AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No.:2022/30
2023 IESC 28

Charleton J.
O'Malley J.
Baker J.
Woulfe J.
Murray J.

Between/

JOHN COLM MURPHY

APPELLANT

-and-

THE LAW SOCIETY OF IRELAND

RESPONDENT

Judgment of Mr. Justice Woulfe delivered on the 29th day of November, 2023

Introduction

1. The appellant appeals to this Court against a decision of the Court of Appeal (Noonan J; Whelan J. and Barniville J. concurring) delivered on the 9th December 2021 (see [2021] IECA 332). The Court of Appeal dismissed an appeal brought by the appellant against the

judgment of the High Court (MacGrath J.) delivered on the 10th February 2021, and his order made in consequence thereof on the 24th February 2021. The High Court judge refused to grant an extension of time which would have enabled the appellant to appeal to the High Court against a decision of the Solicitors Disciplinary Tribunal ("the SDT") made as far back as the 28th September 1999.

2. The facts are set out in detail in the written judgment of the High Court (see [2021] IEHC 148). The appellant was a solicitor practising in Kenmare, County Kerry in the mid-1990s. He agreed to acquire a practice in Killarney formerly owned by a Mr. Tim Healy, and he took over that practice with effect from the 16th August 1996. Essentially, the appellant's complaint is that the respondent has sought to make him responsible for the accounts of the Healy practice from the 1st April 1996 until the 15th August 1996, a time when Mr. Healy was still in charge and the appellant had no control over them. For convenience, this period is referred to as the "missing months".

3. There was extensive correspondence between the appellant and the respondent between 1997-1998, regarding the solicitor's financial statements for the year ending 31st March, 1997. The Kenmare accounts were furnished in April 1998, but not those for Killarney. There is a conflict of evidence as to whether the respondent indicated, during two telephone conversations between the respondent's Registrar, Mr. Connolly, and the appellant's accountant, Mr. O'Reilly, in early 1998, that it would refuse to accept a qualified report for the last eight months of the period in question, leaving out the missing months. It appears that none of the written correspondence refers to this issue of the missing months, or to a problem with the respondent not accepting a qualified report for the last eight months. Ultimately, the accountant's report was in fact filed on the 12th January 1999, which was a qualified accountant's report confined to the eight month period from August, 1996 to 31st March, 1997, and it seems to have been accepted as such by the respondent.

4. The failure of the appellant to file accounts for the year ended 31st March, 1997, had in the meantime been referred to the SDT by the respondent in July, 1998. The relevant complaint or allegation of misconduct, for the purposes of this appeal, was that the appellant was guilty of misconduct in that he failed to file an accountant's report for his Killarney practice in respect of the year ending 31st March, 1997 in breach of Regulation 21(1) of the Solicitors' Accounts Regulations No.2 of 1984 (S.I. No. 304 of 1984) in a timely manner or at all. At the hearing before the SDT in September, 1999 it does not seem that the appellant called any witnesses (such as Mr. O'Reilly, his accountant), nor that he made the argument that filing the accounts in respect of the missing months had been impossible. The SDT found him guilty of misconduct in respect of the said allegation set out above. The SDT made an order under s. 7(9) of the Solicitors (Amendment) Act, 1960 ("the 1960 Act"), as amended, that the appellant be censured and that he pay the respondent's costs.

5. The appellant did not appeal that decision of the SDT to the High Court at the time, as he was entitled to do under s. 7(11) of the 1960 Act, which provided as follows:

> "A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under *subsection (9)* of this section may, within the period of 21 days beginning on the date of the due service of the order, appeal to the High Court to rescind or vary the order in whole or in part, and the Court on hearing such an appeal may -
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> (i) rescind or vary the order, or
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> (ii) confirm that it was proper for the Disciplinary Tribunal to make the order."

6. In the subsequent decade or so various other complaints were made against the appellant, and this ultimately culminated in him being struck off the Roll of Solicitors in 2009. It seems that the adverse finding made in 1999 was relied on by the respondent in its application in 2009.

The High Court

7. The appellant issued proceedings in the High Court in 2004 claiming damages against the respondent, *inter alia*, for misfeasance of public office, breach of duty, negligence and defamation ("the plenary proceedings"). The respondent sought to have these proceedings struck out as an abuse of process. The High Court made an order to this effect in 2012, but in 2015 this Court allowed an appeal from that decision and remitted the matter back to the High Court for plenary hearing.

8. A very lengthy hearing then took place before MacGrath J. in the High Court in mid-2018, culminating in a lengthy judgment which was delivered on the 31st July 2019 (see *Murphy v. Law Society of Ireland* [2019] IEHC 724). During the course of that hearing the former Registrar of the respondent seems to have accepted when giving evidence that the respondent's demand that the appellant file accounts for the year ending 31st March 1997 should properly have related only to the eight months ending on that date, *i.e.*, that he should not have been required to account for the missing months.

9. During the course of that evidence a letter of potential significance regarding the responsibility of the appellant emerged, dated the 9th December 1997, by which the respondent wrote to Mr. Healy ("the Healy letter") indicating that it was he who was responsible for filing accounts in respect of the missing months. While at the foot of the letter it stated "c.c. Mr. Colm Murphy", MacGrath J. was not satisfied that the Healy letter had been received by the appellant (at paragraph 344 of the judgment). He also went on to hold, however, that he was not satisfied that the evidence established that a decision had been taken by the respondent not to send the appellant a copy of the letter, or that there was evidence of *mala fides.*

10. The appellant then issued a motion within the plenary proceedings on the 13th July 2020 seeking an extension of time in which to bring an appeal from the decision of the SDT made

in September 1999. This application was grounded upon an affidavit sworn by him on the 12th May 2020. The gravamen of his complaint in the affidavit was that the respondent had failed to disclose the Healy letter either to him or the SDT, and that this resulted in a wrongful finding of professional misconduct against him. He maintains that the testimony of the former Registrar of the respondent in the High Court, coupled with the Healy letter, furnished him with a complete defence to the disciplinary charge.

11. The appellant also avers that after a long interval he chanced in March 2020 to meet Mr. Healy, from whom he had bought the practice in August 1996. Mr. Healy swore an affidavit on the 8th June 2020 in which he essentially confirms that the respondent had at all times sought to hold him responsible for furnishing the accounts in respect of the missing months.

12. In his judgment the trial judge referred to the fact that the respondent had raised an issue as to whether the Court had jurisdiction to extend the time for bringing an appeal, given that there is a time limit of twenty one days provided for in s. 7(11) of the 1960 Act. He went on to say that the respondent had conceded, for the purposes of this application, that it was prepared to accept that in principle the Court has a jurisdiction to extend time. In the circumstances the judge proposed, without determining the point, to proceed on the basis that such jurisdiction arises.

13. MacGrath J. went on to consider the approach to extension of time as set out by this court in *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3 ("*Gately*"). He noted how it was acknowledged in *Gately* that the three criteria referred to by this Court in *Eire Continental Trading Company Limited v Clonmel Foods Limited* [1955] 1 IR 170 ("*Eire Continental*") do not purport to constitute a check-list according to which a litigant will pass or fail, but the rationale that underpins them will apply in the great majority of cases. The three criteria are not necessarily of equal importance *inter se* and much will depend on the circumstances.

14. MacGrath J. cited a passage from the judgment of O'Malley J. in *Gately* to the effect that the threshold of arguability may arise in accordance with the length of the delay. He also cited Clarke J. (as he then was) in *Tracey v McCarthy* [2017] IESC 7, where he held that prejudice may quite properly by relied on by a party to suggest that an extension of time, which might otherwise be granted, should be refused.

15. The trial judge went on to examine the required threshold of arguability in light of the length of the delay in making the application, and the possible prejudice arising from the delay. He referred in this context to the witness statement of Mr. O'Reilly in the plenary proceedings concerning the alleged telephone conversations in early 1998 with Mr. Connolly about the acceptability of a qualified accountant's report. In this statement, Mr. O'Reilly alleges that Mr. Connolly confirmed that the respondent would not accept a qualified report. However, Mr. O'Reilly went on to say that in reality he did not have a clear recollection of the matter.

16. The trial judge pointed to the fact that nothing in the written documentary evidence expressly referred to such conversations having taken place. He noted Mr. Connolly's evidence in the plenary proceedings that he had no recollection of these alleged conversations with Mr. O'Reilly, but that he would not have said that a qualified report would be unacceptable. He referred to a passage from the cross-examination of Mr. Connolly in this respect when his evidence was to the effect that not only would the respondent not have refused a qualified report, but rather that Mr. O'Reilly would have been obliged to submit such a report as a dim view would have been taken of one filed without qualification.

17. MacGrath J. highlighted this difference of recollection on what he considered to be an important issue. It seemed to him not unreasonable to conclude that had Mr. O'Reilly been called to give evidence in 1999, he would have been in a position to inform the SDT of any conversations he then recalled having had with Mr. Connolly. Any misunderstanding, miscommunication, or indeed disputed representations as to the acceptability of a qualified

report could have been explored at the time. Similarly, Mr. O'Reilly's contention that if the respondent had said from the outset that it was looking for accounts only for the approximate eight month period, he could have completed these immediately, could also have been explored by the SDT at the time. On this issue, the judge concluded that the passage of time gave rise to a real risk of prejudice in relation to a matter of potential significance to the appeal.

18. With respect to the Healy letter, the trial judge stated as follows (at para. 48):

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

19. Taking all these matters into account, MacGrath J. was not satisfied that the threshold of arguability had been crossed. He was further satisfied that the arguability of the intended appeal was outweighed to a significant degree by other factors such as the length of delay, the Court's findings in the plenary proceedings regarding the allegation of concealment, that Mr. O'Reilly could have been called to give evidence to the SDT but was not, and the importance and relevance of the new evidence to the misconduct charge. He was satisfied that the risk of prejudice to the respondent was such that it would be unjust to extend the time, and he concluded that in all the circumstances the balance of justice lay against granting the application.

The Court of Appeal

20. In his judgment for the Court of Appeal, Noonan J. first noted that, prior to the commencement of the appeal, the Court had raised with the parties the issue of whether there was in fact a jurisdiction under s.7(11) of the 1960 Act to extend time. Noonan J. noted how the respondent was prepared to assume jurisdiction for the purposes of the application in the High Court. In those circumstances, in his view the trial judge was correct to proceed as he did to determine the merits of the application without determining the jurisdiction issue. He believed that it was appropriate for the Court of Appeal to proceed in similar fashion and to adopt a like approach to that taken by the Court of Appeal in *Keon v Gibbs* [2017] IECA 195.

21. Noonan J. then proceeded to set out the relevant case-law on the issue of extension of time, including recent cases such as *Goode Concrete v. CRH Plc* [2013] IESC 39 ("*Goode Concrete*") and *Gately.* He noted (at para. 75) that while that a delay of over 20 years in seeking to bring an appeal "might not be unique…it is certainly extremely rare". He thought that a delay of such magnitude required the appellant to show a high degree of probability "that the appeal is likely to succeed", and even then, the question of prejudice to the respondent is likely to be "a significant factor in the exercise that the court must undertake in calibrating the appropriate balance of justice."

22. Noonan J. accepted that it was at least arguable that the Healy letter might have had an impact on the hearing before the SDT had it been available. He did not, however, accept the appellant's contention that the letter presented a total defence to the allegation of misconduct. He stated that, as the respondent submitted, the charge was not simply one of failing to file a report for the 12 month period, but of failing to file <u>any</u> report. He felt that, on one view of the matter, it might be said that the reference to 12 months instead of 8 months by the respondent, subsequently admitted by Mr. Connolly to be incorrect, was at best a somewhat technical point

when the gravamen of the complaint was that the appellant, despite repeated assurances that he would file a report, failed to do so.

23. Noonan J. noted that the appellant had throughout maintained that his complaint was that the respondent was insisting on a 12 month report which he simply could not furnish, as he was only responsible for the approximately 8 month period. However, Noonan J. found it difficult to understand what prevented the appellant from advancing precisely this point by way of defence at the original hearing before the SDT, and he felt that the appellant's ability to do so was unaffected by the availability or otherwise of the Healy letter. Indeed, had the appellant done so, Noonan J. saw no reason to think that the respondent's response would not have been to the same effect as that given by Mr. Connolly in evidence 19 years later, namely that it was simply a mistake and should have referred to 8 months which may, or may not, have resolved the complaint in the appellant's favour. On the other hand, Noonan J. felt it equally possible that the SDT might have taken the view that the real issue was the failure to file any report, irrespective of the period it covered.

24. Noonan J. next considered the conflict of evidence between Mr. O'Reilly and Mr. Connelly on the important issue of whether Mr. Connolly had refused on more than one occasion to accept a qualified report for the approximately 8 month period. Were the appeal to now proceed, the resolution of the conflict between Mr. Connolly and Mr. O'Reilly would become central to the outcome, and the Court would have to adjudicate on a conflict between the undocumented recollections of each witness, in circumstances where Mr. Connolly has already said that he had no recollection of the alleged telephone conversations with Mr. O'Reilly. The position was exacerbated by the fact that no transcript of the SDT proceedings was available, it not being a requirement at the relevant time, which precluded the possibility of exploring any inconsistencies that might arise between the evidence given in 1999 and that

in any future appeal. These were clearly matters giving rise to potentially significant prejudice against the respondent in the event that an appeal were now to proceed.

25. Having addressed in some detail issues of arguability, the potential impact of the Healy letter, the reasons for the delay and prejudice by reason of the delay, Noonan J. ultimately concluded as follows:

> "90. I am prepared to accept, for the purposes of this appeal, that Mr. Murphy has raised a ground of appeal that can properly be regarded as arguable. He is correct in saying that he was found guilty of misconduct for failing to file an accountant's report for the year ended the 31st March 1997 and that this is factually and technically incorrect. However, I am not satisfied that this error has resulted in injustice to Mr. Murphy. Even if it has, any such injustice is far outweighed by the countervailing factors to which I have referred.
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> 91. I agree with the conclusion of the trial judge that Mr. Murphy has fallen far short of surmounting the threshold of arguability in relation to his appeal that such extraordinary delay demands. Even were the appeal arguable, or arguable to sufficient degree, that in my view is again far outweighed by countervailing prejudice. The fact that the original affidavits are still available, as Mr. Murphy submits, is really a factor of no moment. The court in this appeal, were it allowed to proceed, would be faced with having to resolve a conflict of recollection between witnesses who have already, several years ago, said that they do not remember the relevant event.
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> 92. Even absent that, the courts have repeatedly said that lapses of time of a far lesser order than arise here can be presumed to give rise to prejudice insofar

as the memory of witnesses is concerned. An appeal now would, to borrow a well-known phrase, be a facsimile of justice.

93. Accordingly, I agree with the trial judge's conclusion that the balance of justice lies against the grant of an extension of time and that no error has been demonstrated in that conclusion."

Determination

26. This Court granted the appellant leave to appeal by a determination dated the 30th May, 2022: see [2022] IESCDET 65. The Court considered that in the circumstances the application for leave did raise issues of general importance regarding the application of *Eire Continental*-style principles to extension of time in respect of decisions of professional disciplinary bodies, even after what was accepted is a very long delay. This was particularly so where it was said that a regulatory body had failed to disclose relevant material which bears on the correctness of the adverse disciplinary finding now sought to be appealed, and where the person in respect of whom a regulatory sanction had been imposed was not and could not have been aware of the existence or importance of that material.

27. The Court of Appeal had accepted (at para. 90 of the judgment sought to be appealed) that the finding "is factually and technically incorrect". Accordingly, one consequence of a failure to give leave to appeal was potentially that an unsustainable finding and sanction were incapable of being rectified. The public has an interest in the proper governance of the profession of solicitors, and the matters sought to be raised regarding the non-disclosure of potentially exculpatory evidence therefore went beyond the particular facts of the intended appeal.

Submissions in this Appeal

Submissions of the Appellant

28. The appellant filed his original submissions dated the 20th June, 2022, as an appellant in person. He relies firstly on O. 84C of the Rules of the Superior Courts ("RSC") which sets out a procedure for statutory appeals where "provision for the procedure applicable is not made either by the enactment concerned or by another Order of these Rules". It provides for a 21 day time limit for issuing an appeal, which period can be extended, but this provision is "subject to any provision to the contrary in the relevant enactment".

29. The appellant also relies on O. 122, r. 7 of the RSC which contains the general power of the Court to enlarge the time appointed by the Rules, but which power is expressly stated to be "subject to any relevant provision of statute". He refers to the three part test for enlarging time to appeal set out in *Eire Continental.* He confirms that he did not form an intention to appeal within twenty one days of the decision, and further confirms that he is not saying that there was any element of mistake. He submits that he does have arguable grounds of appeal, and that the Courts below accepted this. His principle argument is that relevant material was not disclosed to him or to the SDT.

30. The appellant goes on to review various authorities including *Goode Concrete* and *Gately*. He notes the statements by O'Malley J. in *Gately* that the threshold of arguability may rise in accordance with the length of the delay, and that long delays should require to be counterbalanced by grounds of appeal that go to the justice of the decision sought to be appealed. It is accepted by the appellant that the threshold of arguability is high in this appeal because of the length of the delay, but it is respectfully submitted that because of all the factors involved he surmounts that threshold, and that to allow an extension of time to appeal is the only way to do justice between the parties.

31. The appellant submits that the main issue in this case is that the respondent failed to disclose material which the Court below has decided gives rise to an arguable point, which resulted in a finding that the Court below has also found is factually and technically incorrect. The respondent failed in its duty to disclosure, and it is submitted that in circumstances where the relevant material had a bearing on the correctness of the adverse disciplinary finding, an injustice will be done if that finding remains on the record.

32. As regards prejudice, the appellant argues that he has suffered severe prejudice by a finding of professional misconduct that is factually and technically incorrect, because relevant material was not given to him by the respondent at the appropriate time. This was the first finding of misconduct against the appellant, and was relied upon by the respondent in the application to strike the appellant off the Roll of Solicitors. The finding had an impact on the appellant's constitutional rights to earn a livelihood and to his good name and his dignity.

33. In relation to possible prejudice suffered by the respondent, it is submitted that both the Courts below relied on the memory of Mr. Connolly after the entire period of delay, he being the only person to give evidence on that particular element of the proceedings. The appellant notes that the respondent did not place any evidence of actual prejudice before the Courts below.

34. The appellant submits that once arguability was established, it was not correct for the Courts below to proceed further and decide on the merits of the evidence that could or might have been given at first instance. He argues that he has surmounted the highest threshold of arguability. He was totally unaware of the Healy letter, and could not have considered using it. The failure to use a similar point, i.e. that he was not responsible for the accounts for the missing months, is not relevant. He argues that the circumstances in this appeal are quite extraordinary, especially when taken in conjunction with the associated matters, and the balance of justice could not possibly lie against the grant of an extension of time. While there

has undoubtedly been a lengthy delay in this matter, it is submitted that if one embarks on consideration of delay, one must look at the cause of the delay, and here the delay is entirely the respondent's fault, starting with the failure to disclose the Healy letter at or prior to the SDT hearing.

35. The appellant finishes his submissions with a quotation from Barton J. in *A.N. v. The Minister for Health and Children* [2015] IEHC 396, to the effect that many judgments since *Eire Continental* have recognised that the discretion of the Court to extend time is a free one, to be exercised upon taking into consideration all of the circumstances of the particular case. Given that the discretion of the Court is a free one, if one looks at all the circumstances of this particular case, and more so if one looks at it in the context of related cases, it is submitted that there is no doubt but that the discretion of the Court should be exercised to extend the time to appeal. It is submitted that in all the circumstances it would be an affront to justice if the finding of professional misconduct were allowed to remain extant.

Submissions of the Respondent

36. In its original submissions filed on the 4th July, 2022, the respondent notes that it was accepted by Mr. Connolly in evidence in the plenary proceedings that the request to the appellant for the accountant's report should have referred to the "eight months ending" 31 March, 1997, rather than the "year ending". It notes also the appellant's contention that the Healy letter, which shows that an accountant's report was sought from both the appellant and Mr. Healy for a partly overlapping period of time, was suppressed and that it would have afforded him a full defence to the allegation of misconduct. Notwithstanding that, despite assurances, he did not file *any* accountant's report in a timely manner, only filing the qualified (eight month) report after the making of the application to the SDT.

37. As regards jurisdiction, although the respondent was prepared to proceed on the basis that the High Court did have jurisdiction to extend time in accordance with *Eire Continental* principles, it did not, and does not, suggest that the twenty one day time limit in the statute was thereafter irrelevant. The respondent notes in particular that in *Law Society v. Tobin* [2016] IECA 26 ("Tobin"), in applying the *Eire Continental* principles, the Court of Appeal accepted that it was appropriate to have regard to the legislative intent that an appeal be brought in twenty one days and the extent to which that time limit had been exceeded. In *Tobin*, the time limit was missed by just seven days, whereas in this case the period has been exceeded by two decades.

38. The respondent submits that the judgment under appeal concerns the application by the Courts below of the *Eire Continental* considerations to the appellant's motion to extend time. Insofar as the appellant seeks to rely on the provisions of O. 84C, r. 2(5) of the RSC, this is not the applicable rule, in circumstances where provision has been made in the primary enactment (s. 7(11) of the 1960 Act) for the time limit within which to appeal and, further, same being specifically the subject of another provision of the RSC, *i.e.* O. 53, r. 12(b).

39. As regards the long period of delay of over twenty years, the respondent refers to the appellant's assertion that the period of delay was caused entirely by the conduct of the respondent, and submits that this assertion is not borne out by the evidence and that no such finding was made by the High Court. It notes that the High Court found that even if a considerable portion of the twenty year period was discounted having regard, *inter alia*, to the appellant's argument that the Healy letter might have emerged earlier had a full hearing proceeded before Hanna J. at an earlier stage of the plenary proceedings, the delay was still in excess of ten years. It notes that the High Court considered the two year delay, after the appellant became aware of the Healy letter, to be a factor to be taken into account overall, albeit not a determinative one.

40. As regards whether the high threshold of arguability has been met, the respondent submits that the allegation before the SDT, and the finding, which was made, was of a failure to file "an accountant's report", not of a failure to file a full or unqualified report. It argues that a qualified report is "an accountant's report", and ultimately that was the report which was filed. The appellant did not respond to Mr. Connolly's correspondence to suggest that the delay in filing was owing to the inability to produce a full report and did not file any accountant's report, notwithstanding his assurances to the respondent, only doing so after the application was made to the SDT. Plainly therefore he had not filed any report when Mr. Connolly swore his affidavit, and when the qualified report was filed it undoubtedly had not been filed in a timely manner. The factual inaccuracy in the finding is therefore a technical one: it ought to refer to a period of eight months ending on 31st March, 1997, rather than year ending 31st March, 1997. The respondent submits that, correctly therefore, it has not been found that the Healy letter would, as contended by the appellant, have presented a total defence to the misconduct charge.

41. The respondent submits that the inaccuracy in the SDT finding has not caused injustice to the appellant in circumstances where he provided contemporaneous assurances that he would file an accountant's report and did not do so, resulting in an application to the SDT, and when a report was filed in January 1999, after the allegation of professional conduct was made, it had not been filed in a timely manner. It contends that this is not therefore a case where a finding of misconduct has been made without any basis or, as the appellant suggests, sustainability.

42. Finally, the respondent submits that the Courts below did not err, in balancing justice on all sides, in considering the prejudice to the respondent arising from the delay. In that regard, it states that the appellant is incorrect in asserting that there is no evidence of failing recall of witnesses. There is evidence of actual prejudice arising in circumstances where the

Court, if an appeal were to proceed, would be faced with having to resolve a conflict of recollection between witnesses who have already, several years ago, said that they do not remember the relevant events. Furthermore, a lapse of time of such a magnitude gives rise to a presumption of prejudice. It is inevitable that the recollection of witnesses of events which took place more than twenty years ago would be diminished by the passage of time.

Supplemental Submissions of the Appellant

43. The appellant filed supplemental submissions dated the 29th November, 2022, following new legal representation coming on record. He refers to the precise terms of the relevant allegation of misconduct, and submits that the allegation was confined to his Killarney practice, but was stated to relate to a period that included four and a half months from the 1st April, 1996 to the 15th August, 1996, (the last date on which the Killarney practice was the practice of Mr. Healy, before the appellant took it over on the 16th August, 1996). Consequently, it is contended that the allegation was premised on an impossibility, in that it referred to a period for which the appellant was not responsible for the Killarney practice. It is noted that the Court below accepted (at para. 90) that the SDT finding of misconduct was "factually and technically incorrect", a characterisation which is not disputed by the respondent. That, however, is not to say that the issue is a mere "technical point" (as stated at para. 77 of the judgment of the Court below).

44. The appellant submits that the analysis contained in the judgment of the Court below of the allegation and the characterisation of the gravamen of the allegation is not correct. The appellant had filed a report in respect of his Kenmare practice, and the alleged failure grounding the respondent's application to the SDT related only to the Killarney practice, but for a period of time that included months in respect of which the Killarney practice had been operated by Mr. Healy. Against that background, the respondent's submission that the charge was not one

of failing to file a report for the twelve month period, but of failing to file any report is not an accurate reflection of the allegation before, and the finding of, the SDT. The inclusion of express reference to both the Killarney practice and the twelve month period are integral features of the allegation in question.

45. If the allegation of misconduct was properly and lawfully confined to the Killarney practice, then, the appellant submits, it follows that there was a requirement to set out the accounting date and accounting period in respect of which an accountant's report was required to be filed, a period that self-evidently could not include any day prior to the 16th August, 1996, (when the appellant took over the practice) and, for that reason, both the allegation and the finding of misconduct are defective. The SDT could not lawfully find the appellant guilty of misconduct in respect of a period during which he was not the owner of the Killarney practice.

46. The appellant submits that both the Courts below fell into error for a number of reasons. Firstly, it is submitted that the pure application of the test contained in *Eire Continental* to an application for an extension of time to appeal against a finding of professional misconduct made under the 1960 Act is inappropriate, having regard to the nature of the proceedings before the SDT. Second, the appellant submits that any application for an extension of time against such a finding must be considered in light of the particular nature of the proceedings which are held before the SDT. In that regard, proceedings before the SDT, or any appeal to the High Court against a finding of professional misconduct made by the SDT, are not directly analogous to a *lis inter partes*. This is not a dispute between two private parties. Instead, both the respondent and the SDT fulfil a statutory role in respect of which there is an important public element. Further, the nature of the role of the respondent in the context of disciplinary proceedings suggests that where an error which goes to the validity of a finding of professional misconduct is identified, it is incumbent on it to take steps to ensure that the position is rectified.

47. Third, insofar as the criteria which have been identified in *Eire Continental* may also be relevant to an application for an extension of time to appeal against a finding of professional misconduct, the application of those criteria must be considered in light of the nature of the proceedings before the SDT and the significance of a finding of professional misconduct. In that regard, the overarching factor in any such application must be the justice of the case and an obligation to ensure that where a finding is subsequently found to suffer from a fatal defect, the High Court may intervene to rectify the position. Both the Courts below failed to give sufficient weight to the obligation to ensure that the supervisory jurisdiction of the High Court can be exercised in the context of an appeal against a finding of professional misconduct which is accepted to be flawed.

48. Fourth, in the context of an appeal against a finding of professional misconduct which is flawed and may not be correct, and where information which goes to the validity of the finding was not available to the solicitor in question, significant weight should not be given to the nature of the delay, or any claim of generalised prejudice made by the respondent. In that regard, both the Courts below placed too much weight on the length of the delay and the assertions of prejudice by the respondent, and failed to have any or any proper regard to the public interest in the proper regulation of the solicitors' profession, including the need to ensure that a finding of professional misconduct which is flawed can be rectified.

Supplemental Submissions of the Respondent

49. In response to the appellant's supplemental submissions the respondent then filed supplemental submissions dated the 7th December, 2022. The respondent suggests that the appellant in his supplemental submissions now seeks to advance an entirely new basis, not argued before the High Court or the Court of Appeal, for suggesting that the finding of the SDT is incorrect. This relates to one analysis of the relevant complaint of misconduct put forward by the appellant in his supplemental submissions, based upon evidence given by Mr. Connolly

in the plenary proceedings in 2018, that there was an obligation on the appellant to prepare one accountant's report covering all the branches of his practice.

50. The respondent makes a number of objections to the appellant seeking to advance this alleged new argument, including that it is outside the scope of the leave to appeal granted by this Court, which was granted to consider the issues arising from the Court of Appeal judgment and specifically relating to whether the application of the *Eire Continental* principles was appropriate in the context of a professional disciplinary finding, where "new evidence" had emerged which it was suggested tended to show that the finding should not have been made. In the circumstances it is submitted that the appeal to this Court falls to be determined by reference to the basis upon which the Court of Appeal found the finding to be technically incorrect, rather than an entirely new argument not made to the High Court, nor even the subject of an application to make a new argument in the Court of Appeal (on the principles identified by this Court in *Lough Swilly Shellfish Growers Co-Operative Limited v. Bradley* [2013] 1 I.R. 227). It is further submitted that when regard is had to the correspondence exchanged at the time, it cannot moreover be reasonably be suggested that this new argument would meet the arguability threshold which would be required, having regard to the passage of more than twenty years from the time when the argument could have been raised.

51. As regards the appellant's characterisation of the disciplinary complaint, the respondent notes that the appellant suggests that the Court of Appeal incorrectly characterised the gravamen of the complaint as "not simply one of failing to file a report for the twelve month period, but a failing to file <u>any</u> report". The respondent cites *Georgopoluos v The Medical Council* (Unreported, Carroll J., 3rd March 1992) to the effect that the procedure envisaged by professional disciplinary proceedings is "a broad untechnical procedure". In the light of same it is submitted that the allegation of misconduct, as set out in the affidavit of Mr. Connolly which grounded the application to the SDT, is not therefore to be read as if it were a charge

preferred in an indictment and, in particular, must be read in the context of the affidavit as a whole and the material exhibited to it. From this it is apparent that the gravamen of the complaint was that the appellant, despite having assured the respondent that a report in respect of the Killarney office would be filed, did not file any report. It is submitted that the characterisation of the Court of Appeal is therefore correct.

52. The respondent refers to the four reasons advanced by the appellant in submitting that the Courts below fell into error. The respondent's response to these four alleged errors, which are addressed in further detail in the supplemental submissions, are summarised as follows:

(i) A "pure application" of the *Eire Continental* test (as characterised by the appellant) was not carried out by either Court. Instead, both Courts applied the *Eire Continental* principles by reference to more recent "interpretations" (as referred to by the appellant) of the test and in particular, having regard to the judgment of this Court in *Gately*. This test was appropriate to, and broad enough to do justice to, the particular circumstances of an application for an extension of time in respect of disciplinary findings.

(ii) Both Courts did consider the application for an extension of time in light of the particular nature of the proceedings, *i.e.* disciplinary proceedings.

(iii) Both Courts considered the overall justice of the case. The case was <u>not</u> found to be one where a finding suffering from a "fatal defect" had been made. Rather, the error was of a technical nature and did not result in injustice to the appellant.

(iv) Regard was had to the public interest and the proper regulation of the solicitors' profession. This encompasses the public interest in bringing disciplinary proceedings to a conclusion within a reasonable period of time, and at a time when the relevant evidence is not diminished by passage of time.

Decision

Jurisdiction

53. As set out above, an issue arose in both courts below as to whether there was in fact a jurisdiction to extend time, given the time limit of 21 days provided for in s. 7(11) of the 1960 Act.

54. As set out above, the trial judge proceeded on the basis that such jurisdiction arises, in circumstances where the respondent was prepared to assume, for the purposes of the application, that the Court had jurisdiction. The Court below held that in those circumstances the trial judge was correct to proceed as he did to determine the merits of the application without determining the jurisdiction issue, and that it was appropriate for the Court of Appeal to proceed in a similar fashion.

55. While the jurisdiction issue was not really argued in this appeal, a very similar jurisdictional issue was subsequently argued before this Court in *Kirwan v. O'Leary* [2023] IESC 27 ("Kirwan"). Section 7(12A) of the 1960 Act, as amended, provides that where the SDT is presented with a complaint against a solicitor and determines that there is no *prima facie* case of misconduct disclosed against the solicitor in question, the complainant may appeal that finding to the High Court. Section 7 (12B) provides that such appeal "shall be made" within 21 days of the receipt of notification in writing of the finding. In *Kirwan* the majority of this Court held that the language of s. 7(12B) does not preclude the possibility of an extension of time, and that it is appropriate that this section should be interpreted as enabling the grant of an extension of time for the making of an appeal in appropriate cases.

56. In the light of *Kirwan* and the similar nature of the relevant statutory provisions in each case, and notwithstanding the fact that the jurisdictional issue was not really argued in this appeal, I think it is appropriate to consider the merits of this appeal on the basis that the Court does have jurisdiction to extend time. In the absence of *Kirwan*, I would in any event have felt

it appropriate to consider first the merits of this appeal on the assumption that the Court did have jurisdiction, in line with how matters proceeded in the courts below.

Approach to exercise of jurisdiction

57. As set out above, in their original written submissions the appellant sought to rely on the provisions of O. 84C of the RSC, which deals with procedure in statutory appeals generally, and in particular r. 2(5) of that Order which provides for the commencing of the appeal, and also provides for the possible extension of that period by the Court.

58. Rule 1(2) of that Order, however, states that it only applies where "provision for the procedure applicable is not made either by the enactment concerned or by another Order of these Rules". In the present case provision for the procedure applicable to an appeal under s. 7(11) of the 1960 Act is made either by the enactment concerned and/or by O. 53, r. 12(b) of the RSC. In the circumstances I accept the respondent's submission that r. 2(5) of O. 84C is not the applicable rule.

59. In both his supplemental written submissions and at the hearing the appellant suggested that it might be appropriate for this court to adopt the test concerning extension of time in criminal cases, as detailed by this Court in *DPP* v. *Kelly* [1982] IR 90 and reaffirmed by the Court of Appeal on many subsequent occasions, and this test might suggest a more nuanced approach to the question of prejudice. In my opinion this suggestion is misconceived. Notwithstanding the serious nature of professional disciplinary proceedings, and the adoption of the criminal standard of proof, it is clear that such proceedings are not criminal proceedings and are not on all fours with criminal proceedings.

60. It seems to me from a consideration of the High Court judgment that the respondent's willingness to assume, for the purposes of the application, that the Court would have jurisdiction to extend time involved an underlying assumption that the basis of that assumed jurisdiction was O. 122, r. 7 of the RSC and how the predecessor of that provision was applied

in *Eire Continental* and developed in subsequent cases. It may be recalled that the general power of the Court to extend time under that rule is stated to be subject "to any relevant provision or statute", and in my opinion the respondent's concession can be viewed as inviting the court to assume that there was no relevant provision or statute which displaced this power, in the context of an appeal under s. 7(11) of the 1960 Act.

61. It appears from the High Court judgment that this was also the principal basis for jurisdiction relied upon by the appellant before the trial judge, notwithstanding the alternative basis referred to at para. 52: see paragraphs 1 and 9 of the judgment of MacGrath J. In the circumstances it is unsurprising that the trial judge considered the basis for the assumed jurisdiction to be the *Eire Continental* criteria, as developed in more recent cases.

62. In the Court below it appears that the appellant relied both upon O. 84C as grounding the Court's jurisdiction to extend time, and also upon the line of authorities following on from *Eire Continental*. The Court of Appeal based its approach to the exercise of jurisdiction on that line of authorities, and not on O. 84C.

63. I might mention also the approach adopted by the Court of Appeal in *Tobin*. Having concluded that there was jurisdiction to extend time to appeal under a separate provision of the 1960 Act, the Court felt that the applicable principles governing the exercise of that jurisdiction appeared to be those set by the Supreme Court in relation to extensions of time under the rules of court, subject to one addition. Having regard to the legislative intent in s. 12 of the 1960 Act that an appeal be lodged within 21 days, it appeared that the Court should consider carefully the extent to which that time period had been exceeded by an applicant. Subject to giving consideration to that, it appeared that the Court should have regard to the matters identified in *Eire Continental*, taking into account the flexibility indicated by the Supreme Court in subsequent decisions.

64. Overall, and having regard to the history of these proceedings, it seems to me that, on the basis that there is jurisdiction to extend time, then this Court should adopt the same approach to the exercise of that jurisdiction as adopted in the courts below, and as adopted by the Court of Appeal in *Tobin*. I share the view expressed by Finlay Geoghegan J. in *Tobin* that the principles set out by this Court in the *Eire Continental* line of authority are sufficiently flexible to make them suitable for application in cases dealing with extension of time to appeal against decisions of professional disciplinary bodies. This issue will be touched on further below.

Exercise of jurisdiction

65. The decision of this Court in *Gately* confirmed a broad and flexible approach to the exercise of an appellate court's discretion to extend, or to refuse to extend, time within which to appeal. In her judgment for the Court O'Malley J. stated, *inter alia*, as follows:

> "[62] It was clear from the terms of the judgment of Lavery J. in *Eire Continental* ... at p. 173 that, while the court saw the three matters identified by counsel as 'proper matters for consideration of the Court' although even in that respect modifying them to some extent, the essential point was the necessity to consider *all* of the relevant circumstances.
>
> [63] The jurisprudence of this court consistently demonstrates this approach in such cases.
>
> [64] The analysis in "*Goode Concrete"* sets out the purpose behind the obligation to consider all of the circumstances. Firstly, Clarke J. identified the objective of the court when considering an application to extend time at:
>
> > '3.3 … The underlying obligation of the court (as identified in many other relevant judgments) is to balance justice on all sides.'

[65] He then went on to identify certain considerations that are likely to arise in all cases:

> '3.3 … Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal is expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of those matters will interact on the facts of an individual case may well require careful analysis. However, the specific *Eire Continental* ... criteria will meet those requirements in the vast majority of cases.'

[66] The rationale for holding parties to the stipulated time limits for appeals is, as Clarke J. observed, that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time. Further, in most cases, the parties will be award of all the evidence called, the submissions made and the reasoning of the judge - they have, therefore, all the information necessary for the purposes of making a decision. *Goode Concrete* ... was an exception because the appeal was based on information that it had come to the attention of the appellants only after the conclusion of the High Court process. It is notable that in granting an extension of time the court did not permit the appellants to appeal in respect of any aspect that was known to them in the ordinary course.

[67] While bearing in mind, therefore, that the *Eire Continental* ... guidelines do not purport to constitute a checklist according to which a litigant will pass or fail, it is

necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.

[68] It should also be borne in mind that, depending on the circumstances, the three criteria referred to are not necessarily of equal importance *inter se*. As Clarke J. pointed out in *Goode Concrete …*, it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.

[69] By the same token it seems to me that, given the importance of bringing an appeal in good time - the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice - that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice."

66. It is next necessary to consider how the above principles were applied by Noonan J. in his judgment for the Court below. As set out at paragraphs 22 and 25 above, Noonan J. essentially held as follows:

(a) that the appellant had raised an arguable ground of appeal, but had fallen far short of surmounting the high threshold of arguability that the very lengthy delay demanded;

(b) that the error had not resulted in any injustice to the appellant; and

(c) that even were the appeal arguable to a sufficient degree, and even if the alleged error had caused injustice, these matters were outweighed by countervailing factors, in particular prejudice to the respondent, so that the balance of justice lay against the grant of an extension of time.

67. I would disagree with some of the above findings, in particular with the first finding and with part of the reasoning which underlies the third finding.

68. As regards the first issue, the high threshold of arguability, with respect I cannot agree with the conclusion reached by Noonan J., for the following reasons. The ground of appeal relied on by the appellant is that the SDT finding of misconduct was defective and unlawful, as the underlying allegation of misconduct (as set out in para. 4 above) was defective and incapable of being proven against him beyond reasonable doubt, i.e. he could not be held to have "failed" to file an accountants report for his Killarney practice in respect of the entire year ending on the 31st March 1997, as he was not responsible for the missing months which were the responsibility of Mr. Healy.

69. If the appellant had raised this point by way of a defence at the original hearing before the SDT, it is possible that the respondent would have responded by saying that the relevant Regulation should not be read literally and that the charge was not simply one of failing to file a report for the full 12 month period, but failing to file <u>any</u> report, i.e. the appellant failed to comply with the Regulations as he could have filed a qualified report which included an explanation of the difficulty in respect of the missing months. Alternatively, the respondent could have sought to amend the allegation to omit reference to the missing months: see Mills et al, *Disciplinary Procedures in the Statutory Professions* (2nd ed.), at para.6.114.

70. While there is no transcript of the SDT enquiry hearing available, it appears to be accepted that the appellant made no argument that filing the accounts in respect of the missing months had been impossible. Therefore, the hypothetical positions which the respondent might

have taken in response did not arise. The difficulty now for the respondent is that during the course of the hearing in the plenary proceedings in 2018 the former Registrar of the respondent, Mr. Connolly, accepted in his evidence that the allegation of misconduct was incorrect, and that the reference to "year ended" 31st March 1997 should have referred to "the eight months ended".

71. In the light of that evidence it would seem impossible now for the respondent to advance the "any report" argument at any future appeal. It might still be possible, at least in theory, for the respondent to seek to amend the allegation on appeal, given that the appeal is normally by way of a full rehearing. However, this possibility might be a long shot given the passage of time, and the fact that no application to amend was made before the SDT.

72. Overall, having regard to all the above matters, I am satisfied that the appellant has met the high threshold of arguability that the very lengthy delay in this case demands.

73. As regards the third issue, the balance of justice, this is really the crux of the matter in my opinion. Ultimately, I agree with the conclusion reached by both the Court of Appeal and the trial judge that the balance of justice lies against the grant of an extension of time, but for somewhat different reasons which I will seek to explain as follows.

74. Both Noonan J. and the trial judge relied very heavily on the countervailing factor of prejudice to the respondent, if an appeal were allowed to proceed. Noonan J. stated (at para. 81) that the conflict of evidence between Mr. O'Reilly and Mr. Connolly, on the important issue of whether the respondent had refused on more than one occasion to accept a qualified report for the 8 month period, was as MacGrath J. found, potentially of central relevance to the proposed appeal herein. The respondent would be greatly prejudiced as Mr. Connolly has already said that he has no recollection of certain alleged telephone conversations with Mr. O'Reilly.

75. Some of the submissions made by the appellant appear to query whether the factor of prejudice can arise, in an application for an extension of time in a professional disciplinary case involving a regulatory body, in the same way as in a case involving purely private parties. It seems to me that prejudice to a regulatory body may still be a relevant factor, given the role which such a body has in the protection of the public and the public interest in the efficient conduct of disciplinary proceedings.

76. However, on the facts of the present case I do not think that a serious risk of prejudice to the respondent has been demonstrated. The possibility of a conflict of evidence would only arise in the context of the respondent advancing the "any report" argument on appeal, and this appears to be an unlikely scenario for the reasons set out at para. 69 above.

77. In my opinion the critical countervailing factor in the present case flows from the principle identified by Clarke J. in *Goode Concrete*, that there must be a good reason for the appeal not having been filed within the time limit. I agree with Noonan J. that it is difficult to understand what prevented the appellant from advancing the "impossibility" defence at the original hearing before the SDT, and that his ability to do so was unaffected by the availability or otherwise of the Healy letter.

78. When pressed on this point at the hearing, counsel for the appellant was able only to point to an averment in a draft affidavit proposed to be sworn by the appellant if an appeal were permitted. Mr. Murphy stated there that after the SDT hearing in 1999 he discussed the possibility of an appeal with his accountant and a legal team, but while they all agreed that the decision seemed perverse it was felt that, as long as the Law Society were confirming that he was responsible for the accounts period from the 1st April 1996 to the 31st March 1997, there was no point in appealing the matter. I do not accept that the attitude of the Law Society could amount to a good reason for the appellant not appealing the SDT decision within the time limit back in 1999.

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

Conclusion

80. In conclusion, I would therefore dismiss the appeal.