THE HIGH COURT

[2022] IEHC 743

[Record No 2010/72 SA]

SDT record no. 3638 SDT 136/09

BETWEEN

COLM MURPHY

APPLICANT

AND

LINDA KIRWAN

RESPONDENT

THE HIGH COURT

[Record No 2010/73 SA]

SDT record no. 3638 DT 42/10

BETWEEN

COLM MURPHY

APPLICANT

AND

LINDA KIRWAN

RESPONDENT

THE HIGH COURT

[Record No 2010/74 SA]

SDT record no. 3638 DT 14/10

BETWEEN

COLM MURPHY

APPLICANT

AND

LINDA KIRWAN

RESPONDENT

THE HIGH COURT

[Record No 2010/75 SA]

SDT record no. 3638 DT 130/09

BETWEEN

COLM MURPHY

APPLICANT

AND

LINDA KIRWAN

RESPONDENT

THE HIGH COURT

[Record No 2010/76 SA]

SDT record no. 4280 DT 03/10

BETWEEN

COLM MURPHY

APPLICANT

AND

KEN MURPHY

RESPONDENT

THE HIGH COURT

[Record No 2010/77 SA]

SDT record no. 5297 DT 129/09

BETWEEN

COLM MURPHY

APPLICANT

AND

SOLICITOR X

RESPONDENT

THE HIGH COURT

[Record No 2010/78 SA]

SDT record no. 5297 DT 02/10

BETWEEN

COLM MURPHY

APPLICANT

AND

SOLICITOR X

RESPONDENT

THE HIGH COURT

[Record No 2010/79 SA]

SDT record no. 5297 DT 128/09

BETWEEN

COLM MURPHY

APPLICANT

AND

SOLICITOR X

RESPONDENT

THE HIGH COURT

[Record No 2010/80 SA]

SDT record no. 6812 DT 06/10

BETWEEN

COLM MURPHY

APPLICANT

AND

DARA MACMAHON

RESPONDENT

THE HIGH COURT

[Record No 2010/81 SA]

SDT record no. 3638 DT 07/10

BETWEEN

COLM MURPHY

APPLICANT

AND

LINDA KIRWAN

RESPONDENT

THE HIGH COURT

[Record No 2010/82 SA]

SDT record no. 5297 DT 138/09

BETWEEN

COLM MURPHY

APPLICANT

AND

SOLCITOR X

RESPONDENT

THE HIGH COURT

[Record No 2011/50 SA]

SDT record no. 5297 DT 170/10

BETWEEN

COLM MURPHY

APPLICANT

AND

SOLICITOR X

RESPONDENT

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

1. In 2009 and 2010 Mr Murphy lodged eleven complaints alleging misconduct against four solicitors who held positions within the Society, three of whom had been involved or connected with the progression of disciplinary matters against him. The fourth was the Director General of the Society, Mr

Ken Murphy, regarding comments which he made to the Phoenix magazine about proceedings brought by Mr Murphy against the Society. A further complaint was lodged against Solicitor X in 2011. In each case he completed the appropriate complaint form, DT1 and made application to the Solicitors Disciplinary Tribunal pursuant to the Solicitors Act 1960, s. 7 as substituted by s. 17 of the Solicitors Amendment Act 1994 as amended by s. 9 of the Solicitors (Amendment) Act 2002, for an inquiry into the conduct complained of.

2. Five complaints were lodged against Ms Linda Kirwan, five against Solicitor X, one against Ms Dara McMahon and one against Mr Ken Murphy. The Solicitors Disciplinary Tribunal (the "SDT") rejected all complaints as disclosing no *prima facie* evidence of misconduct. Mr. Murphy has appealed to this court from these decisions. The order of Kelly P. of 11th December 2017 provided for the manner in which these appeals should be heard and determined.

3. Certain of the complaints relate to the manner in which the Society sought and obtained orders under s.18 and in respect of the enforcement of those orders. Four are connected with court undertakings, one of which concerns an *undertaking as to damages* which was given by and on behalf of the Society by Solicitor X to the High Court on the 17th October, 2002. Mr Murphy's complaint is that the Society had no authority to give that undertaking. The factual background is addressed in the context of complaint 2010/82 SA. The other three relate to the much *disputed undertaking* allegedly given on 31st July 2003. In the principal judgment, paragraph 16.10, the court concluded that no such undertaking was reflected in the court order of Finnegan P. and that "*whatever may have been said in court by counsel on behalf of Mr Murphy, that the court did not consider that such an undertaking had been given or accepted. Indeed, one can only wonder how such undertaking might have been enforced through the court process, in the absence of it being reflected in the perfected order of the court*."

4. It would appear from an affidavit sworn by Solicitor X on the 12th of May 2011 that Mr. Murphy instituted 15 sets of disciplinary proceedings against individuals both previously and currently employed by the Society. An application for Isaac Wunder type relief was made by notice of motion dated 7th September 2010. What occurred thereafter is addressed in her affidavit: -

> *"Following a hearing before the President of the High Court on the 1 March 2011, the President of the High Court undertook to consider the said appeals and indicated that he would deliver a written judgment in due course in respect of these appeals in the usual way. However, the President of the High Court refused the Society's application for Isaac Wunder type relief which was also made in the context of a separate application brought by the Society against Mr Murphy in which it sought an order striking out proceedings which Mr Murphy had issued against the Society in 2004 (Record no 2004 no 19212 P) but directed that Mr Murphy bring no further complaints against the Society pending the determination of those proceedings".*

The Principles Applicable - General

5. There is no disagreement between the parties on the principles which, in normal course, are applicable to these appeals. In *O'Reilly v Lee* [2008] IESC 21, Macken J. observed:

> "*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 20 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 the decision of this court in The State (Creedon) v The Criminal Injuries Compensation Tribunal [1988] IR 51 where that Tribunal was the 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 whose 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."

6. In *Sheehan v Solicitors Disciplinary Tribunal and Ors* [2021] IESC 64 it was held that jurisdictional issues which historically might have been said to be appropriately dealt with by judicial review only, are capable of being addressed on appeal. In any event, these are not jurisdictional appeals but are addressed at the substantive merits and reasoning of the SDT in dismissing the complaints at the *prima facie* stage.

7. Subject to certain issues which arise and are consequential on the procedures agreed by the parties and which are reflected in the order of Kelly P., I accept the following summary advanced by Mr. Murphy:

(i) The correct interpretation of the legislation is that an appeal from the decision of the Solicitor's Disciplinary Tribunal 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 (*O'Reilly v. Lee* [2008] IESC 21);

(ii) Having regard to the arguments made before it, the High Court exercises an independent jurisdiction in such matters (*O'Reilly v. Lee*);

(iii) As the appeal to the High Court from the decision of the SDT is an appeal *de novo*, the parties agreed to make all appropriate submissions for the purposes of persuading the High Court that a *prima facie* case of misconduct exists and that the Tribunal should be obliged to deal with such *prima facie* case (*O'Reilly v. Lee* [2008] IESC 21);

(iv) Misconduct is defined in s. 3 of the Solicitor's (Amendment) Act 1960 as amended by the Solicitors (Amendment) Act 1994, s. 24 which provides as follows: -

"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 Principle 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;"

(v) Misconduct has been interpreted broadly by the courts. Reliance is placed *Bank of Ireland Mortgage Bank v. Coleman* [2009] IESC 38, where Geoghegan J referred to the following dicta in *Myers v Elman* [1939] 4 All E.R. 484 at 508-509-

"*The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, . . .The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. . . .*

It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term 'professional

misconduct' has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive, but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action".

8. Mr Murphy alleges dishonest conduct on the part of certain respondents. In *Law Society Of Ireland v Doocey* [2022] IECA 2, a solicitor had been struck from the roll of solicitors. Her misconduct consisted of allowing deficits to arise in respect of client accounts and of using certain means to conceal those deficits and irregularities. Misconduct was admitted. The appeal was confined to sanction. The court held that the admitted misconduct of the solicitor was dishonest. Collins J. observed that dishonesty is not a separate category or heading of misconduct for the purposes of the Act of 1960. Acts or omissions that involve "*fraud or dishonesty"* are now a specific head of misconduct for the purposes of Part 6 of the Legal Services Regulation Act 2015: section 50(1)(a). Dishonesty is not a precondition to the making of a strike-off order. He also observed that the standard for assessing whether conduct is dishonest is essentially objective, a value judgment which is to be assessed by the standards of ordinary reasonable men. However, he was also the view that the test was not entirely objective and that an element of subjectivity may arise in the context of the state of an individual's knowledge or belief as to the facts. Collins J. stated:

"*15. In this context, it is clear that the standard for assessing whether conduct is dishonest is essentially objective. As Donnelly J explains in her judgment, the approach adopted by the Court of Appeal of England and Wales in R v Ghosh [1982] QB 1053 (involving a two-legged test of dishonesty, the first leg being whether the conduct complained of was dishonest by the objective standards of ordinary reasonable and honest people and the second leg being whether the defendant must have realised that ordinary honest people would so regard his or her behaviour) appears never to have been adopted in this jurisdiction and was rejected by this Court in People (DPP) v Bowe & Casey [2017] IECA 250 and People (DPP) v Murphy [2019] IECA 63. In People (DPP) v Bowe & Casey, the Court characterised the issue of (dis)honesty as a "value judgment", one to be "judged by the standards of ordinary reasonable men" (para 174).Mr Casey was given leave to appeal to the Supreme Court but the appeal concerned only the issue of officially induced error: [2019] IESC 7, [2019] 3 IR 482.*

16. In England and Wales, the approach taken in R v Ghosh was never applied in civil cases and in Ivey v Genting Casinos (UK) Limited [2017] UKSC 67, [2018] AC 391, the UK Supreme Court held that the second leg of the R v Ghosh test did not correctly represent the law. Whether Ivey moved "the tectonic plates of the legal firmament" (as Rupert Jackson LJ subsequently suggested in Solicitors Regulation Authority v Wingate [2018] EWCA Civ 366, [2018] 1 WLR 3969, (at para 90)) is perhaps open to debate but Ivey makes it clear that, as a matter of English law, there is no requirement that a defendant must (subjectively) appreciate that what has been done is, by the (objective) standards of "ordinary

decent people", dishonest: per Lord Hughes JSC at para 74. That is the position in Irish law also.

17. The assessment is not wholly objective, however. The "actual state of the individual knowledge or belief as to the facts" is also a relevant consideration: Ivey, para 74 (my emphasis). What is "objectively judged is the standard of behaviour given any known actual state of mind of the actor as to the facts": Ivey, para 60 (again, my emphasis). In his judgment in Ivey, Lord Hughes revisits a scenario that had been discussed in R v Ghosh by way of illustration. Assume that a person comes from a foreign country where public transport is free and then travels on a bus without paying any fare, in the belief that public transport is free. In such a scenario, there will be nothing objectively dishonest about not paying the bus fare (para 60). Such a scenario may be contrasted with one where a person travels on public transport without paying because they do not believe fare-evasion to be wrong, or simply because they want to make the journey but do not have the necessary fare. In such a scenario, the person knows that it is necessary to pay a fare and their failure to do so will be objectively dishonest.

18. The Law Society does not take issue with the approach in Ivey but says that it is of no avail to the Solicitor. The findings here, it says, are of conduct which is self-evidently dishonest and that is so regardless of whether the Solicitor sees it as such. The Solicitor's conduct was deliberate and knowing: for instance, the Society says, when the Solicitor took €24,000 from MD's client account and lodged that sum into her office account describing it as "loan funds", she was fully aware that the money was client money, not loan funds.

19. On the facts known to the Solicitor, her conduct was objectively dishonest. All of the findings of misconduct involved advertent and intentional conduct by the Solicitor. Sums of money did not auto-transfer from one client account to another or from client accounts to the Solicitor's office accounts. The Solicitor knew that the money that she transferred from client account A to client account B was the money of client A, not client B. Equally, she knew that the money transferred from client account X to her office account was client X's money, not hers. The misdescriptions and misstatements referenced in the findings did not auto-generate; they were generated by the Solicitor who was at all times aware of the correct position. The wrongful transactions set out in the findings – all of them admitted by the Solicitor - were carried out by the Solicitor, not by any third party. Whether or not the Solicitor considered her conduct to be dishonest is not the test. It may well be that she persuaded herself that what she was doing was excusable in the circumstances and/or that everything would come right at some point in the future but that does not alter the objectively dishonest character of the conduct knowingly engaged in by her. The Solicitor could not – and, in fairness to her, did not – assert any legal entitlement to act as she did or make any "claim of right" or any analogous claim capable of providing any justification for her conduct. That being so, I agree with Donnelly J that Ivey does not assist the Solicitor here."

9. The standard which is applicable to the making of a finding is the criminal standard, beyond reasonable doubt. Nevertheless, as Mr. Murphy points out this is the standard which is applicable to the ultimate decision of the Tribunal and not at the initial stage in determining whether a *prima facie* case exists.

10. Mr Murphy also submits that as there is no specific definition of *prima facie* case, the normal meaning of *prima facie* will apply and therefore the threshold which has to be achieved is that there has to be established a rebuttable presumption. He submits that in each of the matters a rebuttable presumption has been established;

11. Reliance is placed on the decision of this court in the civil proceedings, where at paragraph 425, the court observed that nothing in the judgment should be taken as detracting from the requirement that the Society in its role as impartial and objective regulator should bring all matters of relevance to the attention of its committees, the tribunal or the court.

Specific Considerations

12. The parties have proceeded on the agreed basis that evidence on all matters would be adduced and tested in the civil proceedings. In truth, this court is in a different position to that which might ordinarily confront it on an appeal from a dismissal at *prima facie* stage. In normal course the court would of necessity be confined to a consideration of whether a *prima facie* case has been disclosed. This would be decided on the basis of the material which was before the SDT at that stage and without the benefit of further evidence tested on a substantive basis. If the court arrived at a different conclusion, the matter would be returned to the SDT for an inquiry of a substantive nature. In this case, and because of the agreed procedure, the evidence advanced includes not only the material that was before the SDT at *prima facie* stage, but also evidence on oath such as might have been advanced in any subsequent substantive hearing. This in turn gives rise to an issue as to what should occur in circumstances where the court might have taken a different view to the SDT insofar as the existence of a *prima facie* case is concerned and on the basis of the evidence before it, but where the court is satisfied on a consideration of the evidence as a whole, a complaint has not, or would not, have been made out to the required standard of proof.

13. The Society submit that it was held in *Law Society of Ireland v Walker* [2007] 3 I.R. 581 that the test to be applied at that *prima facie* stage is whether the application has any real prospect of being established at enquiry. It is submitted that because the standard of proof at enquiry is the higher standard of beyond reasonable doubt, this is a factor to which regard can be had on these appeals. It is submitted that where the plaintiff has failed in the civil proceedings to establish his claims on the balance of probabilities, this is relevant to whether there is any prospect of establishing the higher standard of proof on the basis of the same underlying facts.

14. In the particular circumstances of this case and in consequence of the agreed procedures, I am satisfied that, with the exception of potential evidence which may have been given by Solicitor X, all relevant and available evidence has been advanced and tested in the civil proceedings such as might have occurred at substantive enquiry. I am also therefore satisfied that this is relevant to a consideration of whether the application has any real prospect of a complaint being established at such inquiry, even if the court might take a different view to the SDT with regard to whether a *prima facie* case is made out. The court's assessment of whether such view might be taken at *prima facie* stage must be based on a consideration of the material which was before the SDT at that time.

Statutory Immunities

15. It is further contended on behalf of the Society that it enjoys statutory immunities relating to its role in disciplinary proceedings and that these immunities are relevant to many of the complaints which Mr. Murphy seeks to pursue before the SDT. The Society calls in aid the provisions of the Solicitors (Amendment) Act 1960, s.14(f) and s.15 (3) of the Act of 1960 as inserted by the Solicitors (Amendment) Act 1994, s. 25

16. The question of statutory immunities was touched upon by this court in the principal judgment at paragraphs 336 *et seq*. Sections 14 and 25 of the Act of 1960 provide as follows :

> "14. — *The following —*
>
> *(f) the making of an application under section 7 of this Act or the giving of any information in connection with such application, shall be absolutely privileged and shall, in respect of the doing of any act specifies in paragraph (a) or (e) of this section, be deemed always to have been absolutely privileged."*
>
> "25. — *The Act of 1960 is hereby amended by the substitution of the following section for section 15:…*
>
> *(3) A witness before the Disciplinary Tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court".*

17. Mr Murphy adopts the arguments made by his counsel in the civil proceedings. The court concluded, albeit not the definitive basis, that s. 36 of the Act of 1994 would be rendered meaningless if the effect of s. 14 was to confer an immunity from suit. The point now made is somewhat different. It relates to *privilege* and not immunity in the context of a defence to an action for damages. I shall return to this later in this judgment.

<u>Complaints against Ms Kirwan</u>

18. The appeals in respect of complaints made against Ms Kirwan come before this Court under reference numbers 2010/ 72 SA, 2010/ 73 SA, 2010/ 74 SA, 2010/ 75 SA and 2010/ 81 SA. In summary, they are as follows :

a. **2010/ 72 SA** - this complaint arises in respect of the contents of an averment in the affidavit of Ms Kirwan sworn on 11th June 2004 with regard to the *undertaking* alleged to have been given by Mr Murphy to Finnegan P. on 31st July 2003;

b. **2010/ 73 SA** - When replying to complaint the subject matter of the appeal 2010/ 74 SA, Ms Kirwan sought to correct an averment in her affidavit sworn on 11th June 2004, that *"I was in attendance before the President of the High Court on 31st of July 2003*". Mr. Murphy made a complaint that she knew or ought to have known that the words used by her were false.

c. **2010/ 74 SA** - complaint relates to evidence Ms. Kirwan gave to the SDT on 15th April 2008 in response to a question asked by counsel for the Society:

> "*Q. And I think your colleague, [Solicitor X] was involved in that and we can go back to that. I think, and [Solicitor X] will confirm this, on 31st of July 2003 his barrister told the High Court and undertook that he would attend the next meeting of the Registrars Committee*?
>
> *A. Yes."*

This complaint was made on the 17th February 2010. In an attempt to avoid chronological confusion, it should be noted that this complaint was made prior to the complaint which the subject of appeal 2010/ 73 SA. The appeals to this court appear to have been lodged in somewhat different order. Further, there is considerable cross referencing in the exchange of affidavits in respect of the above three complaints.

d. **2010/ 75 SA** - this also arises from Ms Kirwan's affidavit of 11th of June 2004. She averred that Mr Murphy had been guilty of misconduct in that he registered a property of the complainants in his own name and subsequently failed to produce to the Society any contemporaneous documentation evidencing that the property was to be held by him in trust for the complainants. At the time

she swore the affidavit the property was not in fact registered in his name.

e. **2010/ 81 SA** -this is concerned with the [REDACTED] / [REDACTED] matters. A complaint has also been made against Ms McMahon, arising from these matters (2010/ 80 SA).

2010/ 72 SA (SDT record no. 3638 SDT 136/09)– The Undertaking

19. On the 16th December 2009, the Applicant lodged this complaint against Ms. Kirwan. At paragraph 32 of her affidavit, sworn by her on behalf of the Society on the 11th June 2004 , when outlining the allegation of misconduct she averred that Mr. Murphy had been guilty of professional misconduct in his practice as a solicitor in that he failed to attend a further meeting of the Registrar's Committee on the 30th September 2003, notwithstanding the undertaking given by his counsel to the President of the High Court. As paragraph 27 of her affidavit she averred as follows:

> *"I say that I was in attendance before the President of the High Court on 31 July 2003. The respondent solicitor was not in attendance but was represented by counsel. The President was informed by the Society's solicitor that the Registrar's Committee was not satisfied with the respondent solicitor's responses but saw little point in keeping the matter before the President. The President was further advised that the matter had been adjourned the previous day to the next meeting of the Registrar's Committee in view of the fact that it was still before…"*

20. Mr. Murphy in his affidavit grounding this complaint avers that had Ms Kirwan genuinely believed that an undertaking had been given, it would have been referred to. She had relied almost completely on the attendance of Solicitor

X of the 31st July 2003. He also averred that his own counsel had confirmed to him on the day that no undertaking was given and that the only order made was one for costs. He then referred to the exchange of correspondence in the immediate aftermath of the court hearing, which has been addressed by the court in its judgment in the re-entry application. Mr Murphy maintains that had an undertaking been given, it would be referred to in the correspondence.

21. Mr Murphy contends that before a complaint is brought to the SDT, the Society must first consider it and it must comply with the Solicitors Acts before making a decision to refer the matter. He states that this complaint of alleged misconduct was never made by the Society or discussed by them at any stage. He contends that Ms. Kirwan was aware that no complaint of an alleged failure to comply with the said undertaking was discussed by the Society. He therefore alleges misconduct on the part of Ms. Kirwan in a number of respects:

(i) In her affidavit of the 11th June 2004 she swore the words "*has been guilty of professional misconduct in his practice as a Solicitor in that he . . . (f) 'failed to attend a further meeting of the Registrars Committee on the 30th September 2003 notwithstanding the undertaking given by his counsel to the President of the High Court that he would attend meetings of the Registrars Committee*" when she knew that these words were false.

(ii) That she committed an act of perjury by swearing the statement when swearing as above, knowing same to be untrue.

(iii) That she breached the Solicitors Acts 1954 - 2002 and was subject to penalty under s. 29 of the Solicitors (Amendment) Act 1960 for the making the same statement. That she also breached the Solicitors Acts in making the allegation before the Society had first considered or investigated the alleged complaint.

22. In a replying affidavit sworn on 10th February 2010, Ms. Kirwan averred that the disciplinary proceedings constituted an attempt to re-open and mount an

impermissible collateral attack on the s. 18 and strike off proceedings. She was not cross examined when giving evidence to the SDT on 15th April 2008. His allegation was made some five and a half years after the event and was barred as being stale. The finding at *prima facie* stage made against him was not appealed. Further, the complaint could not conceivably amount to misconduct. This was an impermissible attack on the Society's obligation to bring matters which had come to its attention to the SDT. In those circumstances the making and advancing the allegation was incapable of amounting to professional misconduct. Ms. Kirwan relied on the findings of the SDT after substantive hearing which ultimately resulted in a referral to the President of the High Court and she also referred to what occurred thereafter.

23. Ms Kirwan contended out that insofar as Mr Murphy was challenging the procedures of the Tribunal, the appropriate way to have done so was to bring judicial review proceedings at the relevant time, that it was not now open to him to use the disciplinary process of the SDT to mount a collateral attack on the finding of SDT or the subsequent order of the President which was made on foot of that finding.

24. There followed a further exchange of affidavits in which considerable cross-referencing took place regarding issues arising, or which had then arisen, and which are subject of separate complaint. In a replying affidavit of 28th April 2010 (2010/ 72 SA , SDT record no. 3638 SDT 136/09), Mr Murphy referred to Ms Kirwan's averment in her affidavit of 11th June 2004 that *"I say I was in attendance… The Respondent Solicitor was not in attendance but was represented by Counsel".* Mr Murphy lodged a further complaint about this averment on 23rd April 2010 (3638/DT42/10 - 2010/ 73 SA). He had also lodged a complaint in respect of the evidence given by Ms Kirwan to the SDT on 15th April 2008. This complaint was lodged on 17th February 2010 (3638/DT14/10 – 2010/74SA). In an affidavit sworn on 31st March 2010, in

response to that complaint (3638/DT14/10 – 2010/74SA), Ms Kirwan averred at paragraph 31:

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

It was noted in the attendance that *"Mr Vallelly said that Mr Murphy would undertake to attend the next meeting of the Registrar's Committee."*

25. Arising from that averment, Mr Murphy wrote to Ms Lynch of the SDT on 16th April 2010 and copied it to the solicitor for the Society. He pointed out the discrepancy between her affidavit of 11th June 2004 and her replying affidavit to the complaint at hand. Mr Law replied by letter of 19th April 2010, stating that an error had been made. He wrote:

> *"Having reviewed her original file again, our client believes she was not in Court on 31 July 200. She has advised us that if she had been in Court, she would have prepared her own attendance note and relied on that in her Affidavit as evidence of what happened in Court on that day…*
>
> *It is therefore her view that the word "not" can only have been omitted in error in line 1 of paragraph 27 of her original Affidavit sworn on 11 June 2004, and this is supported by the fact that that paragraph makes it clear that she was relying on a note prepared by [Solicitor X] in relation to what happened in Court on 31 July 2003. She can only conclude that she failed to notice this typographical error when reviewing the Affidavit prior to swearing it".*

26. As stated, on 23rd April 2010, Mr. Murphy made a further complaint arising from this (3638/DT42/10 – 2010/73SA). He also referred to this in the

context of the appeal now under consideration (3638 SDT 136/09 – 2010/72SA). In an affidavit sworn on 28th April 2010 he averred that it was evident that one of the main reasons that his name was struck from the roll of solicitors was because of the incorrect averment by Ms. Kirwan regarding what happened in court on 31st July 2003.

27. Ms. Kirwan swore an affidavit in reply on the 11th June 2010, exhibiting Solicitor X's attendance, in which she averred at paragraph 5: -

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

28. Ms. Kirwan also referred to an affidavit sworn on the same day in response to the complaint 3638/DT14/10, which is subject of appeal 2010/ 74 SA, in which she reiterated that when she gave her evidence to the SDT on the 15th April 2008, she was not cross-examined nor was her evidence challenged in any way. She pointed out that had Mr Murphy maintained that he was present in court on the 31st July 2003, it was open to him to make that case following receipt of her affidavit in June 2004.

29. At paragraph 34 of her affidavit sworn 11th June 2010, in response to complaint 3638/DT14/10, 2010 73/SA, Ms. Kirwan stated: -

> *"While I do of course regret what would appear to be a typographical error in para*graph *27 of my Affidavit sworn on 11 June 2004, I cannot*

accept that the issue as to whether or not I was present in court on 31 July 2003 or indeed whether or not the Applicant was in Court on that day could have had any material impact on the ultimate finding by the Tribunal that the Applicant was not fit to be a member of the profession and its recommendation that he be struck off the Roll of Solicitors. This is particularly so in light of the fact that I exhibited as part of Exhibit "LK 2" to my affidavit sworn on 11 June 2004 [Solicitor X's] detailed file note of what transpired before the Court that day".

30. In a further reply by affidavit of 23rd June 2010, Mr. Murphy averred to his belief that Ms. Kirwan's averment in her affidavit of the 11th June 2004 that she was in court on the 31st July 2002 was a lie. As it was a lie sworn on affidavit he believed it constituted perjury. He did not accept her explanation that the word "not" was omitted in error. While he accepted that it is correct to say that he could have dealt with the allegation in an affidavit but did not, he did so at the hearing before the SDT. The manner in which he chose to reply to the allegation *bears no impact* on his allegation that Ms. Kirwan had lied on oath. He did not accept that she made a typographical error, and he points to the fact that what she stated was repeated many times before the SDT, the High Court and in various documents which were filed.

31. On the 16th of August 2010, Ms Lynch wrote to Mr. Murphy advising him that on the 13th August 2010 a division of the SDT considered the complaints and rejected them.

2010/ 73 SA – SDT 3638/DT42/10 - Ms. Kirwan not in Court when she averred she was and Mr Murphy was not

32. The background to this complaint is set out above. It was made on 23rd April 2010 about the contents of her affidavit sworn on 11th June 2004, arising from matters which came to his attention from Ms Kirwan's response to his earlier complaint (3638/DT136/09 - 2010/72 SA). It is alleged that she averred

that she was in court on 31st July 2003 and *"the Respondent Solicitor was not in attendance but was represented by Counsel",* when she knew or ought to have known that this was false and that in consequence thereof committed an act of perjury. It is alleged that this constitutes misconduct. It is contended that she continued to rely on her affidavit of the 11th June 2004 before the SDT on the 15th April 2008, 25th April 2008, 10th July 2008, and before the President of the High Court on the 21st April 2009 and 18th May 2009, when she knew that it contained a falsehood. He maintains that she permitted an order to be made striking his name from the Roll of Solicitors based to a large extent on paragraph 27 of her affidavit of the 11th June 2004 when she knew that the contents of same were false.

33. Ms. Kirwan in her replying affidavit, raised objections similar to those raised by her in 3638/DT136/09 -72 SA 2010. The evidence which she gave had not been impugned when the matter was before the SDT on the 15th April 2008. She was asked no questions. The matter was also addressed in her affidavit of 11th June 2010. She averred as a result of the complaint she reviewed her file and that she could not recollect at this remove whether she was in Court that day, and repeated that as her affidavit made clear, her information was derived from the note prepared Solicitor X, and not from her own attendance. She repeated that she believed it more likely that she was not present and that the word 'not' was omitted in error after the word 'was' and that she had not noticed this typographical error prior to swearing the affidavit.

34. At paragraph 32 she averred :

> "*As regards his complaint that I also incorrectly stated in para*graph *27 of my Affidavit that the Applicant was not in attendance in Court on 31 July 2003 but was represented by Counsel, as he now claims that he was, I refer to the note prepared by my colleague, [Solicitor X], which refers to the Applicant being represented in Court by Counsel (Exhibit "A"). I say that the point I was making was that the Applicant did not*

appear in person before the President of the High Court but was represented by Counsel".

35. At paragraph 34, Ms. Kirwan averred that she regretted what would appear to have been a typographical error in paragraph 27 of her affidavit. She repeated that she could not accept that the issue as to whether or not she was present in court on 31st July 2003 or whether or not the applicant was in court on that day could have had any material impact on the ultimate finding of the SDT, particularly in light of the fact that she had exhibited to her affidavit of the 11th June 2004, Solicitor X's detailed file note of what transpired before the court that day. She therefore strenuously rejected any suggestion that she committed perjury.

36. In an affidavit in reply sworn on 24th June 2010, Mr. Murphy rejected the suggestion of a typographical error on Ms. Kirwan's part and stated that it was reasonable to suggest that if the error had not been made that he would not have been struck off as a solicitor.

37. The SDT wrote to Mr. Murphy on the 16th of August 2010 rejecting his complaints, stating that it found no *prima facie* case of misconduct in respect of each of the allegations of misconduct advanced. The reasons are broadly in line with the reasons which were provided by the Solicitor's Disciplinary Tribunal in the proceedings 2010/ 72 SA, that either the allegations had been adequately answered or that there was no evidence to support the allegation that Ms Kirwan permitted an order to be made striking his name from the Roll of Solicitors based to a large extent on paragraph 27 of her affidavit. It also found that there was no evidence that Ms. Kirwan had breached the Solicitors Acts 1954 – 2002 or was liable to pay a penalty under s. 29 under the Solicitors (Amendment) Act 1960 as there was no evidence to support that allegation.

Ms Kirwan - 3638/DT14/10 - 2010 /74 SA – evidence to the SDT on 15th April 2008

38. This complain was made the 17th February 2010. He maintains that Ms. Kirwan was guilty of misconduct as a solicitor in that in her evidence to the SDT of the 15th of April 2008. She said "*Yes*" in response to a query "*on the 31st July 2003 his barrister told the High Court and undertook that he would attend the next meeting of the Registrar's Committee?*". It is alleged that she knew that this statement was false, and that she committed an act of perjury and breached the Solicitors Acts in that regard. It is also contended that there were numerous occasions when Ms. Kirwan also rectified the situation. He also maintains that the attendance note prepared Solicitor X was unproven and that reliance has been placed on an unproven attendance note. Mr Murphy points out that different accounts have been given by Ms. Kirwan. In her affidavit sworn in February 2009 for the purposes of bringing the matter before the President, Ms. Kirwan exhibited transcripts of the hearings and her affidavit, thereby maintaining that an undertaking had been given.

39. Ms Kirwan's response in her affidavit sworn on 31st March 2010 raises similar objections to those made in respect of the previous complaints and the most relevant parts of which have been outlined above or are discussed below.

Discussion and conclusions in respect of Appeals 2010/ 72 SA, 2010/ 73 SA and 2010/ 74 SA

40. The undertaking has been addressed in detail in both the principal judgment and also in the judgment in the application to re-enter the strike off proceedings. These complaints, in one way or another, touch on the undertaking allegedly given to Finnegan P . The Society maintains that none of these complaints are sustainable because of absolute privilege which is attracted by virtue of the provisions of ss. 14 and 25 of the Act of 1960, as amended.

Absolute Privilege

41. *Prima facie,* it would appear that the notice of application and Ms Kirwan's grounding affidavit sworn on 11th June 2004, come within the definition of the *giving of information* in connection with the application. Similar considerations would appear to apply to the evidence given by Ms Kirwan to the SDT on 15th April 2008, which appear to be governed by s.15, and by the Act of 1994, s. 25. Mr Murphy in his response to the Society's contention on this point, adopting the arguments made by his counsel in submissions in the civil proceedings. However, it appears to me that it different point was there being addressed, being whether there was an immunity from suit for damages. In the absence of more detailed argument, this court is somewhat reticent to arrive at any definitive conclusions on this issue; and only if necessary.

Proof of the attendance note of 31st July 2003.

42. I should also briefly deal with a submission made by Mr Murphy that the attendance note of 31st July 2003 has never been proved by Solicitor X. Solicitor X gave some limited evidence to the SDT on 10th of April 2008 in relation to the issue of Mr Murphy's non-attendance on that day. No questions were asked of her about the attendance. This is not unexpected, given that she was dealing with an issue concerning attendance. However, Solicitor X was also in attendance before the SDT on 25th April 2008. Neither Ms. Kirwan nor Solicitor X gave evidence on that day. Presenting the case, counsel for the Society explained that he was relying on the contents of Ms. Kirwan's affidavit and he said that he did not propose to call her.:

> "*As I said, it's Ms Kirwan's affidavit, I don't propose to call her because all of the matters deal with correspondence and minutes of meetings. But obviously if she is required for cross examination to dispute any of those letters or any of what happened in the High Court, that can be done. … Equally if there is any dispute about what happened*

in the High Court, [Solicitor X], my instructing solicitor, I think attended at those dates and confirm the minutes of what the President said if there is any dispute over that."

43. Before any witness was called, the chairperson of the SDT asked counsel for Mr Murphy "*how are you on Ms Kirwan's affidavit?*". He replied *"I don't have a problem at the moment. The need may arise but not at this time…"* When the evidence of the Society's witnesses had been completed, counsel for the Society stated "*unless there is any requirement of Ms Kirwan, her affidavit is before you, in case there is any dispute over any correspondence. So I close my case. You have got the allegations in front of you."* Neither Solicitor X nor Ms. Kirwan were subsequently requested to give evidence.

44. The relevant paragraphs of the memorandum record as follows:

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

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

45. The contents of this memorandum were the subject of scrutiny when the matter was before the SDT on 10th July 2008. The relevant parts of the transcripts of the SDT hearings are referred to in schedule III of its judgment in the re-entry application. It is clear that the memorandum was discussed and debated before the SDT (see transcript, 10th July 2008 page 106 *et seq*). Mr Murphy was asked whether he was disputing the memorandum. He replied that he *"would not say* that *the entire verbatim was correct"* but *"generally it isn't bad"*. The transcript also indicates that Mr Murphy accepted that his barrister had said that *"he would be prepared to undertake"* as distinct from "*he would undertake*" and emphasised the difference. The memorandum records "*Mr Murphy would undertake to attend…".*

46. I do not believe there is substance to this point. Neither Ms Kirwan nor Solicitor X was called on to give evidence on 25th April 2008 or at any later time, when both were available or in attendance. No issue was taken with proof at a time when it could have been addressed. In this context, the court must also have regard to the position ultimately adopted by Mr Murphy before the President of the High Court**.**

Collateral attack

47. In its principal judgment, the Court concluded that the doctrine of collateral attack applied in respect of Mr Murphy's claim for damages for misfeasance in public office, negligence and breach of duty concerning how matters were dealt with by the Society in disciplinary matters before the SDT and when they came before the President of the High Court. For reasons similar to those expressed in the principal judgment at paragraphs 316 *et seq,* and further, in view of the Court's refusal of Mr Murphy's application to re-enter the strike off proceedings, I am satisfied that such principles apply in respect of certain aspects of the complaints now made.

48. The doctrine of collateral attack was raised by Ms Kirwan in her replying affidavits to these complaints, although not expressly referred to in the decisions of the SDT issued on 16th August 2010. When the matter was before the President of the High Court, the findings of the SDT were accepted on a wholehearted basis and no issue was taken in relation to the procedures adopted or employed. I am satisfied that this must have consequences for these complaints, particularly where it is alleged that Ms Kirwan was guilty of misconduct in breaching the provisions of the Solicitors Acts by failing to ensure, before the Society brought any complaint before the SDT, that the matter first had to be considered by the Society, and that the complaint was one which had never been made to the Society or discussed by them at any stage. No issue was raised about this before the President of the High Court in the strike off proceedings and in those circumstances it is difficult to see how the

SDT fell into error in its conclusions in this regard. This appears to be particularly the case in respect of the complaints 2010/72SA and 2010/74 SA. It may be, however, that as the basis for complaint 2010/73SA did not arise until Ms Kirwan's affidavit in response to those complaints, that the same considerations do not apply.

49. With regard to complaint 3638/DT136/09 – 2010/72SA and proceeding for the moment on the assumption that the doctrine of collateral attack does not apply to this complaint, I am satisfied that to establish misconduct it is necessary for Mr Murphy to show that in *making the allegation*, Ms Kirwan either contravened the provisions of the Solicitors' Acts or engaged in conduct which tended to bring the solicitor's profession into disrepute. It is difficult to see any basis upon which it can be said that the *making of an allegation* such as this could amount to misconduct within the meaning of the Act unless, perhaps, it was one which was made dishonestly, or at a minimum recklessly. To hold that a regulator might be exposed to such a finding simply on the basis that proof of an allegation is not made out to the requisite standard would, in my view, have a potentially adverse and inhibiting effect on regulators in the exercise of their functions, and would not be in accordance with the procedures envisaged and underpinning such legislative obligations and functions.

50. Although this court has made a finding that no such undertaking was given, it did so on a particular basis. As discussed in the judgment in respect of the application to re-enter the strike off proceedings, confusion abounded to which both parties contributed on the undertaking issue. This cannot be equated to fraud and dishonesty, or, in my view, misconduct within the meaning of the Act. *A fortiori*, I am not satisfied that it has been established that Ms Kirwan was reckless in making the allegation or that she knowingly or wilfully stated something that was untrue. There is insufficient evidence to suggest that she committed perjury. I am not satisfied that the SDT fell into error in holding that there was no *prima facie* evidence of misconduct on her part.

51. Further, even if the Court is incorrect in its conclusion that the SDT was wrong to dismiss Mr Murphy's complaint at *prima facie* stage, having heard the evidence and assessed the witnesses, I am not satisfied that applying the test for misconduct discussed above, including the test for dishonesty as outlined in *Doocey,* that it could be said that the criminal standard of proof would ultimately be achieved. Therefore, I reject the appeal in respect of 2010/72 SA.

52. With regard to complaint 3638/DT42/10 - 2010 /73SA, again, on the assumption that the statutory privileges do not apply, I now consider substantive issues surrounding this appeal. Mr Murphy makes the case that the averment in the affidavit of Ms Kirwan was sworn in circumstances in which she knew it to be untrue, or that she ought to have known that the words were false and thereby committed perjury when so doing. This complaint arose out of the exchange of affidavits in respect the complaint 3638/DT 14/10 – 2020/74SA. As part of that application, Mr Murphy exhibited the transcript of the evidence of 15th April 2008. In her replying affidavit to this complaint, sworn on 31st March 2010, Ms Kirwan averred that it was *evident from the Transcript,* which had been exhibited by Mr Murphy that she was not present in Court on 31st July 2003 but that her colleague Solicitor X had been and had informed her of what had been said. She exhibited Solicitor X's attendance. This averment contradicted what she had averred to at paragraph 27 of the affidavit sworn on 11th June 2004, five and half years previously.

53. I am not persuaded that the SDT erred in its conclusions that there was *no prima facie* evidence of misconduct on the part of Ms Kirwan. She was not cross-examined on 15th April 2008, nor was she called on to give evidence on 25th April 2008. No issue was made of the contents of her affidavit at that time. Mr Murphy, in the complaints advanced against him by the Society in the [REDACTED] matter, did not file a replying affidavit before the SDT at *prima facie* stage when any discrepancy about attendance could have been fully

ventilated. When before Johnson P., he accepted the findings of the SDT about the undertaking. Solicitor X was available to give evidence at the time.

54. The error in her affidavit was largely brought to light by Ms Kirwan herself, which tends to dispel any suggestion that she attempted to conceal it. I am satisfied when all matters are taken into consideration, the conduct of Ms. Kirwan does not constitute evidence of misconduct. That she may have regretted not discovering the error earlier does not alter the Court's conclusions.

55. I am also not satisfied that a *prima facie* case of breach of the Solicitors Acts has been established. When assessing matters on the basis of the information before the SDT, that such a mistake was made is not, *per se* and in my view, evidence of dishonesty as per the test in *Doocey.* Nor am I satisfied that there was *prima facie* evidence of misconduct, perjury or dishonesty in this regard.

56. But even if I am incorrect in this assessment, and that the SDT should not have ruled against Mr Murphy at *prima facie* stage, in the civil proceedings, the Court concluded that Ms Kirwan had made an honest mistake. In so determining, the Court had the benefit of hearing the testimony of Ms Kirwan and of considering her demeanour when closely questioned by counsel for Mr Murphy on this issue. In those circumstances, given the burden of proof applicable in the civil proceedings, it is difficult to see how proof of the complaint to the requisite and higher standard could be established after a full and substantive hearing of the complaint before the SDT.

Ms Kirwan 3638/DT14/10 - 2010/74 SA -evidence on 15th April 2008

57. Mr. Murphy was not present at the SDT on 15th April 2008. He had an injury and was unable to travel. His counsel sought an adjournment for one week. This was opposed by the Society. The SDT reluctantly adjourned the application peremptorily to 25th April 2008 and costs were awarded against Mr. Murphy. Ms Kirwan gave limited evidence. Counsel said that she was being

called "*to establish the dates because I want it done in evidence rather than through my submission".* Ms Kirwan's evidence was as follows:

> *"*Q. *Mr. McDermott: Ms. Kirwan, you swore the affidavit of complaint in this case?*
>
> *A. Yes*
>
> *Q. And I am just going to take you through five or six of the key dates in it and if you could simply confirm that those are correct and they are dates which come from your affidavit. I don't think there will be any controversy over these. The first letter of complaint came in on 10th June 2002.*
>
> *A. That's correct.*
>
> *Q. So it's, what, seven and a half almost eight years now since the first complaint was made?*
>
> *A. Six years.*
>
> *Q. Sorry, six years. On 17th December 2002, the solicitor fails to attend the Registrar's Committee?*
>
> *A. That's correct.*
>
> *Q. And that's one of the allegations he faces today?*
>
> *A. Yes.*
>
> *Q. On 18th February 2003 he failed to attend again and that's another allegation he faces today?*
>
> *A. That's correct.*

Q. In order to try to force him to engage the Society, I think in July 2003 the Society brought him to the High Court?

A. That's correct.

Q. And I think your colleague, [Solicitor X], was involved in that and we can go back to that. I think, and [Solicitor X] will confirm this, on 31st of July 2003 his barrister told the High Court and undertook that he would attend the next meeting of the Registrar's Committee?

A. Yes.

Q. And that was in December 2003 he failed to attend? (It is to be noted that in evidence in the civil proceedings Ms Kirwan stated that this should have been April, not September 2003, see day 8, p. 120)

A. That's correct.

Q.. Notwithstanding the undertaking his barrister had given the High Court, and that's another allegation he faces today. And on 30th September 2003, a decision was made by the Committee to refer him to this Tribunal?

A. Yes.

Q. And I think your affidavit of complaint was sworn on 11th June 2004?

A. That's correct.

Q. And as I understand, and in fact this is a date in the Tribunal's own knowledge, on 14th September 2004 the prima facie decision was made?

A. Yes, we were notified.

Q. Mr. McDermott: I think [Solicitor X] can deal with the dates after that. Thank you.

End of direct examination

Mr. Nix: I have no questions."

58. The questioning was partly focused on Solicitor X's role in the matter. The court has already referred to confusion in respect of the undertaking. For reasons similar to those expressed in connection with appeals 2010/72 SA and 2010/73 SA I am not satisfied that *prima facie* evidence of misconduct, perjury or breach of the Solicitors Acts. While this complaint concerns what was said in evidence, as with the complaint regarding her affidavit, she was not cross-examined on 15th April 2008, nor was she called on to give evidence on 25th April 2008. No issue was taken regarding her evidence. Solicitor X was available to give evidence at the time. Mr Murphy did not file a replying affidavit before the SDT at *prima facie* stage of the Society's complaint when any issue about this evidence could have been ventilated. When before Johnson P., he accepted the findings of the SDT about the undertaking.

59. Further, even if I am incorrect in this assessment, and that the SDT should not have ruled against Mr Murphy at *prima facie* stage, the court's sentiments expressed in relation to the previous complaints are equally applicable here, with regard to its findings in respect of Ms Kirwan's evidence, the burden of proof applicable in the civil proceedings and the requisite standard at substantive stage. It is difficult to see, in those circumstances, how misconduct could be established after a full and substantive hearing of the complaint before the SDT.

60. I must therefore reject this appeal.

Ms Kirwan - 3638/DT130/09 - 2010/75 SA -Registered land

61. This complaint was made on 9th December 2009. It is alleged that Ms Kirwan was guilty of misconduct in swearing at paragraph 32 on her affidavit of

11th June 2004, that Mr. Murphy had been guilty of misconduct in that he "*registered a property of the complainants in his own name and subsequently failed to produce to the Society any contemporaneous documentation evidencing that the property was to be held by him in trust for the complainants*". This relates to the Schoenberg property which was acquired by the [REDACTED]. The essence of the complaint which the [REDACTED] had made was that the Schoenberg lands were in Mr Murphy's name, without them being aware that that was the case. When the matter was subsequently discussed at the SDT, it was established that at the time of the swearing of the affidavit, the land was not registered in Mr Murphy's name. As part of a process by which the partnership dispute was resolved some years later the land was temporarily registered in his name. On 10th July 2008, the SDT did not uphold the Society's complaint on this issue.

62. In his affidavit grounding this complaint sworn on the 9th December 2009, Mr. Murphy avers that neither on the 11th June 2004 nor at any date prior to then was the property owned by the complainants registered in his name. He avers that Ms. Kirwan's statement in this regard was false and untrue and that she was guilty of perjury and also was in breach of the Solicitors Acts. Part of his complaint is that Ms Kirwan ought to have carried out a search of the Registry of Deeds. He further avers that this matter was the subject of much public attention and he exhibits copies of the *Irish Independent* of the 26th April 2008 and in a local newspaper *The Kerryman* of the 30th April 2008. Mr Murphy submits that the effect of the allegation cannot be understated, given the publicity which it attracted.

63. In a replying affidavit sworn on the 10th February 2010, Ms. Kirwan contended it cannot be misconduct for a solicitor acting on behalf of the Society to make an allegation of misconduct in an affidavit grounding that application; and that such complaint is an impermissible attack on the Society's obligation to bring applications arising from matters that had come to its attention before the

SDT. Mr Murphy submits that because the complaint was rejected, issues of collateral attack do not arise in respect of this complaint. Counsel for the Society acknowledged this, given that this complaint was not upheld. Ms. Kirwan also avers that the finding of the SDT that a *prima facie* case existed was not appealed. Mr Murphy maintains the finding of a *prima facie* case of misconduct was solely based on the contents of Ms Kirwan's affidavit of 11th June 2004

64. As this complaint concerns misconduct alleged to arise from the making of a complaint, for reasons similar to those expressed in respect of complaint 2010/72 SA, I am not satisfied that the fact of making an allegation of misconduct in proceedings before the SDT, without more, is capable of amounting to misconduct.

65. Turning then to the substance of the complaint and response in order to assess whether there is more to Mr Murphy's complaint than the making of the allegation, Ms Kirwan pointed out that Mr Murphy's allegation ignored letters exchanged in advance of the complaint having been referred to the SDT. These were exhibited to her affidavit grounding the complaint. Thus, she wrote on 8th July 2003:-

> *"8. You have confirmed that the Schoenbergs property was to be held in your name in trust for your clients. Please furnish a Declaration of Trust or other contemporaneous documentation confirming that the property was placed in your name with the agreement and consent of your clients".*

On 16th July 2003 Mr. Murphy replied: -

> *"8. The property was placed in my name with the agreement and consent of my clients. This was not documented.* [REDACTED] *will confirm that at all times all the brothers were aware that the property was held in my name in trust for them. I would again point out that this was discussed during the Arbitration with Kerry County Council back in 1994/1995 as*

obviously the title to the properties had to be shown to the County Council in order to ascertain the amount of compensation payable. This is the last time that I remember specifically that the fact that the property was in my name was actually discussed. I find it offensive that [REDACTED] *and* [REDACTED] *and* [REDACTED] *would suggest that there is something sinister. Perhaps Mr.* [REDACTED] *could enlighten me as to why he suddenly thinks that the holding of property in trust is "sinister"".*

66. Mr Murphy had attended a meeting of the Registrar's Committee on the 29th July 2003. Ms. Kirwan avers that Mr. Murphy was questioned on this issue at the meeting. Mr Murphy disputes the accuracy of the minute, which records *inter alia*: -

"In response to a further query Mr. Murphy confirmed that property acquired by his clients was placed in his name and there was no declaration of trust or documentation to indicate that he held it in trust. Mr Murphy said that he would do a transfer back to his clients. When asked when he intended to do this he said he would do the transfer when his clients wanted him to. He was asked was there any paperwork or documentation showing the property was held in trust and answered no. He was asked what would happen if he died . . . Mr Murphy withdrew and on his return was advised by the Committee that they were not satisfied that he had furnished the information sought by the Society . . . . The Committee also noted its extreme concern at the fact that the property acquired by Mr Murphy's clients was presently in Mr Murphy's name".

67. On the following day, 30th July 2003, Mr. Murphy wrote: -

"…*There was never any question of the property being beneficially held by me . . . it has been agreed that I will transfer this property to the three partners. My client,* [REDACTED]*, confirms that at all times he and his*

brothers were aware that the Shroneburg (sic) *property was in my name".* (emphasis added).

68. Mr. Murphy submits that his response in correspondence does not contain an admission that the property was registered in his name and that a simple search in the Registry of Deeds would have confirmed that the land was not so registered.

69. Mr. Murphy chose not to file an affidavit at the *prima facie* stage. At paragraph 123 of his witness statement in the civil proceedings, he stated:

" *During this time, the* [REDACTED] *agreed to allow the County Council to build a sewerage treatment plant on part of the land. The purchase price was to be determined by arbitration which would calculate the value of the land and the value of any diminution in value of the rest of the land because of the location of the sewerage plant. As part of this process, the title deeds to all the land was produced and at the Arbitration at which the three brothers attended the title was gone through and it was explained that while there was a conveyance to me that the land was beneficially owned by the* [REDACTED] *and they were entitled to any compensation in respect of that land. Before the Arbitration it was the Barrister involved (Sean O'Donnobhain BL, now Circuit Court Judge) that raised this issue about the title being in my name and at a meeting with him and the three* [REDACTED] *it was agreed that we would proceed as set out above. The* [REDACTED] *knew the land was held by me but not registered in my name. This was per the instructions and request of the* [REDACTED] *themselves. Everyone in my office involved in the* [REDACTED] *matters including various Solicitors and secretaries knew it was the* [REDACTED] *land. As part of the complaint made* [REDACTED] *and the* [REDACTED] *claimed that the land was registered (factually incorrect) in my name at the time and they never knew about it."*

See also para 10(iv) of his witness statement.

70. Mr Murphy is critical of the fact that Ms Kirwan relies on the minutes of the meeting of the 29th July 2003 and submits that in the civil proceedings she accepted that the minute was not accurate. While not further specified in submissions, the Court assumes that this is in reference to an exchange between counsel for Mr Murphy and Ms Kirwan on day 8 of the trial, as follows:

> *"316 Q. Yes. I think we agreed yesterday that, insofar as you took a minute, it wasn't a verbatim account of every transaction --*
> *A. No.*
> *362 Q. -- that took place and that - and this is not a criticism, it's simply an observation - that a minute therefore naturally is incomplete of its nature?*
> *A. I would accept that, yes. I try to capture the most important and particularly the decision.*
> *363 Q. Mr. Murphy says he brought all his files with him. He said he had some files out in the car, he said to the Committee 'you know, here are my files', because he had been directed to bring all his files with him and he was told by the Committee 'well, listen, we don't have time to be going through files like this', so what do you say to that?*
> *A. Well, this is a minute of a meeting that took place on 29th July 2003.*
> *364 Q. 29th July, correct.*
> *A. So it's 15 years ago.*
> *365 Q. It is.*
> *A. Yes. All I can do is refer to, I can't do anything, I'm on oath here. All I can say is that's the minute that I took at the time, I can't add anything further to that.*

366 Q. And therefore when Mr. Murphy says otherwise, you're not in a position to contradict that, are you?

A. I couldn't, no, I could not".

71. Thus, the suggested inaccuracy is largely based on the failure of the minute to record Mr Murphy's evidence that he had brought files with him to that meeting and that the Committee had not considered them. Whether the minutes are inaccurate or incomplete, the fact is that prior to the matter being referred to the SDT, controversy existed regarding the property being "conveyed to the name of Colm Murphy". In his letter of 30th July 2003, Mr Murphy, wrote that property was *in his name.* This was not significantly in dispute. What was in dispute were the circumstances in which, and reasons why, that was so. The exhibits to Ms Kirwan's affidavit also included Mr Murphy's letter dated 16th July 2003.

72. While Ms Kirwan may have made a mistake in using the word '*registered'*, in my view, when all the circumstances are considered, this does not amount to *prima facie* evidence of misconduct. As Geoghegan J., noted and accepted in *Coleman*:

> *"…The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but of gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice."* (Myers v. Elman [1940] AC 282)

73. Any mistake which was made by Ms Kirwan centres on the use of the word "*registered*" in her affidavit of 11th June 2004. While it may be said that a search the Land Registry may have resolved the issue of "*registration*", the circumstances in which the land came to be *in Mr Murphy's name* continued to be controversial. I am not satisfied that it has been established on a prima facie basis that Ms Kirwan was guilty of gross neglect or inaccuracy. I am not satisfied that, when the circumstances are viewed in their entirety, that it has

been established that any mistake in the use of the word *"registered"* or any failure by Ms Kirwan to carry out a search as part of the investigation, amounted to misconduct, whether alleged to be dishonest (see as discussed by Collins J. in *Doocey*) or otherwise. The circumstances described are not, in my view, such as might constitute an exception to the general principle, accepted by this court, that the making of an allegation does not of itself amount to evidence of misconduct. A *fortiori*, I am also not satisfied that perjury or breach of the Solicitors Acts have been established and I must reject this appeal.

74. Mr Murphy attached to his affidavit, copies of the Irish Independent (26th April 2008) and the Kerryman (30th April 2008). These were published when the matter was before the SDT at the substantive hearing stage. Mr Murphy chose not to respond at *prima facie* stage when the [REDACTED] complaints first came before the SDT. An opportunity then existed to set out a response. Any confusion or lack of clarity about *registration* might have been addressed at that time. It is evident from the correspondence which preceded the referral to the SDT, and subsequent to the referral, that Mr Murphy for reasons outlined, including a desire to obtain discovery, chose not to engage with the SDT at that point in time. It is not beyond the bounds of possibility, however, that any adverse publicity attracted when the matter was before the SDT at substantive stage and in public, might have been avoided had Mr Murphy engaged at the *prima facie* stage.

Ms Kirwan (3638/DT07/10 - 2010 /81 SA and Ms. McMahon (6812 DT 06/10 -2010/80 SA)

75. Both of these appeals may be considered together as they touch on the same subject matter.

76. The complaint against Ms Kirwan made on 27th January 2010 (3638/DT 07/10) relates to the contents of an affidavit sworn by her on the 29th April 2002 in disciplinary proceedings in the [REDACTED] / [REDACTED] matter (S5306/DT). The complaint against Ms. McMahon (6812/DT 06/10), which was

also lodged on 27th January 2010, concerns the contents of letters that she wrote and on which Ms Kirwan relied when swearing her affidavit. It also relates to evidence which she gave to the SDT on 20th March 2003.

Ms Kirwan (3638/DT07/10 - 2010 /81SA)

77. The background to this issue is outlined in Mr Murphy's grounding affidavit and is also addressed in the principal judgment at paras. 123 *et seq*. and 351 *et seq*. Two complaints were made to the Society which were somewhat related, one made by Mr. [REDACTED] and the other by Mr [REDACTED]. The former was an agent, and therefore a client. The latter was a purchaser and therefore not a client. Only a client was entitled to make the complaint in issue.

78. A meeting of the Registrar's Committee was held on the 29th May 2001 Both complaints were addressed. By letter of the 31st of May 2001, Ms. McMahon wrote to Mr. Murphy advising him that the Committee had made a finding of inadequate professional services. Ultimately, for the reasons outlined in the principal judgment, the matter was referred to the SDT.

79. In her affidavit grounding that application to the SDT, sworn on 29th April 2002 , Ms. Kirwan averred that at the meeting the Committee made a determination of inadequate professional services. She referred to Ms McMahon's letter and requested a payment and contribution to the Society's costs. She also averred that the Committee had confirmed that its directions covered both complaints.

80. Mr. Murphy did not respond to the letter of the 31st May 2001 or to reminders, including a letter from Ms. McMahon of the 28th of August 2001, in which she informed him that the matter had been referred to the next meeting of the Registrars Committee on 4th September 2001. By letter of the 3rd September 2001 Mr Murphy wrote to Ms. Mc Mahon seeking clarification of the Committee's findings on the 29th May 2001. He requested that the meeting of the 4th September 2001 be put back as he was unable to attend. Mr Murphy avers that the minutes of the meeting on the 4th of September 2001 confirmed

that the Committee made a finding of inadequate professional services *and delay* at the meeting of the 29th May 2001 and was referable to both complaints. By letter of the 18th September 2001 to Mr Murphy she confirmed that both complaints had been dealt with together at the meeting on the 29th May 2001. Mr. Murphy states that because of the confusion in relation to the direction that he refused to pay the penalty imposed. The matter came before the SDT on the 20th March 2003. It was referred back to the Registrar's Committee for clarification.

81. A further meeting of the SDT took place on the 21st October 2003. Mr. Murphy avers Solicitor X informed the meeting that at a Registrar's Committee meeting on the 6th May 2003 the Committee clarified the decision as follows: -

> *"the Committee took the view that whilst it was clear that the remarks made by the Committee Chairman to Mr. Murphy on the 29th May 2001 arose as a result of the complaints made to the Society by both Mr.* [REDACTED] *and Mr.* [REDACTED] *the direction that was made under section 8 related to Mr.* [REDACTED]*'s complaint only . . .*"

82. Mr. Murphy alleges that Ms. Kirwan was guilty of misconduct and perjury in swearing in her affidavit of the 29th April 2002 that the Committee had made the determination of inadequate professional services, knowing that these words were not true. It is also alleged that she was guilty of misconduct and perjury in referring to Ms McMahon's letter of 31st of May 2001.

83. In her affidavit of reply sworn on 1st March 2010, Ms Kirwan raised the issue of collateral challenge. She averred that she had all times acted in a bona fide manner. Any decision made was that of the court or the SDT. The SDT had found that a *prima facie* case existed and Mr. Murphy did not appeal that finding.

84. Ms Kirwan averred that the inquiry had commenced on 20th March 2003. Counsel appeared on behalf of Mr. Murphy. He was also in attendance. The inquiry resumed on the 21st of October 2003. Mr Murphy did not attend at that

time nor was he represented. The SDT found that Mr. Murphy was guilty of misconduct in failing, without reasonable excuse, to comply with the directions of the Registrar's Committee of the 29th May 2001 and ordered that he stand censured. He did not comply with the order of the SDT. This was one of the orders which the Society sought to enforce in the s. 18 proceedings. Mr. Murphy agreed to comply with this order on 31st of January 2007.

85. She stated that Mr. Murphy had omitted to state that he had instituted High Court proceedings to rescind or vary the order of the SDT made on the 21st October 2003. At page 15 of a written decision delivered on the 7th May 2004, Laffoy J. observed: -

> "*That Mr Murphy now seeks an extension of time to appeal, when it was open to him just a year ago to initiate an appeal without objection from the Law Society, is not only illogical but raises a question as to the bona fides of the stance of Mr Murphy in relation to the entire process since he received the letter of 31st May 2001".*

She also stated at p. 16: -

> *"In relation to the technical point raised by Mr Murphy that the allegation of misconduct should have been reformulated when the matter was being re-entered before the Disciplinary Tribunal, in my view, that argument is without any substance."*

Laffoy J. concluded that it was proper for the SDT to make the Order.

86. In reply, Mr Murphy denies that his complaint constitutes a challenge to any order of the High Court. He also dealt extensively in his response to the background of the case which had been set out by Ms Kirwan in her affidavit.

87. By letter of 16th August 2010 the SDT informed Mr. Murphy of their finding that there was no *prima facie* case of misconduct on the part of Ms. Kirwan in respect of the matters complained of, either on the basis of insufficient evidence to support the allegations (SDT noting the minutes of the meeting of the Registrar's Committee dated 29th May 2001) or that there was

no evidence that the Respondent Solicitor knowingly swore an untrue averment in her affidavits. It also concluded that the allegations made did not disclose misconduct or that there had been a breach of the Solicitors Acts.

Ms. Dara McMahon 6812 DT06/10 - 2010/80 SA

88. This complaint was also dismissed by the SDT on 16th August 2010. The allegations of misconduct are that Ms McMahon misinformed Mr Murphy of the outcome of the meeting on 31st May 2001, that she informed him that the finding of the Committee was in respect of inadequate professional services when it was in respect of inadequate professional services and delay, that she had incorrectly completed the minutes of the meeting of 4th September 2001 and that she swore on 20th March 2003 that the Registrar's Committee had clarified the direction related to both complaints, knowing that this was not correct. Further complaints are made in relation to other evidence given by Ms McMahon on the same issue, including her evidence that the direction was in relation to two complaints, rather than one and he submits that she committed an act of perjury in this regard. The transcript of evidence of the proceedings before the SDT on 20th March 2003, page 38, records that Ms McMahon gave evidence of the finding of the Registrar's Committee as being one of inadequate professional services, and that the Registrar's Committee had confirmed that the matter related to both complaints.

89. In her replying affidavit sworn on 3rd March 2010, Ms McMahon averred that she acted in a bona fide manner at all times . She also raised the issue of collateral challenge. Her response is similar to that of Ms Kirwan.

90. The SDT, in its decision communicated on 16th August 2010, rejected the complaints on the basis that the allegations either did not disclose any conduct which could be construed as misconduct or that there was no evidence to support the allegations. Reference was also made to the minute of the Registrar's Committee meeting of the 4th September 2001.

Discussion and Conclusion - 3638/DT07/10 - 2010 /81 SA and DT 6182 DT 06/10 -2010/80 SA

91. As stated, the background and history to the [REDACTED] /Healy issues are set out in the courts judgment in the civil proceedings at paragraph 123 *et seq*. Mr Murphy attended a hearing on 20th March 2003 and gave evidence. This is summarised at page 5 of the decision of Laffoy J. The SDT referred the matter back to the Registrar's Committee for clarification regarding the aspect of direction that referred to each of the complainants. The minutes of the meeting of 6th May 2003, to which Laffoy J. referred, contained the following:

> *"The Committee clarified the decision of its predecessor as follows: the Committee took the view that whilst it was clear that the remarks made by the Committee chairman to Mr. Murphy on 29th May, 2001 arose as a result of the complaints made to the Society by both [the agent] and [the purchaser], the direction that was made under section 8 related to [the agent's] complaint only, as a complaint can only be lodged with the Society under section 8 by or on behalf of a client. The Committee reaffirmed the direction made by the Committee on 29th May, 2001 that Mr. Murphy should refund to his clients the Euro equivalent of £4,000 plus V.A.T. and that he should make a contribution of the euro equivalent of £1,000 towards the costs of the Society in investigating this complaint. The Committee agreed that the letter of clarification should confirm to Mr. Murphy that he had 21 days from receipt thereof to appeal."*

92. Laffoy J commented that it undoubtedly was the case that following Mr Murphy's letter of 3rd September 2001, the clarity with which directions contained in Ms McMahon's letter communicating them was dented. She observed that the statement in the Society's letter of 10th September 2001 that

the directions *"covered both complaints dealt with"* at the meeting on 29th May 2001, confused matters.

93. When matters were clarified, it is clear that Mr. Murphy, in so far as he was dissatisfied with the ultimate outcome, failed to take advantage of the extended time permitted for appeal. As Laffoy J. observed, any prejudice caused by any lack of clarity in the Society's dealings with him was cured by the approach adopted by the Society in its letter of 8th May 2003. He had been afforded *"a second bite of the cherry"*.

94. At paragraph 356 of the principal judgment, the court acknowledged that while mistakes may have been made by the Committee in May 2001, this was addressed in the process described by Laffoy J. This court did not find evidence of malice in the way in which the complaint was addressed by the Society, although the court also noted that this ought not to detract from the obligation of the Society to ensure that all relevant matters and information are placed before Committees, Tribunals or Courts.

95. I am satisfied that the most that can be said is that the Society and the respondents to his complaints, Ms McMahon and Ms Kirwan, created confusion in relation to the outcome of the Registrars Committee's meeting. Matters were subsequently clarified. In my view, any confusion which was created is not to be equated with misconduct as defined.

96. A further fundamental issue is that these complaints relate to the manner in which final and unappealed orders were made. I am satisfied that the principles addressed on the issue of collateral challenge in the principal judgment apply in respect of these complaints. These complaints constitute an impermissible collateral challenge to orders made; and they cannot succeed for this reason also. I am not satisfied that a *prima facie* case of misconduct or breach of the Solicitors Acts has been established. I am not satisfied that there is *prima facie* evidence of dishonesty, misconduct or perjury or that the SDT

erred in its decision in respect of these complaints. I must also reject these appeals.

Mr. Ken Murphy (4280/ DT03/10 - 2010 /76SA)

97. On 18th January 2010, Mr Murphy lodged a complaint against Mr Ken Murphy, then Director General of the Society. In his grounding affidavit sworn on 18th January 2010, Mr. Murphy avers that in an issue of the Phoenix magazine dated 1st June 2007, in an article entitled *"COLM MURPHY V THE LAW SOCIETY*", Mr Ken Murphy is quoted as saying that "*this matter should be seen against the background of three separate findings of professional misconduct against Mr [Colm] Murphy by the Solicitors Disciplinary Tribunal."* He complained that the interview related to matters which were then the subject of the application for attachment and committal and that in this respect there had been a breach of the *sub judice* rule. Temporally, the article was published and the letter written when the attachment and committal proceedings were before the court. There is no evidence, however, that complaint was made to Johnson P. of breach of the *sub judice* rule.

98. Mr. Murphy's solicitor, Mr. McCarthy, wrote to Mr Ken Murphy on 26th of March 2008 but did not receive a response. It is further alleged that Mr Ken Murphy was guilty of misconduct in failing to reply to this letter which concluded *"... unless I hear from you within ten days from the date hereof, in relation to the matters as outlined above, I am to forward papers to counsel to draft proceedings for service on you without further notice".*

99. In his replying affidavit sworn on 10th February 2010, Mr. Murphy said that his only dealing with Mr Colm Murphy had been in his capacity as Director General of the Society. He also contended that the disciplinary proceedings were an attempt to reopen and mount an impermissible collateral attack on the outcome of the concluded disciplinary and regulatory proceedings and that he had acted in a bona fide manner and for the sole purpose of representing the Society in its regulatory and statutory functions.

He pointed out that although the article appeared on 1st June 2007, no complaint was made until January 2010. With regard to the allegation that there had been a breach of the *sub judice* rule, he averred that Mr Colm Murphy had not placed the comments in context.:

> "28…*The mere fact that a matter is before the Court does not preclude the media from reporting and commenting on it and it does not prevent a party to the litigation from providing factual information in response to a media query. I say that this is even more so in the case of a public body such as the Society. I say that none of the proceedings in question were heard in camera or were the subject of any reporting restrictions by the Courts.*
>
> *29. I say and am advised that if the Applicant had the slightest concern about any breach of what he describes as "the sub judice rule" then the appropriate course for him to take was to have brought the matter to the attention of the particular Court in question at the relevant time. I say that the Section 18 proceedings against the Applicant have now concluded before the President of the High Court and the Applicant is not entitled to use the process of this Tribunal in order to seek to mount what is in effect a collateral attack on the outcome of those proceedings.*
>
> *30. I say that on 28 May 2007 Phoenix Magazine raised a query with your Deponent by e-mail about proceedings the Applicant had issued against the Society in 2004 and asked was the Society going to defend itself against the action.*
>
> *31.My response by e-mail of the same day confirmed that the Applicant had issued such proceedings but had done nothing at that stage to progress them and that the Society would vigorously defend such proceedings. I beg to refer to a copy of the aforesaid exchange of*

emails on 28 May 2007 upon which marked with the letters "KM1" I have signed my name prior to the swearing hereof.

32. As is apparent from my email, my reply set out the background to the proceedings-that there were three separate disciplinary findings against the Applicant (a matter of public record) and that there were proceedings by the Law Society against the Applicant before the High Court (again a matter of public record).

33. The reply went on to say that these proceedings related to the Applicant's continued retention of client files while not the holder of a Practising Certificate, not holding mandatory professional indemnity insurance, non-compliance with Orders of the Tribunal and non-compliance with directions of the Complaints and Client Relations Committee of the Law Society. Not only were all of these issues matters of public record but the President of the High Court on 31st of January 2007 had made various Orders against the Applicant relating to all of these matters. The Order was never appealed by the Applicant.

34. The reply went on to say that subsequently Attachment and Committal proceedings had to be taken by the Society as a result of the Applicant's failure to comply with that Order and that the proceedings were still before the High Court. Again this was at the time and remains a matter of public record.

35. I say and believe that all of the information I gave was factual in nature and was already in the public domain. My reply was given in a bona fide manner in response to what I believed to be a legitimate query by the media. I do not believe that this is capable of amounting to professional misconduct."

100. In his witness statement, Mr Murphy explained that having discovered that the communication was by email, rather than by face-to-face interview, he

amended the charge and it now relates to the email. On 27th May 2010, Ms Lynch wrote to Mr Murphy confirming that the division of the SDT sitting on 6th May 2010, on consent, had acceded to his application to amend the allegations by deleting the words "*gave an interview*" and inserting the words "*sent an email*". His witness statement continued:

> ***432*** *"I believe the Judges of the Supreme Court were concerned by the actions of Ken Murphy. This was on the basis of one known communication to the Phoenix. I suspected that Ken Murphy had been in touch with various organs of the media about me and I raised the matter in Interrogatories and I refer to Interrogatories 518 – 526 which deal with communications with the Phoenix and other media communications. It can be seen in this that Ken Murphy is saying that he sent an email to the Phoenix on the 28th May 2007 and that he does not believe that he communicated with the Phoenix other than that but having regard to the passage of time he cannot be definite. In relation to the Irish Independent and Irish Examiner and Dearbhla McDonald the replies are that he has no recollection of communicating with any of these in relation to me."*

101. Mr. Ken Murphy said that he did not respond to this letter because he believed that there was little to be gained in doing so (paragraph 238 of the principal judgment). A decision was taken not to engage with Mr Murphy. He maintains that a failure to reply to a latter before action is not capable of amounting to professional misconduct. As far as he was aware, no further proceedings had been issued, although the Statement of Claim in the civil proceedings made reference to the Phoenix article.

Discussion and Conclusion - 4280/ DT03/10 - 2010 /76SA

102. The Phoenix article was addressed in the principal judgment at paragraph 231 *et seq* and 417 *et seq*. The court expressed the opinion that while it may have been unwise for Mr. Murphy to go into the level of detail which he did, in

all the circumstances, the court was not satisfied that a breach of confidence had been established. The information solicited by the Phoenix magazine and the information supplied was for the most part factual. The court also concluded that while it may have been better had Mr Murphy not gone into particular detail, the court did not believe that there was anything in his response to enable it to conclude that he, or the Society, was in some way maliciously motivated against Mr Murphy in providing the response which it did.

103. In written submissions Mr. Murphy relies on the observations of Hardiman J. in his ex tempore judgment of 25th March 2015. Hardiman J. spoke of being "*a little uneasy"* about what he described as the "*remarkable correspondence between the Law Society and the Phoenix magazine in which the former gave information to the latter, was not calculated to improve Mr Murphy state of mind in the run up to the litigation. The Law Society's interaction with Phoenix seems particularly odd when it is recalled that Mr Murphy was a member of the Society and the interaction was certainly not to his advantage*". Mr. Murphy contends that the Supreme Court was clearly unimpressed with Mr Ken Murphy's intervention and submits that those observation *"get me over prima facie"* stage and gives rise to a rebuttable presumption in his favour. He also submits that in order to overcome the *prima facie* hurdle, malice does not have to be established and therefore the finding of the court on malice is not relevant to the consideration of whether there was a breach of the *sub judice* rule.

104. The court has not had the advantage of being addressed in detail in relation to the law on breach of the *sub judice* rule. This was to some extent considered by the Law Reform Commission in a report issued in 1994, entitled, *" THE LAW REFORM COMMISSION (LRC 46–1994) REPORT ON CONTEMPT OF COURT*". It is also been subject of a recent and helpful article *Irish Criminal Law Journal 2022, 32(3), 88-95, Holmes, 'Contempt of Court'* where the author addresses the issue as follows:

"Sub Judice

Sub judice means "under judicial consideration". This rule prevents commentary on a current or impending court case where that commentary may affect the outcome of the case. This is a form of criminal contempt. Newspaper articles have in the past led to trials collapsing. It is more serious where the matter will be heard by a jury but can still arise when the matter is due to be heard by a judge alone. Intention or reckless indifference as to the result of the publication is not required. In 2011, newspapers were ordered to pay the costs of a collapsed Circuit Court trial where they published things said in the absence of the jury. This doctrine recently came to prominence where a number of journalists and members of the public were prosecuted for commenting on, or sharing prohibited images from, the Ana Kriegel murder case.

The High Court ruled in DPP v Independent News and Media Plc that a national news media company was in contempt of court by publishing articles and extracts concerning what were known as the "Anglo tapes", recordings concerning Anglo Irish Bank. The High Court found that: (a) the publication, which was made after the accused had been charged and returned for trial, gratuitously identified and associated the accused person with particular types of behaviour relevant to the charges to be considered by the jury; and (b) there was a real risk of interfering with pending trials against former officials of Anglo Irish Bank. There the material published did not refer to the transactions that were the subject of the trial, but the prosecution argued that it had the tendency to create hatred towards bankers generally. The court found that "The question for the court is whether or not the publications complained of are calculated to interfere with the course of justice by creating a real risk of an unfair

trial."

The Supreme Court in DPP v Independent Newspapers (Ireland) Ltd dealt with an application to have the editor of a newspaper attached and committed for contempt due to alleged sub judice comments on a murder case where the accused was alleged to have murdered his sister. There Hardiman J. made the following observations:

> *"Although not frequently exercised, it is absolutely essential that the courts should possess a jurisdiction to protect the integrity of their proceedings against loud and plangent assertions of the guilt (or innocence) of a person against whom proceedings are pending, long before the trial begins.*
>
> *It may be a matter of great significance on an application to prohibit a trial on the ground of prejudicial publicity, but that is an application of quite a different sort from the present. The question of whether a publication is or is not a contempt of court falls to be decided as of the time it was published and to that issue the fade factor is not relevant at all.*
>
> *...*
>
> *Newspaper editors or others who are powerful or influential in the shaping of public opinion, must take care not to pollute the fountain of justice by expressing, or seeming to express, a view as to the guilt or innocence of accused persons, especially in lurid or vivid terms."*

The accused in Kelly v O'Neill had been convicted for two drug offences, and sentencing was deferred to allow for further evidence to be admitted. Prior to the sentencing hearing, details of previous convictions and other suspected offences were published in the media. These latter offences would have been inadmissible at

hearing. The sentencing judge stated that he had not been influenced by the information but held the publishers of the information guilty of contempt for breach of the sub judice rule. The matters before the Supreme Court were whether this form of contempt arose when the jury had ceded seisin of the matter by delivering a verdict and the remainder of the case was to be heard by a judge sitting alone, and whether the constitutional rights of the free press meant that such an article as that published could be contempt between the verdict and the sentence being passed. Denham J. observed that:

" Media reporting of events in society, including court cases, has increased in this, the 'information age'. Coverage varies from national broadsheets, tabloids, television and radio to similar publications from organisations which sweep the globe. And then there is the internet! People are exposed to national and international media. Such coverage should be a fair balance between protecting the administration of justice and the right of freedom of expression. If there is a doubt the balance should be tipped in favour of the administration of justice, of a fair trial. The common law offence of contempt of court is largely judge-made. It is to protect the administration of justice for the individual and the community. A balance is sought to support the requirement of a constitutional democratic society wherein there is the rule of law and trials are conducted in court. Such a balance does not preclude criticism of a decision, including sentence, after sentencing. Nor does it preclude such comment after sentence even though there may be an appeal. A key factor is the proximity of the court process.

Freedom of expression is not an absolute right under the Constitution, however it is a fundamental right of great importance

in a democratic society. In striking a balance between that right of freedom of expression and the administration of justice if there is a real risk of an unfair trial the balance should tip in favour of the administration of justice and the determination of a contempt of court. Also, if there is doubt the balance should swing behind the protection of the administration of justice."

Keane J. held that:

"The courts have always considered themselves empowered to treat as contempt of court breaches of the sub judice principle in the case of criminal jury trials. This court has pointed out on a number of occasions in recent times that the courts should not underestimate the capacity of a modern jury to approach its deliberations in a properly impartial manner and to ignore press comment, however unbalanced and even hysterical. But the power to punish such a contempt remains, because of the clear danger that such comment might be seen as being capable of influencing the jury's verdict, not least by the person who is on trial. It is, in short, a common law machinery, essential in the absence of any appropriate legislation, designed to protect the constitutional right of the accused person to a trial in due course of law guaranteed by Article 38.1 of the Constitution."

105. Mr. Ken Murphy's comments were made in the context of enquiry from a journalist with the Phoenix magazine. Although not evident from the article, or at the time of the complaint, Mr. Donal Griffin emailed Mr. Ken Murphy on 28th May 2007. He referenced Mr. Murphy's action for damages and posed the question "*Will the Society defend itself against this action*". This led to Mr. Ken Murphy's reply which is the subject matter of this complaint. There were two sets of proceedings pending at that time; the civil action for damages and the

s.18 proceedings. Mr. Ken Murphy wrote that the proceedings had been issued as long ago as 2004 and that Mr. Colm Murphy had done nothing to progress the proceedings since then. He also wrote that should the proceedings be progressed; the Society would vigorously defend them. These proceedings were not before Johnson P. and had, at that stage, not been progressed with any great speed. A statement of claim was not delivered until some considerable time later, 2009, two years after the article appeared. It is also evident the article conveyed less detail than that contained in Mr. Ken Murphy's email to Mr Griffin.

106. The specific complaint made by Mr Murphy is confined to breach of the *sub judice* principle in the s.18 proceedings and in the attachment and committal application (record no. 2006 no. 371 SP). The complaint, thus framed, is not one of misconduct by reason of breach of *sub judice* principle in the civil action.

107. Mr. Ken Murphy stated that the "matter" should be seen against the background of three separate findings of professional misconduct and proceedings then before the President of the High Court. It was pointed out that Mr. Murphy had not held a practising certificate since 1st January 2005.

108. The publication was referred to by Mr Colm Murphy in his affidavit sworn on 26th March 2008, before the attachment and committal proceedings concluded. Under the heading "*Publicity"* Mr Murphy referenced the Phoenix article and to letters written at that time (exhibit CMKMO"). The letter from Mr Murphy's Solicitors on 26th March 2008 complained of defamation, rather than breach of *sub judice* rule. It does not appear that an allegation of breach of the *sub judice* rule in respect of the s.18 proceedings was made to Johnson P., before those proceedings concluded. It is further noted that when addressing the SDT on penalty in the [REDACTED] matter, counsel for Mr. Murphy referred to the article.

109. I accept Mr Murphy's submissions that motivation/malice need not be proven, at least at *prima facie* stage, in order to establish whether there has been

a breach of the *sub judice* principal. The allegation, however, is not that Mr Ken Murphy breached the *sub judice* rule in the civil proceedings, rather in the s.18 and attachment and committal proceedings of which Johnson P. had seisin. No complaint was made to Johnson P. of breach of the *sub judice* rule and no such finding was made. These factors were brought to the attention of the SDT which, I am also satisfied, was entitled to take them into account.

110. I am satisfied that Johnson P. was best positioned to determine whether the article was likely to have undermined, or did undermine, the administration of justice in the matter which was before him. Given that no complaint was made to the court which was seized of the relevant litigation, a fact which I have said was brought to the attention of the SDT, I am not satisfied that the SDT fell into error in its conclusions on this aspect of the complaint.

111. I am also not satisfied that on a consideration of the evidence as a whole, including the explanations advanced by Mr Ken Murphy on affidavit and in particular in evidence in the civil proceedings, that there is any real prospect of establishing the application to the requisite standard at hearing as per *Walker.* Given the court's findings in the civil proceedings on this issue, I am not satisfied that it could be concluded that Mr Ken Murphy engaged in conduct which tended to bring the solicitors' profession into disrepute. Mr Colm Murphy suggests that the comments and observations of Hardiman J. are sufficient to enable him to overcome the *prima facie* hurdle. However, there is no suggestion that by making those observations, the learned judge was purporting to make any qualitative assessment of the complaint of misconduct or the appeal now under consideration.

112. I am also not satisfied that it has been established the failure to reply to correspondence in which litigation is threatened amounts to professional misconduct. The most that can be said is that perhaps as a matter of courtesy a reply ought to have been issued denying the allegations. Correspondence had already been exchanged. It was decided not to further engage. On the basis of

the evidence advanced, I am satisfied that this could not amount to misconduct within the meaning of the Act. The court is satisfied that the SDT did not fall into error in so deciding .

113. A matter which was raised in submissions is whether there was an ambiguity in the court's judgment in the civil proceedings at paragraph 420. To the extent that any ambiguity arises, the reference to "*Mr Murphy contributed to that situation"* is, and was intended to be, reference to Mr Colm Murphy. It is to be read in the following context. Adversarial litigation had been commenced in which bad faith was alleged. Pleadings are publicly available documents. The queries were raised by the journalist. To the extent that the court commented that if there was a breach of confidence, Mr Murphy contributed to that situation, was intended to reflect on the institution and content of the proceedings in which allegations were made relating to dealings between Mr Murphy and the Society. The court's observations were made in such context and not as a value judgment or assessment of the rights or wrongs of what occurred.

Solicitor X

114. Solicitor X was the subject of five complaints by Mr. Murphy. The record number attached to the appeals does not necessarily follow the chronological order in which the complaints were initially. Two complaints were made on 9th December 2009. The first concerned Solicitor X's averment in respect of substituted service - 5297/DT 128/09 which is the subject of appeal 2010/ 79 SA. The second was in respect of Solicitor X's averment's concerning the Vodafone bill - 5297/DT 129/09 – appeal 2010/ 77 SA. On 16th December 2009 Mr Murphy made a complaint in respect of an undertaking as to damages given by Solicitor X on 17th October 2002 - 5297/DT 138/09 - 2010/ 82 SA. The fourth complaint made was made on 13th January 2010. It concerned the [REDACTED] matter - 5297/DT 02/10 - 2010/ 78 SA. Chronologically, the final complaint was made on 19th November 2010 in respect of Solicitor X's

averments relating to Mr. Murphy's alleged attendance at the auction and instructions which she gave to Counsel when the matter was before the President of the High Court on 31st January 2007, (5297/DT 170/10), the subject of appeal 2011/50SA.

Solicitor X - the Vodafone Bill 5297/DT 129/09 – 2010/ 77 SA-

115. In the course of the attachment and committal proceedings, Solicitor X filed an affidavit on 22nd February 2008 in which she averred (paragraph 9), that a communication which with Eircom (in fact Vodafone) "*disclosed that the billing address was in fact Murphy Healy & Company Solicitors, Kenmare, Co. Kerry*". Mr. Murphy complained that this gave the impression that he was working for Murphy Healy Solicitors at the time. He maintains that the import of this was that his mobile phone had been used in the context of him practising as a Solicitor when not entitled to do so. The letter from Vodafone was dated 17th October 2006 and made no reference to Murphy Healy & Company, nor did it use the word Solicitors. In fact, it referred to the telephone number as being a bill paying phone and that invoices were issued to "*Colm Murphy and Co, Market Street, Kenmare, Co Kerry".*

116. Mr. Murphy submits that Solicitor X was guilty of misconduct in making such averment and that she was guilty of perjury and in breach of the Solicitors Acts in so doing.

117. This complaint was rejected by the SDT on 16th August 2010 on the basis that the allegation had been comprehensively rebutted by Solicitor X. The SDT also said that the Applicant could have raised the matter before the President of the High Court.

118. The Vodafone letter was the subject of discussion in application to re-enter the s.18 proceedings. This court stated at para 96:

> "*96…. The averment of Solicitor X in relation to the Vodafone bill occurred in excess of one year after the making of the consent orders in the s. 18*

proceedings, when the issue, while disputed, was treated as moot. It is difficult to see any relevant connection between an alleged failure or omission to disclose the Vodafone letter to the court on 31st January 2007 and the obtaining of the orders under review, particularly the s.18 orders. While relevant to Mr Murphy's appeal from the decision of the SDT which held that there was no prima facie case of misconduct in relation to the swearing of the affidavit by Solicitor X, there is no evidence that the Vodafone letter was either relied on or referenced on 31st January 2007, although Mr. Murphy contends that what Solicitor X had said was referenced by counsel for the Society when the matter was before Johnson P. on 17th June 2008. There is no evidence that the s. 18 orders were in any way influenced by the Vodafone letter, or by any suggested failure or omission to bring this letter to the attention of the court at an earlier time. It is not, therefore, a letter to which the court can attach the significance which Mr Murphy wishes to place on it as evidence of operative fraud or deceit".

119. In a replying affidavit, sworn on 10th February 2010, Solicitor X contended that Mr Murphy was seeking to reopen and mount an impermissible collateral attack on concluded orders and that all times she acted in a bona fide manner. She pointed out that Market Street, Kenmare is the address of Murphy Healy & Company and that Mr. Conor Murphy and Ms. Catherine Healy were partners in the firm. She averred:

> " 30….*According to the Society's records Colm Murphy & Co was closed on 30 June 2005. In fact this should have been recorded as closed as of 30 December 2004 as effectively there was no principal of Colm Murphy & Co after that date. Thus at the time when I swore the Affidavit, I believed that my Affidavit was correct since the address given by Vodafone was the address of Murphy Healy & Company, solicitors and that is why when I swore my Affidavit, I said*

that the billing address was their address. As Colm Murphy and Co did not exist at the relevant time, I did not believe that it could have been its address. I say that I swore the Affidavit in good faith and insofar as there is any confusion caused by the phraseology that I used, I say that that simply reflects the confusion that actually pertained in terms of the Society's knowledge of what precisely was going on".

120. Solicitor X pointed out that Mr Murphy had submitted a replying affidavit on 26th March 2008, in which he had exhibited the Vodafone letter. He also there set out his version of events "*to help clarify the undoubted confusion caused by [Solicitor X's] affidavit*". She stated that there was no suggestion in that affidavit that she had committed perjury or used words that she knew to be false. Thus, she averred, as can happen in any case, she swore an affidavit, the other side believed that she had caused confusion and dealt with it by way of reply. The Court had the full facts before it. She averred that even if the Mr Murphy remained of the view that her phraseology was confusing, the Court was not misled in any way and at no stage did the President of the High Court express criticism of her affidavit. If Mr. Murphy had concerns that she was deliberately or knowingly seeking to mislead the Court, she stated that Mr Murphy should immediately have brought this to the attention of the President and sought a ruling.

121. The Society submits that no evidence is advanced, beyond the document itself, to establish that there was knowing or deceitful conduct on the part of Solicitor X, or that she committed perjury. It is submitted that the SDT acted within jurisdiction and that this is another example where a course of action was open to Mr Murphy which he did not take at that time and is now seeking to revisit matters.

Discussion and conclusion - 5297/DT 129/09 – 2010/ 77 SA

122. Solicitor X's affidavit did not reflect precisely what was contained in the Vodafone letter of 17th October 2006. Nor did she exhibit the letter in her affidavit sworn in February 2008. Had she done so any discrepancy would immediately have become apparent. Nevertheless, Solicitor X, did not seek to hide the discrepancy when replying at paragraph 30 of her affidavit sworn on 10th February 2010. She gave an explanation that at the time she swore the affidavit in 2008, she believed that her affidavit was correct since Market St, Kenmare was the address of Murphy Healy & Co. A further reason advanced was that "*Colm Murphy & Co"* did not exist at the relevant time, having ceased to practice at the end of December 2004. Therefore, she did not believe that it could have been that firm's address. She averred that any confusion simply reflected the confusion pertaining in the Society's knowledge of precisely what was going on at the time.

123. Mr Murphy points out however, that there are a number of different properties in Market Street. Murphy Healy & Co. Murphy Healy & Co is a separate firm. While they have represented him on occasions and while their partners were former employees of his firm, the factual position is that what Solicitor X swore to was mistaken.

124. When Mr Murphy swore his affidavit in reply on 26th March 2008 he had at that stage obtained a copy of the Vodafone letter. It was exhibited at "CMVODJ". He had obtained the letter in reply to a request from his then Solicitors made to the Society on 26th February 2008. The author had sought details of the *Eircom disclosure* referred to in Solicitor X's affidavit.

125. At paragraph 14 of his affidavit sworn on 26th of March 2008, Mr Murphy explained as follows:

> *"At paragraph 9, [Solicitor X] seems to bundle together a reference to the two findings of the Disciplinary Tribunal and the original order for substituted service of the then President of the High Court, Mr Justice Finnegan. She refers to "Eircom". Eircom is not a mobile*

phone company and their associated company which deals with mobile phones is Meteor. I have never had a Meteor mobile phone. The order of Mr Justice Finnegan refers to Vodafone and to help clarify the undoubted confusion caused by [Solicitor X's] affidavit, my solicitor wrote to [Solicitor X] on the 26th day of February 2008. I'm not sure exactly what [Solicitor X] is saying but she seems to be saying that the billing address for some phone I use is Murphy Healy & Co solicitors, Kenmare Co Kerry. I can assure this Honourable Court that this is not now, and never was, the position. Furthermore, the affidavits of Maureen Gudgeon (paragraph 4) and Joanne Hannegan (paragraph 4) filed herewith support my contention herein. I have since located a letter to [Solicitor X] from Vodafone of October 17, 2006. This confirms to [Solicitor X] that my Vodafone address was Colm Murphy and Co, Market Street, Kenmare, Co Kerry. I confirm that I do own two properties at Market Street, Kenmare Co Kerry. Neither property has a number on the door and in terms of postal address one property is not discernible from the other. Murphy Healy Solicitors used to occupy one of my buildings but do not occupy another premises on the same street that would also have the same address..."

126. Ms Gudgeon and Ms. Hannegan worked for Achilles Property Management, a company owned by Mr. Murphy at various times during 2006 and 2007. They deposed that the bill in respect of the telephone number was always paid out of the Achilles bank account, that properties which had been rented out by Mr Murphy at Market Street included that rented to Murphy Healy & Co., and that Mr Murphy had a second house at Market Street, both of which had the same address. Ms. Hannegan also averred that his post was received on a daily basis at the company address at Kilmurry, Kenmare. She said that she never heard Mr. Murphy describing himself as a practising

Solicitor or to hold himself out as a Solicitor. She also confirmed that she had attended the offices of Murphy Healy & Co. to give instructions or receive updates on the various legal matters they were conducting on Mr. Murphy's behalf.

127. It is evident from the above that :

a. Mr. Murphy's immediate reaction was to treat the matter as one of confusion which required clarification; and
b. He did not immediately allege perjury or deliberate misleading of the Court.

128. It is also evident from the SDT's letter of 16th August 2010, in which it rejected Mr Murphy's complaint, that it took into account that an allegation of falsity was not raised before the President of the High Court at that time.

129. I am satisfied that this entire matter was born out of confusion and lack of clarity, rather than a deliberate attempt to mislead or to commit perjury. While Solicitor X's averment was not accurate, it was stated to have been based on her assessment of addresses at Market St, Kenmare and because the bill was addressed to "*Colm Murphy & Co*", a firm which was no longer in practice. Further, the billing address referred to in the letter was ascribed to "*Colm Murphy and Co*". This was the name of Mr Murphy's former practice, which had ceased to exist long before the letter was written. It is not surprising that ascribing the telephone bill to a practice which had ceased to exist, with an address at Market St. Kenmare, would give rise to confusion. While it might be contended that Solicitor X ought to have exercised greater care when referring to the contents of the letter, I do not see any basis on which it can be said that she was guilty of misconduct within the meaning of the legislation, that she brought the solicitors profession in to disrepute, that she was dishonest, that she committed perjury or that she was in breach of the Solicitors Acts – or that any such allegations could be proved to the requisite standard. I am not satisfied that the SDT erred in its conclusions. I therefore must reject this appeal.

Solicitor X – 5297/DT128/09 - 2010/ 79 SA – no attempt to serve the s. 18 proceedings and reliance on the auction

130. In this complaint, which was initiated on the 9th December 2009, Mr. Murphy complained that Solicitor X was guilty of misconduct in that she proceeded with an application to obtain an order for substituted service on 9th October 2006 in the s.18 proceedings when no attempt had been made to serve the proceedings on him. Mr. Murphy contends that Solicitor X knew when she averred that the Society had been unable to effect service on him that such words were false; and that in doing so she committed perjury. He also alleges that Solicitor X continued to rely on evidence relating to the auction when she knew or ought to have known that he had no involvement with it and was in breach the provisions of the Solicitors Acts in this regard.

131. The alleged offending paragraph (8) in Solicitor X's affidavit is as follows: -

> *"I say that since the issue of the within proceedings the Society has been unable to effect service of same on the respondent solicitor. I say that prior to the issue of the proceedings the Society had been made aware that the Solicitors Disciplinary Tribunal were similarly unable to effect service of proceedings and correspondence. I say that the Complaints Section of the Society had sent correspondence in relation to a complaint to the respondent solicitor at his former practice address. I say that the Society received a response from the respondent solicitor dated 5 March 2006 at an address at Seddulbahir Gelibolu, Cannakale, Turkey. In this first paragraph of his letter the respondent solicitor stated that 'Details of the complaint by Christopher O'Neill had been notified to me by Murphy Healy & Company, Solicitors'".*

Having referred to a copy of that letter she continued: -

> "*I say that this address was subsequently passed on to the Registrar of the Solicitors Disciplinary Tribunal. I say that by letter dated 13th April*

2006 to the Society, Ms Mary Lynch, Tribunal Registrar, informed the Society that correspondence dated 30 November 2005 had been sent by the Tribunal to the respondent solicitor by registered post both to his address in Turkey and to Colm Murphy & Company, Solicitors Market Street Kenmare, Co. Kerry. Ms. Lynch advised that the correspondence addressed to the respondent solicitor's Turkish address was returned to the Tribunal by the Irish postal authorities as the respondent solicitor was not known at that address".

132. At paragraph 9 of that affidavit, she averred that the Society was subsequently advised of Mr. Murphy's home address in Kenmare. The Tribunal Registrar, Ms. Lynch, by letter of the 6th of October 2006, advised the Society that she had sent correspondence to the respondent solicitor at that address by registered post and by prepaid ordinary post. Ms. Lynch advised her that An Post had redirected the letters to Murphy Healy, Solicitors Market Street, Kenmare, Co. Kerry who had in turn returned the letters to the Tribunal under cover of letter of the 27th June 2006. Solicitor X then outlined further details of efforts made by Ms. Lynch to contact Mr. Murphy. She referred to the auction and how it came to the Society's attention. The Society had arranged for one of its staff who had previously investigated Mr Murphy's practice to attend the auction, but that it was Mr. Conor Murphy and not the Respondent Solicitor who appeared at the auction.

133. Mr. Murphy claims there was no attempt by the Society to effect service of the proceedings on him and that Solicitor X's grounding affidavit was a clear attempt to mislead the Court and amounted to perjury on her part. He said that Solicitor X's affidavit referred to vague and uncertain allegations on issues which had no bearing to service. Solicitor X had averred in the affidavit that "*Mr Conor Murphy and not the respondent solicitor, appeared at the auction"* which Mr. Murphy submits clearly implied to the Court that in some way he was involved in the auction in his capacity as solicitor and that he had not

attended at the auction for some unstated reason. Mr. Murphy also refers to affidavits sworn by Mr. George Harrington, Mr. Conor Murphy, Mr. Denis Harrington and also Ms. Egan who prepared the contract for sale . All confirmed that he had no involvement with the auction. Mr. Murphy states that he had nothing to do with the auction of the property and that based on what he described as false averments in her affidavit of the 9th October 2006, the order for substituted service was obtained on 11th October 2006.

134. Mr Murphy repeats many of the issues raised by him in the application to re-enter the section 18 proceedings. Thus, he argued that the effect of the order for substituted service and the application was to tarnish his image in the eyes of the President of the High Court and that when the matter came before the President he was described as a person who had been ducking and diving and avoiding service of the summons. He alleges that the prejudice that was created against him persisted until the High Court finally made an order for costs against him. He avers at paragraph 13 that although the Society was aware that he was not involved with the auction, they persisted to use his alleged involvement with the auction as a means to convince the Court that he was practicing as a Solicitor when he was not entitled to do so. He referred to the transcript of the hearing of the 31st January 2007 and continued use of the auction to demonstrate that he was practicing as a Solicitor when he was not entitled to do so.

135. In a replying affidavit sworn on 10th February 2010, Solicitor X submitted that the mere making of an application for substituted service could not conceivably amount to professional misconduct. She referred to the efforts made by the Tribunal to serve the proceedings and said that at the time of the swearing of the affidavit the Society believed that Mr. Murphy was out of the jurisdiction engaging in property transactions in Turkey. Mr. Murphy did not apply to set aside the order nor did he seek to appeal it. On 31st January 2007, he consented to service being effected in the manner sought - on Murphy Healy &

Co, Kenmare. When Mr Murphy requested Johnson P. to effectively hear an appeal from what she described as the spent order, he declined to do so. She stated that her affidavit of 9th October 2006 accurately set out what the Society knew about it. She referred to the advertisement in which his name appeared as solicitor having carriage of the sale. She stated that a Society representative had attended and that Mr. Conor Murphy rather than Mr. Colm Murphy had turned up. She disagreed with Mr. Murphy's averment that the auction issue was the main reason for the issuing of the s.18 proceedings. She averred at that time the affidavit set out the Society's state of knowledge and belief as of that time. Solicitor X referred to the order of the President made on the 31st January 2007 . At paragraph 33 she avers as follows: -

> "*I respectfully say that the Applicant's continued focus on the issue of substituted service and the auction and his attempt to suggest that 'The prejudice that was created against me by the Affidavit of the Respondent Solicitor persisted until the High Court finally made an order for costs against me' simply illustrates why the President of the High Court was forced to conclude that the Applicant appeared to have a limited understanding of his obligations to comply with orders and directions both of the Society and of this Tribunal. I have no reason to believe that the President of the High Court was improperly influenced by anything in my Affidavit and if the Applicant had a concern about that, it was open to him to raise that issue with the President of the High Court since he would have been the appropriate person to deal with it".*

136. In its letter of the 16th August 2010 the SDT rejected the complaint and found that there was no *prima facie* case of misconduct on the part of Solicitor X, on grounds similar to those which had been outlined in previous decisions namely that the allegations had been comprehensively rebutted by the Respondent in her replying affidavits. It also said that the allegation could have

been raised by the Applicant before the President of the High Court on the 11th October 2006, and that there was no evidence in support of the allegations that there had been a breach of the Solicitor's Acts.

137. In his affidavit grounding the application on the appeal, Mr. Murphy avers that Solicitor X did not refer to or exhibit any proof of an attempt made by her or the Society to serve the summons on him and that her affidavit in reply does not answer the complaint made by him. In his letter of 30th June 2006 to the SDT, he said that he would be home for the entire month of October 2006. He contends that Solicitor X could have served him by post or in person. He also repeats allegations made in his application to re-enter the s. 18 proceedings

138. In submissions to this Court, Mr. Murphy argues that there is no evidence of any attempt to serve the proceedings and that during the civil proceedings, Mr. Elliott admitted that the Society knew on the date of the auction and that it had nothing to do with him. He refers to this court's judgment in the civil proceedings that the auction was the catalyst at the time for the institution of the proceedings, the Court noting that Mr. Elliott accepted that the only attempt made to serve the proceedings was at the auction. In support of this application, Mr. Murphy also repeats many of the allegations made in the civil proceedings and in the s. 18 proceedings regarding Solicitor X's motivation. The Society objects to the expansion of grounds by Mr Murphy, particularly in light of Solicitor X's inability to deal with matters given her medical condition which developed in the interim.

139. It is submitted on behalf of the Society that while the court, in its principal judgment, took the view that a phone call to the plaintiff would resolve the issue, the court found that the actions of the Society in seeking the orders were not unjustified. It is submitted that Mr. Murphy is unable to establish that there is any real prospect of his allegation of misconduct against Solicitor X being established to the criminal standard of proof required.

Discussion and Conclusions- Solicitor X – 5297/DT128/09 - 2010/ 79 SA.

140. The SDT in its letter of 16th of August 2010 rejected Mr Murphy's complaint and stated that the allegation had been comprehensively rebutted. It also wrote that the allegation could have been raised by the applicant before the President of the High Court on *11thn October 2006*. That of course is the day on which the application for substituted service was made. Being an *ex parte* application, he was not a notice of the application and therefore could not have raised it on that day. To that extent, there is an error in the stated and written reasoning of the SDT. Nevertheless, the Court is satisfied that an important consideration is the substance of the reasoning that the matter could have been raised by Mr. Murphy before the President of the High Court. While a particular complaint of perjury or misconduct was not then alleged, when the matter came before Johnson P. on the 31st January 2007, any issue which arose in relation to the application for substituted service was treated as moot. It is also true to say that the evidence indicates that at the time that the consent orders were made, Mr Murphy was not in possession of Solicitor X's affidavit. He was, however, clearly in possession of that affidavit when he sought to re-agitate matters in February 2008. No appeal was made from any of the orders of Johnson P.

141. The controversy surrounding the application for substituted service has been addressed at length in the judgment in the civil proceedings and also in the court's judgment in the application to re-enter the s.18 proceedings. At paragraph 378 of the principal judgment, the court stated that it appeared that the decision to apply for the Order for substituted service was somewhat premature, that it was not beyond the bounds of possibilities that a telephone call to Mr. Murphy may have resolved any difficulties but that Mr. Murphy contributed somewhat to that state of affairs by not calling as arranged to the Tribunal offices to collect documents. The court also accepted, at paragraph 385, that enquiry with the auctioneers would have disclosed that Mr. Murphy was not involved in the auction. At paragraph 387 the court stated that while observations had been made on such issues as the timing of the institution of the

proceedings and the application for substituted service, the fact remained that they were either addressed or were capable of being addressed when the matter was before the court in 2007.

142. At paragraph 21 of her affidavit in reply to this complaint, Solicitor X raised the issue of impermissible collateral attack. In this regard, I am satisfied that the complaints made in respect of the application for substituted service have all the hallmarks of an attempt to reopen issues which have long since been treated as moot. The orders of 31st of January 2007 were to a large extent made on consent. It seems to me that complaint now made constitutes a reformulation and re-agitation of the dispute. On this basis, I am satisfied that Mr Murphy's appeal must fail on the basis of impermissible collateral attack.

143. On the assumption, however, that I am incorrect in the above analysis and applicability of the doctrine of impermissible collateral attack, the question which must be addressed is whether a *prima facie* case of misconduct has been disclosed.

144. It is clear that, as accepted by Mr Elliott in the civil proceedings, only one attempt was in fact made *by the Society* to effect service. In the context of an allegation of perjury or misleading of the court, however, it is important that the alleged offending words are considered in context. When so viewed, a number of things emerge. First, when she averred that the Society was unable to effect service on Mr. Murphy, Solicitor X in fact disclosed only one attempt by the Society itself to serve the proceedings, namely at the auction. She did not purport to suggest that the Society itself made any other attempt at service. Second, there is no averment that she or anyone on behalf of the Society had attempted to contact Mr. Murphy by telephone or to otherwise attempt to contact him at his address in Kerry. Third, considerable reliance was placed by Solicitor X on communications which she had with Ms Lynch regarding the attempts of the SDT to effect service of certain documents in respect of another

matter. Solicitor X exhibited a letter from Ms Lynch dated 6th October 2006 obtained a few days before the application was made.

145. I am satisfied that the real thrust of the complaint and shortcoming in Solicitor X's affidavit, concerns what is in effect a stated conclusion expressed by her of *inability* to effect service. When the affidavit is considered in its entirety, that averment was based on a single attempt made by the Society itself, supported by correspondence regarding earlier attempts made by the SDT to effect service in respect of a different disciplinary matter. What was omitted, and which was not expressly stated was that *no other attempts* were made to contact Mr Murphy or to personally serve the proceedings on him on his address in Kerry. In those circumstances and on the basis of those averments, it may well have been open to the President of the High Court to refuse the application and to reject Solicitor X's conclusion of inability to serve based on such evidence.

146. Potential inadequacies in proof where the basis of a stated or asserted inability to serve proceedings has been outlined, it seems to me, must be contrasted with a failure to state the basis on which the stated belief, assertion or conclusion has been advanced. The former is highly unlikely to give any grounds for an allegation of misconduct, whereas the latter may. When read in its entirety, it is clear that in her affidavit Solicitor X did not purport to suggest that further or other attempts were made to serve or contact Mr Murphy. She set out the basis for her averment. It was open to the court to accept or reject the attempts stated to have been made as being sufficient to justify the making of the order. In the circumstances, I do not believe that when viewed in such contest, that Solicitor X's averment is misleading, constitutes perjury, or that misconduct could be made out to the required standard as per *Walker.* I am not satisfied that the SDT erred in its conclusions and I must therefore dismiss this appeal.

Solicitor X - 5297/DT138/09 - 2010 82 SA – undertaking as to damages

147. This complaint relates to the circumstances in which an undertaking as to damages was given by the Society when making an *ex parte* application to Finnegan P. on 17th October 2002. The perfected order records the following:

> *"…and the said Society by counsel undertaking to abide by any Order which this Court may hereafter make as to damages in the event of this court being of opinion that the said Solicitors shall have suffered any damages by reason of this Order which the said Society ought to pay…"*

148. Mr. Murphy submits that Solicitor X was guilty of misconduct in that:

c. She instructed counsel to give an undertaking as to damages knowing that she had no authority to do so,

d. Instructed counsel to give the undertaking knowing that as a statutory regulatory body, the Society could not do so,

e. Instructed counsel to give an undertaking as to damages without any instructions from the Society to do so,

f. Obtained an order from the President of the High Court based, *inter alia,* on an undertaking as to damages that she was not entitled to give and,

g. Failed to respond a letter which he wrote on 13th May 2004querying the circumstances in which the undertaking was given.

149. In his affidavit grounding the complaint Mr Murphy averred that it was clear from the order that Solicitor X instructed Counsel to give the undertaking. He wrote to Mr. PJ Connolly, the then Registrar of Solicitors, on 24th October 2002 seeking information as to who authorised the giving of the undertaking. He wrote to Mr Connolly again on 21st April 2004. On 26th April 2004 he wrote to Mr. Connolly, the Compensation Fund Committee, Solicitor X and to the President of the Society. He stated that he had been cleared of any possible

wrongdoing but was anxious to get to the bottom of the undertaking issue. A reply was received from Solicitor X on 27th April 2004 in the following terms: -

> "*The Society takes the view that as a statutory regulatory body it does not give undertakings as to damages. If any undertaking as to damages was given it would have been at the direction of the President of the High Court".*

On 13th May 2004 Mr. Murphy replied posing the question: "*Are you now saying that the Counsel you were instructing did not have authority to give this undertaking*?" This letter was not responded to.

150. Mr Murphy maintains that as a result of the order being wrongfully obtained on foot of the undertaking, the Society was granted an order to reinvestigate his practice pursuant to s. 14 of the Solicitors Amendment Act, 1994. The outcome of that inspection was that no wrong had been committed by him or by any of his clients.

151. Solicitor X swore an affidavit in reply on the 10th February 2010. The affidavit, for the most part, repeats many of the issues and defences raised in response to other complaints. It was contended that the complaint constituted an impermissible collateral attack on final orders made by the President. The complaint was not made until 16th December 2009, some seven years after the order had been obtained and maintained that the complaint was barred by reason of gross and inordinate delay. At paragraph 27 she averred that, at this remove in time…

> *"I do not have the slightest recollection as to how the undertaking came to appear in the order. Just because the order refers to an undertaking it does not mean that one was formally given. It appears most likely that the President of the High Court upon making the order simply stated that the usual undertaking will apply. I have no recollection what instructions Counsel was given over seven years ago but given the Society's stance that as a statutory body it is not appropriate for it to*

give such undertakings it seems likely that the reference to an undertaking came from the President of the High Court himself".

152. Outlining the background to the application, Solicitor X averred that Mr. Murphy sought to obstruct the investigation of the reporting accountant, Mr. Edward Sheehan. As a result, the Society made application to restrain him from causing or permitting the removal of files, ledger cards and associated documents relating to conveyancing instructions; and to return those which had already been removed. She avers that if Mr. Murphy had the slightest concern regarding the undertaking, he should have gone "*straight in to the then President of the High Court to raise the issue".* The matter could have been clarified at that time as the President could then have indicated the basis on which his order had been made. If Mr. Murphy was still dissatisfied then his remedy was to apply to set the order aside or to appeal it. Mr. Murphy described the order as having been "*wrongfully obtained* . She maintains, therefore, that this complaint constitutes an impermissible collateral attack on that order. She contended that Mr Murphy was not entitled to invite the SDT to challenge the Order some seven years after it was made. She also averred that Mr. Murphy was speculating about instructions which she may have given to Counsel seven years previously, and queries how he could make such allegations when he was not present in court for the application.

153. With regard to the failure to respond to correspondence, Solicitor X pointed out that she had replied on 27th April 2004 and provided an answer to Mr Murphy's query. That he did not accept this and wrote further letters does not mean that the Society was obliged to repeat its answers. The Society decided not to engage in any further correspondence with him could not amount to professional misconduct. She stated that she acted in a *bona fide* manner in fulfilling the Society's regulatory functions. She found it impossible to understand why Mr. Murphy was seeking to challenge the order of Finnegan P., that no question of damages ever arose and the undertaking never had an effect.

154. Solicitor X filed a further affidavit on the 19th February 2010 averring that since swearing her previous affidavit she had located her attendance of 17th October 2002. Exhibiting the attendance, she averred: -

> "*As is apparent from that attendance, the President of the High Court stated that in view of the fact that he was granting interim relief to the Society, he would require the usual undertaking as to damages from the Society. Counsel on behalf of the Society, Paul Anthony McDermott BL, advised the President of the High Court that the Society did not give undertakings but the President of the High Court took the view that as this application was outside of the statutory framework, such an undertaking should be given".*

She stated her belief that the attendance note was a true and accurate record and that "*(a)ccordingly, it follows that I did not instruct Counsel to give the undertaking as to damages as alleged*". The attendance also records: -

> "*The President stated that in view of the interim relief he would accept the usual undertaking as to damages from the Society. Mr McDermott stated that the Society did not give such undertakings but the President took the view that as he was stepping outside the statutory framework such an undertaking should be given".*

155. By letter dated 16th August 2010, Mr. Murphy was informed of the decision of the Tribunal that there was no *prima facie* case of misconduct. The SDT wrote that his allegations had been comprehensively rebutted by Solicitor X in her replying affidavits. The SDT also stated that the allegation did not disclose conduct which could be construed as misconduct. The complaint concerning the allegation of a failure to respond to the letter was also rejected on the basis that it had been comprehensively rebutted by Solicitor X in her replying affidavits.

156. In his affidavit grounding the appeal to this court sworn on the 6th September 2010, Mr. Murphy maintains that Solicitor X's reply that she *did not*

have the slightest recollection as to how the undertaking of damages came to appear in the court order and that *just because the order refers to an undertaking it does not mean that one was formally given* meant that she had not defended this allegation. He maintains that the attendance note appeared to confirm his allegations that an undertaking was given and on foot of which the order was made.

157. Mr Murphy objected to the inclusion of the second affidavit on the basis that it had not been filed in accordance with the relevant Rules. It appears that on the 11th March 2010 the Society applied to the SDT and was permitted to do so.

158. It should also be stated that further affidavits were exchanged including an affidavit sworn on the 12th May 2010. Mr. Murphy avers that the Respondent Solicitor had lodged five booklets, having been granted liberty to do so by the SDT on the 6th May 2010. He avers that there were very little, if anything, of relevance to his application of the 16th December 2009 contained in those booklets. He submitted that a replying affidavit sworn on the 23rd June 2010, exhibiting a copy of the proceedings which he had issued against the Society and that such history was relevant to the.

159. The SDT rejected his complaint. Mr. Murphy takes issue with the decision of the SDT. He maintains that as Counsel gave the undertaking and that as the respondent was the instructing solicitor, she must have instructed him to give the undertaking. He therefore contends that because the Society cannot give an undertaking as to damages it constitutes gross misconduct to do so or to instruct Counsel to do so. He also pointed out that Solicitor X still had not replied to his letter of 13th May 2004, which he also maintains constitutes misconduct.

160. In written submissions, Mr. Murphy maintains that it is extraordinary that Solicitor X could remember precisely what the President said even though she also averred that she did not have the slightest recollection. She points out that

minutes of the Society's meetings made no reference to the undertaking as to damages and that in the absence of an explanation for this and the failure to respond to letter of 13th May 2004, there is *prima facie* evidence of the matters charged. He also submits that Solicitor X's supplemental affidavit, if anything, confirms that the matters as charged are correct and that "*it seems that the President said such undertaking should be given and obviously was given*". Mr. Murphy points to the judgment in the civil case that there was no evidence as to the decision of the Society to give the undertaking and that it was unclear from Mr Elliot's evidence whether the undertaking had been authorised. He also points to the fact that counsel who gave the undertaking did not give evidence in the civil case. He reiterates that Solicitor X's motivation as evident from various memos and emails are relevant. Mr. Murphy maintains that the only conclusion to be drawn is that Solicitor X instructed Counsel to give the undertaking knowing that she had no authority to do so and the Society had not instructed her in that regard.

161. The Society, in its submissions, refers to the decision of this court in the civil proceedings. The court held that it could not conclude that the onus of proof of establishing malice or bad faith had been discharged by Mr. Murphy. It is therefore submitted that, *a fortiori*, Mr. Murphy cannot satisfy the court that there is any prospect of the allegations of misconduct being established to the requisite standard of proof.

Discussion and conclusion - Solicitor X - 5297/DT138/09 - 2010 82 SA – undertaking as to damages

162. The background to the undertaking is addressed in the principal judgment under the heading "*The O'Dowd investigation and rumours*" (see paragraphs 212 *et seq.* and paragraphs 395 *et seq*.). This complaint was made a long time after the offending conduct is said to have taken place. While Solicitor X raised, by affidavit, a defence of gross and inordinate delay, I do not propose to decide the appeal on this point.

163. At paragraph 400 of the court's judgment of the civil proceedings, the court observed that the circumstances in which the giving of the undertaking, whether extracted or volunteered, was not entirely clear. Solicitor X was not in a position to give evidence in the civil proceedings and therefore could not be cross-examined in relation to the contents of her affidavit or her attendance. While it may be said that the contents of the attendance note would tend to suggest that the undertaking was extracted by the court, nevertheless, as in all such circumstances if the undertaking is not advanced, there is always a risk that the court will not grant the reliefs sought. It is also evident that everything that Mr. Murphy complains of occurred in open court before the President.

164. I am not satisfied that the giving of an undertaking as to damages, whether as a result of being extracted or having been volunteered, is capable of amounting to misconduct within the meaning of the legislation. It is difficult to see any basis upon which this could be said to have brought the profession into disrepute or that any dishonesty was associated with it. I am also satisfied that even if the statutory basis for giving such an undertaking was either questionable, or non-existent, that this could not amount to misconduct as a matter of law. There is nothing to suggest that Solicitor X wilfully attempted to misinterpret the Society's powers or to convey such interpretation to the court, either in her instructions to counsel or otherwise. There is no evidence to substantiate a claim that she was reckless in so doing. In *Law Society of Ireland v Walker* [2007] 3 I.R. 581, it was accepted that a factor to which regard can be had is at *prima facie* stage is whether the application has any real prospect of being established at inquiry where the standard of proof is beyond reasonable doubt. Taking into account Court's conclusions in the civil proceedings, it is difficult to see how the higher standard required on this complaint of misconduct could be achieved. I do not believe that any error has been established on the part of the SDT.

165. Further, in his affidavit grounding the complaint, Mr Murphy refers to the order as having been *wrongfully* obtained. Implicit is that the alleged misconduct of Solicitor X's led the granting of an order, which should not have been made. This argument appears to be based on the assumption that because of the alleged misconduct, the order is thereby rendered invalid. No application was made to set that order aside. There is no evidence on the affidavits which were before the SDT that the matter was raised before Finnegan P. The order was not appealed. In such circumstances, I am also satisfied that this complaint has all the hallmarks of a challenge to the validity of the order of Finnegan P., and that as such, the principles of impermissible collateral challenge apply.

166. I am also not satisfied that misconduct within the meaning of the legislation is capable of being established by reason of a failure of Solicitor X to reply to correspondence. The position of the Society was set out in Solicitor X's letter of 27th April 2004. To hold otherwise would have the effect of imposing an obligation on the Society to continue the debate through correspondence, which I do not consider would be reasonable in the circumstances. I am not satisfied that it has been established that the SDT erred in its conclusions. In the circumstances, I must dismiss this appeal.

Solicitor X - 5297/DT 02/10 - 2010/ 78 SA The [REDACTED] matter

167. Mr. Murphy made this complaint on 13th January 2010**.** It relates to the application to have him attached and committed by reason of his failure to comply with the orders made on 31st January, 2007. Mr. Murphy maintains that the affidavit of Solicitor X sworn on 22nd February, 2007 was almost exclusively based on a complaint made by Mr. [REDACTED]. The essence of Mr. [REDACTED]'s complaint was that he had agreed to purchase property from Mr. [REDACTED] and that even though he had been furnished with a copy of a unstamped, unregistered Deed of Transfer dated 20th September 2004, he was concerned that his title had not been registered. Mr. Murphy wrote to the Society on 13th February, 2007 outlining his position in response to the

allegations being made by Mr. [REDACTED], allegations which he rejected. He states that he had informed the Society that the document was a forgery. Mr. Murphy complains that the Society proceeded with the application for attachment and committal. It came before the court on a number of occasions including 14th March, 2007, 21st March, 2007, 18th April, 2007, 3rd May, 2007, 19th May, 2007, 11th June, 2007, 16th July, 2007, 8th October, 2007, 19th November, 2007, 17th December, 2007, 21st January, 2008, 4th February, 2008, 25th February, 2008, 31st March, 2008, 14th April, 2008 and 17th June, 2008.

168. The substance of Mr. Murphy's complaint is that Solicitor X on numerous occasions wrongfully informed the court that he was in breach of the order of 31st January 2007 and that she or the Society never corrected position. He avers at paragraph 8 of his affidavit grounding this complaint, sworn by him on 13th January, 2010, that:

> "*For much of the time I believed that the only matter that could have been outstanding was the complaint of Mr.* [REDACTED] *as the Society had never advised me or the Courts that they were no longer seeking compliance with any part of the Order that affected the* [REDACTED] *complaint. At the hearing before the President of the High Court on 9th May 2007 Counsel on behalf of the Society, upon instructions from the Respondent Solicitor, instructed the Court that I had the "temerity" to suggest that the document produced by Mr.* [REDACTED] *in support of his complaint was a forgery. It now transpires that I was correct and the Law Society and the Respondent Solicitor and indeed Counsel as instructed by the Respondent Solicitor was incorrect*".

Referring to the transcript of 17th June, 2008, when the order for costs in the attachment and committal proceedings was made, he states that the President's comments were based "*somewhat on the allegations by the Law Society in relation to the* [REDACTED] *complaint and my reply thereto*". He exhibited a

copy of the Irish Times for the day following the court hearing. This reported the President's comments under the title *"Ex-Solicitor's 'excuses' worthy of Puck Fair"*. He averred that he had since ascertained that the purported transfer of 20th September, 2004 on which Mr. [REDACTED] based his complaint, was a forgery. He had obtained a *bona fide* copy of the transfer. He maintained that Mr. [REDACTED] had copied the page on which his signature appeared and attached it to the front page of the purported transfer of 20th September, 2004 which Mr. [REDACTED] had prepared. Mr. Murphy avers that Mr. [REDACTED] was convicted of numerous counts of fraud and forgery including forgery of Land Registry documents in Southwark Crown Court on 1st December 2009. He was imprisoned. Mr. Murphy refers to copies of reports of the proceedings in newspapers in this jurisdiction. Temporally, Mr. Murphy's complaint about Solicitor X was made within a month of this reporting. The allegations are that Solicitor X was guilty of misconduct in that she:

(i) Included the complaint of Mr. [REDACTED] in the application to the High Court to have Mr. Murphy attached and committed to prison without proper investigation of the complaint;

(ii) Failed to inform the High Court at the various subsequent sittings that [REDACTED]'s Solicitors had not replied to the Society's letter of 3rd April, 2007;

(iii) Failed to inform the High Court at sittings from 8th October, 2007 onwards that the Society had closed its file in relation to the complaint of Mr. [REDACTED].

(iv) Continued to allow the High Court to believe that the complaint of Mr. [REDACTED] was still extant and valid in the full knowledge that such was not the case.

(v) Misled the Court by not informing it that the Society was no longer relying on the complaint of Mr. [REDACTED].

(vi) Instructed counsel to inform the court on 9th May, 2007 that Mr. Murphy had the temerity to suggest that the purported transfer was a forgery.

169. Solicitor X swore a replying affidavit on 10th February, 2010. Having raised objections similar to those raised in response to other complaints. She outlined the background to the s.18 proceedings and stated that one of the concerns that led to those proceedings was that Mr. Murphy was retaining client's files. The Society by letter dated 19th January, 2007 had received a complaint from a firm of Solicitors, Messrs Kelly & Dullea, on behalf of a former client, Mr. [REDACTED]. They had enclosed a copy of the transfer dated 20th September, 2004. The transfer had made reference to a previous transfer of the property on the same date, 20th September, 2004 from Mr. [REDACTED] to Mr. Murphy. The complaint was that Mr. [REDACTED] had never been registered as owner and that he wanted to sell the property. Solicitor X averred:

> "*What concerned the Society about this was that it appeared the Applicant had procured the purported transfer of the property to himself at a time when there was already a Petition before the High Court to make Mr* [REDACTED] *a ward of court. This Petition was brought by Mr* [REDACTED]*'s nephew,* [REDACTED] *(a solicitor) and the Order was made on 3 December 2004".*

170. Solicitor X averred that at the time Murphy Healy & Company were acting for Mr. Murphy and the Society sought an immediate explanation from them but received no response. They passed the letter to Mr. Murphy who responded by letter of 13th February, 2007. She averred that instead of addressing the concern of the Society, Mr. Murphy alleged that Mr. [REDACTED] was engaged in some sort of fraud and that Mr. Murphy did not then or since produce any evidence of fraud on the part of Mr. [REDACTED] in respect of that document. She also said that the Society was unaware of any

complaint having been made to any relevant authorities by Mr. Murphy at the time:

> "*Mr.* [REDACTED]*'s solicitors on the other hand claimed their client had paid €167,000 for the property in 2004. Around this time, the Society received a separate complaint from a separate firm of solicitors to the effect that the same property had been sold by the Applicant to a Mr Declan O'Donoghue for €160,000."*

171. Solicitor X referred to copy of a letter which the Society had received, from Mr. [REDACTED], solicitor, who was also Mr. [REDACTED]'s Committee, and Mr. O'Donoghue's solicitors. This was to the effect that he had received a letter from Mr. Murphy in July 2006 in which he had stated that he acted for Mr. O'Donoghue in the purchase of the property from Mr [REDACTED] for €160,000 at an unspecified date. The letter stated that Mr [REDACTED] was never paid for the property *"and is unaware that he was suppose (sic) to have sold it."* Mr. [REDACTED]'s letter enclosed a letter from Mr. [REDACTED]'s Solicitors to the effect that they maintained that Mr. [REDACTED] had bought the property and that they were registered a caution against the folio. That letter also made allegations against Mr. Murphy.

172. Solicitor X also averred that:

> "*Through the medium of the High Court Mr* [REDACTED]*'s file was obtained from the Applicant and transmitted to Mr* [REDACTED]*'s solicitors, Kelly & Dullea. This was under cover of letter dated 3 April 2007 from Martin Clohessy of the Society's Complaints Section. In the course of the letter Mr Clohessy said "Mr. Murphy questions the copy transfer provided dated 20th of September, 2004. I look forward to receiving your comments on this matter"".*

She averred that Mr. Clohessy wrote again on 10th August, 2007 and 21st September, 2007 to the effect that no response had been received to the letter of 3rd April 2007 and stating that "*I will presume you no longer require assistance*

from the Society. I have closed my file". She averred that to date, Mr. Murphy had provided no explanation as to the transfer of the property *"apparently"* to Mr. [REDACTED] or the transfer of the same property to Mr O'Donoghue, other than accusing Mr [REDACTED] of forging the front page. She said that no evidence had been provided of Mr. Murphy's apparent suggestion in his affidavit that this had occurred before an application was made to make Mr. [REDACTED] a ward of court. At paragraph 35 of her affidavit she averred as follows:

> "*35. The prime purpose of Kelly & Dullea writing to the Society on behalf of* [REDACTED] *was to get this file from the Applicant as they claimed their client's title had not been registered. This was duly procured for Kelly and Dullea by the Society and passed on to them. There was no obligation or onus on Kelly and Dullea to correspond any further after that and there is no significance attaching to their lack of communication with the Society repudiating the Applicant's accusation".*

173. Solicitor X also maintains that this complaint amounts to a collateral attack on the order of Johnson P. awarding to the Society of the attachment and committal proceedings as its purpose is to suggest that the order was wrongly granted. She rejects the suggestion that the application which she made in February 2007 was almost exclusively or completely based on a complaint of a Mr. [REDACTED]. In her affidavit sworn by her on 22nd February, 2007 she averred that notwithstanding the terms of the order that up to that date Mr. Murphy had failed to comply with any part of the order of 31st January, 2007 and this was the reason why the Society brought the attachment and committal proceedings; and not just because he had failed to hand over his file relating to Mr. [REDACTED].

174. Solicitor X denies misconduct and says that the matter was brought to the attention of the President in a *bona fide* manner. She avers:

"40…It will be seen from paragraph 11 of my Affidavit sworn on 22 February 2007 I stated that it was a matter for the Court how to deal with the issue and suggested that the Applicant should be made available for cross-examination in respect of the issue. In so far as the Applicant seemed to complain that the Society should have investigated the issue more, I say that at all times it was open to the Applicant to raise that issue with the President of the High Court and it was open to the President of the High Court to make any suggestions or directions that he believed were appropriate. I say and believe that the President of the High Court was the appropriate forum before which this issue should have been debated rather than by way of disciplinary complaint some three years after the event.

41. In respect of precisely what was said to the President of the High Court on each occasion when the matter was before the Court I say that at this remove in time it is simply not possible to recall every submission made and every instruction given to Counsel. In this regard I do not have the slightest reason to believe that the President of the High Court was not informed of any material fact that was relevant to any issue of concern that he raised on any particular date. On any occasion when the matter was in Court it was open to the Applicant to raise any query and to seek any direction that he thought was appropriate from the President of the High Court.

42. It is impossible to understand why the Applicant is still seeking to challenge an order of the High Court over three years after it was made. I say that the within complaint is utterly vexatious. At all times in the proceedings, I acted in a bona fide manner for the purpose of

conducting the Society's regulatory function. I deny all of the wrongdoings alleged against me."

175. Mr. Murphy swore a further affidavit on 3rd March 2010. He averred that when the matter was before the High Court on 11th June 2007, the Society suggested to the court that the matter was not finalised as it was waiting for compliance in a number of respect and that the Society was asked to outline, on affidavit, exactly what was outstanding. No such affidavit was ever filed because no matters were then outstanding. The affidavit filed by him on 31st January 2008 was because of his continued belief that parts of the reliefs sought in the special summons was being adjourned. He maintained that Solicitor X had managed to persuade the High Court that the only matter outstanding was costs and that Solicitor X continued to rely on the transfer. The report of a hand writing expert would be produced. He also referred to his affidavit sworn on the 14th March 2007 where he had rejected any suggestion of impropriety and took issue with Solicitor X's continuing attempt to rely on the forged document. The lands had been sold to Mr. O'Donoghue in late 2003 for €160,000.

176. Mr. Murphy referred to Solicitor X's averment that Mr [REDACTED]'s file had been obtained from him. He states that this is not correct. No file was procured from him. No file existed for the purported transfer of these lands by [REDACTED]. Mr. Murphy averred : -

"*On the 26th February 2010 I asked the practice closure section for a schedule of all the files that I had brought to the practice closure section of the Law Society in compliance with the order of the 31st January 2007. Ms.* [REDACTED] *of the practice closure section sent her letter of the 3rd March 2010 with a schedule of the various files. As can be seen there was no file for* [REDACTED]*".*

There was no file for Mr. [REDACTED] for the purchase of the lands as he had not purchased them and he averred that a clear attempt had been made by Solicitor X to mislead the SDT. There was nothing untoward about the

sale to Mr. O'Donoghue which took place in 2003. Application was made to have Mr. [REDACTED] made a ward of court in September 2004. He continued to have a Practising Certificate until December 2004. He described as untrue her statement that a file *"was duly procured for Kelly & Dullea by the Society and passed onto them"*.

177. On 16th of August 2010, the SDT informed Mr. Murphy that his complaint had been rejected and that it had been comprehensively rebutted by Solicitor X in her replying affidavits.

178. Mr. Murphy maintains that the document relied upon was a forgery and that reasonable inquiry by Solicitor X or the Society would have confirmed this. The High Court was not informed of the closure of the file and it should have been. Mr. Murphy submits, in light of evidence which has emerged in the civil proceedings, that on receipt of the complaint, rather than passing it to the complaints department, Solicitor X, decided to investigate it herself . She used the complaint in the application for the attachment committal in circumstances where she must have known that the provenance of the document was in question. He highlights a letter dated 14th March 2007 from Solicitor X to Mr. O'Donoghue's solicitors, enclosing title documents for the lands the subject of the [REDACTED] complaint. He submits that she must have known that the [REDACTED] document was a forgery and that the land belonged to Mr. O'Donoghue. He points out that she did not refer to the letter of 14th March 2007 in her affidavit of 10th December 2010 and submits that her motivation for not disclosing the information to the court must be seen in the context of her other actions and the combative approach adopted. He submits that at the time of the complaint the [REDACTED] matter has been concluded and Solicitor X could have taken the opportunity to address all issues in a replying affidavit. Mr. Murphy also points to the report of Mr. Lynch handwriting expert, in respect of the document, which was

subsequently obtained. This does not appear to have been before the SDT at the time.

Discussion and conclusion - 5297/DT 02/10 - 2010/ 78 SA - The [REDACTED] matter

179. In the civil proceedings, this court concluded that the order of 31st January 2007, in respect of which the attachment and committal proceedings were brought, had nothing to do with the [REDACTED] matter and therefore it could not have been referenced in the notice of motion. The court also noted that the [REDACTED] complaint had been closed by the Society in September 2007 but there was no evidence of either the court or Mr. Murphy being informed of this prior to disposal of the s.18 proceedings. The court concluded that Mr. Murphy should have been so informed and so should the court. Solicitor X did not give evidence in the civil proceedings and therefore the court does not have available explanations other than those contained in her replying affidavit sworn in 2010.

180. Counsel for the Society submits that in the civil proceedings, the court found that the Plaintiff had not provided evidence to support the case the motivation for a continuance or adjournment of the attachment proceedings was the [REDACTED] matter. It is also submitted that when assessed against the test in *Walker*, there is an evidential void-that there is no proof of any perjury to the requisite standard and that the SDT did not err in its. The SDT had received a response from Solicitor X and had characterised it as a comprehensive rebuttal of the allegations made. It is submitted that Mr Murphy will not be in a position to establish beyond reasonable doubt misconduct as alleged. The Tribunal was entitled to assess the state of the evidence at that time. Mr. Murphy had sought to make a connection between a conviction in the United Kingdom in respect of a different matter with the [REDACTED] complaint in order to establish knowledge but, it is submitted that such knowledge did not exist at the time.

181. Having considered the affidavits which were before the SDT while I am satisfied that the information before the SDT did not disclose a *prima facie* case of perjury, I am not satisfied that it was proper for the SDT to conclude that Solicitor X had comprehensively rebutted Mr. Murphy's allegation that she had failed to inform the court of the closure of the [REDACTED] complaint at an earlier time. The issue is whether this constitutes prima facie evidence of *misconduct*, which includes conduct tending to bring the solicitors' profession into disrepute.

182. The [REDACTED] issue was raised in the attachment and committal application by Solicitor X. She wrote to solicitors for Mr. O'Donnell on 14th March 2007 and while it is suggested that she must have known that the [REDACTED] complaint was a forgery, or at least she must have so suspected, the complaint continued under investigation until September 2007.

183. While it is true that after September 2007 the matter continued to be before the courts by reason of Mr. Murphy's application to revisit matters and because of the outstanding issue of costs, in the assessment of the decision of the SDT, the court must also take into account Mr Murphy's averment, contained at paragraph 10 of his affidavit sworn on 3rd March 2010, that when the matter was before the High Court on 11th June 2007, the Society suggested to the court that the matter was not finalised as it was waiting for compliance in a number of respects. Mr Murphy avers that they were asked to outline, on affidavit, exactly what was outstanding. A review of the orders conducted by this court in its judgment in the application to seek to re-enter the section 18 proceedings, suggest that it was on 16th July 2007 that Mr Murphy was directed to file a further affidavit by 17th September 2007 and that the Society was directed to file any affidavit of non-compliance on or before 8th October 2007. There is no evidence that a further affidavit alleging non-compliance was filed before 8 October 2007. The complaint was closed in September 2007. No further substantive orders were obtained after that date, save in respect of the

costs. In those circumstances I am satisfied that, *prima facie*, the failure to inform the court of the closure of the [REDACTED] complaint by the Society in September 2007 was a failure *to promote the cause of justice* in the context of a complaint which had been brought to the attention by Solicitor X herself, as per dicta of Lord Wright in Myers v. Elman [1940] AC 282, cited above.

184. I am therefore satisfied that a *prima facie* case of misconduct has been established in respect of allegations (iii), (iv) and (v), insofar as these relate to the failure to notify the court of the closure of the complaint. With regard to the allegation at (i) (which relates to the inclusion of the [REDACTED] complaint), while this court has concluded that the order of 31st January 2007 had nothing to do with the [REDACTED] matter and therefore could not have been referenced in the notice of motion, nevertheless all of this was done in open court where it was capable of being addressed. I am not satisfied that it constitutes misconduct. Allegations (ii) and (vi) relate to what occurred prior to the closure by the Society of its file in September 2007. The court has made its observations in relation to the expression "*temerity*". There is little evidence of such instructions having been furnished.

185. Solicitor X was not in a position to give evidence and therefore the court's assessment is based on the matters which were before the SDT without having the benefit of evidence of Solicitor X. The court must assess the appeals on that basis and is satisfied that Mr Murphy's appeal be allowed in respect of allegations contained at para. 14 (iii), (iv) and (v).

Solicitor X – 5297/DT 170/10. - 2011 50 SA – Complaint in relation to allegations concerning the auction, instructions given to Counsel, headed notepaper and the contents of Solicitor X's affidavit sworn on 8th April 2008 in response to complaint 2010/78 SA (SDT reference 5297/DT 170/10)

186. This appeal is against the decision of the SDT made on the 8th April 2011 that there was no *prima facie* case for an inquiry into the conduct of Solicitor X in respect of the following complaints made on 19th November 2010:

a. That Solicitor X had instructed counsel to twice inform the court at the hearing of the 31st January 2007 that Mr. Murphy had attended an auction when he had not.
b. That Solicitor X failed to inform the court at that hearing that she was aware that Mr. Murphy had not attended the auction.
c. That Solicitor X instructed counsel to inform the court at the hearing on the 31st January 2007 that Mr. Murphy had sent various letters on headed notepaper when not entitled to do so. Mr. Murphy contended that Solicitor X had done this knowing that this was not true.
d. Failed to inform the court on the 31st January 2007 that she was aware that the only letter had been written by Mr Murphy on headed notepaper when he was not entitled to do so. This was the letter of the 23rd November 2005 and was addressed to the Society.
e. That in her affidavit of the 8th April 2008 she swore that "*the sole issue before the Court is the question of the Applicants application for the costs of the Attachment and Committal proceedings*" when, it is alleged, she knew that these words were false.
f. That Solicitor X committed an act of perjury by swearing to the above in her affidavit of the 8th April 2008.
g. That in her affidavit of the 10th February 2010, Solicitor X swore the words "*The prime purpose of Kelly and Dullea writing to the Society on behalf of* [REDACTED] *was to get this file from the applicant as they claimed their client's title had not been registered. This was duly procured for Kelly and Dullea by the Society and passed on to them. There was no obligation or onus on Kelly and Dullea to correspond any further after that and there is no significance attaching to their lack of communication with the Society repudiating the Applicant's accusation*", when she knew

these words to be false. This affidavit was sworn in response to Mr. Murphy's complaint concerning Solicitor X's reference to the [REDACTED] matter.

h. That Solicitor X committed perjury when she swore the above words in the affidavit of the 10th February 2010.

i. That in all of the circumstances she breached the Solicitor's Acts.

187. In an affidavit sworn in reply on the 17th December 2010, Solicitor X averred that she had at all times placed information before the court that the Society believed to be true at that time, that Mr. Murphy was legally represented and that it was open to him to place any information that he believed to be relevant before the court. At no time did the court express the slightest concern or criticism. With regard to the contents of her affidavit sworn in April 2008 she avers as follows: -

> *" 31. In respect of paragraph 6 of the Applicant's Affidavit he suggests that the President of the High Court was misled by being told in April 2008 that the sole remaining matter before the Court was that of costs. It was the President of the High Court who was dealing with the proceedings and it was the President of the High Court who decided that the only remaining issue was costs and so, in effect, this allegation is no more than a collateral attack on the correctness of the President's decision. In so far as the Applicant suggests that the main reason for having him attached and committed was the* [REDACTED] *issue, I say that as set out above the reasons they were brought was because notwithstanding the fact that the Applicant had consented to the Orders made by the High Court, he had failed to comply with them. In respect of the Applicant's allegation that a particular document produced by a person had been "proved" to be a forgery, I say that that is the Applicant's opinion and I do not intend to be drawn into a debate as to whether a person who is not a party to*

this complaint has or had not committed an act of forgery. Once again this appears to be an attempt to reopen matters that were previously debated before the President of the High Court years ago".

188. With regard to the procurement of the [REDACTED] file, Solicitor X explained as follows:

" 32. In respect of paragraph 7 of the Applicant's Affidavit he avers in relation to the file of [REDACTED] *that 'there was no file procured from me for Kelly and Dullea pursuant to the Order of the 31st January 2007'. I say and believe that the Applicant pursuant to the Order of the High Court delivered or caused to be delivered to the Society the file of* [REDACTED]. *This file did not go through the Practice Closures Section of the Society because there was an ongoing investigation of a complaint made to the Society by Mr* [REDACTED] *about the Applicant. The file therefore was delivered directly to Mr Martin Clohessy of the Complaints Section of the Society. Mr Clohessy by letter dated 3 April 2007 sent by registered post furnished the file provided by the Applicant to Mr* [REDACTED]*'s solicitors, Kelly & Dullea."*

She exhibited a copy of that letter, which states as follows.

"*Dear* [REDACTED]*,*

I acknowledge receipt of your letter dated 13th of March 2007.

I enclose the file provided from Colm Murphy in relation to [REDACTED] *and an extract from an Affidavit provided by Mr. Murphy. Mr. Murphy questions the copy transfer provided dated the 20th of September 2004.*

I look forward to receiving your comments on this matter".

189. Solicitor X further averred that the Mr Murphy wrote to Mr. Clohessy on 11th June 2008 requesting a copy of the letter from the Society to Kelly &

Dullea and also a copy of the file sent to them. Mr Clohessy responded on 20th June 2008 enclosing a copy of the letter as requested and advised that the reference to a file in his letter of the 3rd April 2007 to Kelly & Dullea solicitors *"is the file you provided subject to the High Court orders sought by the Law Society"*. Those letters are exhibited by Solicitor X. She also avers that by letter dated 4th March 2010 to Mr. Clohessy headed "[REDACTED]", Mr. Murphy again requested a copy of the file. Mr. Clohessy responded on 18th March 2010 that as Mr. Murphy was no longer on the roll of solicitors, he was not in a position to furnish the file. Solicitor X notes that the letter stated, in its penultimate paragraph: -

> "*As regards your other query, as I have stated in my letter of the 3rd April 2007, Conor Murphy presented the Society with the file".*

190. The letter also confirmed that Mr. Clohessy had not kept a copy of the file. Solicitor X believes that the allegations made by Mr. Murphy in respect of this particular complaint constitutes a vexatious attempt to mount a collateral attack on the orders made against Mr. Murphy by the President of the High Court.

191. Mr. Murphy replied by affidavit sworn on 3rd February 2011. He averred that he was not hopeful of ever getting a favourable hearing from the SDT in relation to his allegations of misconduct and, having chronicled all complaints made by him, he said that it was evident that the SDT did not deal with his complaints in a fair way. He repeated that there was no file in existence for Mr [REDACTED] in relation to the lands as Mr. [REDACTED] had not contracted to buy them.

192. The SDT rejected the complaints stating that the allegations had been adequately rebutted by Solicitor X in her affidavit. This was appealed by notice of motion dated 3rd May 2011 grounded on Mr Murphy's affidavit sworn on 24th April 2011. He averred that his allegations had not been adequately rebutted and said that certain allegations were confirmed in most respects by a

reading of the transcript of 31st January 2007. He also contended that the prime purpose of Mr. [REDACTED]'s complaint was not to get the file but that he, Mr. Murphy, had received money for land and that the complainant never became the owner of the lands.

193. Mr. Murphy submits that it was conceded by Mr Elliott in evidence in the civil proceedings that on the day of the auction the Society knew that Mr. Murphy had nothing to do with it and that therefore the Society should not have relied on it after that date. The auction was referred to on two occasions by Counsel when the matter was before the court on 31st of January 2007. He submits that Solicitor X did not deal with this complaint in her affidavit in reply. With regard to the headed notepaper, it is submitted that it emerged during the civil proceedings that the Society were not aware that any letter was improperly written, they were not relying on any letter written to a third party and therefore Solicitor X misled the court in this regard. Mr. Murphy contends that Solicitor X, in her affidavits sworn in the attachment and committal application, effectively blocked off his attempt to reopen everything in relation to the s. 18 proceedings. He also submits that to compound the injustice, this court in its previous judgment decided that matters were looked at by Johnson P. after that date. He submits that the matter was never looked at. With regard to affidavit on 10th December 2010, reliance is placed by Mr. Murphy on the fact that Solicitor X gave documents relating to the [REDACTED] issue to the rightful owner Mr. O'Donoghue on 14th March 2007 and that Solicitor X never disclosed this at the time or at any time since. He submits that Kelly and Dullea were not attempting to obtain the file but were making complaint that the client had been cheated. They never received the file as Solicitor X had given it to Mr. O'Donoghue's Solicitors and therefore he submits that she cannot aver that it was *"This was duly procured record for Kelly and Dullea by the Society and passed on to them".*

194. In response, the Society submitted that the issue of the auction has been dealt with in complaint 2010/79 SA, as had the issue of the headed notepaper. While in civil proceedings the court did not make any direct findings, the court found that the Society was not unjustified in seeking the orders which it did in the s. 18 proceedings. In those circumstances it is submitted that the Plaintiff will not be able to establish that these allegations have any real prospect of being established on enquiry.

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195. Issues concerning Mr. Murphy's alleged involvement in the auction have been addressed in the judgments in the civil proceedings, in the application to re-enter the s.18 proceedings and also in appeal 2010/79 SA (the substituted service application). This is a somewhat different iteration of Mr Murphy's complaint regarding his alleged involvement in the auction. In essence, his complaint is that despite the fact that the Society knew that he was not involved in the auction, it continued to maintain that position before Johnson P., on 31st of January 2007 and that at that hearing Solicitor X instructed counsel to inform the court *"twice"* on that date that Mr. Murphy had *attended* at the auction (complaint (a)).

196. In relation to this complaint number (a), a review of the transcript of 31st January 2007 does not bear out the factual basis for this allegation. It is true that the auction was *referenced* twice by Counsel in his replying submissions. Counsel for the Society sought orders retraining Mr Murphy from practising while not in possession of a practising certificate and submitted that this was no more than a request to the Solicitor to comply with the law.

197. Having referred to the letters allegedly written on headed notepaper, and the sequences of references on the letters, Counsel for the Society submitted:

> *.... but if these letters have been dictated sequentially, it would suggest there may have been other letters in between, but even leaving that aside, there is also the fact of the client account being operated and the auction*

and Fenniston (as heard) solicitor, he said-and there is a letter from the auctioneer saying that that was simply a mistake."

Later in the transcript (at page 19, line 15 *et seq*) , counsel for the Society addressed the court in the following terms:

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

198. While it is reasonable to infer from counsel's comments that the Society was of the view that Mr. Murphy was *involved* in the auction, I am not satisfied that it is reasonable to infer or imply that Mr. Murphy had *attended* the auction, which is the basis for the complaint. I am equally not satisfied a basis for a complaint that Solicitor X had instructed counsel to say that Mr Murphy had attended that auction, has been established. Therefore, I am not satisfied that this aspect of the complaint is supported by the evidence and I do not see any error on the part of the SDT in this regard. The appeal in respect of the complaint at paragraph (a) is therefore dismissed. Further, if this construction or conclusion is incorrect, this allegation also bears the hallmarks of an impermissible collateral challenge to final and concluded orders from which no appeal was taken. This court, in the accompanying judgment, has refused liberty to seek to re-enter for the purposes of having that order set aside. The appeal must be dismissed on this ground also.

199. The second complaint (b) is that Solicitor X failed to inform the court on 31st January 2007 that she was aware that he had not attended at the auction. Mr. Murphy relies on evidence of Mr. Elliott, elicited in cross examination on day 12 of the civil proceedings, in support of this complaint. The questioning of Mr. Elliott proceeded as follows:

"Q. In any event, the auction is going ahead on 11th August. There's a process server and there's some official of the Law Society whom you can't identify go down.

A. That's what I've been told.

Q. Okay. And it then becomes immediately obvious that this is a mistake, that in fact Mr. Colm Murphy had absolutely no hand, act or part in any aspect of this auction or the sale of the property and in fact the solicitor who actually had carriage was Mr. Conor Murphy, and he was, shall we say, somewhat aggrieved that, you know, an important sale, an auction shortly after he'd set up his own practice was essentially being written out of it by the newspapers. So as of 11th August the Law Society knew it had nothing to do with Mr. Murphy, isn't that right?

A. That's correct, yes.

Q. Yeah. And it's also the case as well that Mr. Murphy wasn't there. And therefore, there was no possibility of serving him, isn't that correct?

A. That's right. But that's --

Q. Because you can't --

A. -- something we found out on the day.

Q. On the day?

A. Yes.

Q. Okay. So you're attending with a process server to serve somebody who wasn't there, who knew nothing about it, who wasn't involved in the process. That really cannot constitute an attempt at service, can it?

A. Well, it was an attempted service. It was unsuccessful because he wasn't there.

Q. Is that how you characterise it?

A. Well, that's certainly how I reacted to it at the time. We attempted -- we believed he might be there. We went. He wasn't there. The attempt was unsuccessful."

200. The court reiterates the sentiments which it expressed in its ruling in the application to re-enter that when the affidavits of Mr. Clohessy grounding the s.18 application and Solicitor X's affidavit grounding the application for substituted service, are viewed together, a potential implication is that while Mr Colm Murphy had carriage of the sale, it just happened to be Mr Conor Murphy who turned up at the auction. On an objective analysis, particularly in view of the passage of time between the auction and the application for substituted service, the court observed that it was not unreasonable to suggest that the Society ought to have made further enquiries as to the respective roles, if any, of Mr. Conor Murphy and Mr. Colm Murphy and ought to have made a phone call. However, the allegations made here by Mr Murphy are somewhat different. He alleges that Solicitor X failed to inform the court that she was aware that Mr. Murphy had *not attended* at the auction. The allegation here centres on misconduct of omission rather than misconduct of commission.

201. I am satisfied that this allegation is also an attempt, or a variation or further iteration of an attempt, to reopen concluded matters. It is therefore impermissible by reason of it being a collateral challenge to concluded orders in the s.18 proceedings. Nevertheless, proceeding on the assumption that the court is incorrect in its application of the doctrine of collateral challenge, I am equally satisfied that when the material which was before the court on 31st January 2007 is considered, including the submissions of counsel on that day, that there is little evidence to support the contention that Solicitor X stated, or instructed counsel to say, that Mr Colm Murphy had *attended* the auction. Mr. Clohessy's affidavit was sworn in advance of the auction and therefore does not speak to who attended. No positive assertion was made by Solicitor X that Mr. Murphy attended. I am satisfied that the reasoning of the court in respect of complaint

(a) above applies to this allegation. While it is reasonable to infer that implicit in Solicitor X's affidavit and in the expressions used by Counsel on the day, that Mr. Murphy had an *involvement* in the auction, bearing in mind the principles outlined in *Walker* it is difficult to see how the allegation now made by Mr Murphy could be made out to the requisite standard, in light of the factual position as stated above. In summary it is difficult to see how the failure to correct any impression which had not been conveyed to the court in respect of attendance, as opposed to involvement, could amount to misconduct, or that proof of misconduct to the requisite standard could be achieved.

202. With regard to complaints at (c) and (d), I am not satisfied from an examination of the transcript that this there is evidence which might support these allegations. The SDT was entitled to rely on the transcripts which were exhibited before it by Mr Murphy in arriving at its conclusion. Once again, the misconduct alleged is that of omission rather than commission. The headed paper letters and the frequency with which they were used, were the subject of considerable debate. The concentration was on letters which were written on letter headed notepaper and to some extent, their sequencing. As was pointed out in *O'Reilly v. Lee*, this court must assess the decision of the SDT on the basis of the information which was before it at that time. That further clarification regarding the use, or non-use, of unelected notepaper may have emerged many years subsequently, does not alter the position in this regard. Therefore, for reasons similar to those expressed in respect of the complaint at (a), I am not satisfied that it has been established that the SDT erred in its conclusions. If I am incorrect in this assessment, I am equally satisfied that this complaint cannot be upheld on the basis that it constitutes an impermissible collateral challenge to concluded orders in the s. 18 proceedings.

203. With regard to complaints (e) and (f), I am equally satisfied that these complaints are also an attempt to reopen final and concluded orders in the

attachment and committal proceedings in an impermissible manner, if not also the s.18 proceedings.

204. In this context, Mr. Murphy submits that this court has compounded the injustice by deciding that matters were looked at by Johnson P. after the 8th April 2008. It is not entirely clear to what aspect of the court's judgment/judgements this refers. At paragraph 197 of principal judgment, the court repeated what was contained in the ex tempore judgment of Johnson P, which was delivered on 17th June 2008, when awarding costs to the Society. At paragraph 377 the court observed that when the attachment and committal proceedings were coming to a conclusion, with only the question of costs outstanding, they were prolonged by Mr. Murphy's own actions. It was stated that Mr Murphy changed his solicitor, and brought an application seeking to have the order for substituted service set-aside and to have the proceedings referred to plenary hearing. The court observed "*when the matter came before Johnson P. he commented that finality was required and awarded costs against Mr Murphy*".

205. In any event, the court has addressed this matter in some detail in the context of the application to seek to re-enter for the purpose of setting aside the s.18 proceedings at paragraph 95 *et seq*, under the heading *"Status and Legal Effect of ruling of Johnson P on this application*". When the affidavits which were before the SDT are examined, I do not believe that there is any prospect of misconduct being established on the part of Solicitor X. Matters were addressed in open court. That Mr Murphy disagrees with Solicitor X's contention as to what was before the court at any particular time of the proceedings, or that Solicitor X may have persuaded the court as to the outstanding issue could not, in my view, amount to misconduct. Disagreement, or different interpretations of what was before the court, without more, cannot, in my view, amount to misconduct. Taking into account the principles which this court must apply, and in light of the evidence which was before the SDT, I fail to see how the SDT

fell into error in this regard. I am satisfied that this aspect of Mr Murphy's appeal must also be dismissed.

206. With regard to the allegation at (g) and (h), Mr. Murphy makes two complaints in respect of the contents of Solicitor X's affidavit of 10th February 2010. First he contends that it was wrong for her to say that the primary purpose of the complaint was to get the file, as opposed to what he submits was an allegation that he received money for land and that the complainant never became the owner of it. Secondly, it is contended that Solicitor X committed perjury in this regard.

207. In light of the communications and correspondence exchanged by the parties in relation to the [REDACTED] matter, which have been canvassed extensively in the various judgments of this Court, it is difficult to see the basis upon which Solicitor X could maintain that the primary purpose of Kelly and Dullea writing to the Society on behalf of Mr [REDACTED] was to obtain his file. This allegation of misconduct is intimately connected with Solicitor X's response to the complaints which are the subject of appeal 2010/78 SA, an appeal which the court has allowed in part and on particular grounds. For the reasons expressed in appeal 2010/78 SA and applying principles in dicta in *Myers,* accepted by Geoghegan J., I am also satisfied that the appeal on these matters ought to be allowed. Issues which arise in relation to Solicitor X's affidavit are matters of credibility and reliability which, if a substantive appeal were to take place, would be the subject of testing and further examination. In the circumstances, I am also of the view that, rather than as a separate iteration of the issues thus arising, these allegations ought to be considered in the context of any substantive inquiry which might take place in respect of the complaint which is the subject of 2010/78SA. To hold otherwise would have the potential to encourage multiple applications and allegations of misconduct in respect of the disputed contents of exchanged affidavits in the same matter, when such issues might properly be addressed in one appeal. Further, the immunity

defence raised by the Society might also be fully ventilated on any substantive appeal.

208. The court is conscious, however, that Solicitor X may not be in a position to assist at such inquiry. The parties are invited to address the court on the consequences of the court's rulings this regard. It must also be stressed that the court's rulings are not that misconduct has been established, but that it is satisfied that a *prima facie* case has been made out.