

THE HIGH COURT

[No. 137. S.A/2015]

IN THE MATTER OF

EDWARD MCGARR SOLICITORS PRACTISING UNDER THE STYLE AND TITLE OF  
MCGARR SOLICITORS, 12 CITY GATE, LOWER BRIDGE STREET, DUBLIN 8

AND

IN THE MATTER OF

THE SOLICITOR'S ACTS 1954-2011

BETWEEN

EDWARD MCGARR

APPLICANT

AND

LAW SOCIETY OF IRELAND

RESPONDENT

AND

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**JUDGMENT of Ms. Justice Murphy delivered on the 17th day of December 2019**

**Introduction**

1. The above applications, four in number, arise from an investigation being conducted by the Law Society into two complaints of misconduct made against the applicant Edward McGarr by two fellow solicitors. Both complaints relate to a failure by Edward McGarr to account for costs due to the respective solicitors in respect of work done by them, on litigation cases which were ultimately settled by Mr. McGarr.
2. In the course of its investigation the Law Society's Complaints and Client Relations Section considered it necessary to issue a notice pursuant to s.10 of the Solicitor's (Amendment) Act 1994. In each case, the s. 10 notice sought "*all documents in your possession, under your control or within the procurement of you or your firm in connection with the matters relating to the complaint of (name of solicitor) (whether or not they relate also to other matters).*"
3. In each case the applicant Mr. McGarr has issued a motion pursuant to s.11(1) of the Solicitor's (Amendment) Act 1994 seeking an Order directing the Law Society to vary or withdraw its s.10 notice. In each case the Law Society has countered with an application pursuant to s.11(4) of the Solicitor's (Amendment) Act 1994 seeking an Order directing the applicant to produce the documents sought pursuant to s.10(1) of the Act.

## **Law Society of Ireland Complaints Process and Relevant Law**

4. It is not disputed that the respondent is the body statutorily charged with dealing with the complaints at issue herein.
5. The Law Society's "Resolving Complaints" information booklet details the complaints process: -

### *"How the Complaints System works*

*Under the provisions of the Solicitors Acts, 1954 to 2002, the Society may deal with complaints alleging misconduct, inadequate professional services and complaints of excessive fees. Complaints about services and fees must be made within 5 years [S 8(7) and S 9(6), Solicitors Amendment Act 1994].*

*Virtually all of these complaints are dealt with by the solicitors in the Society's Complaints and Client Relations Section, usually through an exchange of correspondence. It is by means of this correspondence that most complaints are concluded. The balance may be referred to the Complaints and Client Relations Committee, and of these a small number will be the subject of an application to the Disciplinary Tribunal.*

*If a client is dissatisfied with the outcome of his complaint to the Society, he may approach the Independent Adjudicator of the Law Society, or, in a case of alleged misconduct, apply to the Disciplinary Tribunal.*

### *The Independent Adjudicator of the Law Society*

*A complainant who is dissatisfied with the outcome of his complaint to the society can refer the matter to the Independent Adjudicator of the Law Society. The adjudicator calls for the society's file and, based on his/her inspection of the file, decides whether the society has dealt fairly and impartially with the complaint. Further information on the role of the adjudicator is available on request from the Society.*

### *The Complaints Procedure*

*On receipt of a complaint, the Complaints and Client Relations Section copies the letter of complaint to the solicitor involved and asks for his/ her views. Where appropriate, this correspondence is copied to the managing partner of the solicitor's firm. If you receive a letter from the Complaints and Client Relations Section informing you that you are the subject of a complaint, and asking for your comments, it is in your own interest to respond promptly to the Society's correspondence, as in all likelihood the matter can be resolved to the satisfaction of all concerned at this point. You should be as frank as possible with the Society, and co-operate with the Society's staff to have the matter resolved. If you believe the complaint is totally unfounded, you are fully justified in setting out the reasons why you believe your client has no cause for complaint. Whatever the circumstances,*

*reply as quickly as possible, bearing in mind that delays in responding to the Society's enquiries can exacerbate the position and make it more difficult to effect a resolution.*

*When preparing a response, please remember that the Society will forward a copy to the complainant. In this regard, it is important to note that the Society claims privilege on the correspondence relating to complaints. This is to protect both the complainant and the solicitor, so that both parties can communicate freely with the society.*

*The Complaints and Client Relations Committee has made it clear that it will not tolerate any failure by a solicitor to respond to the Society's correspondence. If a solicitor ignores the Society's enquiries, the committee may refer the solicitor to the Disciplinary Tribunal, notwithstanding the fact that it ultimately transpires that the complaint has no substance.*

*If you have any difficulty about responding to a particular complaint, consult a colleague. If you have particularly heavy commitments which make it impossible to reply to the Society within the time requested, telephone the Complaints and Client Relations Section and advise them of your difficulty.*

*If the Society's correspondence is totally ignored, the following can occur: -*

- *The service of a statutory notice under section 10 of the Solicitors (Amendment) Act, 1994 requiring the production of your file.*
- *A direct application to the President of the High Court under section 13 of the Solicitors (Amendment) Act, 2002.*
- *A direction to make contribution towards the costs incurred by the Society as a result of failure to respond to the Society's correspondence.*
- *A referral to the Disciplinary Tribunal, which could result in a finding of professional misconduct.*
- *The attendance at your office of an authorised person under S. 14 of the Solicitors (Amendment) Act 1994. "*

**s. 10 of the Solicitors (Amendment) Act 1994 & definition of "misconduct"**

6. s. 10(1) of the Solicitors (Amendment) Act 1994 provides: -

*"Where it appears to the Society that it is necessary to do so for purpose of investigating any complaint made to the Society —*

- (a) *alleging misconduct, or*

- (b) *alleging that the provision of legal services by a solicitor was inadequate in any material respect and was not of the quality that could reasonably be expected of him as a solicitor, or*
- (c) *alleging that a solicitor has issued a bill of costs that is excessive, the Society may give notice in writing to the solicitor or his firm requiring the production or delivery to any person appointed by the Society, at a time and place to be fixed by the Society, of all documents in the possession or under the control or within the procurement of the solicitor or his firm in connection with the matters to which the complaint relates (whether or not they related also to other matters)."*
7. s. 13 of the Solicitors (Amendment) Act 2002 inserted s. 10A following s. 10 in the Act of 1994 as follows: -
- "(1) Where, in relation to a complaint made to the Society alleging misconduct by a solicitor or a complaint under section 8(1) or 9(1) of this Act, it appears to the Society that the solicitor concerned is obstructing the investigation of the complaint by the Society by refusing, neglecting or otherwise failing, without reasonable cause-*
- (a) *to respond appropriately in a timely manner, or at all, to the correspondence from the Society in relation to the complaint, or*
- (b) *to attend a meeting convened by the Society at which the complaint would be considered, the Society may apply to the High Court for an order compelling the solicitor to respond appropriately within a specified time to such correspondence or to attend such a meeting.*
- (2) *An order under subsection (1) of this section may provide for censuring the solicitor and requiring the solicitor to pay a money penalty and for such matters of a consequential nature as the Court considers appropriate.*
- (3) *Where an order under subsection (1) of this section requires a solicitor to pay a money penalty, the order shall operate as a judgment against the solicitor in favour of the Society, and the money penalty, when recovered, shall be paid into the Compensation Fund.*
- (4) *In subsection (1) of this section, 'meeting convened by the Society' includes a meeting convened by a committee to which functions of the Society which may be performed by the Council have been delegated pursuant to section 73 (as amended by the Act of 1960 and this Act) of the Principal Act."*
8. The complaints herein are of "misconduct" as per s.10(l)(a) of the act. s. 3 of the Solicitors (Amendment) Act 1960 (as amended by s.24 of the Solicitors (Amendment) Act 1994 Act and s. 7 of the Solicitors (Amendment) Act 2002) states the following:
- "Misconduct' includes-

- a. *the commission of treason or a felony or a misdemeanour*
  - b. *the commission, outside the State, of a crime or an offence which would be a felony or misdemeanour if committed in the State,*
  - c. *the contravention of a provision of the Solicitors Acts, 1954 to 2002, or any order or regulation made thereunder,*
  - d. *in the course of practice as a solicitor*
    - i. *having any direct or indirect connection, association or arrangement with any person (other than a client) whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of section 55 or 56 or section 58 (which prohibits an unqualified person from drawing or preparing certain documents), as amended by the Act of 1994, of the Principal Act, or section 5 of the Solicitors (Amendment) Act, 2002, or*
    - ii. *accepting instructions to provide legal services to a person from another person whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of those enactments,*
    - iii. *any other conduct tending to bring the solicitors' profession into disrepute."*
9. The respondent's "Complaints about Solicitors" information booklet describes misconduct in this context as:-

*"Misconduct is defined in the Solicitors Acts. Examples of misconduct include conflict of interest, breach of an undertaking and failure to communicate."*

**s. 11 of the Solicitors (Amendment) Act, 1994**

10. s. 11 of the Solicitors (Amendment) Act, 1994 provides:-

- (1) *A solicitor in respect of whom a determination or direction has been made or given by the Society under section 8(1) 9(1) or 12(1) of this Act or who has received notice for production or delivery of documents from the Society under section 10(1) of this Act may, within a period of 21 days of the notification of such determination or direction to him, or the receipt of such notice by him, apply to the High Court for an order directing the Society to rescind or to vary such determination or direction, or to vary or withdraw such notice, and on hearing such application the Court may make such order as it thinks fit.*
- (2) *Where a solicitor in respect of whom a determination or direction has been made or given by the Society under the provisions of section 8(1), 9(1) or 12(1) of this Act has not applied within the period provided to the High Court under subsection (1) of this section, such determination or direction shall become absolutely binding on the solicitor immediately upon the expiration of such period.*

- (3) *Where the Society have given notice in writing to a solicitor or his firm under the provisions of section 10(1) of this Act and where an application has not been made by the solicitor within the period provided under subsection (1) of this section, the Society may apply to the High Court for an order directing the solicitor to produce or deliver to any person authorised by the Society all documents in respect of which such notice is given.*
- (4) *Where an application has been made by a solicitor under subsection (1) of this section, the Society may apply to the High Court and the Court may dismiss the application of the solicitor if it is satisfied that such application has no merits and has been made purely for the purposes of delay, and, where applicable and if the Court thinks fit, shall order the solicitor to produce or deliver to any person appointed by the Society all documents in respect of which a notice has been given to the solicitor or his firm under section 10(1) of this Act.*
- (5) *If a solicitor, in respect of whom a determination or a direction has been made or given by the Society under the provisions of section 8 (1) or 9(1) of this Act or who has received a notice for production or delivery of documents from the Society under the provisions of section 10(1) of this Act (to the extent that it has not been rescinded or varied by the High Court pursuant to an application under subsection (1) of this section), refuses, neglects or otherwise fails to comply with such determination or direction or notice without reasonable excuse, he shall be guilty of an offence and be liable on summary conviction thereof to a fine not exceeding 11,500. ["£1,500" substituted with "€3,000" by s.22(1)(i) of the Act of 2002]*

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11. The court proposes to use initials to identify the clients, the settlement of whose claims, gave rise to the complaints of misconduct in relation to costs in each case.
12. By letter dated the 29th day of July, 2015, Mr. Thomas Madden, solicitor of Thomas K. Madden & Co. Solicitors, made a complaint to the Law Society of Mr. McGarr's failure to account to Mr. Madden for fees and outlay, due to Mr Madden, on a file which Mr. McGarr had taken over from Mr. Madden. The complaint reads as follows: -

*"Dear Sirs,*

*We represented AB in a High Court action. This matter was dealt with by the Society previously in an application by McGarr Solicitors of 12 City Gate, Lower Bridge Street, Dublin 8, who obtained the file under data protection legislation.*

*Mr. Madden personally delivered the file to the offices of McGarr Solicitors and did not receive the courtesy of an acknowledgement.*

*The sum of €3,283.18 was paid by my office in respect of outlay in relation to this case.*

*Mr. McGarr gave no undertaking in relation to costs: presumably on the basis that he could not predict the outcome, nevertheless I learned that he subsequently settled his case and failed to notify my office so that I could pursue my costs and outlays.*

*I enclose herewith an exchange of correspondence with Mr. McGarr's office. The replies which I received are wholly unsatisfactory, evasive and disingenuous. It is quite clear that Mr. McGarr has not made provision for our costs and outlay.*

*He has not produced nothing (sic) tangible in relation to the costs nor indeed the settlement.*

*In the event that he recovered costs, a substantial portion of those costs are due to this office in relation to the work carried out by myself and those entire costs surely cannot be retained by Mr. McGarr.*

*He also only be (sic) entitled to costs in respect of the ultimate settlement. My understanding is that the matter did not go to a hearing. The case was already set down for hearing when he took over the file.*

*Furthermore, in the event that Mr. McGarr recovered outlay – that outlay is also due to this office. It would be unconscionable and improper if those outlays were not handed over. I enclose herewith a copy of the Bill of Costs which we sent to Mr. McGarr.*

*I would be obliged if you would treat this as a formal complaint against Mr. McGarr insofar as he used the Data Protection Act to obtain a file from a colleague in circumstances where the case was set down for hearing and that the only aspect of the case that needed to be determined was quantum. I had already received a significant offer and my client had met with his barrister at the Law Library.*

*Mr. McGarr has failed, refused and neglected to hand over evidence of the costs recovered and his engagement/correspondence is wholly unsatisfactory. I wrote to Mr. S. but suffice to say that I received no response.*

*I was not kept up-to-date: Nor was I informed of the settlement. Mr. McGarr's letter, particularly of the 31st of October, 2014, is unsatisfactory. He is seeking to shift responsibility onto the client in circumstances where the costs and outlay would have come directly to Mr. McGarr.*

*I spoke with Mr. McGarr on the 23rd of December 2014, and he requested a copy of the costs – notwithstanding that same had been sent previously.*

*We would be obliged if you would investigate the matter and call upon Mr. McGarr to account properly and professionally to this office in respect of fees and outlays.*

*Yours faithfully,*

*Thomas K. Madden."*

13. Mr. Madden furnished a copy of the Bill of Costs which had been sent to Edward McGarr, totalling €35,806.70 which included an instruction fee of €19,750 plus VAT.
14. On the 5th of August, 2015, Eleanor Carmody, solicitor of the Complaints and Client Relations Section of the Law Society acknowledged Mr. Madden's complaint and on the same date, also wrote to the applicant Edward McGarr. She enclosed Mr. Madden's letter of complaint and a copy of the Society's information booklet "Resolving Complaints". She advised him that the Society is empowered by statute to investigate complaints of excessive fees and inadequate professional services and misconduct. She asked for Mr. McGarr's written observations on the correspondence, any necessary explanation of the matters arising and where appropriate his proposals for resolving the matter.
15. He was advised of the potential relevance of the Data Protection Act, 1988-2003 and was further advised that the Law Society's policy governing the investigation of complaints, requires the Society to give the complainant copies of any relevant letters and documents that he might submit to the Society in response to the complaint, and vice versa. On the 12th of August, 2015, the complainant Mr. Madden forwarded to the Law Society an unpaid medical bill in respect of reports and treatment given to Mr. AB in respect of his claim. On the 13th of August, 2015 McGarr Solicitors replied to Ms. Carmody indicating that the applicant was out of the country and advising that he would return and deal with the matter in the week commencing the 25th of August, 2015.
16. The applicant's first position was that the complainant Mr. Madden "has no admissible complaint to make concerning me". He enclosed a copy of correspondence between his office and Mr. Madden. He stated that he had tried to agree the transfer of the file under the Society's recommended procedure but contended that Mr. Madden had failed to engage with his office on that point. He stated that these difficulties had been overcome in due course. He stated that he had acted exclusively for Mr. AB and that his obligations to the client were limited to his personal injury claim. He entirely ignored the fact that Mr. Madden had made a complaint against him Mr. McGarr, not his client, and stated: -

*"Mr. Madden's dispute with Mr. AB is not something we wish to take up for Mr. AB. That said we have invited Mr. Madden to put his proposals to resolve his difficulties and we will use our best endeavours to conclude matters sensibly. As solicitors we have sympathy with Mr. Madden but cannot offer him advice or go beyond such instructions as Mr. AB. may give and we are willing to accept."*

17. Ms. Carmody replied on the 28th of August, 2015. She acknowledged receipt of Mr. McGarr's letter dated the 26th of August, 2015. She referred him to p. 61 of the Guide to Good Professional Conduct for Solicitors, Third Edition. Chapter 7 of the Guide relates to the solicitor and his relationship with other solicitors. It provides: -

*"At the conclusion of a litigation case if a second solicitor recovers costs which include the cost of work done by the first solicitor, he is accountable to the first*

*solicitor for the appropriate portion of those costs. This is the case even if there are solicitor/client costs properly payable to him and these exceed the total amount of the party costs recovered. This applies where the first solicitor was not paid when his instructions were terminated. Ms. Carmody asked two direct questions of Mr. McGarr as follows:*

*“(1) Did you recover costs in the matter?”*

*“(2) If you did recover costs did those costs include the work done by Mr. Madden and if so what happened to those costs?”*

18. On the 1st of September, 2015, the applicant Mr. McGarr sent a letter to Ms. Carmody which, contrary to the ‘Resolving Complaints Procedure’, he was unwilling to have her disclose to the complainant Mr. Madden. Ms. Carmody pointed out that she was unable to retain the letter on file, in those circumstances, and returned it to Mr. McGarr. She asked him once again to answer the two questions that she had raised in her letter of the 28th of August.
19. On the 9th of September 2015, the applicant Mr. McGarr sent a further letter to the Law Society in which he failed to answer the two very clear questions asked in the Law Society’s letter of the 28th of August 2015, nor did he address the clear complaint of Mr. Madden that he had failed to account for costs recovered. He professed in his letter to have *“difficulty understanding the complaint made by Mr. Madden. He has simply copied correspondence and failed to state his complaint, that I can see.”* He ignored the fact that Mr. Madden had made a complaint against him and in effect, suggested that any issue that Mr. Madden had was with his client Mr. AB.
20. In circumstances in which the applicant’s initial reaction to the complaint was that it was inadmissible, and his next reaction was a professed difficulty in understanding the complaint, matters then took a rather strange turn. On the 11th of September, 2015, the applicant, without prejudice to his earlier positions, served what he termed ‘a Notice for Information’. The notice seeking information is a remarkable document in the context of an investigation of a complaint by the Law Society. It is headed the Law Society of Ireland Thomas Madden complainant and Edward McGarr respondent.

**Notice Seeking Information: -**

*“Take notice that as the respondent herein, pursuant to the provisions of Directive 2012/13/EU of the European Parliament and of the Council, I apply to you for information on the following matters arising in relation to the applicant’s letter of the 29th of July, 2015, to the Law Society of Ireland.”*

21. The court presumes that the reference is to the complainant’s letter of the 29th of July, as there is no applicant named in the notice. The notice for information is a combination of a notice for particulars and an application for discovery. In addition, it seeks details of legal protections put in place by the Law Society to secure the rights of the defence as provided for in Directive 2012/13/EU. There are 8 separate queries with a total of 20

subheadings. Throughout the body of the notice reference is repeatedly made to the applicant. It is not clear whether Mr McGarr expects his 'notice' to be answered by the complainant, Mr. Madden, or by the Law Society. In any event, an application to the High Court is threatened in default of the information being furnished.

22. The court rejects *ad limine* Mr. McGarr's assertion that he is entitled to seek or receive the information sought in his 'notice' The court is quite satisfied that Directive 2012/13/EU of the European Parliament and of the Council of the 22nd of May, 2012, on the Right to Information in Criminal Proceedings has absolutely no application to preliminary investigations being conducted pursuant to a statutory power, by the Law Society, in respect of complaints of misconduct made against a solicitor.

23. Article 1 of the Directive, which the court accepts, is and has been of direct effect for a number of years, specifies the subject matter of the Directive and states:

*"this Directive lays down rules concerning the right to information of suspects or accused persons relating to their rights in criminal proceedings and to the accusation against them".*

24. Article 2 dealing with the scope of the Directive provides at 2.1: -

*"This Directive applies from the time persons are made aware by the competent authorities of a member state that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings which is understood to mean the final determination of the question whether the suspect or the accused person has committed the criminal offence, including where applicable, sentencing and the resolution of any appeal."*

25. Article 3 of the Directive provides for right to information about rights and provides at 3.1: -

*"Member States shall ensure the suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law in order to allow for those rights to be exercised effectively.*

*(a) The right of access to a lawyer.*

*(b) Any entitlement to free legal advice and the conditions for obtaining such advice.*

*(c) The right to be informed of the accusation in accordance with Article 6.*

*(d) The right to interpretation and translation.*

*(e) the right to remain silent." (emphasis added)*

26. Thus, even a preliminary consideration of the Directive makes it clear that it has no application to Mr. McGarr who does not at present, stand suspected nor accused of a criminal offence. The court observes however that the very fact that Mr. McGarr chose to serve such a notice would seem to suggest that from the outset, despite his protestation to the contrary, he fully understood the nature of the complaint made against him by Mr. Madden.
27. On the 16th of September, 2015, the Law Society wrote to the applicant acknowledging receipt of his letters of the 9th and 11th of September, 2015, and advising him that Directive 2012/13/EU had no application to investigations being conducted by the Law Society. The Law Society attached a notice pursuant to s.10 of the Solicitor's (Amendment) Act 1994 seeking the production of *"all documents in your possession, under your control or within the procurement of you or your firm in connection with the matters relating to the complaint of Thomas Madden (whether or not they relate also to other matters)."* In addition, pursuant to the applicant's request for copies of documents, the Law Society enclosed a copy of the Society's file in the matter.
28. On the 2nd of October, 2015 the Law Society received a response from Mr. McGarr through P.J. McMahon Solicitors. They asserted that the *"applicability of Directive 2012/13/EU is clear from the provisions of the Directive itself and it is not for his client to explain to the Society why it applies to its investigations. Rather the Society should explain why the Directive does not apply to it."*
29. He also complained that the s.10 notice was defective in that it only allowed ten days for compliance when s. 11 of the Act allowed his client 21 days in which to apply to the High Court for an Order in respect of a s.10 direction. He also alleged that the service of the s.10 notice was premature and *"it quite clearly represents an attempt by the Society to go on a fishing expedition."*
30. He called on the Society to withdraw the s.10 notice and sought a response to his notice for information. Again, no reference is made to the two direct questions raised in the Law Society's letter of the 28th of August, 2015, in which Mr. McGarr was asked, (1) did he recover costs in the matter; and (2) if he recovered costs did those costs include the work done by Mr. Madden and if so what happened to those costs. Four days later on the 6th October, 2015, P.G. McMahon Solicitors issued a notice of motion seeking an Order pursuant to s. 11(1) of the Act, directing the respondent to vary or withdraw its notice issued pursuant to s.10 of the Solicitor's (Amendment) Act 1994 dated the 16th of September, 2015, relating to the file of AB.
31. Pursuant to O.53 r, 16(c) the notice of motion is required to state the grounds of the appeal or application, and the Order sought by the appellant or applicant on such appeal or application. The notice of motion does not set out the grounds upon which the application is made. However, the grounds are set out in the grounding affidavit sworn by Edward McGarr.
32. He contends that he requires a reply to his 'Notice for Information' to allow him: -

- a. Consider whether I had a reasonable chance of succeeding in appealing or judicially reviewing the Respondent's decision;
  - b. Identify the relevant legal issues and prepare my legal submissions for hearing or review;
  - c. Know if the respondent had directed its mind adequately to the issues which it had considered or was obliged to consider;
  - d. Examine the legal basis for the allegation of misconduct or the facts upon which the said allegation of misconduct rested;
  - e. Enable the Court to review the decision.
33. This entire argument and the 'Notice for Information' which preceded it, are based on two false premises. The first is that the Law Society had reached a 'decision'. There is no evidence that any decision had been reached by the Law Society. It had received a 'complaint' and in accordance with its published procedures sought Mr. McGarr's response to that complaint. Second, the Law Society had not 'alleged' misconduct against Mr McGarr. It had received a complaint of misconduct and merely sought, again in accordance with its published procedures, his response to that complaint. If following its investigation of the 'complaint' the Law Society concluded that there was *prima facie* evidence of misconduct, then an allegation of misconduct might be laid, which would be dealt with by either the Complaints and Client Relations Committee or the Disciplinary Committee. In that event, Mr McGarr would be entitled to the full panoply of rights to fair procedures enshrined in domestic and European law. On the other hand, upon receipt of Mr. McGarr's response, the Law Society could well conclude that the complaint was unfounded and there the matter would end.
34. Next, the grounding affidavit asserts that the complainant, Mr. Madden is using/abusing the Law society's regulatory powers to advance his civil dispute against his former client AB for fees. Tied to this is the invocation by Mr. McGarr of the privacy rights of AB. Mr McGarr suggests that the documents sought in the S.10 notice must include the file of the client AB, with whom Mr. Madden is in dispute, and therefore the s10 notice undermines the client's property rights and his rights to privacy of his correspondence. He claims that this is exacerbated by the Law Society's failure to join AB as a notice party to the production notice. The s.10 notice does not in fact seek production of the file of AB, nor, in the court's view, must it be construed as doing so. (see further below).
35. Finally, the affidavit objects that the Notice is not in conformity with the Solicitors (Amendment) Act 1994 or Irish Law generally because:
- a. The Respondent is not investigating a complaint of misconduct within the meaning of s. 8(1) and the production notice is not a notice within the meaning of s. 10.

- b. The production notice imposes a deadline to comply with it of 10 days, thereby impermissibly curtailing the time provided for applying to the Court for relief under s. 11.
  - c. The production notice impermissibly fails to address or provide for the rights of AB by omitting to make him a notice party thereto.
- 36. The court immediately rejects the objection at a. above, because the Law Society never purported to investigate a complaint, pursuant to S. 8 of the Act, which deals with complaints by clients of solicitors. It was always clear that the complaints of misconduct in this case came from other solicitors. S.10(1)(a) specifically empowers the Law Society to investigate complaints of misconduct, howsoever arising.
- 37. The ground at 'b' is a purely technical defence and is without merit. The applicant contends that the deadline of 10 days for compliance with the s.10 notice is impermissible in circumstances where s.11 of the act permits 21 days to apply to court to vary or withdraw the notice. There might be some substance to this objection had the Law Society acted to enforce its notice within the 21-day period. They did not do so. Nor did the Law Society take any steps to curtail the applicant's right to invoke relief pursuant to s.11(1). The s.10 Notice was served on the 16th September 2015. The applicant issued a motion to set it aside 20 days later, on the 6th October 2015. The first suggestion that the Law Society might apply to Court to enforce its notice came on the 23rd October 2015, 37 days after the service of the Notice. It seems to the court that, depending on the circumstances, it is open to the Law Society to specify a time less than 21 days for compliance with its s.10 notice. However, by reason of the provision of s11(1), it cannot seek to enforce its notice until the 21 days within which the person subject to the notice may apply to the court to vary it, have elapsed.
- 38. On the 6th November 2015, the Law Society issued a motion seeking Orders pursuant to s.11(4) of the Solicitors (Amendment) Act 1994, dismissing the application to vary or withdraw the notice issued by the Society pursuant to S.10 of the Act of 1994 dated the 16th September 2015 requiring production of all documents in his possession, under his control or within the procurement of the Applicant or his firm in connection with the matters relating to the complaint of Thomas Madden (whether or not they relate also to other matters) and an Order directing the applicant to produce the documents aforesaid in accordance with the terms of the s. 10 Notice.
- 39. The grounds of the application were:
  - i. The application by the Applicant directing the Society to vary or withdraw its S.10 Notice is without merit and has been made purely for the purposes of delay;
  - ii. The application is, in particular, without merit in circumstances where the nature and basis of the complaint of misconduct on the part of the Applicant, and the Society's investigation thereof, has been fully and properly disclosed to the Applicant.

40. The Application was grounded on the affidavit of Eleanor Carmody, in which she sets out in extensive detail the society's engagement with the applicant in relation to the complaint of Mr. Madden. She sets out the Law Society's response to each of the arguments raised by the applicant, some of which have found favour with the court, as set out in its findings above. In relation to Mr McGarr's assertion that the regulatory powers of the Law Society were being used to assist his competitor in his civil dispute with his former client, and his invocation of his clients' privacy and property rights and in particular his client's entitlement to be made a notice party to the Law Society's s.10 notice, Ms. Carmody replies at paragraphs 28 and 30 of her affidavit as follows: -

*"28. The Society is not..... engaged in, or offering, any assistance to the Complainant in order to pursue a civil dispute – it is solely investigating the complaint in relation to the Applicant's conduct."*

*30. I say that the Section 10 Notice was served in the context of the Society's investigation of a complaint by Mr Madden in respect of the Applicant's conduct – a matter which the Applicant consistently purports to overlook by seeking to characterise the complaint as being by Mr Madden against his former client – a matter which would not be within the remit of the Society to investigate. The Society has statutory powers to give notice for the delivery of the file and is not required, nor would it be appropriate, in exercising those powers to join Mr. AB to the complaint or to the Notice. Mr AB 'rights' are not involved or compromised in any way in circumstances where the complaint is not in respect of him but is in respect of the conduct of the Applicant – and specifically as to whether he failed to properly account to Mr Madden for costs recovered or which might have been recovered. There can be no "disadvantages to Mr. AB." as alleged by the Applicant at para. 21 of his affidavit in production of the file – the matter at issue being whether Mr. Madden's complaint against the Applicant is well founded."*

41. Having set out the basis of the Law Society's opposition to Mr. McGarr's application, Ms. Carmody then sets out the grounds on which the Law Society seeks an order pursuant to S. 11(4).

42. While the Law Society maintains in its affidavit, an entitlement to call for production of Mr. AB's file, the court notes that in fact, the s. 10 Notice does not call for production of the file, but merely seeks *all documents in your possession, under your control or within the procurement of you or your firm in connection with the matters relating to the complaint of Thomas Madden (whether or not they relate also to other matters).*" Since Mr Madden's complaint concerns Mr. McGarr's failure to account to him for costs claimed and/or received by Mr. McGarr, it is clear that the documents sought in the s. 10 Notice are directed to Mr. McGarr's actions in respect of costs, and not to any action of his client. In this context, Mr McGarr's assertion that, as a matter of law, costs recovered are the property of the client, is an irrelevant red herring, which is not in issue in the investigation of the complaint, in respect of Mr. McGarr's conduct.

43. The type of documents which one might expect to be produced in compliance with the S.10 notice, are Mr. McGarr's own Bill of Costs; any claim made for those costs from a third party or the client; any payment made on foot of that Bill; any taxation of costs which may have occurred and the outcome of such taxation; any payment in respect of taxed costs made to Mr. McGarr.
44. As of the 6th November 2015, the issues between the parties were joined. The motions were thereafter listed for hearing on the 7th of April 2016.
45. More than three months later, out of the blue, on the 25th February 2016, a detailed response to Mr. Madden's complaint was sent to the Law Society, on behalf of Mr. McGarr. It is stated to be without prejudice to the pending High Court application. It addresses each of the issues raised in the complaint of Mr. Madden. The court is at a loss to understand why this detailed response could not have been furnished by Mr McGarr when first requested on 5th August 2015.

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46. Mr. Niall O'Reilly, solicitor of Lawlor O'Reilly & Co. Solicitors, acted for Mr. CD in High Court proceedings relating to a road traffic accident (2008/3209P). In or around July, 2012, Lawlor O'Reilly & Co. received correspondence from McGarr Solicitors, enclosing notification from Mr. H., informing them that its retainer was discontinued and that McGarr Solicitors were now acting for Mr. H.
47. On or about 12th July, 2012, Lawlor O'Reilly & Co. furnished a solicitor/client bill to Mr. H. through McGarr Solicitors.
48. Following correspondence and intense negotiation between the parties, Mr. O'Reilly released Mr. H's file to the applicant on foot of an undertaking from McGarr Solicitors, dated 18th July, 2012. The undertaking provided as follows: -

*"We are instructed by J H to again write to you seeking the transfer of his file in the above matter to this office forthwith.*

*In consideration of you doing so we undertake as follows:*

1. *To refund to you outlay of €4,129 made on the plaintiff's behalf*
2. *We formally confirm that we will preserve your lien and return the files to you (to advance any taxation of costs application that you may wish to commence) upon the termination of the proceedings (including any party-party taxation).*
3. *To hold on the anticipated successful conclusion of the matter the sum of €10,000 as security for your claim against J H for costs in the proceedings to the date he discontinued your retainer.*

4. *We will hold the said money in our client A/C pending the resolution of your claim, for the period of six months, commencing from the date of the signing of the Requisition to Tax [or a Court order to like effect] but not longer.*
5. *To disburse all or some of the said sum of €10,000 to pay your claim for costs when vouched, ascertained and agreed or taxed in default of agreement.*
6. *Paragraphs 3, 4 and 5 are subject to our success in negotiating the settlement cheque by payment into our client A/C of same. In default of achieving this we will hold the settlement cheque on our file until J H puts us in funds of €10,000. Thereafter we will hold that sum of €10,000 in our client A/C pending the resolution of your claim, for the period of six months of the signing of the Requisition to Tax [or a Court order to like effect] but not longer.*
7. *This undertaking supersedes all earlier proffered undertakings in this matter and is in substitution for same."*

49. The claim was settled by McGarr Solicitors, four months later, in November, 2012. McGarr Solicitors gave several assurances that they would keep Lawlor O'Reilly & Co. informed regarding the receipt of the party/party costs.
50. Following several telephone calls to the offices of McGarr Solicitors, Mr. O'Reilly spoke with Mr. Simon McGarr, solicitor, on 28th July, 2014. Mr. Simon McGarr informed Mr. O'Reilly that he had intended to write to Lawlor O'Reilly & Co. to inform them that all of the party/party costs recovered had been paid directly to the client together with the €10,000 retained, because the time in respect of the undertaking had passed.
51. By letter dated 13th August, 2014, Lawlor O'Reilly & Co. wrote to McGarr solicitors referring to the telephone call of 28th July, 2014, expressing surprise and concern at the lack of compliance with the undertaking and Mr. Simon McGarr's failure to send any correspondence in relation to the matter, despite his indication of his intention to do so. Lawlor O'Reilly & Co. advised that it was passing the matter over to the Law Society to seek its assistance. Lawlor O'Reilly & Co. further sought the return of the file in part compliance with the undertaking.
52. By letter dated 15th August, 2014, McGarr Solicitors replied to Lawlor O'Reilly & Co. expressing confusion. It requested that Lawlor O'Reilly & Co. specify the terms of the undertaking which it was now saying subsisted.
53. By letter dated 1st September, 2014, Lawlor O'Reilly & Co. outlined to Mr. Edward McGarr the grounds upon which it maintained that the undertaking had not been complied with. It advised Mr. McGarr that in the absence of receipt of proposals for resolving the matter amicably within three weeks, it would refer the matter to the Law Society.

## **The complaint**

54. By letter dated 21st October, 2014, Mr. Niall O'Reilly made a complaint to the respondent about the applicant's non-compliance with his undertaking of 18th July, 2012. Mr. O'Reilly advised the respondent that the firm had requested the applicant to comply with paragraph 2 of the undertaking (return of the file) and that the applicant had not replied. He further advised the respondent that his firm believed that paragraph 3 of the undertaking had not been complied with. He stated:-

*"...we further wish to make a complaint of misconduct against McGarr Solicitors arising out of their failure at the conclusion of this Litigation Case to discharge to us an appropriate portion of the Party/Party costs which we believe were agreed and paid".*

55. Mr. O'Reilly confirmed that the applicant had complied with paragraph 1 of the undertaking to discharge the outlay of €4,129 which sum had been paid upon receipt of the file.
56. By letter dated 24th October, 2014, Ms. Eleanor Carmody, for the respondent, replied to Mr. O'Reilly acknowledging receipt of his letter of complaint. She informed him that inquiries were being made in relation to the complaint and she explained the investigation process.
57. On the same date, Ms. Carmody wrote to the applicant. She enclosed a copy of Mr. O'Reilly's letter of complaint, a copy of the Society's information booklet "*Resolving Complaints*" and advised him that the Society was empowered by statute to investigate complaints of excessive fees, inadequate professional services and misconduct. She requested the applicant to furnish within 10 working days his written observations on the correspondence, any necessary explanation of the matters arising and where appropriate, his proposals for resolving the matter.
58. By letter dated 31 October, 2014, the applicant advised Ms. Carmody that the relevant file was being taken up from archiving.
59. In a further letter dated 5th November, 2014, the applicant enclosed a copy of an intended letter to Mr. O'Reilly dated 7th November, 2014 which referred to delivery of the file and apologised for the failure to deliver it promptly on request. It further stated "*We hold €10,000 to the credit of J H in our client a/c*" and stated that the firm would write to Mr. O'Reilly further shortly.
60. By letter dated 18th November, 2014, Ms. Carmody responded to the applicant advising that the respondent considered the complaint closed unless it heard to the contrary from Mr. O'Reilly. By letter of the same date, Ms. Carmody wrote to Mr. O'Reilly seeking confirmation that intervention by the Society was no longer required.
61. In a letter to Ms. Carmody dated 24th November, 2014, Mr. O'Reilly enclosed correspondence with the applicant dated 21st November, 2014. He advised that as the files had now been furnished, paragraph 2 of the undertaking had been complied with. He

stated that paragraph 3 (relating to the undertaking to retain €10,000) remained in issue as did the associated paragraphs 4, 5 and 6. He confirmed that a requisition to tax had been received. He stated that *"The complaint in relation to the retention by Edward McGarr of our portion of the Party/Party costs on an ethical basis remains extant"*.

62. By letter dated 28th November, 2014, Ms. Carmody advised the applicant that the file was being kept on review.
63. Following receipt of the file, Lawlor O'Reilly taxed their costs and issued Circuit Court proceedings against CD for the sum awarded on taxation. Judgment for the sum of €29,243.11, plus costs was awarded in the Circuit Court in July 2015.
64. By letter dated 29th July, 2015, Ms. Carmody wrote to Mr. O'Reilly inquiring whether he continued to require the intervention of the Society.
65. By letter to Ms. Carmody dated 27th August, 2015, Mr. O'Reilly enclosed a copy of a Circuit Court judgment (dated 31st July, 2015) for €29,243.11, together with costs against Mr. CD, in favour of Lawlor O'Reilly & Co. Mr. O'Reilly informed Ms. Carmody that the matters of the complaint against the applicant continued. The applicant refers to this letter as the "second complaint". On the facts, the court is satisfied that it is a continuation of the original complaint made the 21st October 2014, which seeks to have the outstanding complaints resolved.
66. By letter dated 7th September, 2015, Ms. Carmody wrote to the applicant enclosing a copy of Mr. O'Reilly's letter dated 27th August, 2015. She sought a response to the issues raised by Mr. O'Reilly within ten working days.
67. By letter dated 9th September, 2015, the applicant informed Ms. Carmody that he had difficulty understanding the complaint. He asked for a summary of the complaint and for confirmation whether the respondent endorsed the complaints and whether the applicant was required to answer the complaints. The applicant asked that the Law Society cite the basis upon which it deemed the complaint admissible. This response echoes the approach taken by the applicant to the Madden complaint, set out above. As in the Madden complaint, the applicant provided no substantive response to the complaints made against him.
68. By letter dated 11th September, 2015, the applicant served a "Notice for Information", in precisely the same terms and on precisely the same basis, as that which he served in response to the Madden complaint. The court rejects his entitlement to the information sought, in the context of the investigation of a complaint, for the reasons set out in the Madden complaint. The provisions of Directive 2012/13/EU of the European Parliament and of the Council of 22nd May, 2012 on the right to information in criminal proceedings, have no relevance or application to the preliminary investigation of a complaint made to the Law Society.

## **S. 10 Notice**

69. By letter dated 16 September, 2015, Ms. Carmody acknowledged receipt of the applicant's letters of 9th and 11th September, 2015 and advised the applicant that she did not believe that Directive 2012/13/EU applied to the respondent's investigations and asked him if he disagreed to set out the legal basis for that belief. Ms. Carmody attached a notice pursuant to s. 10 of the Solicitors (Amendment) Act: -

*"YOU ARE HEREBY REQUIRED pursuant to Section 10 of the Solicitors' (Amendment) Act, 1994, within 10 days of the date of service of this Notice, to deliver to Eleanor Carmody Solicitor at the Law Society of Ireland, Blackhall Place, Dublin 7 the following documents:*

*all documents in your possession, under your control or within the procurement of you or your firm in connection with the matters relating to the complaint of Niall O'Reilly (whether or not they relate also to other matters)."*

70. Ms, Carmody enclosed a copy of the Law Society file in relation to the matter, pursuant to the applicant's request for copies of documents.
71. On the 1st October 2015, the applicant filed a complaint on behalf of his client CD against Mr. O'Reilly with the Law Society. That complaint was rejected for stated reasons on the 13th October 2015.
72. There are some factual differences in the progress of the investigation of Mr. O'Reilly's complaint to that of Mr. Madden, but none of those differences affect the issues of law which arise in these complaints. Lawyers for Mr. McGarr deployed exactly the same strategy in resisting the Law Society's s. 10 Notice in Mr. O'Reilly's complaint as they did in Mr. Madden's. They challenged the admissibility of the complaint; they professed confusion as to the content of the complaint; they claimed entitlement to responses to a list of complex questions pursuant to Directive 2012/13/EC to allow them consider judicial review of a 'decision' to 'allege' misconduct; they alleged misuse of the complaint procedure to advance a solicitor's claims against his former client; they invoked the client's privacy and property rights and they contended that the s. 10 Notice was not in conformity with the statute. .
73. As in the complaint of Mr. Madden, on 6th October, 2015, the applicant issued a notice of motion seeking an order directing the respondent to vary or withdraw its s. 10 notice relating to the file of Mr. CD.
74. On 6th November, 2015, the respondent countered with a motion seeking an order pursuant to s. 11(4) dismissing the applicant's application to vary or withdraw the s.10 notice and seeking an Order compelling the applicant to comply with the s. 10 Notice. The issues were joined and the applications were listed for hearing on the 7th April 2016.

## **2016**

75. On the 30th March 2016, a week before the scheduled hearings, the applicant sent to the respondent a substantive and detailed response to the complaint of misconduct. The letter identifies the misconduct complained of and responds to them under headings

'Failure to comply with paragraph 2 of the undertaking', 'Failure to comply with paragraph 3 of the undertaking', 'Failure to account for costs' In addition, the applicant provided some further information which he considered relevant to the complaint. There is no information in the letter of the 30th March 2016, which was not available to the applicant on the 7th September 2015, when he was first invited to respond to the complaint of Mr. O'Reilly. Had he chosen to do so, he could have responded in those terms in September 2015. Instead, he embarked on a series of misconceived legal stratagems to avoid responding to the complaints in accordance with the process set out in the 'Resolving Complaints' Procedure adopted by the Law Society. At the time of the hearing, the belated response of the applicant had been sent to the complainant and his response was awaited

### **Submissions on behalf of the applicant**

76. For the reasons set out above and below, the court is not persuaded of the merits of the applicant's arguments and submissions. However, for the sake of completeness, the court sets out hereunder the main submissions of the applicant.

#### **1. Respondent's Awareness of the Applicant's response to the complaints**

77. In respect of the Madden complaint, the applicant submits that the Law Society asked if costs had been recovered in the case of Mr. AB. and it was informed that they had not been. The applicant therefore submits that Ms. Carmody and the Law Society knew the answer to what they professed to be investigating as of 25th February, 2016, when a detailed response was furnished in a letter from the solicitors for the applicant.

78. In relation to the O'Reilly complaint, the applicant submits that he delivered a detailed written complaint on behalf of Mr. CD to Ms. Eleanor Carmody on 1st October, 2015. That complaint recited the history of the applicant's role and actions particularly with regard to party/party costs recovered in Mr. H's personal injury action. The applicant submits that the letter of P.G. McMahon Solicitors dated 30th March, 2016, is a compressed or summarised version of that complaint of Mr. H. The applicant submits that consequently, the respondent knew the import, in great detail, of the response set out in the P.G. McMahon letter dated 30th March, 2016, as of 1st October, 2015. The applicant submits that he requested that the respondent withdraw its s. 10 notice after receiving all pertinent information and/or replies under s.11 of the applicant's motions of 6th October, 2015, and before the respondent's "retaliatory motions" were served on the 6th November 2015.

#### **2. Costs belong to the client.**

79. The applicant submits that costs received by solicitors are 'client moneys'. I-le refers to Statutory Instrument No. 516/2014 — Solicitors Account Regulations 2014 which also reiterates the obligation on a solicitor to lodge a client's moneys into the solicitors client account. The applicant further refers to s68(3) of the Solicitors (Amendment) Act 1994 which provides as follows: -

*"A solicitor shall not deduct or appropriate any amount in respect of all or any part of his charges from the amount of any damages or other moneys that become*

*payable to a client of that solicitor arising out of any contentious business carried out on behalf of that client by that solicitor.*

80. In relation to the payment of solicitors' costs, the applicant submits that fees may be settled between the client and the solicitor and paid to the solicitor by the client or, in default of agreement, be taxed and the sums due under the Certificate of Taxation may then be paid to the solicitor.
81. The applicant submits, referring to O'Callaghan, *The Law on Solicitors in Ireland* [2000] at p. 169, that a solicitor has a common law lien in respect of his costs over client's funds in the solicitor's possession. Referring to *M'Cormack v. Ross* [1894] 2 QB 545; *Ex p Bryant* (1815) Ch. 49, the applicant submits that the lien accrues in respect of the solicitor's costs. The applicant submits that s.68(3) of the Solicitors (Amendment) Act 1994 has no effect on the solicitor's particular lien; that s.68(3) refers to "*appropriation*" and not to the existence of a lien. The applicant submits that a solicitor did not have a right to seek immediate payment from funds in the solicitor's possession prior to s.3 of the Solicitors (Amendment) Act 1994. The applicant further submits that without the agreement of a client, a solicitor has no right to pay client's moneys to another solicitor or to use those moneys as security for the claims of that other solicitor.

**3. Directive 2012/13/EC**

82. The applicant submits that as the time for transposition by Ireland of Directive 2012/13/EC into domestic law has expired, the Directive consequently now has direct effect against Ireland and emanations of the State. The applicant submits that the Law Society at least insofar as it acts under a power granted to it by statute, is an emanation of the state. The applicant submits that Article 2(2) of Directive 2012/13/EC defines "criminal" to the effect that a matter is criminal if it implies the consideration of the imposition of a sanction. The applicant further submits that a solicitor who is found guilty of misconduct is open to sanctions of considerable weight either imposed by the Law Society, Solicitors Disciplinary Tribunal or the Court; that a solicitor who fails to comply in a timely fashion with a s.10 notice from the Law Society commits a criminal offence. The applicant therefore submits that Directive 2012/13/EU applies to the circumstances prevailing on the service of the applicants notice for information and that the Law Society wrongfully declined to entertain the notice for information.

**4. S. 10 is limited to Client complaints**

83. The applicant submits that s.10(1) of the Solicitors (Amendment) Act 1994 can produce more than one meaning depending on whether it is read in context or not. The applicant submits that the phrase "any complaint" is conditioned by three conditions in subparagraphs (a), (b) and (c) of s. 10(1) (and the terms of s.24 of the Solicitors (Amendment) Act 1994). The applicant submits that (b) and (c) imply that the phrase "complaint" connotes a complaint by or on behalf of a client of the solicitor the subject of the complaint; condition (a) does not, with the exception of its context, carry the same connotation. The applicant submits that the context includes conditions (b) and (c) but it also includes s.8 and s.9 of the Act, each of which commences with the words "*Where the*

*Society receives a complaint from a client of a solicitor...*". The applicant submits that the context also includes the provisions of s. 10(2) (referring to s.8(l)(e) which reads: -

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

84. The applicant submits that the phrase "nominated by the client" indicates that the documents in issue belong to the client, albeit there may be claims (from others) extant in relation to such documents. The applicant submits that ss.8 and 9 of the Solicitors (Amendment) Act 1994 arguably connote at least an implied consent, by the complainant client to the Law Society taking possession of the client's document under s.10(1) of the Act. The applicant submits that s. 10(1) on its express terms does not imply any such consent, or even knowledge, on the part of the client whose document it is.

**5. Interference with clients' rights to privacy**

85. The applicant submits that the s. 10 notice is undoubtedly an interference with the right to respect for a person's private life provided by Article 8 of the European Convention of Human Rights (as applied by the European Convention on Human Rights Act 2003) due to the sensitivity of clients' files in solicitors' offices. The applicant further submits that most likely preceding steps, such as the decision to serve a s. 10 notice and its actual service also constitute such an interference. Article 8 states as follows: -

*"ARTICLE 8*

*Right to respect for private and family life*

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

86. The applicant submits that when a s.10 notice is issued, it is issued in accordance with law; that the objective of issuing such a notice must be shown to be within the scope of the legitimate aims referred to in para.2 of Article 8, and that the burden of proof lies on the respondent in this regard; and that the phrase "necessary in a democratic society" is understood to mean that such will be satisfied if it answers a "*pressing social need*" and if the interference is proportionate to the aim pursued (the applicant *cites Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 at para.51).

87. The applicant submits that with reference to the constituent elements in Article 8, those referable to necessity and proportionality are relevant in the instant case. In determining whether there has been interference, the applicant submits that the regulatory framework within which the measure has been established and operates will be assessed by asking questions such as: is the framework procedure sufficient to afford true respect to the interests safeguarded by the Article?; is the decision making process fair in such a way as to respect that right?; has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal?; has that person an opportunity to have such an issue considered against the measure to determine its proportionality? Where any of these requirements are absent, the applicant submits that it may be considered that the safeguards necessarily attendant on Article 8 for the purposes of its vindication have not been satisfied and a finding of violation should be follow.
88. The applicant submits that the suggested procedural safeguard applying is the issuing, by the affected solicitor, of a motion under s.11 and this alone indicates that it is intended to address procedural and factual matters, including the compliance or otherwise of the procedural framework.
89. The applicant submits that the issuing of the s. 10 notice took no account of the fact that:-
- a. that the subject of the notice were the documents of a client;
  - b. the client was not on notice of the decision to issue the notice or of its issue;
  - c. the client had not given an express or implied consent to the issue of the notice;
  - d. the notice followed on complaints from a former solicitor of the client with whom the client had been and was in dispute about fees etc. (in both complaint cases).
  - e. the notice was calculated to advance the interests of that solicitor and not the client;
  - f. the Law Society has no jurisdiction over clients of solicitors or over the property of those clients;
90. The applicant submits that the decision of the Law Society to issue the s. 10 notice is a violation of Article 8 and a breach of s. 3 (1) of the European Convention on Human Rights Act 2003.
91. The applicant submits that client documents are the property of clients and consequently, the respondent's decision was a breach of Article I of Protocol I of the European Convention on Human Rights (as applied by the European Convention on Human Rights Act 2003).

92. In addition, the applicant submits that pursuant to the right to privacy under Article 40.3.1 of the Constitution, any administrative action, even based on a statutory provision, must take into account the constitutional rights of the clients whose documents are the subject of a s. 10 request. The applicant submits that the Law Society failed to do this, evidenced by its failure to make the clients notice parties to the respective requests. The applicant refers to Denham C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 at para.40: -

*"The term "unreasonable" is the key, it is broader and essentially the basis of this type of scrutiny. A decision which interferes with constitutional rights, if it is to be considered reasonable, should be proportionate. If such an approach is not taken then the remedy may not be effective. This is relevant especially when access to the courts has been limited by the legislature."*

93. The applicant refers to the judgment of Fennelly J. in the same case: -

*"Most recently, Geoghegan J. , writing for a unanimous Supreme Court in Clinton v. An Bord Pleanála [2007] 4 I.R. 701 at 723, a case concerning [he compulsory acquisition of land said:*

*"It is axiomatic that the making and confirming of a compulsory purchase order (CPO) to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (East Donegal Co-Operative v. The Attorney General [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense.*  
"

94. The applicant submits that these authorities show that the respondent, in taking no account of the constitutional and Convention rights to privacy and property of the respective clients, breached those rights, and the decision to issue the s. 10 notice was not in accordance with the Constitution or Convention.

95. The applicant submits that the European Convention on Human Rights Act 2003 requires the courts shall "*in so far as is possible*" interpret and apply any legislative measure or rule of law in a manner compatible with the State's obligations under the Convention provisions. The applicant refers to Barrett J. in *CRH v. ICPC* [2016] IEHC 162 at p.27: -

*"the Court needs to be careful not to be induced into arriving at a Convention inspired interpretation of legislation that is contra legem, i.e. an interpretation that would contradict or defy what the Act of 2014 provides"*

96. The applicant submits that the Charter of Fundamental Rights of the EU, although similar in content to the ECHR, places a more onerous duty on domestic courts as there is no "in so far as is possible" proviso. The applicant submits, therefore, that where a domestic law is incapable of being interpreted in line with the Charter, it must be disapplied. The applicant submits that accordingly, Barrett J.'s concerns in respect of a contra legem application of the ECHR are not applicable to Charter rights. The applicant further submits that this requirement to the Charter applies, in principle at least, even to provisions of Bunreacht na h Eireann, referring to *Melk & Abdeli* C-188/10 & C-189/10 in support of this: -

*"The Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means*

97. The applicant submits that the Charter is an instrument of EU law, and therefore does not apply in all domestic cases, only those which are within the scope of EU law. The applicant submits that the Court of Justice has interpreted this scope more widely than simply the implementation of EU legislation; that it is settled jurisprudent that a member state is "implementing" EU law even where it is availing of an exception provided for by EU law (*Familiapress* C-368/95, *ERT* C-260/89). The applicant submits that it follows that even when departing from EU law (providing such departure is mandated by EU law) a member state must respect the requirements of such general principles of EU law and in particular the Charter, citing *Pfleger* C390/12 as an example: -

*"The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded, as the Advocate General states in point 46 of her Opinion, as 'implementing Union law' within the meaning of Article 51 (1) of the Charter."*

98. The applicant submits that although s. 10 is not an implementation of EU law in the sense that it does not owe its existence to a "parent" EU directive, it is nonetheless within the scope of EU law insofar as it derogates from a Directive of the EU, namely 95/46/EC on Data Protection. Article 13 of the Directive provides: -

*"1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:*

- (a) national security;*
- (b) defence;*
- (c) public security;*

- (d) *the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;*
- (e) *an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;*
- (f) *a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);*
- (g) *the protection of the data subject or of the rights and freedoms of others. "*

99. Article 6(1) provides as follows:

"Member States shall provide that personal data must be:

- a. *Processed fairly and lawfully;*
- b. *collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provided appropriate safeguards;*
- c. *adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;*
- d. *accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;*
- e. *kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use. "*

100. The applicant submits that the Court of Justice has held (C 201/14) that (subject to the exceptions permitted under Article 13) all processing of personal data must comply, not only with Article 6 but also with one of the criteria for making data processing legitimate listed in Article 7: -

"Member States shall provide that personal data may be processed only if:

- (a) *the data subject has unambiguously given his consent, or*
- (b) *processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or*

- (c) *processing is necessary for compliance with a legal obligation to which the controller is subject, or*
- (d) *processing is necessary in order to protect the vital interests of the data subject, or*
- (e) *processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed, or*
- (f) *processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1). "*

101. The applicant submits that a solicitor's file is the personal data of a client; the solicitor, in holding the file, is a "*data controller*"; the client is the "*data subject*" and the act of handing over or providing a copy of the file to the Law Society is an act of data processing. The applicant submits that under the terms of the Directive, the transfer of documents envisaged by the s. 10 procedure would not be permitted were it not for the derogations allowed under Article 13.1.
102. The applicant submits that accordingly, s. 10 is measure within the meaning of Article 13.1(d) and is therefore a *Pfleger* implementation of the Directive. The applicant further submits that s. 10 comes within the measures contemplated by Article 7 which provides that Member States shall provide that personal data may be processed only if, inter alia, "*processing is necessary for compliance with a legal obligation to which the controller is subject*".
103. The applicant submits that s. 10 is a clear instance of a legal obligation on a controller (here, Mr. McGarr) to process personal data (his client's file) and that it follows, under the principle outlined above, in *Pfleger* and other cases, that s. 10 comes within the scope of EU law.
104. The applicant submits that this very question came before the Court of Justice in 2014, in *Bara v. Romania* C 201/14 where a domestic legislative measure which allowed the transfer of data between state agencies was challenged. The applicant submits that the Court of Justice had no difficulty in treating the domestic measure as being within the scope of EU law, holding that: -

*"Directive 95/46 must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing"*

105. The applicant submits that the sole distinction between *Bara* and the operation of s. 10 is that while *Bara* applied to the transfer of data between two public bodies, s. 10 involves a

transfer between a private body and a body acting on foot of a statutory power. The applicant submits that the underlying principle is that the mere existence of a statutory requirement cannot suffice to permit the transfer of data without, at the very least, the data subjects having been informed of that transfer or processing.

106. The applicant submits that the Court of Justice might have gone further, the questions submitted to the Court being related solely to the question of informing the data subject prior to processing. Accordingly, the applicant submits that Bara was decided solely on that basis, without regard having been had to the Charter; however, by coming within the scope of EU law, the Romanian law in Bara was clearly within the scope of the Charter (as was repeatedly emphasised in *Pfleger*) and accordingly, it follows that any law which purports to require a processing of data must do so in a manner that respects the Charter.

107. The applicant submits that the EU Charter, unlike the ECHR, contains a standalone right to data protection. At Article 8:-

1. *Everyone has the right to protection of personal data concerning him or her*
2. *Such data must be processed fair for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has [he right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority."*

108. The applicant submits that it is clear that s. 10 purports to require the processing of personal data and that under Bara, any such provision must require that a data subject be informed of that transfer or processing, which s. 10 fails to do. The applicant submits that in addition, s. 10 requires the processing of data which are "excessive in relation to the purposes for which they are collected and/or further processed", as prohibited by Article 6.1 (a) and by doing so infringes the data protection rights under Article 8.

109. The applicant submits that the privacy rights provided for under the Charter largely mirror the ECR rights, with two distinctions. First, there is no discretion available to national courts in applying it. Secondly, member states have no "margin of appreciation" in compliance with its principles. Article 7 of the Charter provides:-

*"Everyone has the right to respect for his or her private and family life, home and communications."*

110. The applicant argues that this almost identically mirrors para.1 of Article 8 of the ECHR which reads:-

1. *Everyone has the right to respect for his private and family life, his home and correspondence."*

111. The applicant submits that given this similarity and the fact that the ECHR already forms a significant part of the "General Principles" of EU law, it is likely that any relevant ECHR case law would be adopted by the Court of Justice in considering an Article 7 question.
112. In considering any legal measure in light of Charter rights, the applicant submits that the Charter requires, at Article 52(1), that: -

*"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".*

113. The applicant submits that the "provided for by law" requirement applies to all Charter rights and can be read in a similar manner to the "in accordance with the law" requirement in respect of interference with Article 8 of the ECHR. The applicant refers to *Sunday Times v. UK* 6538/74 European Court of Human Rights where it was held: -

*"Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law " unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."*

## **6. Insufficiently defined offence**

114. The applicant submits that the infringements of a client's privacy and data protection rights envisaged by s. 10 are insufficiently provided for by law, in that their purpose is the investigation of an insufficiently defined offence. The applicant submits that the definition of "misconduct" in the 1960 Act is inadequate to the requirement of precision in that it merely "includes" within its ambit the listed categories of conduct but does not limit itself to them. The applicant further submits that subsection (d) [actually ("conduct tending to bring the solicitors' profession into disrepute") which the applicant presumes is the subsection under which the Society purports to act in this case is itself insufficiently precise; "disrepute" is no more defined than "misconduct", it may even be less so.
115. The applicant further submits that the Law Society procedures in its investigations failed to remedy this want of precision; the complaints were either vague and unparticularised (Mr. O'Reilly) or unsustainable (Mr. Madden) and in each case the Law Society failed to express to the applicant what it considered was the misconduct it was investigating. The applicant argues that it was not sufficient for the Law Society to send on the unstructured material of the complaining solicitor and that it was confusing in the absence of a statement from the Law Society. In the case of Mr. Madden, Ms. Carmody enclosed a copy of a page from "*A Guide to Good Professional Conduct for Solicitors*". The applicant submits that it is not open to the Society to rely on this as a basis for fulfilment of the

Charter and Convention "provided for by/in accordance with the law" requirements, the guide not being, under even the widest definitions, a law.

116. The applicant points the fact that s. 10(1) explicitly provides that a s. 10 notice may only be issued where it appears to the Society that it is "*necessary*" to do so for the purpose of investigating a complaint. The applicant submits that "*necessity*", particularly when read in light of EU or ECHR law, means that the action in question is something more than merely a desirable or convenient means to the relevant objective. Rather, to show necessity, it must be shown that there was no other means of achieving the objective sought, not merely that there was no other convenient means.
117. The applicant argues that the Society did not limit the documents sought by category but rather made the most extensive demand permitted by the scope of s. 10, and that this would not be permitted in, for example, a discovery request. The applicant further argues that even if a s. 10 notice was necessary (which the applicant denies), the notice went beyond what was necessary and no attempt was made to limit their terms to that which was necessary.
118. The applicant refers *CRH v. Competition and Consumer Protection Commission* where Barrett J. notes, at p.51, that had the Commission harvested a large amount of data, only later sifting through it to determine what was relevant to its investigation and what was not, that it would have acted in contravention of the ECHR Act and of Article 40.3 of the Constitution: -

*"when a warranted search occurs and information happens to be taken by the party doing the search, here the Commission, 10 which it is not entitled by law, and when the answer from the Commission 10 a person who complains that material has been seized that ought never to have been seized is 'We'll have a look at it anyway and get back to you', this Court must admit that it struggles to imagine a greater invasion of privacy in the situation arising*

[...]

*the Commission appears to contend that... it is best placed to determine what material is, to borrow from s. 37(1), 'information which may be required in relation to a matter under investigation.' But that is no answer to the complaint that what the Commission holds in its hands, and wants to see, is material that it ought never to have held and thus has no right to see "*

#### **7. Necessity for S.10 notice**

The applicant submits that the Solicitor's Act clearly grants to the Law Society a number of powers to obtain information from solicitors, that these powers are tiered and that a more invasive procedure should not be used where a less invasive one would suffice. The applicant submits that even if he did not adequately cooperate with the Society, which he denies, neither the s. 10 notice of 16th September, 2015 nor any s.10 notice was necessary.

119. The applicant states that in oral argument counsel for the Society sought to justify the decision to issue a s. 10 notice by alleging that he would not abide by a s. 10A notice. The applicant states that in response, he submits that this can be no means of assessing necessity as a s. 10A notice is enforceable by the same means as a s. 10 notice and that in any choice between tools having similar enforcement procedures, the Society must choose the tool which is less invasive of the client's rights in his file. The applicant submits that by choosing the more invasive of the two procedures, the Society went beyond what was necessary to its purposes.
120. The applicant states that he understood that the Law Society was seeking the client's file and not merely such documents which relate to costs, citing Mr. Carmody's letter of 7th October, 2015 in which she wrote "*I await receipt of your client's file*" and the respondent's outline submissions in support of this understanding. He alleges the Law Society then resiled from that position in oral argument. The applicant submits that this change of position is an acknowledgement that the s. 10 notices as originally formulated went beyond that which was necessary for the investigation of the complaints at hand.
121. The applicant argues that certain privacy, data protection and privilege rights attach to a solicitor's file given that it contains the private and personal information of a client and in the case, as here, of a personal injury plaintiff, the file will include at least one medical report. The applicant submits that the materials come within the definition of sensitive personal data and therefore avail of a higher level of protection under data protection law, although even at the ordinary standard, the obligation that no unnecessary processing occurs applies.
122. Accordingly, the applicant submits that any statutory provision which purports to allow for the infringement of these rights must be applied sparingly in order to ensure that the rights of innocent third parties are not infringed beyond what is absolutely necessary in pursuit of the relevant objective and that further, that objective must be a legitimate one and the infringement of the rights must be proportionate to the relevant objective. The applicant identifies that the aim here appears to be to aid a solicitor in the recovery of his fees.
123. The applicant questions whether this is a legitimate aim which would justify the infringement of a client's privacy and data protection rights. He expresses his doubt that the power to demand access to a file is necessary or proportionate to the aim. He submits that necessity and proportionality imply a minimalist approach to the infringement of rights; that an infringement which is merely convenient may not be necessary and where any other means to an objective is available, even where it is less convenient, it must be preferred over a means which involves infringement of a fundamental right. The applicant submits that, at the very least, a balancing exercise is required prior to choosing a means to the relevant end and it is not clear if this ever took place. The applicant alleges that Ms. Carmody states that the client has no rights which he says is an extraordinary position for the respondent to take in respect of the clients of its members and that while

the Society may now seek to modify it, it is clear that it was the Society's position both at the time of the issuing of the s. 10 notices and afterwards.

124. The applicant submits that any ruling in which a domestic court declines to apply EU law, or in which a litigant is placed at a disadvantage or subjected to a costs penalty to which he would not be subjected had he relied solely on domestic law must offend against both the principle of procedural autonomy and the principle of equivalence and effectiveness.

#### **Submissions on behalf of the respondent**

125. The respondent submits that the applicant must show that the decision to issue a s. 10 notice was "*vitiated by a serious and significant error or a series of such errors*" per *Finnegan P. in Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IESC 323.
126. The respondent submits that this test was endorsed by the High Court under s.11(1) of the Act of 1994 in *Fitzgibbon v. Law Society* in the context of applications seeking to rescind or vary determinations by the Society of inadequate professional services and excessive fees under s.8 and s.9 of the Act of 1994 respectively. The decision of the High Court was affirmed by the Supreme Court (*Fitzgibbon v. Law Society* [2014] IESC 48). Denham C.J. (at pp.5-7) reviewed the authorities including *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* in which

Finnegan P. held that:-

*"To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C,J. in Orange v. The Director of Telecommunication Regulation & Anor..."*

127. In his decision in *Fitzgibbon*, Clarke J. provided general observations on different forms of appeals. In the case of an appeal against error he observed that:-

*"6.1 The critical distinction between an appeal against error and either a de novo appeal or an appeal on the record is that the appellate body does not have regard to the determination of the first instance body and must, in order for (the appeal to be allowed, be satisfied that the first instance body was in some way in error.*

*6.2 The default position is, therefore, that appellate body considers the record of the proceedings at first instance (and in the absence of any rules permitting further evidence or materials to be produced only that record) and considers whether the first instance body came to a correct or sustainable decision on the basis of that record. So far as facts involving an assessment of credibility of witnesses are concerned, then the role of the appellate body is to decide whether there was a sufficient basis disclosed on the record for such findings of fact ..*

*6.3 In addition, and depending on the level of expertise in the area concerned which is brought to bear by the first instance body (and indeed having regard to the extent to which the appellate body may itself have expertise), the appellate body may accord appropriate weight to any expert determinations of the first instance body."*

128. McKechnie J. also dismissed the appeal against the High Court ruling but reserved his position as to whether the Ulster Bank test was the appropriate test in respect of the statutory appeals in question. He was further of the view that the concept of affording curial deference to statutory decision makers might on occasion require an inquiry into the extent of deference to be given (to ascertain the existence and quality of the expertise). He was however, as with the other judges of the Supreme Court, satisfied that the Complaints and Client Relation Committee which had made the determinations in question was due deference (which he found to be "a degree of appreciation").
129. The respondent distinguishes this application from Fitzgibbon, saying that no decision or determination has yet been made on the complaint by the Complaints and Client Relations Committee; the matter is still at initial investigatory stages by a solicitor in the Complaints and Clients Section. The respondent submits that the investigation is at an early information gathering stage without any adverse finding or determination having been reached and that the Court consider only whether it was correct or sustainable for the respondent to decide to issue a s. 10 notice; in particular that it ought not to vary or rescind the notice in the absence of a finding that there was a serious and significant error sufficient to vitiate the decision to issue a s. 10 notice.
130. The respondent submits that it is unnecessary and inappropriate for the Court to seek to come to a conclusion on the substantive merits of the complaint by Mr. O'Reilly, no decision or determination having been arrived at by the Society, provided that it is satisfied that there was a sufficient basis from the information available to it for the Society to take initial steps to investigate the matter. The respondent further submits that there was clearly sufficient material in the complaint received for the Society to form the view that such initial steps were required.
131. The respondent submits that its decision to issue a s. 10 notice was properly and correctly made and that the applicant will be unable to show that the respondent acted in error, to the standard posited in Fitzgibbon or at all.
132. The respondent notes that the applicant has not set out the grounds of his application in his notice of motion as required by O.53 r. 16 of the Rules of the Superior Courts:
- "(g) The evidence upon the hearing of any such appeal or application shall be given by affidavit, except insofar as the President may direct oral evidence to be given. "*
- but responds to grounds raised in the applicant's affidavit of 6th October, 2015.
133. The respondent submits that the applicant's assertion that the complaint against him was vague or not expressed with sufficient precision to enable him to respond cannot be

reasonably maintained. The respondent avers that the applicant was able to identify the complaints in his letter of 2nd October, 2015 and that Mr. O'Reilly made the grounds of his complaint perfectly clear. If there was any doubt, the respondent avers that the letter of 27th August, 2015 specifically particularised the allegation that the applicant was responsible to Lawlor O'Reilly & Co. for the appropriate share of party/party costs and quoted the Society's Guide to Good Professional Conduct.

134. The respondent submits that the applicant's assertion that the Society is not investigating a complaint of misconduct within the meaning of s.8(l) and that therefore the Respondent cannot serve a production notice in relation to something which is not such a complaint" ,cannot be sustained. The respondent submits that the applicant appears to suggest that the complaint was not of misconduct and that he mistakenly and incorrectly refers to s.8(l) which relates to complaints of inadequate professional services.
135. The respondent submits that Mr. O'Reilly was clear that he was making a complaint of misconduct and that the matters raised were clearly sufficient and proper grounds for the Society to conduct an investigation; in circumstances where the applicant refused to provide any substantive response to the complaint, it was necessary to issue a s. 10 notice. The respondent submits that it is patently incorrect to state that this was a complaint under s.8 — which refers to complaints of inadequate professional services. The respondent submits that Mr. O'Reilly evidently was neither a client complaining about the provision of inadequate professional services nor someone complaining on behalf of a client about professional services.
136. In response to the applicant's allegation that the s.10 notice imposed an impermissible deadline as it demanded compliance within 10 days in circumstances where s. 11 permits 21 days to apply to court to vary or withdraw the notice, the respondent submits that there is no merit to this ground nor error on the part of the Society. If the Court was to find that it did amount to an error, the respondent submits that it could not reasonably be suggested to be a serious or significant error sufficient to vitiate the issuing of the notice and must be regarded as de minimis. The respondent submits that the Society did not purport to curtail the applicant's right to apply to court and did not make any suggestion that it would apply to court seeking to enforce the order until 23rd October, 2015, long after the expiry of 21 days.
137. In relation to the applicant's contention that all the evidence which may be required to support and investigate the complaint must be in the possession of Mr. O'Reilly and available to the Society upon requesting same, the respondent submits that it is not clear how this assertion can be made in circumstances where the complaint made is in relation to the recovery of party/party costs (which Mr. O'Reilly would not have been involved in) and an alleged failure on the part of the applicant to account to Mr. O'Reilly for those costs and further is made in relation to an alleged breach on the part of the applicant of his undertaking and his misleading the applicant in relation to the recovery of costs. The respondent submits that these are matters which could only be responded to and addressed by the applicant.

138. The respondent responds to the applicant's contention that the production notice *"impermissibly fails to address or provide for the rights of J H by omitting to make him a notice party thereto"*, stating that Mr. O'Reilly's complaint was very clearly related to the conduct of the applicant. Furthermore, the respondent states that no error whatsoever can be identified by the applicant in the alleged failure of the Society to join Mr. H to the notice - the Society having no statutory remit whatsoever to investigate complaints by solicitors against clients (if one had been made, which it was not).
139. The respondent submits that privacy rights are not absolute and here any breach is proportionate in the regulation of an important public interest, analogous to the inspection of solicitors' accounts or medical institutions.
140. The respondent notes that although it is not specifically enumerated as one of the grounds upon which relief is sought, the applicant also appears to rely on the fact that the Society did not provide him with information sought by him on foot of his "Notice Seeking Information" purportedly pursuant to the provisions of Directive 2012/13/EU on the right to information in criminal proceedings.
141. The respondent submits that the Directive has not yet been transposed into Irish law. It further submits that even if the Directive does have direct effect, its application, as is apparent from the title and provisions of the Directive, is clearly restricted to criminal proceedings and there is no provision for its application to regulatory and disciplinary proceedings, and less still to the initial investigatory stage of regulatory proceedings. The respondent refers to Article 1 which expressly states that the Directive lays down rules concerning the right to information of suspects or accused persons *"relating to their rights in criminal proceedings and to the accusation against them"*. Article 2 provides that the Directive applies from the time a person is *"suspected or accused of having committed a criminal offence"*. The respondent submits that even where an authority in a member state which is not a court can impose a sanction for a minor offence, the Directive does not apply to that authority but to proceedings before a court following an appeal of such sanction (Article 2(2)). If the applicant were to be exposed to criminal proceedings, in respect of an offence under s. 11(5) of the Act of 1994, proceedings would be instituted in the District Court and it would be at that stage (in the context of a criminal prosecution) that the possibility of invoking the Directive, if applicable, might arise.
142. The respondent submits that in any event there is no basis or reality to the applicant's suggestion that he required more information from the Society as to the nature and detail of the complaint or the investigation. The respondent states that the applicant had been fully apprised of all information received by the Society in respect of the complaint and all steps taken by the Society in its investigation. To the extent therefore that the applicant may seek to suggest that there had been some absence of fairness by the Society in its investigation, which had a bearing or could possibly have had any bearing on his decision not to comply with the s. 10 notice, the respondent submits that there is no reasonable basis for such argument.

143. The respondent refers to *O'Sullivan v. Law Society* [2012] IESC 21, where the Supreme Court in judicial review proceedings, considered and did not uphold various arguments as to the absence of fair procedures in the Society's investigation of a complaint of misconduct, ultimately, referred for inquiry before the Solicitors Disciplinary Tribunal, the Society having formed the view that there was a prima facie case of misconduct. The respondent refers to the observations of McKechnie J, at p.43 following a detailed review of authorities: -

*"74 ... Having considered these and other authorities, what can be said, at least with some confidence, is that when determining if a right to fair procedures exists and (if so) its scope, whether within a process which may have no direct legal effect or one which is multi-tiered with some effect, a court is not bound by any rigid set of rules but rather must apply fairness to an extent which is both appropriate and responsive, to the individual occasion."*

144. The respondent submits that the applicant was properly and fairly treated as appropriate to the very initial stages which the investigation was at, and should the investigation proceed to a stage where the Complaints and Client Relations Committee might exercise further powers available to the Society, he will have the fair procedures and protections afforded him as are necessary, to ensure that the investigation continues to remain fair. The respondent further submits that to impose a burden on the Society to respond to the minutely detailed "*Notice for Information*" as served by the applicant in respect of the complaints herein and in the form and manner specified would impose an impossibly onerous burden on the Society in the discharge of its statutory functions to investigate complaints and, more importantly, is neither required by law nor necessitated by the requirements of fair procedures.

145. The respondent submits that the applicant's very belated substantive response to the complaint, just over a week prior to the hearing date herein, without any explanation or acknowledgement of the delay, clearly underlines that the applicant did understand and did have sufficient information available to him to provide such a response, contrary to his previous assertions. The respondent submits that that it also clearly demonstrates as contended by Society, that the proceedings issued by the applicant seeking the variation or withdrawal of the s. 10 notice were without merit and are purely for the purpose of delay. The respondent submits that although this response has enabled the Society to progress the investigation, it does not detract from the fact that the s. 10 notice was properly and correctly issued due to the lack of engagement by the applicant.

146. The respondent submits that to allow the applicant avoid compliance with the s.10 notice more than six months later would amount to a clear abuse of s. 11.

147. The respondent submits that the Court should dismiss the applicant's application. Furthermore, in circumstances where the Society cannot yet say, contrary to what the applicant asserts following his inordinately delayed response, that it will not require the production of the documents, the Society seeks an order requiring the production of the documents sought.

### **Decision of the court**

148. At all material times, the respondent Law Society, was the body statutorily charged with the investigation and where appropriate the prosecution of complaints of misconduct made against solicitors. s. 14 A of the Solicitors Amendment Act, as inserted by s. 40 of the Civil Law (Miscellaneous) Act 2008 provides: -

*“For the avoidance of doubt it is hereby declared that the power of the Society to investigate alleged misconduct by a solicitor may be exercised whether or not the Society receive a complaint in relation to the solicitor”.*

149. The definition of misconduct provided for in the Solicitors (Amendment) Act 2002 includes at s. 7 (e) *“any other conduct tending to bring the solicitors' profession into disrepute”.*

150. The respondents (Complaints about Solicitors) information booklet describes misconduct in this context as: -

*“Misconduct is defined in the Solicitors Acts. Examples of misconduct include conflict of interest, breach of an undertaking and failure to communicate”.*

151. As we have seen the Law Society received two complaints of misconduct against Mr. McGarr made by two separate solicitors. Both complaints relate to a failure to properly account for fees potentially recovered by Mr. McGarr in respect of work done by the two solicitors, on files which had been taken over by Mr. McGarr's office, shortly prior to the settlement of the client's claims.

152. The complaints procedure at the material time was set out in the Law Society's "Resolving complaints" information booklet and it provides in relation to the complaints procedure as follows: -

*“On receipt of a complaint, the Complaints and Client Relations Section copies the letter of complaint to the solicitor involved and asks for his/her views. Where appropriate, this correspondence is copied to the managing partner of the solicitor's firm. If you receive a letter from the Complaints and Client Relations Section informing you that you are the subject of a complaint, and asking for your comments, it is in your own interest to respond promptly to the Society's correspondence, as in all likelihood the matter can be resolved to the satisfaction of all concerned at this point. You should be as frank as possible with the Society, and co-operate with the Society's staff to have the matter resolved. If you believe the complaint is totally unfounded, you are fully justified in setting out the reasons why you believe your client has no cause for complaint. Whatever the circumstances, reply as quickly as possible, bearing in mind that delays in responding to the Society's enquiries can exacerbate the position and make it more difficult to effect a resolution.*

*When preparing a response, please remember that the Society will forward a copy to the complainant. In this regard, it is important to note that the Society claims privilege on correspondence relating to complaints. This is to protect both the*

*complainant and the solicitor, so that both parties can communicate freely with the society.*

*The Complaints and Client Relations Committee has made it clear that it will not tolerate any failure by a solicitor to respond to the Society's correspondence. If a solicitor ignores the Society's enquiries, the committee may refer the solicitor to the Disciplinary Tribunal, notwithstanding the fact that it ultimately transpires that the complaint has no substance.*

*If you have any difficulty about responding to a particular complaint, consult a colleague. If you have particularly heavy commitments which make it impossible to reply to the Society within the time requested, telephone the Complaints and Client Relations Section and advise them of your difficulty.*

*If the Society's correspondence is totally ignored, the following can occur:*

- The service of a statutory notice under section 10 of the Solicitors (Amendment) Act, 1994 requiring the production of your file.*
- A direct application to the President of the High Court under section 13 of the Solicitors (Amendment) Act, 2002.*
- A direction to make a contribution towards the costs incurred by the Society as a result of failure to respond to the Society's correspondence.*
- A referral to the Disciplinary Tribunal, which could result in a finding of professional misconduct.*
- The attendance at your office of an authorised person under S.14 of the Solicitors (Amendment) Act 1994".*

153. The one thing a solicitor must do upon receipt of a complaint, is to respond to that complaint. That obligation arises both from the statute and the procedures adopted by the Law Society to give effect to the statute. The response must be in a format that can be published to the complainant. In the initial stages of the investigation of a complaint, the Law Society acts as a 'Go Between' who facilitates the parties in communicating with each other in an environment in which their communications are privileged. The process encourages early resolution of complaints.

154. In purportedly responding to the complaint of Mr. Madden, the applicant sent a letter to the Law Society in early September 2015, which he would not permit them to release to the complainant. In the complaint of Mr. O'Reilly, he contends that the Law Society already had all pertinent information because it was contained in a complaint that he had lodged with the Law Society on behalf of his client, CD against Mr. O'Reilly. In neither case, did he comply with the requirements of the complaints procedure, to respond to the complaint in a format which could be forwarded to the complainant. That he was in a

position to do so, is evidenced by the fact that shortly before the hearing of these applications, he forwarded to the Law Society a detailed response to each complaint.

155. The fundamental error in Mr. McGarr's approach to these complaints is his contention that, what might be described as 'fair trial rights', apply to the Law Society's investigative process. That is simply not so. While an investigation must of course be fair, and must be conducted in accordance with any applicable procedures, it is not constrained by the rules which apply to a trial. If fair trial rights were to be applied to all investigations, then the Gardai could never ask for the assistance of the public in solving crime. We are all aware of the existence of Confidential Garda Helplines. Undoubtedly, much of the information passed to the Gardai on those Helplines would not be admissible in a trial because it is hearsay. However, that hearsay can give rise to enquiries which do produce admissible evidence which can be used at the trial of an accused. 'Fair trial rights' come into play when a person is suspected or accused of an offence. Mr. McGarr does not currently have that status. The process adopted by the Law Society in the initial investigation of a complaint is to forward the complaint and any accompanying correspondence to the person complained of and request a response. The court cannot discern any unfairness in that approach. In the instant cases, two solicitors complained of misconduct by Mr. McGarr in failing to account for costs in one case, and in failing to honour undertakings in another. The complaints called for a response. Under the Law Society procedures Mr. McGarr had a duty and obligation to respond and he declined to do so.
156. On receipt of the complaints from the Law Society, instead of responding, Mr. McGarr adopted the position of an accused. He maintained a failure to understand the complaints being made and challenged their admissibility. He made no response to the substance of either complaint. When pressed in September 2015 for a substantive reply, he served what he termed a 'notice for information' in respect of each complaint. This notice was purportedly issued pursuant to the provisions of Directive 2012/13/EC. This Directive has no application to investigations being conducted by the Law Society into complaints of misconduct, which may or may not, ultimately lead to proceedings before the Complaints and Client Relations Committee of the Law Society. Mr. McGarr is not at present, suspected, accused nor charged with any criminal offence. If, and when he is so suspected, accused or charged with a criminal offence, he will be entitled, if necessary, to avail of the provisions of the Directive. While the court is satisfied that the provisions of the Directive are of direct effect, they have absolutely no application to Mr. McGarr's current position as a person subject to a complaint of misconduct, before the Law Society.
157. The service in each case, of a detailed and complex 'notice for information' which runs to two pages and contains in total, 8 queries with 20 sub-headings, was a powerful indicator of Mr. McGarr's unwillingness to engage with the Law Society's complaint process. Faced with such an approach, and having regard to Mr McGarr's earlier positions of challenging the admissibility of the complaints and professing confusion as to the complaints being made against him, the Complaints and Client Relation Section of the Law Society were perfectly entitled to deploy their statutory powers to obtain the information necessary to allow for an adjudication on the complaints made.

158. The statute confers a number of investigative powers to ensure the cooperation of a solicitor in the investigation of a complaint. In addition to serving a notice under s. 10, these include application to the President of the High Court for an order compelling the solicitor to respond appropriately, within a specified time, to the Law Society's correspondence, or to attend a meeting convened by the Society at which the complaint could be considered; or the attendance at his office of an authorised person appointed pursuant to s. 14 of the Solicitors (Amendment) Act 1994 for the purpose of inspection of specified documents or categories of documents in the possession of, or under the control of the solicitor.
159. The Law Society, in the court's view, used the least invasive of its investigative powers and served in each case, a statutory notice under s. 10 of the Solicitors (Amendment) Act, 1994. The behaviour and attitude of Mr. McGarr in failing to respond to the complaints made, rendered the service of such a notice necessary. In each case the Notice required Mr McGarr to deliver to the Law Society "*all documents in your possession, under your control or within the procurement of you or your firm in connection with the matters relating to the complaint of Thomas Madden/Niall O'Reilly (whether or not they relate also to other matters).*" Neither notice required the production of the relevant clients' file. The conduct complained of was Mr McGarr's. The documents sought were Mr. McGarr's documents in respect of costs claimed and/or received by him. While costs recovered may be the property of the client, the Bill of Costs and any correspondence relating to that Bill, are Mr. McGarr's. Rather than providing a substantive response to the complaints or furnishing documents in relation to the issue of costs, Mr. McGarr brought these two motions pursuant to s. 11(1) of the Solicitors (Amendment) Act 1994.
160. The court finds that the applicant's argument that the S.10 Notice infringes his clients' privacy rights, and that as a minimum, each of them should be made a notice party to the S.10 notice, is contrived and, in common with other arguments identified earlier in this judgment, is based on a false premise. In order to set up the argument, the applicant averred in each case that the documents sought in the S.10 Notice '*must include the file of A.B./CD (which is his property)*'. As the court has already held, that is not so. The documents sought are the applicant's documents in relation to costs, not his clients' files. Unfortunately, the respondent gave some air to this argument by referring in subsequent correspondence and in its affidavits to '*production of the file*'. This may have arisen because the preponderance of complaints coming before the Complaint and Client Relations Section of the Law Society are from solicitor's clients, and indeed the procedure set out at para. 147 above, specifically refers to a complaint from 'your client', so that in those cases where a client is the complainant, it would be normal that a S.10 would seek production of the client's file and, as a consequence, that term may have slipped into the correspondence and the affidavits. Alternatively, the reference to 'file' in the correspondence and affidavits may in fact refer to the applicant's file in relation to his costs. Whatever the explanation, the court is clear that the actual S. 10 notice does not seek production of either client's file. Whether, and to what extent, (if any), the Law Society's statutory power to require the production of client's files, is affected by

European law and in particular GDPR, falls to be decided in an appropriate case. This is not that case. Finally, on this aspect of the application, the court observes that while purportedly protecting his clients' privacy rights, the applicant repeatedly identified and named them throughout his application. It is the court which has decided to anonymise them.

**Conclusion**

161. The Applicant, Mr. McGarr, as a solicitor, has a duty and obligation to respond to complaints sent to him by the Complaint and Client Relations Section of the Law Society. Furthermore, his obligation is, to do so in a format which can be furnished to the complainant. Mr. McGarr failed to do this. Instead, he deployed various misconceived legal stratagems, to avoid his obligation. The court is satisfied, for the reasons set out in this judgment, that his application for an order, directing the respondent to vary or withdraw its S. 10 notice, is also misconceived and must fail.

If necessary, the court will make an order pursuant to S. 11(4) of the Solicitors (Amendment) Act 1994, directing the applicant to produce to any person appointed by the Law Society all documents relating to the complaints under investigation by the Law Society.