Neutral Citation Number: [2009] IEHC 339

THE HIGH COURT

2007 1696 JR

BETWEEN

DENIS McMAHON

APPLICANT

AND

THE LAW SOCIETY OF IRELAND

RESPONDENT

AND

THE SOLICITORS DISCIPLINARY TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice Herbert delivered on the 10th day of July 2009

The applicant is a Solicitor, practising in the State, and is subject to the disciplinary powers of the Law Society of Ireland (hereinafter referred to as the Society), conferred upon it by the terms of the Solicitors Acts, 1954 – 2002. By leave of this Court granted on the 17th December, 2007, the applicant was given leave to seek judicial review, in the form of an order of *certiorari*, directing that the decision of the Complaints and Client Relations Committee of the Society made on the 26th September, 2007, to apply to the Solicitors Disciplinary Tribunal for an inquiry into the conduct of the applicant, on grounds of alleged misconduct, be delivered up and quashed.

The application is grounded on the affidavit of Patrick Groarke, Solicitor, of Groarke and Partners, Solicitors for the applicant. A Statement of Opposition was delivered on behalf of the respondent on the 10th March, 2008 and is verified by the affidavit of Linda Kirwan, Solicitor, and Secretary of the Complaints and Client Relations Committee (hereinafter referred to as the Committee), sworn on the 10th March, 2008. A replying affidavit was sworn by the applicant on the 17th June, 2008.

THE FACTS
The applicant had acted as his solicitor for a litigant, M.O'S. in a personal injuries claim which the litigant asserts he was led to believe was settled in November 2003, for the sum of €22,000. The litigant stated that he had received a cheque for this amount and at the same time a request from the applicant to endorse over a cheque for €3,000. The litigant stated that he assumed that this sum of €3,000 was for the applicant's costs. As a result of a news-media exposé of overcharging of clients by solicitors acting in personal injury claims, he re-contacted the applicant in November, 2005. He stated that he was promised a detailed statement of account within two or three days but no such statement was furnished. He stated that he persisted in his complaints and that eventually on the 10th November, 2005, he received a party and party account. He stated that the applicant accepted that the case had been settled for €25,000 together an agreed sum of €4,700 for the applicant's professional fees. The applicant contended that the litigant was at all times aware that the case had been settled for €25,000 and had authorised in writing the deduction of €3,000. However, on the 17th November, 2005, the applicant, without any admission, repaid the sum of €3,000 to the litigant. Despite this repayment, on the 15th February, 2007, the Society received by Email a complaint from the litigant.

DISCUSSION
Two preliminary objections to this application were taken by the respondent.

Counsel of the respondent submitted that the applicant was not entitled to the reliefs sought by reason of his failure to take the application for judicial review promptly. I find that the date when grounds for the application first arose was the 26th September, 2007. This was the date of the decision of the Committee to seek an inquiry by the Solicitors Disciplinary Tribunal. This decision was announced on that day in the presence of Mr. Patrick Groarke, Solicitor for the applicant. The application for leave to seek judicial review was made on the 17th December, 2007. Though almost three calendar months were permitted to elapse by the applicant, his application was still made well in advance of the ultimate date specified in O. 84, r. 21 of the Rules of the Superior Courts.

This rule provides that an application for leave to apply for judicial review shall be made promptly and, in any event, within six months from the date when grounds for the application first arose, where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made. While reflecting and reinforcing a centuries old Rule of Law requiring that applications for relief of this nature must be made promptly, the Statutory Instrument provides a yardstick by reference to which this paramount requirement to act promptly may be judged. In the complete absence of any evidence of circumstances by reference to which justice and fairness, would demand that the application in the instant case be made within a period shorter than six months, I find that it would be altogether unreasonable and entirely disproportionate were this Court to conclude that there was delay on the part of the applicant in seeking leave to apply for judicial review. Therefore, there is no requirement for the court to consider an extension of time.

It was further submitted by counsel for the respondent that the reliefs sought by the applicant should be refused, because of an alleged failure to put material facts before the court in seeking leave, *ex parte*, to apply for judicial review. The legal principles which govern such an application were stated by Kelly J. in *Adams v. The Director of Public Prosecutions* [2001] 2 I.L.R.M. 401 at 416, where he held that:-

> "On any application made *ex parte* the utmost good faith must be observed, and the Applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the Applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground. . . .
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> The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made."

In the instant case, counsel for the respondent submitted, that the *ex parte* Order made on the 17th December, 2007, should be set aside because of a failure on the part of the applicant or of counsel for the applicant, to disclose the following facts which, counsel stated, were very relevant and germane to the decision of Birmingham J. to grant the leave sought:-

> 1. The leaflet or booklet which was enclosed with the letter dated the 22nd February, 2007, by which the respondent notified the applicant of the complaint received from the litigant and, with the letter dated the 5th July, 2007, enclosing a copy of the Preliminary Report of the Secretary of the Committee and, notifying the applicant of the meeting of that Committee and, of his right to attend or to be represented at that meeting and, which identified six sanctions which could be imposed by the Committee, including a referral to the Solicitors Disciplinary Tribunal.
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> 2. The eight reasons why the committee considered that the applicant had been guilty of professional misconduct in his practice as a Solicitor, and which it considered merited an application for an inquiry by the Solicitors Disciplinary Tribunal and, which were set out at para. 10 of the affidavit of Ms. Kirwan, Secretary of the Committee sworn on the 12th October, 2007, which formed the basis of the application of even date seeking that inquiry.

The issue which the learned judge had to determine was, whether the applicant had made out a stateable ground for the relief sought [*G. v. The Director of Public Prosecutions and Another* [1994] 1 I.R. 374 at 377 – 378, per. Finlay C.J.]. That is, whether the applicant had demonstrated that the process by which the decision reached by the Committee to seek an inquiry by the Solicitors Disciplinary Tribunal was *ultra vires.* The grounds set out in s. (e) of the Statement of grounds, as verified by the affidavit of Patrick Groarke, Solicitor for the applicant, sworn on the 17th December, 2007, were as follows:-

> "No issue of overcharging remained outstanding at the date of the complaint, which could be investigated pursuant to the provisions of s. 9 of the Solicitors (Amendment) Act 1999, as the full disputed sum of €3,000 had been repaid by the applicant to the litigant prior to the latter making any complaint to the Society.
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> The Committee had purported to reach its decision without first taking all appropriate steps to resolve the matter by agreement between the parties, which was a pre-condition to the Committee exercising any other power whatsoever under the provisions of s. 9 of the Solicitors (Amendment)Act 1994.
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> The Committee had declined to give any reasons for its decision and, had merely stated that the basis for its decision would be set out in due course."

The applicant was granted leave to seek judicial review on these grounds. In the written submissions filed on behalf of the applicant and on behalf of the respondent and, also during the course of argument before the court at the hearing of the application for judicial review, it was accepted by counsel for the respective parties, that the matters in question between them also encompassed the issue of whether the Committee, arising from the complaint, was entitled to consider the applicant's conduct generally in the matter. The applicant contends, that the Committee was strictly confined to considering only the question of alleged overcharging, but if this was not the case, fair procedures required that he ought to have been advised that an investigation of his general conduct in the matter was being conducted. This issue was in fact first raised by the Statement of Opposition filed by the respondent, at para. 4, 6, and 7 thereof.

It is pleaded at para. 3(i) of the Statement of Opposition and, counsel for the respondent submitted, that the text of this leaflet or booklet in pointing to the powers of the Committee, had put the applicant on notice of the fact that the Committee was looking into his conduct generally and, that it had the option of sending him forward to the Tribunal. Therefore, counsel submitted, the existence of this leaflet or booklet was of central importance in the application and yet it had not been exhibited in the affidavit verifying the Statement of Grounds and was not opened before the court.

I find that the letters of the 22nd February, 2007, and 5th July, 2007, were exhibited before the court, as Exhibit "B" at para. 6 of the verifying affidavit sworn by Mr. Patrick Groarke. I consider, that for completeness of the record it would have been better if this leaflet or booklet, (I assume it be the same document), referred to in these letters, had been exhibited also. However, the issue to which it is germane was not raised in the Statement of Grounds or, in the verifying affidavit and, only really became an issue between the parties as a result of matters pleaded in the Statement of Opposition. In these circumstances, I do not consider that there was any failure on the part of the applicant, or on the part of counsel representing the applicant, to act with the utmost candour. I also accept, what is stated at para. 3 of the replying affidavit of the applicant sworn on the 17th June, 2008, that it was his case that in the circumstances set out in his Statement of Grounds, the Committee had no power to refer the matter to the Solicitors Disciplinary Tribunal, irrespective of whether any leaflet or booklet identified the possibility of same.

I accept the submission of counsel for the applicant that the D.T. 1 application for an inquiry by the Solicitors Disciplinary Tribunal, dated the 12th October, 2007, and, the affidavit of Ms. Kirwan of even date, grounding that application, were matters which arose subsequent to and were therefore entirely extraneous to the matters grounding his application for leave to seek judicial review. Since one of these grounds was the alleged failure of the Committee, at the time of giving its decision, to state reasons for its decision to seek an inquiry by the Solicitors Disciplinary Tribunal and, the statement that the reasons for applying to the Tribunal would be set out in due course, in my judgment, it would have been preferable had this D.T. 1 Application and the affidavit grounding it been exhibited before the court on the application

seeking leave to apply for judicial review. However, I am not satisfied that the failure to refer, or to exhibit, the D.T. 1 application or the grounding affidavit of Ms. Kirwan, both referred to in the letter dated 15h October, 2007, to the applicant, was a failure on the part of the applicant or of his counsel, to make a sufficient and candid disclosure to the court on that occasion.

I find that the complaint of the litigant to the Society received on the 15th February, 2007, was entirely concerned with the demand made to him by the applicant for this sum of €3,000 and, the circumstances surrounding that demand and leading up to it. The litigant wished to know whether he was entitled to receive interest on this sum of €3,000 for the period of two years during which it was withheld from him. He was not just principally, but overwhelmingly concerned with the conduct of the applicant in relation to the negotiation of the settlement of the claim, and especially in relation to the question of costs.

Ms. Kirwan, as secretary of the Committee by a letter dated the 22nd February, 2007, invited the applicant to furnish his observations and any necessary explanations in relation to the complaint, "and where appropriate", his proposals to resolve the matter by agreement. Enclosed with this letter was a copy of the Society's booklet entitled *"Resolving Complaints".*

Counsel for the applicant submitted that the employment of the phrase "and also where appropriate, your proposals to resolve the matter by agreement", in this letter signified that the committee were treating the matter as a complaint of overcharging in a bill of costs and therefore something to be addressed pursuant to the provisions of s. 9(1) of the Solicitors (Amendment) Act 1994. Counsel for the respondent drew the attention of the court to the fact that this booklet expressly advised that one of the powers of the committee was to make a referral to the Solicitors Disciplinary Tribunal seeking an inquiry. Counsel submitted that any practicing solicitor would appreciate that this related to perceived misconduct.

The gravamen of the litigant's complaint was the demand by the applicant for the sum of €3,000, the failure of the applicant to ensure that he was involved in and fully informed with regard to the negotiations surrounding the settlement of his claim and, in particular, the failure of the applicant to give him correct information regarding the costs. I am satisfied, and I so find, that this was a complaint about overcharging and not about the legal services otherwise provided to the litigant by the applicant. In my judgment this complaint fell within the provisions of s. 9 and not of s. 8 of the Solicitors (Amendment) Act 1994, (No. 27 of 1994).

For the purpose of this decision, it is sufficient to refer to the first subsections of s. 8 and s. 9 of the Act of 1994, which, as regards the steps to be taken by the Society, or the Committee on its behalf, are in identical terms. Section 9(1) of the Act of 1994, states as follows:-

> "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."

Section 8(1) of the Act of 1994, provides as follows:-

> "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), (b), (c), (d), (d(a)), (e)]"

In s. 2 of the same Act of 1994, "bill of costs" is defined as including, "any statement of account sent, or demand made by a solicitor to a client for fees, charges outlays, disbursements or expenses".

By Regulation 53(vi) and (vii) of the Council Regulations 2004 – 2005 (adopted 12th November, 2004), the powers and functions of the Society under s. 8 and s. 9 of the Act 1994, are delegated to the Committee to be performed or exercised without reference to the Council of the Society.

In *O'Driscoll and Another v. The Law Society of Ireland and the Solicitors Disciplinary Tribunal* [2007] I.E.H.C. 352, McKechnie J. at paras. 40, 41 and 42 of the judgment held as follows:-

> "40. Section 9, which deals with complaints of overcharging, is structured in exactly the same way: where the Committee receives a complaint of a solicitor charging excessive fees 'it shall, unless it is satisfied that [it is] frivolous or vexatious, investigate the complaint and shall take all appropriate steps to resolve the matter by agreement between the parties concerned and may, if [it is] 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. . .' (emphasis added). The two requirements are then specified. The format of both sections appears therefore to be virtually identical. Concentrating on s. 9, it seems to me that on receipt of a complaint which is not frivolous or vexatious, the Committee must firstly investigate that complaint; secondly, it must take all appropriate steps to resolve the

matter by agreement between the parties; and thirdly, it may, if satisfied that the bill is excessive, issue a direction to the solicitor. Whether these steps are sequential or are all part of the same inquiry is not relevant to this case. What is important however is whether the words 'shall', as used in the context of the investigation and the attempted resolution, are mandatory in nature, or are merely directory. On this important point, I do not believe on closer examination that there is any true disagreement between the parties, and that, in fact, both accept that the relevant provisions of s. 9 are mandatory.

41. In any event, the applicable principles of law by which this issue must be determined are well established, having been laid down by Henchy J. in the *State (Elm Developments Limited) v. An Bord Pleanála* [1981] I.L.R.M. 108 where, at p. 110 the learned judge said:-

> 'Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which is not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and the scheme of the statute, non compliance may be excused.'

42. In applying this statement to s. 9 of the 1994 Act, I have no doubt whatsoever but that the 'get up' of the statutory scheme is directed towards a resolution of the complaint 'by agreement between the parties concerned'. It seems to me that since the complaint must obviously be investigated there cannot be a justification for treating the word 'shall' as it applies to such investigation in a mandatory way, but only in a discretionary sense when the same word is applied to the resolution stage of the process. No good reason could exist for such a differentiation. In addition, the legislature has made a deliberate distinction between the mandatory nature of the investigation and resolution stage on the one hand and, by the use of the word may, the discretionary nature of the direction stage on the other hand. It is only if matters cannot be resolved by agreement that the Committee is entitled to issue a direction in the form of either subpara. (a) or subpara. (b) of subs. 9(1). This restriction is entirely logical given that the primary focus of the provision is dispute resolution. If the complaint can thus be resolved then the parties have achieved by agreement what otherwise is achievable only by direction. In such circumstances there is neither point or purpose in issuing a direction. It follows therefore that the resolution process is an integral part of the section itself.

43. This view, that the focus of s. 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 C.C.R. Committee) is prohibited from making 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. . . ."

I adopt this interpretation given by the learned Judge to the provisions of s. 9(1) of the Act of 1994. The other subss. of s. 8(1) of the Act of 1994 and the provisions of subs. 2 of that section, dealing with the sanctions which the Committee may impose, further demonstrate that the application of s. 8 to the complaint in this instant would be entirely inappropriate.

There is no provision in the sanctions subsections of either s. 8 or s. 9 of the Act of 1994, or elsewhere in any of the other subsections of those sections, conferring a discretion on the Society or the Committee to make an application to the Solicitors Disciplinary Tribunal for an inquiry into the conduct complained of, on the ground of alleged "misconduct". Of course, in my judgment there can be no doubt but that the Society has such a power, whether or not the Society has received a complaint, it is found in the provisions of s. 6A of the Solicitors (Amendment) Act 1960 (inserted by s 36 of the Civil Law (Miscellaneous Provisions) Act 2008); s. 14A of the Solicitors (Amendment) Act 1994 (inserted by s. 40 of the Civil Law (Miscellaneous Provisions) Act 2008) and, s. 7 of the Solicitors (Amendment) Act 1960, (inserted by s 17 of the Solicitors (Amendment) Act 1994).

Despite the fact that s. 14B of the Solicitors (Amendment) Act 1994, as inserted by s. 41 of the Civil Law (Miscellaneous Provisions) Act 2008, provides that the issue of a bill of costs which is excessive may constitute "misconduct", in my judgment it is clear from the terms of s. 10 of the Solicitors (Amendment) Act 1994, that the legislative scheme envisages that a complaint made to the society within the terms of either s. 8 or s. 9 of the Act of 1994, is distinct from a complaint made to the Society alleging misconduct by a solicitor. Misconduct as appears from the statutory definition of the term is in general an altogether more serious matter with graver possible consequences for the solicitor concerned.

"Misconduct", is defined by s. 3 of the Solicitors (Amendment) Act 1960, as amended by s. 24 of the Solicitors (Amendment) Act 1994, s. 7 of the Solicitors (Amendment) Act 2002 and, s. 41 of the Civil Law (Miscellaneous Provisions) Act 2008 as including the following:-

> "(a) The commission of any 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 committed in the State,
>
> (c) The contravention of a provision of the Solicitors (Amendment) Acts, 1994 - 2002, or any order or regulation made thereunder,
>
> (d) In the course of practice as a solicitor –

(i) having any direct or indirect connection, association or arrangement with any person (other than a client) whom the solicitor knows or upon reasonable inquiry should have known, is a person who is acting or has acted in contravention of s. 55 or 56 or s. 58 (which prohibits an unqualified person from drawing or preparing certain documents) as amended by the Act of 1994, of the Principal Act, or s. 5 of the Solicitors (Amendment) Act 2002, or

(ii) accepting instructions to provide legal services to a person from another person whom the solicitors knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of those enactments,

(e) Any other conduct tending to bring the solicitors' profession into disrepute."

The issue by a solicitor of a bill of costs that is excessive may also constitute misconduct.

On the 21st June, 2007, exercising the power vested in her by s. 10(1) of the Solicitors (Amendment) Act 1994 and by Regulation 55(i) of the Law Society Ireland Council Regulations 2004 – 2005, Ms. Kirwan required the applicant to produce all files in the matter. Section 10 of the Act of 1994, provides that such a demand may be made for the purpose of investigating any complaint alleging misconduct by a solicitor or alleging the provision of inadequate legal services, or alleging that a bill of costs was issued which was excessive. Significantly, the section 10 Notice directed to the applicant by Ms. Kirwan stated that the production demand was made:-

"In connection with the matters relating to the complaint of M.O'S. (whether or not they relate also to other matters)."

I find that this wording almost certainly conveyed to the applicant that what was under investigation by the Committee was a s. 9 complaint of overcharging. There was no discussion at the hearing of this application for judicial review as to the proper interpretation of the phrase between the brackets.

These files were furnished and were returned to the applicant on the 5th July, 2007, accompanied by a Report which Ms. Kirwan advised she intended to lay before the Committee at its meeting on the 2nd August, 2007. The applicant was advised that he could attend or be represented at this meeting. A leaflet explaining the powers of the Committee was furnished with this Report. This leaflet or booklet stated that:-

"The Committee attempts (in suitable cases) to seek resolution of a complaint, but where this is not appropriate, it may uphold a complaint and impose a sanction. Sanctions vary according to the type of complaint and may include one or more of the following:-

A direction to waive/refund some or all of the solicitor's professional fees.

A direction to hand over files.

A direction to secure rectification at the solicitor's expense.

A direction to take such other action as the Committee may specify.

The imposition of a formal reprimand.

A reference to the Solicitors Disciplinary Tribunal."

All of these powers, save for the penultimate item, were given by ss. 8, 9, 10 and 17 of the Solicitors (Amendment) Act 1994, and the source of the power stated in the penultimate item was not disclosed or discussed at the hearing of the application for judicial review.

It was submitted by counsel for the respondent that the indication of this latter power to seek an inquiry by the Solicitors Disciplinary Tribunal, was sufficient to put the applicant on notice that the Committee was, considering generally or intended to consider generally whether there had been misconduct on his part. I am unable to accept this submission. The applicant, as a matter of the most basic fair procedures, was entitled to be expressly informed of the precise nature of the investigation being conducted by the Committee. This was not something which lawfully or justly could be left to him to ascertain by a scrutiny of the powers alleged to be available to the Committee in a standard form leaflet, in particular a leaflet included with a Report from the Secretary of the Committee to that Committee which made no mention anywhere of any alleged general investigation of misconduct on the part of the applicant. It further appears to me that the statement of the powers of the Committee as explained in this leaflet or booklet is inconsistent with the passages from the judgment of McKechnie J. in *O'Driscoll and Another v. The Law Society of Ireland and Another* (above cited), to which I have already referred, insofar as it suggests a discretion in the Society to seek agreement between the parties.

In her, - obviously preliminary, - Report to the Committee, the Secretary, Ms. Kirwan, identified what she considered to be a number of aspects surrounding the demand for the payment and the subsequent repayment of the sum of €3,000 which she considered merited investigation by the Committee. In summary, these were:-

"Party and party costs had been negotiated and agreed without any recourse to the litigant himself.

The litigant had received no bill of costs for two years after the case had been settled and, only then, after he had gone back to the applicant to complain.

There was no explanation of what services had been rendered which were not recoverable on a party and party costs basis.

The purported s. 68(1) letter, did not comply with the provisions of that section, as it did not include an estimate

by the applicant of what might reasonably be recovered from the defendant by way of costs.

The only possible inference from the documents furnished was that the sum of €3,000 was for the solicitor's Professional Fees only and, it was not used to make up the shortfall in Counsel's Fees recovered from the defendant.

The cheque for €3,000 did not appear to have gone through the applicant's firm's books and accounts.

Now it may very well be, that reason and commonsense would suggest that any practicing solicitor should be able to discern in some or all of these items a suggestion of "misconduct" as defined by statute. However, be that as it may, I find that it would not be sufficient to fix the applicant with notice that the Committee was not just investigating the s. 9 complaint lodged by the litigant, but was also actively investigating or intending to investigate an issue of general misconduct on his part raised by the Committee's own motion. I accept that neither Ms. Kirwan nor the Committee anywhere expressly stated that this was an investigation within the provisions of s. 9 of the Solicitors (Amendment) Act 1994. I find however, that the applicant was entitled from the correspondence and documentation to consider rationally and reasonably that the sole matter under investigation by Ms. Kirwan and the Committee was the litigant's claim that he had been overcharged by the applicant, and the circumstances in which this was alleged to have occurred. I find that the applicant was entitled to consider that the Committee was exercising the powers vested in it by s. 9(1) of the Solicitors (Amendment) Act 1994, and Regulations 53(vii) and (viii) of the Council Regulations 2004 – 2005.

I find the submission of counsel for the applicant to be correct, that the matters identified in the preliminary Report from Ms. Kirwan refer to the complaint of the litigant of alleged overcharging by the applicant. I am unable to accept what is averred by Ms. Kirwan in her replying affidavit that what was being investigated by the Committee was the applicant's "general conduct". The litigant preferred no charge of "misconduct" or indeed of providing inadequate services, against the applicant. In the context of his letter of the 8th November, 2006, read as a whole, it is clear that when the litigant complains that he was not happy with the way in which he was dealt with by the applicant, that he believed that it was the applicant's duty to represent his best interests and that he believed that the applicant severely let him down in this respect, the litigant is referring only to the demand for the sum of €3,000 and the circumstances surrounding that demand.

I do not accept the submission by counsel for the applicant, that as a result of the litigant having accepted and given a written receipt for the repayment of the full sum of €3,000 on the 17th November, 2005, there was thereafter no live issue of overcharging which the Committee could investigate despite the complaint received from the litigant on the 15th February, 2007. The correspondence suggests that the letter dated the 8th November, 2006, was sent by post by the litigant to the Society in November, 2006, but appears to have become lost in the course of post and, the litigant sent a copy of that letter to the Society by Email on the 15th February, 2007. In my judgment, despite the repayment in full of the sum of €3,000 without admission, - which repayment is certainly one of the objects of the legislation, - there remained the primary obligation imposed on the Committee by s. 9 of the Act of 1994 of seeking to resolve the dispute concerning alleged overcharging, which dispute continued despite this repayment.

I accept the submission by counsel for the applicant, that if the complaint of the litigant (as per his letter dated the 8th November, 2006) was interpreted by the Society or the Committee as alleging "misconduct" within the statutory definition of that term, on the part of the applicant, and, not simply as a claim of overcharging, or as a claim that the legal services provided by the applicant were inadequate, the Society or the Committee would not have had power to investigate the matter under either s. 8(1) or s. 9(1) of the Act of 1994 and, would have had to proceed by way of s. 7 of the Solicitors (Amendment) Act 1960, (as substituted by s. 17 of the Solicitors (Amendment) Act 1994, as amended by s. 9 of the Solicitors (Amendment) Act 2002).

However, I do not accept, nor in my judgment does it follow from the foregoing, that if in the course of properly carrying out an investigation into the complaint, in a manner indubitably within the terms of s. 9(1) of the Act of 1994, the Committee were to become aware of matters which, if established, would appear to point to misconduct on the part of the applicant, the Committee was precluded from further considering this matter. I do not accept either, the submission that the discretionary powers conferred on the Committee by s. 8(1)(a) to (e) inclusive (as amended) and, s. 9(1)(a) and (b) were intended to be exclusive remedies, so as to exclude an application by the Society or the Committee under s. 7 of the Solicitors (Amendment)Act 1960, (as substituted and amended) for an inquiry by the Solicitors Disciplinary Tribunal into this perceived misconduct. If accepted, these propositions would result in extraordinary and absurd results. For example, the Committee would be obligated to complete, if it could, the investigation of the complaint, but careful to turn a blind eye to any question of misconduct a part of the applicant and with power only to impose one of the sanctions specified in s. 9(1)(a) or (b) of the Act of 1994. Then, the complaint having been determined, the question would rise as to how, and by whom and on what facts an application for an inquiry by the Solicitors Disciplinary Tribunal could be made.

The Minutes of the proceedings before the Committee on the 26th September, 2009, clearly indicate that the applicant was not informed of the nature of any perceived misconduct on his part. Had this occurred, the most basic fair procedures would require that he be afforded a reasonable time to consider the matter, to take advice if he so wished and to respond, if he so wished, to these concerns, orally or in writing as the Committee considered appropriate. However, in the events which occurred, the applicant was not advised that the Committee either had investigated or proposed to investigate general misconduct on his part arising from the litigant's complaint to the Society. No perceived misconduct was identified to the applicant. After exchanges between the Chairman of the Committee and Mr. Groarke, Solicitor, representing the applicant, regarding the failure of the applicant to apply any part of the sum of €3,000 to make up the shortfall in counsel's fees as recovered from the defendant and, as to the whereabouts of the cheque for the sum of €3,000, the Committee ruled that it had decided to apply to the Solicitors Disciplinary Tribunal for an inquiry. When the solicitor for the applicant asked for the reasons for this decision, he was advised that reasons would be set out in due course. I accept the submission by counsel for the applicant that the first actual reference to alleged misconduct on the part of the applicant appears in the D.T. 1 Form, dated the 12th October 2007, whereby the Committee sought an inquiry by the Solicitors Disciplinary Tribunal and, that the first time the nature of this perceived misconduct was disclosed and identified was in para. 11 of the affidavit of Ms. Kirwan sworn on the 12th October, 2007, grounding this application to the Solicitors Disciplinary Tribunal.

I am satisfied and I so find, that if during the course of investigating the litigant's complaint to the Society, which I am satisfied was done pursuant to the provisions of s. 9(1) of the Solicitors (Amendment) Act 1994, the Committee came

upon matters which appeared to suggest general misconduct on the part of the applicant, they were fully entitled to continue to investigate these concerns in addition to the other aspects of the complaint. However, the most basic fair procedures required that they clearly and expressly informed the applicant of their intentions in this regard and afforded him a reasonable opportunity, either in correspondence or orally, (at the discretion of the Committee), to address any matters identified by them which appeared to them to constitute misconduct on his part. Only then could they justly and fairly make a decision in the matter. Unfortunately this was not done.

I find that reasons, - but not a lengthy recital of reasons nor a discursive judgement, - should have been given for the decision by the Committee. I am satisfied that it would have been quite sufficient had the eight reasons set out at para. 11 of the affidavit of Ms. Kirwan been given as the reasons for the decision. I do not know why this was not done. I accept the submission of counsel for the applicant that the subsequent statement of these reasons must be regarded as a, "retrospective justification" for the decision of the Committee, even though these matters were already for the most part clearly reflected in the preliminary Report furnished by Ms. Kirwan to the Committee.

I do not accept the submission by counsel for the respondent that the fact that the Solicitors Disciplinary Tribunal, exercising the power vested in it by s. 7(2) of the Act of 1960 (as inserted and amended), might conclude that there was no *prima facie* case for an inquiry or, even if it reached the opposite conclusion, the fact that the applicant would be guaranteed full fair procedures before and during the conduct of the ensuing inquiry, renders it unnecessary to consider the issue of fair procedures, at what is essentially no more than a very basic and preliminary inquiry stage. While accepting that the full panoply of fair procedures need certainly not be afforded at this stage, - and in this respect I entirely agree with the passage cited from the judgment of Shanley J. in *Re. National Irish Bank Ltd. (No. 1)* [1999] 3 I.R. 145, - I find that the applicant remained entitled as a matter of fair procedures not be put to the hazard before the Solicitors Disciplinary Tribunal without receiving the very minimum basic protections which I have identified, that is, be informed that the Committee proposed to look into the question of possible general misconduct on his part; to be advised of any matter which the Committee perceived as constituting misconduct on his part, to be permitted reasonable time to consider and to take advice and, to be permitted, - orally or in writing at the discretion of the Committee, - to address the matter or these matters, before a decision was taken by the Committee whether or not to seek an inquiry by the Solicitors Disciplinary Tribunal.

It is to be noted that the decision of the Solicitors Disciplinary Tribunal, as to whether or not there is a *prima facie* case for an inquiry is made, "after consideration of the application". Therefore, this second Body could reach a decision that the applicant had a case to answer without the applicant ever having had a chance of explaining things. Should the Solicitors Disciplinary Tribunal be of opinion that there was a *prima facie* case for an inquiry, this would mean that the applicant, without ever having had a chance of explaining his position, would face an inquiry, which might result in the most serious consequences for him, starting from the position that both the Committee and the Solicitors Disciplinary Tribunal considered that that there was a *prima facie* case to be answered. Subject to this, I agree that a very preliminary investigation of this nature should not be obstructed or inhibited by an insistence upon procedures appropriate to an actual inquiry before the Solicitors Disciplinary Tribunal. I find the decision in *Miley v. Flood* [2001] 2 I.R. 50, is so distinguishable on its facts, that it is of no assistance to the respondent. I also find that the passage cited from the judgment of Barron J. in *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 at 92, does not assist the applicant. In the instant case the applicant was informed of the complaint and, was invited to comment. However, he was not informed that the Committee was conducting or proposed to conduct an investigation into general misconduct, either solely or in parallel with an investigation into alleged overcharging. I consider the judgment of Barron J. (p. 76 -120) and Hardiman J. (p. 112 – 132) in *Ó Ceallaigh v. An Bord Altranais* (above cited) support the case advanced by the applicant in the instant case.

Section 9(1) of the Solicitors (Amendment) Act 1994, requires that the Society or the Committee acting on its behalf, "shall take all appropriate steps to resolve the matter by agreement between the parties concerned". At paras. 40 to 43 inclusive of his judgment in *O'Driscoll and Another v. The Law Society of Ireland and Another* (above cited), McKechnie J. held that this was a mandatory obligation and it was only in the event that a dispute could not be resolved by such an agreement that the society was entitled to determine the matter and if satisfied that the bill of costs was excessive to direct compliance with the provisions of s. 9(1)(a) or s. 9(1)(b) of that Act. In my judgment, this must also be a precondition to the exercise by the Committee of any other power or powers in connection with the matter, such as the power to seek an inquiry by the Solicitors Disciplinary Tribunal. Since it did not arise on the facts of the instance case it was not argued at the hearing of this application for judicial review whether the attaining of an agreement between the parties concerned operated as a bar to any further investigation or decision by the Committee or whether a positive decision of overcharging was necessary before the Committee could seek an inquiry by the Solicitors Disciplinary Tribunal.

In my judgment, "appropriate" clearly relates to the steps to be taken by the Committee and not as appears to be suggested in the leaflet or booklet explaining the powers of the Committee, to whether or not the Committee considers it appropriate to attempt to resolve the matter by agreement. What would amount to taking "all appropriate steps" must I believe be a matter to be decided on the facts of each particular case.

In the instant case, the only evidence of any contact by the Committee with the litigant or the applicant was an exchange of correspondence and the furnishing of the correspondence received from one party, to the other party. There was no evidence that the Committee sought, by acting as a mediator or facilitator, to induce the parties to arrive at an agreed compromise. Once the parties had stated their positions in correspondence and, having demanded and received the applicant's file or files in the matter, the Committee made no attempt at all to bring the parties together in an agreement but at once proceeded to consider whether there was evidence of possible misconduct on the part of the applicant. On the evidence before me, there was nothing to indicate that the Committee even completed the investigation of the litigant's complaint of overcharging. No decision was given on the matter. Instead, the Committee decided to seek an inquiry by the Solicitors Disciplinary Tribunal into the general conduct of the applicant on the ground of alleged misconduct.

CONCLUSION

By reason of the failure of the respondent to afford fair procedures to the applicant during the course of the investigation and, also and separately by reason of the failure of the respondent to comply with the provisions of s. 9(1) of the Solicitors (Amendment) Act 1994, the court will grant the relief sought at para. (i) of the applicant's notice of motion dated the 18th December,, 2007.

OTHER CASES REFERRED TO IN ARGUMENT

O'Mahony v. Ballagh [2002] 2 I.R. 410.

Davy v. Financial Services Ombudsman [2008] I.E.H.C. 256.

Bailey v. Flood (Unreported, High Court, 6th March, 2000).

Brennan v. The Governor of Portlaoise Prison [2008] I.E.S.C. 12.

Brennan v. Lockyer [1932] I.R. 100.

R. V. Stratford-on-Avon D.C., ex parte Jackson [1985] 3 A.E.R. 769.

De Roiste v. The Minister for Defence [2001] 1 I.R. 190.

O'Donnell v. Dun Laoghaire Corporation [1991] I.L.R.M. 301.

Connolly v. The Director of Public Prosecutions [2003] 4 I.R. 121.

The People (Director of Public Prosecutions) v. P. O'C. (Unreported, C.C.A. 27th January, 2003).

Deka v. The Minister for the Environment and Local Government [2003] 2 I.L.R.M. 210.

The Director of Public Prosecutions v. Monaghan [2007] I.E.H.C. 92.

Faulkner v. The Minister for Industry and Commerce [1997] E.L.R. 107.

Gammell v. Dublin County Council [1983] I.L.R.M. 413.

The State (Duffy) v. The Minster for Defence (Unreported, Supreme Court, 9th May, 1979).

Ainsworth v. The Criminal Justice Commission [1992] 106 Admin.L.R. 11.

R. v. Association of Futures Brokers and Another ex parte Mordens Limited [1991] 3 Admin. L.R. 254.

McNamara v. Ontario Racing Commission [1998] 164 D.L.R. (4th) 99.

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