THE HIGH COURT

[Record No. 2006/371 SP]

[2022] IEHC 742

IN THE MATTER OF COLM MURPHY A SOLICITOR FORMERLY PRACTISING AS COLM MURPHY AND COMPANY SOLICITORS AT MARKET STREET, KENMARE, COUNTY KERRY AND AS MURPHYS AT 1 CHAPEL STREET, KILLARNEY, COUNTY KERRY

AND

IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2002

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

COLM MURPHY

RESPONDENT

THE HIGH COURT

[Record No. 2009 12 SA]

[SOLICITORS DISCIPLINARY TRIBUNAL 5306 DT 464 04]

IN THE MATTER OF JOHN COLM MURPHY FORMERLY PRACTISING AS COLM MURPHY AND COMPANY SOLICITORS AT MARKET STREET, KENMARE, COUNTY KERRY AND AS MURPHYS AT 1 CHAPEL STREET, KILLARNEY, COUNTY KERRY

AND

IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2002

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

JOHN COLM MURPHY

RESPONDENT SOLICITOR

AND

THE HIGH COURT

[Record No. 2009/14 SA]

[THE DISCIPLINARY TRIBUNAL 5306 DT 464 04]

IN THE MATTER OF JOHN COLM MURPHY, A SOLICITOR PRACTISING AS COLM MURPHY AND COMPANY SOLICITORS AT MARKET STREET, KENMARE, COUNTY KERRY AND AS MURPHYS AT 1 CHAPEL STREET, KILLARNEY, COUNTY KERRY

AND

IN THE MATTER OF AN APPLICATION OF THE LAW SOCIETY OF IRELAND TO THE SDT AND

IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2002

BETWEEN

COLM MURPHY

APPELLANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 16th day of November, 2022.

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1. Introduction

1. The applicant, Mr. Colm Murphy, brings these applications seeking leave to re-enter, for the purposes of setting aside, orders made in the following proceedings:

a. *Law Society of Ireland (applicant) v. John Colm Murphy (Respondent Solicitor),* High Court record number 2009/14 SA (hereafter the *strike off* proceedings).

b. *Law Society of Ireland (Applicant) v John Colm Murphy (Respondent Solicitor),* High Court record number 2006/371 SP (hereafter the *s. 18* proceedings).

2. Mr. Murphy was enrolled as a solicitor in 1986. He held a practising certificate until December 2004. It was not renewed in 2005 in circumstances which are disputed. Mr. Murphy did not thereafter apply for a renewal before his name was struck from the Roll of Solicitors by order of Johnson P. made on 18th May 2009. In the meantime, on 10th August 2006, the Law Society of Ireland ("*the Society*") instituted proceedings pursuant to the Solicitors (Amendment) Act, 1994, s.18, seeking to restrain Mr. Murphy from practising as a solicitor without a certificate, to take certain actions in relation to the closure of his practice and to comply with orders of the Solicitors Disciplinary Tribunal (*"the SDT"*). An application for substituted service of those proceedings was made by the Society on 21st October 2006, the necessity and basis for which is and was much disputed by Mr. Murphy. On 31st January 2007 substantive orders were made, mostly on consent, with Mr. Murphy also undertaking not to practice, or to hold himself out as a solicitor entitled to practice when not so entitled. An application for attachment and committal was made by the Society by motion issued on 22nd February 2007. While no attachment or committal orders were made, ultimately the costs of the application were awarded against Mr. Murphy on 17th June 2008. Prior to the conclusion of the attachment and committal application, Mr. Murphy attempted, by affidavit, to revisit the order/orders made in the s.18 proceedings. He also sought extensions of time within

which to appeal three disciplinary findings of the SDT. The applications for extensions of time were also refused on 17th June 2008. No formal order was made in relation to the application to re-visit the order/orders in the s.18 proceedings. On 18th May 2009 Mr. Murphy's name was struck from the Roll of Solicitors by Johnson P., application having been brought by the Society pursuant to a recommendation of the SDT made in January 2009 at the conclusion of disciplinary proceedings in the [REDACTED] matter.

2. Litigation History

3. The litigation history between the parties is protracted. The circumstances surrounding the obtaining of the above court orders and further orders in disciplinary matters were the subject of consideration by this court in its judgment in *Colm Murphy v Law Society of Ireland and Simon Murphy* record No. 2004/19212P, delivered on 31st July 2019, (hereafter referred to as the '*principal judgment'* in the *'civil proceedings'*). Those proceedings, which commenced in 2004, concerned an action for damages by Mr. Murphy, *inter alia*, for misfeasance of public office, negligence, breach of duty and defamation.

4. Between September 2009 and April 2011 Mr. Murphy lodged twelve individual complaints of misconduct with the SDT against four solicitors employed by the Society. Five complaints were made against Ms. Linda Kirwan, five against Solicitor X and one each against Mr. Ken Murphy and Ms. Dara McMahon. Mr. Murphy alleged, *inter alia*, that the respondents either misled the court or were dishonest when swearing affidavits in various disciplinary matters. The SDT rejected all complaints and concluded that there was no *prima facie* evidence of misconduct in any case. The individual solicitors, represented by the Society, are the respondents. Mr. Murphy's appeals, which have been referred to as the *"ancillary proceedings"* are the subject of a separate judgement. The SDT is not a party to these appeal. An application was also made by the Society for an *Isaac Wunder* order. On 1st March 2011 Mr. Murphy gave an undertaking, through counsel, not to institute further legal

proceedings against the officers, employees, agents or legal representatives of the Society pending the determination of the civil proceedings.

5. The civil proceedings were first heard by Hanna J. in 2012. He dismissed the claim principally on the basis of preliminary objections raised by the Society. Mr. Murphy successfully appealed the dismissal to the Supreme Court which delivered an *ex tempore* decision on 25th March 2015. Issues are raised on these applications regarding what occurred before Hanna J. It is alleged that he was misled as to the procedures to be adopted.

6. Following his successful appeal, Mr. Murphy obtained discovery and delivered interrogatories, procedural steps which he had not taken before the first hearing in the civil proceedings. Mr. Murphy also made a data access application in 2015/2016.

7. On 11th December 2017 Kelly P. made an order defining the issues to be addressed in the civil proceedings and the order in which all proceedings be heard and determined (*the order of Kelly P*.). The relevant parts of the order, which was made on consent, are as follows:

> *"1. The Plaintiff's claims 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.*
>
> *1. Law Society of Ireland (Applicant) v. Colm Murphy (Respondent solicitor) High Court Record No. 2006/371SP);*
>
> *2. Law Society of Ireland (Applicant) v. John Colm Murphy (Respondent solicitor) High Court Record No. 2009/14SA;*

3. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/72 SA.

4. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/73 SA.

5. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/74 SA.

6. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/75 SA.

7. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/76 SA.

8. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/77 SA.

9. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/78 SA.

10. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/79 SA.

11. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/80 SA.

12. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/81 SA.

13. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2010/82 SA.

14. Colm Murphy v. Solicitors Disciplinary Tribunal, High Court Record No. 2011/50 SA.

4. Each of the preliminary objections and special pleas contained within the amended defence delivered on 27 July 2011 shall be determined by the trial judge at the conclusion of the trial on liability of these proceedings, insofar as the trial judge, in the exercise of his or her

discretion, considers it appropriate to do so and the judgment to be delivered at that time".

8. The re-hearing of the civil proceedings commenced in 2018. Mr. Murphy's claim for damages was dismissed in a judgment delivered on 31st July 2019. The hearing in the ancillary proceedings commenced in February 2020. They were not completed at that time and were adjourned to March 2020, when they were interrupted by disruption brought about by the Covid pandemic. Prior to the conclusion of submission in the ancillary proceedings, Mr. Murphy requested a review of the decision in the civil proceedings (*"the general motion"*). The court granted his request and a motion subsequently issued. In the interim, on the 13th July, 2020, application was made to extend the time within which to appeal a disciplinary finding made by the SDT in the *Healy matter* in 1999, an application largely based on a finding of fact made by this court in the principal judgment concerning whether Mr. Murphy had received a particular letter at a relevant time.

9. To date this court has delivered three judgments as follows:

a. The '*principal judgment*' in the '*civil case'*, *Colm Murphy v Law Society of Ireland and Simon Murphy* (2004/19212P) of 31st July 2019 [2019]IEHC 724. Costs were addressed in a ruling delivered on 13th November, 2019 [2019] IEHC 777.

b. By notice of motion dated 24th of July 2020, (*the general motion*) Mr. Murphy sought an order to review and set aside the principal judgment. This application was dismissed in a ruling delivered on 26th July 2021 (hereafter referred to as "*the review judgment*"). *Colm Murphy v Law Society of Ireland and Simon Murphy* record No. 2004/19212P, 26th July 2021, [2021] IEHC 848.

c. The application for an extension of time in the *Healy matter* was refused [2021] IEHC 148. An appeal from this decision was refused by the Court of Appeal on 9th December 2021 [2021] IECA 332. On Mr. Murphy's application, the Supreme Court made a determination on the 30th May 2022,

granting leave to appeal from the decision of the Court of Appeal. That appeal is pending.

3.Two Distinct Applications

10. While two separate and distinct applications are made in respect of the s. 18 and strike off proceedings. Mr. Murphy maintains, however, that they are connected for a number of reasons. During the strike off application before Johnson P., the Society referred to the s.18 proceedings. It is contended by Mr. Murphy that the manner in which the s. 18 proceedings were presented gave the court a particular impression of him which affected *his approach* to the strike off proceedings. It is also claimed that what occurred and what was said during applications in the s. 18 proceedings influenced the *court's approach to him* in the strike off application. While each application is separately considered, both are addressed in this judgment.

11. The application in the strike off proceedings was brought by way of motion dated 21st October 2010. In his evidence in the civil proceedings Mr. Murphy said that in or around March 2011 he indicated his intention to Kearns P. to apply to re-enter the s. 18 proceedings and that Kearns P. confirmed that such issues should be dealt with in conjunction with the civil proceedings. The formal application in respect of the s.18 proceedings was brought by motion dated 1st June 2016. Issues raised on these applications include those said to have arisen or to have been discovered since 2011.

4. The Test for Re-entry

12. It is accepted that the same principles apply to both applications. Mr. Murphy submits that the jurisdiction of the court on an application to re-enter proceedings after a final order has been made arises where a court has been misled, whether deliberately or innocently, where proceedings on foot of which an order is made are gravely flawed by reason of a fundamental breach of fair procedures and justice guaranteed by the Constitution, or where special or unusual circumstances exist. He relies on *dicta* in a number of cases in support of the proposition that where a party has deliberately misled the court in a material matter and that such deception has

probably tipped the scales in his/her favour, or where it may reasonably have done so, it would be wrong to allow him/her to retain the judgment so procured (see *Meek v Fleming* [1961] 2 Q.B. 366 at 379 per Pearse L.J.). Reliance is also placed on authority that an order obtained by fraud is a mere nullity. In *D.P.P v Laide and Ryan* [2005] IECCA 24, McCracken J. acknowledged the inherent jurisdiction of the court to set aside or vary a final order in circumstances which include those where the court has been misled, either innocently or deliberately, as to the factual background of the case. Mr. Murphy alleges fraud, deceit and/or misleading of the court in a number of respects. He submits that the circumstances which arise for consideration on these applications are *"special or exceptional"*. He also relies on the observations of this court in the civil proceedings that had a different approach been taken a different path may have emerged for both parties.

13. In *De Smiths, Judicial Review of Administrative Action,* Steven & Sons, 94th Edition (1980), and on which Mr. Murphy relies, the authors state at para. 96:

> "….*Where fraud is alleged, the court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned…".*

14. Counsel for the Society submits that the principles which the court addressed in its judgment in the review application in the general motion apply with equal force to these applications. In *Greendale Developments Ltd.,* Denham J. observed that the Supreme Court had a duty to protect constitutional rights, that such duty may arise even when there has been what appears to be a final order but that it would "*only arise in exceptional circumstances"*. The Society maintain, however, that the jurisdiction is a very limited one, especially when, as is the case here, the orders are final and perfected. It is submitted that what constitute exceptional circumstances are well established. Reliance is placed on *Re Greendale Developments Ltd (No. 3)* [2000] 2 IR 514 (breach of constitutional rights); *Tassan Din v Banco Ambrosiano SPA* [1991] 1 IR 569 (fraud); *Launceston Property Finance DAC v Wright* [2020]

IECA 146 and, generally, Delany and McGrath on Civil Procedure, Roundhall, 4th Ed, [25-90] to [25-99] and [25-103] to [25-119].

15. The Society contend that none of the requisite exceptional circumstances permitting the re-opening of proceedings arise. Such jurisdiction is dictated by the necessity of justice and, as Denham J. observed, a case will be reopened only where, through no fault of the party, he or she has been subject to a breach of constitutional rights. Barron J. emphasised the requirement of certainty in the administration of justice. Uncertainty can lead to injustice. He stated that the Constitution requires that decisions of the court be final and conclusive for good reason which must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced; and that the failure to take steps to remedy such breach, in the eyes of right minded citizens, would damage the authority of the court.

16. Regarding allegations of fraud, counsel for the Society relies to *Tassan Din v Banco Ambrosiano SPA* [1991] 1 IR 569, where Murphy J., when referring to the *Ampthill Peerage Case* [1977] AC 547, stated:

> *" Of course Lord Simon appreciated that a judgment of the final court of appeal could be impeached for fraud. That was obvious in the Ampthill Peerage Case [1977] AC 547 where the legislation in question expressly provided that a declaration of legitimacy could be challenged on that basis. The learned Law Lord, however recognised that it was a proposition of general application and went on to say (at p 591) the following:-*
>
> > *"To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false: The Alfred*

Nobel [1918] p 293. But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient.

Moreover Janesco v Beard [1930] AC 298, a decision of your Lordships' House, confirmed that, to impugn a judgment on the ground of fraud, the fraud must be alleged with particularity and proved distinctly. A person is not permitted merely to allege fraud in the hope of discovering it as the case develops.

'You cannot go to your adversary and say "You obtained the judgment by fraud, and I will have a rehearing of the whole case" until that fraud is established'."

There is one further sentence from the decision of Lord Simon which is material to the present case, namely, (at page 591):-

"The impugner of a judgment as obtained by fraud must adduce evidence of facts discovered since the judgment which show a reasonable probability (which I take to mean a prima facie case) of such fraud as would invalidate the judgment, before he can call on the person whose judgment he seeks to nullify to make any sort of disclosure."

Again in the Ampthill Peerage Case [1977] AC 547 Lord Wilberforce in considering the nature of the fraud or collusion which would justify setting aside a judgment of the court commented (at p 571) as follows:-

"What is fraud for this purpose? Learned counsel for John Russell without venturing on a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a fortiori or at

least analogous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it." [emphasis added]

In the light of the foregoing I am satisfied that nothing short of fraud pleaded with particularity (and ultimately established on the balance of probabilities) would be sufficient grounds in the present case for upsetting the decision given by the Supreme Court on the 8th April, 1987".

17. It is submitted that of particular relevance to allegations of fraud which are said to have tainted Mr. Murphy's disciplinary proceedings is the following extract from *Kenny v Trinity College Dublin & Anor* [2008] IESC 18, per Fennelly J.:

"53. I am satisfied that, in order to ground an action to set aside a judgment, the Plaintiff must allege fraud in the true sense, that is deliberate and purposeful dishonesty, knowing and intentional deceit of the court. That approach is consistent with the statement of principle made by Keane J, in Dublin Corporation v Building & Allied Trade Union and others, with the interests of parties to litigation who have secured a final decision of a court and with the overriding public interest in finality of litigation.

54. In addition, the fraud alleged must be such as to affect the impugned decision in a fundamental way. It will not suffice to allege that the new situation revealed by the uncovering of the fraud might have affected the

judgment. It will not be enough to show, for example, that a witness lied unless it is shown that the true version of his evidence would probably have affected the outcome. Mr Galligan, on behalf of Trinity, submitted that the court should adopt the test adopted by O'Hanlon J in Kelly v Ireland, cited above. The test would be whether new evidence "changes the whole aspect of the case." That was, of course, a very different type of case. The Plaintiff claimed damages for alleged assault by gardaí. He had been convicted in a criminal trial, where the court had rejected as untrue the allegations now made in a civil action. Thus, there was a question of issue estoppel. However, in the course of the proceedings, the Plaintiff claimed in addition to have found new evidence which had not been before the criminal court. O'Hanlon J adopted the test I have mentioned, following a dictum of Goff LJ in McIlkenny v Chief Constable of the West Midlands [1980] QB 283. Would the alleged new evidence "change the whole aspect of the case? I believe that, in an action to set aside a judgment based on an allegation that the court was deliberately deceived into making the impugned decision no less stringent test should be required. There must be something fundamental, something that goes to the root of the case.

55. An additional point arises. In general, a court approaches an application to dismiss pursuant to Order 19, rule 28 on the basis of the pleadings. Do the pleadings, as they are read by the court, disclose a cause of action? Would the alleged facts, if true, confer a cause of action? That test clearly applies in a modified form to such an application when made in a case such as the present. Where the substance of the claim is the validity of a final decision of a court of competent jurisdiction, the court hearing an application to dismiss must be permitted to examine the impugned decision, including the reasoning

of the judgment. It cannot be constrained by the version of that decision disclosed in the pleadings seeking to set it aside.

56. The third matter is the necessity for particularity in pleading. It is the unanimous view of the various judges cited in argument that the allegation of fraud said to have deceived the former court must be pleaded with particularity and exactness. I have cited the statement of Barrington J in Waite. Lord Buckmaster in Jonesco v Beard, cited above, insisted that "the particulars of the fraud must be exactly given…" Similarly, according to Lord Wilberforce, "anyone wishing to attack a judgment on grounds of fraud must make his allegation with full particularity……" In essence, the nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged. It is not enough to allege mere non-disclosure, unless the Plaintiff can identify an obligation to disclose arising either under law or from the circumstances."

18. The Society also place particular reliance on *Lavery v DPP No. 3* [2018] IEHC 185 and *Launceston*, where the Court of Appeal, at para. 7, summarised the jurisdiction as follows:

"In summary, the jurisdiction:-

(i) is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

(iii) requires the applicant to discharge a very heavy onus;

(iv) is not for the purpose of revisiting the merits of the decision;

(v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) cannot be invoked on the basis of the discovery of new evidence;

(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;

(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."

5.Additional submissions

19. In further written submissions made following the hearing Mr. Murphy referred the court to two recent decisions which he says supports his arguments that "*fraud unravels everything": The People (at the suit of the Director of Public Prosecutions) - v - Yusif Ali Abdi* [2022] IESC 24 and *M -v- The Minister for Foreign Affairs & Anor* [2022] IESC 25. The former related to a declaration of miscarriage of justice under the Criminal Procedure Act 1993, s. 9. Mr. Murphy submits that the principles applicable in such case are similar to those which apply to re-entry of final orders. Charleton J. noted that "*for a miscarriage of justice to be demonstrated if the accused is acquitted on retrial, requires a fundamental defect in the administration of justice amounting to an affront*;". In *The People (DPP) v Hannon [2009] 4 IR 147* the complainant withdrew her allegation some years after the accused's conviction for serious sexual assault. The prosecution argued that because they had acted in good faith there could not be a miscarriage of justice. The Court of Criminal Appeal described a miscarriage of justice as "*a failure of the judicial system to attain the ends of justice*". It is submitted by Mr. Murphy that the *Hannon* case is on all fours with his position in the attachment and committal proceeding (the Society did not produce the forged

document) ([REDACTED] document) and that the Court was misdirected by the Society in many ways in the s.18 proceedings. It is contended that similar considerations apply to the strike off proceedings because of reliance by the Society on an undertaking allegedly given to Finnegan P. and a deliberate decision not to, and failure to, comply with an order for discovery. Mr. Murphy emphasises dicta of Charleton J. that a "*significant change from the trial position due to the revelation of a new fact: that the offences had never taken place in the first instance*". He contends that it is evident from new facts which have emerged, including findings of fact in the civil case, that there has been a defect in the administration of justice amounting to an affront. Charleton J., referring to *The People (DPP) v Conmey [2010] IECCA 105,* said:

> "*A miscarriage of justice can arise due to prosecution fault, as in the concealment, or material non-disclosure, of witness statements focused on a central issue in the prosecution case which tend to support an actual defence for the accused*; *…..this amounts not just to the justice system correcting itself but to the substantial failure of the system to administer justice in the first place".*

20. Arguing that there has been a substantial and fundamental failure in the trial process in the s.18 and strike off proceedings, Mr. Murphy also refers to the requirement set out by Charleton J. that the accused "*demonstrate such bad faith on the part of the State authorities (as in Wall or Conmey) that undermines the justice system, or such a failure in the administration of justice (as in Meleady or Hannon) due to error that the prosecution is fundamentally undermined.*" It is submitted that the actions of the Society establish bad faith on its part.

21. Mr. Murphy also contends that *Takhar v Gracefield Developments* [2019] UKSC 13, [2019] 2 WLR 984 has been accepted in *M -v- The Minister for Foreign Affairs & Anor* [2022] IESC 25. Dunne J. repeated the proposition that *"fraud*

unravels everything" and had no difficulty with the proposition set out in para. 90 of the judgment of the Court of Appeal that:

> *"... the starting point must be that a fraudulently obtained permission is a nullity. It confers no rights or entitlements of any kind. Fraud, as it is often said, 'unravels all' (Takhar v. Gracefield Developments [2019] UKSC 13, [2019] 2 W.L.R. 984 at para. 43 and following). Fraud 'vitiates judgments, contracts and all transactions whatsoever': Lazarus Estates Ltd v Beasley [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712. There are many examples of this in the general law, amongst them court orders ('an order obtained by fraud is a nullity' (Walsh v. Minister for Justice[2019] IESC 34 at para. 3)), marriages (M.K.F.S v. The Minister for Justice and Equality[2018] IEHC 103 (at para. 16): '[w]here it is determined that the applicants' relationship is based on fraud, no 'rights' can arise from such a relationship') and in the United Kingdom, leave granted to a non-national to enter the jurisdiction (R. v. Home Secretary ex parte Zamir[1980] AC 930, 'an apparent leave to enter which has been obtained by deception is vitiated as not being 'leave [given] in accordance with this Act".*

22. Referring to *re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514, Dunne J. stated at paragraph 95 and 96:

> "*The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity*

of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.

Obviously, that case was concerned with an issue as to whether it was necessary to set aside a judgment of this Court on the basis of an issue of constitutional justice said to have arisen in that case. The general observation in relation to an order obtained by fraud being a mere nullity is not a controversial proposition."

23. In response, the Society submits that *Abdi* concerns circumstances arising under a specific criminal statutory framework in which a miscarriage of justice certificate ought to issue, and that it is not of assistance in resolving the issues in a case concerning an application to re-enter concluded regulatory proceedings under the Solicitors Acts in which final orders were made and were not appealed. Following a re-trial on the grounds of newly discovered fact, Mr. Abdi was acquitted on the grounds of insanity. The Supreme Court described them as "*unprecedented and extraordinary facts*" and in granting the certificate it relied on its judgment in *People (DPP) v Buck* [2020] IESC 16 para. 44 where it was stated that:

"*to undermine a conviction after an appeal has upheld the jury's verdict as safe and satisfactory, the accused, must demonstrate an error that goes beyond nuance and, furthermore, for a miscarriage of justice to be demonstrated if the accused is acquitted on retrial, requires a fundamental defect in the administration of justice amounting to an affront*".

24. The Society rejects the contention that this case is "*on all fours*" with *People (DPP) v Hannon* [2009] 4 IR 147. In *Hannon* a complainant withdrew an allegation of sexual assault after conviction. It is submitted that a parallel cannot properly be drawn but to the extent that it is, the test in *Abdi* requires the demonstration of a fundamental defect in the administration of justice. In

Launceston the Court of Appeal referred to a requirement to show "*that there is a fundamental issue concerning a denial of justice."* Mr. Murphy in sworn evidence accepted the SDT findings in the strike off application and it is submitted that the threshold is not met in circumstances where there is "*no evidence that the acceptance by Mr Murphy of the findings resulting in that order, sworn on affidavit and advanced at a hearing where he was legally represented, were the product of fraud or not voluntarily made."*

25. The Society also submit that in *UM v Minister for Foreign Affairs [2022] IESC 25* the court did not overrule or alter the tests in the judgments previously referred to and it was not in dispute that the declaration of refugee status was revoked on the grounds of fraud.

26. Further, it is contended by the Society that while in the civil proceedings this court found, on the balance of probabilities, the undertaking had not been given, the court did not make findings of abuse of process, deception or that the court was misled by the Society. The SDT's finding in respect of the undertaking was accepted wholeheartedly and Mr. Murphy apologised for it. When viewed in the totality of what occurred at that time, the Society relies on this court's finding, i.e. that it could not be determined that had the undertaking situation been treated or explained otherwise, that the same conclusion might not have been arrived at by the court in striking Mr. Murphy off the roll of solicitors (para. 391 [2019] IEHC 724). Thus, it is argued, that a fundamental issue concerning a denial of justice cannot be said to arise.

27. Similar considerations are said to arise in respect of the s. 18 proceedings. Notwithstanding any criticism made of the Society by the court concerning the initiation and progress of the s.18 proceedings, it is argued that the court ultimately found that it could not be concluded that in seeking the orders the actions of the Society were unjustified. It is submitted that there is no evidence that those orders, largely made on consent and following constructive engagement by Mr. Murphy with the court through his legal representation, were obtained by fraud.

28. It is, nevertheless accepted by the Society that if there is evidence of fraud and deception in the relevant proceedings this could give rise to the setting aside of final orders and, specifically, if the fraud was instrumental in securing that order. Such fraud must be strictly proved by evidence and cannot be established by assertion and opinion. It is contended that Mr. Murphy has not established fraud and that there is no finding to this effect in the court's judgment in the civil proceedings.

6.Discussion and Conclusion on Test

29. The court is satisfied that the principles as outlined in *Launceton* and as discussed in the review judgment apply. In circumstances where fraud is alleged, particular regard must be had to dicta in *Tassin Din* and *Kenny*. In the review judgment this court noted that *Student Transport v Bus Eireann* [2021] IESC 35 indicates that the most appropriate procedure to set aside a final order on the grounds of fraud is by way of plenary proceedings in which allegations of fraud are specifically and particularly pleaded. No point is taken in relation to the absence of fresh plenary proceedings on this application. The parties have agreed a particular course of action which is reflected in the order of Kelly P. Further, it has not been suggested that different principles apply where an order has not been appealed where that possibility exists, from those relating to final orders of the Supreme Court. In both cases the orders are final. That a right of appeal was not exercised and the reasons advanced therefor, however, appears to this court to be relevant to the consideration of the overall justice of the situation and in the determination of whether the court's exceptional jurisdiction ought to be invoked. Having considered the more recent submissions of the parties it does not appear to me that they substantially or materially alter the test which this court must apply.

30. In summary, the jurisdiction to set aside a final order of the court is exceptional. The moving party bears a heavy burden. The court may intervene where there has been a fundamental denial of constitutional justice, whether brought about by a fraud upon the court, the misleading of the court, or in any other

exceptional way. In the exercise of this jurisdiction the court must have due regard for the need for finality and certainty. As a matter of principle, where it is alleged that a fraud has been perpetrated on a court resulting in the procurement of an order in the proceedings sought to be re-entered, there must be evidence to support the allegation that such fraud has occurred and that it was operative in the procurement of that order. The bar, while not impossible, is a high one.

7.General Observations

31. It is clear from the principles outlined above that these applications are not to be treated as appeals on the merits. I am satisfied, however, given the procedures agreed, that the potential merits of arguments made are relevant to the overall assessment of the application and as to whether conditions of exceptionality have been satisfied. The court must also exercise care not to approach the applications as if they had been re-entered. The court must, however, be satisfied that the allegations made are supported by evidence. A desire to advance different arguments in the light of discovery of new material, or regret over an approach initially adopted, borne from the benefit of hindsight and knowledge of the consequences of that approach, do not, without more, satisfy the test . This must particularly be the case where the initial approach followed a period of reflection and was formulated with the assistance and benefit of legal advice. A contrary approach would risk undermining the principle of finality and certainty and of placing a respondent at an unreasonable, if not interminable, prospect of unending litigation.

8.Overlapping Issues – revisiting issues addressed in the civil proceedings

32. The Society contend that Mr. Murphy, in arguments made on these applications, seeks to re-visit issues which have already been decided in the civil proceedings and that such approach constitutes an impermissible attempt to do so. Many of the issues raised on these applications were to a greater or lesser extent considered in the judgment in the civil proceedings. I am satisfied, however, that given the agreed procedures as outlined in the order of Kelly P., while the court must have due regard

to its findings and assessments in the civil proceedings, it is not appropriate to simply approach these applications on the basis that they constitute an impermissible collateral challenge to the court's decision in the civil action. It is to be recalled that in these applications allegations of fraud and deception are made. As Mr. Murphy submits, his pleadings in the civil proceedings did not extend to allegations of fraud. Given that these applications are separate and distinct and based on particular grounds, the court proposes to address and consider the particular points raised; and, at the risk of some repetition, intends to do so in expressed detail.

33. The formal application in the s.18 proceedings was made by motion dated 1st June 2016. While later in time than the application in the strike off proceedings, given their stated connection and the time at which the orders were made, it seems appropriate to first consider the application in the s. 18 proceedings.

PART I – The Section 18 proceedings.

9.Reliefs sought in the s. 18 proceedings

34. The application in the s. 18 proceedings was commenced by special summons issued on 10th August 2006. Sixteen substantive reliefs were sought. It was grounded on an affidavit sworn on the 10th of August 2006 by Mr. Clohessy, a complaints executive in the Complaints and Client Relations Committee (CCRC) of the Society. The numbering adopted in Mr. Clohessy's affidavit mirrors the numbering in the summons. The following orders were sought:

i. Orders prohibiting Mr. Murphy from acting as a solicitor or from holding himself out to be a solicitor entitled to practice. (Reliefs sought at 1 and 2)

ii. An order requiring the delivery for destruction of all stationary bearing the letter heading of his previous firm (3).

iii. An order requiring the delivery to a nominee of the Society of all files, deeds, wills and accounting records or any documents relating to his practice as a solicitor, within his possession power or procurement (4).

iv. An order directing Mr. Murphy to remove his name from all client account mandates where client account monies were held, particularly the account at AIB, Kenmare (5).

v. An order requiring Mr. Murphy to deliver to a nominee of the Society all files, deeds and monies relating to the estates of two named clients (the [REDACTED]*)* who had property at 11 Church Place, Rathmore, Co. Kerry (6).

vi. An order requiring the respondent to deliver to a nominee of the Society all files documents and deeds and monies relating to Mr. and Mrs. O'Donoghue (7).

vii. An order requiring Mr. Murphy to deliver to a nominee of the Society files documents and monies relating to Ms. [REDACTED] (8).

viii. An order requiring Mr. Murphy to deliver forthwith all files, deeds and documents and monies relating to Mr. [REDACTED]. This was not pursued and Mr. Murphy is critical of its inclusion in the reliefs sought (9).

ix. Orders directing Mr. Murphy to comply with orders of the Tribunal made on 29th May 2002 (*The* [REDACTED] *matter*) and 23rd November 2004 (*the* [REDACTED] *matter*) (10 and 11).

x. An order directing Mr. Murphy to comply with the directions of the Complaints and Client Relations Committee made on 4th November 2003 (the [REDACTED] matter) (12).

xi. An order directing that Mr. Murphy deliver forthwith an accountant's report in the prescribed form for the accounting period ended 31 March 2004 (13).

xii. An order directing Mr. Murphy to deliver a closing accountant's report for the period 1st April 2004 to 30th June 2005, or such later date when he ceased to receive, hold, control or pay client monies (14).

xiii. An order requiring Mr. Murphy to forthwith effect professional indemnity run-off cover in relation to his practice for the year 2006 (15).

xiv. An order for substituted service (16).

10.The Order for Substituted Service – 11th October 2006

35. An *ex parte* application for substituted service was granted by the then President of the High Court, Finnegan P., on 11th October 2006. The order provided for the service by ordinary prepaid post addressed to Mr. Murphy, c/o Murphy Healy, Solicitors, Market St., Kenmare, Co Kerry. Mr. Murphy's mobile telephone billing address was also referred to in the order as follows:

"IT IS FURTHER ORDERED that the billing address for Vodafone mobile phone number (number stated) *be supplied by the phone company to the Law Society-liberty to apply in relation to this*".

In an affidavit sworn on 10th February, 2010, in response to a complaint made by Mr. Murphy to the SDT (2010 77/SA), Solicitor X averred that at the time of the swearing of the affidavit for substituted service, the Society believed that Mr. Murphy was out of the jurisdiction engaging in property transactions in Turkey. The Society sought the court's permission for both it and the SDT to serve Mr. Murphy at Murphy Healy & Co solicitors at Market St, Kenmare County Kerry. It will be recalled that the SDT was not granted an order, the President observing that it was an independent body which could make its own application. The contents of Solicitor X's affidavit, and the basis upon which the application for substituted was made was the subject of extensive discussion in the civil proceedings, as it is in the court's judgment in the ancillary appeals.

11.Orders made in the s. 18 proceedings on 31st January 2007

36. Mr. Murphy consented to the orders sought at paragraphs 3-8 and 10- 15. The relief sought at 9 was not pursued. Consequent upon the furnishing by Mr. Murphy of an undertaking not to practice, Johnson P., who did not make orders in respect of the reliefs sought at paras. 1 and 2, observed that …"*[t]he matter is in the respondent's own hands*".

37. The perfected order of the court provided for compliance "*forthwith*" with most of its requirements. Mr. Murphy was directed to :

i. deliver to the Society within four weeks an accountant's report in the prescribed form for the accounting period ended 31st March 2004;

ii. deliver to the Society within four weeks a closing accountant's report for the period 1st April 2004 to 30th June 2005 or to such later date when he ceased to receive, hold control or pay client monies.

iii. effect professional indemnity run-off cover in relation to his former practice for 2006 or to produce to the Society two refusals from approved insurers within four weeks.

38. The proceedings were adjourned for mention to the 28th of February 2007 to "*ensure that all orders I have made have been complied with. In the event of any order not being complied with I will issue the injunctions as requested* ". In relation to the application for substituted service, Johnson P. stated that *"there is no problem about the service of documents"*. A costs order was made in favour of the Society. Attachment and committal proceedings followed.

12.The Notice of Motion dated 1st June 2016 to re-enter the s.18 proceedings

39. Leave was sought to make this application notwithstanding an undertaking given by Mr. Murphy on 1st March 2011, not to institute further proceedings. Mr. Murphy contended that the undertaking was given on the understanding that the civil action would be heard at an earlier date. It had been fixed for hearing on 2nd June 2011.

40. In his notice of motion, Mr. Murphy seeks an order pursuant to the inherent jurisdiction of the court, to re-enter the s. 18 proceedings and to set aside a number of other orders made during the course of those proceedings and the attachment and committal application. The application is grounded on an affidavit sworn on 27th May 2016. Temporally, the application was brought following a response to data access requests made by Mr. Murphy and the receipt of documentation in response.

41. Certain reliefs which were sought have not featured to any great extent at hearing. These concerned the retention and control of files and matters connected with taxation of costs. The Society gave undertakings or assurances which obviated the necessity for the further ventilation of those issues. This is reflected in the replying affidavit to the motion, sworn on behalf of the Society by Mr. Peter Law, who averred that he did not propose to address matters contained in paragraphs 31-41 of Mr. Murphy's affidavit on his understanding that Mr. Murphy was not pursuing those reliefs. He made reference to a letter of 23rd June 2016 in which Mr. Murphy

had stated that there was no requirement for orders in respect of interlocutory reliefs sought as those matters had been dealt with.

13. (a) Orders sought to be re-entered

42. The orders which Mr. Murphy seeks to have re-entered are not confined to those made on 31st January 2007. He seeks to re-enter to have set aside the order for substituted service made on 11th October 2006 and orders made in the course of the attachment and committal application on 28th February 2007, 9th May 2007, 11th June 2007, 16th July 2007, 8th October 2007, 19th November 2007 and 17th June 2008. A further order was made on 14th March 2007. It is not expressly referred to in the notice of motion. The order provided as follows:

> ...*"and it appearing that there is non-compliance on the part of the said Respondent with the direction in said order to have his name removed by close of business on said date from all client account mandates wheresoever client account monies are held and in particular the client account (2107 8005) held at Allied Irish Banks 9 Main Street Kenmare Co Kerry.*
>
> *IT IS ORDERED that Seamus McGrath (senior investigating accountant of the Law Society) be now substituted in lieu of Mr. Colm Murphy (the said Respondent herein) and is hereby mandated as the signatory on Mr. Colm Murphy's client accounts."*

This order was perfected on 31st October 2012.

13.1 Attachment and Committal - the order of 28th February 2007

43. On 22nd February 2007, the Society issued a motion seeking to attach and commit Mr. Murphy for failure to comply with the orders of 31st January 2007. The application was grounded on the affidavit of Solicitor X sworn on that day, in which she also referred a more recently made complaint, made on behalf of a Mr. [REDACTED] (*"The* [REDACTED] *complaint")*. The perfected order of the court of 28th February 2007 records as follows:

1. That the papers ordered by the order of 31st January 2007 be delivered to the Society.

2. That the motion for attachment and committal be returnable for Monday, 14th March 2007.

3. That the respondent forward a cheque to the Society to cover matters as outlined in the said order of 31st January 2007.

4. That service of any documents, motion and summonses by serving same on Murphy, Healy and Co. solicitors be good and sufficient service on the respondent.

44. In his affidavit in reply sworn on 14th March 2007, Mr. Murphy outlined difficulties encountered by him in attempting to comply with the requirements of the orders of 31st January 2007. He referred to communications with the Society and stated that he had clearly complied with the orders to the best of his ability. He also responded to the allegation regarding the [REDACTED] complaint. Mr. Murphy maintains that this complaint was based on a forgery and was subsequently proved to be such. He contends that it was relied on in the attachment and committal proceedings when it ought not to have been and that the Society was aware that this complaint had been addressed and effectively closed prior to the final determination of that application in June 2008 but did not draw this to the court's attention at any relevant time. This issue is addressed in the principal judgment at paras. 367 *et seq*. Mr. Murphy also lodged a complaint against Solicitor X the SDT on 13th January 2010 in connection with her role in this regard (5297/DT 02/10) (2010/78SA). The complaint was rejected at *prima facie* stage. Mr. Murphy's appeal from that finding is considered in the court's separate judgment in the appeals.

13.2 The order of 9th May 2007

45. The court directed that Mr. Murphy's accountant furnish client accounts three days prior to the action being listed for mention on 11th June 2007 and also listed the matter for 30th July 2007. The papers supplied to the court suggest that Mr.

Murphy was examined on oath at that hearing in respect of issues of alleged non-compliance.

13.3 The order of 11th June 2007

46. No order appears to have been made. If it was, the court has not been provided with it. It is unclear whether a hearing took place as a court appearance for that day is not referred to in the schedule of court dates in the perfected order made by Johnson P. on 17th June 2008.

13.4 The order of 16th July 2007

47. Mr. Murphy was directed to file a further affidavit by 17th September 2007. The Society was directed to file any affidavit of non-compliance on or before 8th October 2007. The application was adjourned to that day.

13.5 The order of 8th October 2007

48. On 8th October 2007 the Society was given liberty to file an affidavit and Mr. Murphy was given liberty to file a response within three weeks. The summons and motion were adjourned to 19th November 2007.

13.6 The order of 19th November 2007

49. Mr. Murphy was given liberty to file an affidavit within two weeks and the Society an affidavit within a further two weeks. On the action being listed for mention to fix a date for hearing on 17th December 2007, costs were reserved.

13.7 Further court appearances

50. Although perfected orders are unavailable in respect of certain court appearances, it is clear from the order of Johnson P. made on 17th June 2008 and perfected on 14th July 2008, that the parties were also in attendance in court on 21st January 2008, 4th February 2008, 25th February 2008 and 31st March 2008.

14. (b) Grounding Affidavit of 27th May 2016

51. Mr. Murphy addressed a number of issues, including matters arising from replies which he received to his data access application. He also raises issues which he maintains are relevant to the strike off application.

52. Mr. Murphy maintains that the Society, to its knowledge, improperly relied on the s.18 procedure when making its application. Mr. Murphy refers to internal emails, including that of 30th May 2005 from Ms. Kirwan to Solicitor X in which she said that "*all I have to do is get any application before the High Court*" and Solicitor X's reply that in her view the Society should take s. 18 proceedings in order to make Mr. Murphy comply with directions of the CCRC. He points to an email of 5th November 2004 from Solicitor X to Mr. Elliott which was generated after the civil proceedings had been issued, in which it is recorded that she had discussed the matter with Ms. Kirwan and that they both agreed that Mr. Murphy should be struck off the Roll of Solicitors. Mr. Murphy avers that it was an abuse of process by the Society, effectively conceded, that the s. 18 proceedings were an attempt to get him to comply with a wide range of orders and directions and that such orders should be ancillary to a s. 18 order and not the driving force for the taking of the proceedings. The s. 18 proceedings concluded in June 2008. In July 2008, at the behest of the Society, the Oireachtas enacted the Civil Law (Miscellaneous Provisions) Act, 2008, s. 43, inserting s. 18 (A) of the Solicitors Amendment Act 1994, thus making provision for the enforcement of orders of the SDT. The court has addressed a number of these issues, particularly in the review judgment. This matter has also been addressed in the judgment in the civil proceedings at paragraphs 40 *et seq* and at para. 383.

53. In his grounding affidavit, Mr. Murphy avers that the court was misled with regard to the following:

> (i) ***The auction and the application for substituted service.*** The Society misled the court when obtaining the order for substituted service. To establish that he was acting as a solicitor when not entitled to, the Society relied principally on the allegation that he attended an auction in the capacity of solicitor having carriage of sale when he was not entitled to. His brother Mr. Conor Murphy had carriage of the sale. The auction

was brought to the Society's attention by an unnamed person, details of whom could not be found. He had nothing to do with the auction and it is alleged that counsel for the Society repeatedly referred to the auction at a time when the Society knew he had nothing to do with it. The Society should have discontinued the s. 18 proceedings as it knew that they had no foundation and that it was not entitled to the orders which it was seeking. Affidavits in support were sworn by the owner of the property, Mr. George Harrington and the auctioneer, Mr. Denis Harrington. The Society, knowing that he was not involved, nevertheless proceeded with the application for substituted service on 11th October 2006 based on an affidavit sworn by Solicitor X on 9th October 2006. She averred that the Society was *unable to effect* service of proceedings on him. This was misleading as the Society had not attempted to serve him previously. The Society was aware of his address and phone number. Mr. Murphy maintains that a certain impression of him was created in the eyes of the court by the nature of the proceedings, the accusation that he had attended the auction and that he was avoiding service of the summons. He submits that when the matter came first came before the then President of the High Court on 6th November 2006, the then President described him as a person who was ducking and diving and evading service. On 9th December 2009, Mr. Murphy lodged a complaint to the SDT against Solicitor X regarding the contents of the affidavit for substituted service(5297/DT 128/09) (2010/79 SA). Mr. Murphy also relies on the observations of this court in the civil proceedings and submits that because there is now an existing judgment that *"takes out the catalyst for these proceedings"*, unusual and exceptional circumstances arise.

(ii) ***The letters/letterheads allegedly used by him.*** In his affidavit grounding the application in the s.18 proceedings, Mr. Clohessy referred to

a letter received on 23rd November 2005. This was on the headed notepaper of Mr. Murphy's former practice. Mr. Murphy states that he never denied that he caused this letter to be sent. It was sent to the Society. He wrote a number of letters to the Society on which he did not use headed notepaper. There were also letters sent to SDT which were not written on headed notepaper. He argues that these letters should have been brought to the court's attention. Documentation since received by him pursuant to his data request indicate that the Society knew that he was not generally using headed notepaper and had used it only once. Further, he complains that counsel incorrectly insinuated that he used headed notepaper *many times* when there was no evidence to substantiate this allegation.

(iii) ***The operation of accounts - writing cheques on client account.***

Mr. Clohessy referred in his affidavit to a letter received by the Society from a local solicitor who claimed that Mr. Murphy had written a client account cheque to refund a deposit to a client. While correct, Mr Murphy maintains that he was acting in accordance with the instructions of the Society, that this had been substantially confirmed by Mr. Seamus McGrath and that the Society was attempting to find fault with him for doing something he had been instructed to do. He argues that a solicitor may write cheques from a client account in circumstances envisaged by s.26 (2) of the Solicitors Accounts Regulations 2001. This refers to the period between the cessation of practice and "*such later date when he ceased to receive, hold, control or pay client's monies*". He did not receive client's monies after ceasing practice. He simply repaid money to an entitled person on the same day it was requested and disputes that this constitutes a breach of the Solicitors Acts. Only one cheque was drawn and he maintains that this was done with the blessing of the Society. Notwithstanding this, counsel for the Society was not deterred from referring to "*the fact of the client account being operated"*. As an example

of the poor light in which the Society attempted to paint him and in the context of the subsequent application for attachment and committal, he avers that he wrote to the bank on 31st January 2007, the day the order was made. The bank required information from the Society. Solicitor X did not write to the bank until 15th March 2007, six weeks after the s. 18 order was made. Mr. Murphy avers that this shows that Solicitor X was clearly unsure of what to do. She was seeking the appropriate forms, yet the Society maintained that the reason why a change of name on the account was not finalised was because he had failed to contact the bank. He avers that this was untrue and that the blame for this lay entirely with the Society.

(iv) ***The need for the private investigator.*** Mr. Murphy takes issue with the contents of a memorandum of 8th February 2006 to Ms. Latham, copied to Solicitor X, in which Mr. Elliott wrote that "*consideration is being given to engaging the services of a private investigator to obtain information regarding Mr. Murphy's whereabouts*". Mr. Murphy complains that this was without foundation and wrongfully created the impression that "*I was a fugitive*".

(v) ***The*** [REDACTED] ***document was a forgery.*** Mr. Murphy contends that the [REDACTED] transfer was a forgery, that it ought not to have been relied on and that it continued to be relied on after the complaint was closed. In relation to another [REDACTED] file, in respect of which an issue had arisen in 2006, he complains that this was referred to in the s.18 application but it had been closed prior to the application. He submits that it should not have been referred to.

(vi) ***The reference to a telephone bill by Solicitor X in support of the contention that Mr. Murphy was practising.*** Prior to the finalisation of orders in the attachment and committal application, Mr. Murphy attempted

to re-visit the order for substituted service and the orders in the s.18 proceedings. He swore a number of affidavits in that context. In response, Solicitor X averred in an affidavit sworn on 22nd February 2008, that she had obtained his "*Eircom*" bill and that *"this disclosed that the billing address was in fact Murphy Healy & Company solicitors Kenmare Co Kerry"*. He states that this was not the billing address for his mobile phone and that he subsequently obtained the document from which Solicitor X had obtained her information. It did not say "*Murphy Healy & Co*". Nor did it say "*solicitors"*. This is the subject of a complaint of misconduct made against Solicitor X on 9th December 2009 (5297/DT 129/09) (2010/77 SA).

(vii) ***Directions of 7th June 2006*** The minutes of the CCRC meeting of 7th June 2006 records that "*the Committee directed Mr. Murphy to deliver all files and monies in his possession*". Mr. Murphy contends that he never received any such direction and that there is no proof that it was ever conveyed to him. He points to another sentence in the minute which says, "*the Committee further authorised the Society's solicitors to take whatever proceedings were appropriate on this matter".* He contends that there was no other meeting or direction of the Society in relation to *"whatever proceedings were appropriate"*

(viii) ***Miscellaneous matters.*** Mr. Murphy refers to issues concerning former clients. A number of these issues were ventilated in the civil proceedings. They include:

a. *Mr. Declan O'Donoghue*. Proceedings involving Mr. O'Donoghue were instituted prior to the s. 18 proceedings and were settled on payment of monies to him by Mr. O'Donoghue.

b. *Ms.* [REDACTED]. Mr. Murphy had been instructed approximately seven or eight years previously by her father, Mr. [REDACTED]. Ms. [REDACTED] was involved in an accident.

The file relating to her claim and to financial matters connected therewith was under her father's name. It had been taken over by Murphy Healy & Co. but they could not locate the file and they were not to know that Ms. [REDACTED] had since got married and moved address. No breach of the Solicitors Acts occurred. Mr. Murphy contends that there was no misconduct or complaint of misconduct.

15. Proceedings before the President of the High Court on 31st January 2007.

54. Mr. Murphy states that there was no incentive for him to litigate the consequential orders sought when the application came before the President on 31st January 2007 because:

i. his headed notepaper had already been destroyed;
ii. he had no desire to hold onto files that had long since been closed; and
iii. he did not he have the desire to contest any of the orders sought.

His attitude to the orders seeking to prohibit him from acting as a solicitor and from in any way holding himself out as a solicitor in practice, however, was different. Mr. Murphy complains that reference was made to the auction, the use of the letterheaded notepaper, the writing of a cheque on a client account and that counsel for the Society left Johnson P. in no doubt but that he was practising as a solicitor while not entitled. Even though he never practiced as a solicitor nor held himself out as a solicitor entitled to practice when not so entitled, he states, the "*judge gave me little choice but to give the undertaking*".

16.Transcript of proceedings of 31st January 2007

55. The transcript of the proceedings before Johnson P. on 31st of January 2007 are considered in schedule I to this judgment. The matters referred to therein, including observations of the court in respect of the contents of the transcript are to be read as part of this judgment.

17.Attachment and Committal

56.A motion for attachment and committal was issued on 22nd February 2007. Mr. Murphy maintains that this was based entirely on an allegation made by Mr. [REDACTED], of which there was significant evidence that it was a forgery. He also places emphasis on a letter which he discovered in the course of his data access application, written by Solicitor X to the solicitor for Mr. and Mrs. O'Donoghue on 14th March 2007, the date on which the attachment and committal application first came before the court. He avers that "*at the commencement of these proceedings they knew that Mr.* [REDACTED]*'s story was not correct and yet were happy to rely on it to have me attached and committed to prison*." This letter was not brought to the attention of the court and Mr. Murphy contends that by sending that letter, Solicitor X was admitting that she was not relying on the [REDACTED] document. Nevertheless, the Society proceeded with the application and on 9th May 2007 counsel for the Society stated in court that Mr. Murphy had the *temerity* to suggest that the document was a forgery. Although the Society closed its file in respect of Mr. [REDACTED]'s complaint in September 2007, neither he nor the court was so informed. Proceedings were adjourned from time to time and he maintains that the Society wrongfully maintained reliance on the forged document. This was addressed in the judgment in the civil proceedings at paragraph 368 *et seq.*

57. Mr. Murphy maintains that it was as a result of a combination of the above matters that Johnson P. commented when delivering judgement on 17th June 2008 that he, Mr. Murphy, had been "*giving excuses which would have amazed theologians of a mediaeval nature in their dexterity and which would even have surprised three card trick men at Puck Fair in the manner in which they were applied"*. He believes that this was a reference primarily to his *excuse* that the document produced by Mr. [REDACTED] was a forgery and that he had not been at the auction.

18.Decision not to appeal the s.18 orders/attachment and committal costs order.

58. Mr. Murphy did not appeal the orders of Johnson P. In his grounding affidavit, he avers that *"notwithstanding that I had grave reservations about the Law Society's procedures and while contemplating an appeal (and retained new solicitors as I would be appealing orders I had consented to) I still did my very best to comply with the orders.* While aggrieved at the outcome of the application, in view of the protracted history and "*hardening of the arteries*" between him and the Society and because of his state of mind and illness at that time, he decided to focus on the civil case and to make applications to the SDT in relation to the conduct of certain solicitors within the Society.

19.Matters arising since the making of the orders in the s. 18 and the order for costs in the attachment and committal proceedings

59. Mr. Murphy contends that matters have arisen since the above orders were made which are relevant to his application. First, he states that by admitting certain documents in the civil proceedings without the necessity for formal proof by letter written on 14th November 2011, the Society had accepted that he had nothing to do with the auction and had thereby acknowledged that the [REDACTED] document was a forgery. Second, information came to light in response to his data access request which he contends illustrate that the Society were targeting his solicitors and that the Society had decided to fight the civil case to the end at all costs. Included was a memorandum prepared for the purposes of instructing/ or updating progress in respect of the case. Further, relevant documentation was lost or destroyed by the Society. To the extent that these issues relate to the strike off application, they are addressed in Part II. Third, Mr. Murphy alleges that Hanna J. was misled and that this gave rise to delays in the progress of his case, that those actions and consequential delays resulted in injustice and that the Society's response to his applications should be struck out on that basis.

20.The Society's response

60. Mr. Peter Law in a replying affidavit sworn on 12th July 2016, avers that the Society stands over the s. 18 proceedings and rejects Mr. Murphy's attempt to impugn them. The response may be stated as follows:

i. ***Delay*.** Mr. Law rejects the contention that the Society was responsible for delay. He outlined the history of the proceedings. The plenary summons issued in October 2004, a Statement of Claim was not delivered until June 2009. The Society issued a notice of motion on 15th October 2010 seeking an order prohibiting Mr. Murphy from instituting further legal proceedings, including disciplinary and legal proceedings against any officer or employee of the Society without first obtaining the leave of the President of the High Court. That came before the court on 1st March 2011. Mr. Murphy gave undertakings through his counsel that he would not institute further proceedings pending the determination of the civil proceedings. The Society issued a motion on 1st April 2011 seeking the trial of preliminary objections and special pleas in its defence. Mr. Law asserts that when the matter came before Kearns P. on 11th April 2011, an order was made on consent, *inter alia*, that the preliminary objections and special pleas together with an application by Mr. Murphy to have the matter set down before a judge and jury, be tried as preliminary issues to commence on 2nd June 2011. The terms of that order were disputed by Mr. Murphy. On 2nd June 2011 the Society's motion seeking the hearing of the preliminary issues was adjourned generally, subject to directions for the exchange of amended pleadings, in circumstances where Mr. Murphy's counsel agreed that the claim be restricted to slander and misfeasance of public office and that this would be reflected in amended pleadings. An amended statement of claim was delivered on 1st July 2011. An amended defence was delivered on 27th of July 2011. The matter was listed for

hearing on 15th November 2011. By order of the President of the High Court made on 10th October 2011, liability was to be determined in advance of quantum. As a judge was not available on 15th November 2011 the case was relisted before Hanna J. for hearing on 8th March 2012 . Application was made by the Society, and acceded to by Hanna J., that the preliminary objections and special pleas raised by the defendants in its amended defence should be so determined. The trial of preliminary issues was heard over four days. In a reserved judgment delivered on 30th March 2012 the plenary proceedings were dismissed. The order of Hanna J. was subsequently appealed to the Supreme Court. A notice of change of solicitors was filed on 4th March 2013. The Supreme Court delivered an *ex tempore* judgment on 25th March 2015 allowing the appeal, setting aside the order of Hanna J and remitting the case to the High Court for rehearing. Costs were awarded against the Society. Proceedings against a second named defendant, Mr. Simon Murphy were struck out. On 11th May 2015 Mr. Murphy served a notice of change of solicitors. By letter dated 18th February 2016, the new firm of solicitors sought discovery for the first time. He contends that the entirety of the delay in the prosecution of the plenary proceedings following the Supreme Court appeal, at least up to the time of the swearing of his affidavit, was caused by Mr. Murphy.

ii. ***Failure to comply with directions, representation at hearing and consent to orders.*** Mr. Law avers that it is not in dispute that Mr. Murphy had not held a practising certificate since 1st January 2005. He contends that the s. 18 proceedings were commenced in circumstances where the Society was concerned that Mr. Murphy: (a) had failed to comply with directions issued by the CCRC, (b) had failed to comply with orders of the SDT, (c) appeared to be holding client's monies and was continuing to practice, (d) was in breach of the Solicitors Accounts

Regulations and (e) was in breach of the Professional Indemnity Insurance regulations. Fifteen substantive reliefs were sought. The Society pursued fourteen. Mr. Murphy was represented by solicitor and senior counsel and consented to twelve reliefs.

iii. ***No choice but to give undertakings not to practice.*** Mr. Law submits that, as matters stand, it is difficult to see to what end Mr. Murphy would wish to be released from undertakings not to practice or to hold himself out as entitled to practice. He disputes the contention that Johnson P. gave Mr. Murphy little choice but to furnish the undertaking, which he describes as inaccurate and wholly inappropriate. At no stage was it intimated to the court that such was Mr. Murphy's perception. Johnson P. invited his senior counsel to state whether he was prepared, on behalf of Mr. Murphy, to give an undertaking. Senior counsel took instructions. After a brief adjournment counsel informed the court that there was no such difficulty.

iv. ***Points already before the court on 31st January 2007.*** Mr. Law states that issues concerning the application for substituted service and the auction were addressed in an affidavit sworn by Mr. Murphy before the orders in the s. 18 proceedings were made.

v. ***No application to set aside and no appeal.*** Mr. Law avers that "*it is difficult to see how Mr. Murphy contends that the issues relating to the auction constitute a basis either to re-enter these proceedings, or to set aside the order is made therein*". in circumstances where:

   a. Mr. Murphy did not apply to set aside the service of the proceedings. The issue regarding the manner in which the order was obtained was before the court. Mr. Murphy agreed to the mode of service. Notwithstanding that he was then represented, Mr. Murphy

did not claim that he was prejudiced in the eyes of Johnson P. when the matter was before him on 31st January 2007.

b. Mr. Murphy consented to many of the orders sought and gave the undertakings.

c. The order was not appealed.

vi. ***The lawful basis for the s. 18 proceedings.*** Mr. Law describes as inaccurate what he refers to as a misapprehension by Mr. Murphy that the only possible manner in which the Society could have issued s. 18 proceedings was if he had something to do with the auction. In Mr. Clohessy's affidavit, a range of matters were identified regarding the Society's apprehension that Mr. Murphy was practising as a solicitor. He disagrees that the Society relied principally on the allegation that Mr. Murphy attended the auction. On the propriety of using the s. 18 procedure, Mr. Law avers that Mr. Murphy's reference to s. 18 of the Act is incomplete. Section 18 applies not only where it is shown that a solicitor has contravened or is contravening such provisions, but also where a solicitor is likely to do so. Mr. Law avers that this is an important omission because, as is evident from Mr. Clohessy's affidavit, three sets of regulations were identified in respect of which it was contended that Mr. Murphy was in breach. These also formed the basis upon which the proceedings were issued. While Mr. Murphy disputes that he was in breach of those regulations when the proceedings were issued, Mr. Law states that the clear position of the Society is that he was.

vii. ***Failure to comply with s. 18 orders.*** Mr. Law contends that by the time Mr. Murphy had rectified his failure to comply with many aspects of the s.18 orders, the only matter which remained for determination was the question of costs, an order which was made in favour of the Society, again which Mr. Murphy did not seek to appeal.

viii. ***Headed notepaper.*** Mr. Law argues that Mr. Murphy failed to exhibit documents received as a result of his Data Protection Act application which reveal that the Society knew he was not generally using headed notepaper, had used it only once and that that was a letter to the Society. He contends that it is factually incorrect to state that headed notepaper had been used *"only once".* Two letters on headed notepaper of Colm Murphy and Co., Solicitors were identified. One was a letter dated 20th May 2005 from Mr. Murphy to Mr. Declan O'Donoghue. The second was from Mr. Murphy to the Society on the 23rd November 2005. It is suggested that given the reference numbers on the correspondence, there is a possibility that further such correspondence may have issued. The letter of 20th May 2005 bore reference number "CM/EE/996". On a letter of 23rd November 2005 it is "CM/EE/1001. He accepts that this does not establish that any other correspondence was sent between these dates but points out that the reference numbers are not sequential. This was also mentioned by counsel for the Society to Johnson P. on 31st January 2007. Mr. Murphy did not offer an explanation for the reference numbering used. Mr. Law states that it is evident from correspondence from the Society that it was not correct to say that it was common case that he was allowed practice and to use his old headed notepaper to the end of June 2005. Nor was it correct to say that headed note paper was used with the consent or blessing of the Society after he ceased holding a practising certificate. In support, he points to a letter from Mr. Elliott dated 1st March 2005. Mr. Murphy had enclosed a cheque in respect of his practising certificate fee for 2005 in circumstances where he had stated that he wished to withdraw his application for a practising certificate. Mr. Elliott wrote "*please confirm to the Society that your name has been removed from the professional notepaper of the practice*". He regards it as noteworthy

that in his affidavits, rather than asserting that the Society consented to him correspondence with such letterheaded paper, Mr. Murphy stated on multiple occasions that after he ceased practice he had used the headed notepaper of his former practice *"only once"*.

61. Mr. Law also refers to the affidavit of Solicitor X sworn on behalf of the Society on 8th April 2008 as demonstrating the difficulties which the Society encountered in securing compliance with the orders of 31st January 2007. She averred that the application for attachment and committal was not completely based on an allegation by Mr. [REDACTED] and had raised what Mr. Law describes as a wide variety of compliance issues. That Mr. Murphy appeared to be practising as a solicitor was only one such issue. Other matters included wrongful retention of documents pertaining to his previous practice, the operation of the client account notwithstanding that he was not the holder of a practising certificate, failure to comply with a number of orders from the SDT and directions from the CCRC, breach of the Solicitors Accounts Regulations and breach of The Professional Indemnity Insurance Regulations.

21.Previous attempt to set aside the order for substituted service, the s. 18 orders and to dismiss the special summons.

(a) Mr. Murphy's affidavit of 31st January 2008

62. In his affidavit sworn on 31st January 2008 Mr. Murphy attempted to set aside the order for substituted service and the s. 18 orders made a year earlier. The affidavit was filed before the attachment and committal proceedings were finalised. In addition he sought orders dismissing the special summons and the attachment and committal application. In the alternative, he requested liberty to file a supplementary affidavit to deal more fully with these matters.

63. It is evident that on the application now under consideration, Mr. Murphy repeats many of the issues raised in his affidavits sworn in 2008. The grounds then raised reflect many of those now raised on the instant application which include the following:

i. The primary thrust of the proceedings was that he was practising as a solicitor when not entitled to do so. This, he said, was simply not true and that the main reason for this accusation was that his name appeared in the Examiner newspaper on 10th August 2006 as the solicitor having carriage of sale of the property to be sold at the auction on 11th August 2006. The Society issued the proceedings based on the advertisement.

ii. On the following day someone from the Society attended at the auction. It was quite clear from the affidavits of Mr. Harrington, Mr. Conor Murphy and the auctioneer, that he had nothing whatsoever to do with the auction. His name had appeared in the newspaper in error. It was also clear that anyone attending the auction would have known that he had nothing to do with the auction, his name was not in a contract for sale and no mention was made of him. The Society knew that he was not at the auction. Affidavits sworn by Mr. Conor Murphy and persons involved in the auction were also produced at that time. In addition to pursuing the order for substituted service when the Society knew or ought to have known that the application was not properly grounded, it had further compounded the situation by referring to the auction a number of times at hearing on 31st January 2007.

iii. His affidavit sworn in 2008 continued:

> *"Your deponent submits that at this point, having established that the auction had nothing to do with your deponent, there was a duty on the Law Society to reconstitute the proceedings or at least remove the part that referred to the auction but they choose to further mislead the court by proceeding with an application for substituted service. Any person who wished to establish the true identity of the solicitor having carriage of sale could quite easily have done so without ever leaving a Dublin office by contacting the Auctioneer named in the advertisement. To have*

failed to do so was at the very least careless or recklessly indifferent to the truth."

iv. No attempt had been made to serve between the date of issue of the summons in August and the date on which the order for substituted service was made. In sentiments which are echoed in the instant application he continued at paragraph 6:

"The significance of this misleading of the Court is that when the matter first came before the President of this Honourable Court he said that he remembered this case as one where the Respondent had gone to great lengths to avoid service of the Summons herein. It was clear that the Law Society had created a prejudice against me that I have not been able to alter since then and as there was no proper attempt by the Law Society to serve the Summons I feel that there is no basis for the President's comments"

v. The court was misled in relation to a letter he wrote to Mr. O'Donoghue on headed notepaper in May 2005.

vi. The Society was not entitled to raise the [REDACTED] matter and issues surrounding the distribution of the compensation fund claim forms.

vii. Regarding use of headed notepaper and the writing of a cheque, he averred:

"Apart from the first two orders sought by the Law Society I consented to all the orders sought by them. At the time I was going to contest everything but lacked a crucial piece of evidence that showed that all matters that have arisen between me and the Law Society were caused, inter alia, by the breach of duty, breach of confidentiality and malice of some officers of the Law Society. Thankfully new evidence has come to light that

proves what I felt to be the position all along which evidence will be introduced in my supplementary affidavit herein, if allowed, in my proceedings against the Law Society and in any other forum in which these proceedings will be heard."

(b) Solicitor X's replying affidavit of 22nd February 2008.

64. In her affidavit in reply sworn on the 22nd February 2008, Solicitor X addressed disciplinary hearings in two further matters which had come before the SDT on 10th July 2007. Orders had been made in August 2007 in 5306/DT27/05 (the [REDACTED] matter) and 5306/DT26/05 (the [REDACTED] matter). They had not been appealed within time. She also referenced a memorandum prepared by Mr. McGrath in which it was stated that the records disclosed that in June 2007 the Society had received an accountant's report for the period May 1st, 2004 to 31st of January 2007 which showed a deficit in client funds. This was subsequently cleared by Mr. Murphy. Solicitor X averred that this would not have come to light had the proceedings not been brought.

(c) Mr. Murphy's affidavit of 26th March 2008

65. On 25th February 2008, Mr. Murphy was permitted time to file a more substantial affidavit *"outlining my entire position in this matter."* A more extensive affidavit was filed on 26th March 2008, Mr. Murphy addressed many issues in more detail. These included the auction, without which he said there would not be any case against him. He re-addressed issues relating to the headed notepaper, the operation of the client account, the deficit in client account, how it came about and how it was dealt with; and matters relating to files. He objected to reference by Solicitor X to other disciplinary matters. He averred that counsel for the Society had informed the court on at least nine occasions that other than costs there was nothing outstanding in the application for attachment and committal. Mr. Murphy pointed out that the terms of the order of 31st January 2007 confirmed that the President had adjourned two items and that the main element of the proceedings had yet to be adjudicated on, and he said that the Society had misled and abused the court process.

66. Mr. Murphy addressed the [REDACTED] matter in a substantive way and expressed concerns over the Vodafone bill issue. He stated that it was being contended that he had used a billing address of Murphy Healy & Co for a phone which he had used, which, he said, was never the case.

67. Other matters were raised by him such as the takeover of the Healy practice and the alleged failure by the Society to provide financial support to him at that time. The accountant's investigation in 2001 was referenced. He averred that had he been aware of the name of the solicitor who had spoken about him to a client in Cork, he would not have consented to any of the orders - a reference to Mr. Simon Murphy who was joined as a co-defendant in the civil proceedings but whose name was subsequently struck from those proceedings by the Supreme Court in 2015. Mr. Murphy also referred to the opinion expressed to him by his psychiatrist, which ascribed his condition to actions which he had to unjustly endure. He also raised the issue of the undertaking as to damages which was given by the Society in October 2002, and his failure to receive an explanation for the basis on which that undertaking was given. This is also the subject of a complaint against Solicitor X made on 16th December 2009 (5297/DT 138/09 2010/82 SA). He sought an order discharging him from his undertaking not to practice and an order setting down the proceedings for plenary hearing.

(d) Solicitor X's affidavit of 8th April 2008.

68. Solicitor X repeated that the sole issue before the court related to the costs of the attachment and committal proceedings. She averred that on 19th November 2007, the respondent was given two weeks to file an affidavit on the issue of costs and this had not been done by 17th December 2007. The court was informed that a new solicitor and counsel were coming on record for the respondent. On 21st of January 2008, Mr. Murphy was given a further two weeks to file his affidavit and on Friday, 1st February 2008, the Society received five affidavits from the respondent. To its surprise, instead of simply placing facts before the court that might be relevant to the issue of costs, Mr. Murphy had sought to raise a variety of issues including a

challenge to the validity of orders that the court had previously made. She averred that at no stage had he informed the court that he was seeking to set aside any of its orders and that adjournments were granted on the basis that he wished to file an affidavit in respect of costs. At para. 30 she stated that when the matter came before the President on 30th March 2008…

> *"…Counsel for the Society asked the President to confirm that the only issue before the court was the issue of the costs of the attachment and committal proceedings and that the Respondent would not be permitted to attempt to litigate the proceedings again or to set aside any of the Court's orders. The President confirmed that the only issue that was properly before him was the issue of costs and that if the Respondent wished to challenge any of the orders that had been made then correct approach was to appeal them to the Supreme Court.'*

At para. 32 she averred:

> *"Counsel for the Respondent then indicated that he had a motion before the court to extend the time within which to appeal orders that had been made by the Disciplinary Tribunal. Counsel for the Society objected to this on the basis that the Respondent had previously consented to an order that he comply with the said rulings of the Tribunal and could not now seek to reopen them again. The President indicated that he would not accede the Respondent's motion".*

69. Mr. Murphy, in submissions, disputes that the only issue was one of costs. He informed this Court that the issues raised by him on affidavit were not ventilated because the Society persuaded the President to the view that the only issue to be addressed was costs.

22. Ex tempore judgment of 17th June 2008

70. On 17th June 2008 Johnson P. delivered an *ex tempore* judgment in the following terms :

"The case of Mr Murphy comes from Kerry. His total failure to have any regard for orders I found bizarre. Excuses which would have amazed mediaeval theologians and three card trick men were offered by him. I was astonished that a motion to attach and commit him was not brought earlier. Unless the prison gate opened I am satisfied that he would not comply with the orders. The Law Society were not only entitled to (sic) *required to bring a motion to attach and commit him. In respect of his application to extend time for appealing certain orders of the Tribunal. These procedures have been exhaustive. There has to be some limit. This is a professional solicitor who failed to exercise his rights under the law. I refuse the application".*

23.The perfected orders in respect of the rulings delivered on 17th June 2008

71. Two separate orders were made. The first order, in respect of costs, was made in proceedings which bear the record number for the s.18 application (2006 /No 371 SP). A second order, perfected on 14th July 2008, and also stated to have been made in proceedings bearing the same record number (2006 /371 SP) records that Johnson P. refused to extend time for appealing decisions of the SDT in three matters – 5306/DT 446 ([REDACTED] matter), 5306/DT26/05 (the [REDACTED] matter) and 5306/DT/27/05 (the [REDACTED] matter).

24. Discussion

(a) Status and Legal Effect of Ruling of Johnson P. on this Application

72. While it does not appear that a formal notice of motion issued in 2008, it is evident that Mr. Murphy previously attempted by affidavit to have the order for substituted service and the s.18 orders set aside. Many of the issues raised in his 2008 affidavits bear a strikingly similarity to those raised on this application. The perfected order of Johnson P of 17th June 2008 records:

"*And upon reading the said Special Summons and the said motion the affidavits as set out in schedule 1 hereinafter and the documents and the*

exhibits referred to in said respective Affidavits ...., IT IS ORDERED that the Applicant herein do recover their costs of the action and said motion for attachment from the date of issue of the said motion to this day to include all reserve costs as against the respondent when taxed and ascertained." (emphasis added)

73. The affidavits referred to in schedule 1 of that order include Mr. Murphy's affidavits filed on 31st January 2008 and 28th March 2008. The perfected order does not record a refusal of the reliefs sought in those affidavits, nor does it expressly refer to a distinct application to set aside previous orders.

74. No formal procedural objection has been raised nor does the Society contend that Mr. Murphy's application has been previously judicially determined, although the Society, in certain respects, seeks to rely on the findings of this court in civil proceedings.

75. As no previous orders were made which expressly govern the issues now raised, I am satisfied that Johnson P. in his *ex tempore* judgment delivered on 17th June 2008 was concerned only with the applications for extensions of time to appeal the stated SDT matters and the order for costs in the attachment and committal application.

76. Nevertheless, I am also satisfied that the contents of the affidavits sworn by Mr. Murphy in 2008 are relevant to the claims of deceit and fraud and suggested misleading of the court which are advanced on this application. What is clear is that despite such expressions of dissatisfaction with the s. 18 orders and the rulings of Johnson P., none of the were appealed. It is also evident, with regard to the order for substituted service and his alleged involvement in the auction, that prior to 31st January 2007 Mr. Murphy sought to agitate issues very similar to those now raised.

77. That Mr. Murphy previously raised very similar if not identical issues concerning the auction and the alleged misleading of the court, and did not appeal those orders, must be relevant to a consideration of how and why this application raises exceptional issues. That it is made at a time considerably removed from the

complained of events is also relevant. The period is at least three years, allowing and excusing the time period between 2011/12 and 2016, which might be ascribed to the undertaking given by Mr. Murphy to Kearns P. in 2011. I am also satisfied that the similarity of the issues raised are also relevant to a consideration of whether there has been a breach of Mr. Murphy's constitutional rights and the overall justice of the case.

25. Why is this an exceptional case?

(a) The Auction

78. Mr. Murphy's alleged involvement in the auction arises for consideration in respect of two matters about which he claims the court was misled. First, as evidence that he was allegedly practising as a solicitor and, second, in the context of the application for substituted service. The reference to a private detective in a memorandum which was exhibited to Mr. Clohessy's affidavit arises for consideration in this context.

79. Under the heading "*Practising as a solicitor without a practising certificate*", in his affidavit sworn on 10th August 2006, on the day before the auction, Mr. Clohessy averred that the attention of the Society had recently been drawn to the property section of the Irish Examiner dated 3rd June 2006 the auction of a public house at the Imperial Hotel on Friday, 11th August 2006 at 3 p.m. The solicitor with carriage of the sale was stated in the advertisement to be Mr. Colm Murphy.

80. The application for substituted service was grounded on Solicitor X's affidavit, sworn on 9th October 2006, two months after the auction. She averred that Ms. Lynch of the SDT had arranged for a summons server to attend at the auction. The Society also arranged for one of its staff, who had previously investigated Mr. Murphy's practice and who was familiar with him, to attend for the purpose of service of the proceedings. Solicitor X averred:

> *"I say however, Mr. Conor Murphy and not the respondent solicitor, appeared at the auction and neither the Society nor the Tribunal was able to effect service of the respective documents."*

81. Solicitor X also averred that *"since the issue of these proceedings the Society has been unable to effect service of same on the respondent solicitor".* This averment is the subject of a further complaint by Mr. Murphy to the SDT, now appealed to this court. This is addressed in the separate judgment of the court addressing the appeals..

82. In his evidence in the civil proceedings, Mr. Elliott accepted that the only attempt made by the Society to serve the proceedings was at the auction. Solicitor X relied to an extent on communications with SDT. She averred that she was informed by Ms. Lynch of attempts made by the SDT in November 2005 to effect service of papers on Mr. Murphy at an address in Turkey. The papers were returned. She received a letter from Ms. Lynch dated 6th October 2006. This in turn referred to letters which had been sent to Mr. Murphy's home address in June 2005. These were re-directed by An Post to Murphy Healy and Co., solicitors, who returned them to the SDT on 27th June 2006. Mr. Conor Murphy wrote *"You will appreciate that this documentation has no relevance to these offices".* At paragraph 9 of her affidavit Solicitor X averred :

> *"... Ms Lynch further advised that, after enquiring into the position with an officer of An Post, she again sent two further letters dated 30 June 2006 to the respondent solicitor at Claddanure, Kenmare, Co Kerry, one by registered post and the other by pre-paid ordinary post. She advised that her letter of the 30th June 2006, sent by registered post was returned by An Post marked 'not called for'."*

Ms Lynch forwarded to Solicitor X a copy of her letter and the returned envelope. She also informed Solicitor X that the SDT's records showed that it received a letter from Mr. Murphy on 11th July 2006 but could not at that time locate it. By fax sent on the same day, 6th October 2006, she copied Solicitor X with the letter received from Mr. Murphy dated 30th June 2006 and which referred to his mobile phone. Mr. Murphy had said that he could arrange to pick up correspondence from Ms. Lynch. (see also the principal judgment at para. 147).

83. The order for substituted service was made on 11th October 2006. In a replying affidavit sworn on 20th November 2006, Mr. Murphy averred that *"I am not aware of the Law Society's difficulty of service in the absence of the affidavit and exhibits grounding their application for substituted service and until I receive same I cannot make any comment."* At para. 11, he pointed out that by letter dated 6th November 2006 he had sought further documentation from Solicitor X concerning the order for substituted service. This was replied to on the same day by Solicitor X who said that he was not entitled to the papers as he was not a notice party to the Society's application for substituted service. As a matter of courtesy she enclosed a copy of the order. By reply of 9th November 2006, Mr. Conor Murphy, solicitor then representing his brother Mr. Colm Murphy, averred that he could not understand why the Society would be reluctant to give the information, that the matter would be referred to counsel, would be brought to the attention of the High Court and "*if necessary seek their permission to obtain copies of the documentation herein and adjourn the matter further to consider the contents of such documentation*."

84. In a further affidavit sworn on 20th November 2006, prior to hearing before Johnson P., Mr. Murphy submitted evidence confirming that he was not involved in the auction. A letter dated 16th November 2006 was exhibited in which Mr. Harrington confirmed that he acted on behalf of Mr. George and Mrs. Carmel Harrington in the sale of the public house. Mr. Harrington wrote that "*while advertising the details of sale I mistakenly stated that the solicitor with carriage of sale was Colm Murphy and Company, solicitors when in fact it should have been Conor Murphy of Murphy Healy & Company solicitors".* In evidence to this court Mr. Murphy said that he did not receive all the documentation which was relied on in the application for substituted service until after 31st January 2007. While it is not entirely clear when he obtained a copy of Solicitor X's affidavit, it would seem that he was in receipt of a copy before the finalisation of the attachment and committal proceedings.

85. With regard to the reference to the private investigator, an examination of Solicitor X's affidavit suggests that Mr. Elliot's memorandum was not separately exhibited to that affidavit. It was, however, exhibited in Mr. Clohessy's affidavit, In her affidavit grounding the application for substituted service, Solicitor X referred to the proceedings and Mr. Clohessy's affidavit "when produced". As Mr. Murphy did not have sight of Solicitor X's affidavit at that time, it may well be that he was unaware that Mr. Clohessy's affidavit had been referred to by Solicitor X. He was, nevertheless, in possession of Mr. Clohessy's affidavit and exhibits prior to the hearing on 31st January 2007 and was by then aware of the reference to the private investigator, something which he expressly raised in his replying affidavit sworn on the 20th November 2006 where he averred "*I do not see how Mr. Elliott the Registrar can say it was not possible to locate me".* He did not understand why the Society had difficulty contacting him and awaited sight of the affidavit grounding the application for substituted service. Further, at para. 17 he averred that "*if Martin Clohessy was genuine in his attempt to locate me (without the need for private detective as he mentioned) surely he could simply have rang Harrington estate agents and asked them about me"*.

86. Referring to exhibit 'MC19' to Mr. Clohessy's affidavit (the memoranda of 1st and 8th February 2006), in evidence in the civil proceedings (statement of evidence para. 286) Mr. Murphy said :

> *"The attendance which is appended to the Statement herein confirms (Tab 180) "It is currently not possible to locate Mr Murphy and consideration is being given to engaging the services of a private investigator to obtain information regarding Mr Murphy's whereabout". This was a very damning statement about me to be allowed to go before the then President of the High Court"*

87. Mr. Elliott was cross examined as follows on the memorandum of 8th February 2006 (day 13 of the civil proceedings):

> *Q. And what you say is: "The position is that there are a number of*

regulatory and disciplinary matters which the Society may wish to pursue Mr. Murphy in connection with, including concerns raised by the Complaints and Client Relations Committee. However - you say - it is currently not possible to locate Mr. Murphy and consideration is being given to engaging the service of a private investigator to obtain information regarding Mr. Murphy's whereabouts."

Then you go on to say that the case is being dealt with by [Solicitor X] and then you ask that she contact [Solicitor X] regarding any further updates that the Committee may require, do you see that?

A. I do.

Q. Yes. Now this is in February of 2006 and you are saying that we can't find Mr. Murphy?

A. That's right.

Q. And you are also saying as well that we are considering engaging the service of a private investigator to obtain information in relation to him?

A. That's correct, yes.

Q. But when we went through the correspondence on Friday it was quite clear that you had at least one Turkish address for Mr. Murphy, you also knew what his Irish address was and then you also had a telephone number for him, so why did you need a private investigator?

A. Well, I was advised at the time that despite having that information it hadn't been possible to serve documents on Mr. Murphy and therefore that it was appropriate for us to make additional enquiries to try and effectively serve documents.

Q. But that was -- they were Disciplinary Tribunal documents?

A. That's right, and I think I explained on Friday why I believed it was relevant for the Law Society to draw on the solicitor's Disciplinary Tribunal experience, and I believe we made that absolutely crystal-clear to the High Court and it was sufficient for the High Court to grant the order for substituted service.

He was then asked about Ms. Lynch's statement

Q. ...Ms. Lynch says that she: "Wrote to [Solicitor X] on 13th April of 2006 advising her of the difficulties that she had in notifying Mr. Murphy of the SDT's decision and then she also referred

[Solicitor X] to the provisions of section 30 of the Solicitor's (Amendment) Act which permits the making of an application for substituted service."
And then she made certain suggestions to her in relation to it. Now, if [Solicitor X] is being notified now essentially for the first time by Ms. Lynch in April why were you concerned or agitated about getting a private detective two months earlier?
A. I don't think that was the first time that Mary Lynch communicated with [Solicitor X] on the matter. My recollection would be that there were telephone discussions well prior to that and that the discussion I had with [Solicitor X], I assume early February, had the benefit of knowledge that [Solicitor X] knew from informal contact with Mary Lynch before then. I think that this letter of 13th April 2006 is no more than formal confirmation by Mary Lynch of information that the Law Society had already received.
Q. Do you not think a memorandum like that, 'we need a private detective to find that man' is quite inflammatory in the context of an application for substituted service?
A. I wouldn't call it inflammatory, I would call it factual".

88. Ms Lynch gave evidence on day 14 of her interaction with Solicitor X and Mr. Murphy. Mr. Murphy had written to her on 30th June 2006, stating that he would be in Ireland for a few weeks at the end of July/early August and could arrange to pick up any correspondence from her then. Ms Lynch's evidence was that Mr. Murphy did not call at that time.

26.Discussion and Conclusions

(a) The order for substituted service and the *Vodafone* Letter

89. While the court is mindful of the exchange between Solicitor X and Ms. Lynch on 6th October 2006, when the affidavits of Mr. Clohessy and Solicitor X are viewed together, a potential implication of that which was being conveyed is that while Mr. Colm Murphy had carriage of the sale, it just happened to be Mr. Conor Murphy who turned up at the auction. In view of the passage of time between the auction and the

application for substituted service, it is not unreasonable to suggest that the Society ought to have made further enquiry as to the respective roles, if any, of Mr. Conor Murphy and Mr. Colm Murphy. The court concluded in the principal judgment at para 378 that, on an objective analysis, the decision to apply for the order for substituted service was somewhat premature and that it was not beyond the bounds of possibility that a telephone call to Mr. Murphy may have resolved any difficulties. The court also concluded that Mr. Murphy himself contributed somewhat to this state of affairs by not calling as arranged to the offices of the SDT to collect documents. When the application came before Johnson P. on 31st January 2007, counsel for Mr. Murphy pointed out that no request had been made at any stage for the acceptance of service of the proceedings and that no issue arose before the apparent difficulty which the Society said it had in communication.

90. Mr. Murphy's grievance in relation to the application for substituted service is one of long standing. It was not of recent origin in either 2012 or 2016. It was ventilated in his affidavit sworn 20th November 2006, at the time he did not have access to Solicitor X's grounding affidavit. In his affidavit sworn on the on 31st January 2008, however, Mr. Murphy averred that Solicitor X's affidavit was based on hearsay evidence and that there was *absolutely no attempt* made to serve him prior to the application. He said that his family were at home in Kenmare, his home address was known to the Society, he had two full-time secretaries working in the property business in Kenmare at an address known to the Society and his office and address in Turkey was also known to the Society.

91. On 31st January 2007, issues surrounding the application for substituted service were treated as moot. Mr. Murphy was represented by solicitors and counsel at that hearing. Attempts were made to re-agitate the matter before Johnson P**.** in affidavits sworn in January, 2008 and March, 2008. No appeals were brought.

92. Given the manner in which the issue was addressed on 31st January 2007, unless something of a fundamental nature has since emerged which supports the contention that the *court* was misled when *the s.18 orders* were made and when the substituted

service issue was treated as moot, it is difficult to see how any grievance in relation to the earlier application for substituted service could give rise to a basis on which to suggest that the court was misled on this account and that the s. 18 proceedings should be re-entered.

93. In this context, Mr. Murphy places reliance, *inter alia*, on a letter from Vodafone dated 17th October 2006, and which he submits calls into question and undermines the contents of Solicitor X's affidavit of 22nd February 2008.

94. In his grounding affidavit sworn on this application on 27th May 2016, Mr. Murphy averred that the address in the Vodafone letter was not the billing address for his mobile phone. He obtained the document from which Solicitor X had received her information following inquiry made by his then solicitor to the Society on 26th February 2008. He points out that the author did not say "*Murphy Healy & Co*", or *"solicitors*". It was stated that the mobile phone was a bill paying phone and that invoices were issued to "*Colm Murphy and Co., Market St., Kenmare County Kerry"*.

95. In her affidavit grounding the application for the order for substituted service Solicitor X exhibited two letters which referred to Mr. Murphy's telephone number. The first was from Mr. Murphy to the Complaints and Client Relations section of the Society dated 5th March 2006 (exhibited at 2) and the second, a letter from Mr. Murphy to Ms Lynch dated 30th June 2006 (exhibited at 3).

96. It is self-evident that when Solicitor X prepared her affidavit grounding the application for substituted service, the Vodafone letter did not exist. Nor was it in existence when the order for substituted service was made. The averment of Solicitor X in relation to the Vodafone bill occurred in excess of one year after the making of the consent orders in the s. 18 proceedings, when the issue, while disputed, was treated as moot. It is difficult to see any relevant connection between an alleged failure or omission to disclose the Vodafone letter to the court on 31st January 2007 and the obtaining of the orders under review, particularly the s.18 orders. While relevant to Mr. Murphy's appeal from the decision of the SDT which held that there

was no *prima facie* case of misconduct in relation to the swearing of the affidavit by Solicitor X, there is no evidence that the Vodafone letter was either relied on or referenced on 31st January 2007, although Mr. Murphy contends that what Solicitor X had said was referenced by counsel for the Society when the matter was before Johnson P. on 17th June 2008. There is no evidence that the s. 18 orders were in any way influenced by the Vodafone letter, or by any suggested failure or omission to bring this letter to the attention of the court at an earlier time. It is not, therefore, a letter to which the court can attach the significance which Mr. Murphy wishes to place on it as evidence of operative fraud or deceit.

97. The alleged misconduct on the part of Solicitor X in respect of the averments in her affidavit grounding the application for substituted service is addressed in the court's decision in the ancillary proceedings, 2010/79 SA. For reasons outlined therein, the court has dismissed the appeal. Those reasons also have relevance to the allegations of fraud, deceit and misleading of the court made by Mr. Murphy on this application. The court is not satisfied that the evidence advanced supports those allegations.

98. In summary, while Solicitor X made inquiries of Ms Lynch and relied on those inquiries when making the application for substituted service, had inquiries been made of Mr. Murphy between the date of the auction and the date of the application for substituted service, any perceived difficulties in relation to service may have been obviated. It may also have been that any concerns about the auction would have been clarified. Although Mr. Murphy exhibited a letter from Mr. Harrington in his replying affidavit, the auction continued to be referenced at the hearing on 31st January, 2007. On 31st January 2007, the parties, and the court, were alive to the central grievance of Mr. Murphy and the substantive basis for that grievance. The evidence on which he relied in support of his position was contained in his affidavit. No order was made prohibiting him from practising as a solicitor. He gave an undertaking not to so do.

99. In so far as the application for substituted service is concerned, I am not satisfied that it has been established that there is evidence that a fraud was perpetrated on the court leading it making any relevant order now sought to be re-entered, or that there is evidence of the existence of a fundamental constitutional injustice on this account. Further, any suggested misleading of the court in relation to the application for substituted service, whether intentional, reckless or by mistake was addressed or capable of being addressed at the relevant time. I am also not satisfied that there is evidence to establish that the suggested misleading of the court was operative in the obtaining of any relevant orders in the s.18 proceedings. The substituted service issue was treated as moot. I am also not satisfied that it has been established that anything which has since emerged since alters this position.

(b) The [REDACTED] **issue(s).**

100. Two matters arise in relation to Mr. [REDACTED]. First, the inclusion of a complaint in the reliefs sought in the s. 18 proceedings (para. 9), and, second the [REDACTED] *document* raised in the attachment and committal proceedings.

101. With regard to the former, Mr. Murphy maintains that documents recently obtained shows that prior to making the s. 18 application, the Society was aware that any issue relating to the delivery of files, deeds and documents in relation to Mr. [REDACTED] had been dealt with a year previously.

102. It is evident that no relief was pursued at hearing in respect of this file. While it is therefore difficult to see any basis on which it is contended that any relevant order of the court was obtained by fraud or deceit, a central thrust of Mr. Murphy's complaint is that it should not have been included in the first place, and that any file which may have existed was closed the previous year.

103. In submissions to the court, Mr. Murphy stated that he did not receive all documentation in relation to this [REDACTED] matter/file and that documents did not come into his possession until recently. Mr. Murphy prepared an affidavit on 28th September 2021 in which he averred that in September 2021 he got his hands on a file which had been locked away with old files in the offices of Murphy, Healy and

Co.. Included was a letter of 1st February 2006 from Ms Latham to Mr. Conor Murphy, confirming that the Society was closing its file. He also references a letter which Mr. [REDACTED] had written in reply to the Society, in which it was stated that Mr. Conor Murphy had acted for him at all times. In the circumstances, Mr. Murphy maintains that it was wrong for the Society to include any reference to this in the s.18 proceedings and that the Society should not have proceeded with an *ex parte* application without disclosing that letter. He also points to a letter written on 9th February 2006 by Mr. [REDACTED] to the Society, entitled *"Re: Conor Murphy*", in which Mr. [REDACTED] complained that Mr. Conor Murphy had been allowed to go unpunished. Mr. [REDACTED] had also described the Society in pejorative terms, warning that he would go to the press.

104. It is not entirely clear how this file of papers came to be included in the s. 18 proceedings. Documents submitted to the court include a memo from Ms Latham to Mr. Elliot dated 1st February 2006. Both Mr. Colm Murphy and Mr. Conor Murphy are referred to but it is unclear whether this is in reference to the same file. Accepting for the moment that Mr. Murphy is entitled to rely on a late affidavit for which no formal leave has been granted, on the face of it, it would appear that this matter had nothing to do with Mr. Colm Murphy and any complaint in respect of that file had been closed several months earlier. An examination of the transcript of 31st January 2007 shows that nothing much was said of this issue and to the extent that it is contended that a fraud was perpetrated on the court leading to the obtaining of the s.18 orders, no such order was obtained and there is no evidence to support any allegation of fraud in this regard.

105. Perhaps Mr. Murphy's real grievance is that this file of papers was referenced in the proceedings and in Mr. Clohesssy's affidavit, both of which were in turn referred to by Solicitor X in her affidavit grounding the application for substituted service. It is argued that had diligent enquiries been made by the Society prior to the institution of the proceedings, this file would not have been included in the application. It seems to me that if the Society had pursued this relief before

Johnson P., Mr. Murphy's complaint would have more substance. That is not what occurred. It was dropped. Insofar as it is contended that matters should have been addressed differently, it is instructive to note that in his replying affidavit sworn on 20th November 2006, not only was no specific point raised about this file but Mr. Murphy deposed… *"9(9) I am happy to hand over all such papers sought to Murphy, Healy & Co if the Honourable President deems appropriate".* Relief 9(9) refers to the [REDACTED] file. There is no evidence, therefore, that any mistaken reference to this file, whether innocently, negligently or even recklessly made, led to the making of any order, nor was any great issue taken at the time. I am not satisfied that this could be considered as evidence sufficient to justify the re-visitation of an order in which such relief was not pursued, or the re-visitation of an order for substituted service which was treated as moot.

106. The second matter in respect of Mr. [REDACTED] concerns his complaint in January 2007 which was brought to the court's attention *after* the s.18 orders were made. The has been addressed in the principal judgment and in the review judgment. Particular emphasis is placed in this regard on a letter which Solicitor X wrote to Mr. and Mrs. O'Donoghue on 14th March 2007, the same day as the attachment and committal matter first came before the court. Mr. Murphy maintains that *'by sending the documentation to O'Donoghue's solicitor [Solicitor X] is admitting that she is not relying on the* [REDACTED] *matter, but the court was not informed of this."* . He submits that the Society knew from very early on and at least by the time it wrote that letter that what Mr. [REDACTED] had said was not correct, but the Society was happy to rely on it to have him attached and committed. Mr. Murphy submits that this letter ought to have been brought to the attention of the court and the court should have been informed that the complaint file had been closed. This is addressed at para. 367 *et seq*. of the principal judgment. It is also addressed in the review judgment at para. 87 and arises for consideration in the separate judgment in the ancillary appeal proceedings.

107. There is no evidence that either the court or Mr. Murphy was informed of the closure of the [REDACTED] file in September 2007 or at any time prior to disposal of the attachment and committal proceedings. This court observed in the principal judgment that Mr. Murphy… "*should have been so informed and so should the court, as it is clear that the* [REDACTED] *issue had been adverted to in court and on affidavit when the attachment and committal motion issued.".* The court also described as regrettable the submission of counsel for the Society at the adjourned hearing on 9th May 2007. The order of 31st January 2007 had nothing to do with the [REDACTED] matter and therefore ought not to have been referenced in the application. Having reviewed the evidence, the court stated in the principal judgment that significant issues remained in relation to the preparation of closing accounts, which revealed a deficit in the client account which had to be dealt with by Mr. Murphy.

108. A number of questions arise. Did the above failure amount to deceit or misleading of the court? If so, to what did such deceit lead? Can it affect the validity of an order made at a previous time?

109. In addressing the issue under consideration, therefore, the court proceeds on the basis that the closure of the [REDACTED] complaint ought to have been brought to Mr. Murphy's and the court's attention prior to the conclusion of the attachment and committal proceedings. Nevertheless, the court is satisfied that even if the failure to bring this letter or the closure of the [REDACTED] complaint might be said to amount to deceit – i.e. a deliberate or reckless intention to mislead, this failure did not result in, or facilitate, the obtaining of the earlier orders in the s. 18 proceedings, nor could it. It is therefore difficult to see how the subsequent emergence of the letter of 14th March 2007 and any failure to disclose this letter to the court, is relevant to the issue of whether the court was misled into making orders at a previous time, particularly where those orders were made largely on consent.

110. Mr. Murphy's appeal from the decision of the SDT in respect of a complaint which he made against Solicitor X about this matter is addressed in the

judgment in the ancillary proceedings, in which the court has upheld, in part, Mr. Murphy's appeal.

111. In summary, I am not satisfied that the allegations concerning the [REDACTED] matters and the evidence advanced in support, form an evidential basis on which the court could conclude that s.18 orders ought to be re-entered. I am also not satisfied that even if misconduct were established following full enquiry (2010/78 SA, 5297/DT02/10) any alleged wrongdoing or misconduct on Solicitor X's part is such as would affect the above conclusion. The only substantive order made in the s. 18 or attachment and committal proceedings after the 31st January 2007 was the order for costs made of 17th June 2008. Nevertheless, in the judgment in the civil proceedings, the court observed at para. 386 that it was not satisfied that the actions of the Society in seeking the orders in question were unjustified… *"(p)articularly in the light of Mr Murphy's acceptance of and consenting to many of the orders that were sought and in light of the deficit which was discovered in the client account."*

27.The reasons advanced for not appealing the orders of Johnson P.

112. In his grounding affidavit sworn on 27th May 2016 Mr. Murphy avers that while he was "*very aggrieved at the outcome in view of the protracted history and "hardening of the arteries" between me and the Law Society and because of my state of mind and illness at the time I decided to focus on my civil case against the Law Society and to make applications to the Solicitors Disciplinary Tribunal in relation to the conduct of certain solicitors within the Law Society."* It is thus evident that an appeal was contemplated but that it was decided to concentrate efforts elsewhere.

28.Medical Evidence and state of mind.

113. A medical report is not exhibited to Mr. Murphy's grounding affidavit. In his evidence in the civil proceedings, however, Mr. Murphy stated that in advance of and during the hearings before the SDT, he had numerous appointments with Dr Lucey, a psychiatrist. To some extent, the hearings in the s. 18 attachment and

committal application and the SDT hearing in the [REDACTED] matter overlapped. Mr. Murphy attended Dr. Lucey on 4th March 2008, 28th March 2008, 6th June 2008, 16th June 2008, 27th June 2008, 22nd August 2008 and 22nd December 2008. Dr Lucey's report was prepared on 4th October 2008, This post-dated the SDT findings of misconduct on 10th July, but before the hearing on penalty in January 2009. The report was submitted to the SDT. Dr Lucey wrote that Mr. Murphy had been referred to him by his general practitioner and at the time of writing Mr. Murphy remained under his care. Initial evaluation was based on an assessment which took place on 16th February 2007. The report records that Mr. Murphy dated the onset of the symptoms to rumours which circulated following the audit of his practice in 2001. Dr Lucey expressed the opinion that Mr. Murphy was suffering from bipolar affective disorder, the precipitating and exacerbating stress being the investigations and subsequent rumours in relation to his practice. Mr. Murphy was prescribed medication on 16th February 2007. This was subsequently adjusted. Dr Lucey also reported that an antipsychotic mood stabiliser was added on 6th June 2008, as Mr. Murphy's behaviour had become irrational and he had become paranoid in attitude. Dr Lucey also reported that since that time Mr. Murphy's mood had largely settled but he was subdued at times with feelings of futility.

114. Mr. Murphy's medical condition was addressed during the strike off hearing before Johnson P. Mr. Murphy's wife gave evidence that, at that time, he was able to conduct his business and that he was back to himself (see p.72 of the transcript 21st April 2009).

115. While one must have sympathy for Mr. Murphy's medical condition at that time, there is little by way of evidence that his state of mind or illness impaired his decision making capacity. I am not satisfied, therefore, that evidence has been advanced to establish any valid reason or satisfactory legal explanation which might explain why the orders, the subject matter of this application, were not appealed at the relevant time.

29.What has come to light since the making of the orders that might justify intervention?

116. Mr. Murphy submits that certain matters have emerged since the order in the s.18 proceedings that justify the court's intervention at this time. These include:

i. the alleged misleading of Hanna J. and the attempt to mislead the Supreme Court on procedural issues,

ii. The admission of certain documents in evidence without the necessity for formal proof, and

iii. The emergence and discovery of letters and documents in the course of a Data Access Request.

30.Alleged misleading of Hanna J. in 2012.

117. Mr. Murphy alleges that while Kearns P. left everyone in no doubt that he was entitled to a full hearing, the Society made contrary submissions to Hanna J. and to the Supreme Court. He highlights a memorandum created by the Society's external solicitors which addressed what occurred before Kearns P. on 2nd June 2011 and in which the following was stated:

> "*…despite the Society's submission that the remaining claims of slander were statute barred….The President of the High Court made it clear that these matters should proceed to plenary hearing*".

118. In an *ex tempore* decision delivered on 25th March 2015, Hardiman J., speaking for the Supreme Court, stated that Mr. Murphy's proceedings had been struck out on the basis that he had failed to make out his case on the single issue of which Hanna J. considered himself seized. Hardiman J. continued as follows:

> *"…it appears to us that this occurred in a context in which, in the words of President Kearns on 2 June, 2011:*
>
> > *"I have indicated my view that the case that went to Judge Hanna was expressly formulated by me to dispose of these allegations of improper behaviour by officers of the Society."*

There is also on page 4 of the transcript of the same day another reference to the same effect. Referring to the very understandable desire to resolve these issues which have been hanging about for an embarrassing length of time unheard, what the President said on that occasion on p.4 :

> *" I decided because, he, Colm Murphy, had the right in law under the Constitution to bring such a claim that the claim should proceed and I would hear all the evidence in relation to the allegations being made. As a result of doing that it meant that the appeal was effectively against the findings of the solicitors disciplinary tribunal was resolved because all the evidence came out in the case that had to be heard. And I thought I had conveyed that very clearly to the parties on the last occasion."*

On that basis it seems to us that Mr Murphy may reasonably have believed that the hearing before Mr Justice Hanna was a plenary hearing of his action, and that the conditions laid down by the learned President in the order of 11 April 2011 had not been complied with by the Law Society. On the basis because there was a real apprehension that Mr Murphy may genuinely have believed that what was about to proceed before Hanna J was his plenary action, we will set aside the order."

119. At the conclusion of his judgment Hardiman J. also expressed the following sentiments:

> *"The second thing we wish to say is directed to Mr Colm Murphy in particular. We are all of the view that Mr Murphy should take full advantage of the excellent legal team which he now has to consider his legal position not in isolation, not something which is quite separate from the rest of his life, but in the context of his life as a*

whole. We are confident that he will receive excellent advice from Mr Sutton and Mr O' Flynn, Mr Richardson and Mr Ferry. This is the time that that advice should be availed of, this and no later stage, not waiting, for example, until the matter goes back to the High Court. It must be borne in mind, and I am sure Mr Murphy will have it forcibly suggested to him, that litigation, though it may be sometimes necessary, is not a natural or an inevitable condition of life and may often lead to dreadful personal tragedies, and obsessions."

120. It is submitted by Mr. Murphy that the only conclusion which can be drawn is that the Society deliberately misled Hanna J. and attempted to mislead the Supreme Court. This delayed the civil proceedings for a considerable number of years, which in turn caused delay in the processing of the re-entry of the strike off and s. 18 proceedings. Mr. Murphy does not make the case that what occurred before Hanna J. accounts for all of the delays in the case. It is clear that applications for discovery and interrogatories, procedures not employed prior to the hearing before Hanna J., could not but have contributed to any prolongation of proceedings or suggested delay in this regard.

121. Counsel for the Society submits that no finding has been made that Hanna J. was misled and draws the court's attention to the affidavit sworn by Mr. Elliott in the general motion on 24th September 2020 which sets out a full defence to the points made by Mr. Murphy. Counsel also refers to the observations of Hardiman J. that Mr. Murphy should take the advice of his lawyers seriously, all of which it is submitted, is not consistent with the suggestion that the High Court had been misled by the Society or its lawyers. It is also submitted that there is no connection between the events of 2007, 2008 and 2009 and what is alleged to have occurred in 2012 .

122. A number of authorities are relied on in support of this proposition by Mr. Murphy, including and in particular, *Bebenek v Minister for Justice* [2018] IEHC 323 and *Cabot Financial (Ireland) v Heffernan* [2021] IEHC 823. In *Bebenek* the applicant had withdrawn judicial review proceedings. In considering the

respondent's application for legal costs the court of its own motion raised the question of whether it was appropriate to make a wasted costs order against solicitors who had represented the applicant. The applicant had been the subject of a removal order issued by the Minister. She sought to challenge that order. It would appear that at the *ex parte* stage a number of matters which ought to have been brought the court's attention were not, including the Minister's written reasons for the making of the removal order and that the application was out of time as provided by statute. An order for costs was made against the applicant and a further order was made requiring the solicitor for the applicant to indemnify him. Keane J. held that the matter could not end there and the court must protect the integrity of its own processes. He invited the solicitor and counsel involved to respond to certain specific matters of concern and to show cause why each should not be found to have conducted proceedings in accordance with proper standards of professional behaviour and the duty each owed to the court. Keane J said that he was required to consider the exercise of the court's inherent jurisdiction to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of all lawyers who appear before the courts. Ultimately no action was taken against either counsel or solicitor for reasons expressed by him in a subsequent judgment [2019] IEHC 154.

123. *Cabot Financial Ireland Ltd v Heffernan* [2021] IEHC 823 concerned an application to dismiss proceedings for want of prosecution. On the application of the appropriate test, it was held that the delay in the prosecution of the proceedings was inordinate and inexcusable. The plaintiff's attempt to excuse delay raised serious issues as to the manner in which the proceedings were conducted, which Meenan J. held, could be taken into account in considering the balance of justice aspect of the applicable test. The court had regard to the fact that submissions were made which were not grounded on facts. It also took into account that at an early stage of the proceedings a certificate of commercial urgency was submitted on a failed application to have the proceedings admitted to the Commercial Court. Such stated

urgency remaining unexplained. Ultimately it was held that the defendant had reached a required threshold of prejudice and the proceedings were struck out for want of prosecution and delay.

124. Mr. Murphy submits that his evidence on this issue has not been controverted. He was not questioned on it during the hearing in the civil proceedings. The Society submit that the allegation in respect of what occurred before Hanna J. was not the subject of consideration by the court in the principal judgment because it did not arise on the pleadings. They point to Mr. Elliot's affidavit sworn in the general motion which addresses and defends this aspect of Mr. Murphy's allegations and submissions. Mr. Murphy maintains that this is an impermissible manner in which to address this issue and that his evidence has effectively gone untested and must be treated as such.

125. I have come to the conclusion that it is unnecessary to determine this aspect of the dispute between the parties because, even accepting what Mr. Murphy has said, I fail to see a legal basis to support the argument advanced. In an exchange during submissions, the court queried Mr. Murphy on the relevance of delay in the context of the applications now made. The thrust of the argument is that due to the alleged misrepresentations and misleading of Hanna J., and consequent delay, the Society's defence to the application to set aside the s.18 order ought to be struck out. Thus the argument appears to be based more on alleged impropriety in the conduct of litigation rather than on any evidential connection.

126. This court is not satisfied that the authorities relied on support such far reaching proposition. In the cases referred to there was an evidential connection between the alleged conduct and the reliefs sought or resisted. There is no such evidential connection in this case between the applications to set aside orders made in 2007/2008 and what is alleged to have occurred before Hanna J. four to five years later. Therefore, accepting for the purposes of this argument that Hanna J was misled in 2012 regarding how the hearing was to proceed, but without making any findings

in this regard, I fail to see how this could provide a legal or evidential basis to strike out a response to an application regarding orders obtained in 2007 and 2008.

31. The admission in evidence in the civil proceedings of certain documents, without formal proof.

127. This is addressed by Mr. Murphy at para. 29 of his grounding affidavit and at para. 392 of his statement of evidence in the civil proceedings as follows:

> "*In advance of the hearing date namely 15th November 2011 my Solicitor contacted the Law Society to see if they would agree certain portions of the evidence without formal proof. They agreed to admit in the following without formal proof:-*
>
> *1. The Affidavit of Denis Harrington – this was the auctioneer who sold the Brown Pub, which had kicked off the s.18 proceedings. His Affidavit confirmed that I had nothing to do with the auction and that he had used the name in error.*
>
> *2. The Affidavit of George Harrington – this was the owner of the Brown Pub. He also confirmed that I had nothing to do with the auction.*
>
> *3. The Report of Sean Lynch, Document Analyst – this was the document that proved that the document produced by* [REDACTED] *had been produced by copying the signing page of another transfer and confirmed the document relied on was a forgery."*

128. It will be recalled that Mr. Dennis Harrington swore an affidavit on 31st January 2008. His evidence, therefore, was available prior to the conclusion of the attachment and committal proceedings. Mr. George Harrington also swore an affidavit, the date of which is unclear from the court's copy. It is evident, nevertheless, from para. 3 of Mr. Murphy's affidavit sworn on 31st January 2008, that this affidavit was also available at that time. Another letter was written at a much earlier time and exhibited in Mr. Murphy's affidavit of 20th November 2006. Therefore, nothing new can be said to arise save for the contention that by agreeing

to have the contents of the affidavit admitted in evidence without formal proof, the Society was belatedly accepting that Mr. Murphy had not been involved in the auction and that the orders for substituted service and the s. 18 orders should not have been granted. Mr. Law, in his replying affidavit describes as inaccurate Mr. Murphy's contention that the main reason for the accusation that he was practising as a solicitor when not entitled to do so was that his name appeared in the Examiner newspaper in relation to the auction. He points out that the Society had consistently disputed "*averments of this kind*". By way of illustration, he again references Solicitor X's affidavit of 22nd February 2008 where she identified a range of other issues giving rise to the issuing of proceedings. A considerable number of matters other than the auction were identified. These have been referred to earlier in this judgment.

129. Mr. Harrington's position was known in November 2006. It was in evidence before the court prior to the making of consent orders and when any dispute regarding substituted service was treated as moot. It may also be said that at that time the Society disputed Mr. Murphy's position or, at minimum, did not expressly or by implication accept what was advanced on his behalf. Mr. Murphy's position was fully set out, however. The court was not required to rule on this conflict. While the admission in evidence of these affidavits in the civil proceedings may have assisted in undermining the evidential basis for the allegation of his involvement in the auction, there were other matters on which reliance was placed as evidence of alleged practising. Fundamentally, the matter was treated as moot. With regard to the Lynch report, again while this may have supported Mr. Murphy's allegation that the [REDACTED] document was a forgery, I am not satisfied that this provides an evidential basis for the re-entering of proceedings where the substantial orders complained of were made prior to the emergence of the [REDACTED] complaint and the reference to it by Solicitor X in her affidavit sworn approximately a month later.

130. In summary, I am not satisfied that the evidence advanced supports the argument that the subsequent admission of affidavits in evidence in the civil proceedings without formal proof, amounts to the acceptance by the Society that a fraud had been perpetrated on the court or otherwise provides an evidential basis to support the allegation that a fraud was committed on the court such as might justify the court's intervention. While Mr. Murphy is undoubtedly aggrieved about the Society's inclusion and reference to the auction as evidence of him practising and by the manner in which it introduced and treated the [REDACTED] document, no order was made restraining Mr. Murphy from practising. No injunctions issued. An undertaking was given. A consideration of the transcript of 31st January 2007 shows that Mr. Murphy consulted with counsel before giving the undertaking, one which was said to have been given without difficulty. Mr. Murphy argues that he had no choice but to give the undertaking. I am not satisfied that there is evidence to support this contention. He had the benefit of legal advice. He consulted with counsel. There is nothing in the transcripts to suggest oppression, undue persuasion or a reluctance to provide such an undertaking. Even if subjectively Mr. Murphy may have felt that he did not have such choice, I am not satisfied that the evidence advanced supports a contention that the undertaking, or any order now sought to be re-entered, was obtained by reason of alleged fraudulent, deceitful or allegedly misleading conduct.

131. The dispute in relation to substituted service was treated as moot. The [REDACTED] complaint emerged a month after the consent orders were made and it is difficult to see how that issue is temporally relevant to orders obtained on consent at an earlier time.

32. Documents revealing that the Society wished to make some application before the court and impermissible use of s.18

132. At para. 383 of the principal judgment, this court stated that no issue was raised either by Mr. Murphy or the court when the matter was before it on 31st January 2007 as to the appropriateness of the statutory procedures employed. This court observed:

> "*All proceeded on the basis that such jurisdiction existed even though it may be said that subsequent disclosure and discovery of [Solicitor X's] communications with others in the Society and with counsel illustrate an anxiety to bring the matter before the court by whatever means and perhaps an uncertainty as to its lawful basis, it is clear that formal authorisation was not sought until the matter had been cleared by counsel."*

The court was also satisfied with that when the proceedings were instituted, Mr. Murphy was in default of a number of his obligations. For the sake of completeness, I should also reference that the issue of the authorisation for the s.18 proceedings was addressed by the court in the review judgment at para. 85 *et seq.*

133. Given the findings of the court in its principal judgment in relation to the institution and prosecution of the s.18 proceedings, I am unable to accept that the emergence of the documentation referred to by Mr. Murphy at para. 8 of his grounding affidavit, significantly alters the fundamental position which pertained when the s.18 application which was made. I am not satisfied that any issue of jurisdictional dispute now raised amounts to or could provide evidence to support the contention that exceptional circumstances exist requiring the re-entering and revisiting of the s. 18 application. If an issue of proper authority existed, it was one of legal construction and statutory interpretation. That there may be a dispute or doubt as to the correct legal interpretation of powers is not in my view and in the circumstances capable of providing evidence of fraud, deceit or the misleading of the court. This is particularly so when no issue was raised as to the court's jurisdiction at the relevant time.

33. Writing of client account cheques-new matters?

134. With regard to the writing of cheques from the client account, nothing new can be said to have emerged subsequent to the making of the order in the s.18 proceedings which was not referred to in the affidavit submitted by Mr. Murphy prior to the conclusion of the attachment and committal proceedings (see para. 6 of Mr.

Murphy's affidavit sworn on 26th March 2008) such as to provide evidence warranting the re-visitation of the s.18 proceedings and orders. The points made at para. 13 (2) of that affidavit were either aired, were capable of being aired or were before the court prior to the conclusion of the attachment and committal proceedings. It is difficult to see that anything of significance has since emerged in this context to affect the view of the court on this aspect of the case.

34. Headed notepaper-new matters?

135. At para. 13 (ii) of his affidavit grounding this application sworn on 27th May 2016, Mr. Murphy contends that documentation which he received pursuant to his data request reveal that the Society knew he was not generally using headed notepaper. He had used it only once, being a letter to the Society. It is contended that the Society knew that other letters were written which were not on headed notepaper and that it ought to have brought these to the attention of the court.

136. The transcript of the proceedings of 31st January 2007 make it clear that Mr. Murphy, through his counsel, maintained that only one letter had been so written. In the principal judgment this court found that there was another such letter, but not one that was referred to, or relied upon, when the matter came before the court in January 2007 (see para. 380 of the principal judgment). Counsel for the Society, in addressing this issue before Johnson P., referring to two letters, submitted:

> "*I do not know what the position is, but if these letters have been dictated sequentially, it would suggest there may have been other letters in between, but even leaving that aside, there is also the fact the client account being operated and the auction and Fenniston (as heard) solicitor, he said … and there is the letter from the auctioneer saying that that was simply a mistake."*

He continued…

> *"I suppose if there was not that history in place, one would give somebody the benefit of the doubt and say, well, it may have been one or two letters, he may not have had any notepaper. The*

explanation given now seems inconsistent with his explanation on affidavit, which was to the effect that the reason he used his own notepaper was he did not have any of his own to hand."

Counsel submitted that if Mr. Murphy had dictated a letter to be typed up in Kerry, it was difficult to see why the office in Kerry would not have had notepaper available there. He also referred to a letter dated 1st March 2005 from Mr. Elliott to Mr. Murphy requesting him to confirm that his name had been removed from the practice notepaper. Counsel also referred to Mr. Murphy's explanation that the letter had been written when he was out of the country. Mr. Murphy had averred on affidavit:

"*I felt it was in order to use the headed notepaper, when replying to the Law Society, as they knew I was not a practising solicitor and it was the only headed notepaper I had to hand.".*

Counsel submitted that this appeared to be inconsistent with the suggestion made in court by Mr. Murphy's counsel who had said:

. .. *"His explanation for that, my Lord, that he was in Turkey where he has property development interests and he dictated a letter to the Law Society, which was typed in Kenmare and signed on his behalf*.".

137. This issue was also addressed by Mr. Murphy at paragraph 5 of his affidavit sworn on 26th March 2008. He averred that subsequent to the letter of 23rd November 2005, he again wrote to the Society on 5th March 2006. He did not use solicitor's headed notepaper. On the same day, under separate cover, he wrote to the Society using ordinary paper and gave the Society his mobile phone number. This letter was stamped "received" by the Society on 7th March 2006. The second letter, dated 20th of May 2005, which had been referred to by counsel on 31st January 2007, related to Mr. O'Donoghue. Mr. Murphy averred, "*it is common case that I was allowed practice and use my old headed notepaper up at the end of June 2005 and any indication to the contrary is misleading*."

138. While it may be, as Mr. Murphy contends, that the insinuation that there were other letters was not borne out by the evidence, Mr. Murphy's counsel accepted that the communication should not have been on headed notepaper. He added that Mr. Murphy was adamant that:

> "*that is the only use that has been made of any solicitor's headed notepaper at any time since the middle of 2005 when he ceased to be in Kenmare, winding down the practice on a full-time basis.*".

139. It is evident from a consideration of the transcript of 31st January 2007 that while Mr. Murphy at all times maintained that he had written only one letter, this was disputed by the Society. The focus was on the letterheaded paper that *was* used and submissions were based on the very limited amount of headed paper allegedly used. It is difficult to see how a failure to refer to all correspondence from Mr. Murphy to the Society could constitute evidence of deceit, misleading or fraud as contended. It is not part of this court's task on this application to draw any conclusions or make findings on substantive issues of dispute, such as the suggestion that a reference sequencing went unexplained. When viewed in the round, however, it is not unreasonable to suggest that Mr. Murphy must have been aware of the correspondence on which he now relies, particularly if he was the source of its emanation. His counsel accepted that the letter should not have been so written. Explanations were advanced which on their face were not entirely consistent. No finding was made by the court and ultimately any dispute on this issue was overtaken when the undertaking not to practice was given.

140. In the circumstances, I am not satisfied that it has been established that any suggested failure on the part of the Society to expressly draw the court's attention to other letters which were not written on headed notepaper resulted in any misleading of the court to make orders such as would justify the court's intervention to direct that the s.18 proceedings be revisited.

35. Miscellaneous other matters

141. At paragraph 19 et seq. of Mr. Murphy's grounding affidavit on this application, issues are raised in respect of a number of matters including the following:

i. Letter of 15th March 2007 from Solicitor X to the bank inquiring how to proceed. Mr. Murphy relies on this as evidence that Solicitor X was unsure how to proceed while at the same time alleging that he had failed to contact the bank.

ii. Letters which subsequently emerged in disclosure/data protection that :

   a. the Society was targeting his solicitors

   b. the Society had decided to fight the case to the end and at all costs

   c. Solicitor X /Ms. Kirwan exchange of emails-reflecting a desire or intention on the part of the Society to have Mr. Murphy struck from the roll of solicitors because he was suing the Society.

142. Mr. Murphy maintains that these must be viewed in the light of the questionable actions which included the taking of inappropriate s.18 proceedings, the application for substituted service when there had been no attempt to serve and the Society's attempt to "*have me jailed based on a document they knew to be a forgery"*. He contends that they help to explain some of the actions of the Society and why they have "*repeatedly misled the disciplinary Tribunal and the High Court and attempted to mislead the Supreme Court*".

143. It is difficult, however, to see the relevance of these points to the grounds on which an application such as this might be brought or succeed. The matters raised either post-dated the orders of 31st January 2007 in the s.18 proceedings ((i), above) or, in my view, are directed towards motivation rather than fraud (ii). Many of these

issues have been referred to in the principal or review judgments. The court was not satisfied that bad faith or misfeasance in public office had been established.

36. Summary and conclusions

144. The orders sought in the s. 18 proceedings were either made on consent, not pursued or dealt with by way of undertaking. Mr. Murphy attempted to revisit the orders before the conclusion of the attachment and committal proceedings. Although not the subject of a formal court ruling, most of the issues now formally advanced on this application, were raised at that time. Mr. Murphy maintains that this was because the Society persuaded the President that the only issue outstanding was one of costs. The reality is, however, that while an appeal was considered, Mr. Murphy decided to concentrate his efforts elsewhere. Mr. Murphy does not criticise the quality of legal advice he received. No valid legal reason has been advanced for the failure to appeal, whether on medical grounds or otherwise. Three to four years passed before Mr. Murphy indicated to Kearns P. in 2011/2012 that he wished to challenge the s. 18 orders. He had given an undertaking to the court in 2011 not to bring further applications. He anticipated an earlier hearing and conclusion of the civil proceedings. This formal application was brought in 2016.

145. To the extent that the issues raised by Mr. Murphy are said to constitute special or exceptional circumstances warranting and requiring the intervention of the court, I am satisfied of the following:

i. When the application came before Johnson P. on 31st January 2007 the substituted service controversy was treated by all as moot. The issue of whether Mr. Murphy was practicing as a solicitor when not entitled was ventilated. The jurisdiction of the court to make the orders sought under s. 18 was not in issue. Mr. Murphy's position was substantially if not fully articulated by counsel on his behalf. The matter was dealt with in a particular way and a particular approach was pursued. Mr. Murphy and his legal team engaged with the Society and the court on the issues. Injunctive relief was not granted, rather an undertaking was given in

respect of two of the reliefs sought (1 and 2). A third (9) was not pursued and the remaining substantive orders were made on consent. Although Mr. Murphy maintains that he was given little choice but to give the undertaking, the transcript does not bear this out. It shows that during a short adjournment counsel consulted with Mr. Murphy. The undertaking was in line with what Mr. Murphy was not entitled to do in any event. He did not then have a practising certificate.

ii. Any lingering discontent which Mr. Murphy had regarding issues pertaining to the allegation that he was practising when not entitled to so do, or the appropriateness of obtaining an order for substituted service, were substantially if not fully articulated and ventilated in affidavits sworn on 31st January 2008 and 26th March 2008, at least three years prior to Mr. Murphy indicating to Kearns P. that he intended to make this application. When considering the overall justice of the situation and the important public interest in the finality of litigation, this period of three years is also a factor to be considered.

146. I am not satisfied that evidence has been advanced to support the contention that the court by fraud, deceit or otherwise was misled into making the orders in the s. 18 proceedings now sought to be revisited. The court was apprised of the issues raised. Even if incorrect in this conclusion and that the court ought to conclude that Johnson P. was misled I am equally satisfied that the evidence advanced does not support the contention that any such alleged deception contributed to the obtaining or making of the orders sought to be impugned on this application. I am also satisfied that anything which has emerged since, in the context of the data access application, insofar as relevant to the application to set aside the s. 18 order, does not materially alter the court's conclusions. The contents of Vodafone letter does not, in my view, give rise to any new ground of material significance, or strengthen any existing ground of grievance which Mr. Murphy may have with the order for substituted service. For reasons which I have outlined above, I am equally

satisfied that it cannot be said that issues surrounding the [REDACTED] complaint/ forged document and/or the report of the handwriting expert, obtained some years later, can have had any effect on the earlier obtaining of the s. 18 orders, now sought to be re-entered.

147. I am therefore not satisfied that Mr. Murphy has discharged the burden of proof which lies on him to establish an evidential basis for his contention that this is an exceptional case in which, in all the circumstances, the court ought to intervene and re-enter the s.18 proceedings; or to support the contention that there has been a fundamental breach of fair procedures and constitutional justice in the manner in which the orders in those proceedings were obtained. The application must therefore be refused.

37. Significance otherwise of the s.18 proceedings.

148. Mr. Murphy submits that the manner in which the s. 18 proceedings were presented gave the court a particular impression of him which affected "*his approach* to the strike off proceedings and influenced the *court's approach to him"* when the strike off application was before Johnson P. In submissions to the court in the strike off application counsel for the Society referred to the attachment and committal proceedings. He submitted:

> *"President insofar as you previously have attachment and committal proceedings dealing with Mr. Murphy you may take comfort in knowing things you have said about him are not being said for the first time. The former President, Finnegan J. had exactly the same view of Mr. Murphy and his level of appreciation for his obligations. So Mr. Murphy has a track record in that regard*".

He also referred to memoranda, including the Society's note of what Finnegan P. is recorded to have said on 9th July, 2003, that:

> "*the solicitor had delayed for over a year in relation to a matter involving a substantial amount of money. He said the delay alone, even if it transpires that there is no complaint, brings the profession into disrepute in an outrageous way and pointed out to Mr. Murphy's counsel that Mr. Murphy's former clients have as much right to the information he holds as his present client*…"

149. Perhaps, therefore, the primary significance of the s.18 proceedings arises in the context of Mr. Murphy's contentions about what occurred in the strike off proceedings when the matter was considered by the same judge who a year earlier had dealt with the s.18 and attachment proceedings. The strike off proceedings are now considered.

PART II - The Strike Off Application

38. Introduction

150. On the 18th October 2010, Mr. Murphy applied *ex parte* for liberty to issue a notice of motion for leave to re-enter the strike off proceedings. The application was granted and by motion on notice dated the 21st October 2010 relief was sought, pursuant to the inherent jurisdiction of the High Court, to re-enter the proceedings and to re-enter and set aside the recommendation of the SDT. The application is based on allegations of fraud and deceit, or that orders were obtained because the court was misled innocently and deliberately. When made in 2010, the application was based on particular grounds. These have since expanded to include grounds said to arise following a response to a data access request in 2015/2016 and from the conclusions of this court in the civil proceedings. There is some degree of overlap between the bases on which the s.18 application is brought and on which this application is maintained.

39. Special or Unusual Circumstances

151. In support of his contention that special or unusual circumstances exist, emphasis is placed by Mr. Murphy on certain matters which arose in the s. 18 proceedings, including:

i. the actions of Solicitor X and the absence of explanation for those actions.

ii. The varying accounts given by witnesses for the Society as to why the s. 18 proceedings were commenced in the first instance.

iii. Allegations of questionable actions of the Society in the s. 18 proceedings which emerged during the civil proceedings, conduct on the part of Solicitor X which are the subject of complaint, now under appeal (record number 2010/77 SA- the Vodafone billing address issue) and which, it is maintained, cast doubt over the s. 18 proceedings.

152. Mr. Murphy also relies on matters raised in the civil proceedings, the alleged of misleading of the court in the Healy matter, the accounts investigation, unexplained memos of the Society which, if taken at face value, show that the Society intended to have Mr. Murphy struck from the Roll of Solicitors, failure to disclose all relevant matters to the court and continued reliance on matters long after the Society was aware that their provenance was questionable. Many of these allegations were advanced as evidence of *mala fides* and misfeasance in public office, a claim which was not accepted by the court in its principal judgment. Mr. Murphy also maintains the relationship between Mr. [REDACTED] and the Society was too close, if not conspiratorial; and that Mr. [REDACTED] was treated more favourably by the Society than he was.

153. At the heart of this application, however, are Mr. Murphy's contentions that the court was misled in relation to two principal issues: the undertaking allegedly given to Finnegan P. on 31st July 2003 and the alleged failure to make proper discovery in the [REDACTED] disciplinary proceedings. The application for discovery arose, *inter alia*, from concerns which Mr. Murphy harboured regarding communications between the Society and Mr. [REDACTED].

154. In support of this application, Mr. Murphy also relies on this court's findings regarding the undertaking. He emphasises the Society's response to his data access application made in 2015/2016. Issues arising from his data access request were addressed in the affidavit sworn by him in 2016 in support of the application to re-enter the s.18 proceedings. Mr. Murphy avers that the Society's response showed that documents relevant to the strike off proceedings had gone missing. It is contended that correspondence which he then received was unavailable to him when the [REDACTED] complaint was considered by the SDT. This is said to include communications between the Society and Mr. [REDACTED]. When he queried the Society, it replied that it had mislaid the file but had reconstructed it as best it could. When further pressed he maintains that the Society admitted that, since he first made

the data request, relevant emails had been deleted. This stunned him particular in light of a letter written by counsel to the Society on 17th July 2008 stating that "*any Colm Murphy papers… as well as all of your own papers and notes and records should be carefully stored…*". He maintains that documents were deleted, that their contents which are unknown would have greatly assisted him in his defence of the [REDACTED] complaint and that the matter would most likely never have been referred to the High Court by the SDT with the recommendation that it made. To the extent that there was a failure to disclose and comply with the order for discovery, Mr. Murphy maintains that fraud has been occasioned on him and on the court, and that he should be permitted to re-enter the strike off proceedings.

155. The following is a summary of the Society's response:

i. Mr. Murphy is inviting the court to engage in a roving enquiry, an unending formless investigation, a reprieve of matters previously dealt with and what counsel describes as a constant attempt to seek to reopen issues which have been the subject of past admissions by him.

ii. The inescapable evidence is that in 2009, Mr. Murphy, both in sworn affidavit and in open court, wholeheartedly accepted the findings of the SDT. Matters were deposed to as being true with the intention that they would form the basis of submissions made on his behalf. The Court was invited to rely on the evidence of the truth of that which was sworn in support of a plea of mitigation and it is submitted that Mr. Murphy's own conduct is inconsistent with the case which he now seeks to make and that he now seeks to minimise, evade and explain away what occurred through what are described as self-justifications.

iii. No appeal was brought from the decision of Johnson P.

iv. Mr. Murphy never sought to eschew the legal advice he received at that time.

v. The finding of this court in relation to the undertaking is that while Ms Kirwan had made a mistake, which ought not to have been made, it was

an honest mistake. There was no finding of recklessness or malice. Mr. Murphy seeks to have the court review those findings in a manner which constitutes an impermissible challenge.

vi. It is necessary to plead and prove fraud with particularity. Mr. Murphy's application has no evidential foundation and his allegations are not supported by proof. Mr. Murphy, without evidence, seeks to have allegations elevated to the status of proof of fraud, particularly those made against Solicitor X in relation to discovery. Solicitor X is now a ward of court and is not in a position to engage with these allegations. Fundamentally, an assertion that there has been a failure to comply with discovery, even if correct, does not necessarily amount to fraud and dishonesty and that to so conclude would require a leap from one platform to another without establishing the necessary evidential foundations in respect of such serious allegations.

40. Application to re-enter the Strike Off proceedings - Affidavits

156. The application to re-enter the strike off proceedings is grounded on an affidavit sworn by Mr. Murphy on the 27th September 2010, in which he avers that he was struck off due to:-`

i. Previous findings of misconduct by the SDT;
ii. That having appeared before Johnson P. on a number of occasions, he had taken the view that Mr. Murphy never appeared to understand that the laws and rules applied to him;
iii. That Mr. Murphy's attitude to Finnegan P. did not assist him.;
iv. His attitude to the Society.

157. Mr. Murphy averred that since 21st April 2009 matters had come to light which affected the reasons given by Johnson P. These related to the *Healy* complaint, the application for substituted service in the s.18 proceedings, the [REDACTED] matter, the undertaking and reasons underlying his attitude to the Society which

Johnson P. commented on in his judgment. Mr. Murphy averred to the relevance of the substituted service application as follows:-

> *'I accept that nothing major rests on this order for substituted service (other than there being misconduct on [Solicitor X's] part) and the reason it is relevant to this application is that when the matter first came before the then President he described me as the person who had been 'ducking and diving and evading service of Summons'. As there had been no attempt to serve me with the Summons this impression formed by the President was not correct".*

158. Mr. Murphy states that his name was struck off the Roll of Solicitors largely based on the evidence of Ms. Kirwan who had sworn that she had been in court at the time of the disputed undertaking of 31st July 2003, and that he had not been. He maintains that the breach of the alleged undertaking was the biggest factor in the decision of the SDT to make the recommendation it did. It was referred to over fifty times in the transcript. He argues that when Johnson P. referred to his attitude to Finnegan P., this related to the undertaking. He emphasises that the only part of the complaint that Johnson P. referred to in his judgment was the breach of the undertaking. The undertaking was central and the SDT and the courts were repeatedly misled about this. He submits that "*there is no doubt but that in these matters, each deception or a combination of various deceptions tipped the scales in favour of the Society"*.

159. In a replying affidavit, Solicitor X averred that no appeal had been brought by Mr. Murphy, that Johnson P. had retired and was ".. *deprived of the opportunity of dealing with Mr. Murphy's contention that he was defrauded by the Society into striking Mr. Murphy off the Roll of Solicitors*". She averred that Mr. Murphy's delay in bringing the application was particularly inexplicable when viewed in the context of all other proceedings in being at that time and that there was "*clearly nothing which could have just come to Mr. Murphy's attention at this present moment in time*

which could justify this delay". Solicitor X averred that it was only when the Society issued a motion seeking an *Isaac Wunder* order that Mr. Murphy sought to re-enter the proceedings. It is contended that the orders were properly obtained and that at no stage did Johnson P. express criticism of the manner in which the Society had conducted proceedings. She described the application as vexatious, an abuse of process and "*simply part of a general campaign by Mr. Murphy arising out of long standing grievances against the Society*". Solicitor X states that the application was a "*further impermissible attempt to attack and reopen final orders made by this Honourable Court*".

160. In his affidavit in reply sworn on the 10th January 2011, Mr. Murphy rejected Solicitor X's contentions and averred:

> "*Because of the actions of the Law Society in this and other matters, my psychiatrist said that I had suffered from a bi-polar condition and that this affected my attitude to the Law Society which was one of the considerations which contributed to the ultimate making of the order striking me off the Roll of Solicitors. The main reason that I was struck off the Roll of Solicitors was for breach of an undertaking which I had not given, that did not exist and for an attitude that was to a very large extent generated by the actions of the Law Society".*

161. Mr. Murphy avers that Johnson P. was misled into making the orders, that Johnson P. was not aware that "*Ms. Kirwan was not telling the truth"* and that he had been misled in relation to the undertaking. Also, Johnson P. did not have proof that the [REDACTED] document was a forgery or that the Society had, after fourteen years, admitted that they had made a payment to a solicitor for taking over a practice. Referencing his disciplinary history, at para. 18 of his affidavit of 10th January 2010, Mr. Murphy avers:

> *"I only wish my mental health, which has now stabilized by treatment and medication, had allowed me to properly deal with all the matters as they*

were raised a number of years ago and then the list of 'prior convictions' would be much shorter if indeed there were any prior convictions at all".

162. In response, in an affidavit sworn on 18th February 2011, Solicitor X referred to disciplinary proceedings issued against Ms Kirwan (3638/DT 07/10) and Ms. Dara McMahon, a solicitor once employed by the Society (6812/DT 06/10) arising out of their handling of the [REDACTED] / [REDACTED] matter. She pointed out that in both cases the SDT had found that there was no *prima facie* evidence of misconduct (see appeals 2010/80 SA and 2010/81 SA). She also averred that Mr. Murphy did not refer to a letter which he had written on 5th October 2010 to solicitors representing Mr. McMahon and Ms Kirwan, stating that he was prepared to agree to the withdrawal of the appeals, provided an order was made on consent agreeing to a particular interpretation of the original direction made by the Registrar's Committee in May 2001 and that no order be made as to costs. The solicitors, in response, stated that they were only prepared to consent to an order striking out the appeals on the basis that an order for costs was made in their favour. Mr. Murphy had not, at the date of swearing of Solicitor X's affidavit, replied to that letter. A further complaint was made against her in respect of the [REDACTED] matter (5297/DT 170/10). What she described as his campaign was extended to encompass criticism of the SDT. In an affidavit which he swore on 3rd February 2011 he averred that "*it is also evident that the Disciplinary Tribunal does not deal with my complaints in a fair way*". She averred that a document which had been exhibited to a previous affidavit of Mr. Murphy, entitled "*Disciplinary History-Colm Murphy's Remarks"* was important because it confirmed that Mr. Murphy's campaign to overturn every order that has been made against him was to continue.

163. Mr. Murphy swore a further affidavit on the 24th of February 2011. The stated purpose was not to respond, rather to adduce evidence which had come to light since his affidavit of the 10th of January 2011. He pointed to communications between the Society with Mr. [REDACTED] during the period April to September

2007, which were not brought to the attention of the court at the time of the attachment and committal proceedings.

164. Mr. Murphy referred to the [REDACTED] matter which was the subject of a decision of Registrar's Committee on the 29th May 2001, a finding referred to in the strike off application. A separate complaint of Mr. [REDACTED] was also heard on the same day, 29th October 2001. The Registrar's Committee's decision was appealed to the High Court. The appeal was refused. He contended that new material had now come to light which meant that the finding was deeply flawed. This consisted of an email dated 14th February 2011 from Mr.[REDACTED] for whom Mr. [REDACTED] acted as caretaker. On receipt of that email, he decided to appeal to the Supreme Court. It will be recalled that, subsequently, the Supreme Court refused his application for an extension of time within which to appeal.

165. The [REDACTED] matter was addressed by this court in its judgment in the civil proceedings (paras. 123-139, 351-357) and was analysed in the context of the doctrine of collateral challenge (paras. 327 – 333). At para. 356 this court stated: -

> *"While mistakes may have been made by the Committee in May, 2001 in the manner in which it gave directions, this was addressed through the process described by Laffoy J. and I find no evidence of malice in the way that this complaint was addressed by the Society or that any power it had was exercised from a motive that could be described as improper or ulterior."*

In making those observations this Court stated that it was not to be taken to express a view that detracts from the obligations of the Society when presenting matters of complaint at disciplinary hearings to ensure that all relevant information was placed before the Committee, SDT or the court including information which tends to support or detract from the cause for complaint or the findings being appealed.

166. Solicitor X did not give evidence in the civil proceedings. She was unavailable for cross examination in respect of her affidavits. Further, her affidavits

only speak to matters which were advanced up to the time of their swearing and no witness statement was made by her in the civil proceedings. Following the conclusion of the civil proceedings and after submissions in the s.18 and strike off applications were commenced, Mr. Murphy wrote to the Society on 23rd August 2021 requesting that another person swear affidavits in reply, failing which application would be made to strike out Solicitor X's affidavit. No such formal application was made. While the court must exercise caution in relation to the weight which it attaches to the contents of Solicitor X's affidavits, it is fair to say that for the most part they contain submissions and/or refer to disciplinary matters about which the court has received evidence from other sources. It seems to the court therefore that little weight ought to be placed on her affidavits as thus sworn, save to note the opposition of the Society to the application, a stance which has been adopted in submissions.

41. The Notice of Motion and the breadth of the application.

167. An appeal to the High Court from findings and recommendations of the SDT is effectively a *de novo* hearing. Mr. Murphy appealed by notice of motion dated 20th February 2009. The grounds on which he sought to vary or rescind the orders of the SDT were outlined as follows :

a. That the SDT failed to take into account all matters of mitigation he had raised.

b. That the SDT did not provide adequate and /or sufficient reasons for its decision or recommendation.

c. That the recommendation to have Mr. Murphy struck off the Roll of Solicitors was excessive.

168. The reliefs sought by Mr. Murphy on the instant application to seek to re-enter the strike off proceedings are outlined in his notice of motion dated 21st October 2010. They specifically refer to re-entering proceedings bearing record numbers 2009 12 /SA and 2009 14 /SA. The reliefs are referable to *court orders* obtained in the strike off proceedings Mr. Murphy has not sought to set aside the order of the

SDT on the ground that the *SDT* was defrauded or misled. The SDT is not a party to this application. This might be considered to be an overly technical analysis given that should the application be successful; the matter will be treated afresh by the court. Nevertheless the relief which *is* sought is to re-enter and seek to set aside the orders on the ground that the *court* was misled *"both innocently and deliberately as to the factual background of the cases."* In substance, however, it can be said that not only does Mr. Murphy seek to re-enter for the purpose of setting aside the *order* or *orders* made by Johnson P. but to go further and to seek to re-visit and contest what occurred before the SDT. To this extent it may also be said that he seeks to effectively expand his grounds of appeal against the substantive findings and recommendations of the SDT.

42. Principles Applicable

169. The principles applicable on this application are the same as those which apply to the application to re-enter the s.18 proceedings. The application ought not to be treated as if the court had granted leave to re-enter the proceedings, nor, ought the application be approached as if it was an appeal on the merits. Nevertheless, in light of the agreed procedures, including that all evidence pertaining to these issues be addressed in the civil proceedings, the court has available to it evidence in relation to what occurred during the Society's, the SDT's and the court's consideration of the [REDACTED] complaints, which might not otherwise be the case. It seems appropriate therefore to adopt a more expansive approach to Mr. Murphy's application, to assess not only what occurred during the court proceedings, but to also consider what is said to have occurred prior to referral of the matter by the SDT to the court. The court must, however, do so in light of the legal principles applicable on an application such as this.

170. At the risk of some repetition it is proposed to address the issues raised by a consideration of the following :

i. What occurred prior to the reference to the SDT. The evidence in relation to what occurred during this period is chronicled in schedule II.
ii. The transcript of hearings before the SDT. See schedule III.
iii. The appeal and hearing before Johnson P.
iv. The absence of an appeal and the reasons advanced for failure to do so, and;
v. What is said to have emerged subsequently which warrants intervention by the court.

43. The [REDACTED] **complaints**

171. Mr. Murphy had represented a partnership of three brothers since 1988. He also acted for them in personal matters. In the mid-1990s they were involved in a number of commercial and property transactions involving the purchase and sale of various parcels of property in the Kenmare area. One of the transactions resulted in an arbitration with Kerry County Council. Subsequently an issue arose regarding the subdivision of certain property. In 1999 two of the brothers, Mr. [REDACTED] and Mr. [REDACTED], came to be represented by Mr. [REDACTED]. Mr. Murphy continued to represent Mr. [REDACTED]. On 28th of May 2002 Mr. Murphy served a notice of dissolution of the partnership on behalf of his client. By letter dated 30th of May 2002, addressed to the Society, the other two brothers, made complaints against him. This letter was forwarded to the Society on 10th June 2002 by Mr. [REDACTED]. They requested the Society to investigate certain matters. First, they had been awarded £134,000 in the arbitration which was finalised in October 1995. The monies were in substantial part used to purchase another property from a Mr. Bigham. It was claimed that despite numerous requests, they never received an account of exactly what happened the money, nor had they received an account of *the various transactions.* Second, their solicitor had served two authorities on Mr. Murphy on 15th November 1999 and neither they, nor their solicitor, had received papers or accounts.

172. On 21st of June 2002, Ms. Kirwan wrote to Mr. Murphy stating that a full and prompt reply would help to resolve matters quickly. Correspondence was exchanged and by letter dated 25th of July 2002 a "Statement Of Balance" was provided by Mr. Murphy. On 3rd September 2002, Mr. [REDACTED] replied that the accounts submitted were totally inadequate, were incomplete and that his clients had not been given an account of all the monies dealt with by Mr. Murphy, nor had they received their papers. Mr. [REDACTED] later wrote that his clients had not received an account of *the various transactions*, which prompted Ms. Kirwan to seek further detail of those *various transactions*. Mr. [REDACTED] provided more detail by letter dated 31st of October 2002. This was forwarded to Mr. Murphy by Ms. Kirwan on 11th November 2002. She requested him to furnish the information within 14 days.

173. In the meantime proceedings had been instituted in respect of the partnership. Mr. [REDACTED] acted on behalf of Mr. [REDACTED] and Mr. [REDACTED] in those proceedings. Coincidentally, also on 11th November 2002, an order was made which, it appears, formed the basis of a proposed resolution of the partnership dispute.

174. Because of his failure to address correspondence either at all or in a timely manner, Mr. Murphy was requested to attend before the Registrar's Committee of the Society. For a variety of different reasons he did not attend meetings which were scheduled for 17th December 2002 and 18th February 2003. With regard to the December meeting, he maintained that he did not receive notification of the meeting until January 2003. He had informed the Registrar's Committee that he would be unable to attend in respect of another matter on that day. With regard to the meeting in February, he sought an adjournment due to pressure of business. This was refused and the Committee directed that application be made to the President of the High Court for an order under the Solicitors (Amendment) Act 2002, s.13 compelling Mr. Murphy to respond appropriately and to attend meetings of the Registrar's Committee when requested to do so. Mr. Murphy was then informed of the

Committee's direction. Correspondence ensued and the application was deferred to enable Mr. Murphy to attend to matters.

175. Following further correspondence, application to court was commenced by notice of motion issued on 24th June 2003. It was returnable for 7th July 2003. The hearing was adjourned to 9th July 2003 when Finnegan P., *inter alia*, made an order directing Mr. Murphy to attend the next meeting scheduled for 29th July 2003. The court application was adjourned to 31st July 2003. Correspondence was again exchanged. Mr. Murphy attended the Registrar's Committee meeting on 29th July 2003. No final decision was made and the matter was adjourned to its next meeting. A hearing took place before Finnegan P. on 31st July 2003. This was the hearing at which the undertaking was said to have been given to the Court. A meeting of the Registrar's Committee took place on 30th September 2003. Mr. Murphy did not attend. He was out of the country. He sought an adjournment in advance. This was not acceded to. The Committee decided to refer the matter to the SDT by way of complaints.

176. The above chronology, which is considered in more detail in schedule II illustrates that correspondence went unanswered, that queries were not fully addressed, promises to respond were not fulfilled or fulfilled in time and meetings were not attended for one reason or another. The alleged failure of Mr. Murphy to adequately respond to correspondence, to communicate with the Society and to attend meetings were significant factors in the decision of the Society to refer Mr. Murphy to the court in the first instance, and ultimately the SDT. The court addressed this at para. 401 of its judgment in the civil case.

177. On 17th June 2004 the Society made application to the SDT for an inquiry into the conduct of Mr. Murphy. The application was grounded on an affidavit sworn by Ms. Kirwan on 11th June 2004 in which fifteen allegations of misconduct were advanced. Mr. Murphy did not file a replying affidavit. Correspondence was exchanged. Mr. Murphy sought an adjournment of the SDT's consideration of the complaints at *prima facie* stage. This was refused. On 14th September 2004 the SDT

found that there was a *prima facie* case of misconduct for inquiry into the fifteen complaints. Certain averments in this affidavit were to become the cause for complaints made by Mr. Murphy against Ms Kirwan to the SDT a number of years later.

178. Mr. Murphy was written to by Mr. Lynch of the SDT on 20th September 2004. She advised him that the SDT had declined his request for an adjournment and informed him of the opinion of the SDT that, having considered the form of application and Ms. Kirwan's affidavit sworn on 11th June 2004, there was a *prima facie* case of misconduct in respect of the each of the allegations.

179. Mr. Murphy sought discovery of documents against the Society. His application was refused by the SDT but granted on appeal to the High Court on 6th December 2004. An affidavit of discovery was sworn by Solicitor X on 16th December 2004.

180. A considerable period of time elapsed before the application was listed for hearing before the SDT. The application was first scheduled for 12th November 2007. It was overlooked by Mr. [REDACTED], a witness who the Society intended to call. Proceedings were adjourned to 13th March 2008. At 11.15 a.m. a fax was received by the SDT from Mr. Murphy. He wrote that he had heard only at 10.45 a.m. that the matter was listed for that day. He had changed his legal team in January and had retained counsel. They were unaware of the hearing. He sought an adjournment. Having taken into account the contents of a medical report submitted on his behalf, the SDT adjourned the hearing peremptorily to the 15th April 2008. On that date Mr. Murphy was not in attendance but was represented. He had an injury and was unable to travel. His counsel sought an adjournment for one week. This was opposed by the Society. An answer to a question which she was asked while under oath also became the basis for a complaint by Mr. Murphy against her to the SDT many years later. Limited evidence was given by Ms Kirwan. Solicitor X was also in attendance but was not required to give evidence. The SDT adjourned the

application to 25th April 2008 on a peremptory basis and costs were awarded against Mr. Murphy.

181. On 25th April 2008, all parties were present. Mr. Murphy was represented by counsel. Evidence was given by Mr. [REDACTED] and Mr. [REDACTED], both of whom were cross examined by counsel for Mr. Murphy. Mr. Murphy then gave direct evidence. Cross-examination was postponed to 10th July 2008. On resumption Mr. Murphy was cross-examined by counsel for the Society. Mr. [REDACTED] gave evidence. The members of the SDT, having considered the evidence, upheld ten of the fifteen complaints of misconduct. The hearing in relation to penalty/recommendation of sanction was adjourned to 13th January 2009, following which the SDT recommended that Mr. Murphy's name be struck from the Roll of Solicitors. By notice of motion dated 12th February 2009, the Society made the application to have Mr. Murphy's name struck from the Roll of Solicitors. By motion dated 20th February 2009 Mr. Murphy cross appealed. A hearing took place on 21st April 2009. Both applications were heard together. Mr. Murphy was represented by solicitor and counsel. Johnson P. delivered a reserved judgment on 18th May 2009, directing that Mr. Murphy's name be struck from the Roll of Solicitors.

44. Schedules

182. The above is a summary of the chronology of events and the background to the [REDACTED] complaints. For completion and for ease of reference, a more detailed chronology and background to events which occurred before referral by the Society to the SDT is contained in schedule II to this judgment. A consideration of the transcripts of evidence of the hearings before the SDT is addressed in schedule III. The schedules, including all stated chronology and expressions of opinion by the court on particular issues, form part of this judgment.

45. The SDT Findings

183. On 10th July 2008 the SDT upheld the following ten complaints of professional misconduct:

(a) Up to the date of the swearing of the within affidavit by Ms. Kirwan on the 11th June, 2004, he failed to vouch and account to his former clients for various disbursements made by him out of the proceeds of an arbitration award the subject matter of a complaint to the Society.

(b) Failed without reasonable cause to respond appropriately and in a timely manner to the Society's correspondence.

(d) Failed to attend a further meeting of the Registrar's Committee about the same matter on the 18th February, 2003.

(f) Failed to attend the further meeting of the Registrar's Committee on 30th September, 2003, notwithstanding the undertaking given by his counsel to the President of the High Court that he would attend meetings of the Registrar's Committee.

(g)Breached s.68 (1) of the Solicitors (Amendment) Act, 1994, by failing to provide to his clients particulars in writing of his charges as prescribed by the section.

(h)Breached s.68 (3) of the Solicitors (Amendment) Act, 1994,by deducting costs from the Arbitration Award made to his clients, without the consent in writing of his clients.

(i) Breached s. 68 (6) of the Solicitors (Amendment) Act, 1994, by failing to furnish to his clients as soon as practicable after the conclusion of the arbitration a bill of costs in the format prescribed by the section.

(k) Received monies being rents out of a property owned by the complainants, failed to account to the complainants for these monies and appropriated these monies towards fees without the knowledge, authority or consent of the complainants and without raising a bill of costs.

(l)Failed to address in a timely manner the request made by his former clients' new solicitors that the files be handed over.

(m) Failed to account for the sum of €21,141/£21, 141 paid on account by his clients, and for clarification purposes that is a figure which has been disputed and changed throughout the course but it's the figure which is placed in Mr Murphy's initial statement of account in relation to the balancing of the monies.

184. In most cases the findings against Mr. Murphy were stated to have been made "*by reason of the evidence adduced and the documents produced to the Tribunal*". The findings in respect of breaches of s. 68 were *"by reason of the admissions made by the respondent solicitor."* An additional and particular reason was provided in respect of allegation (f), the "*undertaking*", as follows:

> *"By reason of the evidence adduced and the documents produced to the Tribunal, and in particular the affidavit of the respondent solicitor sworn on 30th July 2003 in proceedings 2003 No 25 SA."*
> (emphasis added)

185. Mr. Murphy was found not guilty of failing to attend the meeting of the Registrar's Committee on 17th December 2002 (c). He was found not guilty of complaint (e), *"delay and obstruction of the Society's investigation, caused the Society to have to make an application to the President of the High Court for an order compelling him to reply to the Society's correspondence and to attend before the Registrar's Committee when requested to do so"*. The reason for this finding was that *"this matter was dealt with within the jurisdiction of the High Court."* He was also found not guilty of complaint (j) that he had *"registered a property of the complainants in his own name and subsequently failed to produce to the Society any contemporaneous documentation evidencing that the property was to be held by him in trust for the complainants"*. The SDT's stated reason for this finding was because *"the evidence adduced was inadequate to make such a finding of*

misconduct". In respect of the charge (n) that he had "*failed to furnish a satisfactory explanation for the issue of a bill of €73,705 in respect of an arbitration in respect of which he has already been paid taxed costs of €69,510.06",* he was found not guilty *"by reason of the evidence adduced and the documents produced"*. Finally, he was also found not guilty of complaint (o), being an alleged failure *"to complete the normal conveyancing procedures on behalf of his clients in relation to the purchase of the properties known as the Beeches and Schoenberg"*, the stated reason being that *"the evidence adduced is inadequate to make a finding of misconduct"*.

186. The members of the SDT requested submissions in relation to previous history, penalty and costs. Counsel for Mr. Murphy sought an adjournment to adduce medical evidence. The matter came before the SDT again on 13th January 2009.

46. SDT penalty hearing-13th January 2009.

187. The transcript of the proceedings before the SDT on 13th January 2009 record that it had been counsel for Mr. Murphy's intention to call Dr. Lucey, a psychiatrist, who had prepared the medical report dated 4th October 2008. He was not available on the day of the resumed hearing. A note prepared by him and dated 12th January 2009 was produced and in which he explained his practice commitments. Counsel for Mr. Murphy said that had he known that Dr Lucey was available only on Wednesdays he would have requested an adjournment to a Wednesday.

188. The transcript also records that an application had been made to another division of the SDT on the previous Friday to adjourn the matter *sine die* on the basis of the revival of the *libel proceedings* and the joinder of a further party to those proceedings. Counsel for Mr. Murphy thought that this had been made on the basis of the unavailability of the medical witness. The matter was subsequently clarified. Counsel had not been involved in that application.

47. Submissions by Counsel for the Society to the SDT

189. While counsel for the Society queried the meaning of the medical report, it was accepted that the SDT could take it into account. He submitted that at least some of its contents were what might be expected in a plea in mitigation. Counsel described Mr. Murphy's approach to the allegations as one of showing contempt for the Society and of his obligation to cooperate with the Society in its attempt to regulate the profession and to protect the public. He submitted that it also showed contempt for his duties to his clients and that "*it also displays contempt even to his counsel's undertaking to the President of the High Court that he would attend future committee meetings"* . He stated that Mr. Murphy had taken an inconsistent position on the undertaking. It was submitted that the evidence showed that Mr. Murphy had limited insight into his obligations to his clients, that when requests were made to clarify matters and to hand over a file, he attacked the Society, the complainants, the complainants' solicitor and made allegations against them. Mr. Murphy had not sworn a replying affidavit and his position only became evident at hearing. As evidence of Mr. Murphy's suggested confrontational approach, reference was made to threats to injunct the meeting of the 30th September 2003. The SDT was urged to consider this when deciding penalty because it was submitted that a matter to be taken into consideration was whether the solicitor had recognised that matters were not addressed in an appropriate way. He described as a *"constant feature"* the threatening of injunctions when the Society attempted to move things forward. Reference was made to Mr. Murphy's failure to comply with orders of the SDT and to the attachment and committal proceedings.

190. Counsel stated that his instructions were that, given the findings of the SDT, the manner in which Mr. Murphy approached the allegations and what counsel described as his "*appalling disciplinary record*", that:

> "*…it may be that the Tribunal would feel this is not a fit person to be a member of the solicitor's profession and the Tribunal, whilst penalty is entirely a matter for it, may feel that Mr Murphy should be struck off the roll*."

48. Submissions by Counsel for Mr. Murphy to the SDT

191. In response, counsel for Mr. Murphy submitted that he should not be punished for contesting the allegations, particularly when a number were successfully defended. Mr. Murphy always had "*open doors*" for the [REDACTED]. The complaints had arisen out of partnership issues. He accepted that over a period of time his client had disagreements with the Society. He referenced the 2001 audit, the rumours which circulated, his correspondence with the Society and said that it was perfectly clear that "*arteries hardened*".

192. With regard to the soccer club rent, counsel submitted that Mr. Murphy entered in his books a greater amount of rent than the soccer club had said it had paid. He stated that outstanding fines would be paid within 14 days. He emphasised the contents of the medical report and pointed out that the [REDACTED] brothers had sold property for considerably in excess of the original suggested sale price. Counsel also referred to the letter dated 5th October 2006 from PJ O'Driscoll's solicitors in which it was stated that "*whatever payments were received by Mr Murphy and whatever amounts outstanding will be determined following taxation*". This was by agreement. He questioned the difficulty given that one of the former partners, Mr. [REDACTED], gave evidence on Mr. Murphy's behalf and had said that "*whatever money is owing will be paid*".

193. With regard to correspondence counsel continued:

> *"In not living up to his obligations to the Society he has paid for it dearly and continues to pay dearly for it. He has not had an income from law since 2005, since he ceased practising in June of that year."*

194. No money had been stolen and there was no claim on the compensation fund. It was submitted that the failure to correspond had now been resolved, because Mr. Murphy had stabilised. *"His arteries did harden because he felt that this correspondence was not being dealt with and at all times a kind of a hammer was being used against him"*. Counsel also queried whether the Society could be said to have been dealing fairly with Mr. Murphy about the auction. He submitted that the

Society should have ascertained the truth of the allegation but, without having done so, had gone to court. He queried whether members of the SDT might feel aggrieved in similar circumstances.

195. With regard to the failure to attend the meeting on 18th February 2003 while his client had sought an adjournment, counsel again described it as a "*hardening of arteries between my client stupidly (sic) and his governing authority*".

196. On the issue of the undertaking, counsel pointed out that Mr. Murphy's sworn evidence was that *he did not realise* that his counsel had given such an undertaking. Mr. Murphy was out of the country on a family matter when the subsequent meeting of the Registrar's Committee took place. He had written to the Society in advance. He did attend one meeting and on another occasion brought accounts with him "*but that is neither here nor there. That charge has been upheld."*

197. Counsel also addressed the findings in respect of the s. 68 letters. No complaint had been raised for eight years. Similarly, no complaint had been made in respect of the failure to account for the *21,141 paid on account* and a letter had been written on the following day explaining the deduction.

198. Counsel submitted that, in his view, the two most serious allegations were not upheld, being the alleged failure to complete the normal conveyancing procedures with regard to the Beeches and Schoenberg properties, and to furnish a satisfactory explanation for the arbitration a bill of €73,705. The complaint of registering property in his own name without contemporaneous documentation was not withdrawn and was not upheld.

199. Counsel informed the SDT that Mr. Murphy had been told that there was a way of dealing with matters even where an officer of the Society is attributed as giving a quotation to the Phoenix magazine. He said that it was pointed out to Mr. Murphy that *"you just don't refuse to deal with correspondence from the Incorporated Law Society because one of its officers gives a quotation or is quoted in the Phoenix magazine, even if he turns around later where millions are missing and says,* "*he doesn't comment on individual cases*" . Counsel continued:

"... I've explained this to him and now he is on his medication he sees the point. He sees the difficulty he has been in and because his condition is stabilised he doesn't have a problem, everything will be dealt with properly and appropriately.

He has learned a salutary lesson. He has been deprived of income by and all since '05. He and his family have suffered grievously."

200. Counsel later referred to the effect on Mr. Murphy's family:

"[He].. *has had a salutary lesson handed down to him. His past behaviour I am instructed to say is no indicator for his future behaviour. I would expect that if the Society, the Tribunal, were not to take the drastic step of recommending that he be struck off that they would at least recommend that he would not be allowed practice on his own. That is of course, I would suggest, would be appropriate in the area where he would have a person, to be approved by the Society, under whom he would work. If for no other reason than this: he seems to have had good instincts. I mean looking at where we are today by comparison where we were even six months ago. He does appear to have had good instincts in the safeguarding of his clients' interests when he advises 11.5 million is too low for that and is softly sold for 19.4*".

201. It was submitted that Mr. Murphy and the [REDACTED] had many shared interests all of which tended to blur the line between what he described as the "*new professionalism*"; and that he was *"too close to his clients"*.

49. The SDT Recommendations of 27th January 2009

202. Following a short adjournment, the Chairman stated that the SDT was satisfied that Mr. Murphy had displayed a cavalier attitude to both the monies of his

client and the inquiries of the Society. The SDT recommended the following sanctions:

1. That Mr. Murphy is not a fit person to be a member of the solicitors' profession.
2. That the name of Mr. Murphy be struck off the Roll of Solicitors.
3. That Mr. Murphy pay the whole of the costs of the Law Society of Ireland to be taxed in default of agreement.

203. The SDT had regard to previous findings of misconduct not rescinded by the High Court, being:

a. Order of the SDT on the 28th September, 1999 (5306/DT156); (It would seem that the Order of the SDT was made on the 7th March, 2000). This was in the **Healy** matter.
b. Order of the SDT made on the 13th October, 1999 (5306/DT160). This was the decision of the SDT in respect of the [REDACTED] matter concerning a failure to reply to correspondence from the Society, failure to register clients title deeds in a timely manner or at all, and failure to attend the Registrar's Committee and to comply with the statutory notice.
c. Order of the SDT made on the 2nd November, 1999 (5306/DT151). Decision of the SDT in relation to the complaint of **Mr.** [REDACTED]
d. The Order of the SDT made on the 21st October, 2003 (5306/DT331). The [REDACTED] matter.
e. Order of the SDT made on the 4th November, 2004 (5306/DT446/04). The [REDACTED] matter.
f. The Order of the SDT made on the 10th July, 2007. (Record No. 5306/DP27/05). This concerned a complaint in the [REDACTED] **/Healy** matter.

g. Order of the SDT made on 10th July, 2007. (Record No. 5306/DT26/05). This concerned the complaint in the [REDACTED] matter.

50. SDT Report of 27th January 2009.

204. At para. 12 of its report the SDT stated:

… *"in this particular case, the respondent solicitor has displayed a cavalier attitude to both the monies of his client and the enquiries of the Law Society. He has displayed a haphazard attitude to his clients' funds and extreme vagueness as to billing for services rendered*.

There is an unquestionable refusal on the part of the respondent to reply at all or within a reasonable time and in a reasonable manner to correspondence issued by the Law Society. He has an unreasonably coloured view of his regulatory body.

He has an inability to differentiate between his obligations and responsibility to his present and former clients' and obligations to his professional body.

It is noted that the complainants' and their solicitor specifically point out that they wish Mr. Murphy well and they are appearing before the Tribunal under subpoena.

In ways it is a sad and salutary tale, a partnership of three brothers asundered in acrimony. The relationship between the complainants' and their solicitor ended badly. The normal relationship which should exist between solicitors and their colleagues and, indeed, between solicitors and their regulatory body has evaporated.

The Tribunal does not admonish the respondent solicitor for his robust defence of the allegations either proven or dismissed. However, the evidence adduced leaves the Tribunal with grave concerns as to the

ability of the respondent to recognise and comply with the professional responsibilities to his clients, his former clients, and to the Law Society. It is not merely as regards financial probity that such obligations exist. The cumulative effect of the findings of misconduct in this matter are of such gravity as warrant referral to the High Court"

51. The Application to the President of the High Court to have Mr. Murphy's name struck from the Roll of Solicitors

205. The application was brought by way of notice of motion dated 12th February 2009, grounded on the affidavit of Ms. Kirwan sworn that day and in which she referenced her previous affidavit sworn on 11th June 2004 and the findings and report of the SDT. A copy of the *order* of the SDT signed on 27th January 2009 and a copy of the *report* of the SDT, of the same date, were exhibited.

206. Mr. Murphy in his extensive affidavit sworn on 20th February 2009 sought to explain the background to the complaints and, in some respects, to repeat the defences he had raised before the SDT and his grievances with the Society. He averred at paragraph 2:

"At the outset of this Affidavit and Appeal I would like to point out to this Honourable Court that I fully accept the findings of the Disciplinary Tribunal. I acknowledge that I have made mistakes, mistakes for which I unreservedly apologise. I would like to emphasise to this Honourable Court that I have never misappropriated clients funds, defrauded the Revenue Commissioners, obstructed justice, misled the Law Society or did anything that caused any loss or damage to any client or member of the public."

The apology and acceptance was repeated at para. 23 where he averred:

"I again say that I accept the findings of the Disciplinary Tribunal but I do ask this court to look at the overall situation. I regret and apologise for any actions where I have acted inappropriately."

207. Before opening Mr. Murphy's affidavit his counsel addressed Johnson P. as follows:

"*…my client wholeheartedly accepts the findings of fact made by the Tribunal. He wishes to apologise to the court, to his fellow practitioners but especially to his family and for the position that he is in today and the fact that he is before this court at all*."

208. Mr. Murphy effectively placed himself at the mercy of the court. Referring to Mr. Murphy's notice of motion his counsel said that *the part* he was seeking was *"simply that my client should not ever again find himself capable of practising as a solicitor, that this reality of it* (see transcript 1st of April 2009, p. 7). The applications were heard on 21st April 2009. Submissions of counsel to Johnson P. are addressed in the principal judgment at para. 9.2 *et seq*. Mr. Murphy's counsel summarised his appeal as follows:

" 1. I am sorry.

2. I have acknowledged my short failings. I regret them and they will not be repeated.

3. There is no money missing. There is no dishonesty. There is no claim upon the Compensation Fund.

Clients, I think my friend said some time in 2007 the point of it was that clients would have been discommoded, if I can put it like that.."

At that point Johnson P. intervened, saying *"And this Court?,* to which counsel responded:

" And this Court, indeed, my Lord. Your Lordship is absolutely right, I am sure the Incorporated Law Society have an awful lot better things to be doing, absolutely, and this is all totally unnecessary. As I say until we

received this medical report we had nothing where we could say what is the problem here.

Next I would say to your Lordship this: my client acknowledges that he is going to have to in a court of law resolve the issues that lie between himself and the Incorporated Law Society and if he is not successful he has no business being a solicitor and he won't be one ever. In those circumstances I would ask your Lordship not to strike him from the roll of solicitor."

Counsel for the Society responded. This court noted in the civil proceedings that this was described by Mr. Murphy's then counsel, Dr. Craven S.C, as a no holds barred approach. This led to a robust response from Mr. Murphy's counsel. Johnson P. reserved his decision.

52. Judgment of the President of the High Court – 18th May 2009

209. On 18th May 2009 Johnson P. ordered that Mr. Murphy's name be struck from the Roll of Solicitors. In the course of his ruling he stated as follows: -

"*4. On his behalf Mr. Nicks* (sic) *said that he had apologised for what he had done and basically indicated that the situation arose because he felt aggrieved as a result of the treatment of the Law Society. He stated that he never misappropriated any funds and that would appear to be correct insofar as no funds are missing.*

5. However, Mr. Murphy in his Affidavit appeared to try and shift the blame for many of the misfortunes which he has had onto the Law Society and others. He has also indicated he received treatment from Dr. Lucey and there is a medical report to that effect available to the Court which has been accepted.

6. In addition his wife gave evidence to the effect that he has been attending Dr. Lucey on eighteen occasions and that since this he has

improved in his attitudes very much. She also gave evidence to the effect that his moods had changed dramatically over the period prior to that and this obviously contributed to the situation he finds himself in.

7. However, as Mr. McDermott pointed out, throughout his Affidavit Mr. Murphy continues to blame the Incorporated Law Society and others for his troubles and whereas he admits the findings of the Law Society he appears to continue to try and justify his decisions. It is impossible to avoid the fact that Mr. Murphy had on seven previous occasions been found guilty of misconduct by the Law Society. He has appeared before me on a number of occasions in recent years and I came to the conclusion that he never appeared to understand the fact that the laws applied to him, rules applied to him and directions of the Court and the Law Society apply to him.

8. The regulations imposed by the Law Society are extremely rigorous, I appreciate, but those are the terms and conditions under which people practice as solicitors and if a person is not willing or capable of accepting these rules and regulations then there is no place for them in the profession.

9. As Mr. McDermott clearly pointed out the Tribunal have recommended to the Court that Mr. Murphy is not a fit person to be a solicitor. He has been before my predecessor Mr. Justice Finnegan, President of the High Court and his attitude to him does not in any way assist him. Mr. Murphy appears through Mr. Nix to indicate that he has been suffering from a mental condition for some time but I am not satisfied on the evidence before me that his attitude to the Incorporated Law Society is changed despite the evidence given by his wife.

10. Under those circumstances I make the following orders: -

1.An order striking the name of the respondent solicitor John Colm Murphy otherwise Colm Murphy from the Roll of Solicitors and

2. An order for the costs of the Solicitors Disciplinary Tribunal and the costs of this Court".

53. Acceptance of findings of SDT and failure to appeal

210. Mr. Murphy's decision to accept the findings of the SDT was not instantaneous. It was a considered decision. It was made well in advance of the hearing. Further, having been struck from the Roll of Solicitors, he did not appeal. These matters were within the Mr. Murphy's control and must be considered to be of significance, particularly in view of his contention that the Society misled or defrauded *the court* or, even if considered on an expanded basis, that any alleged deceit of *the SDT* is operative.

54. "No choice" but to make admissions

211. In the civil proceedings Mr. Murphy gave evidence that..

"…In 2009 when on the advice of the legal team and medical professionals I accepted the findings and put myself at the mercy of the Court I still felt obliged to have it pointed out that I was blaming the Society. I believe evidence has now emerged which supports me in this regard"

He further states:

"*During the application to have me struck off on the 21st April, 2009, counsel on my behalf made certain admissions in relation to the findings against me. I also made admissions in my affidavit filed on the 23rd February 2009 in connection with that hearing. I apologised for my conduct. These admissions and apologies were made with the advice of my Solicitor, Junior Counsel, Senior Counsel, family*

members including two of my sisters who are doctors, my GP and my psychiatrist. I have no issue with the advice I received at the time. However this advice and the admissions and apologies must now be looked at in light of the many matters, including admissions of the Defendants, and evidence that casts doubt on or completely negate the evidence against me that has come to light since. This in turn would cast doubt on most if not all the findings against me and that would show that the Defendants had decided that this was a case that had to be fought to the end "whenever that might be" which is set out in the Data Protection Section of my Statement.

In short I say that the admissions were made as were the apologies but the circumstances leading up to those admissions and apologies, as will be revealed in the evidence, will demonstrate that the conduct of the Defendants left me with no choice but to make those admissions. In fact if anything those admissions by me show the extreme nature of the oppressive conduct of the Defendants and their desire then, since then and now, to deprive me of any chance of a fair hearing or justice. My biggest obstacle in this case and the main reason for the decision to fall on the mercy of the court was that the Society, solely on the testimony of Linda Kirwan, had proved about the undertaking and the breach of it. I was very frustrated as I knew this was not correct but the advice, legal, medical and from my family was that I had no chance of overcoming this evidence. As will be shown hereinafter the Society had also obtained findings in the S. 18 proceedings based on allegations in relation to an auction I was not at, letters I had not written, cheques that I had not improperly written and findings obtained by their reliance on a forged document. There were also the other very questionable findings against me. To me my situation

seemed hopeless and although I was not happy to admit things I knew were wrong I simply had no choice"

212. When questioned on having no choice by the court in the civil proceedings, Mr. Murphy replied:

> *"Because at the time I was under medical treatment, Judge, my home life was in tatters, Judge, there was things had been written about me in the newspapers, Judge, various reports in the filings about taking clients' land and whatever all the things was. My legal counsel said while the undertaking was there, there was no way -- while this allegation about the undertaking was proven, there was no way we'd get -- Brendan Nix was my counsel, an extremely good counsel…..I have no issue with my legal advice".*

213. With the exception of his brother Mr. Conor Murphy, while acknowledging the passing of his Senior Counsel in the interim, no other member of Mr. Murphy's former legal team or teams gave evidence at the hearing. Mr. Conor Murphy was not asked to address this issue. He did not represent his brother before the SDT or the court in the strike off proceedings. On 10th July 2008, (q. 584), in evidence to the SDT, Mr. Murphy said that his barrister did not feel that he gave an undertaking and added "*I can bring him down if you like*". Counsel was not called to give evidence to the SDT or to this court.

214. Mr. Murphy submits that, as this court has found that no undertaking was given, it follows that any such admission made by him was not true. Nevertheless, he accepts that the bar which he has to overcome on this application is a high one. In support, Mr. Murphy relies on dicta in *R v Maxwell* [2011] 4 All E.R 941, a decision of the UK Supreme Court. The defendant was convicted of murder and robbery. A report by the Criminal Cases Review Committee revealed that the police had systematically misled the court, the Crown Prosecution Service and counsel by concealing and lying about benefits received by a principal witness in the case. The

investigation concluded that a number of police officers had conspired to pervert the course of justice and had deliberately withheld information from the court. They had colluded in witness perjury at the trial, had lied in response to inquiries following conviction and had perjured themselves in the course of the defendant's first application for leave to appeal against conviction. The Commission referred the case to the Court of Appeal who, in 2009, quashed in the conviction. Between October 1998 and September 2004, however, the defendant had made voluntary admissions of guilt to various persons. Under relevant legislation in that jurisdiction, where the Court of Appeal allows an appeal against conviction it can order a re-trial where it appears to the court that the interests of justice so require. Having identified strong reasons why a retrial should not be ordered, in conducting a required balancing exercise, the court nevertheless concluded that the public interest in convicting those guilty of murder outweighed the public interest in maintaining the integrity of the criminal justice system. The defendant appealed against the decision to order a retrial. The appeal was refused.

215. Mr. Murphy relies in particular on *dicta* of Lord Collins, who stated that the level of misconduct was such that the interests of justice demanded that after a conviction procured by such misconduct, after the accused had served a substantial sentence and would not have made the admissions but for the conviction so procured, there should be no retrial. Lord Collins stated:

> "*I would find that the interests of justice demanded the application of the integrity principle. In this case it means that there should be no retrial on evidence which would not have been available but for a conviction obtained (and upheld) as a result of conduct so fundamentally wrong that for the criminal process to act on that evidence would compromise its integrity".*

216. Lord Collins was in the minority. The majority held that the Court of Appeal had a discretion to order a retrial and that it had been correct to consider, as no more than a relevant factor, that the defendant's admissions would not have been

made but for the conviction which had been obtained by prosecutorial misconduct. This was not determinative of whether a retrial was required in the interest of justice.

217. Mr. Murphy also refers to a decision of the Supreme Court India, *Ngubai Ammal and Others v Shama* (1956 AIR 593; 1956 SCR 451) where Venkatarama Ayyar J. , delivering the decision of the court, in addressing the distinction between collusive proceedings and fraudulent proceedings, stated as follows :

> *"An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.*

218. While significant emphasis is placed by the Society on Mr. Murphy's admissions in court and on affidavit, estoppel, as a matter of law, is not specifically raised by the Society on this issue.

219. I am satisfied that, taking the above authorities into account, that the correct approach is to consider the evidence in respect of the undertaking in its entirety and, as suggested by Mr. Murphy, to consider the admissions in context. It follows:

i. That Mr. Murphy may have made such admission is not determinative against him on this issue, and
ii. Despite the ultimate finding of this court in respect of the undertaking in the civil proceedings, nevertheless that such admissions were made are relevant and must be weighed in the balance in determining whether Mr. Murphy had discharged the onus of proof of establishing that there is evidence to support the contention that a fraud was perpetrated on the court; and in the consideration of the overall justice of the situation.

55. Admissions in context

220. Reference has been made earlier in this judgment to Mr. Murphy's contention that the manner in which the s. 18 proceedings were presented gave the

court a particular impression of him which affected *his approach* to the strike off proceedings. It is also claimed that what occurred, and what was said in the s. 18 proceedings, influenced the *court's approach to him* in the strike off application. In oral submissions Mr. Murphy contended that, given his previous dealings and encounters with the President of the High Court, he felt that he was left with little option and that he did not have a chance of arguing to the contrary. Mr. Murphy stresses that the s.18 and attachment and committal proceedings concluded in June 2008 and that the strike off proceedings came before the court in April 2009, nine months later. He submits that what he describes as *a big problem* for him was that the judge who was going to hear the strike off application was the same judge who had some months earlier referred to him as a three card trick man who would confuse mediaeval theologians. He had been accused of trickery and deceit and the judge also referred to him as ducking and diving and evading service. His legal advice at a time, when he was ill and under medical treatment, was to take the course which he did and, he submits, that the level of deceit and fraud perpetrated by the Society made him make those admissions.

56. Reason for Failure to Appeal

221. Mr. Murphy avers at para. 14 of his affidavit sworn on 10th January 2011 that the reason he did not appeal the order of Johnson P. was because at that time he did not have the evidence in relation to Ms. Kirwan and that other matters had since arisen. If that information had come to light within the time allowed for an appeal, however, he would not have appealed and would have taken a different course:

> "…*If the new evidence in relation to Ms. Kirwan or any of the other new evidence has* (sic) *arisen within the time allowed to appeal I would not have appealed the matter to the Supreme Court but would have called upon this Honourable Court to invoke its inherent jurisdiction and re–enter the matter. It is not correct for [Solicitor X] to suggest that I was waiting for the then President to retire. Ms.*

Kirwan did not admit that she had not been in court on the date the alleged undertaking was given until her affidavit of the 31st March 2010 in High Court record no. 2010/74/SA . . .".

222. Mr. Murphy's contention is that Johnson P. had been misled and was not aware that "*Ms. Kirwan was not telling the truth"* in relation to the undertaking.

57. Medical Reporting and Medical Condition

223. This has been addressed in the context of the s. 18 application. Dr. Lucey's report of 4th October 2008 was placed before Johnson P. Mr. Murphy's wife gave evidence in relation to his behaviour and condition. She explained that Mr. Murphy been in receipt of treatment from Dr Lucey's for just over two years. He had been seen him on eighteen occasions. Rumours which circulated in 2002 had affected him. When asked how Mr. Murphy was "*now*" she replied: " *I find Colm to be very well now but he is on medication of course but he is very well*." Mrs. Murphy was also asked by counsel for Mr. Murphy whether he was able to conduct his business. She replied:

*"A….He is well able and he is very much back to himself and Dr Lucey has done great work with Colm and with me with Colm and has helped us tremendously to understand and explain the happenings in our lives and to deal with them and get on with our lives." (*p. 72 of transcript*)*

58. Evidence on issues of admission in context and failure to appeal

224. No criticism is made of the advices which Mr. Murphy received at the relevant time. In an exchange with counsel for Mr. Murphy on day 8 of the civil action (p. 176) it was confirmed that no issue was being raised concerning Mr. Murphy's capacity or that it was in any way impaired, or necessarily impacted upon things. No further medical evidence was advanced before this court in support of any contention, express or implied, that Mr. Murphy's ability to give instructions or take advice was impaired or that any illness was an operative factor in his decisions.

225. Implicit in his submission is that Mr. Murphy harboured a concern that the proceedings before Johnson P. might, or would be pre-judged, as a result of

impressions previously formed, or, at minimum, that Johnson P. would be unimpressed by the mounting of a full appeal. If that is the case then any such concerns must have existed before the hearing on 21st April 2009. They did not, however, give rise to a recusal application. Any such allegation, express or implied, must also be considered in the context of a failure to appeal.

226. I am not satisfied an evidential basis has been advanced by Mr. Murphy either on the basis ill health or what amounts to a suggestion, or fear, of pre-judgment, or risk thereof, to excuse or account for the admissions made, the course of action adopted or the failure to appeal. The court must therefore consider the importance of such admissions when assessing whether there is evidence to support the allegations that any alleged deceit or misleading led to the procurement of the order sought to be re-entered. The alleged deceit occurred in relation to the undertaking and discovery in the [REDACTED] complaint.

59. The Undertaking

227. The breach of the undertaking, accepted by Mr. Murphy on affidavit and in submissions before Johnson P., featured in the strike off application. This court noted at para. 85 of its principal judgment, that this was a very serious allegation made against an officer of the court. Having considered the evidence on this issue, this court observed at para. 388 as follows:

> *"… It seems clear that whatever may have been said in court by counsel on behalf of Mr. Murphy, that the court did not consider that such an undertaking had been given or accepted. Indeed, one can only wonder how such undertaking might have been enforced through the court process, in the absence of it being reflected in the perfected order of the court."*

228. This court concluded that an enforceable undertaking was not, as a matter of fact or law, given on behalf of Mr. Murphy, or accepted by the court. The court also considered the evidence of Ms Kirwan who had averred at paragraph 27 of her affidavit sworn on 11th June 2004, that she was in attendance in the High Court on

31st July 2003 and that Mr. Murphy was not in attendance. Further, Mr. Murphy contends that at the hearing before the SDT on 15th April 2008 Ms. Kirwan confirmed that an undertaking had been given on his behalf. It will be recalled that because of injury Mr. Murphy was not in attendance but was represented by counsel. An adjournment was sought. Counsel for the Society called Ms. Kirwan *simply to establish the dates* in evidence rather than through submissions. Ms Kirwan was questioned as follows:

> *"Q. In order to try to force him to engage the Society, I think in July 2003 the Society brought him to the High Court?*
>
> *B. That's correct.*
>
> *Q. And I think your colleague, [Solicitor X], was involved in that and we can go back to that. I think, and [Solicitor X] will confirm this, on 31st of July 2003 his barrister told the High Court and undertook that he would attend the next meeting of the Registrar's Committee?*
>
> *A. Yes".*

229. Ms. Kirwan was not cross-examined. The above evidence is the subject of a further complaint by Mr. Murphy (2010/74 SA). He alleges that she knew that he had not given any undertaking to the High Court on 31st July 2003 and that no such undertaking was given on his behalf.

230. In complaint the subject of appeal 2010/74/SA, Mr. Murphy alleges that Ms. Kirwan had no evidence to support her sworn testimony of 15th April 2008 when she answered "*yes*" in response to the query "*on 31st July 2013 his barrister told the High Court and undertook that he would attend the next meeting of the Registrar's Committee?", when she knew that this statement was false*". He maintains that she should have said she did not know as she was not in court, that the SDT did not deal with the issue on 10th July 2008 and that "*everyone believed that the respondent*

solicitor had been in court on 31st of July 2003 as she had sworn this in her affidavit of 11th June 2004 and implied it in evidence to the SDT on 15th April, 2008".

231. Ms. Kirwan in an affidavit sworn on 10th February 2010 rejected any impropriety. This affidavit was sworn in response to complaint the subject of appeal 2010/72 SA). She averred:

> *"30. One of the allegations in the affidavit of your deponent sworn on 11th June 2004 was that the applicant had: "Failed to attend a further meeting of the Registrar's Committee on 30 September 2003, notwithstanding the undertaking given by his counsel to the President of the High Court that he would attend meetings of the Registrar's Committee".*
>
> *31. The applicant alleges that this statement is false and untrue and accuses this deponent of committing perjury. I utterly reject these allegations….*
>
> *33 At the hearing of the matter, the Tribunal found that in relation to this allegation that it had been proved. This Tribunal, in the light of this as well as other findings, found that the applicant was not fit to be a member of the profession and its recommendation that he be struck off was accepted by the President of the High Court."*

232. In an affidavit sworn on 31st March 2010, Ms Kirwan pointed out that the evidence she gave was not challenged at the time. She further averred:

> *"31. As is evident from the transcript, I was not present in court on 31st of July 2003. However, my colleague [Solicitor X] was in court on that day and advised me as to what was said in court. [Solicitor X] prepared an attendance following the High Court hearing on 31st of July 2003…"*

Ms. Kirwan exhibited the attendance, which recorded, *inter alia*,

"Mr. Vallely said that Mr. Murphy would undertake to attend the next meeting of the Registrar's Committee.

The President said it did not matter whether Mr. Murphy attended or not if he was not interested in continuing as a member of the solicitor's profession."

233. Ms. Kirwan stated that when giving evidence to the SDT on 10th of July 2008, Mr. Murphy's position was that his counsel told the President of the High Court that he *would* undertake to attend the Committee, that this did not mean that he had undertaken to attend and that if there was not a formal undertaking recorded the order that he was not bound by what his counsel had said.

234. Ms. Kirwan's averment in her affidavit sworn on 31st March 2010 resulted in Mr. Murphy writing to Ms. Lynch, Registrar of the SDT, on 16th April 2010 highlighting the contents of that paragraph of her affidavit. He pointed out that in her affidavit of 11th June 2004 she had said that she was in attendance on 31st of July 2003. By letter dated 19th of April 2010, solicitors on behalf of Ms. Kirwan wrote as follows:

"Having reviewed her original file again, our client believed she was not in court on 31st of July 2003. She has advised us that if she had been in court, she would have prepared her own attendance note and relied on that in her affidavit as evidence of what happened in court on that day. She did attend court the first time that this matter came before the President of the High Court on 7th July 2003 and there is a note prepared by her on her file of what occurred on that day.

It is therefore her view that the word "not" can only have been omitted in error in line 1 of para. 27 of her original affidavit sworn on 11th of July 2004, and this is supported by the fact that the paragraph makes it clear that she was relying on a note prepared by [Solicitor X] in

relation to what happened in court on 31 July 2003. She can only conclude that she failed to notice this typographical error when reviewing the affidavit prior to swearing it."

235. In an affidavit sworn on 11th June 2010 in appeal 2010/72SA, Ms. Kirwan referred to the contents of her earlier affidavit and Solicitor X's attendance note and averred at paragraph 5:

"When this inconsistency was first drawn to my attention by the Applicant in his letter dated 16th April 2010 addressed to the Tribunal, which was copied to my solicitors A and L Goodbody, I reviewed my file. I cannot recollect at this remove whether I was in Court that day, but as my affidavit makes it clear that the information in relation to what happened in Court on 31st of July 2003 was derived from the note prepared by my colleague, [Solicitor X], and not from my own attendance. I believe it is more likely that I was not present and that the word "not" was omitted in error after the word "was" in the first line of paragraph 27 of my affidavit and I did not notice this typographical error prior to swearing the affidavit."

The point that she was making, she stated, was that "*the applicant did not appear in person before the President of the High Court but was represented by counsel."* Ms. Kirwan expressed regret that this typographical error had taken place and continued at paragraph 9:

" I cannot accept that the issue as to whether or not I was present in court on 31st of July 2003 or indeed whether or not the Applicant was in Court on that day could have had any material impact on the ultimate finding by the Tribunal that the applicant was not fit to be a member of the profession and its recommendation that he be struck off the Roll of Solicitors. This is particularly so in light of the fact that I

exhibited as part of exhibit "LK 2" to my affidavit sworn on 11 June 2004 [Solicitor X's] detailed file note of what transpired before the court on that day".

236. The undertaking controversy was considered by this court in the principal judgment, at para. 84 *et seq* and para. 388 *et seq*. In particular, the court observed at para. 390 that Ms. Kirwan had accepted that a mistake had been made by her. The court also observed that the explanations as to how the mistake came about were somewhat ambivalent and that this mistake should not have been made. The court ultimately concluded that this was an honest mistake and not one that was made intentionally or recklessly, nor was it motivated by improper purpose.

237. In his submissions in respect of these applications Mr. Murphy has raised further issues which he believes undermines Ms Kirwan's credibility. He refers to a fax which he maintains that he had sent to the Society on the eve of the Registrar's Committee meeting 23rd February 2005 when the renewal of his practising certificate was being considered. Mr. Murphy does not accept that the Society refused his practising certificate before he withdrew his application. In his witness statement Mr. Murphy said that the Society had put forward various accounts of what happened at that meeting. He sent the fax on the evening before, explaining why he was retiring, and as is evident from the minutes of the meeting, he handed in the original. The agenda included such items as his failure to comply with various directions of the Registrar's Committee and to correspond properly with the Society. Mr. Murphy also raised allegations of impropriety on the part of members of the Society, including Mr. [REDACTED] and the Chairman of the Committee. In her witness statement, Ms Kirwan said that there was no record of a fax having been received, nor was there a record of a hardcopy fax on file. Mr. Murphy submits that he had obtained confirmation of receipt of the fax and that, therefore, the accuracy of a memorandum prepared by her of what occurred at that meeting cannot be relied on and nor can her evidence. He highlights the evidence of Mr. Elliott (para. 26 of his

witness statement) who, he says, does not deny that he received the fax on the night before.

238. Ms Kirwan, in her witness statement, did not accept Mr. Murphy's contention that he voluntarily ceased practising for the reason set out in his letter of 22nd February 2005. She stated that the Committee made a decision to instruct the Registrar to refuse his application and she exhibited a copy of the minutes. Ms Kirwan further states that the Committee did not have this letter before it when Mr. Murphy attended but that he handed in the original of the letter at the end of the meeting. Ms Kirwan states that Mr. Murphy is incorrect about the sequence in which things happened and this is clear from her contemporaneous minutes that the Committee, after considering his submissions, refused the certificate. It was only when he was informed of this that Mr. Murphy handed in the letter. The Society then wrote to Mr. Murphy confirming the Committee's decision and in which it was stated … *"I confirm that you then handed in a letter dated 22 February 2005 in which you withdrew your application for a practising certificate"*. Ms Kirwan was cross examined by counsel for Mr. Murphy on day 8 of the trial. She reiterated that she could not find any record of the fax and that she certainly had not received it. All incoming correspondence was logged and there was no record of receiving that fax She said that she checked the file and there was no hard copy fax on the file. She said that she had the original of the letter that Mr. Murphy handed in at the end of the meeting. She said that when she read Mr. Murphy's statement she went back through the documentation and could not find any fax, or record of a fax having been received. There was no computer record of receiving the fax. She had prepared a minute; the accuracy of which Mr. Murphy did not accept . She had written to him in the aftermath of the meeting stating that *"I confirm you were advised that in the interests of your client the Committee decided to refuse your application. I confirm you then handed in a letter dated 22nd February 2005 in which you withdrew your application".* Ms. Kirwan said that the letter, which was written on the day after the meeting, reaffirmed what was in the minute prepared by her. It was put to her that

unfortunately from Mr. Murphy's point of view he doesn't have particular recollection in terms of having received the letter, but he does receive other correspondence from Mr. Elliot subsequently and it doesn't quite record the same sequence of events that you are now putting before the court? She replied that she had not read Mr. Elliot's statement but stood over her contemporaneous account.

239. Mr. Elliott gave evidence on day 12 of the trial. He was cross examined on whether different considerations applied to circumstances where a solicitor who might wish to re-enter practice had withdrawn an application, from circumstances in which an application had been refused. The thrust of his evidence is that where an application is withdrawn, Mr. Elliott would deal with any future application. If an application is refused by the Committee, future application would be referred back to that Committee. Mr. Elliott said that if Mr. Murphy had re-applied, the matter would have to go back to the Registrar's Committee to see if its decision was still applicable. There would be no question of him, as Registrar, simply issuing the certificate. Arising from this, counsel for Mr. Murphy queried what would the position have been if, as Mr. Murphy contended, a fax had been received and was before the Committee prior to any decision being made. Mr. Elliott replied that when the letter was received and came to the attention of the Law Society, it made the Registrar's Committee procedure irrelevant. The multiple complaints procedure really only operates where there is an application. *And if there's no application, there's no reason for them to make a decision.* While the issue was moot because Mr. Murphy had not applied for a certificate Mr. Elliot was confident that he would have conferred with Ms Kirwan about whether this application would be referred back to the Registrar's Committee. Further exchanges are focused on procedures which applied, or might have applied, where an application is withdrawn as opposed to being refused.

240. Given that Mr. Murphy did not in fact re-apply, the debate is academic, save in one respect. Mr. Murphy relies on the above as evidence of Ms Kirwan's unreliability-that she got the issue about receiving the fax wrong and therefore this

is further proof of her unreliability, if not dishonesty. It is clear that Ms. Kirwan was relying on records which were available to her on the day. 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. I do not believe that there is anything which emerges from this aspect of Mr. Murphy's submission which alters the court's view in relation to Ms Kirwan's honesty. The court is not satisfied that the issue thus raised, even if properly before the court at this late stage, and even if it is appropriate for the court to take it into consideration, alters the court's assessment of Ms Kirwan's credibility in respect of the undertaking issue.

241. What remains to be addressed is whether the mistake in Ms Kirwan's affidavit, albeit one found to have been honest, but which ought not to have been made, provides an evidential basis to support Mr. Murphy's contention that the court ought to intervene to set aside the order made in the strike off proceedings.

60. Discussion

242. In submissions to SDT on penalty, counsel for Mr. Murphy referred to the undertaking (SDT transcript, 19th January 2009, p.38):

> "*His sworn evidence in that matter was that he did not realise that his counsel had given an undertaking that he would attend at that meeting and that he was actually out of the country on a family matter and that he had written to the Law Society on a number of occasions prior to this meeting. He had in fact attended one meeting and I think on another occasion turned up with accounts which were not (inaudible) on time, but that is neither here nor there. That charge has been upheld".*

243. In submissions to Johnson P. counsel spoke of "*confusion* (transcript 21st April 2009, p. 65):

"…Concerning the issue of the undertaking to the court, first of all I wasn't there myself so I don't know what exactly was said but there certainly seems to have been a right 'to – do' about what was said and what was one's understanding and what was not one's understanding. As to whether he was told or not told all I can say about that is there may have been confusion. I don't know but in any event he is here now".

244. When explaining the deduction of fees in the sum of €22000/24,000 from monies received from the arbitration in 1995, it will be recalled that Mr. Murphy criticised the Registrar's Committee for not acceding to a request which he made at the meeting on 30th July 2003, to view the files and to set aside time to investigate the matter. He was then questioned as follows:

" Q. .. So the problems in the investigation of the Law Society, your position is still in its the Law Society's fault?

A. No, what I'm saying is that I was asked to attend a meeting and I did because I am also charged in this document with not attending a meeting which I did attend the meeting that I was asked to attend.

Q. Have you read actually the charges?

A. I have. I have read the charge in relation to that… (Interjection).

Q. And do you think there is a charge they are alleging you didn't attend a meeting that you did?

A. There is the charge relating to that I undertook, that counsel on my behalf undertook to attend a meeting of 29th of or the twentysomething of September 2003. I didn't give an undertaking and if the Law Society had done an investigation and checked the High Court orders, which I have done since, you will see there was no such undertaking given to the President of the High Court… We'll deal with that now in the order as well.

Q. Just to be clear, and again this is something you have raised so please just be as precise as you can, could you identify which of the allegations you say that alleges that you didn't attend the meeting and you say you did attend? If you could just identify that allegation for me, please." (emphasis added)

At this point the Chairman interjected. It appears that he felt that in light of the above answer that clarification was required. He referred to allegation 32 (f). He asked Mr. Murphy to clarify whether he was saying he attended the meeting or that he did not attend but never gave an undertaking that he would attend. Mr. Murphy replied… "*No, what I'm saying is that there was no undertaking given by counsel to the President of the High Court to attend that meeting.".* He explained to the Chairman that he did not attend that meeting and that he did not give the undertaking that he would attend and that this was reflected in the orders of the court.

245. Although in his review application Mr. Murphy queried this court's interpretation in the principal judgment of what was said by him in answer elsewhere to other questions he was asked before the SDT, I do not believe that the court's conclusion differs significantly from his own counsel's assessment of the confused and different understandings held by the parties as to what occurred. The perfected order of Finnegan P. was before the SDT and the court. The SDT took a particular view of the undertaking.

246. To the extent that it is permissible to look behind the *court* proceedings and to review what occurred before the SDT, I am also not satisfied that there is evidence to support an allegation of fraud or misleading, whether innocent or deliberate. That the Society took a strong position on the undertaking before the SDT and that the SDT made a decision in its favour on this point is not, in my view, evidence of fraud or misleading.

247. Mr. Murphy's conviction as to the central significance of the undertaking and of its effect on the outcome of the application before Johnson P., may have gained increased strength as a result of this court's conclusion on the undertaking

issue, but it does not follow that a necessary implication of this finding is that it amounts to evidence that the Society or its officers were guilty of fraud or deceit in adopting the stance which they did. That an opponent might advance a position or make an argument which is accepted by one Tribunal or Court but not by another does not thereby imply that there has been fraud or deception; or that the unsuccessful party in that argument has necessarily adopted a fraudulent or misleading stance. There must be evidence of fraud, deliberate misleading or deception before such behaviour may be attributed to a party who is unsuccessful on an issue. In arriving at its conclusion on the undertaking this court had particular regard to the perfected order. The court wondered how such an undertaking might be enforced in the absence of its inclusion in the order and recorded the observations of Hardiman J. in his *ex tempore* judgment. The court did not find that a fraud had been perpetrated, that there had been deceit or that the Society had purported to mislead the SDT.

248. While it is evident that the SDT was made aware of the contents of the perfected order, it is also evident from the transcript of the hearing before the SDT on 10th July 2008 that the Chairman posed questions about an affidavit sworn by Mr. Murphy on 30th July 2003; an affidavit which had been submitted to Finnegan P. and in which it was averred at paragraph 10:

> *"10. I further confirm that I wish no disrespect either to this Honourable Court or to the Law Society and I am willing to do whatever is necessary to bring this matter to a conclusion and confirm that I will again attend any Registrar's Committee meeting with the client files if same should be necessary. I further say and believe that apart from my initial hesitation in dealing with this matter because of the partnership situation that once I received the direction from this Honourable Court that I was anxious to finalise the matter for once and for all and have no wish or intention to obstruct the Law Society in any way whatsoever."*

249. This affidavit was before Finnegan P. on 31st July 2003 when the alleged undertaking was said to have been given. This affidavit is expressly mentioned in the SDT's reasoning. This reasoning cannot be ignored in the assessment of the importance that Mr. Murphy seeks to place on the undertaking and the contents of Ms Kirwan's affidavit as to who was or was not in court on 31st July 2003. In the principal judgment this court expressed its view on Ms Kirwan's role and of the errors made by her on affidavit. Having considered her evidence and her demeanour when giving it, this court was satisfied that it was an honest mistake which ought not to have been made. It was a mistake in an averment as to *who was in court* on 31st July 2003, and *who was not*. The court is not satisfied that there is evidence to support the contention that she was guilty of fraud or deception.

250. If the court is incorrect in the above assessment, I am also not satisfied that there is evidence to support a contention that any such alleged deception or misrepresentation led to, or was instrumental in, the SDT's conclusions on this issue or that any such alleged fraud, deceit or misleading of the SDT, led to the procurement of the order of Johnson P. When considered in its entirety it is difficult to disagree with the observations of Mr. Murphy's counsel of possible confusion as to what occurred before Finnegan P. Confusion cannot be equated with deception or fraud.

251. I am also not satisfied that there is evidence to support the contention that Johnson P. was misled or deceived about the undertaking or that a fraud was perpetrated on the *court* on this issue. A breach of the undertaking was accepted by Mr. Murphy. He apologised for it.

252. I am not satisfied that it has otherwise been established that there is evidence to support the contention that a fundamental injustice or breach of constitutional rights has occurred such as would warrant the court's intervention. Mr. Murphy's approach to the appeal before Johnson P. was a considered one. It was adopted after a period of reflection on the basis of advices received, advices which he does not criticise. That the outcome was not what was hoped for was capable of

being raised on appeal. No excuse recognised by the law has been advanced to explain the failure to appeal.

61. Deceit and misleading of the court by alleged failure to make Discovery

(a) The order for discovery of 6th December 2004.

253. Given the nature of the deceit and fraud alleged in relation to discovery, of central importance must be the terms of the order for discovery, the date on which that order was made and the date on which the affidavit of discovery sworn.

254. The order for discovery made by Finnegan P. on 6th December, 2004 directed that:

> *"..the applicant do within a period of two weeks from the date hereof make discovery on oath of all communications between the applicant, its servants or agents and Mr.* [REDACTED] *solicitors who acted on behalf of* [REDACTED] *and* [REDACTED] *the complainants herein including notes or memoranda of any conversations whether in person or on the telephone with Mr.* [REDACTED] *and all communications sent to and received from Mr.* [REDACTED]*".* (emphasis added)

Solicitor X swore the affidavit of discovery on 16th December, 2004.

(b) Allegation of deliberate withholding and deception

255. Mr. Murphy's contention is that Solicitor X failed to make proper discovery. He also believes that there were other documents of which he does not have particular knowledge and which were not discovered. As is apparent from the statement of evidence, he is suspicious as to the manner in which his data access request was dealt with. Mr. Murphy submits that the evidence contained in his

witness statement from paragraphs 155 to175, is uncontroverted. His position in this regard is probably best expressed in an affidavit sworn by him on 24th July 2020 in the context of the general motion in the review application, in which he averred:

> *"..it is uncontroverted that [Solicitor X] decided not to comply with the order for discovery and she wrote to Linda Kirwan confirming her decision. There is no evidence that Linda Kirwan advised her against this course of action. [Solicitor X] swore her affidavit of discovery which, in accordance with her stated decision, deliberately omitted exculpatory evidence. Her conduct constitutes prosecutorial misconduct, breach of duty of an officer of the court, breach of an order of the court and misfeasance in public office. It is respectfully submitted that for this reason alone, which I hope is truly exceptional, the application to re-enter the strike off must be allowed and all orders must be set aside*

256. Mr. Murphy invites the court to conclude that the Society and in particular Solicitor X was guilty of deliberate conduct amounting to deception. On the case made, the contention is that there was a deliberate or conscious decision on Solicitor X's part to omit documents from the affidavit of discovery which included exculpatory evidence. Therefore, Mr. Murphy bears the onus of establishing the existence of evidence that supports his contention that the documents in question came within the ambit of the discovery order, that they were in existence at the time of the swearing of the affidavit and were therefore in Solicitor X's power, possession and procurement at that time.

257. It is not expressly argued that there was a failure to comply with a continuing obligation to disclose documents which may have come into existence after the date upon which the affidavit of discovery was sworn. In the light of *Bula Ltd v Tara Mines (No. 5)* [1994] 1 I.R. 487 and *Moorview Developments Ltd v First Active Plc*. [2008] IEHC 274, that may have been a difficult case to make. The case

made is that the documents were deliberately or consciously omitted in accordance with a prior expression of intent.

(c) Mr. Murphy's evidence regarding discovery in the [REDACTED] **complaint**

258. Mr. Murphy contends that during 2003/2004 he became concerned about two matters which gave rise to an application for discovery. First, Mr. [REDACTED] had told him that he had had a number of discussions with the Society and that he, Mr. [REDACTED], had informed the Society that there really was *nothing to* the [REDACTED] complaint, that all matters could be sorted and that they could discuss monies owed. Mr. Murphy was astounded when he heard this. It appeared to him that there was an inappropriate and ongoing exchange of correspondence and that conversations had been taking place between Mr. [REDACTED] and the Society. He also felt, however, that they would go some way towards assisting him.

259. Second, in relation to the complaint that he had held property in his own name, he said that he had received information that Mr. [REDACTED] and Mr. [REDACTED] had been involved in tax evasion. To avoid attracting attention to themselves they had asked him to hold land in his name so that no one would realise that they were amassing a land bank. Mr. Murphy sought discovery of accounts they had used. He believed that if he was correct regarding non-declaration for tax purposes he would be supported in his contention that he had had instructions to hold land in his name *"albeit I understood this was to disguise the extent of the land holding*" and that this would go to the complainants' credibility. Mr. Murphy contends that his view was proved to be correct when company accounts were disclosed. They did not show the source of the money used to clear borrowings for the land.

260. Mr. Murphy also states that the complaint about the land being put in his name was dropped during the SDT hearing before he gave evidence in relation to the source of the money. The transcript suggests that the complaint was not withdrawn

before being adjudicated upon. When advancing a plea in mitigation on behalf of Mr. Murphy to the SDT on 13th January 2009, his counsel referred to complaints (j) being the registration of property in his own name, and (o) normal conveyancing procedures in respect of the Beeches and Schoenberg property, neither of which had been upheld. He said that these allegations had not been withdrawn and that the only way to deal with them was to contest them.

261. Mr. Murphy also states that there was great cooperation between the Society and Mr. [REDACTED]'s office in dealing with discovery. His applications for discovery were refused by the SDT, a decision which he appealed. That the Society and the [REDACTED] were represented by the same barrister, he states, undermines the independence of the Society.

262. Mr. Murphy's evidence is that, having obtained the order for discovery, Solicitor X swore an affidavit purporting to discover all letters and notes of telephone conversations. While he was not satisfied with the discovery he received, he states that he was not in a position to challenge it. In the course of a subsequent data request in 2015/2016 he was provided with certain letters and memos. These included a letter dated 7th December 2004, written by counsel to Solicitor X. In it reference was made to the discovery application hearing before the President on 6th December 2004. Counsel wrote in the following terms…"*the President's attitude is clearly to err on the side of disclosure rather than leaving a Solicitor feeling aggrieved that there might have been a document out there that could have saved him".* Mr. Murphy believes that despite the terms of the order and the warning from counsel that Solicitor X did not make full discovery. He contends that the following issues arise from the documentation obtained in response to his data access request:

i. In an email from Solicitor X to Ms. Kirwan of the 21st September 2004 (Tab 139), which he alleges was prepared in contemplation of discovery, Solicitor X wrote … "*I am of the view that we should not give access to the complaints file*". He considers this to be

extraordinary in light of the order for discovery and the advices of counsel.

ii. In his data access request, he sought all letters referred to by Solicitor X. The Society confirmed that the original file had been mislaid and they had reconstructed same *"insofar as they could*" (Tab 140). Mr. Murphy states that it now seems that some of the file was missing.

iii. In response to his data request he was provided with a memo of a conversation which is said to have taken place between Mr. [REDACTED] and Solicitor X (Tab 141). This memo was attached to a note which contained the date 11/3/08. Mr. Murphy maintains that the memo is not a continuation of that note and *"I do not know why at the data protection stage the memo was attached to the note"*. He states that the memo of this conversation was almost exactly what Mr. [REDACTED] had told him in 2004 and that had he known this at that time it would have had made a huge difference to his position. His evidence is that "*I can only presume that this conversation took place in the context of me looking for discovery in relation to the source of the monies"*. He contends that the memo discloses the following:

1. Mr. [REDACTED] regarded Mr. Murphy's worst conduct as pocketing the soccer club rent. This was evident from the statement that Mr. [REDACTED] regarded the deduction of £1800 without the clients' consent as the biggest crime he had committed. This money went towards fees. He maintains that the Society confirmed to other parties that a solicitor is permitted to do this. He also states that as VAT due was paid by him, deception did not arise. If Mr. [REDACTED] had thought that this was the worst conduct, then he must have known there was no basis to the complaint that Mr. Murphy

had taken £22,400 or that he had put land worth £5m into his name without the clients' consent.

2. At the end of the note Solicitor X wrote: "[REDACTED] *happy to let him keep the money he has taken on condition he claims no further fees*". Mr. Murphy submits that this indicated a desire on the part of the [REDACTED] to resolve matters. It was consistent with a letter from P.J. O'Driscoll, solicitors, dated 5th October 2006 (tab 142) in which it was stated that an account of fees owed would be calculated and that any that monies taken in respect of fees would be deducted from the total. Mr. Murphy contends that this potential resolution of the matters should have been put to him and that matters could have been resolved at that stage…"*but of course [Solicitor X] and Ms Kirwan had already decided that I should not be a solicitor".* Later, at para. 170 of his witness statement Mr. Murphy concludes that *"there is no doubt that much of the documentation would have assisted me. I cannot be 100% definite of the date of the memo of the conversation with* [REDACTED] *but it is exactly what he told me he had told the Society in 2004 and it would be obvious he would repeat this a month later in the run up to the discovery. His telling me this was one of the reasons I actually applied for the Discovery and I say so in my affidavit so I must presume the note is from before my application".*

263. Mr. Murphy states that further to the response to his data request he discovered documents which he argues indicates that Solicitor X was less than truthful in her affidavit of discovery. His statement of evidence continues…

"I have a book prepared of it all but I am reluctant to overburden the court. The sheer volume of the communications would raise concerns. There were regular communications between the Society and the offices of PJ O' Driscoll. For now I will just append the most relevant communications (Tab 143)."

The documents referred to consist of:

(a) an email from Ms Kirwan to Solicitor X dated 9th of April 2003,

(b) a handwritten note of Solicitor X of 21st October 2004 (tab 137),

(c) two notes relating to file 464 - the Society's file reference number for the [REDACTED] complaint, and

(d) a note relating to the last three typed pages of the Society's response prepared by the complainants/Society.

264. Mr. Murphy believes that other documents which were omitted would have assisted him including;

1 A draft of a letter to him from Mr. [REDACTED] dated 1st May 2003 (Tab 144) which was not discovered but which showed that Mr. [REDACTED] was working very closely with the Society. Mr. Murphy states that… "*In the absence of any other explanation I would suggest that the "investigation" into my conduct had become a joint venture between* [REDACTED] *and the Society.*

2 Solicitor X wrote in an email dated the 27th September 2004 to Ms. Kirwan "*I also requested (ages ago) from* [REDACTED] *a written report on the* [REDACTED] *case. I have heard nothing from him which is a bit disconcerting*" (tab 145). Mr. Murphy

maintains that in discovery there was no mention of this request from Mr. [REDACTED]…*"There is no letter. There is no memo of a phone call".*

3 A letter from Ms. Kirwan of the 5th August 2003 to Mr. [REDACTED] (Tab 146) refers to a "*recent telephone conversation*" between them but there are no details of this telephone conversation.

4 The handwritten note of 21/10/04 (Tab 147). Mr. Murphy states that "*it seems more likely*" that "*the page referred to above*" is a reference to the document which he maintains was attached to the note of 11th March 2008 at data protection stage but he does not know why this occurred.

5 Communications took place with Mr. [REDACTED] which required explanation. There was a bill from Mr. [REDACTED] to the Society in respect of a trip by him to Dublin which, Mr. Murphy maintains, raises serious questions as to *what exactly was going on* as no hearing had by then taken place before the SDT and the issue of expenses for Mr. [REDACTED] or Mr. [REDACTED] could not have arisen.

265. Mr. Murphy said that he was concerned by the Society's admission during the data protection process that documents were missing from the [REDACTED] file. He queried the Society in relation to the email to Ms. Kirwan of the 21st September 2004 seeking letters from the [REDACTED] (tab 148). He was informed by letter of the 2nd June 2015 (tab 149) that the file had been mislaid and that the Society had reconstructed the file insofar as it could. Following further inquiry Mr. Murphy states that he was informed by letter of the 5th April, 2016 (tab 150) that he was not entitled to that information which, he contends, raises additional concerns. After being informed of the deletion of emails, he instructed his solicitors to write to

the Society to seek an undertaking to ensure that all documentation was preserved. This was provided through the Society's solicitors.

266. Mr. Murphy contends that Solicitor X deliberately did not make discovery of documents that would have assisted him and that states that he will now probably never know exactly what existed. In her affidavit of discovery Solicitor X provided little more than what was already evident in the application to the SDT. He points out that this affidavit of discovery was sworn by her five weeks after she wrote the email expressing her wish that he be struck off. Mr. Murphy maintains the Society had a duty to investigate and regulate and that the actions of Solicitor X were not in accordance with these obligations. He contends that had this documentation been available for the hearing, the outcome would have been very different. It would have disclosed an inordinate level of communication between the Society, Mr. [REDACTED] and/or his office and that the Society had discussed his case with a third party ([REDACTED] – (tab 151). Documentations would have either supported his position or disclosed a desire of the [REDACTED] to resolve the matter.

267. Mr. Murphy also suggests that certain evidence given by Mr. [REDACTED] to the SDT on 25th April 2008 could not be relied upon, or at least ought not to have been relied upon. Similar contentions are made in respect of the evidence of Mr. [REDACTED] to the SDT.

(d) Discovery in context – the admissions.

268. As with the undertaking issue, given Mr. Murphy's admissions before Johnson P., it is difficult to see how it can now be contended that because of an alleged failure to make proper discovery when the matter was before the SDT, that the *court,* to which the appeal was made, was misled and that the *court order* was procured by fraud. If there was a failure to make discovery, as contended, it seems that any finding in that regard could be of potential assistance to the hearing before the SDT and not to the hearing before the court on appeal. Should this court be

constrained to a consideration of what occurred before Johnson P., then, in principle, this ought to be dispositive of the application.

269. Nevertheless given the complexities of this litigation, and in light of the arguments made and the courts previous observations that the admissions be viewed in context, in order to assess whether there are special or unusual circumstances evidencing a fundamental injustice and warranting the court's intervention, it seems appropriate to approach the issues raised on a more expansive basis by examining the contents of the documents expressly referred to and to consider issues which may arise in relation to other potential documents.

270. Solicitor X was not in a position to give evidence in the civil proceedings. She has since been made a ward of court. A witness statement was not prepared by her in response to Mr. Murphy's statement of evidence. The court has previously expressed the view that care ought to be exercised in assessing the conduct of a person who is not in a position to participate in the proceedings. Equally an opposing party ought not be disadvantaged in such circumstances. While the onus of proof remains on Mr. Murphy, the burden must not be unwittingly raised or lowered by reason of the non availability of a potential witness.

271. In *Tassin Din*, Murphy J., having considered the case as pleaded concluded that it could not be said that the plaintiff or his legal advisers were in any way misled or prejudiced by the suppression, if that is what it was, of a document having regard to the fact that a copy of it was in their possession. He outlined his approach as follows:

> *"In St Albans Investment Co v London Insurance and Provincial Insurance Co Ltd (Unreported, High Court, Murphy J, 27th June, 1990) a similar problem arose though in far less complex circumstances and I examined the documents which it was alleged had been fraudulently omitted from the affidavit of discovery made on behalf of the defendant in that case and concluded that there was no evidence to support the*

proposition that the omitted documents would have any impact on the decision which it was sought to impeach. I am equally clear that in the present case not only the particular document referred to in the statement of claim but also the other documents exhibited in the grounding affidavits already referred to would not have advanced the case made by Tassan Din. I do not accept the far reaching proposition that a document which was not discovered might for some unexplained reason have put the other party on a train of inquiry or investigation which might have resulted in the production of vital evidence and that such a possibility would be a ground for upsetting the order of the Supreme Court. If the omitted documents had that potential I have no doubt that such inquiries would have been made long since with the results thereof made available to the court to demonstrate, as I believe would be necessary, that the order of the Supreme Court was obtained as a result of the alleged fraud".

272. *Tassin Din* suggests, therefore, that on an application based on a failure to make discovery, it is appropriate for the court to engage in a qualitative assessment of the documents in issue. It is proposed to consider the documents on which Mr. Murphy relies in order to assess whether they came within the order for discovery and, if so, whether evidence exists to support Mr. Murphy's allegations of fraud and deception.

62. The email from Solicitor X to Ms. Kirwan of the 21st September, 2004 (tab 139).

273. In her email of 21st September 2004 to Ms. Kirwan, Solicitor X expressed the opinion that the Society should not give access to the complainants' file. Mr. Murphy states that this is extraordinary in light of the order for discovery and advices from counsel. The advice to which he refers is at tab 138 of his witness statement. The advice is contained in a letter from counsel to Solicitor X dated 6th December 2004, the day on which the discovery application was made before the President. On

the face of it, the email of 21st September 2004 was an exchange between two solicitors/officers of the Society, as to the approach it should take on the discovery application. This email was generated almost three months prior to the date on which the order for discovery was made. It is difficult to see how a previously generated email could be said to confirm a decision not to comply with an order for discovery which had not yet been made. I am also not satisfied, therefore, that the email of 21st September 2004 was captured by the order for discovery. To the extent that the existence of the email is relied upon as evidence of (a) breach of the order of discovery, or ,that (b), such breach amounted to an intentional or reckless breach of the court order, I am not satisfied its *existence* provides an evidential basis to support any such contention.

274. Reference is made in the email to letters *from the* [REDACTED] *to the Society which have no relevance to the case we eventually made*. It is not clear what documents these are and Mr. Murphy invites the court to conclude that such documents, whatever they may have been, come within the ambit of the order for discovery. The order for discovery captures communications between the applicant Society, its servants or agents and Mr. [REDACTED]; and to memos of telephone conversations between Mr. [REDACTED] and the applicant its servants or agents. Strictly speaking, the order is confined to communications with Mr. [REDACTED], rather than direct communications with the [REDACTED] themselves. But even if this is too strict an interpretation of the order, I am satisfied that it would require a considerable amount of supposition and speculation to draw the inferences of fraud and deception which Mr. Murphy invites the court to do in respect of this document, or to conclude that there is evidence to support the assertion of fraud and deceit .

63. The note/attendance of 21st October 2004 (tab 137)

275. This note makes reference to "[REDACTED]" and to another person, who may be a solicitor in the same office as Mr. [REDACTED]. The first part of the note states "*subpoenaed*" and then "[REDACTED]". The next paragraph refers to "

[REDACTED] and to matters which appear to be connected with that issue. It will be recalled that the complaint of the [REDACTED] was addressed at or around that time. Coincidentally, this would appear to have been the same day that [REDACTED] telephoned the Society and spoke with Ms Kirwan, following a complaint by him of an approach made by Mr. Murphy on 21st October 2004. This is discussed at paragraphs 151-153 of the principal judgment.

276. Later in the memo, a number of other names are mentioned including *Maeve*, *Joseph = C Murphy* and that *some discovery* was sought. Reference is then made to the name of a senior counsel and to the DT Rules. It seems not unreasonable to infer that the '[REDACTED]' referred to is [REDACTED]. It may also be that the reference to discovery relates to Mr. Murphy's application then pending before the SDT for discovery of documents.

277. As Mr. Murphy points out, this memo does not give any detail of the conversation. The court proceeds on the assumption that this memorandum constitutes a record of a brief conversation between an officer/officers of the Society and Mr [REDACTED], or someone from his office. It appears to have been generated when discovery had been sought by Mr. Murphy. In those circumstances, on the face of it, it should have been discovered. It may also be reasonable to infer that it is evidence of communication between Mr. [REDACTED] and the Society in relation to the processing of complaints against Mr. Murphy and feeds Mr. Murphy's contention of close cooperation between Mr. [REDACTED] and the Society. It is difficult to see, however, how a failure to disclose this document is evidence which supports the allegation of fraud on the SDT or the court. Mr. [REDACTED] was acting for the complainants and was later called to give evidence. That a subpoena may have been required to secure his attendance could not be considered unusual. Even if deliberately withheld, I am not satisfied that an evidential basis exists to support a contention that its omission from discovery was operative or instrumental in securing of the order of the SDT or the court.

64. Memorandum attached to the note of 11th March 2008 (tab 141)

278. A document on which Mr. Murphy places significant reliance is a note on a page attached to a memorandum which contains the date, 11th March 2008. As previously noted, in his evidence (witness statement para. 170), Mr. Murphy states that the memorandum contains exactly what Mr. [REDACTED] had told him that he had informed the Society in 2004 about his view of the gravity or nonserious nature of the complaint. It was one of the reasons he applied for discovery. He had said so in his affidavit. He states that had he known this in 2004, it would have made a huge difference to his position. In submissions and in evidence he cited examples of circumstances where the Society had not involved itself where proceedings were in existence between parties making complaints. He submits that the Society had an obligation to attempt to resolve the complaint and that this memorandum provides evidence that Mr. [REDACTED]'s clients were disposed to resolving their differences by reference to terms reflected in the letter of 5th October 2006. This letter was referred to during the proceedings before the SDT. Mr. Murphy concludes that it is obvious that Mr. [REDACTED] would repeat this a month later *in the run up to discovery*, and therefore that he must *presume the note is from before* his application for discovery.

279. While the "*dated*" portion of the memorandum post-dated the swearing of the affidavit of discovery by in excess of three years, Mr. Murphy further maintains that the second page of the memo/document was incorrectly attached to the note of 11th March, 2008 and that it is not a continuation of that note. He states that he did not know why, at the data protection stage, the memo was so attached. His statement of evidence continues "*I can only presume that this conversation took place in the context of me looking for discovery in relation to the source of the moneys and the memo.*" Mr. Murphy maintains that the letter of 5th October 2006 is consistent with the overall approach of the complainants as to the seriousness of the complaint. This letter, which in its heading references record number 2002/10370P, the proceedings between the [REDACTED], was generated in response to a letter from Murphy Healy of 19th September 2006. It contains the following paragraphs:

"*We have written to your client about his costs already. From our examination of the file it appears that these are the same costs. In the course of that questions were asked none of which have been answered. In that correspondence we demanded that the costs be taxed and that appropriate bills be prepared for that purpose. This has not been done. We repeat that requirement.*

In addition, our clients have repeatedly sought a full account of monies handled by Colm Murphy on their behalf and that this account has not been furnished. You will be aware that many of these issues have been the subject of a complaint by our clients against your client that is the subject of a decision of the Disciplinary Tribunal adverse to your client, which your client has appealed.

To summarise, these costs will have to be taxed, and when settled, will have to be balanced against the monies owed by your client to our client".

It would appear that the words "*your client*" was used interchangeably, given the title of the letter and the reference in the body of the letter to the complaint brought against Mr. Murphy. In evidence to the SDT Mr. Murphy said that it was referable to him.

280. The only date on this document, *"11/03/08"*, is written on the first page. There is no other express evidence of the date on which either page of the memorandum was created. It appears to be in the handwriting of Solicitor X and to concern a discussion with someone whose name is not expressly referred to, presumed to be Mr. [REDACTED].

281. It may or may not be coincidental that a hearing of the [REDACTED] complaint was scheduled to take place before the SDT on 13th March 2008, two days later. Ms Kirwan gave evidence to the SDT on 15th April 2008 that a hearing had been scheduled for 13th March 2008, that Mr. [REDACTED] and both of the [REDACTED] attended on that date (see transcript SDT 15th of April 2008, p. 13) .

The hearing did not then proceed. Mr. Murphy did not attend. He sent a fax at 11.15 a.m. stating that he had only become aware of the hearing at 10.45 a.m.

282. The first page of the memorandum references a *November 95 letter*. The first paragraph refers to matters arising from the purchase of the Beeches, the closing of that sale and subsequent litigation. The memo includes the following: *"did nothing to defend case notwithstanding it was the cause of delay. The* [REDACTED] *ended up paying damages as a result. Civil bill drafted 6/03/03. All he did was enter an appearance. Send brief to barrister to draft defence. See…* [REDACTED]*'s fee note €278."* The second paragraph, in so far as it is decipherable, contains a reference to the deduction of monies from the arbitration award and matters connected therewith.

283. Mr. Murphy submits at para. 76 of his written submissions that it is clearly stated that *"the* [REDACTED] *had this letter since 20/10/95"*. When the allegation concerning the deduction of monies from the arbitration award for fees was being explored with Mr. [REDACTED] before the SDT, he was asked whether he had received a copy of a letter dated 2nd November 1995 written by Mr. Murphy to the [REDACTED]. The terms of the letter referred to in the memo at tab 141 reflect the terms of the letter explored in the questioning of Mr. [REDACTED] on 25th of April 2008 (see transcript of evidence 25th of April 2008, p. 86). Mr. [REDACTED] said that he did not recall getting that letter. This evidence is further considered in schedule III of this judgment. If the letter to which Mr. Murphy refers in his submissions is the letter dated 2nd November 1995, then, if dated correctly, neither Mr. [REDACTED] nor any of the [REDACTED] could have received it on *20/10/95*. The memo also appears to record that it was being said that *they never got this* - in reference to that letter, and that the first time they saw it was when they were shown the "*Statement of Balance as at 20/10/95"*. A "*Statement of Balance*" was forwarded to the Society by Mr. Murphy under cover of letter dated 25th July 2002 in response to a request from Ms Kirwan made on 3rd July 2002. The statement of balance forwarded by Mr. Murphy refers to transactions which occurred as late as

July 1996. Therefore, even if (i) Mr. Murphy's contention that the [REDACTED] had this letter since 20th October 1995 should read 2nd November 1995, or approximately that time; and (ii) this document was withheld in breach of discovery obligations, if anything, the first page of the memo tends to support, rather than undermine, Mr. [REDACTED]'s recall of not receiving the letter.

284. On the second page which Mr. Murphy maintains does not flow logically from the first the following is written:

> "[REDACTED] *regards the worst conduct was his pocketing the soccer club rent. He says that any real work Murphy did was the arbitration. J and P Ar say the County Council said from the time they entered the land they would be responsible for costs. The Arb post-dated this.* [REDACTED] *happy to let him keep the money he has taken on condition he charges no further fees."*

285. Mr. Murphy's contends that this page came into existence in excess of four years prior to the document to which it was attached; and that for some unexplained reason one of the Society's officials charged with responding to data requests attached it to the later dated memo. While Mr. Murphy may genuinely harbour suspicions I am satisfied that, in order to accept his contention, the court would have to go beyond any proper inferences and engage in speculation and assumptions. On the case advanced, it would require the court to infer and conclude that the undated memo was generated before the affidavit of discovery was sworn, and that there was a deliberate and/or reckless and/or mischievous intent on the part of Solicitor X not to disclose the document. I am not satisfied that the court is entitled to draw such inferences or make such assumptions on the basis of the evidence adduced or that the evidential basis for such allegations has been made out. Further, unless attached by happenchance, it may possibly require the court to infer that the officer(s) or employee(s) of the Society involved in assembling the file and responding to the data

access request many years later, and who may or may not have been aware of its suggested significance, made a decision to place it much later in the chronology.

286. If I am incorrect and it is the case that the memo under discussion was generated in 2004 and was deliberately omitted from discovery, it must then be considered whether there is evidence that withholding it resulted in a fraud being perpetrated on the SDT and facilitated the procurement of the order of the SDT.

287. Mr. Murphy's evidence is that he was informed by Mr. [REDACTED] of his clients' approach to matters in 2004. On this basis, it may be said that he was aware of what is contended to have been the [REDACTED] stated position from 2004, in excess of three years prior to the SDT hearings in 2008. When cross examined before the SDT on 25th April 2008, the letter of 6th October 2006 was raised with Mr. [REDACTED]. Extracts were read to him. He was asked whether this letter represented the sentiments of the [REDACTED] at that time. He replied that counsel was *reading the letter accurately*. Counsel then said…*"my client agrees".*

288. It might be argued that in the event that the memorandum had been discovered, that the attitude of the [REDACTED] to the complaint might have been further explored with a greater degree of confidence with Mr. [REDACTED]. It might also have been called in aid to challenge any negative response. One way or the other, the *conversation* which Mr. Murphy says that he had with Mr. [REDACTED] was not explored. It was also not expressly raised by Mr. Murphy in his evidence to the SDT. The focus was on the letter of 6th October 2006 which was clearly in possession of all parties.

289. At para. 21 of his affidavit sworn on 20th February 2009, Mr. Murphy averred that a final resolution in relation to the *exact amounts owed* by the [REDACTED] *to him* was only possible after the taxation process which had been initiated. He averred that this was agreed to in evidence by Mr. [REDACTED] and he expected that when the full and final taxation and balancing was finished that the [REDACTED] would owe him in excess of €250,000. While it may be that this document, had it been discovered, would have been of some assistance to Mr.

Murphy in the manner in which he contends, to elevate its nondisclosure/discovery to the status of evidence of a fraud on the SDT would be to ignore or substantially disregard much of the contents of the SDT's report and findings, such as the failure of Mr. Murphy to interact with the Society. Indeed his counsel, in submissions to the President of the High Court in April 2009 (at p.5 of the transcript) having referred to two of the charges which were not upheld, said "*it is perfectly clear that the history that this man has had a failing to interact with the Incorporated Law Society was an accumulative factor and led to the recommendation of the Tribunal. That is the position we find ourselves in".* It would also involve the court in ignoring, as if it never happened, Mr. Murphy's wholehearted acceptance of the findings of the SDT in the affidavit sworn by him on 20th February 2009, and as pleaded before Johnson P. in April 2009.

290. Should the Court's above analysis regarding this memorandum be incorrect, nevertheless, I am not satisfied that Mr. Murphy has overcome the burden on him to establish an evidential basis for the allegations of fraud with clarity and to the required standard. Nor am I satisfied that he has established that the evidence advanced support his contention that exceptional or unusual circumstances arise, that a fundamental breach of constitutional rights has occurred or that the circumstances are otherwise such as would warrant the intervention of the court.

291. In summary, even if it were proper to conclude that the Society failed to make discovery of this document in accordance with its discovery obligations, it is difficult to see how this could amount to evidence of a fraud on the *court* in respect of the order which was made by Johnson P. in May 2009. Insofar as it is permissible to go a step further back to analyse what occurred before the SDT, I am also not satisfied that it has been established that there is evidence that the order/ recommendations of the SDT was tainted by any such alleged fraud in this respect. I am also not satisfied that there is evidence which supports the contention that the alleged withholding of this memo gives rise to exceptional circumstances or has resulted in a fundamental injustice warranting the court's intervention.

292. In the principal judgment the court referred to dicta of McKechnie J in *Fitzgibbon v Law Society* [2014] IESC 48, para. 59, where he said that the obligation of the Registrar's Committee when determining a complaint under ss. 8 or 9 of the Solicitors (Amendment) Act, 1994 is in the first instance to try and resolve the matter by agreement between the client and the solicitor. McKechnie J stated "*with allegations of misconduct this requirement does not arise.*" He also observed at para. 60 that Committee procedures are not to be seen in the same light as investigation by the SDT of an allegation of misconduct. Such allegations are investigated, not by the Society, but by an independent body, the SDT. Mr. Murphy maintains that the Society failed in its duty to attempt to resolve matters, and that the letters and documents to which he refers displayed a willingness on the part of the [REDACTED] to do so. The letter of 5th October 2006 and the memo which Mr. Murphy contends was generated in the run up to discovery in the [REDACTED] matter, post-dated the referral to the SDT by way of complaints of misconduct in June 2004. Mr. Murphy's allegations of the Society's failure to resolve the complaints must also be viewed in the light of the above dicta of McKechnie J. (As to procedures generally, see also *Law Society v Coleman* Supreme Court, 21 December 2018).

65. The attendance of Mr. [REDACTED] (tab 151)

293. The memorandum of an attendance on Mr. [REDACTED] dated 6th May 2004 appears to be signed by "*Jean*". The memo is entitled "*Colm Murphy - Complaint of* [REDACTED]. It records as follows;

> *"*[REDACTED] *telephoned for an update on the case. Told him the case was referred to Solicitors Disciplinary Tribunal on 30th September 2003 by registrar's committee and that the case is being prepared here by [Solicitor X]. He asked how long would it take for the case to be*

heard. Told him very lengthy process but we will write to him as soon as any progress made."

294. I am not satisfied that it has been established that this document came within the terms of the order of discovery of Finnegan P. It is a communication between an officer/employee of the Society and a person other than Mr. [REDACTED]. Even if it should have been, but was not discovered, the most that can be said is that it showed that a party who was unconnected with the complaint (although judging by his surname, perhaps not unconnected with the parties) had made enquiries about it. It seems to me that this memo, if it has any relevance, it is to Mr. Murphy's complaint that the Society had been in contact with Mr. [REDACTED] and others, rather than in respect of a failure to comply with discovery. It is difficult to see how it would or could have advanced Mr. Murphy's situation, or to amount to evidence that supports a case that a failure to discover it constituted an operative fraud or deceit, which was instrumental in the SDT making its findings; or the court in making its order.

66. Documents collectively referred to at Tab 141 attached to Mr. Murphy's witness statement

295. The first document is an email from Ms. Kirwan to Solicitor X dated 9th April 2003. It is internal, between Ms. Kirwan and Solicitor X. It is not between Mr. [REDACTED] and the Society, its servants or agents. It refers to *"another letter from* [REDACTED]*... containing a whole new set of allegations".* Temporally, this would appear to correspond with the receipt from Mr. [REDACTED] of a letter of 1st April 2003 which was forwarded to Mr. Murphy on 14th April 2013. Both of these letters are expressly referred to in Solicitor X's affidavit of discovery. I am not satisfied that this email comes within the terms of the order for discovery.

296. The next is a handwritten note of Solicitor X dated 12th of October 2004. It addresses a number of matters including "*the* [REDACTED]". The note appears to record that there was a *prima facie* finding, that there was no affidavit from Mr.

Murphy and that the matter was listed with the [REDACTED] matter for 4th November 2004. There is no reference to Mr. [REDACTED]. If, in truth, this document was generated as a result of the fruits of a discussion with Mr. [REDACTED] then it ought to have been discovered. It appears, however, to refer to procedural matters regarding issues such as filing of affidavits of discovery and other affidavits. In the third last paragraph it is stated "*applic to put in Aff re both cases*". Even if this document ought to have been discovered and was not, it is unclear how, in light of its contents, any failure to discover, for whatever reason, could be said to have facilitated the procurement of the order/recommendation of the SDT or the Court.

297. The next two documents in Tab 143 are file notes in respect of file 464. This number is an internal reference number ascribed by the Society to the [REDACTED] complaints. The note appears to deal with procedural matters and refers to the date for the discovery application and replying affidavits. I am not satisfied that even if these notes came within the order for discovery as reflecting a record of a conversation between Mr. [REDACTED] and Solicitor X or some other officer of the Society, for similar reasons as apply to the handwritten note of 12th October 2004, that they are evidence which support an allegation of fraud having been committed on the SDT or the court.

298. The next document, at Tab 143, is described as the *last three pages -Law Society response prepared by Complainants/Law Society.* This is headed *Response to Law Society Disciplinary Affidavit* and outlines what appears to be an updated response on behalf of Mr. [REDACTED] and Mr. [REDACTED]. It also appears to have arisen in consequence of the generation of a *Resume of the Case* furnished on 11th July 2007. Mr. Murphy points to this as an example of the regular communications between the Society and Mr. [REDACTED]. For the purposes of this argument the court assumes that this was prepared by Mr. [REDACTED] on behalf of his clients and/or completed by Solicitor X following exchanges or discussions between them. At para. 165 of his witness statement Mr. Murphy states

that *"there was a lot of documentation that I was entitled to which was not included in her Affidavit of Discovery"*. This document clearly post-dated the affidavit of the discovery by in excess of two and a half years. If there has been a failure to disclose, then it can only be in respect of a continuing obligation to make discovery, a case not specifically made by Mr. Murphy. There is nothing before the court to suggest that a further or updated affidavit of discovery was either sought or furnished between the date of Solicitor X's affidavit sworn on 16th December 2004 and the SDT hearing.

299. Nevertheless, assuming that Mr. Murphy's complaint extends to a failure to comply with an implied or continuing obligation, or that such arises from the position of the Society as a regulator. As this court understands Mr. Murphy's submissions, it is not so much the contents of this document, rather its existence and failure to disclose it which are criticised. Nevertheless, in the context of the claim made, it is proposed to interrogate its contents. First it is not clear that there is anything in this document which had not already been referred to by Ms Kirwan in her affidavit sworn on 11th June 2004. The issues addressed appear to largely co-relate with the clause numbering adopted in Ms Kirwan's affidavit. I am, therefore, not satisfied that there is anything in this document of which Mr. Murphy was not already aware. If this document was required to have been discovered and on the assumption that there was a deliberate or intentional withholding of it from discovery, therefore, I am not satisfied that there is evidence that it was in any way operative in the suggested unlawful procurement of the court order or that of the SDT. It seems to do no more than update the position in relation to complaints which had been outlined in Ms Kirwan's affidavit at least three years previously.

300. The next letter is at tab 144. It is entitled "draft" and dated 1st May 2003 and addressed from Mr. [REDACTED] to Mr. Murphy. Accepting that the date on the document accurately reflects the date of its creation, it was in existence when the discovery order was made. Solicitor X has not given evidence, as she has not been in a position to do so. No explanation has been advanced by the Society in relation

to how this document came into its possession. The letter appears to be one created in the context of *inter partes* correspondence between the firms of solicitors representing the partners in the partnership dispute. It is stated to be in response to a letter from Mr. Murphy of 15th April 2003, which the court has not seen. It is also not clear whether a letter consistent with the draft was received by Mr. Murphy. The court has no evidence on this. Taking Mr. Murphy's case at its height and on the assumption that a letter to the same effect, or consistent with it, was not received by him, the following emerges from an examination of the letter:

i. It is entitled *"Von Schoenberg Property"* the first paragraph concerns issues relating to VAT and as to whether an opinion ought to be obtained.

ii. The second paragraph addresses an issue regarding advices of counsel (although not stated, it is assumed from other evidence that this relates to discussions said to have taken place after the arbitration);

iii. The third paragraph concerns a query - whether payment of stamp duty arose if no beneficial interest transferred;

iv. In the fourth paragraph Mr. [REDACTED] wrote that he had now seen a copy of the deed from Mr. Von Schoenberg to Mr. Murphy and that previously "*we had only been shown that in the hands of Mr Conor Murphy. We now see a special certificate that Colm Murphy was stated to be the beneficial owner."*

v. The writer sought a copy of a deed of 2nd September 1991 and wrote that subject to production of that document a draft conveyance to rectify the matter was approved by the clients but that they reserved, however, *"to have a full investigation into the circumstances that Mr Colm Murphy became recorded as the beneficial owner of this property unknown to them."* The writer continued.. *"What happened is sinister when seen in the light of the letters written by you to the county council confirming that your client had acquired rights through this land. He*

will not be allowed…to dodge facing up to this issue. We suggest you make a clean breast of it now."

vi. The matter of stamp duty was addressed in the final paragraph. The author advised that his clients were willing to contribute two thirds of the sum. The manner of how that should be done was also addressed. The author concluded stating that it was not reasonable to expect his clients to pay out until Mr. Murphy had accounted for funds held.

301. In his written submissions on this issue, para. 77, under the heading "*Questionable Conduct of [Solicitor X]"*, Mr. Murphy states that this letter would have *"sorted out a lot of the issues before there was any court application"* and that *"we do not know why this letter was never sent or what the LS response to it was.*"

302. On the assumption that this letter was not disclosed as it ought to have been and/or that was deliberately or intentionally withheld from the affidavit of discovery, it is not entirely clear the basis upon which it is contended that what is contained in the letter, would have *sorted out* the issues before the matter went court. The title documents were presented to the SDT by Mr. Murphy (see exhibit LK4 to Ms Kirwan's affidavit sworn on 11th June 2004). The complaint in relation to the registration of the Schoenberg property was not upheld.

303. It has remained unexplained why a draft of this letter was on the Society's file at all. However, its contents do not appear to differ significantly from the contents of Mr. [REDACTED]'s letter to the Society of 1st April 2003, in which he wrote that he considered Mr. Murphy's name on the title to be sinister. This was replied to by Mr. Murphy on 16th July 2003.

304. The issue is whether a failure to discover this letter provides evidence of the perpetration of a fraud on the court or, on an expanded basis, the SDT. I am not satisfied that the nondisclosure of this letter could be described in as in any way significant in the context of all of the information and documents available when the matter was before the SDT. The letter did not contain anything new or then unknown.

While it may have assisted in corroborating the allegation that Mr. [REDACTED] and the Society were in close contact, or as suggested, too close, it is difficult to see that had it been discovered it would have made a significant difference to the issues before the SDT, an independent body, whose existence is separate from the Society. But even if I am incorrect in this I do not see a basis upon which it could be concluded that the failure to disclose this letter is capable of amounting to evidence of fraud or deceit. Should I be incorrect in this conclusion, I am also not satisfied that any such fraud or deceit was instrumental in the procurement of any order. The complaint in respect of the allegation that Mr. Murphy had registered property in his own name was not upheld and was not one of the matters that was before Johnson P.

305. Mr. Murphy places emphasis on the email from Solicitor X to Ms Kirwan, dated 27th September 2004, confirming that she had requested a written report on the [REDACTED] complaint, and the absence of a reference in discovery to a letter or memorandum to this effect. This contention is based on the assumption that memos were created to record every contact. Perhaps they should have been, but Mr. Murphy is required to establish that such omission is evidence of fraud or deceit and that such document, if it existed, was or would have been operative or instrumental in procuring any relevant order or orders. While such correspondence is evidence of communication between Solicitor X and Mr. [REDACTED], taken at its height, however, it seems to me that any complaint in this regard again relates more to the contention that the Society and Mr. [REDACTED] were too close and/or were in some way in collusion in the processing of the complaint. The same may be said of the memorandum of 21st October 2004.

306. Mr. [REDACTED] was acting for complainants. That he was in contact with those employed in the complaints section of the Society is not unusual. The allegation made by Mr. Murphy is that the Society and Mr. [REDACTED] had been acting in concert. While there may have been close contact, any suggestion of adverse collusive is not consistent with Mr. Murphy's evidence at para. 164 and 173 of his witness statement. At para. 164 he states as follows -

"*As part of my data access request, I was provided with a memo of a conversation with* [REDACTED] *(Tab 141). This memo was attached to a note marked the 11/3/08 but the memo is not a continuation of that note and I do not know why at the data protection stage the memo was attached to the note. The memo of the conversation is almost exactly what* [REDACTED] *told me he had said in 2004 when he told me that he told the Society there was not much in the complaint and when he told me he told the Society if we worked out a deal about the fees this would be the end of the matter. If I had known this back in 2004 it would have made a huge difference to my position. I can only presume that this conversation took place in the context of me looking for discovery in relation to the source of the monies and the memo deals with the following….*

At para. 173, he states:

"*To put the matter in relation to the Discovery in bullet point form:-*

a) I believed, from talking to [REDACTED], *that there were many communications between him and the Law Society in relation to the complaint. I <u>believe that some of these communications showed an indication from</u>* [REDACTED] *<u>that there was not much to the complaint.</u>*

b) These communications would help me in my defence and some may have exonerated me completely. <u>[REDACTED] *had told me he had asked for the complaint to be withdrawn.*</u> *<u>He specifically said he had told the Society in 2004 that there was nothing in the complaint,</u> that the only real issue they had was the Soccer Club rent and that matters could be sorted out if we could agree on fees. This of course was the route to sort the matter out and the Society should have chased this up.* (emphasis added).

307. In evidence to the SDT, Mr. [REDACTED] said that neither he nor his clients bore ill will towards Mr. Murphy. The SDT noted this in its findings. Mr. [REDACTED] was cross examined at the SDT and any conversations that he may have had with Mr. Murphy were capable of being explored with him at that time. Again, all of this must be placed in context of Mr. Murphy's subsequent admissions.

308. With regard to the letter of 5th August 2003 from the Society to Mr. [REDACTED] in which reference is made to a *recent telephone conversation* between them, Mr. Murphy states that there is no memo of that telephone conversation. Solicitor X's affidavit of discovery includes reference to "*copy letter from Law Society to* [REDACTED] *dated 5th August 2003"*. If this is the same letter as that to which Mr. Murphy makes reference then it was discovered in Solicitor X's affidavit sworn in December 2004. No complaint was made about this at that time. This letter referred to a recent telephone conversation and confirmed that on 31st July 2003 the President agreed that the matter could be referred back to the Registrar's Committee. It was stated that there would be a further Committee meeting on 30th September 2003 and outlined what occurred at that hearing before the President. The underlying assumption of Mr. Murphy, which inference he invites the court to make, is that a written memorandum of a conversation between Ms. Kirwan and Mr. [REDACTED] was created and was in existence at the time of the swearing of the affidavit of discovery. The letter appears to confirm the contents of the discussion. But even if a separate memorandum existed which recorded the contents of the telephone conversation and which ought to have been discovered, I am not satisfied that there is evidence that any failure in discovery was fraudulent or that it was instrumental in a fraud being perpetrated on the court or the SDT.

309. In all the circumstances I am not satisfied that Mr. Murphy has discharged the burden of proof to establish an evidential basis for his contention that there are exceptional or unusual circumstances arising from the letters to which he expressly refers either when viewed individually, or collectively, which warrant or justify the intervention of the court.

67. Deletion of emails

310. Mr. Murphy places significance on the deletion of emails between his first and second request for access to his personal data. He particularly draws attention to two letters written by Ms. O'Keeffe of the Society's Department of Finance and Administration, who was dealing with his data access request.

311. The first letter, written on 2nd June 2015, addressed issues raised by Mr. Murphy with the Office of the Data Protection Commissioner. Under the heading *"Data Protection Commissioners Letter: Query 1*", and repeating the queries raised, Ms. O'Keeffe wrote as follows:

> *""I raised queries with Ms O'Keeffe on 11th, 16th and 17th of February 2015. Ms O'Keeffe replied by letter of 18 February 2015. This did not answer my queries"*
>
> *a) Letter dated 11 February 2015,..*
>
> > *"In an email from [Solicitor X] to Linda Kirwan (copy attached Appendix 1) of Tuesday, September 21, 2004 she refers to "letters from the* [REDACTED] *to the Society which have no relevance to the case we eventually made". Please let me have the letters that [Solicitor X] is referring to."*
>
> *The original* [REDACTED] *complaint file was mislaid. We reconstructed the file insofar as we could; however it does not include the letter referred to by [Solicitor X]. [Solicitor X] no longer works with the Law Society. We are satisfied that we have processed whatever data we had in relation to this complaint in accordance with the Data Protection Acts 1988-2003"*

Queries raised in the letter of 16th February 2015 were addressed at para. (b) of Ms O'Keeffe's letter. The first issue (b) (I) relates to a document prepared by Ms

Kirwan in which she referred to "*new matters raised by the complainants solicitors*". Mr. Murphy does not particularly highlight this. However, he does highlight (II) and (III) of part (b).

> *"II. "In a letter of 16th March 2007 to [Solicitor X] from* [REDACTED] *refers to [Solicitor X's] query of 14 March and "that conversation". Please let me have the memo of "that conversation" of 14th March 2007"*
>
> *The Law Society has carried out a search and there is no memo of this conversation.*
>
> *III The Law Society has carried out a search and there is no memo of this conversation. The Data Protection Acts 1988-2003 entitle you to personal data not copies of documents. "In an affidavit of Martin Clohessy of 10 August 2006 (Record number 2006 371 SP)-(copy front page of the relevant section attached-Appendix 3), Mr Clohessy swore "I saw that the attention of the Society was recently drawn to the property section of the Irish Examiner dated Saturday 3rd June 2006. On page 5 of the section references made to the auction… The solicitor with carriage of sale is stated to be Mr Colm Murphy". I cannot find in the papers you have given me any record of the auction being drawn to the attention of the Law Society. There must be a letter, email, memo of conversation or other record of this matter being drawn to the Law Society's attention. You might find this record and let may have same."*
>
> *The Law Society has carried out a further search of documents on file but cannot find this record. Due to the time-lapse, Mr Clohessy does not have any recollection of how his attention was drawn to the auction."*

312. The second letter, dated 5th April 2016, is stated to be in response to a letter from Mr. Murphy of 21st of January 2016. Ms O'Keeffe wrote that Mr. Murphy was not entitled to any information regarding the misplacement of the [REDACTED] file

as it did not form part of a *relevant filing system pertaining* to him. It was filed under the [REDACTED] name. The letter continued:

> "*when we carried out your initial data access request [Solicitor X] was still working in the Society, however now due to retirement the relevant emails have been deleted*."

313. At para. 79 of his written submissions Mr. Murphy states that "*we will never know exactly what was deleted by* [Solicitor X] *or why they were deleted."* It is unclear whether any of the referred to emails which were deleted between the first and second requests had already been disclosed or whether there were further emails. In the final paragraph of Ms O'Keeffe's letter of 5th April 2016 she advised that if Mr. Murphy was unhappy with the response, he could complain to the Data Protection Commissioner.

314. The issues raised by Mr. Murphy are outlined by him in his witness statement at para 171, synopsised at para 265 above. He continued at para 172.

> *172. It now seems that [Solicitor X] deliberately did not make discovery of matters that would have helped me. Subsequently the file was "mislaid" and emails have been deleted. I will probably never know now exactly what existed but there is no doubt that documentation that could have assisted me was in existence at the time [Solicitor X] swore her Affidavit of Discovery in which she gave little more than what was already evident in the application to the Tribunal. One must remember that the Affidavit of Discovery was sworn by [Solicitor X] five weeks after she wrote the email that discloses that she wanted to see me struck off. Their duty is to investigate and regulate. [Solicitor X's] actions were not in accordance with either of these duties. She says "for example there are letters from the* [REDACTED] *to the Law Society which have no*

relevance to the case we eventually made". I obtained an order for discovery, the President granted same, [Solicitor X] was advised by her Counsel and I believe she deliberately frustrated my attempt to get information that could help exonerate me.

315. Mr. Murphy's appeal to the Supreme Court was determined on 25th of March 2015. From the chronology provided, it appears that his initial request for discovery in the civil proceedings in respect of ten categories of documents, was made by letter dated 3rd March 2016. The Society responded on 23rd March 2016 that it was not prepared to make voluntary discovery. On 24th March 2016 a motion was issued returnable for 18th April 2016. It was during this period that Ms O'Keeffe replied on 5th April 2016.

316. Mr. Law swore an affidavit on 14th April 2016 resisting the application on grounds which included prejudice and delay. He pointed out that when the matter was before Hanna J. Mr. Murphy was not only prepared for, but was expecting, a full plenary hearing. This was reflected in the reasoning of Hardiman J. Addressing Solicitor X's position, he averred that she had ceased to work for the Society in January 2015. She retired in April 2015 on grounds of ill-health and Mr. Law averred that her medical consultant had advised the Society that she was not in sufficient good health to participate in the proceedings. Mr. Law stated that the ability of the Society to make discovery in the s.18 proceedings or otherwise, arising from work involving Solicitor X was seriously prejudiced. He continued:

"35…It appears that the plaintiff's complaint in respect of the section 18 proceedings extends to events in approximately June 2008. It is not clear why, and the plaintiff has offered no explanation as to why, he failed to seek discovery of this documentation at any point prior to now. Had such discovery been sought prior to January 2015, the position of the Society would not have been prejudiced as [Solicitor X] was still working for the Society up to this time.

> *36. At para. 15 of her affidavit, Ms Byrne states that the documentation sought is from the Society's files and that the "defendants do not suggest that the documentation is not available". It is correct that the Society does not maintain that the material is not available, because, I say and am so advised that it is not in a position to know this owing to the uncertainty arising from the fact that [Solicitor X] cannot participate and provide assistance. The Society is in a position to state that in the absence of [Solicitor X] it is seriously prejudiced in making full discovery and that this prejudice has arisen entirely as a result of the plaintiff's unexplained delay."*

317. While such contentions are not accepted by Mr. Murphy, it is clear that his complaints about issues arising from his data access request were aired in affidavits sworn in advance of the order for discovery being made in *the civil proceedings.* Mr. Murphy issued the motion to re-enter the s.18 proceedings on 8th June 2016. In an affidavit sworn on 27th May 2016, he raised issues concerning what he described as the "*Law Society's breach of Data Protection Act*", a subheading of which was entitled "*Loss and Destruction of relevant documentation by the Law Society*". Exhibiting a letter of advice from counsel written over seven years earlier, on 17th July 2008, he averred that it seemed that the Society went against its own legal advice *"in order to frustrate my attempts to get data that I was entitled to."* This letter was written by counsel to Solicitor X in the aftermath of the SDT hearing on 10th July 2008 and arose from a casual discussion which he had with Mr. Murphy's counsel to the effect that Mr. Murphy was considering appealing *"various things"* and that there had been a *"vague reference to the order for substituted service".* Counsel wrote: *"Anyway it was a casual chat and the only point in my mentioning this is that any Colm Murphy papers that I have sent back to you recently as well as all of your own papers and notes and records should be carefully stored since we may be facing future litigation…."*

318. The discovery application in the civil proceedings was before the court for several months. Interrogatories were exchanged and an order for discovery was made on 14th February 2017. The order directed Mr. Murphy to provide the Society, within 14 days, a list of the documents held by him following his data access request. The Society was directed within six weeks from receipt of that list to make discovery of three categories of documents being:

> *"All documents to include correspondence, internal memos, emails and minutes of meetings relating to the decision to commence proceedings Law Society of Ireland v Colm Murphy, High Court Record No: 2006/371 SP (Section 18 Proceedings) and the information made available to the person or persons responsible for making such decision, limited to documents generated no later than 11 October 2006*.
>
> *All documents relating to all complaints alleged to have been made on behalf of* [REDACTED] *and* [REDACTED] *to the Law Society against the plaintiff and any subsequent communication between those parties and the Law Society including but not limited to correspondence, internal memos and minutes of meetings, limited to documents generated no later than 30 January 2009*
>
> *All documents evidencing the undertaking alleged to have been given on 31st of July 2003 to Finnegan P by Colm Murphy"*.

319. The chronology indicates that Mr. Murphy's complaints in respect of his data access application were known in advance of the making of the discovery order. While there were two different orders for discovery, one in the [REDACTED] matter and the second in the civil proceedings, no application was made about an alleged failure to make proper discovery in the civil proceedings to this court prior to

judgment. The matter was raised by Mr. Murphy during the general motion on the review application.

320. Dealing specifically with the contents of the letter of 2nd June 2015 which generated Mr. Murphy's further queries, the email referred to was generated on 21st September, 2004. The court has expressed the opinion that this email was not captured by the order for discovery of 6th December 2004, an order which was of a defined and limited nature concerning *"communications between the applicant, its servants or agents and Mr.* [REDACTED] *solicitors who acted on behalf of* [REDACTED] *and* [REDACTED] *the complainants herein including notes or memoranda of any conversations whether in person or on the telephone with Mr.* [REDACTED] *and all communications sent to and received from Mr.* [REDACTED]*"*. In his evidence Mr. Murphy refers to letters from the [REDACTED] to the Society. Ms O'Keeffe wrote that the complaint file had been mislaid. To the extent that it is alleged that Solicitor X deliberately frustrated attempts to get information which he believes might have assisted him, Mr. Murphy's supposition is that this file included documents which were captured by the order for discovery.

321. The second document referred to is a letter of 16th March 2007 from Mr. [REDACTED] to Solicitor X relating to her query of 14th March and to a *conversation*. Mr. Murphy sought a copy of the memo of the conversation. Again, absent an argument of a failure to disclose based on a continuing obligation to make discovery of documents which came into existence after the order for discovery was made, this letter and any note of conversation would not, it seems to me, have been captured by the order for discovery. The third matter related to the s.18 proceedings, which, again, was not captured by the order for discovery in the [REDACTED] matter.

322. Mr. Murphy's query, which led to the reply that emails had been deleted, arose in relation to the email of 21st September 2004, previously discussed. This email in turn referred to *"letters from the* [REDACTED] *to the Society which have*

no relevance to the case we eventually made". Letters *from the* [REDACTED], unless they included letters written or transmitted by Mr. [REDACTED] on behalf of the [REDACTED], were not captured by the order.

323. It is not unsurprising that the deletion of emails would give rise to suspicion, particularly where the acts of deletion have gone unexplained beyond that proffered in Ms. O'Keeffe's letter of 5th April 2016. Apart from stating in her letter of 2nd June 2015 that Solicitor X no longer worked with the Society, it is not clear when the emails were deleted, or by whom. In order to determine that the act of deletion provides a basis for intervention, the court would have to be satisfied that the act of deletion of unknown emails, in and of itself, is evidence of an attempt to cover up a failure to comply with the order for discovery made over seven years earlier. This would require the court to infer that emails captured by the order for discovery were in existence in 2015, that Solicitor X failed to discover those emails at the appropriate time, that such failure was deliberate, fraudulent or at minimum reckless and that the act of deletion was in itself deliberate, fraudulent or reckless. I am not satisfied on the basis of the evidence adduced that the court could reasonably draw such inferences, particularly as the email leading to the request was not captured by the terms of order for discovery.

68. Summary and Conclusions

324. It is accepted by the parties that on an application such as this, a high burden of proof lies on a person who alleges that a court order was obtained through fraud and/or deceit and/or misleading of the court. Mr. Murphy wholeheartedly accepted the findings of the SDT both on affidavit and before Johnson P. on 21st April 2009. There is no evidence of fraud having been perpetrated on that court or that any fraud or misleading of the court was instrumental in the procurement of the

order. Mr. Murphy enjoyed, but did not exercise, a right of appeal. This should be dispositive of Mr. Murphy's application.

325. On the assumption that the court is entitled, on a more expansive view, to look at what occurred when the matter was before the SDT, I am not satisfied that a detailed consideration of the evidence in respect of the undertaking or issues pertaining to discovery, discloses or establishes an evidential basis which might support the allegations made.

326. In conclusion, I am not satisfied that it has been established that there is evidence which supports the contention that a fraud has been perpetrated either on the court or the SDT or that, otherwise, special and unusual circumstances exist which point to a fundamental denial of justice and breach of constitutional rights such as to warrant the intervention of the court. In the circumstances, I am not satisfied that Mr. Murphy has discharged the onus of proof and therefore this application must be refused.

Schedule I

69. Transcript of Evidence of 31st January 2007

(a) Submissions made and explanations given on behalf of Mr. Murphy.

327. It is clear from the transcript of 31st January 2007 that Mr. Murphy did not consent to orders sought in respect of practising. His counsel submitted that Mr. Murphy had not at any stage unlawfully acted as a solicitor. He had a practicing

certificate until the end of the year 2004. In the first half of 2005 he wound down his practice and took on no new clients. He made no court appearances nor did he take on new cases for existing clients. Later, in response to submissions by counsel for the Society, counsel for Mr. Murphy said:

> *"The affidavit sworn on behalf of the Law Society says that an ad for sale of property by auction appeared in the Examiner Newspaper… and the solicitor having carriage of sale was described as Colm Murphy. That was a mistake. The auctioneer himself says it was a mistake. He should have put in Murphy Healy. That Colm Murphy never had carriage of sale as far as the auctioneer knew, and he had dealt with Mr. Colm Murphy in the past and Mr. Colm Murphy's name slipped into the ad by mistake and it was acknowledged that there is a satisfactory explanation in relation to that."*

Explanations were also offered in relation to the use of stationary.

328. Johnson P. was informed that the winding down process was conducted in consultation with the Society with whom the transfer of files had been discussed. Counsel said that the acknowledgement and readiness to hand over files was without prejudice to any liability, or to the prosecution of any available appeal. He continued:

> "*…but my client will be giving an undertaking and consenting to an order on the basis that it would be without prejudice to prosecuting any appeal. In other words, the clients would get their papers. The Compensation Fund would get its money, but if there were any residual rights of my client in terms of challenging any orders, and I am not asking the Law Society to acknowledge that such right exists, but if such right exists, it is without prejudice to my client pursuing those rights."*

329. In respect of relief number 4 (files, deeds, wills, accounting records and documents relating to the practice) counsel stated that there was no difficulty in providing documents, that certain documents were in the possession of Mr. Murphy's accountant for the purposes of dealing with the accounts (reliefs in respect

of which were sought at paragraphs 13 and 14). When Johnson P. queried when they were provided to the accountant, counsel replied …

> "…*Last December, relatively recently and, as I say, it was late and should have been done sooner, that is when it was done. I am not trying to in any way limit the scope of the order... These caveats are intended to facilitate the orderly finalisation of the winding down process. There is, for example, a sum of some € 70,000 still in the client account. Most of that money is due to clients in small sums, such as legatees with whom there has been some difficulty in locating, to pay legacies and matters of that kind. So if my client is to be expected to do that work, he will need to know the extent of his responsibility*."

The court queried the attempt to locate legatees. Mr. Murphy's counsel said that any such information would be provided by his client without any difficulty and if necessary on oath.

330. With regard to the mandate (para.5) counsel said that his client was willing to sign whatever bank mandate the Society required and that there would be no difficulty regarding the immediate delivery of documents (paras 6 and 7). A sum was due for fees. A discussion ensued about a potential lien and counsel clarified what was intended in that regard. Counsel further explained that .. "*in relation to the former client* [REDACTED] (para. 8)*, again there is no difficulty... In relation to number 9, it is my understanding that the Law Society is no longer pursuing their application for remedy under paragraph 9.* This concerned Mr. [REDACTED]'s papers in respect of which no order was made.

331. With regard to the reliefs seeking to compel compliance with orders of the SDT in the [REDACTED] and [REDACTED] matters (10 and 11), counsel explained that Mr. Murphy believed that there was an appeal. He would, however, pay such sums within such short period of time as the court considered appropriate. Counsel requested that the order would recite that it was without prejudice to such right of appeal, if any, that Mr. Murphy may have. The court was informed that Mr.

Murphy would consent to an order on a similar basis in respect of the [REDACTED] matter (12).

332. Counsel explained that the accounts for the period ending 31st of March 2004 (13) were in hand, albeit very belatedly. They would take a further two (*"a couple of"*) weeks, the period of time which he had been instructed was required. Regarding the accounting report to 30th June 2005 (14) the court was informed that a new firm had taken over from 1st July 2005 and that the Society was aware of this. There was a residual sum in the client account for disbursement.

333. Counsel emphasised that although Mr. Murphy was dilatory in his accounting and in his dealings with clients, something he was not attempting to *"conceal or resile from"*, the complaints did not concern his honesty. He said that Mr. Murphy was anxious to avoid an order which rendered difficult or impossible the practical administration of the outstanding client account fund. The court posed the question as to how that could be done if Mr. Murphy was not a solicitor. Counsel replied that it was his understanding that the court had inherent jurisdiction in relation to the affairs of solicitors. This would allow for such an order as the most practical way of ensuring that people who were entitled to money got it. Counsel continued… *"Certainly, I am not taking any jurisdictional point in relation to that. I simply want to draw that practical consideration to your Lordship's notice. "*

334. The difficulties encountered in obtaining run-off and retrospective insurance cover (15) were also addressed. It was explained that Mr. Murphy was

> "*… anxious now, and I accept belatedly… I am not trying to say it is other than very belated; to effect whatever insurance is required. Certainly if he can get run off insurance, there having been a gap for the year 2006 , he will do that, but I do not want to be seen to be consenting to an order which it is not practically possible for me to comply with. If there is a solution to that difficulty, my Lord, my client will address it in a very constructive way, but there does appear to be a slight practical difficulty there".*

(b) Submissions made on behalf of the Society.

335. Having noted that consent was forthcoming for many of the orders sought, counsel referenced the auction in support of the application for the first two reliefs. He suggested that discrepancies existed in the explanations advanced for the use of headed notepaper. Counsel for the Society submitted:

> "*… So I suppose what I am saying, President, is the Society is suspicious and remain suspicious as to… the solicitor's suggestion he was at no time trying to act as a solicitor, and there is the client account and the auction. So for those reasons, I respectfully maintain my application for the first two reliefs."*

336. A discussion ensued as to whether insurance was available. It was explained to the court that if three companies refused cover, an *"assigned risk pool"* fund existed which would take up the insurance. Johnson P. requested the Society to provide Mr. Murphy with a list of approved insurers to which Mr. Murphy's counsel replied, " *We have asked for that and if it is provided, it will be acted on forthwith".*

(c) Undertaking not to practice

337. Johnson P. inquired of counsel whether he was prepared, on behalf of his client, to give an undertaking that Mr. Murphy would not practice as a solicitor in this country or anywhere else where he was not locally qualified. A short adjournment ensued. Having taken instructions, counsel informed the court:

> *"I can confirm, as I thought was the case, that there is no difficulty in giving an undertaking to the court, which I can now do on my client's behalf, and he is here and he can give it personally, not to practice-not to hold himself out as being a solicitor in Ireland or elsewhere*".

Johnson P. then adjourned … *"questions 1 and 2 for four weeks to ensure that all orders I have made have been complied with. In the event of any order not being complied with I will issue the injunctions as requested."* No injunctions issued.

(d) Section 18 jurisdictional issues

338. On this issue, counsel for Mr. Murphy submitted:

"In relation to the substantive matter, you have a power under section 18 of the 2002 Act to make an order by way of injunction, restraining the commission-or the contravention of any provision of the Solicitors Acts, that is section 18 (1), and notwithstanding that, for example, it might be a criminal offence to hold oneself out as a solicitor when one is qualified or on the roll. So there is that jurisdiction. The Act is silent, it is a discretionary remedy and it is not something-the Act is silent on the principles which should inform the exercise of the court's discretion. I am not aware of any express authority, but I don't think it would be disputed that the main requirement is that any order of your Lordship were to make under that section should be proportionate to the difficulty which it is designed to address, and I do not think there could be any controversy about the requirement of proportionality in the making of any order in any circumstances, particularly a discretionary order"

(e) The order for substituted service

339. Mr. Murphy's counsel stated …" *that was quite a contentious matter at one stage, my Lord. We said there was no difficulty in serving, but I think it is now a moot issue, number 16".* Counsel for the Society suggested to the court that the service of proceedings on a particular address such as Murphy Healy's would obviate any difficulties going forward. In reply, counsel for Mr. Murphy said that there would be absolutely no difficulty in relation to the service of future documents, that it could be done on his then solicitors and that at no stage had there been a request that service might be effected in such manner. He continued:-

"Had they asked for that or had they even wrote in advance of this action saying, look, unless you do the following, we are going to issue proceedings against you in the High Court. All of these matters, we say, could have been addressed but I will come back to that because they touch on the question of costs".

(f) Potential appeals from disciplinary findings.

340. Although not expressly identified by name or title, it seems likely that references made to residual rights of appeal in certain disciplinary matters were to the following:

i. a potential appeal to the Supreme Court from the order of the Laffoy J. in the [REDACTED]matter (considered at para. 327 *et seq* and para. 351 *et seq* of the principal judgment) and

ii. a potential appeal in the [REDACTED] matter (considered at paras. 157 *et seq* and 358 *et seq*. of the principal judgment).

341. The status of potential appeals was addressed by Mr. Murphy in his affidavit sworn on 14th March 2007 in response to the application for attachment and committal. Laffoy J. had delivered judgment in the [REDACTED] matter on 7th May 2004. An order was made on 18th June 2004 which was perfected on 11th October 2004. Mr. Murphy averred that a notice of appeal had been received by town agents. It was out of time. He had been advised by letter from town agents dated 6th March 2007 that it was necessary to obtain a letter of consent to the late filing of the appeal or to apply for an extension of time. On 24th February 2011 Mr. Murphy issued a motion seeking an enlargement of time within which to appeal the order of Laffoy J. This was refused by the Supreme Court on 1st April 2011.

342. With regard to the [REDACTED] matter, in his affidavit sworn on 14th March 2007 Mr. Murphy explained that Mr. [REDACTED]'s file had been sent to Mr. [REDACTED] on 12th March 2007. The reason advanced for this not being done earlier was that Mr. Murphy had been attempting to establish the status of an appeal which he had lodged with town agents. He was informed by town agents in a letter dated 6th March 2007 that a notice of appeal had been received on 23rd November 2004, It was presented to the Central Office and papers had been retained by the registrar. It was stated that direct contact had been made between Mr. Murphy and the registrars. Mr. Murphy averred that his then solicitors, Murphy Healy and

Co., were in the process of ensuring that the appeal was dealt with in due course. This is also referred to at para. 359 of the principal judgment.

Schedule II

70. Background and correspondence in respect of complaints made by the [REDACTED].

(a) The initial complaints- 10th June 2002.

343. On **30th May 2002** Mr. [REDACTED] and [REDACTED] wrote a letter containing a number of complaints against Mr. Murphy. The complaints centred on issues arising from the conclusion of an arbitration between the [REDACTED] and

Kerry County Council many years earlier and for an alleged failure to return papers when requested. They wrote, *inter alia*:

> *"The two of us jointly with our brother* [REDACTED] *instructed Colm Murphy in a number of transactions buying numerous properties in the vicinity of Kenmare and including particularly an arbitration with the Kerry County Council in which we were awarded £134,000.*
>
> *That award was finalised in our (sic) about the …. day of October, 1995. The monies were in part used to purchase another property from Mr. Bigham and we have despite numerous requests never received an account of exactly what happened the money, nor have we received an account of the various transactions.*
>
> *PJ O'Driscoll & Sons, solicitors have served two authority's (sic) on Mr. Murphy on the 15th day of November 1999, for these items, and neither they nor us have received our papers or the accounts"*

344. This letter was attached to a letter of **10th June 2002** from Mr. [REDACTED] to the Society. The complaint was forwarded by Ms Kirwan to Mr. Murphy on **21st June 2002**. She requested a prompt reply and also stated that the matter could be most conveniently addressed by the provision of a statement of account showing disbursements from the award of £134,000.00.

345. Mr. Murphy responded on **27th June 2002**, stating that the complaint was out of time. He pointed out that he continued to act on behalf of Mr. [REDACTED] who was involved in another arbitration with Kerry County Council in respect of which an award had been made in March 2002. The files in the previous arbitration were required for the later arbitration and they were with his costs drawers. Mr. Murphy wrote that he would be in Dublin the following week and he hoped to retrieve all the files. He would then be in a position to submit a detailed account to Mr. [REDACTED] and Mr. [REDACTED] together with full details of various transactions. He wrote that the amount paid in respect of the "Beeches property" which was purchased in early 1996 was in excess of £132,000 "*which obviously*

accounts for the bulk of the money received from the County Council", and that once all accounts were finalised, substantial monies would be owed by the [REDACTED] to his office.

346. By reply of **3rd July 2002** Ms. Kirwan advised Mr. Murphy that while there was a limitation period in respect of allegations of inadequate services and excessive fees, there was no such limitation period in respect of the investigation of allegations of misconduct. She looked forward to receiving the statement of account showing the disbursements made from the arbitration award.

347. On **25th July 2002** Mr. Murphy enclosed a statement of account regarding the arbitration. This was also sent to Mr. [REDACTED], solicitor acting for Mr. [REDACTED] and Mr. [REDACTED]. He apologised for the delay in reverting and confirmed that he was now in the process of preparing final bills of monies due by the partnership to his office in respect of other matters. A document entitled "*The* [REDACTED] -*Statement of Balance*" was enclosed. This included a statement of receipts and payments, one of which was a payment on account of £22,141.00 which subsequently became the focus of attention during the SDT hearings.

348. Ms. Kirwan replied on **30th July 2002** acknowledging receipt of the statement of account and informing Mr. Murphy that if the [REDACTED] solicitors had any queries that they should revert to him directly. By letter of the same day she wrote to the [REDACTED] attaching the account and informing them that if they had any difficulty in obtaining a response to their queries they were welcome to revert to the Society.

349. On **3rd September 2002**, Mr. [REDACTED] wrote to Ms. Kirwan informing her that the accounts submitted were totally inadequate and incomplete. He stated that his clients had not had an account of all the monies dealt with by Mr. Murphy on their behalf and had not been given the papers to which they were entitled. He requested that the matter be expedited.

350. On **9th September 2002**, Ms. Kirwan wrote to Mr. [REDACTED] stating that she assumed from his reply that his clients required vouching documentation

regarding disbursements set out in the statement of account. She informed him that she had written to Mr. Murphy on that basis but wrote that if further information was required he should inform her by return. With regard to the transferring of files, she noted Mr. Murphy's reference to the preparation of final bills and assumed that files would not be released until after the discharge of fees properly owing. On the same day, she wrote to Mr. Murphy seeking vouching documentation, stating that as some considerable time had elapsed she had assumed that the bills were now issued. She requested that copies be furnished to the Society and sought confirmation of whether Mr. Murphy required payment prior to the release of the files or whether he was prepared to accept an undertaking.

(b) Further detail of complaint

351. Mr. [REDACTED] replied on **19th September 2002** stating that while the £134,000 was high on his clients agenda, other matters "*are of significant importance too"*. It was almost three years since an authority had been served. In the meantime in excess of thirty letters had been written to Mr. Murphy with only a fraction of that number in reply. His clients complained that they were very unhappy about the level of service given by Mr. Murphy and were disappointed that a more serious attitude was not being adopted by the Society, particularly as it concerned a failure to account for monies received. Mr. [REDACTED] also stated that Ms Kirwan's quotation from the letter of 30th May was incomplete - she had omitted words "*nor have we received an account of the various transactions*". On **23rd September 2002**, Ms. Kirwan wrote to Mr. [REDACTED] seeking further information about the "*various transactions*" to which he was referring and sought details of what the Society was being requested to investigate so that Mr. Murphy would know the precise nature of the allegations against him. This letter was copied to Mr. Murphy, Ms. Kirwan informing him that the particular priority was a detailed account in relation to the sum of £134,000. She also pointed out that the complainants were maintaining that they had never received an account of the

various transactions which he had handled on their behalf. She invited a response. A reminder was sent on **8th October 2002.**

352. Mr. Murphy replied on **10th October 2002.** He apologised for not finalising matters. Administrative/staff difficulties had been experienced by him and he had been managing a practice in Cork. Ms. Kirwan acknowledged his reply by letter of **18th October 2002**. She also wrote to Mr. [REDACTED] on 18th October 2002 reminding him of her letter of 23rd September 2002 and stating that she was anxious to obtain specific details of any allegations, other than that in relation to the sum of £134,000. She wrote that if it became necessary to request an investigating accountant to inspect Mr. Murphy's books, she would require details of the particular transactions queried by his clients. If necessary, she was prepared to meet with his clients in order to obtain details from them.

353. By letter dated **31st of October 2002** Mr. [REDACTED] wrote to Ms. Kirwan, outlining the following issues which concerned his clients:

a. Mr. Murphy undertook to let portion of his clients' lands to the local soccer club; the soccer club had moved in ten years previously but despite numerous requests no rent had been accounted for.

b. There was no response to the authority served by Mr. [REDACTED]'s firm on Mr. Murphy in November 1999. No documentation had been furnished.

c. No account was furnished of the monies received. There was no account dealing with the deduction of the sum of £22,141 which was contained in the statement of balance. It was contended that this had been debited without his clients' permission and that no bill had been furnished.

d. It was alleged that Mr. Murphy had been obtaining timber on account from the partners' timber business. He was now acting for Mr. [REDACTED] and was in the process of dissolving the partnership. An account had been furnished to Mr. Murphy for € 6,060.00. After much delay Mr. Murphy had responded to say that more was owed to him and that he

refused to pay for the timber. No account of what Mr. Murphy had claimed by way of *contra* had been furnished.

e. In 1996, Mr. Murphy had acted for the [REDACTED] in the purchase of the 'Beeches' premises from a Mr. Bigham. Mr. [REDACTED] wrote that his clients did not know if the deed had ever been stamped and, if so, when and for what sum of money. They were unaware of what funds were used to discharge that sum. The consideration was approximately £132,000.00. No evidence had been furnished that the stamp duty payable on the transaction had been discharged. Numerous appointments had been made by their solicitor to call to Mr. Murphy's office to inspect files and it was contended that each appointment had been broken by Mr. Murphy for a wide variety of reasons.

354. On **11th November 2002**, Ms. Kirwan confirmed receipt of the above letter and requested Mr. Murphy to address matters relating to bills, the furnishing of documentation, the provision of a breakdown of the sums paid on account, issues concerning the letting agreement, rent paid by the soccer club, the deed in respect of the purchase of the "Beeches" and authorities which had been served. She noted that bills had not been furnished despite assurances in his letter of 25th July 2002 where it was stated that they were in the process of being finalised. He was asked to identify what bills were outstanding and to explain the reason for the delay in sending them to his clients. Mr. Murphy was also requested to furnish documentation to vouch the account in relation to the arbitration award and a breakdown of the sum of £22,141 paid on account on 1st November 1995. He was requested to confirm whether a letting agreement had been prepared in favour of the soccer club and to furnish a copy of it. He was also requested to indicate whether any rent was paid and to furnish an account. Regarding the Beeches property, she sought confirmation of whether the purchase deed had been stamped and, if so, to identify the monies that were used; or alternatively provide a reason why the deed has not been stamped. He was requested

to deal with the issue concerning appointments for the inspection of files. A reminder was sent to Mr. Murphy on the **26th November 2002** .

(c) Failure to respond to communications from the Society and referral to Registrar's Committee

355. By letter dated **6th December 2002**, Mr. Murphy was informed that the file had been referred to the next meeting of the Registrar's Committee because of his failure to respond to the Society's letters. He was requested to attend before the Committee on **17th December 2002** and was also informed that the only issue before the Committee is "*your failure to communicate with the Society"*. If he was not in a position to attend personally he should arrange representation. If he did not attend or arrange representation, he was advised that the Committee reserved the right to deal with his failure to communicate with the Society in his absence which this could result in a referral to the SDT.

(d) Failure to attend meeting on 17th December 2002, and directions to respond to queries

356. The minutes of the Committee meeting of **17th December 2002** record that Mr. Murphy did not attend as requested and that there had been no communication from him. However, Mr. Murphy had communicated with the Committee in connection with his inability to attend in respect of a different matter and the meeting was adjourned on a peremptory basis.

357. Mr. Murphy was written to on **19th December 2002**. Concerns were relayed to him about his failure to address the Society's correspondence or to reply in any meaningful way to the complaint made by Mr. [REDACTED] on behalf of his former clients. He was informed that the Committee had directed that he respond to the queries contained in Ms. Kirwan's letter of 11th November 2002 on or before 14th January 2003. He was also informed that the matter had been adjourned on a peremptory basis to the next sitting which would take place on 18th February 2003

and that the Committee directed that he attend that meeting. If he was not in a position to attend personally he was told that he should arrange representation. Once again he was advised that if he did not attend or arrange representation, the Committee reserved the right to deal with the matter in his absence.

358. On **11th February 2003**, Mr. Murphy was again written to by Ms. Kirwan, reminding him of the meeting on 18th February 2003 and requesting his attendance. He was asked to bring with him his file and, if relevant, his books of account. He was also informed that an application for adjournment would not be considered save in exceptional circumstances. If he was not in a position to personally attend before the Committee because of pre-existing commitments, he should arrange to be represented. He was reminded that if he did not attend or arrange representation, the Committee reserved the right to deal with the matter in his absence and that this might result in it being referred to the SDT.

359. On **17th February 2003**, Mr. Murphy replied outlining logistical difficulties which he *had* encountered and *would* encounter in attending the meeting on 20th February 2003. He was due to attend at the Circuit Court in Cork on 17th February 2003 and an auction in Killarney on 19th February 2003. He was required to deal with further matters in Dublin on Friday of that week. He wrote that it would be practically impossible for him to attend in Dublin on Tuesday, 18th February. His letter continued:

> *"I would further point out that I have indicated to the Registrar's Committee that I am arranging to dispose of the practice and hope to have everything concluded by June. It is my intention to clear any outstanding matters with the Registrar's Committee before this date."*

360. Mr. Murphy also wrote outlining what he described as his attitude to each of the matters that were before the Committee. He wrote "*I am sure that all matters will be sorted out prior to the date on which they will be next listed*.". He sought an adjournment until the Committee's April meeting stating that March did not suit him

as he was out of the country for a week. He assured that "*if the matter is adjourned to April then I will do my best to ensure everything is sorted out prior to that date*." The letter concluded …"*I trust you will give this application for adjournment your favourable attention and look forward to hearing from you."*

361. In the second letter written to Ms. Kirwan on **17th February 2003**, Mr. Murphy expressed grave reservations about dealing with any complaint made by Mr. [REDACTED]. He said that Mr. [REDACTED] had advised him in the past that he was "*untouchable"* by the Society. He referenced the [REDACTED] complaint in which it appeared to him that Mr. [REDACTED] was indeed untouchable. He wrote that someone who had said that they were untouchable should not be in a position to rely on the Society when seeking assistance. Mr. Murphy also pointed out that there were numerous files in relation to the [REDACTED] and that he still acted on behalf of Mr. [REDACTED]. Full detailed bills were being prepared and a final account would be issued within the next week. He informed Ms. Kirwan that proceedings had been issued by Mr. [REDACTED] against his brothers and partners. An interim order had been obtained in the High Court. He enclosed a copy of the order. Mr. Murphy believed that in the fullness of time all files and documentation would have to be discovered on all sides and only then would the Committee be able to deal fully and finally with the complaint. He wrote:

> "*We would respectfully suggest that it is in everybody's interest to defer dealing with this complaint until the proceedings have been finalised and discovery has been made. At this stage, we are quite sure that both the Revenue Commissioners and the Criminal Assets Bureau will also be interested in the matter. Accordingly we apply for an adjournment of the matter".*

362. A handwritten form of agreement/undertakings and signed by the [REDACTED] was attached to that letter. It seems that the parties agreed to the

appointment of a receiver of partnership properties and for the sale of those properties. The agreement was dated 11th November 2002.

(e) Failure to attend a second meeting of the Committee on 18th February 2003 and direction to the Society to make application to court to compel attendance.

363. It was noted in the minutes of the Registrar's Committee meeting of **18th February 2003** that for the second meeting in a row Mr. Murphy did not attend as requested. The request for an adjournment was declined. It was recorded that Mr. Murphy had been advised in writing that if he could not attend he should arrange legal representation. The minute concluded as follows:-

> *"The Committee took the view that Mr. Murphy was obstructing the investigation of the complaint by failing without reasonable cause to respond appropriately in a timely manner to the Society's correspondence. Accordingly the Committee directed that the Society's solicitor should apply to the High Court for an Order compelling the solicitor to respond appropriately within such time as specified by the High Court and to attend before the Registrar's Committee when requested to do so."*

364. On **21st February 2003** Ms. Kirwan wrote to Mr. Murphy in those terms - informing him that the Committee had taken the view that he was obstructing the investigation by failing without reasonable cause to respond appropriately and in a timely manner to the Society's correspondence; and by his failure to attend a meeting of the Registrar's Committee when requested to do so. He was informed of the Committee's direction that application be made to the President of the High Court under the Solicitors (Amendment) Act 2002, s.13 for an order compelling him to respond appropriately and to attend meetings when requested to do so. He was further informed that the Society's solicitor would communicate with him directly in relation to the application.

365. Mr. Murphy replied by letter dated **27th of February 2003**, stating that he would deal with the Society's correspondence and would attend meetings of the Registrar's Committee when requested. He wrote that the Society would receive a comprehensive reply within seven days and expressed the view that there was no necessity for the Society to make an application to court. He confirmed that he was available and would attend the next meeting and said that the reason he did not attend on the 18th February 2003 was due to pressure of business. Mr. Murphy requested that the letter be exhibited in any application made by the Society to the High Court.

(f) Mr. Murphy's substantive reply of 13th March 2003

366. By letter dated **13th of March 2003**, Mr. Murphy apologised for the delay in replying to her letter of the 11th of November 2002. He wrote that he had been extremely busy in relation to the matters and "*the division of the partnership of the* [REDACTED]*"*. This had taken a lot of his time and he was quite concerned to protect his own position. Addressing the points raised in Ms. Kirwan's letter, he enclosed copies of bills in respect of fees due and wrote that there were other bills that required to be finalised. He explained that he and the clients had discussions that monies were due but they had not got around to finalising matters. He stated that the total amount awarded was £134,000.00 and that the clients were well aware of this. This figure had been received by his office on 20th October 1995 and he queried whether the clients were disputing that amount. Mr. Murphy addressed the issues of costs and the letting agreement with the soccer club (which he was unable to locate at that time). He wrote that the soccer club had indicated that it would vacate the property in June, that if Mr. [REDACTED] and Mr. [REDACTED] were maintaining that rent was due to them that he would pursue that amount on behalf of the partnership. Mr. Murphy also wrote that the [REDACTED] were well aware of the reasons why the deed had not been stamped and that when the case between the [REDACTED] was finalised and all affidavits of discovery made, the reason would

become clear. Mr. Murphy further wrote that the documents were owned by all three partners, that he continued to act for one of them, that proceedings had been instituted and all documentation and files would be released in due course. A meeting with the receiver had been arranged for the following week at which all documents would be shown. When he had cancelled appointments due to other commitments, the other side were notified. Mr. [REDACTED] was in Kenmare one day per week only and had attended at his office on one occasion. He stated that when he momentarily stepped out of his office, on his return Mr. [REDACTED] was going through the files on his desk. He did not relish the thought of having Mr. [REDACTED] back in his office. Mr. Murphy concluded that he was happy to attend before the Registrar's Committee with all of the files and to show the full extent of the communications with the [REDACTED], which kept them fully abreast of all developments. He did not wish to put all correspondence and attendances before the Committee at this time but he said would do so if requested.

367. Attached to that letter were statements of account marked "without prejudice to taxation", dated **6th March 2003,** in which fees were claimed , *inter alia*, in the arbitration matter, the purchase of the Beeches, a matter concerning Mr. Bigham, and an account in respect of another issue entitled the Stone Circle.

368. On **21st of March 2003**, Mr. Murphy's response was forwarded to Mr. [REDACTED]. On the same day a letter was written by Ms. Kirwan to Mr. Murphy seeking clarification of certain matters arising from his response, including details of any other bills which were outstanding. She requested a copy of bills in which certain deductions were made. Clarification was sought regarding the costs of the arbitration. Vouchers were sought in respect of monies received for the arbitration and rent.

369. That Mr. Murphy was acting for one partner in contentious business having acted for all three partners in the past was also addressed. Ms. Kirwan wrote that the Society had not received any complaint of conflict of interest but, "*it strikes the*

writer that if your client and his legal team have access to documentation which [REDACTED] *and* [REDACTED] *do not have access to, you are placing yourself in a position where a complaint of conflict of interest may arise. Is there any reason why complete copies of the file should not be made available."* Ms. Kirwan also pointed out that it was a matter of concern that the information requested in her letter of 11th November 2002 had still not been furnished. In view of the length of time which elapsed she sought priority and requested that he revert to the Society within the next 10 days. Failing this, she wrote that the Society "*will have no option but to proceed with the application to the High Court"*.

(**g) The [REDACTED] response.**

370. On **1st April 2003**, Mr. [REDACTED] responded at length to Ms. Kirwan's letter of 21st of March 2003. He wrote that a meeting had taken place with Mr. Conor Murphy of Colm Murphy & Co on 13th March 2003, at which "*for the first time most if not all of the documents necessary were disclosed".* Mr. [REDACTED] referred to a number of properties, including the Schoenberg's property transaction. He pointed out that certain documents had been stamped but not registered and another was not dated, stamped or registered. His letter continued " *but most disturbing of all the property was conveyed to the name of Colm Murphy. Conor Murphy gave as the explanation 'this was the arrangement between the parties'".* Mr. [REDACTED] wrote that Mr. [REDACTED] and Mr. [REDACTED] had said that no such arrangement existed nor had they any understanding as to why property belonging to them should be in Mr. Colm Murphy's name. They considered it sinister and would require a full explanation from Mr. Murphy together with confirmation of whether Mr. [REDACTED] knew of the arrangement. He also clarified that Mr. Conor Murphy had confirmed that Mr. Colm Murphy made no claim against the property but that a Declaration of Trust did not exist. Other matters relating to various properties were also addressed. Mr. [REDACTED] pointed out

that the statement of account dated 6th March 2003 had never been seen by his clients until then.

(h) Deferral of application to court

371. Mr. [REDACTED]'s letter was forwarded to Mr. Murphy on **14th April 2003.** Ms. Kirwan requested Mr. Murphy, in addition to responding to queries contained in her letter of 21st March 2003, to deal with issues including whether the deed in respect of the purchase of properties on 16th October 1998 had been stamped or registered, to identify the reasons why the [REDACTED] were well aware as to why the deed in respect of the Beeches had not been stamped. She queried why the first deed of conveyance in the Schoenberg matter was stamped but not registered and the second was not dated, stamped or registered. Queries were also raised in relation to the Schoenberg property - to explain the reason why the property was conveyed into his name. She sought copies of relevant attendances and documents to vouch the explanation. Mr. Murphy was requested to indicate why the Harrington documents were not registered. With regard to the account dated 6th March 2003 in respect of the arbitration with Kerry County Council, he was informed that it was being alleged that his clients were advised that all costs would be paid by County Council. He was asked whether he had been paid any fees by the County Council and to confirm the amount, to furnish a copy of s. 68 letter in respect of the Beeches, if instructions were received on or after 4th February 1995, and to outline the reason for the delay in furnishing the bill. He was requested to explain the delay in furnishing the bill in the Bigham matter, why a claim for interest arose and to furnish a copy of the s.68 letter. With regard to the "Stone Circle", he was requested to furnish his file for inspection and to ensure that it included a copy of the s. 68 letter.

372. Ms. Kirwan advised Mr. Murphy that in the light of the new matters raised in Mr. [REDACTED]'s correspondence, the Society's application to the High Court would be deferred. She requested that he ensure that his response be with the Society

on or before the end of April 2003. Ms. Kirwan's letter was not responded to within that time.

(i) No response by end of April and warning of potential recommencement of referral to court

373. By letter of **7th May 2003** Ms. Kirwan informed Mr. Murphy that in the absence of communication from him, she was left with no option but to recommence the Society's application to the High Court. He was informed that if he required more time to fully respond to the issues raised he should contact her but that failing receipt of a detailed response or a request for further time, the Society would proceed with the application without further notice.

374. Mr. Murphy replied on **9th May 2003**, explaining that he been under extreme pressure during the last four months. He had every intention of making a full and detailed reply to the allegations and confirmed that he would do so within two weeks. He requested Ms. Kirwan to bear with him for a while longer.

375. Ms. Kirwan replied on **15th May 2003** that she would diary the matter forward to **23rd May 2003**. If at that stage a full and detailed response had not been received she advised the application would proceed. While she had no wish to take Mr. Murphy short, equally she had an obligation to ensure that there was no undue delay in investigation of any complaint.

(j) No response to the Society's correspondence and recommencement of application.

376. As is evident from her affidavit sworn on 11th June 2004, Ms. Kirwan confirmed that no response was received to her letter of 15th May 2003. A notice of motion issued on **24th June 2003.** It was made returnable for **7th July 2003.**

(k) Mr. Murphy's response to the notice of motion – and request for adjournment

377. On **4th July 2003**, Mr. Murphy wrote a lengthy letter. He complained that the refusal of his request for an adjournment was *totally unreasonable*. He pointed out that he had every intention of cooperating with the Society except that there were a number of issues which he felt necessary to address. These included the difficulty he had in dealing with any issue raised by Mr. [REDACTED]. While there were a number of reasons for this, the most important was that he felt that Mr. [REDACTED] was treated much more favourably by the Society than he or any of his colleagues. Mr. Murphy detailed how the complaint had arisen, that he had acted for the partnership, that the partnership had been dissolved and that legal proceedings had been issued by Mr. [REDACTED] for whom he acted. There had been no complaint in relation to him continuing to act. A defence was awaited, following which all documents would have to be disclosed by all parties. He also contended that there were inconsistencies in the version of events advanced by Mr. [REDACTED] and Mr. [REDACTED]. He would address these at the next Registrar's Committee meeting. He had spent a colossal amount of time working on the [REDACTED] files over the past year. The correspondence was voluminous and because of this and "*an extremely busy schedule I have had difficulty in finding time to deal with the requests and felt that the discovery process would deal with all the outstanding issues"*.

378. Addressing the letters of 11th November 2002 and 21st of March 2003, he stated that any issues arising from the letter of 11th November 2002 had been dealt with by his letter of 13th March 2003. With regard to the letter of 21st March 2003 and the issuing of bills, he referenced letters going back to 1998 and 1999 which he had written to his clients. He addressed the arbitration award. £69,510.06 was paid by the County Council but a further sum of £73,105.00 was due. He had written letters on 11th July 1996, 19th of July 1996 and 11th March 1998 which were sent to each of the partners. He stated that they showed that outstanding fees included additional fees in respect of the arbitration were due to him. He explained that the total arbitration award was in the sum of £134,000.00 and that the total sum received

was £156,179.61, which covered the award plus interest together with interest earned on some of the funds that were invested for a period in 1996. He had on "*even date*" asked his accountant to obtain all documentation in these matters from the bank and "*to furnish you with the cheques which will vouch the disbursements made*". Insofar as the rent issue was concerned he could not find a letting agreement or any record of rents having been paid to the [REDACTED] *via* his office. He wrote that he had asked his accountant to check whether there were records of this and pointed out that *"..we do not collect rents for clients".* With regard to the query concerning why complete copies of the file should not be made available, he replied that "*as already pointed out we are anxious to comply with the Partnership Acts and any orders of the High Court made herein".*

379. In the same letter of 4th July 2003, Mr. Murphy addressed queries raised in Ms Kirwan's letter of 14th April 2003 concerning the registration/stamping of deeds. He explained that the deed in respect of the lands purchased on 16th October 1998 was stamped but not registered. When the [REDACTED] purchased the land it was felt that subdivision would take place. He addressed issues such as tax implications and stated that it was felt that the brothers might do better in terms of stamp duty and capital gains tax in the future if some of the documentation for the lands were not stamped and registered. The position was discussed in 1994/1995 when the arbitration with Kerry County Council was ongoing and that *"the barrister involved at that time remembers quite clearly discussing the fact that the documents had not been registered. As late as November 29th 2000* [REDACTED] *acknowledged that he was aware that some of the documentation had not been stamped and/or registered.*" With regard to the Beeches property, he did not have funds with which to pay the stamp duty and was never instructed to do so. Around that time there were many discussions in relation to possible subdivision of the properties and he believed that because of this the stamp duty issue was never advanced. He pointed out that the stamping of the documentation had been discussed as part of the existing High Court action and he believed that the documents would

be stamped in early course. He enclosed letters sent to his clients in 1998 and 1999, which he said showed the level of correspondence which he had with his clients regarding subdivision. He requested the complainants to state when it was contended that he had been asked to stamp the documentation and who asked him to do so. While not entirely sure, he thought it may have been possible that, in respect of the second part of the Schoenberg's property, it was not stamped due to oversight when the rest of the documentation was being stamped. Mr. Murphy said that Mr. [REDACTED] and [REDACTED] were aware at all times that *"some of the documentation"* was going to be transferred into his name. He wrote "*it is of course held by me in trust for them"*. He pointed out that his client particularly remembered this discussion and would give evidence to confirm that all partners were aware that the lands were being put into his name. He wrote that he resented insinuations to the contrary and thought that Mr. [REDACTED], of all people, would understand that land is often held in trust. The reason for holding the land in trust was that certain tax benefits would be obtained in the future when the lands were taken out of his name. He questioned the complainants' ability to tell the truth and pointed out that in the High Court partnership proceedings that the lands belonged to the partnership had always been acknowledged by him. There was no question of anything sinister in that regard. Regarding the issue of costs in the arbitration, he wrote that while much of the costs were paid by the County Council, there were further costs payable by the partners. Correspondence showed that his clients were always aware that there were fees due to him. The total amount of costs awarded was IR £60,512.24. He addressed issues concerning s. 68 letters and acknowledged that he may not have served all relevant such letters. Because partnership issues were subject to High Court proceedings he did not believe that it was appropriate to part with the file. He was willing, however, to bring it to the next Registrar's Committee meeting, which he would attend and he requested that the motion returnable for 7th July 2003 be adjourned. He stated his belief that the contents of his letter should satisfy the Society's requirements. If not, he would submit a replying affidavit.

380. By reply dated **8th July 2003,** Ms. Kirwan raised a number of queries regarding bills, fees, vouchers, stamping of deeds and matters arising from his letter of 4th July 2003.

(l) Application before Finnegan P. on 9th July 2003 – orders and adjournment

381. The Society's application, returnable for Monday 7th July 2003, came before Finnegan P on **9th July 2003**. The Society sought an order directing Mr. Murphy to respond fully to the matters raised by the Society in three letters, dated 11th November 2002, 21st March 2003 and 14th of April 2003. An order was also sought directing Mr. Murphy to attend at the next scheduled meeting of the Registrar's Committee, if requested. Having noted Mr. Murphy's letter in response, Finnegan P. directed that Mr. Murphy should reply to the Society's letter of 8th July 2003 within seven days, that Mr. Murphy attend before the Registrar's Committee on 29th of July 2003 and that he produce all files in his possession relating to the affairs of [REDACTED] and [REDACTED]. The motion was adjourned to 31st July 2003. This was after the next scheduled meeting of the Registrar's Committee on 29th July 2003.

(m) Memorandum of court attendance on 9th July 2003.

382. **On 9th July 2003**, Ms. Kirwan prepared a memorandum of proceedings before the court on that day. She recorded that Finnegan P. expressed concern about Mr. Murphy's delay, that he had expressed the view that Mr. Murphy was obliged to furnish information to his clients and to the Society and that Mr. Murphy's difficulty with Mr. [REDACTED] was irrelevant. The memorandum records the following observations of Finnegan P.:

> … "*the solicitor had delayed for over a year in relation to a matter involving substantial amounts of money. He stated that the delay alone*

even if it transpires there is no complaint, brings the profession into disrepute in an outrageous way. He pointed out to Mr Murphy's counsel that Mr Murphy's former clients have as much right to the information he holds as his present clients."

383. The memorandum also records that the President stated that Mr. Murphy seemed determined to obfuscate as long as possible, something which he would not tolerate. The attendance note continued:

> *"Mr. Murphy's counsel then raised his client's second concern i.e. what use would be made of the information by his former clients. The President asked if Mr. Murphy had any appreciation of his duty to his former clients. He stated that the correspondence suggested that Mr. Murphy was going to retire from practice and Mr. Murphy's counsel confirmed that this was no longer his intention. He was prepared however to undertake to attend at meetings of the Registrar's Committee. The President stated that he would be making an order and he would be requiring the Society's solicitor to serve it with a penal endorsement.*
>
> *The President made an order that Mr. Murphy should reply to the Society's letter of 8th July 2003 within seven days, attend at the Registrar's Committee meeting on 29th July 2003 and bring all files with him. The President told the solicitor he would taken* (sic) *an extremely serious view of any failure to attend to these orders in a full and comprehensive way. He also adverted* (sic) *his power to impose a monetary penalty. The matter was adjourned to 31st of July 2003".*

In cross examination in the civil proceedings (Day 8, p. 106) it was put to Ms. Kirwan that the contents of the memorandum was consistent with the terms of the perfected court order for that day, and she agreed.

(n) Mr Murphy's response and correspondence before the adjourned date of 31st July 2003 and after the hearing on 9th July 2003

384. Mr. Murphy replied to Ms. Kirwan's letter of 8th July 2003 by letter of **16th July 2003.** He wrote that having gone through files there were a lot more fees due to him that he had thought. They would take some time to finalise. He would bring them to the meeting on 29th July 2003. He disputed the contention of the [REDACTED] that they had been told that all the legal fees in relation to the arbitration would be discharged by the County Council. He said that he had requested his cost drawers to furnish an itemised bill and to prepare a requisition to tax. He also pointed out that the payment on account of € 21,141.00 was not necessarily for the arbitration. In 1995 he was owed considerable money by the partnership for matters other than the arbitration. Mr. Murphy addressed issues in relation to stamp duty and stamping of documents and said that he would explain these in more detail at the meeting. The property was placed in his name with the agreement and consent of all his clients. This was not documented. [REDACTED] would confirm that at all times the brothers were aware that the property was held in his name in trust for them. This was discussed during the arbitration with Kerry County Council in 1994/1995, as the title to the properties had to be shown in order to ascertain the amount of compensation payable. He described as offensive the suggestion by Mr. [REDACTED] or the two [REDACTED] that there was something sinister. He suggested that Mr. [REDACTED] might enlighten him as to why he suddenly thought that the holding of property in trust was "*sinister*".

385. Ms. Kirwan replied by letter of **22nd July 2003**, requesting that Mr. Murphy furnish a fully itemised bill and sought documentation by return so that it could be furnished to the Committee in advance of the meeting. Ms. Kirwan noted that the documentation was first requested on 9th September 2002.

386. In her affidavit sworn on 11th June 2004, Ms. Kirwan exhibited letters dated **22nd July 2003** received from the complainants, which contained their detailed

responses to the issues raised in Mr. Murphy's letter of 4th July 2003, regarding costs in the arbitration, disputing contentions in relation to stamp duty, the Schoenberg property, the closing of the sale of the Beeches and the soccer field rent. They disputed many of Mr. Murphy's contentions and refuted any allegations made about the truth of what they had said. They wrote that they had not become aware until very recently that Mr. [REDACTED] had been informed by Mr. Conor Murphy that Mr. Colm Murphy was the legal and beneficial owner of the Schoenberg property and that no declaration of trust existed. A number of other issues were addressed in relation to matters arising from a planning application, rights of way. A letter from the soccer club regarding rental payments dated **10th July 2003** was also enclosed. This was followed by a further letter from Mr. [REDACTED] and [REDACTED] to Ms. Kirwan dated 28th of July 2003 concerning the acreage and market value of the Schoenberg land. Mr. Murphy wrote on **23rd July 2003** saying that he would bring all files to the meeting on 29th July 2003.

(o) The meeting of the Registrar's Committee on 29th July 2003

387. A meeting of the Registrar's Committee took place on **29th July 2003**. A minute of that meeting was exhibited in Ms. Kirwan's later affidavit. Mr. Murphy attended. The memo records that Mr. Murphy said that he had spent the previous weekend preparing bills. He gave the Committee fourteen bills with a covering note. He confirmed that he had deducted costs from the arbitration monies. He was queried in relation to the lands held in trust, as to whether there was a declaration of trust or whether there existed documentation in support of the creation of a trust. It is recorded that Mr. Murphy said that he would do a transfer back to his clients when they wanted him to. With regard to the disbursements, it is recorded that Mr. Murphy handed in four copy letters but that "*these were rejected by the Committee as vouching the payments*". Issues concerning the rent received from the soccer club were also addressed. The minute records that:

"Mr. Murphy withdrew and on his return was advised by the Committee that they were not satisfied that he had furnished the information sought by the Society and they would be advising the President accordingly. The Committee also noted its extreme concern at the fact that the property acquired by Mr. Murphy's clients was presently in Mr. Murphy's name. Having regard to the fact that the matter was due back before the President on 31st of July 2003, the Committee did not make any final decision and adjourned the matter to its next meeting."

388. Attached to this minute was a list submitted by Mr. Murphy entitled *"List of different files/cases in which I acted for the* [REDACTED] *and details in relation to same"*. Also attached were further statements of account/miscellaneous matters dated 28th of July 2003 ("*Purchase of land from Cousins*", "*Dealing with Sheen Falls Estate*" , "*Purchase of Brennan's Row"*, "*Soccer Field"" Sub Division of land"*) and 6th of March 2003 (in respect of *"The Stone Circle"*, *"Arbitration with Kerry County Council", "Purchase of the Beeches"* and miscellaneous other matters).

389. In submissions in respect of appeal 2010/75 SA, Mr. Murphy makes the point that in evidence in had the civil proceedings Ms. Kirwan confirmed that the minute was not an accurate reflection of what occurred at that meeting. Particular emphasis was placed on her answers in cross examination on the absence of a reference to the fact that Mr. Murphy had brought files to the meeting. Ms Kirwan accepted that the minute was not a verbatim account and that she tried to capture the important parts and the Committee's decision. It was put to her that when Mr. Murphy said that he had the files with him, the Committee's replied that it did not have the time to go through the files and that this was not reflected in the minute. Ms. Kirwan replied that she was then giving evidence in accordance with the minute and was not, some fifteen years later, in a position to contradict Mr. Murphy's contention in this regard.

390. The accuracy of the minute of this meeting was also raised by Mr. Murphy when cross examined by counsel for the Society before the SDT on 10th July 2008. In particular he referenced the fact that at the meeting he informed the Committee that he had *"all the stuff that they wanted to see in the boot of my car and would they like to see it and they said they didn't want to see it."*. He stated that he had told the Committee that if they were to carry out a proper investigation they should ask the third partner about what happened and that this was also not referenced in the memo and that he had said other things which were not included. Counsel also referred to a statement that Mr. Murphy had apologised to the Committee and queried what the apology was for. Mr. Murphy, while querying the accuracy of the memorandum, said that he could have been apologising for not vouching the documentation for the arbitration, but he did not remember to what the apology referred.

(p) Mr. Murphy's response by letter and affidavit

391. Mr. Murphy wrote to Ms. Kirwan on **30th July 2003**, stating that it appeared that the Committee was not satisfied with his responses. He wrote that he would now try to deal with any issues believed to be outstanding. They were addressed by reference to Ms. Kirwan's letter of 22nd July 2003. Mr. Murphy attached statements of accounts in respect of matters in which he contended substantial monies were due to him. He addressed the issue of the arbitration and taxation of costs, enclosed letters which he said proved that the [REDACTED] were informed on numerous occasions that there were further fees due (including letters dating back to 19th July 1996). He attached letters in relation to disbursements, wrote that he was anxious to finalise matters and stated that if there was anything else required of him, they might be indicated immediately. It seems from Ms. Kirwan's letter of 5th August 2003 that this letter was with the Society when the matter proceeded before Finnegan P. on 31st July 2003.

392. Mr. Murphy swore an affidavit on **30th July 2003** in which he referred to correspondence which had been exchanged in July, his attendance at the Registrar's

Committee meeting on 29th July 2003 and his letter of 30th July 2003. He averred to his belief that he had dealt with all matters except the itemised bill of costs for the solicitor/client fee for the arbitration. He stated that this should not cause a delay in the Society's investigation and that while there were many fees due to his office by the [REDACTED], this should not hold matters up. At para. 10 he averred:

> *"10. I further confirm that I wish no disrespect either to this Honourable Court or to the Law Society and I am willing to do whatever is necessary to bring this matter to a conclusion and confirm that I will again attend any Registrar's Committee meeting with the client files if same should be necessary. I further say and believe that apart from my initial hesitation in dealing with this matter because of the partnership situation that once I received the direction from this Honourable Court that I was anxious to finalise the matter for once and for all and have no wish or intention to obstruct the Law Society in any way whatsoever."*

Note: This averment was specifically referred to by the SDT on 10th July 2008 in its reasons for its decision to uphold the complaint in respect of a failure to attend the meeting om 30th September 2003, notwithstanding the 'undertaking'.

(q) Mr. Murphy informed of adjournment of Committee meeting to 30th September 2003

393. Mr. Murphy was written to by Ms. Kirwan on **30th July 2003** and was informed that, having regard to the fact that the matter was pending before the President, the Committee had made no final decision and had adjourned the matter to their next meeting which was due to take place on 30th September 2003. The letter concluded "*the Committee will make a decision on that date as to whether or not this matter warrants enquiry by the Disciplinary Tribunal. Your attendance at the next meeting is required and I will write to you nearer the date."*

(r) The perfected order of the court of 31st July 2003

394. The perfected order of 31st July 2003 records that Mr. Murphy's affidavit filed on that day was considered, as was the order of 9th July 2003. The terms of the order stated, *inter alia*, as follows:

> *" The court doth make no further order on the said motion save in regard to costs. And IT IS ORDERED that the solicitor in the title hereof named to pay to the Society's costs of the said motion to be taxed in default of agreement."*

(s) Ms. Kirwan's reply of 5th August 2003 to Mr. Murphy's letter of 30th July 2003 and further correspondence prior to the Registrar's Committee meeting on 30th September 2003

395. Ms. Kirwan replied on **5th August 2003.** She wrote that she had given a copy Mr. Murphy's letter of 30th July 2003 to Solicitor X prior to the hearing on the 31st July 2003.

Note: Mr. Murphy places significance on this letter in connection with the undertaking. In his evidence and in submissions he stated that had he given an undertaking to Finnegan P on 31st July 2003, it would have been reflected in this letter.

396. By letter dated **2nd September 2003**, Mr. Murphy sought copies of the minutes of all relevant meetings at which the matter had been discussed. He also expressed concern at various comments said to have been made by the Chairman and other members of the Committee at the meeting of 31st July 2003 and also by comments that were made "*by your [Solicitor X] and the matters before the President of the High Court"*. He asked for a copy of the minutes *"in early course"*. Specifically addressing the meeting of 30th September 2003, Mr. Murphy said that he would not be in the country on that date and requested that the meeting be deferred to October. His letter continued…*"and subject to you dealing with the issues outlined in the first and second paragraphs of this letter I would only be too happy to attend at that date*". He stated that he that he had been taken aback when he arrived

at the last meeting. Even though he had brought all files he was not afforded the opportunity of dealing with the various matters that were raised by the Committee. He stated that the Committee had told him that they had sat there long enough and had no intention of then going into matters. Mr. Murphy had advised that a separate meeting of at least half a day should be set aside to deal with the outstanding issues.

397. The letter concluded with Mr. Murphy expressing his belief that in the fullness of time the Society would realise that he had all times acted in accordance with his clients' instructions. He again suggested that it might be better *"if this matter were referred until after the discovery process in the High Court action between* [REDACTED] *and his former partners,* [REDACTED] *and* [REDACTED]*"*.

398. On the **17th September 2003** Ms. Kirwan replied. She attached a copy of the minutes of meeting of 29th July 2003 but stated that it was in draft form until approved by the Committee at its next meeting. Dealing specifically with the adjournment request, she wrote that while she would place it before the Committee it was *"extremely important that you understand that this request may not be granted. Accordingly you may wish to arrange to be represented at the meeting, as the Committee may make a decision on that date whether or not there is prima facie evidence of misconduct which would warrant referral to the disciplinary tribunal.*" Ms Kirwan also copied additional correspondence which she had received since last communication from [REDACTED] and [REDACTED] and informed him that if he wished to reply that he should do so as soon as possible to enable the response to be circulated in advance of the meeting of 30th September 2003.

399. On **22nd September 2003** Mr. Conor Murphy wrote on Mr. Colm Murphy's behalf. He acknowledged receipt of the minutes. He said that Mr. Murphy was out of the jurisdiction until the middle of October. In those circumstances he simply could not attend. He advised that if Ms. Kirwan could not confirm an adjournment by return, the matter would have to be referred to counsel *"to see if an injunction is necessary to protect the interests of Mr. Colm Murphy in his absence."*

Mr. Conor Murphy also addressed an issue arising from correspondence in which his name appeared. He disputed a suggestion that some documents had not been signed.

400. On **30th September 2003,** the day of the scheduled Registrar's Committee meeting, Mr. Conor Murphy once again communicated with Ms. Kirwan, referring to a letter written by her on 23rd September 2003. Four ([REDACTED], Hayes, [REDACTED] and [REDACTED]) matters were referenced. He sought an adjournment which he said was appropriate, particularly "*as Colm Murphy has not had sight of the minutes forwarded to these offices and representation on his behalf is not feasible until he has gone through the contents of same and furnished instruction to a representative on the basis of same*".

(t) Registrar's Committee meeting of 30th September 2003

401. The minute of the meeting of 30th September 2003 records:

> *"the matter is now before the Committee in order for the Committee to determine whether there is prima facie evidence of misconduct which would warrant referral to the Disciplinary Tribunal. Mr. Murphy has requested an adjournment on the basis that he will be out of the country. The Committee will note that Mr. Murphy was advised of the date of this meeting by letter dated 5th August 2003."*

402. The decision of the Committee is recorded as follows:

> *"The Committee noted the faxes received from Mr. Conor Murphy, the solicitor's brother and assistant solicitor in his firm. Having reviewed the file in its entirety, and noting Mr. Murphy's record of responding to the Society's correspondence and attending at meetings, and further noting that Mr. Murphy had been specifically advised of his right to arrange representation if he could not attend, the Committee declined his request for an adjournment.*

The Committee decided that the papers disclosed prima facie evidence of misconduct which would warrant referral to the Disciplinary Tribunal."

403. Ms. Kirwan wrote to Mr. Murphy on **2nd October 2003** advising him of the referral to the SDT and informed him that the Clerk of the SDT would be in contact with him.

(u) Application to Court

404. On 17th June 2004, application to court was made. It was grounded on an affidavit sworn by Ms. Kirwan on 11th June 2004. Mr. Murphy wrote to Ms. Kirwan on **8th July 2004** stating his intention to defend the allegations and requesting the *full and entire minutes* of all meetings of the Registrar's Committee.

(v) Complaint of discussions with Mr. [REDACTED]

405. Mr. Murphy wrote further to Ms. Kirwan on **9th July 2004** stating that he had been informed by Mr. [REDACTED] that he had had various conversations with Ms. Kirwan in relation to the complaint and that he was *"absolutely stunned"* by this revelation. He sought full details of all correspondence and conversations she had with Mr. [REDACTED] in relation to the complaint. In passing it is noted that this letter was among correspondence placed before the SDT and exhibited (LK4) to Ms. Kirwan's affidavit sworn by her on 12th February 2009 grounding the application before Johnson P.

(w) Mr. Murphy corresponds with SDT but does not file replying affidavit at *prima facie* stage.

406. During this period, Mr. Murphy was in correspondence with both the Society and the SDT. In a letter to the SDT dated **9th July 2004,** in which he stated his intention to fully defend the application, he also informed Ms. Lynch that before

submitting his affidavit there was material which he wished to obtain from the Society and that he would seek discovery from the complainants. If he did not receive the documents sought, he advised that he would apply to the SDT for discovery.

407. On **25th July 2004** Solicitor X wrote *"in relation to your requests etc for minutes etc, all relevant documentation including minutes have been exhibited in the society's affidavit. In relation to your letter referring to conversations with Mr* [REDACTED], *Mr* [REDACTED], *as you are aware is the solicitor on behalf of the complainants".*

408. On **9th August 2004** Mr. Murphy wrote to Solicitor X seeking *"the memos of all conversations between Mr.* [REDACTED] *and the Law Society of Ireland in relation to the complaint and any correspondence. I do not believe all documentation in this regard is included in the minutes exhibited in the Society's affidavit. Please let me have all memos of all conversations with* [REDACTED] *and all letters to and from Mr.* [REDACTED] *in relation to the complaint. If I do not receive the documentation as requested I will make an application for discovery of same."*

409. Mr. Lynch wrote to Mr. Murphy on **7th September 2004**, noting that he had not availed of the opportunity to file a replying affidavit. She informed him that the SDT, in deciding whether there was a *prima facie* case for an enquiry, would consider the application and Ms. Kirwan's affidavit sworn on 11th June 2004.

410. Mr. Murphy replied to Ms. Lynch on **9th September 2004**, enclosing letters which he had written to the Society on 9th July 2004, the Society's reply of 25th July 2004 and his further letter of 9th August 2004 to which he had not received a reply. He informed Ms. Lynch that it was his intention to seek an order for discovery.

411. Ms. Lynch wrote to Mr. Murphy on **13th September 2004**, noting that the period within which to submit a replying affidavit had expired and she stated that while Mr. Murphy had written on **9th July 2004** no further communication was received until the SDT received his letter of 9th September 2004 in response to her letter of 7th September 2004. Ms. Lynch advised that as he had not applied to the

SDT for an extension of time, the matter would be listed before the SDT on 14th September 2004 "*to decide whether or not there is a prima facie case of misconduct on the part of the respondent solicitor for inquiry*."

412. On **14th September 2004** Mr. Murphy again wrote to Ms. Lynch stating that there were a number of matters in respect of which he required discovery from the Society and from the complainants. He reiterated that he had written to the Society on 9th August 2004 and he said that the Society had not replied to that letter. He continued "*if the application before the Tribunal today were adjourned for one month the discovery process should be well advanced by the return date*." The request for an adjournment was refused. On 14th September 2004 the SDT found that there was a *prima facie* case of misconduct for inquiry into the fifteen complaints. Mr. Murphy was written to by Mr. Lynch on 20th September 2004 and advised him that the SDT had declined his request for an adjournment and informed him of the opinion of the SDT that, having considered the form of application and Ms. Kirwan's affidavit sworn on 11th June 2004, there was a *prima facie* case of misconduct in respect of the each of the allegations.

Schedule III

71. The SDT Hearings of 15th April, 2008, 25th April 2008 and 10th July 2008

(a) SDT hearing on 15th April 2008

413. Mr. Murphy was not present. He had an injury and was unable to travel. The transcript for 15th April 2008 records that his counsel sought an adjournment for one week. This was opposed by the Society. The SDT adjourned the application peremptorily to 25th April 2008 and costs were awarded against Mr. Murphy. On **15th April 2008,** Ms Kirwan gave limited evidence. Counsel said that she was being called "*to establish the dates because I want it done in evidence rather than through my submission".* Ms Kirwan's evidence was as follows:

> *"*Q. *Mr. McDermott : Ms. Kirwan, you swore the affidavit of complaint in this case?*
>
> A. *Yes*
>
> *Q. And I am just going to take you through five or six of the key dates in it and if you could simply confirm that those are correct and they are dates which come from your affidavit. I don't think there will be any controversy over these. The first letter of complaint came in on 10th June 2002.*
>
> *A. That's correct.*
>
> *Q. So it's, what, seven and a half almost eight years now since the first complaint was made?*
>
> *A. Six years.*

Q. Sorry, six years. On 17th December 2002, the solicitor fails to attend the Registrar's Committee?

A. That's correct.

Q. And that's one of the allegations he faces today?

A. Yes.

Q. On 18th February 2003 he failed to attend again and that's another allegation he faces today?

A. That's correct.

Q. In order to try to force him to engage the Society, I think in July 2003 the Society brought him to the High Court?

C. That's correct.

Q. And I think your colleague, [Solicitor X], was involved in that and we can go back to that. I think, and [Solicitor X] will confirm this, on 31st of July 2003 his barrister told the High Court and undertook that he would attend the next meeting of the Registrar's Committee?

A. Yes.

Q. And that was in December 2003 he failed to attend? (In evidence in the civil proceedings Ms Kirwan clarified that this should have been April, not September, 2003, see day 8, p. 120)

A. That's correct.

Q.. Notwithstanding the undertaking his barrister had given the High Court, and that's another allegation he faces today. And on 30th September 2003, a decision was made by the Committee to refer him to this Tribunal?

A. Yes.

Q. And I think your affidavit of complaint was sworn on 11th June 2004?

A. That's correct.

Q. And as I understand, and in fact this is a date in the Tribunal's own knowledge, on 14th September 2004 the prima facie decision was made?

A. Yes, we were notified.

Q. Mr. McDermott: I think [Solicitor X] can deal with the dates after that. Thank you.

End of direct examination

Mr. Nix: I have no questions."

Considerable significance has been attached by Mr. Murphy to this evidence.

414. Solicitor X was called to give evidence. In answer to counsel, she confirmed that on 20th October 2004 Mr. Murphy had sworn an affidavit seeking discovery, at para. 2 of which he averred *"... I confirm I intend to defend this matter in full and had prepared a replying affidavit and will apply to the disciplinary tribunal for leave for the late filing and serving of the replying affidavit."* She confirmed that no replying affidavit had been received. Solicitor X was questioned as follows by counsel for the Society:

"Q.... I think Mr Murphy sought discovery both from the Society and from Mr [REDACTED] *who is the solicitor for the* [REDACTED] *who are the complainants?*

A. *No. He sought discovery from the Society and from Mr* [REDACTED]*'s clients,* [REDACTED] *and* [REDACTED].

Q *And my understanding is that in November and December 2004, the President of the High Court in effect said--he looked at some documents and said there is --I think the solicitor had been suggesting there was*

some conspiracy against him, that Mr [REDACTED] *had a favoured position with the Society. The President looked at the documents and indicated there's nothing there to establish that, you might as well give them to him.*

A. Yes.

Q. And I think you swore a discovery affidavit on 16th December 2004?

A….. Mr [REDACTED] *didn't.* [REDACTED] *and* [REDACTED] *produced certain copy documents that Mr Murphy was looking for. There are elements of which to the case nobody could see."*

Solicitor X also gave evidence in relation to what occurred on 12th November 2007, explaining that Mr. [REDACTED] had overlooked the hearing and was acutely embarrassed. He offered to fly from Cork to attend in the afternoon, an offer not accepted by the SDT. The hearing was adjourned to 13th March 2008, when Mr. [REDACTED] and [REDACTED] were in attendance and when the matter was further adjourned.

(b) SDT hearing on 25th April 2008.

415. The Society's presentation of the evidence to the SDT was based on the correspondence, the evidence of Mr. [REDACTED] and [REDACTED], and Ms. Kirwan's affidavit. Ms Kirwan did not give evidence and thus was not questioned on the contents of her affidavit. Counsel for the Society in opening went through the correspondence. Mr. [REDACTED] gave evidence and was cross examined. He explained that he had acted for the [REDACTED] family in the past and that there was a period in which he did not act for them. His evidence was that in 1999 he was approached by [REDACTED] and [REDACTED] who wished him to act for them in place of Mr. Murphy. He prepared an authority which his clients served in November 1999. He wrote numerous letters and had conversations with Mr. Murphy seeking papers. Nine letters were written before he received a response. Papers were not enclosed. Further letters were written before he received a second reply. This did not enclose papers but opened issues concerning a dispute between [REDACTED]

and [REDACTED] and [REDACTED]. Mr. [REDACTED] said that they felt significantly disadvantaged because Mr. Murphy had sight of papers, while they did not. He gave evidence that he wrote 43 letters and not many of them were responded to. He never got the original file but he did get some copy papers when, he said, on one occasion he was invited to Mr. Murphy's office. On that occasion, in the presence of Mr. Conor Murphy, Mr. Colm Murphy not being present, he was permitted to look at papers. He took notes. The Schoenberg file was not among the papers shown to him and he said that relations between him and Mr. Colm Murphy deteriorated thereafter. He subsequently met Mr. Conor Murphy who gave him an explanation in relation to the Schoenberg conveyance. Some documents were stamped and not registered and some were neither stamped nor registered and he expressed concern at this situation. He was asked about the risks which might arise if one of the parties died and if the property was in Mr. Murphy's name without documentation to show that it was held in trust. Mr. [REDACTED] was also questioned about other transactions between or involving the [REDACTED], the soccer club rent and the deduction from the arbitration award, which he said he had never been able to get to the bottom of.

416. When Mr. [REDACTED] was cross examined by counsel for Mr. Murphy, particular emphasis was placed on transactions concerning the Beeches and Schoenberg lands, near Kenmare, which had been accumulated by the [REDACTED]. He was queried about his involvement in the transaction, his representation of Mr. [REDACTED], about a disputed right of way on those lands and the manner of their sale. Initially, the tender price was approximately €12 million. The tender did not proceed and it was put to him that, at Mr. Murphy's insistence, it went to public auction and sold for in excess of €19 million. He was also asked questions in relation to an affidavit which had been sworn by him in the High Court.

417. Mr. [REDACTED] was questioned in detail about correspondence from July 1991 in which it was stated :"*our clients Hibernia Products Limited sold*

Schoenberg to Colm Murphy (in trust) property lands at Kenmare". Mr. [REDACTED] could not say that he had previously seen that letter. He accepted that at the time the property was registered in Mr. Murphy's name he had *"very well acknowledged both to the Society and through Conor Murphy to me that it was indeed held in trust."* Mr. [REDACTED] thus fully accepted that Mr. Murphy had acknowledged both to the Society and through his brother Mr. Conor Murphy, to him, that the Schoenberg land was held in trust. He also said that neither he nor his clients bore ill will towards Mr. Murphy. In reference to letters which Mr. Murphy had written to the Society, he replied "*I would prefer if those issues were left behind us"*. While Mr. [REDACTED]'s letter of 5th October 2006 to Murphy Healy was discussed, no questions were asked about the propriety of any conversations or communications which Mr. [REDACTED] may have had with the Society or about any conversation he may have had with Mr. Murphy regarding how seriously he or his clients viewed the complaints.

418. [REDACTED] in evidence said, in reference to the payment of €22,141, that he did not recall ever seeing a statement of balance prepared by Mr. Murphy. He said that he never gave Mr. Murphy permission to deduct that sum from the arbitration award, nor was he aware of anyone having given permission on his behalf. He did not know what the sum of €22,141/€24,000 deducted concerned. He had not seen any bill for the €24,000 in respect of work done. It was his understanding that all arbitration costs would be paid by Kerry County Council. When asked whether he received a bill from Mr. Murphy for work done with either the total of €22,141 or €24,000 at the bottom of it, he said that he hadn't seen it. He had no idea what the money was taken for. It was his understanding that Kerry County Council were paying for everything. When asked whether, had he known on 1st November 1995, that Mr. Murphy had deducted the sum of 22,141 from the award and whether he would have queried it he answered- *" I didn't know because we never actually saw the amount that was awarded to us, we never…got it.*" He was asked whether he had received anything in writing setting out how much had been received from the

arbitration, and how much had been paid out. He replied that a letter had come *saying the amount of 134,000 and that was all*. Specific questions were raised about the letter of 2nd November 1995. He was questioned by Counsel for the Society as follows:

> *"Q. ...I'd like to refer to one letter which I referred to in my opening, it's page 80 of LK 2 and it's a letter dated 2 November 1995, to* [REDACTED], [REDACTED] *and* [REDACTED], *Market Street, Kenmare County Kerry. It says: "Re:Account. Dear* [REDACTED], [REDACTED] *and* [REDACTED], *I refer to the above matter and confirm I have deducted to date the sum of 20,100 from your account, together with VAT in the sum of 4431." Do you recall ever getting that letter?*
>
> *A. No, because my address is Sallyport house.*
>
> *Q. And just ignore the scribbles by the side of the letter, but just have a quick glance of that to make absolutely sure we are talking about the same document. Just have a quick glance, you know my writing and look at the text.*
>
> *A. Yes, it is addressed to* [REDACTED], [REDACTED] *and* [REDACTED], *Market St, Kenmare.*
>
> *Q. And did you ever receive that letter?*
>
> *A. I haven't seen sight of that, no.*
>
> *Q. And do you have any idea why it would have been addressed to Market Street, Kenmare if it seems to be written to all three of you?*
>
> *A. I don't know. I never lived at that address.*
>
> *Q. Did your brother* [REDACTED]?
>
> *A. Yes*
>
> *Q. And* [REDACTED]?
>
> *A. No."*

419. Mr. [REDACTED] was queried about bills which were issued on 6th March 2003. He said he was astonished by the bill and that "*we expected the Council were paying everything*". With regard to the soccer club, he said that he did not receive rent or a rental agreement and did not give permission to use rental payments for fees. Questions arose in relation to the Schoenberg property. He said that the first he knew anything about the land being in Mr. Murphy's name was after Mr. [REDACTED]'s meeting following his complaint to the Society. He stated that he found it hard to believe that the property was in Mr. Colm Murphy's name and he never received a letter from Mr. Murphy explaining the manner in which the property was held.

420. Mr. [REDACTED] was cross-examined at length in relation to the various property transactions and correspondence sent to him in respect of fees, some of which correspondence he could not recall seeing. He agreed that [REDACTED] lived at Market Street. He was questioned about a letter concerning the subdivision of lands which had been sent to that address on 24th of March 1998. He did not recall seeing it. It was put to him the post was sent to that letter but he said he did not know this. Some of the letters were written - "Dear John". He said he had not seen these letters either and queried why they had not been sent to his address at Sallyport. It was suggested to him that meetings took place in Mr. [REDACTED]'s house in Market Street and that this was the address to which correspondence was sent. Counsel put to him that he was the person who dealt with the accounts. He accepted that he did some of the accounts. He was also questioned about purchases, sales, the value of the properties and tax advantages in having the Schoenberg property bought in trust. When questioned in relation to a number of transactions about which he said he could not remember, it was put to him that if he could not remember paying off sums of money, that it was possible that his memory was faulty about Mr. Murphy telling him and then writing to him and informing him that he was taking 20,000 plus VAT on account of fees due and owing to him.

421. He did not recall an issue being raised by counsel who acted in the arbitration, about whether there would be a difficulty obtaining compensation for the Schoenberg lands, since they were in the name of Mr. Murphy. It was also put to him that there were tax advantages in buying land in trust. He replied that he did not know that.

422. The Chairperson intervened to enquire why questioning was focused on the value of lands in Kenmare in the 1990s. In reply, counsel for Mr. Murphy stated that the credibility of Mr. [REDACTED] was at issue. Counsel pointed out that the witness was saying that he did not know that Mr. Murphy was instructed to purchase the land in trust and that he did not know it remained in trust until it was registered to be sold. Counsel said that Mr. Murphy was instructed to purchase the land in trust. It will be recalled that this complaint was not upheld.

423. Neither Ms. Kirwan nor Solicitor X gave evidence on 25th April 2008. Counsel for the Society stated that he was relying on the contents of Ms Kirwan's affidavit and that he did not propose to call her. Counsel said:

> "*But obviously if she is required for cross examination to dispute any of those letters or any of what happened in the High Court, that can be done. … Equally if there is any dispute about what happened in the High Court, [Solicitor X], my instructing solicitor, I think attended at those dates and confirm the minutes of what the President said if there is any dispute over that."*

424. What is said to have occurred before the President on 31st July 2003 was addressed at para. 27 of Ms. Kirwan's affidavit sworn on 11th June 2004. Ms. Kirwan also averred that Mr. Murphy had delivered to the Society an affidavit sworn on 30th July 2003 and particularly highlighted para. 8 where Mr. Murphy stated his belief that he had dealt with all matters in relation to the Registrar's Committee except in relation to the itemised bill of costs for the solicitor/client fee for the arbitration. It will be recalled that at paragraph 10, on which the SDT ultimately placed some emphasis, Mr. Murphy had averred that he was willing to do whatever was necessary

to bring the matter to a conclusion and confirmed that he would again *"attend any Registrar's Committee meeting with the client files if same should be necessary"*.

425. Mr. [REDACTED] did not give evidence. This was alluded to by counsel at page 80 of the transcript-"*I think he is unwell at the moment and he can't be with us".*

426. Mr. Murphy in evidence outlined the background to his interaction with the [REDACTED], business dealings which he had with them, work that he had been engaged to do for them, his involvement in the purchase of properties and in personal or individual matters. He said that there was no particular billing policy. Preparing bills was never one of his *fortes*. Considerable work was completed for which he never charged. They had become friends and there was a feeling that matters would be sorted out someday. He gave evidence in relation to the Schoenberg land and disputed the allegation that his clients were unaware that the lands had been bought in trust by him. Ultimately the land was registered in his name in 2004 for the purpose of sale in the same year. The Beeches property was purchased in 1996. This was crucial for the Schoenberg property as it gave access to the main road and access was key to its value. The land was purchased between the [REDACTED] and Mr. [REDACTED]. The partners had fallen out because of a disagreement over subdivision. Mr. Murphy said that it was decided that he could continue to work for Mr. [REDACTED] with Mr. [REDACTED] working for Mr. [REDACTED] and Mr. [REDACTED]. On 28th May 2002 he served a notice of dissolution of the partnership. The complaint was made two days later. When he received monies in 1995 a considerable number of persons were owed fees by the [REDACTED]. The account was ongoing. While he was owed fees, he had not sent any bills, except when he worked for the [REDACTED] on an individual basis or where separate payment was required. Partnership dealings were ongoing. His evidence was that when monies came through he informed the [REDACTED] that he had worked for them for five or six years and that he was taking some money being a professional fee of €20,000 plus outlays plus VAT.

427. Mr. Murphy was taken through the complaint which he made against Mr. [REDACTED]. This was dismissed by the Society. He said he never even got a reply about that complaint and had tremendously hard feelings about it.

428. The letter of 6th October 2006, from Messrs P.J. O'Driscoll (Mr. [REDACTED]) to Murphy Healy & Co was addressed. While it contained the heading " *re:* [REDACTED]*"*, Mr. Murphy said that "*it is obviously meant to be about me*." There were *"lots of bills outstanding to me that must be done up yet, and there are balancing figures to be done and there is a balancing procedure that has to be done, I have never denied that"*. He said that he agreed completely with the terms contained in the letter.

429. Mr. Murphy then referred to the initial complaint made on 30th May 2002, two days after he served the letter to dissolve the partnership. He explained that proceedings issued, various motions were brought and on 11th November 2002 an agreement was arrived at that certain lands would be sold, that there would be joint carriage of sale between his office and Mr. [REDACTED]'s. It was decided that the lands would be sold by tender. Tender documents were drawn up. He said that everyone knew that the land was in his name and the manner in which stamp duty would be paid was decided. The land was transferred to the [REDACTED], as were all documents in sale. He had never argued that the land was his. As far as he was aware no revenue penalty was paid. The tender documents had been drawn up. In late 2002 he had disquiet about the way things were moving. He had heard on the ground that Mr. [REDACTED] had given away part of the right of way that the [REDACTED] had over his land. His fear was that if his client signed the contract permitting someone a right of way over land in the part of the strip which had been disposed of, then they would have contracted to sell something which they could not. Mr. Murphy said that he advised his client to get to the bottom of this immediately. He was concerned about his potential exposure and insurance cover. He and his client spent time working on it. Letters were sent to Mr. [REDACTED]. Correspondence was exchanged between the parties. It would appear that arising from these matters,

Mr. Murphy wrote a letter of complaint about Mr. [REDACTED] to the Society, to which he said he did not receive a reply.

430. Mr. Murphy then referred to the Society's investigations in 2001/2002. He gave evidence in relation to the sale of the lands, the involvement of a client of Mr. [REDACTED], the manner in which the parties wished to approach it and his insistence that the property could be sold with the benefit of the right of way under the previous agreement. This would mean that Mr. [REDACTED]'s clients could not use the access road for building. Mr. Murphy said that "*the hiding of this transfer of the lands to us, the denying that it took place is the cause of an awful lot of this problem*".

431. Mr. Murphy's counsel then questioned him as follows:

> *" Q. Now, there is no doubt that over a period of time because of the circumstances that we have described and possibly other reasons, you weren't reasonable in your replying to the issues being raised by the Incorporated Law Society, do you agree with that?*"
>
> *A. Yes, but there was a lot of other reasons. I was writing to them about the story going around about what was being said about it in Cork, and I was getting no replies.*
>
> *Q. And you perceived that you were being dealt with differently by the Incorporated Law Society than other people* ?
>
> *A. Absolutely."*

Mr. Murphy accepted that this did not help him. He explained that he felt quite depressed at this time because of the "*story*" which had been going around which he said did a lot of damage, which he said, he knew could only have come from the Society. He could not get his head around it. He was subsequently diagnosed with a condition which he maintained was entirely brought on by the Society's conduct.

432. Mr. Murphy was questioned about the other allegations, including failure to issue s. 68 letters and about the rental income from the soccer field. On the issue

of handing over files to his former client's new solicitor, he replied that they might have been entitled to copies of the files but he could not see why they should have the files and not his client. "*If they had suggested give us a copy maybe that would have worked, but I didn't think they were entitled to them*." He also accepted that the President of the High Court had told him to give them a copy of the documents, which he did. Mr. Murphy also responded to allegations in relation to the failure to account for the sum deducted and the issuing of the bill for €73,705. He said that this would have to be referred to taxation. He would estimate the bill and then send it to cost drawers. With regard to the allegation of failure to complete the normal conveyancing procedures in relation to the purchase of the Beeches and Schoenberg properties, he replied that it was quite obvious that the money used for the purchase of Schoenberg's did not come through "*the normal channels*". What was done was for the benefit of his clients. There was absolutely no gain for him.

433. Mr. Murphy was questioned about matters the investigation of May 2001, and his interaction with the Society at that time. He said that the Society felt that he "*was handling under the table payments to clients, they made me go through every file, there was 40 incidents. Every one of them was proved by me to be correct and in the end they closed that investigation and found absolutely no fault with what I had done."*

434. Attempting to explain his attitude to the Society, Mr. Murphy's counsel questioned him as follows:

> *"Q. Now, I think about this time also you began--and I am trying to explain your attitude to the Incorporated Law Society because, let's be honest about this, you have been a naughty boy, a very bold boy but I think your arteries hardened; would you agree with me?*
>
> *A. Yes.*
>
> *Q. Now, first of all, you had a complaint that you felt had not been responded to, and then you had the investigation and these*

complaints were all answered, and I think the following year you got a clean bill of health".

He was then asked about what was then *"happening on the streets of Kenmare",* about what his brother had heard and what he also had heard from others. These rumours were said to be attributable to an officer of the Society. The questioning continued:

> *"Q. Now, that combined with what you perceived as no action on the complaints you had made against Mr Butterly, (sic) I think it's fair to say that caused your arteries to harden and made it difficult for you to properly deal with the business of the Incorporated Law Society. Now, that is being very polite about it. Would you agree with that?*
>
> *A. That is being extremely polite about it".*

435. Mr. Murphy was also questioned about the land which was sold by auction rather than tender. He said that that another client of Mr. [REDACTED]'s was trying to purchase the land and that he was extremely nervous from an insurance perspective. He accused Mr. [REDACTED] of telling mistruths at that time. He said that he had to go to the Cayman Islands to get a memorial of land which had been transferred by Mr. [REDACTED] and that Mr. [REDACTED] apologised "*on two affidavits*" for this. He gave evidence that due to his client's perseverance in instructing him, the land was sold for €19.4 million instead of €11 million. He gave further evidence in relation to his dealings with the [REDACTED], that he was friendly with them, that they would speak about bills but that they would say that they would not worry about that, and that he trusted them. He was then asked-

> "*Q. okay, so that's why in reality you haven't done it yet but you agree to go to taxation on it?*
>
> *A. I would go to taxation on the costs, yes."*

His counsel also went through the issue of vouching. In the seven years that had elapsed since he acted for Mr. [REDACTED] against [REDACTED], no one ever asked him about these monies because everyone knew there was not much money there.

436. He was questioned about his failure to attend the meetings of the Registrar's Committee on 17th December 2002 and 18th of February 2003, and he was also questioned about the undertaking:

> *"Q. Now, you failed to attend a further meeting of the Registrar's Committee on 13th (sic) September 2003, that was under an undertaking given by counsel to the President of the High Court, do you see that?*
>
> *A. Yes.*
>
> *Q. You were out of the country at that time; is that right?*
>
> *A. Yes.*
>
> *Q Well, without going into too much detail, why did you go out of the country?*
>
> *A. What meeting was that?*
>
> *Q. September 2003?*
>
> *A. Because I had to take one of my children out of the country for a number of weeks to get treatment for something, and I don't want to go into it."*

This has been addressed in both the principal and review judgments.

437. At the conclusion of the hearing on 25th of April 2008, it was agreed by Mr. Murphy's counsel that Mr. [REDACTED] and his client could be released, the Chairperson noting that they might be available if something *"raises its head."*

(c) SDT hearing on 10th July 2008.

438. On the adjourned hearing date, 10th July 2008, Mr. Murphy was cross examined by counsel for the Society. He was asked whether his psychiatric condition

was being proffered as an explanation for his conduct. Mr. Murphy replied that it was not an explanation. He suffered an illness because of what happened to him in 2001, when the Society conducted their investigation and when rumours were in circulation. He attributed his medical condition to the actions of the Society; that is what his doctor had told him.

439. Mr. Murphy accepted that it was proper for solicitors to cooperate with the Society but he believed that the Society should also conduct itself properly. While accepting that he did not have the right to refuse to engage with the Society, he thought that how they had acted coloured the way in which he would deal with them. He referenced the delay in receiving a reply when he queried the Society about the basis on which the undertaking as to damages was given to Finnegan P. in October 2002. The attachment and committal proceedings were addressed. He was questioned about the rent from the soccer field, whether he had a written authorisation permitting the deduction of rent received as fees and was also questioned on the number of ledger cards which he had in respect of the [REDACTED]. Mr. Murphy referred to the meeting of 29th July 2003 when he had come to Dublin with an account card but the Committee said it did not want to see it. He did not accept that by placing the sentence "*we do not collect rents for any clients*" in a letter which he had written to the Society, it would give the reader the impression that there was a doubt about whether rent being was paid into the office. He said that to say that he *did not collect rents* meant that he did not go to people telling them that the rent was due. Counsel also asked Mr Murphy about the arbitration that had been finalised in 1995, and that by May 2002 the [REDACTED] had complained that they had not received an account for the disbursement. He accepted while it was factually correct to say that as of that date they had not received documentation showing where monies from the County Council had been dispersed, he pointed out that the complaint was made two days after he had served a notice of dissolution of the partnership. While they had not received a detailed breakdown, the breakdown itself was obvious by reference to the amounts they received from the

arbitration and the amount in respect of the Beeches. This provided a general explanation of where the money had gone. He agreed that in July 2002 he furnished a written account in respect of monies received in 1995. He was questioned about interest on funds and about stated disbursements. In particular, counsel focused on how Mr. Murphy knew on 1st November 1995, the precise sum to pay himself so that it would balance out as of July 1996, which was when the interest payments calculated. He explained that there was an error in that amount. Mr. Murphy said that he had sent a letter at the time informing the [REDACTED] that he was deducting £20,000 plus VAT as payment on account. It was not on a particular account but was a general payment for works done. He accepted that he did not have authority in writing from the [REDACTED] to deduct money from the arbitration cheque. However, he said that he had written to them at the time and no one had complained until two days after the partnership was dissolved. Mr. Murphy was further questioned as to whether, when he furnished the statement of account in respect of the arbitration with the County Council in March 2003 and had raised a fee of €60,000, this was in response to the Society's query about the deducted amount of €22/€24,000 (€22,141). He agreed but said that it was a general statement of account, without prejudice to taxation… *"(t)heir solicitor already suggested we go to taxation about these and that's the way you resolve it."* The sum deducted did not go to specific bills, all bills would be taxed and balanced, which would include money received *"including rents like the soccer field were paid off something. There was different amounts paid here and there and obviously at that stage the £24,000 would become an issue because there would be a full statement of accounting".* He again referred to the agreement about taxation in the letter of 6th October 2006, which he described as a letter from the complainant's solicitors "*saying that's the way it would be dealt with and I agreed with that".* He was asked whether it was being suggested that this letter written some ten years later, *"retrospectively authorises the money you took on 1st November 2006",* Mr. Murphy said that the letter

acknowledged the reality of the situation; that the clients knew that he did not steal money.

> *"They knew there would have been an accounts procedure at the end of the day. I am sure they themselves would acknowledge that they owed me lots of money for work and once that's sorted out, the balancing procedure would be done. I think it's not that complicated to understand."* (Transcript SDT, 10th July 2008, p.54)

The [REDACTED] were good clients and good friends and it was an ongoing account. A lot of work was done.

440. Mr. Murphy explained that reference in his letter of 4th July 2003 to the payment on account made when the arbitration monies were received, was not an attempt to link the sum to the arbitration award, it reflected the date the money was taken, not what it was for. This was also reflected in his letter of 16th July 2003. He said that all of these questions would have been answered had the Committee accepted his invitation to look at documents on 30th July 2003.

441. Mr. Murphy was questioned at length about his failure to respond to correspondence from the Society, and that his reply was to be offensive to the solicitor who was acting for the complainants, without dealing with the Society's queries. Mr. Murphy said that there had been four issues involving former clients before the Society and all of those involved Mr. [REDACTED]. He described this as one of the greatest coincidences of all time or else that there was something else that he did not know of. He also accepted that he had *taken slight* with Mr. [REDACTED] in correspondence. It was suggested to him that he appeared to have an *utterly unreal appreciation of his duties to the Society and how its Committees worked.* He replied…*"it all depends…I mean, if a solicitor is really busy and…up to his eyes doing a thousand things, it's hard to get around to this thing. I mean I was still working on the* [REDACTED] *case every day probably."*

442. Mr. Murphy was questioned about meetings which he did not attend for reasons stated to be connected with his schedule or because he was out of the country.

He was asked whether he had placed dealings with his regulatory body at the bottom of his list. He denied this and the questioning continued:

> *Q. … And do you think it's acceptable when dealing with a regulatory body to say I was too busy?*
>
> *A Well, I think there are times when it can be justified."* (Transcript 10th of July 2008 p.68)"

443. Mr. Murphy stated that the files belonged to the partnership. He had a duty to [REDACTED] and could not just give the documents away. It was put to him however, that the issue was simple, and concerned answering letters and turning up for meetings. He was asked whether it came as a surprise that the Committee, following the meeting on 18th February 2003, felt that the only way to secure compliance was to bring him to the High Court. He answered: "*no, at that stage I wasn't surprised, no",* although he thought that they would understand. When questioned why he didn't move to reply when the Society had written to him "*on pain of going to the High Court"*, he again referred to the High Court proceedings between the [REDACTED]. He repeated that he did not believe it would have been correct for him to hand over the documents to anyone at that stage. It was pointed out to him that the letters from the Society included more than a request to deal with a complaint about failure to hand over papers.

444. Mr. Murphy queried why the Society did not tell the client that there was another legal remedy open to them and why the matter was not settled within the ambit of the proceedings in existence between the [REDACTED]. He said that he felt it would have been safer to let the Society go to the High Court and that an order be made to hand over the documents. Counsel for the Society asked Mr Murphy whether he could distinguish between issues which he may have had with the [REDACTED] and his relationship with Society as his regulatory body. He replied that in this particular case the matters were entwined. Mr. Murphy spoke of the "realisation", that he had come to "afterwards", that he had a difficulty dealing with

the Society then because of all of the things that they had done to him, but he did not understand at the time why he had such difficulty…*"I wasn't saying I'm not replying to you because you don't reply to me. What I'm saying is that because of what happened in the history and the rather fraught history I have had with the Law Society that I found it hard to deal with a lot of stuff that they did"*. Mr. Murphy also clarified that when he wrote saying that he had every intention of cooperating with the Society, that this would always be subject to what was happening in the [REDACTED] case. Questions were also raised in respect of the s. 68 letters and the stamping of deeds.

445. While he accepted that he did not have the right to refuse to engage with the Society, Mr. Murphy said that the view which he formed that the Society had not conducted itself properly coloured the way in which he dealt with them. In this regard he raised the issue about the undertaking as to damages and the failure to receive a response to his queries on this. He continued:

> "*…It doesn't totally justify me burying my head in the sand but all I'm saying is that if the Law Society or members of the Law Society continue to refuse to engage with me on certain matters, then it affects the way I affect them. I think that's a normal reaction. I'm not saying it justifies it, I'm saying it's a human reaction.*"

446. Mr. Murphy was then questioned about the contents of the memorandum of what occurred before Finnegan P. on 8th July 2003. He said that he could not remember if he was present then but that he *"certainly had counsel there."* When questioned whether comments by the President that he had been bringing the profession into disrepute *"in an outrageous way"* would have stuck in his mind if it had happened, he replied that he did not remember if he was there or not. He said that he was sure that if he was not there it would have been noted and he concluded *"I'm sure I was there".* He was also asked whether he remembered what was said by the President had been conveyed to him either because he was there or because a solicitor or barrister informed him to which he replied, "*I do, yes*" (Transcript 10th

July 2008 page 103). He was not disputing that the President of the High Court had said, that he was bringing the profession into disrepute. When asked whether this caused him concern, he replied that, on one level, it was almost in ease of him to be directed to hand over the files. With the benefit of such order he felt that any liability he might have was limited. He said had significant concerns in respect of the [REDACTED] file and without a specific court order he would not *"have given anything belonging to anybody away."* Mr. Murphy also accepted that the President of the High Court had said that as far as he was concerned, the suggestion by Mr. Murphy, that he could not deal with Mr. [REDACTED] or that he had an issue with him, was not relevant. Another extract of the note of what occurred in court on that day was put to him- "*the President said Mr Murphy seemed determined to obfuscate as long as possible and he would not tolerate that".* He accepted that that was brought to his attention.

447. With regard to the undertaking Mr. Murphy said: *"I didn't give an undertaking and if the Law Society had done an investigation and checked the High Court orders, which I have done since, you will see there was no such undertaking given to the President of the High Court."* Mr. Murphy was then questioned by the Chairman of the SDT as follows:

> *"Q. Chairman: ... Just to clarify, just to abbreviate, are you saying you attended the meeting or are you saying that you didn't attend but that you never gave an undertaking that you would attend.*
>
> *A. No, what I'm saying is that there was no undertaking given by counsel to the President of the High Court to attend that meeting."*

448. Mr. Murphy agreed that he did not attend the meeting but he disputed that he gave the undertaking and relied on wording of the High Court order in support.

When questioned about the contents of the Society's attendance note, he said that his counsel had said that he was *prepared to undertake* as distinct from *undertaking*. (See transcript 10th of July 2008, page 106). The questioning continued:

> *"Q. And when a barrister stands up in court, Mr Murphy, and says to the President of the High Court my client is prepared to undertake. Are you seriously telling us that that actually means, well, he'd be prepared to undertake but I'm not actually saying he will? Are you seriously…*
>
> *A. It would depend on what the order said afterwards."* (Transcript 10th July 2008, page 106)

449. The questioning continued (transcript 10th July 2008 p. 108, q. 466 *et seq*):

> *"Q…Did your barrister tell you that he stood up before the President of the High Court, and clearly he was trying to defend you under some pressure, and say that you were prepared to undertake to attend at meetings of the Registrar's Committee?*
>
> *A. Yes, and he said that I was prepared to undertake. That's a big difference from undertaking because you said later on that I undertake. There's a big difference in being prepared to undertake as to undertake. If you look at the High Court order, have you seen the orders?*
>
> *Q. Mr Murphy, I won't repeat myself. I'll ask the questions…(interjection)*
>
> *A But, I mean, I'm presuming you haven't seen the order if you don't know what you're talking about.*
>
> *Q. I'm going to ask the chair, because you are under oath and they have the powers of the High Court, that if you don't comply with that one more time, I'm going to ask the Chair to exercise its powers under the Act. Do*

you understand that? Do you understand that I ask the questions in cross…(interjection)

A I understand that, yes.

Q Can you apply that understanding to this occasion?

A. Okay, okay, right, okay. In relation to that day in the High Court, I am reading from the High Court order. It says… (interjection)

Q. Mr Murphy, I'm asking you a question. Firstly did your barrister tell you… (interjection)?

A.I don't remember what happened on the day and you are reading from a Law Society memo. I will go by the High Court order. I went into the High Court Office to get the two orders and that's what I'm reading from.

Q. Why did you take up the orders if you had a barrister telling you what happened in court?

A. Because I wanted to know exactly what the terms of the order was because the Law Society were making a very specific charge that I undertook to attend the meetings on 31st September, which I didn't do. That's why I looked it up and I think maybe the Law Society should have gone to the bother of doing some investigation and go into the High Court office and take up the order because I did not undertake to attend the meeting on 20th (sic) September.

Q. So just to be clear, you have now said two things. I think firstly you'd indicated your barrister had told you what he'd told to the President of the High Court and now you're saying you can't remember. Can we just at least pin down which answer you'd prefer to give at the moment?

A You're reading from the memo of the Law Society thing. I'm actually going by the High Court order…(interjection)"

450. Copies of the High Court orders having been handed to the SDT, the Chairman addressed Mr. Murphy about what happened in court on what he referred to as the 9th July. The Chairman continued (question 473):

> *"Q . ... In relation to the order, you have been asked a question in relation to contact and communication between you and your barrister in relation to what happened in court on 9th July. That's what's in issue. Now, you have told us that you don't remember whether you were in court that day…(interjection)*
>
> *A. Yes, I don't remember specifically."*

451. Mr. Murphy stated that he knew he had been in court for one of the hearings. He confirmed that he did not specifically remember whether he was in court on that day but he said that he thought that he was. The Chairman then asked:

> *"Q. And you say that you don't really remember what your counsel may have told you?*
>
> *A. No, I don't remember specifically, no, as it's so long ago."*

452. Mr. Murphy later said that he was told that ...

> *"I had to attend the meeting on 9th July. That may not be the correct, it was 29th July. I went to that meeting. I was never told or didn't believe that there was any order outstanding in relation to the meeting on 30th, so I went to get the High Court order to see what did the order say. The order said nothing about a meeting on 30th September…"*

When questioned about what his barrister or solicitor had said to him in July 2003 regarding what had been said to the President the High Court in relation to his attendance at meetings, he replied that he was to attend the next meeting which was 29th July and that he was to bring everything with him. He repeated that he drove up the day before the meeting and brought everything with him. Mr. Murphy was then questioned about the letter of 16th July 2003. He replied that it

was written because the President also ordered him to reply to a letter. He agreed that he was aware of what had been said although he said that he did not know the exact detail and that he complied with the order. He did not know whether he was ordered or had undertaken to attend the meeting on 29th July 2003, but he attended on that day. The minutes of the Registrar's meeting confirmed that he was there.

453. He was then questioned on the contents of the memorandum of 31st July 2003 (q. 507 et seq.)

> *" Q. Then over the page we see an attendance before the High Court on 31st July 2003.*
>
> *A. Yes.*
>
> *Q. And you'll see your barrister--again, I assume the barrister was acting on your instructions?*
>
> *A.Yes*
>
> *Q. And you'll see about five lines up from the bottom your barrister… says: "Mr. Murphy would undertake to attend the next meeting of the Registrar's Committee.*
>
> *A. Yes.*
>
> *Q. Is that what he said?*
>
> *A. He said I would undertake, yes.*
>
> *Q. I'm almost afraid to ask but… (interjection)*
>
> *A. It wasn't part of the order.*
>
> *Q. I know what you're going to say, Mr Murphy, let's just stop there. What is the significance of the word "would" when your barrister said to the President that you would undertake to attend the next meeting?*

A. But I didn't obviously. He said I would undertake, maybe that I might undertake but it didn't say that I did undertake. Undertake--or if I was asked then to give an undertaking, I'd have given an undertaking.

Q. Do you think barristers play games with the President of the High Court?

A. But I also think that I would also, if I wanted to know what happened in the High Court, I'd always read it in the order. That's what I'd go by, not an attendance note taken by a member of the Law Society."

454. Mr. Murphy's stated that he had no idea that an undertaking given by or on his behalf to attend at the Registrar's meeting. He reiterated that the only time that he knew that there was an undertaking to attend the meeting related to the previous High Court order. On further questioning, he was asked whether he heard his barrister say that he would undertake to attend the next meeting of the Registrar's Committee. Mr. Murphy replied that…

"*there was talk about me giving an undertaking but I didn't give an undertaking or he didn't give an undertaking.*

…

… if required, I would give an undertaking, yes, that I would undertake. And then the judge goes on to say it did not matter whether Mr Murphy attended or not if he was not interested in…".

Later he said:

"*…what it means is that there was a discussion there about me giving an undertaking and then the President made that comment and then that point wasn't pursued at all. And when I took up the order, I see there was no undertaking given because from being in court on that day I didn't get the impression that there was an undertaking given by me or my barrister on my behalf to attend at the meeting because I certainly would have gone….. When I left the*

court that day, I did not think that I had any undertaking given to the court by myself or by anybody on my behalf and that's why I took up the order."

It was put to him that taking up the order two weeks previously had nothing to do with the state of mind in July 2003.

"Q. So your state of mind when leaving court was notwithstanding those exchanges which took place and what the President said, there was no particular obligation on you to attend the next meeting?

A. No."

455. Mr. Murphy placed this in context, At the meeting on 29th of July 2003 someone had said that there would be referral to the SDT. He said that the matter had already been decided by somebody else and "*would they want me to undertake to attend the meeting where they already had decided I was going to be referred to this Tribunal?"*

456. His position was that what was contained in the High Court order was more significant than what was contained in a memo of an officer of the Law Society.

"Q. Albeit a memo you're not disputing?

A. The entire verbatim I wouldn't say it is correct but generally it isn't bad."

457. Mr. Murphy later reiterated that he was quite certain that no undertaking had been given by anybody on his behalf to attend the meeting on 30th September 2003. He added that what he had said that he would not rely one hundred per cent on the memo of the Society. Mr. Murphy said that "*I don't remember what was said"* (p. 154 of the transcript) and then gave an example of how things could be taken down wrong by Solicitor X, by reference to the Vodafone billing address issue. When pressed on whether he was disagreeing with something he had said earlier in his evidence, he replied: "*No I'd say that counsel said that exactly, it's just generally*

a reflection of what happened at the meeting. That's why I got the High Court order to know what had happened." He also added that the Society must not have felt that there was any High Court order or undertaking because "*surely they would have said we refer to your letter of 2nd September, you are obliged by the order or the undertaking your barrister gave to the High Court. There wasn't any."*

458. Mr. Murphy's evidence is that he was in Italy when the meeting of 30th September 2003 took place. What he was doing was more important but he did not wish to go into it. It was put to him that he had not written a letter to the Society, or placed on affidavit, or given the Committee by any other means, a reason as to why he did not attend the meeting. He added that if the Society had themselves felt that there was an outstanding undertaking, it would also have been mentioned in the letter of 17th September 2003. On this issue, when re-examined by his own counsel, he said that... *"The only undertaking given on or about my behalf in relation to attending meetings was in conjunction with the order. It was ordered. The order was the only thing that compels me to go to meetings. There was no undertaking given."*He further pointed out that there was no reference to the undertaking in the minutes of the meeting of 30th September 2003.

459. Mr. Murphy was questioned by counsel for the Society about the bill for the arbitration and the letter which he said he had written to the [REDACTED] on 2nd November 1995. It was put to him that Mr. [REDACTED] had said that he had not got that letter.

460. The issue of property being in his name was raised. Mr. Murphy repeated that had the Committee allowed him to produce the documents at the meeting on 29th July 2003, they would have known that the allegations were incorrect, and that the property was not registered in anyone's name at that stage. It was not registered in his name. When this matter was further explored, the Chairman intervened to say that the point that was being made was *"that at the time that the affidavit was sworn, the property wasn't registered in Mr Murphy's name, but was subsequently registered in his name solely to accommodate its sale and that that registration was*

at the knowledge and collusion and agreement of all parties concerned". Mr. Murphy later added that when the property was bought, all the documents, being the original contract, the objections and requisitions on title and the family home declarations referred to it being purchased in trust. Documentation in support was produced. It was put to him that the allegation was that he had failed to *produce* documentation. When asked whether the documentation that he was now producing to the SDT was produced to the Society, he replied "*the Society could do a search in the Registry of Deeds"*. He had all of this material with him on 29th July 2003, when he said he was "*told to go away".* The property was not registered on that date. Subsequently, following the exchange of correspondence with Mr [REDACTED], it was decided that title be registered in his name and a transfer would be done to the clients. The Chairman intervened and said that it appeared to be "*common case that the property was registered in your name subsequent to the affidavit"* (i.e. of this Kirwan of 11th June 2004).

461. Mr. Murphy's application for discovery also arose for discussion. In an affidavit sworn on 20th October 2004 grounding his application for discovery, he averred that he intended to fully defend the matter and "*have prepared a replying affidavit and will apply to the Disciplinary Tribunal for leave for the late filing and swearing…"*. He did not submit an affidavit but might have prepared a draft. He did not actually remember. He did not specifically remember why he chose not to file one. In his affidavit grounding the application for discovery, sworn on 20th October 2004, he had averred that he had prepared a replying affidavit and would apply to the SDT for leave for late filing and serving. In relation to discovery he stated that *"It was specifically to get the documentation in relation to the account, that's what it was."* .

462. When questioned whether he was changing his plea in relation to the s. 68 matters, Mr. Murphy said he would seek advice from his legal team, although he appeared to have accepted that there were breaches in respect of a s. 68 letter concerning the Beeches which he described as technical. He denied that he had

failed to account for disbursements from the arbitration award and said that he had sent a letter in November 1995 which was the day he took the £20,000 plus VAT. When pressed on this he was asked whether he was saying in that letter that he vouched and accounted for the various disbursements made out of the proceeds of the arbitration award. He replied that he was *saying what I did with the… £24,341*. The other disbursements *made on the card* were prior to the 1993 Act. Counsel asked him to confirm whether he had, as of that day, accounted to his clients for the other disbursements out of the Kerry arbitration award. He replied:

> *"…the position is that in accordance with a letter from their solicitor of October 06, it's agreed that the matters will go to taxation. After taxation of full accountant process would be done, monies that had been paid would be deducted from the amount they owe to me and there will be a balance due to me*.
>
> *Q. I am pretty sure you understand the question and I don't ask it again… (Interjection)*
>
> *A. Yeah, and I'm pretty sure you understand the answer".*

463. Later the following exchange took place on this issue:

> *"Q. ..And I think your position is that even as of today you can't say what that money was for but when the whole thing is eventually being taxed, at that point you may be in a position to allocate this to something?*
>
> *A. Exactly. All the costs, they'll go into the one hat and then there will be a final day of reckoning of all the monies owed, monies owed to me and credit will be given for any costs already paid."*

He explained that the bill for costs of £73,000 would also have to be taxed.

464. Regarding the allegation that he had failed to respond to correspondence, he said that he responded to a lot of the correspondence and at the time he was under a lot of pressure. He had a lot of *misgivings* about what the Society and *the way they were handling things*. Mr. Murphy reiterated that he had written to the Society *"about things"* to which they had not replied.

465. With regard to his failure to attend the meeting of 17th December 2002, he said that he did not receive the letter about that meeting until the following January. There was another matter scheduled for the same day and he had written to Ms. Kirwan explaining that he would not be able to attend. With regard to the meeting of 18th February 2003, while he accepted he did not attend, he explained that "*I'm sure that I would have written in saying I wasn't going to the meeting".* Concerning the allegation of delay and obstruction of the investigation which caused the Society to apply to the President of the High Court, he replied that he had a lot of difficulties with the Society. He referenced the rumours which were in circulation and stated "*I wasn't in a great position to be cooperative with the Law Society. I admit that maybe the way I dealt with it wasn't properly but at the same time I feel that there was some reason behind all this, it wasn't just something that happened out of the blue".*

466. Regarding the rent issue, he said that the rents were all on the account cards and not to the client account. He explained that the money taken from rent for costs were taken prior to the introduction of the Act of 1994 when different rules applied. This led to further exchanges regarding the Act of 1994 and the regulations.

467. When cross examination was completed, Mr. Murphy consulted with his legal team. His counsel indicated that he was pleading guilty to charges at (g), (h) and (i). (See p.174 the transcript of 10th July 2008) – effectively accepting that he had breached the provisions of s. 68 on three occasions, (g) by failing to provide written particulars of his charges, second (h) by deducting costs from the arbitration award without written consent and third (i) by failing to furnish to his clients a bill of costs in the format prescribed by the section as soon as practicable after the conclusion of the arbitration.

468. On re-examination Mr. Murphy was asked about the order of 9th July 2003 which specifically provided that he attend before the Registrar's Committee on 29th July 2003. He reiterated that the order was the only thing that compelled him to go to meetings and that there was no undertaking given. He pointed out that there was

no reference made in the minutes of the Registrar's Committee meeting of 30th September 2003 to an undertaking having been breached.

469. Following re-examination, the Chairman asked a number of questions. He pointed out that the court order of 31st July 2003 referred to an affidavit which had been filed by Mr. Murphy in which he averred that *" I will attend any Registrars Committee meeting with the clients' files if same should be necessary"*. Mr. Murphy could not say for definite whether that affidavit was filed in court before the order of 31st of July 2003 was made. When pressed, Mr. Murphy accepted that his averment at paragraph 10 was before the court before the order of 31st July 2003 was made. This affidavit appears to have been sworn by him on 30th July 2003. While the transcript refers to an affidavit sworn on 13th July 2003, the affidavit which this Court has seen was sworn on 30th July 2003. The perfected order of the court of 31st July 2003 refers to an affidavit filed that day . *"And upon reading the order herein of the 9th July 2003 and Affidavit of the (sic) Colm Murphy solicitor in the title hereof named filed in court this day and exhibits therein referred to".* The title number of the proceedings in the order and also on that affidavit bore the same record number, 2003 No. 25 SA.

470. Mr. [REDACTED] gave evidence that he was aware that the Schoenberg property had been bought in trust, of which there was no doubt. He was questioned:

> *"Q. And did you consent to that?*
>
> *A. Well, I did. It was taken, we'll say, for granted that was the way it was being done and I accepted it and you see the reason for that was that you see with the Schoenberg property, it was the final property that was bought in that block and then there was another property which my brothers were not interested in which I bought attached onto that Schoenberg property, and within the partnership, well it was a foregone conclusion that I would be getting the Schoenberg property. So that to all intents and purposes, to the time of the*

dissolution of the partnership, the Schoenberg property would have been mine."

He said that it was quite well known by the three of them that the property had been held that way. It was assumed that there would have been an immediate division of lands, but it went "*on and on*" and it was not divided up.

471. When asked whether there was any objection to the payment of £20,000 plus VAT, he said he did not know about it, that he had nothing to do with the partnership account but he never heard a complaint from anyone. He felt that Mr. Murphy had acted in his best interests. The partnership broke up because he had it dissolved in 2002. He did not hear any complaint from his brothers about Mr. Murphy when they were in discussions. In cross examination he agreed that he was friendly and on good terms with Mr. Murphy. He accepted that the dispute between the brothers had broken out sometimes in 1999 but was unsure. He also accepted that he had never been given the bill for €73,705 in respect of the arbitration, but said he had nothing to do with the partnership accounts at that time. The first time he heard that a bill had been produced for a total of €73,705 and with his name on it was at the previous SDT hearing. He said that if the money was due, it would have to be paid. He also accepted that he had not seen the bills from 6th March 2003 and he had never been asked to pay. He was questioned about fees in other matters. He said that his brother [REDACTED] dealt with the financial side of things. When re-examined by Mr. Murphy's counsel, Mr. [REDACTED] agreed that he had no reason to doubt Mr. Murphy's honesty or fairness. In response to a question from the Chairman in relation to the arbitration, he said that he did not know how much was involved because he had nothing whatever to do with the finances of the partnership.