

THE HIGH COURT

[2015 No. 88 S.A.]

**IN THE MATTER OF MICHAEL O’SULLIVAN, A SOLICITOR FORMERLY PRACTISING AT 41 LOWER BAGGOT STREET, DUBLIN 2
AND IN THE MATTER OF AN APPLICATION BY THE LAW SOCIETY OF IRELAND TO THE SOLICITORS DISCIPLINARY TRIBUNAL
AND IN THE MATTER OF THE SOLICITORS ACT 1954 – 2011**

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND

MICHAEL O’SULLIVAN

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 22nd day of April, 2016

1. The Law Society seeks an order pursuant to s. 7(3)(c)(iv) of the Solicitors (Amendment) Act, 1960, as substituted and amended that Michael O’Sullivan not be permitted to practice as a sole practitioner or in partnership and that he be permitted only to practice as an assistant solicitor in a partnership and under the direct control and supervision of another solicitor, of at least ten years standing, to be approved in advance by the Law Society of Ireland, and an order that he pay a sum of €10,000 to the Compensation Fund of the Law Society and a further sum of €6,774.51 as restitution to one James Nolan, his former client. An order is also sought that Mr. O’Sullivan pay the costs of the Solicitors Disciplinary Tribunal to include witness expenses to be taxed in default of agreement. Mr. O’Sullivan appeared in person.

2. The respondent was admitted to the Roll of Solicitors on 22nd June, 1982, and formerly practiced as principal of Michael O’Sullivan & Co. Solicitors, Baggot Hall, 41 Lower Baggot Street, Dublin 2.

3. On 17th September, 2007, an application was made to the Solicitors Disciplinary Tribunal by the Registrar of Solicitors for an inquiry into Mr. O’Sullivan’s alleged misconduct as set out in the affidavit of Ms. Linda Kirwan.

4. The Law Society received a complaint from Mr. James Nolan, dated 18th May, 2004, enclosing correspondence between Mr. Nolan and Mr. O’Sullivan. It concerned the issue of fees charged by Mr. O’Sullivan in respect of a personal injury case in which he had acted for Mr. Nolan. The case was settled on 19th February, 2004, on the day of the hearing of the action, for €100,000 damages and costs. Mr. Nolan claimed that the respondent received the settlement monies on 2nd March, 2004, but failed to furnish him with a Bill of Costs and, in particular, a statement as to why he was charged a legal fee of €15,000 plus Value Added Tax. He also complained that Mr. O’Sullivan was withholding a sum of €49,000 of the settlement monies despite the fact that he had agreed to pay Mr. O’Sullivan the costs claimed. Mr. Nolan stated that Mr. O’Sullivan was refusing to pay out this balance because he had asked him to explain his fee. He also sought from Mr. O’Sullivan, a breakdown of the money which would be returned to him in respect of outlay which he had paid during the case and a statement of the special damages which had been handed into court but which had not been furnished to him. Mr. Nolan wrote to the Law Society seeking its assistance and enclosing a copy of this correspondence.

5. The correspondence indicates that on 14th March, 2004, Mr. Nolan sought a detailed breakdown of the basis upon which the calculation of the €15,000 fee was made. He complained that the figure was excessive and thought it most unfair that he would be required to pay this fee since the defendant had agreed to pay his costs. He complained that he felt under enormous pressure at the time of settlement to settle the case and accept the solicitor’s fee. On 19th March, 2004, Mr. O’Sullivan replied but did not address the issue of the fee charged specifically. He stated that once recovered from the defendant, the outlay due to Mr. Nolan would be returned. He declined to furnish a statement of the special damages claimed. He intended to refer the matter to counsel in respect of the suggestion that undue influence or pressure had been applied to Mr. Nolan at the time of settlement. By email dated 25th March, Mr. O’Sullivan advised Mr. Nolan that he was awaiting the advice of counsel but in respect of costs noted that this may be “a subsidiary issue” if Mr. Nolan sought to set aside the High Court order on the basis of duress. In the meantime, he intended to hold onto the balance of the funds as “it would be better to retain the funds in the client account pending receipt of the responses mentioned above” (from counsel and from Mr. Nolan).

6. In the subsequent correspondence, Mr. O’Sullivan clearly rejected any suggestion of undue influence at the time of settlement or that Mr. Nolan had not been furnished with a breakdown of the items of special damage claimed on his behalf. On 29th March, Mr. Nolan responded suggesting that Mr. O’Sullivan had not addressed the question raised in respect of the sum of €15,000. He emphasised that he wished to have a copy of the schedule of special damages handed into court on the date of settlement because he wished to know if he had to pay any further monies to hospitals or any other person and what sums of special damage would be reimbursed by the defendant. He rejected an allegation by Mr. O’Sullivan that he had defamed him as an attempt to bully him into paying the fee.

7. On 30th March, 2004, Mr. Nolan requested the transfer of his settlement monies (€100,000) by Mr. O’Sullivan and provided him with his bank account details for that purpose. He sent a further email on the same date stating that he was not interested in reopening

the case. He simply wished Mr. O'Sullivan to explain his costs and emphasised that this was the only issue between them. He stated that this would be his final request for the transfer of the monies failing which he would contact the Law Society and asked Mr. O'Sullivan to confirm the legal basis upon which he was withholding the settlement monies.

8. By letter dated 1st April, 2004, Mr. O'Sullivan indicated that Mr. Nolan's:-

"...false allegations of professional misconduct still remain on the record and have to be withdrawn. You stated that you wished to put the matter behind you. The easiest way of doing this is to withdraw your various allegations...."

9. He reiterated his contention that Mr. Nolan had been sent and had approved a schedule of special damages which was the same schedule in circulation on 19th February, 2004, at the time of settlement. In respect of costs, he offered the following options:-

"1. I will ask my Legal Costs Accountant 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 cost now, the balance of the settlement funds will be released to you and I will seek the remainder of the costs from the defendant."

10. He then indicated that:-

"Either way settlement funds will be released to you before close of business on Monday, 5th 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."

11. In a further letter on 5th April, 2004, Mr. O'Sullivan stated that the complainant's Bill of Costs was being assessed by a cost drawer and would be "in or around the €46,000 figure". He stated that:-

"Your Bill of Costs is currently being assessed by a cost drawer, and not a considerable task, given the lengthy history of your litigation. It is estimated by the cost drawer that the bill will be in or around €46,000 figure. If you dispute liability and the matter goes to taxation (i.e. measurement) there is potential for a further charge relating to court duty on the bill at 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 reverted to for any shortfall in the amount due by the defendant....

In the meantime, I enclose a cheque for €48,689.56, which is the balance currently due to you pending the 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."

12. By reply, Mr. Nolan stated on 29th April, 2004, having received the cheque for €48,689, that Mr. O'Sullivan had failed to provide a breakdown of the fee claimed. He offered a sum of €5,000 towards his solicitor's costs and also required "a breakdown of all costs due to me from the other side together with a copy of the schedule of special damages which was in court on the day of the hearing".

13. On 13th May, 2004, Mr. O'Sullivan replied stating that it was unnecessary to keep addressing points which he had previously raised and which he regarded as previously answered. He added:-

"Your offer in relation to your legal cost liabilities 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 past seven years, you will be served with it..."

Mr. O'Sullivan and the Law Society

14. On 24th May, 2004, Ms. Kirwan wrote to Mr. O'Sullivan, on behalf of the Law Society, furnishing him with a copy of the complainant's letter dated 18th May, 2004, and requesting a response. Mr. O'Sullivan replied that the complainant's litigation file was with legal costs accountants and that once the Bill of Costs was finalised, he would retrieve the file and consider the matter. He raised a series of questions concerning the Society's investigation and asked whether the Society had formally accepted the complainant's correspondence as a complaint within the meaning of the Solicitors' Acts. He also requested that the Society indicate the section of the Acts under which the complaints were made and what sections are alleged to have been breached. He asked for details of the exact nature of each alleged breach.

15. Ms. Kirwan replied by letter dated 8th June, 2004, and advised the respondent as follows:-

"On the basis of Mr. Nolan's covering letter to the Society and the 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 of 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 (sic) the outlay will be refunded (presumably production of the Bill will address this complaint insofar 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 Solicitor's Amendment Act 1994. Complaints of inadequate services fall to be considered under Section 9 of the Solicitor's 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."

16. Ms. Kirwan requested that Mr. O'Sullivan respond to the Society following the return of the complainant's file by his Legal Cost Accountants.

17. On 15th June, 2004, the complainant sent a letter to the Society enclosing a copy of a letter from Mr. O'Sullivan dated 10th June, furnishing him with the Bill of Costs which included an instruction fee measured at €25,850 and a total bill amounting to €45,129.11. Mr. Nolan stated that he did not understand why the amount being claimed by the respondent had "suddenly doubled without explanation".

18. In his letter to the complainant, Mr. O'Sullivan stated that if Mr. Nolan disputed the bill, he could have it taxed. He added that because Mr. Nolan had made malicious and false allegations against him and failed to withdraw them when requested, Mr. O'Sullivan could no longer represent him.

19. On 22nd June, 2004, Mr. O'Sullivan furnished a letter to the Law Society noting that Mr. Nolan had now received his Bill of Costs. Mr. O'Sullivan sought clarification of the Society's powers in respect of the investigation of the complaint and complained that the Society had not supplied him with the information which he had sought in his letter of 26th May. He also asked whether the Society was seeking immediate confirmation that the provisions of s. 68 had been complied with. Ms. Kirwan replied by letter dated 23rd June, requesting that Mr. O'Sullivan confirm whether the Bill of Costs furnished to the complainant represented the bill of the entire costs due to the respondent and whether the bill had been sent to the solicitors acting for the defendants. She also requested confirmation as to whether the settlement cheque was endorsed by his client prior to negotiation and that the sum of €49,000 in settlement monies retained by Mr. O'Sullivan remained in the client account. A reply was received from Mr. O'Sullivan dated 24th June but was not thought to have addressed the matters raised by Ms. Kirwan. Mr. O'Sullivan stated that before the matter could progress any further, the Society would have to reply to his queries of 22nd June. He also noted that the complainant had incorrectly stated in correspondence that the Bill of Costs was for €33,716.86 and that the total bill was, in fact, as stated above.

20. Ms. Kirwan replied by letter dated 29th June, and advised that not all complaints made against solicitors related to statutory breaches but might be dealt with by the Society as matters of conduct. She again requested confirmation that the provisions of s. 68(3), (4), (5) and (6) had been complied with and noted that as the Bill of Costs had now issued, Mr. O'Sullivan would be able to retrieve the complainant's file and respond to her earlier correspondence.

21. In a further letter dated 22nd July, Mr. O'Sullivan indicated that he did not believe Ms. Kirwan's letter of 8th June had answered his queries "with sufficient clarity" and claimed that he was entitled to have details of the complaints which the Society had decided to investigate before he was required to respond. On 28th July, Ms. Kirwan informed Mr. O'Sullivan that she proposed to ask the Registrar's Committee, now the Complaints and Client Relations Committee, whether she had responded sufficiently to his queries and to seek directions as to how the investigation of the complaint should proceed.

22. On 25th August, 2004, the complainant wrote to the Law Society indicating that Mr. O'Sullivan had informed him that he was going to make disbursements from these monies even though the matter was the subject of the complaint to the Society. Ms. Kirwan wrote to Mr. O'Sullivan by letter dated 30th August and suggested that it might be expedient not to deal with the settlement funds held by him until such time as the Committee had an opportunity to consider the papers. He replied by letter dated 1st September, 2004:-

"What Mr. Nolan has not told you is that he was furnished with a requisition to tax his Bill on 16th July, 2004. He did not respond.

He was advised by letter of 23rd August, 2004, that, as he had not requested that his Bill be taxed that the funds would 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."

23. Mr. O'Sullivan then proceeded to make disbursements from the money in advance of the Registrar's Committee meeting. He wrote to Mr. Nolan on 8th September, enclosing a cheque for €4,140.09 made up of a refund of monies paid by him during the course of litigation (€1,245.99) and the excess due to him after payment of the Bill of Costs. He stated that this excess had been held pending the outcome of taxation and that as Mr. Nolan had decided not to proceed to taxation, the excess funds could now be released to him amounting to €2,894.10. Mr. Nolan was informed that a number of items specified in the Bill of Costs were not now payable and that two items were inadvertently included in the Bill which meant that the total of the Bill was, therefore, reduced from €45,129.11, to €44,939.11.

Mr. O'Sullivan and the Complaints and Client Relations Committee

24. Between September 2004 and September 2006, the Committee met on a number of occasions to consider the issues that had arisen between Mr. O'Sullivan and his client. On 29th September, 2004, the Committee reviewed the correspondence with Mr. O'Sullivan and directed that he should be requested to attend its next meeting. It also directed that he be advised that the Committee had taken the view that the correspondence raised the following issues which Mr. O'Sullivan should be asked to address within fourteen days:-

- "1. The allegation made by Mr. Nolan that, at the time of the settlement, he requested payment of a fee of €15,000.
2. The reasonableness or otherwise of your insistence on receiving from Mr. Nolan a 'proposal for the payment of financial compensation for defamation'.
3. Your response to your client's 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 s. 68(1), (3), (4), (5); s. 68(8)(a), (b)(ii) and s. 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."

25. The Committee also directed that Mr. O'Sullivan should provide the following information:-

1. Confirmation that his client received a letter pursuant to the provisions of s. 68(1) of the Solicitors (Amendment) Act and if applicable, a copy of the letter.
2. Confirmation that Mr. O'Sullivan has his client's written authority to deduct fees from the settlement cheque and a copy of same.
3. Confirmation whether the funds deducted from the settlement cheque were placed in the office or client account.
4. Confirmation that the settlement cheque was endorsed by Mr. Nolan prior to its negotiation or, in the alternative, that he had his client's written authority to endorse the cheque as his agent. In the latter case, a copy of the written authority was requested.
5. A copy of the schedule of special damages was requested.
6. Confirmation whether any payments had been made to any third party in the funds which he held and the details thereof.

26. A letter notifying Mr. O'Sullivan of the Committee's intention to consider the matters listed above at 1 – 7 and seeking the information set out at 1 – 6 was sent to Mr. O'Sullivan on 7th October, 2004.

27. Mr. O'Sullivan replied on 8th October, requesting that the Law Society identify the section of the Solicitors' Acts under which the complaints were made and the sections of the Solicitors' Acts alleged to have been breached. He pointed out that Mr. Nolan had elected not to use the statutory system for the measurement of costs and requested that the Law Society identify the statutory authority upon which the Society relied in purporting to create "a system to judge the 'reasonableness or otherwise' of a Bill of Costs".

28. On 3rd November, 2004, Mr. O'Sullivan attended before the Committee and handed a letter to the chairman. The Committee indicated that it would require some time to consider its contents and Mr. O'Sullivan then withdrew. On his return, he was advised that the Committee would have to furnish a copy of his letter to the complainant for his comments and it was agreed that the matter would be adjourned to the Committee's next meeting. The chairman advised Mr. O'Sullivan 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 in Mr. O'Sullivan's correspondence.

29. Mr. Nolan was furnished with a copy of Mr. O'Sullivan's letter and wrote to the Law Society on 1st December, 2004, indicating that he had still not had been furnished with an explanation of how the figure of €15,000 costs was determined. He complained that instead of offering an explanation Mr. O'Sullivan had, without his consent, taken a fee of €44,939.11 and issued him with a cheque of €4,140.09, as per his letter of 8th September, 2004. Mr. Nolan noted that the final paragraph of his s. 68 letter stated that professional charges were made on a solicitor and own client basis which may exceed any costs recoverable from the other party. However, it appeared that Mr. O'Sullivan had not made any effort to obtain his costs from the other side and Mr. Nolan did not understand how he had compiled his Bill of Costs if they are to be measured on that basis. He accepted that he had authorised a payment by Mr. O'Sullivan to PTSB on his behalf about which there was no issue. He also accepted that he received a s. 68 notice. He sought a schedule of special damages as he was confused as to what money he was entitled to get back and what money he had yet to pay in respect of certain items. He acknowledged that he received a copy of the schedule in advance of the date of the hearing, however, he had sought the final copy of the schedule which was in court on the day of the case. He said there was now no issue in respect of this matter except that it took an unreasonable time to get a copy of the schedule from Mr. O'Sullivan. On 15th December, 2004, the Committee convened again and Mr. O'Sullivan attended. He said that he had not yet received a reply to his letter of 3rd November and requested that the Society specify the allegations he was required to answer.

30. The Law Society informed Mr. O'Sullivan by letter dated 20th December, 2004, that the Committee proposed to consider the following issues arising out of the correspondence on the Society's file to date:-

- (i) His advice to Mr. Nolan during the settlement negotiations of a proposal to charge a solicitor/client fee of €15,000.
- (ii) Clarification of the basis upon which the proposed fee of €15,000 was measured.
- (iii) Mr. Nolan's request for a copy of the schedule for special damages and details of the outlay expended by him which are recoverable from the other side.
- (iv) Compliance with the relevant provisions of s. 68 and s. 76(17) of the Solicitors (Amendment) Act 1994.
- (v) The whereabouts of the monies retained by Mr. O'Sullivan.
- (vi) Mr. O'Sullivan's demand for the payment of financial compensation by Mr. Nolan and his decision to cease representing him.

31. Mr. O'Sullivan was invited to make submissions in relation to these issues, ten days before the next meeting which was due to take place on 9th February, 2005. By letter of the same date to Mr. Nolan, the Committee inquired whether he wished to have the Bill furnished by Mr. O'Sullivan taxed and also sought to establish whether Mr. Nolan had endorsed the settlement cheque or gave permission to Mr. O'Sullivan to endorse it on his behalf.

32. Mr. Nolan replied on 3rd February, stating that he did not accept the Bill of Costs furnished by Mr. O'Sullivan. It appeared to him that Mr. O'Sullivan had already appropriated the funds in his account as appeared from his letter of 8th September, 2004. Therefore, it appeared to Mr. Nolan that the issue of taxation had been unilaterally dealt with by Mr. O'Sullivan. He did not wish to be further penalised in costs and time by having a Bill of Costs arbitrated when it was so fundamentally different from the sum of money initially being sought. He added that he did not endorse the settlement cheque and did not give Mr. O'Sullivan permission to negotiate it on his behalf. He confirmed that the only authorisation he gave him was to discharge an undertaking to PTSB. On 7th February, 2005, Mr. O'Sullivan raised a number of queries in respect of the letter of 20th December, from the Committee.

33. The Committee reconvened on 9th February, 2005. The Committee decided that a s. 10 notice would be served on Mr. O'Sullivan who would be advised that on receipt of the Nolan file, the Society intended to instruct a cost drawer to deal with the recovery of the party costs and report back to the Committee on any shortfalls.

34. A notice pursuant to s. 10 of the Solicitors (Amendment) Act 1994, was issued to Mr. O'Sullivan requiring him within ten days of service thereof to deliver to Ms. Kirwan all documents in his possession, under his control or within the procurement of his firm in connection with the matters relating to the complaint of James Nolan. The notice was dated 14th February, 2005, and was served under cover of a letter of the same date.

35. Mr. O'Sullivan, in a letter dated 11th March, raised a number of challenges to the s. 10 notice. He pointed out that as Mr. Nolan had paid all fees due to him, he was not entitled to exercise any lien on his file and stated that Mr. Nolan might like to instruct a firm of solicitors to take up the file in due course.

36. In the meantime, Ms. Kirwan wrote to Mr. Nolan suggesting that in the interest of expediency, the Committee had decided with his consent to enlist the services of a Legal Costs Accountant to negotiate with the defendant in the action to recover the party and party costs. Once those costs were quantified the Committee could then deal with his complaint in its entirety. Mr. Nolan indicated his consent to this proposal.

37. At a meeting on 23rd March, 2005, the Committee noted Mr. Nolan's agreement with the proposal and directed the Committee Secretary to take up the file and make an arrangement for a meeting with a cost drawer. Ms. Kirwan then wrote to Mr. O'Sullivan informing him of Mr. Nolan's agreement to this proposal and requesting that arrangements be made to transmit the original file to the Law Society.

38. In his reply, dated 13th April, 2005, Mr. O'Sullivan pointed out that the Committee had not dealt with the issues raised by him in relation to the s. 10 notice. He repeated that it was open to Mr. Nolan to retain a solicitor to take up his file and he enclosed a form of authority for this purpose which required his signature. On 22nd April, 2005, Ms. Kirwan replied. She stated that the Society was no longer proceeding on foot of the notice issued pursuant to s. 10 and that the queries raised in his correspondence were moot. She stated that if he were unwilling to hand over the file to the Law Society for the purpose set out in the correspondence, she would refer the matter back to the Committee to obtain its directions. In a further letter of 13th May, Mr. O'Sullivan noted that it did not appear that Mr. Nolan wished to appoint a solicitor to enforce the High Court costs order of 19th February, 2004. He stated that the plaintiff or his new solicitor must comply with O. 7, r. 2 of the Rules of the Superior Courts in this regard.

39. The matter was referred back to the Committee on 31st May, 2005, and it decided to seek the views of Ms. Joan O'Neill, Solicitor, as to whether or not a referral to the Disciplinary Tribunal would be successful. At a further Committee meeting on 27th July, 2005, it was decided to authorise the Society's solicitor to make whatever application was appropriate to the High Court in order to secure the release of the file to the Society.

40. When notified of this decision, Mr. O'Sullivan wrote on 23rd August, 2005, that he did not believe that the Committee had sufficient legal grounds to apply to the High Court for any relief. However, since he had no lien on Mr. Nolan's file and he had not appointed a solicitor to take up the file, Mr. O'Sullivan sent him his file on 11th August, 2005. This was confirmed to the Law Society by Mr. Nolan on 14th September, 2005. He arranged to have the file delivered to the Law Society. He noted that it had taken from 14th February, 2005 until August 2005, to deliver his file.

41. The Law Society then appointed Behan and Associates and instructed them to prepare a Bill of Costs in relation to the case on a party and party basis. A draft Bill of Costs was produced on 2nd February, 2006, which contained an allowance in respect of a professional fee for the solicitor of €23,000. Negotiations then took place between Behan and Associates and AXA Insurance on behalf of the defendant and a settlement of the plaintiff's party and party Bill of Costs was reached and recommended to Mr. Nolan. This agreement included an agreement that the instruction fee of €23,000 would be reduced to €18,500. As set out in a letter of 29th June, 2006, when the instruction fee was added with a number of other items recovered there was a total professional fee of €19,134.69, together with a further sum of €700 agreed in respect of postage. Mr. Nolan accepted the terms of this agreement by letter dated 26th July, 2006.

42. Mr. O'Sullivan was informed by the Law Society on 3rd August, 2006, of this settlement and that Mr. Nolan had now recovered his party and party costs from AXA Insurance. He was informed that the matter would be reviewed by the Complaints and Clients Relations Committee at its next meeting on 20th September, 2006. Further information was requested from Mr. O'Sullivan confirming that counsel's fees had been discharged together with outlay. By letter dated 19th September, 2006, Mr. O'Sullivan objected to the jurisdiction of the Committee to hear any matter in respect of the issues raised by Mr. Nolan.

43. At its meeting on 20th September, the Committee noted the progress made with Axa. It also noted that Mr. O'Sullivan was previously advised in writing concerning the issues which the Committee intended to consider. The Committee reviewed the papers in relation to the matter and determined that the documentation disclosed prima facie evidence of misconduct which would warrant an application to the Disciplinary Tribunal or a sworn inquiry. Mr. O'Sullivan did not attend this meeting. He was informed of the Committee's decision and that the file would be transmitted to the Society's solicitors who would be dealing with the application. He was informed that all the material upon which the Society would be relying in support of the application to the Disciplinary Tribunal would be exhibited in the Society's grounding affidavit which would, in the normal course, be furnished to him by the clerk of the Tribunal.

44. Mr. O'Sullivan sought material outlined in his letters of 19th September and 29th November, 2006, and requested that the specific allegations of wrongdoing in respect of which the jurisdiction of the Disciplinary Tribunal was invoked be set out. Judicial review proceedings were threatened in the absence of a satisfactory reply.

Disciplinary Tribunal

45. The Law Society's application to the Disciplinary Tribunal in respect of Mr. O'Sullivan was received on 26th September, 2007. The application is dated 17th September and is grounded on the affidavit of Ms. Linda Kirwan sworn 14th September, and the documents exhibited therein. The Tribunal Registrar indicated that a copy of the Society's application, affidavit and exhibits would be furnished to the respondent solicitor with a request that any observations be furnished within 28 days in the form of a responding affidavit. Mr. O'Sullivan was also requested to indicate to the Registrar whether he had any objection for reasons of bias or otherwise to any Tribunal Member included on an enclosed list being nominated to consider the allegations. If he had such objections, he was asked to indicate the reasons.

46. Mr. O'Sullivan in a reply dated 8th October, 2007, sought a history of the involvement of all or any of the solicitor members on the

list furnished, with him and in respect of any lay members, their addresses and occupations or professions and a history of their involvement, if any, with him.

47. In a reply dated 15th October, 2007, the Registrar requested a responding affidavit sworn by or on his behalf setting out his full reply to all of the allegations of misconduct set out in the applicant's grounding affidavit. It was confirmed to Mr. O'Sullivan that he had already been furnished with the information available regarding members of the Tribunal. In the absence of a replying affidavit, the registrar indicated in a letter dated 12th November, 2007, that the Tribunal would consider the documents lodged in support of the application and would decide whether or not there was a prima facie case of misconduct on his part to warrant an inquiry. Due to the heavy workload of the Tribunal, a decision was not reached by the end of 2007 in respect of the matter. However, leave to apply for judicial review was granted to Mr. O'Sullivan on 21st January, 2008, for an order of prohibition against the Disciplinary Tribunal and the Law Society.

48. On 6th October, 2009, the High Court (Edwards J.) dismissed Mr. O'Sullivan's application for judicial review following a judgment delivered on 31st July, 2009. The applicant then appealed to the Supreme Court by notice of appeal dated 20th November, 2009.

49. All issues raised by way of judicial review were fully examined and determined by the High Court and subsequently by the Supreme Court which dismissed appeal, [2009] IEHC 632 and [2012] IESC 21. The proceedings before the Disciplinary Tribunal were in abeyance until the conclusion of these proceedings though further correspondence had taken place.

The Decision

50. On the 21st March, 2013 the Tribunal determined that there was a prima facie case of misconduct against Mr. O'Sullivan based on the affidavit of Ms. Kirwan and a statement of allegations of misconduct submitted in September 2007, sufficient to warrant an inquiry by the Tribunal in respect of eleven matters. A separate division of the Tribunal comprising of Mr. Michael Tyrrell (chairperson, solicitor), Ms. Elizabeth Lacy (solicitor) and Mr. Joseph Peake (non solicitor member) held an inquiry pursuant to s. 7 as substituted by s. 17 of the Solicitor's (Amendment) Act 1994 and amended by s. 9 of the Solicitor's (Amendment) Act 2002. This inquiry commenced on the 8th of May, 2014. There were further hearings on the 8th September, 7th October, 5th November and 27th November 2014, and 20th February 2015. Mr. O'Sullivan appeared on his own behalf on each of these dates. The Tribunal resumed hearings on the 26th February, 2015 and concluded on the 31st of March but Mr. O'Sullivan did not attend either of these hearings.

51. Mr. O'Sullivan made applications that the Tribunal should recuse itself and for discovery of certain documents. The Tribunal declined to make the order for discovery sought as it was not deemed necessary for disposing fairly of the issue raised. The application that the Tribunal should recuse itself was adjourned to enable the parties to file supplemental affidavits. On the 7th October, 2014 the Tribunal extended the time for the furnishing of a supplemental affidavit by Mr. O'Sullivan. At that stage the Tribunal had a number of affidavits dated the 5th June, 15th September and 3rd October, 2014 grounding Mr. O'Sullivan's application that it should recuse itself. This application was ultimately refused by the Tribunal. On the 5th November, 2014 an application to adjourn the inquiry was granted. A further adjournment was granted on the 27th November, 2014. On the 20th February, 2015 Mr. O'Sullivan made an application to the Tribunal for discovery of two categories of documents which was refused.

52. On the 26th February, 2015 the Tribunal reconvened. On the 23rd February Mr. O'Sullivan sent the letter to the Tribunal requesting that the chairman recuse himself on the grounds that counsel who appeared for the Law Society in an interlocutory application on one occasion in the case was a member of the panel established by the Chartered Accountant's Regulatory Board and the chairman was also a member of the same panel. The Tribunal indicated to Mr. O'Sullivan that he could raise these issues at the commencement of the hearing on the 26th February. However, by email dated 26th February Mr. O'Sullivan indicated that he was "withdrawing from process". The Tribunal at the commencement of the hearing on the 26th February ruled on the matter raised by Mr. O'Sullivan in his letter of the 23rd and rejected the suggestion that the chairman should recuse himself.

53. The decision of the Disciplinary Tribunal was delivered on the 9th July, 2015. The Tribunal found beyond reasonable doubt that Mr. O'Sullivan was guilty of misconduct in respect of the following matters:

"That the respondent solicitor

(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 the 19th 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 recovered 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 on 14th 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 14th 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 14th 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...

(h) Deducted and/or appropriated monies in respect of his charges for 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 s. 68 (3) and (5) of the Act of 1999...

(m) Failed to respond in a timely manner to the Society's request to transmit his file to the Society."

54. In respect of the binding at "h" the Tribunal determined that Mr. O'Sullivan had not at any stage provided an estimate to Mr. Nolan as required by s. 68 (5) as to what costs he believed might be recoverable from the defendants in the original personal injury proceedings and in fact made no effort to recover these costs. Instead Mr. Nolan was informed that unless he agreed a solicitor client

fee with him, Mr. O'Sullivan would retain a sum equivalent to the entire costs of the action and leave Mr. Nolan to pursue the party and party element from the defendant as best he could and independently of Mr. O'Sullivan. This is what Mr. O'Sullivan did. At no stage did Mr. Nolan agree that the fees could be deducted from his damages award. The Tribunal found that he was in breach of s. 68 (3) and (5) in the manner in which he deducted or appropriated the solicitor/client charge.

55. In respect of the finding at "m" above the Tribunal determined that the Law Society sought the personal injury file from Mr. O'Sullivan in a letter dated 31st March, 2005 so that the Society could tax the party and party costs on behalf of Mr. Nolan. However, it was not until almost five months later, under threat of applying to the High Court for an order to deliver the file, that Mr. O'Sullivan finally handed it over in the last week of August, 2005. The Tribunal was satisfied that there was significant delay on his part.

56. The Tribunal found that Mr. O'Sullivan was not guilty of misconduct in respect of the matters alleged at paras. (g), (i), (k) and (l). It found in respect of para. (g) that he had not wrongfully retained settlement monies payable to Mr. Nolan without his consent or written agreement and despite requests for the transfer of the money to him. It found that strictly speaking Mr. O'Sullivan was entitled to have the costs formally drawn and to retain Mr. Nolan's settlement as a lien until the costs issue was finalised. However the Tribunal was also of the view that no reasonable solicitor would have acted in this way but as the law stood it found that he was entitled to do so.

57. In respect of the alleged misconduct at (i) the Tribunal found that Mr. O'Sullivan was not guilty of failing to take any or any appropriate steps to recover the party and party costs in respect of the complainant's personal injury action. Though it might be the norm that a solicitor would do so, there was no obligation on Mr. O'Sullivan to take that course. The Tribunal also found Mr. O'Sullivan not guilty of failure to cooperate with the Society's investigation, in particular by failing to respond appropriately and in a timely manner or at all to queries raised by the Society.

58. Mr. O'Sullivan was also found not guilty of failing to comply appropriately and in a timely manner or at all with the directions of the committee at para. (l). The Tribunal observed in respect of both (k) and (l) that there was no doubt that the respondent solicitor "placed every obstacle that he could think of in the way of the investigation carried out by the Law Society. However, the basis of that investigation was, at times, not as clear as it might have been and this opened the door to queries which might otherwise have been avoided. The respondent solicitor was entitled to raise certain queries, which he did. In the circumstances the Tribunal makes no finding of his conduct in relation to these complaints."

59. Having found that there had been misconduct by Mr. O'Sullivan in respect of the matters set out at paras. (a), (b), (c), (d), (e), (h) and (m) the Tribunal recommended that the following sanctions be imposed upon him:-

(a) That he not be permitted to practice as a sole practitioner or in partnership and that he be permitted only to practice as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years standing to be approved in advance by the Law Society of Ireland;

(b) That he pay a sum of €10,000 to the compensation fund;

(c) That he pay a sum of €6,774.51 as restitution to James Nolan, the complainant in the case;

(d) That he should pay the whole of the costs to the Law Society of Ireland including counsels' fees and witnesses' expenses to be taxed by a taxing master of the High Court in default of agreement."

60. In the course of the hearing concerning the sanction to be applied, the Law Society sought an order for costs in the amount of €8,800. This sum was confined to outlays, including counsel fees and witness expenses. It was clear that the period of time expended by the Law Society in dealing with Mr. Nolan's complaint required considerable application of resources and time. The Tribunal determined that Mr. O'Sullivan should pay the whole of the costs of the Law Society including counsel fees and witness expenses to be taxed by the Taxing Master of the High Court, in default of agreement. Having regard to the history of the case, I regard that as an entirely reasonable determination.

61. The sum of €44,850.91 was retained by Mr. O'Sullivan from the award made. Party and party costs were recovered from the defendant in the original personal injury action upon the Law Society's intervention in the amount of €35,085.40. The difference that remained between that amount and the amount retained was €9,774.51. Evidence was given by Mr. Fitzpatrick, cost accountant, that a solicitor and client bill might be between €2,000 to €3,000. It was submitted that an appropriate figure under the heading of restitution to Mr. Nolan should therefore be between €6,700 and €7,700. Having considered all of the evidence, the Disciplinary Tribunal determined that Mr. O'Sullivan should pay a sum of €6,774.51, as restitution to Mr. Nolan. I am satisfied that this recommendation was reasonable and supported by the evidence advanced during the course of the hearing and the materials presented.

62. The sum of €10,000 was directed to be paid into the compensation fund of the Law Society, a figure I regard as wholly reasonable, appropriate and proportionate in the circumstances.

63. The range of sanctions which the Disciplinary Tribunal is empowered to apply if it thinks it appropriate under s. 7(9) was considered by Bingham M.R. in the English Court of Appeal in *Bolton v. Law Society* [1994] 2 All E.R. 486 at 492, where he stated in respect of a similar statutory provision:-

"There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth."

It was also stated in *Bolton* that if a solicitor fails to discharge his duties with complete integrity, probity and trustworthiness, he/she

must expect severe sanctions to be imposed by the Solicitor's Disciplinary Tribunal. These principles have been adopted and applied in this jurisdiction (*The Law Society v Carroll & Anor*, Unreported Supreme Court, 20th May 2009) . Though lapses from the required high standard may take different forms and be of varying degrees, failures to reach the required standards still remain very serious matters for members of a profession whose reputation depends on trust. In this case, the sanctions properly extended to the payment to the compensation fund, a restitution order and costs.

64. The applicant was not guilty of misconduct in respect of a number of matters. Though the matters of which he was found guilty were very serious, they fell short of the more egregious forms of misconduct based on fraud or dishonesty that might attract the sanction of being struck off as a solicitor. It is clear from the facts of the case that Mr. O'Sullivan dealt with the issue raised by Mr. Nolan in an unreasonable and unprofessional way. It is in the context of the extensive history which I have outlined above that the Disciplinary Tribunal recommended that Mr. O'Sullivan not be permitted to operate as a sole practitioner or in partnership, and that he be permitted to practice only as an assistant solicitor in the employment or under the direct control and supervision of another solicitor of at least ten years standing to be approved in advance by the Law Society of Ireland. Whatever about having made an ill-advised initial response to Mr. Nolan's request, the failure to reflect and exercise a reasonable judgment in respect of the issue raised and the further failure and refusal to engage appropriately or reasonably with Mr. Nolan provided ample grounds for the recommendation made by the Tribunal. This was compounded by his correspondence alleging defamation and seeking withdrawal of what he perceived to be unwarranted allegations before dealing with the real issue. This was the prelude to the extremely hostile, intemperate and intimidatory correspondence that followed, culminating in the deduction of a sum from the settlement money without the consent of the client and a reasonable estimate of what was due or might be recoverable. He clearly needs supervision. He has no insight into his unfair and unreasonable behaviour towards his client. His client was left at a loss for a considerable period. He showed no regret for any of his actions nor did he offer any indication that such behaviour might not be repeated in the future. I am satisfied that the sanction recommended is entirely necessary to uphold professional standards within the profession in dealing with clients in relation to issues of costs and the other misconduct in respect of which he was found guilty. The court is, therefore, satisfied that Mr. O'Sullivan should be restrained from practising as a sole practitioner or in partnership and should only practice as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of, at least, ten years standing to be approved in advance by the Law Society of Ireland.

65. The issue of costs is central to the conduct of a solicitor's practice and is manifestly of enormous importance to clients. There is no place in the solicitor/client relationship for obfuscation as to what will be charged as a reasonable fee. If the law and practice in relation to these matters are not adhered to, confidence in the solicitor/client relationship and the profession generally would be undermined. I am entirely satisfied to adopt the recommendation of the Tribunal.

66. Mr. O'Sullivan, just prior to this application, issued a plenary summons on 16th October, 2015, seeking various declarations that ss. 3,6,7,8 and 15 of the Solicitors (Amendment) Act 1960, as substituted and amended by subsequent Acts, are invalid having regard to the provisions of the Constitution and/or are incompatible with the State's obligations under Article 6 of the European Convention on Human Rights. Some of the issues sought to be raised in these proceedings appear to be similar to issues raised in the previous proceedings referred to above, though raised in respect of an earlier stage of the disciplinary process. Declarations are also sought that the order of the Disciplinary Tribunal, in this case, is void and invalid as a result of this unconstitutionality. An order is also sought preventing the Law Society from bringing the order of the Disciplinary Tribunal before this Court, under the provisions of the Act. I am satisfied that the provisions under which this application is made carry a presumption of constitutionality and I am not satisfied that there is any basis upon which to adjourn or strike out these proceedings pending the determination of Mr. O' Sullivan's plenary proceedings in respect of the Act.

67. Though the jurisdiction of the court on this application is defined by sections 7 and 8 of the Solicitors (Amendment) Act 1960 as amended, Mr. O'Sullivan canvassed the issue of objective bias in the course of the hearing. I am not satisfied that there is any basis for the submissions made by Mr. O'Sullivan in respect of his complaints concerning the failure of the chairman of the Disciplinary Tribunal to recuse himself. Mr. O'Sullivan was given a full opportunity to vent this matter before the Tribunal which he declined by his non-attendance. Notwithstanding his non-attendance, the matter was adjudicated upon by the Tribunal when it considered the letter outlining his objections prior to entering upon the hearing of the case. Insofar as Mr. O'Sullivan's plenary proceedings related to that issue, I regard them as wholly unmeritorious. No application has been made by way of notice of motion grounded on affidavit for any relief in respect of that issue. Though Mr. O'Sullivan appeared in person and made submissions as to why the matter ought not to proceed, I am satisfied that Mr. O'Sullivan was afforded a hearing before the Disciplinary Tribunal which was in accordance with fair procedures under Article 40.3 of the Constitution and the Act.

68. Therefore, I am satisfied that the recommendations of the Disciplinary Tribunal in relation to the sanctions to be imposed upon Mr. O'Sullivan as a result of the findings of misconduct made are appropriate. I will therefore direct that the sanctions set out at paragraph 59 of this judgment be applied to Mr. O'Sullivan in their entirety and for the reasons set out above.