THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023/97
High Court Record Number: 2004/19212P
Neutral Citation: [2023] IECA 310

Noonan J.

Faherty J.

Meenan J.

BETWEEN/

COLM MURPHY

APPELLANT/PLAINTIFF

-AND-

THE LAW SOCIETY OF IRELAND
AND SIMON MURPHY

RESPONDENT/DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 12th day of December, 2023

1. This judgment concerns an application by the appellant (Mr. Murphy) to extend the time for appealing to this Court from an order made by the High Court on the 11th December 2017 on consent. In order to understand the context of this application, it is necessary to refer in some detail to the lengthy and complex history of this litigation and related matters. For convenience, I shall refer to the respondents throughout as "the Society".

Relevant background

2. Mr. Murphy was a solicitor practicing in Kenmare, County Kerry. In 1996, he acquired the practice of another solicitor, Mr. Tim Healy, in Killarney with effect from the 16th August, 1996. There were certain difficulties with Mr. Healy's practice in relation to the practice accounts which were not up to date and in respect of which the Society had been in contact with Mr. Healy. Mr. Murphy was aware of this when he took over the practice. After the acquisition, Mr. Murphy engaged with the Law Society who required him to file the requisite accountant's report for the Healy practice for the year ending the 31st March, 1997. Mr. Murphy was not however in control of the Healy practice for the first four and a half months of that period, subsequently referred to by the Supreme Court as *"the missing months"*. It was therefore Mr. Healy's responsibility to file accounts for that period and Mr. Murphy's in respect of the subsequent seven and a half month period.

3. Matters evolved from there and it is sufficient for the purposes of this judgment to note that the Society brought disciplinary proceedings against Mr. Murphy for failing to file an accountant's report for the "*year ended the 31st March, 1997*." The Solicitors Disciplinary Tribunal ("SDT") found Mr. Murphy guilty of misconduct in relation to this alleged failure and sanctioned him with a censure and required him to pay the Society's costs. Mr. Murphy did not appeal, although he considered doing so in consultation with his then legal team and decided against it.

4. In 2004, Mr. Murphy brought the within proceedings against the Society claiming, *inter alia*, damages for misfeasance in public office arising out of the Society's dealings with him in regulatory matters. Mr. Murphy claimed that the Society was motivated by malice in its approach to those regulatory proceedings. Mr. Murphy did not renew his practicing certificate in 2005. In 2006, the Society brought proceedings against Mr. Murphy pursuant

to s. 18 of the Solicitors (Amendment) Act, 2002 to prohibit him from practicing as a solicitor and for the winding up of his practice. These proceedings came before the President of the High Court on various occasions in 2006 and 2007 and on the 31st January, 2007, Johnson P. made an order by consent directing the delivery up of Mr. Murphy's practice files and directed that reports on his accounts be delivered. Mr. Murphy gave an undertaking to the court not to practice.

5. Shortly thereafter, in February 2007, the Society brought a motion for the attachment and committal of Mr. Murphy arising out of his alleged failure to comply with the order of the 31st January, 2007. Various further orders were made arising from that application and ultimately the proceedings were struck out in June 2008.

6. The Society brought further proceedings in 2009 seeking to strike Mr. Murphy off the Roll of Solicitors following a number of findings of misconduct against him made by the SDT which recommended that Mr. Murphy be struck off. The complaint that led to the SDT determination was made by Patrick Arthur and John Arthur, for whom Mr. Murphy had acted. Mr. Murphy appealed the SDT findings to the High Court and it is clear from the transcript of the appeal before Johnson P. on the 21st April, 2009 that Mr. Murphy accepted the findings of the SDT-and in effect confined his appeal to a plea in mitigation, asking that he be subjected to a lesser sanction than being struck off. Johnson P. subsequently delivered judgment on the 18th May, 2009 striking Mr. Murphy off the Roll of Solicitors.

7. Between 2009 and 2011, Mr. Murphy made fifteen applications to the SDT alleging misconduct against various employees of the Society arising out of his dealings with those parties concerning, *inter alia*, the s. 18 proceedings. The SDT found in respect of each complaint that no *prima facie* case of misconduct had been disclosed. Mr. Murphy appealed this determination to the High Court in respect of twelve of the cases.

8. In October 2010, the Society brought a motion seeking to dismiss the plenary proceedings on the basis that they were frivolous and vexatious together with an *Isaac Wunder* Order against Mr. Murphy.

9. The Society's application for an *Isaac Wunder* Order came before the High Court on the 1st March, 2011 when Mr. Murphy gave an undertaking in the following terms:

> *"Not to institute any legal proceedings (whether by way of fresh proceedings or appeals from previous proceedings or attempts to reopen previous proceedings) against the Society pending the determination of the within proceedings; and not to institute any disciplinary or legal proceedings against any of the officers, employees, agents or legal representatives of the Society (past or present) or any member of any committee (past or present) appointed by the council of the Society in respect of any matters arising out of or relating to their work for or on behalf of the Society pending determination of the within proceedings."*

10. This appears to have provided some impetus to proceed with the plenary proceedings which came on for hearing before Hanna J. in the High Court on the 8th March, 2012. On that date, the court directed that there should be a preliminary hearing of issues raised in the Society's defence and on the 30th March, 2012, Hanna J. delivered a judgment holding that the proceedings were an abuse of process and dismissing them. Mr. Murphy has alleged on numerous occasions since the hearing before Hanna J. that the Society and its legal team deliberately misled the judge in relation to what was before the court and this led to his proceedings being wrongfully struck out.

11. It is relevant to note that Mr. Murphy was represented by solicitors and counsel at that stage in the hearing before Hanna J. and during the course of a subsequent appeal of Hanna J.'s order to the Supreme Court. On the 22nd March, 2015, the Supreme Court allowed

Mr. Murphy's appeal with the court's judgment being delivered by Hardiman J. who found that there was *"a real apprehension that Mr. Murphy may have genuinely believed that what was about to proceed before Hanna J. was his plenary action."* Mr. Murphy was again legally represented in the Supreme Court and it would appear that his legal team did not make any case to the Supreme Court that the Society or its lawyers had deliberately misled Hanna J. In any event, there was certainly no finding to that effect made by the Supreme Court or indeed any other court since. The Supreme Court remitted the matter to the High Court for rehearing.

12. Shortly after the Supreme Court delivered its judgment, Mr. Murphy applied on the 13th April, 2015 to the High Court to be restored to the Roll of Solicitors. When the matter came before the then President, Kearns P., he directed that it should not be heard until Mr. Murphy's plenary proceedings had been determined and that those proceedings should get an early hearing.

13. Thereafter, the parties unsuccessfully attempted mediation and Mr. Murphy in early 2016 served interrogatories and sought discovery from the Society. In June 2016, Mr. Murphy issued a motion seeking to re-enter the s. 18 proceedings and in the course of that year, made a number of criminal complaints against various parties including the Registrar of Solicitors, the Society's solicitor and senior counsel. These complaints appear to have stemmed from an allegation that the Society had wrongfully and dishonestly sought a hearing of preliminary issues before Hanna J. which Mr. Murphy alleged was contrary to a direction that had been given by the President of the High Court.

14. These complaints in turn led to the bringing of a motion by the Society in 2017 seeking to dismiss the plenary proceedings on various grounds including abuse of process in attempting to interfere with the administration of justice or in the alternative, an order staying

the proceedings until Mr. Murphy withdrew the criminal complaints. One of the criminal complaints related to Solicitor X, so designated because she was subsequently made a Ward of Court, that she had knowingly relied on a forged document in proceedings before the High Court. One of Mr. Murphy's criminal complaints related to Ms. Linda Kirwan, a solicitor in the Society and head of the Complaints and Client Relations section. He accused her of perjury and swearing an affidavit in which she confirmed that she was in court on the 31st July, 2003 when Mr. Murphy allegedly gave an undertaking in relation to the Arthur complaint.

15. The Society's application came on for hearing before Kelly P. on the 27th June, 2017 and the upshot was that Mr. Murphy gave a sworn undertaking to withdraw any criminal complaints concerning the Society and any related parties. Kelly P. stayed the proceedings until the 28th July, 2017, on which date Mr. Murphy confirmed that he had withdrawn all complaints. The President accordingly lifted the stay.

16. The matter again came before the President on the 11th December, 2017 when he made the order the subject matter of the application now before this Court.

17. The terms of that order, in so far as relevant to this application, are as follows:

> *"BY CONSENT*
>
> *IT IS ORDERED*
>
> *1. The plaintiff's claim in these proceedings is limited to the matters pleaded in the plaintiff's amended statement of claim delivered on 1 July 2011 (as so defined by the terms of this order) together with the updated particulars of the plaintiff's claim furnished on 23 October 2017.*

2. The statement of claim delivered on 22 June 2009 is a spent document which no longer has any bearing on the trial of the within proceedings.

3. No application in respect of the following sets of proceedings shall be either heard or determined prior to the determination of the within proceedings;…"

The order then proceeds to list 14 sets of proceedings between the Society and Mr. Murphy, and Mr. Murphy and the SDT.

18. The plenary proceedings were heard by MacGrath J. over some 15 days in mid-2018 during which Mr. Murphy was represented by solicitors and counsel. In a very detailed and lengthy judgment delivered on the 31st July 2019, MacGrath J. dismissed Mr. Murphy's claim.

19. Delivery of the judgment ("the Principal Judgment") in the plenary proceedings cleared the way for the other matters now to proceed. Accordingly, directions were given by the High Court for the hearing of the strike off re-entry proceedings and the s. 18 re-entry proceedings together with the various SDT appeals awaiting determination. Before that could happen however, a motion was brought by Mr. Murphy on the 24th July, 2020 by which Mr. Murphy sought a review by the High Court of its own Principal Judgment. By this juncture, Mr. Murphy no longer had the benefit of legal representation and pursued this application as a litigant in person.

20. Mr. Murphy argued in the course of the re-entry motion that various issues had either not been addressed, or addressed inadequately, by MacGrath J. in the Principal Judgment. This was in substance and effect a *Greendale* type application. In or around the same time, Mr. Murphy also issued a motion to extend the time for appealing from the determination of the SDT in 1999 that Mr. Murphy was guilty of professional misconduct in relation to the

Healy matter. That application was subsequently refused by the High Court ([2021] IEHC 148), on appeal by this Court ([2021] IECA 332), and by the Supreme Court in judgments delivered on the 29th November, 2023 ([2023] IESC 28), the day following the hearing of the within motion. I will refer further to the judgments of the Supreme Court below.

21. Mr. Murphy's application for a review of the Principal Judgment was dismissed by the High Court on the 26th July, 2021 ([2021] IEHC 848) ("the Review Judgment"). In two further judgments delivered on the 16th November, 2022, MacGrath J. dismissed both the strike-off re-entry proceedings and the s. 18 re-entry proceedings. All judgments of the High Court in this matter were appealed by Mr. Murphy so that there are currently a large number of appeals awaiting determination in this Court together with a number of applications to extend time for bringing appeals from orders of the High Court made over a decade ago. There are also motions brought by Mr. Murphy pending before this Court seeking to admit new evidence on appeal and for further discovery.

The Motion to Extend Time

22. The primary relief sought by Mr. Murphy now from this Court is an extension of the time within which to bring an appeal from the order of Kelly P. made on the 11th December, 2017. The essential basis upon which Mr. Murphy makes this application is that the Society wrongfully failed to disclose documents and evidence to him "*throughout the proceedings*". Mr. Murphy contends that had the Society done so, he would not have consented to the order made by Kelly P. and would have amended his statement of claim to rely on matters he says were wrongfully concealed from him.

23. In the course of two affidavits, Mr. Murphy identifies these matters and I propose to deal with each of these further below. First however it seems to me appropriate to set out the legal context within which this application is made.

Legal principles

24. The touchstone remains *Éire Continental Trading Company Limited v Clonmel Foods Limited* [1955] 1 IR 170, discussed in countless subsequent judgments, in particular, *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3. The well-known criteria set out in *Éire Continental* are the formation of an intention to appeal within the time limit, something in the nature of a mistake and finally arguable grounds of appeal. While these criteria have been said to be applicable in the vast majority of cases, in cases where the application to extend time is grounded upon new evidence not available at the time of trial, different considerations arise. In such cases, an intention to appeal within time and the presence of a mistake will not, as here, necessarily arise for consideration.

25. In *Goode Concrete v CRH Plc & Ors.* [2013] IESC 39, the appellant sought an extension of time to appeal to the Supreme Court in circumstances where facts had come to its attention after the trial in the High Court. The appellant submitted that those facts gave rise to a reasonable apprehension of bias on the part of the trial judge. Speaking for the Supreme Court, Clarke J. (as he then was) said the following:

> *"3.7 It seemed to me to remain the case that an arguable basis for appeal on the grounds of a reasonable apprehension of bias must, nonetheless, be established for without such an arguable basis for an appeal the interest of justice would not be served by extending time to allow an unmeritorious appeal to go ahead.*
>
> *3.8 However, the other two specific criteria, which are concerned with the time within which the appeal should have been brought, need to be modified in cases where the whole basis of the appeal is dependent on facts not before the trial court. In such circumstances I was satisfied that the Court should consider the following factors:-*

(a) The time when the party seeking an extension of time first became aware of the facts on which it wishes to rely;

(b) The extent to which it was reasonable for that party to engage in further inquiry before bringing an application to the Court for an extension of time;

(c) The time which elapsed between information coming to the attention of the relevant party and the application for an extension of time measured by reference to the tight limit of 21 days within which a party is expected, in an ordinary case, to appeal to the Supreme Court; and

(d) Any other factors arising in the special circumstances of the case but in particular any prejudice which might be said to have been caused to the successful party in the High Court by reason of the overall lapse of time between the order sought to be appealed against and the application for an extension of time.

3.9 It seemed to me that such a test is an appropriate adaption of the specific Éire Continental criteria in the circumstances of the type of case with which this Court is currently concerned being one where the entire basis of the appeal (or at least the aspect of it which concerns reasonable apprehension of bias) is founded on facts which did not form part of the materials before the trial court."

26. The appellant in *Goode Concrete* sought to appeal on a number of grounds including that of reasonable apprehension of bias but in granting the extension of time, the Supreme Court limited the ground of appeal to that sole issue.

27. Thus in *"new evidence"* type applications for extensions of time, the threshold of arguable grounds obviously still arises and criterion (c) identified by Clarke J. suggests that

there is an onus on a party seeking an extension of time to proceed without delay, such delay to be measured by reference to the applicable time limit for appealing, in this case 28 days. The same judge reiterated this in *Tracey v McCarthy* [2017] IESC 7 saying (at para. 4.5):

> *"The very fact that the rules provide a relatively short period of filing a notice of appeal necessarily implies that a person is under an obligation to move reasonably quickly if finding themselves in a position where they need to seek an extension of time."*

28. *Gately* suggests that the threshold of arguability rises with the passage of time. Conversely however, even having an unassailable ground of appeal does not abrogate the relevance of delay. That is clear from the judgments delivered in these proceedings by the Supreme Court in relation to Mr. Murphy's application for an extension of time to appeal the SDT's 1999 determination. That determination was described as *"factually and technically incorrect"* by this Court, which the Supreme Court considered provided Mr. Murphy with a strongly arguable ground of appeal. Despite that, Woulfe J., delivering the principal judgment of the court, said (at para. 77):

> *"In my opinion the critical countervailing factor in the present case flows from the principle identified by Clarke J. in Goode Concrete, that there must be a good reason for the appeal not having been filed within the time limit."*

29. Woulfe J. was of the view that Mr. Murphy had not demonstrated such good reason saying (at para. 79):

> *"In the absence of a good reason for not appealing within the time limit and having regard to the extremely long delay in seeking to appeal, in my opinion the balance of justice lies against the grant of an extension of time."*

30. In her concurring judgment, Baker J. identified the central issue in the appeal (at para. 5):

> *"The question presents as to whether the interests of justice must mean that, when an applicant for extension of time has a certainty or a near certainty of success in an appeal, that leave to appeal should always, or for the most part, be granted."*

31. In referring to the judgment of the Supreme Court in *MO'S v The Residential Institutions Redress Board and Ors.* [2018] IESC 61, Baker J. observed (at para. 11):

> *"In MO'S, Finlay Geoghegan J. accepted that the appellant had established that, were time to be extended, the applicant would undoubtedly have been entitled to an order of certiorari. However, she was clear that this factor alone was not sufficient, and an applicant had to satisfy the court as to the reason for the delay in bringing an application and whether the reasons objectively explained and justified the failure to meet the time limit."*

She went on to say (at para. 15):

> *"MO'S is not authority for the proposition that an intended litigant or appellant will invariably, or even mostly, be successful in obtaining an order extending time on account of the fact that the underlying proceedings are likely to be successful."*

Finally, Baker J. observed (at para. 17):

> *"There is no authority which suggests that even were the appellant to show that he would succeed in the appeal time should be extended. The prospect of success is one, and only one, of the possible grounds and arguments that must weigh in the balance."*

32. While the court was concerned with the statutory time limit under s. 7 of the Solicitors (Amendment) Act, 1960 in that case, clearly these observations are of general applicability.

33. In his judgment, Murray J., in referring to the statutory time limit, said (at para. 6):

> *"In particular, a Court faced with an application to extend time under the provisions contained in s. 7 of the 1960 Act must start from the proposition that the legislative stipulation that an appeal will be brought within a specified period must be given very great weight, and that there be some clearly identified exigency which both explains the failure to bring an appeal within that period, and provides sufficient justification for exceptionally extending it."*

In speaking of the circumstances in which the demand for finality must bend to the requirements of justice, as he described it, he said (at para. 8):

> *"These two interests can be reconciled by ensuring that the jurisdiction to extend time is one that will most usually fall to be exercised within a very short period of the effluxion of the limitation period that has been fixed by the Oireachtas. To extend that facility so as to allow a solicitor to petition the court more than two decades after the finding in question to seek to upset a final determination by reference to fresh evidence, new insights or subsequent experience would make a nonsense of the public interest in the finality of the process that underpins the limitation period in the first place. To be clear, and as Woulfe J. rightly observes in his judgment, this is a factor recognised in all of the cases dealing with extension of time applications: They stress that one important aspect of the 'balance of justice' that is central to that case law is the entitlement of parties who have obtained final orders to rely upon them thereafter, and the avoidance of the uncertainty that attends the unravelling of those orders many years after they were made…"*

34. This passage makes clear that Murray J.'s observations are of general application and not simply confined to cases where a statutory time limit has been fixed by the Oireachtas. On the question of arguable grounds, Murray J. went on to say in the context of the previously quoted passage (at para. 9):

> *"Second, that the appellant believes he had (or for that matter, has) a strong, very strong or unanswerable case does not alter this."*

He agreed with the observations of Baker J. concerning *MO'S* and that the strength of the ground of appeal is a relevant factor but *"it is not and never has been, in itself a decisive one."*

35. On the issue of prejudice, it is relevant to note that Woulfe J. considered that no particular prejudice had been demonstrated by the Society arising from an extension of time but, despite that and the strength of the ground of appeal, Woulfe J. nonetheless refused to extend time on the basis that the delay had not been explained. Murray J. on the other hand placed greater emphasis on the public interest in finality of the process and the significant weight to be attached to prescribed time limits.

The "New" Evidence

36. As a number of discrete matters are relied upon by Mr. Murphy, I propose to deal with each of these in turn in the order in which they are raised in his affidavits.

The Tim Healy matter

37. On the 9th December, 1997, the Society wrote to Mr. Healy saying:

> *"I also take the opportunity to advise you that a closing accountant's report has not been filed by you. The last accountant's report filed with the Society covered your*

financial year ended 31st August 1995. A closing accountant's report should have been filed covering the period 1st September 1995 up to the date of acquisition of your practice by Mr. Murphy in 1996."

The letter also stated that it was copied to Mr. Murphy, although his evidence was that he never received it. The essential contention made by Mr. Murphy with regard to this letter, and the basis for his application for an extension of time dealt with by the Supreme Court above, was that this letter demonstrated that the Society knew that Mr. Murphy was not responsible for the missing months and could not file an accountant's report for those months. Mr. Murphy has always contended that this letter, had it been available to him during the disciplinary hearing before the SDT, would have provided him with a complete defence.

38. The trial before MacGrath J. commenced in April 2018 and this letter, *inter alia*, was put to Mr. Murphy in the course of his cross-examination on the 13th April, 2018. This was the date upon which Mr. Murphy first became aware of it. The within application for an extension of time was brought by Mr. Murphy on the 4th May, 2023, over five years later.

39. The onus is on Mr. Murphy to establish a good reason for this delay. As soon as Mr. Murphy became aware of the Healy letter, he knew it might give rise to a potential further claim. He has consistently maintained that its existence was deliberately and maliciously concealed from him by the Society. In answer to questions from this Court as to why it was not open to Mr. Murphy to apply to amend his pleadings during the course of the trial before MacGrath J., Mr. Murphy's answer was that he was precluded from doing so by the terms of the order of the 11th December, 2017, the subject of this application.

40. I cannot accept that this order prevented Mr. Murphy from seeking to amend his pleadings at that stage. It was a case management order consented to for the purpose of the

orderly regulation of the proceedings. Case management orders are, almost by definition, subject to change and variation as the exigencies of the litigation require and the court is always free to revisit interlocutory case management orders where that is appropriate in the interests of doing justice between the parties.

41. The disclosure of the Healy letter was, according to Mr. Murphy, a hugely significant event and if he believed it to be such, I cannot accept the proposition that it was not possible for him to even apply to amend his statement of claim if he wished to do so. If he thought the case management order represented some impediment to him making such an application, it was open to him to make the very argument he now makes that the case management order was obtained without his informed consent. He has not explained why he did not do so.

42. Quite apart from this, it is clear that the Healy letter was in fact considered by MacGrath J. in the Principal Judgment in which he said (at para. 344):

> *"It is not at all clear to me that the Society was aware, or ought to have been aware, that Mr. Murphy had not received a copy of this letter".*

This observation by the trial judge represents a clear finding that there was no deliberate concealment of the Healy letter from Mr. Murphy as he now alleges. It clearly precludes him from seeking to plead by way of amendment that there was some type of fraud or malice in the concealment of the letter and this is a finding that stands unless and until it is overturned on appeal. Consequently, Mr. Murphy has established no arguable ground of appeal in respect of the Healy letter.

43. In addition, Mr. Murphy's explanation for the delay in bringing forward this application is, in my view, unconvincing. He says that by virtue of his 2011 undertaking, he

was not free to bring this application until the final perfection of the orders of the High Court in respect of both the Principal Judgment and the Review Judgment which only occurred in June 2023. It was only at that time that it could be said that his undertaking was spent. When it was pointed out to Mr. Murphy that the perfection of the orders occurred after the within motion had issued, he said that he received the orders in draft in March 2023 and it was only then that the final position became clear.

44. Apart from the fact that it is somewhat doubtful that the terms of the undertaking could be regarded as applying to the amendment of pleadings in these proceedings, Mr. Murphy's explanation rings somewhat hollow when one has regard to the fact that when Mr. Murphy in July of 2020 brought an application to extend the time for appealing from the SDT determination on the 28th September, 1999, he prayed for the following relief at para. 1 of his notice of motion:

> *"1. An order, if necessary, permitting the bringing of this motion in view of the undertaking of the 1st March, 2011 in proceedings High Court Record Number 2004/19212P."*

In the affidavit grounding that application, Mr. Murphy averred (at para. 4):

> *"I believe I may require the Courts consent to the bringing of this application in view of the undertaking I gave in Record No 2004/19212P on the 1st March 2011."*

Nor has Mr. Murphy explained why, when bringing his review application before MacGrath J., it was not then open to him to make the application he now advances.

45. Accordingly, in relation to the Healy matter, Mr. Murphy has not in my view either established a good reason for the delay in making this application or an arguable ground upon which an appeal could succeed.

The O'Dowd Documents

46. Mr. O'Dowd was at the material time an accountant engaged by the Society for the purpose of investigating Mr. Murphy's practice accounts. Mr. Murphy claims that Mr. O'Dowd in the course of examining the practice files photocopied a number of documents which Mr. Murphy says were unrelated to any issues concerning the practice accounts. Mr. Murphy however says he was unaware of what documents were actually copied by Mr. O'Dowd. Mr. O'Dowd gave evidence at the trial and on day 11, the 26th April, 2018 in the course of cross-examination, Mr. O'Dowd produced some documentation which Mr. Murphy said had been wrongfully copied from his files.

47. Mr. Murphy further claims that this documentation was used by the Society for the purpose of investigating matters regarding clients of Mr. Murphy, that investigation being unrelated to any issues concerning accounts. Mr. Murphy claims that the nature of these documents and the fact that they were copied were concealed from him until Mr. O'Dowd gave evidence. As with the Healy matter, Mr. Murphy alleges that this is a further instance of misfeasance in public office by the Society and he wishes to make a claim on foot of this by way of amending his pleadings. As in the case of the Healy letter, Mr. Murphy says that he is precluded from doing so by the order of Kelly P. he now seeks to appeal.

48. In my view, all the observations I have already made regarding the Healy letter apply with equal force to these documents and it is unnecessary to repeat them. In addition, Mr. Murphy faces the difficulty that his complaint about the late disclosure of the O'Dowd documents was actually considered and ruled upon by MacGrath J. in the Review Judgment where he said at paras. 66 and 69:

"66. Mr. Murphy maintains that certain documents should have been handed over at the interlocutory injunction stage in 2002 or at other times, such as during the data access request or in Mr. O'Dowd's witness statements. The documents were produced on the 11th day of the hearing when Mr. O'Dowd was being cross-examined. Mr. Murphy maintains that these would have helped him prove that the interlocutory proceedings in 2002 were unnecessary, that there was a lack of candour on the part of the Society and that this represented yet another example of misfeasance of public office. He says that the updated particulars of claim of 23rd October, 2017 would have included particulars of claim specifically in relation to the accounts investigation. He submits that his witness statement would have been very different in this regard and that these documents would have been discovered in a particular category of the discovery application, which was discontinued, largely because the Society had rejected his contention that he had not received all documents to which he was entitled in his Data Access Request…

69. The Court was aware of the substantial contentions of Mr. Murphy when it delivered [the Principal Judgment] *and considered the issue of bad faith in the context of the tort of misfeasance of public office. Again, it is to be observed that the documents in issue were produced on day 11 of the trial and no application was made at any time to the Court that the late production of these documents resulted in injustice or affected the manner in which the case had been progressed. I am not persuaded that a fundamental error has been established in respect of any issue which arises in connection with the authority for such undertaking, or failure to provide documents."*

49. It is thus clear that MacGrath J. gave full consideration to the issue that Mr. Murphy now seeks to re-litigate by amending his pleadings in the manner suggested. The findings of MacGrath J., as before, stand unless and until they are overturned on appeal.

50. Therefore, as with the Healy matter, Mr. Murphy has not established either a good reason for his delay or an arguable ground of appeal regarding the O'Dowd documents.

Authorisation for Attachment and Committal proceedings

51. In February 2017, the Society brought an application for attachment and committal against Mr. Murphy for an alleged failure to comply with the order of the High Court of the 31st January, 2007. At the hearing of the plenary proceedings, evidence was given by Mr. John Elliott, a former Registrar of Solicitors, during the course of which he produced certain emails that Mr. Murphy said he had never seen before. On foot of these emails, Mr. Murphy concluded that the attachment and committal motion had been brought against him by a solicitor employed by the Society without proper authorisation from the Society or any relevant committee thereof.

52. Mr. Murphy claims that this is a further instance of wrongdoing by the Society against him of which he was unaware due to the failure of the Society to disclose to him documents that ought to have been disclosed. Accordingly, he now proposes to amend his pleadings to make a claim in this regard. The comments I have already made with regard to documents only disclosed during the plenary trial apply with equal force here. Mr. Murphy has given no, or no adequate, reason for the extremely long delay in seeking to introduce this claim. A further difficulty in advancing this claim arises again from the fact that it was explicitly considered by MacGrath J. in the Review Judgment, having been one of the subjects about which Mr. Murphy made complaint in his application to MacGrath J. to review his judgment.

53. Thus, MacGrath J. stated in the Review Judgment at paras. 89 - 91:

"89. Insofar as it is contended that an injustice arose because of the late production of a number of emails at trial by Mr. Elliott in relation to the initiation of the attachment and committal proceedings, being emailed from Solicitor X to Linda Kirwan dated the 16th of [February] *2007 and 21st of February 2007, again, these documents were in fact produced at trial and no application was made in connection with any suggested injustice or prejudice arising from alleged late disclosure of these emails. The substance of the complaint is that these emails would have confirmed that Solicitor X had no authority for the institution of the attachment and committal proceedings, that in effect she was on a solo run. It was also contended that these documents, had they been produced at an earlier time, could have been used to form the basis of the cross-examination of all witnesses including Ms. Kirwan. It is now contended by Mr. Murphy that they were crucial to his preparation of the case and that he would have been able to tie this action by Solicitor X to the meeting of 1st February, 2006, to research the legitimacy of proceeding without authority and it would have forewarned him and the court about the importance of the letter of 14th March, 2007. He also suggests that the updated particulars of claim of 23rd October, 2007 would have been entirely different. He suggests that his witness statement would have been very different and that all of this supported or was further proof of misfeasance in public office. The thrust of Mr. Murphy's submissions is that had he known about these emails, it may have been contended and proved that Solicitor X had effectively gone on a solo run without appropriate authority.*

90. The first matter to be noted is that Mr. Elliott was closely questioned in relation to these emails and on this issue, and no application was made to recall any witness

for the purposes of further examining him or her, or indeed to seek to amend the pleadings, as a result of the emergence of these emails in his evidence. A period of two months elapsed between the time of the completion of the evidence on this aspect of the claim and the submissions of the parties and no application was made during this period for the court to further consider the effect and import of the disclosure of the emails during the course of Mr. Elliott's evidence.

91… Any complaint that Mr. Murphy has in connection with these emails must be seen in context. I am not satisfied that it has been established that an error [of a] *fundamental nature has been made by the court in its assessment of this aspect of Mr. Murphy's claim or in consequence of the failure to produce these documents at an earlier time."*

54. It is also of significance that in the course of the Review Judgment, MacGrath J. concluded that even if there had been a want of authorisation in relation to the attachment/committal motion, this would not have given rise to a cause of action against the Society. Accordingly, it is clear that the issue that Mr. Murphy now seeks to agitate by amending his pleadings is one that has already been fully litigated and ruled upon by the High Court.

55. Here again, Mr. Murphy has failed to demonstrate any arguable ground of appeal and further to adequately explain the five year delay in bringing this application.

Denis McMahon proceedings

56. Mr. Denis McMahon is a solicitor who brought proceedings against the Law Society in 2011. Mr. Murphy gives no information as to the nature of those proceedings other than they appear to have been some form of judicial review proceedings brought by Mr.

McMahon against the Society arising out of a determination of a committee of the Society adverse to him. Those proceedings were settled while at hearing. What is clear however is that Mr. Murphy was not a party to these proceedings and as they were settled, that there is no judgment making any findings that could be relevant to Mr. Murphy's claim.

57. As far as Mr. Murphy's complaint can be understood, it amounts to a suggestion that Solicitor X had behaved inappropriately in relation to the claim of Mr. McMahon and consequently, despite the fact that the matter did not proceed to judgment, she ought to be regarded in the context of Mr. Murphy's claims as a discredited witness. Mr. Murphy appears to suggest that had he known this at the time of the trial before MacGrath J., it would have formed the basis for the cross-examination of some of the Society's witnesses, and in particular Mr. Elliott.

58. Assuming for a moment that these allegations against Solicitor X, and they appear to be no more than that, could have a bearing on Mr. Murphy's case, it is incumbent on Mr. Murphy to demonstrate how that arises. At para. 58 of his first affidavit, Mr. Murphy avers that *"at the date of the making of the consent order the appellant had some information in relation to the conduct of Solicitor X in what the appellant will refer to from here on as the McMahon case (Record Number 2011/569JR). However he did not have enough information to substantiate his claim."*

59. There are a number of features about this averment which are quite unsatisfactory. The first is that Mr. Murphy is clearly giving hearsay evidence in his affidavit on the basis of something that was conveyed to him by an unnamed third party concerning Solicitor X. He does not however identify the source or when *"some information"* was given to him, other than it was clearly prior to December 2017.

60. Hearsay evidence is in general inadmissible save in interlocutory applications as provided for in O. 40, r. 8 of the RSC:

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted…"*

61. In *F & C Reit Property Asset Management Plc v Friends First Managed Pension Funds Limited* [2017] IEHC 383, the High Court (Murphy J.) in considering this rule observed as follows:

> *"23. Order 40, rule 4 does not give an automatic entitlement to a party to rely on hearsay evidence but rather gives the Court discretion to allow the admission of hearsay evidence. It appears to the Court that the rationale for creating an exception to the general requirement that applications should be evidence based, is that in urgent applications which are truly interlocutory in nature (within the meaning of s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877) where there may be a requirement to protect the status quo pending the hearing of an action, it may not be possible to garner all appropriate evidence immediately, and so, the rule gives the Court a discretion to admit hearsay.*
>
> *24. The admission of hearsay even in interlocutory applications should be the exception and not the rule. Order 40, rule 4 does not, in the Court's view, grant a general dispensation from the normal rules of evidence but rather permits the Court in appropriate circumstances to allow hearsay evidence."*

62. Mr. Murphy in his affidavit does not state the grounds of his belief or why his informant was not in a position to swear an affidavit. Accordingly, it seems to me that Mr. Murphy's averments in this respect should be disregarded entirely, even if this application could be regarded as interlocutory in nature, which in itself is doubtful.

63. Further, the information referred to by Mr. Murphy is not information that he alleges was somehow concealed from him by the Society. Mr. Murphy does not identify the information that he had before December 2017 or how this information was not *"enough information to substantiate his claim."* There is also nothing to suggest that the information which apparently subsequently came to Mr. Murphy's attention could not on reasonable enquiry have been obtained by him at an earlier juncture. It is notable in that regard that Mr. Murphy applied to the Law Society for discovery of documents in relation to the McMahon proceedings but did not pursue it by way of motion. Instead, it would appear that on the 27th May, 2022, Mr. Murphy applied to the President of the High Court for liberty to take up the transcript of the hearing in the McMahon case which, as previously noted, settled before conclusion.

64. Mr. Murphy does not explain why he could not have taken precisely this step years earlier, particularly when he was on notice, according to himself, of relevant information prior to December 2017. It is not open to a party to appeal on the basis of new evidence where that evidence could with reasonable diligence have been obtained for the original hearing - see *Murphy v Minister for Defence* [1991] 2 IR 161 at 164.

65. I am therefore satisfied that Mr Murphy has not identified any arguable ground of appeal under this heading and, moreover, has entirely failed to explain first the delay in seeking the evidence he now appears to wish to deploy and second the delay in making this application.

The Society's policy of not interfering with matters the subject of court proceedings

66. Mr. Murphy alleges that one of the matters that led to the strike-off proceedings against him was a complaint by John and Patrick Arthur who appear to have been in a partnership with their brother Joseph Arthur in relation to the acquisition of certain development lands. That subsequently became the subject matter of litigation between the Arthur brothers. The complaint against Mr. Murphy by the Arthurs was investigated while those court proceedings were in being. Mr. Murphy alleges that in an unrelated case involving a Mr. Sean McAndrew, Ms. Kirwan for the Society wrote to Mr. McAndrew advising him that it was the Society's policy not to investigate complaints that were the subject of litigation before the courts.

67. Accordingly, Mr. Murphy claims that the investigation into him of the Arthurs' complaints breached the Society's own policy as articulated by Ms. Kirwan. In his affidavit, Mr. Murphy says that he believes that in the unlikely event that the Society's policy breach would not give rise to a successful claim for negligence and/or misfeasance in public office on its own, it would give rise to such claim taken in conjunction with the Healy matter, the O'Dowd matter and his complaint about the attachment and committal proceedings authorisation.

68. The first point to be noted here is that Mr. Murphy has not identified in his affidavit when he became aware of the policy of the Law Society and in particular of the McAndrew complaint. The onus is on him to do so. In any event, it appears that Ms. Kirwan, who gave evidence at the plenary trial, was expressly cross-examined about this issue so that it was clearly before MacGrath J.

69. It is also difficult to see how this could constitute a new claim by Mr. Murphy in the light of the finding of MacGrath J. concerning the Arthur brothers' complaint in the Principal Judgment at para. 401:

> *"In the Arthur matter, Mr. Murphy accepted the findings of the Tribunal. The order of the President of the High Court is unchallenged. While many complaints are made about the handling of the Arthur complaint, it seems to me that the reality of the situation is that a principal cause for the difficulties which Mr. Murphy encountered was his failure to engage with correspondence in a timely manner and to attend meetings, when his case could have been put and points raised at relevant times."*

This accordingly is an issue that has been considered and ruled upon by the trial judge and could not form an arguable basis for a new complaint by Mr. Murphy.

70. As with the previous matters, there is again no explanation for the very long delay in bringing this matter forward.

Meeting of the Registrar's Committee of the 23rd February 2005

71. Mr. Murphy's evidence in this respect is that he had faxed a letter to the Law Society the day before the meeting was due to take place confirming that he was withdrawing his application for a practising certificate. Ms. Kirwan in her witness statement said that there was no record of the fax having been received. She repeated this in her oral evidence. Since the hearing of the plenary proceedings, Mr. Murphy says that he *"received old files from Mr. Ray Hennessey solicitor"* who had acted for him in the past. Mr. Murphy says that he found in those files a fax confirmation slip confirming that he had sent the fax to the Law Society on the 22nd February, 2005 and that this proves that Ms. Kirwan's evidence was incorrect. He goes on to say that if he had had this slip, it would have formed part of his amended

points of claim and would have become a significant part of his evidence and the cross-examination of Ms. Kirwan.

72. However, Mr. Murphy entirely fails to identify when he received these documents from Mr. Hennessey or the circumstances in which he received them. For example, he does not state whether he asked Mr. Hennessey for these documents and if so, why he asked him and when he asked him. There is absolutely nothing to suggest that these documents were not available to Mr. Murphy at all relevant times from his own solicitor. The fact that he discovered them after the event, even if they could be classed as relevant, could not form a basis for an extension of time.

73. Here again, the delay is entirely unexplained and as in previous instances, the onus is on Mr. Murphy to give that explanation. However, all of this is *nihil ad rem* in the light of the finding of MacGrath J. in the re-entry judgment [2022] IEHC 742 at para. 240:

> *"Accepting that the fax was marked received in the offices of the Society from the previous evening, I am not satisfied that the evidence leads to the conclusion that, on the balance of probabilities, that Ms. Kirwan was aware of its receipt when she attended the meeting on the following day."*

The Arthur Complaint

74. In his grounding affidavit, Mr. Murphy avers that in September 2021, he met Mr. Brian Gallivan whose company acquired the lands the subject matter of the dispute between the Arthur brothers. The general thrust of Mr. Murphy's complaint under this heading is that the Arthur brothers and their solicitor acted *mala fides* in making the complaint against Mr. Murphy and did so for some ulterior purpose. Mr. Murphy also alleges that the evidence given by the solicitor in question to the SDT was knowingly untrue. Mr. Murphy appears to

suggest that insofar as the Society is concerned, its involvement lies in *"allowing itself to be misled"* and it should have made a variety of other enquiries of the complainants before investigating the complaint against Mr. Murphy.

75. Here again, Mr. Murphy does not explain what led him to make an enquiry of Mr. Gallivan in September 2021 and why such enquiry, if important, could not have been made at an earlier juncture before the plenary trial. Even on this timescale, Mr. Murphy does not explain in any way why he waited from September 2021 until May 2023 to seek to extend the time for appealing based on this new information. It is in any event difficult to see how this information, which was not even allegedly withheld from him by the Society, could form the basis for some claim by him against the Society.

Subject Access Request in 2014/2015

76. Mr. Murphy made a subject access request in 2014 and received documents from the Society on foot of same. In his affidavit, he says that he realised in 2020 that he had not received significant documentation which he ought to have received originally. If this documentation is relevant to any claim Mr. Murphy says he wishes to pursue against the Society, he has again failed to explain why he waited until 2023 to do so. He places particular emphasis on a complaint of Patrick and Mary O'Sullivan which was not given to him in 2015. However he describes this matter as *"not hugely significant"* but rather going to credibility of the Society's witnesses.

77. Here again I am not satisfied that an arguable ground of appeal has been demonstrated and, in any event, as before the delay is unexplained.

Draft Affidavit of James Murnane

78. In his grounding affidavit, Mr. Murphy exhibits a draft unsworn affidavit of James Murnane. As such, it has no evidential value, and Mr. Murphy has not explained why it remains unsworn.

79. He claims to have received information from Mr. Murnane about a complaint about Mr. Murphy made by Mr. Murnane's former solicitor. Mr. Murphy then purports to outline what the evidence of Mr. Murnane would be regarding this complaint. As before, this is purely hearsay and inadmissible for the reasons already explained. It is of no value and cannot form the basis for an arguable ground of appeal. In any event, it does not stem from anything that was, according to Mr. Murphy, withheld from him by the Society and to compound matters, there is no explanation from Mr. Murphy as to when this information from Mr. Murnane was received or why it was not available at an earlier juncture.

Mr. Murphy's Supplemental Affidavit

80. In a supplemental affidavit sworn by Mr. Murphy, he has added to his list of new issues that he seeks to litigate as follows.

Frank Fallon complaint

81. In this affidavit, Mr. Murphy suggests that Mr. Fallon's complaints against him were not made *bona fide* for some unexplained reason. Mr. Murphy suggests that the Society should have known about this and not included Mr. Fallon's complaints as a basis for the s. 18 proceedings. Mr. Murphy avers that details of how he came upon documents relevant to this matter are set out in his affidavit of the 28th September, 2021. He does not specify when he came upon these documents other than it was clearly before that date.

82. That affidavit appears to disclose that these papers were discovered when an office occupied by Mr. Murphy's former solicitors was being cleared out. That being so, it is clear that these are documents which ought with reasonable diligence have been available to Mr. Murphy at the relevant time as part of his plenary proceedings and an attempt to rely on them now would, as in other similar instances, be contrary to the rule in *Henderson v Henderson*. Here again also, there is no explanation why Mr. Murphy waited from September 2021 at the latest until May 2023 to move this application.

The Council Regulations

83. In his supplemental affidavit, Mr. Murphy avers that the Society in moving against him relied upon various internal Council Regulations but that these were never made available to him and this was, *inter alia*, a breach of the discovery order. It should be noted that neither during the course of the plenary proceedings nor the motion to review did Mr. Murphy seek any relief based on a failure to comply with an order for discovery by the Society. It emerged during the hearing of this application that while these Regulations are not published on the Society's website, they are freely available to any solicitor who asks to see them. No such request appears to have been made at any time by Mr. Murphy.

84. It is in any event difficult to see how this could give rise to any arguable ground of appeal in the light of the finding by the High Court in the Review Judgment at para. 93:

> *"The important fact is that when the section 18 proceedings came before the Court they were addressed by all parties without issue being taken in relation to the procedures employed by the Society at that time."*

In his affidavit, Mr. Murphy volunteers no information as to how or when he first became aware of the Regulations. In his affidavit, he simply says that the Society repeatedly referred

to the Regulations during the course of the trial but did not produce them and it follows that Mr. Murphy was aware of their existence from at least that time. Yet no explanation for the subsequent delay in moving this application is offered.

Instructions to A&L Goodbody from Solicitor X

85. With respect to Mr. Murphy, his complaint under this heading is difficult to fathom. He appears to express dissatisfaction about the manner in which a new committee for the ward, Solicitor X, was appointed in June 2023 and he questions the status of the instructions to A&L Goodbody in that respect. How that can have any conceivable relevance to the issues that arise in this application is quite unexplained by Mr. Murphy. Mr. Murphy is appealing against a case management order made in 2017 on the primary basis that he would not have consented to it had documents and information not been concealed from him by the Society. Events that occurred in 2023 can have no conceivable bearing on this issue.

Affidavit of Tim Healy

86. The affidavit referred to here was sworn by Mr. Healy on the 8th June, 2020. This affidavit does little more than refer to the Healy letter and advances matters no further than those already fully canvassed above in relation to the Tim Healy matter.

Summary and Conclusions

87. In my judgment, this application is wholly misconceived. Mr. Murphy seeks to appeal the consent order of the 11th December, 2017 in order to amend his statement of claim in proceedings that have been fully litigated to conclusion in the High Court. Thus stated, the premise of the application is on its face untenable. The ultimate objective is, as Mr. Murphy concedes, to re-litigate the entire proceedings by introducing issues that are allegedly new and thus set at naught the Principal Judgment and the Review Judgment delivered after years

of litigation. This would amount to a collateral attack on final judgments of the High Court, which are in any event under appeal. The objective Mr. Murphy seeks to advance could only ever come about if those appeals succeed, but to attempt to amend his pleadings before that happens is to put the cart before the horse. It is an abuse of process.

88. Even were that not so, Mr. Murphy has failed to establish the threshold of arguability that he must surmount after such inordinate delay before an extension of time to appeal could be granted. He has failed by a significant margin to overcome that hurdle. Further, the recent judgments of the Supreme Court in these proceedings make clear that in *Goode Concrete* type applications which are premised on the discovery of new evidence post-trial, there is a requirement to explain delay and provide a good reason why the application was not moved sooner.

89. Delay in this context has to be measured against the yardstick of the tight time limits prescribed by the Rules for appealing, here 28 days. In a case such as the present where the delay concerned stretches over years, the appellant carries a heavy burden of explaining the delay. The arguability bar is correspondingly high. The delay in this case could not be characterised as anything other than very lengthy. I am not satisfied that Mr. Murphy has advanced anything approaching a good reason for that delay but even if he had, as I have already explained, the nature of the application is such that it was doomed to failure from the outset.

90. It is also important to note that the order Mr. Murphy now seeks to appeal was made with his consent. The scope for appealing such an order is necessarily very limited and would in the normal way be confined to circumstances where the appellant was induced by fraud or some other vitiating factor to give consent. While Mr. Murphy does in effect allege fraud against the Society in relation to some of the documents and evidence he says were

wrongly concealed from him, in other instances the evidence relied upon came to his attention without any involvement on the part of the Society. This could not, in my view, provide a basis for arguing that his consent was not validly given.

91. I would therefore dismiss this application.

92. My provisional view on costs is that as the Society has been entirely successful, it should be entitled to the costs of this application. If Mr. Murphy contends otherwise, he will have a period of 21 days from the date of this judgment to deliver written submissions not exceeding 1,000 words and the Society will have a similar period to respond likewise. In default of the receipt of such submissions, an order in the terms proposed will be made.

93. As this judgment is delivered electronically, Faherty and Meenan JJ. have authorised me to record their agreement with it.