[THE HIGH COURT

[2004 No. 19212 P]

BETWEEN

COLM MURPHY

PLAINTIFF

AND

THE LAW SOCIETY OF IRELAND

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of July, 2019.

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1. Introduction

1. The plaintiff, Mr. Colm Murphy, brings this action for damages against the Law Society of Ireland *("the Society").* He was subjected to regulatory and disciplinary procedures and ultimately, on the application of the defendant, was struck from the Roll of Solicitors by order of the President of the High Court made on 18th May, 2009. He alleges that the defendant, a statutory authority charged with the regulation of the solicitors' profession in Ireland, acted unlawfully in its dealings with him on matters of regulation and discipline. It is alleged that the defendant abused its powers, was guilty of misfeasance in public office, was responsible for slanderous comments made of and concerning him and was in breach of its duty of care and duty of confidentiality.

2. Mr. Murphy was born on 8th September, 1959 and resides in Kenmare, Co. Kerry. He qualified as a solicitor and was enrolled in 1986. Initially he practised in Limerick before opening a practice in Kenmare in 1988. He described to the Court how he developed a successful practice and by 1996, he employed two solicitors, an apprentice and five other staff. When he commenced practising in Kenmare, there were three other solicitors' practices operating on a part time basis from the town. It is Mr. Murphy's belief that he took a considerable amount of business from one of those firms, and at least one solicitor connected with one of those firms, [REDACTED], was instrumental in the initiation of complaints against him.

3. Mr. Murphy renewed his practicing certificate on an annual basis up to 2005. It is his case that he decided not to renew the certificate for that year and that the treatment which he received from the Society was instrumental in this decision. The Society maintains that at a meeting of the Registrar's Committee on 23rd February, 2005, a decision was taken to recommend that it not be renewed. It is contended that it was only then that Mr. Murphy decided not to pursue the application.

4. Mr. Murphy maintains that the Society, as his representative and regulatory body, was negligent and careless in its consideration, assessment and prosecution of disciplinary complaints and proceedings against him. He maintains that the Society was motivated by malice, that it instituted and prosecuted disciplinary proceedings in an unlawful manner, for an ulterior and improper purpose and in a way which was designed to cause him damage. The matters in respect of which complaint is made span a considerable period of time, some of which relate to occurrences in the 1990s.

5. While the principal causes of actions are based on misfeasance in public office and negligence, there are three separate claims for defamation and a claim of breach of confidence. The first in time is an allegation that an investigating accountant of the Society, Mr. O'Dowd, was responsible for spreading rumours about Mr. Murphy in 2002. It is alleged that Mr. O'Dowd informed a solicitor, Mr. Coakley, that Mr. Murphy was in trouble with the Society because of the manner in which certain payments were handled and/or in respect of understated consideration on transactions; and that he was likely to be struck off the Roll of Solicitors. Mr. Murphy also alleges that this constituted a breach of the Society's duty of confidentiality. The second concerns a conversation which Mr.

Simon Murphy, a solicitor who at different times, was President of the Society, Chairman of the Compensation Fund Committee, and Chairman of the Complaints and Client Relations Committee had with his client, a Mr. Keating, in 2002. The third concerns the distribution of compensation fund claim forms by the Society in 2007 following the closure of his practice. Mr. Murphy is particularly critical of the wording employed in those forms which invited clients to provide details of dishonesty on the part of a solicitor. Fourth, it is alleged that the Director General of the Society, Mr. Ken Murphy, communicated with, and made comments to members of the media in a manner which was unlawful, breached the sub judice rule and in breach of confidence. It is alleged that this also constitutes misfeasance in public office and abuse of power.

6. It is agreed that liability should be addressed and that if the plaintiff is successful, damages should be considered at a later hearing.

2. The pleadings

7. The proceedings were instituted by plenary summons on 28th October, 2004. A significant number of complaints made by Mr. Murphy relate to issues which occurred after that time. By order of Kelly P. dated 11th December, 2017, and on consent of the parties, it was directed that the claim be limited to matters pleaded in an amended statement of claim delivered on 1st July, 2011, and pleaded in updated particulars of claim furnished on 23rd October, 2017. An earlier statement of claim delivered on 22nd June, 2009 was treated as being spent and to have no bearing on the trial. It was further directed that no application in respect of certain proceedings between the parties should be heard prior to the determination of the within proceedings. These include proceedings instituted in 2006, *The Law Society of Ireland v. Colm Murphy* 2006/271SP (referred to as *"the s. 18 proceedings"* and/or, where relevant, "*the attachment and committal proceedings*") and in 2009, *The Law Society [of Ireland] v. Colm Murphy* 2009/12SA (which resulted in Mr. Murphy's name being struck from the Roll of Solicitors on 18th May, 2009 – hereinafter referred to as "*the strike off proceedings*"). The ruling of Kelly P. also applies to proceedings relating to complaints made by Mr. Murphy against officers of the Society.

8. In the amended statement of claim of 1st July, 2011, it is pleaded that the Society engaged in repeated and orchestrated attempts to subject Mr. Murphy to unwarranted and unnecessary disciplinary proceedings, and to have his name removed from the Roll of Solicitors. It is alleged that in so doing, the Society considered complaints which were false and untrue and which it knew or ought to have known to be so, that it failed to deal with complaints in a fair and proper manner, that it negligently and/or maliciously withheld material information from the Solicitor's Disciplinary Tribunal *("the Tribunal")* and the High Court; and that it negligently or deliberately misled the Tribunal and the High Court in a material way. It is pleaded that the Society was guilty of misfeasance in public office and an abuse of process in failing to apply proper procedures, failing to adhere to statutory provisions and accepting and dealing with complaints against Mr. Murphy from persons who had no authority to make them. Allegations of wrongdoing are made in connection with a finding of misconduct and the failure to provide financial

assistance relating to his takeover of a practice formerly run by Mr. Tim Healy. Mr. Murphy also makes complaint about the manner in which an investigating accountant appointed by the Society, Mr. O'Dowd, conducted that investigation. This investigation took place during May, 2001 and Mr. Murphy maintains that records and information were sought by the Society to which they were not entitled when conducting such an investigation. The manner of the Society's investigation was challenged in Kennedy v. *Incorporated Law Society (No. 3*) [2001] IESC 35, [2002] 2 I.R. 458, a decision delivered in April, 2001, and which had been reported in the media in May, 2001, at or near the time of the investigation. It was held that the Society had exceeded its powers in the conduct of accounts investigations in seeking details of complaints made by clients. He alleges that he wrote to the Society expressing his concerns, that the Society delayed in replying and that complaints which he made against Mr. O'Dowd were not properly investigated.

9. Mr. Murphy also pleads he was notified by telephone on 16th October, 2002 that the Society was threatening an application to the High Court directing that he preserve and make available his practice files to Mr. Sheehan, another investigating accountant of the Society. He alleges that he was informed that the application would not be made if he confirmed that the files would be provided and that despite providing such confirmation, the Society nevertheless applied *ex parte* for a court order. Mr. Murphy believes that this was disparaging of him. It is also alleged that on the making of this application, the Society gave an undertaking as to damages, something which it was not entitled to do. He also alleges that the Society treated complaints which he made in a manner which was different to those which were made against him.

10. The principal matters and complaints made against Mr. Murphy addressed in evidence include:-

    (a) The [REDACTED]complaint (made on 30th May, 2002);
    (b) the Healy matter (1999 to 2000);
    (c) the [REDACTED] & [REDACTED] complaint (16th July, 1999 and 30th November, 1999);
    (d) the [REDACTED]complaint (12th November, 2002);
    (e) the [REDACTED] complaint (30th June, 2003);
    (f) the [REDACTED] complaint (6th October, 2004); and
    (g) the [REDACTED] complaint (19th January, 2007).

11. A further matter of significant contention concerns an undertaking which Mr. Murphy is stated to have given to the President of the High Court on 31st July 2003, in the context of the [REDACTED] complaint, relating to his attendance at meetings of the Society's committees. He maintains that the Society misrepresented the making of this undertaking which in turn caused or contributed in a substantial way to the removal of his name from the Roll of Solicitors. It is contended that in April, 2009 during the application to Johnson P. in the strike off proceedings, the Society placed significant emphasis on the breach of this alleged undertaking. He is heavily critical of the role played by Ms. Linda

Kirwan, the head of the Society's Complaints and Client Relations section, because of an averment she made in an affidavit sworn by her on 11th June, 2004 and persisted with for some considerable time thereafter, that she was present in court when the undertaking was given. It transpires that this averment was incorrect. She was not in court.

12. The claims are denied by the Society. It is pleaded that the proceedings constitute an impermissible collateral attack on valid and subsisting orders which have not been appealed or otherwise set aside, are not actionable and are statute barred.

13. On 28th May, 2009, Mr. Simon Murphy was joined as a co-defendant to the proceedings. It was alleged that he had defamed the plaintiff by informing a mutual client that the plaintiff was in trouble with the Society for handling under the counter payments, would face sanctions and would possibly be struck off. The application was opposed. On 27th March, 2015 the Supreme Court made an order striking out the proceedings on the basis that they were statute barred against Mr. Simon Murphy.

3. The Regulatory Code

14. The manner in which complaints against solicitors are investigated is addressed in Part III of the Solicitors (Amendment) Act 1994. The statutory framework was helpfully summarised in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 by McKechnie J. at para. 59 et seq. as follows:-

> *"…in Part III of the Act of 1994 as amended, the Society is entrusted with the power to investigate complaints regarding inadequate legal services (s. 8) and the charging of excessive fees (s. 9). It does so by way of delegation, provided for by Council Regulations and authorised by s. 73(1) of the Solicitors Act 1954: carrying out this function through one of the standing committees of the council namely, the complaints and client relations committee which was formerly known as the 'Registrar's Committee'. The obligation of that Committee, when determining a complaint under either section, is in the first instance to try and resolve the matter by agreement between client and solicitor. With allegations of misconduct this requirement does not arise. If resolution cannot be found, the Committee can make a determination or issue a direction which may impact on the solicitor in question not only financially, but also on her good name and professional reputation. The degree so affected will of course in some measure be reflected by the terms of the determination or direction, but any admonishment by the professional body must surely be quite damaging; not only in respect of the relationship between the concerned client and the solicitor but also because such a finding becomes a matter of record and in certain circumstances a matter of full public disclosure. So even though an adverse decision under either ss. 8 or 9 of the Act of 1994, as amended, cannot be equated with a finding of misconduct, nonetheless, such will always to some extent, become and remain a stain on one's reputation. Consequently, any determination by the Committee followed by*

sanction must be looked upon with a good deal of concern and regarded as a matter of heightened significance.

60. However, such procedure is not, at least generally, to be seen in the same light as an investigation by the disciplinary Tribunal of an allegation of misconduct. This is recognised by the statutory code in that such allegations are investigated, not by the Society but by a body independent of it, namely the Solicitors Disciplinary Tribunal whose members, following consultation, are appointed by the President of the High Court under s. 6 of the Solicitors (Amendment) Act 1960 as substituted by s. 16 of the Act of 1994 and later amended by s. 8 of the Solicitors (Amendment) Act 2002 and ss. 35 and 36 of the Civil Law (Miscellaneous Provisions) Act 2008. Moreover, to recognise the seriousness of misconduct proceedings, there is an express rule that any appeal from a finding of the disciplinary Tribunal in that regard shall be by way of full rehearing, to include all of the evidence unless otherwise agreed: that rule reads:-

> *'... the President [of the High Court] shall direct that the appeal shall proceed as a full rehearing of the evidence laid before the Disciplinary Tribunal, unless a less than full rehearing is contended for by the respondent solicitor and concurred in by the Society and ... unless agreed to by the President' (O. 53, r. 12(h)(i), RSC. See also s. 7 of the Solicitors (Amendment) Act 1960 as amended).*

61. This differentiation in treatment as provided for by the express wording of the varying provisions is fully justified and whilst the appellant points to the absence of a similar right or entitlement in respect of appeals from either a s. 8 or a s. 9 finding, she has no good grounds of complaint in this regard."

15. Section 18 of the Solicitors (Amendment) Act 1994, is also relevant. It provides:-

"(1) Where, on the application of the Society, it is shown to the satisfaction of the High Court—

> *(a) that a solicitor or any other person has contravened, is contravening or is likely to contravene any provision of the Solicitors Acts, 1954 to 2002, or*
>
> *(b) that a solicitor has contravened, is contravening or is likely to contravene any provision of regulations under those Acts,*

the Court may by order prohibit the solicitor or other person concerned from contravening that provision, notwithstanding that any such contravention may constitute an offence and notwithstanding section 77 of the Principal Act.

(2) An order under subsection (1) of this section may contain such provisions of a consequential nature as the Court considers appropriate."

16. Section 18 was amended by s. 43 of the Civil Law (Miscellaneous Provisions) Act 2008 which came into operation on 20th July, 2008. The following has been added:-

"18A.— (1) Where, on application by the Society in circumstances where the matter is not otherwise before the High Court, it is shown that a solicitor or any other person has refused, neglected or otherwise failed, without reasonable cause, to comply in whole or in part with an order made by the Solicitors Disciplinary Tribunal, the Court may by order direct the solicitor or other person, as the case may be, to comply in whole or in part with the order of the Solicitors Disciplinary Tribunal.

(2) An application by the Society pursuant to subsection (1) shall be on notice to the solicitor or other person concerned unless the High Court otherwise orders.

(3) An order of the High Court under subsection (1) may contain such provisions of a consequential nature as the Court considers appropriate."

Mr. Murphy stressed that this amendment post-dated the s. 18 proceedings brought against him, which were concluded by June, 2008. He asserts that this supports his contention that under the original section there was no power to seek to enforce an order of the Tribunal and that the section was used against him in an improper manner.

17. Also of relevance is s. 14 of the Act of 1994, pursuant to which Mr. Sheehan was appointed and application was made to court in October, 2002. This empowers an authorised person to attend at a solicitors' office where it appears to the Society, whether as a result of a complaint or otherwise, that it is necessary, for the purpose of investigating alleged misconduct by a solicitor, to attend with or without prior notice. The authorised person may require the solicitor or clerk to make documents available for inspection and in the event that he or she fails or refuses to do so, to make application to the High Court for an order requiring the solicitor to do so.

4. The practical implementation of the regulatory code

18. Mr. John Elliot is the Director of Regulation of the Society, a position which he has held since 2004. He is also the Registrar of Solicitors and is described as the most senior executive in the direction and administration of the statutory regulatory functions of the Society. He described in evidence that the regulatory system operates to protect clients, solicitors and members of the public; and assists in the maintenance of the reputation of the solicitors' profession. It thus contributes towards the maintenance of confidence in the legal system.

19. The main objective of the regulatory functions of the Society is the protection of clients. This protection is achieved primarily through the issuing of practicing certificates on an annual basis. It is also fulfilled by the handling and resolution of complaints against solicitors, the enforcement of the solicitors' accounts regulations, the enforcement of professional indemnity insurance regulations and the prosecution of misconduct before the Tribunal. The Society also fulfils this function through the making of applications for protective orders to the High Court and through the operation of a fund to compensate

clients for monies lost through dishonesty of solicitors. The work of the staff of the Regulation Department, which carries out the day to day regulatory functions of the Society, is conducted under the oversight of regulatory committees. Decisions made by such committees include referring a solicitor to the Tribunal for an inquiry into alleged misconduct.

20. At the relevant time, the Regulation Department was divided into five sections, Complaints and Client Relations, Financial Regulation, Registration, Practice Closures, and Regulatory Litigation. Mr. Elliot explained that when complaints are made about solicitors, the primary objective of the Society is to achieve a reasonable and practical resolution if possible. This is largely effected by the staff of the Complaints and Client Relations section, with more serious and difficult complaints being referred to the Complaints and Client Relations Committee, previously known as the Registrar's Committee.

21. The Tribunal, which is wholly independent of the Society, has three principal functions. First, it considers applications by solicitors to have their names removed from the Roll of Solicitors. Second, it considers applications for and holds inquiries where a *prima facie* case of solicitor misconduct has been disclosed. Third, it considers applications and holds inquiries, where a *prima facie* case of misconduct has been disclosed in respect of an apprentice solicitor. The President of the High Court is responsible for the appointment of persons to the Tribunal, and the Tribunal is composed of divisions of three persons, with two solicitors and one lay member in each division. The chairman is a solicitor. The referred matter is initially processed by a division of the Tribunal based on a consideration of affidavit evidence. If a *prima facie* finding of misconduct is made, the matter then proceeds to a full hearing. Once made, an application cannot be withdrawn without the leave of the Tribunal. The burden of proof rests on the Society with the standard of proof in criminal cases, i.e. beyond a reasonable doubt, applying. Mr. Elliot informed the Court that the policy of the Society is to publish findings of the Tribunal and orders of the High Court relating to disciplinary findings in the Law Society *Gazette* and on the Society's website.

22. When Mr. Elliott was appointed, Ms. Joan O'Neill was the most experienced regulatory solicitor in the Society. She retired on health grounds in 2015. Mr. Elliott described Ms. O'Neill as being the leading specialist solicitor in Ireland in the field of the regulation of solicitors. He was her line manager and he informed the Court that he never had any doubt about the propriety of relying on her advice and experience. He had no reason to doubt her skill, ability and dedication to her work. They worked closely on cases. Most of their meetings were informal, *ad hoc* and face to face. The contents of such meetings, however, might not be documented.

23. Ms. Kirwan explained that when a complaint is made it is investigated by a solicitor. He or she will enter into correspondence with the complainant and the complained solicitor. Where there is a failure to correspond, where the matter cannot be resolved, or where the issue is deemed to be serious, the matter is placed before the Complaints and Client

Relations Committee. This Committee's role is to decide whether there is *prima facie* evidence of misconduct which warrants a sworn inquiry before the Tribunal. When this happens, the Society's complaint file is transferred to a regulatory litigation section. A solicitor is then assigned to prepare the Society's application to the Tribunal. This is done on affidavit. After the exchange of affidavits, the Tribunal decides whether there is *prima facie* evidence of misconduct and if it is so satisfied a sworn inquiry is held at which witnesses are called and may be cross-examined. The Tribunal then decides whether the solicitor is guilty of misconduct and whether the matter should be referred to the President of the High Court for sanction.

5. Complaints history

24. Mr. Murphy has had a considerable number of complaints made against him during his career. However, he is particularly critical of the manner in which the Society has presented his complaints history. He maintains that it has been presented in a prejudicial manner and in an attempt to paint him in a poor light. He states that many of the complaints are historical and a significant number were resolved. His evidence is that between 1986 and 1998 there were no complaints against him. He stated that between 1998 and 2003 there were three complaints, and between 2003 and 2005, there were a further five complaints, four of which were made by [REDACTED] or his clients.

25. Ms. Kirwan's evidence is that between 1994 and 2015, 48 complaints were received by the Society concerning Mr. Murphy. While not all were upheld, it is her view that multiple complaints are generally an indication of an underlying or systemic problem within a practice. That there was such a volume of complaints meant that complainants were not able to resolve matters with Mr. Murphy and felt that they had to come to the Society. That certain complaints were resolved did not mean that no significance was to be attached to them. She does not accept that the Society had a hidden agenda against Mr. Murphy. The complaints were unsolicited and were made by third parties. It was suggested to her that by not outlining the outcome of the complaints – such as being settled, resolved or withdrawn – an unfair presentation has been made. Ms. Kirwan does not accept this and states that the list of complaints was included without qualification. Although, at the time of giving evidence, she was in a position to deal with the manner of the resolution of those complaints, she stated that when preparing her statement of evidence in December, 2017, she did not have sufficient time to complete that task. She accepted that many of the complaints related to, or concerned, legacy matters relating to the Healy practice which had been taken over by Mr. Murphy. Under cross-examination, she highlighted that the intervention of the Society contributed to establishing communication between the parties, thereby assisting in the resolution of some disputes. There were different reasons why complaints were resolved, some of which resulted in costs sanctions.

26. Ms. Kirwan also observed that much of the information provided by Mr. Murphy to this Court was not furnished to the Society at the time the complaints were being investigated. She referred to what she described as his persistent failure and/or delay in replying to correspondence when complaints were being investigated. Her belief is that

had Mr. Murphy engaged with the Society and attended meetings of the Registrar's Committee before reference was made to the Tribunal, matters might have been dealt with differently.

27. Mr. Elliot informed the Court that the plaintiff's allegation that the Society was "out to get him" is utterly misconceived. The Society deals with a significant number of complaints relating to its members. Between 2003 and 2009 it received 12,483 complaints in respect of which it launched 6,117 inquiries. 400 complaints were referred to the Tribunal. He informed the Court that many of the 48 complaints made against the plaintiff were resolved upon recommendation of the Society, the Registrar's Committee or the Complaints and Client Relations Committee.

28. The Court was provided with a schedule of complaints. Between 1986 and June, 2005 when Mr. Murphy closed his practice, the Society received 37 complaints and a further 11 were received thereafter. Mr. Elliot does not accept that complaints made against Mr. Murphy were investigated in a manner which was different to those involving other solicitors. His evidence is that in certain cases Mr. Murphy's refusal to comply with the directions of the Registrar's Committee, resulted in referrals and applications to the Tribunal in which the Society sought findings of misconduct. While the plaintiff has referred to complaints resulting in censure and/or finding of misconduct against him, Mr. Elliot stresses several complaints were resolved to the complainant's satisfaction following recommendations from either the investigating solicitor or the Registrar's Committee. Certain complaints resulted in the imposition of financial sanctions. Mr. Elliot's evidence is that although his situation is not unique, Mr. Murphy is one of a relatively small number of solicitors against whom, what he describes as, a large volume of complaints has been made during his legal career.

6. The complaints in context

29. The strike off proceedings arose in the context of a complaint made by the [REDACTED] and the subsequent referral by the Tribunal of the plaintiff to the High Court in January, 2009. At the hearing before the President of the High Court on 21st April, 2009, when addressing Mr. Murphy's disciplinary history, counsel for the Society referred at length to the s. 18 proceedings and the matters to which they related. Mr. Murphy maintains that reference to those matters significantly influenced the Court's decision to strike his name off the Roll of Solicitors. He also contends that undue emphasis was placed on the alleged undertaking of 31st July, 2003.

30. The Society emphasises admissions made by and on behalf of Mr. Murphy in his affidavit sworn in response to the application in the strike off proceedings and through his counsel at that hearing. However, he informed this Court that while he made such admissions, he had taken that course on the advice of his legal team, his family, his General Practitioner and his psychiatrist. Mr. Murphy does not take issue with those advices but believes that any such advice, and the admissions and apologies made, must be viewed in the light of evidence which has subsequently emerged, including evidence casting doubt on, or undermining, evidence which was relied on in the proceedings taken against him. He

maintains that the conduct of the Society left him with no choice but to make the admissions, and if anything, the admissions show the extreme nature of the oppressive conduct and the Society's desire then, and now, to deprive him of any chance of a fair hearing or justice. The significance placed by Mr. Murphy on the undertaking is clear from para. 189 of his statement of evidence:-

"My biggest obstacle in this case and the main reason for the decision to fall on the mercy of the court was that the Society, solely on the testimony of Linda Kirwan, had proved about the undertaking and the breach of it. I was very frustrated as I knew this was not correct but the advice, legal, medical and from my family was that I had no chance of overcoming this evidence."

7. The role of the Court

31. It is a fundamental contention of the defendant that these proceedings amount to an impermissible collateral challenge to orders which have been made, including the orders made on the s. 18 application and on the strike off application. These retain their validity and have not been set aside or overturned. The plaintiff maintains, however, that he is not in these proceedings attempting to mount such challenge to those orders. In this regard it is of importance to note that applications by Mr. Murphy to re-enter proceedings have been deferred pending the outcome of these proceedings. Considering these stated positions, a certain predicament aries as to how the Court should address issues concerning the manner in which complaints were dealt with, the motivation for disciplinary proceedings and rulings and more importantly the effect of those orders. If the defendant is correct in its assertion that the proceedings constitute an impermissible collateral challenge, then what business does the Court have in expressing a view on those determined matters or the process by which orders were obtained? This is particularly relevant to that part of the claim based on the tort of misfeasance in public office. It has been agreed, however, that the Court ought to consider the evidence adduced in respect of the Society's handling of complaints, even if it is concluded that the plaintiff's case based on misfeasance in public office amounts to an impermissible collateral challenge. While this may have been the agreed procedure, should the defendant be correct in its submission on collateral attack, then the Court's further role or observations must of necessity be limited. Further, it cannot be the function of this Court to rehear, revisit or redetermine the many complaints in these proceedings.

8. Complaints made by Mr. Murphy

32. Mr. Murphy made a total of fifteen complaints against officers of the Society to the Tribunal between late 2009 and early 2011. All have been rejected by the Tribunal which determined that there was no *prima facie* evidence of misconduct. Of the 15 complaints, eight were made against Ms. O'Neill, five against Ms. Kirwan, one against Mr. Ken Murphy, and one against Ms. Dara McMahon, a solicitor who was employed by the Society.

33. The five complaints of misconduct against Ms. Kirwan arise from her averment regarding the undertaking and in respect of evidence given by her to the Tribunal on 15th April,

2008 and in an affidavit sworn on 10th February, 2010. Another relates to an affidavit sworn by her in respect of a complaint to the Tribunal in the [REDACTED] matter that Mr. Murphy had registered land in his own name, when it was held in trust. Mr. Murphy's complaints against Ms. O'Neill largely relate to her involvement in the s. 18 proceedings, particularly concerning the manner in which court orders were obtained, and as to how certain complaints were handled by her. The complaint made against Ms. Dara McMahon concerns the handling of the [REDACTED] matter. The complaint made against Mr. Ken Murphy relates to communications and the provision of information to the media regarding ongoing issues between the parties.

34. Mr. Murphy has appealed 12 of the 15 decisions of the Tribunal. They have been listed for hearing before the then President of the High Court since March, 2011 and those hearings have been deferred pending the decision of the Court in these proceedings.

35. Mr. Elliot informed the Court that Mr. Murphy also filed a complaint against junior counsel with the Barristers' Professional Conduct Tribunal, relating to which the manner in which he represented the Society. I have been informed that the complaint was dismissed.

9. The strike-off proceedings

36. These proceedings arose in the context of the Tribunal's consideration of Mr. Murphy's response to a complaint made by [REDACTED], solicitor, on behalf of the [REDACTED]. Mr. Murphy had been referred by the Society to the Tribunal on a charge of misconduct because of his failure to comply with the directions of the Registrar's Committee. This complaint is addressed in greater detail below.

37. On 13th January, 2009, the Tribunal decided that Mr. Murphy should be referred to the High Court and recommended:-

> *"1) That the respondent solicitor is not a fit person to be a member of the solicitor's profession;*
>
> *2) That the name of the respondent solicitor be struck off the Roll of Solicitors;*
>
> *3) That the respondent solicitor pays the whole of the costs of the Law Society of Ireland to be taxed in default of agreement."*

38. On 12th February, 2009 the Society brought the application. On 23rd February, 2009, Mr. Murphy issued a motion appealing against the Tribunal decision. Both matters were heard together.

39. The application came before the High Court on 21st April, 2009. Mr. Murphy was represented by solicitor and counsel. It is fair to categorise the plea made on his behalf as one whereby he threw himself at the mercy of the court. In so doing, both on affidavit and through his counsel at the hearing he openly acknowledged what he described as his shortfallings. He *wholeheartedly* accepted the findings of fact made by the Tribunal but counsel stressed that monies had not gone missing.

40. Perhaps in taking this course of action, Mr. Murphy and his lawyers hoped that a more lenient approach might have been taken by the Society in the presentation of evidence, and by the court when making its decision. If he or they did harbour such beliefs or hopes, then they must have been gravely disappointed at the outcome and what has been described by Mr. Murphy's counsel in this case, Mr. Craven S.C., as a "*no holds barred*" response by the Society to his plea in mitigation. Having considered the transcript of that hearing, it may be said that Mr. Murphy's disciplinary history was outlined with vigour and determination. The Society left the President of the High Court in no doubt of its wish that Mr. Murphy ought not be allowed practice as a solicitor. Counsel posed a rhetorical question as to how many findings of misconduct could be "*racked up*" before a solicitor faces the ultimate sanction. Seven previous findings were discussed. The [REDACTED] matter was the eighth.

9.1 The matters considered in the strike off proceedings

41. The disciplinary findings to which reference was included went back to September, 1999 and arose in the context of the takeover by Mr. Murphy of a practice previously owned by a Mr. Tim Healy. Mr. Murphy was censured by the Tribunal and ordered to pay the Society's costs for failing to file an accountant's report in a timely fashion and for failing to file a report and in a letter dated 16th June, 1998 he indicated that the outstanding accountant's report would be filed the following week.

42. The second was a decision of the Tribunal on 13th October, 1999. This concerned a complaint of delay in registration of title made by the Mr. and Mrs. [REDACTED]. Mr. Murphy was ordered to pay a sum of £750 to the Compensation Fund and to pay the Society's costs. This related to a failure to reply to correspondence from the Society, failure to register clients' title deeds in a timely manner or at all, failure to attend the Registrar's Committee and failure to comply with a statutory notice. Mr. Murphy explains that the delay arose from a mapping difficulty and in obtaining necessary death certificates. The matter had been originally handled by an assistant solicitor in his office. Mr. Murphy believes that there was no misconduct on his part; that he moved as quickly as he could to rectify matters and that no loss was suffered.

43. The third was a finding of the Tribunal in the context of a complaint by a Mr. [REDACTED] of 2nd November, 1999 in relation to the sale of property and the closing of that sale on the basis of an undertaking. Mr. Murphy was censured and fined £2,500 plus costs. Counsel described this complaint as one involving "*a shopping list of misconduct*". It included a failure to comply with undertakings or to respond to communications from the Society. Mr. Murphy also failed to attend a meeting of the Registrar's Committee. He explains that he had not been dealing with the sale but became aware of a mapping problem and did his best to resolve it. He accepted that a delay had occurred in his office and accepted responsibility for it. He further explains that at this time he was very focused on dealing with the Healy matter.

44. The fourth concerned an order made by the Tribunal on 21st October, 2003 in respect of the [REDACTED] matter. Mr. Murphy was censured, advised and admonished and

ordered to pay €4,000 to the Compensation Fund for failing to comply with the direction of the Registrar's Committee made on 29th May, 2001.

45. The fifth was an order made by the Tribunal on 4th November, 2004, in relation to the complaint made by a Mr. [REDACTED]. Mr. Murphy was censured and ordered to pay €5,000 to the Compensation Fund. He was also ordered to pay restitution of €1,000 to Mr. [REDACTED], to hand over the client's file to [REDACTED] and to pay costs. This concerned a failure to furnish documents including title documents and a failure to reply to letters from the client's new solicitor. Mr. Murphy was also charged with failing to reply to correspondence from the Society.

46. The sixth complaint to which reference was made resulted in the plaintiff being censured by the Tribunal on 10th July, 2007. This concerned the [REDACTED] complaint. Mr. Murphy was directed to pay €10,000 to the Compensation Fund and to pay costs. The misconduct alleged was that of failing to reply to correspondence, ignoring requests for certain actions to be taken and causing the solicitor taking over the file to make an application to have a grant of probate revoked, resulting in the delay in the administration of an estate.

47. The seventh complaint, concerned a complaint made by a [REDACTED], and resulted in Mr. Murphy being censured by the Tribunal and being directed to pay €4,000 to the Compensation Fund and the Society's costs. This order was also made on 10th July, 2007. On this occasion, the misconduct alleged was that Mr. Murphy had failed to comply with directions of the Registrar's Committee and had failed to reply to correspondence from the Society.

9.2 The submissions in the strike off proceedings

48. In his submission to the President of the High Court, counsel for the Society addressed the plea in mitigation and in particular a psychiatric report which was relied upon by the plaintiff. The report referenced a belief held by Mr. Murphy that *"there are people in the Society out to get him"*. Counsel described this as an unusual plea in mitigation, characterising it as: "*I have a psychiatric condition and in effect it is caused by the Law Society itself and that is my plea in mitigation".* In addressing the [REDACTED] complaint, counsel submitted that Mr. Murphy's evidence altered through the hearing and had further altered in his position in affidavits sworn in response to the strike off application.

49. The undertaking alleged to have been given to the court in July, 2003 was addressed. Counsel stated that Mr. Murphy had failed to attend a meeting of the Registrar's Committee notwithstanding his undertaking to do so. The significance of the undertaking in the context of counsel's presentation is highlighted in his address to the President of the High Court in the following passage from the transcript:-

> *"It is a matter for you as to how serious that is if as a solicitor and an officer of the Court you permit a barrister to give an undertaking on your behalf that you will attend*

meetings and then you don't attend them and in effect you breach that undertaking.

One of the things solicitors have to do is give undertakings, it is one of the key issues of trust. Here was a solicitor who the Society would suggest from the evidence has very little conception of what an undertaking means."

50. Counsel also highlighted what he described as the shifting of position adopted by Mr. Murphy concerning whether he had given the undertaking. He submitted:-

"If one takes one of the allegations, which was this, through his counsel he had given an undertaking to the former President of the High Court that he would attend meetings of the Society's committees, because one of the key problems here was that he wasn't turning up. He failed to turn up notwithstanding his counsel had given that undertaking to the President of the High Court. Mr. Murphy's answer to that changed, his first one was, in effect: 'I am not bound by an undertaking given by my barrister'. Secondly, he said: 'It is not really an undertaking because my barrister said that I would turn up at meetings and the word would means that I wasn't necessarily bound to turn up at them, this was simply a hypothetical I would turn up at meetings'.

Thirdly, when that didn't work his position shifted and he said: 'I am not bound by what my barrister says in Court because it didn't appear in the Court Order'. In other words the Order drawn up by the President didn't formally record an undertaking and therefore in effect he said: 'Sure, it doesn't matter what my barrister says to the President if it doesn't appear in the Court Order I am not bound by it.'"

51. Reference was also made to Mr. Murphy's approach to his obligations under the Solicitors Accounts Regulations. Referring to the [REDACTED] complaint, counsel suggested that former clients who made complaints were furnished with a bill for fees and the one client with whom Mr. Murphy remained friendly did not receive such a bill, despite the fact that all had been in partnership. Counsel described this as an *"extraordinary moment in the hearing"*. It was submitted to the President that Mr. Murphy's conduct showed contempt for the Society, contempt for his obligations to his client and to [REDACTED], their solicitor.

52. [REDACTED] had given evidence to the Tribunal that he had written 43 letters and Mr. Murphy had refused to hand the file to him or to provide copy documents to him. Emphasis was placed on what Finnegan P. had said when the matter was before him in July, 2003. He had informed Mr. Murphy that regardless of whatever difficulties he had with [REDACTED] or the [REDACTED], that they needed their papers and he was to *"get them to them*" and warned Mr. Murphy of the consequences of non-cooperation. On 22nd September, 2003, Mr. Murphy's brother and solicitor, Mr. Conor Murphy, wrote on his behalf requesting an adjournment. He stated that if consent to an adjournment was not confirmed, the matter would have to be referred to counsel to see if an injunction was

necessary to protect the interests of Colm Murphy in his absence. This position was described by counsel as "*chaos*" – on the one hand Mr. Murphy's barrister was telling the President that he would give an undertaking to attend, while on the other hand the Society was being threatened with an injunction if it attempted to go ahead with the meeting. Counsel described Mr. Murphy's conduct as bringing the profession into disrepute in the most outrageous way and emphasised that notwithstanding this, when faced with allegations of misconduct his position was to first abuse the Society and then say he would sue it.

53. Counsel also referred to other matters, including Mr. Murphy's failure to account for rent from a soccer club. It was submitted that Mr. Murphy collected rent, did not inform others that he had done so, pocketed the fees and then sent a bill for the rent. Counsel also referred to the issuing of these proceedings by Mr. Murphy and submitted that in his affidavit before the President, he purported to make a plea in mitigation and thereafter purport to explain that the findings were incorrect. In conclusion, counsel referred to what he described as the disgraceful manner in which Mr. Murphy had treated the former President of the High Court and the Society.

54. Mr. Murphy's counsel submitted in response that it was perfectly clear that the Society was seeking revenge against his client and referred to the publication in the *Phoenix* magazine.

10. The section 18 proceedings

55. Mr. Murphy maintains that what happened in the s. 18 application had a consequential effect on the decision of the President of the High Court to strike him from the Roll of Solicitors. These also featured in the strike off application. These proceedings were instituted on 10th August, 2006, a day before an auction was due to take place in County Cork in respect of the sale of lands in which it was suspected that Mr. Murphy was acting. Mr. Murphy had retired from practice by 30th June, 2005 and did not have a practising certificate. He maintains that the s. 18 proceedings were grounded principally on a wrongful allegation of his involvement in the auction and on other unfounded allegations that he was improperly using headed notepaper and that he had inappropriately distributed monies from a former client account.

56. The Society had concerns that Mr. Murphy continued to hold himself out as a practising solicitor. It was believed, as a result of the placement of an advertisement in the *Irish Examiner* on 3rd June, 2006, that he was the solicitor with carriage of the sale. This was incorrect. The solicitor dealing with the sale was the plaintiff's brother, Mr. Conor Murphy. An unidentified representative of the defendant attended at the auction, as did a process server on behalf of the Tribunal. The Society's position is that while these matters did form part of the reasoning behind the s. 18 proceedings, a considerable number of other issues formed the basis of the application. These included non-compliance with orders of the Registrar's Committee and Tribunal in relation to complaints which had been made by [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. A significant additional reason for the proceedings was Mr. Murphy's failure to correspond

with it. The proceedings were grounded on an affidavit sworn by Mr. Martin Clohessy on 10th August, 2006.

57. It is evident that long before there was any suspicion of Mr. Murphy's involvement in the auction, Ms. O'Neill was keen to make an application to court. In May, 2005, she sought the advice of counsel as to whether s. 18 was the appropriate mechanism for so doing. In support of his contention that the s. 18 procedure was utilised for an improper purpose and was motivated by malice against him, reliance is placed by Mr. Murphy on emails and communications of which he has since become aware.

58. On 30th May, 2005, Ms. O'Neill addressed the following email to Ms. Kirwan:-

"Linda,

Re your memo in relation to Colm Murphy's failure to comply with an order of the Tribunal, I am of the view we should take section 18 proceedings against him, not only in relation to this but the [REDACTED] *case where he has failed to comply with a direction of the CCRC, and in fact any other case where he has failed to comply with an order or direction. In the case of* [REDACTED] *part of the order was that Mr. Murphy hand over* [REDACTED]*'s file to* [REDACTED] *to complete* [REDACTED] *title. He hasn't done this either and I take a very serious view of his conduct and attitude to the Society and DT … My reasoning is that Mr. Murphy by his conduct is bringing into disrepute both the standing of the Society as a statutory regulatory body and the DT. It makes a laughing stock of both institutions, (especially in the eyes of the public) if a solicitor can ignore with impunity such directions and orders. So these are the instructions I would like to get."*

Later that day Ms. O'Neill sent the following email to Ms. Kirwan:-

"Linda,

I will check with Paul McDermott first but I think implicit in breaching a direction of the CCRC – to refund fees etc and which direction becomes completely binding on a solicitor and where such non compliance is in fact a criminal offence then I think it is a breach of Section 11 of the 1994 Act. As I recall it, all the DT cases have their genesis in direction being made by the CCRC which led the DT to make the findings and orders it did. It may be that the way we deal with this aspect is to invoke the very wide general powers of the High Court under Section 38(1) of the 1994 Act to enable the Society to secure the rights of clients of a solicitor, the public interest etc. All you have to do to invoke this section is to get any application before the High Court. It's well worth a try I believe. But I'll talk to Paul first and perhaps get a letter of advice from him for the Committee."

59. For the sake of completeness, s. 38(1) of the Solicitors (Amendment) Act 1994 provides as follows:-

"(1) On any application coming before it under the Solicitors Acts, 1954 to 1994, the High Court may make such order as it thinks fit in relation to a solicitor, including any order in relation to the production, delivery, inspection, disposal or destruction of any document or documents in the possession or control or within the procurement of that solicitor or any clerk or servant or any former clerk or servant of that solicitor or his firm, to protect or secure the rights of a client or clients of that solicitor or the public interest or the interests of the solicitors' profession as a whole, or to enable the Society to discharge their functions under those Acts, without prejudice to the determination of any issue that may be, or may later come, before the Court as to the conduct of the solicitor named in such order.

(2) The High Court, on the hearing of any application or appeal coming before it under the Solicitors Acts, 1954 to 1994, may make such order as to costs as the Court thinks fit."

60. The advices of counsel were obtained and on 24th August, 2005 Ms. O'Neill requested Ms. Kirwan to obtain instructions from the Complaints and Client Relations Committee to initiate proceedings. This request was considered at a meeting of that committee on 7th September, 2005. It authorised the Society to bring the appropriate application before the President of the High Court. The issue was also considered at a meeting of the Regulation of Practice Committee on 8th September, 2005. That committee had concerns that Mr. Murphy may have been practising illegally and it also decided that a s. 18 application ought to be made and gave directions to do so.

61. Mr. Elliot's evidence is that between the making of the decision to bring the proceedings in September, 2005 and the institution of those proceedings the following August, a number of additional matters had come to the attention of the Society regarding the retention of client files, suspicion that he was practising without a certificate, the operation of the client account and the advertisement in the *Irish Examiner* newspaper on 3rd June, 2006.

62. It is instructive to consider the special indorsement of claim in the s. 18 proceedings in which it was pleaded that the Society had received information and documentation indicating that Mr. Murphy was acting as a solicitor in the sale of property, was holding client files and monies, was in breach of the Solicitors Accounts Regulations and the Professional Indemnity Insurance Regulations. Thus, while it was clearly pleaded that the plaintiff was acting as a solicitor in the sale of property, a considerable number of other reliefs were sought. The orders sought were:-

(a) an order prohibiting Mr. Murphy from acting as a solicitor;
(b) an order prohibiting Mr. Murphy from in any way holding himself out as a solicitor entitled to practice;
(c) an order directing him to deliver all stationery of whatever type bearing the letter heading of his firm Colm Murphy and Co;

(d) an order directing him to deliver to a nominee of the Society all of his files and other documents relating to his practice;

(e) an order directing him to remove his name from all client account mandates;

(f) an order directing him to deliver to a nominee of the Society all files, deeds and monies relating to the estates and premises of [REDACTED] and [REDACTED] in Rathmore;

(g) an order directing him to deliver all files of Mr. and Mrs. O'Donoghue, Ms. O'Sullivan and [REDACTED];

(h) an order directing him to comply with an order of the Tribunal in connection with the complaint of [REDACTED];

(i) an order directing him to comply with an order of the Tribunal in respect of the [REDACTED] complaint, which order was made on 23rd November, 2004;

(j) an order directing him to comply with the direction of the Complaints and Client Relations Committee of 4th November, 2003 directing the refunding of fees and the payment of interest to [REDACTED];

(k) an order directing him to deliver a closing accountant's report for the period 1st April, 2004 to 30th June, 2005 or to such later date as when he ceased to receive, hold, control or pay client monies;

(l) an order requiring Mr. Murphy to obtain professional indemnity run-off cover.

63. The summons issued on 10th August, 2006. A process server attended the auction. Mr. Murphy was not there. Then on 11th October, 2006 the Society sought and obtained an order for substituted service. This application was grounded on an affidavit sworn by Ms. O'Neill on 9th October, 2006. At para. 8 of her affidavit Ms. O'Neill averred that it had come to the Society's attention that Mr. Murphy appeared to be acting in the sale of the public house. She referred to the advertisement in the *Irish Examiner* and also referred to the efforts made by Ms. Lynch on behalf of the Tribunal to effect service of certain documentation. Ms. Lynch had also arranged for a summons server to attend the auction. The Society arranged for a process server, one of its staff who had previously investigated the practice, to attend to serve the proceedings on him. Ms. O'Neill averred that it was Mr. Conor Murphy who appeared at the auction and neither the Society nor the Tribunal was able to effect service. She alleged that the Society had been frustrated in carrying out its regulatory functions and that the Tribunal had been unable to progress a number of cases against Mr. Murphy. She sought an order on behalf of both the Society and the Tribunal for substituted service on the firm; which by now had taken over files from Mr. Murphy's former practice, Murphy, Healy and Co. She exhibited a letter from Mr. Murphy which had been received by the complaints section on 5th March, 2006. This letter made reference to his telephone number. Further, she exhibited a letter of 6th October, 2006 addressed to her from Ms. Mary Lynch, the Registrar of the Tribunal, in which she outlined efforts made by the Tribunal to serve various letters on him. The exhibited letters included a letter dated 30th June, 2006, which had Mr. Murphy's telephone number on it.

64. Following the obtaining of the order for substituted service the proceedings were served on Murphy, Healy and Co. on 17th October, 2006. Mr. Murphy swore an affidavit in reply on 20th November, 2006. While he was dissatisfied at the manner in which the order for substituted service had been obtained, no formal application was made to set it aside and at the hearing of the application on 31st January, 2007 many of the orders sought were made on consent. The application was adjourned to 28th February, 2007.

65. The Society was dissatisfied with Mr. Murphy's compliance with the order. A perfected copy of the order with a penal endorsement was served on him on 16th February, 2007. On 22nd February, 2007 a motion issued seeking leave to issue attachment and committal proceedings. On the adjourned date, 28th February 2007, an order was made requiring Mr. Murphy to deliver to the Society files referred to in the s. 18 order and to deal with other matters also referred to therein.

66. To understand the complaint which Mr. Murphy makes in these proceedings of the improper employment of the attachment and committal procedure, and the perpetuation of the s. 18 proceedings throughout 2007 and up to June, 2008, it is necessary to be aware that a serious complaint was made on behalf of a [REDACTED] by Kelly and Dullea, solicitors on 19th January, 2007, concerning his alleged involvement in the transfer of property. Mr. Murphy maintains that the transfer which was at the heart of this complaint was a forgery.

67. The attachment and committal application was served on Murphy, Healy & Co. on 3rd March, 2007 and was returned to 14th March, 2007, when an order was made directing that Mr. Seamus McGrath (investigating accountant appointed by the Society) be substituted for the plaintiff as the mandated signatory on his client account. The application was adjourned regularly thereafter throughout 2007.

68. On one such adjourned date, 9th May, 2007 an order was made directing the plaintiff's accountant, Mr. Kevin O'Reilly, to furnish client accounts to the Society by the 8th June, 2007. Mr. Murphy takes issue with the manner in which his response to the [REDACTED] complaint was treated by counsel for the Society on that date when counsel spoke of Mr. Murphy's "temerity" in describing the transfer as a forgery. To this day, Mr. Murphy maintains that the document is a forgery. [REDACTED] was convicted in the United Kingdom on 30th November, 2009 on fraud and forgery charges in relation to another matter and was sentenced to a term of imprisonment. The complaint made by [REDACTED], which will be considered in more detail below, was closed by the Society on 21st September, 2007 because of a failure on the part of [REDACTED] or his advisers to respond. In 2010, Mr. Murphy made a complaint to the Tribunal against Ms. O'Neill (DT. No. 2010/78) that she had used the [REDACTED] complaint to support the application for attachment and committal for contempt of the s. 18 order, in circumstances where she knew or ought to have known that the documents produced by [REDACTED] could not be relied on. It is also to be noted that [REDACTED] has corresponded with the Society on this issue as recently as 2016.

69. On a further adjourned date, 11th June, 2007, the court was informed that any deficit in the client account had been made good and that a report had been received from Mr. O'Reilly in this regard.

70. While the the attachment and committal application continued to be adjourned until 17th June, 2008, when the s. 18 proceedings were struck out with costs to the Society, this period must be seen in the context, not only of adjournments at the Society's behest, but also in the context of an application brought by Mr. Murphy to revisit the making and the terms of the s. 18 order, which are addressed in more detail below.

71. On 1st June, 2016, Mr. Murphy brought an application to re-enter the s. 18 proceedings. This application has been deferred pending the outcome of these proceedings.

11. The complaints

72. I now propose to deal with the various complaints made against Mr. Murphy which were subjected to detailed discussion in evidence in these proceedings and which were referred to in the strike-off application. There was no great debate in relation to certain complaints, such as those of [REDACTED] or [REDACTED], and they are not here considered.

11.1 The [REDACTED] complaint (the genesis of the strike off proceedings and the undertaking)

73. Mr. Murphy had acted for three brothers, the [REDACTED], for approximately ten years. To expand their business, they acquired land in the Kenmare area on an incremental basis. They permitted the local authority to build a sewage treatment plant on part of the land. Issues arose in relation to the purchase price of certain of the lands and it was agreed that this would be determined at arbitration. Certain factors were to be taken into account, including the requirement for the provision of sewage facilities. The land had been purchased in Mr. Murphy's name in trust but had not been registered in his name. Problems regarding the title to the land were addressed at arbitration. Other lands required to be purchased to address potential access difficulties. By the late 1990s or early 2000s, differences arose between the brothers. Mr. Murphy informed them that he could not be involved in the dispute. His evidence is that he was requested by them to assist in resolving their differences and that each time he made a proposal, he advised that they should obtain independent legal advice. Mr. Murphy states that it was ultimately agreed that he would act for one of the brothers, [REDACTED], although he states that he had reservations in so doing. The other brothers, [REDACTED], were represented by [REDACTED].

74. A notice of dissolution of the partnership was served by Mr. Murphy on behalf of his client, on 28th May, 2002. Two days later, on 30th May, 2002, a complaint was made to the Society by [REDACTED] on behalf of the other brothers. The substance of the complaint was that, unknown to them, the land had been registered in Mr. Murphy's name. Mr. Murphy emphasises the timing of the complaint in the context of the service of the notice of dissolution. He maintains that when addressing this complaint, the motivation of the [REDACTED] should have been considered by the Society. A plenary summons was

issued by Mr. Murphy on behalf of [REDACTED] in the partnership proceedings in July, 2002. On 11th November, 2002, an interlocutory order was made on consent. The complaint which had been lodged by the two brothers remained in existence and Mr. Murphy believes that it was not appropriate for the Society to investigate a complaint against a solicitor acting for another party in such proceedings while they were ongoing.

75. On 17th December, 2002, the Registrar's Committee considered the complaint. Mr. Murphy was not in attendance. On 18th February, 2003, the Committee directed the Society to make application to the High Court to compel Mr. Murphy to respond to its correspondence in relation to this complaint, and to attend before the Registrar's Committee when requested to so do.

76. Another aspect of the overall transaction which Mr. Murphy has referred to is that a Mr. Peter O'Sullivan, for whom [REDACTED] also acted, had become involved in the dispute. Mr. Murphy states that Mr. O'Sullivan's involvement was vital in respect of access to the partnership lands. Mr. Murphy maintains that there was a conflict of interest on [REDACTED] part and that this was not properly investigated by the Society.

77. On 7th July, 2003, the Society made application to the President of the High Court to compel Mr. Murphy to respond to its correspondence and to attend the Registrar's Committee when requested to do so. Correspondence had been received from Mr. Murphy on 4th July, 2003. The Society raised further queries on 8th July, 2013. On 9th July, 2003, the court directed Mr. Murphy to respond to those queries within seven days and to attend with his file before the Registrar's Committee on 29th July, 2003. The motion was adjourned to 31st July, 2003.

78. In the interim Mr. Murphy was in communication with the Society which maintained that his reply of 16th July, 2003 was incomplete. A further letter was written to him on 22nd July, 2003. The queries primarily related to costs alleged to be due and payments made on account and the trust issue. The Registrar's Committee considered Mr. Murphy's responses at its meeting on 29th July, 2003. Mr. Murphy apologised that all matters had not been addressed. The Committee informed him it was not satisfied that he had furnished the required information and advised that the matter would be brought to the attention of the President of the High Court. As the application was due back before the court on 31st July, 2003, no final decision was made by the Committee and the matter was adjourned to its next meeting.

79. On 31st July, 2003, the President of the High Court was advised that the matter was likely to be referred to the Tribunal and the application was struck out with costs. It was at this hearing that the undertaking was stated to have been given.

80. Mr. Murphy swore an affidavit on 30th July, 2003 confirming that all matters had been addressed with the exception of the preparation of an itemised bill. The Society replied to Mr. Murphy on 5th August, 2003 informing him that the matter would be listed before the Registrar's Committee on 30th September, 2003. He wrote to the Society on 2nd

September, 2003 advising that he would be out of the country on that date and sought an adjournment to the Committee's October meeting. The Society wrote to Mr. Murphy on 17th September, 2003 informing him that his request for an adjournment would be placed before the Committee but also advised that as the adjournment might not be granted, he might wish to be represented at the meeting as the Committee might make a decision on whether there was prima facie evidence of misconduct which would warrant referral to the Tribunal. As previously noted, on 22nd September, 2003, Mr. Conor Murphy wrote on behalf of the plaintiff seeking an adjournment.

81. Mr. Murphy was not represented at the meeting on 30th September, 2003 and the request for an adjournment was refused. The Committee decided to refer the case to the Tribunal. On 2nd October, 2003, Mr. Murphy was informed of this decision.

82. When the application was before the President of the High Court on 31st July, 2003, Mr. Murphy was represented by counsel, Mr. Vallely B.L. Ms. O'Neill was in attendance. She completed an attendance note, following the hearing, which recorded:-

"Mr. Vallely said that Mr. Murphy would undertake to attend the next meeting of the Registrar's Committee.

The President said it did not matter whether Mr. Murphy attended or not if he was not interested in continuing as a member of the solicitor's profession."

83. The order of the court does not reflect that an undertaking was given or accepted.

84. What is of particular importance in the context of Ms. Kirwan's evidence is the affidavit sworn by her on 11th June, 2004 for the purposes of the hearing by the Tribunal. One of the allegations of misconduct which had been made against Mr. Murphy, contained at para. 32(f) of the application was that he:-

"failed to attend a further meeting of the Registrar's Committee on 30 September 2003, notwithstanding the undertaking given by his counsel to the President of the High Court that he would attend meetings of the Registrar's Committee…"

85. It is clear therefore, that a very serious allegation had been made of non-compliance by an officer of the court with an undertaking to the court. In her affidavit, Ms. Kirwan averred that she was in attendance before the President of the High Court on 31st July, 2003 and further stated that while the respondent solicitor was not in attendance, he was represented by counsel. This affidavit had been drafted by Ms. O'Neill. Ms. Kirwan's evidence is that she proofread the affidavit before swearing it but did not notice that it contained an error. It should have read "*I was not in attendance".* This error did not come to light until after Mr. Murphy's name had been struck off the Roll of Solicitors.

86. The hearing commenced before the Tribunal on 15th April, 2008. It was heard over several days, including 10th July, 2008 and 13th January, 2009. Ms. Kirwan emphasises that the *giving* of the undertaking did not raise its head in any significant manner before

the Tribunal on the first occasion. She also lays emphasis on the fact that when cross-examined before the Tribunal in April, 2008, Mr. Murphy did not deny that he had given the undertaking. It also seems that Ms. O'Neill who was in attendance at the Tribunal was not requested to clarify the situation in relation to the undertaking. However, when he was further questioned on the second day of the hearing, 10th July, 2008, Mr. Murphy stated that there was a difference between "*being prepared to undertake"* and "*undertaking*". At this hearing, Mr. Murphy made the point that the undertaking was not part of the order and he placed significance on the conditional nature of the undertaking referred to by his barrister, as reflected in the use of the word "*would*" in the attendance. At that resumed hearing, Mr. Murphy also stated that he had no idea that there was any undertaking made on his behalf to attend a meeting of the Registrar's Committee. He further confirmed that he had obtained a copy of the order of the court, two weeks prior to the date of the resumed hearing.

87. The Tribunal reconvened on 13th January, 2009 and concluded that the cumulative effect of the findings of misconduct (ten in number) were of such gravity as warranted referral to the High Court.

88. It was in his affidavit sworn for the purposes of that hearing that Mr. Murphy stated that he fully accepted the findings of the Tribunal and apologised for his shortcomings.

89. In December, 2009, Mr. Murphy made a complaint of misconduct against Ms. Kirwan to the Tribunal. In a replying affidavit to that complaint sworn by her on 31st March, 2010, Ms. Kirwan acknowledged that she was not in fact present in court on 31st July, 2003. Mr. Murphy was written to on 19th April, 2010 and it was explained to him that Ms. Kirwan had made a mistake. He did not accept this explanation and he made a further complaint against Ms. Kirwan that she had lied in her affidavit sworn on 11th June, 2004.

90. Ms. Kirwan makes the point that her affidavit was primarily directed at the issue of whether Mr. Murphy was in attendance or represented that she had made the averment. She also points to a discrepancy in Mr. Murphy's evidence as to his recollection of whether he was in court on that day. In her witness statement Ms. Kirwan stated that it is somewhat curious that while Mr. Murphy was adamant in his affidavit that he was in court on 31st January, 2003 (this appears to be an error and should refer to 31st July, 2003), in his evidence before the Tribunal he himself could not specifically recall whether he was in fact in attendance. However, the transcript of evidence of the hearing before the Tribunal on 10th July, 2008 records Mr. Murphy stating that he did not specifically remember if he had been in court on 9th July, not 31st July.

91. Ms. Kirwan's evidence is that there was no deliberate attempt on her part to deceive the court. She does not believe that whether she was present or not present in court on 31st July, 2003 had any impact on the recital in her affidavit as to what happened on that day. This was derived from Ms. O'Neill's contemporaneous note. She also gave evidence to the Tribunal on 15th April, 2008 and while she was questioned by the Society's counsel about her affidavit, she was not cross-examined by Mr. Murphy's counsel. Ms. Kirwan

states that she was not aware that there was an issue about her attendance or non-attendance at that time. The affidavit had been drafted by Ms. O'Neill but it is clear that the draft was examined, corrected and amended by Ms. Kirwan. It was put to her that given her experience and the manner in which she had corrected the draft affidavit that it was difficult to view this as an innocent error. Her reply was adamant that it was an innocent and honest error, she had not spotted it and there was nothing deliberate in what she had done. It was a mistake which she regrets. She was also closely questioned in relation to her later affidavit of 31st March, 2010 (sworn in response to Mr. Murphy's complaint) in which she had averred that *"as is evident from the transcript, I was not present in court on 31 July 2003*", when it was far from clear that this was evident that the transcript of that day's hearing revealed this.

92. In a further affidavit sworn on 11th June, 2010 in response to another complaint made to the Tribunal, she averred that she had reviewed her file and could not, at that remove, recall whether she was in court on the day. She stated that it was more likely than not that she was not there and the word "*not*" had been omitted in error (emphasis added). It was again put to her that her position had shifted. In reply she accepted that there had been some ambivalence on her part but that this had been brought about by the fact that she had recalled being in court when undertakings were given by or on behalf of Mr. Murphy, which she found difficult to reconcile with her stating that she was not in court on 31st July, 2003. Further, Mr. Murphy had made many allegations against her, some of which were variations of other allegations such that she felt somewhat bamboozled by them. She denied that she had any personal animus against Mr. Murphy, albeit she accepted that she had feelings of frustration. Ms. Kirwan was also questioned on why, if an undertaking had been given on 31st July, 2003, it was not mentioned in a letter which she wrote to Mr. Murphy on 5th August, 2003, in the immediate aftermath of that hearing referring to the meeting scheduled for the 30th September 2003, or when she wrote to him on 17th September in reply to his request for an adjournment. She stated that her letter of 5th August had been written on the Tuesday after the bank holiday weekend and that it was unlikely that she had Ms. O'Neill's attendance note at that stage, the court hearing having taken place on the previous Thursday, immediately before the bank holiday. With regard to the letter of 17th September, she felt that as Mr. Murphy's counsel was in court it was not up to her to remind him of his obligations.

93. While the [REDACTED] investigation was ongoing, Mr. Murphy made a complaint to the Society on 4th April, 2003 regarding [REDACTED] conduct. On 15th April, 2003, the Society decided that no further action would be taken as there was no evidence of misconduct by [REDACTED]. Mr. Murphy was disappointed with this decision and he maintains that the Society vigorously pursued complaints against him that were not nearly as serious as those he made against [REDACTED]. He maintains that by failing to take action against [REDACTED], the Society discriminated against him. He also believes that [REDACTED] was one of the individuals behind a company who wished to purchase the subject property and that the Society should have suspended the investigation pending the outcome of the [REDACTED] proceedings.

94. Mr. Murphy reported the matter again on 8th March, 2004, bringing the attention of the Society to matters which had come to light since his earlier complaint, including matters concerning the conveyance of the lands owned by the [REDACTED] family. He believes that a proper investigation of the complaint made against him would have warranted an investigation of those matters. He also highlights information which came to light following his application for discovery in these proceedings. He maintains that there was a failure to provide complete discovery by the Society or that part of the file is now missing. This, he believes, is supported by a reply to a data access request which he made. In particular, he refers to a memorandum of a conversation which the Society had with [REDACTED]. The memo was attached to a note containing the date 11th March, 2008, although it is not a continuation of that note. The conversation as recorded in the memo, was almost precisely what [REDACTED] had told him in 2004 that he, [REDACTED], had informed the Society that there was not much to the complaint. Mr. Murphy states that if he had known about this in 2004, it would have made a difference to his position.

95. In his witness statement, he conducted a detailed analysis of the affidavits and evidence which were before the Tribunal in April, 2008. By then, he argues, no great issue was regarding the conveyance of the land. He believes that if agreement had been reached in relation to costs, then the basis for any substantive complaint would have disappeared. Further, while the allegation that he had placed property in his name without any supporting trust documentation was withdrawn, for him it was a most serious issue and one upon which local and national media reported. If the only issue remaining was the failure to comply with the undertaking, then this was not one which had been made directly by the [REDACTED], rather by the Society itself.

96. Mr. Murphy maintains that the Society should have contacted his client, [REDACTED], in relation to any alleged impropriety. He thought it incredible that [REDACTED] would not have had some complaint if the land was registered in Mr. Murphy's name.

11.2 The Healy matter

97. On 28th September, 1999, the Tribunal ordered that Mr. Murphy be censured and pay the Society's costs for failing, *inter alia*, to file in a timely manner an accountant's report for the Killarney practice for the year ending 31st March, 1997. This concerns the taking over of the practice of Mr. Tim Healy by Mr. Murphy. He believes that the handling of this complaint should be viewed in the light of what he alleges to be the inadequate support which he received from the Society in contrast to the more favourable treatment which other firms of solicitors received in comparable situations.

98. He also alleges that the Society improperly placed a requirement on him to file an accountant's report regarding Mr. Healy's practice in respect of a time period in which a similar requirement was being made of Mr. Healy. This only emerged in a more concrete way during the course of the evidence.

99. Mr. Healy had been employed as an assistant solicitor in Mr. Murphy's practice in Kenmare between 1993 and 1995. He then opened a practice in Killarney. In 1996, Mr. Healy contacted Mr. Murphy seeking assistance and advised him that he was in difficulty with the Society following discovery of a deficit in his client account. This was ultimately made good by Mr. Healy from family resources. Mr. Murphy negotiated with Mr. Healy to purchase the practice. Mr. Murphy states that he discussed the matter with the Society who provided him with relevant accounts. He attended two meetings with the Society in Dublin and agreed to pay Mr. Healy IR£20,000. He states that the Society agreed to this course of action.

100. The problems in the practice were much more serious than he had realised. There were shortfalls in client accounts and a number of outstanding undertakings which had not been complied with. He discovered deficiencies in record keeping. Clients informed him that they had paid money but the receipt of the moneys was not recorded. Mr. Murphy states that he worked diligently to resolve these problems and availed his own funds to make good any deficits.

101. By letter of 20th August, 1997, Mr. Connolly, who was the Registrar of Solicitors and Secretary of the Compensation Fund Committee of the Society from 1990 to 2004, advised Mr. Murphy that the Society was anxious to receive a closing accountant's report in relation to Mr. Healy's former practice, and that it should be filed for the period 1st September, 1995 to the date of Mr. Murphy's acquisition of the practice in October, 1996 and that any future accountant's reports should include the Killarney practice. The next accountant's report in respect of Mr. Murphy's practice was required to be filed with the Society prior to 30th September, 1997. This was stated to be in respect of the financial year to the end of March, 1997.

102. Mr. Murphy had retained an accountant, Mr. Kevin O'Reilly. Discussions took place between Mr. O'Reilly and Mr. Connolly regarding the Killarney practice accounts. Mr. Seamus McGrath, an investigating accountant was also involved in these discussions. Mr. McGrath was requested by the Society to investigate the accounts in Mr. Murphy's practice with particular reference to the Killarney practice. Mr. Murphy complains that despite being aware of the difficulties that existed in the accounts of the former Healy practice, the Society insisted on him filing a full accountant's report. Mr. Murphy states that his own accountant, Mr. Kevin O'Reilly, informed him and the Society that this was impossible. At that time no issues arose or existed in relation to the Kenmare practice. The failure to complete and file the accounts was referred to the Compensation Fund Committee meeting on 17th July, 1998. Mr. Murphy states that he informed the Society in advance, that he would not be able to attend on that day. Nevertheless, the matter was referred to the Tribunal, even though he alleges that he was not given advance warning that such a course of action might be taken.

103. The application to the Tribunal commenced on 16th December, 1998 and the accountant's report, in so far as it could be completed, was filed on 12th January, 1999. Mr. Murphy felt very aggrieved. He believed that he was being punished for attempting

to resolve what he described as "a complete and utter mess" in the practice which he had taken over. He also maintains that the practice circumstances were known to the Society prior to the takeover.

104. Ultimately, on 28th September, 1999, the Tribunal censured Mr. Murphy and ordered him to pay the Society's costs, notwithstanding what he describes as the "*practical problems"* which he faced.

105. Mr. Murphy also contends that the Society treated him less favourably than it had treated other firms of solicitors in similar situations and that it was neither open, truthful or fair with him in its dealings. He sought financial assistance from the Society but was informed by Mr. Connolly, the then Registrar of Solicitors, that the Society did not give financial assistance in such situations. He contended that another practice had received assistance in identical circumstances by the Society. Mr. Connolly denied that this was the case and disputes that Mr. Murphy was treated differently to other solicitors.

106. In his letter of 9th December, 1997 Mr. Connolly informed Mr. Murphy that he had written to Mr. Healy and enclosed a copy of his letter of "*Today's date addressed to him*". He also reminded Mr. Murphy that he had not yet filed the accountant's report relating to his own practice for the year end 31st March, 1997.

107. Mr. Murphy states that it was only during the hearing of this case that he became aware of a letter dated 9th December, 1997 which the Society also sent to Mr. Healy; he had never previously seen nor had it previously been referred to by the Society. The letter of 9th December, 1997 to Mr. Healy stated, inter alia, as follows:-

> *"I also take the opportunity to advise you that a closing accountant's report had not been filed by you. The last accountant's report filed with the Society covered your financial year ended 31st August 1995. A closing accountant's report should have been filed covering the period 1st September 1995 up to the date of acquisition of your practice by Mr. Murphy in 1996."*

108. In the same letter, the Society also sought to ensure that Mr. Healy provide evidence of run-off insurance cover, which Mr. Murphy maintains constitutes clear evidence that the Society was aware that Mr. Healy's was a "*run-off*" situation. Although the letter to Mr. Healy was stated to have been copied to Mr. Murphy, Mr. Murphy maintains that he did not receive it at that time. Supportive of his contention in this regard is that the letter is nowhere referred to in the statements of evidence of Mr. McGrath or Mr. Connolly. He also maintains that the contents of correspondence between the parties at that time suggests that the letter to Mr. Healy was not copied to Mr. Murphy.

109. Mr. Murphy believes that if he had been given a copy of this letter at the time, it would have been of great assistance to him when responding to the misconduct charge. He contends that this letter is indicative of an understanding and acknowledgement by the Society that Mr. Healy remained responsible for the filing of an accountant's report, while

at the same time it sought to impose responsibility on Mr. Murphy to discharge Mr. Healy's liabilities. He maintains that the contents of the letter indicate knowledge on the part of the Society of the true situation and that it was an important letter which was withheld from the Tribunal. He believes that at the very least this letter should have been shown to the Tribunal. Not only would it have corroborated his contention that Mr. Healy was responsible for the filing of particular accounts but would have confirmed that the Society knew this. The Tribunal finding may not have been made against him had the complete picture been known to him and to the Tribunal and consequently it would not have featured in the strike off proceedings. He contends that this constitutes an act of misfeasance of public office by the Society.

110. Mr. Murphy argues that there was a clear overlap in the periods because the year in respect of which he was required to file an account for that practice was from the end of March, 1996 to the end of March, 1997. The practice had been taken over in August, 1996 and the difficulty which arose for him included those which occurred in the period between March and August, 1996.

111. On 23rd December, 1997 Mr. Connolly wrote to Mr. Murphy referring to the letter of 9th December, 1997. He informed Mr. Murphy he had received what he described as an interim reply from Mr. Healy and enclosed a copy of an undated letter in which Mr. Healy was seeking a copy of the agreement regarding the takeover of the practice and he sought a copy of the agreement. Matters were somewhat complicated because the undated letter from Mr. Healy, confirming receipt of Mr. Connolly's letter of the 8th inst. Mr. Connolly also replied to Mr. Healy on 23rd December, 1997 acknowledging the undated reply to his letter of 9th December, 1997. This would tend to indicate that Mr. Healy was incorrect when he referred to the letter of the 8th – there is no record of any letter being sent by Mr. Connolly to Mr. Healy on 8th December, 1997.

112. In a memorandum of 23rd December, 1997, Mr. Connolly requested the matter to be placed on the agenda for the Compensation Fund Committee meeting of 23rd January, 1998. He attached a number of documents for the agenda file which included his letters to Mr. Healy and Mr. Murphy of 9th December, the letter of Mr. Healy which was undated, and his letters of 23rd December, 1997 to both Mr. Healy and Mr. Murphy.

113. Mr. Murphy replied to the letter of 23rd December, 1997, on 22nd January, 1998. He referred to an agreement which referenced a meeting which he had with Mr. Healy on 13th August, 1996 and enclosed a copy of a handwritten memorandum of agreement prepared on that day. The intention was that a more formal agreement would be drawn up but this did not happen as it seems Mr. Healy did not attend at his office subsequently.

114. The Court was provided with a copy of this handwritten agreement. The agreed price was IR£20,000 payable in three stages – IR£10,000 by 16th August, 1996, a further IR£5,000 by 16th October, 1996, and the final IR£5,000 payment by 16th December, 1996. The agreement also recorded that all fees received after 6th August, 1996 were to be given to

Mr. Murphy, excluding, it seems, one particular item. There were other terms relating to co-operation and non-competition.

115. Mr. Murphy wrote a second letter to Mr. Connolly on the same date, 22nd January, 1998, in which he informed Mr. Connolly that he had reminded his accountant to file the updated report and stating that his accountant had assured him that he would have it ready in very early course. He described the transaction as being a takeover. He complained that Mr. Healy did not comply with his obligations under the agreement but confirmed that he would make the accounts of the practice available to the Society *"at their request"*.

116. The minutes of the meeting of the Compensation Fund of 23rd January, 1998 record that Mr. Murphy had been advised to make claims on the Compensation Fund because on takeover there were insufficient funds to discharge liabilities due to the former clients of the practice. The matter was adjourned a number of times until 3rd June, 1998, at which meeting the chairman of the Compensation Fund Committee, Mr. Shubotham, is recorded as having said "when the solicitor bought the practice he bought it warts and all". The memo also records Mr. Shubotham as putting it to Mr. Murphy that when he bought the practice there were unearned fees in the practice and that *"presumably the solicitor had taken those fees".*

117. The Society's position is that it did not provide financial assistance to a practice which was being taken over and being run as a going concern. The position may be different where a practice was being wound up and the assistance of another solicitor was enlisted for this purpose. Mr. Connolly explained that the Society's Practice Closure Department normally handled the winding up of a practice, but on occasion it was more practical for the Society to engage local solicitors to carry out the work. Mr. Murphy believes this to be an artificial distinction. To him, he had to deal with a practice which was to all intents and purposes being wound up and any such distinction was new and was not made clear to him at that time. He believes that the failure on the part of the Society to explain such distinction at that time is further evidence of lack of candour on its part from an early stage. It is Mr. Murphy's evidence that the Society had maintained a point-blank refusal to provide assistance of a financial nature to anyone.

118. Mr. Murphy states that it was at a meeting on 4th September, 2003, in respect of a different matter (concerning Mr. O'Connell) that the Society first acknowledged that assistance of a financial nature had been provided to another firm. He contends that this supports his case that there was no misconduct by him in relation to his preparation or filing of the accounts of Mr. Healy's practice. He is also aggrieved by the fact that no disciplinary action was ever taken against Mr. Healy, despite what he describes as the uncovering of irregularities in his accounts after the practice had been taken over.

119. Mr. Connolly in evidence stated that he had no specific recollection of a discussion with Mr. Murphy around the time of the takeover regarding the provision of financial assistance. It is the Society's position, however, that it did not request or induce Mr.

Murphy to take over the practice. Mr. Connolly explained that the Society paid fees to solicitors engaged in the winding up of another person's practice, but not in a takeover situation. This type of arrangement might occur when it is more practical for the Society to engage a local solicitor to carry out such work, and Mr. Connolly states that this is precisely what occurred in the case to which Mr. Murphy had referred.

120. The Society maintains that it is incorrect for Mr. Murphy to assert that it was aware that he was not in a position to prepare and finalise accounts for that practice and points to repeated contemporaneous assurances given by Mr. Murphy that he would file the relevant report.

121. Mr. Connolly confirmed that no disciplinary proceedings had been brought against Mr. Healy but he explained that Mr. Healy had ceased practising and had emigrated. His family had made good the accounts deficit. He did not believe that Mr. Murphy was out of pocket in the takeover of Mr. Healy's practice. He accepted that the bookkeeping in Mr. Healy's practice was deficient and it would not be easy to sort out the accounts. Nevertheless, he did not believe that there would have been any bar on Mr. Murphy's accountant, Mr. O'Reilly, submitting a restricted or qualified report. He also believed that Mr. Murphy took over the practice in the full knowledge of the problems.

122. Mr. Connolly accepted that his letter, dated 8th June, 1998 should have read *"eight months ended 31st March 1997", and not "the year ended 31st March, 1997*" where it recounted that "*[i]t would also be in your interest to file an accountant's report for the year ended 31st March 1997 in respect of your Killarney practice*". He was unable to say whether a closing accountant's report had been obtained from Mr. Healy. He accepted that it appeared that Mr. Healy did not comply with the requirement to obtain run-off cover as was required of him. Mr. Connolly also accepted that certain undertakings which had been given by Mr. Healy had to be dealt with by Mr. Murphy.

11.3 The [REDACTED] complaint and the [REDACTED] complaint

123. Mr. Murphy had acted for two clients, a [REDACTED] and a [REDACTED] in proceedings relating to land transactions concerning a Mr. Weeland for whom [REDACTED] acted. [REDACTED] had at one stage also represented those two gentlemen. Mr. Weeland introduced them to local farmers as prospective purchasers and they, and a connected company, became involved in land deals. Mr. Murphy states that [REDACTED] was deeply involved in the transaction. The manner in which the deal was completed, according to Mr. Murphy, resulted in the Dutchmen funding the entire transaction yet ending up as part owners of the company that owned part of the lands only. Another deal related to the acquisition of lands from a Dutch clergyman, again for whom [REDACTED] acted. This again, was another complex transaction in which impropriety was alleged.

124. Mr. Murphy contacted [REDACTED]. He alleges that [REDACTED] warned him off any involvement and stated that he was well connected and "*in*" with the Law Society. Mr. Murphy decided to seek assistance from the Conveyancing Committee of the Society. He consulted the law directory and he states that to his horror he saw that [REDACTED] was

a member of that committee. He took over the file from [REDACTED]. He had concerns in relation to the Statute of Limitations, the transactions having taken place in 1978. Fraud, therefore, had to be established.

125. Ultimately Mr. Weeland contacted Mr. Murphy directly to discuss settlement. Mr. Murphy had been in contact with Mr. Weeland's solicitor and it was agreed that matters would proceed in this way. The proceedings were settled directly by Mr. Murphy on behalf of his clients with Mr. Weeland, subject to their approval.

126. Problems arose on the implementation of the settlement as the company had been struck off. A further problem emerged when the property was placed for sale with a company run by Mr. Murphy's brother, and of which he was also a director. Mr. [REDACTED], who had been a caretaker and who had acted as intermediary for the Dutchmen, unknown to Mr. Murphy agreed with them that if the case against Mr. Weeland had a successful outcome, he would have carriage of the sale of the property. Mr. Murphy states that an offer of IR£100,000 was made but [REDACTED] informed him that the property was to be sold to [REDACTED] for IR£75,000. Mr. Murphy was reluctant to issue contracts as he was concerned about the proper statement of the consideration.

127. On 16th July, 1999, [REDACTED] made a complaint *on behalf of* [REDACTED] and [REDACTED] regarding Mr. Murphy's handling of the transaction (emphasis added). There were a number of aspects to the complaint. It was complained that there was a failure to ensure that the settlement agreement was signed, that Mr. Murphy dealt directly with Mr. Weeland, that there was delay in progressing the proceedings and in finalising the settlement, and a further aspect of the complaint related to advice which he had given on the transfer of the site to Mr. Weeland. A further complaint was made that Mr. Murphy had engaged Mr. Weeland as a client while still acting for [REDACTED] and [REDACTED]. Mr. Murphy described the main complaint, however, as being that [REDACTED] had lost his agency on the sale. The Society forwarded the complaint to Mr. Murphy on 6th August, 1999. In his reply of 24th August, 1999 he highlighted the complexity of the case.

128. Mr. Murphy claims that the Society failed to investigate this complaint properly, particularly with regard to the role of [REDACTED]. He also states that an offer he made to meet [REDACTED] was never transmitted to him by the Society, in breach of its duty to seek to have matters resolved by agreement.

129. On 30th November, 1999, the purchaser of the property, a [REDACTED], also lodged a complaint because of delays in the closing of the sale.

130. Mr. [REDACTED] and [REDACTED] complaints were considered by the Registrar's Committee on 29th May, 2001. A finding was made of inadequate professional services and delay. Mr. Murphy was written to on 31st May, 2001 and was directed to refund fees of IR£4,000 and to contribute IR£1,000 to the Society's costs.

131. Mr. Murphy places significance on the timing of the decision of the Registrar's Committee. The meeting was held and the decisions made almost immediately after the suspension of Mr. O'Dowd's investigation. Mr. Murphy was also advised of his right of appeal and informed that he had 21 days within which to do so. He did not respond and did not appeal. The appeal period having expired, the Society wrote to Mr. Murphy by letter dated 25th June, 2001 confirming that the decision and direction of the Registrar's Committee was binding. This was not replied to.

132. Reminders were sent to Mr. Murphy on 3rd July, 2001, 24th July, 2001 and 22nd August, 2001 when he was advised that because he had not complied with the Registrar's Committee's directions, the matter was being relisted for a meeting of the Registrar's Committee which would take place on 4th September, 2001. On the day before this meeting, Mr. Murphy sent a letter to the Registrar's Committee saying that he was not in a position to attend but he sought confirmation whether the Committee's directions covered both complaints.

133. Mr. Murphy's evidence is that he expected to receive separate findings in respect of each matter. He states that it was his intention to appeal both. He did not believe that the Society had acted fairly and expressed misgivings about the manner in which the two complaints were effectively merged as one. He sought clarification. At the meeting of the Committee on 4th September, 2001, it was confirmed that the finding related to both matters and he was informed of this by letter of 10th September, 2001. He was advised that if the direction was not complied with within two weeks, it would be referred to the Tribunal. Mr. Murphy replied on 12th September, 2001 stating that he intended to appeal to the High Court. He was informed by the Society that he was out of time to do so.

134. Mr. Murphy did not comply with the directions of the Registrar's Committee. This led to a referral to the Tribunal on a charge of misconduct. The Tribunal considered the misconduct charge on 20th March, 2003 and in light of Mr. Murphy's objections and observations, the complaints were referred back to the Registrar's Committee to seek clarification of the directions made on the 29th May, 2001. The matter came back before a differently constituted Registrar's Committee on 6th May, 2003. Mr. Murphy maintains that he was not given advance notice of this meeting, nor was he requested or invited to attend. This Committee decided that the decision of 29th May, 2001 related to the [REDACTED] complaint only. Mr. Murphy was informed of this on 8th May, 2003 and was also advised that if he wished to appeal this decision, that he should do so within 21 days. He did not appeal.

135. It is Mr. Murphy's case that despite of the history as recounted above, Ms. Kirwan in an affidavit sworn on 29th April, 2002 and Ms. McMahon, solicitor, in evidence before the Tribunal when it first dealt with the matter on 20th March, 2003, maintained that the decision referred to both complaints. However, when the Tribunal resumed the hearing on 21st October, 2003, Mr. Murphy did not appear. The Tribunal found him guilty of misconduct for failing, without reasonable excuse, to comply with the direction of the Registrar's Committee, regarding the [REDACTED] complaint. He was censured, ordered

to pay €4,000 to the Compensation Fund and, pursuant to s. 8(1) of the Act of 1994, was ordered to comply with a direction of the Registrar's Committee. While he was dissatisfied with this decision, it was not appealed at that time, although Mr. Murphy maintained that it was his intention to do so. He contends that this was a finding of significance as it was relied on in the application to strike him from the Roll of Solicitors.

136. Mr. Murphy appealed this decision to the High Court and was unsuccessful, as was an application for an extension of time to appeal to the Supreme Court.

137. Mr. Murphy states that since that time, and pursuant to a data access request, he has received correspondence between the Society, [REDACTED] and [REDACTED] solicitor which he believes would have assisted his case, but that he was unaware of it at the relevant time. He states that such correspeondence illustrates what he describes as the vitriolic and personalised nature of the complaint being made and maintains that if he had been in possession of this information at the relevant time, he would have been in a position to display that the only reason for [REDACTED] complaint was that he had not been paid by [REDACTED]. He further believes that the correspondence indicates that the Society was aware that the main issue was one of loss of agency. He further contends that if a proper investigation had taken place, taking into account the information in the correspondence, the Society would have known that consideration for the transaction had been understated. Queries should have been raised about this and he would not have been compelled to complete the transaction. Further, it is maintained that [REDACTED] had the Land Certificate even though he had authority to hand it over eight years previously.

138. Mr. Murphy states that he was also concerned about the true identity of this "*complainant*". Some years later, in 2011, he met [REDACTED] who informed him that he was not aware of the finding of the Tribunal nor was he aware of the real nature of the complaint. Mr. [REDACTED] sent an email to Mr. Murphy on 14th February, 2011 stating that he was satisfied with the services provided Mr. Murphy.

139. It is submitted that as [REDACTED] was not a client of Mr. Murphy's, there was no basis for the Registrar's Committee to proceed with the complaint. That this complaint was investigated together with [REDACTED], it is submitted, compounded matters, neither of which were properly investigated. It is further submitted that the Society should have attempted to resolve the issues before referring the matter to the Tribunal and that it failed to disclose all matters favourable to him of which it was aware. Reliance is placed in this regard on a letter of 24th August, 1999 to Ms. Dara McMahon, the investigating solicitor. It is submitted that in proceeding as they did, the solicitors investigating the matters on the part of the Society and its Registrar's Committee were at best negligent in the discharge of their functions, or at worst acted with reckless indifference and that this is so, notwithstanding that Mr. Murphy's appeal of the Tribunal's findings of the High Court was unsuccessful as was his later application to extend time to appeal to the Supreme Court. Mr. Murphy complains that the Society continued to rely on this decision of the Tribunal before the High Court on 7th May, 2004, in the attachment and committal

proceedings and also in the strike off proceedings. Further, it is submitted that the Society has continued to do so notwithstanding the email obtained from [REDACTED] in 2011. Reliance is also placed on the fact that Ms. Kirwan, in evidence, admitted that the Society had not attempted to resolve the complaint, had not attempted to contact [REDACTED] or [REDACTED], and no attempt was made to revisit these complaints post 2011.

11.4 The [REDACTED] complaint

140. Mr. [REDACTED] was a longstanding client of Mr. Murphy. He died intestate in April, 2000. His brother, [REDACTED] instructed Mr. Murphy in the administration of the estate. A grant of administration issued on 16th August, 2000. Mr. Murphy states that [REDACTED] was happy with the speed with which the grant had been obtained.

141. [REDACTED] instructed Mr. Murphy in relation to the sale of sites from the lands in the estate. Mr. Murphy became concerned that the full consideration was not recorded in the contract and he prepared an attendance in October, 2000, in which he recorded his unease. When he raised this issue with [REDACTED], his services were dispensed with. [REDACTED] then wished to be represented by [REDACTED].

142. On 12th November, 2002, a complaint was lodged against Mr. Murphy by [REDACTED], through [REDACTED], in repect of overcharging and failure to provide a letter in compliance with s. 68 of the Solicitors (Amendment) Act 1994. This provides that solicitors must provide clients with certain information in relation to legal charges. [REDACTED] also complained that, without permission, Mr. Murphy had deducted fees from monies which he had held.

143. The Society wrote to Mr. Murphy on 16th December, 2002, seeking a response and requesting that his files be submitted for inspection. Mr. Murphy did not reply but in evidence stated that he did not have the files because [REDACTED] already had them. He accepted that he could have informed the Society of this without difficulty. A further letter of 28th January, 2003 was also not responded to.

144. By letter of 5th February, 2003 he was requested to attend the Registrar's Committee which was to be held on 18th February, 2003. On the day before that meeting, Mr. Murphy wrote that he could not deal with the complaint as he did not have the file and requested that the files which had been sent to [REDACTED] be returned to him. He did not attend the meeting. Mr. Murphy believes that it was obvious that he required sight of the files to deal with the complaint.

145. Part of the file was sent to him by [REDACTED] on 10th March, 2003 but no further communication was received from Mr. Murphy despite reminders in March, April and May, 2003.

146. Mr. Murphy was requested to attend a meeting of the Registrar's Committee on 17th June, 2003. Mr. Murphy did not attend but wrote to the Society on 15th June, 2003 stating that he had to attend the Circuit Court in Limerick and it was impossible for him to

hand the matter over to another person to deal with on his behalf. He also complained that [REDACTED] had not sent him the full file on 10th March, 2003.

147. The Registrar's Committee decided that he had failed to respond appropriately and at its meeting on 17th June, 2003, it authorised the making of an application to the President of the High Court should Mr. Murphy continue to fail to cooperate. It also made a direction in respect of the Society's costs. The matter was adjourned to a meeting of the committee on 29th July, 2003. Mr. Murphy attended, apologised for his previous failure to attend and gave an undertaking to reply within seven days. The committee agreed to adjourn the matter for further consideration on that basis. Again, placed in context, this meeting took place two days before the hearing of the adjourned court application in respect of the failure to correspond on the [REDACTED] matter. It will be recalled that the issue of the disputed undertaking is said to have been given at the hearing before the President on 31st July, 2003.

148. The Society's case is that notwithstanding the opportunity afforded to him, Mr. Murphy did not comply with the undertaking given to the Committee. The Society requested transmission of the original files which were forwarded on 17th September, 2003 and a report was prepared for the Registrar's Committee. The report was sent to Mr. Murphy on 2nd October, 2003, and he was afforded the opportunity to comment on any factual inaccuracies. Certain recommendations were made in relation to fees and the failure to comply with the undertaking. While Mr. Murphy reduced the professional fee in relation to the administration of the estate by 15% and paid the contribution towards costs, he did not comply with other directions because of his belief that no adequate analysis had been conducted on the amount of work he had completed and of the fees properly chargeable for that work.

149. Once again, Mr. Murphy believes that the Society made no attempt to resolve this complaint. The [REDACTED] complaint was one of three matters considered at the meeting on 30th September, 2003 which was not attended by Mr. Murphy. Again, the delay in dealing with this issue was explained by Mr. Murphy on the basis that he had a number of matters to deal with, including rumours which had been circulating about him and he was concerned about what he alleges was a bias in favour of [REDACTED].

150. The matter came before the Registrar's Committee on 4th November, 2003 and it directed that the fees should be reduced, that interest due to the estate be paid, and that €1,000 be paid towards the Society's costs. The Committee also reprimanded Mr. Murphy for failure to comply with the undertaking given by him to the Committee on 29th July, 2003, pursuant to s. 12(c) of the Act of 1994, as substituted by s. 14 of the Act of 2002. This decision was communicated to Mr. Murphy on 6th November, 2003.

151. Mr. Murphy maintains that certain information came to his attention which confirmed his suspicions regarding the understatement of consideration on transactions involving [REDACTED]. On 21st October, 2004, he approached [REDACTED] and informed him that he would bring the transaction to the attention of the Revenue Commissioners. Mr.

Murphy states that he made such contact in accordance with what he believed were the directions given by the Committee regarding under the table payments that might come to a solicitor's attention. He was accompanied by his brother, Mr. Conor Murphy, whose role was described as that of witness.

152. [REDACTED] was unhappy with this approach and on the same day, 21st October, 2004 he telephoned the Society and spoke with Ms. Kirwan. She prepared an attendance. This records that [REDACTED] informed Ms. Kirwan that Mr. Murphy advised him that if he intended to pursue his course of action, it was being brought to his attention that he had defrauded the Revenue and that this would have to be notified to them. The conversation lasted three minutes. [REDACTED] informed Ms. Kirwan that he had no idea what Mr. Murphy was talking about but suspected that it may have been in relation to sites which he was selling. It is recorded in the attendance that [REDACTED] expressed his belief that Mr. Murphy was attempting to intimidate him. At [REDACTED] request, Ms. Kirwan spoke with a [REDACTED] who worked for [REDACTED] and her attendance records that while he did not overhear the conversation, that after it had taken place [REDACTED] was very frightened, down and very annoyed.

153. Mr. Murphy disputes that it was his intention to intimidate. He made contact with the Revenue Commissioners by telephone in advance of the Registrar's Committee meeting of 3rd November, 2004, although he did not meet a revenue official until after the meeting. He subsequently informed the Revenue Commissioners of his concerns and he denies that there was a trade-off between his stated intention to go to the Revenue Commissioners and a request to [REDACTED] to withdraw the complaint. He disputes that a charge was made against him of such a link and expressed outrage at the suggestion of blackmail. The Committee issued a formal reprimand. Mr. Murphy argues that [REDACTED] was not a client, no formal complaint had been made and therefore this reprimand was without lawful basis. Mr. Murphy also complains that the Registrar's Committee did not conduct an analysis of what costs might have been due and that it failed to comply with s. 9 of the Act of 1994. In his view, the committee came to its decision because it was annoyed at the approach which he had made to [REDACTED] and that it protected a person who was involved in what he describes as criminal activity. Again he describes this approach as inconsistent when contrasted with the Society's treatment of him. He also took issue with the Chairman of the Committee who he accused of having his own problems with the Revenue Commissioners and sought clarification as to whether the issues which he had raised would be investigated. He believes that such absence of consistency and fairness on the part of the Society led to frustration which may have shown in his dealings with the Committees and in his correspondence. All of these events contributed to his decision to retire from practice in the months that followed.

154. Mr. Murphy states that he subsequently discovered that other members of the [REDACTED] family had difficulty in obtaining their share of the estate and proceedings were necessary.

155. During this period, an investigation was also underway into a complaint made by Ms. [REDACTED]. On 10th December, 2004, Mr. Murphy forwarded the file in this matter to the Society and expressed his outrage at the decision of the Committee in the [REDACTED] complaint. He advised of his intention to challenge the decision by way of application for judicial review.

156. Mr. Murphy did not comply with the Committee's direction. The matter was referred to the Tribunal. In a replying affidavit sworn on 22nd June, 2005, Mr. Murphy raised concern about the fairness of the hearing. On 10th July, 2007 he was censured by the Tribunal, ordered to pay €4,000 to the compensation fund and to pay costs. This finding occurred at the same time that attachment and committal proceedings were being adjourned from time to time and given everything that was going on, Mr. Murphy states that he was not in a position to appeal.

11.5 The [REDACTED] complaint

157. Mr. Murphy acted for [REDACTED] in the purchase of property. A mortgage was required. There was a delay in closing primarily because, Mr. Murphy states, [REDACTED] failed to sign the mortgage deed. He states that he requested [REDACTED] to come to his office to sign the mortgage deed. He received an authority to transfer the file to [REDACTED]. Although not certain, he believes that this occurred because of rumours which had been circulating about him at that time.

158. Given that he was dealing with a number of issues including the [REDACTED], [REDACTED] and [REDACTED] matters, Mr. Murphy states that he was reluctant to deal with [REDACTED]. He did not trust him. He also felt that he could not hand over the title documents because he had furnished an undertaking to the bank in respect of a mortgage which had yet to be registered. In retrospect he believes that he should have instituted proceedings against Mr. [REDACTED] to compel him to complete necessary documents and to permit registration to take place to enable the undertaking to be discharged.

159. A complaint was made by [REDACTED] on behalf of Mr. [REDACTED] on 30th June, 2003 and was sent to Mr. Murphy on 8th July, 2003. According to the Society, reminders were sent to Mr. Murphy on 22nd July, 2003 and 5th August, 2003. The complaint was considered at a meeting of the Registrar's Committee on 30th September, 2003, which also considered the [REDACTED] and [REDACTED] matters. A fourth complaint was also addressed, which Mr. Murphy states "*went nowhere*". Mr. Murphy maintains that [REDACTED] was behind all of these complaints and that he was behind the [REDACTED] complaint was evident from the fact that the complaint was addressed to Ms. Kirwan and by an admission by Mr. [REDACTED] to Mr. Murphy's wife that [REDACTED] had placed the complaint before him for signature.

160. Mr. Murphy was out of the country in September, 2013 as his son was receiving treatment. He attempted to get the meeting adjourned, as did his brother. Mr. Murphy wished to attend personally and this is why he did not arrange for representation and sought the adjournment. He did not attend the meeting, nor did he arrange for

representation. The application for an adjournment was refused, particularly as no response to the complaint accompanied the request for the adjournment. The Committee referred the matter to the Tribunal.

161. One of Mr. Murphy's complaints in these proceeedings is that there was nothing in the letter of 23rd September, 2003 which gave warning of a potential referral to the Tribunal. It was put to him that he could at that time quite easily have stated his position in relation to the [REDACTED] complaint, the existence of the mortgage and the effect which this had on the overall situation, but he had not done so. It was suggested that this was part of a repeated pattern of non-communication at that time. Mr. Murphy repeated that there was a lot going on and that in any event, the Society, including Ms. Kirwan, ought to have been aware that if, as in this case, there existed an accountable trust receipt or a mortgage on a property, a client is not entitled to the deeds. Mr. Murphy also replied that any time he did correspond with the Society, he got nowhere. He believes that both [REDACTED] and [REDACTED] were aware that there was no entitlement to the documents and that any request for them should have come from the bank. Mr. Murphy complains that no effort was made by the Society to seek to resolve the complaint.

162. Ultimately, Mr. Murphy proceeded to register the title and sent [REDACTED] a notice of completion of registration on 6th January, 2004. He wrote to [REDACTED] on 15th March, 2004 informing her of this and also that he had met [REDACTED], apologised and offered an explanation to him. Mr. Murphy believes that that should have been the end of the complaint, and that in any event registration occurred well before the date upon which Ms. Kirwan swore an affidavit on 2nd April, 2004 in respect of the Tribunal hearing.

163. On 4th November, 2004 the complaint was heard by the Tribunal. Mr. Murphy emphasises that in his evidence to the Tribunal, [REDACTED] stated he was aware of the mortgage. Given that he had been on the Conveyancing Committee, Mr. Murphy believes that he must have known of the consequences of an undertaking and that [REDACTED] was not therefore entitled to the file.

164. The Tribunal made a finding of misconduct. Mr. Murphy was ordered to pay €5,000 to the Compensation Fund, to pay €1,000 to [REDACTED] and to pay costs. He believes that he appealed the finding, paid his town agents to take the necessary steps, but the appeal was mislaid.

165. Mr. Murphy subsequently made a complaint to the Tribunal (record number 5297/DT 139/09) against Ms. Kirwan that she had not brought his correspondence with Ms. O'Neill of 15th March, 2004 to its attention. Ms. Kirwan's evidence is that at the time of the swearing of her affidavit, she was unaware of the existence of the letter, but that it had been placed before the Tribunal. This complaint was dismissed and was not appealed, although Mr. Murphy maintains that he attempted to do so. Nevertheless, Mr. Murphy believes that it was for Ms. Kirwan to ensure that all information placed before the Tribunal was correct. He does not dispute that the information was before the Tribunal when it made its decision.

11.6 The [REDACTED] complaint

166. Ms. [REDACTED] instructed Mr. Murphy in the sale of her property. She died before contracts were exchanged. He then received instructions to act for the executor of her estate, Mr. [REDACTED], who died in July, 2002. A caveat had been entered which was extant at the date of his death. Mr. Murphy's office nevertheless proceeded to correspond with the District Probate Registry Office which issued a grant of probate on 25th November, 2003. Because the grant had issued after the executor's death, it had to be revoked.

167. Ms. [REDACTED], solicitor, acting on behalf of [REDACTED] personal representative, [REDACTED], wrote to Mr. Murphy on 18th December, 2003, requesting him to apply to revoke the grant. He did not respond. She further communicated with him on 22nd April, 2004 and requested to see the grant which he had extracted. Again she did not receive a reply. On 31st August, 2004, [REDACTED] sought the title deeds of the property, and because she did not receive a response, she made a complaint to the Society on 6th October, 2004.

168. On 11th October, 2004, Mr. Murphy was sent a copy of the complaint by Ms. Kirwan. He states that if given time he would have been able to rectify the error, but as a number of complaints were in the process of being dealt with or had recently been dealt with, he was concerned that the Society would not give him the opportunity to make good the error. He accepts that a mistake was made in his office in extracting the grant, something which he states that he had always admitted.

169. It was put to Mr. Murphy that instead of replying to the complaint he submitted bills to [REDACTED], who forwarded them to Ms. Kirwan on 10th November, 2004. On 22nd November, 2004, Ms. Kirwan served Mr. Murphy with a notice pursuant to s. 10 of the Act of 1994 requiring him to transmit his files to the Society, which he did. Following inspection of the files, she prepared a report which was sent to Mr. Murphy on 21st December, 2004 and upon which she invited his comments. She reported that although first advised in April, 2003 that [REDACTED] had died in July, 2002, he proceeded to write to the District Probate Registry on 13th November, 2003 seeking the issuing of the grant. Mr. Murphy replied on 5th February, 2005. He wished Ms. Kirwan to ascertain whether [REDACTED] or her clients were ever clients of his office and stating that, if not, the complaint ought not be entertained, as it related to the provision of inadequate professional services. He maintained that [REDACTED], for whom [REDACTED] acted, was not a client and therefore, the complaint should have been withdrawn. Ms. Kirwan informed Mr. Murphy that his letter of 5th February, 2005 would be placed before the Registrar's Committee at its meeting on 9th February, 2005 and he was reminded of his entitlement to be present at the meeting or to be represented thereat. He did not attend the meeting. The Committee decided that the complaint should be referred to the Tribunal.

170. Mr. Murphy complains that he was not warned that the matter might be referred to the Tribunal. He places emphasis on the contents of the minutes of the Registrar's

Committee meeting of 9th February, 2005 where the complainant was described as a solicitor acting for a former client. He contends that the Society entertained the complaint on an incorrect basis. Ms. Kirwan confirmed in evidence that Mr. Murphy's letter was put before the Committee, Mr. Murphy believes that it was not. He emphasises that the contents of the *minutes* of that meeting recorded that he had not responded. Ms. Kirwan states that this was in fact the *agenda*, which had been prepared two weeks before the meeting and before his response was received (emphasis added).

171. It was put to Mr. Murphy that the complaints also concerned the application for a grant of probate after the death of the executor, the failure to hand over a file, and the failure to hand in the grant of probate from the Probate Office. Ms. Kirwan maintained that these were complaints which might be investigated if made by another solicitor and they were not complaints of inadequate services. Mr. Murphy accuses the Society of applying such reasoning in an *ex post facto* manner.

172. Mr. Murphy's evidence is that he corresponded with [REDACTED] in June, 2005 when he was winding down his practice; and that he had an agreement on fees. To explain why he did not communicate with [REDACTED] and reply to her correspondence, Mr. Murphy stated that there were ongoing discussions between them in relation to fees. He believed that the issue would be resolved. While he accepts there was an error made in relation to the grant, he does not believe that it was misconduct. He maintains that he had agreed to a reduction in his fee from a total of €4,000 to €2,000. He alleges that the Society was aware of this agreement but nevertheless proceeded to have the matter referred to the Tribunal.

11.7 The [REDACTED] complaint and its connection to the s. 18 proceedings and the attachment and committal application

173. Mr. [REDACTED] had previously made a complaint about Mr. Murphy in 2005/2006 about files which he was handling on his behalf. The complaint was investigated and no action was taken. On 19th January, 2007, Messrs. Kelly and Dullea, solicitors made a complaint on behalf of [REDACTED] relating to an alleged transfer of lands to which Mr. Murphy was stated to be as party, in September, 2004. The lands were owned by a Mr. Donal Brendan O'Connell. Mr. Murphy alleges that he was not a party to and did not sign any such transfer and that it was a forgery.

174. While the letter of complaint has a number of different receipt stamps on it, it seems clear that the complaint was received by the Society a short time before the orders were made in the s. 18 proceedings. Enclosed with the letter was a copy of a deed of transfer dated 20th September, 2004 stated to have been made between Mr. Murphy and [REDACTED]. Mr. Murphy was described as trustee and [REDACTED] described as beneficiary. The transfer is stated to having been supplemental to another transfer of 20th September, 2004 made between Donal Brendan O'Connell and Mr. Murphy which recited that he was the person entitled to be registered as owner of the lands.

175. Kelly & Dullea again wrote to the Society on 16th February, 2007, informing the Society that they had written to a representative of the registered owner on 9th February and to which they had received a reply on 12th February. Kelly & Dullea said it was essential that the file and the transfer of 20th September, 2004 be located. The letter continued *"Our client has also informed us about another file which Mr. Murphy was dealing with about which our client claims €35,000 has been retained by his office…"* and *"Mr. Murphy refused to pay out monies from the sale's proceeds and the matter requires further investigation."* The file related to two sites in Kenmare and Lauragh.

176. On 12th February, 2007, Mr. Frank O'Connell solicitor wrote to Kelly & Dullea informing them that "quite definitely" Mr. O'Connell did not sell nor was he aware of any purported sale of his property in 2004 and that the transaction came as a complete surprise. The letter continued:-

> *"I can tell you that I became aware of an alleged sale of the property to a colleague of Colm Murphy's named Declan O'Donoghue who is, I understand an auctioneer in Kenmare. However, when I investigated the matter last July it transpired that Colm Murphy had purported to act for both Mr. O'Connell and for Declan O'Donoghue in connection with that sale. As far as I am concerned no sale took place and certainly no proceeds of sale were ever received by Mr. O'Connell or by me."*

177. It was confirmed that in December, 2004, because of ill-health and incapacity, Mr. O'Connell was made a ward of court and Mr. Frank O'Connell was appointed his committee. Mr. O'Connell also confirmed that he had in his possession the original land certificate and protested that the land belonged to Mr. O'Connell.

178. On 16th February, 2007, Mr. Kelly replied to Mr. O'Connell, enclosing copy of the Deed of Transfer of 20th September, 2004 and a copy of a planning permission stating:-

> *"While we appreciate your position in this matter and the fact that Mr. O'Connell may well be a victim of Mr. Murphy's apparent malpractice, our client has suffered considerable expense and loss which he intends to pursue by all means possible and will keep you informed of any progress which we hope with the Law Society".*

179. Mr. Murphy denied that he had been involved in the transfer and informed the Society of this in an affidavit accompanied by a letter dated 13th February, 2007.

180. On 3rd April, 2007 Mr. Clohessy wrote to Mr. Kelly enclosing the file provided by Mr. Murphy, an extract from his affidavit, and stated that Mr. Murphy was questioning the copy of the transfer. A reply to this letter was not received. On 10th August, 2007 the Society wrote to [REDACTED] solicitor seeking a response within 14 days, advising that in the absence of a reply the file would be closed. Again, no response was received and on 21st September, 2007 [REDACTED] solicitors were notified of the closing of the complaint.

181. Although the complaint was closed, further correspondence took place in 2008. On 11th March, 2008, Kelly & Dullea wrote to the Society referring to a conversation between Mr. Kelly and an individual in the complaints section:-

> *"I confirm that having received a phone call from Colm Murphy yesterday threatening defamation proceedings as a result of my letter of the 9th February stating that he was struck off I would be obliged if you would please confirm the exact position in relation to Mr. Murphy's status as a solicitor."*

182. This was replied to on 12th March, 2008 by Ms. Kirwan who confirmed that Mr. Murphy did not hold a practising certificate for the years 2005 to 2007 and that he did not apply for it. Of note, in passing, that the contents of this reply are not entirely consistent with the contention that Mr. Murphy's practising certificate had been refused.

183. On 9th July, 2008, [REDACTED] wrote directly to the Society seeking copies of all correspondence between his solicitor and the Society. On 22nd July, 2008, Mr. Clohessy replied enclosing copies of correspondence exchanged in March, 2008.

184. On 26th July, 2008, [REDACTED] informed Mr. Clohessy that Mr. Kelly was no longer representing him. He made a further complaint regarding a transaction in Kenmare. In a lengthy document he described a history of dealings with Mr. Murphy. [REDACTED] stated that he was a property developer who became aware that the property was for sale. He contacted an auctioneering firm owned by Mr. Declan O'Donoghue to discuss another land deal and he requested Mr. O'Donoghue to recommend a solicitor in Kenmare. He recommended Colm Murphy. [REDACTED] contacted Mr. Murphy and found him to be efficient and honest in his dealings. He relied on Mr. Murphy for professional, legal and commercial advice. Mr. Murphy completed a number of land transactions in the Kenmare area for him and he was satisfied with the quality of his work. They socialised from time to time and in return for his loyalty, [REDACTED] introduced Mr. Murphy to land deals in the United Kingdom and Dubai. Mr. Murphy also approached him regarding certain prospective land deals as they arose in Kenmare.

185. [REDACTED] alleged that in late December, 2003 Mr. Murphy advised him that a client, Donal Brendan O'Connell, wished to sell a parcel of land for €165,000. The sale was subject to planning permission. He conducted planning searches. The lands were subject to two previous planning applications made by Mr. O'Connell in 1997 and 2000, which were refused. [REDACTED] described how he made planning enquiries, retained an architect and decided to purchase the property subject to planning permission. A deposit of €12,000 was paid. He alleged that Mr. Murphy represented both parties in the transaction. Planning permission was granted on 31st May, 2004. He contacted Mr. Murphy to complete and transfer the lands into his name, which Mr. Murphy confirmed he would do. He alleged that he received an original signed deed of transfer of 20th September, 2004 from Mr. Murphy which recited the transfer from Mr. O'Connell to Mr. Murphy. [REDACTED] claimed to be the person entitled to be registered as owner and stated that at the time of the transfer Mr. Murphy was "*very edgy*" and informed him that

he was having some trouble with the Society. [REDACTED] stated that "*without warning Mr. Murphy disappeared off the scene*". He stated that he contacted Mr. Murphy and was assured that the matter was in hand. He then discovered that the property remained in the name of Mr. O'Connell. [REDACTED] states that he was at a significant financial loss due to Mr. Murphy's actions and bad advice. The consequential loss was stated to be at least €2.3 million, "*if not an awful lot more*". He queried whether Mr. Murphy had insurance and whether he should sue Mr. Murphy's insurance company. He also complained of stress.

186. On 11th August, 2008 Mr. Clohessy wrote to [REDACTED] informing him that he should seek independent legal advice. He enclosed a copy of an extract from Mr. Murphy's affidavit sworn on 14th March, 2007 in which he averred that he did not transfer any property either before or after Mr. O'Connell was made a ward of court alleging his belief that [REDACTED] had taken the back "*signature*" page of the transfer of lands at Rossmore and attached a different front page to this page. By reply of 29th August, 2008, [REDACTED] recorded that he was underwhelmed by Mr. Murphy's dishonest allegation.

187. Mr. Murphy states that land was purchased by Mr. O'Donoghue long before Mr. O'Connell was made a ward of court. [REDACTED] may have assisted Mr. O'Donoghue in respect of a planning application, but he never owned it. He states that [REDACTED] was motivated to make a claim against him or the fund and that on a day that he was before the court for attachment, 14th March, 2007, Ms. O'Neill forwarded the file relating to the folio to Mr. O'Donoghue's solicitors.

188. Many years later, on 25th April, 2011 [REDACTED] once again wrote to the Society, attaching the complaint made by him on 26th July, 2008 and enclosing what he described as a very upsetting article in the *Phoenix* magazine which was published on 8th April, 2011. He sought an update on the progress being made by the Society in dealing with his complaint. The *Phoenix* magazine article referred to the case between Mr. Murphy and the Society and Mr. Fallon's name was mentioned as was his conviction and sentencing in England on a different matter. It was also mentioned that [REDACTED] had contributed to his downfall. The article recounted how Mr. Murphy had a history of trouble with the Society, having appeared before the Tribunal eight times and having twenty findings of misconduct made against him between 1999 and 2008. The article also stated that:-

> *"Murphy will argue that the Law Society in part relied on the evidence of a since convicted fraudster* [REDACTED] *to have him struck off."*

189. The article also referred to [REDACTED] having been involved in a complicated property dispute some years previously involving a London solicitor resulting in a judgment against him in 2005 for €310,000. Judgment was also entered against a former business associate Declan O'Donoghue.

190. The [REDACTED] issue must be viewed in context. The attachment and committal proceeedings had been adjourned from time to time and Mr. Murphy maintains that this application was wrongly continued because of the [REDACTED] matter and that the neither he nor the court were informed that the complaint had been closed. Interrogatories were raised in these proceedings on 8th August, 2016. They were replied to by Mr. Elliot on 6th October, 2016. At p. 123 the following issue was raised:-

"Did the first named defendant advise the court that it had sent a letter (the letter of 21st September 2007 in respect of [REDACTED] *saying it had closed its file)?"*

The reply was as follows:-

"Ms. O'Neill is not in a position to give oral evidence on medical grounds or to assist in the answer to the interrogatories, "accordingly it has not been possible to ascertain at this remove the answer to this interrogatory. Having made inquiries, it is my belief that the answer to this interrogatory is that the first named defendant cannot confirm or deny whether the first named defendant so advised the court. I wish to note by way of general reply that insofar as any of the orders sought in such proceedings were consented to by the plaintiff, it is possible that the court may not have acquired any further evidence or debate in respect of those issues and so what is set out in the affidavits and exhibits may represent the totality as to what was before the court at that time."

191. Mr. Murphy contends that additional evidence has come to light since he made a complaint against Ms. O'Neill that she had used the [REDACTED] complaint to have him attached and committed when she knew, or ought to have known, that the transfer could not be relied on (2010/78SA). He maintains that correspondence which he sent after the s. 18 order was obtained shows that he was willing to comply with that order. What kept the attachment and committal proceedings alive was the [REDACTED]/O'Connell issue, and that the application to commit was brought without reference to any decision taken by a relevant committee. If he was in breach of the s. 18 order when this application was brought, he states it was because the Society had not replied to his letters of late January and February, 2007 from his solicitor. He contends that Ms. O'Neill's letter of 14th February was focused on the [REDACTED] matter and it thereafter became the central issue. His letters were not replied to until 14th March, 2007, and only after the motion was brought. His then solicitors, Messrs. Murphy Healy wrote on 8th March, 2007 protesting at what had occurred.

192. The Society maintains that Mr. Murphy is incorrect on this and that concerns continued regarding the transfer of files, run off insurance cover, and a closing accounant's report which had been sought when the practice closed in 2005. When this was delivered two years later it showed a deficit of €255,227.74. This was made good and the court was so informed on 11th June, 2007. Correspondence continued thereafter concerning the examination of ledger files in respect of files which had been transferred to Murphy Healy. The matter was due back in court on 19th November, 2007. The Society state that the

only issue related to claims on the compensation fund, the only issue then outstanding was costs. On 14th December, 2007, his solicitors asked whether everything had been dealt with and querying what claims arose on the compensation fund. That was not replied to prior to the next court date on the 19th, when an order was made that further affidavits be filed.

193. On 13th December, 2007 the Society wrote to Mr. Murphy's solicitors, informing them that a letter had been received from Mr. and Mrs. O'Donoghue's solicitors withdrawing their complaint. Further, a notice of change of solicitors was served, which resulted in the case being adjourned to 21st January, 2008. As new counsel was retained, the matter was further adjourned to 4th February, 2008. Having changed his solicitor in December, 2007, Mr. Murphy brought an application to revisit the order for substituted service in the s. 18 proceedings and also to review the orders to which he had consented on 31st January, 2007. In an affidavit sworn by Mr. Murphy in support of that application, Mr. Murphy raised many issues which have been revisited in this case. These include the failure of the Society to deal with his assertion that he had nothing to do with the auction, that his alleged participation in the auction was the catalyst to the issuing of the proceedings, and that without the auction, the s. 18 proceedings would not have been brought. He also addressed the issue of the alleged use of stationery and challenged any suggestion that he was not entitled to use headed notepaper up to the time that he ceased practicing in June, 2005. He queried whether certain clients had authorised the making of complaints, for example [REDACTED] who was a client of Messrs. Coakley Moriarty. He raised issues concerning queries which he had addressed to Mr. McGrath regarding the manner in which someone in his position, ceasing practice, would go about repaying monies to clients and states that Mr. McGrath confirmed to him that the only way he could have paid the money was to write a cheque on the client account. He referred to the [REDACTED] matter, the O'Donoghue issue (which he stated was resolved), and the O'Sullivan matter which had been clarified. He pointed to an affidavit of Mr. O'Sullivan which had been sworn confirming that no wrongdoing had occurred. He addressed the issue of professional indemnity insurance. While he was out of the country the renewal notice arrived and on becoming aware of the requirement for runoff cover, he immediately contacted his previous insurers, the Solicitors Mutual Defence Fund Limited, who refused him cover, despite the fact that he never had a claim. The court had directed the Society to provide a list of approved insurers. He wrote to one of them and was informed that that company did not provide such insurance. He addressed the issue of the accountant's reports in considerable detail. He explained that the shortfall occurred because he was owed fees from his practice, a considerable amount of which was in the client account and which he removed. He reiterated that there was no risk to the compensation fund. He protested at Ms. O'Neill referring to disciplinary matters which were before the Tribunal in July, 2007, and this was particularly so because counsel for the Society had informed the court *on at least nine occasions* that there was nothing outstanding in relation to the original order or the application for attachment and committal other than the question of costs. He then addressed the individual complaints such as the [REDACTED] matter and the [REDACTED] matter. He described how he had

instructed solicitors to apply for an extension of time within which to appeal in these cases but this was not done. He clarified the position in relation to a mobile phone bill. At para. 15 of that affidavit he accepted that on occasion, his interaction with the Society may have been less than the professional standards required and may have been inappropriate on occasion. Such behaviour was stated to have been borne from frustration rather than contempt for his profession. He went into great detail in relation to the Healy matter, the fact that he was not given financial assistance, that even though the Society attempted to distinguish its involvement in affording financial assistance to another practice, it had not yet been wound up. The accountant's investigation in 2001 was also addressed in considerable detail. The innuendos and rumours, Mr. Simon Murphy, the divulging of confidential information. He confirmed his intention to continue the proceedings against the Society for the manner it conducted this investigation and breached confidence. Issues in relation to the undertaking, his retirement from practice, and various other complaints were also addressed. At para. 22 of that affidavit he stressed the importance that the order for substituted service be set aside. At para. 25 he addressed issues arising out of the obtaining of the order in the first place and had expressed the view that a reason why the matter was back before the court was because Ms. O'Neill failed to deal with correspondence from him in an appropriate manner, in particular his letter requesting the Society to appoint a nominee in respect of the files and the client account. He considered appealing the order of the 31st January, 2007 and it was agreed that because he was appealing a consent order, he should change his legal team. He also stated that in dealing with the application for attachment and committal, the Society introduced the [REDACTED] matter which it should not have done. He states that the Society brought the accounting matter under the umbrella of the committal proceedings, which they should not have done, because those proceedings were issued on 22nd February, 2007 before the date which was set for the filing of the accountant's report, 28th February, 2007. He sought an order discharging him from his undertaking not to practice or to hold himself out as a solicitor, an order setting the s. 18 proceedings down for plenary hearing and for an order that certain witnesses be cross-examined.

194. I have set these matters out at some length to illustrate that to a greater or lesser extent, many of the issues of which Mr. Murphy complains of in these proceedings have already been placed before the court in the s. 18 proceedings and the attachment and committal application which arose therefrom.

195. Mr. Murphy also relied on affidavits from those involved in the sale of the public house, including the auctioneer, the owner of the pub and Mr. Conor Murphy all confirming that he was not involved in the sale. An affidavit sworn by his former solicitor, Mr. Hennessy, was to the effect that his letter of 14th February, 2007 requesting Ms. O'Neill to nominate a body or person to whom files might be transferred was not responded to.

196. The Society was granted time to file a replying affidavit, in which it drew the court's attention to unappealed determinations of the Tribunal on 10th July, 2007 where fines were imposed and which had not been paid. Mr. Elliot also refers to an affidavit sworn by

Mr. O'Reilly, Mr. Murphy's accountant on 26th March, 2008, in which he described the shortfall being due to a miscalculation by Mr. Murphy in relation to drawing of fees due, something which Mr. Elliot finds difficult to comprehend. Mr. Elliot states that it is apparent that these funds were repaid only when, on foot of the attachment and committal proceedings, the accountant's report was submitted and which identified the miscalculation. On 8th April, 2008, Ms. O'Neill filed a final affidavit in which she stated that she would not address the issues raised about the s. 18 proceedings because Mr. Murphy had consented to those orders. Therefore, she contended that the only remaining issue related to costs.

197. In an *ex tempore* judgment delivered on 17th June, 2008, in awarding costs to the Society, Johnson P. ruled:-

> *"In respect of his application to extend time for appealing certain orders of the Tribunal. These procedures have been exhaustive. There has to be some limit. This is a professional solicitor who failed to exercise his rights under the law. I refuse the application."*

12. Defamation

12.1 The O'Dowd investigation and rumours

198. Mr. Jim O'Dowd, an investigating accountant appointed by the Society, had conducted investigations into Mr. Murphy's practice in the past and gave evidence of those previous investigations. In September, 1988 a deficit was discovered in a client account and required to be funded. Certain recommendations were made by him in his report in October, 1988 for the guidance and benefit of Mr. Murphy. The matter was considered before by Compensation Fund Committee on 12th October, 1988 but no disciplinary action was taken at that time.

199. Mr. O'Dowd conducted an investigation in 1993, which was also referred to and considered by the Compensation Fund Committee in March, 1993. Mr. O'Dowd felt that between the late 80s and early 90s, proper books of account were not being maintained, balanced or reconciled. At a Compensation Fund Committee meeting the chairman informed Mr. Murphy that the Committee had decided not to put him out of practice *"this time"* but that in future if even IR£1 went astray, his record would be taken into account and he would be prevented from practising as a solicitor. To this extent, this historical information, in so far as it is relevant to the issues to be addressed in this case, gives some insight into the uneasy relationship which existed between Mr. Murphy and the Society, long before the matters giving rise to these proceedings arose.

200. Mr. O'Dowd believes that he nevertheless enjoyed a good relationship with Mr. Murphy. Between 27th April, 2001 and 17th May, 2001 he attended Mr. Murphy's practice and conducted a further investigation. He was provided with documentation which suggested to him that there were certain deficits and errors in the ledger balances. He believed a deficit to be greater than that shown. Mr. O'Dowd states that up to 4th May, 2001, the level of cooperation provided by Mr. Murphy was exceptional in some respects, such as by

the making of voluntary disclosures and the provision of files in a proper manner. However, he states that cooperation was not exceptional in other respects, such as the provision of inaccurate figures at the commencement of the investigation.

201. On the fourth day of the investigation, Mr. O'Dowd went through a document with Mr. Murphy containing what he described as standard investigation questions. He described this document as his audit checklist. It contained questions which he states that he would generally address to solicitors. One of the queries concerned claims, potential claims or complaints to the Society. Another queried whether claims being handled by the solicitor had become statute barred. Queries were also raised as to whether the solicitor had borrowed or taken client monies, whether deeds had been stamped and whether there were arrears in the stamping.

202. One such question "*Any recent complaints to the Law Society*?" was responded to by Mr. Murphy as follows: "[REDACTED] *thinks I acted for Weeland against* [REDACTED]. This was the first that Mr. O'Dowd became aware of a complaint by [REDACTED]. His evidence is that he did not pursue the matter further as he believed that this was irrelevant to the work which he was doing. Mr. O'Dowd denies that he placed undue emphasis or spent a considerable time investigating files in relation to Mr. Weeland. He contends Mr. Murphy was responsible for taking the investigation down what he described as an unexpected route when he voluntarily referred to under the counter payments on property transactions. He photocopied certain documents from certain files.

203. Mr. Murphy felt that Mr. O'Dowd had acted inappropriately in inspecting and copying files, or particular entries on files, which were unrelated to financial transactions. He came to believe that the Society, and in particular Mr. O'Dowd, had a hidden agenda and he states that while he may have appeared fully cooperative in the initial stages, nevertheless he had concerns which were confirmed on the weekend of 8th May, 2001 when he read media reports regarding a decision of the High Court in *Kennedy v. Law Society (No. 3)* [2001] IESC 35, [2002] 2 I.R. 458. It was held by the Supreme Court, *inter alia*, that the investigation of fraudulent claims was not an authorised purpose under the Solicitors' Accounts Regulations. Furthermore, such investigation was limited to the sole purpose of determining the solicitor's compliance with the Solicitors' Accounts Regulations. Nevertheless, an accountant who encountered a suspicious transaction or matter was bound to investigate it thoroughly, irrespective or his or her status as a reporting or investigating accountant. Mr. Murphy challenged Mr. O'Dowd about these concerns in a letter written on 8th May, 2001.

204. Mr. O'Dowd believes that Mr. Murphy's change in attitude after the May bank holiday weekend was due to Mr. Murphy's appreciation and concern in relation to his voluntary disclosures of client matters. He spoke on the telephone with Mr. Murphy on 8th May, 2001 when Mr. Murphy queried whether he had a hidden agenda in examining the Weeland files and in particular in relation to a complaint that he had acted for all parties at the same time. Mr. O'Dowd denied such hidden agenda and stated that files were chosen based on an examination of the client's ledger accounts. On the same day, Mr.

Murphy wrote to Mr. O'Dowd and accepted that there was no hidden agenda in relation to the inspection of files or in respect of Mr. Murphy's own personal financial affairs. Mr. Murphy's evidence is that his anxiety was heightened by media reports on the Kennedy case. His outstanding issue was whether Mr. O'Dowd should have access to client files if the client objected. He thought it would be useful if this could be *"thrashed out on an amicable basis"* for the benefit of solicitors in general and the Society.

205. Mr. O'Dowd forwarded Mr. Murphy's letter to Ms. O'Neill on 9th May, 2001 and sought advice as to whether he had authority to examine and report on contents of client files which he believed should be brought to the attention of the Compensation Fund Committee, even where the clients involved did not wish him to examine their files. Mr. O'Dowd also informed her:-

> *"To date, Mr. Murphy has told two clients about the investigation and he stated that they do not want me to examine their files".*

206. In another fax sent later that day, Mr. O'Dowd sought advice on:-

> *"…whether or not I have authority to include details in the Investigation Report of Mr. Murphy's work for Mr. Weeland, which would be mainly included for the benefit of Dara McMahon who is handling the complaint."*

Draft findings were attached which included reference to a disclosure made by Mr. Murphy of "*under the counter*" transactions. Mr. O'Dowd could not recall whether he received a reply to these queries. Nevertheless, his report was completed on 18th May, 2001 and was considered by the Compensation Fund Committee at its meeting of 24th May, 2001. It was decided to seek counsel's advices on the issues raised.

207. Prior to receipt of counsel's advices, the matter came back before the Compensation Fund Committee on 6th December, 2001 and a decision was taken to investigate Mr. Murphy's Killarney practice. It was also decided that on completion of that investigation, an authorised person should be instructed to attend at the Kenmare practice to complete a report on the files referred to in Mr. O'Dowd's report of 18th May, 2001.

208. In the months following the inspection, Mr. Murphy became aware of rumours that he was to be struck off the Roll of Solicitors for irregularities in client accounts and for taking clients' funds. Initially, those rumours circulated locally but were subsequently heard further afield. One particular instance recalled by Mr. Murphy is that his sister heard such a rumour when attending Cork courthouse. In December, 2001, he states that his brother Conor made him aware that Mr. O'Dowd had conducted an inspection of another local practice of Mr. Vincent Coakley, and had questioned him about various transactions that he had had with Mr. Murphy's office. Because of such questioning, Mr. Murphy states that Mr. Coakley formed the opinion that he, Mr. Murphy, was in trouble with the Society. This prompted him to write letters to Mr. O'Dowd on 21st January, 2002, and again in

February, 2002 outlining his concerns. Mr. Murphy complains that neither of these letters were replied to by Mr. O'Dowd or the Society.

209. In a letter of 21st January, 2002 he repeated his contention that files which had nothing to do with the audit had been examined. He sought to correct any impression that payments had been made in a manner which contravened his clients' revenue obligations and withdrew any implication of impropriety on their part. He also stated that his clients had expressed outrage at what he described as such breach of confidentiality by him and they had demanded the return of their files. On 13th February, 2002, Mr. Murphy wrote complaining to Mr. O'Dowd that he had questioned a solicitor about his practice with the result that the solicitor believed that Mr. Murphy was in trouble with the Society.

210. Mr. O'Dowd's evidence is that his report of 18th May, 2001 did not deal with alleged impropriety by clients, rather, alleged impropriety by Mr. Murphy. He denies that he questioned another solicitor about Mr. Murphy's practice. He had no recollection of receiving the earlier letter and the first time the matter was drawn to his attention was around the time of a Compensation Fund Committee meeting in early 2003. Mr. O'Dowd believes that any conversation that he may have had with Mr. Coakley referred to the actions of Mr. Coakley and not of Mr. Murphy, and was not reported on by him and that he did not question Mr. Coakley about Mr. Murphy or about his practice. He maintains that in any event it is evident from Mr. Murphy's letter of 8th May, 2001, that it was he who informed his clients of the issue and Mr. O'Dowd believes that such letters would have served to fuel the rumours of which Mr. Murphy complained.

211. Mr. Murphy states that the Society did not reply to his letters until 9th October, 2002, when he was informed that arising out of Mr. O'Dowd's investigation, the Society was appointing an investigating accountant, Mr. Edward Sheehan, to conduct further investigations. Mr. O'Dowd's report was submitted with that letter. This prompted Mr. Murphy to write to the Society on 10th October, 2002 repeating his concerns and stating that if he did not receive a satisfactory response to his earlier letters, he would refuse access to the investigating accountant. The Society responded on 11th October, 2002, advising that unless he confirmed that all files would be made available to the accountant, application would be made to the High Court for an appropriate order.

212. On 17th October, 2002 following an *ex parte* application, the President of the High Court made an order granting the Society liberty to issue a motion returnable to 25th October, 2002. The Society gave an undertaking as to damages. Mr. Murphy queried the basis on which such an undertaking could be given, and he made a complaint to the Tribunal against Ms. O'Neill in 2010 (DT/2010/82 SA) that she had instructed counsel to give such undertaking when she had no instructions or authority to do so. The Tribunal dismissed this application and this is the subject of a pending and deferred appeal.

213. On 21st October, 2002, Mr. Murphy gave the undertaking which had been requested by the Society. The application came before the President of the High Court on 23rd October, 2002 and was adjourned to 25th November, 2002. On 29th October, 2002 Mr.

Sheehan commenced his investigation of Mr. Murphy's practices in both Kenmare and Killarney. The investigation was conducted over a number of days and on 7th November, 2002, Mr. Sheehan prepared his report. This was provided to Mr. Murphy under cover of letter of 21st November, 2002. The previous report of 18th May, 2001 prepared by Mr. O'Dowd was also included. On 25th November, 2002, the motion was struck out by the President of the High Court with costs against Mr. Murphy and he was released from his undertaking.

214. At a meeting of the Compensation Fund Committee on 20th February, 2003 the investigation report was considered. Mr. Murphy was in attendance. The meeting was adjourned to 27th March, 2003 to afford Mr. Murphy time to provide additional information. In the meantime, on 14th March, 2003 the Committee replied to Mr. Murphy's letter of 13th February, 2002 and stated that neither the Society nor Mr. O'Dowd had a record of receiving the letter of 13th February, 2002, and that first occasion on which it came to the attention of the Society was when it was exhibited to an affidavit sworn by Mr. Murphy on 23rd October, 2002. The Society denied that Mr. O'Dowd questioned a solicitor in the Kenmare area about Mr. Murphy's practice and stated that there had been no previous complaints that Mr. O'Dowd had breached confidence. Unless credible evidence to the contrary was forthcoming, the Society's view was that it considered the letter of 13th February, 2002 as having been fully responded to.

215. In his reply of 2nd April, 2003, Mr. Murphy commented that despite the fact that the letter was exhibited in his affidavit of 23rd October, 2002, it should have been noticed and if it had not been received, it should have been mentioned in a replying affidavit. Mr. Murphy did not name the solicitor in question but stated that the conversation between Mr. O'Dowd and the solicitor came to light in December, 2001.

216. In letters written in February, 2005 Mr. Coakley is stated to have expressed surprise that he might have some input into the case or that he might be called as a witness. He was unsure as to the nature of the conversations which were stated to have taken place or what his alleged involvement might be. Mr. Coakley was not called to give evidence.

12.2 Simon Murphy & Frank Keating

217. Mr. Simon Murphy was joined as a co-defendant. The proceedings have since been struck out against him as being out of time. Nevertheless, the circumstances of a conversation between him and a client, Mr. Frank Keating, was the subject of detailed consideration during the evidence. Mr. Simon Murphy was one of a number of solicitors who Mr. Keating had engaged.

218. In evidence Mr. Keating stated that he believed that he referred to the plaintiff on the occasion of a visit to Mr. Simon Murphy in January, 2002. He stated that Mr. Simon Murphy suggested to him that he should be careful when dealing with Mr. Colm Murphy and that the latter was being investigated by the Society in respect of under the counter payments. Mr. Keating inquired as to whether it was possible that he might be struck off,

to which Mr. Simon Murphy indicated that he did not believe the plaintiff would be struck off but the implication was that "*Colm could not be trusted*".

219. Under cross-examination, however, Mr. Keating agreed that it may have been he who initiated the conversation, and not Mr. Simon Murphy. He was satisfied that Mr. Simon Murphy was not trying to get the plaintiff into trouble but that was warning him and looking after his interests as a client. While he kept Mr. Simon Murphy's name confidential for many years, Mr. Keating understood that nothing had been proven at that time. Mr. Keating also stated that what prompted him to mention matters to Mr. Colm Murphy were rumours he had heard from another unnamed solicitor. Some six or seven years later he mentioned the matter to the plaintiff, and it was then that he named the person with whom he had the conversation, *i.e*. Mr. Simon Murphy. He disclosed the name at that time, because he felt that the plaintiff was being unjustly treated and there was another solicitor in Cork causing problems for him. He was not aware that Mr. Simon Murphy was on the council of the Society. He also confirmed that he heard the rumor that the plaintiff was being investigated for under the counter payments from a number of people.

220. Mr. Simon Murphy's evidence is that Mr. Keating informed him that he had heard that the plaintiff was being investigated concerning stamping of deeds. He also confirmed that he told Mr. Keating that if it transpired that there was any substance to such allegations the plaintiff would most likely get away with his knuckles being rapped and that he may have said that there was no likelihood of Mr. Murphy being struck off because there was no suggestion that client monies had been taken. He requested Mr. Keating to keep this conversation confidential between them. Mr. Simon Murphy accepted he should not have disclosed this information to Mr. Keating but the conversation was one which he believed was part of a solicitor/client discussion and in direct response to a remark or question raised by Mr. Keating on an occasion of a professional visit. He recollected that some time thereafter he saw a letter from the plaintiff to the Society in which he referred to an unnamed council member having made an allegation concerning him, the plaintiff. Mr. Simon Murphy thought that he may have mentioned his unease at the time to both Ms. O'Neill and Mr. Connolly and that it was he who suggested that he should not sit on any committee which might have to deal with the plaintiff.

221. On 26th March, 2008 the plaintiff wrote to Mr. Simon Murphy requesting that he accept responsibility and threatened to join him as a co-defendant. Mr. Simon Murphy stated until he received this letter he had completely forgotten about his conversation with Mr. Keating. In an affidavit sworn on 3rd April, 2009 to oppose the plaintiff's application to be joined as a co-defendant he swore that the first he had heard of any complaint by the plaintiff against him was when he received the letter of 26th March, 2008. He denied the allegation. He also averred that he had no knowledge of the identity of the unnamed client with whom he was alleged to have had the conversation. It is clear that this was incorrect but he states that it was only when Mr. Keating's name emerged in replies to particulars that he recalled the conversation. It was suggested to him that he should have

recollected this at the time he swore his affidavit in 2009. His reply was that while he had many dealings on the regulatory side in the Society, he had no dealings with Mr. Murphy, so when he received the letter in 2008 it came as a "*bolt from the blue*". He did not recall the earlier interactions with Mr. Keating when he swore the affidavit in April, 2009, which had been drafted for him and which he had approved. That affidavit contained a paragraph expressing a view that the only reason why the plaintiff would have invented such an allegation was in order to interfere with the Society's attempts to regulate him. In replies to interrogatories, however, he confirmed that he did discuss the allegations with Mr. Frank Keating, but only to the extent of briefly telling Mr. Keating of the existence of the allegations.

12.3 Compensation fund claim forms

222. The Society took control of the plaintiff's client account pursuant to the order of the President of the High Court dated 31st January, 2007. The plaintiff maintains that the Society became concerned, and wrongfully so, that there was not enough money in the account to meet the liabilities to his clients. Ms. Mary Devereux, senior investigating accountant with the Society was dispatched to investigate files which were then held by Messrs. Murphy Healy. She sent a report to Mr. McGrath. Mr. McGrath decided that the appropriate course of action was to send compensation fund forms to former clients. The form, entitled "*Notice of Loss"* included a number of queries seeking details of the name and address of the person on whose part dishonesty was alleged and the facts relied upon in support of the allegation of dishonesty.

223. Mr. Murphy protested against the use of this form particularly because if there was a shortfall in the account, this was not due to dishonesty. He had not been dealing with these files for over two years, during which time the files were in possession of Messrs. Murphy Healy. The funds had been held by the Society since March, 2006. Despite protest, the forms were distributed by Ms. Healy at the direction of the Society. Mr. Murphy believes that the forms were defamatory of him.

224. The Society's case is that Ms. Devereux's report disclosed neglect of client matters for a number of years. The practice had been closed in 2005 but by 2007 there were still substantial funds held in the client account and client matters had not been resolved. Mr. McGrath was concerned that revenue interest and penalties would arise in respect of stamp duty and taxation. The Society had been advised by one firm of solicitors, Messrs. Philip O'Sullivan and Company, that they had received a verbal undertaking from Mr. Murphy that funds would be held in his client account upon resolution of proceedings in relation to a matter concerning a limited company. These funds were not shown in Ms. Devereux's report. Thus, for these reasons it was decided to distribute the forms. They were in standard format and continued to be used until 2010 when a new claim forms was introduced. This new form differentiates between claims for dishonesty and claims for money under the control of the Society.

225. A total of nine forms were sent by Mr. McGrath to Messrs. Murphy Healy on 7th September, 2007 for completion by former clients of Mr. Murphy. It is unclear how many

were sent to former clients. The Society is only aware of the form having been provided to a Ms. Mullins who made direct contact with Mr. McGrath. Mr. Murphy maintains that this former client was not comfortable completing the form because of the reference to dishonesty. Ms. Mullins was not called in evidence.

226. On 12th September, 2007, Messrs. Murphy Healy wrote to the Society questioning the need to distribute the forms. They sought to have the Society discharge monies directly to clients and that if a claim arose then it could be dealt with at that stage. Mr. Conor Murphy wrote to Mr. McGrath querying why the matter was one for the fund and stating his understanding that there were sufficient funds in the accounts of Colm Murphy and Co to discharge sums due to executors and beneficiaries. Mr. Hennessy also wrote Mr. McGrath protesting that all files and monies had been in the possession of the Society and that there was no necessity for any claim on the fund. Mr. McGrath replied by letter dated 5th October, 2007 outlining his concerns about the uncertainty. He said it was unclear whether there were liabilities to clients. He gave evidence of his understanding that the dominant concern being expressed about the use of the compensation fund form procedure was that it would further delay payments to clients. At that time the Society had experienced difficulties in other cases where solicitors were in personal difficulty. In those cases the Society took possession of the funds in the client account, requested the clients to make claims on the fund, made payments from the fund and reimbursed the fund from the client account. Mr. Murphy confirmed that *"that was the only way we could do it"*. After Ms. Mullins had spoken to him, he put in place a procedure to release funds to Murphy, Healy and Co. He stated that his concern was for clients, that they would not be exposed to interest and penalties and to have their affairs properly dealt with. Mr. McGrath reiterated that he did not at any stage set out to deliberately damage Mr. Murphy or his reputation. Mr. Elliot was also in communication with Mr. Conor Murphy at that time.

227. The only former client to receive a form who gave evidence was Mr. Thomas Randles. He stated that his concerns were alleviated once he spoke to Murphy Healy. He also accepted that the form did not diminish the standing of Mr. Murphy in his eyes.

228. Mr. Murphy states that he contacted Mr. McGrath on 24th October, 2007, who acknowledged that the forms may not have been correct and that there was no necessity to send them out. A decision was made thereafter not to distribute any further forms. Mr. McGrath had no recollection of a conversation with Mr. Murphy that the forms were defamatory, and believes that had he had such a conversation he would have remembered it. The Society did not receive a completed claim form.

229. Mr. McGrath's evidence is that when Ms. Devereux had looked at the records and files, in some cases there were no files and in some no ledger accounts. While the deficit of €225,000 had been cleared, it had arisen and his examination of the report showed that money was due in State taxes and in all the circumstances he was concerned that the funds were sufficient to deal with liabilities. It had been the Society's view at that time that where interest and penalties were due, they should not be discharged from the fund.

He accepted that there was no evidence that Mr. Murphy had kept funds for himself but stated that his correspondence regarding his concerns about interest and penalties had not been responded to. Some files concerned matters which went back to 2001 and 2002. Records had been examined and there was no mention of at least one client's monies; and while ultimately there may have been no reason for concern, there was such concern at that time.

230. Mr. McGrath also stated in evidence that he recalled a discussion, at some stage, with the head of the Practice Closure section to the effect that the forms were not designed for such purpose and that they needed to be changed. While the Society never had any difficulty about receiving completed forms, it was aware that the forms were not appropriate for that purpose and they were changed in 2010. They had to be modernised by way of amending statutory instrument and it took time to effect the change.

13. Breach of confidence – Ken Murphy

231. On 1st June, 2007 an article appeared in the *Phoenix* magazine referring to the s. 18 proceedings and to these proceedings. The article included the following passage:-

> *"The Law Society is suing Murphy (Colm that is) for allegedly practising after his resignation as a solicitor in 2004, which he denies, as well as for his alleged non-compliance with various orders from Blackhall Place. As part of that action, Judge Richard Johnson in the High Court recently ordered Murphy to refund some former clients, to hand over a bunch of files to the Society, to return all stationary [sic] bearing his practice name and, obviously, not to practice again.*
>
> *Murphy, for his part, is suing the Law Society for damages arising from an audit it conducted of his practice several years ago. Murphy alleges that the Society was inconsistent in its motives for the audit, which, he claims, ruined his business and represented nothing less then a 'breach of confidentiality, breach of fiduciary duty, slander, malicious falsehood, negligence, breach of duty, breach of contract, misrepresentation,' amongst others.*
>
> *The Society is having none of it and, indeed, Ken Murphy told Goldhawk that, this matter should be seen against the background of three separate findings of professional misconduct against Mr. [Colm] Murphy by the Solicitors Disciplinary Tribunal."*

Reference was made to the [REDACTED] complaint and to other financial dealings of Mr. Murphy in respect of a petition to wind up a company called Kenmare Financial Services Limited.

232. The plaintiff maintains it was unlawful for the Director General of the Society to have communicated with the *Phoenix* magazine while the s. 18 proceedings were pending. They had been adjourned and were not finalised until June, 2008. The article was published proximate to the time of a court hearing on 9th May, 2007 which was adjourned to the 11th June, 2007. The hearings in relation to the [REDACTED] were ongoing. The plaintiff states that at that time he was under tremendous pressure trying

to deal with a matter in which there was a threat to send him to jail based on what he knew to be a forged document. He was stunned by the article. He believed that it was evident from the content of the article that Mr. Ken Murphy had spoken about the claim.

233. After his name had been struck from the Roll of Solicitors, he made a complaint to the Tribunal against Mr. Ken Murphy. By affidavit in response of 10th February, 2010 Mr. Ken Murphy stated that he did not give an interview but that on 28th May, 2007 he was contacted by email by the magazine and he responded on the same day. It is the plaintiff's belief, however, that extensive communications took place with the *Phoenix* magazine and members of the press. He points to the fact that a book was published in 2010, entitled *"BUST: how the courts have exposed the rotten heart of the Irish economy*", and was authored by a journalist, Ms. Dearbhail McDonald. Mr. Murphy states that the book was particularly scathing of him by implying that he should share some of the blame for having contributed to the downfall of the Irish economy. In an acknowledgements section, Ms. McDonald wrote *"[t]hanks also to Ken Murphy, the Director General of the Law Society, for his never-ending engagement with me…".*

234. Further, in an article in the *Irish Examiner* on 5th January, 2010, entitled "*Solicitors in the Dock*" there appeared a section entitled "*What does it take for a rogue Solicitor to be struck off?"*. The article contained a photograph of the Director General and the plaintiff. Mr. Murphy states that the article contained information that was not in the public domain and he believes that it must have come from the Society. It was an article which was written while these proceeedings were pending.

235. In response to a data access request, Mr. Murphy obtained a copy of an email from a Mr. David Irwin, a journalist from the *Phoenix* magazine, to Mr. Ken Murphy on 10th July, 2008. Mr. Irwin commented that a representative of the Irish Independent had been present at one of the hearings into the [REDACTED] complaint and that a journalist had *"attended the previous hearing*". The plaintiff states that he did not request the presence of the *Irish Independent* and presumes that the Society did. While he accepts that the Society might be entitled to inform the media of upcoming cases, he believes that the Society was interacting with the media in a way which was not helpful to him. He also believes that his case was the first Tribunal case to be reported in the media as one cannot tell in advance what cases are listed before the Tribunal other than by reference to surname of the respondent.

236. Mr. Ken Murphy's evidence is that as Director General of the Society, he communicates with the media on behalf of the Society almost every working day. He could not specifically recall communications concerning the plaintiff, but outlined how he came to be in contact with the *Phoenix* magazine. He received an email from Mr. Donal Griffin of the magazine on Monday 28th May, 2007, at 10.38 a.m., as follows:-

"Ken,

In relation to an article I'm preparing, I would be obliged if you could assist me with the following queries:

Colm Murphy, a Kenmare-based solicitor has taken an action against the Law Society. He is looking for damages for 'breach of confidentiality, breach of fiduciary duty, slander, malicious falsehood, negligence, breach of duty, breach of contract, misrepresentation, breach of constitutional rights, and breach of rights protected under the European Convention on Human Rights.

Will the Law Society defend itself against this action?

Thanks Ken, I look forward to hearing from you by the end of today as the magazine is going to print tomorrow morning".

237. This was replied to by Mr. Murphy on the same day at 16.47, inter alia, as follows:-

"Colm Murphy did issue proceedings against the Law Society as you have described. However, these proceedings were issued as long ago as 2004 and Mr Murphy has done nothing to progress the proceedings since then. If he did do anything to progress the proceedings, the Law Society would, of course, vigorously defend the proceedings.

This matter should be seen against the background of three separate findings of professional misconduct against Mr. Murphy by the Solicitors Disciplinary Tribunal and proceedings by the Law Society against Mr. Murphy which are currently before the President of the High Court.

Mr Murphy has not held a practising certificate since 1st January, 2005. The proceedings before the President of the High Court relate to Mr Murphy's continued retention of client files while not the holder of a practising certificate, not holding mandatory professional indemnity insurance, non-compliance with orders of the Solicitors Disciplinary Tribunal, and non-compliance with directions of the Complaints and Client Relations Committee of the Law Society.

Mr Murphy was the subject of a High Court order made by the President of the High Court on 31st January 2007. Subsequently attachment and committal proceedings had to be taken by the Law Society as a result of Mr Murphy's failure to comply with that order and proceedings against Mr Murphy are still before the President of the High Court.

I trust that the above information assist your understanding of the situation in relation to the Kenmare-based solicitor, Colm Murphy."

Mr. Griffin replied at 17.32:-

"Ken,

Thank you for getting back with the information, that's a great help.

Donal Griffin"

238. While Mr. Ken Murphy accepts that the Society's general policy is not to comment publicly on individual cases, nevertheless, in response to media queries, it will seek to assist by disclosing or confirming information about individual solicitors which is already properly in the public domain because it is in the public interest for the Society to assist the media to ensure accurate reporting. He believes that this was a *bona fide* response to a legitimate query by the media. The information was factual and was already in the public domain. On 26th March, 2008, he received a letter from Mr. Murphy's then solicitors, threatening proceedings for defamation. He did not respond to this letter because he believed that there was little to be gained in doing so.

239. Dealing with the suggestion that the Society had communicated with other newspapers, as disclosed in an answer to interrogatories prepared by Mr. Elliot on 6th October, 2016, Mr. Murphy stated he advised Mr. Elliot that he, Mr. Murphy, did not believe that he had communicated with the *Irish Independent* regarding the plaintiff, but that with the passage of time he could not be certain. He believed that to be the correct position as at that time.

240. In so far as communications with Ms. McDonald are concerned, Mr. Murphy states that he informed Mr. Elliot that while he had on many occasions communicated with Ms. McDonald on matters concerning the Society and the legal profession generally, he had no recollection of communicating with regard to Mr. Murphy at any time. When complying with the order of discovery in these proceedings, a number of letters and documents were identified, in particular email communications between him and or representatives of the Society, and the *Phoenix* magazine. Mr. Ken Murphy explains that because the email addresses to which these communications pertained did not contain the phrase "*Phoenix magazine*", they were not detected in searches by the Society when preparing the answers to interrogatories. There are in fact six such communications.

241. The first is an email of 2nd April, 2007. It was sent by Mr. Murphy to Mr. Griffin, with an email address containing the name "*Goldhawk*". The letter was sent in response to a fax enquiring as to litigation involving the Society and Mr. Murphy. Attached to the email was the order in the s. 18 proceedings made on 31st January, 2007. It was confirmed that the Society had taken those proceedings against the plaintiff under s. 18, which provides for orders prohibiting a solicitor from contravening provisions of the Solicitors Acts and Regulations made under those Acts. On 27th August, 2007, Mr. Griffin again wrote to Mr. Murphy stating that he was preparing an article and requested information regarding the complete disciplinary record of Mr. Murphy and clarification as to whether he was still practising or had been disbarred. In a reply of 5th September, 2007 a document was attached outlining his disciplinary history extending back to September, 1999. On 17th September, 2007 Mr. Griffin sought clarification from the Director General as to whether these were connected with the action being taken by the Society against Mr. Murphy. Mr.

Ken Murphy replied almost immediately to state that they were not and later on the same day, he wrote to Mr. Griffin stating that only summaries of the Tribunal's decisions were being furnished in order to preserve the anonymity of clients. The email proceeded:-

"However I can tell you now that on 10 July 2007, the Solicitors Disciplinary Tribunal made two separate findings of misconduct against Colm Murphy. In each case it was for failure to comply with directions of the Society's Registrars Committee".

Details were given of the sanctions imposed. In a further email on 18th September, Mr. Griffin sought clarification of penalties imposed, to which Mr. Ken Murphy replied.

242. Further emails were exchanged in March and April, 2009. On 25th March, 2009, Mr. Griffin wrote to Mr. Murphy noting that two cases concerning the plaintiff were listed for hearing before the President of the High Court and seeking information about them. A reminder was sent on 1st April, 2009 and Mr. Murphy replied on 2nd April, 2009 stating that those cases had yet to be decided and that "*[t]he Society can say nothing about these cases or any such cases until they have [been] decided".*

243. On 8th March, 2011, Mr. Conn Corrigan of the Phoenix wrote to Mr. Murphy seeking details of the progress of the litigation. This was replied to by the solicitors acting on behalf of the Society stating that as the proceedings were still pending before the High Court, it would not be appropriate to comment on the various matters raised.

244. During the discovery process, communications with Ms. Maeve Sheehan of the *Irish Independent* were disclosed. The Society explains that the word "*independent*" was not contained in the title or in the body of the email and thus did not appear in an initial search when preparing replies to interrogatories. Mr. Ken Murphy stated he did not recall this correspondence at that time, nor could he recall any other communication with the *Irish Independent* regarding the plaintiff.

245. In January, 2014 further communications took place between Mr. Murphy and Ms. Sheehan, enclosing copies of orders and judgments in the strike off proceedings, together with a transcript of the judgment delivered by Hanna J. in the plenary proceedings. She was informed that the order had been appealed. In the final sentence of the email of 8th January, 2014, Mr. Murphy stated that the case was pending before the Supreme Court, was sub judice and therefore he could not comment about it in any way. Ms. Sheehan further sought details of the findings of professional misconduct, particularly in relation to financial issues. Mr. Ken Murphy replied that he could not provide these for legal reasons.

246. Mr. Ken Murphy denied that he was responsible for anything that Ms. McDonald wrote in her book and stated the plaintiff's allegations regarding communications with the *Irish Examiner* are entirely based on conjecture on his part. He also denies that any attempt is made to arrange for the attendance of journalists from the *Irish Independent* at the Tribunal hearing.

247. Mr. Ken Murphy stated that contact had been initiated by Mr. Griffin. Communication was by way of email only and that comments in the article that the *"Society was having none of it"* were not words that he used. He had a policy of dealing with queries by email. He did not engage in telephone discussion with the *Phoenix*, because the Society understood the sensitivity of this information and the requirement to give only factual information that was already in the public domain.

248. When questioned about failure to recall certain emails in the replies to interrogatories, he stated that he has communicated with or responded to communications from the media on several thousand occasions over the years. He had no recollection of individual communications and it was through email search and the keywords chosen in such searches that other incidents emerged. These were among many communications of this kind in relation to individual solicitors from the *Phoenix*, from individual journalists within the Phoenix and sometimes different email addresses were used. While he accepted that there were not many cases with the name Colm Murphy, there were many regulatory cases and this explained his failure to recollect communications in respect of Mr. Murphy when interrogatories were being prepared. He believed that there was particular interest being shown by Ms. Sheehan in Mr. Murphy because she told him that Mr. Murphy was in litigation or had threatened litigation with her. Such information as she was provided with was in the public domain, in the form of pleadings and affidavits. While he provided information he did not express an opinion on litigation or disciplinary issues. He did not believe that Mr. Murphy, the plaintiff, was singled out for any special attention or treated any differently to any other solicitor who may have been the subject to the regulatory process of the defendant.

249. In response to a question from the Court as to why he had adopted the choice of giving background information to the *Phoenix* magazine, rather than to either remain quiet or to state that the proceedings would be vigourously defended, Mr. Ken Murphy stated that he was acting in accordance with Society policy. Regulatory powers are delegated to the Society by the Oireachtas on behalf of the public and are exercised in the public interest. He stated that the public, therefore, has an interest in factual and balanced reporting in the media in relation to such matters. His belief is that the placing of factual information before a journalist, even if not specifically requested, if factual and in the public interest *is* in the interest of accurate reporting and that the public, and the legal profession would get a balanced sense of what has transpired in the case (emphasis added). Claims of bad faith had been pleaded against the Society and he saw it as a matter of balance to place before a journalist factual information which was already in the public domain. The information, he believes, was supplied for the purposes of showing that the allegations had been made by the plaintiff against a particular background.

14. Voluntary cessation of practice

250. Mr. Murphy contends that he voluntarily ceased practising in 2005 and was motivated in so doing by the manner in which he had been treated by the Society, rumours which he attributed to the Society and inconsistency in administration. In a letter to the Registrar of Solicitors dated 7th February, 2002 he stated his belief that he had no choice but to

take this course of action because the devastating effect the rumours were having on him. Nevertheless he continued renewing his annual practising certificate until February, 2005 when he maintains that he voluntarily retired from practice. Ms. Kirwan disputes this. Her evidence is that due to the number and nature of the complaints, the Registrar's Committee in 2005 decided to take what she described as the almost unprecedented step of refusing a practising certificate, something which it is very reluctant to do. Mr. Murphy had been written to on 24th January, 2005 setting out a list of complaints which had been made against him in the preceding two years, nine in total, two of which were pending before the Tribunal. The Registrar's Committee convened a meeting on 23rd February, 2005 at which Mr. Murphy's application for a practising certificate was to be considered. He attended the meeting. She was present at the meeting on 23rd February, 2005 and prepared minutes which she accepts did not contain a verbatim account and in which, again she accepts, certain utterances may not have been recorded. The focus of the meeting was the number and nature of the complaints against Mr. Murphy in the preceding two years.

251. Mr. Murphy's evidence is that on the day before the meeting he faxed a letter to the Society explaining that he was retiring from practice and withdrawing the application for a practising certificate. Ms. Kirwan states that incoming correspondence is logged and there is no record of the Society receiving a fax, nor is there a hard copy on file. She confirmed, however, a letter was handed in at the end of the meeting. She believes that her contemporaneous note of the meeting confirmed the position, as did the letter written by her on the day after the meeting, although Mr. Murphy had no recollection of receiving that letter. It will be recalled, however, that in March, 2008 when Messrs Kelly and Dullea made an inquiry regarding Mr. Murphy's practising status that Ms. Kirwan confirmed to them that Mr. Murphy did not hold a practising certificate for the years 2005 to 2007 and that he did not apply for it. This reply appears inconsistent with the contention that Mr. Murphy's practising certificate had been refused.

252. Ms. Kirwan was questioned in relation to the complaints which were made during that two year period. It was disputed that there were in fact nine complaints and it was put to her that the only matter pending before the Tribunal at that time was the [REDACTED] matter, which was no *"canon of outrageous or disgraceful or dishonourable behaviour*". She accepted that while these may not have been the most serious of complaints, that nine complaints had been made within a period of two years led to the Committee's decision, although in maintaining this she also stated that it was not her decision, but the decision of the Committee. She emphasised Mr. Murphy's refusal to reply to correspondence from the Society, which resulted in delays in investigation of complaints thus compounding the situation and she stressed the predicament of the clients in all of this.

15. Submissions

253. Extensive submissions were made to the court on behalf of both parties and this is not intended to be an exhaustive reproduction of the submissions, and certain submissions have been addressed in more detail in the court's conclusions.

15.1 The plaintiff's submissions

254. It is submitted on behalf of the plaintiff that the Society as the regulator of solicitors which enjoys duties, powers and functions as prescribed by statute is required to exercise due care when discharging those functions, and that if it acts carelessly it has no defence based on statutory authority. It is an abuse of power by persons under a legal duty to carry out a public function and the tort of misfeasance in public office applies.

255. It is submitted that a duty of care in negligence is owed and the Society has been guilty of negligence in the manner in which it has dealt with Mr. Murphy. Reliance is also placed in this regard on authorities concerning the exercise of statutory powers in other areas such as, for example, child protection, police searches on solicitors' offices and actions of local authorities in the exercise of their powers. Thus, it is submitted that the conduct of an investigation by a statutory authority which amounts to breach of rights to fair procedures may amount to misfeasance in public office, as in *P.D.P. v. Patrician Secondary School* [2012] IEHC 591. It is accepted that a statutory body exercising statutory duties in the public interest may enjoy immunity from an action in ordinary negligence provided there is no evidence of lack of *bona fides – Beatty v. Rent Tribunal* [2006] 2 I.R. 191. It is also accepted that a statutory body performing a function in the public interest is a factor which may outweigh any duty of care to private individuals, but this is dependent on the nature of the public body.

256. Reliance is also placed on Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 I.R. 566, where it was accepted by Clarke J. (as he then was) that, in principle, a claim for damages at common law may lie where a civil action has been instituted or maintained without reasonable or probable cause and for the wrongful purpose of exerting pressure on the defendant such that the defendant may suffer damage. It is contended that impropriety or misconduct in the issuing or prosecution of proceedings may constitute an abuse of process. It is also submitted that there may be circumstances where, without undermining the tort of misfeasance of public office, a private duty of care may be owed in respect of some particular aspect of the carrying out of the duty and in such circumstances negligence must be precisely pleaded.

257. It is submitted that the Society has a duty of confidentiality in respect of its dealings with a solicitor, at least until the provisions regarding the publication of the outcome of enquiries are engaged under s. 23 of the Act. The purpose for this is to avoid reputational damage except in the most serious of cases. It is also submitted that disclosure of confidential information by careless means is actionable in accordance with the principles in *Ward v. McMaster* [1988] I.R. 337 and *Hanahoe v. Hussey* [1998] 3 I.R. 69. Reliance is also placed on the decision of Quirke J. in *Gray v. Minister for Justice* [2007] 2 I.R. 654.

258. With regard to the plaintiff's claim in defamation, it is submitted that liability arises in respect of the disclosures made by Mr. O'Dowd and Mr. Simon Murphy. While the personal claim against Mr. Murphy is statute barred, nevertheless, it is relied upon as evidence of the failure on the part of the Society to properly discharge its statutory duties of the maintenance of untruths in response to the plaintiff's legitimate concerns. It is

submitted that this is an unjustifiable abuse of power and amounts to evidence of misfeasance. In an affidavit sworn to oppose joinder as co-defendant and in support of an application to strike out proceedings, Mr. Simon Murphy had denied spreading any rumours or speaking with any client, but it is submitted that this has now been conceded as being incorrect.

259. Regarding the distribution of compensation fund claim forms the plaintiff submits that the raising of questions of dishonesty was defamatory of him and that issues of privilege do not arise. Even if qualified privilege did apply, it is defeated by malice, something which is capable of being established intrinsically such as from the tone of the communication, or extrinsically, from evidence of the circumstances in which the statement is made. Where irrelevant statements have been made, this may cause the occasion of qualified privilege to be lost and amount to evidence of malice.

260. It is submitted that the defendant was not fair in its dealings with, and did not act in a *bona fide* manner towards, Mr. Murphy in the context of the Healy matter. This, it is suggested, is evidence of *mala fides* on the part of Society and that he was treated less favourably than other solicitors in similar situations for no objectively justifiable or defensible reasons and that he was told untruths. With regards to the account's investigation, it is maintained that inappropriate enquiries were made about him by Mr. O'Dowd in another practice and that his concerns were ignored by the Society. It is submitted that Mr. O'Dowd's improper behaviour is evidenced by his letter of 9th May, 2001 to Ms. O'Neill. Mr. O'Dowd strayed beyond his proper remit and caused highly damaging allegations, implying that Mr. Murphy was involved in questionable activity and during the trial he produced documents which he had copied from the plaintiff's files in relation to [REDACTED] and [REDACTED], which were unrelated to the account's investigation. This confirmed the plaintiff's concerns which he expressed to Mr. O'Dowd at that time and supports the reasonableness of his request that the investigation be conducted in a proper manner. No reason was given for the failure on the part of the Society to respond to his letter of 8th May, 2001. As such activity had been conceded as being improper some 17 years later, it is submitted that it must be taken to be at least a breach of the Society's duty to the plaintiff and that the making and prosecution of this application was an abuse of process and amounts to misfeasance.

261. It is submitted that on 21st October, 2002, the Society wrongfully sought and obtained orders under s. 14 of the Act, on an *ex parte* basis directing Mr. Murphy to produce files to an authorised person appointed by the Compensation Fund Committee, despite the plaintiff being informed in a telephone conversation with Mr. Connolly on 16th October, 2002 and by letter on 17th October, 2002 that the application would not be made if Mr. Murphy confirmed that he would co-operate. It is submitted that Mr. Murphy gave the necessary undertakings in writing on 21st October, 2002. Despite this in obtaining the order on an *ex parte* basis the Society failed in its obligations of utmost good faith by failing to disclose to the court either the correspondence from Mr. Murphy or his undertaking. The authority to give an undertaking as to damages remains unexplained

notwithstanding Mr. Murphy's requests for clarification since 2003 and the Society has never acknowledged that Mr. Murphy's concerns were well founded. The plaintiff thus argues that the ignoring of his concerns, the unnecessary prosecution of his s. 14 application and its subsequent conduct together with the actions of Mr. O'Dowd and Mr. Simon Murphy, are unjustifiable and constitute an abuse of power and amount to misfeasance.

262. Mr. Murphy also contends that while the Society's case is that he is bound by the admissions he made to the President of the High Court in 2009 in the strike off proceedings, the reality is that subsequent admissions by the Society and the evidence which has emerged since, through witness statements and otherwise:-

> *"…have cast what appeared to be clear events, albeit contested by Mr. Murphy, in a different light, evidencing at best negligence and breach of duty on the Society's part and, more correctly, a recklessness as to the actual state of affairs amounting to misfeasance"* (see submissions 2nd March, 2018, para. 55).

263. Mr. Murphy believes that there is little doubt that one of the main reasons why his name was struck off the Roll of Solicitors was the allegation that he was in breach of an undertaking to the court. When viewed as part of a pattern of dealings with him, the actions of the Society were such as were intended to cause him damage and to disparage him as a solicitor. It is submitted that the evidence indicates that there was no undertaking given and the only matter in issue on 31st July, 2003 related to the costs of that application. Ms. Kirwan was not in court. He argues that she had known of the position for some time and did not make an effort to correct it, a position which is irreconcilable with her denial of personal motive against him. This is supported by an email of 5th November, 2004 suggesting that the plaintiff should not be a solicitor. Mr. Murphy does not accept that the mistake made by her in her affidavit sworn in 2004 was a matter of no consequence. The mistake was not admitted until some considerable time thereafter in an affidavit sworn on 31st March, 2010 in separate proceedings. Reliance is placed in this regard on an earlier draft of the affidavit which made no reference to the undertaking, something which was subsequently inserted in the final draft.

264. With regard to the s. 18 proceedings, Mr. Murphy submits that it is clear from the exchange of emails that it was the intention of the Society to bring him before the court based on, inter alia, incorrect information regarding his involvement in an auction. He maintains that the Society did not properly inform the court that he was not involved in the auction and as such this displays a lack of candour to the court or in its instructions to counsel.

265. Regarding the use of headed notepaper, while in his submissions, Mr. Murphy referred to the evidence of only a single letter which had been directed to the Society dated 23rd November, 2005, it emerged in evidence that two letters on Mr. Murphy's headed notepaper were sent to certain individuals on 19th July, 2005 and 3rd August, 2005. Mr. Conor Murphy does not believe that the signatures were his or that he in fact issued the

correspondence. A further letter, suggested to have been issued in the name of Catherina Healy, is one which she does not accept that she in fact signed. Mr. Murphy in evidence stated that he had no idea what the letters were about, that he was in Turkey at that time concerning the complaint in respect of [REDACTED] and the third was dated 21st September, 2005 enclosing a cheque to a firm of accountants on behalf of a former client of Mr. Murphy, Irish West Shell Fish Limited. It is submitted that, in any event, it is impermissible for the Society, to rely upon that letter. In so far as the operation of funds are concerned Mr. Murphy maintains that he refunded a client deposit in respect of the sale that had not been completed in a manner in which he was advised to do; by way of drawing a cheque on the client account, something which he believes has been acknowledged since by Mr. Elliot and Mr. McGrath.

266. The wrongful application for an order for substituted service in the s. 18 proceedings, it is submitted, misled the court as to the attempts made to effect service of the summons and that no attempt was made to serve the proceedings. Not only was no bona fide attempt made by the Society to serve the summons but it misled the court. Reliance is placed on Mr. Elliot's concession that the only attempt to serve the proceedings was at the auction. It is submitted that it is also clear from Ms. O'Neill's supplemental affidavit sworn on 8th April, 2008 that she was aware that he was not present at that auction. During this time, the Society was provided with Mr. Murphy's telephone number and his address in Turkey. The obtaining of the order for substituted service, led the President of the High Court to form an unfavourable view. On 6th November, 2006, the President described him as ducking and diving and evading service of the proceedings. It is contended that it was an act of misfeasance and abuse of process to initiate and prosecute the application for an order for substituted service on 11th October, 2006.

267. He maintains that the Society must have known that proceedings under s. 18 were not appropriate and they were used as a device to get any application before the Court with a view to obtaining ancillary orders against him. To this extent, reliance is placed on the fact that the legislation was amended on 14th July, 2018, by the Civil Law (Miscellaneous Provisions) Act 2008 which inserted, through s. 43, a new s. 18A to provide that where a person had failed or refused to comply with a Tribunal order, the court may order such compliance. Implicit is that it was not considered possible to do so before that time and therefore the Society must have had strong suspicions that it did not have the proper legal basis for what it was doing. Authorisations were given for the proceedings as far back as September, 2005 but it is submitted that the delay in initiating the proceedings remains unexplained. Counsel submits the protection of the public and the reputation of the profession took second place and the delay in the initiation of the proceedings are explicable only if what occurred is seen for what it manifestly was, a pursuit of Mr. Murphy to get any application before the court *"to disparage him" and that this is "a clear example of misfeasance and abuse of process…"*

268. It is submitted that by 31st January, 2007, the Society was aware that Mr. Murphy had not been involved with the auction, the position in relation to the writing of letters had

been misrepresented to the court because they related to the wind down of his practice and furthermore, there was no evidence that his client account was being operated. The President of the High Court gave directions in respect of nine matters to be complied with, and Mr. Murphy states he did everything to comply with them but was frustrated in so doing by the Society. Three further matters, being the delivery of the outstanding accountant's report, delivery of a closing accountant's report and the obtaining of professional indemnity run-off cover were to be completed within a period of four weeks. Mr. Murphy wrote to his bank and to the Society seeking information to enable him to comply with the order, but the Society failed to reply.

269. It is contended that the attachment and committal proceedings were not *bona fide,* were fuelled by the [REDACTED] complaint and continued even though the Society was aware that the provenance of the document relied upon by [REDACTED] was at best questionable.

270. Reliance is placed on the evidence of Mr. Elliot who produced documents not previously disclosed regarding the initiation of proceedings by Ms. O'Neill. Ms. O'Neill did not seek the authority of the Committee to make the application but merely sought to keep them informed about what she had decided to do. When that application was made, it is submitted that the time limited for complying with the order had not yet expired, something of which the Committee must have been unaware.

271. Finally, with regard to the distribution of compensation fund claim forms, it is submitted that although investigations showed that no money went missing, Mr. McGrath had considered it was appropriate to distribute the compensation fund forms to former clients. The plaintiff and his solicitors objected to this. No claim was made against the Compensation Fund. In October, 2007 when he complained that the distribution of the forms were defamatory, he states that Mr. McGrath conceded that the Society knew this and that the money in the client account would be given to Murphy Healy to distribute.

15.1.1 Submissions of plaintiff on the failure of Society to act with reasonable care

272. The following issues were identified in particular as establishing that the Society did not act with reasonable care and from improper motive:

(a) The Society pursued Mr. Murphy in respect of accounts of the Healy practice when they were also pursuing Mr. Healy in respect of accounts for the same period, which was not acknowledged until Mr. Connolly gave evidence at trial.

(b) The application for an order under s. 14 despite it being agreed that the matter would be adjourned on a certain undertaking being given by Mr. Murphy and furnishing an undertaking as to damages without any lawful authority.

(c) The failure to respond to requests at the time of the accounts investigation.

(d) The lawfulness and timing of the s. 18 proceedings. The rhetorical question is posed - if the Society was concerned that he was practising without a certificate,

why did it not take earlier preventative measures? Ms. O'Neill took over the pursuit of the attachment and committal proceedings without a committee determination to do so.

(e) The failure to resolve complaints particularly in relation to the [REDACTED] matter.

(f) The manner of the defence of the proceedings and the vigorous pursuit of Mr. Murphy and his solicitors in relation to the case, including the expression that his brother, who represented him was "*playing with fire*" in communications with the Society. It is submitted that Hanna J. was misled in respect of court orders and directions.

(g) An email in November, 2004 authored by Ms. O'Neill that "*it is my view that Mr. Murphy should not be a solicitor, Linda Kirwan shares this".*

273. Mr. Craven S.C. submits that there is no entirely innocent explanation for the above and in essence, the views expressed are inconsistent with what a regulatory body, which is also his representative body, should be saying. This is evidence that he was not been dealt with in good faith. Taken in their totality, citing *Muuse v. Secretary of State for the Home Department* [2009] EWHC 1886, Mr. Craven S.C. submits that while one mistake is bad enough, and at least one could be forgiven, this number of mistakes and the failure to implement clear procedures is unforgivable.

274. In the context of the Society's defence that the claim in these proceedings amounts to an impermissible collateral attack, Mr. Craven S.C. submits that this is misconceived because it concerns orders in respect of which applications can always be made and it is always open to the plaintiff to apply to be readmitted to the Roll of Solicitors. He describes as ironic, the position adopted by the defendant, given it had applied to court to have the matter dealt with in this way. The plaintiff had acceded to this course of action because it seemed to make sense rather than trying to deal with plenary proceedings and perhaps 12 or 14 other proceedings involving the parties. However, in direct response to a question from the Court, it was accepted that an order, such as for example the strike off order, remains valid pending further application or entry. It is also accepted that the plaintiff consented to the mode of trial and no claim is made that the defendant is estopped from maintaining the defence of impermissible collateral challenge.

275. Finally, it is submitted that the plaintiff is entitled to aggravated and exemplary damages by reason of the oppressive conduct of the defendant, including the manner in which it has conducted these proceedings.

15.2 The Defendant's submissions

276. The defendant submits that the claim involves an impermissible collateral attack on previous orders of the Committees, Tribunal and the court. The plaintiff did not avail of the appropriate remedies, but then a number of years later seeks to include the incident to justify a claim for damages.

277. It is submitted on behalf of the Society that it treated the plaintiff fairly in its dealings with him and that it did not publish defamatory material of and concerning him. Further, and fundamentally, considerable emphasis is placed on the fact that on the application before the President of the High Court in 2009, which ultimately resulted in his name being struck off the Roll of Solicitors, Mr. Murphy unequivocally accepted the allegations of misconduct made against him.

278. What is described as the plaintiff's evolving response to the undertaking had three stages. While the plaintiff's evidence is that he felt that he had no choice but to accept that he had given the undertaking, nevertheless it is submitted that he did have a choice and that he has simply seized upon an error in Ms. Kirwan's affidavit, a genuine mistake on her part, to put his case to best advantage. With regard to the undertaking and the contents of the attendance note prepared by Ms. O'Neill, her evidence to the enquiry and the contents of her attendance note were not challenged.

279. The ruling of the committee and the comments of its chairman on 13th January, 2009 as to sanction, refer to the cumulative effect of the findings of misconduct being of such gravity as to warrant referral to the High Court but despite this, Mr. Murphy insists that the undertaking was by far the biggest offence. It was but one of many.

280. It is submitted that certain complaints could have been avoided or dealt with differently by the plaintiff. Earlier replies and responses could quite easily been given.. It is submitted that the plaintiff made a decision that compliance by him would be based on his own subjective assessment of the merits of the decisions.

281. It is submitted that, in the context of the [REDACTED] complaint, there is no evidence that the Society knew that the document was forged. Further, this complaint was not rejected but simply closed in the light of the nonresponse by [REDACTED] solicitors to queries which were raised.

282. It is argued that is not correct to say that the s. 18 proceedings were based exclusively on the [REDACTED] complaint. The order required the plaintiff to take 12 different actions, the most serious of which was the failure to submit an accountant's report. His accountant was ordered to appear before the President to explain the delay in the filing of the report. Mr. Murphy accepted that he was told to bring his toothpaste if the accountant's report was not done.

283. The application for substituted service was made at the suggestion of the Tribunal and arose in circumstances where the plaintiff had informed Ms. Lynch that he would call to the Tribunal to collect certain documents. He did not do so prior to the application for substituted service.

284. The s. 18 proceedings eventually led to compliance by the plaintiff with a number of important obligations including the delivery of a closing accountant's report on 1st June, 2007. A deficit of €225,227 was revealed and the plaintiff accepted that such a deficit

should not happen. It is argued that this is evidence of the lack of perspective on the part of the plaintiff and that it is not open to him to say that those proceedings were either misconceived or borne out of malice, and at the same time to have to accept that they resulted in the finding of a deficit in the account which had to be made good. It is suggested that it was happenstance that the plaintiff was fortunate enough to be in a position to immediately reimburse the account.

285. Similarly, in relation to the use of the headed notepaper, it is submitted that letters on headed notepaper were authored by the plaintiff, including the letter of 23rd November, 2005 which confirms and supports what the Society had alleged in the s. 18 proceedings.

286. Mr. Connolly's evidence, it is submitted, illustrates that the Healy and O'Callaghan situations were entirely different and that the allegation that Mr. O'Dowd was responsible for the spreading of rumours about the plaintiff is groundless. The plaintiff spoke to his clients over the weekend of 8th May, 2001 and it is submitted this created or fuelled any rumours which may subsequently have been put in circulation. Any discussion which Mr. Simon Murphy had with Mr. Keating was in good faith and in any event privileged.

287. Regarding the distribution of compensation fund forms only one witness gave evidence that was Mr. Randles. He spoke to Messrs. Murphy Healy about the form and was told that there was no need to complete it and had no further concerns. No completed forms were ever received by the Society. There could be no bad faith on the part of Mr. McGrath. He was responsible for €300,000 of client's monies and his objective was to make sure the money went back to the correct clients. He followed a process that had been adopted by the Society and had been put in place over a number of years. It is claimed that no defamation arises and that in any event qualified privilege applies.

288. Regarding the claims in defamation, it is denied that anything that was said about him on any of the occasions as alleged in these proceedings was untrue. Reliance is also placed on the statutory immunity contained in ss. 14 and 15 of the Act of 1994 because the Society submits that it acted in good faith at all times. Reliance is also placed on the defence of qualified privilege. Whether the matter is viewed through s. 36 or by way of qualified privilege, it is submitted that there is no evidence of any malice which might disturb such defences. It is submitted that there is no evidence that the Society set out to damage the plaintiff rather than acting in sending out forms to ensure that money was properly distributed, dealing with clients queries, or trying to reassure a client. There is no evidence of malice on the part of Mr. Simon Murphy and the evidence indicates that he did not bring up the matter with his client.

289. Regarding the complaint in respect of Mr. Ken Murphy's communication with the Phoenix magazine, only facts were communicated. No opinion was expressed and the defendant maintains that the plaintiff was treated no differently to any other solicitors about whom Mr. Ken Murphy had received queries.

290. All of the Society's witnesses, it is submitted, have said that their engagement began when complaints were made. It is further submitted that there is no evidence of any reckless indifference or intention on the part of the defendant or of any attempt by the defendant to use a statutory scheme for a different purpose. The Society invoked the structures that were available. There is no evidence of any motive to do otherwise than to apply the regulations in accordance with complaints received.

291. It is contended that the appropriate tort for a wrong committed in the course of an administrative duty is misfeasance and that this requires malice. Absence of reasonable care is not sufficient. Malice is required which in this context means that an improper or wrongful motive must be established. It is therefore submitted, that the Court must conclude not only that a mistake was made, which on its own is insufficient to establish the tort, but must go further and conclude that the Society was acting from motives other than those of regulating the profession, protecting the public or utilising such powers as it believed the Act conferred upon it. This would involve the Court in concluding that if his clients or members of the Society had such a wrongful motive, that in the pursuit of that motive, they were simply fortunate enough that so many complaints were made to enable the execution of such a plan.

292. While the standard of proof in these proceedings remains the balance of probabilities, it is submitted that given the serious nature of this allegation, it must be established on clear evidence.

293. It is submitted, for example, in the context of the order for substituted service, that no attempt was made to set aside that order at the relevant time in a manner consistent with a suggestion that it was a significant event.

294. The only evidence before the Court in relation to breach of confidentiality, it is submitted, relates to rumours emanating from two sources. The evidence indicates that Mr. Murphy sought injunctive relief against someone else and clearly felt that it was he who was responsible for the rumours and had written to his own clients.

295. Finally, contrary to a suggestion made by the plaintiff in his submissions, the defendant does not accept that it in fact made any admissions of wrongdoing at any stage or that they had admitted to knowingly doing anything wrong.

16. Preliminary observations

296. On 11th December, 2017, on consent of the parties, Kelly P. directed that the proceedings be limited to the matters pleaded in the plaintiff's amended statement of claim delivered on 1st July, 2011 together with the updated particulars of claim furnished on 23rd October, 2017. It was directed that the preliminary objections and special pleas contained in the amended defence delivered on 27th July, 2011 should be determined at the conclusion of the trial on liability in so far as the trial judge, in the exercise of his or her discretion, considered it appropriate to do in the judgment to be delivered at that time.

297. It seems that the agreed procedure was borne from a concern arising from the procedural history of the case. It was left to this Court to decide on the most appropriate manner in which to proceed, but on the clear understanding that evidence would be heard on all issues, and that issues would be determined in so far as they were considered to be of relevance to the pleaded case. It was therefore not the intention of the order that the court would only deal with preliminary issues pleaded in the defence relating to the statute of limitations, privilege and collateral attack. As Mr. Craven S.C. pointed out, the purpose of the order was to ensure that the court did not take it upon itself to deal with preliminary issues in the absence of plenary evidence and to avoid the occurrence of what is described to have occurred on a previous occasion when the matter was before the High Court.

298. The parties have requested the Court to make findings on all issues, even if it concludes that the defendant should be entitled to succeed in its defence for a reason, or reasons, which have been raised by way of preliminary issue.

299. In the light of the defences pleaded, it seems appropriate to consider separately the claims founded on misfeasance in public office, negligence and breach of duty on the one hand, and claims based on defamation and breach of confidence on the other, but recognising that the facts on which the latter are based have in certain instances been relied upon as evidence of the former.

16.1 The causes of action – misfeasance in public office and negligence

300. The plaintiff's principal cause of action is based on the tort of misfeasance in public office. He also maintains that the Society was negligent. It is accepted that the appropriate tort for a wrong committed in the course of an administrative duty is that of misfeasance in public office, a cause of action which requires malice to be established. It is submitted that abuse of power by persons under a legal duty to carry out a public function prescribed by law encompasses two forms of misconduct; where there is targeted malice towards an individual involving the exercise of the public power for an improper or ulterior motive; or where there is a reckless indifference to the matter in question and its consequences. Both forms involve an element of bad faith on the part of the public officer. Counsel, stresses, by reference to *dicta* of Lord Steyn in *Three Rivers District Council v. Bank of England (No. 3)* [2003] 2 A.C. 1, that where it is contended that a public officer has acted knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff, "*it involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.*"

301. The plaintiff pleads that the Society engaged in a repeated and orchestrated attempt to subject him to unwarranted and unnecessary disciplinary proceedings and to have his name removed from the Roll of Solicitors. It is also pleaded that the Society continued disciplinary processes in circumstances where it had information that would tend to discredit complainants.

302. Before dealing with misfeasance in public office, I propose to address the cause of action in negligence.

16.2 Negligence

In light of the pleaded case, fundamental to the claim in negligence is the requirement on the plaintiff to establish that the Society owes him a duty of care in the conduct of its investigations and in the enforcement of the statutory disciplinary code.

303. Counsel for the plaintiff places reliance on *dicta* of Geoghegan J. in *Kennedy* as authority for the proposition that, as a matter of principle, the Society may owe a duty of care to a solicitor who is under investigation. At para. 13 of his judgment, Geoghegan J. observed:-

> *"As a general proposition, it can safely be said that, apart from exceptional circumstances, a body such as the [Law Society] carrying out a public function in pursuance of the public duty is not liable to a private individual in tort unless the authority in so acting has committed the tort of misfeasance in public office. I will be explaining this tort in more detail later on in this judgment but subjective mala fides is an essential feature of it. To allow damages to be awarded for breach of an alleged duty of care owed to the individual on the basis of a reasonable person might have done (and therefore an objective test) would be to undermine the clear limits attached to the tort of misfeasance in public office. I would accept that there may be circumstances where, without undermining the tort of misfeasance in public office, a private duty of care may be owed in respect of some particular aspect of the carrying out of the duty. However, in such a case, the negligence would have to be precisely pleaded, if for no other reason, so as to enable it to be properly answered at trial."* (emphasis added)

304. This must be viewed in context. The main allegation of negligence addressed on appeal in Kennedy was that independent legal advice should have been obtained by the Society when purporting to exercise the particular power under consideration. Noting that the case was neither pleaded nor made at trial, Geoghegan J. concurred with the views expressed by Fennelly J. that an administrative body could ground to a halt if it was under an obligation to obtain legal advice in relation to every issue that might arise. Geoghegan J. considered that the High Court judge in *Kennedy* ought not have embarked on a detailed treatment of claims based in negligence and breach of statutory duty. He continued:-

> *"Even if it had been properly pleaded and the Law Society had had a proper opportunity to meet it, it is difficult to conceive that it could possibly have succeeded. Being of that view, I do not consider that this is an appropriate case to consider again the interesting questions arising from the interplay particularly of Anns v Merton London Borough Council [1978] A.C. 728, Ward v McMaster [1988] I.R. 337 and Caparao v Dickman [1990] 2 A.C. 605. Having regard to the constituents of the tort of misfeasance in public office, I think it unlikely that Lord Wilberforce (whose speech in Anns v Merton London Borough Council is now overruled by the House of*

Lords) would never have countenanced a parallel Donoghue v Stevenson [1932] A.C. 562 private duty of care in a case such as this and I rather suspect that McCarthy J. who had expressed similar views in Ward v McMaster would have considered that there was a 'compelling exemption based upon public policy' given the ingredients of the tort of misfeasance in public office. I would have no hesitation, therefore, in rejecting the grounds of appeal based on negligence and breach of statutory duty."

305. In <u>*Cromane Seafoods Limited v. Minister for Fisheries*</u> [2017] 1 I.R. 119, Charleton J. observed that as the relationship between the parties was governed by statute, the first point of analysis must be the legislative matrix and that it must be shown that such powers expressly establish a duty of care in favour of the plaintiff or that such a duty arises by necessary implication. Clarke J. acknowledged, however, that the court should carefully scrutinise any restriction sought to be imposed on the potential liability of a public authority to ensure that it is justified and proportionate in the light of the public interest sought to be protected and which might operate on a materially more generous basis than that which applies in the private sphere. He agreed with Charleton J. that an excessive expansion of the law of negligence may have the result of "*swamping*" other torts and that it would make a nonsense of the carefully worked out parameters of other torts if it were easy to circumvent their established boundaries by simply bringing a claim in negligence. At para. 91 he stated:-

"…the fact that the courts have defined the limits of the tort of misfeasance in public office in a particular way must be taken to stem from an analysis of the competing entitlements of those affected by the wrongful acts of public officials or bodies when exercising legal powers, on the one hand, and the need to ensure that such legal powers can be reasonably exercised for the public good, on the other. Torts such as misfeasance in public office have their boundaries and limitations precisely because, over the years, courts have come to the view that balancing factors, such as those which I have identified, require that liability be confined within the boundaries of the tort as thus defined. That analysis clearly gives rise to what might, in the context of the jurisprudence on the scope of the duty of care, be said to amount to a 'countervailing factor'. If there is a good reason, in accordance with existing jurisprudence in respect of another tort, for limiting the scope of that tort in a particular way, then that would equally be likely to be a similar good reason or countervailing factor which would limit the duty of care in a similar way."

Expressing the view that, in practice, it is more likely that a countervailing factor may be the public nature of the functions being exercised, he observed at para. 85:-

"…It is inevitable, therefore, that whatever general approach is adopted for the purposes of defining the limits of the duty of care, the application of that general approach in practice is likely to differ as between public and private persons or bodies at least where public entities are carrying out functions which are peculiarly within the public domain.

86. I note this last qualification because, of course, sometimes a public official may simply be doing something which could just as easily be done in a private context. A statutory body charged with, for example, establishing a utilities network (such as electricity) could hardly expect to have a different standard or duty of care applied to it when constructing safe power lines than that which might apply to a private electrical contractor doing much the same thing. A public official who happens to drive a car in the course of their public duties could not (except in very unusual circumstances) expect to be assessed on any different basis to any of the road user just because they happen to be driving about in the course of their official business"

306. It seems to me that case law establishes a number of principles. First the boundaries of the tort of misfeasance in public office must be respected and the law of negligence, as a matter of principle, should not be permitted to be used to circumvent those boundaries. Second, in the context of public authorities or bodies exercising powers pursuant to statute, and which themselves depend upon statute for their very existence, the determination of the nature, extent or quality of any duty of care must be assessed against the backdrop of the enabling legislation and the nature of the powers or duties being exercised when the alleged carelessness which causes harm is said to have occurred. Statutory bodies are not omni potential and therefore the assessment of any duty of care owed by them must be viewed against the limits of the powers and it must recognise the obligations imposed upon them.

307. In the High Court in *Kennedy*, Kearns J. observed in the context of the defendant's regulatory powers, at p. 250:-

"I am of the opinion that these authorities set out principles which are equally applicable in this jurisdiction and that counsel for the respondents is correct in asserting that the duty of care which arises in the course of an investigation by the first respondent of a solicitor is to the public, rather than the individual solicitor. To hold otherwise and to find that a duty of care existed to the solicitor, or to both the public and the solicitor, would be to uphold two incompatible duties and would completely undermine the capacity of the first respondent to exert proper supervisory and regulatory control of the profession. There is absolutely nothing in the Solicitors Acts 1954 or the Regulations of 1984, containing, as they do, measures for the control and sanction of solicitors, which could be interpreted as creating a duty of care to an individual solicitor under investigation. The only duties to the solicitor are to apply fair procedures and observe natural and constitutional justice appropriate to different stages of the process. Its duty is to protect the public against loss and to ensure that solicitors conform with their obligations."

308. It may well be that part of the rationale underlying this approach is the avoidance of circumstances in which a public authority is deterred from performing a duty which is

owed to the public, by virtue of a fear of a damages claim: see O'Donnell J. in *Minister for Justice, Equality and Law Reform v. Devine* [2012] 1 I.R. 326.

309. Further, and although it may be contended that this is not an entirely novel situation, the Court must be mindful of the approach which ought to be taken in the analysis of whether a duty of care exists in novel circumstances. In *Whelan v. Allied Irish Banks p.l.c.* [2014] 2 I.R. 199, O'Donnell J. in considering the correct approach, stated at para. 66:-

> *"To the casual observer it might appear that there is little difference between an approach which imposes liability where there is prima facie a duty of care unless considerations of policy negative the existence of such a duty, and one which imposes a duty of care only when there is sufficient proximity and considerations of policy make it just and reasonable that such a duty should exist. One approach might seem to be merely the negative image of another and to the mathematically minded, five minus two is exactly the same as one plus two. However, there is and has been in practice a very significant difference between the two which might be illustrated by this case. The formulation in Anns v. Merton London Borough Council and Ward v. McMaster of prima facie liability only negatived by considerations of policy loads the balance heavily in favour of finding liability. Furthermore, it tends to ensure that the general issue as to the existence of a duty of care in such circumstances will be addressed in the particular circumstances of the case and the question becomes, almost imperceptibly, whether a plaintiff who has now been found to have been injured by the carelessness of a person whose acts could foreseeably cause damage to the plaintiff, should nevertheless be deprived of damages."*

He also observed that the test did not permit a consideration of each individual case and whether the imposition of a duty of care met some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court:-

> *"In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson."*

310. It seems to me that the authorities establish that where the actions of a body which derives its powers from statute are called into question, primarily because it is contended that those powers have been exercised for an ulterior purpose or from unlawful motives, or perhaps with a reckless indifference as to whether those powers exist, there is little room for an additional argument that even if such motives cannot be established that a fallback position arises in negligence. Even where there might be room for such argument, the analysis invites a consideration of potentially conflicting obligations. In this regard it is clear on the authorities that caution ought to be exercised in relation to the acceptance of a proposition that a duty of care arises in circumstances where there may be conflicting duties, particularly where the powers being exercised arise in the context of

an investigative and disciplinary process. That this is so was recognised by Kearns J. in Kennedy.

311. In *Kennedy*, Kearns J. accepted the reasoning of Geoffrey Vos Q.C. in *Miller v. Law Society* [2002] 4 All E.R. 312, a decision which is considered in more detail below in the context of the collateral attack doctrine. It will also be recalled that he embarked upon an assessment of the claims in negligence and breach of statutory duty which the Supreme Court felt he ought not to have done because of the absence of adequate pleadings. He dismissed the claim for reasons associated with the defence of collateral attack, which I will shortly address. Mr. Craven S.C. submits that while Kearns J. may have relied on the decision in *Miller*, in this country we operate to a different constitutional order and not one based on parliamentary supremacy. He submits that this is an exceptional type of case. The claim in negligence has been very fully pleaded and therefore not subject to the same limitations that the court was confronted with in *Kennedy*. Further, in so far as Kearns J. may have approved *Miller*, this was not considered by the Supreme Court. Mr. Craven S.C. also relies on the decision of the Supreme Court in *Cromane Seafoods,* particularly the minority judgments. Further, he submits that s. 36 of the Act provides that the Society may be liable in damages and that there are thus limitations on the effect of the *Miller* decision.

312. Perhaps this was not what was intended, but I find it difficult to accept that Geoghegan J. in *Kennedy* was expressing the view that if a case is pleaded with particularity, it thereby falls into a category of an exception to the general rule. While it is not clear from his decision what may constitute exceptional circumstances, it appears to me that whatever those circumstances may be, they must not be permitted to undermine the tort of misfeasance in public office. This much is further borne out by the decision of the Supreme Court in *Cromane*, to which I have referred above. Any *prima facie* duty of care which may exist in a case such as this must be assessed in the light of the potentially countervailing obligations of the Society in the exercise of its statutory obligations in regulatory and disciplinary matters to protect clients.

313. I am not satisfied that it has been established that this is an exceptional case in which a duty of care in negligence is owed in the context of the disciplinary proceedings and procedures adopted and enforced by the defendant. In my view, if the plaintiff is to succeed in relation to his principal complaints (excluding defamation which is considered below) it must be on the basis that he has established a cause of action for misfeasance in public office.

314. Therefore, I do not believe it is necessary to consider whether any duty of care or cause of action in negligence has been excluded by s. 36 of the Act of 1994. It may very well be, as counsel for the plaintiff argues, that this section implicitly acknowledges that a cause of action may arise where it is shown that in exercising, or not exercising its powers, the Society has not acted in good faith, and that it has not acted reasonably in the circumstances, but it does not appear to me to follow that the section creates a cause of action in negligence which would not otherwise exist at law.

315. But even if I am incorrect in this, and a duty of care exists, nevertheless, the defence of impermissible collateral attack must be addressed. This defence also impacts on the claim based on misfeasance in public office and it is appropriate that it is now considered.

16.3 Collateral attack

316. From the outset, it was made clear by counsel for the plaintiff that no attempt is made in these proceedings to circumvent, challenge or mount a collateral attack on final and conclusive orders. However, it is stated that the case concerns, to quote counsel, *"how the Society dealt with Mr. Murphy in the lead up to those applications actually being made".*

317. Counsel for the Society drew the court's attention to the fact that no formal reply was delivered to the pleadings of the Society in its defence regarding the Statute of Limitations or the *res judicata* issue, although it must be said that this pleading point was not particularly advanced at hearing. However, while it is true that in the context of the pleadings, no particular or exceptional pleading is made in reply to the preliminary and technical objections taken by the first named defendant in its defence, I do not decide the matter on this point in light of the very extensive arguments made at trial.

318. The Society maintains that the proceedings constitute an impermissible collateral attack and that this is so, is laid bare by the proposition advanced by the plaintiff that orders to which Mr. Murphy is subject can be challenged at some future stage and can be based on this Court's findings as to how the Society dealt with him in the lead up to the applications resulting in the obtaining of the orders. It is argued that there is therefore an inconsistency at the heart of the plaintiff's claim. On the one hand it is stated that there is no challenge to the orders, but on the other, the plaintiff is reserving the right to challenge such orders after these proceedings have been determined. It is submitted, for example, that to seek damages because he was improperly struck off while that order remains in existence is inconsistent and impermissible.

319. Considerable emphasis was placed by counsel for the respondent, Mr. McDermott S.C. on the statutory provisions for agitating grievances and appeals, to articulate points and perhaps to make a timely application for judicial review, a remedy arising as a matter of law. Emphasis is placed on what is described as the self-contained statutory code. It is argued that where a person has the right, the ability and the choice to avail of all those mechanisms, if complaints are not litigated at the appropriate time then the matter becomes final. It is impermissible to return years later and to maintain a claim for misfeasance or breach of duty in respect of some or all of the matters which could have been challenged at the time and were not. Counsel submits that the plaintiff does not make the case that the statutory remedies were inadequate or that they did not provide a range of potential remedies and does not claim that the potential for judicial review would or did not arise. That Mr. Murphy had answered many questions regarding his failure to take particular steps, at particular times, by referring to a number of other matters which were exercising him at such times, implies that he was aware of the remedies available and he decided not to pursue them. He is an experienced solicitor and he made a choice.

He chose not to appeal and therefore, it is submitted, it is not open to him to have all or some of these matters re-litigated at this time. Procedural anarchy would occur if the position were otherwise and it is contended that if Mr. Murphy is correct, then there is little point in the Oireachtas laying down a statutory mechanism to deal with complaints if a person could decide not to avail of them and to revisit them in his own way by making a claim for damages.

320. In so far as it may be the plaintiff's case that it is open to him to challenge those orders at some future time, should he get a favourable outcome from this Court, it is submitted that this amounts to no more than a purported elongation of the process with a view to avoiding the principle of *res judicata*. Further, it is submitted that it is impermissible to avoid the application of the *res judicata* rule by saying that the matters may be re-entered. Mr. McDermott S.C. highlights that at no stage in the submissions of the plaintiff is it explained how he is not bound by the doctrine of collateral attack.

321. Further, it is contended that it was Mr. Murphy's choice to accept the findings of the Tribunal in January, 2009, which he did before the President of the High Court. It is submitted that he did so in order to gain a perfectly legitimate advantage of perhaps a lighter penalty. The fact that an expected gain did not materialise is not a basis to seek to unwind the formal acceptance, in affidavit and through counsel, of the various findings and orders made against him. To permit a claim in damages in such circumstances would be to go against the plaintiff's own sworn position on affidavit and the principle of finality of litigation. It would also go against what his lawyers had said in open court that he *wholeheartedly* accepted the findings of fact. No attempt was made to bring an application for judicial review if it was considered that sufficient grounds arose on procedural issues or that fair procedures were not applied and, if he had chosen to do so, he would have had been bound by the six months limitation period which applied at that time.

322. It is further submitted, that if the principles in relation to collateral challenge or *res judicata* do not apply in the regulatory sphere, it would follow that there could never be a final and conclusive judgment in a regulatory matter. In answer to the suggestion that the circumstances under consideration are different because of the entitlement to re-apply, it is contended that an application to reapply is predicated on the fact that a person has already been struck off. If it is claimed that the order is wrong, then the appropriate avenue is that of appeal – not an application to re-apply. Such application to be re-admitted to the Roll of Solicitors does not speak to the situation which pertained at the date of strike off. The application focuses on the circumstances in which the applicant subsequently finds him or herself some years later. There is a corpus of law which provides guidance as to when read, re-admittance might be considered and that there is no authority for the proposition that simply because the matter may be re-entered it is an exception to the rules regarding res judicata. Any contention to the contrary would undermine the status of any judgment.

323. In *Kennedy*, Kearns J. accepted the reasoning in *Miller v. Law Society* [2002] 4 All E.R. 312, where the Law Society in England appointed an investigating accountant to inspect the books of account relating to the practice of a sole practitioner. Under the relevant statutory rules, the accountant was required to prepare a report setting out the results of his inspection. Such report could be used as a basis for proceedings under the relevant Solicitors Act in that jurisdiction. The accountant reported a deficit in the client account. As it suspected dishonesty, the Law Society intervened by vesting in itself the monies held by the solicitor in connection with his practice. The solicitor failed to make an application to the High Court within the appropriate time to have a relevant notice withdrawn. A considerable time later the Tribunal of the Law Society found that the solicitor had not acted in a deliberately dishonest manner but nevertheless suspended him. This suspension was lifted two years later by the Law Society, who by statutory demand, *inter alia*, sought its costs of intervention. The solicitor failed to have the statutory demand set aside. On appeal he contended that the accountant's investigation had been conducted negligently and that the Law Society would not have resolved to intervene but for the alleged negligence on the part of the accountant. If there had been no intervention, he would have continued to derive profits from his practice. He therefore claimed damages. This claim was rejected. It was held that the accountant's investigation was an inseparable part of the disciplinary process laid down by the Act, which could lead to the making of an intervention order or disciplinary proceedings. The procedure for application to the High Court formed part of a complete statutory scheme to protect the public from errant solicitors and it was not open to a solicitor to challenge the process leading to the decision to intervene by way of private law action for damages for negligence. Geoffrey Vos Q.C., sitting as a deputy judge of the Chancery Division, concluded that the investigation must be regarded as part of the unitary and indivisible statutory process and it was simply not open to a solicitor to challenge the process leading to the decision to intervene by way of a private law action for damages for negligence.

324. Kearns J. observed that the applicant in *Kennedy* had not pointed to any provision of the Solicitors Act, 1954 or any regulations made thereunder which suggested that the reasoning outlined by Geoffrey Vos Q.C. and the principles therein stated by him were in error.

325. I should also refer to *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 I.R. 566, to which reference was made in argument by analogy. This concerned a procedural application in the context of a claim based, *inter alia,* on malicious prosecution. Clarke J. there observed that the precise parameters of a claim for malicious prosecution remained to be clearly defined. He referred to *dicta* of Costello J. in *Dorene Ltd v Suedes* (Ireland) Ltd [1981] I.R. 312, where, despite the advices of counsel that the plaintiffs did not have a cause of action, they persisted with it and attempted to negotiate a lease which was the subject matter of the substantive proceedings. Clarke J. thought that there was no reason in principle why, in an inappropriate case, the pursuit of such a claim based on an assessment of that which the plaintiff knew not to be true would amount to an abuse of

process. He also observed, however, that where there is a binding determination of the court on certain facts, such findings could only be gone behind in limited circumstances such as where it had been shown that the order secured by the plaintiffs was procured by a fraud on the court. He observed that in the absence of the original order being set aside on such grounds, the court could not entertain a second set of proceedings which were predicated on the fact that the original finding of the court was incorrect. Different considerations may apply where a case is compromised and where there is no such finding which is binding on the parties. While the precise parameters of the circumstances in which a party may be entitled to seek to go behind a settlement on such grounds remain to be the subject of authoritative determination, he thought it at least arguable that *"a plaintiff can simply not rerun on the same evidence in the action which it had compromised by means of asserting that the claim made by the plaintiff in the action was false to the knowledge of the plaintiff concerned and no more*." Much would be dependent upon the facts.

326. Having considered the evidence, the submissions of the parties and the authorities, I accept that it is not permissible for the plaintiff to challenge the manner in which the orders were sought or made, while those orders remain valid, un-appealed and not otherwise reviewed. To seek to raise as a fundamental aspect of a cause of action, the manner in which things were done and orders sought and obtained, and yet to leave those orders unchallenged is equivalent to removing the foundations and trusting that the house will remain standing. I do not see any reason for distinguishing or disagreeing with the reasoning of Geoffrey Vos Q.C in *Miller* and relied upon by Kearns J. in *Kennedy*, that the manner in which a decision is arrived at, the procedures employed, the arguments of the parties, the conduct of the parties leading to the decision, whether one or both parties are disgruntled by the manner in which the proceedings have progressed or determined, are all part and parcel of the process by which the decision is arrived at. As was stated in *Miller*, these matters constitute inseparable parts of the disciplinary process, a process which is part of a complete statutory scheme to protect the public against what have been described as the actions of errant solicitors. Unless and until otherwise set aside, such as for example on appeal, or perhaps on the grounds of fraud, mistake or some other lawful ground by which such order or decision may be set aside, it remains valid both in its terms and in its effect. To award damages for the manner in which a regulatory body exercising powers under statute in relation to disciplinary matters, but to accept that the orders obtained at the end of the disciplinary process remain valid, is to adopt a position which is inconsistent, offends against the principles of impermissible collateral attack and finality of litigation.

327. The difficulty in adopting a contrary approach is highlighted by reference to the [REDACTED] matter, which was the subject of directions and orders made by the Registrar's Committee, the Tribunal, the High Court and the Supreme Court. On opening the case, and perhaps before the controversy in the earlier Healy matter became the subject of greater attention as the evidence unfolded, counsel for the plaintiff described this action as being bookended at one end by the [REDACTED] issue. Yet when one looks

at the history and outcome of that complaint, it is quite clear that what this Court is being requested to do in respect of that matter is to re-travel well-travelled ground.

328. To recap and place in context, this complaint had been before the Registrar's Committee on 29th May, 2001. Directions were made and notified to Mr. Murphy. They were not appealed within the required time. Mr. Murphy's failure to comply with the directions was referred to the Tribunal and he complained of lack of clarity in those directions. On 20th March, 2003 the Tribunal referred the matter back to the Registrar's Committee for clarification. The transcript of the hearing on that date records:-

> *"The Tribunal now proposes to enable the matter to go back to the registrars' committee to clarify and break down which aspect of the direction refers to the agent and which aspect of it refers to the purchaser. That re-clarified direction is then to be served on Mr. Murphy so that Mr. Murphy has his opportunity to consider an appeal, or to make an appeal"*

The Tribunal recommended that on such clarification consent might be forthcoming to an extension of time for appeal. On 6th May, 2003, a differently constituted Registrar's Committee confirmed that the finding related to the [REDACTED] complaint only. This order was not appealed. The matter was once again referred back to the Tribunal and on 21st October, 2003 Mr. Murphy was censured and directed to comply with the directions of the Registrar's Committee made on 29th May, 2001.

329. Mr. Murphy appealed that order to the High Court and sought extensions of time to appeal the Committee's directions.

330. The grounds of appeal were summarised by Laffoy J. and it is fair to say that the plaintiff sought to agitate many of the complaints made by him in these proceedings. He contended, *inter alia*, that:-

(i) The direction of 29th May, 2001, both in its making and its communication was invalid.

(ii) The decision of the Registrar's Committee made on 4th September, 2001 was invalid.

(iii) The Tribunal was not entitled to act on the direction because it was flawed.

(iv) The decision of the Registrar's Committee of 6th May, 2003 was invalid and was merely a "*vehicle of convenience".*

(v) The Society had issued no direction in relation to the complaint of the purchaser.

(vi) A reformulated allegation of misconduct should have been made before the matter was re-entered before the Tribunal.

(vii) The finding and order of the Tribunal was invalid.

(viii) That the conclusion of the Tribunal that Mr. Murphy did not wish to appeal the direction of the Registrar's Committee in relation to the complaint of the agent/the clients was not correct. He wanted to find out exactly what the position was in relation to that complaint and having found out would have considered his position.

331. Laffoy J. delivered judgment on 7th May, 2004. She observed that it was undoubtedly the case that following Mr. Murphy's intervention by letter of 3rd September, 2001, the clarity of the Committee's direction and the letter communicating its making was "*dented*". The Society's letter of 10th September, 2001 confused matters because it referred to the direction as covering both complaints. The Registrar's Committee had no jurisdiction to deal with the purchaser's complaint under ss. 8 or 12 of the Act of 1994. Referring to the first hearing before the Tribunal of the 20th March, 2003, Laffoy J. observed that Mr. Murphy's evidence, as recorded in the transcript, was unequivocal that he never had a difficulty with a finding with respect to his client, [REDACTED], as opposed to the finding in respect of the purchaser's complaint. She continued:-

"I assume that what was intended to be conveyed by that letter was the making of the direction in relation to the clients' complaint disposed of the purchaser's complaint also. Secondly, Mr. Murphy's letter of the 25th September 2001 should have been dealt with. Thirdly, the manner in which he was treated at the hearing of the disciplinary Tribunal on the 20th March 2003 understandably perhaps, led Mr. Murphy to believe that his legal position was other than it was. The allegation of misconduct which Mr. Murphy was facing was failure, without reasonable excuse, to comply with the direction. From reading the transcript it is clear, on the strength of Mr. Murphy's own testimony, the Disciplinary Tribunal considered that as things stood, it would not be fair to make a finding of misconduct against him. The approach adopted by the Disciplinary Tribunal was clearly motivated by a desire to be fair to Mr. Murphy. It was in ease of him and it does not help his cause to complain about it."

She concluded that the decision of the Registrar's Committee of 6th May, 2003 was correct and while the Committee had no power to extend the time for appealing, a pragmatic approach had been adopted by the Committee on the recommendation of the Tribunal. Laffoy J. described this as being motivated by a sense of fairness towards Mr. Murphy. He chose not to appeal. That a second bite of the cherry was offered to him, without there being any basis in law for so doing, in her view, did not prejudice him in any way. She was satisfied that nothing had happened after the expiration of the 21 days from the receipt of the first communication of the making of the direction to alter its absolutely legally binding nature on such expiration:-

"Any prejudice caused to him by lack of clarity in the Law Society's dealings with him was cured by the approach adopted in the letter of the 8th May 2003. That Mr. Murphy now seeks an extension of time to appeal, when it was open to him just a year ago, to initiate an appeal without objection of the Law Society, is not only illogical but

raises a question as to the bona fides of the stance of Mr. Murphy in relation to the entire process since he received the letter of the 31st May 2001."

Describing as without substance Mr. Murphy's contention that the allegation of misconduct should have been reformulated when the matter came back before the Tribunal, she observed that he chose to ignore the proceedings on 21st October, 2003. Refusing the reliefs sought, Laffoy J. concluded that there had been no breach of fair procedures on the part of the Tribunal in proceeding with the hearing in his absence:-

"As in the McEniry case, it is uncontroverted that Mr. Murphy has failed to comply with an absolutely binding direction and in the circumstances, it was open to the disciplinary Tribunal to make a finding of misconduct in respect of such failure in the absence of a reasonable excuse."

332. Laffoy J. refused Mr. Murphy's application for an extension of time within which to appeal against the discretion and the subsequent decision of the Registrar's Committee, stating that the court had no jurisdiction to grant such an extension. She also refused his application to rescind the order of the Tribunal. Mr. Murphy did not appeal Laffoy J.'s decision within the time and did not seek to do so until 2008 when his application for an extension of time to the Supreme Court was refused.

333. The similarity of the points raised before Laffoy J. in relation to the [REDACTED] matter and the issues raised in this case are striking. In essence, Mr. Murphy seeks to ventilate this issue once again. If this court were to accede to this approach, in my view it would be to set at nought what occurred in the application before Laffoy J., her decision and the failed attempts before the Supreme Court. This fortifies the Court's conclusion that it is impermissible for Mr. Murphy to attempt to introduce matters which have already been considered and determined and which formed the basis of findings and rulings which continue to stand and which are not and have not been challenged or set aside.

334. To permit what occurred in the processes before the Committees, the Tribunal (which is not a party to these proceedings) and the Court to find the basis for the claim now being pursued would be to run contrary to the provisions of the statutory framework of the disciplinary code, the time limits applicable, the jurisdiction to extend such limitations of time and the principle of finality of litigation.

335. I am also not persuaded by Mr. Murphy's contention that the corpus of jurisprudence on collateral attack is distinguishable because it is open to a solicitor whose name has been struck from the Roll of Solicitors to re- apply, or that re-entry of proceedings might be possible. No authority has been opened to the court to support such proposition. I am more persuaded by the submission of the respondent that an application to be readmitted to the Roll of Solicitors does not speak to the situation which pertained at the date of strike off, rather its focus is the situation in which an applicant finds him or herself at the time its making

16.4 Immunity from suit

336. Something ought to be said of the alternative suggestion that the Society enjoys an immunity in a case such as this. Section 14 provides:-

"The following

(a) the doing, before the passing of this Act, by the former Disciplinary Committee or the registrar, in purported exercise of the powers purported to have been conferred on them or him by section 18 or 21 of the Principal Act, of any act, being an act purported to have been authorised to be done by such section,

(b) the making to the High Court by the Disciplinary Committee of a report under section 7 or 9 of this Act or a supplemental report under paragraph (b) of subsection (1) of section 8 of this Act,

(c) the bringing by the Society of a report before the High Court under section 7 or 9 of this Act,

(d) the publishing, in accordance with section 17 of this Act, of any notice authorised by the said section 17,

(e) the making, before the passing of this Act, of an application to the former Disciplinary Committee under section 14 of the Principal Act or the giving of any information in connection with such an application, and

(f) the making of an application under section 7 of this Act or the giving of any information in connection with such application,

shall be absolutely privileged and shall, in respect of the doing of any act specified in paragraph (a) or (e) of this section, be deemed always to have been absolutely privileged."

337. Also of relevance is s. 36 of the Solicitors (Amendment) Act 1994 which provides:-

"(1) Without prejudice to any other defence, it shall be a defence to an action for damages against the Society in relation to exercising or in relation to not exercising any power conferred on the Society by the Solicitors Acts, 1954 to 1994, for the Society to prove that:-

(a) the Society, in relation to exercising or not exercising their powers, have acted in good faith, and

(b) the Society, in relation to exercising or not exercising their powers, have acted reasonably having regard to all the circumstances,

(2) In this section "the Society" includes any person acting for or appointed by the Society"

338. Reliance is placed by the Society on the statutory immunity conferred by ss. 14 and 15 of the Act of 1994 because the Society submits that it acted in good faith at all times. It is therefore submitted that the matters of which Mr. Murphy complains, with the exception of the defamation aspect of the claim, are the subject to absolute privilege and s. 14 provides a complete defence to the claim based on misfeasance in public office. Particular reliance is placed on subs. (f). There was some debate as to whether this amounted to an immunity from suit and, if not, whether there was any practical difference between such defences.

339. Mr. Craven S.C. submits that s. 14 is referable solely to the defence of a defamation action. The Act confers protection in relation to certain activities including making a report to the court, the making of an application to the court and what it does is to confer protection in relation to those activities in so far as defamation only is concerned. He draws a distinction between immunities and privileges. An immunity, it is submitted, is conferred on policy grounds and any claim which might be made in such circumstances fails in limine. A privilege is a defence to such a claim. He submits that this proposition is bolstered by the wording of se 36 which is prefaced with the words *"without prejudice to any other defence".* Mr. McDermott S.C. relies on the wording of s. 36 in support of the contrary proposition. Mr. Craven S.C. contends that this section contemplates that there may be a cause of action against the Society in damages, a position which is inconsistent with the assertion of a statutory immunity. While the Society may have other common law defences available to it, it is submitted that should it purport to rely upon s. 36, then the Society must establish that it has acted in good faith and with reasonable care.

340. In light of my conclusion on duty of care and the collateral attack issues, once again I must express reluctance to form a definitive view on this point. The parties have requested that I should so do, in light of the procedural history of the case and in the event that this matter proceed further and the court agreed to do so on that basis. With that caveat, having considered the submissions of the parties, I accept the proposition that s. 36 would be rendered meaningless if the effect of s. 14 was to confer an immunity from suit in a case such as this. To construe what is contained therein otherwise immunity might potentially offend the provisions of the Convention as discussed in *Osman v. United Kingdom* (Application no. 23452/94) and *Z and Others v. United Kingdom* (Application no. 29392/95). In truth, I do not believe the counsel for the Society's submissions goes this far but in so far as it is suggested that the absolutely privileged defence referred to in s. 14 relates to matters other than potential defamation would seem to me to go beyond what is reasonably required by this section. In my view, the references to "*absolute privilege*" in s. 14 must be read in the light of the activities described in the section. The tort of defamation may apply to actions as it does to words. The provisions of the Act, in so far as they are relevant, in relation to the making of reports pursuant to s. 9, the bringing of the report before the High Court pursuant to ss. 7 or 9, the publishing of any notice authorised by ss. 7 or 9, the making of an application under s. 7 or the giving of any information in connection with such application would all

seem to point in the direction that the privilege applies in the context of the tort of defamation. In my view, if the legislature had intended the defence to be wider, it would have expressly so provided. However, the courts views on this should not be regarded as definitive, as it will require more complete argument in an appropriate case.

16.4.1 Alternative conclusions on the issues

341. Given the above conclusions, again, in normal course, it would neither be necessary nor desirable to comment on or to make findings in relation to how individual complaints and issues were treated by the Society and whether its actions and words constitute evidence of misfeasance of public office. However, in light of the agreed manner in which I should proceed, I make the following observations on those issues as they have arisen individually and cumulatively. In this regard, I reiterate that it is not the function of this Court to re-hear or re-determine those complaints and any observations hereunder must be seen in this light.

16.5 Observation on the Healy matter

342. In the light of the contents of the letter of 9th December, 1999 from the Society to Mr. Healy, it is clear that the Society sought an accountant's reports from both Mr. Healy and Mr. Murphy in respect of the same period, or at least a particular overlapping period. Counsel for the plaintiff submits that the actions of the Society are inexplicable and that the only reasonable inference that may be drawn is that the Society was incompetent, or that it acted negligently or maliciously. In this regard it is submitted that significance ought to be attached to the fact that it was only some 20 years later and in evidence to this Court that a concession was made regarding the respective obligation of Mr. Healy and Mr. Murphy. It is argued that important information was concealed and such concealment must have been intentional and deliberate. There can be no lawful justification for it and the Society should not have relied upon the Healy matter in the strike off proceedings. At the very minimum, its error should have been brought to the attention of the President of the High Court at that hearing. It is submitted that this constitutes a breach of the Society's duty to the plaintiff and that the failure of the Society to revisit the disciplinary process in this regard, despite what was actually known, implies malice.

343. The Society replies that the evidence suggests that Mr. Murphy received the letter of 9th December, 1997 and that Mr. Murphy had received a letter from Mr. Connolly dated 23rd December, 1997 which contained reference to the earlier letter of 9th December, 1997. It is suggested that Mr. Murphy did not appear to be have been taken aback by that reference.

344. When one considers the evidence in its entirety, apart from the reference in the letter to Mr. Murphy of 9th December, 1997 that a copy of the letter to Mr. Healy was being enclosed, the latter is not further mentioned at any of the Compensation Fund Committee meetings which took place in 1998 and 1999. Although it is possible that Mr. Murphy received the letter addressed to Mr. Healy and that the letter of 23rd December, 1997 ought to have put him on notice of its existence, on the totality of the evidence, I am not

satisfied as a matter of probability that Mr. Murphy received a copy of the letter to Mr. Healy. If he had it seems unlikely that he would not have referred to it in his letters to the Society in subsequent correspondence including his letter of 22nd January, 1998 in which he raised issues concerning the takeover of Mr. Healy's practice. Mr. Murphy therein informed Mr. Connolly that he had reminded his accountant to file the updated accountant's report but once again protested that Mr. Healy had refused to cooperate with him. He stated that he would give the Society any assistance required but apart from this, nothing in the letter is indicative of Mr. Murphy having seen the letter to Mr. Healy of 9th December, 1997 at that time. The detail of this letter to Mr. Healy is not referred to in any communication or correspondence or in the minutes of any meeting which took place at or around that time. On the other hand, it is not at all clear to me that the Society was aware, or ought to have been aware, that Mr. Murphy had not received a copy of this letter. Objectively he was informing the Society that he had reminded his accountant to file the closing report, all of which, it seems to me, added to the confusion, even if the creation of that confusion was the responsibility of the Society in not ensuring that Mr. Murphy was kept apprised of communications with Mr. Healy on the same issue.

345. It is also clear that there was at least a deficit in the quality of the communication between the Society and Mr. Murphy in relation to the circumstances in which financial assistance might or might not be afforded and to the distinction which was drawn between the winding up of the practice and its takeover. In my view, there is certain merit in the plaintiff's case that at no stage at the relevant time was it expressly explained to him that the Society differentiated between take overs of practices as going concerns and involvement in practices that were being wound up. As of 2003 and into 2004, Mr. Murphy's letters of inquiry in this regard went unanswered. In evidence, Mr. Connolly accepted that with hindsight it was regrettable that they were not responded to. It is unfortunate that the position, particularly in relation to the involvement of Messrs. O'Mahony Farrelly in the winding up of the O'Callaghan practice, was not better explained to Mr. Murphy. It is also unfortunate that the Society did not have clear and documented guidelines concerning the circumstances in which it might afford such financial assistance. Had this been the case in 1999 it may be that Mr. Murphy would not have become embroiled in controversy regarding the Healy practice to the extent that occurred at that time.

346. As a matter of first principle, it appears to me that a distinction must necessarily exist between a commercial transaction in which a firm of solicitors is being taken over as a going concern, with the hope of deriving future financial benefit, from a situation where the primary purpose is to assist in the orderly winding up of a practice which is in difficulty. It must have been evident to Mr. Murphy, who at that time was an experienced solicitor advising clients on business and commercial matters, that he had involved himself in a commercial transaction. Further, I am not satisfied on the balance of probabilities, that the Society requested him to assist Mr. Healy. The financial terms were negotiated between Mr. Healy and Mr. Murphy. The price was agreed. That the takeover did not prove to be profitable, or that there were greater problems in Mr. Healy's practice

than Mr. Murphy was aware when he agreed to take it over does not alter matters, in my view. I do not accept that these issues give rise to legitimate cause for complaint, even less that they constitute evidence of malice or recklessness; or of an intention to harm Mr. Murphy.

347. It is highly unfortunate that the letter of 3rd December, 1999 was not copied to Mr. Murphy but, having considered the evidence of the parties, particularly the evidence of Mr. Connolly, I do not believe that he intentionally formed the view that the letter to Mr. Healy should not be given to Mr. Murphy. Given the surrounding circumstances, including that the letter to Mr. Murphy stated on its face that a letter to Mr. Healy was being copied to him, the contents of minutes of meetings and the ongoing discussions which had been taking place between the parties, while no doubt his failure to receive a copy of this letter has fuelled his belief that he was being unfairly treated, I am not satisfied that the evidence establishes that a decision was taken by the Society not to provide Mr. Murphy with a copy of that letter at that time, or that it was reckless in failing to do so. Having considered the evidence of the witnesses and their demeanour on this issue, I am also not satisfied that any ulterior motive has been established for this omission.

348. I must conclude however, that although the Society was seeking closing accounts from both parties in respect of an overlapping period or that there was a failure of communication regarding the circumstances in which financial assistance was provided, is not evidence of *mala fides.* The minutes of the Compensation Fund Committee meeting on 3rd June, 1999 which Mr. Murphy attended, that views were expressed by members of that committee that when a practice was being taken over, it was being taken over *"warts and all"*. The minutes also record that views were also expressed that any issues between Mr. Murphy and Mr. Healy were matters of indemnity between them.

349. It is contended that these matters should have been brought to the attention of the President of the High Court in 2009 and that the Healy matter ought not to have been relied upon. If I was satisfied that the Society was then aware of any frailty in the order obtained in the *Healy* matter, then there may be substance to this argument. I am not, however, satisfied on the evidence that the Society, as of April, 1999, was or ought to have been aware of any frailty in what was then a subsisting order in a disciplinary matter, which had neither been appealed, nor set aside and which had been made almost ten years previously.

350. In the circumstances, in so far as the plaintiff seeks to rely upon the circumstances surrounding the disciplinary finding in the Healy matter, as evidence of *mala fides* on the part of the Society, I am not satisfied that he is discharged the onus of proof in so doing.

16.6 Observations on the [REDACTED] matter

351. This issue has already been addressed at great length by Laffoy J. and even were I at large in the assessment of the issues raised by Mr. Murphy on this point, I could not and do not disagree with Laffoy J.'s assessment of the situation.

352. Ms. Kirwan was cross-examined as to why, once the Society became aware that the email from [REDACTED] which was described by counsel as raising serious concerns as to whether [REDACTED] had authority to act on his behalf, it had taken no action. In response she stated that [REDACTED] signed an authority on 14th July, 1999 permitting [REDACTED] to take care of all financial and legal issues in connection with his property interests. [REDACTED] signed a further document on 18th August, 1999 specifically authorising [REDACTED] to deal with the Society on his behalf. Ms. Kirwan also made it clear that it was not her role to make decisions in relation to litigation and that the email from [REDACTED] in 2011 had been dealt with by the litigation section of the Society. The Society had not received a request from [REDACTED] to withdraw his complaint. At the time the complaint was made, the Society accepted that [REDACTED] had authorised [REDACTED] to make it. This was not queried and that the Society had dealt with [REDACTED] complaint in good faith. She did not believe that the onus was on the defendant to take action on the basis of the email but accepted that no formal decision was made on this. However, she conceded that the Society took positive steps to oppose Mr. Murphy's application to extend the time within which to lodge the appeal in 2011.

353. Ms. Kirwan was also queried as to why the Society might in one case (such as, for example, the [REDACTED] matter) telephone the complainant, but not in another, such as in [REDACTED] case. As far as she was concerned, there was a considerable difference between the two complaints. The [REDACTED] complaint had been decided many years previously. On the other hand, the [REDACTED] matter was ongoing when contact was made.

354. More fundamentally, the Society maintains that it was open to the plaintiff to appeal the decision of the Registrar's Committee. The complaint had been sent back to the Registrar's Committee, and at that time the Society stated that it would not object to an extension of time within which to appeal. No appeal was taken. Mr. Murphy did not appear at the resumed hearing of the Tribunal on 21st October, 2003, when the finding of misconduct was made.

355. It was put to Mr. Murphy that the appeal process was uncomplicated and involved the simple writing of a one page letter. His evidence as to why he did not do so is that this was but one of many matters that were taking place, and which were occupying his attention at that time. This theme – that other matters were taking place and that the Court should bear this in mind in the assessment of the reasons why things were not being done or that responses were not being made in a timely manner or perhaps at all by Mr. Murphy – is one which pervades Mr. Murphy's explanation on a number of issues. In my view, at least in the context of his failure to appeal on this issue, Mr. Murphy's explanation is unconvincing. Further, he did not appear at the resumed hearing of the Tribunal. In all the circumstances, I fail to see evidence of an intention to target Mr. Murphy in the [REDACTED] matter. The status of [REDACTED] letter/email in 2011 has already been commented upon by the Supreme Court and in the absence of a withdrawal of the complaint, I do not believe that it unreasonable for the Society to adopt the stance

it did. Even if it might be seen to be unreasonable for the Society not to re-enter the matter, in my view, its failure to do so in the circumstances is not evidence of malice, improper motive or intention to injure.

356. While mistakes may have been made by the Committee in May, 2001 in the manner in which it gave directions, this was addressed through the process described by Laffoy J. and I find no evidence of malice in the way that this complaint was addressed by the Society or that any power it had was exercised from a motive that could be described as improper or ulterior.

357. In making these observations, however, this Court is not to be taken to express a view that detracts from the obligation on the Society, when presenting matters of complaint at disciplinary hearings, to ensure that all relevant information is placed before the Committee, Tribunal or the Court, including information which tends to support, or detract from, the cause for complaint or the findings being appealed.

16.7 Observations in relation to the [REDACTED] complaint

358. Mr. Murphy maintains that although he had sent a notice of completion of registration of [REDACTED] title in January, 2004, something which he confirmed to the Society by letter of 14th March, 2004, nevertheless, Ms. Kirwan swore an affidavit on 2nd April, 2004, that he failed to furnish title to [REDACTED]. It is submitted that it must have been clear to Ms. O'Neill when preparing the affidavit that registration of [REDACTED] title had been completed at an earlier date. Ms. Kirwan admitted that Ms. O'Neill did not bring the letter to her attention and that had she known about it at the time it would have been disclosed. It is contended that Ms. O'Neill failed to bring to the attention of Ms. Kirwan that the contrary was the case at the time of swearing or alternatively, Ms. Kirwan was recklessly indifferent to the true state of affairs before doing so. This, it is submitted, constituted a very serious degree of misfeasance.

359. The Society contends that Ms. Kirwan had written to the plaintiff suggesting that he arrange to be represented at the meeting of the Registrar's Committee on 30th September, 2003. Mr. Murphy did not attend that meeting. The matter was referred to the Tribunal. Mr. Murphy accepted, in answer to a question posed by the Court, that he did not "*cover himself in glory*" in the way in which he dealt with this matter. It was his contention, however, that it should not be looked at in isolation and he did not believe that he would get a fair hearing from the Society. He also believes that the Society was remiss in not investigating [REDACTED] conduct at that time. In his affidavit sworn on 14th October, 2004, in response to this complaint of misconduct, he detailed many of the allegations he makes in these proceedings relating to the Society and [REDACTED] including those arising in the [REDACTED], [REDACTED] and [REDACTED] matters, the leaking of information regarding the accounts investigation and being misled about the takeover of the practice. He states that the Society never considered any of these matters. Yet, although he says that he did appeal and that he paid a fee to town agents to lodge the appeal and has proof of the appeal he does not know where it went, and he did not seek to pursue the matter at that time.

360. Ms. Kirwan in evidence stated that if Mr. Murphy had engaged with the Society and furnished a full response, in all probability, the complaint would not have been referred to the Tribunal. It was her belief that his total lack of engagement was the principal reason why his complaint was referred to the Tribunal.

361. In my view, acknowledging as I do, Mr. Murphy's concession that there may have been some contribution on his part, and even though he may have had a complete answer to [REDACTED] complaints, any issue that Mr. Murphy has in relation to the manner in which the Society handled this matter was predominantly brought about by his own actions and inactions. No matter how distrustful he was of the Society, individual members thereof, or fellow members of the profession, particularly [REDACTED], he ought to have addressed the concerns of the Society.

362. As a solicitor and member of the Society, he was subject to its rules and legal options were available to him under statute (appeal) or at law (appeal from the Tribunal and judicial review) to seek to redress any perceived unfairness. I find it difficult to understand that Mr. Murphy did not address the [REDACTED] matter more comprehensively at the relevant time, even though there were several matters then requiring his attention

363. While there was a failure to update the information regarding the initial complaint in Ms. Kirwan's affidavit, I am also satisfied on the evidence that his letter of the 14th March, 2004 was before the Tribunal and that it was addressed at the hearing.

364. Further, it seems to me that the [REDACTED] matter provides evidence of one example of a general misunderstanding on Mr. Murphy's part of the difference between the substantive consideration by the Committee of a complaint in relation to inadequate services etc, and the failure to comply with directions given by that Committee which is referred to the Tribunal as a complaint of misconduct.

16.8 The [REDACTED] complaint

365. Mr. Murphy considers this finding to be unjust and unfair. He maintains that the Society was aware of the agreement which he had reached with [REDACTED] in June, 2005. The matter had been referred to the Tribunal on 9th February, 2005. His complaint about the referral relates, *inter alia*, to the fact that he was not given advance notice that it might be referred to the Tribunal and that his letter of 5th February, 2005 was not placed before the Committee. He did not attend. He did not appeal. The Tribunal considered the matter on 10th July, 2007 and made its findings on that day. Temporally, it occurred at a time when he was dealing with an application for his attachment and committal. For this reason he states that he was not at that time in a position to contest the matter properly or to appeal the decision.

366. Whatever may have been the rights and wrongs of the situation, Mr. Murphy did not appeal the finding of the Tribunal. Counsel for the defendant pointed out that this was an example of a complaint which did not involve [REDACTED]. While Mr. Murphy denies that

he had been treated fairly, the simple fact of the matter, however, is that objectively, Mr. Murphy did not communicate with [REDACTED] in a timely fashion. He did not attend at the meeting on 9th February, 2005. It seems to me that even if he felt strongly about want of jurisdiction, lack of fairness, or that insufficient credit was given for the admission of the error, it was open to him to attend and he chose not to do so. In her affidavit grounding that application before the Tribunal Ms. Kirwan averred, as she did in evidence to this court, that Mr. Murphy's letter of 5th February, 2005 was put before the Committee; Mr. Murphy believes that it was not. Ms. Kirwan was present at the meeting, he was not. I accept her explanation of the difference between the agenda which had been prepared in advance and minutes of the meeting. If Mr. Murphy had attended then he would have been in a position to put his case to best advantage. It seems to me that Mr. Murphy brought trouble, perhaps unnecessary trouble, on himself by the manner in which he dealt with the complaint and a colleague. In all the circumstances, I am not satisfied that it has been established, on the balance of probabilities, that the Society was motivated by malice in its handling of the [REDACTED] matter.

16.9 The s. 18 proceedings, the order for substituted service, the attachment and committal application and the [REDACTED] complaint

367. Given the temporal and procedural connection between these issues, I propose to deal with them together. The decision to commence the s. 18 proceedings, the manner in which the Society obtained the order for substituted service, the way in which it conducted the s. 18 proceedings, and the attachment and committal proceedings, are major factors underlying these proceedings. It is Mr. Murphy's belief that the real reason why the s.18 proceedings were brought was with a view to compelling compliance with directions, in particular, to force the payment of fines imposed, to discredit him before the High Court and that the [REDACTED] complaint was used as the basis for the attachment and committal proceedings.

368. It is clear that, temporally, the [REDACTED] complaint was received shortly before the order was made in the s. 18 proceedings on 30th January, 2007. The complaint was closed in September, 2007 but there is no evidence that Mr. Murphy was informed of this at that time. Further, there is no evidence that the court was informed of the position prior to the disposal of the s.18 proceedings. He should have been so informed and so should the court, as it is clear that the [REDACTED] issue had been adverted to in court and on affidavit when the attachment and committal motion issued.

369. It is regrettable that at an adjourned hearing on 9th May, 2007, it was stated by counsel for the Society that Mr. Murphy had the "*temerity*" to describe the transfer as a forgery. The correspondence and communications between the parties which I have outlined in detail in this judgment, illustrate the complexity of the issues and the vehemence with which Mr. Murphy was challenging any assertion that he was party to a forged document. A serious issue had been raised by Mr. Murphy. It was under investigation. The file was not closed on 9th May, 2007. Mr. Murphy's contention had been put to the complainant. A reply was awaited. It was not part of the remit of the Society to determine whether the document was a forgery and in my view, it was not appropriate to ascribe the word

temerity to the case being made by Mr. Murphy. Not alone does it suggest that Mr. Murphy's response on this was not being taken seriously but such expressions cannot have assisted in dampening the flames.

370. It seems clear that the [REDACTED] matter was very much alive and in the background when the attachment and committal application was brought before the court. The details of the complaint were set out in Ms. O'Neill's grounding affidavit of 22nd February, 2007, stated to have been made for the purposes of verifying facts contained in the notice of motion grounding the application for attachment and committal. The order of 31st January, 2007 had nothing to do with the [REDACTED] matter and therefore could not have been referenced in the notice of motion. Ms. O'Neill exhibited a letter which she had written to Mr. Murphy in which she protested that none of the orders made by the President on 31st January, 2007 had been complied with. Thereafter she detailed the complaint made by [REDACTED] and averred that it was a matter of grave concern to the Society that Mr. Murphy appeared to have procured the transfer of property from a person in respect of whom there was in existence a petition to have him made a ward of court. She stated that the Society required an immediate explanation of the situation. Ms. O'Neill also referred to the letter from Mr. O'Connell, solicitor and restated the concern of the Society:-

> *"…while it is a matter for the court as to what steps are taken in relation to this wardship matter it would appear that in respect of that issue this cannot even begin to be addressed until the respondent solicitor has appeared before the court for the purposes of being examined under oath as to his dealings with the property of the ward of court, Mr Donal Brendan O'Connell" .*

371. This affidavit was sworn when the investigation of the complaint made by [REDACTED] was very much in its infancy. Mr. Murphy responded to the complaint by letter of 13th February, 2007 in which he stated his belief that the complaint was based on *"some kind of fraudulent action*" by [REDACTED].

372. It seems to me that if the court was satisfied that the [REDACTED] matter was a reason for the continuance of the application for attachment and committal, then it would be open to conclude that the Society had used this procedure for an improper purpose. The employment of this procedure in such manner would have the potential to amount to an attempt to resolve a complaint which was in its infancy and which had nothing to do with the s. 18 proceedings or compliance with the order made in January, 2007. The attachment and committal application was all the more serious because it was brought against an officer of the court.

373. Mr. Murphy in a replying affidavit of 14th March, 2007 dealt with the alleged breaches of the order and his attempts to comply with its terms. He also dealt comprehensively with the Fallon issue and pointed out that it was irrelevant and extremely prejudicial to the motion. He stated that his belief was that having checked the files, [REDACTED] had

taken the back page of the transfer of different lands and attached it to the transfer in question, a position which he has maintained in evidence before this court.

374. It is evident, however, from the communications in the months following the court application that continuing efforts were made to obtain run-off insurance cover and to transfer files. On 14th March, 2007, the President made an order that Mr. McGrath be substituted in lieu of Mr. Murphy as the mandated signatory on the client accounts. It is recorded in the order that there was an "*appearance of non-compliance*" with a direction in the order of 31st January, 2007 to have Mr. Murphy's name removed from client account mandates at a particular branch. Again, these matters were addressed in a supplemental affidavit sworn by Mr. Murphy on 26th March, 2007 and he outlined his attempts to contact his accountant, and his accountant's efforts to contact the Law Society for the purposes of finalising his report. He also addressed the issue of outstanding files. In an affidavit sworn on 20th March. 2007 while Ms. O'Neill specifically addressed the parts of the order of the court with which it was contended there had been non-compliance, she also revisited the complaint of Messrs. Kelly and Dullea, but in the context of a file which remained outstanding, she also addressed the steps being taken by Mr. McGrath, the investigating accountant.

375. The matter once again came before the President on 9th May, 2007. Mr. Murphy's accountant was ordered to furnish client accounts three days prior to the further adjourned date of 11th June, 2007 and that the matter was also to be listed on 30th July, 2007. It is unclear precisely what occurred on those dates but the matter was further adjourned to 19th November, 2007, at which time Mr. Murphy was afforded two weeks to file an affidavit, which was ultimately sworn by him on 31st January, 2008. This was sworn for the purpose of grounding an application to have the s. 18 order revisited.

376. Having considered the orders, affidavits and exchanges between the parties, I am unable to conclude that there is adequate evidence to support the proposition that the motivation for the *continuance or adjournment* of the attachment and committal proceedings and the s. 18 proceedings was the [REDACTED] complaint. A significant issue remained outstanding in relation to the preparation of closing accounts and receipt of the report which had been outstanding for some time. This revealed a deficit in the client account which had to be dealt with by Mr. Murphy.

377. It is also clear that when the attachment and committal proceedings were coming to conclusion, with only the question of costs outstanding, they were prolonged by Mr. Murphy's own actions. He changed his solicitor and brought an application seeking to have the order for substituted service set-aside and to have the proceedings referred to plenary hearing. When the matter came before Johnson P. he commented that finality was required and awarded costs against Mr. Murphy.

378. With regard to the order for substituted service, a review of the transcripts of the hearing which took place on 31st January, 2007 shows that while Mr. Murphy's concerns were alluded to, no application was made on this issue – and to all intents and purpose it was

treated as moot. Mr. Murphy then consented to twelve orders which were sought by the Society. Nevertheless, in these proceedings Mr. Murphy takes offence that he was not contacted in advance of the application for substituted service or prior to the institution of these proceedings, despite the fact that the Society had his address and telephone number. Mr. Elliott accepts that the only attempt to serve the proceedings was at the auction. Having considered the evidence and on an objective analysis, it does seem to me that the decision to apply for the order for substituted service was somewhat premature. It is not beyond the bounds of possibilities that a telephone call to Mr. Murphy may have resolved any difficulties. But it also seems to me that Mr. Murphy contributed somewhat to this state of affairs by not calling as arranged to the Tribunal offices to collect documents.

379. The Society maintains that obtaining an order for substituted service could not in any event give rise to an imputation of an adverse nature against the plaintiff's good name. Reliance is placed in this regard on *Goold v. Judge Collins* [2004] IESC 38, where Hardiman J. observed that no right-thinking person could be justified in drawing any conclusion or inference adverse to a person's good name on the basis that they had been subject to an ex parte order of any kind.

380. Mr. Murphy also maintains that at all times during the s. 18 proceedings, the Society continually attempted to portray that he was still practising as a solicitor and holding himself out as such after June, 2005, and that he had abandoned the practice without any effort to wind it down. His evidence is that after June, 2005, he ceased to have anything to do with the practice. In fact, his brother Conor Murphy, and Ms. Healy had taken over the files. Mr. Murphy firmly believes that the Society knew or must have known that he was not in fact practising and that the s. 18 proceedings were used as a ruse to facilitate the Society in obtaining ancillary orders and reliefs. He maintains that only one letter was written by him on headed notepaper of his former practice after 30th June, 2005. This was a letter to the Society itself on 23rd November, 2005. He also maintains that between writing of this letter and the issuing of the s. 18 proceedings, nine months later, the Society received numerous letters that were not written on headed notepaper. During the hearing, it became apparent that a signature purporting to be that of Mr. Murphy was on another letter. I believe that Mr. Murphy was mistaken as to the number of letters which were written by him on headed notepaper but I do not believe that there was an intention by him to mislead the Court. Neverthless, I must conclude on the balance of probabilities, and in the light of the evidence of Ms. Healy and Mr. Conor Murphy on this point, that Mr. Murphy used headed notepaper and that he was the author of the disputed letter. However, the evidence also indicates that the Society was not aware of this at the time and was not a letter relied on by the Society when it sought and obtained the order of 31st January, 2007.

381. Another concern of the Society was the use by Mr. Murphy of the client account chequebook. This was based on a complaint by Mr. Vincent Coakley, solicitor, that Mr. Murphy had written a cheque on the client account and thus was in breach of the

Solicitor's Accounts Regulations. Mr. Murphy denies that he was in breach of these regulations, his explanation for the cheque is that a former client had sold a site to a client of Mr. Coakley's and that sale was subject to planning permission. When the planning permission was refused, Mr. Coakley wrote to Murphy Healy Solicitors who were by now acting on behalf of the former client and requested the return of the deposit. Mr. Murphy states that on the morning that Murphy Healy received the request he was telephoned by them. He went to the office and gave them a cheque written on his former client account in which account the deposit was held. He states that he had checked with the Solicitor's Accounts Regulations in relation to writing cheques in matters such as this and that he had spoken with Mr. McGrath of the Society. Therefore, he could not understand the basis of the complaint made by Mr. Coakley or the fact that it was entertained by the Society. He emphasises that the writing of this cheque was relied upon by the Society in the proceedings, in the application for substituted service, and in the attachment and committal proceedings. It is also submitted that the institution and prosecution of the s. 18 proceedings was no more a device to get *any application* before the High Court with a view to obtaining ancillary orders and that it was not until 14th July, 2008 that s. 43 of the Civil Law (Miscellaneous Provisions) Act 2008 inserted s. 18A after s. 18 of the Solicitors (Amendment) Act 1994 to provide that where a person had failed or refused to comply with an order of the Tribunal, the court may order such compliance. It is submitted that this clearly suggests that it was not considered possible to do so before July, 2008 something of which the Society was or ought to have been aware and that it must have entertained strong suspicions that it did not have the proper legal basis for what it was doing.

382. The Society's case is that while the three matters referred to by the plaintiff formed part of the basis for its decision to commence the proceedings, other matters were central to that decision and that the proceedings led to the compliance by the plaintiff with his. It was not until 1st June, 2007, that the closing report of the accountant was forthcoming and this revealed a deficit of €225,227.74. Mr. Murphy accepted that this should not have occurred, and the Society submits that this demonstrates the absence of bad faith on its part.

383. Ms. O'Neill was unable to give evidence at this hearing and therefore the court ought to be cautious in relation to any observations it makes on her reported actions. I accept, however, that the evidence establishes that persons within the Society had formed the view perhaps as far back as 30th May, 2005, that an application ought to be brought before the court to enforce compliance. I am also satisfied that there was uncertainty as to the statutory basis for making of an appropriate application. It is also the case that Ms. O'Neill wrote of getting any application before the court (emphasis added). However, no formal step was taken to obtain the authorisation of the relevant committees until advices had been obtained from counsel. These advices supported the entitlement to make the application. Further, when the matter came before the court on 31st January, 2007, the transcript indicates that no issue was raised as to the appropriateness of the procedures employed, either by Mr. Murphy or the court. All proceeded on the basis that such

jurisdiction existed and even though it may be said that subsequent disclosure and discovery of Ms. O'Neill's communications with others in the Society and with counsel illustrate an anxiety to bring the matter before the court by whatever means and perhaps an uncertainty as to its lawful basis, it is clear that formal authorisation was not sought until the matter had been cleared by counsel. While it may be that the Act of 2008 clarifies matters to an extent that casts doubt on the statutory basis upon which the application was made, insofar as it is open to this court to make any observation or conclusion on these actions of the Society in light of the court's findings on the collateral attack issue, I am not satisfied that it has been established that the Society was reckless in taking the action which it did. Nevertheless, the facts also establish an inconsistency in the pace and urgency with which the Society viewed the matter and in which it acted. The seeds for the application were sown not later than May 2005, the month before Mr. Murphy was due to close his practice, authorisation was obtained from the relevant committees in September 2005. The proceedings were not instituted until August 2006 and an application for substituted service was not brought until October, 2006, to which I now turn.

384. In support of the contention that the Society's actions amounted to an abuse of process, Mr. Murphy points out that although Mr. Clohessy swore his affidavit on 10th August, 2006, the Society was aware at least by the following day that he had no involvement with the auction, something which it failed to inform the court.

385. On the evidence, I am satisfied that the catalyst for institution of the proceedings *at the time at which they were brought* was his alleged involvement in the auction. I also accept Mr. Murphy's submission that inquiry with the auctioneers would have disclosed that he was not involved in the auction. I am also satisfied that given the contact between Ms. O'Neill and Ms. Lynch a simple phone-call to Mr. Murphy, or the auctioneers, would have assisted in taking the seeming urgency out of the perceived necessity to institute proceedings at that time. This is particularly so in light of the pace at which matters progressed up to that time.

386. It seems clear, however, that when the proceedings were brought Mr. Murphy had been in default in complying with certain of his obligations. There was a deficit shown in the accounts and while Mr. Murphy clarified the matter and indeed ensured that no financial harm was sustained, nevertheless, I could not reasonably conclude that the actions of the Society in seeking the orders in question were unjustified, particularly in the light of Mr. Murphy's acceptance of, and consenting to many of the orders that were sought and in light of the deficit which was discovered in the client account.

387. While I have made observations on such issues as the timing of the institution of the s.18 proceedings, Mr. Murphy's non involvement in the auction and the application for substituted service, the fact remains that they were either addressed or were capable of being addressed when the matter was before the court in 2007.

16.10 The Undertaking

388. In an *ex tempore* judgment delivered on 25th March, 2015, in the context of the consideration of orders and transcripts on appeal, Hardiman J. emphasised that the order of the court, and not what may have been said in the course of a long day leading to an order, is the primary source of information about what happened on a particular occasion in the High Court. These sentiments are equally applicable to what occurred in court on 31st July, 2003. There is nothing in the perfected order of the court made on that day to suggest that an undertaking was either furnished or accepted by the court. There has been a considerable amount of time taken up not only in these proceedings but in other proceedings, including those before the Tribunal and this court on a previous occasion, about whether an undertaking had been furnished by or on behalf of Mr. Murphy. The primary source of what occurred must be the perfected order. If there is a mistake in an order, it is possible to make application to have such error rectified. Nothing of that nature occurred in this case. On that basis, it seems clear that whatever may have been said in court by counsel on behalf of Mr. Murphy, that the court did not consider that such an undertaking had been given or accepted. Indeed, one can only wonder how such undertaking might have been enforced through the court process, in the absence of it being reflected in the perfected order of the court. Having said that, however, when Mr. Murphy was before the tribunal on 25th April, 2008, in answer to a question put to him by counsel that he failed to attend a further meeting of the registrar's committee on 30th September, 2003 and "*that was under an undertaking given by counsel to the president of the High Court*", he said "*yes*". He also stated on affidavit that he was unaware that counsel had given such an undertaking, and it seems to me that once he obtained a copy of the perfected order, his position hardened. Counsel who acted for him on the occasion of the alleged undertaking was not called to give evidence.

389. The order of the Tribunal which was signed on 27th January, 2009 reflects a finding by the tribunal that Mr. Murphy was guilty of misconduct in a number of respects including that which is referred to at para.(f) of the findings, that he *"[F]ailed to attend a further meeting of the Registrar's Committee on 30 September 2003, notwithstanding the undertaking given by his counsel to the President of the High Court that he would attend meetings of the Registrar's Committee"*. On 21st April, 2009, the matter was before the President of the High Court and this was one of the findings that Mr. Murphy's counsel stated that he accepted wholeheartedly and wished to apologise for. It seems to me, therefore, that any confusion that may have existed in respect of what was said or not said, undertaken or not undertaken, when the matter was before the court in 2003 was contributed to by both parties.

390. It is also clear that Ms. Kirwan made a mistake in her affidavit that she was present in court, when she was not. She has accepted that a mistake was made by her. The circumstances in which the mistake first came to light and explanations as to how it came about, is accepted by her as being somewhat ambivalent but she explains this on the basis of the number of allegations that she was attempting to deal with at the time her affidavits were sworn. I have referred to this in great detail above. The mistake should not have been made. Ms. Kirwan acknowledges this and indeed regrets having made that

mistake. What I must consider in the context of my observations on this aspect of the evidence is whether it was a mistake that was intentionally or recklessly made by her or was one that was motivated by an improper purpose. Her attempts to explain how the mistake came about in the various affidavits which she swore and which give rise to a degree of accepted ambivalence raised questions as to the credibility of her evidence in this regard. However, Ms. Kirwan was closely cross-examined at length on this point. I have had the opportunity to assess not only Ms. Kirwan's answers, but also her demeanour when answering and I am not satisfied that it has been established that the mistake which was made was anything other than an honest mistake. On the evidence, when considered in its entirety on this point, I accept that she made an honest mistake.

391. While the undertaking was one matter upon which emphasis was placed on the strike off application, it was not the only matter that was before the court. It is true that considerable emphasis was placed on the undertaking when the application was made. Mr. Murphy does not criticise the advices which he received and upon which he acted in accepting the findings of the Tribunal, which he did on a wholehearted basis. He suggests that had he known then, what he knows now about Ms. Kirwan's affidavit, he may have taken a different course. It is also clear that the court must have been aware of the contents of the court order, given that it was the subject of submission by counsel for the Society who referred to the manner in which Mr. Murphy had dealt with the undertaking issue. On the face of it, it appears to me that while Mr. Murphy may have grounds for grievance as to the manner in which the undertaking was dealt with by the Society, this is something to which he contributed. When viewed in the totality of what occurred at that time, including his acceptance of the findings of the Tribunal, even if it were open to this court to so conclude, which it is not, I could not reasonably and safely determine that had the undertaking situation been treated or explained otherwise, the same conclusion might not have been arrived at by the Court. Again, the fact of the matter is that this decision was not challenged at the appropriate time.

16.11 Observations on the O'Dowd investigation

392. There was a delay in dealing with Mr. Murphy's query regarding the power and entitlement of the Society to view files where objection was taken. Mr. Connolly stated that following the decision of the Supreme Court in *Kennedy v. Law Society of Ireland (No. 4)* [2005] 3 I.R. 228, counsel's opinion was sought as to whether procedures ought to be changed. However, he could not give any specific reasons why Mr. Murphy was not replied to. Whatever the reason for the delay, it is yet again unfortunate that Mr. Murphy was not communicated with at an earlier date or kept informed of the situation.

393. It is submitted by Mr. Murphy that the investigation into his accounts between 27th April, 2001 and 17th May, 2001 was carried out with an improper motive and that there were unauthorised disclosures about his practice by both Mr. O'Dowd and Mr. Simon Murphy, the chairman of the Society's Compensation Fund Committee. Emphasis is placed on the fact that during the course of the hearing Mr. O'Dowd produced documents which were copied from Mr. Murphy's files in relation to the Dutch nationals, which were wholly unrelated to the accounts investigation. This, it is submitted, confirmed the concerns

expressed by Mr. Murphy in his letter of 8th May, 2001 and supports the reasonableness of his request that the investigation be completed properly in accordance with the principles outlined in *Kennedy v. Law Society of Ireland (No. 4*). It is submitted that this improper activity had only been conceded at trial, 17 years later and must have been intentional and deliberate. It is further submitted that this improper conduct and breach of duty on Mr. O'Dowd's part is aggravated by the decision to proceed with an application under s. 14 of the Act to the High Court in October, 2002 when Mr. Murphy's queries had still not been responded to. In his affidavit grounding that application, and sworn on 17th October, 2002, Mr. Connolly had stated that there had been difficulties with the previous inspection of the practice. It is submitted that this was incorrect and has been acknowledged to be incorrect. It is submitted that Mr. Murphy was seeking to clarify legitimate concerns which he had in relation to the purpose of the investigation and, as I understand the situation, such concerns were reinforced by the fact that the Society delayed considerably in replying to Mr. Murphy, part of the reason for such delay being that it too was seeking clarification of the legal position following the decision in Kennedy. Implicit in this is that it was not unreasonable for Mr. Murphy to raise these concerns and that to characterise them as being obstructionist was wrong. Mr. Murphy submits that the actions of the Society gave rise to the circulation of highly damaging allegations about him being involved in questionable activity as a solicitor.

394. I accept that the Society did not deal appropriately with the concerns of Mr. Murphy with particular reference to the power of the Society to examine and take copies of files which may be unconnected to financial matters, nor did they properly address his concerns in this regard. I am therefore satisfied that after receiving Mr. Murphy's letter of 8th May, 2001, the Society adopted a less than optimal approach. Nevertheless, it must also be recognised that part of the delay in dealing with the issue may have arisen from the fact that the *Kennedy* case, in which a decision had been given in April, 2001, was put back for further consideration by the Supreme Court to December, 2001.

395. It appears to me that what precipitated the s. 14 application was Mr. Murphy's letter of the 10th October, 2002, in response to the Society's letter regarding Mr. Sheehan's investigation. Mr. Murphy expressed surprise to learn that the Society was carrying out a further inspection. He wrote that following the previous inspection, a rumour had circulated in Kenmare saying that he was to be struck off. He protested that he had written to Mr. O'Dowd and had not received a reply. He also stated that unless he got a satisfactory reply he would not permit the Society to carry out the inspection and that he had advised clients whose files were mentioned in the report of the position and that each client had asked him to return their files to him or her. He also stated that he was going on holidays, needed his own advice and was considering taking action against the Society arising out of the O'Dowd investigation. The prospect of an application for an injunction was raised. Further communications were exchanged between the parties on 11th October and Mr. Murphy was informed that if he undertook not to remove files, or cause the removal pending the completion of the investigation and provide access to those files, the Society would adjourn the application. Mr. Murphy maintains that he discussed and

agreed a postponement of the High Court application with Mr. Connolly. Mr. Connolly, on the other hand states he would never have countermanded the decision of the Committee to make application to the High Court. Mr. Murphy relies on the contents of the letter of 17th October, 2002 in support of his position in this regard. Nevertheless, Mr. Connolly believes that he would not have engaged with Mr. Murphy during the course of the application process. In his letter of 21st October, 2002, Mr. Murphy expressed his willingness to provide an undertaking not to remove the files pending the completion of the inspection and stated that he had no objection to the inspection provided the concerns he had already raised in correspondence were addressed. This was described during the course of the evidence as being a not unequivocal response. However, in another communication by fax on 21st October 2002, Mr. Murphy confirmed that no files had been removed arising out of the inspection notification. Mr. Connolly stated that there was extreme concern that they would be removed and thus the Society pursued the application with urgency.

396. Mr. Connolly was also closely questioned in relation to his affidavit grounding that application in which he had averred that difficulties had been encountered in completing the inspection commenced in April, 2001 and that Mr. O'Dowd had received two letters of 8th May, 2001 taking issue with the Society's right to conduct the inspection of the files. It was put to Mr. Connolly that the fact was that Mr. O'Dowd remained on in the office after the letters were written and finished his inspection towards the middle of May, 2001. It was suggested that there were no difficulties, until the Society sought to further investigate in October, 2002. Mr. Connolly appears to have accepted that there were no difficulties, at least up to October, 2002.

397. The application was placed before the President of the High Court on 17th October, 2002 although did not come before him until 23rd October. It seems however, that the letter of 17th October, the motion and the application were all prepared on the same day. A memorandum prepared by Ms. O'Neill confirms that the papers had been left with the President at lunchtime on Thursday the 17th and while the President had initially indicated that the application could be taken at 4p.m., having read the papers he contacted the Society through his secretary at 1.40 p.m. stating that he regarded the matter as being serious and invited the Society to interrupt his list to make the application. Matters were proceeding at pace at this time. The papers had been lodged with the President and the communication of 21st October from Mr. Murphy expressed his unequivocal agreement that files would be made available and not removed. It was put to Mr. Connolly that the Society proceeded with the application in circumstances where they had stated that they would not go ahead with it. Mr. Connolly, on the other hand, does not accept that the Society confirmed this. The Committee had made a decision on 15th October and was adamant that the application should be made. It is true that his letter to Mr. Murphy of 21st October referred to an adjournment of the application nevertheless it went ahead on 23rd October and returned before the President of the High Court on 25th November, in relation to costs only.

398. It was on this application an undertaking as to damages was provided, the lawful basis for which Mr. Murphy has sought clarification for some time.

399. It seems clear that the application had been prepared and papers lodged on 17th October, 2002 and that being the case, whatever may or may not have been said between Mr. Connolly and Mr. Murphy, the process had already been commenced. Mr. Connolly was also closely questioned in relation to the giving of the undertaking as to damages. He was unclear as to whether it had been authorised.

400. It is my view that given the pace at which matters were progressing at that time, whatever may have been agreed, or not, between the parties, the state of affairs that then existed significantly contributed to Mr. Murphy's initial response to the notification of the investigation. Neither is the society blameless. No response had been made to Mr. Murphy's queries from May, 2001 and I am satisfied that this contributed to Mr. Murphy's reaction to the notification of the investigation. Had Mr. Murphy been replied to at an earlier stage, his response may not have been what it was. That being said, however, the onus of proof lies on the plaintiff to establish, on the balance of probabilities, that the Society was motivated by improper purpose or malice. The standard of proof is that which applies in civil cases generally, the balance of probabilities, but I must accept that as a general proposition the more serious the allegation, the clearer must be the evidence upon which the court should act in assessing whether that onus has been discharged. While I have some reservations in relation to the manner in which Mr. Murphy's undertaking was dealt with, I find it difficult to conclude that the onus of proof has been discharged by him to establish malice or bad faith on the part of the Society, in all the circumstances, including his contribution to the events. It seems to me that the same applies to the undertaking as to damages, it was one which was given in open court and although the circumstances of its giving, whether it was extracted by the court or volunteered by the Society, is not entirely clear, I do not believe that one could reasonably conclude that the making or giving of such an undertaking is evidence of malice.

16.12 Observations on the [REDACTED] and [REDACTED] matters

401. I have dealt with these in great detail in the course of this judgment. In the [REDACTED] matter, Mr. Murphy accepted the findings of the Tribunal. The order of the President of the High Court is unchallenged. While many complaints are made about the handling of the [REDACTED] complaint, it seems to me that the reality of the situation is that a principal cause for the difficulties which Mr. Murphy encountered was his failure to engage in correspondence in a timely manner and to attend meetings, when his case could have been put and points raised at relevant times.

402. Mr. Murphy also has related the [REDACTED] complaint to the manner in which the Society failed to investigate transactions of [REDACTED]. However, once again, the evidence suggests that Mr. Murphy did not respond, communicate or engage with the Society or its committees. Had he done so, it is not inconceivable that this matter might not have been referred to the Tribunal. The sentiments which I have expressed in relation

to the [REDACTED] matter are equally applicable here. As already noted, it was open to him to challenge the decisions of the Committee and the Tribunal but he did not do so.

17. Defamation

403. There are three elements in the claim for defamation. The first relates to Mr. O'Dowd as being allegedly responsible for the spreading of rumours. The second concerns Mr. Simon Murphy's discussion with his client, Mr. Keating. The third concerns the distribution of the compensation fund claim forms.

17.1 Conclusion on the alleged conversation between Mr. O'Dowd and Mr. Coakley

404. Mr. O'Dowd's evidence is that any conversation he had with Mr. Coakley concerned clients of Mr. Coakley and not a client of Mr. Murphy. His evidence is that a letter which had been written by Mr. Coakley to Mr. Murphy in respect of the transaction came to his attention as a result of the examination of Messrs O'Mahony Farrelly's files, not Mr. Murphy's files. This letter had been written by Mr. Murphy in the context of a particular transaction in which he had expressed concern about the legality of the manner in which it was intended to deal with the purchase price. Mr. O'Dowd stated that it was standard investigation procedure for the investigating accountant to examine and report on stamp duty irregularities. His belief is that he questioned Mr. Coakley about his actions. Having discovered this letter, he also questioned Mr. Coakley as to whether he had attempted to have Mr. Murphy or any other solicitor draw up a contract such as might reduce his client's stamp duty liabilities and as to whether there were other files which might have to be reported upon. Mr. O'Dowd described this as standard procedure. While Mr. Coakley may have felt that he was being grilled about a particular file, and while Mr. O'Dowd did not have a specific recall of the investigation of Mr. Coakley's practice, he states that he was certain that he did not question Mr. Coakley about Mr. Murphy nor did he tell Mr. Coakley anything about Mr. Murphy's practice. He did not believe that would make sense for him to ask a solicitor about files in another solicitor's office or about some other solicitor's practice.

405. It is also of importance to place this in context. In February, 2001 Mr. Murphy had instituted proceedings against [REDACTED]. When Mr. Conor Murphy was questioned in relation to his knowledge of matters which occurred at this time, his recall was uncertain. He was aware that his brother had difficulties with [REDACTED] and was also generally aware that his brother had taken issue with aspects of Mr. O'Dowd's investigation but again, given the passage of time, was not specific in his evidence in relation to those dealings. By December, 2001 when he had his discussion with Mr. Coakley, the two issues that were raised related to whether his brother was having difficulties with the accountant and whether he was about to be struck off. Mr. Conor Murphy was not shocked at this matter being raised and gave evidence that *"it was out in the ether in Kenmare at that stage".*

406. This would tend to suggest that whatever their origins, rumours were in circulation prior to any direct conversation which may have taken place between Mr. Coakley and Mr. Conor Murphy, and that if Mr. O'Dowd had spoken to Mr. Coakley in the manner

suggested, one could not conclude on the balance of probabilities that such rumours originated through Mr. O'Dowd.

407. What Mr. O'Dowd may or may not have said to Mr. Coakley, as recounted by Mr. Murphy and made to a third party, namely Mr. Murphy's brother, Conor Murphy, appears to me to be hearsay evidence. Even if I am incorrect in this, I find much of this evidence to be inconsistent and unreliable; which may be accounted for by the fact that it is suggested that such conversation took place on a social occasion in a public house and after the consumption of alcohol. Further, it also appears that there is confusion as to the name of the client, or indeed whose client was the subject of discussion. I do not believe that it is safe to place reliance on the contents of this conversation particularly in the absence of evidence from Mr. Coakley.

408. I accept Mr. O'Dowd's evidence that he was not responsible for such rumours. In so far as there may have been rumours circulating in the area, the Court cannot rule out the possibility that these rumours may have been the unintentional consequence of Mr. Murphy's own actions in contacting his clients over the May bank holiday weekend, 2001 and in his dealings with [REDACTED]. For the same reasons, I am not satisfied that it has been established that Mr. O'Dowd breached confidentiality in discussions which he had with Mr. Coakley.

17.2 Conclusion on the Simon Murphy issue

409. On one view it is somewhat surprising that in the affidavit sworn by Mr. Simon Murphy in April, 2009 opposing the application to be joined as a co-defendant, he did not recall his conversation with Mr. Keating, particularly when he had many years before decided not to become involved in issues which concerned Mr. Murphy. I am far from satisfied, however, that it has been established that he wrongfully or knowingly swore an untruth. I believe it likely that his failure to recall the conversation with Mr. Keating when swearing his affidavit in 2009 is attributable to the passage of time. It also seems likely that the revelation of Mr. Keating's name in later pleadings jogged his memory. The claim brought against him has since been struck from the proceedings. The Court has been informed that this was because the claim was ruled to be out of time.

410. While it may have been unwise for Mr. Murphy to say anything to Mr. Keating, in the circumstances, I am satisfied that had he not done so or if he had simply stated that he was not at liberty to discuss the matter, any such response is likely to have aggravated the situation. I am also satisfied as a matter of probability that the topic was introduced by Mr. Keating, who accepted that Mr. Simon Murphy was protecting his interests. In my view, in responding as he did, Mr. Murphy's words were designed to temper and downplay the rumours. Mr. Keating accepted that Mr. Simon Murphy was not attempting to cast adverse aspersions on the plaintiff as a solicitor but was attempting to minimise the effect of the rumour, of which Mr. Keating was already aware.

411. Even if the communication is defamatory, it was between a solicitor and client and was made during the course of a professional consultation. I find that this was an occasion of

qualified privilege. I do not find any evidence that Mr. Simon Murphy was motivated by malice. Qualified privilege applies.

412. The proceedings against Mr. Murphy personally have been struck out. I find it difficult to envisage circumstances whereby the Society might be held to be vicariously liable for the words spoken by Mr. Murphy on this occasion. Mr. Murphy was not engaged in the Society's business when the communication was made and I am not satisfied that it has been established on the balance of probabilities that the Society is vicariously liable for anything that he may have said. I do not accept, therefore, that this aspect of the claim in defamation has been established.

413. Regarding rumours circulating generally, Mr. Keating's evidence is that he heard a rumour from another solicitor in the area. The origin of this rumour was entirely independent of anything Mr. Simon Murphy is alleged to have said. In my view it would be a step too far to conclude that, as a matter of probability, the Society was responsible for the generation of this rumour. As previously observed, it cannot be overlooked that proceedings had been instituted by Mr. Murphy against [REDACTED] on 12th February, 2001 in which he sought damages for slander and injunctive relief. The plenary summons is dated the same day as a letter from Messrs. Ferrys solicitors, who were then acting for Mr. Murphy, and which letter was directed to [REDACTED]. The letter accused [REDACTED] of making certain slanderous statements to a number of individuals in the Kenmare area to the effect that Mr. Murphy had acted in an unprofessional and fraudulent manner. No great detail is given in this letter as to the nature of the alleged fraudulent activities or unprofessional conduct.

414. In so far as it is contended that the actions of Mr. O'Dowd and Mr. Simon Murphy constitute evidence of abuse of power and evidence of misfeasance, I am not satisfied that evidence of abuse of power or misfeasance on the part of Mr. O'Dowd or Mr. Murphy has been established.

17.3 Conclusion on compensation claim forms

415. No claim arose on the compensation fund and it has been argued that on the evidence, no damage has been shown to have occurred. I do not believe that this is necessarily an answer to the claim. In my view the contents of the compensation claim forms are capable of being and probably are defamatory, as there is an implication of dishonesty in the questions. However, the forms were distributed to former clients of the plaintiff on the insistence of the Society. In the circumstances, I am satisfied that even if defamatory of the plaintiff that any such communication occurred on a privileged occasion and therefore attracts the defence of qualified privilege. While I accept as a general proposition, and as submitted by Mr. Craven S.C., that the principle that neglect of duty does not cease by repetition to be neglect of duty might equally apply to an unfortunately worded form, in determining whether the privilege is defeated by malice, I cannot lose sight of the fact that it was a form which was standard as of that time. That it has been objected to by Mr. Murphy, Mrs. Healy Murphy and Mr. Hennessy ought properly to have heightened the Society's awareness and caution in respect of the distribution,

nevertheless on the evidence of Mr. McGrath, I accept that the Society had legitimate concerns about client account funds and that he, and the Society, were motivated by those concerns and the concerns of client protection.

416. In the circumstances, I find that the plaintiff's claim for defamation based on the distribution of the claim forms has not been established and that the defence of qualified privilege applies.

17.4 Conclusion on breach of confidence

417. Mr. Ken Murphy's response to the queries raised by the *Phoenix* magazine must be viewed against the particularly serious allegations that were made in the plenary summons which went far beyond allegations of negligence or breach of duty, but included more specific allegations of deliberate misconduct on the part of the Society.

418. The plaintiff points to inconsistencies between replies to interrogatories, discovery and disclosure. Again, one would have thought that given the complex and lengthy history of dealings between the Society and the plaintiff, the defendants ought to have had a better recall of their communications with the press in relation to the plaintiff. Having considered the evidence in its entirety, however, the fact that Mr. Ken Murphy deals with the press on a daily basis on issues, including those concerning regulatory matters and involving many solicitors and also taking into account the explanations given by and the demeanour of Mr. Ken Murphy when giving evidence, I am unable to conclude that there was any deliberate intention on the defendant, in its answers to the interrogatories raised by the plaintiff, to withhold information from the court concerning its communications with the press in relation to Mr. Murphy.

419. While the parties' submissions to the Court on this issue were not detailed, Mr. Craven S.C. referred to s. 23(3) of the Solicitors (Amendment) Act 1994. This section imposes an *obligation* on the Society to publish court orders made under the provision of s. 8 (emphasis added). Where a solicitor has been struck off or suspended from practice, there is an obligation on the Society to publish appropriate notification in the Law Society *Gazette* and *Iris Oifigiuil.* Therefore, it is suggested that it is implied that there is an obligation on the Society not to do so otherwise than in accordance with that section. I accept that as a matter of principle there must be an obligation on the Society to exercise confidentiality in respect of its dealings with solicitors generally, if for no other reason than to maintain the confidentiality of clients. However, in so far as the solicitor who is engaged in active litigation with the Society is concerned, it seems to me that there must be some modification of that principle, particularly where pleadings and proceedings and orders made in cases are or may be available to the public. In this case, it is clear from the chain of correspondence between Mr. Ken Murphy and the *Phoenix* magazine that those who made contact were aware of the existence of the proceedings, and it is also clear from the email from Mr. Donal Griffin to Mr. Ken Murphy that he was aware of the full and pleaded claim. He raised a legitimate query as to whether the Law Society would defend itself. Mr. Ken Murphy, in the circumstances, stated that he felt obliged to ensure that the facts were placed before the public and did not wish there to be an implication

that the Society would not defend itself. He also stated that the regulatory powers of the Society were conducted in the public interest and that it was necessary that there be factual and balanced reporting. He confirmed that the information which he supplied was for the purposes of providing background to the allegations made against the Society.

420. Mr. Murphy's pleaded causes of action, alleged breach of confidentiality and malicious falsehood, it was not simply a claim based on carelessness. Therefore, adversarial litigation was taking place between the parties in which breach of confidence and, essentially, bad faith was being alleged. To that extent, if there was a breach of confidence, Mr. Murphy contributed to that situation. The information was solicited by the *Phoenix* magazine. The information supplied was for the most part factual. It seems to me that while it may have been unwise for Mr. Murphy to go into the level of detail which he did, or to comment at all, in all the circumstances I do not believe it has been established that he breached confidence. Further, the matters to which he referred were primarily those which had been addressed or were being addressed before the court. While it may have been better had he not gone into particular detail in relation to matters which were then pending, I do not believe that there was anything in his response to enable me to conclude that he, or the Society, was in some way maliciously motivated against the plaintiff in providing the response which he did.

18. The Statute of Limitations

421. At the time of the events, the subject matter of these proceedings, the relevant limitation period for actions in tort which did not concern personal injuries was six years from the date on which the cause of action accrued. The action for misfeasance of public office and negligence, to the extent that they are not connected to a claim for personal injuries, is therefore six years. The limitation period for an action in slander was three years and for libel, six years. These limitation periods have since been amended by the Defamation Act, 2009.

422. A plenary summons was issued in these proceedings on 28th October, 2004. A statement of claim delivered on 22nd June, 2009, but by order of Kelly P. dated 11th December, 2017 it is now treated as being spent. An amended statement of claim was delivered on 1st July, 2011, and updated particulars of claim were delivered on 23rd October, 2017.

423. It appears to me, that as a matter of probability, the conversation between Mr. Frank Keating and Mr. Simon Murphy occurred in January, 2002. As the plenary summons was issued within three years of that date, it does not appear to me, that if this action was sustainable, it is statute barred. In relation to the O'Dowd investigation, in circumstances where it is entirely unclear if and/or when any conversation occurred between Mr. O'Dowd and Mr. Coakley it is difficult to express an opinion in relation to the statute. I have already come to the conclusion that this claim is unsustainable and in so far as the onus of proof is concerned, if it was sustainable then theoretically the onus would not be discharged by the defendant. In the amended statement of claim, however, it is pleaded that this communication occurred in or about Novmber, 2001, but no evidence has been led on this save to the extent that as regard to general timing, Mr. Conor Murphy stated

to have had his conversation with Mr. Coakley in the public house in December, 2001. I am satisfied that the plaintiff is also within time in relation to the compensation fund claim forms, which were distributed in 2007. The amended statement of claim pleads to these events at para. 29 and therefore, as the relevant tort is libel, a six year limitation period applies. I similarly find that the plaintiff is within time in respect of the claim of breach of confidence.

424. In relation to negligence and the tort of misfeasance of public office, I am satisfied that the relevant limitation period is also six years. An issue arises as to whether this claim is properly pleaded in the summons. It is clear that it is not expressly so pleaded but the case is proceeding on the basis of the claim as amended and therefore at minimum, to the extent that the plaintiff relies on events which occurred within six years prior to the date of the amendment, it is not statute barred.

19. Vacation of Findings

425. It is part of Mr. Murphy's case that there is an obligation on the Society to vacate findings if new evidence comes to light. An example in this regard is the email from [REDACTED] wherein it was stated that he had no complaint about the quality of services provided by Mr. Murphy. He asserts that the Society owes a duty to him, as his representative body, to vindicate his rights, and not to stand over a finding in circumstances where the very basis of the complaint had been brought into doubt. The reality of the situation, however, is that this complaint was never withdrawn. No evidence has been forthcoming as to why this was not done, or as to whether there was an impediment to [REDACTED] taking such course of action. In the light of my findings, I do not believe that it is desirable to further expand on the nature and extent of such duty, in *vacuo*. Suffice to restate that nothing in this judgement should be taken as detracting from the requirement that the Society in its role as an impartial and objective regulator to bring all matters of relevance to the attention of its committees, the Tribunal or the court.

20. [REDACTED]

426. [REDACTED] is not a party to these proceedings. Even if the court had the power to do so, I do not believe that it would be constitutionally permissible to embark upon an investigation of the manner in which complaints against him were treated, in order to see whether Mr. Murphy was treated differently, without affording him an opportunity to be heard. I note, however, from the papers submitted to the court that [REDACTED] has since had his own difficulties with the Society.

21. The Conduct of these proceedings

427. Mr. Murphy lays emphasis on the manner in which the defence of these proceedings have been conducted by the Society as further evidence of bad faith in their dealings with him. It seems to me that in the event of a breach of court processes, or where there is an allegation of unfairness of procedures or the manner in which a case progresses, the appropriate way in which to deal with such issues is by application at the relevant time and in accordance with the rules of court, as judicially interpreted. Insofar as it is alleged that there was bad faith on the part of the Society in the manner in which the initial proceedings were treated when it came before the court in the first instance, and I make

no comment on this, Mr. Murphy has already had his remedy in the form of a successful appeal and resultant rehearing. I do not believe that it is either desirable nor necessary to comment upon the many allegations which Mr. Murphy makes in this regard, which are contained towards the end of his statement, particularly in the light of the court's conclusions on the substantive legal issues of defence raised by the Society.

22. General Observations

428. I wish to make it clear, having considered Mr. Murphy's extensive statement, his evidence, and his demeanour particularly under cross-examination, that nothing in this judgment should be interpreted as reflecting upon his honesty. While he was closely questioned in relation to one letter which he stated he did not sign, which in my view as a matter of probability he did, I do not believe that his answers were intentionally untruthful. Passage of time leads to frailties in recall. Further, while there was delay in the provision of accounts, particularly closing accounts. I do not see evidence of financial dishonesty and no such allegation has been made. There is no evidence to suggest that any client was left short of funds or that financial loss was suffered by any party as a result of Mr. Murphy's actions or inactions. No such implication can be taken from any of the evidence which was before this court. While there may have been a certain degree of dilatoriness in paying fines and compensation, there is no evidence before me to suggest that these were not paid.

429. In my view, however, the stance taken by Mr. Murphy in his dealings with the Society reflects a loss of objectivity, perhaps borne out of his frustration at perceived injustice. Unfortunately, he detached himself from the reality and the seriousness of the situation in which he found himself and there is evidence of a confused approach when, on occasion, he failed to distinguish between steps necessary to deal with initial complaints, some of which would have been quite easy to take, and defending allegations of misconduct once the matter had been referred to the Tribunal. Indeed, Ms. Kirwan acknowledged in respect of certain complaints that if Mr. Murphy had laid before the Society the information which he laid before this court, then matters may have concluded differently. The explanation that he gave for failing to take certain steps at certain times, particularly procedural steps, was that he had quite a number of matters to contend with. It is difficult to see that blame can be apportioned elsewhere for such state of affairs.

430. Mr. Murphy also adopted a combative approach. But he was not alone in this. The evidence also indicates that in response, the Society itself adopted a reciprocal combative approach in certain respects. The contents of internal letters and the manner in which, on occasion, matters were presented in court, bear this out. These can only but have fuelled the sense of grievance that Mr. Murphy feels. Regulators have a difficult task and there is often little room for a compassionate approach. But that is not always the case. This is particularly so where, as here, the respondent was placing himself at the mercy of the court and in circumstances where funds had not "*gone missing*". He also had, for example, a legitimate point to raise regarding the powers of the Society when conducting a financial investigation, to examine or take copies of files concerning any complaints. It is clear that when Mr. O'Dowd's investigation commenced, Mr. Murphy was quite open

with him and perhaps he volunteered information which he regretted doing, particularly in the light of the article in a Sunday newspaper which he had seen over the bank holiday weekend in May, 2001. Nevertheless, in my view, Mr. Murphy raised legitimate questions in his letter of 8th May, 2001 and, affording all due allowances to the necessity of the Society to clarify the legal situation following the ruling in *Kennedy*, these queries should have been dealt with in a more straightforward and matter of fact way. Mr. Murphy was not only someone who was subjected to an investigation, he was also a member of the Society and even though I have found that he has no legal cause of action in respect of the manner in which the disciplinary process was conducted, one can again only but wonder whether a different approach would have led to a different path for both parties.

23. Conclusion

431. In all the circumstances, I am not satisfied that the plaintiff has discharged the onus of proof which is upon him to establish his cause of action and liability, and I must therefore dismiss these proceedings.