UNAPPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2023/269
High Court Record Number: 2023/93 MCA
Neutral Citation: [2024] IECA 251

Costello P.

Pilkington J.

Butler J.

BETWEEN/

THE PROPERTY SERVICES REGULATORY AUTHORITY

APPLICANT/RESPONDENT

-AND-

GABRIEL DOOLEY

RESPONDENT/APPELLANT

JUDGMENT of the Ms. Justice Butler delivered on the 21st day of October 2024

Introduction

1. This appeal arises out of a decision made by the respondent (the PSRA) following an investigation into a complaint made against the appellant who was at the time a licenced property professional. The PSRA found that the appellant was guilty of improper conduct

and imposed a major sanction on him, in this case a fine of €10,000. The particular question before the court is whether the appellant can seek to appeal against that decision outside of the 30-day time limit fixed by s. 70(1) of the Property Services (Regulation) Act, 2011 (the "2011 Act") and, if so, whether time should be extended to permit the intended appeal to be brought.

2. Both of those questions were decided against the appellant by the President of the High Court ([2023] IEHC 419) on the 17th July 2023. However, since the date of the High Court decision a seminal judgment has been delivered by the Supreme Court in the case of *Kirwan v. O'Leary* (Murray J. [2023] IESC 27) ("*Kirwan*") which examined an ostensibly similar statutory provision in s. 7(12A) and (12B) of the Solicitors (Amendment) Act, 1960. The Supreme Court overturned the decision of the then-President of the High Court (Irvine P. [2022] IEHC 152) which had held that the relevant time limit was absolute and did not permit of an extension. In so holding, Irvine P. relied on many of the same authorities which were opened to and relied on by Barniville P. in the High Court in this case. Consequently, much of the argument on this appeal concerned the application of the principles set out in the judgment of Murray J. in *Kirwan* to the circumstances of this case.

3. The appellant relies on *Kirwan* to contend that the time limit contained in s. 70(1) of the 2011 Act is not absolute and can be extended by the High Court in accordance with O. 84(C), r.2(5)(b) of the Rules of the Superior Courts. The respondent on the other hand contends that the statutory scheme in issue here is very different to that in issue in *Kirwan* and, when the relevant provisions are construed in accordance with the principle set out in *Kirwan*, that it is clear the time limit is an absolute one which is not capable of extension.

4. I have given some thought to the structure of this judgment because normally it would be appropriate for the court to decide whether it had jurisdiction to extend a statutory time

limit before deciding on the facts whether the time limit should be extended. However, for reasons which will become apparent in the course of this judgment I have, exceptionally, decided to take the opposite approach in this case. In particular, I am concerned that the provisions the court is required to construe are ones which are capable of impacting on the entitlement of a property professional to continue to practice as such and, therefore, in a different case might impact on the constitutional right of a licenced person to earn a living. This is not the case here as the sanction imposed, although classified under the legislation as a major sanction, consisted only of a fine and, therefore, did not impact on the appellant's entitlement to continue to hold a licence and to practice as a property professional. As shall be seen, the extent to which constitutional rights were engaged in the exercise of a right to appeal was the subject of some disagreement between the majority of the Supreme Court in *Kirwan* and the dissenting judgment of Woulfe J. ([2023] IESC 27). Therefore, in circumstances where some of the constitutional rights which might be affected by the interpretation given by the court to the relevant provisions are not engaged in this case, it seems prudent to decide what is, in my view, the more clear-cut issue first.

5. Before addressing the legal issues, I propose to briefly outline the circumstances in which this appeal arose and the legislative provisions to which it is subject.

Factual Background

6. The appellant is an auctioneer and, on the introduction of a licencing regime for property professionals, he became the holder of a licence under Part 3 of the Property Services (Regulation) Act, 2011 (the "2011 Act"). The appellant has in fact held two separate licences between November 2012 and December 2021 with an interval in 2016. He is not currently licenced, but that status is unconnected with the decision the subject of these

proceedings. The PSRA is the statutory authority established under Part 2 of the 2011 Act and is responsible for the issuing of licences under Part 3 and the investigation of complaints against licence holders under Part 7 of that Act.

7. In October 2019, a complaint was made to the PSRA by the liquidator of a company called Granja Limited alleging that the appellant had refused to return a booking deposit of €50,000 paid by Granja in 2014 in respect of the intended purchase of lands in Kilpedder, County Wicklow which purchase did not proceed. The appellant was acting as the agent for the vendors of the land whom I will refer to collectively as the "McDonagh brothers". The PSRA appointed two investigators to examine this complaint. Originally the investigators were appointed on terms which referred to the second of the appellant's two licences which was the one held at the time the complaint was made, but those terms were subsequently extended to cover the first licence which was the one in force at the time the deposit was initially paid.

8. The background to this complaint is extremely complex and the underlying transaction is one which has given rise to much litigation. In brief, the purchase of these lands by the McDonagh brothers in 2007 was facilitated by a substantial loan from their bank, Ulster Bank, which in turn had relied on the report of a property valuer as to the value of the lands provided as security for the loan. The timing of the purchase was inauspicious in light of the collapse of the property market in 2008 and the economic downturn which followed. The intended residential development of the lands did not materialise and the McDonagh brothers were unable to meet repayments on their loan. A company owned by one of the McDonagh brothers subsequently obtained planning permission to build a data centre on the site, but it was not developed for that purpose either.

9. In March 2013, a compromise was reached between Ulster Bank and the McDonagh brothers which, if complied with, would have resulted in a significant debt write-off by Ulster Bank in favour of the McDonagh brothers. Part of the terms of that settlement required the sale of certain properties by certain dates with the proceeds of sale going to offset the outstanding loans. In particular, the Kilpedder lands were to be sold on or before the 31st July 2014.

10. In 2013 the McDonagh brothers appointed the appellant to act as their agent regarding various matters including the sale of the Kilpedder lands on terms which included payment of the appellant's fees at a percentage rate which increased depending on the price achieved for the property. At this point difficulties arose between Ulster Bank and the McDonagh brothers including a disagreement with the agent appointed by Ulster Bank in respect of the same sale. This gave rise to issues in subsequent proceedings between Ulster Bank and the McDonagh brothers as to whether Ulster Bank had consented to the sale purportedly effected by the McDonagh brothers to Granja Limited. On the 13th of June 2014 a document entitled *"Heads of Agreement to Sell"* the Kilpedder lands to Granja for the sum of €1,501,000 was purportedly signed by the McDonagh brothers and on behalf of Granja and by Dooley Auctioneers. On foot of that agreement, Granja paid what was described in the document as a "booking deposit" of €50,000 to Dooley Auctioneers. The document also stated that a deposit of 10% (i.e., circa €150,000) was to be paid when a contract of sale was signed and exchanged simultaneously between the parties.

11. Much of the subsequent litigation has concerned whether the *Heads of Agreement* dated 13th June 2014 comprised a concluded contract for the sale of the lands. If it did then the McDonagh brothers would have met their obligation under the compromise agreement to sell the Kilpedder lands before 31st July 2014 and the appellant would be entitled to his

fee in respect of the sale. In a judgment delivered on 6th April 2020 in proceedings between Ulster Bank and the McDonagh brothers, Twomey J. ([2020] IEHC 185) held that it was not a concluded contract for the sale of the lands. He also held on the balance of probabilities that the document dated 13th June 2014 was not executed on that date but, in light of other documentary evidence, was more likely created in October 2014 (when Ulster Bank appointed a receiver to the Kilpedder site) and backdated to the earlier date. Twomey J. accepted the case made by Ulster Bank that Granja was not an independent company but was a vehicle through which Brian McDonagh was using his own funds (the existence of which had not been disclosed to Ulster Bank for the purposes of the compromise agreement) to purchase the Kilpedder lands. Other litigation involved Granja's attempts to achieve specific performance of the alleged contract of sale and Ulster Bank's claim in negligence against the valuer in respect of the original valuation of the lands.

12. This background is relevant, in part, because it illustrates the complexity of the relationships between those involved in the Kilpedder lands and, if anything, highlights the imperative of ensuring that property professionals involved in transactions of this nature maintain a very high standard of professional conduct. It is relevant also because it shows the extent to which the appellant's position is affected by the correctness or otherwise of the contention that the *Heads of Agreement* of the 13th June 2014 comprised a concluded contract for the sale of the Kilpedder lands. The appellant's entitlement to be paid his fee for the sale depended on there being a concluded contract for the sale of the lands. Further, under Clause 12 of the Property Services Agreement on foot of which the appellant provided his services, any deposit paid by the purchaser to secure the property was to be held in the appellant's client account. It was only when *"the contract for the sale of the property is signed by both parties and the sale complete"* that the appellant became entitled to payment of the fees to be deducted from the deposit and the balance then paid to the client (i.e., the vendor).

13. Whatever about the status of the *Heads of Agreement*, following the appointment of a receiver over the lands by Ulster Bank in October 2014, the intended sale of the property to Granja did not proceed. Granja issued specific performance proceedings, initially against Ulster Bank and the receiver appointed by it as well as against the McDonagh brothers. It discontinued the proceedings against Ulster Bank and the receiver in March 2018 and in October of that year it entered a settlement with the McDonagh brothers as a result of which the proceedings were struck out. The settlement agreement appears to acknowledge that the sale of the lands could not proceed pending the determination of issues raised in proceedings brought by Ulster Bank against the McDonagh brothers and indeed unless the McDonagh brothers obtained orders in their favour regarding, *inter alia*, the validity of the agreement of 13th June 2014. As previously noted, that relief was refused by Twomey J. ([2020] IEHC 185). Nonetheless, the settlement was exhibited by the appellant in this application and he relies on it to show that there was a *"contract for the sale of the lands"* in place.

14. In July 2019 Granja went into liquidation and a liquidator was appointed by the High Court. The liquidator took the view that the €50,000 booking deposit, supposedly held by the appellant in his client account, was an asset of the company and sought its return. When Granja's proceedings against Ulster Bank and the receiver were discontinued in March 2018, the appellant had confirmed in an email that the €50,000 would not be paid out pending further order of the High Court. Consequently, the liquidator applied to the High Court for an order releasing the appellant from his undertaking not to pay the deposit out and directing him to pay it to the liquidator. The appellant's response to the liquidator (contained in an affidavit dated 24th September 2019) was that a contract had been entered into on the 13th June 2014 which he asserted had been acknowledged by the liquidator and, thus, that Granja had lost its deposit by indicating that it would not proceed with the sale. He asked the court to direct payment of his fees and costs.

15. In spite of the fact that the order requested by the liquidator was made by the High Court on 10th September 2019, the appellant did not arrange for the deposit to be returned to the liquidator. Consequently, on 4th October 2019 the liquidator made a complaint to the PSRA. He also brought a motion for the attachment and committal of the appellant before the High Court. Shortly prior to the hearing of that motion the booking deposit was returned by the appellant to the liquidator on 16th December 2019.

Procedural Steps regarding the Complaint

16. In the meantime, the PSRA appointed two inspectors to investigate the liquidator's complaints. The investigation proceeded slowly – indeed one of the findings made by the PSRA was that the appellant had provided only limited cooperation to the inspectors. As a key element of the inspection the inspectors sought copies of bank statements for the appellant's client account from his bank pursuant to s. 66(3) and (4) of the 2011 Act. Initially the bank was reluctant to provide those statements in the absence of a court order but ultimately it did so. The appellant takes great exception to the inspectors accessing his bank statements and makes a number of legal arguments as to why, in his view, this was unlawful. The bank statements show that almost immediately after the €50,000 was lodged to the appellant's client account, sums were withdrawn from it and the appellant did not subsequently maintain the sum of €50,000 in the account.

17. A draft report was prepared by the inspectors and issued to the appellant on 20th September 2021. The appellant was invited to make comments but did not submit substantive observations despite being afforded a second opportunity to do so. A finalised report dated 8th February 2022 was submitted to the PSRA on 21st March 2022. That report recommended that two findings of improper conduct be made against the appellant. The

PSRA, at a meeting on 5th April 2022, decided to make a finding in respect of the first of these – i.e., that the appellant withdrew fees from a booking deposit held in his client account before the sale of the property was finalised which is, *inter alia*, contrary to The Property Services (Regulation) Act 2011 (Client Moneys) Regulations 2012 (S.I. No. 199/2012) (the "Client Moneys Regulations"). The PSRA accepted the factual findings of the inspectors regarding the other allegation which concerned the giving of an undertaking to the High Court that the appellant would continue to hold the booking deposit at a time when he no longer held the funds in his client account and he had deducted his own fees, but the PSRA was not satisfied that this amounted to improper conduct under the 2011 Act.

18. By letter dated 22nd April 2022 the appellant was advised of this finding and furnished with a copy of the PSRA's decision dated 11th April 2022. He was invited to make submissions and to attend a meeting which would consider the imposition of a sanction. After some toing and froing that meeting was ultimately held on 3rd October 2022. Before that date, the appellant made four written submissions to the PSRA. He attended the meeting on 3rd of October and then made two further written submissions on the 3rd and the 9th of October. These were not really focused on the question of sanction but addressed a wide range of issues some of which were relevant to the underlying finding of improper conduct and others less so.

19. Because submissions were made after the date of the sanctions meeting, the PSRA met a second time on the 20th October 2022 and made a decision to impose a major sanction on the appellant under s. 68(4)(a)(ii) of the 2011 Act, namely a financial penalty of €10,000 to be paid within 90 days of confirmation of that sanction by the High Court.

20. This decision, dated 25th October 2022, was communicated to the appellant by means of a letter from the PSRA dated 28th October 2022. The terms of the decision and the letter are of some significance as regard the appellant's request for an extension of time within

which to bring his appeal. The decision is headed *"Decision of the Authority regarding sanction in respect of Gabriel Dooley"*. It refers to the investigation report, the decision of 5th April 2022 and the meetings on 3rd and 20th October to consider sanction. It then sets out certain definitions from s. 2 and the text of s. 68(4) of the 2011 Act and Regulation 6(6) of the Client Moneys Regulations. Finally, it sets out the matters to which regard should be had when imposing sanction under s. 73 of the 2011 Act. It summarises the complaint against the appellant, the investigation and the finding of improper conduct made by the PSRA. In considering sanction, it notes the submissions made by counsel for the CEO of the PSRA at the sanctions hearing and the various submissions made by the appellant. It identifies the factors it regarded as irrelevant and how they impacted on the decision before concluding that the appropriate sanction was a fine of €10,000. The decision is signed by the chairperson of the PSRA.

21. The letter accompanying the decision is dated 28th October 2022 and is signed by the CEO of the PSRA. It covers much of the same material as the decision itself and includes a portion extracted from the decision dealing specifically with the PSRA's analysis of the appropriate sanction. Crucially, the letter concludes as follows: -

> *"Right of Appeal*
>
> *In accordance with section 70 of the Act you have 30 days from the date that you receive this notice to appeal the decision of the Authority to impose a major sanction on you, to the High Court.*
>
> *Section 70(1) of the Act provides:*
>
> [The text of s.70(1) is then set out]"

I will return to the text of s. 70(1) of the 2011 Act below. The appellant does not dispute that he received this letter.

22. Assuming that a letter posted from 28th October 2022 (a Friday) would have been received the next working day, Tuesday 1st November 2022, the 30-day time limit for the taking of an appeal from the decision expired on 30th November 2022. The appellant did not bring an appeal within this time. The appellant has not put the date of receipt of the letter in issue nor offered any evidence on this point which is, in any event, largely irrelevant given the length of the delay involved.

23. Instead, on 28th March 2023 the PSRA issued an originating notice of motion seeking an order under s. 71(2) of the 2011 Act confirming its decision. The motion papers were served on the appellant on 31st March 2023. That motion was made returnable for 17th April 2023. It seems the appellant attended on that date and the matter was adjourned to 15th May to allow him to file an affidavit which he did on the 10th of May. In that affidavit the appellant indicated that he wished to appeal the PSRA decision and that he was not aware of the cut-off date for an appeal as he was expecting formal notice from the PSRA. On the adjourned date, Barniville P. indicated that if the appellant wished to seek an extension of time, he would need to issue a formal motion and adjourned the matter further to allow for this to be done. On 28th June 2023, the appellant issued the motion which is the subject of this appeal.

24. The motion was heard by Barniville P. on 10th July 2023 and judgment was delivered on 17th July 2023 ([2023] IEHC 419). I do not propose to summarise that judgment here, not least because the appellant's central argument is based on a Supreme Court decision ([2023] IESC 27) which was delivered subsequent to the judgment and, naturally enough, was not considered by Barniville P. I will make reference to it as appropriate throughout this judgment.

25. Suffice to say that Barniville P. held that the 30-day time limit for bringing an appeal under s. 70(1) was absolute and was incapable of extension. Further he indicated that he would have exercised his discretion to refuse an extension of time to the appellant having

regard to the principles in *Éire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170 ("*Éire Continental")*.

Legislative Framework

26. It may assist in understanding the legal arguments made on this appeal if the relevant legislative provisions are considered at this point. As previously noted, the decision which the appellant wishes to appeal is one made under s. 68(4)(a) of the Property Services (Regulation) Act, 2011. Part 2 of that Act established the PSRA and introduced a system for the licencing and regulation of persons providing property services, such as auctioneers. As is typical in such statutes, provision is made for the regulatory body to licence professionals coming within its jurisdiction and it is then made illegal for persons to purport to practice that profession without being licenced (Part 3). The regulatory body is also given jurisdiction to investigate complaints of improper conduct against licenced professionals and power to impose a sanction if a complaint is upheld (Part 7). The exercise of such a power can be very far reaching for the professional concerned as the range of sanctions open to the PSRA under the 2011 Act include the revocation or suspension of a licence. If such sanction were to be imposed, it would prevent the person concerned from exercising their profession and would have a major impact on their constitutionally protected right to earn a livelihood. However, again typical in statutes of this nature, the regulatory body also has a discretion to impose a lesser sanction which would not have the same impact on a person's continued ability to practice their profession. Under the 2011 Act the procedure to be followed subsequent to the imposition of a sanction varies depending on the sanction imposed. These variations and the manner on which they are set out in the 2011 Act has some bearing on how the PSRA contends the relevant provisions should be interpreted.

27. Section 2 of the 2011 Act contains a series of definitions including definitions of what constitutes a *"major sanction"* and a *"minor sanction"*. Unsurprisingly, revocation or suspension of a licence constitutes a major sanction. However, a range of financial penalties also fall into this category. These include the payment of a sum not exceeding €50,000 into a statutory compensation fund or to the PSRA itself (in respect of the costs of an investigation) and a financial penalty not exceeding €250,000. A minor sanction means the issuing of advice, a caution, a warning or a reprimand. Therefore, the imposition of any financial penalty, such as the €10,000 fine imposed on the appellant in this case, brings the sanction into the category of *"major sanction"*.

28. Section 63 of the 2011 Act allows for complaints alleging improper conduct by a licensee to be made to the PSRA and requires the PSRA to cause an investigation into the complaint to be carried out unless the complaint is one made in bad faith or is frivolous and vexatious. The procedure governing the investigation is set out in s. 65 and requires the PSRA to appoint one or more inspectors to carry out the investigation. In this case there were two inspectors, one of whom ceased employment with the PSRA before the investigation concluded so the final report is signed by only one. Nothing turns on this.

29. Under s. 65(3) the terms of appointment of an inspector define the scope of the investigation to be carried out. An investigation is an iterative process in which the licensee must be given notice of the complaint, must be provided with relevant documentation and afforded the opportunity to respond. Under s. 66 inspectors have certain statutory powers for the purpose of the investigation. One of the arguments made by the appellant is that the inspectors utilised an incorrect statutory provision in seeking and acquiring his client account bank statements from his bank. The inspectors relied on s. 66(3) which allows an inspector to require any person in possession of records, books, or accounts relevant to the investigation to provide these documents to the inspector and the obligation to comply with

such a request under s. 66(4). The appellant argues that, as s. 66(1)(f) deals expressly with bank accounts and empowers an inspector to require a licensee to give written authorisation to a bank to enable inspection of any account, it was mandatory to use that provision. The key difference between the two provisions from the appellant's perspective is that as the requirement under s. 66(1)(f) forces the licensee to provide authorisation for inspection of his bank accounts, the licensee is aware that such an inspection has taken place, whereas the power under s. 66(4) may be exercised without the licensee being aware that material is being disclosed to the inspector. The appellant also makes a related argument about the scope of the inspectors' authorisation linked to the particular licence and whether it covers the entire of the period for which the bank accounts were examined.

30. Section 68 sets out the actions to be taken on the conclusion of an investigation. These include the preparation by the inspector of a draft report which must be provided to the licensee who is entitled to make submissions on it before it is finalised and sent to the PSRA. Under s. 68(3) where a report makes a finding of improper conduct in respect of the licensee, the inspector is precluded from making any recommendation as to sanction. Instead under s. 68(4) if it agrees with any finding of improper conduct made by the inspector, the PSRA has a discretion regarding the appropriate sanction. The relevant portion of s. 68(4) is as follows:

> *"(4) Subject to subsection (5), where the Authority has considered an investigation report (and any submissions annexed thereto) submitted to it pursuant to subsection (2), the Authority –*
>
> *(a) if it is satisfied that improper conduct by the licensee to whom the investigation relates has occurred or is occurring, shall, subject to subsections (8) and (10) and section 69 –*
>
> *(i) impose a minor sanction on the licensee, or*
>
> *(ii) impose a major sanction on the licensee,*

as it thinks fit in the circumstances of the case,"

The PSRA also has power to require further investigations to be carried out (s. 68(4)(b)) or to dismiss a complaint if not satisfied that improper conduct has occurred (s. 68(4)(c)).

31. Crucially, a decision of the PSRA to impose a major sanction under s. 68(4)(a) is not self-executing. It requires confirmation by the High Court under s. 69 which provides as follows: -

> *"Subject to section 64, a decision under section 684(4)(a) to impose a major sanction on a licensee shall not take effect unless the decision is confirmed by the High Court under section 70(3) or 71(2)."*

Part of the argument made by the PSRA focuses on the fact that the High Court's confirmation may be provided under two different subsections which in turn reflect the two different ways in which the matter may come before the High Court. In the event that a minor sanction is imposed, High Court confirmation is not required.

32. Central to this appeal is the interpretation of section 70, subsections (1) and (2) of which provide as follows: -

> *"(1) A licensee the subject of a decision under section 68(4)(a) by the Authority to impose a major sanction on the licensee may, not later than 30 days from the date the licensee received the notice under section 68(7) of the decision, appeal to the High Court against the decision.*
>
> *(2) The High Court may, on the hearing of an appeal under subsection (1) by a licensee, consider any evidence adduced or argument made, whether or not adduced or made to the inspector or the Authority."*

33. The issue which the court has to decide is whether the 30-day period referred to in s.70(1) is an absolute time limit for the bringing of an appeal after which a licensee is totally precluded from appealing or, as certain other statutory provisions have been characterised,

whether it creates a 30-day period within which the licensee may appeal as of right and after which he must seek the leave of the court to do so *via* an application to extend time to bring the appeal. If it is the latter, then the provisions of O. 84C, r. 2(5) of the Rules of the Superior Courts ("RSC") under which an extension of time may be granted to bring such an appeal, become relevant. I will return to this rule in due course.

34. Under section 70(3) of the 2011 Act, the High Court, on the hearing of an appeal, may either confirm or cancel the decision of the PSRA and, if cancelling a decision, may impose a different sanction or no sanction at all. Confirmation of a decision under s. 70(3) – even where a different sanction is imposed – enables the decision to take effect under s. 69.

35. An application to the High Court seeking confirmation of a decision to impose a major sanction must be made by the PSRA under s. 71 of the 2011 Act which provides: -

> *"(1) Where a licensee does not, within the period allowed under section 70(1), appeal to the High Court against a decision under section 68(4)(a) by the Authority to impose a major sanction on the licensee, the Authority shall, as soon as is practicable after the expiration of that period and on notice to the licensee, make an application in a summary manner to the High Court for confirmation of the decision.*
>
> *(2) The High Court shall, on the hearing of an application under subsection (1), confirm the decision under section 68(4)(a) the subject of the application unless the court considers that there is good reason not to do so."*

36. Confirmation of a decision under s. 71(2) also enables it to take effect under s. 69. Practically this is achieved in respect of both s. 71(2) and s. 70(3) by s. 72(2) which provides as follows: -

> *"(2) Where the High Court confirms or gives a decision under section 70(3) or 71(2), the Authority shall, as soon as is practicable after the decision is confirmed*

or given, as the case may be, give notice in writing of the decision to the licensee the subject of the decision and, if the decision provides for the imposition of a "major sanction" on the licensee which falls within paragraph (b) of the definition of "major sanction" in section 2(1), the notice shall specify the day on which the relevant period referred to in that paragraph is to commence, being a day not earlier than 7 days from the date on which the decision is confirmed or given, as the case may be."

37. It is evident from these provisions that there are two ways through which the decision of the PSRA may come before the High Court. In the case of an appeal, the licensee is the moving party and, as is apparent from s. 70(2), the appeal may be by way of full rehearing at which the appellant has an entitlement to adduce evidence including evidence which was not put before the PSRA and make arguments which were not made to the PSRA. In contrast, where the matter comes before the High Court on an application for confirmation by the PSRA, that application must be brought in a summary manner indicating that it will be on affidavit and that the licensee, in responding to it, will not be at large as regards the introduction of evidence which was not advanced before or arguments which were not made to the PSRA.

38. Further, the starting point for the High Court's consideration of a confirmation application under s. 71 is materially different to an appeal under s. 70. Under s. 71(2) the High Court *"shall"* confirm the PSRA's decision *"unless there is good reason not to do so"*. This puts the onus on the licensed person to establish that the decision of the PSRA is incorrect in some material respect or that the sanction imposed is inappropriate. In contrast, following the hearing of an appeal under s. 70(3) (which, as noted, may constitute a full rehearing) the High Court *"may"* do a number of different things. This suggests the exercise of a broad discretion which is untrammelled by the decision made by the PSRA.

39. Because of these differences I think it is fair to characterise an appeal as being more advantageous to a licensee than the opportunity to respond to a confirmation application. Nonetheless, it is significant that even if a licensee does not bring an appeal, the decision of the PSRA does not take effect until it has been confirmed by the High Court. In other words, the matter must come before the High Court one way or another before the decision of the PSRA can be given effect to under s. 72(2) and the licensee will have the opportunity to make submissions as to the legality of the process followed or the proportionality of the sanction proposed to the High Court before any sanction is imposed. In looking at analogous provisions of the Solicitors (Amendment) Act, 1960 in *Coleman v. The Law Society* [2020] IEHC 162, Simons J. described the difference as follows: -

> *"4. ... in brief outline, there are two options open to a solicitor against whom findings of misconduct have been made, and in respect of whom the Law Society is seeking a "strike off" order. First, the solicitor may choose simply to make submissions in response to the formal application which the Law Society must make to the High Court seeking an order striking the solicitor's name off the Roll of Solicitors. Such submissions will, generally, be confined to the question of whether a "strike off" order is an appropriate and proportionate sanction, but, as will be explained presently, can also be directed to the question of whether the findings of misconduct are legally sustainable. Secondly, the solicitor may choose, instead, to invoke their statutory right of appeal against the decision of the Disciplinary Tribunal. Such an appeal will be by way of a full rehearing (unless the parties otherwise agree, and the High Court so directs)."*

In circumstances where the solicitor in *Coleman* had not exercised his statutory right of appeal against decisions which made findings of misconduct against him and the matter came before the High Court solely on the basis of the Law Society's application seeking an

order striking him off, Simons J. acknowledged that *"the consequence of this is that the ambit of the submissions which the solicitor would have been entitled to make to the High Court were more limited than had he brought an appeal."*

40. Although the statutory provisions under the 1960 Act are analogous, they differ in some respects which the PSRA argues are material. Most notably, the 1960 Act envisages that an appeal may be brought by a solicitor against a finding of misconduct at the same time as the Law Society brings an application seeking to strike the solicitor off the Roll of Solicitors. The 1960 Act expressly provides that in such circumstances the High Court *"shall determine such appeal when it considers the report of the Disciplinary Tribunal"*. The Rules of the Superior Court provide for the sequencing of the two applications under O. 53, r. 9(a) which requires the President of the High Court to hear the solicitor's appeal first and then deal with the Law Society's application having regard to the outcome of the appeal. In contrast, under s. 71(1) of the 2011 Act the PSRA may not make its application for confirmation until after the time for bringing an appeal has expired and then only where no appeal has been brought by the licensee. In the circumstances, no provision is made for parallel or overlapping applications under s. 70 and s. 71.

Order 84C of the Rules of the Superior Courts

41. The appellant relies on the provisions of O. 84C RSC which govern the procedure applicable to statutory appeals to the High Court. Because the order applies to a potentially large number of statutes which provide for a right of appeal to the High Court in a wide range of different circumstances, it envisages that the statute may make express provision for certain matters. Where the terms of the Order and the terms of the statute conflict, those of the statute would prevail. This is evident in the provision particularly relied on by the

appellant which prescribes a time limit for issuing the originating notice of motion by which such appeals must be brought. Order 84C, r.2(5) provides as follows: -

> *"(5) Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued:*
>
> *(a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or*
>
> *(b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."*

42. Central to this appeal is the question of whether the statutory provisions discussed in the preceding section of this judgment and, in particular s. 70(1), clearly provide *"to the contrary"*. The appellant says they do not because there is no express provision excluding a late appeal if the court grants an extension of time. The PSRA argues that the scheme of Part 7 of the 2011 Act and in particular when s. 70(1) is read in conjunction with sections 71 and 72, clearly constitutes a provision contrary to the general scheme under Order 84C, r.2(5) pursuant to which the court has jurisdiction to extend the time limit provided by the Rules.

43. If the court has jurisdiction to extend time under O. 84C, r.2(5)(b) the test as to whether that jurisdiction should be exercised in favour of an intending appellant is two-fold. Firstly, the court must be satisfied that there is *"good and sufficient reason"* for extending the time and secondly, the extension must not result in an injustice to any other person. "Good and sufficient reason" suggests that something concrete is required to justify the extension in contrast to the more general provision of Order 122, r.7 RSC under which the High Court

has a general discretion to extend any time fixed by the Rules for the doing of any thing. The phrasing of sub-para. (b) suggests that these are cumulative requirements such that the mere fact that no injustice arises does not, of itself, constitute a "*good and sufficient reason"* to extend time.

Extension of Time

44. As explained at the outset, I propose to deal with this issue first because, in my opinion, the circumstances permit of only one outcome. Barniville P. held that s. 70(1) created an absolute time limit and constituted a *"provision to the contrary"* such that the court did not have jurisdiction to extend time under O. 84C, or 2(5)(b) and, therefore, it was unnecessary to decide whether there was a *"good and sufficient reason"* to extend time. Nonetheless he held, on an *obiter* basis, that were it necessary to decide the issue he would have decided it against the appellant on the basis of the very clear terms of the correspondence sent to him by the PSRA on the 28th October 2022. Also, he was not satisfied that the appellant met the criteria for seeking an extension of time in the *Éire Continental* test, without deciding if those criteria actually applied to the case.

45. The appellant has appealed against this aspect of the decision primarily on the basis that s. 70(1) did not preclude the court from granting an extension of time, an issue to which I will return in the next section of this judgment. He also contends that the court was incorrect in refusing the extension of time. Somewhat surprisingly the appeal is also brought on the basis that the trial judge erred in his treatment of the case law cited by the appellant, most particularly *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3, [2020] 2 I.R. 441 ("*Seniors Money Mortgages*"). The suggestion appears to be that, in finding that the appellant did not satisfy the *Éire Continental* criteria, Barniville P. did not pay adequate heed to the more recent decision of the Supreme Court in *Seniors Money Mortgages* in which it

was pointed out that these criteria are guidelines only, such that a failure to meet them does not automatically result in a refusal of the requested extension.

46. A useful starting point is the *Éire Continental* criteria themselves. These are set out at p. 173 of the reported judgment as follows: -

> *"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."*

47. Two things should be noted about this decision. Firstly, in accepting these criteria (which were proposed to the court by counsel), Lavery J. did not treat them as the exclusive criteria by reference to which such an application should be considered. Rather, he described them as *"proper matters for the consideration of the court"* but matters which *"must be considered in relation to all the circumstances of the particular case."* He also emphasised that the court's decision was a discretionary one.

48. The second factor which it may be useful to bear in mind is that this case was decided before the adoption of the current Rules of the Superior Courts and, in particular, before the adoption of O. 84C. The rule under which the court exercised its discretion to grant an extension (O. XXXVIII of the Rules of the High Court and Supreme Court, 1926) was equivalent to the current O. 122, r.7 under which a court has the power to enlarge or extend any time fixed by the Rules. This case is materially different both in that the time limit is fixed by statute and the rule under which the time limit may be extended specifically requires that there be "*good and sufficient reason"* for extending the time, which, in my view, imposes a higher threshold than that which applies under O.122, r.7.

49. More recent case law, culminating in the decision of the Supreme Court in *Seniors Money Mortgages*, has moved away from the notion that there are specific criteria which should be met for an extension to be granted and that an extension should be refused if these criteria are not met towards looking at what the overall justice of the situation requires. However, the Supreme Court continues to acknowledge that the *Éire Continental* criteria are *"proper matters for the consideration of the court in determining whether time should be extended"* (*per* Clarke J. in *Goode Concrete v. CRH plc* [2013] IESC 39). Thus, while the *Éire Continental* criteria remain relevant *"the court still has to consider all the surrounding circumstances in deciding how to exercise its discretion"* (*per* Geoghegan J. in *Brewer v. Commissioners of Public Works* [2003] IESC 51, [2003] 3 I.R. 539).

50. These jurisprudential strands were most recently brought together by O'Malley J. in *Seniors Money Mortgages*. She adopted the rationale of Clarke J. in *Goode Concrete* stating as follows at paras. 63 to 65 of her judgment: -

> *"63. While bearing in mind, therefore, that the Eire Continental guidelines do not purport to constitute a check-list according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.*
>
> *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.*

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

Whilst the central focus of this judgment is to move away from the notion that there are strict criteria for compliance or non-compliance with which will determine the outcome of an application to extend time to appeal, it also usefully points out that the length of the delay both in itself and relative to the strength of the intended grounds of appeal, should also be considered.

51. The reason I regard the appellant's appeal on these grounds as surprising is two-fold. First, in making his application to the High Court the appellant expressly relied on his supposed compliance with the *Éire Continental* criteria as justifying an extension of time. The affidavit grounding his application goes through these criteria sequentially and claims that each of them are satisfied. Barniville P. did not agree and, in particular, was not satisfied that the appellant had demonstrated an intention to appeal within the time period or the existence of a relevant type of mistake. In making these findings Barniville P. was not declining to place reliance on *Goode Concrete* or *Seniors Money Mortgages* but was rejecting the appellant's application in the terms in which it had been advanced by the appellant. Secondly and perhaps more significantly, Barniville P. was clearly live to the significance of the more recent Supreme Court decisions which he cites in his summary of

both the appellant's and the PSRA's arguments. In his conclusion on this issue, he expressly decides on the basis of *"all of the circumstances of the particular case"* rather than just on the basis of a non-compliance with elements of the *Éire Continental* criteria. He also expressly notes that he is not deciding the issue of whether the *Éire Continental* criteria applied to the case. Presumably, he has addressed them for the reasons set out in the preceding paragraph, namely the appellant's reliance on having complied with them as justifying the grant of an extension of time.

52. Therefore, I find these grounds of appeal wholly unmeritorious. This does not, however, determine whether (assuming jurisdiction exists) an extension of time should be granted. On the premise that the *Éire Continental* criteria may be considered but are not determinative of the exercise of the court's discretion and because of the appellant's reliance on them, they are a useful place to start.

53. I agree with Barniville P. that the appellant has not demonstrated an intention to appeal within the statutory time period. The appellant points to detailed correspondence he sent to the PSRA after the decision as to improper conduct was made but before the decision on sanction as indicative of an intention to appeal. It is beyond argument that the appellant took issue with a very wide range of matters in this correspondence. Nonetheless, I have difficulty construing this as indicating an intention to appeal before any appealable decision had been made. There is in fact no reference at all to the possibility of an appeal. Rather, a range of objections and complaints are ventilated.

54. I also agree with Barniville P.'s conclusion that the appellant has not demonstrated something like a procedural mistake which resulted in the appeal being out of time. In his grounding affidavit, and referring back to his earlier replying affidavit, the appellant seems to advance three inter-related reasons which he contends amount to something like a mistake as to procedure. These are the fact that he did not have legal representation; that he was

expecting *"a formal notice"* from the PSRA and that he *"was not aware of the cut-off period for an application to seek an appeal"*. No other grounds have been advanced.

55. In my view, the latter two of these reasons are simply not credible. The PSRA sent the appellant a copy of its decision dated 25th October 2022 under cover of a letter dated 28th October 2022. I have already outlined the contents of that decision and, more particularly, of that letter. The letter expressly advised the appellant he had 30 days from the date of receipt of the decision to appeal to the High Court and copper fastened that advice by setting out the text of s. 70(1) in full. Thus, the PSRA took care to advise the appellant of the time limit for bringing an appeal from its decision and of the point in time from which that limit would run. In light of this correspondence, it is difficult, if not impossible, to see how the appellant can maintain that he was unaware of the cut-off point for appealing.

56. Although the appellant was unrepresented at the time he received the PSRA's decision, this affidavit and motion were filled on his behalf by a solicitor and, thus, he had the benefit of legal representation in advancing the reasons on which he relies. That said, the fact the appellant was unrepresented at the time he received the decision does not exempt him from the operation of the statutory provision nor of the Rules of Court which apply to all litigants. This is all the more so when the relevant time limit was expressly brought to his attention by the PSRA. Some allowance might be made for an unrepresented litigant who attempts to comply with these requirements within time but, due to a misunderstanding as to the correct procedure does not manage to do so. As we shall see, such an error formed part of the factual scenario in *Kirwan*.

57. This appellant does not rely on having made a procedural error due to his lack of knowledge of the relevant statutory provisions nor of the relevant rules but seeks to rely on his status as a lay litigant to justify total inaction on his part. I do not accept that this

constitutes either a mistake in the *Éire Continental* sense or as an acceptable explanation or justification for having failed to comply with the relevant statutory provision.

58. Barniville P. does not express any view on whether the appellant had arguable grounds of appeal. Inferentially it might be assumed that he accepted that such grounds might exist. The appellant's affidavit is unhelpful in this regard. He refers to his earlier replying affidavit and asserts that virtually everything set out in that affidavit constitutes an arguable ground of appeal even where they are manifestly incapable of doing so. For example, it is difficult to see how Ulster Bank suing its valuer for negligence could constitute a ground of appeal against a decision imposing a sanction on the appellant following a finding of improper conduct for the misuse of the funds in his client account - nor indeed the settlement of that action. No real effort is made by the appellant to identify actual grounds of appeal against the finding of improper conduct or against the sanction imposed. More significantly, all the grounds of appeal appear premised on the overarching proposition that there was a binding agreement in place for the sale of the property – a proposition which has already been rejected by the High Court.

59. At the hearing of the appeal counsel focussed on the contention that the inspectors had relied on a statutory provision which was not open to them to access the appellant's bank accounts as constituting, not just an arguable, but a serious ground for appeal. Without deciding this issue, I accept that there is an argument to be made under this heading. It is the only clearly defined ground (which has not already been decided by the High Court) advanced. Thus, the question is whether the interests of justice require that the appellant should be allowed to advance that ground by way of appeal notwithstanding that he has not brought his appeal within the statutorily limited period.

60. In answering this question in the negative I have had regard to three matters. The first is the length of the appellant's delay. Unlike, for example, the facts in *Kirwan*, this is not a

case where the appellant attempted to appeal within time and then moved promptly to bring the appropriate application when he realised his earlier attempts were insufficient. Here the appellant was notified of the decision by letter dated 28th October 2022 and the time for appealing expired on 30th November 2022. The PSRA issued its motion seeking confirmation under section 71(1) on 29th March 2023 (four months later) and served the appellant electronically on 31st March 2023, and by registered post sent on the same date. Even if the court were to accept the appellant's claimed lack of knowledge of the time limit (which, as explained above, I do not), he was expressly put on notice of it by Mr. O' Ceidigh's grounding affidavit on behalf of the PSRA which was served on him on 31st March 2023. Para. 20 of that affidavit references the appellant's failure to appeal the decision of the PSRA and the fact that the 30-day period for bringing an appeal under s.70 of the 2011 Act has elapsed. It took nearly three months from that date for the appellant to bring the application the subject of this appeal. The delay between the expiration of the time limit and the issuing of the application to extend is some seven months.

61. These are lengthy delays which do not demonstrate any sense of urgency on the part of the appellant. Whilst I accept that there may be an arguable ground of appeal as to whether the inspectors accessed his bank accounts under the appropriate statutory power, I do not regard that ground as being sufficiently strong to justify overlooking these lengthy delays.

62. Second, and bearing in mind that the overarching task of the court in considering an application of this nature is to ensure that the interests of justice are served, I am satisfied that the existence of an alternative mechanism through which this matter must come before the High Court ensures that no injustice will be done to the appellant. I accept that an appeal may well be the preferable remedy for the appellant in that it allows for a full rehearing of the complaint against him. Nonetheless, the court's jurisdiction on a confirmation application is sufficiently broad to permit the appellant to raise issues, such as the legal basis

for the inspection of his bank accounts, which go to the legality of the finding of improper conduct made against him.

63. Third, drawing from the *Éire Continental* criteria, it is particularly striking that the appellant has not provided any realistic or credible reason – whether characterised as a mistake or otherwise – which would explain why he did not appeal in time. Indeed, the appellant has not provided any explanation as to why he did not move with greater expedition once the matter came before the High Court on the PSRA's application for confirmation in circumstances where that application was made in reliance of his failure to appeal within the statutory period. It is also extremely concerning that the excuses offered by the appellant are manifestly inconsistent with the documentary record as evidenced by the correspondence sent to him in October 2022.

64. Taking these factors together, like Barniville P., I am not satisfied that the appellant has demonstrated that there is a "*good and sufficient reason*" to extend the time for bringing an appeal. Therefore, regardless of the court's decision on the interpretation of section 70(1) this appeal must fail. There is simply no basis for granting the appellant an extension of time in the circumstances of this case.

Interpretation of Section 70 of the 2011 Act

65. The bulk of the argument in this appeal was directed towards Barniville P.'s finding that section 70(1) created an absolute time limit which did not leave open the possibility of an extension of time and, thus, was "*a provision to the contrary*" for the purposes of Order 84C Rule 2(5)(b) of the RSC.

66. In reaching this conclusion Barniville P. distinguished this case from the facts underlying the decision of the Court of Appeal in *Law Society v. Tobin* [2016] IECA 26 ("*Tobin*") on the basis that *Tobin* concerned a constitutionally guaranteed right of appeal

from the High Court to the Court of Appeal (unless excepted by law) which in turn required the construction of the relevant statutory provisions in a manner which facilitate that right. He held that this case concerned a right of appeal created purely by statute and thus was essentially a question of statutory construction. He approached that exercise following the principles recently restated by the Supreme Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43 and *A, B and C. [A minor] v. Minster for Foreign Affairs and Trade* [2023] IESC 10. He regarded the limiting words "*not later than 30 days*" as being very clear and distinguishable from the words under consideration in other cases, including the High Court decision of Irvine P. in *Kirwan* [2022] IEHC 152. In this regard Barniville P. stated at the end of para. 74 of his judgment:-

> "*It will be seen, however, that in my view, the words used in s. 70(1) in prescribing the time limit within which to appeal are even stronger and clearer in terms of excluding the possibility of an appeal being brought outside the time period referred to than the statutory provisions at issue in those other cases*."

67. Barniville P. then looked at s.70(1) in the context of other relevant provisions of the 2011 Act, most notably s.71(1) and s.72. He regarded s. 71(1) under which the PSRA must bring a confirmation application where the licensee does not appeal to the High Court against its decision "*within the period allowed under s.70(1)"* as providing "*strong support*" for a construction of s.70(1) which precluded any extension of the 30-day period. Similarly, the provisions of s.72 which provide for the finality of a decision of the High Court on an appeal under s.70(1) or confirmation application under s.71(1) supported a construction of s.70(1) which ensures that matters are dealt with quickly and without delay and, consequently, which do not permit the possibility of an extension of time for appealing the decision of the PSRA.

68. The appellant's arguments on the appeal engaged only to a very limited extent with the decisions analysed by Barniville P. in reaching his conclusion as to the correct

interpretation of s.70(1). Instead, it was contended that the rationale underlying Barniville P.'s analysis was overtaken by the subsequent decision of the Supreme Court in *Kirwan v. O' Leary* overturning the High Court decision in the same case. Interestingly, the PSRA also relied on *Kirwan* to support the contrary case, i.e. that the High Court's interpretation of s.70(1) was correct. In addition to the majority decision of Murray J. in *Kirwan*, there is also a brief dissenting judgment of Woulfe J. To a certain extent, the arguments made on behalf of the appellant mirror Woulfe J.'s understanding of the import of Murray J.'s judgment, whereas the PSRA contends that the judgment does not have the meaning or effect contended for by the appellant.

69. In order to understand the argument, it should be appreciated that there are a very large number of cases considering various statutory time limits for appeal and addressing the question of whether those time limits can be extended. In a footnote to para. 2 of his judgment in *Kirwan*, Murray J. cites fourteen such cases (including the High Court judgment in this case). Most of these cases concern either s. 123 of the Residential Tenancies Act, 2004; s.46 of the Workplace Relations Act, 2015 or various provisions of the Solicitors (Amendment) Act 1960. In some of the cases the court considered applications for an extension of time without addressing whether there was an underlying jurisdiction to grant an extension; in others it was assumed that a statutory time limit could not be extended; some cases decided the relevant time limit could not be extended and others that it could.

70. The appellant in *Kirwan* was the former client of a firm of solicitors who had made complaints of misconduct against members of that firm to the Solicitors Disciplinary Tribunal under the 1960 Act. The tribunal, without holding an oral hearing, held that a *prima facie* case of misconduct had not been established by the appellant. Under s.7(12B) of the 1960 Act the appellant had a statutory right to appeal to the High Court "*within 21 days of the receipt*" by him of notification of the decision. The appellant received the tribunal's

decision at a time in 2020 when significant public health restrictions were still in place due to the Covid-19 pandemic. He liaised with Central Office of the High Court and prepared a notice of motion and affidavit for the purposes of his intending appeal within the 21-day period. Because of the restrictions in place, he could not easily attend in person at the Central Office to issue his motion and instead purported to do so pursuant to a Practice Direction which allowed non-personal delivery of documents and, specifically, that documents could be sent to the Central Office by post. However, instead of sending the documents to the Central Office, he sent them to the registrar responsible for the relevant list. For various procedural reasons unrelated to the time issue, the Central Office refused to accept the documents and to issue the motion and instead raised a number of queries which were duly responded to by the appellant. The motion was not issued until some eight weeks after the documents had been posted to the registrar and well outside the 21-day time limit.

71. It is unnecessary to consider here Murray J.'s analysis of when the appeal was "*made*" for the purposes of the relevant time limit save to make two observations. Firstly, he held it was made out of time which necessarily led to a consideration of whether the time limit could be extended. Secondly, the factual contrast with this case might be noted. The *Kirwan* appellant had proactively tried to issue his appeal from a time within the relevant time limit, but through a lack of understanding of the relevant procedures (and at a time when exceptional procedures were in place) did not manage to achieve this. The appellant in this case took no steps to issue his appeal until months after the time limit had expired and many weeks after being advised by the court that a formal application would be necessary.

72. In addressing the question of whether a statutory time limit could be extended Murray J. started by framing the issue as follows at para. 70 of his judgment: -

> *"… it is more usual that provision will be made for a statutory appeal to be brought within a specified period. Where this happens, the legislative intent will be either (a)*

that that appeal period is absolute, or (b) that the function of the period thus specified will be to identify when an appeal can be brought as of right, with the prospect that a discretionary power to extend the period for bringing an appeal in appropriate (and usually exceptional) cases may be conferred by the Superior Court Rules Committee or, for that matter, by other primary legislation."

73. This passage has echoes of the analysis adopted by Finlay Geoghegan J. in *Law Society v. Tobin* [2016] IECA 26 albeit in a somewhat different context. The solicitor in *Tobin* wished to appeal an order of the High Court to the Court of Appeal. Under s.12 of the Solicitors (Amendment) Act 1960 such an appeal was to be brought "*within a period of 21 days*" of the date of the High Court order. Finlay Geoghegan J. held that s.12 had to be interpreted in its constitutional context which, in the particular case, meant Article 34.4.1 of the Constitution which stipulates that the Court of Appeal has appellate jurisdiction from decision from all decisions of the High Court subject to such exceptions as prescribed by law. Earlier decisions had recognised that an absolute time limit for the bringing of such an appeal operates as a restriction of the constitutional right of litigants to appeal from a decision of the High Court (see *Clinton v. An Bord Pleanála* [2006] IESC 58, [2007] 1 I.R. 272). Consequently, any such provision required clear and unambiguous language. Thus, Finlay Geoghegan J. characterised the issue before her as to whether s.12 had clearly and unambiguously excluded the jurisdiction of the Court of Appeal to permit an appeal commenced outside the 21-day period. She concluded that it had not. Consequently, the Court of Appeal had an inherent jurisdiction to consider an application to extend the time for bringing an appeal under the section. In circumstances where the appeal was issued less than a week outside the statutory time limit and the equivalent period under the rules had recently been reduced by a week, the extension of time was allowed.

74. In his dissenting judgment in *Kirwan,* Woulfe J. distinguished *Tobin* on the basis that the test formulated by Finlay Geoghegan J. was specific to circumstances where a provision limited the constitutionally guaranteed right of appeal from the High Court to the Court of Appeal. Clear statutory language was required to exclude the constitutional right which would otherwise apply. He pointed, *inter alia,* to the distinction drawn by Barniville P. in the High Court judgment in this case, between a constitutional right of appeal and a right of appeal with a purely statutory basis. In his view, the majority had placed undue reliance on a case which was materially different to that before them.

75. However, it is clear that Murray J. appreciated this distinction and, at paras. 81-85 of his judgment, he expressly addressed the arguments made by the respondent to this effect. Murray J. regarded a statutory provision conferring a right of appeal from a statutory body to the courts subject to a time limit as engaging the litigant's constitutional right to litigate. Thus, it brought into play a rule of construction under which there is a strong interpretive presumption that a statutory provision curtailing the exercise of any constitutional right (in this case the right to litigate) must do so in terms that are clear and unambiguous and that such statutory provision must be strictly construed.

76. Based on this analysis, in construing a limitation period on a right of appeal created by statute in its constitutional context, the court is not looking only for a constitutional basis for the right to appeal itself. Instead, the constitutional context is broader and encompasses the right to litigate that arises by virtue of the creation of a right to appeal from a statutory body to a court. In regulatory statutes of this nature, this context will also include the constitutional rights associated with a professional person's right to earn a livelihood through the exercise of their profession.

77. At the outset of this judgment, I expressed some caution about offering a definite interpretation of s.70(1) in circumstances where, regardless of the court's view on that issue,

the appeal would not succeed as the extension of time would, in any event, be refused. I am also mindful that this is not a case where the appellant was prevented from practising as an auctioneer and thus, exercising his constitutional right to earn a living, by reason of the fine imposed on him by the PSRA. However, any fine is classified as a major sanction, a term which also includes the suspension or revocation of a licence. The imposition of any major sanction is subject to the time limit in s.70(1). Consequently, I am conscious that the constitutional context in a different case (where for example a licence had been revoked) might well be broader than that which arises here. Obviously, the interpretation of s.70(1) of the 2011 Act cannot vary depending on the sanction that has been imposed.

78. All of this is relevant because the exercise of interpreting a statutory time limit is one which, post *Kirwan*, must be carried out in the constitutional context I have just described. That said, Murray J. was not positing the outcome in *Kirwan* (i.e. the conclusion that the time limit in section 7(12B) of the 1960 Act was not absolute and could be extended) as one which would necessarily govern all time limits in similar regulatory statutes. Instead, the provision falls to be interpreted by reference to the particular language used by the Oireachtas in light of the statutory scheme as a whole and having regard to the constitutional context. The constitutional context in this case includes that the section may operate as a potential restriction on the right to litigate and on an affected person's right to earn a livelihood.

79. The concerns expressed at para. 29 of Woulfe J.'s dissenting judgment to the effect that the majority decision causes a great deal of uncertainty in the area of professional regulatory law proceeds from an assumption that all such statutes will be interpreted in a similar manner. Woulfe J. describes "*the invariable practice of the Oireachtas*" as to provide for a right of appeal "*invariably within a fixed period of 21 days and without any express power to extend time*". However, it seems to me that the majority decision is more nuanced

and acknowledges that time limits created by different statutory texts may well be construed differently. As Murray J. put it at para. 73 of his judgment: -

> *"It would be attractive to reduce this to a single answer that could be applied across all legislation using language of this kind, just as it would be comforting to think that the Oireachtas would always use uniform language when it wished to achieve one or other of these objectives. The wide range of different statutory appeals, and the reality of the process of statutory drafting, dictate that neither is true. But it does seem to me that viewing each statutory scheme from the perspective of the constitutional right to litigate allows some of the considerations relevant to the construction of such provisions to be identified."*

Application to this Case:

80. It is interesting that in introducing this issue in *Kirwan*, Murray J. had expressly identified not only that the Oireachtas can impose an absolute limitation period for the bringing of an action or appeal, but also that language that stipulates that the action or appeal cannot be brought after that period will generally be construed as imposing such an absolute limit. He stated at para. 71:-

> "*When the Oireachtas intends the time period to be absolute, this is easily made clear: it is not uncommon for legislation to provide that legal proceedings 'shall not be brought after ...' a specified date. Sometimes the specific provision will not expressly state that the period is absolute, but it will nonetheless be evident from the text of the statute as a whole that this was the parliamentary intent. So, there are provisions which state that the decision of a statutory body shall, on the expiry of the relevant period, become binding on the parties concerned unless, before that expiry, an appeal in relation to the determination is made within the relevant period.*

Provisions of this kind are consistent only with the imposition of an absolute and non-extendable time period. Conversely, the Oireachtas may expressly provide in the statute providing for a right of appeal, that the period fixed by the legislation for bringing an appeal may be extended."

81. There was some dispute in the High Court as to whether the use of the word "*may*" in section 70(1) ("*the licensee may, not later than 30 days …*") as opposed to "*shall*", as in the quotation above, connoted a discretionary - and thus extendable - time limit rather than a mandatory one. I note that at para. 79 of his judgment, Murray J. appears to have approved the decision of Barniville P. on this point (i.e. para. 74 of the High Court judgment). I have no doubt that this is correct. "*May*" in section 70(1) refers to a fact that a licensee may choose to appeal, but equally may choose not to do so. Once he elects to appeal then, the appeal is subject to the balance of section 70(1) which includes the relevant time limit. Therefore, it seems to me that the significance of the formulation used by Murray J. as an example in para. 71 lies not in the word "*shall*", but rather in the choice of negative language which precludes the doing of something after a certain point in time.

82. In my view, two of the features identified by Murray J. (in the paragraph cited above) as being indicative of an absolute time limit are present in section 70(1). The first is the language of the provision itself. Murray J. regarded language stipulating that the appeal may not be brought after the relevant period as being more absolute in its terms than language stipulating positively that an appeal may (or shall) be brought "*within*" a certain period. Indeed, the final sentence in para. 80 of Murray J.'s judgment implicitly approves Barniville P., making that distinction in the High Court judgment in this case: -

"…The fact that the word 'may' was used was neither here nor there insofar as that conclusion was concerned. This, I note, was the conclusion reached by Barniville P.

when considering a similar issue of construction in Property Services Regulatory Authority v. Dooley [2023] IEHC 419 at para. 74."

83. I accept, of course, that Murray J. was not considering whether the High Court decision in this appeal was correct. However, at a minimum, the reference to the High Court judgment in this case confirms that Murray J. did not see *Kirwan* as establishing a principle that all statutorily created time limits for appeal should be regarded as extendable. It may also be unlikely that he would expressly note Barniville P.'s conclusion if he regarded that conclusion as fundamentally erroneous.

84. Secondly, the effect of the expiration of the relevant period without an appeal being brought is relevant to construing the nature of the period itself and whether the time limit thereby created is absolute or not. This is likely to require an examination of not just the text of the provision in issue but of the statute, or that part of the statute, as a whole.

85. There is a distinction between *Kirwan* and this case which is potentially relevant in this regard. The appeal provision in *Kirwan* related to a range of scenarios where either a complaint was dismissed or, if the complaint was upheld, a very minor sanction such as a warning or caution was imposed. In those circumstances the matter would proceed no further and would not come before the High Court in the absence of an appeal. In other words, on the facts of *Kirwan* if the time limit were absolute, the High Court would never consider whether the Tribunal's decision to dismiss the appellant's complaint was correct. On the other hand, alternative scenarios, where a complaint was upheld and a more serious sanction imposed, were subject to different provisions which required in all such cases that the Law Society prepare a report for the High Court and seek confirmation of its decision. Thus, in those cases an application was required to the High Court even where an appeal was brought by the solicitor concerned and the rules made provision for the sequencing of the two sets of proceedings where both arose.

86. The position under the 2011 Act is materially different. When s. 70(1) is read in conjunction with s. 71(1) and, to a lesser extent, ss. 69 and 72, it is clear that the scheme of the 2011 Act allows for the possibility of an appeal but, if an appeal is not taken within the stipulated time limit, then a different procedure becomes mandatory. The application by the PSRA for confirmation of its decision cannot be brought in parallel to an appeal by a licensee since under s. 71(1) it is a precondition to the bringing of such an application that the licensee has not brought an appeal within the relevant period. In my view this is crucial. Both procedures result in the matter being brought before the High Court. The two procedures are not simply alternatives, they are mutually exclusive.

87. The obligation on the PSRA to make an application to the High Court to confirm its decision arises only when the licensee has not brought an appeal. When the licensee brings an appeal, the obligation on the PSRA to seek confirmation of its decision is not merely postponed – it simply never arises. This is because confirmation of the PSRA decision, which enables the decision to take effect under s. 69 and any major sanction to become operative under s. 72, can come about through either the decision of the High Court on an appeal under s. 70(3) or its decision on a confirmation application under s. 71(2). Once a decision is made under one of these subsections it is never made under the other.

88. This is in stark contrast to the position under the Solicitors (Amendment) Act, 1960 where the Law Society must report to the High Court and make the appropriate application even where an appeal is brought, and both the legislation and the rules envisage and cater for overlapping applications. If an appeal is brought, the High Court will proceed to deal with the Law Society's application after the appeal has been heard and determined, albeit that it will do so in light of the outcome of the appeal.

89. Further, the text of s. 71(1), under which the obligation on the PSRA to apply to the High Court for confirmation does not arise if an appeal is brought, expressly refers back to

the time limit for bringing that appeal under s. 70(1). Not only is the time limit phrased negatively in a manner which Murray J. suggests is indicative of an intention on the part of the Oireachtas that the time limit be absolute, the consequences of non-compliance with it are spelled out in the legislation. It would be inconsistent with the either/or approach evident in these provisions if the time limit for bringing an appeal could be extended. This is so particularly when the PSRA has made an application under s. 71(1) as it opens up the possibility, which s. 71(1) the 2011 Act excludes, of parallel proceedings before the High Court relating to the same decision of the PSRA. In short, the possibility of an extension of time to appeal a decision does not sit comfortably with the obligation to seek confirmation of that decision once the limitation period has expired without an appeal being taken. The fact that other legislative schemes contemplate this possibility has no bearing on what the Oireachtas intended as regards the 2011 Act.

90. This analysis is broadly consistent with that of Barniville P. in that it looks at the text of s. 70(1) both in itself and in light of the statutory scheme for the conduct of disciplinary proceedings in the related provisions of Part 7 of the 2011 Act. The point where the High Court judgment diverges from the analysis in *Kirwan* is that having distinguished this case from *Tobin*, Barniville P. did not then consider whether any other constitutional rights were engaged. Consequently, he did not apply the rule of strict construction that Murray J. says is appropriate where legislation is capable of impinging upon constitutionally protected rights. This is unsurprising in circumstances where the High Court judgment predates the Supreme Court decision in *Kirwan*.

91. On the basis of the analysis in *Kirwan* I accept that s. 70(1) is, in principle, capable of impinging upon the constitutional right to litigate. However, it does so only to a very limited extent. In circumstances where an application to confirm must be brought by the PSRA when the licensee does not bring an appeal within the relevant time limit, the finding of

improper conduct and the imposition of a major sanction on the licensee will come before the High Court in any event. The licensee must be notified of an application to confirm the PSRA's decision and will have the opportunity to make submissions to the High Court both as to the legality of any finding of improper conduct and the appropriateness of the penalty imposed. Thus, the restriction created by the time limit results in a procedural difference as to how the matter comes before the High Court rather than preventing the matter reaching the courts at all. Crucially, the imposition of a time limit in this case does not deprive the courts of jurisdiction in respect of the underlying matter. Rather it deprives a licensee who does not comply with the time limit of a potential procedural advantage in relation to the form in which the litigation comes before the High Court.

92. In that constitutional context, even when s. 70(1) is strictly construed, it does not change how the section ought to be interpreted. I think Barniville P. was fundamentally correct in concluding that s. 70(1) creates an absolute time limit which cannot be extended. Consequently, as Murray J. puts it at para. 101 of *Kirwan*, since the primary legislation has prescribed an absolute time limit for the institution of legal proceedings, the Rules of the Superior Courts cannot purport to amend that legislation by enabling the time limit to be extended. The general provision in O. 84C, r. 5(2) RSC which allows for an extension of time to appeal in respect of statutory appeals does not avail the appellant in this case since s. 70(1) of the 2011 Act is a *"provision to the contrary in the relevant enactment"* which precludes an appeal outside the relevant time limit.

Conclusions

93. In all of the circumstances I am satisfied, firstly, that Barniville P. was correct in his interpretation of s. 70(1) of the 2011 Act albeit that the approach to the interpretation of such sections is now informed by the decision of the Supreme Court in *Kirwan*. However, even

when the *Kirwan* approach is factored into this case it does not change what is, in my view, the correct interpretation of the section. I am satisfied that the time limit created by s.70(1) of the 2011 Act is absolute and does not permit of an extension.

94. Secondly, even if I am wrong in this and the court has jurisdiction to extend the time to bring an appeal under s. 70(1), I am satisfied that this jurisdiction should not be exercised in favour of the appellant on the facts of this case. Therefore, the appellant's appeal should be dismissed and the order of the High Court affirmed.

95. In circumstances where the appellant has been unsuccessful in his appeal the application of the normal rule that costs should follow the event means that an order should be made against the appellant in respect of the costs incurred by the respondent, i.e., the PSRA, in defending this appeal. I would propose making an order in those terms. If either of the parties wish to contend for an alternate order, they may do so by notifying the office of the Court of Appeal and filing short written submissions (not to exceed 1,500 words) within 21 days of the date of delivery of this judgment. The opposing party may have an additional 10 days to respond to such submissions.

96. My colleagues Costello P. and Pilkington J. have read this judgment in advance of its delivery and have indicated that they agree with it.