

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2012/797 JR

Between/

MARY CECILIA LYONS

Applicant

-and-

LAW SOCIETY OF IRELAND AND SOLICITORS DISCIPLINARY TRIBUNAL

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 29th July. 2013.

Introduction

1. The applicant is a former solicitor who seeks a range of reliefs by way of judicial review in respect of the handling by the respondents of a complaint made against her by a client. The complaint stands adjourned, pending the outcome of these proceedings.
2. The applicant's case is that the first named respondent has acted in breach of fair procedures and natural justice in that it has concealed material information from the applicant and from the second named respondent. This contention centres on the fact that, at an early stage of the complaint process, four letters from the first named respondent were sent to but not received by her. Although it has been accepted by the relevant committee of the first named respondent that she did not get the letters, she maintains that the initial assumption that she was failing to answer the correspondence prejudiced her at the time and has continued to prejudice her position before the second named respondent.
3. The applicant also claims that the first named respondent has failed to make proper disclosure to her in respect of both the correspondence issue and contact that it had with a potential witness in the matter. There are also other criticisms of the initial handling of the complaint by the Complaints and Client Relations Committee of the first named respondent.
4. It is common case that, as well as the correct address for the applicant's home and practice, the first named respondent did for some reason have on its files the address of a house in Dunderry, Co. Meath. It seems clear that the applicant had no connection with that address at any time. There is evidence, by way of affidavit from the occupier of the house, that the first respondent had been sending communications addressed to the applicant to that house for some years.
5. The applicant says that, despite the concession as to the non-receipt of the letters, the process has been tainted by the innuendo that she deliberately did not deal with the correspondence and that doubt has thereby been wrongly and unfairly cast on her veracity.
6. As against the first named respondent the applicant alleges breach of fair procedures, failure to make proper disclosure, *mala fides* and breach of its obligations as a regulatory body. She seeks various declarations coming within those categories. She also seeks certiorari of the decision of the first named respondent to apply to the second named respondent for an inquiry into the complaint, certiorari of the decision of the second named respondent that there was a *prima facie* case against her and prohibition restraining the first named respondent from taking any further steps in relation to the complaint. She also claims damages.
7. There is also an application for an extension of time in which to seek relief.

Background

8. The applicant qualified as a solicitor in 2005. From the 1st June, 2006 to the 5th November, 2007 she practiced from a premises in the Northwest Business Park, Ballycoolin in Dublin 15. Thereafter she moved the practice to her family home in Copeland Grove, Clontarf. She was a customer of the OX postal service, the nearest office of which was in Killester.
9. The complaint made against her came from a client who appears, from the material before the court, to be, or to have been, the subject of investigation by the Criminal Assets Bureau. I am not aware of the status of that investigation and shall therefore refer to him as Mr. G.
10. The court is not, of course, concerned to determine the legitimacy or otherwise of Mr. G's complaint. However, for the purpose of explaining the progress of the complaint it is necessary to summarise it.
11. Very briefly, Mr. G. had been introduced to the applicant by a Mr. Des Walshe. She had previously done some conveyancing work for a company associated with Mr. Walshe. Mr G. was the main shareholder in a company which owned a quarry or sand-pit in Co. Offaly. The company was significantly in debt to the bank, which had a charge over the quarry. Mr. G. was anxious to stabilise the finances of the company so that the quarry could be sold, for what was anticipated to be a large profit, before the bank moved to appoint a receiver. For this purpose an agreement (dated June 2007) was drawn up by the applicant, by virtue of which the income of the company was to be administered through her client account at the direction of Mr. Walshe. Mr. Walshe's role was to deal with the bank and sort out the company's finances. Over €590,000 passed through this account. Much of the money was paid out for manifestly proper purposes, such as reducing the debt to the bank. However, over €200,000 was paid to companies allegedly controlled by Mr. Walshe. It is claimed by Mr. G. that these payments were made without his proper authority. This is firmly denied by the applicant.
12. In 2008 a prospective purchaser of the quarry paid a deposit of €130,000, which was lodged in the client account. There is a dispute as to the authority of the applicant to deal with that money as she did. The purchaser did not ultimately agree to buy the

quarry and sought the return of his deposit. In July 2008 he issued High Court proceedings against Mr. G., who claimed in his defence that the money was given to the applicant and that she, rather than he, was responsible for what had happened to it.

13. By letter dated the 3rd April, 2009 Mr. G. wrote to the Complaints and Client Relations Section of the first named respondent complaining, in summary, that she had misused monies lodged by him with her. He referred to a copy of the 2007 agreement, with what purported to be an authorisation signed by him for the disbursements made, and raised the possibility that it had been forged.

14. It must be made clear that the forgery allegation was subsequently withdrawn. The focus of the complaint and the investigation thereafter shifted to alleged failures to advise the client and administer payments from the account properly, and a potential conflict of interest relating to the involvement in the client's affairs of Mr. Walsh e. It was alleged that €216,000 had been improperly paid out of the account to companies associated with Mr. Walshe and that the applicant and Mr. Walshe had defrauded him.

The Investigation Process

15. The investigation process is set out in the affidavit of Linda Kirwan as follows:

"The first stage is the preliminary information gathering stage. Preliminary information can be obtained from various sources, for example, a specific complaint to the First Named Respondent or from a routine inspection of a Solicitor's practice. In this case, the initiating event was the letter of complaint dated 3 April 2009 that the Society received from the Complainant.

The Committee Stage

Where the First Named Respondent obtains information which causes it to have concern, it notifies the solicitor and invites the solicitor to respond. It will seek information from the Solicitor in question and may or may not call him or her to appear before the relevant Committee.

The referral to the Solicitors Disciplinary Tribunal

The relevant Committee may refer a Solicitor to the Solicitors Disciplinary Tribunal, if it is satisfied that there is a prima facie evidence of misconduct such as to warrant a referral. The Committee is an administrative committee and simply decides if the matter merits an application by the Society for an inquiry by the Solicitors Disciplinary Tribunal into the conduct of a Solicitor. The Solicitors Disciplinary Tribunal is appointed by the President of the High Court, and is independent of the First Named Respondent. If a decision to refer is made, the Society's Solicitor prepares a Notice of Application to the Tribunal and a Grounding Affidavit which sets out the background facts and a list of allegations that the Tribunal is requested to rule upon.

The prima facie decision by the Solicitors Disciplinary Tribunal

The Solicitors Disciplinary Tribunal will consider the documents which have been forwarded to it, along with the Grounding Affidavit of the First Named Respondent and any Replying Affidavit of the Solicitor and if the Tribunal is of the view that no prima facie case for an inquiry has been disclosed, then that is the end of the matter (subject to a right of appeal to the High Court). As part of this process, the Solicitor is sent the materials the First Named Respondent has and can file an Affidavit in response, setting out his or her version of events, or any other matter which they wish to put before the Committee. According to the rules of the Disciplinary Committee, there can be an exchange of up to five Affidavits before the Disciplinary Tribunal will consider whether or not a prima facie case for an inquiry is disclosed."

Receipt of the complaint and correspondence between the first named respondent and the applicant

16. Mr. G's complaint was received by the Complaints and Client Relations Section of the first named respondent, where it was dealt with by Ms. Linda Kirwan, Senior Solicitor and head of that section. By letter dated the 17th April, 2009 she wrote to the applicant, enclosing a copy of the letter of complaint. She identified the issues that she considered to be of concern and sought observations thereon. She also requested copies of certain documentation.

17. This letter was addressed to the applicant at her home in Copeland Grove, Clontarf and was sent by ordinary post.

18. The applicant replied by letter dated the 1st May. She set out the history of her professional dealings with Mr. G., provided relevant documents and denied any dereliction of her duty as a solicitor.

19. The covering letter of the applicant's response used her professional headed note-paper, which gave her address in Copeland Grove and also gave a DX Killester number.

20. Arising out of that response, Ms. Kirwan wrote back to the applicant on the 22nd June, with two queries. This letter bears the DX number in addition to the applicant's address.

21. No response being received from the applicant, Ms. Kirwan wrote a reminder letter on the 22nd July, 2009 asking for a response within seven days. She wrote again on the 11th August, stating that if the Society did not receive a response within the following seven days the matter would be referred to the Complaints and Client Relations Committee and that the Committee might consider both the original complaint and the applicant's failure to respond to enquiries.

22. Again, no reply was received. On the 28th August, Ms. Kirwan wrote again, saying that she had been left with no option but to refer the matter to the next meeting of the Complaints and Client Relations Committee. She went on:-

"The Committee will be asked to consider both the substantive complaint made by Mr. {G} and your failure to respond to the Society's correspondence which may itself be regarded as a disciplinary matter. You should also be aware that the Society is entitled to seek a contribution towards costs incurred by the Society as a result of a solicitor who does not respond to the Society's correspondence.

Your attendance at the meeting will be required and I will write to you nearer the date of the meeting (9th October 2009) to furnish you with details of your attendance.

23. All of the above four letters were addressed to the applicant referring to her home address and using the OX number. The applicant says that she did not receive any of them.

24. On the 30th September, 2009 Ms. Kirwan sent a letter by registered post to the applicant's home, confirming that the matter would be considered at the next meeting of the Committee at 3pm on the 9th October and that the applicant was required to attend.

25. On receipt of this letter the applicant immediately rang Ms. Kirwan to ask for clarification. According to the applicant, she asked why the matter was being referred to the Committee, and at such short notice, and was advised that she had failed to respond to four letters. She told Ms. Kirwan that she had not received any of the four letters and asked for copies to be forwarded to her. The applicant followed up this phone call with a letter dated the 6th October. At the outset of this letter, she stated that she not receive the letters, which appeared to have been sent via the OX, and added that

"In the past, as your records will show I have always responded promptly to correspondence from the Law Society. I am not in a position to throw any light as regards the reason for no delivery/receipt."

26. The applicant indicated that she was fully prepared to cooperate with the Society. The letter goes on to deal with the two queries raised by Ms. Kirwan.

27. On the 9th October, 2009 the matter was considered by the Committee. The applicant attended, accompanied by Counsel.

28. The record of the meeting is contained in a document headed "Complaints & Client Relations Committee Meeting 9th October 2009 No. 22". The document starts by recording the details of the applicant and the complainant. There is then a brief summary of the complaint and the applicant's assertion that any payments made were made with the authority and consent of the complainant.

29. It is then recorded that

"Ms Lyons was asked by the Society for further information by letter dated the 22nd June 2009 but she did not reply."

"Because of the gravity of the allegations and the fact that Ms Lyons has not replied to the Society's last letter despite a number of reminders, Ms Lyons has been requested to attend."

30. Next there are the headings "Additional Comments" and "Historical Record", both of which are left blank. Then comes the heading "Decision". The first two lines read as follows:

"Ms Lyons attended before the Committee represented by Mr Treacy BL who advised the Committee that he had known Ms Lyons to be a conscientious and diligent solicitor. He referred to Ms Lyons not receiving the Society's correspondence and the Chairman indicated the Committee accepted she did not receive those letters."

31. The rest of the minute deals with the substance of the complaint, with members of the Committee asking questions of the applicant on that topic only. The meeting ended with the Committee advising her that the complainant would be invited to the next meeting.

32. The Committee next met in relation to the matter on the 26th November, 2009. The minute contains the same details in relation to the parties and the same summary of complaint and denial as the previous one. It again refers to the unanswered letter and the reasons why the applicant had been invited to attend. It then records the decision to invite Mr. G and the fact that he did not respond until the eve of the meeting. The matter was then adjourned to the next meeting, on the 29th January, 2010.

33. On the 29th January Mr. G. attended with his solicitor, Mr. Dore, who summarised the history of his client's dealings with the applicant. Members of the Committee asked questions of Mr. G., who said *inter alia* that he was not disputing his signature on the relevant document. He did however assert that it was not explained to him.

34. It is relevant to note that at one point Mr. Dore, is recorded as making a submission as follows:

"Mr Dare submitted that a solicitor making payments in excess of €250,000 has a duty to her client and that if she does not make basic enquiries about the payments that is outrageous. Mr Dare said his client was duped. He did not understand the implications of what he was asked to sign."

35. At a later stage Mr. Dore submitted that the fact that documents were signed by the client did not absolve the solicitor of her duties.

36. It also relevant that a member of the Committee at one stage asked Mr. Gill whether his complaints could be summarised in a particular way, and Mr. G. agreed with the summary.

37. The Committee next met on the 29th April, an earlier scheduled meeting having been adjourned due to the unavailability of counsel.

38. On that date the Chairman is recorded as having said that this was a very unusual and complex case which was still under investigation by the Committee. He outlined the Committee's perception of the complaint and invited counsel to make submissions. Counsel did so, and is recorded as having handed in a copy of written submissions, which were appended to the minute. The applicant, in her affidavit for the Tribunal, refers at paragraph 53 to the presentation of this detailed document, running to eight pages. At paragraph 132 she says that these were notes prepared by counsel. The Chairman asked if the Committee could have them and counsel "obliged" and handed them in. The Committee then questioned the applicant in relation to the matter and she replied to all points raised.

39. At the conclusion of the hearing the Committee took time for consideration. The members came to the view that

"there was a conflict of evidence, a failure to account, a failure to protect the client's interest and the disbursement of monies without proper authorisation from the client."

40. The Committee therefore decided to refer the complaint to the Solicitor's Disciplinary Tribunal. The applicant was informed of this at the end of the meeting. She was further informed in writing by letter dated the 6th May, 2010.

41. It should be noted that after each meeting of the Committee the minutes were sent to the applicant. From reading these documents it is clear that the minutes were compiled on a cumulative basis - each contains the same material as the one before it, with the addition of the minute of the most recent meeting.

The referral to the Solicitor's Disciplinary Tribunal

42. The application by the registrar of the first named respondent to the Tribunal for an inquiry was made on the 10th February, 2011, grounded upon an affidavit sworn by Ms. Kirwan on the 27th January, 2011. It is not clear why it took from the end of April, 2010 to make the application but no real point seems to be taken in this regard.

43. As set out in the affidavit, the allegations in relation to which the inquiry was sought were that the applicant:

- a. Failed to protect the interest of her client Mr. G; and/or*
- b. Failed to disclose to the complainant that the respondent solicitor acted for one or more of Mr Walshe's companies and/or*
- c. Failed to advise the complainant to obtain separate legal advice in circumstances where the respondent solicitor drafted the 2007 agreement on the instructions of Mr Walshe and the complainant and/or*
- d. Showed complete disregard for the interests of the complainant by failing to explain adequately or at all the terms of the 2007 agreement to the complainant and/or*
- e. Showed complete disregard for the interests of the complainant by failing to advise him adequately or at all about the implications of the 2007 agreement and/or*
- f Failed to maintain adequate papers to underpin and/or vouch the entries in the client account...and/or*
- g. Made one or more payments from the client account...without the knowledge and/or any or any adequate authorisation from the complainant; and/or*
- h. Showed complete disregard for the interest of the complainant by failing to obtain confirmation that such payments were in order, in circumstances where any reasonable solicitor acting for their client would have concern about the authenticity for the demands for payment and/or*
- i. Showed complete disregard for the interests of the complainant by failing to make any or any adequate inquiries to validate or verify the reasonableness of the demands for payment and/or*
- j. Breached section 68(1) of the Solicitor Amendment Act, 1994 by failing to provide the complainant with a section 68/etter as soon as practicable on taking instructions as is prescribed by that section and/or (sic).*

44. The grounding affidavit set out the complaint made by Mr. G. and the details of the applicant's initial response, appending the relevant documents.

45. Ms. Kirwan then referred to her letter raising the two queries, and the three follow-up letters, to which no reply had been received. She referred to the applicant's response to the registered letter, indicating that she had not received the earlier correspondence. The affidavit does not refer to the fact that the Committee had accepted that the applicant did not get those letters.

46. There followed a lengthy hiatus for which neither party is to blame. The applicant was unable to prepare a replying affidavit due to the fact that the Criminal Assets Bureau had, on the 24th September 2010, taken her files relating to the matter as part of its investigation into Mr. G. (It should be stressed that the applicant herself was not a subject of investigation.) The applicant ceased practice as a solicitor as of the 30th November, 2010. She has variously deposed that this was because of the trauma of the complaint and investigation, the deterioration it caused in her business, and the significant increase in her professional indemnity insurance on foot of the making of the complaint.

47. Also in 2010, the applicant's practice was inspected by a Senior Investigating Accountant from the first named respondent. This was a routine inspection and not part of the complaint investigation. The report identified a couple of very minor difficulties with the accounts but nothing more. It was noted that the turnover for the previous eight months had only been in the region of €14,000.

48. In August, 2011 the applicant was contacted by a lady named Vivienne Mulligan, whose mother Mabel Mulligan lives in Dunderry, Co. Meath. Ms. Mulligan told the applicant that her mother had been receiving Law Society correspondence addressed by name to the applicant for the previous two years and that she, the daughter, had decided to track her down to inform her. She said that her mother had returned all such correspondence, unopened, to the Law Society, with a note to the effect that no-one of that name lived at that address.

49. It might be noted at this point that Mrs. Mulligan has sworn an affidavit for these proceedings in which she says that she has about fifteen items of post addressed to the applicant over eight years.

50. As mentioned above, the applicant swore a replying affidavit on the 8th February, 2012. In it she dealt in detail with the allegedly unanswered letters and the contact from Ms. Mulligan. She complained of a serious breach of her right to privacy and serious negligence on the part of the Society.

51. The applicant further stated that she had not failed to respond to correspondence, but that the falsely-alleged failure formed "a significant basis for the referral" to the Committee at a stage when the complaint itself had not been fully investigated. She was therefore denied the full pre-CCRC investigative phase. She contended that, once it had been accepted that she had not received the letters, the grounds for referral to the Committee no longer existed. The request for her attendance should have been cancelled and the matter referred back for appropriate investigation.

52. It was further contended in the affidavit that the failure to amend and correct the summaries contained in the minutes of the meetings to reflect the fact that she did not receive the letters meant that there was a continuing "inappropriate negative impression" of her.

53. The applicant then criticised the Committee's handling of the meeting of the 29th January, 2010. In particular, she complained of the fact that a Committee member "worded" or "formulated" Mr. G's complaint for him, although Mr. G. was accompanied by a solicitor. She also described this as "a witness leading style consultation". This is said to have been inappropriate, improper and in breach of fair procedures.

54. The applicant also complained that the Committee took insufficient time to consider its decision in relation to what its Chairman had described as "*a very unusual and somewhat complex case*".

55. Issue was taken with the statement by Ms. Kirwan that Counsel handed in to the Committee a written submission on behalf of the applicant. It was contended that what in fact happened was that Counsel was referring to his typed notes and the Chairman asked could the Committee have them.

56. There was also an allegation by the applicant that documents prepared in response to Mr. G's complaint had been used by him in his defence of the High Court action by the purchaser suing for his deposit money.

57. The affidavit also deals in detail with the substantive issues relating to the complaint.

58. The first respondent did not file a replying affidavit. This is now characterised as an active concealment of the fact that the Law Society knew that the applicant's averments as to the misdirection of her post were true.

Proceedings before the Solicitor's Disciplinary Tribunal

59. On the 9th March, 2012 the Prima Facie Committee of the second named respondent wrote to both parties informing them that it was now proceeding to decide whether there was a prima facie case against the applicant. On the 11th April, 2012 it communicated the fact that it had on the 5th April decided that there was a prima facie case of misconduct in respect of the allegations a. to c. inclusive, e., and g. to j. inclusive and that it was now proposed to hold an inquiry. For each allegation in respect of which a prima facie case had been found, the reason given was stated as being

"by reason of the averments set out in the affidavit of Linda Kirwan sworn on behalf of the applicant on the 27 January 2012 (and exhibit thereto) and the averments set out in the replying affidavit of the respondent solicitor sworn on 8 February 2012 (and exhibits thereto)."

60. The other two charges (of failing to explain adequately the June 2007 agreement and of failing to maintain sufficient papers in relation to the client account) were considered to have been adequately rebutted by the applicant. The first named respondent had a right to appeal these two findings to the High Court but did not choose to do so.

61. The applicant had by this stage decided that she wished to change career and join the Bar. Having regard to her qualification as a solicitor, all that was necessary was to do a short conversion course. She did that, and hoped to enter the Law Library in October, 2012. She therefore sought, and was given, an early hearing date of the 4th September, 2012 before the Solicitor's Disciplinary Tribunal.

62. It appears that before the scheduled hearing on the 4th September, 2012 the solicitor for the first named respondent made contact with Mr. Walshe and asked him to meet with counsel. Ultimately, no such meeting took place as it was clear to that Mr. Walshe was favourable to the applicant rather than to the complainant and would, it was thought, be giving evidence on her behalf.

63. On the 30th August, 2012 the applicant's solicitor wrote to the first respondent requesting a schedule of witnesses, any witness statements and any witness material not yet furnished. The letter also asked if it was now accepted that the four letters did not reach the applicant and that she had not made any attempt to "evade service" of them.

64. The first named respondent's solicitor replied by letter dated the 31st August, stating that it was intended to call Mr. G., Mr. Dare and Ms. Kirwan, that there were no witness statements and that there was no unfurnished witness material. The letter went on:

"In respect of the query contained in your letter dated the 30 August 2012, you might please note that the Law Society has not alleged any failure on the part of Dr. Lyons to respond to correspondence from the Law Society. We further note that the Complaints and Client Relations Committee accepted at its meeting on 9 October 2009 that Dr Lyons had not received certain correspondence from the Law Society."

The hearing before the second named respondent

65. On the 4th September, 2012 the applicant appeared before a division of the second named respondent, represented by Senior Counsel, Mrs. Walley, and Junior Counsel, Mr. Treacy. At the outset, Mrs. Walley sought an adjournment for the purpose of making an application for leave to bring judicial review proceedings and made an extensive submission as to her grounds for so doing.

66. The first matter complained of was the issue of the unanswered correspondence. It was stated on behalf of the applicant that those letters were not sent to the applicant's home but were in fact sent to Mrs. Mulligan's house in Dunderry. Mrs. Walley said that she was "*not taking any issue with persons who were involved in the mail etcetera, we all make mistakes*" but that the first named respondent was under an obligation to correct the mistake it had made. By this it she meant that an affidavit should have been filed setting out the fact that the post had gone to the wrong address, instead of which Ms. Kirwan had said on affidavit that the letters had not been answered. The first named respondent had therefore put prejudicial material before the second named respondent. It was also submitted that the complaints process had been "escalated" in the sense that the complaint had been referred to the Committee in part because of the alleged failure to respond. In this regard Mrs. Walley said "*I accept it was inadvertent, I understand that. Nobody is trying to point fingers at anyone doing their job but I have an obligation to point out the unfairness of all of this.*"

67. That stance seems to have shifted somewhat in the course of submissions and at a later stage it was said that

"The material that had been sent to the Committee was redolent with the allegation that she had Jailed and not only the exhibits have the address of Copeland Grove and that raises considerable questions as to was that a later letter that was superimposed and that wasn't a copy of the letter that was sent originally or were the letters sent originally but the label on the envelope was different. None of that has been explained by the Law Society in circumstances where they have an obligation to do so."

68. The fact that the second named respondent itself had, on the 16th February 2011, written to the applicant at the Dunderry address was raised. This had come to light when the Booklet of Correspondence was furnished on the 24th July, 2012. It was accepted, again, that this was inadvertent, but it was said that

"it shows the manifest disorganisation and lack of fairness that even then there was a residual suspicion probably that Mary Lyons did have some association with this address".

69. Having regard to the communications from the Mulligans and that the fact that Mrs. Mulligan had been sending post back to the first named respondent for a period of years, there should have been an affidavit from the first named respondent to set out the true position clearly and unequivocally. Failure to do this left open the possibility that the tribunal would be affected by "subliminal bias".

70. A number of criticisms were then made in relation to the handling of the matter by the Committee. A submission was made that the complainant and his solicitor had made the complaint for the purpose of getting material with which to defend the High Court proceedings and that they had, in breach of the regulations, improperly used confidential documents in that regard.

71. It was stated that Mr. Dare had given evidence before the Committee which was both hearsay and in breach of the "rule against self-narrative" in that he was repeating the instructions of his client. Moreover, he had given expert evidence in that he gave it as his opinion that any solicitor seeing this volume of cheques passing through the account had an obligation to make enquiries on behalf of the client. This, it was submitted, fell foul of the principles identified in the judgment of Kearns P. in *McManus v. Fitness to Practice Committee of the Medical Council*, which had been delivered on the 14th August prior to the Tribunal hearing.

72. Mrs. Walley said that the most serious complaint she was making against the Committee was that the hearing on the 29th April, 2010 was

"a very brief and perfunctory affair and was a manifest denial of fair procedures and the right to be heard."

73. In this regard she referred to the averment in Ms. Kirwan's affidavit that written submissions had been advanced by counsel for the applicant. In fact, according to Mrs. Walley, there had been an "ambush".

'Jim Treacy as counsel had his own notes, his aide memoire, personal notes to address the Committee and he was asked by the Committee are they your submissions, are they your notes and he said well they are my notes and they said fine, we will take those, they withdrew and fifteen minutes later they came out without further ado and said we are sending this upstairs to the Tribunal. That is not a fair hearing, that is not a definition of the right to make submissions in the context of In Re Haughey and in the context of fair procedures because it is manifestly clear that Mr. Treacy was never told that his own personal notes were going to be elevated to the status of written submissions. He was never told he wasn't going to get an opportunity to amplify his telegraphic notes to himself'

74. This was characterised as *"manifestly in breach of audi alteram partem, manifestly in breach of the right of access to the court and the right of In Re Haughey to have your accusers confronted in cross-examination."*

75. The Committee was said to have failed to investigate the complaint properly. The complainant and his solicitor had not been cross-examined, in breach of the *In re Haughey* principles. One of the members of the Committee had *"taken over"* the representation of the complainant and expressed his complaint in a more effective fashion.

76. At a certain stage during submissions the lay member of the tribunal asked why judicial review proceedings had not been taken prior to the commencement of the hearing. The response was that Senior Counsel had only recently come into the case, that the *McManus* decision had made it clear that there was an issue in relation to Mr. Dare's evidence and that if the applicant proceeded with the hearing she would be deemed to have abandoned her fair procedures arguments. In this latter regard she compared the situation of the applicant to that of a person who is wrongfully convicted as the result of a fundamentally flawed process in the District Court, who is entitled to judicial review rather than simply appealing. Mrs. Walley stressed that she was ready to run the case and that the evidence of Mr. Walshe, the financial advisor, would *"drive a coach and four"* through that of Mr. G.

77. Mrs. Walley also submitted that there had been *"a cumulative litany of incidences"* of breaches of fair procedure, culminating in the failure of the first respondent to put before the second named respondent an affidavit setting out all of the matters of which that respondent should be aware.

78. Opposing the application for the adjournment, Mr. McDermott pointed to the fact that the Tribunal had not been asked to make any ruling on any issue. He submitted that the correspondence issue was concluded with the acceptance by the Committee that the letters had not been received. No argument had been made to the Committee that the matter could not proceed further and no complaint had been made at the time in relation to unfair procedures or unfair treatment by Committee.

79. It was stated that it was incorrect to assert that Mr. Dare had given *"evidence"* - he had not.

80. It was suggested therefore that the applicant was not entitled to judicial review because of delay on her part. Even at the time the applicant's affidavit, which did raise procedural complaints in a comprehensive fashion, had been sworn on the 8th February, 2012 there had been no application to the High Court.

81. Mr. McDermott reminded the Tribunal that the case came to it, not directly on foot of the Committee's application, but after a finding by a division of the Tribunal that there was a *prima facie* case against the applicant.

82. The members of the Tribunal considered the application for an adjournment and granted it. In so doing they stated that they did not believe that they would have been prejudiced had the hearing proceeded. They also pointed out that the hearing had been fixed as a priority on foot of a specific request on behalf of the applicant.

83. After the adjournment and before the leave application on the 19th September, the applicant's solicitor wrote to the first named respondent's solicitors seeking disclosure.

The judicial review proceedings

84. Leave to apply for judicial review was granted on the 19th September, 2012.

85. The Statement of Grounds in the proceedings claims that the first named respondent acted unfairly; in breach of its duty to

behave impartially; in breach of natural and constitutional justice and in breach of its obligation to disclose material relevant to the proceedings. There is a specific plea that it acted *mala fides* and a declaration is sought to that effect.

86. There are many criticisms made of the behaviour of the first named respondent and of the Committee, including a claim that "Counsel's personal notes/aides memoire were taken from him by the Chairman" and that he was afforded no further opportunity for oral submissions". It is said that these are included only to put matters in context and no relief is sought in respect of the Committee hearings. However, an order of certiorari is sought in respect of the application to the second named respondent for an inquiry.

87. In respect of the first named respondent's communications with the second named respondent, there is a claim at Paragraph (vi) for a declaration that the former knowingly placed inaccurate, untrue, misleading and/or prejudicial material before the latter. Leave was not granted in relation to this but the court is informed that there was liberty to seek leave in the hearing. The claim is based on the issue of the unanswered correspondence and the references thereto, with the additional element that the incorrect address had somehow been given to the Tribunal, which wrote one letter to the applicant on the 16th February, 2011 at that address. The submission is made that this was an attempt by the first named respondent to communicate to the second its belief that the applicant did in fact have some connection with that address.

88. It is claimed that the first respondent failed to disclose its contacts with Mr. Walshe before the scheduled hearing on the 4th September, 2012. It is further claimed that in refusing to meet with him and explore his evidence, the first named respondent was acting unfairly and in a partisan manner. The respondent may have assumed, but could not have known, that Mr. Walshe would be a witness for the applicant. The applicant did not know until the 3rd September, 2012 that this contact had taken place this is relied upon as one of the reasons for making the adjournment application on the morning of the hearing and as a ground for extending time, if necessary.

89. Complaint is made in relation to the fact that the respondents have refused to accede to a request by the applicant to come off the Roll of solicitor so that she can be called to the Bar. This application was made on the. It was refused on the basis that the disciplinary hearing was pending. No relief was applied for in relation to it and I do not propose to deal with it.

90. The argument in relation to Mr. Dare's appearance before the Committee was not pursued in these proceedings.

91. Essentially, the applicant's case is that the first named respondent has treated her with malice and has not respected her rights to fairness of procedures. By its actions, it has contaminated the process and caused a risk of prejudice. The second named respondent has been "*passively contaminated*" to the extent that either the process should be stopped completely or the matter should be remitted to the *prima facie* stage.

The first respondent's case

92. Ms. Kirwan has sworn an affidavit in which she sets out the general rules and procedures applicable to complaints and disciplinary inquiries. She goes on to give a chronological summary of the case. She also deals with the correspondence issue. She maintains that the disputed letters were sent to the correct address via DX and were not returned to the Society. She says however that on searching the files of the Society she has found three letters that were sent to Dunderry and were returned. One was from the CPD section, one from the Financial Regulation section and one was from the Practice Registration section. All three were sent in 2011.

93. It appears that the central database did have the incorrect address as the home address for the applicant and that when she ceased practice in 2010 the system automatically directed all correspondence to that address. However, according to Ms. Kirwan, the address on the file of the Complaints section did not change from the one entered at the time of receipt of the complaint in 2009.

94. Ms. Kirwan is unable to explain what happened to the four letters. She did not file an affidavit with the second named respondent in response to the applicant's because, she says, she had nothing further to say. She points out that in her grounding affidavit for the application for an inquiry she exhibited the minutes of the Committee which recorded the acceptance that the applicant did not get the letters.

95. On behalf of the first named respondent Mr. McDermott BL submits that the inquiry into the complaint has nothing to do with the letters and that there is no evidence that the issue ever impacted on anyone's mind. The inquiry is based on the issues arising from the applicant's dealings with Mr. G. He says that, with hindsight, the affidavit of complaint might have been clearer on the issue of non-response but what is absolutely clear is that no-one is saying that she got the letters. Any doubt could easily have been cleared up at the hearing.

96. Mr. McDermott then analysed the evidence relating to the complaint in some detail with a view to establishing that there was in fact a *prima facie* case against the applicant, particularly having regard to the role played by Mr. Walshe.

97. In relation to the contact between the first named respondent and Mr. Walshe, Mr. McDermott concedes, with the benefit of hindsight, that it might have been best to write to the applicant's solicitor. However, Mr. Walshe turned up for the hearing so no harm was done.

98. As a general proposition it is acknowledged that the Law Society is under a duty to present evidence as fairly as possible. However, it is not neutral and does not pretend to be. In this case it has a view that there is evidence which, if it survives cross-examination, leads in a particular direction.

99. It is contended that the applicant has been guilty of acquiescence and delay.

The second named respondent's case

100. The registrar of the Solicitors' Disciplinary Tribunal, Ms. Mary Lynch, has sworn an affidavit in which she deposes that the normal practice of the Tribunal is to get the solicitor's address from the Records section of the Law Society. She believes that this practice was followed in this case and that the Dunderry address was provided. The letter sent by the Tribunal to that address was returned. She then wrote to the Copeland Grove address instead.

101. Ms. Lynch avers that the documents before the second named respondent when considering whether there was a *prima facie* case against the applicant were the form of application for an inquiry, the affidavit of Linda Kirwan and the affidavit of the applicant. The decision was made solely on the basis of these documents. It appears, therefore, that the booklet of correspondence was not part of the documentation considered.

102. For the second named respondent, Mr. Carolan BL stresses that it has, as of now, no position on any disputed matters arising

between the applicant and the first named respondent. No application has been made to it for a ruling in relation to the any issue. It is submitted that the decision of the *prima facie* division is not based on credibility, since the assessment is on the papers and no witnesses are examined. There was no ground for supposing that the question of the letters was held against the applicant. The second respondent had held in the applicant's favour on two of the charges, based on her rebuttal of them, which was incompatible with a finding that she was not credible on those issues.

Discussion and conclusions

103. Counsel for the applicant has opened a great many authorities to the court on the topic of fair procedures and natural justice in disciplinary and other proceedings. I consider it unnecessary to cite them because this is actually a relatively simple case and the principles are not in dispute, save perhaps on the question of the extent to which the first named respondent should regard itself as impartial in this process. I do not think that this is an appropriate case to embark on a detailed examination of this latter issue, mainly because I do not think that it arises in the manner contended for.

104. Similarly, the respondents have cited a great many authorities on issues such as delay. Again, that is not really the issue here.

105. The salient point seems to me to be this: there is no authority to the effect that a misstatement of fact made by a prosecutor, or a person in a role comparable to that of prosecutor, on a disputed issue of fact can give rise to judicial review relief when that dispute has been resolved *in favour* of the applicant by the relevant decision maker. That is what happened here.

106. The analogy with criminal trials has been very much relied upon in the case but needs to be treated with caution. In the first place, this is not a jury trial but a process conducted before the members of an independent statutory body, a majority of whom are lawyers. Ms. Kirwan is not the prosecutor in the case. She is the solicitor in the Complaints and Client Relations Section and in that capacity she referred the matter to the Complaints and Client Relations Committee. It was the Committee that had the task of deciding whether any charges should be laid against the applicant and, if so, what they should be. The Committee decided on the 9th October, 2009 that it accepted that the applicant did not get the letters. That was the end of the issue and Ms. Kirwan's attitude to it is really neither here nor there. The Committee never resiled from that position in any way and it did not make any complaint to the second respondent of failure to answer letters. In those circumstances it was never going to be open to the second named respondent to make an adverse finding or draw adverse conclusions against the applicant on the issue.

107. It would, in my view, have been preferable if Ms. Kirwan had noted that position in the body of her affidavit rather than simply averring that there was no response to the letters. It was her role at that stage to place all relevant matters relating to the history of the complaint before the second respondent and it would have been wiser not to appear to leave the issue open. However, even a cursory reading of the minutes of the Committee meetings and of the applicant's affidavit would have made the situation clear. No evidence or reason has been put forward that could ground a finding that the members of the second respondent would not read the documents carefully.

108. Mrs. Walley says that she does not need to prove prejudice and that all that is required is a real risk of unfairness. That is so, but there is still a burden on her in these proceedings to adduce evidence of such a risk. The existence of risk will not be presumed - rather, there is a presumption that in the case of an independent statutory body such as this the members will carry out their duties properly. If the argument as to "subliminal bias" were to be accepted it would be tantamount to a finding that even an expert tribunal cannot be allowed to continue with its task if any participant in the process has misstated a material fact. The members of the *prima facie* Division in fact rejected two charges, serious on their face, on the basis that there was no case to answer in view of the applicant's account. I accept the submission of Mr. Carolan that this is not compatible with the proposition that they were prejudiced against the applicant's credibility.

109. In my view, this was a case where the concerns of the applicant, arising from Ms. Kirwan's affidavit, should have been raised at the hearing on the 4th September, 2012. All that was necessary was to ask for a ruling as to whether the tribunal considered the issue to have been disposed of and to make such submissions as might be required.

110. Next there is the question of disclosure. The applicant was given leave to seek a declaration that the first named respondent acted in breach of fair procedures, and or in breach of its obligation as a regulatory body in failing to make proper disclosure of relevant material to the applicant. She was refused leave for a declaration that the first named respondent had failed to make proper or adequate disclosure or her or the Tribunal; a declaration that its refusal to make disclosure was unreasonable, arbitrary, capricious or unfair and an order directing the first respondent to make full disclosure of all materials relevant to the proceedings at issue.

111. This issue largely relates to the complaint about the correspondence and the fact that the Law Society had a wrong address for the applicant. I have held that this did not result in any material prejudice to the applicant. However, there is also an issue in relation to the contacts with Mr. Walshe.

112. Again, it would have been wiser to inform the applicant's solicitor of the contact made by the first respondent's solicitor with Mr. Walshe, in case they were not aware that he was available to them. If it had transpired at the hearing that such was the case it might well have been incumbent on Mr. McDermott to inform them. As it happens, Mr. Walshe conveyed the information himself and no prejudice resulted.

113. In view of these findings, it is unnecessary to make any ruling in relation to the delay issue. It is fair to point out that the application for judicial review did not seek reliefs in respect of the earlier proceedings before the Committee, but a great deal of criticism was focussed on that phase and the delay arguments on behalf of the first respondent were, as a result, concentrated on those aspects. Had this court considered the complaint in relation to the correspondence issue to be well-founded, the booklet of correspondence furnished on the 24th July, 2012 (with the inclusion of the Tribunal's letter to Dunderry) might have sufficed to prevent any such argument being raised.

114. However, it is also pertinent to point out that the application as made in court did not bear much in the way of relationship to the arguments raised before the second respondent on the 4th September, 2012. That is undesirable. That respondent was given to understand that the judicial review would to a large extent deal with matters outside of its remit (such as, for example, the issue of Counsel's written submissions or Mr. Dare's input at the Committee hearings). In the event, the main issues argued here would have been appropriate for resolution by ruling of the Tribunal.

115. For the foregoing reasons I refuse the reliefs sought.