THE HIGH COURT

[2004 No. 19212P]

[2021] IEHC 148

IN THE MATTER OF JOHN COLM MURPHY A SOLICITOR FORMERLY CARRYING ON PRACTICE UNDER THE STYLE OF COLM MURPHY AND COMPANY SOLICITORS AND IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 1994

BETWEEN

JOHN COLM MURPHY

APPLICANT

AND

LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 10th day of February, 2021.

1. This is an application for an extension of time within which to file a notice of appeal to set aside the finding of the Solicitors Disciplinary Tribunal (hereafter "*the Tribunal*") made against the applicant on 28th September, 1999 in proceedings entitled "In the Solicitors Disciplinary Tribunal and in the Matter of the Law Society of Ireland and John Colm Murphy Respondent Solicitors Disciplinary Tribunal Record No. 5306/DP156". The application is brought by notice of motion dated 13th July, 2020 pursuant to O.84 C(1)(5), O. 122, r. 7 and O.53, r. 9(1) of the Rules of the Superior Courts. The Tribunal made a finding of misconduct - that the applicant on this application, Mr. Murphy, failed to file an accountant's report for his Killarney practice in respect of the year ending 31st March, 1997 in breach of Regulation 21(1) of the Solicitors Accounts Regulations No. 2 of 1984, in a timely manner or at all. The Tribunal made an order under s. 7(9) of the Solicitors (Amendment) Act, 1960 ("*the Act of 1960*"), as substituted and amended by s. 17 of the Solicitors (Amendment) Act, 1994 ("*the Act of 1994*") that Mr. Murphy be censured and that he pay the respondent's costs. On 7th March, 2000 the matter was reported to the President of the High Court in accordance with statutory requirements.

2. This application is made by way of motion within proceedings *entitled Colm Murphy v. The Law Society of Ireland*, Record No. 2004/19212P (hereinafter referred to as "*the plenary proceedings*"), in which the applicant claimed damages against the respondent, *inter alia*, for misfeasance of public office, breach of duty, negligence and defamation. It was alleged, *inter alia*, that the respondent had instituted and prosecuted disciplinary proceedings in an unlawful manner. In its judgment of 31st July, 2019, the court dismissed the claim for damages. One of the disciplinary proceedings about which complaint was made in the plenary proceedings and which gave rise to the abovementioned finding of misconduct related to matters arising from the applicant's takeover of a Killarney practice formerly owned by Mr. Tim Healy, in 1996. Issues relating to the takeover of the Healy practice ("*the Healy matter*") were dealt with at para. 11.2 *et seq*. of the judgment of 31st July, 2019.

3. A number of preliminary matters arise and may be disposed of at this stage:

    a. While this application ought more properly to have been brought by way of originating notice of motion under the Solicitors Acts, no significant objection is taken to the failure to do so by the respondent. I shall deal with the application,

therefore, as if it had been brought in an appropriate manner on the understanding that necessary corrective administrative steps are taken.

b. Reliance is placed by the respondent on the undertaking given by the applicant to the High Court on the 1st March, 2011 not to institute any legal proceedings, whether by way of fresh proceedings or appeal from previous proceedings or to attempt to reopen previous proceedings, pending the determination of the plenary proceedings. The respondent rejects any suggestion that the undertaking does not continue. The applicant disputes this and points to the fact that on the 8th July, 2020, the court granted him liberty to make this application. He emphasises the circumstances surrounding the undertaking and submits that what occurred in the period after June, 2011 is relevant to the delay in having the re-entry of the strike off proceedings heard and to the motion generally. The court also notes that in para. 14 of the draft affidavit prepared for the appeal, in the event that this application is successful, the applicant states that had the hearing proceeded before Hanna J., in all probability the issues that give rise to this appeal would have emerged at that time and the application to extend the time could have been made earlier. Further, he contends that the application is made pursuant to the order of this court of 8th July, 2020. Having considered the submissions of the parties on this issue, apart from the fact that the on 8th July, 2020 the court acceded to the applicant's application to bring this motion, I am satisfied that it is in the interests of justice to permit the applicant to make this application, notwithstanding the undertaking. To the extent that it may be necessary, the Court grants Mr. Murphy liberty to make this application.

c. Within the notice of motion, the applicant seeks injunctive relief to restrain the respondent from repeating an assertion that two findings of misconduct were made against him by the Tribunal on 28th September, 1999, when only one such finding was made. The applicant has documented a number of occasions when the respondent referred to two findings. He complains that the respondent repeated this assertion to courts and to third parties over a period of 10 years, and no explanation has been provided by the respondent about this. He seeks an order that the respondent do not maintain before any Tribunal, the High Court or to any third party that a finding of misconduct was made in respect of the allegation set out in para. 17(b) of Mr. Connolly's affidavit sworn on 16th December, 1998 in support of the application to the Tribunal. The respondent accepts that there was only one finding and that past references to two findings of misconduct were made in error. In the circumstances, the court does not consider it necessary to determine whether (a) it has jurisdiction to make such order on this application and (b) if so, whether it is appropriate to do so in the circumstances.

The Healy Matter

4. In the plenary proceedings the applicant alleged that he received inadequate support from the respondent when he took over Mr. Healy's practice in 1996. He also alleged that the respondent had improperly placed a requirement on him to file an accountant's report

in respect of Mr. Healy's practice covering a period of time which was not his responsibility and in respect of which a similar requirement was made of Mr. Healy; and that he was being made responsible for Mr. Healy's liabilities.

5. The applicant's failure to complete and file the accounts for the period in question was referred to the Compensation Fund Committee ("*the Committee*") which, at its meeting on 17th July, 1998, referred the matter to the Tribunal. The application to the Tribunal commenced on 16th December, 1998 and as the court noted in its judgment in the plenary proceedings, a qualified accountant's report, insofar as it could be completed, was filed by the applicant's accountant, Mr. O'Reilly, on the applicant's behalf on 12th January, 1999. The disciplinary proceedings were concluded on 28th September, 1999 when the finding of misconduct was made. The decision of the Tribunal was not appealed.

6. The applicant contends that in April, 2018 during the course of his cross examination in the plenary proceedings that he became aware of a letter dated 9th December, 1997, sent by the respondent to Mr. Healy. Mr. Healy was informed and advised in that letter that the last accountant's report filed with the respondent covered the financial year ended 31st August, 1995 and that *"[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"* . As recorded at para. 109 of the court's judgment, the applicant believes that if he had been given a copy of that letter it would have been of great assistance to him when responding to the misconduct charge. He maintained in the plenary proceedings that this was an important letter which had been withheld from him and the Tribunal and that the Tribunal finding may not have been made against him had the complete picture been known to him and to the Tribunal at that time. His contention is that the letter amounted to an effective acknowledgement by the respondent that Mr. Healy remained responsible for the filing of an accountant's report, while at the same time it sought to impose responsibility on him to discharge Mr. Healy's liabilities.

7. In its judgment in the plenary proceedings the court concluded that although it was possible that Mr. Murphy received a copy of the letter and that while correspondence to him at that time ought to have put him on notice of its existence, on the totality of the evidence, the court was not satisfied, as a matter of probability, that Mr. Murphy received it. The court also observed at para. 344 of its judgment that it was not clear that the respondent was aware, or ought to have been aware, that Mr. Murphy had not received a copy of the letter. Further, at para. 347, the court concluded that it was not satisfied that a decision had been taken by the respondent not to provide the applicant with a copy of the letter, that it was reckless in failing to do so or that there was an ulterior motive for the omission.

Appeals from findings of misconduct by the Tribunal

8. Section 7(11) of the Act of 1960, as amended by s. 17 of the Act of 1994, which makes provision for an appeal from a decision of the Tribunal made under s. 7(9) provides:-

> *"(11) A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under subsection (9) of this section may, within the period*

of 21 days beginning on the date of the due service of the order, appeal to the High Court to rescind or vary the order in whole or in part, and the Court on hearing such an appeal may—

(i) rescind or vary the order, or

(ii) confirm that it was proper for the Disciplinary Tribunal to make the order."

9. The applicant submits that the court has jurisdiction to extend the time under the Rules of the Superior Courts and that it should be exercised in accordance with the principles outlined by the Supreme Court in *Éire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] 1 I.R. 170, as developed. It will be recalled that in *Éire Continental* the Supreme Court referred to three criteria:

(i) Whether the applicant formed a *bona fide* intention to appeal within the time limit;

(ii) Whether there was a mistake (a mere procedural error not being sufficient); and

(iii) Whether there was an arguable ground of appeal.

10. The applicant accepts that he did not form an intention to appeal within the 21 day period and he also confirms that there was no element of mistake on his part. He submits that he has arguable grounds of appeal and as a matter of justice time should be enlarged because evidence was concealed from him and from the Tribunal.

11. The respondent has raised an issue concerning whether the time limited for bringing the appeal is capable of being extended. It is suggested that because the time limit is provided for by primary legislation it does not arise for consideration under O. 84C RSC and that it thus follows that the applicant is now precluded from appealing. The court has been referred to *Curran v. Solicitors Disciplinary Tribunal* [2017] IEHC 2 and *Law Society of Ireland v. Tobin* [2016] IECA 26 in this regard. In the alternative and given the state of jurisprudence regarding the statutory time limits in respect of the appeal, the respondent contends that if a discretion to extend time exists, this is not an appropriate case in which it ought to be exercised in favour of so doing. At para. 20 of its submissions, however, the respondent concedes that while the jurisdictional position remains unclear, for the purpose of this appeal it is prepared to accept that, in principle, the court has jurisdiction to do so. In the circumstances and without so determining, for the purposes of this appeal, the court proceeds on the basis that such jurisdiction arises.

12. The applicant contends that because of the emergence of new evidence during the plenary proceedings, in the interests of justice, he ought now be entitled to an extension of time within which to appeal. Further, since the conclusion of the plenary proceedings he has been in contact with Mr. Healy and he contends that information supplied to him by Mr. Healy also justifies the application at this time. He submits that the necessity to appeal the finding at this remove is because this was the first finding made by the Tribunal which was adverse to him, that it has been used repeatedly against him and used in an inappropriate manner with reference being made to two, rather than one

finding. It was referred to by the respondent as part of his disciplinary history on the application to have his name removed from the roll of solicitors in 2009. Those proceedings are the subject of a re-entry application.

13. The applicant contends that the respondent has failed to comply with its duty as an impartial objective regulator, to disclose the letter of the 9th December, 1997 to the applicant or to the Tribunal. He submits that this failure resulted in a wrongful finding of professional misconduct against him and that the respondent, in compliance with its obligations as impartial and objective regulator, ought to be making this application. He wrote to the solicitors for the respondent on 11th February, 2020 requesting that they make the necessary application to vacate the finding. The respondent does not accept that it has failed to set the record straight or that there is a mechanism under the Solicitors Act by which it could apply to rectify a finding of the Tribunal. Apart from the absence of such a mechanism, it is submitted that the appropriate party to file an appeal was the applicant and that he failed to do so within the requisite time period or for a considerable time thereafter.

Grounding Affidavits

14. The application is grounded on the affidavit of the applicant sworn on the 12th May, 2020, to which he has exhibited a notice of motion and draft affidavit which it is intended to issue and file in the event that this application is successful. He relies also on an affidavit sworn by Mr. Tim Healy on 8th June, 2020. The respondent has replied by way of affidavit sworn by Mr. John Elliot on 24th September, 2020, in response to which the applicant has filed further affidavits sworn by him and by his accountant, Mr. Kevin O'Reilly, on 5th October, 2020. Written submissions have also been furnished to the court.

15. In his affidavit of 12th May, 2020, the applicant avers that:

    a. The application is made on the basis that new evidence has recently become available which was withheld from the Tribunal and from him during the complaint process and during the hearing before the Tribunal in 1999. He maintains that had this information been available to the Tribunal, it would have provided him with a full defence to the allegation of professional misconduct. This information has become available to him in two ways. First, during the course of the evidence in the plenary proceedings. Second, subsequent to the plenary proceedings, he was contacted by Mr. Healy who furnished him with additional information that was material to the complaint.

    b. It was at all times his position, before the Committee, the Tribunal and the Court, that Mr. Healy was responsible for accounts of the Killarney practice up to the 15th August, 1996 and that he was responsible thereafter.

    c. The standard of proof required to be met on a misconduct charge is that it must be proved beyond reasonable doubt. Had the Tribunal known of the existence of the letter he would have had a complete defence to the charge.

d. There was nondisclosure by the respondent to him and to the Tribunal. The letter was never disclosed in the affidavits sworn by Mr. Connolly in connection with the disciplinary proceedings. Extensive discovery, interrogatories and a data access request were made in respect of his dispute with the respondent. It was not until the fourth day of the hearing and for the first time that he was shown the letter to Mr. Healy in which the respondent was holding Mr. Healy personally responsible for the accounts up to the date of the closure of his practice on the 15th August, 1996.

e. In his evidence in the plenary proceedings, Mr. Connolly, who was the Registrar of Solicitors and Secretary of the Compensation Fund Committee of the respondent between 9th April, 1990 up to his retirement in April, 2004, finally accepted that the letter to the applicant of 8th June, 1988 should have read "*eight months ending 31st March, 1997*". The applicant had prepared accounts for the eight-month period ending 31st March, 1997 but the respondent insisted that he was responsible for an accounting period that included the four months prior to him taking over the practice. That the accounts for the period up to the 16th August, 1996 were Mr. Healy's responsibility was effectively conceded by the respondent during the course of the trial in the plenary proceedings. While the respondent knew that responsibility lay with Mr. Healy for those accounts, for reasons best known to the respondent, it made him responsible for that period and did not inform him of the contents of the letter to Mr. Healy. If the period of accounts for which he was sought to be held responsible had stated eight months from August, 1996 to 31st March, 1997, there would not have been a difficulty and the charge of professional misconduct would not have arisen. The respondent must have known that he had such defence.

f. Since the hearing in the plenary proceedings, he made contact with Mr. Healy. The opportunity for the meeting arose as a result of a conversation he had with a third party, who informed Mr. Murphy that the person in charge of that person's nursing support was Mr. Healy. It was the first time he had spoken with Mr. Healy in almost 24 years.

16. Mr. Tim Healy in his affidavit avers that in March, 2020 his path crossed with Mr. Murphy's by chance. Mr. Healy states his belief that he was responsible for the practice accounts up to August, 1996, that he never denied this and that the respondent was aware that he was responsible. He recalls receiving the letter of the 9th December, 1997. While he wrote a holding letter in response, he never dealt with the substantive issues concerning the accounts and run off cover which were raised in the letter. He did not provide the accounts that the respondent was seeking, nor did he obtain run off insurance cover. Mr. Healy left the jurisdiction and started a new business. Sometime after January, 1998, the respondent took disciplinary proceedings against him in respect of the breach of an undertaking which he had given to a financial institution. A finding of misconduct was made against him and a sanction imposed. He believes that this occurred in 2002. He avers that the respondent had at all times informed him that he was responsible for the accounts up to the middle of August, 1996, that he should provide runoff cover, that

he was responsible for any liabilities in respect of the practice up until the middle of August, 1996 and that it was on this basis that the findings of misconduct were made against him.

Respondent's Affidavit

17. In his affidavit in response, Mr. John Elliot, the Registrar of Solicitors and the Director of Regulation of the respondent, deposes as follows:

    a. It is accepted that it was incorrect to refer to two findings of misconduct by the Tribunal on previous occasions but maintains that a *bona fide* error was made. The Tribunal order referred to "*allegations*". Mr. Connolly gave evidence in the plenary proceedings accepting that there was in fact one finding.

    b. The applicant has failed to demonstrate a proper basis for an extension of time, even if there is jurisdiction to do so. The application has been brought more than 20 years after the finding of the Tribunal. The applicant did not form an intention to appeal within the permitted 21 day period, nor was he under a mistake concerning his right to appeal. During this period the applicant engaged in litigation with the Society, yet no appeal was brought against this finding. It is not accepted that the applicant has arguable grounds for appeal. It is not accepted that the applicant would have had a complete defence to the misconduct charge if he had known that correspondence had issued to Mr. Healy seeking closing accounts up to the date of the takeover of the practice. This is particularly so in circumstances where the applicant had filed no report despite assurances. It would require very unusual features, not present in this case, for a court to accede to an application to extend time to appeal given the passage of time. Any frailty in the finding, if there is one, could only be regarded as being of the most technical nature and not such as to cause injustice or give rise to an arguable ground for an appeal. The threshold of arguability rises with the passage of time and there is an insufficient basis for the court to find in favour of the applicant.

    c. Mr. Connolly's affidavit grounding the application to the Tribunal demonstrates that the applicant was referred to the Tribunal in circumstances where no report was filed, despite assurances from him that it would be. Correspondence from that time shows that Mr. Connolly wrote to the applicant on 28th October, 1997 advising him that he was in arrears in filing an accountant's report for the year ended 31st March, 1997. The applicant responded on 3rd November, 1997 indicating that he would contact his accountant and instruct him to prepare the relevant report. By letter of 19th March, 1998 the applicant stated that he had sent a reminder to his accountant to bring his accounts up to date. The respondent again wrote to him on 24th March, 1998. This was responded to by the Mr. O'Reilly on 24th March, 1998 indicating that his firm were in the process of completing the applicant's financial statements for the year ended 31st March, 1997 and that they should be completed and furnished to the Society in early April, 1998. The accounts of the Kenmare practice were furnished on 20th April, 1998. The accounts in respect of the Killarney practice were not furnished. The applicant informed the Committee on

15th May, 1998 that there were some anomalies in the Killarney office to be dealt with before the report could be filed. The respondent again wrote to the applicant on 8th June, 1998 requesting the filing of the accountant's report for the year ended 31st March, 1997 in respect of the Killarney practice. By letter of 16th June, 1998, the applicant advised that the outstanding report would be filed before the end of the following week; it was not. The applicant failed to attend the meeting of the Committee on 17th July, 1998 to which the matter had been adjourned peremptorily. By letter dated 16th July, 1998, the applicant advised he would be unable to attend the meeting and that his accountant's report would be filed by the end of the following week. A qualified accountant's report was filed by Mr. O'Reilly on 12th January, 1999 - the qualification being that the opening balances brought forward per Mr. Healy's client ledger cards did not reflect the bank balance as transferred to Mr. Murphy's client bank accounts. The accountants had been unable to satisfy themselves as to whether any client was likely to suffer a loss in the period under review. Mr. Elliot also points out that, while accepting that the letter should have read "*the eight months ended 31st March 1997*", Mr. Connolly nevertheless also gave evidence that the accounts regulations required that one accountant's report be filed by the accountant covering all of the applicant's practices within the same accounting year.

d. Mr. Connolly gave evidence that had a qualified report been delivered, it would have been sufficient for compliance.

e. When giving evidence in the plenary proceedings, Mr. O'Reilly stated that he could not really remember whether the report he was being requested to file was from March to March, or from August to March. His evidence was consistent with the report being for the period from August to the end of March. In evidence he confirmed that the report which was ultimately filed was in respect of the period August to 31st March and that difficulty arose in working out opening balances from the date the applicant took over the practice. It is not the case, as the evidence in the plenary proceedings demonstrated, that the applicant was precluded from filing a report arising from the difficulties in taking over the Healy practice. It was possible to work backwards to prepare the report and, following that work, it was also possible to file a qualified accountant's report which met the statutory filing requirement. There is no evidence that the "*sticking point*" was whether a report for 12 or eight months would be filed. No report was in fact filed and when it was filed it was undoubtedly the case that it not been filed in a timely manner. Any suggestion by the applicant that the accounts for the eight month period had been prepared is inconsistent with the evidence given by Mr. O'Reilly in the plenary proceedings

f. Mr. O'Reilly was not called to give evidence at the Tribunal. In evidence in the plenary proceedings he accepted that had he been asked to swear an affidavit or attend to give evidence he would have done so. It is suggested that it appears from Mr. O'Reilly's evidence in the plenary proceedings that any evidence he might

have given to the Tribunal would not have been to confirm that the accounts for the eight-month period were prepared and ready to be submitted but were delayed only by the insistence of the respondent that accounts for a 12 month period be submitted. On the contrary Mr. O'Reilly's evidence was that delays and difficulties were encountered in preparing the accounts for the eight month period, that this was the timeframe he was working with and that when the report was belatedly filed it was for that period. Mr. O'Reilly's evidence is not therefore consistent with the assertion of the applicant in his grounding affidavit that *"…if the period of accounts for which I was responsible had stated the eight-month period from August 1996 to 31st March, 1997 I would have no difficulty and there would have been no charge against me before the Tribunal as the accounts for the eight-month period had been prepared*" or that the charge before the Tribunal was only technically incorrect.

g. The respondent objects to any attempt by the applicant to use the extension of time motion as a means of attacking the final and conclusive judgment of the court in the plenary proceedings. Mr. Elliot emphasises the court's conclusion that it was not satisfied that the evidence established that a decision was taken by the respondent not to provide the applicant with a copy of the letter or that it was reckless in failing to do so.

h. The application to strike the applicant from the roll of solicitors was not made on foot of the findings in the Healy matter but arose in the context of an application in proceedings [REDACTED]. By that time, the finding in the Healy matter was the most historic of the findings of misconduct in the applicant's disciplinary history.

i. The respondent is at a disadvantage in that transcripts of the proceedings have not been exhibited and attempts to locate transcripts from the Tribunal have been unsuccessful. This illustrates the difficulties and prejudice arising from an attempt to revisit matters concluded more than two decades previously.

j. The applicant did not make enquiry about the correspondence with Mr. Healy, there being reference to it in correspondence with the applicant. There was nothing precluding the applicant from contacting Mr. Healy.

Affidavits in response to Mr. Elliot

18. In an affidavit sworn on the 5th October, 2020, Mr. O'Reilly refers to his witness statement in the plenary proceedings. He avers that he has no doubt that had the respondent stated from the outset that it was seeking accounts for the eight month period, these would have been completed immediately and there would have been no dispute. The difficulty was that he was asked to prepare accounts that included the period from the 1st April, 1996 to the 15th August, 1996, a period prior to the applicant taking over the Healy practice. This is evidenced by the fact that in his correspondence with Mr. Connolly he referred to difficulties with Mr. Healy's accounts. He had worked as the applicant's accountant since 1994 and the applicant's staff had been trained in the safeguard accounting system in the Kenmare office. A separate account, using the same

system, operated in the Killarney practice. He was required to include in the report the period from 1st April, 1996 to the 15th August, 1996, a period over which the applicant had no control and for which complete records were unavailable. The only manner in which this could be achieved was to start with the balances as at 31st March, 1997 and work backwards to the time when the applicant took over Mr. Healy's practice, an exercise which he describes as being straightforward. However, he avers that it was virtually impossible for the period prior to 16th August, 1996 because of the lack of records. His discussions with Mr. Connolly and his correspondence all referred to Mr. Healy's accounts, which he says were obviously for the period up to 16th August, 1996. The respondent eventually agreed to accept a qualified report. The qualification was that he was not standing over the opening balances as at the 16th August, 1996. Mr. O'Reilly accepts that Mr. Elliot is correct in saying that the account as eventually submitted was for the eight-month period, but he avers that this is not to suggest that the accounts period that he had been instructed by Mr. Murphy to work on and on which the respondent had been insisting, was that eight-month period. He was asked to prepare accounts for the year ending 31st March, 1997. He avers that he explained the difficulties to the respondent.

19. The applicant, in an affidavit sworn on the 5th October, 2020 raises a further issue concerning the authority of the Committee to make application to the Tribunal. This is addressed at para. 52 *et seq* below. He says that no explanation has been advanced as to why the letter of 9th December, 1997 was not provided to him under his data access request, or why it was not included as an exhibit to Mr. Connolly's affidavit to the Tribunal or to witness statements. The finding of misconduct is serious and affects a solicitor's professional standing, good name and professional reputation.

20. Mr. Murphy refers to letters which he wrote to Mr. Connolly on 16th June, 1998 and 16th July, 1998. The former stated that the reason that an accountant's report for the year ending 31st March, 1997 had not been filed was due to matters that arose before he had taken over the practice. The later letter, 16th July, 1998, stated that the delay was caused by matters that occurred before he had taken over the practice and "*again is simply a matter of us not having the manpower to deal with same"*. Again, he reiterates that documentation to finalise the accounts from the period following his takeover of the practice were in place and no issues arose in relation to them. The period *under* review, referred to in the qualification of 12th January, 1999 could only have referred to the period between 1st April, 1996 and 15th August, 1996 and could only have meant the period before he took over the practice. He further disputes the interpretation which Mr. Elliot wishes to place and Mr. O'Reilly's evidence.

21. To the extent that the respondent places emphasis on the transcript of the evidence of proceedings before the Tribunal, Mr. Murphy avers that despite his protestations, Mr. Elliot and the staff of the respondent never examined the findings to ascertain the true position and that it was only after the issuing of this motion that an issue concerning the transcripts arose. He avers that no issue of prejudice was raised *until after the truth came out* during the plenary proceedings. He states that the transcripts were never a

matter of concern to the respondent when they represented to the Court, on multiple occasions, that there were two findings made by the Tribunal. He also alleges that any prejudice sustained by the respondent, if it exists at all, pales into insignificance in relation to the finding of professional misconduct against him. The applicant states his belief that the keeping of transcripts and a "*verbatim account*" of Tribunal proceedings did not arise until the enactment of the Solicitors Amendment Act 2002 and that even had he appealed within 21 days, a transcript would not have been available.

Submissions of the Applicant

22. In addition to the matters referred to in his affidavits, the applicant, in written submissions, contends as follows:

a. Even though two of the three conditions in Éire Continental have not been met, the court must consider all of the surrounding circumstances. In Éire Continental Lavery J. observed at p. 173:-

> *"In my opinion these three conditions are proper matters for the consideration of the Court in determining whether time should be extended but they must be considered in relation to all the circumstances of the particular case…"*

In *Brewer v. Commissioner of Public Works* [2003] 3 I.R. 539, Geoghegan J. emphasised the discretionary nature of the court's jurisdiction where he stated:-

> *"I would interpret those words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion."*

In *Goode Concrete v. CRH plc and others* [2013] IESC 39, Clarke J. (as he then was) noted at para. 3.3:-

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

specific Éire Continental criteria will meet those requirements in the vast majority of cases."

b. It is submitted that *Goode* is on all fours with the instant application and that arguable grounds of appeal derive from facts and materials which were not before the Tribunal and which only came to his attention at a relatively late stage in the process. The applicant cites, in support, the following passage from *Goode* where Clarke J. stated at para. 6.6:-

> *"The whole rationale behind allowing Goode to now raise the reasonable apprehension of bias point was precisely because it derived from facts and materials which were not before the High Court and which only came to the attention of Goode at a relatively late stage in the process. None of that rationale has any application to any of the other points which arise entirely out of the facts and materials which were before the High Court and in respect of which no new information or materials have become available. To the extent that the allegation of bias might be said to be a new material item then, if it be established, Goode will have its remedy anyway and if it be not established then it cannot be said to have affected any of the other points."*

c. Reliance is also placed on *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 where O'Malley J. accepted that the three criteria in *Éire Continental* are not necessarily of equal importance *inter se.*

d. While it is accepted that there has been exceptional delay and that the applicant must meet a high threshold for arguability in relation to the appeal, he submits that there is every reason to be confident that the appeal will be allowed once all information is laid before the court.

e. The period of delay is similar to that in *AN v. Minister for Health and Children* [2015] IEHC 396 where Barton J. extended the time for appeal after a period of 17 years had elapsed because there were good and sufficient reasons.

f. In *Keon v. Gibbs* [2015] IEHC 812, Baker J. concluded that the court must look at the reasons for the delay and analyse the explanations offered so that the mere fact that the intended appellant was just out of time would not be determinative. The applicant places significance on the court's reliance on *Goode*. The court should consider whether the intended appellant has arguable grounds of appeal. The very good reason for the delay in this case is that exculpatory evidence was suppressed by the respondent and that arguable grounds are evident from the contents of the affidavits sworn in support of this application.

g. The respondent, in breach of its prosecutorial duty and its duty of candour to the court, did not put the letter of 9th December, 1997 addressed to Mr. Healy before the Tribunal nor did they make the applicant aware of it at that time. The respondent wrongfully obtained a finding against him. The respondent had

knowledge that he was responsible only for the eight month period between August, 1996 and March, 1997. He had no difficulty in producing accounts for the Killarney practice for that period. The respondent refused to accept the accounts for the eight month period and insisted that he was responsible for accounts for a period in respect of which it knew that Mr. Healy, and not the applicant, was responsible.

Respondent's submissions

23. The respondent in its written submissions reiterates many of the matters referred to in Mr. Elliot's affidavit. The respondent's position may be stated as follows:

a. *AN* is exceptional and distinguishable on its facts and there is nothing which renders this case exceptional. In *AN*, the plaintiff was unaware for a period of five years that she had a right of appeal against an award made by the Hepatitis C Compensation Tribunal and was unaware for a further period of eight years that she could make an application to extend time. The court in *Tobin* accepted that in applying the *Éire Continental* principles it was appropriate to have regard to the legislative intent that an appeal be brought within 21 days. There, the applicant had formed a *bona fide* intention to appeal within the permitted time and had only exceeded the permitted timeframe by a relatively short period. This instant case is also to be sharply contrasted with *Tobin* where a solicitor who had made a mistake pointed to a recent change in the law and that the appeal was only seven days out of date.

b. In *Gately*, O'Malley J. observed that the threshold of arguability may rise in accordance with the length of the delay. The applicant did not seek to extend the time to appeal for in excess of 20 years, notwithstanding that during this period he was in a position to engage and progress extensive litigation and applications against the respondent, its employees and representatives.

c. The respondent refutes any contention that this application is based on new evidence which was withheld from the Tribunal and from him. Such contention is not consistent with the judgment of this court in the plenary proceedings. The applicant provided contemporaneous assurances that he would file the accountant's report but did not do so. The 'new evidence' does not give rise to arguable grounds of appeal and in particular to the appropriate threshold, having regard to a 20 year delay. It cannot be suggested that the information could not, with reasonable diligence, have been obtained and nothing precluded the applicant from contacting Mr. Healy.

d. The application to the Tribunal was based on an affidavit sworn by Mr. Connolly on 16th December, 1998 and the application was made in July, 1998 in circumstances where no report had been filed despite assurances given by him that he would do so. No transcripts of the Tribunal hearing are available, but as appears from the report of the Tribunal, the applicant appeared on his own behalf and did not call any witnesses. In particular he did not call Mr. O'Reilly to give evidence.

e. It is suggested that the affidavit sworn by Mr. O'Reilly on 5th October, 2020 appears to contradict his evidence to the court in the plenary proceedings. In his affidavit he now states that there was absolutely no issue with the accounts of 16th August, 1996 to 31st March 1997, whereas in his witness statement, adopted by him in his direct evidence in the plenary proceedings, he stated that he was aware that the issue was ultimately referred to the Tribunal but that he would leave it to the applicant to deal with this as in reality he did not have a clear recollection.

f. It was at all times open to the applicant to file a qualified accountant's report, which would have met statutory filing requirements. The report which was filed was not filed in a timely manner.

g. Further delay has occurred between April, 2018, when evidence was given by Mr. Connolly, and the bringing of this application. By April, 2018 the applicant was aware of the contents of the correspondence with Mr. Healy, yet despite this, a further period of in excess of two years has elapsed before this motion has been brought. Emphasis is placed on dicta in *Tracey v. McCarthy* [2017] IESC 7 where it was held by Clarke J. that:-

> *"…The very fact that the rules provide a relatively short period for 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."*

h. The respondent is prejudiced in attempting to revisit matters concluded more than two decades previously. It is inevitable that the recollection of witnesses will be diminished by the passage of time. Mr. O'Reilly, who appears to be a key witness for the applicant, has already stated as much in his witness statement in the plenary proceedings. The absence of a transcript and a record of submissions made to the Tribunal, is of potential relevance in order to assess whether a consistent account has been offered.

i. There is a public interest in the proper regulation of the solicitor's profession which requires the disciplinary proceedings be brought to a conclusion within a reasonable period of time. To permit an appeal at this time would undermine this principle.

j. The finding in the Healy matter is not one in respect of which application was made in 2009 to the High Court to strike the applicant's name from the Roll of Solicitors. This arose on foot of separate disciplinary proceedings.

k. If there was any frailty in the wording of the allegation it is not a frailty giving rise to an injustice and, as was pointed out in *Gately*, the fact that it can be established that there was an irregularity or defect in the impugned proceedings does not mean that the court is compelled to grant the remedy as of course. Given the passage of time since the finding of the Tribunal it would require very unusual features before the court could accede to the application to extend time to appeal. Such features

are not present and any frailty in the finding, if there is one, could only be regarded as being of the most technical nature and not such as to give rise to an arguable ground for an appeal at such remove.

l. To the extent that reliance is placed by the applicant on the past and repeated representations by the respondent that two findings of misconduct were made by the Tribunal in the Healy matter, this is an error which has no bearing on the application to extend time to appeal the sole finding of misconduct.

Discussion and Decision

24. In *Gately*, O'Malley J. described the central issue to be determined in that case as being whether time should be extended if the court was satisfied that there were arguable grounds of appeal, even if not satisfied either that a *bona fide* intention to appeal had been formed within the prescribed period, or that there was something in the form of a mistake to excuse delay in bringing forward the appeal. She later observed:-

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

25. It was also acknowledged that the É*ire Continental* criteria do not purport to constitute a check-list according to which a litigant will pass or fail but the rationale that underpins them will apply in the great majority of cases. The three criteria are not necessarily of equal importance *inter se* and much will depend on the circumstances. O'Malley J. reiterated that it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court. O'Malley J. continued:-

> *"65. By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be*

counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice." (emphasis added)

26. Prejudice was discussed by Clarke J. in *Tracey*:-

> *"4.12 I should emphasise that, in mentioning this point, I do not seek in any way to depart from the well established jurisprudence which makes clear that it is not necessary for a respondent to establish prejudice in order to be able successfully to resist an application for an extension of time. Ordinarily appeals should be brought in time and if they are not, without good and sufficient reason, brought within the time specified then the right to appeal will be lost irrespective of any question of prejudice. However, the presence of prejudice can, in my view, make it unjust to extend time even in a case where the broad criteria might suggest that an extension should be granted. The presence of prejudice is not, therefore, a necessary basis for opposing an extension of time. Prejudice may, however, quite properly be relied on by a party to suggest that an extension of time, which might otherwise be granted, should be refused.*
>
> *4.13 In the main parties are entitled to assume, once the period for appeal has passed, that the litigation is at an end. They are entitled to order their affairs accordingly. An extension of time, and particularly an extension of time at a significant remove, inevitably runs the risk of prejudice. I would suspect that very many respondents, faced with an application for an extension of time at the remove of the eight years which is present in this case (or even significantly lesser periods), would very easily be able to persuade a court that it would be fundamentally unfair to allow proceedings which had been allowed lie as if finished for such a period to be reopened." (emphasis added)*

27. Somewhat similar considerations arose in *Coleman v. The Law Society* [2020] IEHC 162 which concerned an application for an extension of time for an appeal under s. 7(13) rather than s. 7(11) of the Act as amended. The solicitor had not formed an intention to appeal within the time limit and the failure to bring the appeal within that time had not been the result of any mistake. Simons J. commented that in exercising its discretion to extend time, the underlying obligation upon a court is to balance justice on all sides, He also repeated that:-

> *"…[Gately] goes on to emphasise, however, that the rationale that underpins the guidelines will apply in the great majority of cases."*

28. Simons J. thought it inevitable that the recollection of witnesses to events which had occurred over 15 years previously would have diminished with the passage of time. Referring to *Tracey*, he concluded at para. 83 that "*…the delay in the present case is so inordinate that prejudice can be assumed".*

Summary of applicable principles

29. Having considered *Éire Continental, Brewer, Goode, Gately* and *Coleman* it seems to me that the position as applies in this case may be summarised as follows. The criteria outlined in *Éire Continental* are not be regarded as if they are set in stone but will apply in the great majority of cases. Their relative importance is likely to vary from case to case. The underlying obligation of the court is to balance justice on all sides. The applicant must have an arguable ground of appeal. The threshold of arguability may rise in accordance with the length of the delay. The proper administration of justice and finality of litigation require to be considered, as it seems to me, does the nature of the proceedings, being disciplinary, where the criminal standard of proof applies. Although the sanction might be said to be at the minor end of the scale (censuring) a finding of misconduct is a matter of importance to the reputation of the solicitor and to the respondent in the exercise of its regulatory powers over members of the solicitors' profession. Prejudice must be considered. Even where arguable grounds might be established and/or where, as Clarke J. stated, "*the broad criteria might suggest that an extension should be granted*", relief may be refused on the grounds of prejudice. As a matter of principle, it is not necessary for a responding party to positively establish prejudice to successfully resist an application. The longer the delay the more likely it is that the risk of prejudice will be a significant factor in the court's determination. This is particularly so where any appeal may depend on the memories and recollections of the participants and is not based exclusively or substantially on records or documents.

Reason for the application at this time

30. The applicant states that there is a necessity to appeal at this remove because this was the first disciplinary finding against him and was used in the strike off proceedings as part of his disciplinary history. An application to re-enter the strike off proceedings is pending. While the respondent submits that the strike off proceedings arose in the context of a different complaint, it is nevertheless true that in the strike off proceedings the finding of the Tribunal in the Healy matter was referred to as part of the applicant's disciplinary history.

31. It seems to me that while this might be a reason for now making the application, it is nevertheless difficult to see how it is relevant to the threshold of arguability of the intended appeal.

The length of the delay and the focus of the application

32. The focus of this application is based on the arguability of the intended appeal. The applicant accepts that the delay has been exceptional and that he must meet a very high threshold of arguability in relation to his appeal.

33. It seems clear that a positive decision was taken not to appeal. At para. 32 of the draft affidavit of the applicant prepared for the purposes of the intended appeal, which is exhibited at 'CM2' of his affidavit sworn on 12th May, 2020, the following is stated:-

> *"At the Tribunal hearing on the 28th September 1999 I was found guilty of misconduct in respect of one allegation only – that at 28 (a) above. I discussed the possibility of an appeal with my accountant and a legal team but while they*

all agreed that the decision seemed perverse that, as long as the Law Society were confirming that I was responsible for the accounts period from the 1st April, 1996 to 31st March, 1997, there was no point in appealing the matter."

34. Even if one were to discount a considerable portion of the 20 year period on the basis that (i) the applicant might have been precluded or believed he was precluded from making this application in light of the undertaking given by him to the Court in 2011, or that (ii) the evidence on which he now relies as new evidence might have emerged much earlier had a full hearing proceeded before Hanna J., nevertheless, the period is considerable. Making allowances for those factors, the delay is still in excess of ten years. It seems to me that a delay of such magnitude must be relevant to both the threshold of arguability and the assessment of the risk of prejudice.

35. The applicant, in his written submissions, states that he does not to seek to *rely* on parts one and two of the *Éire Continental* test. It would seem to me, however, that the issue is not so much one of reliance as one of compliance and that it would not be proper simply to ignore the absence of requisite intention or relevant mistake without explanation. Here, the applicant submits that this application is based on information which came to his attention many years after the conclusion of the disciplinary process and he places emphasis on *Goode* in this regard. He submits that there is good reason for the delay, being the suppression of exculpatory evidence.

36. The respondent places emphasis on the delay since April, 2018, a period of in excess of two years. In *Tracey*, Clarke J. observed that the very fact that the rules provide a relatively short period for filing a notice of appeal necessarily implies that a person is under an obligation to move reasonably quickly if finding him or herself in a position where they need to seek an extension of time. The court must, therefore, also consider any period of delay after the applicant became aware of the contents of the letter in April, 2018. In this context the applicant met with Mr. Healy sometime in early 2020, which meeting arose through third party contact. The relevant portions of Mr. Healy's affidavit have been recounted at para. 16 above. Having considered this affidavit, I do not believe that the applicant's meeting with, and what he discovered from Mr. Healy, adds in any significant way to the essential gravamen of his case which is centred on what emerged in evidence in the plenary proceedings. In truth, the crux of his contention is that information contained in the letter of 9th December, 1997 was withheld and concealed from him and he emphasises the number of occasions when it was not produced to the court, exhibited in support of the initial application before the Tribunal nor was it referred to in the statement of evidence of Mr. Connolly in the plenary proceedings.

37. On the face of it, therefore, there has been further delay on the part of the applicant in making this application. It seems to me, however, that it is appropriate for the court to make some allowances in this regard. First, it may be that it was not unreasonable for the applicant to await the court ruling in the plenary proceedings before making this application. Second, the pandemic intervened with significant effect on court proceedings from early March, 2020. Third, it may also be that the applicant was reticent to make the

application in view of the undertaking given to the court in 2011. Taking all such matters into consideration, I consider that any delay by the applicant post April, 2018, although a factor which I take into account, is not of itself to be considered determinative or fatal.

Suppression of Evidence

38. With regard to the applicant's contention that evidence was suppressed, I must conclude that this argument is substantially the same, if not identical, to that which was advanced by counsel on his behalf in the plenary proceedings, that the letter had been concealed from him. The court addressed this in its judgment at para. 347 as follows:-

> *"347. It is highly unfortunate that the letter of 3rd December, 1999 (sic) [9th December, 1997] was not copied to Mr. Murphy but, having considered the evidence of the parties, particularly the evidence of Mr. Connolly, I do not believe that he intentionally formed the view that the letter to Mr. Healy should not be given to Mr. Murphy. Given the surrounding circumstances, including that the letter to Mr. Murphy stated on its face that a letter to Mr. Healy was being copied to him, the contents of minutes of meetings and the ongoing discussions which had been taking place between the parties, while no doubt his failing to receive a copy of this letter has fuelled his belief that he was being unfairly treated, I am not satisfied that the evidence establishes that a decision was taken by the Society not to provide Mr. Murphy with a copy of that letter at that time, or that it was reckless in failing to do so. Having considered the evidence of the witnesses and their demeanour on this issue, I am also not satisfied that any ulterior motive has been established for this omission."*

39. In my view the continuing insistence of the applicant that the letter was 'suppressed' by the respondent is inconsistent with the above prior conclusion of the court and amounts to an attempt to request the court to revisit its finding. The court was aware of and considered the letter, the evidence of the applicant and the evidence of Mr. Connolly before arriving at its conclusion. The appropriate mechanism for the applicant to challenge the ruling is to appeal.

40. It is also a relevant consideration that the public interest requires that disciplinary proceedings should be brought to a conclusion within a reasonable period of time. Simons J. observed in *Coleman*, at para. 85:-

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

41. Here it may be said that the reason for the "*change of mind*" stems from the evidence given in the plenary proceedings. Nevertheless, it seems to me that the public interest in finalisation of disciplinary proceedings is a factor to which the court must afford some

weight in balancing where the justice of the case should lie. I am satisfied, however, that where there is a significant risk of injustice, this becomes a less pressing consideration.

The threshold of arguability, delay and prejudice

42. It is not the function of the court on an application such as this to enter upon a determination of the merits of the appeal, rather it must consider whether the point sought to be made has reached the necessary threshold of arguability. Although the court has previously addressed the issue of 'suppression' or concealment and approaching the applicant's case on the basis that the letter ought to have been produced by the respondent to the Tribunal and to the applicant, it seems proper that the court should address whether the necessary threshold of arguability has been reached. In view of *dicta* of O'Malley J. in Gately and Clarke J. in *Tracey*, it seems to me that the required threshold ought to be assessed in light of the length of the delay, and that the court should also address, in this regard, the consequences of any risk of prejudice.

43. Consideration of the precise finding of misconduct and the exchanges between the parties at that time would seem to be an appropriate starting point in the analysis. The finding was one of misconduct based on a failure to file the accountant's report in a timely manner or at all. It is appropriate to consider the new evidence in the context of that finding. The letter of 9th December, 1997 advised Mr. Healy, *inter alia*, that a closing accountant's report had not been filed by him and one should have been filed covering the period 1st September, 1995 to the date of acquisition of his practice by the applicant in 1996. Written correspondence opened to this court demonstrates that while difficulties were stated to have been encountered, assurances were also being given that the report would be furnished.

44. With regard to relevant oral exchanges which are suggested to have taken place, in April, 2018 in the plenary proceedings Mr. O'Reilly gave evidence of his recollection of telephone conversations in which he was informed by Mr. Connolly that a qualified report would not be acceptable. In his statement of evidence, he referred, in particular, to his recollection of two telephone conversations:-

> *"From my recollection in early 1998 I had I believe at least two telephone conversations with PJ Connolly of the Law Society and possibly a conversation with Seamus McGrath also of the Law Society. I outlined in particular to PJ Connolly my very real concerns in relation to the Tim Healy practice and I indicated to PJ Connolly that my intention was to issue a qualified certificate. I append to this Statement a letter I sent to Mr PJ Connolly of 20th April 1998 wherein I say "As you are aware Mr. Healy's clients records were less than adequate". PJ Connolly confirmed that that would not be acceptable. I wrote to the Law Society on 21st of October 1998 looking for time to complete the Tim Healy accounts and I also append a copy of that letter to my Statement. I never received a reply to the letter and I contacted the Law Society by telephone indicating that I could not verify the initial amounts and therefore could not put in anything other than a qualified report. I am aware that the issue was ultimately referred to the Disciplinary Tribunal. I will leave it to Colm*

to deal with this as in reality I do not have a clear recollection other than to say I had real concerns about the practice of Tim Healy and that while I have made several attempts to unravel the accounting situation I found it impossible to do so."

Nothing which this court has seen, or to which its attention has been drawn, indicates that the conversations referred to by Mr. O'Reilly concerning a qualified report are expressly referred to in a letter or note, contemporaneous or otherwise. The letters of 20th April, 1998 and 21st October, 1998 appended to Mr. O'Reilly's statement do not refer to the issue of a qualified report. The letter of 20th April, 1998 states as follows:-

"Dear Mr. Connelly (sic),

I refer to my fax of the 24th of March 1998.

Apologies for the delay in forwarding the enclosed Accountant's Report.

However this report is not complete as it does not cover Mr. Murphy's Killarney practice. The Kenmare and Killarney offices are operated separately.

We are experiencing difficulty in reconciling the opening balances as transferred from Tim Healy's records. As you are aware Mr. Healy's clients' records were less than adequate.

It will take at least one further month to issue a report on the Killarney practice. I wish to confirm we are giving this case our full attention in order to finalise it as soon as possible."

45. Mr. Connolly's evidence in the plenary proceedings was that while he had no recollection of the conversation with Mr. O'Reilly, he would not have said that a qualified report would be unacceptable. He stated that a qualified report was submitted on behalf of Mr. Healy prior to the transfer. This led to Mr. McGrath being appointed as investigating accountant to Mr. Healy's practice. The following is the relevant excerpt from the transcript of the cross examination of Mr. Connolly by counsel for the applicant:-

"611Q. So Mr. O'Reilly then apparently had telephoned you several times, saying he was going to issue a qualified report in relation to Killarney and apparently you weren't happy about that. And you can't recall that.

A. Well, I think there's some misunderstanding there, because he has subsequently filed qualified reports. I mean, I think he was an accountant, I think, that wasn't familiar with the -- I think this was his first client or he was not that familiar with the reporting requirements.

612 Q. Apparently so, because -- and he had just about touched on Mr. Healy's, done some VAT returns for Mr. Healy --

A. Yes, very little, yeah.

613 Q. And that was referred to. But for whatever reason, when he spoke to you he got the impression from you or understood from you that he couldn't put in qualified accounts. That's what he says.

A. Well, that's what he says. And I think there's a misunderstanding on what I tried to convey...

614 Q. I understand. But your recollection is that you can't recollect the telephone calls. He says he had some phone calls with you. So it's a long time ago --

A. It is. It's a long time ago, yeah. I mean, if he said he had telephone calls with me – I doubt if he had calls - but anyway, if he had a telephone call with me, I certainly wouldn't have refused, you know, qualification. And he'd be obliged to restrict or to qualify his report. In fact we'd take a very dim view of it if he filed one without the qualification, as I think I've said there, that we have referred accountants to their professional body for their failure to qualify.

615 Q. I know. But he --

A. I would certainly never refuse a qual -- I think – the accountant, I know, is not here to defend himself – I think there must've been a misunderstanding as to what his understanding of what I was saying or maybe my failure to convey...

616 Q. I suppose you'd be anxious though, Mr. Connolly - like, Healy was a disaster, if I could politely refer to him like that, he had a practice in Killarney, it wasn't making a lot of money, it had very small turnover and he was going out of business. Correct?

A. He was. Well, I thought -- I don't know what turnover he had, but I think it was, you know, a three-year practice. It was bigger, I think, than I thought at the time, but..."

46. There is therefore, a difference of recollection on what is an important issue. Mr. O'Reilly was not called to give evidence before the Tribunal. The following is a relevant extract from the transcripts in the plenary proceedings of an exchange between Mr. O'Reilly and counsel for the respondent:-

"Q. And if Mr. Murphy at any stage had asked you to assist him, to either swear an affidavit or attend to give evidence to explain any problems at that time or any difficulties, would you have had any difficulty in helping him in that way?

A. I wouldn't, no.

Q. And, for example, you could've told the Disciplinary Tribunal any of the points you've been making in response to Mr. O'Mahony's questions here?

A. *I could if I was asked, yeah.*

Q. *But that didn't happen at the time?*

A. *No."*

47. It seems not unreasonable to conclude that had Mr. O'Reilly been requested to provide evidence by way of affidavit or in person in 1999 he would have been in a position to explain the difficulties he encountered in the preparation of the Killarney practice accounts and to inform the Tribunal of the conversations which he recalled having had with Mr. Connolly. Any misunderstanding, miscommunication or indeed disputed representations as to the acceptability of a qualified report, could have been explored at that time. Similarly, Mr. O'Reilly's contention, outlined in his affidavit sworn on 5th October, 2020, that he had absolutely no doubt that if the respondent had stated from the outset that it was looking for accounts for the eight month period that these would have been completed immediately and there would not have been a dispute about the matter, could also have been explored by the Tribunal for its assessment. These issues could have been addressed at a much earlier time when they were more likely to have been to the forefront of the minds of the participants than they are now over 20 years later. The same might be said in respect the court's assessment of any such dispute on appeal. In the circumstances, therefore, and apart from any issue concerning the absence of a transcript of the Tribunal hearing, I am satisfied that the passage of time gives rise to the real risk of prejudice in relation to a matter of potential significance.

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

49. I do not lose sight of the fact that this was a disciplinary finding and a matter of considerable importance to both parties, particularly to the applicant, and that it was relied on when his disciplinary history was being outlined to the court in the strike off proceedings. I also take into account the standard of proof applicable in respect of a charge of misconduct. The court must also have regard to the assurances given to the respondent that the accounts would be furnished. Some weight ought also to be given to the respondent's submission that the reference to the letter to Mr. Healy in the letter to Mr. Murphy of 9th December, 1997 might legitimately have placed him on notice or inquiry, even if, as I have found as a matter of probability, the letter was not copied to him.

50. Having considered all of the above factors I am not satisfied that the threshold of arguability has been crossed. I am also satisfied that the arguability of the intended appeal is outweighed to a significant degree by other factors considered above, including the length of delay, the court's finding in the plenary proceedings regarding the allegation of concealment, that Mr. O'Reilly could have been called to give evidence to the Tribunal but was not, and the importance and relevance of the new evidence to the misconduct charge.

51. In *Tracey*, Clarke J. observed that the presence of prejudice can make it unjust to extend time even in a case where the broad criteria might suggest that an extension should be granted. In this regard, even if this were a case where the broad criteria suggest that an extension might be granted, I am also satisfied that a risk of prejudice arises such that it would be unjust to extend the time. In all the circumstances I must conclude that the balance of justice lies against the application.

Delegation of Powers

52. In his affidavit sworn on the 5th October, 2020 the applicant avers that at the time of the swearing of his affidavit of 12th May, 2020 he was not aware of how the various powers vested in the Council of the respondent were delegated to its various organs. He refers to s. 4 of the Solicitors Act 1954 ("*the Act of 1954*") which provides that the functions vested in the respondent by or under the Act shall be performed by the Council. Section 73 provides for the delegation by the Council of its functions to a committee. This section has been subject to a number of subsequent amendments. The applicant avers that the Council at its annual meeting deals with delegation of powers and functions with or without restrictions or conditions. Evidence which emerged during the cross-examination of Mr. Elliott led him to make enquiries and he avers that it is "*now part of that case that proper proof of the delegation of powers would be an essential proof of not alone the Law Society of Ireland (whose name the proceedings are taken under) but also any organ of the Society prosecuting a solicitor."* He submits that it is essential for the respondent to comply with the provisions of this regulation and that this is a required proof. He avers that certain powers and functions were delegated to the Compensation Fund Committee, including *"(v) the institution of proceedings on behalf of the Society before the Disciplinary Committee or Disciplinary Tribunal for the time being or any court*", and maintains that he was never shown the requisite proof.

53. Following a request made to the respondent on 1st October, 2020, the applicant obtained a copy of the Council Regulations which were passed in November/December 1998. He maintains that in his case a decision was made by the Finance Section of the Compensation Fund Committee on the 17th July, 1998 and that he would address the court by way of submissions on this issue. Copies of the relevant regulations from 1998/1999 are exhibited.

54. When this matter was mentioned before the court, the motion was given a provisional date for oral submissions. The applicant suggested at a for mention date that the matter could proceed by way of written submissions and then filed them. The respondent also confirmed that it would proceed by way of written submissions. The respondent's

submissions were delivered electronically and the provisional date set aside for oral submissions was vacated. This issue of authority/power/delegation is not specifically addressed by the parties in their submissions.

55. It seems to me that this argument is of a type which in truth goes to the jurisdiction of the Tribunal. In my view this is captured by the *dicta* of Costello J. in *Sheehan v. Solicitors Disciplinary Tribunal & Ors*. [2020] IECA 77, that challenges of a jurisdictional nature ought to be brought by way of application for judicial review. As Simons J. noted at para. 34 of his judgment in *Coleman*:-

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

56. Further, I do not believe that the late emergence of a potential ground of appeal based on a technical point of a jurisdictional nature in respect of proceedings that were instituted and determined by the Tribunal in excess of 20 years ago is sufficient to disturb the court's overall conclusions.

Conclusion

57. For the above reasons, I am not satisfied that the court should exercise its discretion to extend the time within which to bring an appeal against the decision of the Tribunal and must refuse the relief sought.

58. With regard to the applicant's suggestion that, to the extent that there may be conflicts of facts and evidence, such conflicts must be resolved by way of cross examination of Mr. Elliot, I do not believe that such examination is relevant or necessary in view of the court's conclusion.