Neutral Citation [2009] IEHC 632

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 50 J.R.]

IN THE MATTER OF THE SOLICITORS ACTS 1954 – 2002

BETWEEN

MICHAEL O'SULLIVAN

APPLICANT

AND

THE LAW SOCIETY OF IRELAND AND THE SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENTS

JUDGMENT of Mr Justice John Edwards delivered on the 31st day of July, 2009

Introduction

The applicant in this matter is a practising solicitor with offices at 41 Lower Baggot Street, Dublin 2.

The first named respondent (otherwise "the Law Society of Ireland", or "the Society") is the professional body for solicitors practising in this jurisdiction. The first named respondent traces its origins back to 1773, and it has operated since then in various incarnations and under various different names including the Society of Attorneys, the Law Club of Ireland, the Society of Attorneys and Solicitors, the Incorporated Law Society of Ireland and, latterly, following the enactment of the Solicitors (Amendment) Act 1994 (otherwise the Act of 1994), as the Law Society of Ireland. It was incorporated by royal Charter dated 1852. Those interested will find an overview of the origins of the Society in a collection of essays edited by Dr Eamonn G. Hall and Daire Hogan entitled "*The Law Society of Ireland 1852 – 2002: Portrait of a Profession*" (Four Courts Press; 2002), as well as in "*The Legal Profession in Ireland 1789 – 1922*" (ILSI; 1986) also by Daire Hogan.

The modern legislative basis for the Law Society of Ireland is set out in the Solicitors Acts 1954 – 2002 and the first named respondent is charged with the duties and obligations entrusted to it under that legislative code.

The Law Society of Ireland is governed by a Council, comprised of elected and nominated members of the profession. The statutory functions of the Society, as set out in the Solicitors Acts 1954 – 2002, are exercised by the Council or by committees to which the Council delegates those functions.

The Council's statutory functions can be divided into three broad categories namely, (i) the education and admission of solicitors; (ii) the regulation of practise by, and the discipline of, solicitors; and (iii) the protection of clients of solicitors. Section 73(1) of the Solicitors Act 1954, provides that:-

> "The Council may appoint a committee for any purpose which the Council considers would be better effected by means of a committee and may delegate to the committee, with or without restrictions, the exercise of any functions of the Council."

This has been done in a number of cases, *e.g*. issues relating to education, professional indemnity insurance, regulation of practise, and complaints and client relations. In each instance the actual delegation is effected by the passing of annual "Council Regulations". These regulations are in turn made pursuant to "Council Bye-laws" and the power to make such byelaws is provided for in the Charter of 1852.

The Complaints and Client Relations Committee (otherwise the CCR Committee) was formerly known as "The Registrar's Committee" (the change of name occurring during the period we are concerned with) and it deals principally with the investigation of complaints against solicitors. In the period with which the Court is primarily concerned in this case, namely 2004/2005, the powers and functions delegated to the CCR Committee are set out in regulations 53 and 54 of the annual Council Regulations 2004/2005. Reg 53 lists those powers/functions that may be performed by the CCR Committee without reference to the Council. The list includes *inter alia* powers/functions under s.8, s.9 and s.10 of the Act of 1994. Reg 54 in turn lists those powers/functions that may be performed by the CCR Committee "subject to a report being furnished by the committee to the Council in every instance of the function having been performed or the power having been exercised as appropriate". The list includes *inter alia* powers/functions under s.17 of the Act of 1994 (as amended by s.9 of the Solicitors (Amendment) Act, 2002) substituting s. 7 of the Solicitors (Amendment) Act 1960 (hereinafter the Act of 1960).

The second named respondent is a statutory body, independent of the Law Society, established under s. 6 of the Act of 1960, as substituted by s. 16 of the Act of 1994, and which is empowered under s. 7 of the Act of 1960, as substituted by s. 17 of the Act of 1994, to conduct an inquiry into the conduct of a solicitor on the ground of alleged misconduct pursuant to an application by a person (not being a person who has made a complaint to an independent adjudicator under s. 15 of the Act of 1994, about the conduct of a solicitor referred to in the application), or by the Society subject to the provisions of the Act of 1960 (as amended) and rules made under s.16 of that Act, and in particular the Solicitors Disciplinary Tribunal Rules, 2003.

These proceedings are judicial review proceedings, and in summary they were commenced in the following circumstances. On the 17th of September 2007 the first named respondent by its CCR committee, having made a decision to do so on the 20th of September 2006, applied to the second named respondent pursuant to section 17 of the Act of 1994 for an inquiry into the conduct of the applicant. On the 21st of January 2008 the applicant applied for, and was successful in obtaining, the leave of the High Court (Peart

J, presiding) to apply by way of application for judicial review for various reliefs, including *Orders of Certiorari* quashing the decision of the first named respondent of the 20th of September 2006 and the application of the 17th of September 2007, respectively; various Declarations; and an *Order of Prohibition* restraining the second named respondent from holding an inquiry into the conduct (or in the words of Peart J's Order as perfected, "the alleged misconduct") of the applicant.

Factual background
The facts of the matter are to be gleaned from the affidavit of the applicant sworn on the 18th of January 2008 and the extensive exhibits thereto, as well as the replying affidavits of Linda Kirwan (on behalf of the first named respondent) sworn on the 26th of March 2008 and of Mary Lynch (on behalf of the second named respondent) sworn on the 7th of April 2008, respectively, and the documents exhibited in those affidavits.

Dealings between Solicitor and Client

In October 1997 the applicant was asked to represent a Mr J.N. (hereinafter the plaintiff) in relation to a personal injuries claim that he wished to bring arising out of a motor accident which occurred on the 28th September 1997. The usual pre-litigation steps were taken which included correspondence with the defendant, the Gardai, doctors etc. From May 1998 until September 1999 the applicant had difficulty in obtaining instructions from the plaintiff who was not responding to the applicant's correspondence. However, following advice by letter from the applicant to the plaintiff concerning the operation of the statute of limitations, the plaintiff resumed communication with the applicant in September 1999. He had difficulty accepting some of the medical advice he had received and was looking for further medical advice. Ultimately, proceedings issued on the 14th July 2000 by way of Plenary Summons, followed by a Statement of Claim dated the 27th September 2000. Further and better particulars were sought and furnished in the normal way, and on the 19th of February 2001, following the issuing of a motion for judgment in default of defence, the defendant eventually filed a Defence to the plaintiff's claim. It is not clear from the affidavits filed in the present proceedings whether or not liability was admitted, but nothing turns on it.

I should digress at this stage to say that on the 15th of June 2001 the applicant wrote to the plaintiff in respect of various aspects of his claim, and also enclosed with that letter a document purporting to be "an obligatory statement under s.68 of the Solicitors' Acts 1954 – 1994." This document was in the following terms:

"STATEMENT UNDER SECTION 68 OF THE SOLICITORS ACTS 1954 -- 1994

> Section 68 of the Solicitors' Acts obliges this legal practice, as a member of the Law Society, to point out to you, as a client of this practice, that the basis of the professional charges, on a solicitor and own client basis, for the provision of legal services, are:
>
> 1. The time involved in bringing the matter to a conclusion;
>
> 2. The expertise and experience provided;
>
> 3. The urgency of the matters requiring attention;
>
> 4. The difficulty, novelty, and complexity of the issues involved;
>
> 5. The documentary aspects to the matter;
>
> 6. The value of the matter and the importance of it to the client;
>
> 7. All outlay to be borne by the client, as it occurs.
>
> If litigation is involved, attention should be given to the fact that you can lose as well as win a case and, in losing a case, the losing party generally will have to pay the costs of the other party as well as his/her own costs.
>
> Please note that professional charges for the provision of legal advice are made on a solicitor and own client basis, which may exceed any costs recoverable from the other party."

Subsequent to this, the plaintiff underwent further medical investigations and then there were unsuccessful settlement negotiations in October of 2001. One of the reasons for the unsuccessful outcome of those negotiations was that the plaintiff was seeking very substantial compensation for his injuries including special damages for anticipated future loss of earnings. His basis for doing so was, apparently, a belief on his part that he had fractured a disc in his spine due to the accident. However, the medical advice that had been received by the applicant concerning the plaintiff's injuries, and which had been briefed to counsel who had advised on quantum, did not support a claim for compensation at the level being sought by the plaintiff, and in particular did not support a claim for future loss of earnings.

Despite this, and notwithstanding the advice of counsel and of the applicant as to the quantum of his claim, the plaintiff maintained an inflated view of the value of his case and remained insistent on promoting a claim for very substantial compensation including special damages for future loss of earnings. In the circumstances, and on the further advice of Counsel, a report was then sought from a Vocational Assessor as well as a report from an Actuary in the hope of improving this aspect of his claim. It is clear that this was pursued by the plaintiff's legal team more in hope than in expectation. Matters progressed slowly because of difficulty in obtaining adequate instructions from the plaintiff and also, and more particularly, because of difficulty in obtaining funds from him to cover the outlay involved in commissioning those additional reports. Eventually, these difficulties were overcome and it was possible to set the matter down for trial on the 8th of January 2003.

Although the question of whether the additional reports provided any added value to the case is not specifically addressed in the affidavits before me, I am prepared to infer that they did not do so on the basis of information provided to the effect that while the plaintiff had been seeking €500,000 plus party and party costs at the negotiation in October 2001, the case ultimately settled for €100,000 plus party and party costs.

At any rate, after the action was set down it progressed slowly up the list. On the 30th of October 2003 the applicant wrote to the plaintiff advising him that his case was about to appear in the advance warning list and that a hearing "will follow in the immediate future". He also enclosed a schedule of the plaintiff's special damages, current to the end of October 2003, based on documentation

that he had received from, or on behalf of, the plaintiff. The plaintiff was asked to update it, and return it to him as soon as possible. On the 4th of November 2003 the applicant sent the same schedule of special damages to the plaintiff, this time attached to an e-mail which requested the plaintiff to "Please confirm its accuracy". By the 1st of December the plaintiff had not replied to either the letter of the 30th of October or to the e-mail of the 4th of November and so the applicant sent him a further reminder by e-mail stating (inter alia): "You can assume now that this matter is urgent" and also "Please confirm the special damages list reflects your position. Again, this is urgent." The plaintiff finally replied by e-mail dated 3rd of December 2003 stating (*inter alia*): "The special damages list is correct."

At a call-over in the High Court on the 19th of December 2003 the Court fixed a date for the hearing of the action, namely the 19th of February 2004. On the 17th of February 2004 the applicant wrote to the plaintiff enclosing a letter that he had just received from the defendant's solicitors indicating that the defendant was putting the plaintiff on "strict proof" with respect a list of items of special damage and in particular the claim for loss of earnings (including bonuses and future loss of earnings) and items associated with, or consequent upon, material damage to the plaintiff's vehicle. The applicant offered his views on certain aspects of the special damages claim.

On the 18th of February 2004 the plaintiff attended a pre-trial consultation with the applicant and Senior Counsel and the various aspects of his case were discussed, including the special damages claim.

On the 19th of February 2004 the plaintiff attended at the Four Courts for the hearing of his case. He was accompanied by his brother, a solicitor. The case was called on at the 10.30 call-over, and took its place in the list for hearing later in the day at whatever time a court should become free. It did not get on before lunchtime. However, as the morning progressed there were settlement negotiations and several offers were made and were rejected. Also, during the course of the morning those items on the schedule of special damages that were being accepted by the defendants, and in respect of which proof was not being insisted upon, were totalled by the plaintiff and/or by his brother, and the figure "7460.55" accompanied by the word "ok" was written on a copy of the schedule, which copy was retained by the applicant.

A court became free at around lunchtime and the hearing of the action commenced at 2 pm. After about an hour the court rose to facilitate further negotiations. In the course of those negotiations the defendants made an offer of €100,000 plus party and party costs in full and final settlement of the action.

The applicant describes what happened next at paragraph 2 (h) of his affidavit sworn in the present proceedings on the 18th of January 2008. He states (inter alia):

> "In considering whether to take this offer, [J. N.] asked for an indication of my fee. I told him that I estimated his solicitor/client liability could be up to €20,000 but that it was impossible to be precise at that point. However, in the interests of settling the case, I agreed to limit the solicitor and client fee to €15,000. [J. N.] accepted the offer and, at the end of February 2004, his settlement cheque arrived. I wrote to him on the 1st of March 2004, advising him of the receipt of the cheque and outlining the payments to be made therefrom."

The next thing that occurred was that on the 16th of March 2004 the plaintiff sent an e-mail to the applicant in which (*inter alia*) he stated the following :

> "I refer to my case which was part heard in the High Court on the 19th of February 2004. As you are aware my case settled for €100,000 together with my legal costs.
>
> It is specifically in relation to my legal costs on which I am writing to you.
>
> You are aware, I had expected up to the morning of the hearing, that my case would attain a settlement or award figure in the region of €200,000. I based this figure on the following (i) our discussions (ii) my special damages, which were in excess of €100,000 (iii) my medical reports and (iv) on the basis that I am still suffering from back pain almost seven years after the date of the accident.
>
> On the morning of the hearing of my case I was asked what I thought my case was worth. I stated that I thought it was worth €200,000. I asked you what your solicitor client fee would be. You replied that you had done in excess of seven years work and that you will be looking for €20,000 and 'that was not even €3000 per year'.
>
> I do not propose to go into full detail on the history of the negotiations that took place on the day except to say that only for the fact that I insisted on having the matter go on for hearing, that the matter settled for €100,000. If it were not for my perseverance the case would have settled for at least a quarter less than that.
>
> Before the case finally settled, during a break from the hearing, when the final settlement monies were being offered I asked you for an indication of your fee. You then stated that it was €15,000 plus VAT. I felt at the time that I was put under enormous pressure to settle the case and accept your fee despite the advice given to me by my brother who was at the hearing. Under extreme pressure I felt obliged to accept the offer and your fee.
>
> In the circumstances I feel that your professional fee is excessive, especially in the light of the eventual settlement amount I received. €15,000 plus VAT is just over 18% of my settlement monies. I feel this is too much. I have paid for all of my medical reports, court stamp duty and every item of outlay towards my case. Indeed this has contributed towards some delay in my case as I had to raise the money for this outlay throughout my case.
>
> Throughout the running of my case we had about four personal meetings in total. I have now taken advice on this issue and I am informed that the other side will pay the majority of your fees. I appreciate that you may be entitled to a solicitor client fee, however I am not sure what this should be?" … "I have no idea on what basis, or why, you are charging me €15,000 plus VAT. It seems most unfair given the fact that the other side has agreed to pay my costs. If there are fees, which are not recoverable from the other side, can you please confirm precisely what these are.
>
> As already stated, throughout the running of my case I have discharged all outlay for the case. Please confirm that I will be reimbursed all of this outlay. Can you please also provide me with a breakdown of what I am entitled to be reimbursed.
>
> I am most anxious to have my case completed and to receive my monies from you." ... "I was not informed on the day of the hearing that I would have to pay hospital charges to [a named hospital]. I was not furnished with a copy of the

special damages prior to the day of the hearing and, indeed, I still do not have a copy of this schedule. If I remember correctly the only spare copy was given to one of the barristers. Please furnish me with a copy of this schedule.

Please let me hear from you in relation to this issue. Until the costs matter is sorted out, I request that my settlement monies are immediately sent by registered post to my home address … .

Yours faithfully"

On the 19th of March 2004 the applicant, who was clearly incensed by the terms of the plaintiff's said e-mail, replied in rather sarcastic terms as follows:

"Thank you for your e-mail dated the 16th of March 2004.

I had wondered why you had been so recalcitrant about collecting your cheque so I am shocked to discover that you feel unhappy. I am doubly shocked to discover that you feel that you were subject to extreme pressures to accept what you appear to regard as an unfair settlement. Do you feel that these extreme pressures were such as to overwhelm the exercise of your free will so as to amount to duress? If so, you may wish to consider legal avenues to have the settlement abnegated, to have the Order of the High Court set aside and to have your case re-listed for a full hearing. If you so wish, I will correspond with the solicitors for the defendant to ask them if their client would consent to this.

I myself would be very unhappy if a client of this practice for the last seven years felt cheated at the end of a long and arduous legal suit.

As you were accompanied throughout the 19th of February 2004 by your brother who I understand practices as a solicitor with ... , it should be possible to obtain a statement from him as to his observations on the day. As you had several private consultations with him during the course of the day, he should be able to throw some light on the situation. I will correspond with both your senior and junior counsel to put your dilemma to them and to ask them if they feel that you may have been the victim of undue pressures in accepting the settlement. You may also wish to let me have a full statement in which you should identify the persons who you felt subjected you to extreme pressures.

Your perseverance with your case was certainly admirable but I sense that you may be underestimating the perseverance of other parties connected with your case.

With regard to the bill due to [the named hospital], I did not state that you have to pay the hospital but there may be a contractual or statutory obligation on you to do so. It is a matter you should take up with the hospital. I understand that the hospital had written directly to you in December 2007 seeking payment. I understand that an ambulance charge is also outstanding. It may seem a bit churlish to ignore the fact that they looked after you in your hour of need.

Any outlay you paid out during the course of the action and which is eventually recovered from the defendant will be due to you.

Finally, I am certain that you were furnished with a schedule of your special damages prior to the hearing. Am I to take it that your position is that you did not know or were not made aware of the full extent of special damages and that you settled your case in ignorance of the true value of special damages? If so, that again would be a very serious matter.

I look forward to hearing from you.

Yours faithfully"

On the same date the applicant forwarded his file in the matter to a firm of legal costs accountants stating "I will need a short bill of costs in relation to party and party costs and I expect, given the tenor of recent correspondence from the client, that I will need some form of solicitor and client bill also." The applicant also wrote to both the senior and junior counsel who had acted for the plaintiff requesting their respective "observations on this matter". Then, on the 25th of March 2004, following a missed telephone call from the plaintiff, the applicant sent an e-mail to the plaintiff advising him that he was awaiting hearing from counsel, and of the fact that he had sent the file to his legal costs accountants. He concluded by saying "I feel that it would be better to retain the funds in the client account pending receipt of the responses mentioned above."

On the following day, the 26th of March 2004, following yet another missed call from the plaintiff, and having in the meantime heard from counsel, who were emphatically repudiating any suggestion that the plaintiff had been subjected to undue pressure by his legal advisers, or any of them, the applicant sent another e-mail to the plaintiff. Having informed the plaintiff of counsels' observations he then stated:

"…..I would have to say that I consider your allegations to be most objectionable as an attempt to bring my professional conduct into disrepute. Likewise, your allegations are an attack on the professional conduct of two reputable barristers.

With regard to your other allegation that you were never provided with a schedule of special damages, I have taken the trouble to review your case file in this regard and I found that, on the 4th of November 2003, you were e-mailed this schedule and asked to confirm its accuracy. You did not immediately do so and had to be reminded by e-mail of the 1st of December 2003. You finally replied by e-mail of the 3rd of December 2003, when you stated; 'The special damages list is correct'. This is therefore another false allegation emanating from you.

In the circumstances, I will have to insist that you formally withdraw all false allegations made concerning this practice, with a written apology and a proposal for the payment of financial compensation for defamation.

Yours etc"

This intemperate and, indeed, legally flawed e-mail message (in as much as both torts in defamation, namely slander and libel respectively, require publication of the false statement by the alleged defamer to a third party, of which there was none in this case) elicited a reply on the 29th of March 2004 stating (*inter alia*):

"I stand over my statements regarding what occurred on the date of the case. If it were not for my persistence my case would have

settled for much less than it eventually did.

I am most anxious to have this whole affair closed and put behind me. I never want to do business with you again. Your cynical claim for compensation for defamation will not be used to bully me into paying you.

I look forward to hearing from you by 5 pm today with your confirmation that my money will be available for collection."

Following the exchange of some further brief correspondence the applicant then wrote to the plaintiff on the 1st of April 2004 and commenced by complaining that there had been no response to his letter of the 19th of March 2004. Then, after re-iterating his insistence that the plaintiff should withdraw his "false allegations of professional misconduct", and joining issue with the plaintiff on the adequacy of the settlement achieved in the light of the available evidence, the applicant continued:

"With regard to costs, I felt that we had an agreement." ... "I am therefore giving you the opportunity now to state what figure would be acceptable to you in terms of costs and I await hearing from you by return.

With regard to costs, the options are:

> 1. I will ask my legal costs accountants to prepare a full bill of costs for the entire case which you can have taxed, if you wish. I will exercise my lien on that portion of your settlement funds which will be required to meet the bill plus the outlay associated with the taxation. The balance of the settlement funds will be released to you and you would then be free to pursue the fees and outlays owed to you by way of indemnity by the defendant.

Or:

> 2. If we agree the solicitor/client costs now, the balance of the settlement funds will be released to you and I will seek the remainder of the costs from the defendant.

Either way, settlement funds will be released to you before close of business on Monday the 5th of April 2004 but ... the funds to be released by virtue of option no.2 will greatly exceed the funds which could be released now by virtue of option no.1.

I await hearing from you."

The plaintiff replied by e-mail on the 4th of April 2004 re-iterating his previous requests including his request for an explanation of the costs demanded. He then stated: "Whatever fees you are entitled to from me will be paid to you. However I am not authorising you to deduct any money from my settlement."

On the following day, the 5th of April 2004, the applicant wrote to the plaintiff stating:

> "Your bill of costs is currently being assessed by a costs drawer, a not inconsiderable task, given the lengthy history of litigation. It is estimated by the costs drawer that the bill will be in or around the €46,000 figure. If you dispute liability and the matter goes to taxation (i.e. measurement), there is a potential for a further charge relating to court duty on the bill @ 8% of the bill, in this case approximately €3,700.
>
> Alternatively, if you agree a once off figure now for your liability to this practice, the costs liability of the defendant can be pursued by this practice and you will not be referred to for any shortfall in the amount due by the defendants.
>
> If you require clarification, please revert.
>
> [A named bank] were paid €2310.44 on foot of my undertaking to them.
>
> In the meantime, I enclose a cheque for €48,689.56, which is the balance currently due to you pending settlement of the bill. The balance of €49,000 is retained by virtue of a solicitor's lien on unpaid costs, on the basis of an estimation of the total bill and associated costs relating to any taxation that may occur."

That letter elicited a response from the plaintiff by way of letter dated the 13th of May 2004 in which (*inter alia*) he stated the following:

> "It is specifically in relation to the costs issue on which I am writing to you again. Despite my repeated requests to you to explain your costs you have failed to respond to me on the issue. You have failed to give me a bill of costs, which I feel I'm entitled to and from which I could try to determine what you should be paid.
>
> Notwithstanding the above, in the interest of getting this matter disposed of, I'm willing to offer you €5000 plus VAT towards your solicitor/client costs.

In addition to the above I require a breakdown of all costs due to me from the other side together with a copy of the schedule of the special damages which was in court on the day of the hearing. Certain items were included in that schedule which, I believe, were included in the settlement and for which I will not be reimbursed. I wish to know what these are."

On the 13th of May 2004 the applicant replied to the plaintiff in the following terms:

> "I feel is necessary to keep addressing points which have previously been raised and which I have previously answered. Your offer in relation to your legal costs liability to this practice is completely unrealistic. When the legal costs accountant completes the bill of costs for the legal services supplied to you over the last seven years, you will be served with it. The contents of the bill of costs will be self-explanatory."

The next thing that happened was that the plaintiff wrote a letter of complaint to the Law Society of Ireland concerning the applicant.

The Complaint to the Law Society of Ireland

The plaintiff complained to the first named respondent about the applicant in a letter dated the 18th of May 2004. After setting out the background to the matter as viewed from his perspective the plaintiff then continued:

"The reason for writing to you is that, despite the fact that my case settled on the 19th of October 2004 and that Mr O'Sullivan received my money on the 2nd of March 2004, he has failed to furnish me with a bill of costs, or to explain why he is charging me €15,000. He is also withholding €49,000 of my money, despite the fact that the defendants have agreed to pay my legal costs.

It would appear that Mr O'Sullivan has refused to pay the balance of my settlement monies to me on the basis that I have asked him to explain his fee of €15,000 plus VAT. I do not object to paying Mr O'Sullivan a fee, however €15,000 together with VAT is very high on the basis of the sum I received. Furthermore I do not understand why he is retaining the balance of my money given the amount being queried.

Mr O'Sullivan wrote to me to suggest a figure I should pay to him for his work. I found this impossible to do as firstly, I understand the defendants are to pay his costs, and secondly, I would not know how to, as I was not furnished with a bill or breakdown of costs (despite numerous requests) from which I could attempt to do so.

In addition to the above I am seeking a breakdown of what monies will be returned to me in respect of the outlay I have paid out during the case. I have asked for a copy of the schedule of special damages, which was in Court on the day of the hearing, but this has not been furnished to me despite numerous requests for same.

Throughout my correspondence with Mr O'Sullivan I have asked him to provide me with an explanation of his costs. He has not done so. Instead he has suggested that I tell him what he should charge me (by way of letter of the 5th April 2004) and he also requested that I make a compensation payment to him for defamation (e-mail of the 26th March 2004) arising out of a letter which I wrote to him directly concerning the day of the hearing and the specific issue of his costs.

I'm now seeking the assistance of the Law Society in having this matter resolved as quickly as possible."

The letter went on to enclose copies of relevant correspondence and to emphasise the urgency of the matter from the plaintiff's perspective.

Dealings between Solicitor and The Law Society and further dealings between Solicitor and Client

Upon receiving the plaintiff's complaint the first named respondent wrote to the applicant by means of a letter of the 25th of May 2004 enclosing a copy of the letter of complaint and requesting him "to furnish within the next 10 days your observations thereon and any necessary explanation of the matters arising." A copy of the Society's information booklet entitled "Resolving Complaints" was also enclosed with this letter.

The applicant responded by letter dated the 26th of May 2004 in which he stated (*inter alia*) "Mr [N's] litigation file is with legal costs accountants since the 19th of March 2004 and that puts me at something of a disadvantage in dealing with your correspondence. Once the bill is finalised, I will be able to retrieve the file and consider the matter." The letter then went on to deliver a series of interrogatories to the first named respondent concerning the nature of its intervention and in particular as to whether it was treating the plaintiff's correspondence as a complaint or complaints under the Solicitors Acts and, if so, the particulars thereof.

The next thing that occurred was that on the 10th of June 2004 the applicant wrote to the plaintiff enclosing a bill of costs in the sum of €33,716.86 plus outlays of €11,412.25 giving a total figure of €45,129.11. These figures were inclusive of VAT. The covering letter stated:

"I now enclose my bill of costs in relation to legal services rendered to you. If you dispute the bill, you may have it taxed. For obvious reasons, including the making of malicious and false allegations by you and your failure to withdraw same, I can no longer represent you."

Then, on the 14th of June 2004 the applicant received a letter from the first named respondent dated the 8th of June 2004 in reply to his letter of the 26th of May 2004. The first named respondent's letter stated (*inter-alia*):

"You might be good enough to contact your Costs Drawer and indicate when he expects to be in a position to return the file to you together with his bill.

On the basis of Mr N's covering letter to the Society and enclosures which he has attached, I understand him to be making the following allegations.

1. That he has not received a bill of costs (I note that this is in hand).

2. That he believes that you are seeking payment from him in the sum of €15,000 plus VAT over and above any amount that may be recovered on a party and party basis and he alleges that this is an excessive fee.

3. He is looking for the Society's assistance in obtaining confirmation of the outlay will be refunded (*sic*) (presumably production of the bill will address this complaint in so far as it will contain details of the amounts being claimed).

4. He has asked for the society's assistance in obtaining a copy of his Special Damages.

Complaints of excessive fees fall to be considered by the society under section 8 of the Solicitors Amendment Act 1994. Complaints of inadequate services fall to be considered under section 9 of the Solicitors Amendment Act 1994. In addition to the foregoing I will be asking you to confirm that the provisions of section 68 (3) (4) (5) & (6) have been or will be complied with."

(Although nothing turns on it, the passage quoted contains an error in as much as the references to s.8 and s.9 respectively of the Act of 1994 are inverted. In fact complaints of inadequate services fall to be considered under section 8 whereas complaints of excessive fees fall to be considered under section 9.)

On the 22nd of June 2004 the applicant wrote to the first named respondent and notified it that the plaintiff had been sent a bill of costs He further complained that the society had not answered his earlier interrogatories and asserted that "If the Society is invoking its statutory powers, I am entitled to know which powers the Society is invoking and on what basis." He concluded:

"With regard to your comments on s.68, I am not clear whether you are stating that the Society is now asking for these

confirmations or whether you are stating that it intends, at some future time to ask for these confirmations. You might clarify."

On the 15th of June 2004 the plaintiff wrote again to the first named respondent in the following terms:

> "I am enclosing a copy of letter sent by Michael O'Sullivan on the 10th of June 2004 enclosing a bill for €33,716.86.
>
> You will see from my earlier correspondence with Mr O'Sullivan that I have asked him to explain his costs of €15,000. Instead I have received a bill for the above amount. I do not understand how the amount being claimed by Mr O'Sullivan suddenly doubled without explanation. I see in the bill that I have been billed for items which I have already paid for such as medical reports and stamp duty.
>
> In addition to the above my settlement monies continue to be retained by Mr O'Sullivan. There is an outstanding amount over and above what he is claiming. Is there a legal basis for the retaining of this money?"

As a result of receiving this letter Ms Linda Kirwan on behalf of the first named respondent was moved to write to the applicant on the 23rd of June 2004 asking that:

> "You might be good enough to confirm the following:
>
> 1. Is the bill enclosed with your letter of the 10th of June 2004 to Mr N a bill of the entire costs that are due to you?
>
> 2. Has this bill been sent to the solicitors who acted for the defendants? In relation to the settlement I would be obliged if you would confirm:
>
> a. whether the settlement cheque was endorsed by your client prior to negotiation;
>
> b. that the sum of €49,000 which was retained from your client's settlement remains in your client account."

On the 24th of June 2004 the applicant responded to this letter stating (*Inter alia*):

> "Before this matter can progress any further, the society will have to reply to my queries.
>
> Mr N is incorrect in stating that the solicitor and own client bill of costs he has received is for €33,716.86. The total of the bill is €45,129.11 and a further sum may be due by him …"

The first named respondent replied by letter of the 29th of June 2004 asserting its view that the applicant's queries had been fully addressed in its letter of the 8th of June 2004 but adding for clarification that "not all complaints made against solicitors relate to 'statutory breaches'", and by way of example instanced an alleged failure to comply with an undertaking. The letter stated that there "is no statutory provision …that solicitors must comply with their undertakings. Nonetheless the Society will deal with such a complaint, as failure to comply with an undertaking is a matter of conduct."

The letter concluded:

> "In relation to section 68, I am asking you to confirm that the provisions of section 68 (3), (4), (5) and (6) have been complied with. I noticed that the bill has now issued and therefore you will be able to retrieve the file and respond to the society's correspondence."

The next thing that happened was that on the 6th of July 2004 the applicant wrote to the plaintiff enclosing a statement in respect of funds received by him from the plaintiff to cover outlays. This indicated that total funds of €1,245.99 had been received by the applicant between March 1998 and October 2002. Then, on the 16th of July 2004 the applicant wrote to the plaintiff withdrawing the bill of costs that had been sent to him on the 10th of June 2004 on the basis that the front cover sheet thereof mistakenly described it as a "party and party bill of costs". He enclosed a new bill of costs which was in all respects identical to the previous bill of costs except for the fact that the front cover sheet attached thereto now described the document as a "solicitor and own client bill of costs". The letter of the 16th of July 2004 again invited to the plaintiff to submit the bill for taxation if he was unhappy with it, and it further gave detailed instructions as to how he might go about doing that. A "Requisition to Tax" form was also enclosed.

On the 22nd of July 2007 the applicant wrote to the first named respondent stating:

> "I had asked you, in my letter of the 26th of May 2004, to specify certain matters in relation to your functions. I believe that your reply of the 8th of June 2004 fails to answer my queries with sufficient clarity. I believe that I am entitled have details of the complaints you have decided to investigate, before I am required to respond."

Ms Kirwan, on behalf of the first named respondent, replied on the 28th of June 2004 as follows:

> "In my letter of the 8th of June 2004 I set out what I understood to be the allegations that were being made by your client. I cannot think of anything further to add. As I do not wish to delay the investigation of the complaint, I propose to ask the Registrar's Committee whether I have responded sufficiently to the queries contained in your letter of the 26th of May 2004, and to seek their directions as to how the investigation of this complaint should proceed.
>
> The next meeting of the Committee takes place on the 28th of September 2004. If you would like to present you please let me know and I will make the necessary arrangements. If you do not wish to be present, the committee will deal with the matter on the basis of the correspondence furnished to date."

The next event of significance occurred on the 23rd of August 2004 when the applicant wrote to the plaintiff stating "As you have not requested that your bill of costs be taxed, I will now distribute the funds in accordance with the bill of costs." The plaintiff immediately replied to the applicant by letter dated the 25th of August 2004 pointing out that "you are aware that this matter is the subject of a Law Society complaint and investigation" and stating that "no disbursements are to be made from my compensation monies in your client account until this matter has been resolved by the Law Society or until you are authorised to do so by me." The plaintiff copied his correspondence to the first named respondent and on the 30th of August 2004 Ms Kirwan wrote to the applicant to advise him that the plaintiff had done so. Ms Kirwan suggested that in the circumstances "it might be expedient not to deal with the

funds that you hold until such time as the Registrar's Committee have had an opportunity to consider the papers."

The applicant replied on the 1st of September 2004 stating:

> "What Mr N has not told you is that he was furnished with a requisition to tax his bill on the 16th of July 2004. He did not respond.
>
> He was advised by letter of the 23rd of August 2004 that, as he had not requested that his bill be taxed, the funds will be distributed in accordance with the bill.
>
> I have complied with all relevant statutory requirements, particularly s.2 of the Attorneys and Solicitors (Ireland) Act 1849. The funds will accordingly be paid out."

On the 8th of September 2004 the applicant sent the plaintiff a cheque for €4,140.09 made up of "a refund of monies paid by you during the course of the litigation (€1,245.99) and the excess due to you after payment of the bill of costs." He added "As you have decided not to proceed to taxation, the excess funds can be released to you". He further advised that the final bill of costs after adjustments was now reduced from €45,129.11 to €44,939.11.

The Registrar's Committee duly met on the 29th of September 2004 and considered the relevant correspondence. Following this meeting, and on their instructions, Ms Kirwan then wrote to the applicant on the 7th of October 2004 advising him that "The Committee have requested your attendance at their next meeting which takes place on the 3rd November 2004." She further stated:

> "On the basis of their review of the correspondence, the Committee intend to consider the following issues:
>
> 1) The allegation made by Mr [N] that, at the time of the settlement, you requested payment of a fee of €15,000.
>
> 2) The reasonableness or otherwise of your insistence on receiving from Mr [N] a 'proposal for the payment of financial compensation for defamation'.
>
> 3) Your response to your clients request for a breakdown of the amounts which he was entitled to be reimbursed.
>
> 4) The circumstances in which the solicitor/client relationship was terminated.
>
> 5) Confirmation that you have complied with the obligations imposed by Section 68 (1), (3), (4), (5), Section 68 (8) (a) (b) (ii) and section 76 (17) of the Solicitors (Amendment) Act 1994.
>
> 6) The reasonableness or otherwise of your bill of costs.
>
> 7) Your response to the Society's correspondence to date."

The letter went on to advise that "in order to assist with the investigation of the above matters, the Committee have directed that within 14 days of receipt of this letter, you would respond" to six specific queries thereinafter set out.

The applicant replied by letter of the 8th of October 2004 enquiring as to whether each of the seven issues listed "is grounded by a complaint from a client" and, if so, demanding that they should identify the statutory provisions "under which the complaint(s) is/are made" and those "alleged to have been breached". The letter further pointed out that the plaintiff had "received and ignored a requisition to tax his bill of costs" and enquired (*inter alia*) as to "the statutory authority upon which the Society rely in purporting to create a system to judge the 'reasonableness or otherwise' of a bill of costs."

To this, Ms Kirwan replied on the 13th of October 2004 in terms that:

> "Not all of the issues raised by the Committee are the subject matter of a specific complaint from the client. For example, there are very few clients would be aware of the provisions of section 17 (17) of the Solicitors (Amendment) Act 2002 and would make a complaint alleging a breach of this section. This does not prevent the registrar's committee from seeking confirmation that there has been compliance.
>
> In relation to your request to refer you to the statutory authority upon which the society relies 'in purporting to create a system to judge the reasonableness or otherwise' of a bill of costs, I refer you to section 9 of the Solicitors (Amendment) Act 1994."

The applicant duly attended the meeting of the Registrar's Committee held on the 3rd of November 2004. At the commencement of the meeting he handed in a letter of that date addressed to the chairperson of the Registrar's Committee stating that he was attending the meeting out of professional courtesy to the committee and without prejudice "to any course of action that remains open to me to protect my personal and professional rights." The letter then continued:

> "I have been attempting since May 2004 to get the society to state what breaches of the statutory code have allegedly occurred in this instance. The society has refused to commit itself to such a statement. By the 7th of October 2004, the list of four complaints identified in your letter of the 8th of June 2004 had transmogrified into a list of 7 different complaints and the 4 original complaints had disappeared. No correspondence from my former client has been furnished by the society to indicate that he withdrew his original complaints and made new complaints. The Society states in its letter of the 13th of October 2004: 'Not all of the issues raised by the Committee are the subject matter of a specific complaint from the client.' In this event, it is incumbent on the Society to identify which of the complaints originated with a client and which did not.
>
> Having made the above distinction, the society ought then to set out the connection between each complaint and a breach of the statutory code. If, as has been implied, there is also some allegation concerning breaches of a non-statutory code or standard, the nature of the breach and the code or standard allegedly offended against ought to be stated."

The letter went on (*inter alia*) to enclose on a "without prejudice" basis (i) a copy of the s.68 statement sent to the plaintiff, (ii) a copy authority and undertaking dated the 12th of March 2003 and correspondence exchanged between solicitor and client relating to

that, as well as (iii) a copy schedule of special damages current to 03.10.03 and subsequent correspondence exchanged between solicitor and client relating to that. It further complained that the plaintiff had been selective in the correspondence that he had forwarded to the first named respondent and suggested that "it might be wise for the Society to ask [JN] to provide you with a full set of the correspondence that passed between us". By way of purported example the applicant referred back to his letter of the 1st of September 2004 and asked "Was any action taken by the Society over [JN's] failure to include a salient matter in his letter of the 21st of August 2004?"

The Chairman of the committee advised the applicant that the committee required some time to consider his letter and accordingly the applicant withdrew for a period to facilitate this. On his return the applicant was advised that the committee would have to furnish a copy of his letter to the plaintiff for his comments and that the matter would therefore be adjourned to the committee's next meeting. The Chairman further advised the applicant that the committee did not consider that it was incumbent on them to connect each complaint to a breach of the statutory code as suggested by the applicant's correspondence.

The next meeting of the Registrar's Committee was scheduled to take place on the 15th of December 2004. In advance of that the applicant's letter of the 3rd of November 2004 was sent to the plaintiff for his comments and he replied on the 1st of December 2004 in the following terms:

"The correspondence sent to you by me comprises the correspondence which passed between myself and Mr O'Sullivan subsequent to the settlement of my case. It is incorrect to state that this was selective. I raised a number of very definite issues with Mr O'Sullivan which are clearly set out therein.

> I am not sure what matter is referred to as being salient and omitted from my letter of the 21st of August 2004. If it is relevant please let me know and I will respond to you on the matter.
>
> You will know from the correspondence that I have made a simple request from Mr O'Sullivan to explain his costs of €15,000. I also stated, as I am entitled, that I was not happy with how I was treated or my case was handled. I still have not received an explanation of his costs of €15,000 but instead he has taken a fee, without my consent, of €44,939.11 and issued me with a cheque for €4,140.09, as per his letter of the 8th September 2004. The final paragraph of his section 68 letter states that professional charges are made on a solicitor and own client basis which may exceed any costs recoverable from the other party. It appears that he has not made any effort to obtain his costs from the other side and in that instance I do not understand how he has compiled his bill of costs if they are to be measured on that basis."

The letter then goes on to deal with the enclosures to the applicant's letter of the 3rd of November 2004. It acknowledges that he (the plaintiff) did provide the applicant with the authority in question and that "there is no issue there." It further acknowledges that he received the s. 68 Notice. With respect to the schedule of special damages he stated:

> "I was seeking the schedule of special damages as I was confused as to what money I was entitled to get back and what money I have yet to pay out. I did receive a copy of the schedule in advance of the date of the hearing however I sought the final copy of the schedule which was in court on the day of the case. There is no issue with this either except that it took so long to get a copy of the schedule from him."

The Registrar's Committee duly met as planned on the 15th of December, 2004 and the meeting was attended by the applicant, once again on the basis (as expressed in a letter of the same date handed in at the start) that he was doing so "out of professional courtesy to the committee" and without prejudice "to any course of action that remains open to me to protect my personal and professional rights." The minutes of that meeting have been exhibited in the affidavit of Ms Kirwan and they record:

> "15th December, 2004 - Mr O'Sullivan attended before the Committee. He said that he had not yet received a reply to his letter of the 3rd of November 2004 and he was waiting for the Society to specify what allegations he was required to answer. He said that he did not know where the Committee believed he had gone wrong. In response to the Chairman's observation that he was refusing to answer questions, Mr O'Sullivan said he was not refusing to answer any questions, but was saying that the Committee had a responsibility to tell him where he had gone wrong. He said that he had been met with a wall of silence and he demanded that the Committee specify where any breaches lie. The Chairman advised Mr O'Sullivan that the Committee would communicate with him in writing. Mr O'Sullivan referred to the fact that he had been kept waiting by the Committee for two hours and the Chairman apologised for keeping Mr O'Sullivan waiting."

On the following day, the 16th of December 2004, the applicant wrote to the Chairman of the Registrar 's Committee, ostensibly to record what had occurred at the meeting from his perspective. His letter states:

> "Initially, [the Chairman] asked why no reply was received to the society's letter of the 7th of October 2004. I stated that I had replied by letter dated the 8th of October 2004. He also appeared to take exception to my handing in a letter of the 15th of December 2004.
>
> [The Chairman] then asked me if I was refusing to answer the questions of the Registrar's Committee. I replied that it was incumbent on the Committee to specify the information sought in my letter to the Committee dated the 3rd of November 2004, to which no reply has been made. Once that information was made available, replies could be made to the Committee's queries.

I think it is worthwhile to point out that the Committee cannot abrogate to itself a general right of inquisition but must recognise the boundaries set by statute."

On the 20th of December 2004 Ms Kirwan wrote to the applicant. Her letter stated (*inter alia*):

> "I have been directed by the Registrar's Committee to advise you that the Committee propose to consider the following issues arising out of the correspondence on the Society's file to date.
>
> 1) Your advice to your client during the settlement negotiations of your proposal to charge a solicitor/client fee of €15,000
>
> 2). Clarification of the basis upon which the proposed fee of €15,000 was measured.

3). Your client's request for (1) a copy of the schedule of special damages and (2) details of the outlay expended by him which are recoverable from the other side.

4). Compliance with the relevant provisions of section 68 and section 76 (17) of the Solicitors (Amendment) Act 1994.

5). The whereabouts of the monies retained by you.

6). Your demand for the payment of financial compensation by your client and your decision to cease representing him.

If you wish to make any submissions in relation to any of the above issues, please furnish them at least 10 days before the date of the next meeting ... . The next meeting takes place on the 9th of February 2005 ... ."

On the 7th of February 2005 the first named respondent received a letter from the plaintiff misdated as the 3rd of February 2004. However, it is clear from the context of the letter that it was written on the 3rd of February 2005. It stated:

"Please note that I do not accept the bill of costs furnished by Mr O'Sullivan. In any event it appears that Mr O'Sullivan has already appropriated the funds in his account (by virtue of his letter of the 8th of September 2004. Copy letter enclosed). As such, it appears that the issue of taxation has been unilaterally dealt with by Mr O'Sullivan. Furthermore, I do not wish to be further penalised in costs and time in having a bill of costs arbitrated on when it is so fundamentally different from the sum of money initially being sought.

Please also note that I did not endorse the settlement cheque and I did not give Mr O'Sullivan permission to negotiate the cheque on my behalf. The only authorisation I gave him was to discharge the undertaking to [a named Bank]."

On the 7th of February 2005 the applicant wrote to the Chairman of the Registrar's Committee in the following terms (*inter alia*):

"I refer to my letter of the 3rd of November 2004. I note that I have not yet received a reply.

In reference to your letter of the 20th of December 2004, please state, in relation to each of the six matters listed there, what breaches of a statutory or non-statutory code have allegedly taken place.

Please state what happened to the seventh item mentioned in your letter of the 7th of October 2004. Was that complaint disposed of and, if so, when was the result of your deliberations notified to me?

Please confirm that the matters will not be further considered by the Registrar's Committee until such time as the information sought is furnished."

On the 14th of February 2005 Ms Kirwan replied on behalf of the Registrar's Committee in the following terms (*inter alia*):

"The Committee have reviewed the correspondence in relation to this matter and decided that it cannot conclude its deliberations until such time as the amount of the party and party costs recoverable have been quantified. To this end the Committee have decided (subject to the consent of Mr [N]) to instruct a Cost Drawer to act on Mr [N's] behalf in the recovery of any party and party costs that might be due, and further to advise the Committee with regard to the overall level of costs applicable to this case.

I am enclosing a Notice issued pursuant to the provisions of section 10 of the Solicitors (Amendment) Act 1994 requiring the delivery of your file to the Society. Can you also please forward a letter addressed to the defendant's solicitors confirming that you have no objection to the appointment of a third party to act on Mr [N's] behalf in the recovery of the party and party costs..

In your letter of the 7th inst. you have asked, in relation to the matters listed in my letter of the 20th of December last, 'what breaches of a statutory and non-statutory code have allegedly taken place'. The Committee are considering the issues in the context of a solicitor's overall obligation not to engage in conduct that brings the profession into disrepute. The Committee also wishes to ensure that in your dealings with Mr [N] the relevant provisions of section 68 and section 76 (17) of the Solicitors (Amendment) Act 1994 have been complied with together with the provisions of the Solicitors Accounts Regulations as they apply to the handling of clients funds.

You should be aware that the committee always takes the view that if, during the course of their investigations any other matters come to light, they reserve the right to investigate same."

Subsequently, the applicant wrote to the Registrar's Committee on the 11th of March 2005 contesting the validity of the s.10 notice and the vires of its issuance. Further, he stated:

"It may be useful to point out at this stage that, as Mr [N] has paid all fees due by him to this practice, I am not entitled to exercise any lien on his file and he may wish, as I no longer act for him, to instruct a firm of solicitors to take up his file in due course.

With regard to your suggestion that I write to the solicitors for the defendant in relation to Mr [N's] case, I no longer represent Mr [N] in respect of that matter."

On the 31st of March Ms Kirwan wrote to the applicant to inform him that the Registrar's Committee had noted the contents of his letter of the 11th of March and also to inform him that the plaintiff had agreed to a proposal by the committee to enlist the services of a Legal Costs Accountant to negotiate with the defendants in the plaintiff's action to recover the party and party costs. A copy of the plaintiff's letter to the Society of the 21st of March 2005 confirming his agreement was enclosed. Ms Kirwan again requested the applicant to "make arrangements to transmit your original file to the Society".

The applicant replied by letter of the 13th of April 2004 complaining, *inter alia*, that his objections to the s.10 notice had not been dealt with. He added:

"It is open to Mr [N] to retain a solicitor to take up his file and I enclose a form of authority for his signature in order to facilitate this."

Ms Kirwan responded by letter of the 22nd of April 2005 stating:

> "I would have thought that Mr [N's] letter of the 21st of March 2005 constituted sufficient authority for you to release the file to the Society. I cannot ask Mr [N] to sign the authority attached as he will not be appointing the undersigned as 'my solicitor in relation to the above High Court proceedings'.
>
> As the Society is no longer proceeding on foot of the notice issued pursuant to Section 10 the queries raising your correspondents are moot.
>
> If you are unwilling to hand over the file to the Society for the purposes set out in my correspondence, I will refer the matter back to the Committee to obtain its directions."

The letter also enclosed, in response to a request of the applicant, a copy of the plaintiff's letter of the 3rd of February 2005 (misdated 3rd of February 2004) which had not previously been sent to him. Then on the 13th of May 2005 the applicant wrote to the Registrar's Committee to put it on the record that he took issue with the contents of the plaintiff's said letter. He said:

> "It appears that Mr [N] does not appear to want to appoint a solicitor to enforce the High Court order of the 19th of February 2004 in respect of the recovery of his party and party costs. The plaintiff or his new solicitor should comply with O. 7 r. 2 of the Rules of the Superior Courts. This is the standard procedure.
>
> I note that Mr [N] is factually incorrect in his letter to you of the 3rd of February 2004 (presumably this should read ' 2005'), as follows:
>
> 1. Mr [N] received his solicitor and client bill of costs by registered letter dated the 16th of July 2004 and was, inter alia, advised by me of his right to tax the bill furnished with a requisition to tax. He was further advised on the 23rd of August 2004 that, as he had not sought taxation, the matter would proceed to distribution. The Law Society was made aware of this, at the time, and you apparently did not advise Mr [N] to avail of the taxation procedure. I also advised the society by fax of the 1st of September 2004 that, as Mr [N] had not sought taxation of his solicitor and client bill of costs, the funds would be distributed. Still no requisition to tax was received from Mr [N]. It is therefore factually incorrect for Mr [N] to state that I appropriated funds or that the issue of taxation was dealt with unilaterally. He was involved and advised at every stage. He now states, in the same letter, he does not want to have the bill of costs arbitrated upon. What does he mean by that?
>
> 2. The second factually incorrect statement by Mr [N] is in relation to the endorsement of the settlement cheque. In late 2002, Mr [N] requested that I underwrite his borrowings from [a named Bank] by giving them a personal undertaking to pay his borrowings from them. In order to authorise me to do this, an authority was drafted by me and forwarded to Mr [N], with the advice that he may wish to seek independent legal advice as to its contents."…(Copies of relevant correspondence were enclosed) … "On the 3rd of December 2002 Mr [N] was sent a copy of a letter from [a Senior Counsel] …. which sounded a cautious note in relation to Mr [N's] expectations of the level of damages he was anticipating." …(more correspondence enclosed)… "In any event whether connected to the Senior Counsel's advice or not, Mr [N] decided to seek an altered undertaking for the lesser amount of €1,745 instead of €10,000. The necessary authority for the undertaking was signed by Mr [N] and a copy was enclosed with my letter to you of the 3rd of November 2004. You will see that it contains his authority to lodge the gross proceeds of his action to my client account. Therefore, Mr [N] is factually incorrect in stating that he did not give me permission to negotiate the cheque and in further stating that the only authorisation he gave me was to discharge the undertaking to [the named Bank].
>
> I reserve my position with regard to the contents of your letter of the 14th of February 2005."

The applicant's said letter of the 13th of May 2005 was acknowledged by Ms Kirwan on the 17th of May 2005 and her letter of that date further advised the applicant that "The matter will be reviewed by the Complaints and Client Relations Committee (formerly the Registrar 's Committee) at its meeting on the 31st of May 2005". At its meeting on the 31st of May 2005 the CCR committee decided to seek legal advice and pending receipt of that the matter was adjourned to its next meeting on the 27th of July 2005. Then on the 28th of July 2005 Ms Kirwan wrote to the applicant in the following terms:

> "I confirm that at its meeting on the 27th of July 2005 the Committee authorised the Society's solicitor to make an application to the High Court seeking an Order for the release of the file to the society.
>
> To obviate the need for making such an application, and the costs involved, I'm asking you again to transmit Mr [N's] file to the Society."

On the 11th of August 2005 the applicant forwarded all original documents making up his file to the plaintiff and retained copies for himself. He then wrote to the CCR Committee on the 28th of August 2005 asserting that "I do not believe that you have sufficient legal grounds to apply to the High Court for any relief" while pointing out that, in any event, he had sent the file to the plaintiff. He enclosed a copy of the covering letter addressed to the plaintiff that had accompanied the file.

What happened next, according to the affidavit of Ms Kirwan, is that following receipt of the plaintiffs file in September of 2005 the first named respondent transmitted it to Behan & Associates, Legal Costs Accountants, who were instructed to draw a bill of costs and negotiate with the defendants for recovery of same. The plaintiff was advised of this in a letter from Ms Kirwan of the 20th of September 2005 in which she further stated:

> "The Committee 's primary focus is on resolving the costs issue and no decision will be made in relation to the disciplinary aspect of your complaint until that has been resolved."

By the 14th of March 2006 the applicant had heard nothing further from the first named respondent and accordingly on that date he wrote to the Chairman of the CCR Committee pointing out that "this matter has been on-going since the 25th of May 2004" and seeking "confirmation as to its current status." Ms Kirwan replied by letter of the 3rd of May 2006 stating "the process of recovering costs on a party and party basis from the defendants is taking place and Mr [N's] complaint remains adjourned."

On the 3rd of August 2006 Ms Kirwan wrote to the applicant to advise him that:

> "... Mr [N] has now recovered his party and party costs from AXA Insurance as per the attached schedule. Settlement in

this amount was recommended by the Society's cost accountants Behan & Associates.

I received an enquiry from Mr [N] asking what the position is with regard to the discharge of counsels' fees and other outlay. In order to respond to this enquiry can you please let me have a copy of your ledger card.

I confirm that the matter will be reviewed by the Complaints and Client Relations Committee at its next meeting which takes place on the 20th of September 2006."

A Schedule of Costs was enclosed with that letter indicating a total figure for costs agreed of €35,086.01 inc. VAT.

On the 19th of September 2006 the applicant wrote to the Chairman of the Complaints and Client Relations Committee in the following terms (*inter alia*):

"I note from your correspondence dated the 20th of September 2005 to Mr [N] that your 'primary focus is on resolving the costs issue'. Please note that you have not claimed that you are dealing with a complaint under s. 8 of these Solicitors' Acts, despite extensive correspondence with you on the topic of your jurisdiction in this matter.

You also refer in the same letter to 'the disciplinary aspect' of Mr [N's] complaint. You are not entitled to proceed as you have not, despite repeated requests, stated what statutory provision Mr [N's] allegations relate to nor have you stated, again despite numerous requests, what statutory provision you allege has been breached.

In that letter, you tell Mr [N] that 'the nature of the responses received from the solicitor contributed to an alleged unavoidable delay. I regard this statement to be defamatory. Please justify your statement.

I confirm that all outlays included in my bill of costs dated the … were discharged.

It is also worth noting that when Mr [N] was requested by me to tax his solicitor and client bill of costs of the 10th of June 2004, … , he declined to do so. As he was in receipt of Law Society advices at that time, it is quite clear that the Society did not advise him that he should have the solicitor and client bill taxed. It may therefore be concluded that the Society was quite happy with the solicitor and client bill of costs. When I pointed out to you in my letter of the 1st of September 2004 that I had complied with all relevant statutory requirements, you did not demur and did not request a taxation. This sequence of events raises the issue of estoppel in relation to your position.

In conclusion, for the reasons stated, I do not believe that you have any jurisdiction in this matter."

The CCR Committee duly met on the 20th of September 2006 and considered the entirety of the correspondence including the applicant's letter of the 19th of September 2006. The applicant did not attend. Then on the 22nd of September 2006 Ms Kirwan wrote to the applicant on behalf of the CCR Committee stating:

"Having reviewed the correspondence, the Committee took the view that it disclosed prima facie evidence of misconduct which would warrant an application to the disciplinary tribunal for a sworn enquiry.

My file in the matter is now being transmitted to the Society's solicitor who will be dealing with the application."

Some further correspondence was then exchanged between the applicant and the first named respondent which adds nothing in terms of the issues that I have to decide. However, I do note that on the 16th of January 2007 the applicant was advised by Ms Kirwan that "all the material upon which the Society will be relying in support of its application to the Disciplinary Tribunal will be exhibited in the Society's affidavit which will be furnished to you by the clerk of the tribunal." Then on the 26th of January 2007 the applicant wrote to the Chairperson of the CCR Committee stating (*inter-alia*):

"I now request that you set forth your reasons for seeking a referral to the Disciplinary Tribunal and state the specific allegation of wrongdoing upon which you are invoking the jurisdiction of the Disciplinary Tribunal.

Please note that if a satisfactory response is not received from you within 10 days, it is my intention to seek a judicial review of your decision communicated by letter of the 22nd of September 2006 ..."

By letter of the 7th of February 2007 Ms Kirwan replied and reiterated that "the Society's grounding affidavit to the Tribunal will contain all of the relevant material and will specify the allegations of misconduct which the Society is referring to the Tribunal. This affidavit is being drafted by the Society's solicitor and I cannot pre-empt same."

According to the applicant's affidavit, by letter of the 26th of September 2007 he received notification from the Registrar of the second named respondent that an application had been made to it by the first named respondent for an enquiry into alleged misconduct. The letter enclosed the application and an affidavit of Linda Kirwan sworn on the 14th of September 2007. He was asked to respond within 28 days.

Before describing the nature of the application it is appropriate to digress for a moment to record what Ms Kirwan has to say in her affidavit concerning the delay between the decision taken by the first named respondent to apply to the Disciplinary Tribunal and the actual making of that application. Ms Kirwan states at paragraphs 55 to 57 of her affidavit:

"55. During this period I prepared my application to the Tribunal. By way of preparation for this application to the Tribunal the Society sought the opinion of Mr Stephen Fitzpatrick of Peter Fitzpatrick & Co Legal Costs Accountants. Mr Fitzpatrick was asked to comment upon the reasonableness of the applicant's bill of costs and on the reasonableness of the fee of €15,000 which the applicant sought from the complainant. By way of response Mr Fitzpatrick prepared a statement dated 3 September 2007.

56. I say that some delay in preparing the same affidavit was due to a backlog of work in the Society, which was caused due to its dealing with an unprecedented influx of complaints from applicants to the Residential Institutions Redress Board concerning their solicitors' conduct in the handling of claims.

57. On 14 September 2007 I swore my grounding affidavit to the Tribunal."

The Application to the Solicitors Disciplinary Tribunal.

The first named respondent's application to the second named respondent was, as required by the relevant regulations, made upon a Form D.T. 1, which was dated 17th of September 2007 and expressed itself to be an application "for an inquiry into the conduct of the respondent solicitor" (the applicant herein) "on the ground of alleged misconduct, in respect of the matters disclosed in the accompanying grounding affidavit sworn by Linda Kirwan (and the documents exhibited thereto)."

The affidavit of Ms Kirwan runs to 55 paragraphs and some 48 pages in length. In paragraphs 1 to 54 thereof she summarizes the factual history of the matter. Then in paragraph 55 the precise nature of the first named respondent's complaints of misconduct are particularised. Paragraph 55 is in the following terms:

> "It is submitted that the respondent solicitor in the title hereof Michael O'Sullivan has been guilty of misconduct in his practice as a solicitor in that he:
>
> a. Unreasonably requested payment of a solicitor/client fee of €15,000 plus VAT at the time of settlement negotiations of the complainant's personal injury action on 19 February 2004, and in subsequent correspondence, without having advised the complainant on what basis the proposed fee was measured and without advising the complainant what costs might be recoverable from the defendant to that action on a party and party basis and without having furnished the complainant with a bill of costs in accordance with s.68 (6) of the Act of 1994.
>
> b. Demanded payment of an excessive solicitor/client fee of €15,000 plus VAT from the complainant.
>
> c. Unreasonably refused and/or failed to respond to the complainant's request, contained in his letter to the respondent of 14 March 2004 and subsequent correspondence, for an explanation of the amount of the respondent's solicitor/client fee of €15,000 and in particular failed to clarify the basis upon which the proposed fee was measured.
>
> d. Failed to respond in an appropriate and timely manner, or at all, to the complainant's request, in his letter to the respondent of 14 March 2004 and subsequent correspondence, for a breakdown of the outlay in respect of the said personal injury action for which he was entitled to be reimbursed.
>
> e. Failed to respond in an appropriate and timely manner to the complainant's request, contained in his letter to the respondent of 14 March 2004 and subsequent correspondence, for a copy of the updated schedule of special damages which had been in court on the day of the hearing of the complainant's said personal injury action.
>
> f. Failed to respond to the queries raised by the complainant in his letter of 14 March 2004 and subsequent correspondence in an appropriate and professional manner and in particular unreasonably sought from the complainant, by e-mail dated 26 March 2004, a "*proposal for the payment of financial compensation for defamation*".
>
> g. Wrongfully retained settlement monies payable to the complainant without the consent and/or written agreement of the complainant and despite the complainant's requests for transfer of the said monies to him.
>
> h. Deducted and/or appropriated monies in respect of his charges from monies payable to the complainant without the written agreement of the complainant and without providing the complainant with an estimate of what he reasonably believed might be recoverable on a party and party basis in respect of his charges in breach of section 68 (3) and (5) of the Act of 1994.
>
> i. Failed to take any or any appropriate steps to recover the party and party costs in respect of the complainant's said personal injury action.
>
> j. Unreasonably terminated the solicitor/client relationship with the complainant and/or failed to provide the complainant with any or any adequate notice of termination of the solicitor/client relationship.
>
> k. Failed to co-operate with the Society's investigation and in particular failed to respond appropriately and in a timely manner, or at all, to queries raised by the Society.
>
> l. Failed to comply appropriately and in a timely manner, or at all, with the directions of the Committee.
>
> m. Failed to respond in a timely manner to the Society's request to transmit his client file to the Society."

The applicant (in these proceedings) failed to furnish an affidavit in reply to Ms Kirwan's affidavit of the 14th of September 2007 within the 28 day period specified. Moreover, he did not seek an extension of time within which to do so. Accordingly, the Registrar of the second named respondent wrote to him on the 12th of November 2007 and advised that:

> "In the circumstances, the Tribunal, in due course, will consider the following documents to decide whether or not there is a prima facie case of misconduct on the part of the respondent solicitor for inquiry: -
>
> 1. Form of application to the Tribunal for an inquiry into the conduct of a solicitor on the ground of alleged misconduct dated the 17th of September 2007.
>
> 2. Affidavit of Linda Kirwan sworn the 14th of September 2007 and the documents exhibited thereto."

Before the second named respondent had an opportunity to convene for the purposes outlined in the Registrar's letter of 12th November 2007, the applicant commenced his present proceedings and, as previously stated, on the 21st of January 2008 applied for, and successfully obtained, leave to apply for judicial review against both of the respondent's herein.

The present proceedings.

As stated in the introduction to this judgment the applicant was granted leave to apply by way of judicial review for *Orders of Certiorari* quashing (i) the decision of the first named respondent of the 20th of September 2006 to apply for an inquiry into the conduct of the applicant (relief D 1 in the applicant's Statement of Grounds), and (ii) the application by the first named respondent to the second named respondent on the 17th of September 2007 for such an inquiry (relief D 2 in the applicant's Statement of Grounds).

He was also granted leave to seek *Declarations* (i) that the first named respondent has acted *ultra vires* the provisions of sections 8,9 and 17 of the Act of 1994 (relief D 3); (ii) that the first named respondent has applied the provisions of the Act of 1994 in an unlawful manner (relief D 4); (iii) that the first and second named respondents have acted in breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (relief D 6); (iv) that the procedures and statutory provisions adopted by the first and second named respondents are in breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (relief D 7) and (v) that insofar as the membership of the second named respondent is comprised mainly of members and former members of the Council of the first named respondent, it fails to observe the requirements of natural and constitutional justice and of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (relief D 8). He was also granted leave to seek an *Order of Prohibition* restraining the second named respondent from holding an inquiry into the conduct of the applicant (relief D 5); if necessary, an extension of time (relief D 9); damages (relief D 10) and costs (relief D 5).

At the outset of the hearing before me in this matter Counsel for the applicant informed the Court that the applicant was no longer seeking relief D 8. Further, no arguments whatsoever were advanced on behalf of the applicant either in original written submissions, or in supplemental written submissions, or in oral submissions before the Court, in support of reliefs D 6 and D 7 respectively, and in the circumstances I propose to treat these claims as having been abandoned. Accordingly, the reliefs still being sought are those at D 1, D 2, D 3, D 4, D 5, D 9, D 10 & D 11.

The grounds upon which relief is sought are pleaded at Part E of the Applicant's Statement of Grounds which contains 24 paragraphs. Once again, at the outset of the hearing before me in this matter Counsel for the applicant informed the Court that the applicant was no longer relying on certain grounds, namely those pleaded at paragraphs 18, 23 and 24 of his Statement of Grounds. Excising those paragraphs, Part E now reads as follows:

> 1. Failure by the first named respondent to furnish to the applicant copies of the materials is had before it in making its decision.
>
> 2. Failure by the first named respondent to furnish correspondence regarding the matters it was investigating, in breach of its own stated policy, fair procedures and natural and constitutional justice.
>
> 3. Failure by the first named respondent to notify the applicant that it was about to enter upon a determination of the complaints of J N.
>
> 4. Failure by the first named respondent to afford the applicant an opportunity to be heard in relation to the evidence or materials before it.
>
> 5. Failure by the first named respondent to give reasons for its decisions of the 20th of September 2006 and 17th of September 2007.
>
> 6. Failure by the first named respondent to observe the principles of natural and constitutional justice and fair procedures in its deliberations and statutory procedures
>
> 7. failure by the first named respondent to identify and state the exact complaint or complaints they were investigating as a result of communications is had received from J N.
>
> 8. Failure by the first and respondent to identify and state the breaches of statues and alleged against the applicant.
>
> 9. Failure by the first named respondent to observe the provisions of sections 8 and nine of the Solicitors (Amendment) Act 1994.
>
> 10. That the first named respondent acted *ultra vires* in investigating matters concerning which no complaint had been made and in adjudicating up on such matters.
>
> 11. That the first named respondent acted *ultra vires* in instigating complaints which it then purported to investigate and adjudicate upon.
>
> 12. That the first named respondent acted unreasonably in purporting to decide on the 20th of September 2006 that there was prima facie evidence of misconduct by the applicant.
>
> 13. Failure by the first named respondent to consider separately or at all each of the seven allegations of misconduct at its meeting on the 20th of September 2008
>
> 14. Failure by the first named respondent to consider separately or at all each of the thirteen allegations of misconduct upon which it subsequently applied to the second named respondent at its meeting on the 20th of September 2006.
>
> 15. Failure by the first named respondent to give reasons why each of the seven allegations before it on the 20th of September 2006 constituted misconduct
>
> 16. Failure by the first named respondent to give reasons why each of the thirteen allegations for which it has applied for an enquiry constituted misconduct.
>
> 17. That the first named respondent acted *ultra vires* and in breach of natural and constitutional justice in applying to the second named respondent on the 17th of September 2007 for an enquiry into thirteen matters of alleged misconduct.
>
> 18. (Excised).
>
> 19. Delay by the first named respondent in investigating the complaints of JN made on the 18th of May 2004.
>
> 20. Delay in arriving at a decision in relation to the complaints of JN made on the 18th of May 2004.
>
> 21. Delay by the first named respondent in making an application to the second named respondent.
>
> 22. Overall delay by the first named respondent in relation to the matters before it from the 18th of May 2004 to the 17th

of September 2007

23. (Excised).

24. (Excised)."

By virtue of Order 84 Rule 7(a) of the Rules of the Superior Courts where leave to apply for judicial review is granted, then, if the relief sought is an order of *prohibition* or *certiorari* ***and*** the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders (my emphasis). The Court notes that Peart J's Order of the 21st of January, 2008, as perfected, is silent on the question of a stay, although it does grant liberty to apply. While it is possible that there was no application for a stay, it is also possible that there was an application for a stay and that the Order fails to record it. It is not for this Court to speculate as to which is the case. Nevertheless, the Court understands it to be the position that the second named respondent has not in fact taken any further steps in the matter since the making of Peart J's Order. It may be that this is due to a belief on their part that a stay was in fact granted, or, alternatively, due to their voluntary forbearance. Once again, it is not for this Court to speculate as to which is the case. Prima facie, however, on the basis of the Order of the 21st of January, 2008 as drawn, the second named respondent has at all times been at liberty to proceed notwithstanding the existence of these proceedings.

Both respondents have since filed Statements of Opposition consisting, essentially, of a denial of the applicant's claims to relief and a traverse of each of the grounds upon which he claims entitlement to relief. In addition, the Statement of Opposition of the first named respondent raises certain matters by way of preliminary objection and on foot of which the first named respondent says that the applicant should, in the exercise of the Court's discretion, be denied relief in any event. Briefly summarized these are:

- That the applicant has failed to move promptly and ought to be denied relief on the grounds of delay;

- That the applicant is not entitled to relief by reason of his own conduct;

- That the applicant is not entitled to relief by reason of the prolix and vague nature of the grounds upon which relief is sought.

- That much of the applicant's affidavit is devoted to debating the merits of the allegations of misconduct that have now been sent forward to the Solicitors Disciplinary Tribunal. These are not matters appropriate for consideration within the context of judicial review proceedings.

- That there was no decision on the 17th of September 2007 capable of being quashed by way of *certiorari*. It is not possible to quash an "application".

Let me say immediately with respect to the third point, that the Court does not agree that the applicant's grounds are either prolix or vague. Further, with respect to the fifth point, while it is true that an "application" may not be quashed by way of *certiorari*, that relief may be available in respect of the decision to make the application in question, and *prohibition* may be available in respect of proceedings initiated by the application in question. These reliefs have in fact been sought by the applicant and, accordingly, the pleading point made is somewhat insignificant. As regards the remaining preliminary objections (the first, second and fourth points respectively) the Court will consider and, if necessary, rule upon these later in this judgment.

Relevant legislation

For the purposes of this judgment it will be necessary to consider and refer in some detail to ss. 8, 9, 17 and 24 respectively of the Act of 1994 and, accordingly, it is appropriate that I should now recite them in full. Before doing so, I should state that all of these provisions appear within Part III of the Act of 1994 which is entitled "Investigation of Complaints". Moreover, there was also reference in the correspondence to an invocation by the first named respondent of s. 10 of the Act of 1994. However, as this was not ultimately proceeded with it is sufficient to simply note that s.10 empowers the Society to serve a notice in writing on a solicitor or his firm requiring the production or delivery of documents.

Section 8 of the Act of 1994

Section 8 is in the following terms:

"8.—(1) Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, alleging that the legal services provided or purported to have been provided by that solicitor in connection with any matter in which he or his firm had been instructed by the client were inadequate in any material respect and were not of the quality that could reasonably be expected of him as a solicitor or a firm of solicitors, then the Society, unless they are satisfied that the complaint is frivolous or vexatious, shall investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if they think fit, following investigation of the complaint, do one or more of the following things, namely—

(a) determine whether the solicitor is entitled to any costs in respect of such legal services or purported services, and if he is so entitled, direct that such costs in respect of such services shall be limited to such amount as may be specified in their determination;

(b) direct the solicitor to comply, or to secure compliance, with such of the requirements set out in subsection (2) of this section as appear to them to be necessary as a result of their investigation;

(c) direct the solicitor to secure the rectification, at his own expense or at the expense of his firm, of any error, omission or other deficiency arising in connection with the said legal services as the Society may specify;

(d) direct the solicitor to take, at his own expense or at the expense of his firm, such other action in the interests of the client as the Society may specify;

(e) direct the solicitor to transfer any documents relating to the subject matter of the complaint (but not otherwise) to another solicitor nominated by the client or by the Society with the consent of the client, subject to such terms and conditions as the Society may deem appropriate having regard to the circumstances, including the existence of any right to possession or retention of such documents or any of them vested in the first-mentioned solicitor or in any other

person.

(2) The requirements referred to in subsection (1) of this section are—

(a) a requirement to refund, whether wholly or to any specified extent, any amount already paid by or on behalf of the client in respect of the solicitor's costs in connection with the services he had provided or purported to provide, and

(b) a requirement to waive, whether wholly or to any specified extent, the right to recover the costs of the solicitor to the extent that they have not already been paid by or on behalf of the client.

(3) (a) The Society shall not make a determination or give a direction under subsection (1) of this section unless they are of opinion that it would in the circumstances be appropriate to do so.

(b) In determining whether it would be appropriate to make a determination or give a direction, the Society may have regard to such matters as they think fit including—

(i) the existence of any remedy that could reasonably be expected to be available to the client in civil proceedings;

(ii) whether proceedings seeking any such remedy have not been commenced by the client and whether it would be reasonable to expect the client to commence such proceedings;

(iii) whether section 13 of this Act applies to the subject matter of the complaint.

(4) Where the Society have made a determination or given a direction under subsection (1) of this section as to the costs of a solicitor in respect of any legal services provided or purported to have been provided by him, then—

(a) for the purposes of any subsequent taxation of a bill of costs covering those costs, the amount charged by the bill of costs in respect of those costs shall be deemed to be limited to the amount specified in the Society's determination and a copy of the written confirmation of either or both the Society's determination or direction given under subsection (1) of this section shall be included with the bill of costs submitted for taxation, and

(b) where a bill of costs covering those costs has not been taxed, the client shall, for the purposes of the recovery of those costs (by whatever means) and notwithstanding any statutory provision or agreement to the contrary, be deemed to be liable to pay in respect of those costs only the amount specified in the determination of the Society.

(5) Where a bill of costs covering costs of a solicitor has been taxed in accordance with subsection (4) (a) of this section, the determination of the Society under subsection (1) of this section shall, so far as relating to those costs, cease to have effect.

(6) The fact that a person who was a party before any court, tribunal or arbitrator appointed under the Arbitration Acts, 1954 and 1980, was not satisfied with the outcome of such proceedings, shall not, of itself, be grounds for a complaint to the Society under this section.

(7) The Society shall not enter upon, or proceed with, the investigation of a complaint under this section, or otherwise apply the provisions of this section, where the Society are of the opinion that such complaint relates to the alleged inadequacy in any material respect of legal services provided by a solicitor more than five years before the date on which the complaint was made.

(8) The Society, with the concurrence of the President of the High Court, may make rules of procedure in relation to complaints received by the Society under this section."

Section 9 of the Act of 1994

Section 9 is in the following terms:

"9.—(1) Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor, the Society, unless they are satisfied that the complaint is frivolous or vexatious, shall investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if they are satisfied that the bill of costs is excessive, direct the solicitor to comply or to secure compliance with one or both of the following requirements, namely—

(a) a requirement to refund without delay, whether wholly or to any specified extent, any amount already paid by or on behalf of the client in respect of the solicitor's costs in connection with the said legal services;

(b) a requirement to waive, whether wholly or to any specified extent, the right to recover those costs.

(2) Nothing in subsection (1) of this section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill of costs to a Taxing Master of the High Court for taxation on a solicitor and own client basis.

(3) Where the Society have received a complaint under subsection (1) of this section and the client concerned (before or after the receipt of the complaint) has duly requested the solicitor concerned to submit his bill of costs to a Taxing Master of the High Court for taxation on a solicitor and own client basis, the Society shall not make a direction under subsection (1) of this section unless, after due notice to that solicitor, they are of the opinion that the solicitor or his agent in that regard is unreasonably delaying in submitting such bill of costs to a Taxing Master of the High Court for such taxation.

(4) Where a bill of costs, which has been the subject of a complaint under subsection (1) of this section has been subsequently taxed, then—

(a) if the Society have given a direction under subsection (1) of this section, such direction shall cease to have effect,

or

(b) if the Society have not given a direction under subsection (1) of this section, the Society shall not enter upon or proceed with the investigation of such complaint or otherwise apply the provisions of this section.

(5) Where the Society have notified a solicitor of the making of a complaint under subsection (1) of this section in relation to a bill of costs issued by that solicitor, the solicitor shall not—

(a) issue or cause to be issued civil proceedings (whether on his own behalf or on behalf of any other person or persons), or

(b) if already issued, proceed further with civil proceedings, in relation to the amount (or any part thereof) of such bill of costs without the written consent of the Society before the Society has completed any investigation of the complaint pursuant to subsection (1) of this section, unless on application by that solicitor, on notice to the Society, a court otherwise orders.

(6) The Society shall not enter upon or proceed with the investigation of a complaint under this section or otherwise apply the provisions of this section, where the Society are of the opinion that the bill of costs, the subject of such complaint, was issued prior to a date that is five years before the date on which the complaint was made.

(7) The Society, with the concurrence of the President of the High Court, may make rules of procedure in relation to complaints received by the Society under this section."

Section 17 of the Act of 1994

Section 17 is in the following terms:

"17.—(1) The Act of 1960 is hereby amended by the substitution of the following section for section 7:

'7 --(1) An application by a person (not being a person who has made a complaint to an independent adjudicator under section 15 of the Solicitors (Amendment) Act, 1994 , about the conduct of a solicitor referred to in the application) or by the Society for an inquiry into the conduct of a solicitor on the ground of alleged misconduct shall, subject to the provisions of this Act, be made to and heard by the Disciplinary Tribunal in accordance with rules made under section 16 of this Act.

(2) Where an application in relation to a solicitor is duly made under this section and the Disciplinary Tribunal, after consideration of the application, are of opinion that there is no prima facie case for inquiry, they shall so inform the applicant in writing and shall take no further action in relation to the application.

(3) Where an application in relation to a solicitor is duly made under this section and the Disciplinary Tribunal, after consideration of the application, are of opinion that there is a prima facie case for inquiry, the following provisions shall have effect:

(a) they shall proceed to hold an inquiry;

(b) on the completion of the inquiry, the Disciplinary Tribunal shall—

(i) embody their findings in a report to the High Court, specifying therein the nature of the application and the evidence laid before them and any other matters in relation to the solicitor (hereinafter referred to in this section as the 'respondent solicitor') which they may think fit to report;

(ii) in a case where the Disciplinary Tribunal find that there has been misconduct on the part of the respondent solicitor and they have not made, and do not intend to make, an order under subsection (9) of this section, the Disciplinary Tribunal shall include in their report their opinion as to the fitness or otherwise of the respondent solicitor to be a member of the solicitor's profession having regard to the contents of the report and their recommendations as to the sanction which in their opinion should be imposed, and the Society shall bring the report before the High Court.

(4) Where, on completion of an inquiry under subsection (3) of this section, the Disciplinary Tribunal find that there has been misconduct on the part of the respondent solicitor but they have made or are of the opinion that it is appropriate that they should make an order under subsection (9) of this section, the Disciplinary Tribunal shall include in their report the reasons for their opinion that it is appropriate to make an order under subsection (9) of this section.

(5) The Disciplinary Tribunal shall, as soon as possible after it has been prepared, make available to the respondent solicitor a copy of their report prepared pursuant to subsections (3) and (4) of this section, as the case may be.

(6) Where, on completion of an inquiry under subsection (3) of this section, the Disciplinary Tribunal have found that there has been no misconduct on the part of the respondent solicitor, they shall take no further action in relation to the matter and they shall so inform the respondent solicitor and the Society or other person who made the application as the case may be.

(7) Where an application is made under this section, the Disciplinary Tribunal may, at any stage of the proceedings in relation to the application and before the completion of any inquiry under subsection (3) of this section, postpone the taking of any steps or further steps in the matter for a specified period and, if they do so, then, if before the expiration of that period the applicant applies to the Disciplinary Tribunal for leave to withdraw the application, the Disciplinary Tribunal may, if they think fit, allow the application to be withdrawn and, if they do so, no further action shall be taken by them in relation to the application.

(8) The Society shall be entitled to make an application to the Disciplinary Tribunal in accordance with the provisions of this section, notwithstanding that any other person may be entitled to make such an application.

(9) Where, on completion of an inquiry under subsection (3) of this section, the Disciplinary Tribunal find that there has been misconduct on the part of the respondent solicitor, they shall have power, by order, to do one or more of the following things, namely—

(a) to advise and admonish or censure the respondent solicitor;

(b) to direct payment of a sum, not exceeding £5,000, to be paid by the respondent solicitor to the Compensation Fund;

(c) to direct that the respondent solicitor shall pay a sum, not exceeding £5,000, as restitution or part restitution to any aggrieved party, without prejudice to any legal right of such party;

(d) to direct that the whole or part of the costs of the Society or of any person appearing before them, as taxed by a Taxing Master of the High Court, in default of agreement, shall be paid by the respondent solicitor.

(10) On the making of an order under subsection (9) of this section, the Disciplinary Tribunal shall, as soon as possible, serve a copy of such order on the respondent solicitor, either personally or by sending same by prepaid registered post to his address as stated in the register (or, if never on the register, the roll).

(11) 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 due service of the order, appeal to the High Court to rescind or vary the order in whole or in part, and the Court on hearing such an appeal may—

(i) rescind or vary the order, or

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

(12) The Society, or any person who has made an application under subsection (1) of this section, may, within the period provided under subsection (11) of this section, appeal to the High Court against an order made by the Disciplinary Tribunal under subsection (9) of this section on the ground that the sanction imposed by the Disciplinary Tribunal is inadequate, or that the Disciplinary Tribunal, in lieu of making such an order, ought to have exercised their powers under subsection (3) (b) (ii) of this section, and the Court, on hearing such an appeal, may—

(i) confirm the sanction imposed by the Disciplinary Tribunal on the respondent solicitor, or

(ii) in relation to the respondent solicitor, do one or more of the things specified in section 8 (1) (a) (as substituted by the Solicitors (Amendment) Act, 1994) of this Act.

(13) 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.

(14) Where a respondent solicitor refuses, neglects or otherwise fails to comply with an order made under subsection (9) (b) or (c)of this section (to an extent that it has not been rescinded or varied by the High Court consequent on an appeal to the High Court under subsection (11) of this section), the Society or any aggrieved party to whom a sum by way of restitution or part restitution has been ordered, may recover that sum as a liquidated debt.

(15) An application brought under subsection (1) of this section may relate to one or more complaints against a respondent solicitor.

(16) An application by the Society under subsection (1) of this section shall include an application made by the Society pursuant to a direction by an adjudicator appointed under section 15 of the Solicitors (Amendment) Act, 1994 .

(17) The Society may authorise any person on their behalf to do all such things and acts as may be necessary for the purposes of any application made or inquiry held under this section.'.

(2) Subsection (1) of this section shall not apply to any application under section 7 of the Act of 1960 made before the coming into operation of this section."

Section 24 of the Act of 1994

"24.—Section 3 of the Act of 1960 is hereby amended by the substitution of the following paragraph for paragraph (c)in the definition of "misconduct":

'(c) the contravention of a provision of the Principal Act or this Act or the Solicitors (Amendment) Act, 1994 , or any order or regulation made thereunder,',

and the said definition as so amended is set out in the Table to this section.

TABLE

'misconduct' includes —

(a) the commission of treason or a felony or a misdemeanour,

(b) the commission, outside the State, of a crime or an offence which would be a felony or a misdemeanour if committed in the State,

(c) the contravention of a provision of The Principal Act or this Act or the Solicitors (Amendment) Act, 1994 , or any order or regulation made thereunder,

(d) conduct tending to bring the solicitors' profession into disrepute;"

The Issues
It must be clearly stated that this Court is not concerned with the merits of the plaintiff's complaints against the applicant or, indeed, with the merits of the first named respondent's complaints against the applicant. It is concerned solely with the fairness of the procedures involved and with the legal propriety of various alleged acts or omissions of the respondents.

At this remove there does not seek to be any substantive complaint against the second named respondent. To the extent that the relief of *prohibition* continues to be claimed against the second named respondent, it is claimed in consequence of alleged acts or omissions on the part of the first named respondent rather than in consequence of any alleged acts or omissions on the part of the second named respondent itself.

For convenience, the grounds upon which the applicant seeks relief based on acts or omissions of the first named respondent may be grouped (with some overlaps) and considered under several broad headings:

- Alleged failure to observe fair procedures, natural and constitutional justice - grounds: E 1, E 2, E 3, E 4, E 6, E 7, E 8, E 11, E13, E 14, & E 17
- Alleged irrationality and failure to give reasons – grounds: E 5, E 12, E 15, & E 16,
- Alleged failure to act lawfully and intra vires statutory powers – grounds :E 9, E 10, E 11, & E 17
- Delay on the part of the first named respondent: - grounds: E 19, E 20, E 21 & E 22.

In addition, the three outstanding issues arising from the preliminary objections pleaded by the first named respondent, and previously alluded to, may fall to be considered.

Submissions
The Court received extensive written submissions on behalf of all of the parties. These were amplified in the course of counsels' oral submissions to the Court, and with the leave of the Court supplemental written submissions were subsequently filed by both the applicant and the first named respondent. This was to allow those parties to further address certain aspects of the matter on which particular emphasis had been laid by their opponents, respectively, in the course of the oral submissions. The Court wishes to express to the parties its appreciation for their very helpful submissions. It is not proposed to comprehensively review the submissions received in the course of this judgment. Rather, the Court will refer to them as required in addressing the issues that I have identified.

First issue for determination:

Alleged failure to observe fair procedures, natural and constitutional justice
By far the greatest number of the complaints pleaded in the applicant's Statement of Grounds fall to be considered under this heading. In addition to being pleaded in the Statement of Grounds they are re-iterated within the applicant's grounding affidavit (which endeavours to lay the evidential basis for them) and in particular in paragraphs 19 to 21 thereof. However, although it was indicated by the applicant's Counsel at an early stage of the proceedings that these complaints were not being abandoned, they are not addressed specifically within either the applicant's main written submissions or within his supplementary written submissions, and to the extent that they were referred to at the hearing they received what might be referred to colloquially as "a light rub".

The main written submissions filed by the first named respondent do attempt to address the complaints as pleaded by the applicant.

In summary, the majority of the complaints made under this heading may be characterised as alleged acts or omissions on the part of the first named respondent possibly giving rise to breaches of one of rules of natural and constitutional justice, namely the principle of *audi alteram partem*. This is pleaded both on a roll-up basis (at E 6) and also on specific bases. The acts or omissions specifically complained of include an alleged failure to furnish materials to the applicant (E 1); an alleged failure to furnish correspondence to the applicant (E 2); an alleged failure to notify the applicant that complaints against him were being considered (E 3); an alleged failure to afford the applicant an opportunity to be heard (E 4); an alleged failure to identify and state the exact complaint or complaints they were investigating arising out of communications by J.N. (E 7) ; an alleged failure to identify and state what breaches of statute were being alleged against the applicant (E 8) ; and alleged failures to consider issues separately (E 13 & E 14).

There is also a complaint that the first named respondent instigated complaints which it then purported to investigate and adjudicate upon (E 11). This amounts to an allegation that the first named respondent effectively breached the other rule of natural and constitutional justice, namely the principle of *nemo iudex in causa sua*.

In seeking to address the applicant's complaints the first named respondent has stated in its written submissions that it is clear from the evidence that the applicant was furnished with all relevant material. It contends that it was perfectly clear to him what issues were of concern to the Society. It further submits that the applicant was given every opportunity to place whatever explanations he had before the Committee.

It was further submitted that there was clearly sufficient material before the Committee on which it could determine that the matter merited referral to the Disciplinary Tribunal. It is contended that the function of the CCR Committee (and its predecessor the Registrar's Committee) is simply to determine whether or not there are grounds to refer someone to the Tribunal. It is the Tribunal which decides whether or not there is a prima facie case and thereafter whether or not any allegations of misconduct have been proven.

The applicant's complaints under this heading are predicated on an assumption that he was at all times entitled to the benefit of that panoply of fair procedures and natural justice rights appropriate to a formal disciplinary inquiry. The first named respondent challenges

that assumption and in doing so relies in particular on *Doupe v Limerick County Council and Patrick O'Connor* [1981] ILRM 456.

In order for the Court to address the issues raised under this general heading it is necessary in the first instance to consider what level of fair procedures and natural justice rights the applicant was entitled to, and then to consider whether or not his rights in that regard were in fact respected.

What level of fair procedures and natural justice rights was the applicant entitled to?

It seems to this Court that the answer to this question depends upon the nature of the investigation being conducted by the Law Society. In very broad terms it can stated that if an investigative process, or investigative processes (if two or more investigations are being run in parallel), has the potential to result directly in the making of an adverse finding or findings against, and/or the imposition of sanctions upon, the person under investigation that person must be afforded the level of fair procedures and respect for his/her natural justice rights appropriate to a formal disciplinary inquiry. If, however, an investigative process is in the nature of a preliminary step, in which the investigator does not have the power to make adverse findings against, or impose sanctions upon, the subject under investigation, and which involves merely the gathering and sifting of information which requires to be assessed in order to determine if there is a basis for the initiation of some further process in the course of which the subject will have a full opportunity to deal with relevant complaints or concerns, eg. a formal disciplinary inquiry, then less formal procedures may be quite adequate and appropriate.

I have derived considerable assistance from previous case law, most of which I was referred to by the parties. It is appropriate at this point to review the most important authorities. As previously mentioned, it was submitted by the first named respondent that some useful guidance as to the appropriateness and fairness of the procedures adopted by the Law Society is to be found in *Doupe v Limerick County Council and Patrick O'Connor* [1981] ILRM 456. This case concerned a challenge to a decision taken by the relevant licensing authority to refuse an application by a Mr James Doupe for a licence to operate an abbatoir on the basis of environmental and public health objections having regard to the scale of the operation. The challenge was based, inter alia, on alleged failures by the licensing authority to observe the principles of natural justice and, in particular, *audi alteram partem*. The applicant alleged that he was given no adequate opportunity to know the objections being made against his application or to meet those objections. In dismissing the challenge Costello J. stated (at p. 463):

> "As to the extent of the duty to disclose, in some cases natural justice may require that disclosure of all relevant documents be made prior to an oral hearing (*Nolan v. The Irish Land Commission*, unreported, Supreme Court, 9th May 1980); in others an indication of the evidence against an applicant for a licence, but not its source or details, may suffice (*R. v. Gaming Board of Great Britain* (1970) 2 WLR 1009). In the application of the same statutory provisions a decision-making body must, in some cases, give an opportunity to make written representations whilst, in others, no such obligation may arise (*Irish Family Planning Association -v- Judge Ryan;* 1979 I. R. 295). As to the nature of the opportunity to present a case to which an applicant for a licence is entitled, this too varies. The rule does not require that every administrative order which may adversely affect rights must be preceded by a judicial-type hearing involving the examination and cross examination of witnesses. It requires that adequate notice of the case which an applicant has to meet be given to him and that an adequate opportunity be afforded to answer any objections which may be taken to his application. And it is clear that the requirements of the rule may be fully satisfied by the adoption of quite informal procedures. In some cases an applicant may be entitled to make his submissions orally, in others a written submission will meet the requirements of the rule."

I have also derived considerable assistance from the judgments of the Supreme Court in the case of *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R.54, and also from the judgment of Kelly J in the High Court in *Miley v. The Flood Tribunal & The Law Society of Ireland* [2001] 2 I.R. 50, both of which were included in the applicant's Book of Authorities.

The factual matrix underlying the decision in Ó Ceallaigh's case is complex and was such as to give rise, in the words of Hardiman J, to "many headed litigation". For present purposes it is sufficient to record that Ms Ó Ceallaigh was a registered nurse and domiciliary midwife in private practice. In the mid 1990's she was the subject of certain complaints by the master of one maternity hospital and the matron of another to An Bord Altranais. There were four complaints in all.

An Bord Altranais is a statutory body established by the Nurses Act, 1985, for the purpose of promoting high standards of professional education and training and professional conduct amongst nurses. The Board has a particular statutory function in relation to fitness to practise, governed by Part V of the Act of 1985. This is an investigatory, adjudicatory and disciplinary function. The Board is obliged to establish a committee in relation to these functions, known as the Fitness to Practise Committee. S.38 of the Nurses Act 1985 provides (*inter alia*):

> "(1) The Board or any person may apply to the Fitness to Practise Committee for an inquiry into the fitness of a nurse to practice nursing on the grounds of -
>
> (a) alleged professional misconduct, or
>
> (b) alleged unfitness to engage in such practice by reason of physical or mental disability,
>
> and the application shall, subject to the provisions of this Act, be considered by the Fitness to Practise Committee.
>
> (2) Where an application is made under this section and the Fitness to Practise Committee, after consideration of the application, is of opinion that there is not sufficient cause to warrant the holding of an inquiry, it shall so inform the Board and the Board, having considered the matter, may decide that no further action shall be taken in relation to the matter and shall so inform the Committee and the applicant, or it may direct the Committee to hold an inquiry into the matter in accordance with the provisions of this section.
>
> (3) Where an application for an inquiry is made under this section and the Fitness to Practise Committee, after consideration of the application, is either of opinion that there is a prima facie case for holding the inquiry or has been given a direction by the Board pursuant to subsection (2) of this section to hold the inquiry, the following shall have effect -

(a) the Committee shall proceed to hold the inquiry ,

…"

In relation to the first complaint against Ms Ó Ceallaigh she was informed by the Fitness to Practice Committee both of the fact of the complaint and of the nature of the complaint, and she was afforded an opportunity to submit a response for the Committee's consideration when it came to determining whether or not there was a prima facie case for an inquiry. However, in the case of the second, third and fourth complaints against her, respectively, she was in each instance not informed of the fact of the complaint until after the committee had considered the matter and decided (as it did in each instance) that there was a prima facie case for an enquiry. Ms Ó Ceallaigh sought (inter alia) to challenge the Committee's decisions that there was a prima facie case for an inquiry in respect of the second, third and fourth complaints, respectively, on the grounds that she had not been afforded natural justice and in particular the benefit of *audi alteram partem*.

Among the decisions relied upon by Ms Ó Ceallaigh in argument before the Supreme Court was a decision of the Privy Council in *Rees v Crane* [1994] 2 A.C. 173. In extensively reviewing the judgments in this case Barron J said (at p. 88 et seq):

> "On the question of fair procedures, the contest was whether or not they required notification of a preliminary step in administrative action when the person concerned would be entitled to be represented and heard at later stages. Dealing with this issue, Lord Slynn of Hadley referred at p. 189 to the following passage from the judgment of Geoffrey Lane L.J. in *Lewis v. Heffer* [1978] 1 W.L.R. 1061 at p. 1078 which was as follows:-
>
> > 'In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maxim *audi alteram partem*.'
>
> A further passage from the judgment refers to what was said by Lord Morris of Borth-y-Gest in *Wiseman v. Borneman* [1971] A.C. 297. In that case the issue was whether a taxpayer should be consulted before the Commissioners of Inland Revenue issued a certificate that there was a prima facie case for instituting proceedings against the taxpayer.
>
> Lord Slynn said at p. 190 of *Rees v. Crane* [1994] 2 A.C. 173:-
>
> 'Lord Morris of Borth-y-Gest, at pp. 308 and 309, stressed the importance of observing the rules of natural justice. He added, at p. 309: 'The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair'"
>
> He continued:-
>
> 'we were referred to many decisions. I think that it was helpful that we should have been. But ultimately I consider that the decision depends upon whether in the particular circumstances of this case the tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded.'

Lord Slynn also cited the following passage from the same case at p. 190:-

> 'It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.'

He then referred to four cases in which *Wisemen v. Borneman* [1971] A.C. 297, had been applied, in that no notice was required to be given to the person affected before action was taken. Where there was need for immediate action in order to protect third parties: *Reg v. Birmingham City Council Ex Parte Ferrero Limited* [1993] 1 All E.R. 530; before the Secretary of State appointed an inspector under the Companies Acts: *Norwest Holst Ltd. v. Secretary of State for Trade* [1978] Ch. 201; before a notice under the accounts rules was served on a solicitor requiring him to produce documents for inspection: *Parry-Jones v. Law Society* [1969] 1 Ch. 1; and before a decision was made by the executive of the panel on take-overs and mergers to institute disciplinary proceedings on the basis of a prima facie case: *Reg v. Panel on Take-overs and Mergers, Ex Parte Fayed* [1992] B.C.L.C. 938.

> Lord Slynn then continued on p. 191:-
>
> 'It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.'"

A little later in his judgment, Barron J continues:

> "Much of what is contained in this judgment is clearly referable to the present case. Clearly, as in *Parry-Jones v. The Law Society* [1969] 1 Ch. 1, where the right to proceed does not arise until a particular opinion has been formed, it is not the law that the person who may be affected by the proceedings based upon that opinion should be informed prior to the issue of those proceedings so as to be able at that stage to argue to the contrary. His or her right to be heard arises once the proceedings are put in train. The question in any particular case as to when the person affected has a right to be heard depends upon the existence of the relevant procedure. There can be no right to be consulted until some step

has been taken to set the procedures in motion. Once that has been done, the right to be consulted, the right to be heard etc. will depend upon what is proper, what is fair. There can be no hard and fast rule. It is not the step in the procedures or the stage which they have reached which governs the right. What might require notice in one case may not require it in another for varying proper reasons, the most obvious being urgency or other necessity. It is entirely a question of what is fair and proper.

This case is stronger than *Rees v. Crane* [1994] 2 A.C. 173 in relation to the giving of notice to the person affected. In that case the Judicial and Legal Service Commission did not decide anything in relation to the allegation. It recommended that a process should continue. Here, the process had commenced once the complaints were made. The finding by the Fitness to Practise Committee that a prima facie case existed was a further step in that process. Certainly, the cases show that where the commencement of proceedings is dependent upon an opinion that a prima facie case exists, notice to the person affected is not required. But that only sets the process in train. In such a context it has a different connotation to that when found by the Fitness to Practise Committee.

The reality is that fairness of procedures is fair play in action to quote Lord Morris. Matters which may have a serious adverse affect on the rights, let alone the livelihood, of the person affected should not be considered behind closed doors and without notice to such person once it becomes appropriate that such matters should be considered by an impartial body.

In relation to the later three complaints, the Fitness to Practise Committee did not follow its normal practice. The Fitness to Practise Committee did not notify Ms. Ó Ceallaigh nor did it seek her comments nor ask for her records insofar as they did not already have them.

The practice observed in relation to the first complaint by the Master is not required by the Act of 1985. However, since the said Act carries a presumption of constitutionality, its provisions also carry the presumption that the powers and functions granted by it will be exercised in accordance with fair procedures. What is fair is dependent upon a number of factors. The most significant one is the manner in which the exercise of the particular power or function has impinged upon the rights of the person affected. In my view, as provided by the Act of 1985, there must be a filtering system before a decision is made to hold an inquiry. It is a very serious matter for the nurse concerned and it would be unfair for the Fitness to Practise Committee to decide to hold an inquiry without recourse to her having regard to the additional strain such an inquiry would impose."

Barron J concluded (at p. 92)

"In my view, there was no breach of fair procedures in relation to the decision of the Fitness to Practise Committee that there was a prima facie case for holding an inquiry into the first complaint of the Master.

In relation to the other three complaints, the situation is quite different. There can be no obligation to inform a nurse that an application is going to be made to the Fitness to Practise Committee. Such an application does not prejudice the nurse. It is the commencement of the process. Her position is protected by the obligation of the Fitness to Practise Committee to exercise fair procedures once it becomes involved. Obviously an application for an inquiry made by anyone other than the Board could not be notified to the nurse before it is made. There is no reason for so doing because the Board may be acting on a complaint by someone else.

Once the applications had been made to the Fitness to Practise Committee, that body had an obligation to apply fair procedures. That necessitated the making of inquiries. None was made of Ms. Ó Ceallaigh. How the inquiry should have developed thereafter and what other procedures should have been adopted would have depended upon the manner in which Ms. Ó Ceallaigh treated the complaint, and bearing in mind that disputed matters of fact did not fall to be decided in the course of such inquiries. Since Ms. Ó Ceallaigh was not contacted before the decision was made in each case that there was a prima facie case, there was a breach of fair procedures in relation to all three complaints once they had become applications for an inquiry."

In his judgment in the same case Hardiman J, who ultimately arrived at the same conclusion on this issue as Barron J, and with whom Geoghegan J agreed, stated (at pp 126 – 127):

"*Rees v. Crane* [1994] 2 A.C. 173 was followed by the New South Wales Court of Appeal in *Murray v. Legal Services Commissioner* (1999) 46 N.S.W.L.R. 224 and the ratio is basically similar. What the two cases have in common is that the respective bodies making the preliminary decision gave no colourable reason why they did not supply the complaints to the person to whom they related. Counsel for the Board sought to distinguish this case on the basis that the statutory context was different, in that the Commissioner had to be satisfied that the solicitor was likely to be found guilty of professional misconduct, and not merely that there was a prima facie case. But if it is permissible to take no step to find out what the person complained of says, a finding of a prima facie case will generally imply the probability of a finding of guilt. In any event, *Rees v. Crane* related to situation where a prima facie finding was all that was required.

In Hogan and Morgan, "Administrative Law in Ireland" (3rd ed., 1998), the following is said at p. 298:-

'Traditionally, it was thought that the principles of constitutional justice should not apply in the case of persons conducting preliminary statutory inquiries (e.g. such as where the report of an inspector requires confirmation by the decision making authority). However, this argument has been rejected by the Irish courts.'

The case referred to is the *State (Shannon Atlantic Fisheries Limited) v. McPolin* [1976] I.R. 93. This was a case where an inspector had been appointed to investigate the cause of the wrecking of a fishing vessel. His inquiry was held pursuant to s. 465 of the Merchant Shipping Act, 1894. His report, which went to the Minister, had no legal effect in itself but might lead the Minister to initiate a prosecution. In the particular case, however, any prosecution would have been statute barred. The inspector also had power to request the District Court to hold a formal inquiry but this was not availed of.

The High Court (Finlay P.) quashed the report because the owners of the vessel had not been interviewed or given an opportunity to comment on the relevant matters. Finlay P. said at p. 98:-

'The fact that it is not the investigating officer but the Minister for Transport and Power who must decide, having regard to the content of the report, whether any further action should be taken by him in relation to prosecutions under the Act

seems to me not to affect the true decision-making role of the person carrying out the preliminary inquiry.'

It may be that the *State (Shannon Atlantic Fisheries Limited) v. McPolin* [1976] I.R. 93 could be distinguished on the basis that the inspector there was held to have made certain findings of fact. Although these had no direct legal effect, Finlay P. felt it was sufficient that they remained on record in the Department with damaging consequences to the ship owners reputation as such, to confer locus standi on the latter to challenge the report. On any view however the case is authority for the proposition that, in some circumstances at least, a preliminary inquiry without direct legal effect may give rise to an obligation to apply principles of procedural justice."

Later in his judgment, Hardiman J had this to say with regard to the role and purpose of the preliminary enquiry under s.38 of the Nurses Act, 1985:

> "In considering whether the Board ought to have notified Ms. Ó Ceallaigh of the complaints in this case it is instructive to consider the role and purpose of the preliminary inquiry. It is clearly a filtering process designed to avoid unnecessary inquiries. There are manifest benefits to this from the point of view of both the Board and its Fitness to Practise Committee and of the nurse involved. From the latter's point of view an inquiry involves great expense, disruption of her practice, … distress and anxiety. It is also likely to involve, and in this case did involve, knowledge of the complaint coming to the attention of various persons in the medical and midwifery professions and indeed the general public. It is pointed out by the Privy Council in Rees v. Crane [1994] 2 A.C. 173 that knowledge of the fact of a complaint may damage the subject of it, and specifically confidence in him or her as a professional person, in a way which may not be entirely repaired even by a successful outcome to the full hearing. Though the applicant in that case was a judge, obliged to sit in public, the opinion of Lord Slynn makes it quite clear that such damage can be incurred by other professionals as well.
>
> I cannot see that, in the circumstances of this case, the Board would have suffered any impairment to its ability to discharge its statutory functions by notification of the [second, third and fourth complaints]. It would have been perfectly entitled to require any answer within a reasonable time. Indeed, if Ms. Ó Ceallaigh's answer to the second complaint is the very basic one that she was not the midwife in charge of the case and was not responsible for the plan to have a home delivery, very little time would be required to make that point.
>
> I believe that in all the circumstances Ms. Ó Ceallaigh was not treated fairly in relation to the s. 38 decision to hold inquiries. She ought to have been told about the allegations made to the Board and given a chance to deal with them - not necessarily by oral hearing but in whatever way was necessary for her reasonably to make her reply.
>
> That is not to say that there may not be circumstances in which the Board will have to act so rapidly that it is not a practical possibility to give notification of the complaints. Such circumstances would, I imagine, be extremely rare. There was no contention that any such circumstances arose in this case."

Ignoring any issues as to *vires* (which will be dealt with separately below under another heading) it seems to me that in the light of the jurisprudence just reviewed a distinction may need to be drawn between any investigation conducted by the Registrar's Committee / the CCR Committee under either s.8 of the Act of 1994 into issues concerning the adequacy of services rendered to the plaintiff and/or under s. 9 of the Act of 1994 into possible overcharging, on the one hand, and any investigation conducted by them into issues of possible misconduct by the applicant in the course of his professional dealings with the plaintiff or otherwise, as a prelude to a possible application to the second named respondent under s 17 of the Act of 1994 for a disciplinary inquiry, on the other hand. These are not equivalent processes.

References to s. 8 in the previous paragraph, and hereafter, are included for completeness and because the first named respondent did refer, inter alia, to s.8 as well as s.9 in its letter to the applicant of the 8th of June 2004. However, it does not appear as though the plaintiff's complaint was regarded by anybody as being fundamentally about the adequacy of services rendered to him.

Although the primary objective of section 8 and 9 investigations is to address solicitor/client issues with a view to providing redress or restitution for a legitimately aggrieved or dissatisfied client, and not to impose discipline, the first named respondent may nevertheless, consequent upon such investigations, make findings itself against a solicitor which might have adverse consequences for him in terms of damage to his reputation and/or the imposition of costs sanctions or mandatory requirements upon him. Clearly, a solicitor under such investigation must be entitled to the benefit of manifestly fair procedures including respect for and application of the principles of natural justice, and in particular *audi alteram partem*.

However, it seems to the Court that different considerations may arise with respect to any investigation by the Registrar's Committee / the CCR Committee into other aspects of the applicant's conduct. In so far as they have conducted an investigation into conduct of the applicant which does not bear directly on a complaint made by or on behalf of the plaintiff into the adequacy of the services rendered to the plaintiff, or the reasonableness of a bill of costs submitted to the plaintiff, the Court is satisfied that it has been a preliminary investigation only. I so describe it in order to convey the Court's understanding that this investigation is "preliminary" to any formal inquiry that might or might not be conducted by the second named respondent pursuant to a s.17 application made to it, should the first named respondent later consider such an application to be warranted; the second named respondent being the party charged in the first instance by statute with the power to adjudicate upon, and to make findings of record concerning, the propriety or otherwise of a solicitor's conduct, with the exception of conduct said to consist directly of the provision of inadequate services, or of the issuing of a bill of costs that is excessive. In either of the two specific instances mentioned, i.e. the provision of inadequate services or overcharging, the complaint in question would fall to be investigated by the first named respondent within the context of s.8 or s.9 of the Act of 1994, either as an alternative to, or in parallel with, any preliminary examination that the Committee might wish to conduct into the general, or perhaps certain specific, conduct of the applicant in the circumstances giving rise to the complaint. Moreover, the fact that the Committee has seen fit to conduct a preliminary investigation into the conduct of the applicant extending beyond s.8 and s.9 issues has, of itself, no significant implications at this stage for the reputation or good name of the applicant. While accepting that it is no small matter for any solicitor to be in the position of having his conduct "looked into" even on a preliminary basis, I find myself in partial disagreement with views expressed by my colleague McKechnie J in an *obiter dictum* contained in his judgment in *O'Driscoll v. The Law Society of Ireland and the Solicitors' Disciplinary Tribunal* [2007] IEHC 352. He said (at para 34):

> "It seems to me that the commencement of an investigation by the Society into allegations of misconduct is potentially a most serious matter for the solicitor in question. From carrying on his professional business, in many instances supporting other colleagues and staff, he may find himself being summoned, within an acute time frame, to appear before the CCR or other Committee, and suddenly in a most concentrated way he may be fighting for his practice and indeed even his

> career. His very livelihood may be in jeopardy and may be even eliminated in extreme cases. It is because of these potentially devastating consequences that the legislature has laid down firm and definite rules which are designed to protect and safeguard, not only members of the public, but also members of the Law Society itself. It therefore seems to me that, at a minimum, fair procedures must demand that the Law Society informs a solicitor of its intention to conduct a misconduct investigation and of the statutory provision(s) under which it proposes to so do. Otherwise there is a grave risk to justice."

I do not fully accept that in a case where the Law Society, through its CCR Committee, sees fit to engage in a preliminary investigation of a solicitor's conduct he is, or even may be, then in the position "of fighting for his practice and indeed even his career", or that his "very livelihood may be in jeopardy and may be even eliminated in extreme cases." Those things might ultimately come to pass, but if they do it will be at a much later stage, and only after the solicitor has been afforded every fair and reasonable opportunity to address the complaint or concern at issue. However, at the preliminary investigation stage the Committee is engaged in no more than a process of gathering and sifting information at the end of which they may or may not form a view that there are grounds for applying to the second named respondent under s. 17 of the Act of 1994 for an inquiry into the solicitor's conduct. The Committee has no power to make or impose, and in the present case has not purported to make or impose, adverse findings or sanctions against the applicant. Rather, it has merely formed a subjective view, the soundness of which is as yet unproven or untested, and which enjoys no special status, and which gives rise to no presumption one way or the other, that the applicant may have been guilty of misconduct. However, it is the making of a section 17 application by the first named respondent that commences the more formal process that may lead to an inquiry into the conduct of the solicitor. Once the matter reaches this stage the considerations mentioned by McKechnie J then come into sharp relief, and I would certainly agree that from this point onwards the subject solicitor must be afforded manifestly fair procedures.

Moreover, before the second named respondent may accede to the first named respondent's application (consideration of which seems to be in abeyance in the present case on account of these proceedings) it is in turn obliged to apply a filtering process and satisfy itself that the solicitor has a prima facie to answer. Because at this point a formal statutory process has been invoked I believe that the procedures to be adopted by the second named respondent in the application of the required filtering process should largely reflect that formality (although, as suggested by Hardiman J in *Ó Ceallaigh's* case, they need not perhaps be quite as formal as those to be adopted at a full disciplinary inquiry) and, of course, they should be manifestly fair. The next stage then requires the second named respondent, if it be satisfied that the solicitor has a prima facie to answer, to proceed to hold an inquiry, or if not so satisfied, to so inform the applicant in writing and take no further action. It is only when the second named respondent has decided that there is a prima facie case for an inquiry into the conduct of the applicant that the applicant can then be considered to be facing a disciplinary charge or charges which, if proven, might have adverse consequences for him in terms of damage to his reputation and/or the imposition of sanctions upon him. However, in terms of his entitlement to natural and constitutional justice the applicant's position is protected by the obligation on the second named respondent to afford him manifestly fair procedures once it has become involved.

In the Court's view it was not necessary for the first named respondent to afford to the applicant the full panoply of natural justice rights in the course of any investigation into his conduct (outside of, and/or in parallel with, any s.8 or s.9 process that may also have been underway) prior to their invocation of s.17. They were, of course, obliged to treat him fairly but they were entitled to adopt less formal and more abridged procedures than in circumstances where s.17 had actually been invoked.

So what process or processes were the Committee engaged in?

Having carefully considered the evidence in this case the Court is satisfied that the Committee was been engaged in both types of investigation. This is an issue that is addressed more fully at a later stage in this judgment in the context of the Court's consideration of the challenge to the vires of the Law Society's actions. However, the essential basis for the Court's view may be stated as follows.

At the time that the complaint was first received from J.N. he had not received any bill of costs, although a sum of €15,000 plus VAT had been informally demanded from him on the basis of an alleged oral agreement made between solicitor and client at the Four Courts on the 19th of February 2004. S. 9 of the Act of 1994 is quite clear in it's terms. It can only apply in cases where the Law Society has received "a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor" (emphasis added). The Court is satisfied that the reference to "a bill of costs" means, and was intended to mean, a formal bill of costs in writing. The general obligation upon a solicitor to furnish his client with a bill of costs in writing stems from s. 2 of the Attorneys' and Solicitors' (Ireland) Act 1849 (12 & 13 Vict. c. 53). Section 2 prescribes that "a Bill of … fees, charges and disbursements for any business done by such … solicitor" be drawn and the said Bill "shall be delivered onto the party to be charged therewith". Moreover, where a solicitor has carried out litigation or contentious business of some sort for a client, the provisions of s. 68(6) of the 1994 Act must be complied with. Section 68(6) provides:-

> "Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client -
>
> (a) a summary of the legal services provided to the client in connection with such contentious business,
>
> (b) the total amount of damages or other monies recovered by the client arising out of such contentious business, and
>
> (c) details of all or any part of the charges which have been recovered by that solicitor on behalf of that client from any other party or parties (or any insurers of such party or parties),
>
> and that bill of costs shall show separately the amount in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services."

Accordingly, as no bill of costs, within the meaning of s. 9, existed at the time of the initial complaint it was not open to the Law Society to open a s.9 investigation at that point. Of course, it was perfectly open to the first named respondent in furtherance of its remit to maintain discipline and professional standards amongst it's members, and to maintain public confidence in the profession as a whole, to look at the specific conduct giving rise to the complaint and, if necessary, to broaden this into an examination of other dealings or transactions between the solicitor and his client, to see if the solicitor had ostensibly conducted himself properly or whether grounds existed for a section 17 application to the second named respondent.

Once the applicant eventually issued the plaintiff with a bill of costs, and the plaintiff had expressed unhappiness to the first named

respondent about this bill of costs, the first named respondent was then obliged to conduct an s. 9 investigation referable to that bill of costs. For the reasons stated later in this judgment, the Court is of the belief that an s.9 investigation was at least commenced at this point. However, the opening of an s.9 investigation would not have had the effect of causing the examination that was already underway into the propriety of the applicant's conduct in informally demanding a sum of €15,000 plus VAT for fees on the basis of an alleged oral agreement and where no bill of costs had been drawn to evaporate or be displaced. At that point two different processes were underway relating to two different, though connected, issues.

It was also perfectly legitimate for the first named respondent to examine other issues arising from the course of correspondence furnished to them with the initial complaint from a conduct perspective, including the circumstances surrounding applicant's demand for compensation for alleged defamation, the termination of the solicitor/client relationship, the way in which the plaintiff's queries as to outlays and his special damages were dealt with, and so on, as well as seeking confirmation of adequate compliance with statutory imperatives such as s.68 of the Act of 1994. Further, it was perfectly legitimate for them to consider the substance, manner and demeanour of the applicant's responses to the first named respondent's queries in the context of an examination of his conduct.

If the first named respondent is to be criticised it must be for failing to specify clearly to the applicant, at every stage, the exact context within which particular issues were being examined e.g. whether they were being examined within the context of an s. 8 or s. 9 investigation, or otherwise as part of a more general examination of the circumstances surrounding his dealings with the plaintiff from a professional conduct point of view. Indeed, the evidence suggests that the relevant personnel who were dealing with this matter on behalf of the first named respondent may not have been entirely clear themselves, or have thought out, within what framework they were required to work.

Thus, while the letter of the 8th of June 2004 does refer to s.8 and s.9 and (erroneously inverting them) says that complaints of excessive fees fall to be considered by the society under section 8 of the Act of 1994 while complaints of inadequate services fall to be considered under section 9 of the Act of 1994, it does not state that any specific aspect of the matter was to be regarded at that time as being investigated under either of those sections. Indeed, as the Court has pointed out, there was no basis at that time for an s. 9 investigation as no bill of costs had issued, and the complaint that had been received, though multi-dimensional, did not appear to criticise in any significant way the litigation services that had been provided. Moreover, following the subsequent issuing of a bill of costs to the applicant, and the communication to the first named respondent of the plaintiff's unhappiness with that bill, the first named respondent did not then specifically inform the applicant that it would, of necessity, be examining that aspect of the matter, within the context of s. 9 of the Act of 1994.

Was the applicant treated fairly?

Be all of that as it may, the Court is absolutely satisfied that it was made clear to the applicant from the very outset what the substance of the plaintiff's complaint was. The initial letter to the applicant of the 25th of May 2004 enclosed the plaintiff's letter of complaint. Moreover, the subsequent letter of the 8th of June 2004 from Ms Kirwan clearly identified in layman's language what the first named respondent regarded as the gravamen of the plaintiff's complaint.

I should digress momentarily to state at this point that the Court considers the applicant's assertion that complaints made against him were required to be related to, or characterised as breaches of, specific statutory provisions as being fallacious. That is not required even within the criminal law context. For example, it has long been established that it is sufficient if a policeman, when effecting an arrest, informs his prisoner in layman's language why it is that he is being arrested. The policeman does not have to specify chapter and verse of the relevant statute – see *Christie v. Leachinski* [1947] AC 573; In *re O'Laighléis* [1960] I.R. 93 and related cases. Neither is such detail always strictly required in the framing of a formal charge or indictment. The important thing is that the person who is the subject of the charge or complaint knows the substance of what it is that is being alleged against them, so that he can challenge the complaint or charge (or in the case of an arrest, the basis for his detention) if he wishes to do so.

Returning to what I was saying, the Court is further satisfied that as yet more issues arose with the passage of time the applicant was made aware that these were also being examined or had been identified as possibly meriting an inquiry, although, as I have said, the framework within which this was occurring was not stated in terms. In support of this finding the Court points to the letters from the first named respondent to the applicant dated the 7th of October, 2004 and the 20th of December 2004 amongst others, as well to Ms Kirwan's affidavit of the 14th of September 2007.

The correspondence discloses that the applicant was repeatedly called upon to respond to the complaints made by the plaintiff, and to other issues raised by the first named respondent in the course of its examination of the entire matter from a conduct point of view. The applicant himself chose to provide limited responses only. However, the important thing is that at every material stage he was called upon to make representations to the Registrar's Committee / CCR Committee. The Court is satisfied that, whatever the framework involved, he had sufficient information concerning the substance of the plaintiff's complaint against him, and the nature of the enquiries being made by the relevant committee, to have allowed him to adequately respond if he had wished to do so. Moreover, he was repeatedly invited to attend the meetings of the Registrar's Committee / CCR Committee at which the matters at issue were to be considered, and he appears to have attended at two of those meetings, albeit subject to the reservation that he was doing so only out of "professional courtesy to the committee" and without prejudice "to any course of action that remains open to me to protect my personal and professional rights." In the circumstances he cannot be heard to complain that he was not afforded an opportunity to be heard.

The Court, having closely studied the full course of correspondence, and all of the documents exhibited in the parties respective affidavits, is satisfied that there is no substance to the complaints to the effect that materials or correspondence have been withheld from the applicant. The Court is satisfied that every document and letter of substance or materiality has been disclosed to him. Moreover, although it did occur from time to time that letters or documents were furnished to him which referred internally to another document or other documents, and that these other documents were not at that point annexed or enclosed, they were invariably provided to the applicant if he asked for them, and to that end they were, if necessary, procured from a relevant third party or third parties if they were not in the immediate possession of the Committee. The Court is satisfied that at all stages the applicant was provided with, or had available to him, such documents and/or correspondence as he might have required to enable him to deal with issues raised by the Committee.

Further, the Court is not satisfied that there has been any failure to consider issues separately. A failure to separate out discreet issues might inhibit a person who is the subject of multiple complaints or concerns from adequately addressing those complaints or concerns, and could therefore constitute a breach of natural justice. This is just another aspect of the notion that in order to defend yourself you have to know with sufficient particularity the substance of the complaint or charge against you. However, in the Court's view it does not arise in this case. A variety of discreet issues have been identified as arising within the context of the applicant's dealings with the plaintiff on the one hand and with the first named respondent on the other hand. While all of these have arisen

directly or indirectly in consequence of investigations/ enquiries prompted by the letter of complaint from the plaintiff to the first named respondent of the 18th of May 2004 there is no basis for contending that in some way everything is being rolled up together so that it is not possible for the applicant to know the full extent of the case that he needs to address. That is simply not so. The affidavits and the correspondence exhibited therein clearly demonstrate that at all stages separate and discreet grounds of complaint or concern were identified for the applicant's benefit and that he was afforded an opportunity to respond to them.

The Court is further satisfied that there is no substance whatever in the contention that the Law Society has acted as a judge in its own cause. All of the matters that are the subject of the s.17 application to the second named respondent remain to be adjudicated on by the second named respondent, which is independent of the Law Society, both in terms of the filtration process wherein it must be considered whether or not a prima facie basis exists for opening an inquiry into the applicant's conduct, and later on, if some or all of the complaints have made it through that filter, in terms of the substantive inquiry that may be conducted. As regards any investigation pursuant to s.9 of the Act of 1994 that is being, or which may yet fall to be, conducted into whether the bill of costs actually issued by applicant to the plaintiff was excessive, such an investigation can only be initiated on the basis of Law Society receiving "a complaint from a client of a solicitor, or from any person on behalf of such client." Accordingly, any such investigation is at the behest of the aggrieved client. It is not instigated by the Law Society and accordingly no question arises of the Law Society being a judge in its own cause.

In conclusion, the Court is satisfied that the first named respondent has afforded the applicant the benefit of fair procedures, including respect for the principles of natural justice, in all its dealings with him. This finding is made notwithstanding, and without prejudice to, the view that I expressed earlier, viz, that with regard to those aspects of its enquiries bearing on the applicant's conduct, and which were not being conducted within the framework of an s.8 or s.9 investigation, there was in fact no obligation on the first named respondent to afford the applicant the full panoply of natural justice rights. He has, however, for all intents and purposes, had such benefits. He has been informed of the substance of the various matters at issue, he has been provided with all necessary documents and correspondence to enable him to deal with them, he has been invited to respond in writing to the complaints or concerns raised, and he has been afforded an opportunity of appearing in person before the Registrar's Committee / CCR Committee and of being heard. There is no question in the Court's mind but that he has been treated fairly.

Second Issue

Alleged irrationality and failure to give reasons
The sole claim of irrationality is that pleaded at Ground No E 12 which is framed in terms that "the first named respondent acted unreasonably in purporting to decide on the 20th of September 2006 that there was prima facie evidence of misconduct by the applicant." However, it seems to the Court that it is not strictly necessary to proceed to any analysis of the rationality or otherwise of the first named respondent's actions as the factual premise on which this claim is based is flawed. The first named respondent has not purported to "decide" "that there was prima facie evidence of misconduct by the applicant". That issue is one for the second named respondent in the first instance on the basis of the first named respondent's application to it for an inquiry. The decision made by the first named respondent on the 20th of September 2006 was, on the contrary, merely a decision to apply to the second named respondent for an inquiry, the first named respondent being of the subjective opinion that the applicant was guilty of misconduct. Without expressing any view whatsoever on whether the applicant was or was not in fact guilty of misconduct, the Court is satisfied that an opinion to that effect could reasonably have been held by the first named respondent, as serious questions had been raised concerning the propriety of actions and omissions on his part, which questions remained unanswered. To name but some of them, there were legitimate questions as to the propriety of his conduct in demanding fees without first producing a bill of costs, in accusing his client of defamation without a sound legal basis for doing so, in demanding compensation from his client without a sound legal basis for doing so and in circumstances where the client was contending that this was done in an attempt to bully him into paying fees demanded, in failing to respond in a timely fashion, or responding in what was arguably an inadequate fashion, to ostensibly reasonable queries raised by his client concerning outlays and special damages, and so on. It has to be remembered that explanations were sought from the applicant and for the most part were not provided. Rather, the applicant adopted a seemingly hostile and confrontational attitude to the Registrar's Committee/ CCR Committee, which had a job to do, and he was arguably obstructive of them. The Court is satisfied that in all the circumstances, and at the material time, an opinion could reasonably have been held by the first named respondent that the applicant had been guilty of misconduct in respect of each of the thirteen instances of alleged of misconduct that were later listed in paragraph 55 of Ms Kirwan's affidavit of the 14th of September 2007. Accordingly, the claim of irrationality is rejected as being without substance.

The applicant also complains that the first named respondent has failed to give reasons for its decision of the 20th of September, 2006 and its application on the 17th of September 2007. It is relevant in this context to note that he has hinted at caprice or mala fides on the part of the Law Society. It was suggested in the applicant's written submissions that the Law Society having responded unfavourably to questions raised by him then chose to treat his correspondence as grounds for making new allegations of misconduct against him, and that this was the real basis for their decision to refer the matter to the Disciplinary Tribunal. The Court, having read all of the correspondence, finds as a fact that, notwithstanding the applicant's perception or belief to the contrary, the Law Society did not respond unfavourably to questions raised by him, and that the suggestion that this was the real basis for referring the matter to the Disciplinary Tribunal is simply not borne out on the evidence.

The first named respondent has sought to initiate a formal process. However, I am not satisfied that there is any obligation on the first named respondent to give reasons for doing so having regard to the very nature of the process, because the whole purpose of it is to fairly inquire into what are merely allegations at this point, that have been neither proven nor tested. The process envisages that in the first instance sufficient evidence in support of first named respondent's allegations of misconduct must be adduced before the second named respondent in order to satisfy the second named respondent that there is a prima facie case for an inquiry into the applicant's conduct, otherwise the matter will not be allowed to proceed. The first named respondent has sought to do this by the filing of Ms Kirwan's 48 page, 55 paragraph, affidavit of the 14th of September 2007, and the extensive documentary exhibits thereto. The reasons for the first named respondent's decision and application are therefore reasonably to be inferred from this material. In the absence of any evidence suggesting caprice or mala fides on the part of the first named respondent, the Court believes there is no necessity for any further or more explicit statement of reasons.

Third Issue

Alleged failure to act lawfully and intra vires statutory powers.
The complaints made under this heading were those in respect of which the most detailed submissions were made, both orally and in writing, and on which the greatest amount of time was spent at the hearing.

The Court feels that it is important at the outset to recognise the "triangle" of relationships that exists between a client, his solicitor, and the Law Society respectively. The triangular nature of the relationship arises principally on account of dual role of the Law

Society, which is concerned, on the one hand, as a professional representative body, with the promotion and defence of the legitimate interests of it's members, and, on the other hand, as a professional regulator, with the protection of the public interest by the setting of appropriate standards for its members and the maintenance of discipline through regulatory action and enforcement. These two roles are not necessarily incompatible and are for the most part easily reconciled both in theory and in practice. However, from time to time difficulties may arise when a solicitor and client who are in dispute both look, respectively, to the Law Society for vindication or redress. In such a situation the Law Society is concerned not just with the relationship between the client and his solicitor, but also with the relationships between the solicitor and Law Society and between the client and the Law Society. It may be concerned with a multiplicity of issues and agendas arising from those individual relationships and from the triangle formed by those relationships. The type of issues that might arise could include issues of an accounting nature, or as to compliance with regulations, as to the adequacy of services or, as in this case, the appropriateness or otherwise of a fee or fees charged, or as to conduct of the solicitor both professionally and personally which might tend to bring the solicitor's profession into disrepute. I must stress that the issues that I have just mentioned do not by any means constitute an exhaustive list.

The agendas that might arise could include ensuring that a genuinely aggrieved client who has been provided with inadequate services or who has been overcharged can obtain redress or restitution; ensuring that a solicitor who has acted properly and professionally can secure the defence and vindication of his reputation and good name; conversely, ensuring that a solicitor who has been guilty of misconduct is appropriately disciplined; ensuring that the good reputation and status of solicitors' profession as a whole is maintained; and ensuring that members of the public have, and can continue to have, confidence in the solicitors profession. Again, this list is not intended to be exhaustive.

Bearing these issues in mind, it seems to me to be clear from the scheme of the Solicitors Acts 1954 – 2002 that they do not seek to prioritise one agenda over another, but rather attempt to strike a balance as between them and in so far as possible to cater for all of them. The point has already been made by Mc Kechnie J in the *O'Driscoll* case, to which I have already referred, at para 43 of his judgment that section 9 of the Act of 1994, "when invoked, treats a complaint of overcharging as primarily being a matter between the client and his solicitor with the Law Society acting as mediator either by achieving an agreed settlement or imposing a just solution". I agree with this assessment and would add that a similar comment might be made in respect of section 8 and complaints of inadequate services. However, it begs the question as to whether the Oireachtas, in specifying that those kind of issues should be resolved in that way, intended to exclude their consideration in any other context. In his judgment in *O'Driscoll*, McKechnie J found it unnecessary in the circumstances of that case to express a view on whether or not there could be a parallel inquiry into overcharging, or the provision of inadequate services, as conduct, and as to whether such conduct might be likely to bring the solicitors profession into disrepute. I think that in the present case it is also not strictly necessary for the Court to express a definitive view on this question, because none of the thirteen grounds listed in para 55 of Ms Kirwan's affidavit in support of the first named respondent's s.17 application relates to overcharging based on the formal bill of costs furnished to the plaintiff by the applicant (as distinct from the sum of €15,000 informally demanded for fees) or to the provision of inadequate services. However, I feel it appropriate to remark that the Oireachtas could hardly have intended that the Law Society should be confined to vindicating only the interests of the individual client and be otherwise impotent to act on such important issues in either the public interest or in the interest of the solicitors' profession as a whole.

The primary significance of the *O'Driscoll* decision in the context of the issues with which I am concerned is that it decides that, regardless of whether or not a parallel investigation in relation to conduct may be carried out, the procedures under section 9 (and it would follow, under s.8 in an appropriate case) are mandatory and must be complied with in cases in respect of which the section is invoked. Must it always be invoked? It must, unless the first named respondent is satisfied that the particular complaint is frivolous or vexatious.

It has been submitted on behalf of the applicant that the first named respondent has misapplied or otherwise acted *ultra vires* the provisions of s. 9(1) of the Act of 1994 in that s.9(1) imposes a mandatory requirement on the Law Society to (a) investigate and (b) to take all appropriate steps to resolve the matter by agreement between the parties. Within that procedure it has the option of issuing a direction to the Solicitor to comply with certain requirements where it is believed that the Bill of Costs is excessive.

It was submitted that the Law Society failed to comply with s. 9(1) at all. According to this submission it was obliged to investigate and to resolve the matter by agreement and had available to it a statutory power to direct the repayment of funds "without delay". The applicant says it did not operate the statutory mechanism set down by s. 9(1).

The applicant says that McKechnie J offers judicial guidance as to the manner in which s.9 should operate in his judgement in the O'Driscoll case, at pages 40-41. At page 41, para 43, he states:

> "This view, that the focus of Section 9 is resolution by agreement, is, I feel, supported by the provisions of Subs. (3) and (4) of that Section. Under Subs. (3,) if a client has requested his Solicitor to submit a disputed Bill of Costs to taxation then the Law Society (through the CCR Committee) is prohibited from any direction under Subs. (1) unless the Solicitor delays unreasonably in submitting such a Bill. Under Subs. (4) where a Bill of Costs, the subject matter of a complaint, has been subsequently taxed, then any direction previously given shall cease to have effect and if no such direction has been given, the Law Society is prohibited from even investigating the complaint. These provisions strongly suggest that the Section, when invoked, treats a complaint of overcharging as primarily being a matter between the client and his Solicitor with the Law Society acting as a mediator either by achieving an agreed settlement or by imposing a just solution. In my view, therefore, the power to issue a direction is conditioned upon the implementation of the preceding step and that step proving unsuccessful."

The applicant further submits that the Law Society misinterpreted the provisions of ss 9(2), (3) and (4). He says that these provisions are calibrated in such a way as to ensure that matters concerning complaints of overcharging remain within the Law Society, giving it a power to impose a solution where agreement has not been reached. He submits that it is clear from the correspondence between the applicant and the Law Society that the Law Society did not see itself as "a mediator" within the meaning of s. 9 because it did not achieve a resolution of the matter, the subject of complaint.

It was further submitted that in order to defend its failure to comply with the provisions of s. 9 of the Act, the Law Society sought to convert the original complaint concerning excessive costs into a complaint about conduct and thereafter invoked Section 17 of the 1994 Act for the purposes of referring the matter to the Disciplinary Tribunal three and a half years later.

The applicant says that it must be borne in mind that Mr. [N], the client, first emailed the applicant on the 16th March 2004 concerning the question of his legal costs stating in a separate one line paragraph "*It is specifically in relation to my legal costs on which I am writing to you*". Mr. [N] also wrote to the Law Society on the 18th May 2004 stating "*The reason for writing to you is that, despite the fact that my case settled on the 19th February 2004 and that Mr. O'Sullivan received my money on the 2nd March*

2004, he has failed to furnish me with a Bill of Costs, or to explain why he is charging me €15,000. He is also withholding €49,000 of my money despite the fact that the Defendant has agreed to pay my legal costs". The Law Society enclosed this correspondence to the applicant on the 25th May 2004 stating "*A full and prompt reply will help to resolve the matter quickly.".* It also enclosed its booklet "Resolving Complaints". The applicant responded the next day raising certain queries. There was no indication from the Law Society that there was any suggestion of "misconduct" on the part of the applicant. Two weeks later (approx – 10th June 2004) the applicant furnished to the Law Society a Bill of Costs. The Law Society wrote to the applicant on the 8th June 2004 specifically stating:

> "Complaints of excessive fees fall to be considered by the Society under Section 8 of the Solicitors' (Amendment) Act 1994, complaints of inadequate services fall to be considered under Section 9 of the Solicitors' (Amendment) Act 1994. In addition to the foregoing, I will be asking you to confirm that the provisions of Section 68 (3), (4), (5) and (6) have been or will be complied with.".

Although that letter, as I have previously pointed out, erroneously inverts s. 8 and s. 9 respectively, the point to be made, according to the applicant, is that the Law Society received a complaint about excessive fees and was dealing with the matter as a complaint under Section 9 of the 1994 Act. Later, on the 28th July 2004, Ms Kirwan in her capacity as a senior solicitor within the complaints section of the Law Society referred the matter to the Registrar's Committee to "seek their directions as to how the investigation of this complaint should proceed". The applicant emphasises that the complaint in question was a complaint about excessive fees.

In his supplementary submissions the applicant further states:

> "It is submitted that there can be little doubt that Mr. [N] made a complaint about excessive fees and that the Law Society focused the attention of Mr. O'Sullivan on the provisions of ss 8 and 9 of the 1994 Act. The history of the exchanges between the parties is well known to the Court and are contained in the exhibits of the grounding Affidavit and the reply thereto. From that point onwards the Law Society was obliged to implement the provisions of s. 9 of the 1994 Act. It failed to do so and its subsequent decision therefore to refer the matter to the Disciplinary Tribunal in September, 2006 was null and void. Its subsequent decision to make an application to the Disciplinary Tribunal in September, 2007 by means of an application under the DT1 form, as provided by regulation, is also null and void for the same reason."

The applicant makes the further point that the statutory mechanisms contemplated in ss 8 – 11 of the Act of 1994 are self contained. They impose a duty on the Law Society to investigate and resolve with the power to impose a sanction. Whether the solicitor in question responded to the enquiries well or at all is beside the point. The Act requires the Law Society to take a decision so that the monies in question can be returned to the client as soon as possible. S. 11 specifically builds in an appeal mechanism for s. 9 so that an aggrieved party can bring the matter before the High Court within twenty-one days. The applicant could therefore, if s. 9 had been properly applied, have appealed to the High Court. This right was denied to him. Accordingly the applicant contends that the first named respondent's decision to transfer the matter to the Disciplinary Tribunal without first of all completing the s.9 procedure meant that the applicant has been precluded from invoking s.11.

It was also submitted that the provisions of s.9 and s.17 are radically different and regard must be had to the fact that they are meant to operate in a different manner.

In the case of s.17, the Law Society is entitled, as an interested party (among others), to apply to the Disciplinary Tribunal for a formal inquiry into the conduct of a solicitor. It takes an adversarial position and prosecutes the complaint.

The applicant says that the position under s. 9 the position is altogether different. In this instance, the Law Society may "receive" a complaint from a client of a solicitor, or from a person acting on behalf of such a client, and it must thereafter investigate the matter itself and take all appropriate steps. It neither prosecutes the matter nor take sides. It investigates and imposes a "just solution" and in that role acts as "a mediator" as described by Mr. Justice McKechnie in the *O'Driscoll* case. (p. 41, para 43).

It was submitted that the legal rights and responsibilities that flow from this distinction help to explain how the two provisions should operate, respectively. The applicant says that if the Law Society writes to a Solicitor explaining to him that they propose to rely on s.9 of the 1994 Act and deal with the matter on the basis that it concerns a complaint of excessive fees, there is an immediate obligation on it to apply those provisions. However, if it is intended to make an application to the Disciplinary Tribunal for a sworn enquiry, the Law Society must so inform the applicant so that he can invoke the different rights accruing to him under that procedure in order to protect his interests. The applicant submits that that was not done in this case. He says there was nothing to stop the Law Society from completing the process envisaged under Part III of the Act as it relates to excessive fees, and thereafter referring the matter to the Disciplinary Tribunal on the grounds that evidence had emerged of misconduct. However, he says that is not what happened. He contends that instead the Law Society for one reason or another decided to suspend the operation of s. 9 for a period of in excess of two and a half years before deciding to refer the matter to the Disciplinary Tribunal, and even then waited a further year before making the legal application to the Tribunal. It is contended that because the Law Society operated the scheme of Part III of the Act in such a manner its decision of the 22nd September, 2006, and the application made on foot of that decision on 17th September 2007, are both null and void.

In reply, the first named respondent says that in the *O'Driscoll* case the crucial finding of fact was that the Law Society had been primarily conducting an investigation pursuant to s. 9 of the Act of 1994. The letter that the Society had sent to the solicitors had stated that "This letter shall serve notice to you of the making of a complaint under s 9(1) of the Solicitors (Amendment) Act 1994." McKechnie J stated (at para 33):

> "It is unclear to me whether, in its submissions, the Law Society is suggesting that there was in fact no s. 9 inquiry, or that there were two investigations running in parallel with each other, namely: one under s. 9 and one relating to allegations of misconduct: or whether the investigation dealing with misconduct was part of the s. 9 inquiry. Whatever about the ambiguity of its submissions in this regard, it seems to me that the letter of the 25th October, 2005, is perfectly clear in at least this one vital respect. From its content I am satisfied beyond question that the Law Society was conducting a s. 9 inquiry into the complaints made by both Mr. N.O'S. and Mr. D.P. This conclusion is inescapable from the wording of the letter itself (see para. 7 above). Firstly it refers to the client's contact with the Law Society which concerned "legal fees"; secondly, it gave notice that it had commenced an investigation "into the matter" (which could only mean the overcharging complaints); and thirdly, that it was treating the communication received as the making of a complaint under s. 9(1) of the Act of 1994. In addition, having so described what "this matter" was, the Law Society then makes repeated references to an inquiry into "such matter". I am therefore firmly of the belief that there was, most definitely, a s. 9 inquiry."

It was further submitted that McKechnie J then proceeded to consider whether the Society had been engaged in a parallel misconduct investigation (i.e. parallel to the s 9 investigation which he had found as a fact that the Society was conducting). However he did not reach any conclusion on this issue, instead observing that "Given, however, the submissions made in this case and the conclusions reached in this judgment it is not necessary to make any specific findings in this regard" (paragraph 34).

The first named respondent says that it is also relevant to note that at the conclusion of his judgment McKechnie J made it clear that "this judgment has no diminishing effect on the lawful use of statutory powers to identify, enquire into, adjudicate upon and impose sanctions on those who have been found guilty of misconduct" (paragraph 63).

It was submitted that that the factual situation in the present case is very different from the one in *O'Driscoll*.

The first named respondent points to, and lays much emphasis upon, the fact that at the time that the plaintiff's complaint was received no bill of costs had been drawn up and served upon him by the applicant. The invocation of s. 9 is dependent on a bill of costs being in existence. The opening words of s. 9(1) are: "Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor…" (emphasis added). In this case the first named respondent makes the point that there was no bill of costs and so, they say, it is difficult to see how there could have been an s. 9 investigation.

Further, they say that when one turns to the correspondence that issued from the Society in the present case it is clear that it was not an s. 9 investigation but rather was a general investigation into misconduct. For example the Society's letter to the applicant of the 14th of February 2005 states that:

> "In your letter of the 7th inst you have asked, in relation to the matters listed in my letter of the 20th December last, "what breaches of a statutory and non-statutory code have allegedly taken place". The Committee are considering the issues in the context of a solicitor's overall obligation not to engage in conduct which brings the profession into disrepute. The Committee also wishes to ensure that in your dealings with Mr [N] the relevant provisions of Section 68 and Section 76(17) of the Solicitors (Amendment) Act 1994 have been complied with together with the provisions of the Solicitors Accounts Regulations as they apply to the handling of client funds.
>
> You should be aware that the Committee always takes the view that if, during the course of their investigations any other matters come to light, they reserve the right to investigate same."

According to the first named respondent, this letter could not be clearer. It is suggested that this is the reason why, when the applicant obtained leave to bring these judicial review proceedings, he did not allege that only an s. 9 investigation was being conducted. The point is made that it is not asserted anywhere in the applicant's Statement of Grounds that the Society should have tried to resolve the matter by agreement between him and his client.

It was further submitted that in *O'Driscoll's* case Mr Justice McKechnie had been influenced by the fact that

> "the word 'misconduct' is never used by the Society, either in correspondence, or until the actual decisions are noted in the minute" (at paragraph 34 of the judgment).

Conversely, in the present case the letter of the 14th of February 2005 referred to "a solicitor's overall obligation not to engage in conduct which brings the profession into disrepute". The first named respondent relies on this as demonstrating that the Society was clearly invoking the concept of misconduct.

Further, the point is made that in *O'Driscoll* the applicant solicitors had asked the Society to resolve the matter by agreement (this is clear from page 5 of the judgment); in the present case the Applicant made no such request.

Reflecting a concern that the Court has already touched upon, the point was strongly made by the first named respondent that the obligation in s. 9 to try and resolve matters can have no application in the context of conduct which brings the profession into disrepute. General misconduct is not primarily a matter between the solicitor and his client; rather it is a matter as between the solicitor and the Society which is acting pursuant to its duty to protect the public as a whole.

It was further submitted that in *O'Driscoll* the learned High Court judge, in concluding that a s.9 inquiry was underway, was also influenced by the following consideration, stated at paragraph 34 of his judgment:

> "Neither did the Society at any stage invoke the provisions of s.10 of the 1994 Act whereunder it could have insisted upon the production of documents for the purpose of a misconduct investigation".

In the present case an s. 10 Notice was issued to the applicant, although it proved unnecessary to proceed with it.

Finally, the first named respondent contends that if, contrary to what they have been urging upon it, the Court arrives at the view that the first named respondent has, in part, been engaged in conducting a s. 9 investigation, then there was also a parallel general investigation into possible misconduct. The first named respondent contends that in that event, even if the Court considers that there were deficiencies in the s. 9 investigation, the general investigation into possible misconduct can be severed from it.

This Court finds both as a fact, and as a matter of law, that the plaintiff's complaint of the 18th of May 2004 gave rise to a general investigation into the propriety of the applicant's conduct as a solicitor in the course of his dealings with and on behalf of the plaintiff. This follows because the in the absence of a bill of costs the statutory preconditions for the invocation of s.9 were not satisfied at that point and an s.9 investigation was therefore not capable of being commenced. Following the subsequent issuing of a bill of costs by the applicant, and communication to the Law Society from the plaintiff indicating that he was also unhappy with that bill of costs, the statutory preconditions for the opening of an s.9 investigation were then satisfied. As the Court has indicated elsewhere in its judgment the satisfaction at this point of the necessary statutory pre-conditions for an s.9 enquiry did not displace the existing conduct investigation, or have the effect of converting it into a s.9 investigation. It could not do so because in so far as the initial complaint had related to alleged overcharging it was based on a demand for fees in circumstances where no bill of costs had been drawn. It was still being contended that this had occurred historically, notwithstanding the new and additional circumstance of the subsequent service of a formal bill of costs. Moreover, the initial letter of complaint, and the correspondence enclosed with it, had also flagged a variety of behaviours and conduct that were separate and distinct from any question of alleged overcharging and which the Society had felt moved to enquire into. These concerns with respect to the applicant's conduct, apart from any question of overcharging, still obtained.

What the satisfaction of the statutory preconditions did allow for was the opening of a further and parallel investigation, under s 9, in respect of the new matter that had recently arisen, namely the furnishing of a formal bill of costs that the client believed to be excessive. It is far from clear, and I would reiterate my criticism of the first named respondent for this lack of clarity, that an s.9 investigation was in fact ever opened. However, Ms Kirwan's letter of the 13th of October 2004 to the applicant referring him to s.9 of the 1994 Act, as well as her letter of the 20th of September 2005 to the plaintiff, which speaks of the CCR's primary focus being on "resolving the costs issue", and indicating that a decision on "the disciplinary aspect of your complaint" would be deferring until the costs issue had been resolved, provide some evidence that an s.9 investigation was indeed embarked upon. Moreover, I think because the Law Society was obliged to open an s.9 investigation unless they considered that the complaint was frivolous or vexatious, and as there is no evidence that they so regarded it, the first named respondent must be deemed to have embarked upon an s.9 investigation. It is clear, however, that the mandatory procedures specified in s.9 were not thereafter followed.

However, unlike in the *O'Driscoll* case, the first named respondent has not proceeded to make a finding of overcharging in the context of it's s.9 investigation and has not made any consequential directions. If it had done so, such a finding and such directions would stand impugned and would have to be quashed for non- compliance with mandatory procedures as indeed occurred (*inter alia*) in *O'Driscoll*.

The present case is different and accordingly can be distinguished. The challenge in this case is to a decision to refer, and the consequential referral, by the first named respondent of thirteen instances of alleged misconduct to the second named respondent, none of which directly relates to overcharging in a formal bill of costs. Accordingly, to the extent that the first named respondent may have, whether by means of the Registrar's Committee or the CCR Committee, acted in breach of s.9, and accordingly *ultra vires* it's statutory powers, it has only done so in regard to dealing with the specific complaint of overcharging in the context of the formal bill of costs. In my view these irregularities have no implications for their decision to refer other issues as to the applicant's conduct, whether of an indirectly related or completely separate nature, to the second named respondent, or for the actual s.17 application in that regard. In the circumstances I find that the complaints made under this heading are not made out.

Fourth Issue:

Delay by the Law Society
The applicant has submitted that the Law Society received a complaint about excessive fees from a member of the public on the 18th May 2004. It applied to the Disciplinary Tribunal on the 17th September 2007. It was submitted that it was unreasonable to permit three and a half years to elapse before invoking Section 17 of the 1994 Act. This is to be contrasted with the twenty-eight days given to the Applicant to respond to the application made to the Disciplinary Tribunal pursuant to Article 6(a) of the Solicitors' Disciplinary Tribunal Rules 2003. It was submitted that in the absence of any statutory time limit for the submission of a complaint to the Disciplinary Tribunal, the delay caused by the Law Society in transferring a complaint of misconduct, if one was received, was inordinate and inexcusable. The applicant says that even if an allowance was made for the first two and a half years of that time period, there is sufficient evidence to indicate that as of September 2006 the Law Society had taken a preliminary decision to refer the matter to the Disciplinary Tribunal but did not do so for a year (until September 2007). The Court was referred to *Stevens v. Paul Flynn Ltd.*, IESC 25th February 2008; *Eamon O'Flynn & Others v. Padraig Buckley*, IESC 22nd January 2009; *Primor plc v. Stokes Kennedy* [1999] 2 IR 459; *Brennan v. Fitzpatrick*, (unreported, Supreme Court, 21st November 2001) and Rogers v. Michelin Pension Trust (No. 2) 2005 IESC 295

With respect to the last point it is to be recalled that in paras 55 and 56 of her affidavit sworn in these proceedings on the 26th of March 2008 Ms Kirwan sought to explain the one year delay between the first named respondent's decision of the 20th of September 2006 to make a section 17 application and the actual making of that application in September of 2007 on the basis that (i) the Society was awaiting the opinion of Mr Stephen Fitzpatrick of Peter Fitzpatrick & Co, Legal Costs Accountants, who had been asked to comment both upon the reasonableness of the applicant's bill of costs and on the reasonableness of the fee of €15,000 which the applicant sought from the complainant, and (ii) due to her own burden of work in dealing with an unprecedented influx of complaints from applicants to the Residential Institutions Redress Board concerning their solicitors' conduct in the handling of claims.

The first named respondent says in reply that there has not been inordinate delay. In addition the applicant has himself been guilty of causing much of any delay that has occurred.

It also says that in any event the applicant has not established the slightest prejudice. There are no missing witnesses and no missing documents. The applicant does not assert any stress or anxiety. The applicant has not indicated with regard to any specific issues why any disciplinary hearing would not be fully fair. In *J.B. v DPP,* unreported, 29 November 2006 Hardiman J stated that "The state of the evidence in this case appears to me to illustrate a common failing in applications of this sort. There has been an omission fully to engage with the facts and to put the case, in evidence, as far as it would have to be put to secure relief." The first named respondent contends that those remarks are apposite here.

The first named respondent also relies upon *Ryan v Law Society* [2002] IEHC 161 where Herbert J reviewed the relevant case law on delay in disciplinary hearings and stated that "In my judgment the decision of the Supreme Court in the case of *Flynn -v-An Post* (1987) I.R. 68, and in particular the judgment of McCarthy J., for the majority of the Court, is consistent with the necessity for an applicant relying upon delay to additionally show specific prejudice."

The Court does not consider that the applicant has made a sufficient case on the grounds of delay to prohibit the continuation of the disciplinary process that has been initiated against him. The Court is concerned with two periods of possible delay. The first is the period up to the making of the decision on the 20th of September 2006 and the second is the period from the 20th of September 2006 until the 17th of September 2007.

With regard to the first period, the Court believes that the primary reason why it took so long to get to the point of decision was to do with a confrontational attitude on the part of the applicant towards the first named respondent and difficulties experienced in getting the applicant to adequately respond to the first named defendant's queries and requests for information.

With regard to the second period, the Court does not regard the explanations of Ms Kirwan to be adequate, and it has arrived at the view that the first named respondent has been guilty of unjustified and culpable delay.

However, the length of the delay, though unjustified, has not been so gross or so inordinate as to cause the Court, without more, to prohibit the continuation of the disciplinary process that has been initiated against the applicant. The applicant has not demonstrated either general or specific prejudice. Moreover, there is a public interest dimension to conduct investigations that also has to be considered. The Court finds itself in agreement with the submissions of the respondent, and indeed with the cited views of Herbert J, i.e., that the applicant would need to have demonstrated specific prejudice before the Court would be justified in granting prohibition.

Accordingly, I also reject this facet to the plaintiff's claim.

Delay on the part of the applicant in commencing these proceedings
This was raised by the first named respondent by way of preliminary objection to the applicant's claims. However, this Court being in complete agreement with McKechnie J's views on respondent's delay points, as he expressed them in *O'Driscoll*, namely that the Court has to be concerned at the end of the day with doing justice, decided in the exercise of its discretion to proceed to consider the merits of the applicant's claims without prejudice to the delay point raised, and because the authorities clearly recognise that the strength or otherwise of an applicant's case is one of the factors that a Court can take into account in dealing with a delay objection.

As I have found against the applicant on the merits it is no longer necessary to give a ruling on the delay point. However, had the Court had to do so it would, consistent with the approach in *De Róiste v Minister for Defence* [2001] 1 IR 190, have considered all of the factors alluded to and so well set out in paras 19 and 20 of McKechnie J's judgment in *O'Driscoll*. In regard to that, the Court simply wishes to say that among the factors that the Court was prepared to take into account, and would perhaps have attached great significance to, were the relative shortness of the period of the applicant's delay, the far reaching potential implications for the applicant of the process he had sought to impugn, his own conduct in the matter and his explanations for not moving sooner, the first named respondent's conduct and in particular that party's own unjustified delay, the complexity of the issues raised, the lack of prejudice to the respondents, the public interest and, as I have said, the overall interests of justice. Though the Court is not now required to rule on it, had I been required to do so it is likely that the applicant's delay would have been excused