therefore that this Court cannot and should not interfere with the order made by the trial judge striking name of the Solicitor from the Roll of Solicitors.

177. I would nonetheless like to add some observations. Firstly, in the written submissions of the Solicitor it is argued that because the trial judge did not appropriate the finding of dishonesty specifically to any of the allegations admitted by the Solicitor, the result is that he has been struck off for acting on both sides in a conveyance, a matter which the Society accepts would not warrant the sanction of strike off. While the latter is correct, the former is not. It is clear from the decision of the trial judge read as a whole that the sanction of strike off was imposed by reason of the conduct of the Solicitor in the preparation of a fictitious contract for the purpose of misleading a financial institution — conduct which was admitted by the Solicitor. Had the only allegation against him been that he had contravened the 1997 Regulations by acting on both sides, he clearly would not have been subjected to the same sanction, but that is not the point.

178. In my view, the imposition of the sanction of strike off was inevitable in this case and there cannot be any doubt that the trial judge was correct in doing so. The trial judge referred to and discussed the relevant authorities, in particular the decision of the Supreme Court in these very proceedings, in *Law Society of Ireland v. D'Alton* and in *Law Society of Ireland v. Herlihy*. In the last of these cases, Kelly P. held that "where dishonesty is established on the part of the solicitor then no matter how strong the mitigation is a strike off will almost inevitably follow."

179. The trial judge nonetheless considered the mitigating factors put forward by the Solicitor, including that it was not contended that the conduct of the Solicitor had resulted in any loss being incurred by ACC, that agreements for the sale of the developed units were subsequently reached and completed, that the ACC loan was paid off, that this was a first offence by the Solicitor, and that he had cooperated with the disciplinary proceedings. The

latter, the trial judge noted, was greatly reduced by the conduct of the Solicitor in attempting to resile from his admissions. The trial judge also had regard to the personal circumstances of the Solicitor.

180. The trial judge went on to say that he had carefully considered whether a lesser sanction than strike off might be imposed instead but having regard to the to the public interest in ensuring that the integrity of the solicitors' profession is maintained, in particular in conveyancing transactions, an order striking the name of the Solicitor off the Roll of Solicitors was required. The trial judge held that "[i]t 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."

181. I consider the analysis and conclusions of the trial judge to be unimpeachable. I acknowledge that there is a difference between the misconduct involved in this case and in other cases of dishonesty where a solicitor deliberately sets out to deprive a client or another party of their property or money. To be fair to the Solicitor, what was involved in this case was a far cry from that, but as the trial judge said his conduct "involved a cavalier disregard of the importance of ensuring that contracts for sale are properly executed and can be relied upon by all parties." For very good prudential reasons, ACC bank in this case required evidence from the Solicitor acting on behalf of Fairview that binding contracts for sale of a specified number of units had been entered into before it would advance funds to Fairview. The Solicitor cooperated in a scheme to circumvent this requirement, thereby putting the funds advanced by ACC at risk. If proof of this is required, all one has to do is consider what occurred in the property market just a few short years later. It is deeply regrettable that the Solicitor, having acknowledged his wrongdoing before the Tribunal, subsequently engaged in a complete *volte face* of his admissions. The only conclusions to be drawn from this are

that he still does not understand the seriousness of his conduct, and the sanction imposed was not just correct, but inevitable.

182. For all of the foregoing reasons, I would dismiss this appeal. As the respondent has been entirely successful in this appeal my preliminary view is that the appellant should pay the costs of the respondent, to be adjudicated in default of agreement. If the appellant wishes to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. The appellant should note that in the event that they are unsuccessful in altering the provisional order for costs which I have indicated, they may be required to pay the costs of the additional hearing.

183. As this judgment is being delivered electronically Whelan and Faherty JJ. have authorised me to express their agreement with this judgment.