AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court appeal numbers: S:AP:IE:2022:000041
and S:AP:IE:2022:000042

[2023] IESC 27

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

BETWEEN/

BRENDAN KIRWAN

APPLICANT/APPELLANT

– AND –

JOHN O'LEARY, BRIDGET O'LEARY, SEAMUS TURNER, PETER REDMOND, CORMAC MULLEN, CATHERINE O'CONNOR, SEAN NOLAN, GERALDINE O'LOUGHLIN AND WENDY SMITH, SOLICITORS

RESPONDENTS

– AND –

SOLICITORS DISCIPLINARY TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice Brian Murray delivered the 29th of November 2023

Background

1. The Solicitors Disciplinary Tribunal (*'SDT'*) was at all times relevant to this appeal invested by statute with the function of adjudicating on complaints of misconduct against members of the solicitors' profession. Section 7(12A) of the Solicitors (Amendment) Act 1960 (*'the 1960 Act'*) as amended, provides that where the SDT is presented with a complaint and determines that there is no *prima facie* case of misconduct disclosed against the solicitor in question, the complainant may appeal that finding to the High Court. Section 7(12B) provides that such an appeal *'shall be made'* within 21 days of the receipt of notification in writing of the finding.

2. The essential questions that fall to be resolved in this appeal are (a) how and when an appeal is *'made'* for the purpose of this provision and (b) if the appeal in issue here was not made within the specified period of 21 days, whether the Court has the power to extend the time for the bringing of such an appeal. Those questions arise from a very particular statutory scheme which has now been replaced by the new disciplinary process for members of the legal profession provided for by the Legal Services Regulation Act 2015 (*'LSRA'*).[1] Nonetheless, there are a significant number of provisions on the statute book in which time periods are fixed for the bringing of various kinds of statutory

[1] As of 7 October 2019, the SDT has stopped receiving complaints, with such complaints now being filed with either the Law Society or the Legal Services Regulatory Authority. Section 74 of the Legal Services Regulation Act 2015 (*'the LSRA'*) which established the Legal Practitioners Disciplinary Tribunal ('*LPDT*') was commenced on 11 October 2019 (S.I. No.502/2019) and was formally 'launched' on 5 April 2022. The LPDT now discharges the functions previously vested in the SDT and the Barristers Professional Conduct Tribunal. Under s. 77 of the LSRA, applications can be brought to the LPDT by the Complaints Committee of the Legal Services Regulatory Authority or by the Law Society.

appeals, and there is now a substantial body of case law from the High Court and Court of Appeal addressing the issue of whether, and if so when, those periods can be extended.[2] So, while the issues to which I have referred arise in the context of a very specific section, they are of some general importance.

3. The sequence of events begins in 2005. In the course of that year, the applicant and a Mr. Eamonn Buttle were engaged in discussions with a view to the sale by the applicant to Mr. Buttle of property owned by him in Wexford town. At a certain point in their discussions (according to the applicant, at a point after an agreement had been reached as to the essential terms of the proposed transaction) they consulted the firm of MJ O'Connor Solicitors, of whom both were long standing clients. Matters ended up with Mr. Buttle's interests being

[2] *Keon v. Gibbs* [2015] IEHC 812 (s. 123 of the Residential Tenancies Act 2004) (High Court extended the time for the bringing of an appeal against a decision of the Residential Tenancies Tribunal, but without a consideration of whether there was any jurisdiction so to do) (the Court of Appeal, [2017] IECA 195, dismissed the appeal, but questioned – without so deciding – whether there was jurisdiction to extend time); *Law Society of Ireland v. Tobin and Callanan* [2016] IECA 26 (s. 12 of the 1960 Act) (finding that the time period for appealing from the High Court to the Court of Appeal could be extended under this section); *Curran v. Solicitors Disciplinary Tribunal* [2017] IEHC 2 (s. 7(12B) of the 1960 Act) (finding that the period for the bringing of an appeal was mandatory and could not be extended); *Re Hickey, a Debtor* [2017] IEHC 20 (s. 115A(9) of the Personal Insolvency acts 2012-2105) (finding that the time period for bringing an application could not be extended under this section); *Re Varma, a Debtor* [2017] IEHC 218, [2017] 3 IR 659 (s. 115A(3) of the Personal Insolvency Act 2012) (finding that the statutory period for the lodging of a notice of objection to the coming into effect of a personal insolvency arrangement could be extended under this section); *Noone v. Residential Tenancies Board* [2017] IEHC 556, [2019] 1 IR 2015 (s. 123 Residential Tenancies Act 2004) (finding that the time period for appeal could not be extended); *Dada v. Residential Tenancies Board* [2018] IEHC 378 (period in s. 123 of the Residential Tenancies Act 2004 cannot be extended); *Coleman v. Law Society of Ireland* [2020] IEHC 162 (s. 7(13) of the 1960 Act) (it was found that time could be extended pursuant to RSC); *Murphy v. Law Society of Ireland* [2021] IEHC 148 and [2021] IECA 332 (s. 7(11) of the 1960 Act) (and currently under appeal to this Court) (High Court and Court of Appeal treated and refused an application for an extension of time for the bringing of an appeal under this section, the Law Society accepting that the Court had jurisdiction to extend time); *Abeyneh v. Residential Tenancies Board* [2023] IEHC 81 (s. 123 of the Residential Tenancies Act 2004) (period fixed by this section cannot be extended); *Aherne v. National Council for Special Education* [2023] IEHC 143 (s. 46 of the Workplace Relations Act 2015) (assumed without deciding that the period fixed by this section can be extended); *Enners v. Residential Tenancies Board* [2023] IEHC 216 (s. 123 of the Residential Tenancies Act 2004) (period fixed by this section cannot be extended); *Property Services Regulatory Authority v. Dooley* [2023] IEHC 419 (s. 70 of the Property Services Regulation Act 2011) (period fixed by this section cannot be extended); *Camarasa v. The Labour Court* [2023] IEHC 471 (s. 46 Workplace Relations Act 2015) (finding that the period prescribed by this section cannot be extended).

represented in connection with the transaction by the first respondent, a senior partner of the firm. The applicant's interests were handled by a legal executive employed by MJ O'Connor. The legal executive was not a qualified solicitor. The respondents say that she was a person who had many years of experience in dealing with conveyancing transactions, that she had been engaged in other commercial property transactions for the applicant in the past and that he knew that she was not a solicitor. The applicant disputes this and says that the respondents arranged matters in such a way that he would be represented and advised by a person who was – unbeknownst to him – not a solicitor and who was under the control of the first respondent. This, he says, resulted in his being given legal advice by a person who had no entitlement so to do and his being, in consequence, significantly disadvantaged by the transaction.

4. As a result, he says, the legal documentation produced around the transaction (all relevant components of which purport to bear his signature) did not reflect the agreement he had actually reached with Mr. Buttle. He says that that agreement was to involve the acquisition by Mr. Buttle of the properties in question for a sum of €4M, with €1M to be paid from the outset. The written documentation, on the other hand, evidences an advance to the applicant of €1M, secured by a mortgage over some of the properties, and a contract of sale that was conditional upon the obtaining of certain planning permission. While the applicant does not in any affidavit before this Court deny that what purports to be his signature on some or all of these documents is in fact his signature, he does deny that he signed some of the documents on the dates on which they were purportedly signed, and he consistently asserts that he was at all relevant

times acting under the influence of the legal executive and/or the first named respondent. In the course of oral submissions on this appeal, the Court was advised that the applicant signed various papers that were put before him, the suggestion being that he was not aware of what, precisely, he was signing.

5. Ultimately, the property market entered a rapid decline in the course of 2008 and the transaction did not proceed. A number of legal actions followed. Mr. Buttle claimed to be entitled to recover from the applicant the sum of €1M which, Mr. Buttle said had been advanced to the applicant by way of loan. Thereafter, that alleged debt was purportedly assigned to a company called Filbeck Limited (*'Filbeck'*), which proceeded to seek judgment against the applicant in that sum. On 15 November 2012, Filbeck obtained judgment in default of appearance in the amount of €1,056,936 against the applicant, the applicant subsequently moving to set this judgment aside. The applicant thereafter sought judgment against Mr. Buttle in separate proceedings in the sum of €3M arising from the terms (as he alleged them to be) of the failed contract. Mr. Buttle brought an application to have these proceedings struck out in February 2013, that application being successfully resisted by the applicant on the basis that the determination thereof should await the outcome of another set of proceedings instituted by the applicant in May 2013 against Mr. Buttle, members of his family and Filbeck, together with the firm of MJ O'Connor Solicitors. His claim against MJ O'Connor Solicitors in that third action sought damages for negligence and breach of contract and contained a wide range of allegations against that firm arising from its representation of the applicant in connection with the transaction.

6. Those latter proceedings were the subject of successful applications to the High Court by the defendants thereto to strike out for want of prosecution, the decision of that Court being upheld by the Court of Appeal. This has resulted in a separate appeal to this Court. The first and second named respondents swore affidavits in connection with these applications. The course of these proceedings is charted, and the facts elaborated upon further in the decisions of the High Court and Court of Appeal recorded at [2019] IEHC 954, and [2022] IECA 242, and in the Determination of this Court granting leave to appeal in that matter, [2023] IESCDET 34.

The complaints

7. On 16 and 19 September 2019 Mr. Kirwan delivered two applications to the SDT pursuant to s. 7 of the 1960 Act, as substituted by s. 17 of the Solicitors (Amendment) Act 1994 (*'the 1994 Act'*) and as amended by s. 9(g) of the Solicitors (Amendment) Act 2002 (*'the 2002 Act'*). The second in time sought an inquiry into alleged misconduct of all of the respondents, who were identified as the partners at the relevant time of the firm of MJ O'Connor Solicitors (*'the firm'*). The first was against the first and second named respondents alone.

8. Each application made wide ranging allegations against the respondents of various forms of illegality. Complaints were made of the fact that the respondents sought to recover fees from the applicant for work that, the applicant said, was done by a person lacking the necessary qualification. He

says that he was deceived into thinking that the legal executive was a solicitor, that he thus instructed her to *'implement the €4 million sale'* and that she personally undertook to do so. He says that due to his chronic dyslexia, he was 100% reliant on the legal executive and that he trusted her. However, he alleges that the legal executive was, in fact, working for the first respondent. He says that the first respondent facilitated her in acting as she did so that he could be in total control of both parties to the transaction.

9. Mr. Buttle, the applicant contends, wanted the deal structured in a manner that was prejudicial to the applicant. He says that *'it is alleged that Brendan Kirwan granted a Mortgage in favour of Eamonn Buttle, which is disputed'* and complains that the legal documentation used to record this alleged mortgage has never been put forward by Mr. Buttle or the firm. He says that no letter of instruction to the legal executive exists, and disputes that she had any authority to act in a manner that would bind him. Later in his application he asserts that the legal executive was acting as Mr. Buttle's agent. He says that the first respondent was *'in control'* of the legal executive and thus of both sides of the transaction. He lays considerable stress on the fact that various documents subsequently relied upon by Mr. Buttle were dated 5 July 2006 when, the applicant says, he was in France.

10. In the course of his affidavit, the applicant says that the fact that what he describes as *'the alleged agreements'* were witnessed by the first respondent and the legal executive confirms that the applicant had no solicitor present on 5 July 2006 and that the legal executive was acting '*as legal executive of Mr. John*

O'Leary, and not as solicitor for Brendan Kirwan'. He describes the agreements as *'one sided agreements where they purport to be executed on a date when Brendan Kirwan was not in the country, and Mr. Buttle, and his Solicitor Mr. John O'Leary and his legal executive were all present yet none of them witnessed the signature of Brendan Kirwan on said agreements …'*.

11. He alleges that these events disclose *inter alia* a conflict of interest, a breach of various provisions of the Solicitors Acts (and in particular ss. 55 and 56 of the Solicitors Act 1954), a failure to protect his interests, a failure to make disclosure to him and a failure to ensure that he received proper and adequate legal advice and representation.

12. The application pertaining to the first and second respondents listed eighteen complaints, said to arise from their actions in what is described as the aiding and abetting of what are characterised as false claims made by Mr. Buttle, members of Mr. Buttle's family and Filbeck. While the overall context is the same as that giving rise to the complaint against the firm as a whole of 19 September, complaints are also made relating to the various sets of legal proceedings to which I have earlier made reference (record numbers 2011 4998S, 2012 2995S and 2013 5514P respectively). The applicant says that in the course of the second and third of those proceedings it was falsely claimed by the first and second named respondents that documents were agreed, signed and witnessed on 5 July 2006 when, it is contended, the applicant was in France, and it is claimed that inconsistent accounts were given of relevant matters by the respondents in those proceedings, on the one hand, and before the SDT, on

the other. The applicant says that the alleged mortgage of that date was lodged to the Registry of Deeds, and that procuring the registration of false instruments is fraud and misconduct as well as a breach of s. 41 of the Registration of Title Act 1964. He alleges that what he claims to be forged documents were used in these High Court proceedings in an attempt to avoid what he says is the €4 million payment to him, the alleged forgeries then being relied upon to seize all his properties.

13. All of this is said, in various ways, to represent breaches of the Solicitors Acts, perjury, and breach of various provisions of the Criminal Justice (Theft and Fraud Offences) Act 2001, the Criminal Justice Act 2011, the Non-Fatal Offences Against the Person Act 1997 and the Registration of Title Act 1964. Also included in his complaints are claims that by refusing to answer a notice for particulars and (as alleged) withholding true facts from the Court in case 2013 5514P, these respondents engaged in perjury, subornation and that they breached the Commissioners for Oaths Act 1889. The applicant demands the return of the fees paid by him, on the basis that they were paid for the services of a person who was not in fact a qualified solicitor.

14. Those claims were disputed in affidavits delivered by and on behalf of the various respondents. The principal affidavits were sworn by the first respondent, in which he deposed on behalf of himself, the second respondent and the firm of MJ O'Connor. He said that the applicant was an experienced businessman of long standing who had engaged in property investment and development ventures. He alleged that the applicant had over the years

consented to act as director of several companies and said that the firm of MJ O'Connor had had many dealings with the applicant over a period of eleven years prior to the events of 2006. The first respondent averred that he had never understood the applicant to consider himself a vulnerable person: he described the applicant as *'competent and well capable of managing his affairs and of understanding, and discussing knowledgably, the concepts and dealings concerned'*. He said that from 2003 onwards the applicant's primary point of contact at the firm was the legal executive, who had also acted in connection with other property transactions to which the applicant had been party. She was, the first respondent says, a senior legal executive with a specialisation in conveyancing and was held out as such. Mr. O'Leary says that the first contact the firm had in relation to the transaction giving rise to the complaint was when he was contacted by Mr. Buttle at the end of 2005, at which point he says that Mr. Buttle advised him of an intended transaction between him and the applicant. The first respondent says that he was advised by Mr. Buttle that the legal executive would be acting for the applicant in connection with that transaction. The deal as explained to him involved, the first respondent says, the sale by the applicant of property in Wexford town in return for a cash consideration of €1M together with developed property comprising a commercial unit and several apartments. The first respondent says that Mr. Buttle instructed him that the deal was to be subject to planning permission.

15. The first respondent refers to a meeting between the legal executive, the applicant, his son and his accountant, in which the respondents contend *inter alia* it was said that the applicant was adamant that he would not sell if planning

permission for the proposed development was not forthcoming, that he was insistent on getting the €1M cash in advance, that the applicant would have to repay this sum in the event that planning permission was not obtained and that this repayment obligation would be secured by a mortgage over certain lands to be given by the applicant to Mr. Buttle. The first respondent says that the documents were signed by the applicant in April 2006, were returned to him by the legal executive on the 20th of that month and were held *'in suspense'* to allow for the resolution of an issue affecting the applicant's ability to grant the required first ranking mortgage to Mr. Buttle in circumstances in which National Irish Bank was a prior encumbrancer over the property in question. He said that that issue was resolved in early July 2006, and the agreements were dated 5 July 2006 and *'came into effect'*.

16. The first respondent's evidence is that the applicant is the author of his own misfortune, having been unable or unwilling to repay the €1M advance that he obtained from Mr. Buttle. He says that when the deal with Mr. Buttle fell through the applicant could have repaid Mr. Buttle, retaining his own property (which, the first respondent says, the applicant retains to this day – unless he otherwise voluntarily disposed of it). The first respondent exhibited letters dated 20 April 2009 and 21 July 2009 in which the applicant acknowledged rescission of the sale contract and his indebtedness to Mr. Buttle and offered property in discharge of his debt. Separate affidavits were delivered in the second complaint by Messrs. Nolan, Mullen, Smith, Redmond, O'Loughlin and Ms. O'Connor. Effectively, these persons said that they had no familiarity or

knowledge of the facts and circumstances referred to in the applicant's complaint.

17. The applicant responded to these affidavits repeating many of his previous averments and assertions, claiming that in a variety of different respects the High Court judge in deciding the application to dismiss the third proceedings, had erred and failed to address submissions and claims made by him. He claims that the respondents failed to correct errors thus made by the judge. He referred to the fact that he had been sued by MJ O'Connor for fees, and that all partners must have known of this, and of the fact that the legal executive was not a solicitor. He says that while Mr. Buttle in the course of the High Court proceedings had denied that there was any agreement to sell the properties to him for €4M, Mr. O'Leary's affidavits show that there was such an agreement. It is then alleged that the respondents withheld this information from the High Court. Similarly, he says that while Mr. Buttle claimed in affidavits sworn by him before the High Court that the contract was entered into in July 2006, Mr. O'Leary claimed before the SDT that the agreement was made in April. He emphasises the fact that there are two versions of a side letter purportedly signed by him and dated 23 March 2006 and claims that these disclose materially different considerations for the transaction (one, he says, shows a consideration of €4M and the other a consideration of €2M). He says that the first respondent was acting as his solicitor in connection with another matter as late as November 2009, and disputes claims by the first respondent that the second respondent was involved only in incidental dealings with the applicant some years after the firm's substantive role had come to an end. He questions the credibility of the

claim that he would have entrusted as important a transaction as the agreement with Mr. Buttle to a person who was not a solicitor, claiming that there were other clients of the firm who were led to believe that the legal executive was a solicitor. Assertions by the first respondent that the legal executive was described on the firm's website throughout the relevant period as such, are disputed. The applicant says that one of the developments which the first respondent said was handled by the legal executive in fact involved other members of his family. He repeatedly draws attention to the fact that the papers appended by the respondent to their affidavits do not disclose any attendance recording the applicant as signing any documents in April 2006. He points to a number of issues arising from the National Irish Bank indenture and memorandum of partial release which, he says, were not executed until February 2008, and that this is long after it was (as he describes it) falsely claimed that the applicant had signed them on 23 June 2006 (when, he also says, he was in France). He claims that the letters of 20 April 2009 and 21 July 2009 are *'completely false and entirely disputed'*. He also disputes claims by the first respondent that once it became apparent that there was a controversy between the applicant and Mr. Buttle, he told Mr. Buttle that he could no longer act for him, pointing to a letter sent to the applicant's then solicitors on 7 July 2010 in which it was said that the firm had instructions to institute proceedings against the applicant. This letter also stated that the firm would not act for Mr. Buttle and Filbeck if the applicant objected to its so doing.

18. In decisions issued on 8 October 2020, the SDT determined that neither of the complaints disclosed a *prima facie* case of misconduct. Those decisions were

based on the papers alone and were not proceeded by an oral hearing. The SDT found that the allegation that the legal executive acted as a solicitor or held herself out as such had been sufficiently rebutted – she was, it said, an experienced legal executive providing legal services under the supervision and in the employment of a solicitor (the solicitor under whose supervision she was providing those services is not identified by the SDT). It said that there was no evidence that the legal executive was held out as a solicitor, emphasising that the applicant had dealt with her for *'some years'*. It found that the applicant was aware that the first respondent was the legal executive's *'boss'*. Allegations of deception or concealment, lack of independence, and of forgery and perjury had, it said, been sufficiently rebutted. It said that *'while it might have been imprudent for the firm to act for both sides in a transaction, that itself is not evidence of a lack of independent advice or misconduct'*. Allegations that the High Court had been deceived by the respondents was a matter for that Court and that allegation had been sufficiently rebutted. The SDT noted that Meenan J. in the course of the High Court proceedings had expressed the view that those proceedings were based on a failed commercial venture for which the applicant sought to attribute blame to the respondent solicitors, and concluded that the complaints in this case, issued many years after the events, had the same basis.

The appeals

19. On the day that the Tribunal's decisions were delivered, notification of the determinations was sent to the applicant by registered post. The applicant received those notifications on Friday 9 October 2020. Thereafter, he engaged

with the Central Office of the High Court, requesting an appeal form from the relevant registrar on 12 October, that registrar then responding on the same day with a sample motion and affidavit.

20. At 8 am on Thursday 29 October 2020, the applicant's son, Mr. Barry Kirwan, swore two affidavits grounding separate notices of motion. At the time of the applications in issue here, these were the documents required for an appeal under s. 7 of the 1960 Act by O. 53 r. 12(a)(i) RSC.[3] This required that the affidavit aver *'to the relevant facts or alleged facts and exhibiting true copies of all documents produced before the Disciplinary Tribunal by or on behalf of the appellant'*.[4]

21. The notices of motion issued by the applicant were headed *'In the Matter of the Solicitors Acts 1954-2011'* and *In the Matter of'* the respondents, continuing:

> *'ON THE APPLICATION OF BRENDAN KIRWAN (disabled, appealing through his Son, Next Friend Barry Kirwan)'*.

22. The body of the motions sought orders rescinding the findings of the SDT and varying these so as to hold the respondents guilty of professional misconduct and sanctioning them accordingly. Seventeen declaratory orders were then

[3] This iteration of O. 53 ceased to have effect on 4 May 2021, from which point the procedure is addressed (depending on the date on which the application is brought) by O. 53B, O. 53C or O.53D as inserted by the Rules of the Superior Courts (Regulation of Legal Services) 2021 (S.I. No. 196/2021). O. 53B applies to such proceedings if commenced prior to the date of entry into operation of Part 6 of the Legal Services Regulation Act 2015 (being 7 October 2019). In this judgment I will refer to O. 53 where relevant as the instrument in force on the date the proceedings were commenced.

[4] Exact language is found in O. 53B r. 9(a)(i).

sought, many of which purported to identify specific errors in the course of the determinations. These included declarations to the effect that the SDT had erred in failing to engage with the true facts in any meaningful way, and that it had overlooked what was described as documented and verified evidence. The affidavits similarly alleged serious errors by the SDT in failing to address the *'facts, proofs and evidence'* adduced before it. The applicant arranged for the affidavits and Notices of Motion to be stamped – his son said in the course of his oral submissions that he believed he did this at Wexford Courthouse.

23. In normal circumstances it would have been necessary for the applicant or his agents to attend at the Central Office of the High Court to issue this motion, whereupon he would have obtained a return date for his application. Had the Central Office any difficulty with the format of the motion, it could have then been corrected and/or an application made to the Court to sanction its issue. However, October 2020 was not a normal time. The State was in the midst of the COVID-19 pandemic, with consequent widespread disruption to all services. In order to enable the business of the Central Office of the High Court to be transacted to the greatest extent possible, the then President of the High Court had issued Practice Direction HC 90. This Practice Direction, which has since been withdrawn, was headed *'Lodgment of a court document by non-personal delivery at the Central Office of the High Court'*. The Practice Direction did not exclude the possibility of litigants attending in person at the Central Office to procure the issuing of papers, but some persons were, obviously, reluctant to do this (and it was said on behalf of the applicant in the course of oral submissions that, by reason of his age, he did not wish to visit the

Central Office during the pandemic). The text of the Practice Direction was as follows:

> *'Order 117a Rules of the Superior Courts*
>
> *Lodgment of a court document by non-personal delivery at the Central Office of the High Court*
>
> *Pursuant to Order 117a2(1) RSC I approve of the condition stipulated by the Officer for the time being managing the Central Office of the High Court that due to restrictions in place for Covid-19 lodgment of a court document by non-personal delivery at the Central Office may be effected only by delivery of that document at the office or to the officer specified in the provision of Order 117a concerned –*
>
> *(i) by pre-paid registered post,*
> *(ii) by pre-paid ordinary post, or*
> *(iii) through a document exchange service accepted by the officer for the time being managing the Central Office'.*

24. The following was stated on the Courts Service website:

> *'The High Court Central Office is open for urgent business by appointment only – by e-mailing dublincivillaw@courts.ie.*
>
> *Documentation for non-urgent business can be filed in accordance with Practice Direction HC90.'*

25. At 11.35 am on Thursday 29 October 2020 either the applicant or his son e-mailed the two notices of motion and affidavits to High Court Registrar Ms. Brennan (who at the time was registrar to the Solicitors List). The text of the e-mail was as follows:

> *'Dear Angela*
>
> *We have been asked to send you attached:*
>
> *Please see attached stamped 2 motions and 2 affidavits for filing 2 appeals of the Solicitors Disciplinary Tribunal on behalf of Brendan Kirwan.*
>
> *Originals and a copy of each for you to insert dates on and return to address below are being sent registered post to you also.*
>
> *Please direct all correspondence to:*
>
> *Brendan Kirwan'*

26. The applicant's address was then specified. At 12.42 pm, the registrar confirmed receipt of the motion and affidavit. On the same day, the applicant also sent a letter by registered post addressed to Ms. Brennan. The letter (which was accepted by An Post at 2.30 pm on 29 October) was as follows:

'Dear Angela and High Court Central office, Please see enclosed original stamped 2 motions and 2 affidavits for filing 2 appeals of the solicitors Disciplinary DT56 and DT62.

Also a copy of each for you to insert date for motions on and return envelope to address above are enclosed.

Kind regards

Brendan Kirwan'

27. A tracking report from An Post shows that this letter was delivered on Friday 30 October 2020 at 9.12 am.

28. According to a document filed by the applicant before the High Court on 21 March 2021, queries were raised of him by the Central Office on 4, 13 and 18 November regarding what have been termed *'next friend forms'* (the perceived necessity for which arose from the fact that the applicant's son was purporting to act for him in the matter) and querying whether the respondents were a firm. The applicant says in this document that on 23 November and 3 December 2020 he, again, demanded that the papers be filed. On December 18, the applicant signed an *ex parte* docket seeking (a) *'leave of the court as requested by the Central Office for my son Barry Kirwan to be my next friend in this matter due to my severe dyslexia'* and (b) leave of the court to file the motions and affidavits of the 29 October.

29. The President said in her judgment that it was clear to her on perusing the proposed notices of motion why the Central Office had likely refused to accept and issue them: the relief claimed in the notices of motion was extensive and, she said, went well beyond that which could procedurally be advanced by originating notice of motion. She noted that that relief included several declaratory orders and reliefs more commonly seen in judicial review proceedings which could only be advanced with the Court's approval following an application for liberty to apply for the relief claimed. She said in her judgment that the applicant appeared in Court on 21 December unannounced, the motion being issued thereafter. She explained (at para. 37):

> *'However, having probed with the appellant's son, the reason why his father was intent on commencing legal proceedings against the respondents, it seemed to me that his principal cause for complaint related to the report of the Solicitors Disciplinary Tribunal which had concluded that he had not made out a prima facie case of misconduct against any of the respondents. Thus, regardless of the multiplicity and irregularity of the claims included in the proposed notices of motion, and because an appeal against a decision of that Tribunal is brought by originating notice of motion, I made an order giving the appellant leave to issue his Motions in the format in which they were presented, regardless of the inclusion of all of the irregular ancillary claims. In so doing, I made clear that my order was made without prejudice to any arguments that the respondents might later raise as to his entitlement to advance the claims contained in the notices of motion or as to the time*

within which he had commenced such claims. Thus it was that the notices of motion were issued on the 21st December, 2021.'

30. Having regard to some of the submissions made by the applicant around these issues, I should say that it is not necessary (nor on the evidence before the Court, possible) to resolve the questions of (a) why the Central Office did not in fact issue the Notices of Motion when they were obtained by it, (b) whether the applicant arrived *'unannounced'* before the High Court on 21 December or whether the matter was formally listed before the Court, and (c) if formally listed, how this occurred without the motions being issued. It is not necessary to determine these issues because the only matters to be resolved here are whether the appeal was *'made'* on 29 October, and if not whether there is a power to extend the time: none of these questions are relevant to those issues (although they may well be of importance in the event that the High Court has to adjudicate on an application to extend the time for appeal).

31. On 31 December, the applicant wrote to the respondents enclosing the appeal papers in each proceeding. The matter thereafter appeared in the Court list from time to time, the President giving directions that papers be filed. A hearing date was fixed. Then, by motion issued on 21 June 2021, the respondents in each of the appeals (which I have conjoined in the title of this judgment) sought orders striking out the proceedings on the ground that they were time barred by the provisions of s. 7(12B) of the Solicitors (Amendment) Act 1960. By Order of 21 June 2021, the President directed that this question be determined by way of preliminary issue with the substantive appeal to be deferred to a future date

pending the outcome of the hearing of that issue. The issue was tried on 11 October and 15 November 2021, following which hearing further written legal submissions were exchanged by the parties (those additional submissions being addressed to the decisions in *Murphy v. Law Society* [2021] IEHC 148 and *Coleman v. Law Society* [2020] IEHC 162). In her judgment delivered on 9 March 2022 Irvine P. determined that the proceedings were out of time ([2022] IEHC 152).

32. While the judgment of Irvine P. contains a detailed and careful analysis of the applicable statutory provisions and relevant authorities, the essential basis for her conclusion was succinctly expressed (at para. 52) as follows:

> *'I am satisfied from my consideration of the various statutory provisions the subject matter of the decisions already referred to herein that the Oireachtas, in deciding to provide a complainant with a right of appeal to the High Court against a finding by the Solicitors Disciplinary Tribunal that no prima facie case had been made out, intended that any challenge to that determination would have to be made within the strict 21 day time limit provided. The wording of s. 7(12B) of the Act could not be clearer. There are no words which permit of any equivocation. The word "shall" used in connection with the right of appeal provided for in the section could not be more definitive. Had it been the intention of the Oireachtas to permit the Court to extend that time limit in any circumstances, it could have so provided by adding words to the section such as "or such further period as the High Court considers just and*

equitable in the circumstances" after the reference to the period of 21 days.'

33. Later (at para. 97) she expressed the conclusion thus:

'… the wording of the statute is clear. The use of the word "shall" in the section is mandatory and makes clear that any person aggrieved by a finding that they had not established a prima facie case must initiate their appeal within 21 days of receipt of the decision of the Solicitors Disciplinary Tribunal. Importantly, there is no provision which confers on the Court a right to extend this time limit as might have been included had that been the intention of the Oireachtas. And we know in this case the notices of motion were not issued until 21st December, 2020.'

34. On 19 December 2022, this Court ([2022] IESCDET 140) granted the applicant leave to appeal the High Court's decision. In the course of that Determination, the panel explained that the applicant had raised a number of arguments by reference to the Constitution and the interests of justice. The Court said that it did not appear that any of these matters themselves would satisfy the constitutional test for appeal, but the issue of the true interpretation of s. 7(12A) and (12B) of the 1960 Act and the related question of whether a Court enjoys the power to extend a time limit provided for by statute raised an issue of importance that it has not recently considered.

35. The applicant thereafter brought a motion to review this Determination, contending that the appeal should not be limited to the issue of whether there is jurisdiction to extend time for bringing an appeal to the High Court from a decision of the Tribunal. The applicant wished to also argue that his appeal was not out of time in the first place. On foot of this application, the Court decided that the applicant should be permitted to raise the following issue as well:

> *'Whether the delivery by registered post of documents constituted the making of an appeal under s. 7(12A) of the 1960 Act as amended, whether pursuant to the provisions of the High Court Practice Direction HC90 or otherwise.'*

The issues

36. The issues in these appeals are accordingly: (1) whether the delivery by registered post (or by e-mail) of the relevant documents constituted the making of an appeal under s. 7(12A) of the 1960 Act as amended, whether pursuant to the provisions of High Court Practice Direction HC 90 or otherwise; (2) whether s. 7(12A) and (12B) of the 1960 Act as substituted by s. 17 of the 1994 Act and in turn amended by s. 9(g) of the 2002 Act, permit the bringing of an appeal from a decision of the SDT that no *prima facie* case has been established outside the statutory 21 day period; and (3) if so, whether the High Court has any power to extend time for the bringing of such an appeal. A question has also been raised by the respondents as to whether, if it is possible for the delivery by registered post of those documents to constitute the making of an appeal, this

was in this case done within the time fixed by the relevant provisions. This question (which, although it is not addressed in the High Court judgment was argued before that Court) clearly falls within the scope of issue (1).

37. It should be said that these are the only issues before the Court. While the applicant has been adamant in his contention that this Court (which he repeatedly asserts is a Court of first instance) should in some sense determine the allegations of fraud, perjury, forgery and alleged criminality of which he constantly complains, this is misconceived. Those allegations subtend the complaints he made to the SDT, but this Court is concerned only with whether his appeal against the decisions of the SDT can proceed. If it determines that the appeals cannot proceed, that is the end of the matter. If it decides that the appeals can as a matter of law proceed either because they were made on time or because the Court has the jurisdiction to extend time for an appeal, it is for the High Court to decide, if the latter is the basis for the decision, whether to extend time and, if it does so, to resolve the underlying issues as it determines them to be.

38. Complaints made by the applicant as to the manner in which the appeals proceeded before the High Court are similarly misplaced. While he feels especially aggrieved that the President, having put in place a strict timetable for the disposition of the appeals, allowed the respondents to bring an application to have the appeals dismissed as being statute barred outside those time limits, this Court does not generally interfere with case management decisions made by trial Courts, and this was a matter of management. The question of whether

the appeal was properly before the Court was an issue that was going to have to be decided one way or the other, and the President was fully entitled to come to the view that it was more efficient to have that issue determined first than to hold the parties to time limits she had previously laid down. For much the same reason, the decision of the President not to allow the applicant to issue a motion seeking some form of inquiry under Article 40 of the Constitution (in respect of which the applicant also makes complaint) was a matter for her: no injustice arose from that decision because, as she explains in her judgment, it was the applicant's position that this motion was issued to enable him to raise arguments of constitutional law which, she said, he could do without issuing the motion.

When is an appeal under s. 7(12A) of the 1960 Act 'made'?

39. As I have earlier noted, s. 7(12B) of the 1960 Act requires that an appeal against a decision that there is no *prima facie* case for an inquiry into the conduct of a solicitor be *'made'* within 21 days of the receipt by the appellant of notification in writing of the finding. Order 53(12)(a) RSC, as it stood at the relevant time, provided that the appeal *'shall be by notice of motion returnable to the President on a date to be assigned by the proper officer in the Central Office'*. Irvine P. found that the appeal was *'made'* when the notice of motion issued, and the respondents did not contend that any further steps were required to stop time running. Subject to the intervention of the former O. 53 r. 12(f) and to a possible argument that in certain circumstances mere delivery to a Court office of papers may suffice to stop the running of a limitation clock (to which points I later return), this was, generally speaking, correct: while there have been cases in

which it has been held that particular types of proceedings that were required to be commenced by notice of motion were not initiated until the motion had been both filed *and served*, these involved specific statutes that, on their proper construction, were found to so require (see *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 IR 128 (*'KSK'*); *Director of Public Prosecutions v. England* [2011] IESC 16; *Director of Public Prosecutions v. Humphreys and ors* [2014] IEHC 539 and *Reilly v. Director of Public Prosecutions* [2016] IESC 59, [2016] 3 IR 229)

40. That this is not always, or indeed generally, the case is clear from the comments of Geoghegan J. in *McK v. AF and anor.* [2005] IESC 6, [2005] 2 IR 163, where he observed (at para. 18):

> *'Given the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any such cognate words should be interpreted as meaning the date of issuing* ***if the proceedings require a summons or filing or possibly in some cases filing and serving if what is involved is a motion*** *but unless there are express words in the statute that require it, it should not be interpreted as meaning the actual moving of the application in open court.'*
>
> (Emphasis added)

41. While this was, on the facts, an *obiter* statement (the appeal in *McK v. AF and anor.* concerned an application under s. 2(5) of the Proceeds of Crime Act 1996 in which the motion was filed and served within the relevant period) the language used suggests that where an application is to be made by notice of motion and the issue arises as to when that application was made, this will normally be the point at which the motion is filed and issued (which for the purposes of this judgment I am treating as occurring at the same time) a requirement that it also be served being the exception. At least in the context of extremely short statutory time limits of the kind in issue here where the statute does not stipulate otherwise, there is an evident logic to this (and see in this regard the extensive and very careful consideration of this question by McDonald J. in *Re Thomas Finnegan (A debtor)* [2019] IEHC 66).

42. I have already noted that the respondent did not contend that service had to be made before the appeal could be filed. However, short reference was made at the hearing of the appeal to the former O. 53 r. 12(f). Referring to an appeal against a finding of the Disciplinary Committee under s. 7, it provided[5] as follows:

> *'The appeal shall be entered by or on behalf of the appellant by filing a copy of the notice of motion (with the date or respective dates of service thereof endorsed), together with any affidavit or affidavits intended to be used in support thereof, in the Central Office, at the latest within three*

[5] These provisions are now, with minor adjustment, replicated in O. 53B r. 9(f).

days after the date of service thereof on the Registrar of Solicitors or on the respondent solicitor or (if applicable) on any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal, as the case may be, provided that, where service is required to be effected on more than one such person, the appeal shall be so entered within three days after the latest date of such service.'

43. If I have understood the sequence of O. 53 as it stood at the times relevant here correctly, it appeared to envisage the notice of motion being assigned a date by the relevant officer of the High Court, being thus *'issued'* for that purpose and the appeal thereupon being *'brought'*. Rule 12(a) was as follows:

'Every appeal to the Court ... under section 7(12A)(a) or (b) ... of the Act of 1960, shall be brought within the period of 21 days of the receipt by the appellant of written notification from the Tribunal Registrar of such finding and shall be by notice of motion returnable to the President on a date to be assigned by the proper officer in the Central Office ...'.[6]

44. Then, that motion was to be served as was required by r. 12(f), being filed in the Central Office with the dates of service duly endorsed within three days after the date of service on the last person to be so served, whereupon the appeal was *'entered'*. The President and respondent have operated on the basis that the first

[6] O. 53B r. 9(a) is similar, save that the words '*on a date to be assigned by the proper officer in the Central Office'* have been deleted.

step stops time under the provision (although one can readily see how the reference to the appeal being *'entered'* might at the very least suggest otherwise). What is of some relevance (and I return to a similar point later) is that if service was a pre-requisite to the appeal being *'made'* and if that requirement arose solely because of the Rules (rather, as in *KSK*, than being required by the governing statute) it would appear that the requirement of such service could, in effect, be retrospectively cured by the Court itself. Order 124(1) RSC states:

> *'Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit'*.

45. This provision does not permit the Court to abate the effect of non-compliance with the requirements imposed by statute (as opposed to by the Rules) (see *Thompson v. Curry* [1970] IR 61) and thus the provision cannot render an appeal that has not been *'made'* within 21 days in accordance with requirements that are provided for in primary legislation, to have been so made. However, if there is a requirement of service prior to filing that arises only because of the Rules (rather than by statute), it would seem that the Court can deem the appeal to have been brought notwithstanding a failure to comply with that requirement.

When was the motion filed and issued?

46. Self-evidently, the point in time at which the motion is *'filed'* or *'issued'* (and, for the purposes only of this judgment I am treating these as meaning the same thing) depends on the relevant documents being accepted and processed by the Central Office of the High Court within the statutory period. As is shown by the facts of *Abeyneh v. Residential Tenancies Board* [2023] IEHC 81 (where the would-be appellant alleged that he had arrived at the Central Office on the final day for making an application under the Residential Tenancies Act 2004 only to find that that Office would not permit him to pay the applicable fees by debit card and the Office having closed by the time he returned with cash[7]) this may result in an applicant who presents papers at the last minute losing the opportunity to pursue an appeal as a result of the operation of the administrative machinery and rules put in place by that office. And it was in that context that the applicant raised a question around how it was not sufficient to stop time running that the papers were delivered to the Central Office of the High Court. It will be recalled from my earlier summary of the facts that the papers were e-mailed and posted by the applicant on 29 October (which day was clearly within the relevant time period), the e-mail being received there on that date, and the posted copies being received on the following day.

47. Irvine P. addressed this aspect of the case, as follows (at para. 75):

> *'The appellant's submission that his appeals were issued within the 21 day time limit provided for the Act is simply not correct as a matter of*

[7] As I have noted in footnote 2, the Court found that the period was not capable of extension under the relevant provision (s. 123 of the Residential Tenancies Act 2014), and thus that the appeal had been brought outside the relevant time.

fact. His appeals cannot be deemed to have issued merely because the documentation he intended to rely upon for the purposes of his appeal had been delivered into the possession of an officer of the Courts Service by email and by post. It was for the Appellant to arrange to issue his Originating Notice of Motion in the Central Office of the High Court and he did not do this until after such time as he attended before me on 21st December, 2020, in the unusual circumstances set out earlier in this judgement. And, as I observed on 21st December, 2020, the appellant's documentation as sent to Ms. Brennan was highly irregular both as to form and content and could not have been issued by any official in the Central Office without the Court's permission.'

48. Later in the course of her judgment, she explained (at paras. 98 and 99):

'The fact that the appellant's notices of motion and proposed grounding affidavits were stamped and sent to the High Court registrar within the 21 day time limit provided for in the Act does not avail the appellant with his argument that his appeals were brought within the statutory time limit. As is clear from O. 53 of the Rules of the Superior Courts, the type of appeal being pursued is one which is required to be commenced by an originating notice of motion issued out of the Central Office of the High Court. Such notices of motion cannot be issued by intended litigants simply by posting documents to a registrar or to the Central Office of the High Court. A pleading such as an originating notice of motion is issued when, having been presented and deemed to be in

accordance with the Rules of Court, it is then stamped as "issued" on that date by an official attached to the Central Office.

Whilst it was clear from the affidavits filed on the present application that the appellant never attended at the Central Office to issue his notices of motion within the 21 day period required by Act, it did not emerge in the course of the hearing before me the date upon which he first tried to issue his notices of motion in the Central Office. All I can be sure of is that the applicant presented his documentation to the Central Office on the 21st December, 2020 when, due to the fact that his documentation was not in accordance with the Rules of Court, the Central Office quite correctly refused to issue the notices of motion until such time as I made my order later that same day.'

49. One of the complaints made by the applicant is that Irvine P. did not address in the course of her judgment HC 90, to which I have earlier referred. This Practice Direction, in turn, falls to be understood by reference to O. 117A RSC as inserted by S.I. No. 692/2011. That Order allows for the lodgement of Court documents by non-personal delivery. *'Lodge'* for this purpose includes *'file'*. *'Court document'* includes any pleading, notice or affidavit required to be lodged with any officer or in any office in connection with any proceedings. *'Non-personal delivery'* includes delivery *'by pre-paid registered post'*. Order 117A r. 2 allows the proper officer with the approval of the President of the High Court in respect of proceedings in that Court, to stipulate conditions

subject to which the non-personal delivery of a Court document may be effected. Rule 2(3) is as follows:

> *'Subject to sub-rule (4) and rules 4 and 5, where a provision of these Rules requires or authorises a party or person to lodge any court document, such lodgment may alternatively be effected by non-personal delivery in accordance with any condition stipulated for that means of non-personal delivery'*.

50. By HC 90, the then President of the High Court approved of a condition stipulated by the officer managing the Central Office of the High Court that due to the Covid restrictions *'lodgment of a court document by non-personal delivery at the Central Office may be effected only by delivery of that document at the office or to the officer specified in the provision of Order 117a … by pre-paid registered post'.* HC 90 is, thus, necessarily limited and conditioned by the provisions of O. 117A. Neither HC 90 nor the relevant provisions of O. 117A enabled delivery by e-mail, nor do I believe that they could be interpreted as allowing for such delivery. They – quite exceptionally – allowed for specific types of non-personal delivery, and e-mail was not one of the methods of delivery so enabled.

51. However, the effect of HC 90 was to allow for the lodgement, and thus filing, of the notices of motion whereby the applicant sought to appeal the SDT decisions by *inter alia* pre-paid registered post. These were in the Central

Office on Friday 30 October 2020. Order 117A r. 3(1) provides that where any Court document is authorised to be lodged by non-personal delivery:

> *'(d) the date of lodgment of the document shall, unless the contrary is proven, be deemed to be the date of lodgment recorded in any cause book or other record kept for the purpose in the office or by or on behalf of the officer concerned;*
>
> *(e) no court document lodged by non-personal delivery shall in any case be deemed to have been lodged with any officer or in any office unless in fact received (as the case may be) at that office, or by that officer or a staff member authorised by such officer to receive it;*
>
> *(f) no court document lodged by non-personal delivery shall in any case be deemed to have been lodged at or within any period of time unless in fact received (as the case may be) at or within that period of time ...'*

Can the Court deem the notices of motion and affidavit to have been filed or issued within the 21 day period?

52. On the analysis adopted by Irvine P. in her judgment, because the Central Office did not issue the motion until 21 December, the appeal was not made by then, irrespective of when the papers were received at that office. There is English authority that might be relied upon to say that irrespective of whether a Court office has processed and issued a proceeding, delivery in accordance with the

relevant rules to the office itself may be sufficient to stop time running for the purposes of applicable limitation periods where the papers as delivered are in order (see in particular *Van Aken v. Camden London BC* [2002] EWCA Civ. 1724, [2003] 1 WLR 684; *Barnes v. St. Helens Metropolitan BC* [2006] EWCA Civ. 1372, [2007] 3 All ER 525 and *Chelfat v. Hutchinson 3 G UK Ltd* [2022] EWCA Civ. 455, [2022] 1 WLR 3613). Indeed, there are cases in which it has been held that where the Court office unjustifiably rejects a writ received within the relevant limitation period and issues it only after that time has expired, the Court has the power to direct that the proceedings should be treated as if they had been issued within the relevant period (*Riniker v. University College London* (1999) The Times 17 April). While these cases were all decided on the basis of the English procedural rules, very careful consideration would have to be given to the RSC and any applicable statutory provision to determine if the logic (and obvious sense) of the decisions could be accommodated within the relevant provisions in this jurisdiction – if they made a difference in this case. It may well be that the position adopted by Irvine P. was unduly rigid: as it was put by Eveleigh LJ in *Aly v. Aly* The Times 27 December 1983:

> *'It does not make sense to penalise a party who has done all that is in his power to do on the basis that a further act is required by the court which has not been done in time to allow the party to qualify for the relief for which he is asking.'*

53. The problem with all of this from the applicant's perspective here is four-fold. First, I have noted earlier that the applicant received the decisions of the SDT

on 9 October 2020. Section 7(12B) provides that an appeal against a finding of the Disciplinary Tribunal under subsection (12A) shall be made *'within 21 days of the receipt by the appellant of notification in writing of the finding.'* Similar language is, in fact, also used in subsection (12A) (*'within the period specified in subsection (12B)'*). Section 18(h) of the Interpretation Act 2005 necessarily means that this period expired on 29 October 2020. That provision states:

> *'Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period'.*

54. The application of this provision has been considered in a number of authorities (see *McGuinness v. Armstrong Patents* [1980] IR 289; *Freeney v. Bray Urban District Council* [1982] ILRM 29; *McCann v. An Bord Pleanála* [1997] 1 IR 264 and *Walsh and ors. v. Garda Síochána Complaints Board* [2010] IESC 2, [2010] 1 IR 400). The unavoidable consequence is that 30 October 2020 – the date the Notices of Motion and affidavits were received at the Central Office is outside, not *'within'*, the 21 day period fixed by the statute: time began running on 9 October, and the last day *'within'* twenty-one days of that date was 29 October. Whatever about the proceedings being deemed to have been commenced from a point prior to the actual issuing or filing by the Central Office of the notice of motion, it is impossible to see how the Court could deem the proceedings to be commenced at a point prior to the delivery in accordance with the applicable Rules of the papers to that Office at all.

55. Second, the provisions of O. 117A to which I have referred dictate that the Court cannot treat posting of the notice of motion and affidavit as the date of filing: the most liberal possible interpretation of O. 117A would treat the point at which it could be proven the documents were actually received at the Office as the date of filing. This, of course, assumes that the papers as delivered were themselves in compliance with the requirements of the relevant statutory provisions and Rules (an issue on which I express no view). As the Rule makes clear, no court document shall be deemed to have been lodged *'within any period of time'* unless in fact received within that time. There are obvious reasons of practicality and certainty that justify this stipulation. I do not see how the Court could ignore it.

56. Third, while copy papers were received electronically by the relevant Registrar on 29 October, this was only as a result of an e-mail communication which is nowhere deemed to be sufficient delivery in law. The actual original papers did not arrive in accordance with the method of delivery that was authorised by HC 90, until one day later. The applicant cannot at the same time rely upon HC 90 to generally authorise non-personal delivery of the papers, and yet rely upon a form of such delivery which is nowhere specified in the Practice Direction itself or the Rules as stopping time: by stipulating certain forms of non-personal delivery, it must follow that HC 90 excluded all others.

57. It is critical that there be absolute clarity on the precise methods by which legal proceedings are commenced. In the case of an application to Court which is to

be made by notice of motion, this may be by filing and issuing the notice of motion, and in some cases it may – depending on the wording of the relevant legislation – be made by filing/issuing and serving. Exceptionally, HC 90 allowed for filing in one of three ways – prepaid registered post, prepaid ordinary post, or delivery through an accepted document exchange service. Obviously, there can be no question of delivery by e-mail being an *'accepted document exchange service'*: this refers to a person or company providing the service of delivery to the Central Office of original documents. Therefore, the provision did not allow for filing through the delivery of what were, by definition, copy documents by e-mail, no more than it allowed them to be simply deposited by a litigant at the Central Office. At the very least, one would expect that authorisation for filing by e-mail would involve the designation of an e-mail address to be used for that purpose.

58. Fourth, the applicant suggested in the course of his submissions that the effect of O. 124 RSC was that the failure to deliver the documents within the relevant period, in the light of the fact that they had been e-mailed to the Office by 29 October, was to allow the Court to treat the proceedings as having been commenced within time. In my view, that proposition would involve an over-extension of O. 124(1). This provision only allows an abatement of what might otherwise be the consequence of non-compliance with the provisions of RSC: as I have already noted, it does not allow the Court to disapply provisions of primary legislation. Here the time limit is statutory.

59. Of course, as I have also noted earlier, it is the Rules, and not the statute, which prescribe *how* proceedings are commenced, and to that extent it might be said that where there has been non-compliance with particular provisions of the Rules in connection with the initiation of an action, that O. 124(1) allows the Court to ensure that that does not invalidate the proceedings. Whether or not that general proposition is well placed, what O. 124(1) ensures is that non-compliance with the Rules shall not render proceedings void, not that a method of delivery to the Central Office of documents that is nowhere contemplated by the Rules should be treated as stopping the clock for the purposes of a statutory limitation period.

60. The consequence of all of the foregoing appears to me to be unavoidable: even if one overlooks the fact that the motion was not issued within time, even if one assumes that the Central Office was not entitled to refuse to issue the motion *and* even if one assumes that there is some version of the law that facilitates the applicant by treating the motion as having been issued when it ought to have been issued, he is still one day out: the original papers were not delivered in accordance with the relevant Rules until 30 October, irrespective of when they were posted or e-mailed. That may seem harsh, but if the period provided for in s. 7(12B) is absolute, effect must be given to it.

Issues of construction

61. It follows that giving the Practice Direction HC 90 and O. 117A their most liberal interpretation, the earliest it could be said that the papers were *'filed'* or '*issued'*

was 30 October, and this was one day outside the 21 day period specified in s. 7(12B). Therefore, the High Court had no option but to dismiss the appeal *unless* it enjoyed the power to extend the time for the making of the appeal.

62. In construing ss. 7(12A) and (12B) it is relevant that these enable two of the five distinct appeal procedures provided for in s. 7. These operate as follows. First, when the SDT becomes seized of a complaint, it may consider the application and decide if there is a *prima facie* case. If it decides that there is no *prima facie* case, it notifies the applicant (s. 7(2)(b)), and his or her right of appeal is as provided for in s.7(12A) with the appeal period identified in s.7(12B).

63. Second, if the SDT decides that there *is* a *prima facie* case, it proceeds to conduct an inquiry. If at the conclusion of that inquiry it decides that the solicitor has not engaged in misconduct, the SDT must inform the solicitor and the complainant. In that situation, also, the complainant has a right of appeal and that right, too, arises from s.7(12A) and (12B).

64. Third, if the SDT proceeds to an inquiry and finds the solicitor guilty of misconduct, it may determine that the less severe sanctions of advising and admonition or censure, or orders requiring the payment by the solicitor of up to €15,000 to any aggrieved parties or into a Compensation Fund. Provision to this effect is made in s. 7(9). In that event, the solicitor can appeal against the order made. That appeal is provided for in s. 7(11)(a), and must be made '*within the period of 21 days beginning on the date of the service of a copy of the order or*

of the report, whichever date is the later.' I will return to the report referred to here shortly. This was the provision in issue in *Murphy v. The Law Society*.

65. Fourth, under s. 7(11)(b) and (12), both the Law Society and/or the complainant can appeal against an order under s. 7(9). Section 7(11)(b) does not identify any limiting grounds for such an appeal. Section 7(12) provides that the appeal may be brought on the basis that the sanction imposed by the SDT was inadequate. The time period for appeals under s. 7(11)(b) and (12) is the same as that governing s. 7(11)(a).

66. Fifth, a solicitor against whom a finding of misconduct is made but in respect of whom the SDT has not made and does not intend to make an order under s. 7(9), may appeal against that finding. That entitlement is provided for in s. 7(13). That provision does not contain any time limit. Order 53 r. 12(b) prescribed a time limit for such an appeal of 21 days from the date of service on the solicitor of the order or report of SDT (whichever was the later)[8] and, being a period fixed only by the Rules, this could be extended in accordance with O. 122 r. 7. This was the provision in issue in *Coleman v. Law Society* [2020] IEHC 162.

67. As the judgment of Simons J. in that case explains, the appeal brought by a solicitor under s. 7(13) falls to be understood in conjunction with the fact that in all cases in which the SDT makes a finding of misconduct, it must prepare a report to the President of the High Court. It is only the High Court that, under s. 8 of the Act, can make orders against a solicitor striking them off the roll,

[8] Order 53B r, 9(b) is now to similar effect.

suspending, prohibiting the solicitor from practising on their own account, or restricting the work they can do.

68. The elements of that report are identified in s. 7(3)(c). Order 53 r. 8 made provision for that report to be filed by the Law Society in the High Court '*as soon as practicable'* after it is furnished with a copy of same.[9] Where the Law Society is proposing to seek orders under s. 8, it must at the same time issue a notice of motion seeking those orders. This is distinct from any appeal by the solicitor and these orders must be sought irrespective of whether the solicitor appeals. It is provided in the Act (s. 7(13)) that where the solicitor has appealed against a finding and the Law Society brings an application under s. 8, that the Court shall determine the appeal when it considers the report of the SDT under s. 8. Order 53 r.12(h)[10] provided that where the solicitor brings such an appeal, and does not exercise his right to a full re-hearing, the President shall not enter upon a hearing of the motion under s.8 until the appeal has been determined.[11] Where the solicitor does not appeal, the President must nonetheless satisfy himself or herself that it is appropriate to make the orders sought, and that the findings have a sustainable basis and must satisfy himself or herself as to the sanction that is appropriate to those findings (*Law Society v. Coleman* [2018] IESC 80 at para. 91).

69. Sections 7(12A) and (12B) of the 1960 Act are as follows:

[9] O. 53B r. 5 now makes provision to similar effect.
[10] Now in O. 53B r. 6(a).
[11] This subsection also states that it shall determine any appeal also brought under s. 7(11) at the same time.

'(12A) The Society or any person who has made an application under subsection (1) of this section ***may appeal*** *to the High Court within the period specified in subsection (12B) of this section—*

(a) against a finding of the Disciplinary Tribunal that there is no prima facie case for inquiry into the conduct of the respondent solicitor, or
(b) against a finding of the Disciplinary Tribunal that there has been no misconduct on the part of the respondent solicitor in relation to an allegation of misconduct (whether or not there has been a finding by the Disciplinary Tribunal of misconduct in relation to any other such allegation), …'

(12B) An appeal against a finding of the Disciplinary Tribunal under subsection (12A) of this section ***shall be made*** *within 21 days of the receipt by the appellant of notification in writing of the finding.'*

(Emphasis added)

70. While (as indeed s. 7(13) shows) a provision enabling the bringing of an appeal to the High Court against the decision of a statutory tribunal might impose no time limit for the institution of the relevant proceedings (in which case any applicable limitation period will be a matter for the Superior Court Rules Committee), it is more usual that provision will be made for a statutory appeal to be brought within a specified period. Where this happens, the legislative intent will be either (a) that that appeal period is absolute, or (b) that the function of the

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

71. When the Oireachtas intends the time period to be absolute, this is easily made clear: it is not uncommon for legislation to provide that legal proceedings '*shall not be brought after ...'* a specified date. Sometimes the specific provision will not expressly state that the period is absolute, but it will nonetheless be evident from the text of the statute as a whole that this was the parliamentary intent. So, there are provisions which state that the decision of a statutory body shall, on the expiry of the relevant period, become binding on the parties concerned unless, before that expiry, an appeal in relation to the determination is made within the relevant period.[12] Provisions of this kind are consistent only with the imposition of an absolute and non-extendable time period. Conversely, the Oireachtas may expressly provide in the statute providing for a right of appeal, that the period fixed by the legislation for bringing an appeal may be extended.[13]

72. It is, obviously, where there is no stipulation allowing, or precluding, an extension and where there is nothing in the text of the statute viewed as a whole pointing one way or another, that the difficulty arises and, equally obviously, it

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[12] This is the formula used in s. 123(2) of the Residential Tenancies Act 2004, and it leaves no room for doubt but that the period for appeal is absolute. A similar provision appears in s. 63 of the LSRA.

[13] Section 13 of the Housing (Private Rented Dwellings) (Amendment) Act 1982 had expressly stated that time could be extended, and indeed in *Dada v. Residential Tenancies Board* [2018] IEHC 378, McDonald J. placed some reliance on that consideration when concluding that the successor statute did not envisage such an extension of time.

is provisions of this kind that have provoked litigation around this issue. The resulting cases crystalise a deceptively simple question: where the Oireachtas confers a right of appeal against the decision of a statutory body and imposes a time limit for that appeal using language such as '*shall be made within'* or '*may appeal within*' a specified period does this mean (without more) that time may never be extended, or does it mean (without more) that it may always be extended? Or to put the matter another way, does such a section prescribe the period within which an appeal lies *as of right*, or does it prescribe the time within which *any* appeal *ever* lies?

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

The statutory language

74. Needless to say, the first step in any such approach involves ascertaining the meaning of the words used in the relevant section, that meaning being ascertained having regard to the place of the section in the statute as a whole, both being viewed in the light of their relevant context, and discernible purpose.

75. Here, there is without doubt a strong argument that the language used in s. 7(12B) implicitly rules out any extension of the time thus fixed: if a section states that an appeal *'shall be made'* within a fixed period, then it is easy to see how it can be said to follow that it can*not* be made *outside* that period. That, clearly, was the view taken by Irvine P. of these provisions and indeed the same view had previously been taken by Eager J. in *Curran v. Solicitors' Disciplinary Tribunal* [2017] IEHC 2 (whose reasoning was specifically approved by Irvine P.).

76. While acknowledging the force of that contention, it must also be observed that this language neither expressly, nor necessarily, negates the prospect that the time period it thus fixes for the bringing of an appeal could be extended. In its own terms, the statement that an appeal *'shall be made'* within a particular period is not in itself inconsistent with the relevant legislation or, for that matter, another provision in separate legislation (primary or delegated) enabling and prescribing the terms under which that time might be extended. It is quite possible to reconcile and combine that seemingly mandatory language ('*shall be made*') with an exceptional facility to extend the time for appeal. Indeed, it is striking that the RSC themselves in fixing the time for bringing an appeal do so using similar language: O. 58 r. 16, while expressing itself to be subject to the other provisions of that Order, says that a notice of application for leave to appeal to this Court *'shall be lodged not later than 21 days from the perfecting of the order in respect of which leave to appeal is sought'*. Order 86A r. 13, governing the bringing of appeals to the Court of Appeal, is similarly framed.

The time period for seeking judicial review is expressed in O. 84 r. 21(a) RSC in the same terms (*'[a]n application ... shall be made within ...'*). Each of these specific provisions is subject to the general terms of the Order in which they appear, each of those Orders contain Rules allowing time to be extended and, obviously, the relevant Rules have to be read as one. But the point is that the direction that an appeal *'shall'* be made within a particular period does not, in itself, negate the possibility that a power to extend time may reside elsewhere. To revert to the question I asked earlier, the language might mean that the period for instituting an appeal is absolute, but it might also be intended to communicate that an appeal can only be brought as of right within the specified period.

77. This is clear from the decision of the Court of Appeal in *Law Society of Ireland v. Tobin* [2016] IECA 26. There, the Court was concerned with the provisions of s. 12 of the Act of 1960, which governs certain appeals from decisions of the High Court in Solicitors Act matters to, originally, this Court and now the Court of Appeal (s. 74(1) Court of Appeal Act 2014). The section states that the Law Society or solicitor concerned *'may appeal to the Supreme Court against an order of the High Court made under'* certain specified provisions of the Act of 1960 *'within a period of 21 days beginning on the date of the order'*. The issue before the Court of Appeal (Ryan P., Finlay Geoghegan and Peart JJ.) in two separate cases was whether the Court had the power to extend time for appeal, the Law Society contending that s. 12 excluded any jurisdiction in the Court of Appeal to extend the 21 day period referred to therein and the respondent solicitors arguing that it did not.

78. The Court decided that the power to extend time for an appeal was not excluded by the language of the section. The provision should be construed, Finlay Geoghegan J. said in her judgment (with which the other members of the Court agreed) as the Oireachtas expressly indicating that an appeal lies without leave (the previous iterations of s. 12 having required leave to appeal) and regulating by law the period within which a party may bring an appeal *as of right*. She contrasted the terms of s. 12 with the language used in the Statute of Limitations 1957, which stated that certain actions *'shall not be brought after the expiry of ...'* particular periods. Section 12, she said, *'by the words used does not expressly exclude the bringing of an appeal after the specified time as do the provisions of the statute of limitations and other statutory provisions with time limits to which we were referred.'*[14]

79. The point was made in this appeal that the language appearing in s. 12 was different from that used in s. 7(12B) because the former provided *'the solicitor ... **may** appeal to the Supreme Court ... within a period of 21 days ...'*. Section 7(12B), in contrast, provides that an appeal against a finding of the SDT under s. 12A *'**shall** be made within 21 days of the receipt by the appellant of notification in writing of the finding ...'*. However, the role of the word *'may'* in s. 12 was not to regulate the time within which an appeal could be brought, but instead to provide the facility for an appeal in the first place: what it meant was that a person *could* appeal a decision to which the provision referred, and

[14] Section 87 LSRA is now the applicable provision: it uses the same language as s. 12 – '*may appeal to the Court of Appeal ... within a period of 21 days ...'*. Section 87, of course, pre-dated the decision in *Law Society v. Tobin*. Although the LSRA has been subsequently amended in a number of respects, this provision remains as enacted.

that if they were to do so, the period of time for bringing that appeal was 21 days. Had the Court of Appeal been of the view that the effect of the word *'may'* meant that an appeal *'could'* be brought in all cases within 21 days, or some other period, the case fell to be resolved fairly easily. That is not the basis on which the Court decided the matter, because it would have made little sense: a statutory provision which *enables* the bringing of an appeal within 21 days, or some other unspecified period, does not impose a time limit at all. What the Court decided was something quite different: that the time period for bringing an appeal was 21 days, but that the statutory language did not preclude a jurisdiction to extend that time. The fact that the word *'may'* was used was neither here nor there insofar as that conclusion was concerned. This, I note, was the conclusion reached by Barniville P. when considering a similar issue of construction in *Property Services Regulatory Authority v. Dooley* [2023] IEHC 419 at para. 74:

> *'The word "may" is used and not the word "shall". That is surely because there could be no obligation on that person to appeal against the Authority's decision. The decision to appeal or not is a matter for the licensee the subject of the decision. However, if that licensee chooses to appeal then the words providing for the time period are immediately engaged.'*

80. So, there was in truth no real difference between the language used in s. 12 and s. 7(12B): s. 7(12A) similarly employs permissive language in expressing the right to appeal (*'any person who has made an application under subsection (1)*

of this section ***may*** *appeal to the High Court'*), with s. (12B) identifying the period in which the appeal *'shall be made'*. None of this is inconsistent with a power of extension surviving: the core question identified by Finlay Geoghegan J. carries into both provisions – did the Oireachtas in expressly providing for a right of appeal within 21 days by implication intend to exclude a jurisdiction to extend time for bringing an appeal? That falls to be considered in a context where there are many statutory formulae which clearly operate to oust such a right, through the use of language that clearly so states. Indeed, as Barniville P. suggests in the course of his judgment in *Property Services Regulatory Authority v. Dooley* (at para. 86), the language used in s. 7(12B) is weaker than that in the provision the subject of a similar dispute in that case, s. 70 of the Property Services (Regulation) Act 2011 (*'not later than 30 days from the date the licensee received the notice ...'*).

Law Society v. Tobin and the right of appeal

81. In resolving the issue of whether the prospect of an extension of time must be expressly or by necessarily implication enabled by a provision fixing the time for an appeal, or whether it must be expressly or impliedly negated, *Law Society v. Tobin* shows the relevance of the constitutional context in which the legislation operates.

82. In the course of this appeal it was argued that the decision in *Law Society v. Tobin* should be limited to the particular issue it presented– whether time could be extended to bring an appeal from a decision of the High Court to the Court

of Appeal. Certainly, that this issue was central to the decision of the Court cannot be doubted. In her judgment, Finlay Geoghegan J. noted that Article 34.4.3 of the Constitution originally posited that this Court (and now, following the 33rd Amendment of the Constitution, the Court of Appeal) shall *'with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court'* and that legislation such as s. 12 is a limitation by the Oireachtas of the scope of a constitutionally conferred right of litigants to appeal decisions of the High Court, and as such any exception to that right of appeal must be expressed in clear and unambiguous terms (citing *AB v. Minister for Justice and Equality and Law Reform* [2002] 1 IR 296, *Clinton v. An Bord Pleanála* [2006] IESC 58, [2007] 1 IR 272 and *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 IR 509). Having regard to those principles, Finlay Geoghegan J. framed the issue to be decided by the Court as follows (at para. 15):

> *'whether the Oireachtas in expressly providing that the parties may appeal within a period of 21 days is to be construed as clearly and unambiguously restricting or limiting or excluding the parties from exercising their constitutional right to appeal outside such 21 day period, and that it has excluded a jurisdiction of the Court of Appeal to permit an appeal to be pursued if commenced outside the 21 day period.'*

83. She continued (at para. 24):

> *'Unless excluded by s. 12 the Court has an inherent jurisdiction to consider an application to extend time to pursue an appeal to which s. 12 of the 1960 Act applies. Such jurisdiction derives from the implied constitutional principles of basic fairness of procedures which underlie the well known decisions in relation to the court's inherent jurisdiction to dismiss for delay. In this instance, the jurisdiction exists in order that a party who by mistake or other justifiable reason misses the 21 day period, may not be unfairly precluded from pursuing a constitutional right of appeal against an order of the High Court of the type to which s. 12 of the 1960 Act applies. Such orders may interfere with the right of persons to earn a livelihood or viewed from the perspective of the Society, the discharge of its obligations to protect members of the public.'*

84. It is to be stressed that the outcome of *Law Society v. Tobin* was not a product of the double construction rule: legislation ousting an appeal to the Court of Appeal would not have been invalid. Instead, the Court's conclusion was that the *'constitutional context'* – in that case the fact that Article 34.4.3 expressed a right to appeal which could be withdrawn by law created a strong interpretative presumption so that legislation, if removing this right, had to do so in terms that are clear and unambiguous. The decisions cited by the Court – *AB v. Minister for Justice and Equality and Law Reform*, *Clinton v. An Bord Pleanála* and *Stokes v. Christian Brothers High School Clonmel* – each reiterated this principle of construction in the specific context of the right to appeal to the Supreme Court. Indeed, the requirement that the preclusion of

such an appeal be expressed in terms that are clear and unambiguous is both of long standing and is firmly established (see *The People (AG) v. Conmey* [1975] IR 341 at p. 360). The novelty of the decision in *Tobin* lay in the extrapolation from that principle of a requirement that the entitlement to apply to extend the time for bringing such an appeal be negated in similarly clear terms.

85. The consequent decision that the Court of Appeal, notwithstanding the prescription of a 21 day period for appeal, had the power to extend the time for such an appeal is clearly neither binding on this Court, nor necessarily applicable to the distinct terms and context of s. 7(12B). Nonetheless, at the most general of levels I find the logic compelling: the Oireachtas could have, but did not, use language that negated the prospect of an extension of the 21 day period prescribed by s. 12 when combined with the fact that the section operated to curtail the right of appeal conferred by the Constitution dictated that, if possible, it should be construed so as to allow an extension of time where this was appropriate, and it was, as a matter of construction, possible to interpret the provision in this way. This decision, it should be said, is the only decision of the Court of Appeal to directly address these issues (the other Court of Appeal decisions in which the question was discussed did so by way of *obiter* comment). That being so, I do not think it right to say that when matched against a series of decisions of the High Court to contrary effect, the decision in *Law Society v. Tobin* is a '*major outlier'*. It is, in fact, the most authoritative examination of these issues to date in this jurisdiction. It is hard not to notice that although the Oireachtas could have quite readily (and constitutionally)

overturned the effect of this decision by altering the similarly worded, and now operative, provision in the LSRA, it has not done so.

The constitutional right to litigate

86. Finlay Geoghegan J. felt that but for the engagement of the constitutional right of appeal, the argument that the language in s. 12(B) had the effect of precluding an out-of-time appeal *'might be correct'*. That point of distinction between *Law Society v. Tobin* and this case was stressed by Irvine P. in the course of her judgment. There, referring to the decision in *Curran*, she addressed the decision in *Tobin* as follows (at para. 51):

> *'As is apparent from the aforementioned passages, there is a clear distinction in the type of appeal that was at issue in Tobin and that which is subject to the Court scrutiny on the present application. Mr Kirwan's appeal is on all fours with that considered in Curran, and those appeals are not appeals guaranteed by the Constitution. They are appeals which only exist because they are provided for in primary legislation. In Tobin, on the other hand, the appellant had a constitutional right of appeal from the High Court to the Court of Appeal and it was that right which s.12 of the Act proposed should be subjected to a 21 day time limit. Hence the conclusion of Finlay Geoghegan J. that any statutory time limit which would trench upon the Court's inherent jurisdiction to extend the time within which somebody might appeal an order in respect of which they had a constitutional right of appeal, had to be clear and*

unambiguous. And, it seems to me that her obiter comments concerning the time limits for appeals not guaranteed by the Constitution are consistent with the decision of Eager J. in Curran, that the Court did not have the discretion to extend what appears to be a mandatory statutory time limit.'

87. Obviously, these comments are entirely correct insofar as they record that the provision in issue in this case does not engage the constitutional right to appeal. But if it engages the right to litigate, a similar interpretative principle is in play: it is firmly established that statutory curtailments on the right to litigate will be strictly construed (see Dodd *Statutory Interpretation* (2008) at para. 11.52, Kelly *The Irish Constitution* (5th Ed. 2018) at para. 7.3.209 *et seq.*, *Re R Ltd.* [1989] IR 126 and *Murphy v. Greene* [1990] 2 IR 566). Indeed, it was very similar logic that led Baker J. in *Re Varma, a Debtor* [2017] IEHC 218, [2017] 3 IR 659 to conclude that the time period fixed by provisions of s. 115A(3) of the Personal Insolvency Acts 2012-2015 could be extended. There, she felt that the engagement of the constitutional rights of an objecting creditor at an application under s. 115A of that Act required the implication of an entitlement to extend time notwithstanding statutory language which, when viewed in isolation, suggested otherwise. In reaching that conclusion, Baker J. cited and relied upon the reasoning of *Law Society v. Tobin*. In my view, she was entirely correct to do so.

88. The suggestion that there is no '*constitutional context'* in issue in this case depends on the proposition that s. 7(12A) does no more than afford a *statutory*

right of appeal, against a decision of a *statutory* body, and thus (either) that the right to litigate as such does not arise or, alternatively, that if it does it has been granted by statute, subject to the terms of the statute, and thus exercisable only in accordance with the conditions attached by statute. This, essentially, was the point made by Irvine P. (at para. 77):

> *'Whilst the appellant argues that he enjoys a constitutional right of access to the Court, and for this reason the Court must extend the time to permit his appeal if it is out of time, that right is not one which is unfettered. In the present case the appellant's right of access to the Court is one provided for by statute and is subject to his compliance with a specified mandatory time limit. There is nothing unconstitutional about statutes which provide time limits for the bringing of differing types of claims or appeals from decisions of a wide range of adjudicative bodies. In circumstances where the Court is satisfied that the appellant has not complied with a clear statutory mandatory time limit, the Court must, if asked to do so, strike out his appeal.*'

89. Viewed one way, none of this is wrong *per se.* What it does not take account of, however, are the related considerations that once the Oireachtas has conferred a cause of action, it has triggered the right to litigate of those who may avail of it, that once that right is engaged a statutory provision that regulates it will be construed strictly, and the fact that the language used in provision in issue in this case does not clearly or unambiguously preclude the co-existence of a power of the Court to extend time. If, as was found in *Law Society v. Tobin*

the direction that a litigant '*may appeal ... within a period of 21 days'* does not preclude an extension of time, then neither does the language '*may appeal ... within the period specified in subsection (12B)'* when combined with '*an appeal ... shall be made within'*. These might as easily be construed as fixing the time for an appeal as of right, as they could be read as absolutely precluding any appeal outside that time.

90. The decision of the Court in *White v. Dublin City Council* [2004] IESC 35, [2004] 1 IR 545, makes it clear that the fact that the appeal to the High Court is purely statutory in origin does not mean that there is not also in this case an important constitutional right in play. There, the Court struck down the provisions of s. 82(3B)(a)(i) of the Local Government (Planning and Development) Act 1963, which purported to provide an absolute period of two months for the bringing of proceedings seeking to challenge the validity of certain planning decisions. The effect of the provision at issue in that case was that the applicant was prevented from challenging the legality of a decision by reason of a time period which expired before he could have known of the decision. The Court explained (at para. 99):

> *'the applicants were deprived of any reasonable opportunity to challenge the validity of the planning permission by an unlawful act of the planning authority within the two-month limit. Nonetheless, the effect of s. 82(3B)(a)(i) is to deny the applicants any opportunity to ask the High Court, even in these circumstances, to extend time.*

91. The applicant in *White* was seeking to challenge by way of a procedure regulated by the RSC, and acknowledged in the 1963 Act, the legality of a decision made under statute. What was engaged was his right to litigate (whether or not it was also a property right – see para. 75 of the judgment of Denham J.). The fact that the process in respect of which he sought to litigate was entirely statutory was irrelevant: *'[a]n aggrieved person ... who has a legitimate civil claim against another, enjoys a legal right – a right also protected by the Constitution – to pursue his claim in the courts'* (at para. 79 and also para. 95). While the fact that the underlying process was purely statutory was emphasised by the respondents in *White* in the course of their submissions, this did not affect the outcome (see para. 99). Overhanging this was the fact that the courts have a particular function derived from the rule of law, *'of enabling all persons to invoke the jurisdiction to review the legality of administrative decisions'* (at para. 86), and undoubtedly the role of the Courts in facilitating the bringing of challenges to the legality of administrative decisions by way of judicial review was important to the Court's reasoning in striking the provision in question down (see para. 95). Similar factors underlay the decision in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 IR 360 upholding the validity of the 14 day period for the bringing of certain applications for leave to seek judicial review – but only because these provisions enabled an extension of that time. Indeed, as Dr. Delaney noted shortly after the decision in *White,* more recent legislative schemes providing for short judicial review periods have generally allowed for an extension of that time (*'The Constitutionality of Limitation Periods without Savers'* (2004) 22 ILT 262). That the extinction of the cause of action in that

case involved a preclusion on the right of the applicant to obtain judicial review of the decision in question was important to the finding that the relevant section was invalid having regard to the provisions of the Constitution, but it was not critical to the conclusion that the applicant's right to litigate was in issue. And, in any event, any suggestion that while judicial review carries with it a rule of law dimension, statutory appeals against decisions of the vast array of tribunals that form part of the modern administrative state do not is, patently unsustainable.

The statutory context

92. This case falls to be resolved (as was *Law Society v. Tobin*) not by reference to the double construction rule,[15] but instead by treating the engagement of the right to litigate as generating a principle of strict construction. These are closely related, but they are not the same thing. Strict construction may produce an outcome that is not demanded by the double construction rule. At least as presently understood, the double construction rule envisages a conditional adjudication as to the compatibility with the Constitution of one interpretation of an Act, while strict construction merely requires the adoption of a meaning that gives effect to a vital constitutional interest where the legislation does not

[15] Decisions of the Courts of the United Kingdom applying the interpretative obligation imposed by the Human Rights Act 1998 may not be of great assistance in the operation of the double construction rule in this jurisdiction, as the English interpretative obligation might involve a more intrusive power of construction: however, it is to be noted that in that jurisdiction legislative provisions with seemingly absolute periods for the bringing of statutory appeals have been construed in accordance with that obligation as enabling the Court, in exceptional circumstances, to extend time for such an appeal, *Pomiechowski v. Poland* [2012] UKSC 20, [2012] 1 WLR 1604. In *R (Adesina) v. Nursing and Midwifery Council* [2013] EWCA Civ. 818 that principle was applied to the statutory regulation of the nursing profession in the context of a provision which stated that an appeal '*must'* be brought within a particular period.

clearly and unambiguously out-rule it. It is quite possible that a construction that does restrict access to the Courts would still be constitutionally valid. The compatibility with the Constitution of a short limitation period will depend on a range of variables, including the reason for the short period, the nature of the interests of the litigant and those of any third party affected by the litigation, as well as the public interest in the finality of particular types of administrative decision. In any case in which the constitutional validity of a provision imposing a limitation period is challenged, these factors may require a careful analysis in the context of what will often be a delicate balance. It would not usually be appropriate to embark upon that exercise in a case to which the Attorney General is not a party.

93. Rules of strict construction are principles derived from the presumed intention of the legislature and, as the Court made clear in its decision in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60 at paras. 54-56 *'should not descend into an obdurate resistance to the statutory object'.* So, there will be cases in which there are features of the legislation viewed as a whole which are consistent only with a legislative intention to preclude any appeal after the expiry of the statutory period. I have given some examples at paras. 71. In those situations, effect must be given to that intent.

94. In this case the particular context in which this provision operates supports, rather than negates, the conclusion that, properly construed, the legislation does not oust the jurisdiction of the Court to extend time in an appropriate case. That context is *sui generis.* The relationship between the jurisdiction of the High

Court and the supervision of members of the solicitors' profession is a unique one. The history is charted in the judgment of the High Court (Maguire C.J.) in *In re Solicitors Act 1954* [1960] IR 239, at pp. 242-243, and that survey shows that, historically, the disciplinary jurisdiction over solicitors was until the late nineteenth century, vested in the judges. In that case, it was held by the High Court that the question of whether a solicitor is to be allowed to continue to practice his profession is a justiciable controversy, the finality of the decision not being affected by the existence of a right of appeal therefrom. While a decision about removal from the roll was thus an administration of justice, Maguire C.J. (while sitting as a Court of first instance, exercising a jurisdiction specifically conferred by the Solicitors Act) found it was a limited function or power for the purposes of Article 37. Having noted the range of other professions over which disciplinary functions were exercised by professional bodies, he said this (at p. 250):

> *'The solicitors' profession in one important particular stands in a different position. As has so often been emphasised they are officers of the Court and came into existence as part of the machinery for the administration of justice.'*

95. The former Supreme Court agreed that the power to strike a solicitor off the roll was, when exercised, an administration of justice but found it was not limited so as to come within Article 37, *both* because the infliction of such a severe penalty on a citizen is a matter which calls for the exercise of the judicial power of the State and *'because to entrust such a power to persons other than judges*

is to interfere with the necessities of the proper administration of justice' (at p. 275).

96. It is for these reasons that the relationship between the SDT and the High Court is singular. The members of SDT were appointed by the President of the High Court (s. 6 of the 1960 Act).[16] As I have noted earlier on the completion of an inquiry, the SDT must deliver its report to the President (s. 7(3)(c)) of the 1960 Act). Where there is to be a finding against a solicitor other than one involving minor sanctions under s. 7(9) of the 1960 Act, the Law Society must bring the matter before the High Court, and it is the High Court which makes the relevant orders. All of these are intended *'to ensure that the judicial arm and not the administrative agency would ultimately be responsible for any findings of misconduct and the resulting sanction which followed'* (*Law Society v. Coleman* [2018] IESC 80, at para. 58 per McKechnie J.). It is for this reason that it has been found that even without an appeal by a respondent solicitor, the High Court is not relieved of its obligations to ensure that findings of misconduct have a sustainable basis (see *Law Society v. Coleman* at para. 91). As it is put in one text (Mills *et al. Disciplinary Procedures in the Statutory Professions* 2nd. Ed. 2023 at para. 12.14):

> *'While the High Court performs an important supervisory function in respect of other statutory professions, nowhere is the professional disciplinary role of the High Court more significant than in the context*

[16] The Disciplinary Tribunal established by the LSRA is appointed by the President of the High Court, '*on the nomination of the Minister'* (s. 75(1)).

of solicitors. Solicitors are officers of the court and the High Court has an inherent supervisory jurisdiction in respect of solicitors' conduct. The overarching supervisory jurisdiction of the President of the High Court is further evidenced in SA 1954-2015, which provides that 'The Chief Justice or any judge of the High Court may, notwithstanding anything contained in this Act, exercise any jurisdiction over solicitors which he might have exercised if this Act had not been passed.''

97. Of course, the decision in issue in this case does not involve striking a solicitor off the roll. That said, not only does s. 7(12A) address a finding that there is no *prima facie* case, it also addresses a substantive finding that there has been no misconduct. And, more importantly, it follows from what I have said earlier about the decision in *Law Society v. Tobin* that the language appearing in s. 7(12A) and (12B) is not significantly different from that appearing in s. 7(11). Section 7(11) is the provision pursuant to which a solicitor, against whom a determination of misconduct has been made but less severe sanctions imposed under s. 7(9), may appeal same, and provides that they *'may'* do so *'within the period of 21 days beginning on the date of the service of a copy of the order or of the report'*. But, as I have earlier explained, the word *'may'* does no more than confirm the facility for an appeal, the time period being fixed by the remainder of the section. It follows that if the applicant here cannot obtain an extension of time, a solicitor against whom a finding of misconduct is made would face a similar dilemma *irrespective* of the reason they were unable to comply with the statutory time period for appeal. What is thus critically relevant is that the effect of the provisions as urged by the respondents is that the High

Court is divested of a significant aspect of its jurisdiction over a disciplinary process in which it has a particularly acute interest, by the combination of a short limitation period, and an inability in an appropriate case to extend the time thus prescribed for an appeal. I do not believe that this outcome could be obtained other than by the clearest of language.

98. In this regard I should stress that the features of the legislative scheme in issue in this case extend – in my view – far beyond the *'general constitutional'* context presented by *'every case'*. The legislature did not have to create a statutory appeal against a decision of the kind in issue here, but it did. Having done so, if it wished to allow the *constitutional* right it thus triggered to be extinguished in the context of this very particular regulatory regime by misunderstanding, bad luck or other happenstance, and to deprive the courts of the jurisdiction to remedy an injustice that might thus arise consequent upon the operation of the extremely short limitation period thereby imposed, it was incumbent on parliament to do so clearly, or for there to be a feature of the legislative scheme, purpose or context that shows that this was in fact the parliamentary intent. In my view, simply put, the Oireachtas did not do the former, and no circumstance surrounding the legislation has been identified to satisfy me as to the latter. The context is thus clearly and decisively probative of a construction which the language of s. 7(12A) and 7(12B) permits and it is appropriate to so interpret the provision (see *Heather Hill Management Company and anor. v. An Bord Plenála* [2022] IESC 43, [2022] ILRM 313 at para. 116).

99. Having regard to the dissenting judgment of Woulfe J., I should make one final observation in this regard. He notes that in the course of his judgment in *Property Services Regulatory Authority v. Dooley* (at para. 77), Barniville P. observed that under the legislation in issue in that case, the applicant Authority was required to bring a confirmation application in respect of the decision to impose a major sanction on a licensee. There, that obligation arose where the licensee did not within the period allowed for an appeal bring one. This, Barniville P. observed, suggested that the period could not be extended, because the terms in which that provision was framed (*'within the period allowed ...'*) implied that the time could not be extended.

100. Noting the force of that argument in that case where the confirmation application could only be brought if there was no appeal, the position that presents itself under the Solicitors Acts is the polar opposite. Here, the legislature has prescribed *no* time for the bringing of an appeal under s. 7(13). Section 7(13) is the only one of the five appeal routes under that section which is combined with a need for confirmation hearing and, it is clear, the time for bringing such an appeal *can* be extended under the relevant provisions of the RSC. In itself, this raises the question as to why time would not be extendable for the purposes of other provisions in the same section which do not entail the complication of a confirmation hearing. Without doubt, where a confirmation hearing has proceeded under s. 8 and concluded without any appeal being brought, an applicant who seeks to extend time will face an unsurmountable hurdle in obtaining an extension: it is hard to see how the Court could ever entertain a collateral attack on orders made under s. 8. However, none of this is

relevant to the quite distinct question of whether, properly construed, a provision allows an extension of time in the first place.

Relevant provisions of the RSC

101. Where primary legislation prescribes an absolute time limit for the institution of legal proceedings, the RSC cannot purport to amend that legislation by enabling that time limit to be extended (see, in particular, the judgment of Hogan J. in *Keon v. Gibbs* [2017] IECA 195 at para. 26) Where, however, the relevant legislative scheme does not out-rule an extension of time, there can be no objection to those Rules prescribing a method by which, and circumstances in which, that time can be extended. While it has been suggested that O. 84C (which makes general provision for the procedure governing statutory appeals) applies so as to enable time to be extended, I agree with Woulfe J. when, in his judgment in *Murphy v. The Law Society* [2023] IESC 28 he observes that this provision is of no application to appeals of the kind in issue here. These are regulated by a distinct procedure described in O. 53 RSC, and O. 84C applies only where provision for the procedure governing an appeal is not otherwise made (see O. 84C r.1(2).

102. Order 53 r. 12(a) is as follows:

> *'12. (a) Every appeal to the Court against a finding of the Disciplinary Tribunal, either that there was no prima facie case for inquiry into the conduct of a respondent solicitor or that there was no misconduct on the*

part of a respondent solicitor in relation to an allegation of misconduct, brought by the Society or by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal under section 7(12A)(a) or (b) (as substituted by section 17 of the Act of 1994 and as inserted by section 9(g) of the Act of 2002) of the Act of 1960, shall be brought within the period of 21 days of the receipt by the appellant of written notification from the Tribunal Registrar of such finding and shall be by notice of motion returnable to the President on a date to be assigned by the proper officer in the Central Office and shall be entitled in the matter of the respondent solicitor and in the matter of the Acts…'

103. I have already explained that, and why, s. 7(12B) does not preclude an extension of the time for the bringing of the appeal provided for in s. 7(12A). In those circumstances, the effect of the repetition of that period in O. 53 r. 12(a) is to provide a mechanism for the Court to enable such an extension. This arises directly from O. 122 r. 7 RSC. It is as follows:

'7. (1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed.

(2) Sub-rule (1) does not apply to any application to which Order 8 applies'

104. It follows from what I have said earlier that, when properly construed, there is nothing in the Act of 1960 to preclude this provision from enabling an extension of time. It also follows that these provisions regulate the jurisdiction to make an order in this case for such an extension of time. That jurisdiction, on standard principles, falls to be exercised in the light of the guidance recently reiterated in *Seniors Money Mortgages Ireland DAC v. Gately and McGovern* [2020] IESC 3, [2020] 2 IR 441 (*'Seniors Money Mortgages'*) but having regard also to the specific statutory landscape in issue. That decision stresses that the Court has a discretion in determining whether or not to grant an extension of time for an appeal, confirms that the critical inquiry in applying that discretion is directed to the balance of justice, and requires that the discretion must be exercised having regard to where that balance lies in all the circumstances of a particular case. There are three questions that guide the exercise of that discretion – (a) whether the applicant formed a *bona fide* intention to appeal within the prescribed time, (b) whether the failure to appeal within that time is explicable by reference to some factor akin to a mistake, and (c) whether there are arguable grounds of appeal. These are the criteria first stated in *Éire Continental Trading Co. v. Clonmel Foods Ltd*. [1955] IR 170, at p. 173, and they remain the essential principles by reference to which the grounds advanced and evidence adduced by the applicant here fall to be judged. They are, however, no more than a guide to the exercise of the discretion, which remains flexible and circumstance dependant: while one might expect the discretion to be exercised in favour of an

applicant who had missed for good and explained reason the time for bringing an appeal, the Court must also have regard in the exercise of its discretion the clear preference of the legislature that appeals against decisions of the kind in issue here should be brought within a very short time period after the determination to be appealed. I elaborate further on these factors in my separate judgment delivered today in *Murphy v. The Law Society*.

Conclusions

105. In summary:

(i) An appeal under s. 7(12A) of the Act of 1960 is *'made'* when the notice of motion and affidavit prescribed by O. 53 RSC for the bringing of such an application is issued by the Central Office of the High Court.

(ii) For as long as it was in force, High Court Practice Direction 90 enabled filing of such a motion to occur by *inter alia* pre-paid registered post.

(iii) Having regard to the provisions of O. 117A RSC the *earliest* the notice of motion and affidavit grounding the applicant's appeal against the decision of the SDT could be deemed to have been made was 30 October 2020. It is not possible to construe that provision so that such an appeal is *'made'* upon posting to the High Court Central Office of these papers.

(iv) Nor, having regard to the terms of HC 90, is it possible for the sending by the applicant of an e-mail to the Central Office of the High Court on 29 October 2020 to have constituted the making of an appeal for the purposes of s. 7(12A).

(v) Therefore, this appeal was *'made'* outside the 21 day period prescribed by s. 7(12B) of the Act of 1960. Properly construed ss. (12B) is not inconsistent with the High Court enjoying the power to extend the time for the making of an appeal.

(vi) By granting a right of appeal against the decision of the SDT, the Oireachtas has engaged the applicant's constitutional right to litigate. The fact that the right to proceed to Court to appeal the decision in question is statutory does not affect this. Having conferred that right, a provision which restricts it must be strictly construed. Here, the language of s. 7(12B) does not preclude the possibility of an extension of time and, having regard in particular to the specific context in which that provision operates *viz* the regulation of the solicitors' profession, it is appropriate that the section should be interpreted as enabling the grant of an extension of time for the making of an appeal in an appropriate case.

(vii) The bringing of an application to extend that time is governed by O. 121 r. 4 and the principles by reference to which the Court will decide

whether to extend that time being as set forth in the decision in *Seniors Money Mortgages* construed in the light of the reason for the time limit.

(viii) In these circumstances I would allow this appeal against the decision of Irvine P., I would set aside her order dismissing these proceedings and would remit this matter to the High Court for further determination in accordance with this judgment.