THE HIGH COURT

2006 NO. 21SA

IN THE MATTER OF
ANDREW WALKER SOLICITOR PRACTISING AS A PARTNER
IN
HAYES SOLICITORS, LAVERY HOUSE, EARLSFORT
TERRACE, 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 ACTS 1954 – 2002
THE LAW SOCIETY OF IRELAND

APPELLANT

AND
ANDREW WALKER

RESPONDENT

Judgment of Finnegan P. delivered on the 21st day of July 2006.

1. On the 13th October 2005 the Appellant made application to the Solicitors Disciplinary Tribunal pursuant to section 7 of the Solicitors (Amendment) Act 1960 as substituted by the Solicitors (Amendment) Act 1994 section 17 and amended by the Solicitors (Amendment) Act 2002 section 9 for an inquiry into the conduct of the Respondent. In a medical negligence action The High Court 2002 No. 15012P David Philip Plaintiff and Peter Ryan and Bon Secours Hospital Bon Secours Health System Defendants the Respondent acted for the first named Defendant a consultant neurologist and for present purposes the allegation made in that action was that the first named Defendant on the 12th July 2001 failed to advise the Plaintiff to have a further PSA test carried out in six weeks time. The Defence delivered on behalf of the Defendants on the 20th February 2003 raised a plea of contributory negligence one particular being that the Plaintiff failed to have a serum PSA measurement carried out in the Middle East in August 2001 when directed by the first named Defendant to do so. The Plaintiff's solicitors sought particulars of the direction and in response the Defendants replied that the direction was given on the 12th July 2001 at the first named Defendant's clinic and was given orally by the first named Defendant. On the 1st July 2003 the Defendants served a notice to admit facts and among the facts of which admission was sought was that on the 12th July 2001 the first named Defendant told the Plaintiff to arrange to have a PSA test carried out six weeks later and to contact the first named Defendant with the results of the same and that it was important that he should do so. Interrogatories were raised on behalf of the first named Defendant to the like effect. There was no admission by the Plaintiff of the facts and the relevant interrogatories were answered "no". The action came on for hearing before Peart J. and events were there disclosed which are dealt with in the Judgment of McCracken J. delivered on the appeal taken against the decision of Peart J. In the interest of brevity I propose incorporating that judgment in its entirety the same to be annexed to my Judgment herein. In short the first named Defendant swore an Affidavit of Discovery and discovered inter alia his clinical notes which contained an entry dated 12th July 2001 reading –

> "ROC at OPD today
>
> 4 CDEC01
>
> PSA 6/52"

2. The entry purported to be a contemporaneous account of what occurred on the date set out in the notes. The evidence at the trial was that the note above was shorthand for "removal of catheter at outpatients department today and that the Plaintiff was to have a PSA test in six weeks". On the sixth day of the hearing before Peart J. in the course of the first named Defendant's evidence in chief the trial Judge asked to see the clinical notes and when the originals were produced the first named Defendant disclosed that the entry cited was an addition made at a later date. During cross examination Counsel for the Plaintiff sought to ask the first named Defendant when was the first time that he had disclosed to anyone that he had altered the document. Counsel for the first named Defendant objected to the question on the grounds of privilege. It was however disclosed in evidence that he had disclosed to the Respondent the fact that the document had been altered approximately one week prior to the hearing. Up to that time the first named Defendant's legal advisors had been misled as had his professional witnesses. The effect was also to mislead the Plaintiff's advisors both legal and professional and to make the first named Defendant's case appear to them much stronger than it really was. A consequence of this is that the Plaintiff might have settled his action for less than full value or indeed determined not to proceed. In fact no offer to settle was made or contemplated by the Defendants. The alteration of the clinical notes came to light fortuitously through the intervention of the trial Judge.

3. Having recited the foregoing facts McCracken J. made the following comment –

> "The truly appalling feature in this case is that it appears that the Defendants' advisors were told of the alteration by the first Defendant between one and two weeks before the commencement of the action. I find it almost incomprehensible that in those circumstances they did not inform the Plaintiff's solicitors of the true facts. While a great deal of blame attaches to the first Defendant for having altered the document in the first place, he did at least disclose the facts to his own legal advisors, and in my view at least equal if not greater blame must be attributable to them. It is instructive that they did not seek to use the clinical notes in cross examination of the Plaintiff or his advisors, although they did suggest in such cross examination that he had been instructed to have a further test taken in six weeks time. They did not seek to have their own client prove the notes until they were called for by the learned trial Judge, although they knew they were being put on proof of the notes. There must be at least a suspicion that there was a deliberate attempt to keep the true facts from the Court notwithstanding that the altered document had been furnished to the Plaintiff's solicitors as genuine, and that the facts stated in the alteration had formed part of the instructions to Mr. Murphy (the Defendants' Consultant Urologist)."

4. In reading these observations it must be remembered that the Respondent was not a party to the proceeding. The comments in their totality are regulated by the word "appears". Neither the High Court nor the Supreme Court conducted an inquiry which would enable the Respondent to furnish his version of what had occurred pre trial. All that can be attributed to the observations of McCracken J. is that on such information as was before him it appeared that the Defendants' legal advisors were blameworthy.

5. Arising out of the Supreme Court Judgment the Appellant investigated the Respondent's conduct in the action. The Respondent furnished a letter to the Appellant dated 28th October 2003 in which he gave the following account. A pre trial consultation was held on the 21st October 2003 attended by the first named Defendant and the expert witnesses it was intended to call on his behalf. The Respondent felt that the first named Defendant at the consultation was a lot less certain than he had previously been as to what he told the Plaintiff on the 12th July 2001. Following this consultation the Respondent discussed the position with senior counsel retained and he was directed to send a letter to the Plaintiff's solicitors clarifying exactly what the first named Defendant would say he had told the Plaintiff on the 12th July 2001. The letter was drafted in consultation with senior counsel. The relevant passage in the draft letter reads as follows –

> "Our client does, however, make the case that your client failed to follow the instructions given to him on the 12th July 2001 to have a repeat PSA test in six weeks and to advise him of the result."

6. On the 24th October 2003 the Respondent wrote to the first named Defendants indemnifiers. In this the Respondent disclosed the following in relation to the first named Defendant –

> "I spoke to him about the notes themselves and in particular that the final line of the note of the 12th July 2001 was on the same line as his signature whereas in the case of most of the other notes the signature was underneath the note. He then told me that the final line of the note was probably added by him at the December consultation."

7. An amended draft letter to be sent to the Plaintiff's solicitors was prepared the relevant part reading as follows –

> "Our client cannot recall at this stage whether he advised your client on the 12th July 2001 to have a PSA test done in six weeks. In this regard we have been informed by our client that PSA 6/52 appearing in his clinical notes was entered in the notes in December 2002."

8. The Respondent spoke to Senior Counsel and informed him of the altered position and it was agreed that the Plaintiff's solicitor should be put on notice of the same. The Respondent determined that he could not send the draft letter of 24th October 2003 without first informing the first named Defendant and his insurer. The first named Defendant was not available to discuss the matter with the Respondent on 24th October 2003 which was the Friday of a bank holiday weekend and accordingly the Respondent determined that the letter should be given to the Plaintiff's solicitors on the morning of the hearing the following Tuesday. On that morning the Plaintiff gave his permission for the Plaintiff's solicitor to be informed by the letter. However Senior Counsel advised that there was no obligation to inform the Plaintiff's solicitor of the alteration to the notes provided that in defending the case it was not sought to rely on them or to prove the notes or cross examine the Plaintiff on foot of them. The Respondent accepted this advice and accordingly the alteration to the notes was not disclosed either to the Plaintiff's solicitor or to the Court. The Plaintiff was not cross examined on the notes nor were they referred to during the presentation of his case. In his Affidavit to the Solicitors Disciplinary Tribunal the Respondent deposes that it was his intention that the correct position would be drawn to the attention of the Court during the trial and that this would be done during the evidence of the first named Defendant. He never intended that the trial Judge be misled. In fact the position emerged as a result of questions asked by the trial Judge. He accepted that he made an error of judgment and that the letter should have been handed to the Plaintiff's solicitors on the morning of the trial. He relied on the advices of Senior Counsel.

Misconduct

9. "Misconduct" is defined in the Solicitors (Amendment) Act 1960 section 3 as amended by the Solicitors (Amendment) Act 1994 section 24. For present purposes the relevant part of the definition is that at (d) – conduct tending to bring the solicitors' profession into disrepute

A solicitor's duty to the Court

10. There are many reported cases dealing with counsel's duty to the Court: there are fewer cases dealing with a solicitor's duty but I apprehend that duty to be the same.

11. *In R v Daniel O'Connell & Ors 7 Irish Law Reports (1844)* Crampton J. considered the duty of counsel in the following terms –

> "This Court in which we sit is a temple of justice; and the advocate at the bar, as well as the judge upon the bench, are equally ministers in that temple. The object of all equally should be the attainment of justice ….

12. Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouthpiece of his client; he told us that the speech of the counsel was to be taken as that of the client; and then seemed to conclude that the client only was answerable for its language and sentiments.

13. Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons – he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly mistake the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

14. In *Rondel –v- Worsley* 1967 1QB at page 502 Denning M.R. said of the barrister's duty –

> "He must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can" because his duty is not only to his client. He has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth."

15. Again at page 517 Salmon L.J. refers with approval to *R v O'Connell & Ors.*

16. *Meek v Fleming* 1961 3 All ER 148 was an action for false imprisonment and assault. The Defendant had been reduced in rank from Chief Inspector to Station Sergeant on a disciplinary charge and this was known to the Defendant's legal advisors who deliberately concealed this fact from the Court at the hearing of the action. The Court held that where a party deliberately misled the Court in a material matter for example by concealing a matter of vital significance even though that matter related to the party's credibility and

did not relate directly to an issue in the action a judgment obtained should be set aside. In his judgment Holroyd Pearce L.J. cited the following from Lord McMillan on The Ethics of Advocacy at p. 17 -

> "In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to the State and a duty to himself."

17. He went on to hold that Counsel to the Defendant had paid insufficient regard to the duty which he owed to the Court and to the plaintiff and his advisors.

18. In *Tombling v Universal Bulb Company Limited* 1951 2 The Times LR 289 a witness was brought to court from prison accompanied by a warder in plain clothes. This fact was not known to the Judge or to the Defendant's advisors. Counsel for the Plaintiff asked the witness if he lived at 96 Church Road to which the witness answered "yes". Counsel then asked him questions which indicated that he had in the past held a responsible position. Denning L.J. expressed the opinion that if the questions had been asked knowingly to mislead the Court it would be improper but in the circumstances of the case he was satisfied that it was not done to mislead. Singleton L.J. however described the case as "near the line".

19. The duty was considered in a number of Australian cases.

20. In *Re Gruzman Ex parte The Prothonotary 1968 State Reports* (NSW 70) the case concerned an application for payment of costs out of an infant settlement. The application was made by Mr. Gruzman who did not disclose an agreement as to his own fees which had been entered into with the next friend. The gravamen of the complaint against him was that he failed on the application to disclose documents which if disclosed would have led to the application being refused. In the course of its judgment the Court at p. 323 said –

> "Frankness should be one of the main attributes of a barrister. It is his duty not to keep back from the Court any information which ought to be before it, and he must in no way mislead the Court by stating facts which are untrue, or mislead the Judges as to the true facts, or knowingly permit a client to attempt to deceive the Court."

21. *Giannarelli & Ors v Wraith & Ors* 1987 – 1988 165 CLR 543 was a negligence action against a barrister. In the course of his judgment Mason C.J. at p. 556 said –

> "The performance by Counsel of his paramount duty to the Court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the Court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case…
>
> It is not that a barrister's duty to the Court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the Court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the Court epitomises the fact that the course of litigation depends on the exercise by Counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice…
>
> Our system of justice as administered by the Court has proceeded on the footing that, in general, the litigant will be represented by a lawyer, not being a mere agent for the litigant, who exercises an independent judgment."

22. In *Unioil International Pty Ltd & Ors v Deloitte Touche Tohmatsu & Anor* (1997) 18 WAR 190. Counsel for the Plaintiff sought an order that the first Defendant should pay the Plaintiff's costs on an indemnity basis on the ground that the Defence put it to the Plaintiffs to prove many allegations (including the incorporation of the Plaintiff) and denied many other allegations which were not genuinely in dispute which should have been admitted from the inception. At p. 193 Ipp J. said –

> "Traditionally lawyers owe a duty of honesty and candour to the Court. It is the general duty of lawyers not to mislead the Court by stating facts which are untrue, or mislead the Judge as to the true facts, or conceal from the Court facts which ought to be drawn to the Judge's attention, or knowingly permit a client to deceive the Court: see *Rondel v Worsley* (1969) 1AC 191 at 227. A trend towards a stringent duty of disclosure has become discernible: *Vernon v Bosley* (No. 2) (1997) 1 All ER 614. Further, in modern times, there is an overriding duty on lawyers to assist in the prompt and economical disposal of litigation: see *Giannarelli v Wraith* (1988) 165 CLR 543 at 556; A*shmore v Corporation of Lloyds* (1992) 1WLR 446 at 453. In my view, the traditional requirement of honesty and candour on the part of lawyers and the modern duty to reduce unnecessary issues and costs, are inimical to the practice of denying or putting parties to the proof of facts which according to the instructions in the lawyer's possession should be admitted.

23. Pleadings perform an important function, apart from defining and crystallising the issues. They should be a mechanism for the purpose of arriving at the true issues in dispute. More than one hundred years ago, for example, it was said that Counsel's signature on a pleading was a "voucher that the case is not a mere fiction": see *Great Australian Goldmining Company v Martin* (1877) 5 Ch. D.1 at 10. If Counsel's signature on a pleading is to carry that imprimatur, Counsel will have to be astute to assure that the pleading admits the facts that should be admitted."

24. In *Kyle v Legal Practitioners Complaints Committee* (1999) WASCA 115 the allegation against Counsel was that he had attempted to mislead the Court into the belief that a Ms Beyer had executed certain documents and that he failed to disclose to the Court a particular fact which was known to him at the time by stating or inferring a contrary position. In fact he had known seven days prior to the trial that Ms Beyer had not signed the deed in question but deliberately created the impression at least until the second day of the trial that the defence would proceed on the basis that Ms Beyer had indeed signed the deed. At disciplinary proceedings it was accepted that Counsel had acted in the expectation that the true position would be revealed in the course of the case but had formed the opinion that it would be in his client's interest to conceal the true position until Ms Beyer gave evidence. It was accepted that he did not intend by deceit or dishonesty to secure a decision from the Court on a false factual basis. The observations of the Supreme Court of Western Australia are of particular interest in the circumstances of the present case having regard to the general similarity of the circumstances underlying each. Ipp J. first stated the basic precept that lawyers owe a duty of honesty and candour to the Court and have a general duty not to mislead the Court by stating facts which are untrue, or mislead the Judge as to the true facts, or conceal from the Court facts which ought to be drawn to the Judge's attention, or knowingly permit a client to deceive the Court. He went on to say –

> "Legal practitioners owe this duty when performing any act in the course of practising their profession, not only when

they are making oral submissions to the Court. Lawyers may not, consistently with their ethical duties and duties to the Court, prepare and file Affidavits known by them to be perjured, whether the Affidavits are made by their clients or other witnesses: *Myers v Ellman* (1940) AC 282. In England, the ethical rule is that lawyers should not produce witness statements that they know to be false or where they know that the witness does not believe the statement to be true in all respects. Further, if, after filing a witness statement, a lawyer is put on inquiry as to the truth of the facts stated in the statement, the lawyer should, where practicable, check whether those facts are true. If the lawyer then discovers that the witness statement which has been served is incorrect the lawyer must inform the other parties immediately, Chancery Guide: February 28th 1995 Par 3.7(7). In my view this rule reflects the duties that lawyers in this country owe to the Court.

In the same way lawyers who file pleadings containing allegations which, to their knowledge are false, will breach their ethical duties and duties to the Court. Pleadings are intended to be a mechanism for the purpose of arriving at the true issues in dispute as well as defining and crystallising the issues: *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (No. 2). There is no justification for knowingly making false allegations of fact in a pleading. A lawyer who does so will ordinarily be guilty of unprofessional conduct. If, after making a factual allegation in a pleading that is before the Court (and thereby leading the Court to believe that the allegation in question is part of his or her case), a lawyer discovers that the allegation is false, the lawyer will mislead the Court if he or she fails to disclose the true position: see *Vernon v Bosley* (No. 2) at 688."

25. He went on to record that the Appellant having opened the case of his clients well knowing that the Defence contained false statements of fact canvassed the issues that arose in consequence of the Defence and did nothing to correct the misleading impression that had been created. He did this in full knowledge that at least until the truth was disclosed when Ms Beyer gave evidence the Court would be under the false impression that Ms Beyer should she give evidence would testify that she had signed the deed. In his testimony to the Tribunal the Appellant acknowledged that he had acted in this way to gain a perceived tactical advantage as to disclose the true facts would have damaged Mr. Beyer's credibility.

26. Ipp J. went on to say –

"There was some discussion concerning the fact that the Appellant only intended to create a false impression for a short period, that is until Mr. Beyer was asked in evidence in chief how the deed came to be signed. The point is, however, that once a practitioner has breached his duty by knowingly misleading the Court for a perceived tactical advantage, it matters not (for the purposes of determining whether professional misconduct has been committed) for what period of time the Court was misled. Professional misconduct has then been established. Of course, if the Court was misled only for a relatively short period of time this may be relevant to the punishment that follows: but it is immaterial as to whether the practitioner is guilty of misconduct."

27. In his judgment Parker J. said –

"The duty of Counsel not to mislead the Court in any respect must be observed without regard to the interests of the Counsel or of those whom the Counsel represents. No instructions of a client, no degree of concern for the client's interest, can override the duty which Counsel owes to the Court in this respect. At heart, the justification for this duty, and the reason for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by Counsel is essential to maintain and justify the confidence which every Court rightly and necessarily puts in all Counsel who appear before it."

28. In relation to the particular facts of the case Parker J. said -

"Nevertheless, to deliberately mislead the Court, even though it was foreseen as merely a temporary misleading, and even though that course may have been decided upon as a matter of erroneous professional judgment, involves such a clear and conscious failure to observe the duty which the Appellant owed to the Court that I am unable to see that any other conclusion was open to the Tribunal. The view was well open to the Tribunal that the conduct of the Appellant to a substantial degree fell short of the standard of professional conduct observed and approved by members of the profession of good repute and competence in accordance with the duty which every Counsel must observe in such a situation."

29. *Vernon v Bosley* (No. 2) 1997 1 All ER 614 is relevant not just in relation to the duty owed to the Court but also the duty owed to his opponent with which I deal hereafter. The facts of the case are that the Plaintiff brought an action claiming damages in respect of nervous shock. There was an appeal to the Court of Appeal. After the appeal was heard but before the final order was drawn up the Defendant was informed anonymously that in family law proceedings in the County Court contrary evidence had been adduced on behalf of the Defendant in that in those proceedings he had claimed to be substantially if not fully recovered. The Plaintiff's advisors were aware of the situation but did not inform the Court or the Appeal Court or the Defendant's advisors. Stuart-Smith L.J. in the course of his judgment said that it is the duty of every litigant not to mislead the Court or his opponent. This duty is not discharged simply by accepting the advice of his legal advisors. While he can rely upon such advice as negativing any mens rea so that he would not be guilty of a criminal offence if that advice is incorrect he is responsible for his conduct *vis-à-vis* the other party to the civil litigation. Thus the duty of the litigant it was held is co-extensive with that of counsel: it would seem to follow from this that the solicitor's duty can be no less. Again it follows that the solicitor's duty is a personal one requiring independent judgment and the fact that counsel gives incorrect advice while relevant to the seriousness of a solicitor's conduct would not prevent such conduct amounting to misconduct. He went on to deal with the course which counsel should adopt where having advised his client that disclosure should be made the client is unwilling to follow that advice. If the client refuses to accept the advice it is not as a rule for counsel to make the disclosure himself but he can no longer continue to act.

30. In his judgment in that case Thorpe L.J. agreed with Stuart-Smith L.J. except in relation to the course which counsel should pursue. At page 654 he said –

"The only difference of opinion I hold from Stuart-Smith L.J. is as to counsel's obligation if his client demurs in the communication of necessary material to the Judge. If counsel's duty goes no further than requiring his withdrawal from the case there seems to me to be a remaining risk of injustice. Of course such an event leads to speculation. But more than one inference is there to be drawn. I would hold that in those circumstances counsel has a duty to disclose the relevant material to his opponent and, unless there be agreement between the parties otherwise, to the Judge."

31. The last case to which I wish to refer is *Myers v Ellman* 1940 A.C. 283. This case concerned the conduct of a law clerk who had conduct of litigation on behalf of his employers a firm of solicitors. The relevant parts of the head note reads as follows –

> "An Order for Discovery requires the client to give information in writing and on oath of all documents which are or have been in his possession or power, whether he is bound to produce them or not, but as a client cannot be expected to realise the whole scope of that obligation without the aid and advice of a solicitor, the latter has a peculiar duty as an officer of the court carefully to investigate the position, and, as far as possible, see that the order is complied with. The solicitor cannot simply allow the client to make whatever Affidavit or documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information which he is entitled to acquire, of if the client insists on swearing an Affidavit which the solicitor knows to be imperfect the solicitor's duty is to withdraw from the case. A solicitor who is innocently put upon to file an Affidavit by his client which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record."

32. In the course of his judgment Viscount Maugham referred to the judgment of Hatherley L.C. in In *Re Jones* (1870) L.R. 6 Ch 497 in which the Lord Chancellor said –

> "I think it the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned."

33. He went on to say at p. 293 –

> "However guilty they (the Defendants) may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue Affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if his client should persist in omitting relevant documents from his Affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured Affidavit upon the file.

34. A further observation should be made here. Suppose that in such a case the client swears an Affidavit of documents which discloses nothing relating to the frauds alleged in the Statement of Claim and suppose that the solicitor has previously given his client full and proper advice in the matter but has no good reason to suppose that the Affidavit is untrue, it may be asked what else ought the most punctilious solicitor to do? My answer is nothing at that time. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original Affidavit by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the Plaintiff, and to the Court, is to inform his client that he, the solicitor, must inform the Plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the Plaintiff failing in the action owing to his client's false Affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an Affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record."

A Solicitor's Duty to the Opponent

35. It is the duty of every litigant not to mislead his opponent. He does not discharge that duty simply by accepting the advice of his legal advisors: see *Vernon v Bosley* (No. 2) 1997 1 All ER at p. 629 and at 654. See also the quote from Hatherley L.C. in In *Re Jones* (1870) L.R. 6 Ch. 497 above. This was cited with approval by Viscount Maugham in *Myers v Ellman* 1940 A.C. at 290 where he said –

> "I cannot find that the proposition laid down by Lord Hatherley has ever been doubted and the cases cited in Hallsbury certainly tend to support it. It is hardly necessary to point out that Lord Hatherley's phrase implying the solicitor's duty to parties for whom he is not acting is founded on his duty to the Court."

36. The importance of that duty in the attainment of justice is illustrated by the facts in this case. Faced with the plea in the Defence, the reply to the Notice for Particulars, the Notice to Admit Facts, the interrogatories and the clinical notes as discovered the Plaintiff might well have been daunted: had an offer been made he might well have accepted the same or indeed conscious of the cost of failing in his case he might have discontinued the same.

Propositions Derived from the Cases

37. The following propositions can be derived from the cases –

> 1. A solicitor has a duty to the Court not to mislead the Court. The duty is paramount to the duty which he owes to his client. *Rondell v Worsley.*
>
> 2. Counsel and litigants have a like duty.
>
> 3. A solicitor must not permit his client to mislead the Court. *Unioil International Pty Ltd & Ors v Deloitte Touche Tohmatsu & Anor, Myers v Ellman*.
>
> 4 Where the Court has been misled the solicitor has a duty with the consent of his client to rectify the situation at the earliest possible moment. *Kyle v Legal Practitioners Complaints Committee.*
>
> 5. If the client will not consent to him rectifying the situation he must forthwith withdraw from the case *Kyle v Legal Practitioners Complaints Committee*, *Vernon v Bosley* (No. 2).
>
> 6. It may be that in addition he has a duty to inform his opponent of the situation. *Vernon v Bosley* (No. 2) per Thorpe L.J.
>
> 7. Unless his opponent consents to his not so doing he may have a duty to inform the Court of the situation. *Vernon v Bosley* (No. 2) per Thorpe L.J.
>
> 8. The duty is a personal one in respect of which the solicitor is required to exercise an independent judgment. He is not excused by the circumstance that he acts on the advice of Counsel although this is a factor relevant in determining the degree of culpability and the appropriate penalty.
>
> 9. The Courts recognise that the circumstances in which issues of this nature arise may not afford sufficient time for a

solicitor to give full consideration to the course which he should adopt and errors of judgment may occur. Lord MacMillan continued the passage which I have earlier quoted from The Ethics of Advocacy as follows –

> "To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat"
>
> However where the breach of duty is so serious this will likely be relevant to the penalty only and not to the issue of misconduct. *Vernon v Bosley, Kyle v Legal Practitioners Complaints Committee* per Parker L.J.

10. While duties are most frequently dealt with in cases as relating to advocacy they arise equally in all dealings with the Court.

The Regulatory Scheme

38. The Regulatory Scheme is contained in the Solicitors (Amendment) Act 1960 section 7 as substituted by the Solicitors (Amendment) Act 1994 section 17 as amended by section 9 of the Solicitors (Amendment) Act 2002 and insofar as it is relevant to this appeal the Act provides as follows –

> "7(1) An Application by a person (not being a person who has made a complaint to an independent adjudicator under section 15 of the Solicitors (Amendment) Act 1994 about the conduct of a solicitor referred to in the application) or by the Society for an inquiry into the conduct of a solicitor on the ground of alleged misconduct shall, subject to the provisions of this Act, be made to and heard by the Disciplinary Tribunal in accordance with rules made under section 16 of this Act.
>
> (2)(a) Where an application in relation to a solicitor (in this section referred to as the 'respondent solicitor') is duly made under this section, the Disciplinary Tribunal shall -
>
> (i) where the Society is not the applicant, inform the Society as soon as practicable of the receipt of the application, and
>
> (ii) before deciding whether there is a prima facie case for inquiry:
>
> (I) send a copy of the application and of any accompanying documents to the respondent solicitor, and
>
> (II) request that any observations which he or she may wish to make on the application be supplied to the Disciplinary Tribunal within a specified period.
>
> (b) If, after receipt of the respondent solicitor's observations or on the expiration
>
> of the specified period, the Disciplinary Tribunal find that there is no prima facie case for inquiry, they shall so inform the applicant, the Society (where the Society is not the applicant) and the respondent solicitor and take no further action in relation to the application.
>
> (12A) The Society or any person who has made an application under subsection (1) of this section may appeal to the High Court within the period specified in subsection (12B) of this section –
>
> (a) against a finding of the Disciplinary Tribunal that there is no prima facie case
>
> for inquiry into the conduct of the respondent solicitor."
>
> (12B) An appeal against a finding of the Disciplinary Tribunal under subsection (12A) of this section shall be made within 21 days of the receipt by the appellant of notification in writing of the finding."

39. The Solicitors Disciplinary Tribunal Rules insofar as relevant provide as follows. Rule 5 requires the application to be in writing and prescribes a form. Rule 6 requires a copy of the application, grounding Affidavit and exhibits to be furnished to the Respondent solicitor with a request for his observations in the form of a responding Affidavit. Rule 7 and 8 provide for the furnishing to the Tribunal of additional Affidavits. Rule 9 provides as follows –

> "9(a) The decision by the Tribunal as to whether or not there is a prima facie case of misconduct on the part of the respondent solicitor for inquiry by the Tribunal should be made on the basis of and upon due consideration of the affidavit or affidavits (in any documents exhibited thereto) furnished to the Tribunal Registrar by or on behalf of the applicant and by or on behalf of the respondent solicitor. Where, upon due consideration of each affidavit (and any documents exhibited thereto) furnished by or on behalf of the applicant and by or on behalf of the respondent solicitor, the Tribunal find that there is no *prima facie* case of misconduct on the part of the respondent solicitor for inquiry the Tribunal shall so inform in writing the applicant, the respondent solicitor and (where the Society is not the applicant) the Society of its decision and the reason or reasons therefor and shall take no further action in relation to the application.
>
> (b) Where, upon due consideration of each affidavit (and any documents exhibited thereto) furnished by or on behalf of the applicant and by or on behalf of the respondent solicitor, the Tribunal find that there is a prima facie case of misconduct on the part of the respondent solicitor for inquiry, the Tribunal shall proceed to hold an inquiry."

40. The task of the Solicitors Disciplinary Tribunal in considering an application for the purposes of the Solicitors (Amendment) Act 1960 section 7(2) as substituted by the Solicitors (Amendment) Act 1994 section 17 and amended by the Solicitors (Amendment) Act 2002 section 9 is to determine whether on the application a prima facie case is disclosed. In the context of an interlocutory injunction in *Esso Petroleum Company (Ireland) Limited v Fogarty* (1965) IR 539 O'Dalaigh C.J. held that the onus on the party seeking an injunction was on the balance of probability. "*Prima facie*" both here and in the United Kingdom was used in this sense at that time. In

American Cyanamid Company v Ethicon Limited (1975) AC 397 the House of Lords held that the onus required the Applicant to show that there is a serious question to be tried and rejected the proposition that the Court was required to evaluate the chances of success in the action of an Applicant for an interlocutory injunction on the basis that if on such evaluation the chances were 50% or less the Court could not grant the same. In short prior to *Campus Oil v Minister for Industry and Energy* (1983) IR 88 it would appear that in this context a prima facie case meant one in which the prospects of success exceeded 50%.

41. In another context however the Courts have held that something less constitutes a prima facie case. In *Armah v Government of Ghana* (1966) 2 All ER 1006 the Court was considering the Fugitive Offenders Act 1881. In the course of his judgment Edmund Davies J. said –

> "But it is settled law that these words require no more than that a prima facie case must be established, and by that is meant only that there must be such evidence that, if it be uncontradicted at the trial, a reasonably minded jury may (not probably will) convict on it."

42. In *R v General Medical Council* ex p Toth (2000) 1 WLR 2209 the Court

43. was concerned with the procedures of the General Medical Council which involved a consideration of a complaint with a view to deciding whether the complaint "ought to proceed". The procedures provided that the doctor should have an opportunity to comment on the complaint and that the Preliminary Proceedings Committee consider the complaint and the doctor's response and make a decision without the complainant having an opportunity to respond to the doctor's comments. In the course of his judgment Lightman J. said –

> "The P.P.C. may examine whether the complaint has any real prospect of being established, and may itself conduct an investigation into its prospects, and may refuse to refer if satisfied that the real prospect is not present, but it must do so with the utmost caution bearing in mind the one sided nature of its procedures under the Rules which provide that, whilst the practitioner is afforded access to the complaint and able to respond to it, the complainant has no right of access to or to make an informed reply to that response, and the limited material likely to be available before the P.P.C. compared to that available before the Professional Conduct Committee. It is not its role to resolve conflicts of evidence. There may be circumstances which entitle it to hold that the complaint should not proceed for other reasons, but the P.P.C. must bear in mind its limited (filtering) role and must balance regard for the interests of the practitioner against the interests of the complainant and the public and bear in mind the need for the re-assurance of the complainant and the public that complaints are fully and properly investigated and that there is no cover-up. In the case of P.P.C. (as in the case of the screener), any doubt should be resolved in favour of the investigation proceeding."

44. In *Bhandari v Advocates' Committee* (1956) All ER 742 the Privy Council considered the meaning of "*prima facie* case" in the Advocates' Ordinance 1949 in Kenya. Before the Advocates' Committee evidence was given in support of the complaint and on behalf of the Advocate. In the course of its judgment the Privy Council said –

> "They do not consider that the words "prima facie case" in s. 9(3)(iii) of the Advocates' Ordinance 1949, have the effect of assimilating the functions of the Committee to those of committing Magistrates or in any way relieving them of the duty of determining the facts. It is clear that the Committee, in fact, so acted."

45. In the light of the authorities which I mention I am satisfied that the function of the Tribunal is to consider all matters on Affidavit before it. While at this stage of the procedures the Tribunal is not the fact finding body it may for the purposes of deciding on whether a prima facie case is disclosed make findings of fact where the facts are clear for example where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the Tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry any doubt being resolved in favour of an inquiry being held.

46. The purpose of this stage of the regulatory process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of.

47. As to standard of proof at an inquiry I have regard to the dicta in *O'Laoire v Medical Council* The Supreme Court 25th July 1997. The standard is the criminal standard of proof beyond reasonable doubt. Notwithstanding reservations expressed by O'Flaherty J. and Murphy J. this remains and will remain so unless and until the Supreme Court directs otherwise. This is a factor to which regard may be had in determining whether a prima facie case is disclosed.

Disposition

48. Arising out of the judgment of the Supreme Court and the criticism therein contained of the first named Defendant's legal advisors the Appellant sought the Respondent comments on that criticism. The Respondent's comments were received in a letter dated 10th March 2005. The Appellant's Registrar's Committee considered the matter at a meeting on the 4th May 2005 and invited the Respondent to attend the next meeting of the Committee. The Respondent attended before the Committee on the 31st May 2005 with Counsel who made submissions on his behalf. The Committee decided that an application should be made to the Solicitors Disciplinary Tribunal.

49. On the 21st February 2006 the Solicitors Disciplinary Tribunal considered the Appellant's application, the grounding Affidavit to the same and the documents exhibited thereto and the Affidavit of the Respondent and the documents exhibited thereto. The complaint in the application is as follows –

> "It is submitted that the solicitor is guilty of misconduct in that he failed to disclose a material fact about the alteration of clinical notes prior to the commencement of the hearing in the case of David Philp v Peter Ryan & Ors in a timely manner or at all, such material fact only being revealed to the Court and to the Plaintiff as a result of queries raised by the presiding Judge during the examination in chief of the first named Defendant on the 6th November 2003."

50. The decision of the Committee on the application was that it did not disclose a *prima facie* case of misconduct on the part of the Respondent. The reason given for the decision is as follows –

> "By reason of the fact that this allegation has been comprehensively rebutted by the Respondent solicitor in his replying Affidavit sworn on the 9th December 2005 and the documents exhibited thereto."

51. For the purposes of this appeal I have considered the papers which were before the Solicitors Disciplinary Tribunal and I have also

had the benefit of the most helpful and detailed submissions by Counsel for both the Appellant and the Respondent.

52. There is no dispute as to the facts. The Court was misled. The Plaintiff and his advisors were misled. This situation continued until the Plaintiff's case had concluded and the first named Defendant was giving evidence when due to a fortuitous intervention by the Judge the true position was discovered. This occurred notwithstanding that the first named Defendant and his indemnifier had authorised disclosure of the alteration of the clinical notes. In these circumstances there was no justification for disclosure not being made to the Plaintiff's advisors prior to the case being opened. The Respondent concedes that he made an error of judgment. The advice of Senior Counsel was undoubtedly a factor contributing to this as the Respondent's first reaction on discovering the alteration of the notes, appropriately, was that this should be disclosed. However disclosure was not made at the earliest possible moment. Applying the principles derived from the cases to the facts which are not in dispute I am satisfied that the Solicitors Disciplinary Tribunal were in error. A *prima facie* case is disclosed on the papers which were before the Tribunal. The Appellant's case is not frivolous nor vexatious nor misconceived nor without substance. The duty in issue in the application is of such vital importance to the administration of justice and to the confidence of the public in the Courts and in the solicitors' profession and to the well deserved reputation of the profession for honesty and integrity that it is in the public interest that an inquiry be held.

53. I allow the appeal and direct that the Solicitors Disciplinary Tribunal hold an inquiry on foot of the application.