



**THE COURT OF APPEAL**

Court of Appeal Record No.: 2021/77

**High Court Record No: 2019/62SA**

Neutral Citation Number [2021] IECA 327

**Haughton J.  
Murray J.  
Barniville J.**

**IN THE MATTER OF THE SOLICITORS ACTS 1954 – 2011**

**IN THE MATTER OF JAMES WATTERS AND STEVROY STEER, SOLICITORS OF JAMES  
WATTERS & CO. SOLICITORS**

**RESPONDENT SOLICITORS**

**AND**

**IN THE MATTER OF AN APPLICATION BY DEBRA EDNEY JAMES**

**APPLICANT**

**JUDGMENT of Mr. Justice Robert Haughton delivered on the 3rd day of December 2021**

**Introduction**

1. This judgment relates to the application by Debra Edney James, (“the applicant”) made by Notice of Motion issued on 29 March 2021 seeking an order for the extension of time for the filing of a Notice of Appeal against judgment of the High Court (O’Connor J.) in the above entitled matter, ([2020] IEHC 688), and his order perfected on 21 December 2020, and further the costs order of O’Connor J. perfected on 4 March 2021.
2. The substance of the appeal that the applicant wishes to pursue relates to a decision of the Solicitors’ Disciplinary Tribunal (“the Tribunal”) that complaints made by the applicant against the respondent solicitors did not disclose any *prima facie* case of misconduct, and that the High Court erred in dismissing her appeal (save in respect of a complaint relating to section 68<sup>1</sup> letters, which was remitted on consent for a disciplinary hearing).

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<sup>1</sup> Section 68(1) of the Solicitors (Amendment) Act, 1994, so far as relevant, stipulates –

“(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of –

(a) the actual charges, or...”

**Recent Chronology:**

3. In his written judgment delivered on 18 December 2020 (the "Judgment") O'Connor J. dismissed all contested elements of the applicant's appeal to the High Court, and directed on consent the section 68 letter complaints be remitted to the Tribunal.
4. The judgment and order of O'Connor J., save in respect of costs, was perfected on 18 December 2020.
5. By application for Leave to Appeal filed on 8 January 2021 the applicant sought leave to appeal the Judgment directly to the Supreme Court.
6. By judgment and order of O'Connor J. both dated 26 February 2021 (the "Costs Order") O'Connor J. determined the issue of costs of the High Court appeal, in broad terms awarding the respondents 75% of their costs, and 100% of the respondents' costs of submissions on costs, with a stay on execution only for 28 days in the event of an appeal to this court, such stay to continue to the first directions hearing in this court.
7. By determination of 11 March 2021 the Supreme Court refused to grant the applicant leave to appeal directly to the Supreme Court. The Supreme Court did not consider that her application raised any issue of law of general public importance, or that there were exceptional grounds justifying an appeal directly to that court pursuant to Article 35.5.4.
8. On 31 March 2021 the applicant filed a (proposed) Notice of Appeal to this court.
9. Also on 31 March 2021 the applicant filed the Notice of Motion herein seeking an order extending the time for filing the Notice of Appeal in respect of both the Judgment order and the Costs Order, and sought an extension on the duration of the stay in respect of the Costs Order.
10. The application for an extension of time is grounded on the affidavit of the applicant sworn on 15 March 2021. On 4 June 2021 the respondents filed affidavits in response to both that application and the Costs Order stay extension application. These affidavits were both sworn by James Watters on 28 May 2021.
11. On 9 June 2021 the applicant filed a further affidavit in response. On the same day the applicant filed a proposed "amended" Notice of Appeal. The respondents consented to that filing (without prejudice to their opposition to the application to extend time for appeal), and the applicant asks this Court to have regard to the proposed Notice of Appeal as amended.
12. On 14 June 2021 the Respondents' Notice was filed, solely for the purpose of identifying and engaging with the applicant's proposed Notices of Appeal.
13. Both parties have filed written submissions in respect of the application for an extension of time, and oral submissions were heard in this court on 8 November 2021.

### **The Costs Order**

14. It will be noted from this chronology that as the Costs Order in the High Court was perfected on 4 March 2021, and the first Notice of Appeal was lodged on 31 March 2021, the applicant was in fact in time in which to appeal the Costs Order, and to that extent no extension of time is required. The Court is only therefore concerned with the application for an extension of time in respect of the substantive order perfected on 21 December 2020.

### **Principles to be Applied**

15. There was no dispute between the parties as to the legal test to be applied by this Court in determining whether or not to extend time. The starting point is the decision of Lavery J. in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] IR 170 where (at p.173) he held that:-

- “1. The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
2. He must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
3. He must establish that an arguable ground of appeal exists.”

16. However, Lavery J. stressed that these conditions must be considered in relation to all the circumstances of the particular case, and he quoted the words of Sir Wilfred Greene MR in *Gatti v. Shoemith* [1939] 1 Ch 841 –

“The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.”

17. In *Seniors Money Mortgages (Ireland) DAC v. Derek Gately & Anor.* [2020] IESC 3, O'Malley J. observed that while there has been a tendency to take the passage of Lavery J. setting out the three criteria as encapsulating the ruling of the court in *Eire Continental*, and while the three factors have been endorsed in enumerable judgments, there has from time to time been a reminder that the court did not, in fact, lay down the “rigid rules” for which the respondent in *Eire Continental* advocated. In *Seniors Money* the court noted that it was agreed between the parties that the starting point for the determination of the application is the analysis of Lavery J. in *Eire Continental* and that the court retains a discretion, having regard to the totality of the circumstances of the particular case before it, to extend or refuse to extend time, and that a court is not precluded from exercising its discretion to grant relief in a case where only some or none of the aspects of the *Eire Continental* tests are satisfied, if the interests of justice require. O'Malley J., in the following passages, emphasised the need to balance justice on all sides:

“60. The analysis in *Goode Concrete v. CRH* [2013] IESC 39 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 paragraph 3.3):

'The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides.'

61. He then went on to identify certain considerations that are likely to arise in all cases.

'Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all 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.'

Also, of particular relevance to the present application is para. 64 where O'Malley J. stated:-

"64. 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."

Accordingly while I approach the present application on the basis of the three factors identified by Lavery J. I also take into account that the court retains a discretion and should have regard to the totality of circumstances in balancing justice on all sides.

#### ***Bona fide Intention to Appeal***

18. The applicant filed leave to appeal the High Court Order to the Supreme Court on 8 January 2021, which was well within the 28-day period set down in O. 86A, r.13(1) of the Rules of the Superior Courts for an appeal to the Court of Appeal. It is clear from this that she did form a *bona fide* intention to appeal the High Court Order within the 28-day time period, and the first limb of the Eire Continental criteria is clearly satisfied.

#### **"Something Like Mistake"**

19. While the applicant offered no explanation in her first affidavit as to why she did not seek to appeal to this court prior to 31 March 2021, she expands on this point in the affidavit which she swore on 9 June 2021. At para. 4 she confirms that she did not know that she could, and should, have filed an appeal in the Court of Appeal at the same time as

applying to the Supreme Court to bring a “leap frog” appeal. She cites an article on “The New Civil Appeals Regime in the Irish Courts” by Eoin Martin BL prepared for the Galway Solicitors Bar Association in 2015, where the author stated that:-

“... however, a different situation arises if a party seeks to bring a leapfrog appeal from a decision of the High Court but is refused leave to do so by the Supreme Court. In that circumstance, it ought to still be open to the would-be appellant to bring an appeal to the Court of Appeal instead. The difficulty is that by the time the Supreme Court notifies a party that their application for leave has been refused, the time for issuing a notice of appeal or notice of expedited appeal is likely to have expired. Consequently it may be necessary for an appellant in those circumstances to apply to the Court of Appeal for an order pursuant to O.86, r.3(3) RSC for an extension of time within which to issue a notice of appeal or notice of expedited appeal. (It is possible that specific provisions for this scenario may be made in future practice direction).”

20. As this extract shows in the first few years after establishment of the Court of Appeal it was not obvious even to practitioners that where an appellant is applying to the Supreme Court for leave to bring a “leapfrog” appeal a protective notice of appeal should be filed in the Court of Appeal. In these circumstances it was entirely understandable that a lay litigant – and although the applicant has some legal qualifications these do not extend to professional qualifications and she has not practiced in the courts – would make a mistake of the sort made by the applicant.
21. I am quite satisfied therefore that the applicant satisfies the first and second limbs of the *Eire Continental* test.

### **Arguable Ground**

22. The real issue on this application is whether the applicant can satisfy the requirement that she show arguable grounds for an appeal. I have come to the conclusion that the applicant is unable to show any arguable ground for appeal, and on that basis I would refuse her application for an extension of time to appeal.
23. What follows in this judgment addresses, necessarily at some length as the relevant materials are extensive, the legal and evidential background to the complaints, the High Court judgment, the proposed Notices of Appeal, and my reasons for coming to this conclusion

### **(1) Legislative background and principles applicable**

24. It is appropriate to set out briefly the legislative provisions regarding “misconduct”, the function of the Tribunal decision upon receipt of a complaint and the initial decision that it takes, and the High Court appeal from that initial decision. I will also refer principles enunciated by the courts that are relevant to the respective functions of the Tribunal and the High Court on appeal, particularly in relation to the standard of proof.
25. By way of background, on 17 November 2019 the applicant lodged with the Tribunal a sworn complaint on Forms DT1 and DT2 complaining about the conduct of the respondent

solicitors. Under s.7 of the Solicitors (Amendment) Act 1950, as substituted by s.17 of the Solicitors (Amendment) Act 1994 and as further amended by s.9 of the Solicitors (Amendment) Act 2002, the Tribunal had first to decide whether there was *prima facie* case for enquiry.

26. Relevant to this decision is the definition of "misconduct". Section 3 of the Solicitors (Amendment) Act, 1960, as amended by s.24 of the Solicitors (Amendment) Act, 1994, now defines it as follows:

"3....

"misconduct" includes –

- (a) the commission of treason or a felony or a misdemeanour.
- (b) the commission, outside the State, of a crime or an offence which would be a felony or a misdemeanour if committed in the State.
- (c) the contravention of a provision of the Principal Act or this Act or the Solicitors (Amendment) Act, 1994, or any order or regulation made thereunder.
- (d) conduct tending to bring the solicitors' profession into disrepute."

As will be seen, what the applicant complains of is the commission of misdemeanours. It is clear from the use of the word "commission" in s.3 that it is not necessary for a complainant to show that the respondent solicitor have been convicted of any offence – although that may be the more usual situation - it is sufficient to show, to the requisite standard of proof, that an offence was committed.

27. The function of the Tribunal in such an application was described by Finnegan P. in *Law Society of Ireland v. Walker* [2007] 3 IR 581, at paras 29-31 as follows:

"[29] ...is to consider all matters on Affidavit before it. While at this stage of the procedures the Tribunal is not the fact finding body it may for the purposes of deciding on whether a *prima facie* case is disclosed make findings of fact where the facts are clear, for example, where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the Tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held.

[30] The purpose of this stage of the regulatory process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of.

[31] As to standard of proof at an inquiry I have regard to the dicta of *O'Laioire v. Medical Council* (Unreported, Supreme Court, 25th July, 1996). The standard is the criminal standard of proof beyond reasonable doubt. Notwithstanding reservations expressed by O'Flaherty and Murphy JJ. this remains and will remain so unless and

until the Supreme Court directs otherwise. This is a factor to which regard may be had in determining whether a *prima facie* case is disclosed.”

28. By its decision dated 2 August 2019 the Tribunal found that there was no *prima facie* in case for enquiry, and advised the applicant of her right to appeal to the High Court. This right of appeal arises under s.7(12)(A) of the Solicitors (Amendment) Act 1960, as amended. On any such appeal, under s.7(12)(B), it is provided, so far as relevant for present purposes, that –

“...The Court may –

- (i) confirm the finding concerned;
- (ii) where the appeal is under paragraph (a) of this subsection, make a finding that there is a *prima facie* case in relation to the allegation of misconduct concerned,...and require the Disciplinary Tribunal to proceed to hold an enquiry under subsection (3) of this section in relation to such allegation or allegations, or...”

29. In *O’Reilly v. Lee* [2008] IESC 21, Macken J. under the heading “*Preliminary*” referred to this type of appeal:

“I am satisfied that the correct interpretation of the Solicitors Act 1954-2002 as amended in the manner referred to above, is that the appeal from a decision of the Solicitors Disciplinary Tribunal, in this case from its decision dated the 20th day of March 2006, is a hearing *de novo* in the High Court in which the matters contended for by the appellant as constituting grounds for the holding of an inquiry into the respondent’s alleged misconduct, and the respondent’s reply, may be exposed again and argued afresh before the High Court, which decides the appeal on the basis of the materials which were before the Disciplinary Tribunal, but having regard to the arguments made before it, the High Court, exercising an independent jurisdiction in the matter. It is for this reason that the respondent is the correct respondent, and equally, that the Solicitors Disciplinary Tribunal is a proper Notice Party to the proceedings, bound by any order which the High Court might make on the appeal.

A different situation would of course arise if the appellant sought to challenge the Solicitors Disciplinary Tribunal in respect of matters dealt with, or failed to be dealt with, in an appropriate case, such as would lend themselves to an application for judicial review. In support of his contention that the Solicitors Disciplinary Tribunal should be a respondent to his appeal and not a mere notice party, the applicant invokes a decision of this Court in *The State (Creedon) v. The Criminal Injuries Compensation Tribunal* [1988] IR 51 where that Tribunal was a respondent to the applicant’s claim. That was not however an appeal, but rather an application for judicial review, and it was both legally appropriate and in accordance with the applicable Rules of Court governing such proceedings, that the relevant Tribunal in that case would be the named respondent. The

appellant invokes the same case for an additional purpose, namely, to support his contention that a Tribunal against his decision he is appealing is obliged to provide appropriate and adequate reasons for its decision and he argues that the Solicitors Disciplinary Tribunal did not do so.

Having regard to the fact that this is not a judicial review of the decision of the Solicitors Disciplinary Tribunal, the arguments and complaints of the above nature and those of an analogous type which the appellant makes on its findings, all fall, once there is a full appeal to the High Court, at which appeal both parties are heard again at an oral hearing in open court, where both can make legal and other relevant submissions on all matters, with a fresh determination of the issues, and where a judgment is delivered on that appeal.”

30. It follows from the fact that the applicant was entitled to a *de novo* hearing in the High Court that she is not now entitled to raise grounds of appeal directed against the *decision of the Tribunal* (as opposed to the decision of the High Court), and further that any arguments or complaints that she has against the Tribunal that are of the sort that might have been raised by way of judicial review of the Tribunal decision are not matters that can be raised at this stage.
31. It is also important to point out that, while the applicant was entitled to have her appeal heard in the High Court *de novo*, the principles identified by Finnegan in *Law Society of Ireland v. Walker* applied equally to that *de novo* hearing, and the High Court was entitled to take into account that in any disciplinary enquiry the standard of proof is the criminal standard of proof i.e. beyond reasonable doubt.

#### **Background to complaints**

32. By way of preface to this section, it is clear from the recitation in paragraph 5 of the Judgment that O’Connor J. had regard to all of the affidavits to which he was required to have regard in hearing the appeal, being those that were before the Tribunal, and also the affidavits sworn by or on behalf of both parties for the purposes of bringing and defending the appeal in the High Court. In addition it is apparent that he read the affidavits sworn on both sides in February 2020, including the Further Affidavit of the applicant sworn on 19 February 2020 and the exhibited Report of Dave Madden, Document Examiner.
33. I have read and considered these affidavits and exhibits, and also the further affidavits sworn in relation to this application for an extension of the time – the affidavit of the applicant sworn on 15 March 2021, the replying affidavit of James Watters sworn on 2 May 2021, and the replying affidavit of the applicant sworn on 9 June 2021, and the exhibits referred to in those affidavits. For the sake of completeness I should add that I have also read the affidavits of the applicant grounding her related applications for an extension of the stay on the costs order (sworn on 30 March 2021, and the replying affidavit of James Watters sworn on 28 May 2021), and to admit new evidence (sworn on 11 October 2021, with exhibits).

34. That the High Court judge did indeed read and consider all relevant material is abundantly clear from the detail in the "Chronological background" usefully set out in para. 8 of the Judgment. While he states that "This summary does not purport to determine facts but merely to outline the facts alleged or not in dispute." it is a convenient place to start because this background is clearly extracted from the affidavit evidence. That is not to say that I regard it as determining facts, or that I necessarily adopt his comments, but for the purpose of considering "arguability" it usefully sets out the applicant's interaction with the respondents from the moment she became their client until she ceased to engage them and filed complaints with the Tribunal. I set it out because it illustrates the interaction or course of dealing that is central to the "*arguable appeal*" that she wishes to make, and in particular the inferences of criminality that she asks the Court to draw from this interaction. The applicant in her Amended Notice of Appeal refers to certain errors in the "Chronological background", and I will highlight these in footnotes.
35. The "Chronological background" refers to Ms. James as "the appellant" and reads as follows:

"31.10.2017

The appellant (according to para. 11 of her affidavit of 19 February 2020) applied for the Irish State Pension (contributory) "on the basis of [her] false impression that [her] UK national insurance contributions constituted qualifying "periods of insurance" equivalent to Irish "paid full rate" contributions, which would oblige the Irish authority "under Article 6 of Regulation EC 883/2004 ["The 2004 regulation"] to "aggregate" the UK contributions in the calculations for eligibility for said pension".

16.11.2017

The appellant was notified that her application had been refused with an acknowledgment of the appellant's "UK national insurance contribution (periods of insurance) as required under Article 6" of the 2004 regulation.

04.12.2017

The appellant was informed that her application for State pension (contributory) had been refused.

06.01.2018

The appellant appealed the refusal of her application for the said pension

25.05.2018

The appellant attended the offices of the first named respondent having identified him from his website that he was a specialist in social welfare. The appellant exhibits contemporaneous notes taken by the solicitor who attended together with

a letter which she wrote and handed over at the consultation. The appellant alleges that the letter shows that she "...had failed to consult the relevant Irish statute wherein 'qualifying' contributions are defined as those obtained by employment or self-employment or appreciate that this requirement was a...special national condition for the opening of a right, and that the Irish authorities had, therefore, correctly applied EU law in my application ....".

In summary, the appellant is aggrieved that the respondent solicitor had not corrected her false impression at the consultation when presented with the facts set out in her letter dated 25 May 2018 which specifically requested the respondent firm to represent her and to engage a named barrister to pursue judicial review proceedings on her understanding that she may not "recover any cost in a judicial review" of the adverse appeal determination. The appellant sets out in her affidavits a lot of detail of the facts and law as she now understands the situation.

07.06.2018

The respondent firm wrote to the chosen barrister, setting out the background and enclosing a booklet of papers with instructions that the appellant wishes to judicial review the adverse appeal decision, while requesting his opinion.

12.06.2018

The barrister advised the respondents that the appeal should be processed and concluded before embarking on a judicial review. In addition he advised that the appellant should obtain her contribution records from the UK.

14.06.2018

The respondents requested the social welfare appeals office ("SWAO") to grant an oral hearing pursuant to the appellant's letter of authority. This followed a consultation with the barrister in the presence of the second named respondent. The appellant alleges that the false impression already given was reinforced at the consultation. At the hearing of this appeal she adduced an expert opinion that a page had been omitted from the agenda and minutes of her meeting on 14 June 2018. This evidence was not available at the hearing before the SDT. The respondents reserve their position and rights in relation to the adducing of that expert opinion if it is pursued by the appellant by way of complaint or otherwise.

At the consultation on 14 June, the appellant advised the barrister that she had also initiated proceedings in the High Court to recover damages in a medical negligence claim. The appellant now alleges that she was advised by another firm of solicitors that no solicitor could act on her behalf in that medical negligence case because the professional indemnity providers for solicitors require solicitors to draft and institute the proceedings in order to maintain their cover. The appellant did not

adduce any evidence of such a view in writing or by way of affidavit from that other firm of solicitors.

16.06.2018

The appellant forwarded a letter to the respondent firm with details which she had obtained under the general data protection regulation.

28.06.2018

The appellant delivered papers in the medical negligence case and paid €1,230 to the respondent firm in respect of her appeal and the sum of €1,845 towards anticipated costs for her medical negligence claim. The latter was refunded to the appellant on the 17 December 2018, albeit following the appellant's complaint to the SDT in November 2018 concerning the absence of a s. 68 letter relating to the medical negligence claim.

19.09.2018

The respondent firm in accordance with counsel's suggestion wrote to the SWAO advising that proceedings would issue without further notice unless a decision on the appeal was made. The appellant at para. 37 of her affidavit sworn on 19 February 2020 complains that this fails to take account of the reasonable expectation for a delay to consider the "added EU dimension". She suggests that the respondents were expediting matters to start a judicial review.

15.10.2018

The SWAO wrote to the appellant "regrettably" disallowing her appeal.

18.10.2018

The appellant emailed the respondent firm and attached a "draft written submission in the defamation action, as discussed with a copy of the impugned medical record" along with a copy letter describing her daily pain for the medical negligence claim. The second named respondent telephoned the appellant that day. The appellant claims in para. 40 of her affidavit sworn on 19 February 2020<sup>2</sup>, that she took what is now a rather indecipherable manuscript contemporaneous note<sup>3</sup> which is exhibited.

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<sup>2</sup> The applicant contends that the attribution to her affidavit sworn on 19 February 2020 is incorrect.

<sup>3</sup> The applicant contends that this is an error and that the contemporaneous note was made by the second named respondent.

22.10.2018

The appellant avers that she re-examined her decisions after she discontinued medication which she claims caused her cognitive impairment. The appellant describes how she concluded around this time that "there was no possibility that legal services in the matter [social welfare] could have been of any benefit whatsoever". Significantly, the appellant alleges deception contrary to s. 2(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001 on the part of the respondents and counsel.

02.11.2018

Counsel emailed the respondents with a draft letter to the chief appeals office seeking "a s. 318 revision of decisions" on the basis that the appeals office erred in law which the respondent firm engrossed and sent.

05.11.2018

The appellant wrote to the respondents that the 21 – day deadline to initiate a statutory appeal had now passed and requested counsel's advice. She also requested invoices for "end of year accounting purposes".

08.11.2018

The respondents emailed the appellant enclosing copies of various documents including a s. 68 letter for the social welfare matter. A copy of the request dated 7.11.2018 from the chief appeals officer to refrain from issuing judicial review proceedings was also enclosed.

09.11.2018

On this date, according to the appellant, she started to write a complaint to the SDT. [Para. 52 of the affidavit sworn on 11.11.2019].

14.11.2018

Counsel wrote a letter addressed to the appellant expressing regret that she was dissatisfied with the services which he provided to date. He wrote: "Kindly note that, to date, the only fees that I have ever sought (and received) was an initial fee of €500 plus VAT in respect of the social welfare matter. I have not at any point, sought any other fee in respect of this matter. Nor do I intend seeking any other fees for this matter in the future. In respect of the medical negligence matter, I agreed to review the case on what I understood to be a *pro bono* basis ...if I believe that your case had merit and that I could assist, I would continue with the case on a *pro bono* basis.

In respect of the progressing of the social welfare matter, the final decision always rests with the client, it is my practice to thoroughly review all aspects of the case, prior to the institution of proceedings. Having done that, I would advise the client of the relative merits and strengths of the case. I would also advise a client of the costs implications where a case is not successful. I have not yet had an opportunity to review your case, but I was planning on carrying out the review early next week and issue advices and a consultation thereafter”.

Counsel then referred to the decision of the Administrative Commission and cited three specific cases in the European Court Reports to support his conclusion: “The decision is not binding and may be challenged or subsequently overturned or reinterpreted in proceedings before the Court of Justice, which considers such decisions as being capable of providing guidance to competent institutions of member States”. You will understand from the foregoing that the existence of an administrative decision does not mean that a case will not succeed. If, following a review, I remained of the opinion that the social welfare case was stateable and had a reasonable prospect of success, I would take the case on without requiring any fees from you. This remains my position. I would only receive the fees if the case was successful (and these would be discharged by the respondents in the case, not you) ...”.

17.11.2018

In a two – page densely typed letter addressed to the respondent firm the appellant sought €75,000 “... in exchange for my signature on a legally binding agreement not to send the complaints, a binding declination of prosecution, and a comprehensive non – disclosure agreement”. Curiously, the appellant continued on to inform “I have lodged an envelope with my solicitor with instructions that it be opened in the event of my death in unexpected, unexplained or suspicious circumstances. It contains copies of the complaints and a copy of this letter. My solicitor has not been given details of the complaints”. She then proceeded to identify her solicitor.

19.11.2018

The appellant was sent a copy of the five – page review of the appeal officer's decision dated 16 November 2018 which found no error of fact or law in the appeal officer's decision. The same letter from the respondents gave an appointment for the appellant to attend their offices on 23 November 2018. The appellant at para. 55 of her affidavit sworn on 11 November 2019 alleges “the reason an existing client is required to attend a solicitor in person, other than for a personal consultation with counsel, is to produce the credit card for payment: everything else is now done by email; as no mention was made of any such consultation, it was apparent to me that the above mentioned letter constituted the culmination of the conspiracy: all appeals procedures had now been exhausted and it was now

appropriate for them to take judicial review proceedings, for which services I would be required to pay the retainer on 23 November 2018.

19.11.2018

The appellant emailed the second named respondent (which she also omitted to exhibit in her affidavit for the SDT). This email would naturally cause great distress to any professional. She alleged that the respondents and counsel "violated the fundamental ethical principle. . . thou shalt not tell the client he has a good case where ..." there is "no arguable case". She stated that she looked forward to "... reporting the fraud to the Gardai on Friday, posting the complaints, and seeing the story in the media. Eventually, I'll enjoy the civil case to get repaid what you robbed plus aggravated and exemplary damages".

23.11.2018

The appellant consciously did not attend this scheduled consultation.

23.11.2018

The respondent firm sent to the appellant a copy of counsel's letter dated 14 November 2018 along with advice that they would be in contact about the medical negligence matter upon hearing further from counsel.

28.11.2018

The respondent firm emailed the appellant asking specific questions in the context of the social welfare matter. The appellant complains at para. 58 of her affidavit sworn on 11 November 2019, that this information "... would already have been fully disclosed to the social welfare services when I applied for State pension (contributory), and seems to be a desperate attempt to scrape the bottom of a social insurance contribution barrel washed up on the shore of some 'forgotten' five - year long period of employment to arrive at the required total of 520 employment - based contributions, and clearly demonstrates the abandonment by the respondents [and counsel] of the "principle of abrogation"<sup>4</sup> grounds of appeal, with no stateable case made out in the alternative". By this date, the appellant had sworn her ten - page affidavit in Form DD2 to start the process before the SDT.

The second named respondent in his affidavit sworn on 19 February 2020 explains that no work was carried out on the medical negligence file after the complaint made by the appellant.

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<sup>4</sup>The applicant contends that the word "abrogation" is an error and this should refer to "principle of aggregation".

18.12.2018

The second named respondent drafted a final fee note for the work done in relation to the social welfare matter and an amended s. 68 letter which he dated 28 June 2018 to reflect the date on which the appellant made the second payment of €1,230 for the social welfare matter. Para. 7 of the second named respondent's affidavit of 19 February 2020 avers "My reasoning for this was that I was preparing a final fee note of €1,845 in the social welfare matter whereas the original s. 68 letter of 14 June 2018 referred to €615.00 in respect of solicitor's fees. I understand that it may not have in fact been necessary to prepare an updated or "amended" s. 68 letter but I did so at this time". He proceeds to apologise for any inconvenience caused and that inexperience led him to backdate the s. 68 letters. Interestingly, the appellant during an oral submission to the court, stated that she would have no claim for damages to pursue in her proceedings (in which she filed the already mentioned affidavit on 1 July 2019), if all of the monies which she had paid were refunded. The respondent solicitors taking account of the €500 plus VAT paid to counsel have recovered modest fees for all of the work undertaken by them and particularly given the refund made in December 2018 for the medical negligence matter."

**The core complaint**

36. In her Form DT2, which sets out her complaints to the Tribunal in some detail, at para. 7 the applicant avers that –

"During the period between 14 June and 15 October 2018 I had revisited my Grounds of Appeal [to the Social Welfare Appeals Office] and discovered that I had completely misunderstood the application of the Social Welfare Regulations in regards to my eligibility, and that this mistake meant that the grounds of the Appeal I have made when the original Decision to refuse State Pension (Contributory) were misguided and I had been incorrectly advised by Watters, [Counsel] and Steer that I had any cause of action or arguable case to pursue the matter to judicial review."

37. The applicant then sets out a number of complaints, but her key complaint of misconduct may be summarised as follows: she asserts that the respondents, who as her solicitors were in a fiduciary relationship with her, made false representations, to wit, by their acts/advice, including omissions, reinforced her "false impression" of the relevant regulations concerning her Social Welfare pension entitlements, and as such acted "dishonestly" for the purpose of making gain or causing loss by deception. She asserts therefore that they committed an offence under s.6(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act") which provides:

"6.(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence."

For the purposes of the 2001 Act, "dishonestly" is defined in s.2(1) to mean "without a claim of right made in good faith". Also relevant is the meaning of "deception" given in s.2(2) which, so far as relevant, provides:

"(2) For the purposes of this Act a person deceives if he or she –

- (a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind;
- (b) ...
- (c) fails to correct a false impression which the deceiver previously created or reinforced..."

It is this reference to "false impression", and acts/omissions of the respondent that the applicant asserts criminally "reinforce[d]" her false impression, that lie at the heart of her complaint.

38. She asserts (para. 9 of Form DT2) that Mr. Waters represented himself as an expert in Social Welfare law and that it was –

"not credible that he was unaware of the requirement in the Social Welfare Regulations...for calculating eligibility for State Pension (contributory), specifically, that social insurance contributions, from any country, must be either paid full-rate or modified contributions to qualify for inclusion in the calculation of such eligibility",

39. She also says that it is not credible that he did not immediately realise that her "credited UK contributions" did not qualify, and she avers that Counsel's opinion was "neither necessary nor desirable", and that her Social Welfare appeal could not succeed. The applicant asserts that her false impression was reinforced on her first appointment with the respondents on 25 May 2018, and further reinforced in subsequent interactions with the respondents, and in particular in her meeting/consultation with the barrister on 14 June 2016, in the letter which she sent to the respondents on 16 June 2018, in remitting €1,200 to the respondents on 28 June 2018, and in the steps taken, including correspondence sent on her behalf, by the respondent in pursuing a further appeal to the Chief Appeals Office, and in threatening judicial review of the Social Welfare Appeals Office decisions. She complains that she was deceived by the respondents into paying for their services. At para. 10 of DT2 the applicant refers on the solicitor's obligation to "to give his client correct advice, whether or not this advice is what the client wants to hear", in accordance with the duty of care identified by O'Donnell J. (as he then was) in *Whelan v. AIB* [2014] IESC 3. She asserts that the respondents' misrepresentations induced her to enter into the client/solicitor relationship, and to pay money on account of professional fees. She refers to the content of the Social Welfare Appeals Office decision and the Chief Officer's review decision, and attributes their criticism of her pension claim/appeals to the respondents' ignorance of the applicable principles and law.

At para. 24 of DT2 the applicant states:

"It is submitted that the respondents are guilty of misconduct in his practice as solicitors in that they failed to provide adequate, complete and correct legal advice *ab initio* to an elderly client amounting to dishonest concealment of facts; conspired with [counsel] to defraud the complainant...which actions constitute fiduciary fraud offences under s.6(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001".

40. The applicant also complained in a similar vein about the payment of €1845 requested by the respondents and made by her for "opening the file" and obtaining counsel's preliminary opinion on the medical negligence matter, noting that at the time of the complaint she had received no s.68 letter and no Opinion.

**The core response**

41. In his replying affidavit sworn on 1st March, 2019 James Watters denies the allegations of misrepresentation, deceit and dishonest concealment of facts, and also denies the allegation that the advice given to the applicant was incorrect. At para. 6 Mr. Watters contends that, while the applicant characterises her complaints as matters of professional conduct, they –

"...more appropriately concern and relate to the adequacy of professional services rendered",

and therefore –

"are patently matters that ought to be dealt with in the appropriate forum i.e. the courts and by way of civil litigation."

**The exhibited minutes of 14 June 2018 and the letter of 17 November 2018**

42. In setting out in more detail his response to the allegations Mr. Watters exhibited minutes of the meeting attended by the applicant on 14 June 2018 where he says the applicant instructed her counsel that "she wanted to abandon the appeal and take Judicial Review proceedings." The minutes exhibited are a handwritten record and run to three pages. Mr. Watters also exhibited the applicant's letter to the respondent solicitors dated 17 November 2018 in which she sought €75,000 in exchange for agreeing not to send complaints to the Tribunal, and copies of her emails dated 19 November 2018, which are referred to in the trial judge's Chronological Background.

43. In response to Mr. Watters' affidavit, the applicant swore a replying affidavit on 1 May 2019. It is not necessary to go into this in detail, but of note is para. 6 where the applicant refers to the minutes of the meeting of 14 June 2018 as "further supporting evidence for the deception...". She sets out transcriptions of pages 1, 2 and 3. On page 2 the note records the reference in the consultation to her Social Welfare appeal, and "you cannot withdraw your appeal and then try to seek JR" and reference to "the difficulty with the EC complaint took a long time". It also records counsel saying:

"BL – you will get your just satisfaction in the HC, and the Appeals Officer will not find in your favour."

On page 3 the transcription says –

- “- BL – your case might go to Europe
- BL – EU Law – you can make an individual complaint to the Commission
- BL – I will attend the Appeal with you”

The applicant relies on the advice recorded on page 2 as reinforcing her misapprehension as to the law, and the creation of false expectation that she would get “just satisfaction in the High Court”. Before setting out her transcription of page 3 the applicant points out in her affidavit that a page is missing: -

“The page that should follow here is missing from Exhibit JW1: It would start with the record of the detailed recounting by [Counsel] of his personal experience in the High Court at being denied leave to apply for Judicial Review in a case because all possible appeal mechanisms had not been exhausted. The text on the second page in the Exhibit to the Replying Affidavit starts with a *non sequitur* and does not complete the statement begun in the last line of the previous page.”

44. It is important to point out here that the applicant does not make a complaint of misconduct arising out of the exhibiting of minutes with a missing page, but does rely on both the content of the exhibited minutes, and the fact of a missing page, as supporting her complaints of deception/misconduct. In the remainder of this affidavit the applicant seeks to counter Mr. Watters’ averments, and restates her case that the breaches of duty by the respondents were intentional and not merely negligent. She further alleges conspiracy between the respondents and Counsel between 25 May 2018 and 14 June 2018, and she responds to what Mr. Watters had to say in his affidavit in relation to s. 68 letters.

#### **The Tribunal decision**

45. The Tribunal issued its decision on 2 August 2019. It is clear that the Tribunal extracted from the applicant’s affidavit of 16 November 2018 (Form DT2) a number of complaints, and found these in paras. 9, 19, 20, 21 and 24 [a] to [i] inclusive. The Tribunal found that “there is no *prima facie* case of misconduct on the part of the respondent solicitor for enquiry in respect of each of the allegations” as set out in these paragraphs. In relation to paras. 9, 19, 24(a), (b), (c), (d), (g) and (h) the reasons given for rejecting a *prima facie* case of misconduct were the same, and as follows: -

“Reason(s):

The allegations made relates to the adequacy of the work provided by the respondent solicitors. These allegations do not disclose conduct which could be construed as misconduct.”

The complaint at para. 21 related to a failure to provide written s. 68 information to the applicant despite formal request, and the complaint at para. 24(f) related to a failure to

provide satisfactory s. 68 statements setting out the legal basis for the charges paid by the applicant. The respondent had asserted on affidavit that s. 68 letters had been issued, both in relation to the social welfare matter and the medical negligence matter, on 8 November 2018, and in relation to both these allegations the Tribunal found no prima facie case on the basis that the allegations had been adequately rebutted by Mr. Watters' affidavit of 1 March 2019 and the documents exhibited thereto. The remaining complaint at para. 24(e) related to breach of duty of care as a solicitor. The Tribunal found that there was no *prima facie* case stating –

“Reason(s):

This allegation has been adequately rebutted by the respondent solicitor in his affidavit sworn 1 March 2019, and the documents exhibited thereto.”

**The affidavits sworn for the High Court appeal**

46. In the affidavit sworn by the applicant on 22 August 2019 the applicant in large part restates her complaints, as set out in Form DT2, and she sets out the Tribunal decision, and in large part restates the basis of her complaints as set out in her earlier affidavits. In a further supporting affidavit which she swore on 11 November 2019 the applicant sets out more biographical detail, and information related to her employment in the State, and her prior employment in the UK where she was awarded the “basic UK State Pension” on 31 March 2016. She also gives more detail in relation to the “credited contributions” which she mistakenly believed, at the time she went to the respondent solicitors for legal assistance, gave her entitlements to Social Welfare in this State. Again, much of this affidavit reprises the allegations made in earlier affidavits and sets out the advice which she was given which she claims intentionally/deliberately reinforced her mistaken impression of her legal entitlements.
47. At para. 29 the applicant refers to the missing page in the exhibited minutes for 14 June 2018, and in a later affidavit which she swore on 19 February 2020 the applicant exhibits a report dated 30 January 2020 of Dave Madden, Document Examiner. That report, based on examination of the original minutes at the office of the respondents on 7 November, 2019 concludes –
- “In my professional opinion, it is probable that a page has been omitted from the questioned document between the page marked ‘1’ and the page marked ‘3’.”
48. In the affidavit which Mr. James Watters swore on 19 February 2020 he responds to the two affidavits sworn by the applicant to ground her appeal. He again refutes the allegations of deceit, misrepresentation and dishonest concealment, stating that they are “baseless and without foundation”, and points out that “the Appellant has not chosen to put any independent evidence whatsoever before the Disciplinary Tribunal or indeed this Honourable Court, which supports the Appellant’s contention that the legal services provided to her fell below the standards to be expected”. Mr. Watters asserts at para. 5.d “that at the core of the Appellant’s allegations lie complaints in relation to the adequacy or otherwise of legal services provided.” He then addresses in paras. 8 – 20 the s. 68

allegations, and from para. 21 on, addresses the allegations in relation to services provided. He provides some new evidence in relation to an initial payment made by the applicant to his firm of €150 on 25 May 2018 when she first attended, and that she wished to consult with a particular Counsel who had written a thesis on social welfare law. This led to the consultation on 14 June 2018. He says at para. 29 -

"29. Whereas the Appellant has chosen to characterise the meeting of 25th May 2018 as involving some form of misrepresentation and alleged '*deception*', what in fact occurred was that the Appellant presented a technical and complex legal question or query and I furnished general advice only in relation to the requirement to exhaust legal avenues prior to embarking on High Court judicial review proceedings. The meeting was the first step in a process and no decision was reached or made save for the decision to engage the Appellant's selected Counsel to consider the matter and to attend a consultation. I say and believe that it is absolutely incorrect to say that the Appellant was misled in any way at this meeting or that there was any intention on the part of anyone to mislead the Appellant. I believe that the Appellant's allegations in this regard are scandalous."

Mr. Watters goes on to deny that the applicant was given any "false" impressions at consultation, and to express his belief that Counsel did not engage in any improper conduct. He does not address the question of a missing page in the minutes which he had previously exhibited. He addresses the medical negligence matter at paras. 33 and 34. He relates that the applicant attended on 28 June 2018 and handed over the social welfare file and was asked to pay €1,230 "in respect of ongoing work" on that matter. He states that the applicant also handed over -

"...a file in relation to a medical negligence claim and that [Counsel] had indicated that he was willing to review the file as a favour to Ms. James. I said to Ms. James that in order for the Medical Negligence file to be assessed a payment on account would have to be made. I informed the Appellant that fees would be lodged and held in the client account and she was duly furnished with a receipt." (para.34)

This led to the further payment of €1,500 plus VAT making in total €1,845, in respect of the medical negligence matter. This sum was ultimately refunded to the applicant on 17 December 2018.

49. An affidavit was also sworn on 19 February 2020 by the second named respondent, Stevroy Steer. This deals largely with the s. 68 letters which he created, and which need not concern us at this stage as that matter has been remitted to the Tribunal. He also refers, at para. 6, to the fact that no work was carried out on the medical negligence file until Counsel completed a review, but Counsel did not review the file because matters were taken over by events in November 2018 when the applicant raised her complaints.

### **The High Court**

50. In the introduction to his judgment dated 18 December 2020 the trial judge briefly summarises the reasons why the Tribunal declined to find a *prima facie* case of

misconduct. He then appropriately refers to the decision of Finnegan P. in *Law Society of Ireland v Walker* in relation to the function of the Tribunal in ascertaining whether a *prima facie* case is disclosed, and appropriately refers to the appeal being a de novo hearing in the High Court following the decision of Macken J. in *O'Reilly v Lee*. Having set out at para. 5 the affidavits that were relevant, he then at para. 8 sets out the "Chronological background" which I set out in full earlier in this judgment.

51. The trial judge did not have to address the s. 68 issues because the respondents consented to an order that the Tribunal allow an enquiry to proceed in relation to the alleged non-compliance with s. 68 of the Solicitors (Amendment) Act, 1994 in respect of both the social welfare pension and medical negligence claims.
52. In respect of the applicant's other complaints it is apparent from a reading of the judgment as a whole that the trial judge agreed with the Tribunal. He did not accept her allegations in relation to fraud, deceit and conspiracy – it is clear that he agreed with Counsel that these allegations were based solely on her own opinion and beliefs. It was also clear that he agreed with the submission on behalf of the respondents that the complaints concerned the adequacy of legal services provided. In respect of this he also pointed out –

"14. Apart from asking the Tribunal and this Court to accept her interpretation of the relevant legislation, the appellant does not offer any evidence of the standard expected of solicitors. She overlooks the onus of proof which rests with her, albeit in the context of what Finnegan P. said in *Law Society v Walker* [2007] 3 IR 581 concerning the standard of proof at this stage."

He accepted the submission by Counsel on behalf of the respondents that the applicant could not rely on negligent advice as the basis for a misconduct complaint: -

"16. Mr. Savage [P.L.] correctly submits that the reliance by the applicant on the principles deriving from *Hedley Byrne & Company Limited v. Heller & Partners Limited* [1964] AC 465 is misplaced because that concerns an issue of liability which does not arise here."

The trial judge also seems to have accepted that he should have regard to the criminal standard of proof in respect of complaints of criminal conduct: -

"17. Most significantly, despite the lack of objection to refer any issue about alleged non-compliance with s. 68, Mr. Savage requests the court to consider the standard which is ultimately going to have to be applied and that is the criminal standard of proof beyond reasonable doubt for the allegations of fraud, deceit and conspiracy."

He found in his conclusions that the presentation of the papers for the appeal "leave a lot to be desired", and that the applicant showed "a lack of discernment in placing the relevant facts before the SDT and this Court by way of appeal." In relation to the medical negligence claim, he found –

"23. The appellant also appears to believe that her opinion is sufficient to support her claim of misconduct in relation to taking on her medical negligence case. I am not satisfied that there is a *prima facie* case of misconduct on the part of the respondents' solicitors in the medical negligence matter. No evidence to support this serious allegation was adduced."

At para. 45 he therefore dismissed the appeal save in respect of the s. 68 issue.

53. In relation to the missing page issue, the trial judge stated –

"21. The introduction of a claim that the respondents disposed of a page to the attendance note for a consultation on 14 June 2018 was not considered at first instance by the SDT. Therefore, following Macken J. for the Supreme Court in *O'Reilly v Lee* [2008] IESC 21 I refuse to consider this new claim."

#### **Notices of Appeal**

54. The applicant has filed two extremely lengthy Notices of Appeal, both inappropriately replete with affidavit evidence, submissions and legal argument. The first, filed on 31 March 2021, runs to some 35 pages, and contains an introduction with a narrative, and recites various rules of the RSC and legal authorities. The applicant then addresses 'Complaint 1: the Social Welfare Matter', from page 8 onwards, and sets out what she perceives to be the elements of the crime of making gain and causing loss by deception and conspiracy, and the facts upon which she relies, and her "logical analysis of the evidentiary facts". On p. 16 she addresses 'Complaint 2: the Medical Negligence Matter', and again sets out parts of her supporting affidavit evidence. In a section headed "Making Gain or Causing Loss by Deception: Intention" the appellant addresses the definition of dishonesty for the purposes of s. 2(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and at para. 19 contends that 'omission can form an *actus reus*' and asserts that "deliberate omissions on the part of a solicitor to act, whether the client's interests are, or may be, prejudiced by such failure to take action, also "speaks louder than words" and intention may be presumed from the absence of what would be the expected action in the circumstances". She then sets out at para. 20, running to four pages, the acts and omissions on the part of the respondents from which she asks the court to infer criminal intent, starting with her initial presentation to the respondents on 25 May 2018 and running up to 23 November 2018 when she deliberately did not attend the appointment that had been made for her to attend at the respondents' offices.

55. The applicant filed her Amended Notice of Appeal on 9 June 2021, and she asked this court to consider this Amended Notice in substitution for the first one. The Amended Notice of Appeal runs to 28 pages, and after a narrative introduction proceeds by following subheadings that would be more appropriate to a judicial review. The subheading at 1.1 is "Failed to take relevant factors into account", and refers to the trial judge misquoting from the affidavit which she swore on 11 November 2019 the "principle of abrogation", whereas in fact the "principle of aggregation" was part of her grounds of appeal to the Social Welfare Appeals Office. At 1.1.2 under "Exhibit JW9" the applicant refers to the letter of 19 November 2019 from the respondents requesting her to attend

their office, following receipt of the Chief Appeals Officer's Review of her social welfare claim. She asserts that that letter omitted to explain why it was "important" for her to travel to Dublin from County Wexford. She asserts that it was because it was now time to advise her to pursue Judicial Review, but that this was not something they wished to put into writing. She asserted that the real reason was "I would also be able to present the credit card personally for payment" to initiate judicial review proceedings. She then asserts that the Chief Appeals Officer's decision was a correct interpretation of the relevant legislation and a "legally effective" statement of the law, and that the respondents (and Counsel) were seeking to reinforce "my 'false impressions of the law'".

56. The subheading to para. 1.2 is that the trial judge "Had regard to irrelevant factors". Here, the applicant points to material referred to by the trial judge in the Judgment in the "Chronological background" for the date 18.10.2018. She says firstly information was incorrectly attributed to the affidavit sworn by the applicant on 19 February 2020, and secondly the "indecipherable manuscript contemporaneous note" described by the trial judge was not taken by her, but was made by the second named respondent. In both these particulars the applicant would appear to be correct.
57. Subheading 1.3 is "Failed to address the contents of the affidavits filed before the Tribunal", and asserts that the trial judge failed to address the actual complaints made in Form DT2.
58. Subheading 2 is "False and misleading statements to the Court by Counsel for the Respondents" and is largely concerned with the applicant's contention that "the issue of destruction of evidence was not a "new matter". In this section the applicant criticises Counsel in the High Court for having referred to the missing page issue as something "that has arisen long after Miss James' appeal", whereas, as the applicant correctly points out, the fact that there was or may have been a page missing was indeed referred to at para. 6 of the affidavit which she swore on 1 May 2019. The applicant then criticises the trial judge for deciding the appeal solely on the basis of the materials which were before the Tribunal, and without regard to the missing page.
59. Under subheading 3 "The judge 'mislead himself as to the relevant jurisprudence'" the applicant criticises the trial judge for not mentioning or analysing the application of the 2001 Act, or the elements of the offence of "making gain or causing loss by deception", and in classifying her complaints as relating to the adequacy of work/services, and negligence, rather than fraud or deception.
60. At para. 50 under subheading 4 the applicant pleads "Without jurisdiction to consider whether the decision by the Tribunal to disregard a complaint or part thereof was lawful, the statutory High Court Appeal is not an effective remedy". At 4.1 the applicant addresses "Power of statutory High Court Appeal to 'go behind the face' of an administrative decision: Authorities", and she asserts that it is a positive requirement for the responsible body to go behind the face of a decision to see whether it is justified. The applicant in mounting this legal argument quotes from the judgment of Clarke J. in

*Rawson v Minister for Defence* [2012] IESC 26, at paras 6.2 and 6.9. At para. 6.9 Clarke J. stated:

“... Where the possible basis for challenge is founded on an absence of the correct question being addressed, incorrect considerations being applied or an irrational decision, any party wishing to assess the lawfulness of the decision will need to know something about the decision making process itself. While, as already pointed out, this is not a ‘reasons’ case per se nonetheless the underlying rationale for the case law on the need to give a reasoned but not discursive ruling, while not strictly speaking applicable, seems to me to have a bearing on a case such as this where the issue is as to whether the decision maker addressed the correct question.”

In this context the applicant wishes to assert that the trial judge failed to decide the question whether the respondents had given “a false impression as to the law”, and whether that had been “reinforced for the purpose of inducing the contract” of engagement.

61. Subheading 6 reads “Failure to give reasons”, and in reliance on *Doyle v Banville* [2012] IESC 25 asserts that neither the Tribunal nor the trial judge gave reasons for not finding that the respondent gave a “false impression as to the law” or made false representations, or why the respondent’s deception did not disclose conduct that should be construed as misconduct.
62. Subheading 7 reads “Adverse consequences of erroneous decisions where fair procedures were not observed: the right to a “good name””. Under this subheading the applicant seeks to argue that it was not open to the High Court to reject her complaints simply because evidence was not presented of the “standard expected of a solicitor”. She appears to argue that this amounted to rejection of evidence that was before the Tribunal on grounds that it was not presented in a form acceptable to the High Court.
63. There is no subheading 8. Subheading 9 is “Failure to engage with ‘essential parts of the evidence’”, and again asserts that the trial judge failed to give reasons why he rejected the applicant’s interpretation (presumably of the 2001 Act, and the acts and omissions on which the applicant relied) in the context of relevant Irish and European law cited by her, including the decision of the ECHR in *Donadze v Georgia* [Application No. 74644/01].
64. In a similar vein under subheading 10 the applicant pleads “Failed to apply ‘the deliberative process of deductive reasoning from evidentiary facts’”, and asserts that the trial judge failed to apply such a process of reasoning “to determine the intention of the respondents by drawing inferences from those facts”. This is followed by the applicant’s own “Chronology”, with reference to the relevant exhibits.

### **Submissions**

65. In written submissions at para. 5 the applicant addresses the question of whether she has an “arguable ground of appeal”. She also handed in at the hearing before the court in written format “oral submissions by appellant, 1 December 2020”, which were her

submissions before the High Court. It is not necessary to recount these in detail because her written and oral submissions to this court pursued arguments which were in line with her Amended Notice of Appeal. Broadly speaking she sought to argue that the respondents' acts and omissions were such that the Tribunal and the High Court should have inferred an intention on the part of the respondents to deceive her by reinforcing her "false impression" as to the law, and that this constituted the commission of a criminal offence under s. 6(1) of the 2001 Act. It was the applicant's contention that the respondents acted dishonestly, with the intention of making gain from the applicant, and that their deception in fact induced her to pay them fees/money on account of fees, and that the respondents have therefore committed an offence, and that there is *prima facie* evidence of misconduct.

### **Discussion/decision**

66. There is no doubt that if a complainant can show a *prima facie* case that solicitors have committed a criminal offence, then that is *prima facie* "misconduct" that should be referred for a disciplinary hearing. This is so, regardless of whether the solicitors concerned have been convicted of any alleged criminal offence, or even charged with such offence.
67. However an essential ingredient of the offence is dishonesty; there must be a deliberate and knowing intention to deceive, without any "claim of right made in good faith". There must also be deception, but this can include creating or reinforcing a false impression, including a false impression as to the law (the definition of "deception" in s 1(2) of the 2001 Act).
68. The applicant has never adduced any *direct* evidence on affidavit of a deliberate, knowing or dishonest intention to deceive her. Instead she relies purely on *inference* from acts of the respondents in taking on her social welfare appeals case, and advising her on it, and more particularly in omitting to advise her that the law was against her and her appeals were bound to fail. She also relies upon the fact that the respondents took fees in respect of the social welfare matter and fees on account in respect of the medical negligence matter. She relies on the initial meeting on 25 May 2018 and the continuing interaction between herself and the respondents up until 23 November 2018 as reinforcing the inferences which she asked the Tribunal, and then the High Court, to draw, and which she would seek to invite this court to draw if this appeal can be pursued.
69. This approach by the applicant is fundamentally misconceived. The acts/omissions upon which she places reliance are such that more than one inference can be drawn.
70. The first and most obvious inference is that the respondents, with the assistance of counsel, were advising the applicant on the basis that all local remedies available under the Social Welfare Acts would be pursued first, and then judicial review would be considered, and that this might involve consideration of the European legislation and in particular EU Regulation 883/2004.

71. This inference is supported by the content of those pages of the minutes of the consultation on 14 June 2018 that are transcribed by the applicant in her affidavit. This is empirical evidence to which the court can attribute considerable weight because, while the applicant complains about a missing page, she herself undertook the transcription and she does not dispute the contents of the minutes as so transcribed. These minutes demonstrate that counsel was live to the possibility that the applicant's Social Welfare appeal would fail under Irish regulations, that all internal appeals would need to be pursued before judicial review could be sought, and that the applicant might need to challenge the relevant domestic regulations under EU law.
72. So far as the medical negligence action is concerned, the most obvious inference is that monies were requested and received *on account*, and counsel agreed to take a preliminary look at the file – without any commitment by the respondents to take steps to support the claims made or represent the applicant in the action.
73. A second inference that *might* be drawn from the same set of facts is that the respondents (and Counsel) during the period of engagement had not conducted an in-depth examination of the applicant's social welfare pension issue, and had decided that she should pursue all local remedies before they would do so and before they would give serious advice on initiating judicial review proceedings. This inference *might* lead to the conclusion that the respondents provided inadequate professional services and/or were negligent. However in respect of this the applicant has never adduced any evidence of the standard to be expected of the respondents as solicitors in the circumstances. Moreover, because no judicial review of the adverse decision on the Social Welfare pension was ever mounted it cannot be said that that decision and the domestic legislation upon which it is based would necessarily survive an EU law challenge. It was not, in my view, the task of the Tribunal or the High Court hearing the appeal to analyse or express a view on this issue.
74. The third inference that *might* be drawn from the respondents' acts and omissions is that they deliberately and knowingly created and reinforced the applicant's false impression as to her social welfare claim, and in that knowledge took payment from her for personal gain.
75. This third inference that the applicant asked the Tribunal and the High Court to draw is not based on any concrete evidence but assertion, allegation and supposition, and in my view asks the Tribunal/the court to speculate in a manner that is impermissible. No Tribunal or Court could, when faced with three possible inferences – the first benign, the second at worst an inference of inadequate service, and the third an inference of commission of a criminal offence – could make a finding of dishonesty, bearing in mind that the commission of a criminal offence involves proof of all elements of the alleged offence beyond reasonable doubt. As Finnegan J. pointed out in *Law Society of Ireland v Walker* the Tribunal/the Court is entitled to have regard to the criminal standard of proof in relation to any allegation of misconduct, but this is doubly so where the allegation is of the commission of a criminal offence.

76. I have considered the applicant's reliance on the minutes of the meeting of 14 June 2018 exhibited by Mr. Waters, which she contends are missing a page, in support of her contention that the inference of dishonesty should be drawn. I accept, but I must stress solely and exclusively for the purposes of this application, that the applicant can show there to be a missing page, and that a strong opinion to this effect from Dave Madden, Expert Forensic Document Examiner, indicates that a page was "probably" missing.
77. There is no doubt that the applicant first brought this to the attention of the Tribunal in the affidavit which she swore on 1 May 2019, although she did not have the benefit of Mr. Madden's report at that point in time. However, she herself in para. 6 of that affidavit indicates what would appear in that missing page –

"... It would start with a record of the detailed recounting by [Counsel] of his personal experience in the High Court of being denied leave to apply for judicial review in a case because all possible appeal mechanisms had not been exhausted."

This averment is not contradicted. The applicant clearly has her own recollection of what took place at that consultation. She does not aver to anything that might be recorded in the missing page which would support her central contention of dishonesty. The mere fact that a page may be missing does raise questions, but does not of itself necessarily point to dishonesty, or support the case that the applicant wishes to make.

There is also no doubt but that the "missing page" was not itself the subject of any complaint to the Tribunal and therefore was not a matter in respect of which the Tribunal was required to make a determination as to whether or not there was a *prima facie* case of misconduct. The trial judge was therefore correct to find, as he did at para. 21, that this was not a "claim" that the Tribunal was required to consider. The position remains that the applicant has never made any formal complaint to the Tribunal in relation to a missing page.

78. For these reasons I am of the view that when one has regard to the respondents' acts and omissions in their interactions with the applicant, the applicant has failed to make out any arguable case for appealing the High Court decision, or challenging the fundamental findings by the Tribunal, with which the High Court agreed, that there was no *prima facie* case of misconduct, and that the applicant's complaints (other than those related to the s. 68 letters) only amount to complaints relating to the adequacy of the work provided by the respondent solicitors.
79. In my view the same considerations apply to the complaint in relation to the medical negligence file. The real significance of this second complaint is the fact that monies were requested and taken on account on 28 June 2018 at the same time as further monies were received in respect of the social welfare pension issue. The monies taken on account were ultimately returned in December 2018. The applicant does not seem to make any separate or distinct allegations of dishonesty relating to the medical negligence file, or the handling of that by the respondents, or the role of Counsel. It appears that Counsel had not in fact undertaken any preliminary review of the file, and that the

respondents' solicitors did not express any view or advise, or even affirmatively indicate that they would take on the case. It seems to me that any suggestion that the respondents were guilty of misconduct in relation to the handling of the medical negligence file is purely based on speculation and could not be a basis for any of the grounds of appeal articulated by the applicant.

80. As the gravamen of the applicant's complaints of criminal misconduct are fundamentally misconceived, it follows that she cannot have arguable grounds of appeal (noting of course that her complaints in relation to the s. 68 letters have already been referred back to the Tribunal). However for the sake of completeness I will briefly address the Grounds of Appeal in the second Notice of Appeal, by reference to the subheadings: -

1.1 Failed to take relevant factors into account.

The first part of this relates to an obvious misquote by the trial judge where he uses the phrase "principle of abrogation" instead of "principle of aggregation", and has all the appearance of a dictation/typographical slip; it is not a ground of any substance.

1.1.2 Exhibit JW9

In this ground the applicant relies on the Chief Appeals Officer's finding of "no error of fact or law" in the Appeals Officer's upholding of the refusal of her application for State Pension, and she therefore contends that in relaying this decision to her on 16 November 2018 and requesting her on 19 November that she attend their office, the respondents were again reinforcing her "false impression as to the law". For the reasons given earlier in this judgment this ground is not arguable, because such an inference is speculative and there are other more likely inferences that could be drawn from the respondents' acts/omissions.

1.2 Had regard to irrelevant factors.

This relates to wording in the trial judge's entry for 18.10.2018 in the "Chronological background" in the Judgment. The applicant asserts that the attribution by the trial judge to an affidavit sworn by her on 19 February 2020 is incorrect – that the material is derived from an affidavit sworn by her on 19 November, 2019. In fact it is derived from the affidavit that she swore on 11 November, 2019, but in any event this is not a ground of any substance. The applicant also refers in Ground 1.2 to the incorrect transcription of paragraph 40 of her affidavit sworn on 11 November 2019. This also lacks substance. The applicant is critical of the wording used in this entry where the trial judge refers to "a rather indecipherable manuscript contemporaneous note" of a telephone call on that date between the applicant and the second named respondent – the trial judge attributes this note to the applicant whereas her affidavit sworn on 11th November, 2019 clearly and correctly attributes this to the second named respondent. These are all errors of no consequence and no merit or substance.

1.3 Failed to address the contents of the affidavits filed before the Tribunal.

This ground is not made out. It is clear from the face of his judgment that the trial judge read and considered all of the affidavits and relevant exhibits, and his detailed "Chronological background" bears this out. It is also clear that he did consider the applicant's actual complaints. In this ground the applicant also takes issue with the trial judge's finding at para. 12 that, while she had spent considerable time researching her pension issue through the Oireachtas database and other databases "Regrettably she does not appreciate the law of evidence in this State." The point that the trial judge was making, and which he returned to in para. 14, was that the applicant failed to offer "any evidence of the standard expected of solicitors". It is the case that she did not adduce any expert evidence of the standard of service that would be expected of solicitors engaging with a client such as the applicant on the two issues – the Social Welfare Pension issue and the medical negligence issue. This ground of appeal is not stateable.

2. False and misleading statements to the Court by Counsel for the respondents.

2.1 The issue of destruction of evidence was not a "new matter".

What counsel for the respondents actually said in the High Court was: -

"... If any issue arises in relation to allegedly a page missing, this is something that has arisen long after Miss James' appeal which were are – Miss James' application which are dealing with when this appeal came before the Tribunal. So it's in fact a new matter."  
(p.25 l.21)

It is apparent from this that Counsel did not entirely discount the possibility that an issue arose in relation to a page missing. The applicant is entirely correct that it was explicitly raised in her affidavit sworn on 1 May 2019, and I have dealt with this earlier. However it cannot be suggested that the High Court was in any way misled by Counsel. Apart from the fact that the applicant had the opportunity in the High Court to correct any impression that may have been given by Counsel, it will have been clear to the High Court from the report of Dave Madden that there was evidence to support the applicant's contention that a page was missing. However this does not arise as a permissible ground of appeal in circumstances where the Tribunal did not have before it a formal complaint in relation to the allegedly missing page, and no finding has ever been made in relation to whether or not that in itself could give rise to a complaint of misconduct. In those circumstances the trial judge's finding at para. 21 cannot be criticised and this does not give rise to an arguable ground of appeal.

3. The judge "misled himself as to the relevant jurisprudence".

As I indicated earlier in this judgment the trial judge clearly directed himself to the relevant jurisprudence in relation to the function of the Tribunal in determining whether there is a *prima facie* case, and the function of the High Court in hearing the matter *de novo*. It was not necessary for the High Court to refer specifically to the 2001 Act when it

is clear that he had read the relevant affidavit evidence and was aware that her allegations related to fraud, deceit and conspiracy in the context of the legal services provided and the money received by the respondents. This much is abundantly apparent from a reading of the judgment as a whole, and the affidavits, and the applicant's written submissions of 1 December 2020, are replete with references to criminal offences and to the 2001 Act. In this ground the applicant suggests that the trial judge was obliged to answer the question of whether she had a "false impression as to the law", and that that question remained unanswered. As I have observed earlier, the difficulty with this is that while the end point of the decisions of the Appeals Officer, and the Chief Appeals Officer is that she had a "false impression as to the law" that question was never tested any further because the applicant disengaged from the respondents and no judicial review proceedings were initiated. On the law as found applicable by the Chief Appeals Officer the applicant on the face of it under a false impression as to her rights and entitlements at the time she engaged the respondents services, but it was not necessary for the Tribunal or the High Court to make a determination on this issue where the real issue that she raised was whether the respondents acted with dishonesty. This is not therefore an arguable ground of appeal, because for the same reasons the appellate court could not be required to determine the issue of whether her "false impression" of her social welfare entitlements was false or was, at least as a matter of EU law, correct.

4. Without jurisdiction to consider whether the decision by the Tribunal to disregard a complaint or a part thereof was lawful, the statutory High Court appeal is not an effective remedy.

In circumstances where the High Court had jurisdiction to hear the appeal *de novo*, and indeed to do so on the basis of additional affidavits sworn post the Tribunal decision for the purposes of the appeal, it is not arguable that the right of appeal under s. 7(12)(A) of the Solicitors (Amendment) Act, 1960, as amended, is not an effective remedy. As recounted earlier in this judgment under s. 7(12)(B) the court can confirm the Tribunal finding, or make a finding that there is a *prima facie* case in relation to the allegation of misconduct concerned, and require the Disciplinary Tribunal to proceed to hold an enquiry. To suggest that the High Court is precluded from questioning the legitimacy of the Tribunal's findings, and that it only provides a "rubber stamp" approval of the Tribunal's decision is erroneous, and unstateable.

4.1 Power of statutory High Court appeal to "go behind the face" of an administrative decision/Authorities.

In this ground the applicant seeks to argue that the statutory appeal to the High Court is not the same as a judicial review in which certiorari is sought, and that there is a positive requirement to go behind the face of the Tribunal decision. This ground, which is in the nature of a submission, is correct, insofar as the appellant from a Tribunal decision is entitled to a *de novo* hearing, in which all matters contended for by the appellant, and a respondent's reply, will be reconsidered and reargued in the High Court. This ground of

appeal is not arguable because the applicant did in fact have the benefit of a full *de novo* hearing in the High Court.

[There is no sub-heading 5]

6. Failure to give reasons.

When the judgement of the trial judge is read as a whole the reasons for his decision are apparent. He was clearly of the view that the applicant had failed to adduce evidence of the standard to be expected of solicitors in providing services of the sort which the respondents were engaged to provide to the applicant. The trial judge accepted that insofar as the applicant relied on breach of duty in the giving of advice, this was an issue of liability that could arise under principles enunciated in *Hedley Byrne & Company Limited v Heller & Partners Limited* [1964] AC 465, but was not an issue which arose in considering a complaint of misconduct. It is apparent from the judgment that the trial judge agreed with the Tribunal that the applicant's allegations did not disclose conduct which could be construed as misconduct. It seems to me that the applicant's complaints of failure to provide adequate reasons is really directed at the Tribunal, where the same reasons are replicated a total of nine times. However, any inadequacy on the part of the Tribunal in giving reasons is not the basis of a ground of appeal from the High Court, where the applicant had a full *de novo* hearing, to this court.

7. Adverse consequences of erroneous decisions where fair procedures were not observed: the right to "good name".

Insofar as this is a repeat of the complaint of an absence of adequate reasoning from the High Court, it is not, for reasons already given, an arguable ground. Insofar as it seeks to suggest that the High Court rejected her complaints on the basis that they weren't presented in "a form acceptable in the High Court", this is a misreading or misunderstanding of the Judgment. The trial judge does not reject the claims for lack of form, but rather rejects the complaints for lack of substantive supporting evidence.

[There is no sub-heading 8]

9. Failure to engage with "essential parts of the evidence".

For reasons given earlier it is clear that the trial judge did engage with the affidavit evidence and the essence of the applicant's case. It is correct to say, as the applicant does, that the trial judge rejected her arguments which he regarded as her "opinion", and that he considered the evidence adduced by her did not identify the "standard expected of solicitors". However it cannot be argued that he did not engage with essential parts of the evidence, and I would reject this ground.

10. Failed to apply "the deliberative process of deductive reasoning from evidentiary facts".

The applicant seeks to appeal on the ground that the trial judge failed to apply this deliberative process “to determine the intention of the respondents by drawing inferences from those facts”. I have dealt with this more fully earlier in this judgment. I am satisfied that the inference of criminal dishonesty which the applicant seeks to draw from the acts/omissions of the respondents is speculative, and that such speculation cannot form an arguable basis for an appeal. There are, as I have indicated earlier, other primary or more likely inferences which do not point towards “misconduct”.

In considering this issue the applicant brought to our attention an article “*Fraud and Negligence in Civil Litigation – Differences Between Cock-up and Conspiracy*” by Jim Oulton published initially in Times Online 17 March 2017, and republished in slightly different form by Mayer Brown International LLP, Insurance and Reinsurance Group, in which Mr. Oulton is a partner. The author discusses how difficult it is to prove civil fraud in the context of professionals who take on work that they lack the ability or time to do. He asks the question “are those people dishonest, negligent, blameless?” He refers to dishonesty in the civil context and the decision in *Derry v Peek* where it was held that where parties rely on statements which the maker intends him to rely on, knowing (or reckless as to whether) they are untrue, deceit is established.

The article does not purport to be an authoritative interpretation of the law. More importantly it is written in the context of “the wave of mortgage fraud claims which have come to light in recent years”. In any event it is not one that assists the applicant’s cause. Her complaints relate to allegations of commission of *criminal* offences, where the standard of proof is that of proof beyond reasonable doubt – not the civil standard of proof such as would apply in the tort of deceit. The author does not discuss *actus reus* or *mens rea* in the context of criminal offences. The applicant’s reference to this article underscores her fundamental misconception as to what is required in terms of proof of dishonesty in the context of an allegation of commission of a criminal offence.

81. As there are no arguable grounds of appeal the third limb of the test in *Eire Continental* is not met. In *Seniors Money* the Supreme Court agreed that it would be difficult to envisage circumstances in which the court might extend time for an appeal where arguability is not met, because that “would simply waste the time of the litigants and the court” (*per* O’Malley J. at para. 64). This is such a case, and indeed both parties’ submissions related solely to the issue of arguability, and accordingly it is not necessary to address any further where the balance of justice lies, as it lies against the granting of extension of time.
82. I would therefore refuse the applicant’s application for an extension of time. In the circumstances it is not necessary to further consider the application to admit new evidence – I have in any event considered the evidence (Dave Madden’s Report) in addressing and determining the application for an extension of time.
83. There remains the applicant’s appeal, lodged in time, in respect of the order in relation to costs made in the High Court. A question also now arises in relation to the costs of this application for an extension of time. It is appropriate that both these questions of costs

should now be heard together by this court. For that purpose I would direct that the applicant furnish her written submissions, in total not exceeding 1,500 words, covering her appeal in respect of the High Court order on costs, and the costs of the motion to extend time. These should be delivered within 21 days from the electronic delivery of this judgment. The respondents will then have 21 days to deliver reply submissions (not to exceed 1,500 words) and the court will then schedule a short hearing and notify the parties accordingly. In current circumstances if any party would like a remote or hybrid hearing (i.e. a physical hearing that one party could attend remotely) then that *preference should be indicated*.

Judges Murray and Barniville have indicated their agreement with this judgment and the orders which are proposed.