THE HIGH COURT

[2021] IEHC 848
[Record No. 2004 19212 P]

BETWEEN

COLM MURPHY

PLAINTIFF

AND

THE LAW SOCIETY OF IRELAND AND SIMON MURPHY

DEFENDANTS

AND

THE HIGH COURT

[Record No. 2009 12 SA]

DISCIPLINARY TRIBUNAL 5306 DT 464/04

IN THE MATTER OF JOHN COLM MURPHY FORMERLY PRACTISING AS COLM MURPHY AND COMPANY SOLICITORS AT MARKET STREET KENMARE COUNTY KERRY AND AS MURPHYS AT 1 CHAPEL STREET KILLARNEY COUNTY KERRY AND
IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2002

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

JOHN COLM MURPHY

RESPONDENT SOLICITOR

THE HIGH COURT

[Record No. 2009 No. 14 SA]

IN THE MATTER OF COLM MURPHY, A SOLICITOR PRACTISING AS COLM MURPHY AND COMPANY SOLICITORS AT MARKET STREET KENMARE COUNTY KERRY AND AS MURPHYS AT 1 CHAPEL STREET KILLARNEY COUNTY KERRY AND
IN THE MATTER OF AN APPLICATION OF THE LAW SOCIETY OF IRELAND TO THE SOLICITORS DISCIPLINARY TRIBUNAL AND
IN THE MATTER OF THE SOLICITORS ACT, 1954 TO 2002

THE DISCIPLINARY TRIBUNAL RECORD NO. 5306 DT 464/04

BETWEEN

COLM MURPHY

APPELLANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 26th day of July, 2021.

1. The plaintiff/applicant, Mr. Colm Murphy, brings this application, *inter alia,* for relief sought at para. 8 of the notice of motion dated 24th of July 2020, being *an order to review and to set aside the judgment of this Court made proceedings entitled Colm Murphy v Law Society of Ireland and Simon Murphy record No. 2004/19212P on the 31st July, 2019 and its ruling made on 13th November, 2019.* In the judgment delivered on 31st July 2019, (the 'principal judgment' in the 'civil case'), the Court dismissed Mr. Murphy's claim for damages for misfeasance of public office, negligence and defamation. The second ruling concerned costs and orders consequent on the principal judgment.

2. A fundamental part of the complaint made by Mr Murphy in the civil proceedings concerned the manner in which the Society had dealt with Court applications. A number of applications were the subject of particular scrutiny and were considered in detail in the principal judgment. It is not intended to repeat the background to civil proceedings, which is fully set out in the Court's principal judgment. It is sufficient for present purposes to record that one set of proceedings concerned Court orders which were made on 31st January 2007 at the behest of the Society under s. 18 of the Solicitors (Amendment) Act 1994 ("the s.18 proceedings"). The Society also instituted attachment and committal proceedings for alleged failure by Mr Murphy to comply with the orders in the s.18 proceedings.

3. The second application to Court was brought in 2009 which resulted in Mr Murphy being struck from the roll of solicitors by the then President of the High Court, Johnson P. This followed a referral by the Solicitors Disciplinary Tribunal on 13th January 2009 with a recommendation that Mr Murphy be struck from the roll of solicitors. On 12th February 2009, the respondent brought the application. On 23rd February 2009, Mr Murphy issued a motion appealing against the Tribunal's decision to refer the matter to the High Court and both matters were heard together. The matter came before the Court on 21st April 2009 and, the decision having been reserved, an order was made by Johnson P. striking Mr Murphy from the roll of solicitors ("the strike off proceedings").

Affidavits.

4. The application now before the Court is grounded on the affidavits of Mr. Murphy sworn on 24th July, 2020, 11th August**,** 2020 and 24th September**,** 2020. These were responded to by affidavit sworn on 24th September, 2020 on behalf of the Society by Mr. John Elliot, the Registrar of Solicitors and Director of Regulation of the Society. Mr. Murphy has sworn further affidavits on 9th October**,** 2020 and 23rd February, 2021. Mr. Elliot has also sworn a

supplemental affidavit on the 12th March, 2021 in reply. The Court has been furnished with copies of correspondence exchanged between the parties, largely since May 2020. The parties have also made written submissions.

Liberty to make this application.

5. An issue arose as to whether Mr Murphy was entitled to make this application in view of undertakings which he had given to the President of the High Court in 2011 not to institute any further proceedings or make any further applications to Court. This Court is satisfied that it enjoys jurisdiction to grant Mr Murphy liberty to make this application regardless of any undertaking which he may have given in 2011, and has ruled that such leave, if required, ought to be granted.

Affidavits of the Applicant.

6. In his grounding affidavit, Mr Murphy avers to his belief that there are errors in the judgment which are so fundamental that they have had an effect on the outcome of the civil case. He submits that there was a failure by the Court to consider all of the evidence, particularly uncontroverted evidence, which led to a mistake in the reasoning of the judgment. The issues which, it is submitted, must be re-addressed, include the Court's consideration of memoranda and documents which it is contended the Court either did not address or failed to address appropriately. The matters raised include the following:

a. It is alleged that the defendants breached Court orders for discovery and failed to comply with Data Access Requests, which have not been properly addressed by the Court.

b. The Court failed to deal with what Mr. Murphy says is the egregious conduct of legal representatives of the Society manifested in the following ways:

i. Incorrect information was placed before the Court by the Society and its legal representatives. They have failed to avail of several opportunities to correct the position. In this context, Mr Murphy points out that Mr Elliot referred to two findings of misconduct (in the [REDACTED] matter) on a number of occasions when the fact is that there was only one. It is averred that Mr Elliot, as an officer of the Court, has a duty to rectify any error made and which may have misled the Court. This has not been done to date.

ii. The Society ought to have rectified the position regarding the undertaking allegedly given by Mr Murphy to the Court in 2003. No such undertaking was given as this Court has found in its principle judgment. It is contended that this is particularly important when giving consideration to the evidence of Ms Kirwan who, without taking up any Court order, stated that such an undertaking had been given. Her colleague, Solicitor X did not take up the order either. Mr Elliot described Solicitor X as the most experienced regulatory solicitor in the Society. It is averred that the conduct of Court officers in the alleged misleading of the Court must be considered in this context. It is particularly contended that there was a failure to analyse Solicitor X's memos, emails and actions and the consequences of those actions. It is contended that an analysis of all the evidence in respect of Solicitor X is necessary.

iii. A letter of 14th March 2007 concerning a complaint in the [REDACTED] matter ought to be reviewed. In this regard Mr Murphy highlights the use of a complaint in the [REDACTED] matter, its impact

on the s.18 proceeding and the failure of the officers of the Society to inform the Court in relation to the progress or outcome of the [REDACTED] complaint as the s. 18 proceedings made their way through the Court.

iv. The Society failed to provide the plaintiff with minutes of a meeting of the Complaints and Clients Relations Committee held on 1st February, 2006, until December 2017. Those minutes could and should have been provided at an earlier stage or stages.

v. Mr Murphy contends that the Court failed to deal with uncontroverted evidence in relation to a number of matters including discovery in the *[REDACTED]* matter and in particular failed to analyse documentation not discovered in the context of the strike off proceedings.

vi. The Court failed to consider the evidence of document analyst, Mr Lynch.

vii. There was a failure to properly consider memos and emails which demonstrates the attitude of the Society in response to the service of proceedings on it by Mr Murphy. One memo stated that the plaintiff should not be a solicitor. These memos are exceptional and extraordinary in any context but even more so when one considers their effect on this litigation. This is particularly so in the context of the role and statutory duties of the Society. It is averred that a failure to deal with these memos and emails is a fundamental error in the judgment.

viii. There is a lack of clarity in relation to the reasons relied upon by the Society for instituting the s. 18 proceedings. It is impossible to say at what meeting the Society decided to commence these proceedings and

what evidence it relied upon. It is averred that the minutes of the meeting of 1st February 2006 would have been extremely helpful to the plaintiff in earlier applications before the Court, had he had them in time.

ix. There was a failure to address, in an appropriate way, issues of delegation of powers and functions of the Council of the Law Society**.**

x. Hanna J. was misled in relation to the issues required to be addressed to him at the first hearing.

xi. The Court is invited to revisit the issue of Ms Kirwan's credibility on the basis, *inter alia*, that the Court failed to look at the magnitude of any mistake which she made and its impact, however honest that mistake might have been. The Court failed to assess or to deal with the fact that Ms. Kirwan had sworn in her affidavit to the Court that an undertaking had been given, and although the Court has concluded that she was honest in the mistake which she made, an honest mistake is irrelevant to the issue of the undertaking and the effect which it had on the application overall.

xii. The Court was wrong to conclude that Mr. Murphy had made admissions in respect of said undertaking.

xiii. The Court failed to accept uncontroverted evidence. Mr. Murphy was not cross examined on certain evidence and the silence of counsel and its witnesses in respect of these matters, meant that these statements should have been accepted by the Court. It is submitted these were not addressed or addressed adequately in the course of the judgment. The Court thereby fell into serious error which has had an effect on Mr Murphy's constitutional rights. In this context, Mr. Murphy relies on

authority that the Court is entitled to draw adverse inferences from the absence of evidence**,** the silence of a witness or indeed a failure to call a witness.

xiv. There was late disclosure in evidence of certain documents by Mr Elliot and Mr O'Dowd, which had an effect on the manner of the presentation of the plaintiff's case.

xv. The Court incorrectly placed reliance on admissions made to the Court, and misconstrued evidence regarding an admission allegedly made by Mr Murphy to the Tribunal.

7. Mr. Murphy also places reliance on the medical condition of Solicitor X not being disclosed by the Society.

8. In his notice of motion, Mr Murphy also sought various directions requiring that the Court investigate, examine and adjudicate on particular conduct alleged against the first defendant/respondent (hereafter the "Society") and its officials. It must be observed that the notice of motion dated 24th of July 2020 was not expressly said to be a motion to set aside the Court's judgment on the basis of breach of discovery orders, or indeed fraud. However, in a supplemental affidavit sworn by Mr Murphy on 11th August 2020, he sought additional relief, including:

> "*No 13. An order striking out the Law Society's defence for its failing and refusing to comply with orders for discovery granted herein and/or to comply with its obligations pursuant to the data protection Acts 1988-2018"*

9. The Court was furnished with issue papers by the parties as to how the matters raised in the plaintiff's notice of motion ought to be addressed. Mr Murphy included in his proposed issue paper the following:

"Breach of Order for Discovery in the Civil proceedings

15. Failure to comply Data Protection Act - alleged compliance with DAR to obstruct Discovery."

10. The Society proposed, inter alia, the following:

"*The principal reliefs sought by the Plaintiff constitute a request to the Court to review and set aside its final judgment.*

2. There does not appear to be any significant divergence between the parties as to the legal principles identifying the circumstances in which a final judgment may be revisited by the Court. See inter alia: Re McInerney Homes [2011] IEHC 25 and Launceston v Wright [2020] IECA 146.

3. The issue is therefore whether the Plaintiff meets the threshold required to invoke the exceptional jurisdiction of the Court to revisit, and further to set aside, its judgment or whether it would be an abuse of process to allow the Plaintiff to re-litigate concluded proceedings.

4. The Court will, in particular, have to consider whether any of the following provide the "strong reasons" required to revisit a concluded judgment:

(i) Alleged failure to make discovery of a minute of the CCRC of 1 February 2006, which minute was appended to a witness statement;

(ii) Alleged failure to make discovery of Council Regulations despite evidence at trial clearly referencing the Regulations without objection being raised of failure to make discovery;

(iii) Alleged failure to comply with a Data Access Request which is the subject of ongoing investigation by the DPC;

(iv) Alleged "fundamental errors" by the Court in not finding in favour of

the Plaintiff in his claims concerning the initiation of the Section 18 Proceedings.

(v) Alleged misleading of Judge Hanna which claim has already been addressed by this Court at para. 427 of its Judgment;

(vi) Alleged fundamental error by the Court in relying on admissions by the Plaintiff;

(vii) Alleged fundamental error by the Court in relying on final, unappealed orders of the High Court in the Section 18 Proceedings and Strike Off proceedings.

(viii) Alleged failure of the Court to rely on "uncontroverted evidence" of the Plaintiff; whether consideration of the evidence was required to adjudicate upon the claims properly before the Court;

(ix) Alleged fundamental error of the Court in not expressly addressing every individual claim in the proceedings".

11. Following preliminary submissions on the hearing of this application, the Court ruled that the issue to be considered on this application is the relief sought at para. 8 of the notice of motion which seeks.

> *"An order to review or set aside the judgements of the High Court made in High Court record no 2004/19212P on 31st of July 2019 and 13th November 2019."*

<u>The Breadth of this Application.</u>

12. In light of the multiplicity of issues raised, it seems appropriate to consider the breadth of the application before the Court. Given the Court's ruling a number of observations ought to be made. First, Mr Murphy has made application to re-enter the s.18 proceedings and also

the strike off proceedings. He has lodged a number of appeals to this Court against decisions of the Solicitors Disciplinary Tribunal. The affidavits submitted in support of this application touch on matters which are stated to be relevant and submitted in support of the application to re-enter the s. 18 proceedings. To a certain extent the affidavits and submissions on this motion have become somewhat conflated with the application to re-enter the s.18 proceedings. This judgment is concerned only with the application to review and set aside its decision in the civil case. Nothing contained in this judgment is intended to be, nor could be construed as being an expression of opinion on the application to re-enter the s.18 proceedings or, for that matter, any other application or proceedings which remain to be considered.

13. Second, while Mr Murphy alleges that the Society has been guilty of fraud in a number of respects, on this application the Court is principally concerned with the review of, or the potential setting aside of the judgment in the civil proceedings. The relief sought at para. 8 of the notice of motion does not specifically seek an order setting aside the judgment on the grounds of fraud or failure to make discovery. All allegations of deceit, impropriety or misleading of the Court on any occasion are vehemently denied by the Society.

14. In light of the submissions made, however, given that issues of alleged misleading of the Court (including Hanna J. at an earlier hearing), alleged deficits in discovery, and allegations of fraud/deceit were the subject of argument before the Court, the Court has considered such in this judgment. Nevertheless, in consideration of any allegation of "*fraud upon the Court"* an important distinction must be addressed, one which has become blurred in the presentation of aspects of the application perhaps in consequence of the multiplicity of issues raised. It is contended, for example, that the Court fell into error in failing to afford consideration to aspects of the plaintiff's statement of evidence that Hanna J. was allegedly misled when this matter was before him in 2012. In truth that is not an allegation of fraud on this Court, rather an allegation that another Court was misled and that this Court has failed to

afford any or due weight to this when arriving at its decision in the claim for damages for misfeasance of public office in the civil proceedings. The same may be said of the allegation that Mr Murphy makes that the *Court failed to consider* his statement of evidence insofar as he made complaint of inadequacy of discovery or the respondent's failure to respond to Data Access Requests. It is difficult to see how any alleged error by this Court in failing to consider evidence presented to it could be considered to be a fraud of *this* Court.

15. Mr Murphy, however, goes further and contends that discovery has been so deficient that both he and the Court were deprived of information and documents, either at the appropriate time or at all, and that such failures have not only led to errors being made by this Court in its decision but that totality of the conduct of the Society ought to result in the setting aside of the judgment. He submits that not only should the judgment be set aside but that the proceedings ought to be dismissed/struck out.

16. No application was made to this Court in the civil proceedings, before trial, during trial or after trial and before delivery of the principal judgment, to dismiss the proceedings on the basis of failure to comply with discovery orders. Despite this, it is nevertheless contended that certain documents ought to have been discovered, or discovered earlier, or came to light too late such that the manner of presentation of his case by the plaintiff was affected, resulting in a denial of justice.

The Principles Applicable to the jurisdiction to review errors in a judgment.

17. There was general agreement between the parties as to the Court's jurisdiction on an application such as this. It is agreed that a Court has jurisdiction to revisit its own judgment even when a final order has been made. *Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 is accepted as authority for this proposition. The order in the civil proceedings has not yet been perfected. The jurisdiction is of a limited nature and must be exercised sparingly.

18. In *Launceston Property Finance DAC v. Wright* [2020] IECA 146, the Court of Appeal summarised the principles applicable as follows:

> *"7. In summary, the jurisdiction:-*
>
> *(i) is wholly exceptional*
>
> *(ii) it must engage an issue of constitutional justice;*
>
> *(iii) requires the applicant to discharge a very heavy onus;*
>
> *(iv) is not for the purpose of revisiting the merits of the decision;*
>
> *(v) alleged errors which have no consequence for the result do not meet the required threshold;*
>
> *(vi) cannot be invoked on the basis of the discovery of new evidence;*
>
> *(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;*
>
> *(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;*
>
> *(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."*

19. Concerning the alleged failure of the Society to lay before the Court information, or to withhold documentation properly discoverable, or as might require to be given to him pursuant to a Data Access Application, Mr Murphy also places emphasis on dicta of Humphreys J. in *Shao v The Minister for Justice and Equality (No. 2)* [2020] IEHC 68 that:

> *"Withholding relevant information from the Court is not a good look. That look is not improved where it is the State that's doing the withholding or, indeed, where some of the withholding was done on foot of a conscious decision by State counsel. Nor does it particularly assist that the information withheld from the Court included*

material previously obscured by not being separately identified when responding to an application under the Freedom of Information Act 2004, a response that was later relied on by the applicant for forensic purposes".

20. Reliance is also placed on *Lavery v DPP* [2018] IEHC 185, which concerned an application for liberty to issue a notice of motion seeking to revisit orders previously made in judicial review proceedings. Mr Murphy relies on para. 9 of the judgment, where Humphreys J. observed:

"Further the applicant seeks an order setting aside the substantive decision of 13th June, 2016, which was to refuse the application for leave to seek judicial review in the proceedings. The circumstances in which such an application can be made are limited:

(i) A Court is entitled to change a judgment or order – and even simply change its mind - prior to the perfection of an order (Re L [2013] 1 W.L.R. 634), but this is a case where the order has been perfected long ago.

(ii) After perfection of the order, the Court can correct material errors of fact in a judgment (D.P.P. v. Nash [2017] IESC 51). This does not arise here.

(iii) The slip rule also applies in such a situation to allow correction of clerical-type errors of any kind (O. 28 r. 11 of the Rules of the Superior Courts). Such considerations do not apply here.

(iv) Procurement of a judgment by fraud is another exception (Kelly v. National University of Ireland [2009] IEHC 484 [2009] 4 I.R 163) but that does not apply here either.

(v) The Court can also amend a judgment or perfected order if it does not reflect what the Court actually decided or intended (Belville Holdings Ltd. v. Revenue Commissioners [1994] 1 I.L.R.M. 29.) That is not an issue here.

(vi) A final order can be set aside in exceptional circumstances on grounds of bias: R. v. Bow Street Magistrate, Ex parte Pinochet (No. 2) [1999] 2 W.L.R. 272; Kenny v. T.C.D. [2007] IESC 42 [2008] 1 I.L.R.M. 241 [2008] 2 I.R. 40. Again that is not an issue here.

(vii) Apart from the foregoing, exceptional circumstances rendering revision necessary in the interests of constitutional justice and constitutional rights, such as arose in In re Greendale Developments Ltd. (No. 3) [2000] 2 I.R. 514 would be required to revisit a final perfected order. There are no such circumstances.

(viii) Finally, a particular order or category of orders may not be intended to be final in an absolute sense and may contain, either expressly or impliedly, a liberty to apply or to re-enter. Such orders may be intended to be variable in a way that, say, the final order here dismissing the application for leave to seek judicial review was not."

21. Mr Murphy submits that the Society has a similar duty of candour, that there was a breach of a Court order and a breach of the Solicitor's duty to the Court, including the obligation to obtain and preserve evidence. He has prepared a schedule of documents which he says he should have received through discovery or by way of Data Access Request but which he did not receive either in time or at all. At para. 7 of his affidavit sworn on 24th July 2020, when dealing with alleged misconduct on the part of Mr Elliot, and the failure of the Court to address same, Mr Murphy prepared a document called "*DPA/Discovery - Chronology of Breaches and Brief Analysis of the Effect of Some of These Breaches".* This is exhibit "CMFM8" to that affidavit. A further schedule, entitled - "*Documents Received After CM's Statement of 20 September 2017 That Should Have Been Received with the Reply to the Data Access Request and/or the Order for Discovery" is at exhibit "CMFM16"* of his affidavit sworn on 11th August 2020 .

22. A book of Court documents was also prepared for this motion which includes 45 items, which were the subject of attention during the course of the oral hearing on this application. I shall return to a consideration of documents, emails and memos upon which particular emphasis was placed at the oral hearing later in this judgment.

The Society's response on the principles applicable.

23. The Society relies on *Launceston* and submits that the reliefs sought by Mr Murphy are exceptionally far-reaching and that this application amounts to an abuse of process. It is submitted that the practical effect of the application is to request the Court to rewrite this judgment, which is not permissible. The fact that a party may disagree with the conclusions of the Court does not provide a basis for the Court to revisit those conclusions. Authority illustrates that 'strong reasons' must be shown to exist before a Court should intervene. No such reasons exist here. There is a heavy onus on Mr Murphy to demonstrate that the jurisdiction ought to be invoked. This onus has not been discharged.

24. Reliance is placed on the decision of Clarke J. in *Re McInerney Homes Ltd* [2011] IEHC 25 where it was observed that examples of the application of the jurisdiction included where a material matter was not drawn to the Court's attention, where the judge changed his mind before the Court order had been drawn up and where the Court might be asked to correct a simple error, such as a computational error. With regard to the introduction of new evidence or arguments, emphasis is placed on dicta of Clarke J. at par 3.11 of *McInerney Homes Ltd* where he said:

> *" It would, again, be a recipe for procedural chaos if a party were entitled, at such a stage, to seek to introduce new evidence or arguments simply because the relevant matters have not been advanced during the hearing. If it is an abuse of process in an examinership, by analogy with Henderson v Henderson, not to*

put forward one's entire case on a petition and then seek to litigate a point not made on the second petition, then that principle applies whether consideration is being given to allowing the new point to be advanced after the process has finally finished to the extent that a final order has been made and perfected or, if possibly with only slightly less force, where the process has, in substance, finished by the parties completing their evidence and argument and the Court reaching a reasoned conclusion".

25. The Society also point out that Clarke J. observed that where the basis for seeking the Court to revisit its judgment is to be found in the proposed presentation of additional evidence or materials, then it would be inappropriate for the Court to do so without applying, at least in general terms, a test similar to that which an appellate Court would apply in deciding whether to admit no evidence at an appeal. Clarke J. continued:

"In those circumstances it seems to me that the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence would not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, had been put before the Court at the trial".

26. Clarke J. further observed that it being highly unusual for a Court to revisit a written judgment after it had been delivered, the Court should be careful not to allow a party to seek to relitigate matters which were already fully and fairly heard and determined at the hearing and which "*led to the written judgment save only to the extent necessary to deal with the question or issue which led to the judgment been revisited".* Again, he observed that to admit such a course of action would be to invite procedural chaos.

27. It is submitted that *SZ (Pakistan) v Minister for Justice and Law Reform* [2013] IEHC 95 is of particular relevance in circumstances where a Court has left over perfection of its final

order to allow for the determination of the ancillary proceedings but its judgment on the claims in the plenary proceedings is not in doubt and has been fully resolved. There is no question, it is submitted, of the Court proceeding on the basis of something like a common mistake, or where an underlying assumption behind the principal judgment is no longer applicable. Further, it is submitted by reference to the authorities, that an application to set aside the judgment already given can only arise in exceptional circumstances as such an application *"runs directly counter to the important value of the administration of justice that it should be finality to litigation"* (per Finlay Geoghegan J. in *Bailey v The Commissioner of An Garda Siochana* [2018] IECA 63).

28. The Society also submits that there is a further well-established principle, referred to in *Doyle v Banville* [2018] 1. I.R. 505, that there is no obligation on the Court to address each and every point advanced by each party.

29. With regard to complaints concerning discovery, it is submitted that if there were concerns in respect of discovery the appropriate time to raise such issues was at trial.

***Student Transport Scheme Ltd v The Minister for Education and Skills and Bus Eireann* [2021] IESC 35.**

30. Following the conclusion of the oral arguments, further written submissions were made by Mr Murphy on the 24th of June 2021, in relation to a recently delivered decision of the Supreme Court in *Student Transport Scheme Ltd v The Minister for Education and Skills and Bus Eireann* [2021] IESC 35, which it is contended has relevance to his application. He also submits, on this occasion, that there had been further development in relation to the Society's alleged failure to comply with discovery and failure in its obligations under the Data Protection Act. Dealing specifically with *Student Transport*, it is submitted that there are three ways in which the judgment is relevant. First, the applicant relied chiefly on the *Greendale Case*,

analysing the possibility of the Court revisiting its own judgment. It is contended that the judgment confirmed that the Supreme Court has jurisdiction to revisit its own decisions but it is one which must be used sparingly. Such jurisdiction can be used to rectify an injustice. It is accepted that this judgment does not in any way detract from the jurisdiction of the High Court to revisit/review its own judgment as set out in the submissions of the parties in the general motion. Second, it is submitted that the judgment reinforces how the *Huddleston* principles are applicable to Irish law and that in public law matters, a public body must place all its cards face up. The strike off proceedings and the s. 18 proceedings are public law matters and the civil proceedings arise principally from the conduct of the Society in those applications. Therefore, it is contended that the Society must act in a transparent manner and that they have not done so in this case. Third is the necessity to analyse all matters in the Court of first instance and appeal Court. This involves interrogating information that came to light at trial, in particular, evidence that might indicate that Mr. Murphy may be successful in his claim. It is submitted that once the Court has exercised jurisdiction to reopen and revisit the judgment, that all matters that had come to light since the original hearing should be considered by the Court.

31. In response, the Society submits *Student Transport* does no more than apply the established principles in *Greendale* and that further reference to discovery/data access issues is a repetition of arguments already made.

32. The Society also points out that the Supreme Court stated that the way to seek to reopen a final decision that is said to have been procured by fraud is to commence plenary proceedings in the High Court. The Society submits that the applicant had been afforded the opportunity to seek to reopen the decision by way of motion rather than by plenary proceedings and that, in any event, it has not as yet been established that a breach of the principle of transparency can be used to set aside a final order. It is submitted that any allegation of fraud would have to be properly established to enable a decision to be reopened.

33. In *Student Transport* the Supreme Court observed at para 2.13 of its judgment that:

> *"There is, therefore, a clear and consistent line of authority on this topic. A high weight is to be attached to the principle of finality. The reason behind this is clear. Where proceedings have reached an end, the parties are entitled to expect that they will not have to continue to litigate the issues which have been finally determined. However, there may be exceptional circumstances where the failure to reopen itself amount to a clear significant breach of the fundamental constitutional rights of the party, going to the very root of fair and constitutional administration of justice, such that the decision was sought to be reopened can properly be considered to be a nullity and not merely arguably in error. Where such a situation arises through no fault of the party concerned, then it follows that the limited jurisdiction to reopen the case can be exercised."*

34. Having considered the decision of the Supreme Court in *Student Transport*, I do not believe that it alters the fundamental principles applicable on this application or the approach which the Court must adopt. I am satisfied that the Court ought to proceed on the basis of the jurisprudence as developed and summarised in *Launceston*. The jurisdiction to review or set aside a reasoned judgment is a rare and exceptional one. There is a strong public interest in finality of litigation and it is impermissible for a party to effectively appeal a Court's ruling to the same Court. The high onus placed on an applicant requires him to demonstrate that there is a fundamental issue concerning the denial of justice; that an error has been made that is so fundamental as to have an effect on the overall result.

35. To the extent that fraud is alleged, I am also satisfied that whether commenced by way of plenary proceedings (which on the face of it would appear to be the appropriate way to proceed in light of the observations of the Court in *Student Transport*) or by motion, as the

applicant has done in this case, an allegation of fraud in civil proceedings requires to be specifically pleaded and strictly proved.

36. It is also important to repeat that the Court, in its consideration of this application, is not and cannot engage in a roving inquiry into aspects of the conduct of the Society or its officers.

Summary of Principal Issues.

37. On the hearing of this application, Mr Murphy was requested by the Court to outline the principal areas of complaint which he has in respect of the judgment in the context of the application to review or set it aside. He summarised the basis of this application under the following headings.

a. The Court, in its judgment, failed to take into account the contents of certain memoranda which it is contended supported the plaintiff's claim of misfeasance in public office. These showed that the Society targeted his Solicitors. This was uncontroverted during the civil case. While this demonstrates what he describes as the appalling attitude of the Society and its external Solicitor and was of no immediate impact on him because he had a legal team, he has since had to discharge his legal team because of financial difficulties. While a number of his former colleagues had indicated that they would help him and his financial situation would not be an issue, when he informed them of the existence of certain memos, they declined to assist him. He exhibits correspondence commencing on 5th May 2020, after the principal judgment was delivered, requesting the Society to address these issues and to withdraw such threats.

b. There was no proper authorisation for the s.18 proceedings. Not all relevant documents were discovered including and in particular, the regulations pursuant to which the Society purported to act when instituting those proceedings.

c. The doctrine of collateral attack does not apply because it was known at all times that Mr Murphy was challenging Court orders made at the behest of the Society; and proceedings are and were at all material times in existence.

d. The Society failed to comply with orders for discovery. This has had a fundamental effect on the Court's reasoning and decision and the presentation of the case by the plaintiff. The Court fell into error in failing to afford due weight and consideration to issues concerning discovery in the *[REDACTED]* matter - and in this regard an error of an exceptional nature was made in the judgment by the Court's failure to deal appropriately with the issue of discovery.

e. In its judgment the Court failed to consider the significance of the combined or cumulative effect of findings made against the Society

f. The Court failed to consider the issue of distribution of the compensation claim forms in an appropriate way The Court ought to have considered this aspect of the claim in the context of the claim for misfeasance of public office, rather than under a separate heading of defamation. He submits that while the defence of qualified privilege might avail in a defamation action, it does not apply in the context of the tort of misfeasance of public office. Emphasis is placed on the amended statement of claim and the updated particulars of claim

delivered on 23rd October 2017. Allegations of negligence, breach of duty, breach of statutory duty, defamation and abuse of process, and/or misfeasance in public office are pleaded at paras. 1 (6) and (7) and in the final sections where it is claimed that the defendants were negligent and in breach of duty including breach of statutory duty and/or guilty of abuse of process and/or misfeasance in public office or abuse of power in a number of respects, including, communicating with media outlets and distributing compensation fund claim forms.

g. The Court misunderstood and misinterpreted the plaintiff's evidence in relation to the alleged admissions made by him before the Tribunal in 2008 concerning the undertaking allegedly given by him in July 2003.

h. The Court failed to address the failure of the Society to comply with its obligations under the Data Protection Act and his Data Access Requests.

i. The Court was misled by solicitors and counsel acting for the defendants in discovery and when this case was before Hanna J., at the first hearing of the substantive proceedings in 2011, he was misled as to the nature and extent of the issues he was required to consider. The Court ought not to have considered that Mr Murphy had already received his remedy for this in his successful appeal to the Supreme Court. Mr. Murphy maintains that a fraud has been committed on the Court and that the actions of the Society in this regard has delayed and denied him justice.

38. Mr Murphy also submits that the Court failed to properly assess the evidence of a number of officers of the Society, and the impact that mistakes made, even if honest, had on him, his case and the proceedings.

Extracts from Mr Murphy's witness statement in the civil action highlighted on this application.

39. The following extracts from Mr Murphy's witness statement, which were principally directed at matters concerning data access, also refer to certain issues which were addressed in more detail in other parts of his witness statement. They also touch on, to a certain extent, several matters of complaint advanced by Mr Murphy on this application. This extract contains an expression of his views on the attitude of the Society in response to the service of proceedings, the lead up to the s.18 proceedings and as to what transpired before Hanna J. This extract was particularly referred to on this application.

> ***"DATA ACCESS APPLICATION***
>
> *356. In 2014, I made a Data Access Application and throughout this statement I refer to various documents that I received that might help understand the Law Society's attitude towards me, why they took various actions and help explain the lengths they are willing to go to defend the civil proceedings and also block my attempts to re-open the Strike Off and the Section 18. The documents will also show that the Law Society deliberately misled the Court particularly in relation to what had transpired before the then President in respect of the directions and agreement and orders that meant I was to have a full hearing before Judge Hanna.*

357 *Many of these documents are set out in my application to re-enter the Section 18 Proceedings but I think it is important to look at each of them now in the context of the civil action and of course at the same time considering how they would have impacted on the Section 18 proceedings or the strike off proceedings.*

358 *Most of these documents are already mentioned in my statement but I believe that the ones I now list and now show together at Tab 204 should be looked at in the context of a claim I am making.*

a) ***The Law Society targeting my Solicitors**:- Various documents I received show that the Law Society take a poor view of anyone who acts for me and they, in conjunction with their external Solicitor, have actually decided to target them. One internal memo of the Law Society states "The Law Society has not yet delivered its defence and both Peter Law and the Society agree to vigorously pursue Mr C Murphy's Solicitors they may well get tired of the case". I received a further internal Law Society memo wherein it says "...instructions are to vigorously pursue Mr. C Murphy and his solicitors in relation to this case". There is also an email from Solicitor X to Therese Clarke wherein she says of my brother Conor Murphy who was acting for me at the time "Conor Murphy is now, as well as Colm Murphy, playing with fire". This would appear to be because he wrote a letter on my behalf when I was his client. I believe this is absolutely outrageous conduct by the Law Society. It now seems that they are willing to target a person they represent because he is simply acting for another person they represent. Of course this attitude by the Law Society maybe already known among Solicitors and may explain why Solicitors are hesitant to give evidence in this case. They are afraid of a backlash from the Law Society. In*

view of these memos I would advise any Solicitor to be very careful in challenging the Law Society in any way or acting for anybody challenging the Law Society. Of course that is for each Solicitor to decide and for me I believe it helps explain many of the procedures adopted by the Law Society against me over the years.

b) ***Law Society decision to fight case to end at all costs:-*** *There is another email I received from the Law Society which says in relation to my civil case "…the case is one that has to be fought to the end whenever that may be". Again this might explain some of the Law Society's actions. I believe it is an extraordinary document. Here we have the Regulatory Body of Solicitors faced with very serious allegations in relation to its own conduct and that of its own officers and Solicitors. A person that this body represents has indicated what can only be described as gross ill treatment by the body. One would think that the first thing that the Law Society would do was to check all matters relevant to the proceedings in case any injustice has been done or in case there is some basis for my allegations. Surely that is the function of a regulatory body. But no. Rather than having an investigation of the matters I had raised they decided that they must win the case at all costs. It seems that they have decided to fight the case to end no matter what the consequences and again this would help explain some of their actions and why they have repeatedly misled the Disciplinary Tribunal and the High Court and attempted to mislead the Supreme Court.*

b) ***Law Society and external Solicitor misleading the High Court and attempting to mislead the Supreme Court*** *–This matter will also be dealt with in the Section in which I will deal with the conduct of the Society in the litigation. As I have*

already said, the then President had said on a number of occasions before the Hanna hearing that this civil case should be heard in such a way that all my grievances and what he called "allegations of skullduggery" should be heard in a way that the re-entry of the Section 18 proceedings, the re-entry of the Strike Off and the appeals to the decisions of the Disciplinary Tribunal in relation to allegations of misconduct against certain Solicitors of the Law Society, could all be disposed of. To put it simply one hearing should deal with it all. The then President has since confirmed that there could be no doubt about what he had intended. I will go through each hearing in detail in the later section about the Society's conduct. It was my belief that the President had said that I was to have a full hearing on all issues. The Law Society said I was wrong and they misdirected Judge Hanna into holding what was essentially their fifth application in respect of the preliminary issues. Judge Hanna acceded to their request and my claim was struck out after a four day hearing. I appealed the matter to the Supreme Court. In the meantime, the President confirmed at various dates that he had left everyone in no doubt but that I was entitled to a full hearing. However, the Law Society put in their Submission to the Supreme Court and insisted to the Supreme Court at the hearing that the President had never said that I was entitled to a plenary hearing. Included in the documentation I received under the Data Protection Act was a memo which would appear to be from the Law Society's external Solicitors, A & L Goodbody, to the Law Society. In this memo the writer says in relation to the hearing before the President on the 2nd June 2011 that "Despite the Society's submission that the remaining claims of slander were statute barred…the President of the High Court made it clear that these matters should proceed to plenary hearing". It

might be helpful to mention at this stage that the Law Society were also aware that the then President had made many pronouncements prior to the hearing before Judge Hanna that I was to have a full plenary hearing of all issues including on the 19th July 2011 ""Of course, absolutely, but maybe I'm just getting old, Mr. Coffey, but I thought I had made my position absolutely clear that I intend to have a full hearing on the matters in respect of which Mr. Murphy is entitled to have a full hearing and can't be stopped having a full hearing". All of the quotes from the President that confirm my position are set out in the section dealing with the Society's conduct.

The only conclusion one can draw is that the Law Society deliberately misled Judge Hanna and attempted to mislead the Supreme Court. The effect of this has been to delay the civil proceedings for at least four years which has caused a delay in the re-entry of the strike off proceedings and the re-entry of the Section 18 proceedings.

c) ***Solicitor X/Linda Kirwan decision to strike Colm Murphy off the Roll and subsequent confirmation that Colm Murphy was struck off to defend the civil case*** *–there is an email that Solicitor X sent to John Elliot after I had served these civil proceedings on the Law Society. This email confirms that I have sued the Society. Rather than considering the reasons for the proceedings and investigating the matters that are the subject of the proceedings Solicitor X has decided that I have sued the Law Society because there are two matters before the Tribunal. She then says "It is my view that Mr Murphy should not be a Solicitor. Linda Kirwan shares this." So at this point in time it seems that Solicitor X and Linda Kirwan, two Senior Solicitors of the Society, had decided*

that I should be struck off the Roll. Solicitor X says that my situation is much the same as Eamonn Carroll. All I know about Eamonn Carroll are the judgments I have read. My situation is nothing like Eamon Carroll's.

d) *Perhaps it might appropriate to consider the email at (c) above in light of another document received in my* ***(D)****ata Access Request. This is probably best described as a report on the civil case. There is a section entitled "Steps Taken To Date in the Action". The first action listed is "Mr. Murphy has been struck off the Roll of Solicitors…". So at (c) above we see that the Law Society, having been sued by me, decide that I should be struck off the Roll. We now have their confirmation that I was struck off as the first step to defend the civil action I had taken. And of course we have all the very questionable actions in between including their reliance on an alleged breach of an undertaking that I had never given, taking Section 18 proceedings that they knew were inappropriate, an application for substituted service when there had been no attempt to serve me, their attempt to have me jailed based on a document they knew to be a forgery and the many times they have misled the Disciplinary Tribunal and the High Court and have attempted to mislead the Supreme Court.*

e) ***Loss and destruction of relevant documentation by the Law Society****– this has been gone through in the section dealing with the [REDACTED]s complaint but it might be no harm to revisit it in the context of showing the Court the conduct of the Society. In the course of my data protection access request I noted that some very important data relating to the complaint for which I was struck off was missing. For example there were many communications between the Law Society and [REDACTED] referred to in correspondence which now appeared to be unavailable. When I queried the Law Society about this they said they had*

mislaid the file but had reconstructed it in as best they could. When pressed further on the matter they admitted that since I had first made the data access request that relevant emails had been deleted. I was stunned at this particularly because I also obtained a copy of a letter from its own Barrister to the Law Society of the 17th July 2008 saying that "…any Colm Murphy papers ...as well as all of your own papers and notes and records should be carefully stored….". So now it seems that the Law Society went against their own legal advice in order to frustrate my attempts to get data that I was entitled to.

…

f) ***Get Any Application Before the Court –*** *When dealing with the Section 18 proceedings above I referred to the emails between Solicitor X and Linda Kirwan. On the 30th May 2005 Solicitor X is complaining to Linda Kirwan that I am making a "laughing stock " of both the Society and the Tribunal. She clearly wants to take some action against me but there was no such system and of course Section 18(A) of the Solicitors Amendment Act which would permit the Society to take action to compel me to pay fines had not been inserted yet. The response from Linda Kirwan goes through various possible avenues but eventually she says "All you have to do to invoke this section is get any application before the High Court. It's well worth a try I believe". This is a shockingly cavalier, dangerous and improper approach to be adopted by any Solicitor not to mind the Solicitor in charge of regulation in the Society. It certainly helps explain why the Society did take the Section 18 proceedings. In fairness to them it seems they did wait to have a "proper" reason to take Section 18 proceedings but this reason was of course the auction that I had nothing to do with. Maybe one can now understand that having decided to embark on the*

Section 18 proceedings in compliance with their wish to "get any" application before the Court why the Society were unwilling to let go or concede any of the three reasons they used for taking the proceedings even when they became aware that neither or the three reasons were valid."

40. Particular submissions were made by the parties on issues pertaining to discovery, Data Access Request and the importance of certain documents and these are addressed below. Before turning to those issues, however, it is necessary to address what the Court considers to be certain fundamental issues regarding the terms of the order of Kelly P. made on the 11th December, 2017. This is the order which directed the issues to be determined and the mode of trial. It is also necessary to address the collateral attack issue and whether it has been established that the Court has fallen into error or errors of a fundamental basis that go to the root of the judgment and which have resulted in a denial of justice, such that the decision ought to be reviewed or set aside.

Discussion – the Order of Kelly P. and Collateral Attack.

(a) The Order of Kelly P.

41. Having considered the arguments and the submissions of the parties, it seems to the Court that a number of the points raised by Mr Murphy are based on a misunderstanding or perhaps misinterpretation of the terms of the order of the then President of the High Court, Kelly P., which specified the matters which this Court was required to consider on the hearing of this case and, importantly, the manner in which matters were to proceed.

42. The order of Kelly P. made on consent on the 11th December, 2017 defined the issues which this Court was required to address. It provides as follows:

"1. The plaintiff claims in these proceedings are limited to the matters pleaded in the plaintiff's amended statement of claim delivered on the 1st July, 2011 (as so

defined by the terms of this order) together with the updated particulars of the plaintiff's claim furnished on the 23rd October, 2017.

2. *The statement of claim delivered on the 22nd June, 2009 is a spent document which no longer has any bearing on the trial of the within proceedings.*
3. *No application in respect of the following sets of proceedings should be either heard or determined prior to the determination of the within proceedings.*
    1. *Law Society of Ireland (applicant) v. Colm Murphy (respondent solicitor) High Court Record No. 2006/371SP*
    2. *Law Society of Ireland (applicant) v. John Colm Murphy (respondent solicitor) High Court Record No. 2009/14SA.*
    3. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/72/SA.*
    4. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/73/SA.*
    5. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/74/SA.*
    6. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/75/SA.*
    7. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/76/SA.*
    8. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/77/SA.*
    9. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/78/SA.*

10. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/79/SA.*
11. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/80/SA.*
12. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/81/SA.*
13. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2010/82/SA.*
14. *Colm Murphy v. Solicitors Disciplinary Tribunal High Court Record No. 2011/50/SA.*

4. *Each of the preliminary objections and special pleas contain within the amended defence delivered on 27th July, 2011 shall be determined by the trial judge at the conclusion of the trial on liability of these proceedings insofar as the trial judge in the exercise of his or her discretion, considers it appropriate to do so and the judgment to be delivered at that time.*

   And by consent

   It is further ordered that the trial of the within proceedings on the issue of liability shall be listed for hearing to commence on Tuesday the 10th April, 2018. And by consent the plaintiff is directed to serve its outline legal submissions on the first named defendant no later than Monday 29th January, 2018 and the first named defendant is directed to serve its outline legal submissions on the plaintiff no later than four weeks thereafter, being Monday the 26th February, 2018 and by consent it is further ordered that the costs of this application should be costs in the cause." (emphasis added)

43. A number of things are clear from the terms of the order. First, the trial of this action was confined to the issues outlined in the amended statement of claim delivered on the 1st July, 2011 and the updated particulars of claim of the 23rd October, 2017.

44. Second, the manner in which the various proceedings were to be heard and determined, and not simply the hearing of the evidence in respect of those proceedings, was agreed by the parties and recorded in the order of Kelly P. It was made clear that no application in respect of the proceedings listed in the order, including the application to re-enter the strike off or s. 18 proceedings, should be either heard or determined prior to the determination of the within proceedings – i.e. the civil proceedings.

45. The Court raised the issue of the order of proceedings with counsel during the hearing. The matter was specifically addressed on day 15 of the trial during the closing submissions of the parties (transcript, day 15, pp 129 *et seq*.). In response, it was not claimed that there was any misunderstanding as to the terms of the order, or that any issue of estoppel arose. It was confirmed that the order was made on consent. The Court noted this at para 274 of the principal judgment.

Collateral Attack Issue.

46. A central finding of the Court in relation to the claim based on the tort of misfeasance of public office was that the civil proceedings constituted an impermissible attempt to collaterally attack final orders of the Court, in particular the strike off and s. 18 proceedings. As indicated at para 341 of the principal judgment, the Court then went on to deal with all other issues on a requested basis.

47. It seems to the Court that the starting point for its consideration of this current application must be the decision on the collateral attack issue. As previously stated, on an application such as this there is a requirement for an applicant *"objectively to demonstrate that*

there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result." It seems to me, therefore, that the Court ought first consider whether it has been demonstrated on this application that there was a fundamental error in the approach or the finding of the Court on this issue which was so fundamental that such error had an effect on the judgment and resulted in a denial of justice.

48. The basis on which it is contended by Mr Murphy on this application that an error arises is that the Court observed in its judgment that the findings made were "unchallenged". He maintains that this is incorrect because the bringing of the applications to set aside the orders were such as to render them 'challenged' decisions to bring them outside the scope of the collateral attack jurisprudence. Mr. Murphy relies on observations of Kearns P. in a decision delivered on 10th December 2012 in *Law Society of Ireland the Colm Murphy and Ballincollig Holdings Ltd* [2012] IEHC 538 ("the 2012 proceedings") as supporting this contention. He also points to the chronology of the proceedings as indicating that the collateral attack doctrine has no application. In the 2012 proceedings, Kearns P under the heading "background" observed as follows:

> *"The respondent solicitor ceased practising 2005. On 18th May, 2009 the respondent solicitor was struck off the roll of solicitors by order of this Court, but he is challenging that decision"*(emphasis added).

49. Mr. Murphy submits that this supports his contention that it was fundamentally incorrect for the defendants to submit to the Court that the decisions have not been challenged; they are and were the subject of challenge. It is also submitted that the conduct of the defendants deprive them of such a technical defence, particularly its conduct in relation to the *[REDACTED]* matter, the s.18 proceedings, the alleged failure to make discovery, the conduct of the legal team for the defence and alleged fraud. The respondent submits that the Court did not err in accepting the defence of collateral attack.

50. A number of observations ought to be made. First, in submissions to the Court in the civil proceedings, it was made clear that the applicant was not challenging final conclusive orders. Second, the argument now advanced is on a different basis to that argued and pursued at hearing. At hearing it was submitted that because it was always open to a Solicitor who has been struck off to apply to be re-admitted that the *res judicata/ collateral attack* doctrine did not apply with equal effect as it might apply in proceedings which were not of a disciplinary nature. It was not suggested that simply because an application is brought outside the time for appeal seeking liberty to re-enter disciplinary proceedings, that this meant that the order became a challenged order for the purposes of bringing the case outside the parameters of the collateral attack jurisprudence. The Court analysed the legal position on collateral attack and stated its conclusions at paras 316 to 335 of the principal judgment. The Court made observations on the claimed exception at para. 335.

51. Third, while the then President of the High Court may have remarked that the Mr Murphy was *"challenging"* the decision to have his name struck from the registrar of solicitors, in this Court's view, such observation cannot be construed as a determination of legal effect or consequence for the Court's findings on the collateral attack issue. It is not suggested that issues of collateral attack or the legal principles applicable thereto were subject to submissions, detailed consideration or detailed reasoning on the application before Kearns P. in the 2012 proceedings. No such argument was made by counsel for Mr Murphy in his submissions to this Court in these civil proceedings. It was accepted that the orders made by the Court remained valid orders, as is evident from the exchange between the Court and counsel on day 15 of the trial and as reflected in the principal judgment at paras 274 and 326 of the principal judgment. The Court also noted:

> *" 316. From the outset, it was made clear by counsel for the plaintiff that no attempt is made in these proceedings to circumvent, challenge or mount a collateral attack*

on final and conclusive orders. However, it is stated that the case concerns, to quote counsel, "how the Society dealt with Mr. Murphy in the lead up to those applications actually being made".

52. To the extent that the Court stated in para. 326 and 401 of its judgment that the orders were "unchallenged" this must clearly be read in the context of the Court's consideration and determination on this issue, particularly at paras. 316 to 335, including the Court's observations at para 326. The expression '*unchallenged'* as used by the Court must be considered in the light of such observations and conclusions. I am therefore not satisfied that it has been demonstrated that the Court fell into error of such a nature on this issue as has or had an effect on the result in so far as the application of the collateral attack doctrine is concerned, or that issues of constitutional justice arise in this regard. Any difficulty which Mr Murphy may have with the Court's conclusions on this issue must, it seems to me, fall for consideration in the context of any appeal which might be taken. It therefore appears to the Court that this finding is in truth dispositive of many of the arguments and submissions on issues on which this application is advanced.

53. I now address particular issues concerning discovery, Data Access Request and the failure of the Court to address these issues. As stated, particular documents were highlighted during the course of this application.

The Memos - Failure of the Court to consider memos showing the attitude of the Society and its officers to the plaintiff – and late disclosure of certain documents.

(a) Mr Murphy's submissions

54. Mr Murphy submits that the Court fell into error in its failure to consider certain memos and documents which demonstrated, in essence, bad faith, on the part of the Society. These include the following which are addressed in no particular chronological order:

a. Email from Solicitor X dated November 5th, 2004, following the service of the civil proceedings, wherein she stated:

"*I have little doubt that the reason they have been issued is that Mr Murphy is before the Disciplinary Tribunal in relation to two serious cases and that this is his motivation. It is my view that Mr Murphy should not be a solicitor. Linda Kirwan shares this. The disciplinary findings against him are mounting and he has been reprimanded twice by the registrar's committee the most recent one being Wednesday of this week. A similar situation occurred in relation to …* (another individual)".

Ms Kirwan was cross-examined in relation to this email on day 9, page 97 of that day's transcript, and said that she had no recollection of expressing such views. However, she also said that if asked whether on November 5th, 2004, she thought Mr Murphy should not be on the roll of solicitors, she would at that stage have had to say yes. Her evidence was that *"so much had built up. There was the multiplicity of complaints, there was the findings, there were the orders that hadn't been complied with, a reprimand… I think I should also say, it doesn't really matter what I thought because at the end of the day the decisions are made by the Committees and the Tribunal…"*

b. A memorandum created following the delivery of a draft statement of claim in June 2009. The memo, for present purposes, concluded *"The Society has not yet delivered a defence and both Peter Law and the Society agreed to vigorously pursue Mr C Murphy's solicitors they may well get tired of the case".* Similar sentiments are expressed in an email

which was most likely generated at around that time-i.e. after the delivery of the statement of claim.

c. An email dated 9th March 2007 from Solicitor X to Miss Clarke, the final sentence of which states "*Conor Murphy is now, as well as Colm Murphy, playing with fire".* This email was in response to an earlier email from Ms Clarke referring to a telephone conversation which she had with Mr Ray Hennessy who explained that he had informed Mr Colm Murphy that he would not come on record until there had been compliance with *"your orders".*

d. Correspondence in connection with an undertaking as to damages given on behalf of the Society on 17th October, 2002. Letters were written by Mr Murphy on 24th October 2002, 21st of April 2004 and 26th April 2004 to the Society and various officers and employees thereof. This was replied to by Solicitor X on 27th April, 2004, in which it was stated "*the Society take the view that as a statutory regulatory body it does not give undertakings as to damages. If any undertaking as to damages was given it would have been at the direction of the President of the High Court".* This was again replied to by Mr Murphy on 13th May 2004, enclosing a copy of the order of 17th October, 2002, and referring to the undertaking and raising the query as to whether it was now being said that *"the counsel you were instructing did not have authority to give this undertaking?"*

e. A document generated for the external Solicitor when taking over the file from the Society. It refers to the "Reporting Department" and contains details in relation to Mr Murphy's case. The heading *"Steps*

taken to Date in the Action" commenced, without explanation, with the statement "*Mr Murphy has been struck off the roll of solicitors…Society unsuccessful in having the proceedings struck out"* that *"the case is one that has to be fought to the end whenever that may be"…* Mr. Murphy avers that this was stated to be a step to defend the civil case. The memo also referred to the decision of Hanna J. delivered on 8th March, 2012, that a defence to the proceedings had been delivered by the Society in March 2010, that the defendants had unsuccessfully applied to have the proceedings struck out and reporting what occurred at a hearing on preliminary issues which took place on 2nd June 2011. The memo then proceeded to deal with the listing of the proceedings before Hanna J, and the outcome of that hearing.

f. An exchange of emails of 30th May 2005 ostensibly between Ms Kirwan and Solicitor X. The first was sent that 15.32 with a reply at 16.34. Ms Kirwan was examined in relation to these emails during the course of the plenary hearing in the civil case. Although the email, on the face of it , is said to have been sent at 16.34 by Ms Kirwan, under cross-examination, she said that she did not send it as it was not her language and that she did not communicate with counsel. Solicitor X communicated with counsel. The chronology of these emails is as follows:

    i. 30th of May 2005 at 15.32, email from Solicitor X to 'Linda K', which was copied to 'John E':

    "Re your memo in relation to Colm Murphy's failure to comply with an order of the Tribunal, I am of the view we should take

section 18 proceedings against him, not only in relation to this, but the [REDACTED] case where he has failed to comply with a direction of the CCRC., and in fact any other case where he has failed to comply with an order or direction. In the case of [REDACTED] part of the order was that Mr Murphy hand over [REDACTED]'s files to [REDACTED] to complete [REDACTED]'s title. He hasn't done this either and I take a very serious view of his conduct and attitude to the Society and the DT. Paul McDermott wanted to wait until after the O'Neill judgment in the O' Duffy case had been delivered. It has been delivered and it doesn't matter that it is being appealed. My reasoning is that Mr Murphy by his conduct is bringing into disrepute both the standing of the Society as a statutory regulatory body and the DT. It makes a laughing stock of both institutions (especially in the eyes of the public) if a solicitor can ignore with impunity such directions and orders. So these are the instructions I would like to get. In relation to pursuing any orders as liquidated amounts, Mr Murphy has no PC and even if he did the amounts are so small that I do not believe, on the basis of the Barron Supreme Court judgment, that we could refuse a practising certificate or even impose conditions… We could adopt the same approach with…(Another unnamed individual). I think getting a judgment against Colm Murphy is a complete waste of time."

ii. Response at 16.54 Linda K to Solicitor X and copied to John E**:**

"Linda, I will check with Paul McDermott first but I think implicit in breaching a direction of the CCRC to refund fees etc and which direction becomes completely binding on a solicitor and where such non-compliance in fact a criminal offence then I think it is a breach of section 11 of the 1994 Act. As I recall it, all the DT cases have their genesis in direction is being made by the CCRC which led the DT to make the findings and orders it did. It may be that the way we deal with this aspect is to invoke the very wide general powers of the High Court under section 38 (1) of the 1994 Act to enable the Society to secure the rights of clients of a solicitor, the public interest etc. all you have to do to invoke this section is to get any application before the High Court. It's well worth a try I believe. But I'll talk to Paul first and perhaps get a letter of advice from him for the committee"-

Mr Murphy states that this document is not from Ms Kirwan. This emerged at trial and exemplifies what he describes as the 'shenanigans' that were taking place. It is suggested that the analysis in the principal judgment which was to the effect that *discussions were taking place regarding s.18 proceedings* is incorrect and that in fact it was the thought of one person, Solicitor X, and the Court effectively failed to properly consider this exchange.

g. The report of Mr Sean Lynch, document examiner, of 22nd September, 2010, and the Court's failure to address this evidence.

h. A memorandum concerning events as of June 2011, when the matter had been back before the then President of the High Court. The memo commences by referring to the fact that a defence had been delivered and that discovery had not yet been requested. It records that on 1st March, 2011, the President refused the Society's application to strike out the proceedings and instead directed that they should be listed for hearing on the 2nd/3rd of June, 2011. It records that he also made an order restraining Mr Murphy from making any further complaints to the SDT pending the determination of the proceedings and that he gave the Society liberty to apply to him for an order striking out those elements of Mr Murphy's claims which it was believed were not sustainable. It is recorded that the Society made such an application on 11th April**,** 2011**,**when the President decided that the allotted trial dates of the 2nd/3rd of June should be used for the purposes of the hearing of that application. The memo proceeds as follows:

> *"At the hearing on 2 June, counsel for Mr Murphy conceded that Mr Murphy was no longer seeking the reliefs sought by him at paragraphs 1 to 6 of his prayer in the statement of claim and further that he was no longer contending for the unlawfulness of the orders of the High Court and the decisions of the Solicitors Disciplinary Tribunal referred to at paragraphs 21 and 32 of Mr Murphy's replies to particulars dated 22 December 2009. Despite the Society's submission that the remaining claims of slander were statute barred and that the purported claim for mala fides or misfeasance in public office was not pleaded and was inseparable*

from the claim that had been abandoned, the President of the High Court made it clear that these matters should proceed to plenary hearing. In order to obtain clarity from Mr Murphy as to what case he is now in fact making before proceeding any further with the motion dealing with the preliminary issues, the President of the High Court by consent made an order adjourning the motion generally with liberty to re-enter on Mr Murphy's undertaking to deliver an amended statement of claim by 5 July when the matter was to be listed for mention only. Due to the President of the High Court's unavailability, the matter has been put back for mention only to Tuesday 19th July…"

Mr Murphy says that reliefs 1-6 were the non-justiciable matters, which were dropped but that all other matters should proceed to plenary hearing. In his witness statement, Mr Murphy had said that the only conclusion one could draw was that the Law Society deliberately misled Hanna J. and attempted to mislead the Supreme Court. The effect of this had been to delay these proceedings for at least four years which has also caused a delay in the re-entry of the strike off proceedings and the re-entry of the s. 18 proceedings. Mr Murphy maintains that this memorandum is in fact correct and that when the matter came before Hanna J., there could be no misunderstanding as to the issues which he had to address, and that it was clear that there was no invitation implicit in what occurred before Kearns P to revisit the application which had in fact been made to him. It is claimed that Hanna J. was deceived and as is evident from the memo, the contents

of which are correct. And that any motion could only be brought for matters which were not sustainable – and which, in any event, were dropped.

Mr Murphy submits that the Court was incorrect in concluding that he had his remedy by virtue of a successful appeal to the Supreme Court- and that he is in fact looking for his remedy in these proceedings. He maintains that the actions of the Society led to the prolongation of his inability to work as a Solicitor and his opportunity to seek a remedy.

55. Mr Murphy maintains that the late disclosure of a number of documents after he had prepared his statement of evidence, which ought to have been disclosed earlier, had an effect on the presentation of his case and that this resulted in a denial of justice. These documents are summarised at exhibit "CMFM 16" of Mr Murphy's affidavit sworn on 11th August, 2020, and include the following (in the order in which they appear, not necessarily chronologically):

a. Minutes of a meeting of the Complaints and Clients Relation Committee held on 1st February, 2006;
b. A memorandum prepared by Edward Sheehan dated 13 April**(,)** 2005,
c. A letter to [REDACTED] of 9th December, 1997,
d. Letters described as having been wrongfully removed from Mr Murphy's files in 2001,
e. Emails from Solicitor X which it is contended confirm that she had no authority to bring the Attachment and Committal proceedings,
f. Certain Council Regulations stated to govern the authority of the Society and its committees to bring s. 18 proceedings.

Each of these documents and the complaints made by Mr Murphy in respect of them is considered in context in this judgment.

(b) The Society's submissions.

56. In response, counsel for the Society submits that if there were concerns in respect of discovery the appropriate time to raise such issues was at trial and that none of the alleged failures to make discovery in the plenary proceedings provide a credible basis for the assertion that there was a denial of justice.

57. To the extent that reference is made to what occurred before Hanna J., the Society submits that the transcripts of the hearing, particularly the submissions of counsel bear out that Hanna J. was aware of the prior procedural history of the case.

58. The following points are made in respect of particular documents:-

i. The minutes of the meeting of 1st February, 2006. This document was not identified as being responsive to the order for discovery. It was, in any event, appended to Mr Elliot's witness statement of 8th December, 2017, and no conceivable denial of justice can therefore be said to have arisen. No claim arose in this regard in respect of alleged inadequacy of discovery or denial of justice was made during the proceedings.

j. The Council Regulations. The disclosure of council regulations was not responsive to the order for discovery. Further, in the course of the proceedings, the issue of authorisation was addressed at trial where Mr Murphy was represented by Solicitors and counsel. He did not then claim that there had been a denial of justice in the making of discovery or that this particular document had not been discovered. The matter of authorisation was canvassed by counsel with Mr Elliot. Further, the regulations do not support the arguments which Mr Murphy now seeks to advance. It is incorrect to say that Council Regulations 2004/2005 do not authorise the Regulation of Practice Committee to authorise s.18 proceedings or that they

do not authorise the Committee to sit in divisions. Regulation 29 authorises the Council to delegate functions to a Committee which may sit in one or more divisions and regulation 43 (xxii) delegates the powers and functions of the Society pursuant to s.18 to the Regulation of Practice Committee. The Committee was expressly authorised to sit in divisions and to exercise the Society's powers under s.18 by s.73 of the Solicitors Act of 1954, as amended. The amendment to s.73 of the Act, introduced by s. 34 of the Civil Law (Miscellaneous Provisions) Act 2008 did not mean that it was only thereafter that the Committee sat in divisions who were empowered to authorise the issuing of the proceedings.

k. The Minutes of the Committee meeting of 8th September, 2005. Insofar as it is contended that the Society ought to have discovered an attendance sheet for the minutes of the Committee meeting of 8th September, 2005, at which meeting it was decided that a s. 18 application should be made to the Court, the minute itself was discovered. If any enquiries arose concerning the sitting of the Committee in divisions, Mr Murphy and his legal team had adequate opportunity to explore them. If Mr Murphy wished to challenge the jurisdiction and authority of the Society to make the application and to enquire into the reporting of that decision by the Council to the Committee, he should have done so in 2007. It is submitted that it is incorrect to contend that as part of its discovery obligations, the Society was obliged to produce evidence of a report by the Committees to the Council. Discovery required documents to be disclosed relating to the decision to commence proceedings and not the reporting of that decision. With regard to the preceding two issues, it is submitted that, in any event, the Court concluded that all

proceeded on the basis that such jurisdiction existed and that orders were made, many of them on consent, on 31st of January, 2007. It would, therefore, be an abuse of process to permit Mr Murphy to now litigate this issue.

l. The Data Access Request. This issue was not addressed at trial by his counsel in closing submissions. As stated, the minutes of 1st February, 2006,were appended to Mr Elliot's witness statement. Emails were produced during the trial. Mr Murphy now seeks to revisit arguments which were made at trial and upon which the Court has adjudicated concerning the initiation of the attachment and committal proceedings. Particular emphasis is placed on the Court's decision at paragraphs 367 to 387. It is submitted that any issue regarding alleged non-compliance with Data Access Requests is a matter for the Data Protection Commissioner; and not for the Court. Mr Murphy's assertion that he adversely altered his approach to his discovery application on foot of an averment by the Society's Solicitors concerning the Data Access Request is not credible. Mr Law, in his affidavit of 14th April, 2016, in which he refuted Mr Murphy's complaints that the Society had not adequately complied with its obligations in respect of the Data Access Requests, made no averment as to whether specific documents had been furnished. The netting down of categories of discovery took place following the raising and answering of very extensive interrogatories. The interaction between discovery and the Data Access Requests was a limited one and the list of documents provided ensured that unnecessary duplication was avoided and that any documents responsive to the categories of discovery, which Mr Murphy did not already have, were furnished.

m. The wrongful categorisation of documentation relating to Mary O'Sullivan and Patrick O'Sullivan as a complaint.The evidence from Ms Kirwan was that the complainant had passed away before an investigation was complete and it is submitted that the categorisation was not in any way material to the proceedings.

n. The alleged failure to disclose the medical condition of Solicitor X. The Society contends that this illustrates that Mr Murphy considers the legal proceedings to amount to a roving enquiry. A medical report concerning Solicitor X, who retired from the Society in April 2015, was obtained in October 2020, eleven years after the order in the strike off proceedings. Nothing in that report gives rise to any credible basis to suggest that there was a prosecutorial failure to disclose a medical condition or to support any assertion that there was a "*possibility that solicitor X's actions, judgment and memory were affected by a medical condition at stages of the proceedings herein*". Mr Murphy was aware, through communications prior to hearing, that Solicitor X would not be able to participate in the proceedings. Had any issue arisen at that time it could have been explored then.

o. The *[REDACTED]* Matter. The Court concluded that the principal cause of Mr Murphy's difficulty was his failure to engage with correspondence and attend relevant meetings (para 401 of principal judgment) . Mr Murphy accepted the findings of the Tribunal on the *[REDACTED]* issue. To the extent that a complaint arises in relation to discovery, the Court has engaged in the key elements of the issue and was not obliged to address each and every point made to the Court. There was no error which goes to the root of the judgment.

59. On the hearing of this application, counsel for the Society produced a table of the documents referred to by Mr Murphy, which table provided a summary of where such documents were provided or were available to Mr Murphy. It is also submitted that it was open to him to seek to recall witnesses if he so wished but this did not occur.

The Society also makes the following submission on other matters:

p. Alleged failure by the Court to analyse various memoranda. In accordance with *Doyle v Banville* there is no obligation on the Court to address each and every point advanced at hearing. The Court engaged in detail with the key substantive elements of the case and did not err in addressing every point that was made.

q. Mr Murphy's alleged admission regarding the undertaking. It is submitted that this is not a fundamental error and furthermore if regard is had to the full question, the Court did not make any error in its characterisation of the evidence.

r. Uncontroverted Evidence. This contention fails to recognise that the Court was not obliged to comment or adjudicate on matters that did not qualify for determination within the terms of the order of Kelly P. It was not necessary for the Society to contest evidence which did not relate to issues before the Court. Silence does not convert evidence into proof where it is not necessary for, or expected of, the silent party to address the evidence in question : *R v IRC ex parte T.C. Coombs and Co* [1991] 2 A.C. 283. It was made clear in cross examination that any claims of improper behaviour and motivation on the part of the Society was rejected. Further, in accordance with the decision

of Baker J in *The People (DPP) v Burke* [2014] IEHC 483, the Court is not compelled as a matter of law to accept evidence because it is not challenged and the fact that it is unchallenged gives it somewhat greater weight but does not direct a particular result.

s. The Court's assessment of the evidence of Solicitor X, Ms Kirwan, Mr Elliot, Mr Law and counsel. It is submitted that Mr Murphy is inviting the Court to substitute his views for those of the Court. The Court does not have jurisdiction to enter into a broad ranging enquiry into the conduct of parties at hearing.

t. Errors in relation to the initiation of the s.18 proceedings. It is contended that all relevant matters were considered by the Court and that in fact this is a request by Mr Murphy to the Court to re-write its judgment.

u. New evidence. To the extent that Mr Murphy wishes to introduce new evidence, this can only be done in exceptional circumstances and the material would have to be such as would have had an important influence on the result of the case and could not, with reasonable diligence, have been put before the Court at trial. No such considerations arise in this case.

v. The Compensation Forms. The written submissions of the parties addressed the issue of qualified privilege and it was not suggested that the distribution of the compensation claims forms had nothing to do with defamation. Where qualified privilege arises and is clearly part of the issues, no fundamental error arises.

w. Alleged misleading of Hanna J. It is not accepted that Hanna J was misled and the transcripts of the hearing before him showed that he was aware of procedural issues and was addressed by both sides. Mr Murphy is requesting

the Court to revisit arguments previously made, something which is particular demonstrated by the attempt to revisit the allegation that the Society's legal team misled Hanna J. in 2011.

Consideration of Particular documentary issues.

The *[REDACTED]* Complaint.

60. Mr Murphy maintains that there was a failure by the Court to consider uncontroverted evidence in his witness statement in which he made complaint about discovery in the *[REDACTED]* matter. In a letter of 2nd June, 2015, prepared by the Society in response to a Data Access Request from the Data Protection Commissioner, it was stated that the original [REDACTED] file had been mislaid and that the file had been reconstructed. The letter noted that while the file was reconstructed by them insofar as they could, *"it did not include the letter referred to by Solicitor X* ."

61. Mr Murphy says that it is uncontroverted that Solicitor X decided not to comply with the order for discovery and that she wrote to Ms Kirwan confirming her decision to do so. He avers that there is no evidence that Ms Kirwan advised her against this course of action. Solicitor X's sworn affidavit of discovery, he contends, deliberately omitted exculpatory evidence and that her conduct constituted prosecutorial misconduct, breach of the duties of an officer of the Court, breach of the order of the Court, and misfeasance in public office. These matters are said to constitute truly exceptional facts and for these reason alone the application to re-enter the strike off proceedings must be allowed and all orders must be set aside. In this context however, as previously noted, the Court is not concerned with any application, save the application to revisit the Court's judgment. Therefore, while this has been advanced as a basis upon which the Court ought to re-enter the strike off proceedings, the Court makes no observations or comments or conclusions on this and has considered the issue surrounding the

[REDACTED] complaint only in the context of this application. As with all observations, findings and comments of the Court in this judgment, the observations of the Court on this issue are not and should not be considered to have any effect or impact on any other application which may be pending.

62. Mr Murphy's evidence was that the complainants in the [REDACTED] matter lacked credibility and that [REDACTED] the complainants were prosecuting him with the help of Solicitor X. He contends that the full extent of this was unknown because of the destruction of documents, that a decision had been taken to not give him access to complainants' files and the files had been mislaid. He says that documentation, to which he was entitled and which were omitted from Solicitor X's affidavit of discovery, would have assisted him. He particularly refers to paras. 155 to 176 of his witness statement. His contention is that Solicitor X deliberately did not make discovery of matters that would have helped him and that these allegations of misfeasance had not been denied. He contends that had he been in possession of this documentation, which he believes would have assisted him at the hearing before the Tribunal, the outcome would have been very different. He also alleged at para. 236 of his witness statement that Mr Law's affidavit of 30th May, 2016 was misleading, and that Mr Law was in Court and could have controverted this. His submits that rather than trying to establish the truth of the matters which might disclose unpalatable failings on the part of the Society, they decided to stand over all of the impugned findings and to take whatever steps were considered necessary to prevent him from getting a hearing.

63. The Society point out that there was no obligation on the Court to address each and every matter arising at trial and that, in any event, during cross-examination, it was made clear that the claims of improper behaviour and motivation on the part of the Society were rejected. Further, as a matter of law, it is submitted that there is no obligation on the Court to accept as proven every uncontested allegation.

64. While it is true that not every allegation made by Mr Murphy has been expressly referred to in the principal judgment, the Court acknowledged at para. 401 that many complaints were made by Mr Murphy regarding the handling of the *[REDACTED]* complaint. The Court proceeded to make a fundamental finding that the principal cause for the difficulties which Mr Murphy encountered was his failure to engage in correspondence in a timely manner and to attend meetings, when his case could have been put and points raised at relevant times. The background to the *[REDACTED]* complaint was outlined at para. 73 *et seq* and the Court's conclusions are contained at para. 401.

65. I am not satisfied that any suggested error which the Court may have made, either by failing to expressly address each and every complaint of Mr Murphy or concerning discovery, are fundamental errors which go to the root of the judgment. The Court accepts the respondent's submission that the key elements of the *[REDACTED]* issue were addressed by the Court. Further, the findings of the Tribunal were accepted by the plaintiff before the President of the High Court and, in any event, the Court concluded that the principal cause of his problems with this issue arose from his own conduct. If an issue arose surrounding discovery, it ought to have been raised at the appropriate time. No such issue was raised before the trial, during the hearing or after the hearing and prior to judgment.

Letters wrongfully removed from Mr Murphy's files in 2001 and the undertaking as to damages.

66. Mr Murphy maintains that certain documents should have been handed over at the interlocutory injunction stage in 2002 or at other times, such as during the Data Access Request or in Mr O'Dowd's witness statement. The documents were produced at the 11th day of the hearing when Mr O'Dowd was being cross-examined. Mr Murphy maintains that these would have helped him prove that the interlocutory proceedings in 2002 were unnecessary, that there

was a lack of candour on the part of the Society and that this represented yet another example of misfeasance of public office. He says that the updated particulars of claim of 23rd October**,** 2017 would have included particulars of claim specifically in relation to the account's investigation. He submits that his witness statement would have been very different in this regard and that these documents would have been discovered in a particular category of the discovery application, which was discontinued, largely because the Society had rejected his contention that he had not received all documents to which he was entitled in his Data Access Request.

67. The Court considered the issue of the furnishing by the Society of an undertaking as to damages at para. 400 of the principal judgment as follows:

> "…*While I have some reservations in relation to the manner in which Mr. Murphy's undertaking was dealt with, I find it difficult to conclude that the onus of proof has been discharged by him to establish malice or bad faith on the part of the Society, in all the circumstances, including his contribution to the events. It seems to me that the same applies to the undertaking as to damages-it was one which was given in open Court and although the circumstances of its giving, whether it was extracted by the Court or volunteered by the Society, is not entirely clear, I do not believe that one could reasonably conclude that the making or giving of such an undertaking is evidence of malice*.

68. It is to be noted that Mr Murphy made a complaint to the Tribunal against Solicitor X in 2010 (DT/2010/82 SA) that she had instructed counsel to give such undertaking when she had no instructions or authority to do so. The Tribunal dismissed this application and this is the subject of a pending and deferred appeal. Nothing in the Court's observations on this issue are intended to be or should be construed as being a comment or observation on the said appeal which has yet to be determined. Any observation which the Court has made in this regard is confined to a consideration of the claim for damages for alleged misfeasance in public office,

the civil action, and as to whether the Court made a fundamental error in its conclusions in this specific regard.

69. The Court was aware of the substantial contentions of Mr Murphy when it delivered its judgment and considered the issue of bad faith in the context of the tort of misfeasance of public office. Again, it is to be observed that the documents in issue were produced on day 11 of the trial and no application was made *at any time* to the Court that the late production of these documents resulted in injustice or affected the manner in which the case had been progressed.

I am not persuaded that a fundamental error has been established in respect of any issue which arises in connection with the authority for such undertaking, or failure to provide documents.

Alleged deficiencies in and late Discovery- Authorisation for s.18 proceedings, counsel's advices memos, communications and Council Regulations - Fraud on the Court

(a) Section 18 proceedings.

70. Mr Murphy also submits that a fraud was committed on the Court by the failure of the Society to make appropriate discovery at the appropriate time. It is submitted that the Society and its officers were aware of the frailty in the issuing of the s.18 proceedings. It is contended that because appropriate data/discovery was not supplied by the Society at the appropriate time, this has led to an error by reason of the Court's failure to address these issues. It is submitted that this has resulted in a fundamental error in the judgment. It is also contended that the Court was incorrect in its conclusion that the proceedings were instituted only after the advices of counsel were obtained. Complaint is made that any reference to counsel's advice in a memo of 24th August, 2005, does not constitute counsel's advice. He submits that this is [Solicitor X's] memo of a meeting rather than counsel's advices.

The minutes of 1st February, 2006.

71. Mr. Murphy maintains that the alleged failure by the Society to make discovery of the relevant Regulations and minutes of a meeting of 1st February, 2006, resulted in there being no proper analysis conducted in the judgment of the authorisation for the s. 18 proceedings. It is argued that there was a deficiency in the hearing in this regard. It is submitted that it is impossible to say exactly what reasons *were* relied upon by the Society or what reasons *they say they were relying on* for the s. 18 proceedings and the attachment and committal proceedings.

72. While the memo of 1st February, 2006, was attached to Mr Elliot's witness statement, it is submitted that this was insufficient and should have been provided in an appropriate place in discovery. The memo records, *inter alia*, the following:-

> *"The Committee noted the complainant's letter of 27th January 2006 and enclosures. After carefully considering the matter, the Committee was of the view that there is really very little that the Society could do to assist [REDACTED]. Mr Colm Murphy appears to be out of the country and his practice is no longer extant. He does not hold a current Practising Certificate. Mr Conor Murphy has said that he never held the files relating to [REDACTED]'s property dealings. Accordingly, the Committee noted that [REDACTED] has retained a new solicitor, Declan Duggan and Co, Charleville, Co Cork. The Committee was of the view that [REDACTED] needs to perfect his title to various properties and that this is a matter in relation to which the Society cannot assist. The Committee recommended that [REDACTED] pursue the matter through his new solicitor.*

73. Mr Murphy also highlights a minute sent by Ms Latham to Mr Elliot on 1st February, 2006, which appears to have been prepared after the meeting of the Complaints and Client Relations Committee of the same date. He submits that had a decision already been taken to

institute s. 18 proceedings, Mr Elliot would have replied to this memo to confirm that this was the case. The memo includes the following sentence "*Mr Gerard Doherty, chairman of the Complaints and Client Relations Committee, asked me to refer the matter to you to discuss with the regulatory solicitors and advise as to whether there is any action that the Society should be taking against Colm Murphy in this matter."* Mr Elliot appears to have replied by memo dated 8th February, 2006, stating that there were a number of regulatory and disciplinary matters, in relation to Mr Murphy, which the Society may wish to pursue, including the concerns raised by the Complaints and Client Relations Committee. The memo continued "*however, it is currently not possible to locate Mr Murphy and consideration is being given to engaging the services of a private investigator to obtain information regarding Mr Murphy's whereabouts. The case has been dealt with by [Solicitor X] and I would ask you to contact [Solicitor X] regarding any further updates the Complaints and Client Relations Committee may require.*" Mr Murphy says that that this makes no sense in the light of the evidence of Mr Elliot at hearing, that the decision had been made to institute such proceedings in September 2005, a conclusion which the Court arrived at, at para. 383 of its principal judgment, where the Court stated that authorisation was obtained from the relevant Committees in September 2005.

74. Mr Murphy also refers to a memo of 28th November, 2007 of the Complaint and Clients Relations Committee where it was recorded that *"The Committee noted the Memo received from [Solicitor X] in relation to Colm Murphy and authorised the issue of the appropriate proceedings".* He further points to memos of the 16th and 21st February, 2007, which were produced very late in the day - on the last day of the trial – when evidence of many witnesses had already been given.

75. In his affidavit sworn on 12th March, 2021, Mr Elliot refers to a minute of Regulation of Practice Committee, Vice Chairman's Division, dated 8th September, 2005 which was included in discovery. This records that the Vice Chairman's committee meeting took place on

8th September, 2005. It also records that a number of queries in relation to Mr Murphy's practice remained outstanding which included the filing of a closing accountant's report, clarification as to who was in charge of the practice from 1st January, 2005 to 1st July, 2005 and clarification of the location of files not taken over by Mr Conor Murphy and Ms Catherine Healy. It further records that the Society had received information to the effect that the Solicitor may be practising illegally. It concluded by saying that "*the Committee noted the documentation and decided that the s.18 application should be made to the High Court in respect of the solicitor seeking relief in respect of all matters which remained outstanding which is not been dealt with by the solicitor".*

Mr Sheehan's memorandum.

76. In his witness statement made in December 2017 in advance of the trial, Mr Elliot said as follows at para. 31:

> "*On 13 April 2005 Edward Sheehan (lnvestigating Accountant) sent a Memorandum to Linda Kirwan in which he stated that during an inspection (of another firm) in Kenmare he passed Mr Murphy's offices and noticed that a name plate bearing Mr Murphy's name was on the external wall of the office. He also said that during his inspection of the (unnamed) practice he inspected a file which involved a transaction with Colm Murphy & Co' Mr Sheehan stated that there was a letter on the file from Colm Murphy & Co dated 4 April 2005 and that Mr Murphy's name appeared on the letterhead as principal of the firm**(.)** Copies of Mr Sheehan's Memorandum and the letter dated 4 April 2005 are attached at Appendix 11. Again, it is evident that the above letter was sent despite the fact that I had specifically advised Mr Murphy to remove his name from his letterhead."*

77. On 14th March, 2007 [Solicitor X] wrote to Solicitors for [REDACTED]. The letter is stated to have relevance to the initiation of the s. 18 proceedings and the proceedings for the enforcement of the orders subsequently made, the attachment and committal proceedings. The letter stated as follows:

> *"Dear Mr Moriarty,*
>
> *I refer to our conversation this afternoon and enclose the file relating to the purchase of 20 a Ashgrove, Kenmare, Co Kerry Folio 2321F Co Kerry.*
>
> *You will note that there is a solicitor's undertaking in favour of Allied Irish Banks. There is no evidence on the file that this has been discharged. In these situations, the Society advises against the new solicitor taking over the undertaking and recommends the following undertaking:*
>
> *I undertake to use reasonable endeavours to put you in as near a position as possible to that in which you would have been had there been compliance with the original undertaking given by the former practice on/approximately…*
>
> *I note that the deed of transfer has not been stamped or lodged for registration and also that there are two declarations signed by the vendor, Donal Brendan O'Connell, which were not declared by him. The Society is aware that Mr O'Connell is a Ward of Court. His Committee is Frank O'Connell of O'Connell and Company, 55 Grand Parade, Cork.*
>
> *I would be obliged if you would acknowledge receipt of this file and documents in due course.*
>
> *Yours sincerely,*
>
> *[Solicitor X]"*

78. Mr Murphy believes that this letter is of importance in a number of respects. To understand the background, he points out that [REDACTED] had made two complaints against him. The first complaint was made on or about 27th October, 2005 regarding an alleged failure to register the title to three properties. A second or new complaint, as described in his affidavit, was initiated by letter of 10th January, 2007. It will be recalled that in that letter, [REDACTED]'s Solicitor enclosed a copy of a transfer and suggested that [REDACTED] had been the victim of a fraud. He inquired as to what steps the Society would take to make sure that he did not suffer any further loss. This document was stated to be a transfer to [REDACTED] of the lands in Folio 2321F Co Kerry. This land had been owned by Donal Brendan O'Connell who was made a ward of Court shortly after the purported transfer. Mr Murphy says that there is a connection between the letter of 14th March, 2007 and the initiation of the s.18 proceedings. He avers that one is only alerted to this connection by an analysis of all matters relating to [REDACTED] and in particular the contents of memos of the meeting of 1st February, 2006, which he contends was withheld from him for 12 years. It is submitted that it is clear from those minutes that the old complaint had been dealt with, that [REDACTED] was advised that the Society could not assist him and that he should pursue the matter through his new Solicitors. It is submitted that the failure to provide this memo to Mr Murphy is all the more curious when one considers that apart from having the minutes of the meetings, Mr Elliot, because of his role as regulator, was sent the minutes of the meeting by Miss Latham on 1st February, 2006. Mr Murphy points out that when [Solicitor X] issued the s. 18 proceedings she included the old [REDACTED] complaint even though, as it now appears, the Law Society closed the file on 1st February, 2006. He maintains that the Society engaged in deception. The [REDACTED] complaint was still included when the *ex parte* application for substituted service was made in October 2006. Further, on 31st January, 2007, the Society, without explanation, said that they were not proceeding with any relief in respect

of [REDACTED]. It is contended that at that stage [Solicitor X] should have informed the Court that the [REDACTED] complaint should not have been included in the s. 18 proceedings. He avers that when [Solicitor X] wrote to him on 13th February, 2007, she was aware that she was writing on behalf of the same [REDACTED] who the Society had said they could not assist the year before. In response to that letter, Mr. Murphy says that he wrote to [Solicitor X] and pointed out that [REDACTED] had made a report to the Law Society in relation to other lands in 2006 and it was curious that he did not mention these lands in that complaint. He submits that [Solicitor X] should have considered this new complaint by [REDACTED] in the context of the old complaint. His letter of 13th February, 2007, had stated to [Solicitor X] that the document was a forgery and suggested that she contact Solicitors for [REDACTED] and asked them when he had paid the deposit or a closing balance for the land. None of these suggestions were followed up. No enquiry was made of [REDACTED] or his Solicitors.

79. Following this, he says that [Solicitor X] then decided to proceed of her own volition with what he described as a very serious action of having him, an officer of the Court, attached and committed to prison. He contends that [Solicitor X] knew about the old complaint by [REDACTED] from 2005. She knew that the new complaint related to a purported transfer of 20 September, 2004. She also had suspicions in relation to the [REDACTED] matter. She should have made further enquiries and he believes that it was not appropriate for her to issue attachment and committal proceedings.

80. Mr Murphy points out that the s.18 proceedings had been adjourned until 28th February, 2007, to monitor compliance. In the meantime, the Society had received this further communication from [REDACTED] and [Solicitor X] must have known that there were two claims for the title to the same piece of land. He also contends that [Solicitor X] proceeded without any authorisation from the appropriate committees to bring attachment and committal proceedings based on, as he described it, the joint complaints and the purported position of the

ward. He avers that there was no valid reason to take the attachment and committal proceedings other than the [REDACTED] complaint because the s.18 proceedings had been adjourned for four weeks to monitor compliance. He submits that Solicitor X's affidavit did not disclose the old [REDACTED] complaint or the minutes of the meeting of 1st February, 2006. She had the opportunity to contact [REDACTED] or his Solicitor before the first hearing date for the attachment and committal which was the 14th March, 2007. The matter was in Court on that day and he says that he was subject to a severe rebuke by the presiding judge. On the same day, 14th March, 2007, Solicitor X sent the title documents in respect of folio 2321F Co. Kerry to the Solicitors for [REDACTED] having, he says, decided that [REDACTED] was entitled to the documents. He maintains that one can conclude from this that Solicitor X was no longer relying on [REDACTED]'s position or the forged document. He maintains that the attachment and committal proceedings were based solely on a forged document and although the Society did not create the forgery, they turned a blind eye to it and should not have proceeded without making some enquiry and that they proceeded without proper authorisation from the Society. He maintains that Solicitor X should have informed the Court on 14th March, 2007, of what had been done in relation to the title documents, and that the old [REDACTED] complaint had effectively been closed at a meeting of 1st February, 2006. He further points out that the [REDACTED] issue was before the Court until the matter concluded on 17 June, 2008.

81. Mr Murphy states that he did not receive the minutes of the meeting of 1st February, 2006 until December 2017. There were numerous prior occasions on which the Society could have produced the minutes but did not do so. These included the time of the original s.18 proceedings, at the hearing of the application for substituted service, at the hearing of the s.18 application on 31st January 2007, in the affidavit for attachment and committal, at the hearing of 14th March 2007, and at the hearing of 9th May 2007 where counsel use the word "temerity" to describe Mr Murphy's suggestion that the document was a forgery. He maintains that this

document ought to have been supplied in his Data Access Requests and in the affidavit of discovery sworn by Mr Elliot.

82. Mr Elliot, in an affidavit in reply, avers that the issues under consideration were raised at the plenary hearing and were considered by the Court and on which it has pronounced judgment. With regard to the [REDACTED] matter, and its part in the s.18 proceedings, this was addressed by the Court at para. 187 of its judgment. He gave evidence in respect of the letter on day 13 of the trial and he points to the Court's conclusions at para. 376 of the principal judgment in this regard.

83. Mr Elliot does not accept that by his failure to include the minutes of the Complaints and Client Relations Committee of 1st February, 2006, at which the 'old' complaint by [REDACTED] made in 2005 in respect of Mr Murphy was considered and where the Committee decided that it could not assist [REDACTED], amounts to the swearing of a false affidavit. He says that he complied *bona fide* with the order for discovery and that the minutes of the meeting of 1st February, 2006, were not identified as responding to category 1 of discovery sought. This category was narrowly confined to "*all documents that include correspondence, internal memos, emails and minutes of meetings relating to the decision to commence proceedings Law Society of Ireland v Murphy… (Section 18 proceedings) and the information made available to the person or persons responsible for making such decision, limited to documents generated no later than 11th of October 2006*". He submits that there was no basis for concluding that the minutes of the meeting of 1st February, 2006, related to or were relied on in the decision to commence the s.18 proceedings. In any event those minutes were appended to his witness statement of 8th December ,2017, and the contents of them were detailed at para. 47 thereof. It is averred that no conceivable prejudice was or could have been suffered by Mr Murphy in his preparation for the plenary proceedings and that no suggestion was made in the course of the hearing of the plenary proceedings, that the affidavit of discovery

was false, that Mr Elliot had committed deception or that any prejudice had arisen to Mr Murphy. In the circumstances, Mr Elliot avers that in truth, the basis for Mr Murphy asking the Court to re-enter the s. 18 proceedings appear simply to be that he disagrees with the Court's judgment.

84. Mr Elliot avers that the issue of such authorisation was dealt with in evidence in the plenary proceedings upon which he was cross-examined. He was also cross-examined in relation to the exercise of regulatory functions by the Society which had been detailed in his witness statement at para. 7. He gave evidence that in the context of the internal governance of the Society, regulations are issued by the Council of the Law Society who delegate various powers to Committees and in some cases to the Registrar of Solicitors. In evidence he said that the list of particular decisions that are reserved to committees were expressly set out in the Council regulations. The Court, at para. 60 of its principal judgment referred to the issue of authorisation and at para. 383, the Court observed, inter alia, "*when the matter came before the Court on 31st of January 2007, the transcript indicates that no issue was raised as to the appropriateness of the procedures employed, either by Mr Murphy or the Court. All proceeded on the basis that such exist existed*."

Discussion and Conclusion on issues arising from the s. 18 and Attachment and Committal proceedings.

85. While it appears that certain of Mr Murphy's submissions, particularly in relation to the reasons for the initiation of the s. 18 proceedings, are primarily directed at his contention that the s.18 proceedings are null and void, nevertheless the Court has confined its consideration of matters to the issue with which it is now concerned, being an application to review or set aside the principal judgment, and *only* in that context.

86. In light of Mr Murphy's submissions, it is not unreasonable to suggest that there is some doubt about the conclusion of the Court that authorisation for the s.18 proceedings was obtained in September 2005. The memos referred to suggest that the issue of authorisation was canvassed for a period thereafter. It is clear that the parties have taken strong positions on the issue of authorisation and in particular whether the Society failed to comply with, or misapplied, the appropriate regulations. The Court is satisfied, however, that it would not be appropriate to express any concluded view on this issue on this application. In this regard, the Court is satisfied that even if the principal judgment was in error in failing to afford the authorisation issue more fulsome consideration, nevertheless, it is not persuaded that this is an error of a fundamental nature going to the root of the decision and resulting in a denial of justice. It is repeated that no issue was raised on this when the matter ultimately came before the Court and of significance to this issue also is the Court's ruling on collateral attack.

87. Having considered the complaint of Mr Murphy in connection with the letter of 14th March, 2007, I am satisfied that any complaint which he may have in relation to the significance of that letter, or that its significance may have been lost because of any alleged failure on the part of the Society to include it in the affidavit, or the weight which the Court may or may not have placed upon it either because of the manner in which it was presented or that it might, on reflection, have been afforded greater weight and significance, do not go to the root of the judgment nor, in my view, is or was it fundamental to the reasons for the decision. The Court, at para. 187 of the principal judgment recounted the evidence of Mr Murphy, that on 14 March, 2007, [Solicitor X] forwarded the file relating to the folio to [REDACTED]'s Solicitors. At para. 376 of its judgment, the Court stated that it was unable to conclude that there was adequate evidence to support the proposition that the motivation for the continuance or adjournment of the attachment committal proceedings and the s. 18 proceedings was the [REDACTED] complaint. The Court observed that a significant issue remained outstanding in relation to the

preparation of closing accounts and receipt of a report which had been outstanding for some time. This had revealed a deficit in the client account which had to be dealt with by Mr Murphy. It is also of note that Mr Murphy consented to 12 orders sought by the Society on 31st January, 2007.

88. With regard to the Sheehan memorandum, it is clear from Mr Elliot's statement, referred to at para 78 above, that Mr Murphy either had this memorandum or was aware of its existence for several months before the trial commenced. No application was made to the Court in relation to deficiency in discovery in this regard. I therefore, do not see any basis for Mr Murphy's complaint in relation to the alleged failure to supply this document in discovery, either on the basis that there was a fraud perpetrated on this Court, or that the failure to receive this document at an earlier time, has led to an error in the judgment of the Court of a fundamental nature.

89. In so far as it is contended that an injustice arose because of the late production of a number of emails at trial by Mr Elliot in relation to the initiation of the attachment and committal proceedings, being emails from Solicitor X to Linda Kirwan dated 16th of February, 2007 and 21st of February, 2007, again, these documents were in fact produced at trial and no application was made in connection with any suggested injustice or prejudice arising from alleged late disclosure of these emails. The substance of the complaint is that these emails would have confirmed that Solicitor X had no authority for the institution of the attachment and committal proceedings, that in effect she was on a solo run. It was also contended that these documents, had they been produced at an earlier time, could have been used to form the basis of the cross examination of all witnesses including Ms Kirwan. It is now contended by Mr Murphy that they were crucial to his preparation of the case and that he would have been able to tie this action by Solicitor X to the meeting of 1st February, 2006, to research the legitimacy of proceeding without authority and it would have forewarned him and the Court about the

importance of the letter of 14th March, 2007. He also suggests that the updated particulars of claim of 23rd October, 2007, would have been entirely different. He suggests that his witness statement would have been very different and that all of this supported**,** or was further proof of, misfeasance in public office. The thrust of Mr Murphy's submissions is that had he known about these emails, it may have been contended and proved that Solicitor X had effectively gone on a solo run without appropriate authority.

90. The first matter to be noted is that Mr Elliot was closely questioned in relation to these emails and on this issue, and no application was made to recall any witness for the purposes of further examining him or her, or indeed to seek to amend the pleadings, as a result of the emergence of these emails in his evidence. A period of two months elapsed between the time of the completion of the evidence on this aspect of the claim and the submissions of the parties and no application was made during this period for the Court to further consider the effect and import of the disclosure of the emails during the course of Mr Elliot's evidence.

91. The issue of the attachment and committal proceedings was addressed from para 370 *et seq* of the principal judgment. The application was before the Court on a number of occasions and was adjourned from time to time. Issues arose in connection with closing accounts and in this regard a significant issue remained outstanding concerning a report which revealed a deficit in the client account which had to be dealt with by Mr Murphy. Therefore, any complaint that Mr Murphy has in connection with these emails must be seen in context. I am not satisfied that it has been established that an error on the fundamental nature has been made by the Court in its assessment of this aspect of Mr Murphy's claim or in consequence of the failure to produce these documents at an earlier time.

92. Even if it be the case that applicable regulations were not complied with or were misapplied, or that there may be room for debate on this or as to when authorisation was obtained, the issue in relation to authorisation, in so far as the claim for damages for

misfeasance of public office made in the civil proceedings is concerned, must be considered in context and particularly in the context of what occurred at the hearing of the s.18 proceedings.

93. The important fact is that when the s. 18 proceedings came before the Court they were addressed by all parties without issue being taken in relation to the procedures employed by the Society at that time. See the principal judgment at para. 383. All proceeded at that time on the basis that the Court had jurisdiction. Further, as the Court also indicated at para. 387 of its judgment, any substantive issues that might have arisen were either addressed or were capable of being addressed when the matter was before the Court in 2007. Also, for similar reasons, in the Court's view the issue of *when* authorisation was provided or obtained is not central or of significant import to the Court's conclusions.

94. I am also not satisfied that the Court has fallen into an error of a fundamental nature in relation to its observations on counsel's advices being obtained before proceedings were instituted. Advices of counsel may be given in writing or orally. While some may consider it preferable that advice of this nature be documented by counsel, there is nothing to suggest that this is a necessary requirement, and I am not satisfied that an error in the Court's judgment has been established in this regard or that any such error was of the nature required on this application.

95. In the circumstances, and quite altogether apart from the Court's conclusions in relation to the central importance of its ruling in the collateral challenge aspect of the claim, the Court is not satisfied that any complaint regarding the Court's consideration of these issues goes to the root of its judgment or creates any injustice as submitted. It seems to me that any dissatisfaction which Mr Murphy has within the Court's judgment in these respects ought more properly be canvassed on any appeal which might be taken.

The Scope of the Order of Kelly P. in the context of complaints regarding discovery, Data Access and the alleged misleading of Hanna J.

96. As referred to earlier in this judgment, the order of Kelly P. defined the issues to be considered by this Court. The amended statement of claim preceded the hearing before Hanna J. but nowhere in the updated particulars as part of the claim for misfeasance of public office is an allegation made that the Society misled Hanna J. when the matter came before him in 2012. Issues concerning alleged deficits in discovery or Data Access Requests as addressed by Mr Murphy in his witness statement did not form part of, nor were they particularised as, allegations of misfeasance of public office. Further, to the extent that the Court addressed issues of discovery, the Court concluded at para 427 of the principal judgment that issues concerning breach of Court processes ought to have been addressed by way of appropriate application at the appropriate time. No such application was made. By way of further observation, this Court was concerned only with liability and in so far as it is alleged that the conduct of the Society before Hanna J. led to delay/denial of justice, if liability had been established, then, on the face of it, such issues might have been capable of being advanced and addressed on the assessment of damages.

97. While it is suggested that deficits in certain aspects of discovery came to light post the order of Kelly J., nevertheless in so far as the consideration of these complaints is concerned, absent application in relation to an amendment of that order or in respect of alleged deficit in discovery, it is difficult to see how as a matter of principle the complaints made on this application in relation to the way matters proceeded before Hanna J., come within the ambit of the jurisdiction of the Court to revisit its judgment on the ground that the *Court has made a fundamental error* in accordance with the *Launceston* principles as developed.

98. Further, the Court is also persuaded by the respondent's submission that, in so far as complaints arise in relation to failure to comply with Data Access Requests, this is a matter for the Data Protection Commissioner and not this Court.

The approach of the Court to the analysis of the cause of action potentially created by distribution of compensation fund claim forms.

99. Whatever the manner of its pleading, this issue was advanced in the plaintiff's opening submissions under the heading "Actionable wrongs of the Society" at section I, para. 84 as follows:

> *"In the context of the proceedings to which Mr Murphy was then being subjected which suggests an improper motive on the Society's part, and of Mr McGrath's concession, and in any event, the circulating of forms suggesting dishonesty on Mr Murphy's part qua solicitor when there was no evidence therefor, is clearly defamatory. No issue of privilege arises. Even if qualified privilege were considered to arise, the context evidences malice to defeat any such purported defence"* (emphasis added)

100. The issue was also addressed at para. 18 of those submissions in the context of a consideration of the elements of the tort of defamation. In closing written submissions, it was submitted at para 35- "*.. .and in addition, abuse of power; the disclosures by Mr O'Dowd and Mr Murphy and the distribution of the compensation fund forms were defamatory and no occasion of privilege arises by way of defence*". The Society, in its closing submissions, addressed the matter in the context of defamation and qualified privilege.

101. On the face of it, therefore, the issue of the distribution of the compensation claim forms was argued, and therefore considered by the Court, in the context of the tort of defamation. Should the approach of the Court have been incorrect in so doing in light of the pleadings, no arguments were advanced to the effect that even if a *prima facie* defamatory statement was

made on an occasion of qualified privilege, in the context of the consideration of the tort of misfeasance of public office, the absence of malice was irrelevant and the tort would be complete regardless of any potential privilege that might arise. This is a concept which the Court would find extremely difficult to accept, absent greater argument and consideration of properly formulated submissions to that end. In all of the circumstances, I am not satisfied that it has been established that the Court fell into error of the fundamental nature in this regard.

Combative Language.

102. To the extent that Mr Murphy highlights emails and internal documentation where words such as "vigorously pursued", "playing with fire" and documents expressing similar sentiments are concerned, while the Court may not have expressly addressed these documents on an individual basis, the Court considers that it addressed such internal documentation in a manner in which it considered it appropriate to do so. The Court observed at para. 430 of the principal judgment that "*the evidence also indicates that in response, the Society itself adopted a reciprocal combative approach in certain respects. The contents of internal letters and the manner in which, on occasion, matters were presented in Court bear this out. This can only but have fuelled the sense of grievance that Mr Murphy feels*." The emails and internal documents referred to by Mr Murphy reflect such combative approach.

103. To the extent that Mr Murphy considers that the Court ought to have gone into each and every email and internal memoranda, while bearing in mind the principles expressed in *Doyle v Banville*, if an error was made by the Court in this regard, the Court is not satisfied that the errors were of such a nature as to go to the root of the judgment or were fundamental to the reasoning of the decision. I am satisfied that the complaints made by Mr Murphy in this connection are based on his subjective assessment of what the Court ought to have done and the manner in which these various internal memoranda and email ought to have been

considered. In my view, this effectively is a complaint regarding the consideration and weight which the Court ought to have attached to this documentation, and I am not satisfied that any error in the weight or consideration to be attached to these documents are such as to go to the root of the judgment. But even if I am incorrect in this, the fact remains, as the Court concluded in the principal judgment, Mr Murphy's own actions contributed significantly to the difficulties in which he found himself with the Society. It seems to the Court that to place the emphasis or weight now sought to be attached to these matters by Mr Murphy would be to fail to contextualise them. This is particularly so in the context of Mr Murphy's acceptance of and consent to orders in the s. 18 proceedings and the acceptance of the complaints placed before the President of the High Court in the strike off proceedings. In my view the matters now raised are ones to be canvassed on any appeal that might be taken.

Targeting Solicitors.

104. To the extent that it was contended that Solicitors were being targeted, no evidence was adduced at the hearing of such targeting, nor indeed was any evidence which would suggest that Solicitors felt that they could not act for Mr Murphy. Mr Murphy was fully and ably represented throughout the trial and no complaint of substance was made to this Court or evidence adduced of any issue that may have arisen in respect of the targeting of Solicitors in such a manner that they felt either uncomfortable or that they felt unable to act for him. The complaint which is made regarding representation on this application is not, in my view, of assistance in the consideration of the substance of the application concerning the decision of the Court delivered following a hearing where he was represented. Again, I am satisfied that similar considerations apply here as they do to the emails and communications referred to above.

Lynch Report.

105. Mr Murphy maintains that the evidence of the document analyst, Mr Lynch, in the form of the report that he prepared on 22nd September, 2010, which was admitted and not contested, was not analysed properly by the Court. In this report, Mr Lynch expressed his opinion in relation to the transfer. The issue of Mr Murphy's complaint regarding the document in the [REDACTED] matter being a forgery was addressed by the Court, and the respondent's response to this issue when it was before the then president of High Court, at para. 369 et seq. of the principal judgment. In the principal judgment, the Court noted at para. 68 that [REDACTED] had in fact been in contact with the Society as recently as 2016. At para. 369 the Court noted that it was not part of the remit of the Society to determine whether the document was a forgery. The point now raised by Mr Murphy is not entirely clear but to the extent that it is an invitation to the Court to conclude on this application that it fell into error in the principal judgment in not arriving at a conclusion as to whether the document was a forgery, would seem to me to involve the Court engaging in the precise activity which was the subject of the Court's comments at para. 369 of the principal judgment. Further, I am satisfied that even if the Court fell into error in not conducting a more detailed analysis of Mr Lynch's report, this is not a fundamental error that went to the root of the decision.

The Undertaking.

106. Mr Murphy submits that there were four fundamental errors made by the Court in relation to its consideration of the undertaking issue. They are as follows:

a. There was no undertaking and the judgment is in error in failing to analyse how the undertaking came to be there. There was no evidence before the Court that [Solicitor X] was unable to give evidence in relation to what occurred. The Court was in error in its analysis of the assessment of how it came to be that no undertaking was allegedly

given. He submits that this became a fraud on the Court because there was more than ample opportunity to rectify this error and the number of occasions upon which he says that such opportunity arose are outlined in exhibit CMFM2 of his grounding affidavit - particular emphasis is placed on what occurred at the Tribunal hearing of 10 July, 2008, when the order was produced. He submits that Ms Kirwan, as of 10 July, 2008, must at least have suspected that she was incorrect . The order was silent in respect of the undertaking.

b. The particular emphasis is placed in this regard on the evidence of Ms Kirwan on day 8, where at page 467, she was asked about whether she was concerned about the consequences of an error that she had made in an affidavit which she had sworn. She replied that *"I'm not particular concerned about the consequences for the reason I said earlier on, that there were two issues: Was I in Court? What happened in Court?, and I still say that my recital of what happened in Court was clearly based on [Solicitor X's]attendance, not on my personal knowledge".* Mr Murphy says that the consequences are of considerable concern to him.

c. The Court failed to attach sufficient weight to the issue of the undertaking, in circumstances where it is submitted that it is not at all clear that Mr Murphy would have been struck off, absent the evidence which was then adduced before the Court in connection with the undertaking.

d. The Court misconstrued the evidence adduced at the Solicitors Disciplinary Tribunal on 25th April, 2008. It is submitted that he never accepted that he had given such an undertaking, before the Tribunal on that date. Mr Murphy submits that an answer to a question which had been given by him was elevated into the status of confirmation by him, suggesting that he accepted he had given an undertaking. The question which

appears at page 149 of the transcript of the Tribunal hearing of 25th April, 2008, states as follows:

> *"Q. Now, you failed to attend a further meeting of the registrar's committee on 13 September 2003, that was under an undertaking given by counsel to the Pres of the High Court, do you see that?*
>
> *A Yes"*

107. In its judgment, the Court, stated at para. 388 *"having said that, however, when Mr Murphy was before the Tribunal on 25th of April 2008, in answer to a question put to him by counsel that he failed to attend a further meeting of the Registrar's Committee on 30 September, 2003 and "that was under an undertaking given by counsel to the Pres of the High Court" , he said "yes"."* He submits that rather than being an expression of understanding of the question was being asked, the Court misconstrued this as being an affirmation that the undertaking was given. He submits that the Court based its findings on the construction placed on this by the Society, rather than what was actually evident from the transcript at the Tribunal.

108. Mr Murphy submits that the overall impact of the undertaking was not afforded sufficient weight by the Court. He submits that the issue regarding the undertaking was a fraud on the Court permitted by two officers of the Court. They were believed as regards the contents of the Court order and when it became clear, on the production of the Court order, that a mistake had been made, rather than saying so, the insistence that an undertaking had been given was perpetuated.

109. With regard to what transpired before the President of the High Court in the strike off proceedings, Mr Murphy submits that the Court ought not look at his admissions in isolation and that, by way of repeated reference to the undertaking, the Society engaged in oppressive behaviour and he found himself in a poor position at that time.

110. At para 389 of the principal judgment the following was stated:

"The order of the Tribunal which was signed on 27 January 2009, reflects a finding by the Tribunal that Mr Murphy was guilty of misconduct in a number of respects including that which is referred to at para (F) of the findings, that he "failed to attend a further meeting of the Registrar's Committee on 30 September 2003, notwithstanding the undertaking given by his counsel to the Pres of the High Court that he would attend meetings of the Registrar's Committee". On 21st of April 2009, the matter was before the Pres of the High Court and this was one of the findings of Mr Murphy's counsel stated that he accepted wholeheartedly and wished to apologise for. It seems to me, therefore, that any confusion that may have existed in respect of what was said or not said undertaken or not undertaken, when the matter was before the Court in 2003 was contributed to by both parties.

111. Having considered Mr Murphy's submissions, it seems to me that even if there is merit in the point made by Mr Murphy concerning the Court's interpretation of what he said at the Tribunal, to consider, in isolation, any complaint he may have in relation to the Court's interpretation of the exchange at the Tribunal in 2008 and to attach prime importance to this would be to ignore the observations and findings of the Court outlined at para. 389, as recited above. It appears to the Court that Mr Murphy seeks to highlight the Court's observations at para. 388, but does so without context, and in particular the Court's recitation of what occurred before the President of the High Court at the strike off proceedings on 21st April, 2009. It is difficult to see that any conclusion by the Court in relation to the confusion that may have existed and the extent to which the same was contributed by both parties, might be altered to any significant degree even in the light of any necessary reassessment by the Court of its interpretation of the events which transpired at the Tribunal on 25th April, 2008.

112. Whatever the correct interpretation of the evidence given by Mr Murphy to the Tribunal and his answer to the question posed may be, there can be no doubt as to what occurred before the President of the High Court on 21st April, 2009, when a charge that there was a failure on his part to comply with the undertaking was wholeheartedly accepted on his behalf by his counsel.

113. In this regard, it also appears to the Court that, with the benefit of the decision of the Court on the issue of the undertaking, a matter which was in dispute during the evidence in the civil case, Mr Murphy seems to now retrospectively reconstruct matters as if it was plain to all from the beginning that no such undertaking had been given. In the Court's view, to accept this proposition in the context of the Court's assessment of the allegation of misfeasance of public office is also to ignore the fact that breach of the disputed undertaking was accepted by Mr Murphy when the matter was before the President of the High Court in April 2009 and in the earlier affidavit sworn by him in support of that application . Mr Murphy points out that he was under pressure at that time and that the repeated statements had been made by the Society and its officers, regarding the breach of the undertaking, were oppressive. This would seem to at least imply that the Court should ignore what was deposed to by Mr Murphy on affidavit sworn on 28th of February, 2009 and what was said on his behalf in open Court when the matter came before the President in April 2009. It will be recalled that at para. 2 of the affidavit Mr Murphy averred:

> *"At the outset of this Affidavit and Appeal I would like to point out to this Honourable Court that I fully accept the findings of the Disciplinary Tribunal. I acknowledge that I have made mistakes, mistakes for which I unreservedly apologise…"*

114. Later, at para. 23 of the affidavit he repeated that he accepted the findings of the Tribunal but asked the Court to look at the overall situation. He continued "*I regret and apologise for any actions where I have acted inappropriately".*

115. Mr Murphy also accepted that he was advised by solicitor and counsel, advice with which he takes no issue. Therefore, to now argue that the Court should assess matters regarding the undertaking in the context of the claim for misfeasance in public office, without reference to what occurred at that time, would be to ignore the facts. I am not satisfied that, even though the Court has come to the conclusion that no undertaking was given, that the maintenance by the respondent of their position in relation to the undertaking should now be construed as an act of fraud on the Court such that the principal judgment ought to be reviewed or set aside. I am also not satisfied that the Court's interpretation and conclusions on this issue constitute a fundamental error which goes to the root of the decision.

The Assessment of Witnesses and their conduct.

(a) Solicitor X and her health

116. It is submitted that the Court failed to properly analyse Solicitor X's actions, memos, attendances, emails, actions and conduct in allegedly misleading the Court, and the consequences of those actions. It is submitted that it has now been demonstrated that the s.18 and strike off proceedings should be re-entered. To this end Mr Murphy exhibits a letter which he wrote to the Society on 25th May, 2020, in which he catalogued 15 items. The letter commenced with the following sentence *"You will be aware of the conduct of [Solicitor X] is a very important element in my application to re-enter the strike off proceedings". Later, having listed the items he stated that these items must now be looked at in terms of the original strike off proceedings and those other proceedings relied on to obtain the order in the strike off proceedings".* In that letter Mr Murphy also made inquiry as to Solicitor X's medical condition. While this letter appears to have been written in the context of the application to seek to re-enter the strike off proceedings and prior to the within application being made, its contents are being relied on in this application to revisit the principal judgment. Again, this is

illustrative of the risk of conflation of issues relative to each application, and with that caveat and repeating that the Court's observations are made on these issues only in the context of this application, I am satisfied that, in substance, these complaints are more concerned with the weight which the Court attached to these issues. I am not satisfied that any alleged failure by the Court to expressly address each and every point made, or any error that it may have made in this regard, are not errors that go to the root of the judgment. They are issues which have been addressed either in this judgment, or more substantively in the principal judgment and insofar as the claim for damages in the civil proceedings is concerned, the Court's observations in relation to the application of the doctrine of collateral attack appears to be applicable to a considerable amount of the complaints made in this regard.

117. To the extent that an issue is raised as to state of Solicitor X's health, no such issue arose at trial. It is difficult, therefore, to see how any failure on the part of the Court to address this issue could be said to be an error of the fundamental nature which goes to the root of the judgment.

(b) Linda Kirwan

118. It appears to the Court that the complaints made regarding the Court's assessment of the evidence of Ms Kirwan and the impact of her mistake, is in reality a complaint that the Court failed to attach particular weight to her evidence in a manner consistent with what Mr Murphy believes the Court ought to have done. Mr Murphy has prepared a schedule in relation to issues concerning Ms Kirwan's credibility and refers to observations made by other judges in other cases. Most of the issues addressed in the memo at exhibit CMFM7 have already been the subject of evidence, argument and agitation. In the Court's view, it is not the purpose of an application such as this to re-argue points of which the Court was aware and took into account in arriving at its conclusions in the principal judgment. The Court's assessment of Ms Kirwan was conducted not only on the basis of what was written, sworn and documented but also on

the basis of its assessment of her demeanour as a witness. Again, I am satisfied that any issue which Mr Murphy has in connection with the Court's assessment of the evidence of Ms Kirwan is for appeal. In addition, the Court find itself once again repeating its observations regarding the collateral attack issue. The Court is not satisfied that any error which may have made was of such a fundamental nature as to go to the root of the judgment in the civil proceedings.

(c) Mr Elliot

119. A principal cause of complaint by Mr Murphy is that Mr Elliot is said to have misled the Court including but not confined to issues of data access and discovery. Some of these issues have already been addressed. They are addressed at length in exhibit CMFM8 attached to Mr Murphy's affidavit sworn on 24th July 2020. Mr Murphy's complaint concerning disciplinary history revolves around affidavits sworn by Mr Elliot who said on a number of occasions that the Tribunal had made two findings of misconduct (in the [REDACTED] matter), when in fact there was only one. This is an issue which had been addressed in another judgment of this Court pertaining to Mr Murphy's application for an extension of time within which to appeal the [REDACTED] matter.

120. To the extent that documents were produced at trial, of which Mr Murphy was not previously aware, in particular the letter of 9th December, 1999, in relation to the [REDACTED] complaint, the Court commented particularly on this letter and para. 347 of the principal judgment. When this complaint is viewed in context of the Court's conclusions, it seems to me that what is complained of is an attempt to re-argue a point already made. I am not satisfied that it has been established that a fundamental error was made by the Court on this issue. It should be observed, that the [REDACTED] complaint has been the subject of separate consideration by the Court in its judgment on Mr Murphy's application for an extension of time within which to appeal that matter.

121. The Court is satisfied that any alleged error made by the Court in the assessment of Mr Elliot's evidence is a matter for appeal. The issue concerning the authorisation for the s.18 proceedings has already been addressed in this judgment. The Court repeats its observations regarding discovery and also its observations on what fell for consideration by his Court within the terms of the order of Kelly P.

Complaints about Counsel.

122. I am also satisfied that any complaint made by Mr Murphy against counsel who appeared in this case, particularly in relation to what occurred before Hanna J., do not fall for consideration within this application for reasons which I have already explained. Any complaint regarding what was said before Hanna J. does not fall within the parameters of what this Court was required to consider at the trial of this action. Nothing contained in this judgment, however, should be interpreted as giving credence to such complaints. They are strongly opposed. They do not arise for consideration. The Court is not satisfied it has been established that any fundamental error arises in this regard.

Cumulative Assessment.

123. At para. 23 of his grounding affidavit, Mr Murphy sets out a number of findings made by the Court and avers that it was a fundamental error that the judgment looked at every finding of fact it made against the Society separately or in isolation. He avers that the finding should be analysed and considered in conjunction with each other.

124. While the Court may have been critical of the respondent in respect of certain issues, none were considered by the Court to be such as to alter its ultimate conclusions on those issues. It is difficult to see how those conclusions ought be displaced by a cumulative assessment or that such assessment should result in a different conclusion or conclusions on those issues,

when none, individually considered and considered in context, would have done so. I am not satisfied that any error arises which goes to the root of the judgment.

Conclusions

Fundamental Errors

125. The jurisdiction of the Court to revisit or set aside its judgment is a limited one and must be exercised sparingly. The principal of finality must be respected. An application such as this ought not to be used as an occasion to agitate matters already considered in a judgment. Nor should it be used as a form of appeal to a decision maker to reconsider his or her reasoning because of dissatisfaction with the result. Any error which must be established must be one which is so fundamental as to have an effect on the result and thereby result in the denial of justice. The bar is a high one. For the reasons outlined in the course of this judgment, I am not satisfied that the issues raised by Mr Murphy are such as to warrant the exercise of that jurisdiction. The suggested errors, even if accepted, are not of a fundamental nature that go to the root of the judgment such that the Court is persuaded that there has been a denial of justice.

Fraud on this Court

126. It is evident that prior to the case coming on for hearing the parties engaged in a long and detailed pre-trial discovery process. Interrogatories were raised and replied to. If any issue had arisen in respect of any particular document or categories of document this ought to have been addressed during the course of the proceedings and/or before judgment. To the extent that complaint is made of late disclosure or that documents were only produced at trial, for reasons outlined above, I am not satisfied that these complaints are such as to have an effect on the reasoning in the judgment or that it has been established that the Court may have been led into error of a fundamental nature.

127. To the extent that the application involves allegations of fraud *on this Court*, these allegations largely are focussed on issues of discovery and disclosure. The respondent maintains that many of the "disputed documents" were not such as to be responsive to discovery. No application was made to this Court in relation to any failure to comply with discovery orders, or indeed to seek further and better discovery. The Court is satisfied that insofar as complaint is made in respect of particular individual documents are concerned, most were either in Mr Murphy's possession or he was, or became, aware of their existence prior to or during trial. Those that may not have been evident at trial, such as for example the regulations, whose discoverability is in any event contested, were not fundamental to the Court's reasoning nor, in the Court's view, and for reasons outlined above, impact on the decision in the manner contended for.

128. An allegation of fraud in civil proceedings must be specifically pleaded and proved. To the extent that it is permissible for the issue of fraud to be agitated on this application, I am not satisfied that Mr Murphy's complaints reach the required threshold.

129. In all the circumstances I must refuse the relief sought.