AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000068

Clarke C.J.
O'Donnell J.
Dunne J.
Charleton J.
Baker J.

Between/

BARRY SHEEHAN PRACTISING UNDER THE STYLE OF BARRY SHEEHAN, SOLICITOR

Appellant

AND

SOLICITORS DISCIPLINARY TRIBUNAL

AND

BERNARD BINGHAM & VIOLA BINGHAM

Respondents

AND

THE LAW SOCIETY OF IRELAND

Notice Party

Judgment of Miss Justice Dunne delivered on the 16th day of September 2021

Introduction

1. In a judgment delivered on 26th March 2020, the Court of Appeal ([2020] IECA 77) upheld the judgment of Kelly P. of the High Court ([2017] IEHC 643), concerning the scope of the statutory appeal provided by s.7(11) of the Solicitors (Amendment) Act 1960, as substituted by s.17 of the Solicitors (Amendment) Act 1994, and amended by s.9(f) of the Solicitors (Amendment) Act 2002, and whether in the course of the statutory appeal to the High Court the solicitor whose conduct was at issue could challenge the first-named respondent's ("the Tribunal" or "the SDT") jurisdiction to make a finding of professional misconduct against the appellant in the performance of his duties acting as a solicitor for the second and third-named respondents ("the Binghams"), the High Court having rejected this argument. This appeal in essence concerns the breadth of the statutory appeal under the Solicitors (Amendment) Act 1960 as amended, and whether a party seeking to appeal a decision can raise an argument that the issue is *res judicata*, or whether such grounds are precluded from challenge under the statutory scheme and should be brought only in accordance with O. 84 of the Rules of the Superior Courts ("RSC").

Grant of Leave

2. On the 15th December, 2020, this Court granted the appellant leave to bring an appeal. The Court considered that the case raised issues of general public importance. These related to the scope of the statutory appeal pursuant to s.7(11) of the 1960 Act, and whether the jurisdiction of the High Court, and on appeal, the Court of Appeal to consider if it was "proper for the … Tribunal to make the order" permits a review of and consideration of jurisdictional error, in particular, a plea of estoppel in *res judicata.*

Background

3. The Court of Appeal decision outlines the context in which this case arises. It is not necessary to describe in detail all of the events which caused the now fractious relationship between Mr. Sheehan and the Binghams. Suffice it to say that the Binghams originally instructed the appellant to act on their behalf in relation to a medical negligence claim arising out of the death of their son. Originally, the retainer was on a contingency fee basis but subsequently, the appellant sought to change the basis of his retainer from one of a fixed fee to an hourly rate but was prepared to continue to act on a contingency basis. The Binghams declined to accept his new proposals and accordingly, the appellant sought to come off record and he was granted leave to do so.

The First and Second Complaints

4. These complaints arise from the complex history of the relationship between the appellant and the Binghams, which resulted in the appellant asserting that he held a lien over their client file due to unpaid fees being due to him after he came off record. This culminated in the appellant bringing debt recovery proceedings against the Binghams in the Circuit Court seeking the recovery of costs alleged to be due to him for work he had undertaken on their file. They declined to pay on the basis of their original retainer, contending that no fees were due. The Binghams counter-claimed against the appellant for professional negligence and breach of contract and sought the return of their file for the purposes of continuing the prosecution of their medical negligence claim. In May 2012, these proceedings were heard in the Circuit Court (Her Honour Judge Flanagan), and both Mr. Sheehan's claim and the Binghams' claims were dismissed. The appellant appealed this decision to the High Court (Hanna J.), the Binghams did not, and the appellant subsequently withdrew his appeal, with the result that the order of the Circuit

Court was affirmed. Despite this, the dispute continued between the appellant and the Binghams. As a result, Mr. Sheehan retained the files and alleged that he had a lien over the files due to the outstanding fees. This was disputed by the Binghams. Meanwhile, between 2009 and 2014, the Binghams made complaints about the appellant to various bodies on three separate occasions; two to Committees of the Law Society, and one to the Solicitors Disciplinary Tribunal. On 13th January 2009, a complaint was made to the Complaints and Client Relations Section ("the CCRS") of the Regulation Department of the Law Society alleging misconduct against the appellant under a number of headings, including his exercise of a lien over the Binghams' files. On 27th May 2009, this complaint was rejected by the CCRS and no finding of misconduct was made. The Binghams brought this matter to the attention of the Independent Adjudicator, and this was disposed of on 17th July 2009.

5. Following the conclusion of the Circuit Court proceedings on 27th May 2013, the Binghams made a second complaint to the CCRS of the Law Society concerning Mr. Sheehan's exercise of a lien over their files. This complaint was subsequently referred to the Complaints and Client Relations Committee for consideration ("the CCRC"). On 11th March 2014, Mr. Sheehan objected to the investigation of this complaint on the basis that it was identical to the first complaint, and thus, he argued, the complaint was *res judicata*. Nevertheless, the CCRC made a determination in relation to the complaint. They held that the appellant could not exercise a lien over the Binghams' files following a decision of the Circuit Court to dismiss Mr. Sheehan's claim that there were fees due and owing to him. The CCRC directed Mr. Sheehan to hand over the files, but the appellant declined, alleging that this determination was *ultra vires* the CRCC. On 10th June 2014, a special sitting of the CCRC took place, and ultimately it was decided that no finding of misconduct would be made on the

undertaking that Mr. Sheehan returned the Binghams' medical records (as opposed to their files).

6. While the second complaint was still pending before the CRCC, there were a number of emails exchanged between Mr. Sheehan, the Binghams, and the CRCC. On 6th June 2014, Mr. Sheehan threatened to destroy the files in accordance with Chapter 9.12 of *A Guide to Good Professional Conduct for Solicitors* (3rd Edition, Law Society of Ireland, 2013), unless the CRCC could demonstrate a basis upon which he was obliged to retain the files. The reason given for the destruction of the files was "to free up much needed filing space." On 9th June 2014, the appellant gave an undertaking to the CRCC that the files would not be destroyed until the complaint was dealt with in full. On 11th June 2014, the CRCC gave their decision noting that he had agreed to return "any medical records" and that they had made no finding on the complaint. After the matter was closed, e-mails continued to be exchanged between the CRCC, Mr. Sheehan and the Binghams in relation to the destruction of the files. Despite further threats to the contrary, the files were never destroyed by Mr. Sheehan.

The Third Complaint

7. The third complaint (to the Tribunal) made about Mr. Sheehan by the Binghams is the one giving rise to the current proceedings. On 15th September 2014, the Binghams lodged another complaint against the appellant, this time, to the Solicitors Disciplinary Tribunal alleging misconduct contrary to s.3 of the Solicitor (Amendment) Act 1960. The complaint stipulated twenty-seven grounds of complaint.

8. On 23rd September 2014, this complaint was forwarded to the appellant, and on 10th October 2014, the appellant replied objecting to the jurisdiction of the Tribunal to hear the matter, referring to the fact that Law Society and the Independent Adjudicator, pursuant to s.15 of the Solicitors (Amendment) Act 1994 and the Solicitors

(Adjudicator) Regulations 1997 – 2005, had already dismissed this exact allegation of misconduct. The appellant claimed that the Binghams were statutorily precluded by s.7(1) of the 1960 Act from making the complaint to the Tribunal. On 4th November 2014, the Tribunal responded to this, indicating that s.15 of the 1994 Act was never commenced and had subsequently been repealed by s.37 of the Legal Service Ombudsman Act 2009, and thus, the Tribunal proceeded to deal with the complaint. On 12th November 2014, Mr. Sheehan swore an affidavit where he stated that the Binghams were not entitled to make their complaint, that the Tribunal was acting *ultra vires* if they proceeded with their inquiry, that the alleged ground of inquiry *was res judicata* and that no finding of misconduct had been made by the CCRC within the meaning of s.3 of the Solicitors (Amendment) Act 1960, as amended.

9. On 1st April 2015, the STD determined that *a prima facie* case of misconduct had been made out for two of the complaints put forward by the Binghams:

> i. The allegation that the appellant was "abusing his position by threatening to destroy the entire file unless [the Binghams] settle his alleged bill of costs, despite a Circuit Court Order dismissing his claim; and
>
> ii. The appellant's refusal to return the file or grant access to the file for the purpose of the Supreme Court appeal.

The other complaints were found not to be made out on the evidence, rather than on the basis that they were *res judicata*.

10. On 13th July 2015, the appellant wrote to the Tribunal informing them that he would be raising a preliminary objection to the jurisdiction of the Tribunal to hold an inquiry on the grounds previously raised. At hearing on 15th July 2015, the appellant raised the objection, and the chairperson of the Tribunal rejected his argument and continued to hear the substantive issues. The hearing did not conclude and was

adjourned until October 2015. On 20th July 2015, the appellant wrote to the Tribunal reserving his right to judicially review the Tribunal's jurisdiction to hold an inquiry into the Binghams' allegations. Such proceedings were not commenced. On 13th May 2016, the Tribunal issued its decision, and concluded that the appellant was guilty of misconduct pursuant to the first allegation above, but not the second allegation. On the 5th July 2016, the Tribunal made an order finding the appellant guilty of misconduct and censured the appellant, ordering him to pay €5000 to the Compensation Fund within twenty-one days of the perfection of the order. The appellant was also ordered to pay compensation of no more than €750 the Binghams to reimburse them for the costs of their attendance before the Tribunal, which was to be taxed in default of agreement.

Appeal to the High Court: [2017] IEHC 643

11. On 28th July 2016, the appellant commenced an appeal against the order of the Tribunal pursuant to O.53, r.12(i) of the Rules of the Superior Courts and s.7(11)(b)(i) of the Solicitors (Amendment) Act 1960 (as amended). The appellant raised six grounds of appeal:

> *"1. The respondent acted ultra vires the statutory powers conferred upon it by the applicable provisions of the Solicitors Acts 1954-2011 and/or the various orders and regulations made thereunder in proceeding to embark upon the Inquiry;*
>
> *2. The respondent breached the twin precepts of constitutional and natural justice namo iudex in sua causa and audi alteram partem during the course of the Inquiry;*
>
> *3. The respondent abused the discretionary powers conferred upon it by the Solicitors Acts 1954-2011 and/or the various orders and regulations made thereunder;*

4. The respondent failed to vindicate, or properly vindicate, the appellant's unenumerated personal right to fair procedures in decision making under Article 40.3 of the Constitution of Ireland 1937;

5. The respondent failed to vindicate, or properly vindicate, the appellant's right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4th November, 1950 and ratified in this jurisdiction by the European Convention on Human Rights Act 2003;

6. The appellant reserves the right to plead further grounds of appeal and to amend the within notice of motion."

The Tribunal was released from the misconduct challenge and the High Court proceeded to deal with that aspect of the matter. Subsequently, the appellant indicated that he wished to pursue the jurisdictional challenge. Initially, the High Court proceeded to deal with the appeal on the merits and left over the jurisdictional challenge. On 31st October 2017, Kelly P. gave judgment in relation to the jurisdictional issues raised by the appellant. Kelly P. concluded that the provisions of the Solicitors Acts regulated by O. 53 of the Rules of the Superior Court envisaged a *de novo* hearing on the merits of the Tribunal's decision but did not accommodate challenges to the jurisdiction of the Tribunal. Kelly P. also held that, even if there was scope within the statutory scheme to accommodate a challenge to the SDT's jurisdiction to hear a complaint, that Mr. Sheehan had precluded himself from doing so due to acquiescence in the procedure, having participated in the proceedings before the Tribunal. The High Court also found against the appellant on the misconduct issue.

Judgment of the Court of Appeal: [2020] IECA 77

12. The Court of Appeal (Birmingham P., Costello and Haughton JJ.) on 26th March 2020 upheld the decision of the High Court in relation to both the merits of the finding of misconduct by the Tribunal, and the scope of the statutory appeal under the 1960 Act.

13. It is unnecessary to consider in this appeal the finding in relation to the misconduct issue. That was part of the appeal to the Court of Appeal which rejected the appellant's submissions in that respect. The focus of this appeal is in relation to the jurisdictional challenge. Costello J. in her judgment helpfully laid out the relevant statutory scheme for appealing a decision of the Tribunal to the High Court. For ease of reference, the same will be set out here.

14. Section 7(3) of the Solicitors (Amendment) Act 1960, as substituted by s. 17 of the Solicitors (Amendment) Act 1994 and as amended by s.9(a) of the Solicitors (Amendment) Act 2002 provides that: -

> *"(3) If the Disciplinary Tribunal find that there is a prima facie case for inquiry, the following provisions shall have effect:*
>
> *(a) they shall proceed to hold an inquiry …*
>
> *(b) when holding the inquiry the Disciplinary Tribunal shall -*
>
> > *(i) consider each allegation of misconduct made against the respondent solicitor, and*
> >
> > *(ii) make a separate finding in respect of each such allegation."*

15. Pursuant to s.7(11) of the Act 1960, as substituted by s.17 of the Act of 1994 and as amended by s.9(f) of the Act of 2002, a solicitor has a statutory right of appeal to the High Court in respect of the finding of misconduct by the Tribunal. This section provides: -

"(11)(a) A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under subsection (9) of this section …

… may, within the period of 21 days beginning on the date of the service of a copy of the order or of the report, whichever date is the later, appeal to the High Court to rescind or vary the order in whole or in part, and the Court, on hearing the appeal, may -

(i) rescind or vary the order, or

(ii) confirm that it was proper for the Disciplinary Tribunal to make the order."

16. Order 53, r.12(b) and (d) of the RSC provides that an appeal under s.7(11) should be brought by notice of motion, supported by affidavit. Rule 12(h)(i) provides that where the respondent solicitor is appealing against a finding of misconduct, the President can direct that the appeal shall proceed as a full rehearing of the evidence laid before the Tribunal, unless a less than full rehearing is contended for by the respondent and concurred in by the person who made the application to the Tribunal, and unless agreed by the President.

17. Costello J. approached the jurisdiction issue as a matter of statutory construction (*Dunne v Minister for Fisheries* [1984] I.R. 230; *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516). A key authority relied on by Costello J. in respect of upholding the finding of the High Court was *O'Reilly v. Lee* [2008] 4 I.R. 269. In that case, the appellant had made a complaint of misconduct in respect of the respondent solicitor, but the Tribunal in that instance concluded that a *prima facie* case of misconduct had not been established. The appellant then sought to appeal this decision to the High Court and argued that he was precluded from arguing certain points as the Tribunal was not

the respondent in the case, but only a notice party. Macken J. held at paras. 6 and 7 of her judgment that the correct interpretation of s.7 of the 1960 Act as amended:

> *"is that the appeal from a decision of the Solicitors Disciplinary Tribunal…is a hearing de novo in the High Court in which the matters contended for by the appellant as constituting grounds for the holding of an inquiry into the respondent's alleged misconduct, and the respondent's reply, may be exposed again and argued afresh before the High Court, which decides the appeal on the basis of the materials which were before the Disciplinary Tribunal, but having regard to the arguments made before it, the High Court, exercising an independent jurisdiction in the matter. It is for this reason that the respondent is the correct respondent, and equally, that the Solicitors Disciplinary Tribunal is a proper notice party to the proceedings, bound by any order which the High Court might make on the appeal.*
>
> *7. A different situation would of course arise if the appellant sought to challenge the Solicitors Disciplinary Tribunal in respect of matters dealt with, or failed to be dealt with in an appropriate case, such as would lend themselves to an application for judicial review."*

18. Macken J. made a distinction between issues that come within the scope of the statutory appeal, and conversely, issues which are more appropriately dealt with through judicial review proceedings, to which the decision maker would be the correct respondent. Macken J. also made the point that where a *de novo* hearing is pursued, judicial review arguments *"fall"* if such proceedings are not pursued and a *de novo* appeal is opted for. The distinction identified in O'Reilly was applied in *Mallon v. Law Society of Ireland* [2017] IEHC 547.

19. The appellant submitted that the phrasing of the Solicitors Acts is broad enough to encompass an appeal pertaining to the jurisdiction of the Tribunal. The legislative provision in question allows for an appeal from the Tribunal to the High Court. The High Court on hearing the appeal may rescind or vary the order in whole or in part, or *"confirm that it was proper for the Disciplinary Tribunal to make the order."* The appellant argued that the High Court could not confirm that the decision of the Tribunal was "proper" if the Court was satisfied that the Tribunal never had jurisdiction to make the order in the first place, and therefore, issues pertaining to the jurisdiction of the Tribunal fell within the scope of the statutory appeal. In relation to the decision in *O'Reilly v. Lee*, the appellant argued that it predated the amendment to ss.11 and therefore was not an authority for the current statutory scheme. However, Costello J. at para. 67 held that the expansive interpretation to the word "proper" proffered by the appellant *"strains the statutory language too far."* She held that the word "proper" in the statutory scheme did not necessarily refer to the jurisdiction of the Tribunal; it could just as easily refer to the appropriateness or the correctness of the Tribunal's decision, and that ultimately, if the interpretation contended for by the appellant was accepted, s. 7 of the 1960 Act as amended would not allow for the High Court to reject an appeal and affirm a decision of the Tribunal. The Court of Appeal held that if the appellant wanted to challenge the jurisdiction of the Tribunal, this was more appropriately done by way of judicial review.

Issues

Appellant's Submissions

20. The appellant submits that the Court of Appeal erred in finding that the scope of the statutory appeal does not extend to issues relating to the jurisdiction of the Tribunal. The thrust of the appellant's argument relates to the breadth of the *de novo*

appeal. The appellant also raises issues as to the multiplicity of litigation which would arise if the approach adopted by the Court of Appeal and the High Court is followed.

The breadth of a de novo hearing

21. The appellant seeks to distinguish this case from the decision of the Court in *O'Reilly v. Lee*. It is argued that in *O'Reilly,* Macken J. only scrutinised the statutory scheme in respect of s.7(12A) of the 1960 Act as amended. The appellant submits that he does not advance the same arguments as those advanced by the appellant in *O'Reilly*. He relies on the provisions of O. 53, r. 12(g) of the Rules of the Superior Courts 1986, as amended, whereby the President can add additional parties to the motion if deemed necessary, and that additional parties were added by Kelly P. in this case. On this basis, the powers exercised by the Court pursuant, on the one hand, to s.7(12A), and on the other, pursuant to s.7(11) as in the instant case, are not necessarily congruent.

22. The appellant also makes the point that there is a line of authority to suggest that it may not always be appropriate for an appellant to institute two separate sets of proceedings and seek relief through both a statutory appeal mechanism and judicial review. The appellant cites *Koczan v. Financial Services Ombudsman* [2010] IEHC 407, where Hogan J. held:

> "*the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference - albeit a rebuttable inference - that the Oireachtas "must have intended that the Court would have powers in addition to those already enjoyed at common law" in respect of its judicial review jurisdiction: see Dunne v. Minister for Fisheries [1984] I.R. 230 at 237 per Costello J.. That in turn suggests that the Oireachtas further intended that the statutory appeal would*

form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so…"

23. The appellant submits that the statutory language used in the Acts permits the appellant to canvas all possible arguments under the one set of proceedings, including the jurisdiction issue. Thus, he contends that where an issue as to jurisdiction has been raised from the outset, the High Court has full jurisdiction to consider whether or not it was proper for the Tribunal to reach the conclusion it did and continue to rule on the matter. An analogy is made between the appellant's position, and the position of a hypothetical solicitor who, at the hearing of the Tribunal inquiry, makes an allegation of bias against a member of the Tribunal. While it may be open to this hypothetical solicitor to bring judicial review proceedings, the appellant argues it must also be open to them to ask the High Court on appeal from the SDT to determine whether it was proper for them to make such an order. The appellants also rely on the judgment of Noonan J. in *Swaine v Solicitors Disciplinary Tribunal* [2016] IEHC 667, where he rejected a claim for judicial review, and held that the appeal pursuant to O. 53 of the Rules of the Superior Courts *"is a full appeal in every sense of the word."*

24. To further illustrate this point, the appellant quotes a number of examples of other statutory appeal mechanisms, including the Health and Social Care Professionals Act 2005, the Medical Practitioners Act 2007 and the Veterinary Practice Act 2005. The appellant submits that each statutory appeal mechanism is unique, and regard must be paid to the particular wording in s.7(11) of the Solicitors Acts. It is the appellant's case that this section empowers the High Court to do one of two things: rescind or vary the order of the Tribunal or confirm that it was proper for the Tribunal to make the order.

25. In relation to the scope of a *de novo* hearing, the appellant relies on *Glancré Teoranta v. Cafferkey* [2004] 3 I.R. 401, where Finnegan P., in considering the scope of a statutory appeal under the Local Government (Planning and Development) Act 1963, discussed the breadth of the *de novo* appeal. In light of this dicta, the appellant says that an appeal must involve full appellate jurisdiction encompassing disputes as to the law. Because the appellant raised the issue of *res judicata* as a preliminary objection at the Tribunal hearing, it is argued that he is entitled to canvas the same issue and have a fresh determination on this issue in the High Court. It is submitted that if this is not a legitimate argument that can be made in a *de novo* hearing, by implication, it is also not something that can be raised at the original hearing.

Practical Implications of the Court of Appeal's Approach

26. The appellant also makes the point that the approach adopted by the Court of Appeal, advanced by the Tribunal and the Law Society, encourages a multiplicity of litigation. It is submitted that it is much more efficient to avoid a situation where a party has to divide up issues and pursue them via different forms of litigation. The appellant relies on para. 111 of the judgment of O'Malley J. in *Petecel v Minister for Social Protection* [2020] IESC 25 to illustrate the point that, where a *de novo* appeal is broad enough to allow for issues pertaining to jurisdiction to be canvassed alongside merits-based arguments, nothing is to be gained from initiating two sets of proceedings to settle a dispute with one decision maker. The appellant makes the point that he was in a 'Catch-22' position in relation to the commencement of judicial review proceeding in this case. Had he initiated judicial review proceedings, it would have been open to the Tribunal to raise a preliminary objection as all alternative remedies would not have

been exhausted. It is submitted that this interpretation is not a logical operation of court procedure.

Compatibility with the ECHR

27. It was a point of controversy throughout case management as to whether arguments relating to the appellant's rights under the European Convention of Human Rights were canvassed in the lower courts, and whether the approach taken in precluding the appellant from raising the jurisdiction issue breached his rights under Article 6 and Article 13 of the Convention. No discussion of these issues occurred in the judgment of the lower Courts. It was agreed that these arguments could be raised *de bene esse* in the course of the hearing but without deciding definitively that the appellant was entitled to do so.

Respondents' Submissions

The Solicitors Disciplinary Tribunal

The breadth of a de novo hearing

28. The SDT say that a challenge to jurisdiction is one that may be brought only by way of judicial review. They rely on the established position in case law to date, an analysis of the terms of s. 7(11), public policy imperatives and finally, an argument that there is no incompatibility between this position and Articles 6 and 13 of the European Convention on Human Rights.

29. The point is also made that insofar as the appellant had argued that an issue of *res judicata* had arisen by reason of the decision of the Independent Adjudicator, the issue as to misconduct which was dealt with by the Tribunal was never previously determined against the appellant.

30. The first-named respondent argues that the appellant's attempt to distinguish *O'Reilly* from the present case is not well-founded, as Macken J. never indicated that she intended her analysis only to apply to s.7(12A) of the 1960 Act as opposed to the scheme under s. 7 as a whole, and that the structure of s.7(12A) mirrors that of s.7(11), and therefore is applicable to its interpretation. Further the SDT makes the point that it does not follow from the power given to the President to add additional parties to a motion under O. 53, r. 12(g) of the RSC, that a jurisdictional challenge is within the scope of the statutory appeal. As of right, rather than at discretion, the decision-maker would have to be a named party in any proceedings challenging its jurisdiction. It is further argued that the appellant does not fall into the exceptions identified in *Koczan* and *EMI.*

31. The Tribunal argues that the principle from *EMI* applies where an applicant who has commenced judicial review proceedings and is met with the objection that he ought to have exhausted the remedy of a statutory appeal, but here, the appellant has sought to use the statutory appeal mechanism and ventilate matters which do not adequately fall into the scope of that appeal. The Tribunal also argues that the appellant's reliance on *Koczan* is misplaced in circumstances where, in that case, Hogan J. expressly stated that the type of challenge as that brought in *Square Capital Ltd. v. Financial Services Ombudsman* [2009] IEHC 407, and which *"falls properly to be canvassed by means of judicial review rather than by way of statutory appeal"* is precisely the same type of jurisdictional challenge as arises in this case. Finally, in P*etecel*, O'Malley J. considered that that particular case fell within the exceptions identified in *Koczan* and *EMI*. The Tribunal summarised its arguments by saying that previous judicial consideration of s.7 leads to the conclusion that a jurisdictional challenge does not fall within the scope of

a statutory appeal pursuant to s.7(11) and that this Court should not lightly depart from this position.

Statutory Interpretation

32. The first-named respondent explores the principles of statutory interpretation that are relevant to this appeal. They argue that in seeking to interpret the meaning of the word "proper", it should be given its plain and ordinary meaning. Reference was made to The Oxford English Dictionary, the Canadian Dictionary of Law, and *Francis v. Francis* [1955] 3 All ER 836 and the first-named respondent submits that the overall emphasis in interpreting "proper" refers to the correctness of the decision. On this basis, it is argued that giving s.7(11) its literal meaning, judicial review must be precluded, as it is not concerned with the correctness, but rather the lawfulness, of a decision (*Sweeney v. District Judge Fahy* [2014] IESC 50 at para. 3.4).

33. The first-named respondent further argues that on a contextual interpretation of the statutory scheme, the Oireachtas could not have intended to create a statutory appeal to accommodate challenges to jurisdiction. In this regard, they point to a number of characteristics in the scheme, in particular, the use of the word "rescind" and "vary" do not connote the concept of nullity, which would arise on a finding of no jurisdiction, and the lack of reference to the word "quashing" (appearing, for example, in the Nurses and Midwives Act 2011). The Tribunal also point to the process of inquiry under the 1960 Act. Once a *prima facie* case of misconduct has been established, the Tribunal is then *"obliged to consider all of the allegations before it, and to make individual findings in respect of each allegation"* (*Coleman v. Law Society of Ireland* [2018] IESC 80 at para. 47), and that the Tribunal is only released from this obligation *"by an order of prohibition obtained on an application of judicial review"* (*Stephens v. Orange*,

unreported, Finnegan P., 18 March 2005). On this reading of the statute, the party subject to an inquiry into their misconduct must bring judicial review proceedings of a *prima facie* finding of misconduct, and if proceedings are not brought at this juncture in the process, then the respondent solicitor must be taken as having waived the right to raise jurisdictional objections. Finally, the respondent also points to s.7(13) of the statutory scheme, which provides for an appeal to the High Court on a finding of misconduct. It is arguable that, read alongside s.7(11) of the Act, s.7(11) only involves an appeal of a sanction imposed by the Tribunal. By implication, an appeal brought by way of s.7(11) is premised on the respondent solicitor accepting both the finding of the misconduct and the jurisdiction of the Tribunal to make such a finding.

34. The Tribunal also argues that the expansive interpretation of the word "proper" canvassed by the respondent is contrary to the principles of purposive interpretation (*Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014). The Tribunal point to the practical implications of such an expansive interpretation, and note that to include jurisdictional challenges under the umbrella of issues that are encapsulated by the use of the word "proper" in the legislation would mean that, for example, the constitutionality of the investigative process could be raised in the context of an appeal under s.7(11),with all that that would entail, demonstrating that if the appellant's interpretation was accepted, it would result in an unwieldy appeal process.

Policy Imperatives

35. The Tribunal also makes the point that a challenge to jurisdiction ought to be made expediently, at the earliest possible juncture in a decision-making process. Raising jurisdictional issues at the preliminary stage of a hearing is in the interests of efficiency. But, the first-named respondent argues that if the approach of the appellant

is adopted, then issues relating to the lawfulness of the decision can be deferred until the appeal process has concluded, and then subsequently challenged. The Tribunal further argues that the concern over multiplicity of proceedings pertaining to one decision would not arise if judicial review proceedings were initiated at the earliest juncture. If the proceedings had merit, then a full hearing at the Tribunal stage would become redundant.

Compatibility with the ECHR

36. The Tribunal makes the point that while reference was made to the ECHR in the lower courts, the appellant's arguments were not developed. The Tribunal argue that no issue of incompatibility with the ECHR arises in this case. The appellant sought to rely on *Ramos de Nunes de Carvahlo e Sa v. Portugal* (App Nos. 55391/13, 57728/13, 74041/13) before the Tribunal. *Ramos Nunes* involved the question of when an appeal would not remedy a flawed hearing at first instance. The respondent Tribunal argues that none of the issues which arose in that case arise here, and that, in any event, it is well-settled law in this jurisdiction that judicial review does remedy any flaw in an initial hearing under the Constitution and the Convention (*Efe (a minor) v. Minister for Justice* [2011] 2 I.R. 798). The Tribunal also rely on the case of *Whiteside v. UK* (App No 20357/92), which is authority for the principle that requiring a party to select the appropriate cause of action is not a breach of Article 13.

Mr. and Mrs. Bingham

The breadth of a de novo hearing

37. Mr. and Mrs. Bingham adopt the same position as the first-named respondent, in that a challenge to the jurisdiction of the Tribunal can be brought only by way of judicial review and cannot be canvassed in the course of a statutory appeal. The starting

point of Mr. and Mrs. Bingham's submissions is *O'Reilly v. Lee*, and the judgment of Macken J. therein, where she distinguished the statutory appeal under the Solicitor Acts 1960 from judicial review proceedings. In *O'Reilly v. Lee,* the Supreme Court found that where an appellant opts for a *de novo* hearing in the High Court under s. 7(11), that any arguments of the type amenable to judicial review *"all fall"*. The Binghams submit that although the appellant seeks to distinguish this case from *O'Reilly*, he fails to explain why the procedure under examination in *O'Reilly* (s.7(12A) of the 1960 Act) should be distinguished from the procedure in this case under s.7(11) of the 1960 Act. *O'Reilly* was adopted in *Mallon v. Law Society of Ireland* [2017] IEHC 547. In *Mallon*, Kelly P. observed that there is a jurisdiction in the High Court to review the inquiry of the SDT where there is an allegation of misbehaviour or a breach of natural justice, but that this "remedy lies within the purview of the judicial review jurisdiction of the High Court." Kelly P. also stated that:

> *"A challenge to the jurisdiction, behaviour or conduct of the SDT prior to the completion of its statutory mandate cannot be made by means of a purported appeal under s.7 but only by way of judicial review."*

38. Mr. and Mrs. Bingham again point to the appellant's failure to explain why the principle in *Mallon* should not be followed in this case, i.e. that the correct procedure to challenge the jurisdiction of the Tribunal was via judicial review. They also take issue with the appellant's reliance on *Swaine v. Solicitors Disciplinary Tribunal* [2016] IEHC 667, where Noonan J. held that s.7 was *"a full appeal in every sense of the word."* Mr. and Mrs. Bingham submit that this was in the context of O. 53 of the RSC, which refers to *"…a full hearing of the evidence…",* and that in *Swaine*, the jurisdiction of the Tribunal was not at issue.

39. Mr. and Mrs. Bingham say that in *Koczan*, Hogan J. gave a series of examples, such as total lack of subject matter jurisdiction, or the integrity or basic fairness of the decision-making process, where legal arguments will more properly be canvassed by way of judicial review. The Binghams point out that the appellant's ground of appeal in relation to jurisdiction falls within one of these exceptions. Hogan J. also held that there was a "rebuttable inference" that the Oireachtas intended *"... that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so..."* The Binghams argue that, insofar as the appellant relies on *Koczan* as an authority for the proposition that the statutory appeal is appropriate for the canvassing of the jurisdictional issue, *O'Reilly* is the superior authority on this matter, which is specifically at odds with this contention. The Binghams, taking the same line of argument as the Tribunal on this point, further submit that the appellant's reliance on the principle arising from *EMI* is not well founded. They also argue that reliance placed on *Petetel*, where O'Malley J. held that the appellant in that case was entitled to bring judicial review proceedings, is misplaced. In the instant case, the appellant seeks the reverse. He seeks to maintain jurisdictional arguments on a statutory appeal, which the Binghams submit is not the effect of *Petecel.*

40. Mr. and Mrs. Bingham also submit that the use of the word "proper" in the statutory scheme refers to the substance rather than the form of the finding of the Tribunal. They submit that the decisions of *O'Reilly* and *Mallon* are at odds with the interpretation proffered by the appellant in this case, decisions which they say clearly preclude jurisdictional challenges. They offer a number of definitions of the word "proper" as describing the correctness of a decision.

The Scope of Statutory Appeals

41. The Binghams submit that the scope of statutory appeals has been considered in a number of cases. In *Dunne v Minister for Fisheries* [1984] I.R. 230, Costello J. quoted with approval the following passage from *Wade's Administrative Law* (5th Ed., p. 34):

> *"The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the court is concerned with its legality. On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?''*

42. In *Vodafone Ireland Ltd v. Commission for Communications Regulation* [2013] IEHC 382, para 9., Cooke J. identified factors such as the power of the court to *"... make such orders as it considers appropriate"*; that the court could remit the matter to ComReg with or without directions as to how it should be reconsidered by that entity; that the court had power to stay the operation or implementation of the decision pending determination of the appeal; and that the court could retain its own expert to examine the merits of the case, which led him to conclude that the scope of the statutory appeal before him in that case was broader than other statutory appeals. Similarly, in *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516, this Court held that having regard to the diversity of statutory frameworks, each must be interpreted *"in accordance with the relevance and well-established canons of construction."* McKechnie J. also made the point that, where an appeal is available to the parties under a statutory scheme, this must confer some extra benefit on them that is not available to them via judicial review.

Compatibility with the ECHR

43. Mr. and Mrs. Bingham submit that the appellant provides no basis for his position that the decisions of the lower Courts create an incompatibility with Articles 6 and 13 of the Convention. They submit that the appellant enjoys both a full statutory appeal under section 7(11 and, in appropriate circumstances, an ability to seek judicial review of a decision of the Tribunal. They submit that it is well-settled that the availability of judicial review is effective to protect right under the Convention (*Okunade v. Minister for Justice* [2018] IESC 56), and that this is not a situation that is comparable to *Ramos de Nunes de Carvalho e Sá v. Portugal*, upon which the appellant relies.

Submissions of the Law Society of Ireland

44. The Law Society of Ireland was joined as a notice party in the High Court proceedings to respond to the jurisdictional arguments raised by the appellant. They also ask this Court to dismiss the appeal.

Scope of a de novo hearing

45. The Law Society examine the general considerations for a Court considering the scope of a statutory appeal. They make the point that the form of appeal will be a question of the proper interpretation of the statute in question in the proceedings (Clarke J. (as he then was), *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516, 550). They also refer to *O'Reilly v. Lee*, and the distinction drawn by Macken J. between issues properly canvassed under a statutory appeal and those issues for which judicial review is the appropriate avenue. They make the argument that the s.7(11) appeal is one which invites the court to rescind, vary or affirm the order of the Tribunal, and not one concerning the jurisdiction of the Tribunal. The Law Society adopt the position that, if

the appellant wanted to challenge the jurisdiction of the Tribunal, the correct juncture to do this was after the Tribunal had established that a *prima facie* case of misconduct had been made out. In this regard, the Law Society rely on the decision of *Stephens v. Orange* (unreported, Finnegan P., 18 March 2005), to the effect that the Tribunal is under a statutory obligation to make a finding in relation to every allegation of misconduct for which a *prima facie* case is made out, unless they are prevented from doing so by an Order of Prohibition obtained on an application by way of judicial review. The Law Society also take issue with the reliance placed by the appellant on the significance of O. 53 r. 12(g) of the RSC and the power of the High Court to join parties to any appeal under the Solicitors Acts. They submit that if a challenge to the jurisdiction was to be included in the scope of the statutory appeal, then the Tribunal would have been expressly included in the event of such an appeal. The Law Society further query the "strained and totally unsustainable" interpretation the appellant seeks to give to the word "proper" in the course of these proceedings. Like the respondents, they submit that this speaks to the correctness of the decision, and they argue that to suggest the use of "proper" extends the statutory appeal to a jurisdictional challenge is unsubstantiated.

46. The Law Society argue that the reliance placed by the appellant on the exceptions recognised in *EMI, Koczan* and *Petecel* is misplaced. Insofar as the appellant seeks to distinguish *Petecel* on the basis that the statutory appeal in this case is a *de novo* appeal, rather than an appeal on a point of law, and therefore is broad enough to facilitate a hearing on jurisdiction issues, they say this fails to take into account the principle in *Koczan,* that lack of subject matter jurisdiction is a ground which is appropriately canvassed via judicial review. The Law Society further submit that it also fails to take into account the principle in *Fitzgibbon* that the statutory appeal is to be

interpreted in the context of the statutory framework, where the Tribunal is obliged to proceed to hold an inquiry into allegations which meet the threshold of a *prima facie* case of misconduct.

47. The Law Society also argue that the issue in relation to multiplicity of proceedings does not arise in circumstances where the respondent solicitor takes judicial review proceedings at the appropriate juncture.

Compatibility with the ECHR

48. The Law Society argue that an interpretation requiring that an argument as to total lack of subject matter jurisdiction be made by judicial review is precisely such a case as could not be said to infringe the principle of effectiveness nor the right to a fair hearing, and that in fact, if the appellant had proceeded with judicial review following a finding of a *prima facie* case of misconduct, and had been successful, then the cost of the inquiry and the current proceedings would have been saved. Finally, the point was made that the appellant did not press the ECHR ground in either legal or oral submission to the Court of Appeal.

The Appeal from the Solicitors Disciplinary Tribunal

49. The determination in this case gave leave to the appellant on the basis of the issue of the nature of the statutory appeal under the Solicitors Acts, and whether the High Court (on an appeal from a decision of the Tribunal) in the course of a statutory appeal could consider a challenge to the jurisdiction of the Tribunal was a matter of general public importance.

50. The form of appeal from a decision of the Tribunal is to be found in s.7 of the Solicitors Acts and in the Rules of the Superior Courts. Section 7 of the Solicitors Acts

has been subject to a number of amendments over the years. Thus, the original provisions of s.7, found in the Act of 1960, were substituted by the provisions of the Act of 1994 and, in turn, its provisions were amended in 2002. Apart from the provisions of the Solicitors Acts, Order 53 of the RSC also has to be considered. The convoluted nature of the statutory provisions is somewhat unhelpful and, indeed, appears to have led to some confusion amongst solicitors, as was noted by the Tribunal in its submissions. It was observed, at para. 113 of the written submissions, that, on one view of s.7(11), it provides only for an appeal against sanction as it appears that s.7(13) provides separately for an appeal against a finding of misconduct, albeit that, if a s.7(11) appeal is also being brought, the appeal against the finding of misconduct can be determined in that context. Section 7(13) of the Act of 1960, as substituted by s.17 of the Act of 1994, provides as follows:

> *"A respondent solicitor may appeal to the High Court against a finding of misconduct on his part by the Disciplinary Tribunal pursuant to subsection (3) of this section, and the Court shall determine such appeal when it considers the report of the Disciplinary Tribunal in accordance with the provisions of section 8 (as substituted by the Solicitors (Amendment) Act, 1994) of this Act, or as part of its determination of any appeal under subsection (11) of this section, as the case may be."*

51. It was noted on behalf of the Tribunal that although this apparent distinction between an appeal against a sanction and an appeal from a finding of misconduct exists within the statutory framework, and even though the appeal in this case was on the basis of s.7(11) alone, nevertheless, in practice, the statutory distinction between types of appeal is not observed. While it was suggested in the written submissions on behalf of

the Tribunal that this reinforces its argument that a jurisdictional challenge has no place in an appeal pursuant to s.7(11), the argument based on this apparent distinction was not pressed in oral submissions, given that the practice on appeals from the Tribunal does appear to vary from the provisions as to appeals set out in the legislation. I would say, by way of observation, that it would be appropriate to give further consideration to the legislative provisions for the purpose of ensuring that the practice in relation to appeals conforms to the statutory provisions providing for appeal. It may be appropriate to consider an amendment to the statutory provisions. It is not necessary to dwell further on this statutory distinction between types of appeal and, for the purpose of this appeal, I will proceed on the basis that the appeal lodged by the appellant from the Tribunal pursuant to s.7(11) was intended and understood by all to be an appeal from the finding of misconduct and sanction.

The Type of Appeal

52. It is necessary now to look at the form of appeal provided for by s.11 of the Solicitors Acts. Section 7(11) has already been referred to, but in ease of reference it may be useful to set it out in full once more. It is to be found in s. 9 of the Act of 2002, which amends, in part, s. 7 of the 1960 Act, as substituted by s. 17 of the Act of 1994. It now reads as follows:

> *"(11) (a) A respondent solicitor in respect of whom an order has been made by the Disciplinary Tribunal under subsection (9) of this section, or*
>
> *(b) without prejudice to subsection (12) of this section, the Society or any person other than the Society who has made an application under subsection (1) of this section,*

may, within the period of 21 days beginning on the date of the service of a copy of the order or of the report, whichever date is the later, appeal to the High Court to rescind or vary the order in whole or in part, and the Court, on hearing the appeal, may -

(i) rescind or vary the order, or

(ii) confirm that it was proper for the Disciplinary Tribunal to make the order."

53. Thus, it will be seen that, on appeal, the High Court may rescind or vary the order or confirm that it was proper for the Tribunal to make the order. As has been seen from the judgment of the Court of Appeal, much discussion has taken place as to the meaning of the word "proper", as used in s.7(11), and I will return to this topic later.

54. For now, it would be helpful to refer briefly to the provisions of Order 53 of the RSC. Order 53(9) is of relevance to the form of appeal envisaged under s.7(11). It provides as follows:

"9(a)(i) Where the respondent solicitor is appealing to the Court against such finding or findings of misconduct on his or her part, the President shall not thereupon enter upon a hearing of the motion of the Society but shall first direct that the appeal shall proceed as a full rehearing of the evidence laid before the Disciplinary Tribunal, unless a less than full rehearing is contended for by the respondent solicitor and concurred in by the Society and (if applicable) concurred in by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal and unless agreed to by the President.

(ii) Where an appeal before the President proceeds as provided for in sub-paragraph (i) of this paragraph of this rule, the President shall thereafter proceed to deal with the motion of the Society having regard to the outcome of such appeal.

(b) Upon the hearing of the motion of the Society or the hearing of the appeal of the respondent solicitor, as the case may be, the President may require that any notice, affidavit, or other document not then before the Court that was delivered to and produced in evidence before the Disciplinary Tribunal or a transcript or other record of any oral evidence given before the Disciplinary Tribunal be made available by the Society or by the Disciplinary Tribunal to the Court in such manner as the President may direct.

(c) Subject as provided in paragraph (a)(i) of this rule, the President may remit the matter to the Disciplinary Tribunal to take further evidence for submission to the Court and to make a supplementary report thereon to the Court.

(d) The President may, following the hearing of an appeal by the respondent solicitor or the motion of the Society, as the case may be, and subject to the provisions of the Acts, give any decision or make any order as the President thinks fit.

(e) ....”

55. It can be seen, therefore, that the starting point for an appeal is that the appeal "*shall proceed as a full rehearing of the evidence laid before the Tribunal*". It is possible to have a "*less than full hearing*" where the solicitor concerned and the Law

Society are in agreement, together with the complainant and the President, as to that approach being taken. However, what one could describe as the default position is that on an appeal to the High Court there is to be a full rehearing of the matter.

56. It would be useful at this point to reflect on what was said previously in this Court on the subject of "*de novo*" hearings in the case of *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516, at pages 551, et. seq. First of all, Clarke J. categorised statutory appeals as follows:

> *"(a) a de novo appeal;*
>
> *(b) an appeal on the record;*
>
> *(c) an appeal against error, and*
>
> *(d) an appeal on a point of law."*

57. He then went on to describe what is involved in a *de novo* appeal, commencing at para. 102 of his judgment, as follows:

> *"102. It seems to me that the critical characteristics of a de novo appeal are two fold. First, the decision taken by the first instance body against whose decision an appeal is brought is wholly irrelevant. Second, the appeal body is required to come to its own conclusions on the evidence and materials properly available to it. The evidence and materials which were properly before the first instance body are not automatically properly before the appeal body. It seems to me that, by defining an appeal as a de novo appeal, any legally effective instrument necessarily carries with it those two requirements.*
>
> *103. However, the matter does not end there. It is sometimes argued that, by providing for a de novo appeal, what happened at first instance becomes*

entirely irrelevant and, indeed, inadmissible. That is not necessarily the case. First, it is important to recognise that the process at first instance may narrow the issues which truly remain alive in whatever adjudicative proceedings are under consideration. To take a simple example from the appellate structure of the courts, there is available what is in substance a de novo appeal to the High Court from almost all civil decisions of the Circuit Court. The High Court Judge considers the case afresh on the basis of the evidence presented on the appeal and without attaching any weight to the decision made by the Circuit Court Judge. However, what happened in the Circuit Court is not, in those circumstances, necessarily entirely irrelevant. The pleadings which were exchanged pre-trial in the Circuit Court may well have narrowed the issues between the parties so that, at least in the absence of leave to amend, the issues remain thus narrowed on any appeal. An appeal may not, by its terms, extend to the entirety of the decision made at first instance so that, in the example of an appeal from the Circuit Court to the High Court, the appeal may be brought only against the quantum of an award of damages made by a Circuit Court judge and not against that judge's finding on liability.

…

107. In summary, therefore, it seems to me that the use of the term 'de novo appeal' or similar terminology, carries with it a requirement that the appellate body exercise its own judgment on the issues before it without any regard to the decision made by the first instance body against whom the appeal lies.

108. In addition, and in the absence of any specific rules to the contrary, the default position will be that it will be necessary that all materials on which the

appellate body is to reach its adjudication are properly re-presented to that body in whatever form may be appropriate to the type of proceedings concerned. Where the proceedings involve oral evidence, then witnesses will have to be called again. Where the proceedings involve inquiries by the decision maker then those inquiries will have to be made afresh.

109. However, even in the absence of specific rules, that latter proposition is subject to some qualification. The process at first instance may have reduced the scope of issues which are properly before the appeal body. Likewise, that scope may be influenced by the terms of any appeal brought. Furthermore, there may be circumstances, such as those which I have identified, where statements made, evidence given or positions adopted at the first instance hearing may, in themselves, be properly admissible as part of the appellate process."

58. That was a case concerning sanctions imposed by the Complaints & Client Relations Committee. The High Court had held, as a preliminary issue, that the nature of the appeal hearing would not be a *de novo* hearing of the complaints, but would be a review of a specialist tribunal, whereby the findings would be reviewed and oral evidence would be called only if necessary. The Supreme Court in that case concluded that the appeal pursuant to s.11(1) of the Solicitors Act was not an appeal *de novo*. It should be borne in mind that the provisions of the RSC at play in that case are different from those at issue in these proceedings, as they provided for a hearing on affidavit, save that the President "*may direct oral evidence to be given*", whereas in this case, as we have seen, in an appeal against a finding of misconduct, the hearing before the President proceeds as a full rehearing, save where the parties and the President are agreed that there is no necessity for a full rehearing.

59. One other aspect of the judgment of Clarke J. in that case is worth repeating. He had some observations to make on the role of judicial review, where he said, at paras. 129 to 130, as follows:

> *"129. I would wish to make one final observation. Any public law decision having an effect on legal rights and obligations is, of course, amenable to judicial review. The purpose of judicial review is to determine the legality (whether procedural or substantive) of the decision challenged. While this judgment is not the place to engage in the difficult but important task of defining the precise boundaries of a judicial review (there is more than ample jurisprudence in this area), nonetheless it is, in my view, worthy of comment to note that, at the level of principle, there must be some difference between even the most restrictive form of appeal (being an appeal on a point of law only) and a judicial review.*
>
> *130. Given that judicial review lies in respect of all public law decisions affecting rights and obligations, it must be assumed that, by conferring a right of appeal, the Oireachtas intended that some greater degree of review is permitted than that which would have applied, in the context of judicial review, in any event. It is in that context that the concept of an 'error within jurisdiction' may well be relevant. Without seeking to define the parameters of that concept, there clearly are errors which do not give rise to judicial review for they do not affect the lawfulness as opposed to the correctness of the decision taken. The precise extent of the type of error which may not give rise to a finding that a decision is unlawful as opposed to merely incorrect is not a matter on which I touch in this judgment."*

60. While considering that judgment, it would also be helpful to refer to one other passage from the judgment of McKechnie J. in that case, where he said at para. 73 as follows:

> *"Where the legislature confirms a right to a statutory appeal, it must evidently be assumed that this was intended to have some meaning and some purpose. Where, for example, judicial review is independently available, it must be considered as conferring some additional benefit(s) on the appellant. Something separate from a mere 'test' for legality, or the mere quashing or remitting of a decision based on standard judicial review grounds. The range of possibilities in this regard is extensive, varying from a full appeal, as from the Circuit Court to the High Court on circuit (s. 38 of the Courts of Justice Act 1936), to one strictly limited, say on a point of law, perhaps even further limited by the nature of the point and only then on due certification by the trial court (see as examples, s.29 of the Courts of Justice Act 1924 as substituted by s. 22 of the Criminal Justice Act 2006 and as later amended and s. 50(3)(f) of the Planning and Development Act 2000). In between, one can find several other variable forms of 'appeal'. It therefore follows that the availability of such a right does not mean that all reviews, by way of appeal, are necessarily the same: quite obviously they are not. As Costello J. pointed out in Dunne v. Minister for Fisheries [1984]1 I.R. 230, "in every case the statute in question must be construed" (p. 237). Barron J. in Orange Limited v. Director of Telecoms (No. 2) [2000] 4 I.R. 159 said "the test for competition cases cannot be a guide for other codes" (p. 238): certainly, without much concordance on many other important factors, this surely must be right. This therefore being the situation,*

it then becomes necessary to consider each legislative framework in its own right."

61. This demonstrates the point that a person dissatisfied with the outcome of a first instance hearing will have the choice of either a statutory appeal or judicial review, depending on the circumstances. Given that judicial review will be available for the purpose of examining the process by which the first instance decision was reached, it may not be the preferred remedy when what is at issue involves the merits of the issue before the first instance body. It would, I think, be fair to say that the narrower the scope of appeal, the more likely it is that judicial review would be the favoured remedy, whereas the broader the scope of the appeal the more likely that the statutory appeal would be the preferred option. That is a general observation but, of course, the choice of remedy will, in truth, be dictated by the circumstances of the case. Even if the statutory appeal involves a *de novo* hearing, judicial review may, in some circumstances, be the appropriate remedy, if the first instance hearing was conducted in a way that was in breach of fair procedures, for example, such that one could say that there was, in reality, no first instance hearing.

62. The parties are not in dispute that what is involved in this case is an appeal under s.7(11) and is a *de novo* appeal allowing for a full rehearing before the High Court. The area of dispute concerns whether "*jurisdictional*" issues can be determined by the High Court on an appeal or whether such jurisdictional issues can only be determined by way of judicial review proceedings. Both the High Court and the Court of Appeal concluded that the statutory appeal did not permit a consideration of the jurisdictional issues.

Can Jurisdictional Issues be raised before the High Court?

63. There is no dispute between the parties as to the relevance of two particular decisions on this issue. They are the cases of *O'Reilly v. Lee*, referred to previously, a decision of this Court, and the decision of Kelly P. in the case of *Mallon v. Law Society*. I propose to look at those two decisions more closely and to consider if they can be relied on to support the contention on behalf of the respondents and notice party that jurisdictional issues are required to be dealt with by way of judicial review proceedings, and cannot be dealt with in the course of the statutory appeal, notwithstanding the fact that the statutory appeal in this case involves a full rehearing before the High Court.

64. Reference has already been made to a number of passages from the judgment of Macken J. in *O'Reilly v. Lee*, and which were relied upon by the High Court and the Court of Appeal in this case. Counsel on behalf of the appellant acknowledges that the decision in *O'Reilly v. Lee* may be of some relevance in this case, but makes the point that the judgment in that case concerned an appeal under s. 7(12A) of the Solicitors Acts, and not s.7(11). However, in my view, the observations of Macken J. are as relevant to an appeal under s.7(11) as to an appeal under s.7(12A). What was said by Macken J., at paras. 7 and 8 of her judgment, bears further scrutiny. As I mentioned, at para. 17 above, reference was made to parts of paras. 6 and 7. It would be useful to set out paras. 7 and 8 in full at this point:

> *"7. A different situation would of course arise if the appellant sought to challenge the Solicitors Disciplinary Tribunal in respect of matters dealt with, or failed to be dealt with in an appropriate case, such as would lend themselves to an application for judicial review. In support of his contention that the Solicitors Disciplinary Tribunal should be a respondent to his appeal and not a mere notice party, the applicant invokes the decision of this court in The State*

(Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51 where that tribunal was the respondent to the applicant's claim. That was not however an appeal, but rather an application for judicial review, and it was both legally appropriate and in accordance with the applicable rules of court governing such proceedings, that the relevant tribunal in that case would be the named respondent. The appellant invokes the same case for an additional purpose, namely, to support his contention that a tribunal against whose decision he is appealing is obliged to provide appropriate and adequate reasons for its decision and he argues that the Solicitors Disciplinary Tribunal did not do so.

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

65. As can be seen, one of the issues which arose in that case concerned the identity of the appropriate respondent to the appeal, an issue which does not arise here. However, what is clear from that decision is that on a *de novo* appeal, the matters at issue before the Tribunal "*may be exposed again and argued afresh before the High Court, … on the basis of the materials which were before the Disciplinary Tribunal, but having regard to the arguments made before it, the High Court, exercising an independent jurisdiction in the matter.*"

66. What was also made clear is that, certain matters which would be appropriately dealt with by way of judicial review, all fall, where the appellant pursues an appeal to the High Court. In other words, the Tribunal could deal with a matter before it in such a way as to give rise to an application for judicial review, but the party concerned may choose to pursue the statutory appeal instead, in which case all evidence, arguments and submissions can be heard again, and a new decision can be made in the circumstances by the High Court, and the issues that could have given rise to an application for judicial review "*fall away*", or, to put it another way, have no further relevance. As has been seen, much reliance was placed on that decision by the Court of Appeal and apart from the point made by counsel on behalf of the appellant that it was a decision relating to s.7(12A) of the Solicitors Acts, there was no suggestion that the decision in that case was not correct.

67. The other case which was the subject of considerable discussion in the course of the written submissions and the argument before this Court was *Mallon v. Law Society of Ireland*. That was a judgment of Kelly P. and, not surprisingly, it featured in his judgment in this case, where he relied on it, (as well as the judgment in *O'Reilly v. Lee*) to conclude that there was no jurisdiction to accommodate "*judicial review type jurisdictional arguments in the context of the statutory appeal created by the Solicitors Acts*".

68. In *Mallon*, an application had been brought by the Law Society to strike out "*in limine*" a purported appeal by Mr. Mallon in respect of what was described as a "*decision/finding of the respondent made on the 16th February, 2017 that the appellant is not entitled to rely on a defence of estoppel against the Law Society in an application … before the Solicitors Disciplinary Tribunal*." Apparently, there was no such decision,

although there was a determination of the Tribunal of that date. The Law Society argued that no appeal lay from that determination, and that the purported appeal should be struck out for want of jurisdiction. Mr. Mallon had sought to argue that the misconduct allegations against him should not be the subject of a hearing before the Tribunal by reason of an estoppel argument which he sought to raise by way of a preliminary objection. His arguments in that regard were heard and determined by the SDT on the 16th February, 2017 when it was concluded that there was no merit to his estoppel argument. Leaving aside certain issues that arose in that case as to candour, Kelly P. had regard to the terms of s.7(11), and s.7(13). Para. 23 of his judgment deals with the forms of appeal provided under the Solicitors Acts, and he observed as follows:

> *"This statutory scheme makes it clear that the right of appeal of a solicitor arises only consequent to the making of a finding of misconduct by the SDT pursuant to s.7(3) of the Act of 1960 as substituted. Under s.7(13) of the Act of 1960 as substituted a solicitor may appeal the finding of misconduct. Under s.7(11) of the Act of 1960 as amended a solicitor may appeal sanctions imposed by the SDT further to findings of misconduct. However, it is clear that in both instances the right of appeal flows from the issuing by the SDT of its formal report under s.7(3)(c) setting forth the results of the inquiry, including its findings in respect of each allegation before it. Under the statutory scheme no appeal lies before the completion of the inquiry process where the SDT is obliged to consider each allegation and make a finding in respect of each such allegation."*

69. He also pointed out that an appeal procedure was also provided for allowing appeals by the Law Society and by lay applicants in certain circumstances. The appeal

brought by Mr. Mallon was said to have been brought pursuant to s.7, but no sub-section was able to be identified by Mr. Mallon which he relied on to bring the appeal. Accordingly, Kelly P. observed, at para. 27 of the judgment, as follows:

> *"In the present case the SDT, as a matter of convenience in the course of hearing the complaints, decided to hear evidence and receive submissions on a preliminary objection taken by Mr. Mallon. It was entitled to take that course as part of the ordinary case management of the complaints that it had to deal with concerning Mr. Mallon. The SDT did not accept his argument concerning the existence of an estoppel and then proceeded to attempt to discharge its statutory function under which it is mandated to consider each allegation of misconduct and to make findings in respect of them. If there are findings of misconduct made then the SDT's report must be served on M.* [sic] *Mallon and his rights of appeal are triggered. None of this happened in this case. No finding of misconduct has been made against Mr. Mallon. No order or report has issued pursuant to s.7 of the Solicitors (Amendment) Act 1960 as substituted and amended. Thus, it can be seen that the necessary statutory preconditions to enable an appeal to be brought under s.7 have not been met."*

70. In the course of the submissions before Kelly P., the Law Society argued that, once a *prima facie* finding had been made that an inquiry should be held, the Tribunal had no choice but to proceed to hold the inquiry, consider the allegations, make findings on them, and issue a report (See *Stephens v. Orange*). Accordingly, it was argued by the Law Society that the only way to halt an inquiry before it is reported on is by judicial review brought within the appropriate time limit.

71. Mr. Mallon, in his turn, sought to argue that his purported appeal was a form of "*unenumerated appeal*", which came within s.7, which was said to arise on a point of law, "*to regularise the conduct of an ongoing inquiry where there is a breach of natural justice flowing from a decision of the Tribunal taken by way of preliminary hearing in order to prevent or guide the Tribunal from making a finding on the basis of a mistake of law that fetters its own function*". Kelly P. observed that this argument as to alleged jurisdiction under s.7 seemed remarkably close to the sort of jurisdiction that might be exercised by the court by way of judicial review. Mr. Mallon also sought to rely on the inherent jurisdiction of the President of the High Court over the Solicitors Disciplinary Tribunal.

72. The conclusions of Kelly P. were very much focused on the argument as to unenumerated appeals, a concept rejected by him. As he said, at para. 49:

> *"The only appeals that are created by the Act are those which arise on foot of the steps prescribed by the Act namely the completion by the SDT of its statutory obligation to consider each allegation of misconduct and to make findings and prepare a report or order in respect of them."*

73. He went on to say, at para. 50, as follows:

> *"I already quoted from para.14 of Mr. Mallon's written submissions. There is no doubt a jurisdiction in the High Court (not confined to the President of the Court) to regularise the conduct of an ongoing inquiry if there is a breach of natural justice or some misbehaviour on the part of the SDT. But such remedy lies within the purview of the judicial review jurisdiction of the High Court. It is not one arising under the structure of the appellate mechanism of the Solicitors Acts."*

74. It might be said that the statement of Kelly P. in para. 50, referred to above, perhaps goes further than was necessary for the purpose of deciding the case before him. As he had explained, in that case, no issue arose that could be decided in the context of a statutory appeal. The issue which Mr. Mallon had raised was one in which there had been a challenge to the jurisdiction of the Tribunal by reason of an issue of estoppel. There was no appeal provided for under the Solicitors Acts in the circumstances of such a challenge. There could have been an appeal from a finding of misconduct or against sanction, but not against a determination as to whether an issue of estoppel arose. Therefore, the only remedy available at that stage was to challenge the jurisdiction by way of judicial review. I think it would be helpful just to emphasise one part of the statement of Kelly P. in para. 50. He commented on the jurisdiction in the High Court to regularise the conduct of an ongoing inquiry if there was a breach of natural justice or some misbehaviour on the part of the Tribunal. That, it seems to me, is an important point to note. Thus, Kelly P. was properly drawing a distinction between judicial review, which could be availed of in the course of an ongoing inquiry, as opposed to the remedy that would arise following the conclusion of the inquiry by the SDT.

75. Finally, in that case, Kelly P. concluded his judgment by saying, at para. 57:

> *"A challenge to the jurisdiction, behaviour or conduct of the SDT prior to the completion of its statutory mandate cannot be made by means of a purported appeal under s.7 but only by way of judicial review."*

76. Again, it seems to me that there can be no difficulty with his observation that a challenge to jurisdiction "*prior to the completion of its statutory mandate*" could only be made by judicial review, and not by way of a statutory appeal. Quite clearly, until

such time as the matter had been dealt with completely by the Tribunal, no appeal under the Solicitors Acts could arise.

77. The difficulty in this case stems from the fact that the appellant sought to challenge "*the jurisdiction*" of the Tribunal to hear the complaints against him, was unsuccessful in that challenge, went through the process of a hearing before the Tribunal, then appealed from the decision of the Tribunal, and, in the course of the appeal, sought to revisit the challenge to the jurisdiction of the Tribunal to hear the complaints made against him. Was the High Court correct in dismissing his challenge to the jurisdiction of the Tribunal, on the basis that such a challenge could only be brought by way of judicial review, and that it was not something that could be dealt with in the course of a statutory appeal? Kelly P. referred in detail to his judgment in *Mallon* in the course of the judgment in the present case, and cited a number of paragraphs from that case, to which I have referred above. (See paras. 34 to 35 of his judgment in this case). He noted that, in *Mallon,* he had to deal with a purported appeal brought before the Tribunal had completed its task, and found support in that judgment for the conclusion that a statutory appeal under the Solicitors Acts *"does not accommodate issues which properly fall to be dealt with by way of judicial review".*

The use of the word "proper" in Section 7(11)

78. As we have seen, the Court of Appeal in its judgment followed the approach of Kelly P.. However, it is noteworthy that an argument was made by the appellant before the Court of Appeal which does not appear to have been made before Kelly P., focusing on the terms of s.7(11), which, as we have seen, provides that the High Court can rescind or vary the order of the Tribunal or "*confirm that it was proper*" for the Tribunal to make the order. As was noted, in paras. 65 of the judgment of the Court of Appeal:

"The argument was that the High Court could not confirm that it was proper for the Tribunal to make the order appealed against if the Tribunal had no jurisdiction to make the order. Therefore, the statutory appeal required the High Court to be satisfied that the Tribunal had jurisdiction, and it followed that it must be able to adjudicate on any challenges to that jurisdiction within the scope of the statutory appeal."

79. As I have noted, the argument focused on the use of the word "*proper*" in s.7(11). The Court of Appeal concluded that the argument made by the appellant as to the scope of the appeal was unsupported by authority and strained the statutory language of s.7(11) too far. (See para. 67). At para. 68 of the judgment it was said as follows:

"The word "proper" as used in the subsection does not necessarily refer to the jurisdiction of the Tribunal; it could just as easily refer to the appropriateness or correctness of the decision under appeal. This is more consistent with the other options set out in subs. (i). A more natural reading of the subsection is that in subs. (i), the High Court must consider whether to allow the appeal or not, and subs. (ii) applies where the High Court upholds the order. If this is not so, on a strict reading of the section, it is not open to the High Court to reject an appeal and affirm the decision of the Tribunal. In my view, the Oireachtas cannot have intended such a result, and thus, should not be taken to have amended the statute in the manner contended."

80. The Court of Appeal concluded, at para. 69, as follows:

"In this case, the jurisdictional challenge alleged a total lack of jurisdiction and did not concern an alleged error within jurisdiction. The appellant has not

advanced any arguments which alter this conclusion. It follows that the appropriate remedy, if he wished to raise these arguments, was to seek judicial review, not to pursue the appeal under the Solicitors Acts. Accordingly, the trial judge was correct to dismiss the appellant's jurisdictional challenge on this ground."

81. It has been argued on behalf of the Tribunal that the use of the word "*proper*" was intended to relate to the correctness of the decision, something which is not the role of judicial review proceedings. (See *Sweeney v. District Judge Fahy* [2014] IESC 50, at para. 3.4). As such, the Tribunal emphasised the point that judicial review is not concerned with the correctness of a decision, but with the process by which the decision was reached. Therefore, it was contended that an issue as to jurisdiction was not concerned with the correctness of the decision but was a matter to be dealt with by way of judicial review, and that a jurisdiction challenge had no place in an appeal under s.7(11). I think there are problems with the arguments of the appellant based on the use of the word "*proper*" in s.7(11). First of all, I think it is important to remember that s.7(11) deals with an appeal against sanction, and s.7(13) deals with an appeal from a finding of misconduct, albeit that it appears that the practice in relation to appeals has blurred the distinction between the two forms of appeal. This blurring of the distinction between the two provisions of s.7 does not help the interpretation of "*proper*" as used in s.7(11). However, I think the Tribunal must be correct when it says that the word "*proper*" in this context refers to the correctness of the decision made by the Tribunal, as opposed to the process by which the decision was reached. It is, I think, hard to believe that the Oireachtas in using the word "*proper*" in s.7(11) was in some way trying to expand the scope of the statutory appeal in cases under s.7(11) to encompass matters

which would not ordinarily arise in the context of a statutory appeal, and which would, in general terms, be matters which could only be dealt with by way of judicial review.

Confusion as to the appropriate remedy

82. Although I find that I cannot agree with the reliance on the word "*proper*" by the appellant to argue for an expanded view of the scope of appeal under s.7 of the Solicitors Acts, I think it is necessary to consider the scope of the appeal in this case, and the circumstances in which judicial review might be the only option to use where it is sought to challenge a decision of the Tribunal.

83. In the case of *O'Reilly v. Lee*, which has been referred to previously, a number of issues arose, one of which was an issue as to bias on the part of the members of the Tribunal. Macken J., in the course of her judgment, as mentioned previously, stated that complaints of that nature "*all fall*" once there was a full appeal to the High Court. She noted that, at such an appeal, both parties would be heard again at an oral hearing in open court, both could make legal and other relevant submissions on all matters, and a fresh determination of the issues would be made on the appeal. Therefore, it followed that in a case where bias was alleged in respect of the decision-maker at first instance, that issue is no longer relevant in the context of a full appeal to the High Court. As she explained, a full appeal of the kind provided for by the Solicitors Acts was not a judicial review of the decision at first instance. It can be concluded therefore that what may be appropriate grounds for an application for judicial review may not arise for consideration in the course of an appeal.

84. Similarly, one can understand the approach taken by Kelly P. in the case of *Mallon*, having regard to the circumstances of that case. There was no provision in the Solicitors Acts for an appeal from a ruling in the course of a hearing (as to an issue of

estoppel in that case) and, therefore, the proper course to have taken to challenge the decision of the Tribunal in respect of its ruling would have been to seek judicial review. The decision simply was not one in respect of which an appeal was provided for by the Solicitors Acts. In some cases, therefore, it will be apparent that the appropriate remedy for a party dissatisfied with a decision may be to challenge that decision by way of judicial review, and in other cases, it will be apparent that the appropriate remedy will be an appeal where that is provided for in the relevant legislation. As has often been said, judicial review examines the process by which a decision is taken, rather than the merits of the decision. So, for example, it will generally be appropriate to appeal if a solicitor is dissatisfied with a finding of misconduct. One, therefore, has to ask the question as to whether or not the decision to proceed by way of appeal, as opposed to judicial review, means that some issues cannot be raised on an appeal and must be viewed as having been abandoned, or, to use the language of Macken J., as having fallen away. In this context, it is worth referring to *Hogan, Morgan and Daly: Administrative Law in Ireland* (5th Edition), where they contrasted appeals and review. At paras. 11-48 to 11-49, they explained the position as follows:

> *"11-48 In a contrast between an appeal and judicial review, four general points are relevant. First, when the High Court exercises such an appellate jurisdiction it has, generally speaking, the power to uphold, reverse, alter or vary an administrative decision. By contrast, in judicial review proceedings these options are restricted. Traditionally, the court was faced with the stark question: to quash (save where the order is severable) or not to quash. Since 1986, however, there has been the possibility of both remittal and award of damages. Secondly, even when an appeal is allowed, this will only have a prospective effect and will not call into question the legality of earlier*

administrative decisions in respect of the period between the actual decision and the appeal. Difficulties can arise in respect of certain statutory schemes. For example, in Manorcastle Limited v. Commission for Aviation Regulation, Charleton J. observed that, if the High Court were to allow the appeal under the Transport (Tour Operators and Travel Agents) Act 1982, a licence would automatically be granted, rather than the matter being remitted to the respondent for reconsideration. This was especially problematic in the instant case where it might have been prudent to impose certain conditions on the grant of the licence of the applicant. Although the High Court had a power to impose conditions, it could not draw on a similar reservoir of expertise to that of the Commission.

11-49 There is thirdly the distinction between "legality", which is all that can be examined on review, and "merits", which are the proper province of an appeal. It has already been explained that in practice there may not be a great deal of difference between the reach of the High Court's jurisdiction to hear appeals where these appeals are confined by statute to an appeal on a point of law; and, on the other hand, the scope of judicial review now that the reach of jurisdictional error has been so greatly expanded. But other differences remain. In the first place, the remedies available on an application for judicial review are discretionary in nature. Secondly, as discussed in the previous Part, a finding of invalidity has effect erga omnes. In other words, there may be a large category of persons who, being similarly affected by the impugned legislation or administrative act, will be permitted to rely on this finding of invalidity. In contrast, because of the nature of the circumstances in which an appeal has been created, a decision of the High Court on appeal is a ruling in an inter

partes matter between the appellant and the administrative body concerned and, its precedential value aside, it need not necessarily have much wider significance for third parties. Fourthly, more evidence may be admissible on appeal than on judicial review:

> *"The admissibility of new evidence in each case depends on the wording of the relevant statute. However, it can be said that there is a general trend towards the discretionary admission of new evidence in the interests of justice unless the appeal is restricted to a point of law or to a re-hearing of the same facts"."*

85. The passage referred to above is a useful reminder of some of the practical differences between judicial review and statutory appeals. Obviously, as has been pointed out in many cases, the scope of a statutory appeal will depend very much on the legislation which creates the particular form of appeal in any given case. It is not necessary to elaborate further on this point, as Clarke J. has very helpfully set out a categorisation of such appeals in *Fitzgibbon v. Law Society*, to which I have referred above. As has been seen, the type of appeal in this case has been categorised as a *de novo* appeal, which in practical terms is as full an appeal as there can be in the context of statutory appeals.

86. Despite the parties being in agreement that the appeal in this case is a *de novo* appeal, the respondents have argued successfully in the courts below that jurisdictional issues cannot be determined on such an appeal. Thus, Kelly P., at paragraph 25 of his judgment, noted the preliminary objections of the Tribunal and the Law Society in the following terms:

> *"They both contend that his complaints as to jurisdiction cannot be pursued in this appeal because such matters ought to have been pursued by way of judicial review. Such jurisdictional issues cannot be accommodated in a statutory appeal which envisages a de novo hearing on the merits."*

As has been seen previously, Kelly P. relied on the judgment in *O'Reilly v. Lee*, and his own judgment in *Mallon*, in support of that proposition.

87. It is worth recalling, as set out in paragraph 20 of the judgment of the Court of Appeal, that the appellant herein, in correspondence with the Tribunal, indicated that he would be raising a preliminary objection to the jurisdiction of the Tribunal to hold the inquiry. At the hearing on the 15th July, 2015, the objection was raised, and the Tribunal Chairman rejected the argument, holding that the Tribunal's jurisdiction was properly grounded, and it went on to hear the substantive issue.

88. The question at the heart of these proceedings then must be whether the appellant was precluded from raising the same "jurisdictional" challenge when the matter came before the High Court by way of appeal. To support his contention that the jurisdictional challenge can be raised on the *de novo* appeal in this case, counsel for the appellant relied on the judgment of the High Court in the case of *Koczan v. Financial Services Ombudsman* [2010] IEHC 407. That was a case which concerned a decision made by the Ombudsman in relation to a matter concerning a life insurance and critical illness policy. The applicant in that case was dissatisfied with the ruling of the Ombudsman and appealed to the High Court pursuant to the provisions of s.57CL(1) of the Central Bank Act, 1942, as inserted by s.16 of the Central Bank & Financial Services Authority of Ireland Act, 2004. Section 57CM(1) of that Act provides:

"The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination."

89. An argument had been made in that case on behalf of the Ombudsman that the appellant in those proceedings had not brought judicial review proceedings "*to challenge anything that the Ombudsman did in terms of the procedure that he followed or in terms of his jurisdiction*." At paragraph 19 of his judgment, Hogan J. said as follows:

"19. There are, doubtless, certain categories of cases where the legal argument raised falls properly to be canvassed by means of judicial review rather than by way of a statutory appeal. As indicated in Square Capital, an argument directed towards a total lack of subject matter jurisdiction is perhaps one such case. Judicial review might also be appropriate where the complaint relates to the integrity or basic fairness of the decision-making process, so that in justice the decision-maker ought to be afforded an adequate opportunity of defending his or her position in judicial review proceedings which admit of the possibility of cross-examination and oral evidence. There may well be other cases - such as, e.g., those touching on the constitutionality of legislation or the validity of statutory instruments - where the legal issues cannot properly be raised by way of appeal (whether by virtue of the special rule contained in Article 34.3.2 of the Constitution or otherwise) and which must be dealt instead with by means of a declaratory action: cf. the discussion of this issue in the judgment of Kearns J. in SM v. Ireland (No.1) [2007] IESC 11, [2007] 3 IR 283."

This paragraph reflects the position that I have already referred to, namely, that there are types of cases where the challenge to the decision at issue is one properly made by judicial review and that there are some types of cases where the challenge to a decision is best accommodated in the appeal process provided for the particular statutory code.

90. Hogan J. continued, at paragraph 20 of his judgment, as follows:

> *"20. These cases must be, however, be* [sic] *regarded as the exception rather than the rule. It is well established that the Oireachtas must be presumed to know the law and the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference - albeit a rebuttable inference - that the Oireachtas "must have intended that the Court would have powers in addition to those already enjoyed at common law" in respect of its judicial review jurisdiction: see Dunne v. Minister for Fisheries [1984] I.R. 230 at 237 per Costello J.. That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so: see, e.g., the comments in this regard of Laffoy J. in Teahan v. Minister for Communications (No.1) [2008] IEHC 194."*

Obviously, one could take no issue with the observation that the Oireachtas must be presumed to know the law, but I would be reluctant to read that passage as meaning that a full statutory appeal was understood to encompass matters more properly the subject

of judicial review proceedings. Hogan J. himself acknowledged as much in the preceding paragraph. Therefore, it would not be correct to suggest that Hogan J. in that case was stating that matters that previously could only have been dealt with by way of judicial review could now be dealt with within the scope of a *de novo* statutory appeal.

91. It does seem to me, however, that in order to determine the scope of a statutory appeal, it is necessary to look to the particular statutory provisions providing for the appeal, and to interpret them accordingly in order to determine what issues can or cannot be considered in the course of the particular statutory appeal. In this context, it is worth recalling what was said by Clarke J. in the case of *Fitzgibbon v. Law Society of Ireland*, referred to above, at para. 95, where he stated:

> *"Within that broad spectrum of appeals, there are, in reality, very many differences both at the broad level of principle and in relation to detail between the types of appeal which may be contemplated. In the vast majority of cases, there is no overarching legal reason why any particular form of appeal may be required. The form of appeal allowed will, in most cases, therefore, be a question of the proper interpretation of the relevant legal measures whether private or public. If those legal measures are sufficiently clear, then it is unlikely that any difficulty will arise. Any court called on to review the actions of relevant bodies or to consider the scope of a right of appeal to or within the courts system itself will simply consider what the rules or statute concerned actually says. However, regrettably, it is all too frequently the case that such rules or statutes are far from clear and often leave any court charged either with reviewing the decisions of outside bodies or considering the scope of its own jurisdiction with a difficult task of interpretation."*

92. In their submissions, the Tribunal placed emphasis on the recognition by Hogan J., in para. 19, referred to above, of the fact that there are categories of cases where the issue raised falls to be considered by judicial review, rather than by way of statutory appeal. The Binghams take a similar view and emphasise that, if *Koczan* is authority for the proposition that the jurisdiction of the Tribunal is a matter amenable to determination on a statutory appeal, then that is at odds with the decision in *O'Reilly*. They placed particular emphasis on the judgment of Macken J. in *O'Reilly*, at para. 7, to which reference has been made previously.

93. For completeness I should refer also to a passage from the judgment of Clarke J. in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 I.R. 669, as to the situation where a statutory appeal exists:

> *"41. ... The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407 ..., that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned."*
>
> *42. However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J.*

in Koczan v. Financial Services Ombudsman [2010] IEHC 407 …, that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. …"

One could say that the broader the scope of appeal, the more likely it is that most issues arising from the first instance hearing should be possible to deal with by means of the statutory appeal but, of course, there will always be exceptions to that proposition such as the issue that arose in *Mallon*.

94. Although reference was made to cases such as *Petecel v. Minister for Social Protection* [2020] IESC 25, and *Swaine v. Solicitors Disciplinary Tribunal* [2016] IEHC 667, those cases do not seem to me to be of assistance in resolving the issues in this case. Finally, reference was made in the course of argument to the statutory appeals in relation to other bodies, such as those applicable to health care professionals, medical practitioners, and veterinary surgeons. There are some differences in the form of statutory appeal in each case, and the appellant relies on the differences to argue that the Oireachtas in framing such appeals has done so in respect of the various professions, each in its own way, with clear differences between each one. Again, it seems to me that not a great deal of assistance is to be found by comparing the statutory regime in respect of other professions.

Decision

95. I think it is abundantly clear from the discussion above that, in some cases, a party dissatisfied with a decision at first instance may be able to avail of a statutory appeal, and, in other cases, it may be that judicial review is the appropriate remedy. The case of *Mallon* is an example of a situation where no statutory appeal lay in respect of

the issue complained of by Mr. Mallon. It had been suggested by him that there was a form of "unenumerated" appeal under s.7 of the Solicitors Acts, but this was, as has been seen, rejected by Kelly P. In that case, no finding of misconduct had been made against Mr. Mallon, and consequently no sanction had been imposed on him. Therefore, the statutory pre-condition for an appeal under s.7 did not exist. Any issue as to the manner in which the matter was dealt with could only have been dealt with by way of judicial review.

96. The argument that has been made in this case is said to raise a "jurisdictional" challenge and, as such, the Tribunal argued that, in such circumstances, the appropriate course of action should have been to seek judicial review to challenge the jurisdiction of the Tribunal to hear the complaints against the appellant. The High Court and the Court of Appeal took the view that the Tribunal was correct in its argument. However, it seems to me that the decision of each of these Courts seems to have been focused very much on the idea that once "jurisdiction" was the subject of the challenge, then the statutory appeal process was unsuitable and the only procedure available was judicial review. I appreciate that both the High Court and the Court of Appeal were very much influenced by the decisions in *Mallon* and *O'Reilly v. Lee*. However, two points have to be made about those cases. As pointed out above, the issue in *Mallon* was one that could not have been dealt with at all, having regard to the statutory appeal process, and in the second case of *O'Reilly v. Lee*, the relevant issue was bias on the part of the Tribunal, a matter which, as this Court said, fell away once an appeal was pursued. It seems to have been assumed that a jurisdictional challenge to the Tribunal dealing with the complaints of the Binghams was one which could not be the subject of the statutory appeal and could only be the subject of judicial review proceedings.

97. In many instances, a party dissatisfied with a first instance decision has a choice to make as to the appropriate remedy to pursue. It is not simply a choice of either a statutory appeal or judicial review. There is a lengthy discussion in *Administrative Law in Ireland* as to the suitability of judicial review and the availability of alternative remedies, and when such alternative remedies should be pursued. (See para. 18-206 et. seq.). The authors of that book make the point, at para. 18-206, as follows:

> *"18-206 The existence of an alternative remedy does not of itself debar an application for judicial review. The question is essentially one for the discretion of the court and regard will be had to the adequacy of the alternate remedy and to all the circumstances of the case. Where the issues in question are principally issues of fact or law not fundamentally going to jurisdiction and which can be dealt with on appeal, then the courts will invariably insist that the appellate remedy be availed of. Where a statutory appeal is provided then, in the case of tribunals, the general rule is that the party affected should pursue a statutory appeal rather than initiate judicial review proceedings, although in this context the scope of the appellate remedy provided is of critical importance since the court "when considering whether an appeal is an adequate remedy" is required to analyse the complaints made by a party seeking judicial review and to determine "whether, in the light of those complaints, the appellate body in question can consider same and, if they be made out, provide an appropriate remedy".*
>
> *18-207 The more difficult questions arise where – as is often the case – the errors of law in question either fundamentally go to jurisdiction or,*

alternatively, can be characterised as such. There is a vast modern jurisprudence on this topic, not all of it fully consistent."

98. The basis of the jurisdictional challenge raised by the appellant was twofold. The first aspect of his challenge was that the complaint being made by the Binghams was the same as that previously made by them, in other words, it was a contention that the complaint was *res judicata*. *Res judicata* is a matter normally raised by way of defence and does not go to the jurisdiction of the body concerned to hear the matter. At its simplest, it is a contention that the matter at issue has been considered and decided in earlier proceedings between the same parties, and that there is a further attempt to ventilate the same matter again. As such, this was a matter which did not question the jurisdiction of the Tribunal as such, but was an argument to the effect that the Tribunal should not hear the complaint, as it had already been considered and rejected. The Tribunal rejected this argument on the basis that it was, in fact, a new complaint following on from events that occurred after the Circuit Court proceedings previously referred to. I can see no reason in principle why this argument could not have been raised before the High Court in the course of the statutory appeal. The issue was as to whether or not the complaint was the same as the one previously made against the appellant which was resolved without any finding against him. This was not an issue as to jurisdiction, but an issue as to whether or not the Tribunal was being asked to consider the same complaint again. Therefore, it is difficult to see why such an argument could not have been ventilated in the High Court in the course of the statutory appeal. The appellant was entitled to raise it before the Tribunal, and I cannot see any reason in principle why he could not raise the same argument in the course of the full statutory appeal in the High Court.

99. The second issue concerned the provisions of s.7(1) of the Solicitors (Amendment) Act, 1960, (as amended), and the fact that a complaint had previously been before the Independent Adjudicator. Section 7(1) permitted an application to be made to the Tribunal by a person (not being a person who has made a complaint to an Independent Adjudicator under s.15 of the Solicitors (Amendment) Act, 1994. The question is whether the Binghams were not persons who had made a complaint to the Independent Adjudicator. The appellant in his affidavit grounding his appeal to the High Court, at para. 44, made the point that he objected to the Tribunal's jurisdiction on the basis that the Tribunal was statutorily proscribed from hearing the application under s.7(1) of the Solicitors (Amendment) Act, 1960, due to the fact that the Binghams had previously made a complaint to the Law Society and appealed against that decision to the Independent Adjudicator of the Law Society. This provision could be and was properly described in the course of the hearing as a gateway provision to the exercise of the Tribunal's jurisdiction. I think it is apparent that the Tribunal would have had to satisfy itself as to whether or not the Binghams did not fall foul of the gateway provision before it could embark on the disciplinary proceedings and it did so. There may have been some confusion as to the legislative status of the provisions of s.7(1) on the part of the Tribunal as is apparent from its ruling on this issue. (See the Transcript of the hearing before the Tribunal at p. 43 et seq.) However, that is not of relevance to the issue before this Court. The submissions filed in this matter on behalf of the Law Society helpfully set out the role of the Independent Adjudicator: he/she could not make determinations in respect of complaints, did not hear appeals from the Society's investigations, and was limited to a review of the Society's handling of complaints. To that extent, it was pointed out that the reference to an "appeal" to the Independent Adjudicator in the narrative factual background of the judgment of the Court of Appeal,

at para. 5, and in the submissions of the appellant to this Court, was inaccurate. Regardless of the status of s.7(1), and of the role of the Independent Adjudicator, it appears that the matter considered by the Independent Adjudicator was a review carried out in 2009, concerning the appellant's right to change the terms of engagement between the parties, the manner in which the appellant came off record in the proceedings, and the lien which the appellant was exercising over the file of the Binghams. As noted previously, that complaint was considered by the Complaints & Clients Relations Committee which decided that the complaint did not warrant further investigation.

100. One of the difficulties in this case seems to me to stem from the fact that the issue in relation to *res judicata* and the review carried out by the Independent Adjudicator have both been described as the "jurisdictional challenge". There is a difference between an issue of *res judicata* and an issue arising under a gateway provision, such as that contained in s.7(1). The question of whether something is, in fact, *res judicata* or not will depend upon the facts and circumstances of the particular case. It does not go to jurisdiction. It is undoubtedly, therefore, in my view, a matter for the Tribunal to consider and, consequently, a matter that is equally open to be considered by the High Court on appeal.

101. A gateway provision, such as s.7(1), is in a somewhat different position. If the parties making a complaint do not get over the hurdle that is provided by s.7(1), then it seems that there is no jurisdiction to embark on a consideration of the complaint. In that sense, it appears to be something that goes to the jurisdiction of the body concerned and could be described as "fundamentally going to jurisdiction", and therefore is an issue that could properly be dealt with by way of judicial review.

102. The fact that an issue could have been dealt with by way of judicial review does not mean that it should have been dealt with by way of judicial review. As we have seen, in the passage referred to above from the judgment of Clarke J. in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner*, the default position is *"that a party should pursue a statutory appeal rather than initiate judicial review proceedings".* The discussion in *Administrative Law in Ireland* as to alternative remedies referred to above is another reminder of the fact that a party may, in appropriate circumstances, have a choice of proceeding by way of statutory appeal or by way of judicial review. What was at issue was more than suitable to be considered by the High Court in the course of the statutory appeal. I can see no reason why the appellant was obliged to confine himself to a remedy in judicial review in respect of that issue. He was entitled to question the jurisdiction of the Tribunal in this regard and if they found against him it is hard to see why the same issue could not have been raised in the course of the statutory appeal. After all, if the complaint was the same as that previously reviewed by the Independent Adjudicator, that would have been the end of the matter. I am therefore not of the view that the matters raised by the appellant could not properly have been dealt with in the course of the statutory appeal. I therefore find myself in disagreement with the approach taken by the High Court and the Court of Appeal in this respect and consequently would allow the appeal in this respect.

103. I am very conscious of the long history between the appellant in these proceedings and the Binghams, arising out of the tragic death of the Binghams' son, Mirek, who died on the 31st December, 1999. Counsel for the Binghams has invited the Court to conclude these proceedings at this stage and I am satisfied that this Court has jurisdiction to do so in the circumstances of this case. Mindful as I am of the

lengthy history of this matter, and with a view to concluding these proceedings once and for all, it seems to me that it is appropriate for this Court to consider the issue of *res judicata* and the s. 7(1) issue now and whether or not, having regard to the circumstances, the contentions of the appellant in this regard are correct. These issues were part of the proceedings before the High Court originally and there is no reason why they cannot be dealt with by this Court at this stage. The Court will hear the parties further as to the orders to be made and the resolution of the remaining issues.