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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **16/09/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPEAL UNDER ARTICLE 14A OF THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

BETWEEN:

THE LAW SOCIETY OF NORTHERN IRELAND

Appellant

and

JONATHAN McKEOWN, MAURECE JANE HUTCHINSON, OLIVIA MARIA MEEHAN

Respondents

Mr McLaughlin KC with Mr Egan KC (instructed by Francis Hanna Solicitors) for the Appellant
Mr Hubble KC, Mr O'Donoghue KC, Mr Lyttle KC (instructed by Granite Legal Services) for the Respondents

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KEEGAN LCJ

Introduction

[1] This is an appeal from an order of the Solicitors' Disciplinary Tribunal ("the Tribunal") dated 10 May 2024 by which it (i) dismissed a professional misconduct complaint against the respondents for failing to produce accounting information and documentation, following a request under regulation 28 of the Solicitors' Accounts Regulations 2014 ("SAR 2014") ("the non-production complaint") and (ii) ordered the Law Society of Northern Ireland ("the Society") to pay a contribution of £10,000 towards the respondents' costs ("the costs complaint"). The respondents, Jonathan P McKeown ("R1"), Maurece Jane Hutchinson ("R2") and Olivia Maria Meehan ("R3"), are each a director of the legal practice, JMK Solicitors (NI) Ltd.

[2] The non-production complaint requires consideration of two issues. The first, of which is a question of law, concerns the interpretation of regulation 28 of the SAR 2014. The second question is an issue of fact, which relates to the purpose for which

the Society requested the relevant information and, more specifically, whether that purpose falls within the scope of requests permitted under regulation 28 of the SAR 2014.

[3] It was agreed by the parties that I would deal with the non-production complaint and reserve the costs issue until a later date. This ruling, therefore, deals only with the first issue.

[4] It was also agreed by the parties that the test to be applied in this appeal is that set out by this court in *Murtagh v the Law Society of Northern Ireland* [2024] NICA 49 at paras [21]-[35]. In summary, I found in that case the test to apply is whether the Tribunal is wrong. Furthermore, I found that an appeal proceeds by way of review, rather than rehearing, with an appropriate level of respect for the Tribunal. This does not stop this court from engaging with the merits and reaching its own conclusions. I proceed on that basis.

[5] At the outset it is important to record that all of the issues that arise in this case came after accounting inspections rather than on foot of any specific complaint and that no disciplinary findings have been made against the respondents who remain in good standing. I am also of the firm view that the passage of time and the lengthy correspondence train has not benefited this case.

Factual background

[6] The factual background and the Society's evidence produced below is largely taken from the comprehensive summary provided by the Tribunal on which there is no disagreement between the parties.

[7] The genesis of this dispute stems from a routine inspection of JMK's accounts which took place on 7-11 November 2016. The Society's Compliance Officer, Mr McAlinden, reported payments made to CSML Crash Services Marketing Ltd ("CSML") between May and October 2016. R1 informed Mr McAlinden orally that the payments were for "business process outsourcing," R1 would not provide Mr McAlinden with a copy of the relevant invoice but indicated that the payment was for software, IT and secretarial support.

[8] Thereafter, there is a long chain of correspondence between the parties which I summarise as follows. By letter dated 24 March 2017, the Society sought further information in relation to the payments to CSML. The Society explained that pursuant to regulation 26.2 of SAR 2014, it "may raise queries upon specific transactions they feel warrant further investigation to show how they reflect the financial position of the practice."

[9] Between 28 March–27 October 2017, there was regular correspondence between the parties. R2 initially refused to provide information on the basis that

regulation 26.2, as per the Society's Guidance note, does not require the respondent to furnish financial information which (i) is clearly identifiable; (ii) is not related to client funds; and (iii) is not a distortion of the firm's accounts. The Society replied, reminding the respondents of their obligations pursuant to regulation 28 of SAR 2014 and expressed the view that it was unable to satisfy itself that "all was in order."

[10] Following several reminders from the Society, R2 forwarded a copy of an invoice from CSML on 22 June 2017. The invoice was for the sum of £270,343.50 for "Business Process Outsourcing provided from 1 May 2016 to 31 July 2016." The Society queried what services fell under the remit of "business process outsourcing" and requested copies of all ancillary documentation in relation to those services on 3 July 2017.

[11] On 7 July 2017, the respondents indicated that the services included accounts services, operations management, IT services, marketing and business consultancy services, accommodation, and administrative services. This information was, in the appellant's view, at odds with CSML's Memorandum of Association. The Memorandum states that one of CSML's objectives is to "carry on the business of vehicle management, administration and marketing including consultancy and all related activities." The respondents did not provide any ancillary documentation and instead relied on the Independent Accountants Auditors Report as evidence of the fact that the firm's accounts were accurate. The respondents further expressly stated that they were not legally obliged to provide further documentation to the Society.

[12] By letter dated 30 April 2018, the Society explained that the Accountant's Report was irrelevant. The Society advised that the payments made to CSML appeared to be out of proportion and that the figure of £400,000 requires the most "compelling explanation." The Society expressed its dissatisfaction with the "cursory and general way" in which attempts at explanation were made by the respondents. The Society further noted that a failure to properly address the questions raised by the Society would be considered as a prima facie breach of the SAR 2014. The respondents were asked to provide answers to a series of six specific information requests (each with sub-components), all relating to the relationship between CSML and JMK and the services provided.

[13] R2 replied on 25 May 2018 and commented that the Society's correspondence created the impression that JMK had not cooperated with the Society; this, she averred, was false. R2 expressed a willingness to comply with reasonable requests and with "an objectively fair process." R2 characterised the Society's request as a "fishing expedition" and indicated that unless there was a specific allegation of misconduct, they were not obliged to provide a response. R2 alleged that the Society was operating in an "opaque manner" and asked the Society to identify any allegations and set out the basis for same.

[14] A reply was not received by the respondents until 14 months later, following a second routine accounts inspection on 23 and 24 July 2019. Mr McAlinden's inspection identified a further payment of £575,447.64 to CSML for the period 1 January 2019–30 June 2019.

[15] On 9 January 2020, the Society made a "composite request" for information and documents relating to the 2016 payment and the 2019 payment. The respondents were again informed that the information already provided by them had failed to satisfy their obligations pursuant to regulation 28 of SAR 2014. The Society requested that the respondents provide clear answers to a number of specific questions, together with any ancillary documentation relating thereto, within 21 days. The Society explained that this was a final attempt to allow them to fully explain their business relationship with CSML and were put on notice that in the absence of the required information, the matter would be referred to the Professional Conduct Committee ("PCC") which may result in a referral to the Tribunal.

[16] R2 responded on 23 January 2020 by challenging the vires of regulation 28 of SAR 2014. R2 stated that the Society's interpretation of the relevant regulation was flawed and invited the Society to reconsider their request. R2 also asserted a right, where there is no apparent breach of the 1976 Order or SAR 2014, to request reasons from the Society why the documentation is being sought. JMK further explained that it reserved the right to withhold sensitive commercial documentation and that regulation 28 does not permit the Society to engage in a "fishing expedition." R2 asked the Society to set out precisely the basis for the Society's suspicions regarding the conduct of the firm.

[17] Due to the COVID-19 pandemic there was a delay of 12 months before a reply from the Society was received. The pandemic resulted in the furlough of some professional and administrative staff which meant that some regulatory investigations were held in abeyance. This was relayed to the respondent by letter of 18 February 2021. The Society also revealed, in that letter, that it had raised similar enquiries across the profession in relation to commercial arrangements and potential breaches of Article 28 of the Solicitors (Northern Ireland) Order 1976 ("the 1976 Order"). (Article 28 of the 1976 Order, not to be confused with regulation 28 of SAR 2014, relates to the criminal offence of sharing fees with an unqualified person). JMK did not provide the requested information but responded by letter on 16 March 2021 stating that there had been no failure to cooperate and no breach of regulation 28 of SAR 2014 or Article 28 of the 1976 Order.

[18] On 26 April 2021, the Society highlighted that they had been writing to the respondents since 24 March 2017 seeking copy documentation regarding office payments to CSML. The Society confirmed that the firm's continued failure to respond in full and provide the documentation sought is a breach of regulation 28 of SAR and a failure to cooperate with the Society in the exercise of its regulatory

function. The respondents were informed that in the absence of a substantive response within 21 days, the matter would be forwarded to the PCC with a recommendation of referral to the Tribunal.

[19] R2 replied on 13 May 2021 advising that JMK had not delayed in responding and alleged that the entirety of the delay rested with the Society. R2 stated she had offered to meet with the Society Committee in person, but that this was not reciprocated. R2 refused to accept that the Society had the right to demand papers in the absence of setting out precisely what was being alleged against the firm. R2 requested that the Society set out the grounds upon which the request under regulation 28 of SAR 2014 was being made.

[20] On 21 June 2021, the Society advised that the PCC had considered the case, was satisfied that JMK had failed to address the Society's queries and that it had decided to refer all three solicitors to the Tribunal. It considered that there was prima facie evidence of a breach of SAR 2014 and the 1976 Order.

[21] By letter of 25 June 2021, R2 informed the Society that the respondents were meeting with the Chief Executive of the Society on 1 July 2021 (which was subsequently rearranged to August 2021) and that they reserved their position until after the meeting. The respondents also requested the matter to be settled via mediation.

[22] The Society replied informing that if, after the meeting, the respondents had any pertinent or new information which they believed ought to be considered by the PCC prior to the matter being considered by the Tribunal, it should be furnished to the Society by 3 September 2021. It was explained that in the absence of any new information, the referral would proceed.

[23] On 5 August 2021, R2 sought clarification on the alleged breaches and procedure regarding a review of the decision made. The Society wrote to the respondents on 24 August 2021 confirming that their request for mediation had been denied. (It was considered an inappropriate forum to deal with prima facie regulatory breaches).

[24] The respondents were informed that the precise allegations would be set out in the Society's grounding affidavit which would include breaches of regulation 12 of the Solicitors Practice Regulations 1987 ("SPR"), regulation 28 of SAR 2014 and Article 28 of the 1976 Order.

The original allegations

[25] On 9 November 2021, the Society's grounding affidavit was served upon the respondents. The original allegations were:

- Allegation 1 ("the non-cooperation complaint"): the respondents acted in a manner which contravened regulation 12 of the Solicitors Practice Regulations 1987 (as amended) ("the SPR") by failing to cooperate fully with the Society in the exercise of its regulatory function.

- Allegation 2 ("the referral fees complaint"): there is prima facie evidence of large payments to CSML for the referral of legal services in relation to personal injury claims in contravention of Article 28 of the 1976 Order and regulation 12 of the SPR 1987.

- Allegation 3: there is prima facie evidence of payments to CSML in order to obtain instructions in contravention of regulation 12A of SPR 1987.

- Allegation 4 ("the non-production complaint"): the failure to produce documents and/or information at the request of the Society contrary to regulation 28 of the SAR 2014.

[26] At this point I note that a series of cases were referred to the Tribunal between June 2018 and March 2022 which raised similar issues; these are referred to by the appellant as Cases A, B and C. In all of these cases the complaint related to a suspected breach of regulation 12 of the SPR 1987, based upon a breach of Article 28 1976 Order and regulation 16(4) of the SPR 1987. The first two of these cases, A and B, were handed down before the decision to refer the Society's Grounding Affidavit was filed on 9 November 2021. However, a decision in the third case, C, was delivered in late March 2023. In that case, the Tribunal confirmed that the applicable standard in proceedings of this nature was the criminal burden of proof.

[27] However, following this decision, the Society reviewed its position in respect of the original allegations it advanced in the grounding affidavit at two separate meetings on 22 August and 4 September 2023.

The abuse of process application

[28] On 8 March 2022, the respondents applied to have the application dismissed by way of strike out application on the basis that the proceedings had no real prospect of success; and/or there is no case to answer; and/or the proceedings are an abuse of process. The appellant explains that the proceedings essentially lay dormant for 12 months due to the ongoing parallel proceedings before the Tribunal.

[29] The Tribunal notified the parties on 25 August 2023 that it would hold a review hearing on 15 September 2023 with the intention of considering the respondents' application to strike out and any other interlocutory matters. By letter of 7 September 2023, the first respondent served his skeleton argument and a hearing bundle in support of the strike out application. Later that same day, the

Society sought to (i) withdraw allegations 2 and 3; (ii) permission to amend allegation 1 to assert a breach of regulation 23, as opposed to regulation 12 of the SPR 1987; (iii) that allegation 4 was to be retained.

[30] At the review hearing, the Tribunal directed that the original allegations 2 and 3 be treated as withdrawn subject to the respondents' right to make an application for costs. The Tribunal further indicated that arrangements be made to deal with the application to amend original allegation 1 and the retained non-production complaint by way of "rolled up" hearing on 15 December 2023. Following the final hearing, the Tribunal's decision and costs award were delivered on 10 May 2024.

The decision of the Tribunal

[31] It follows from the foregoing that there were four issues for the Tribunal to consider: (a) the amended non-cooperation complaint; (b) the non-production complaint; (c) the abuse of process application; and (d) costs. The Tribunal dismissed (a), the non-cooperation complaint, on the basis that:

(i) The application to amend is, properly analysed, an application to substitute for a new allegation of non-cooperation, under regulation 23(a) of the SPR 1987.

(ii) This is impermissible because none of the facts underpinning the referral and initial allegation changed since the date of the initial referral which was made two years prior to the scheduled date for the hearing and after the respondents made a strike-out application in March 2022.

(iii) No good reason was advanced as to why the appropriate allegation had not been set out at the outset.

(iv) In any case, the respondents did reply with reasonable expedition to the Society's correspondence, in contrast with the considerable delay on the part of the Society at various junctures.

(v) Although the Society was dissatisfied with the replies received, this does not equate to a failure to reply with reasonable expedition.

[32] The Tribunal further dismissed (b), the non-production complaint, on the following grounds:

(i) The Society accepted that the information which it sought related solely to the office account and was emphatic that there was no concern as to misuse of any client monies.

(ii) The Society's power to obtain information is rooted in Article 33 of the 1976 Order and confined to information relating to client monies.

(iii) The ancillary provisions referred to by the Society do not alter the position that the central focus of the SAR 2014 is on client monies.

(iv) There was nothing about the size of the sum, in the overall financial context of the respondents' company, which appeared, "objectively, to be remarkable."

(v) No explanation for why the payments were considered to be unacceptable or worthy of examination was advanced by the Society.

(vi) The Tribunal considered the Society's contention that information and documentation relating to any aspect of a solicitor's financial affairs could be requested, and must be provided, amounted to "an impermissible extension of the Society's powers."

(vii) The Tribunal also referred to the fact that on 29 October 2012, the Society wrote to the Lord Chief Justice inviting him to approve what became regulation 16(4) of the SPR (the prohibition on referral fees for the provision of legal services relating to personal injury claims). As part of seeking approval, the Society wrote that: "… This is particularly so as the provisions of Article 33 of the Order, in particular … permit the Society only to make Regulations in relation to client monies and limits the Society's ability to investigate office or other accounts from which referral fees might be paid." [emphasis added]. In the Tribunal's view, this "reinforces the conclusion that the Society was not entitled to raise a complaint that the respondents had failed to produce information and documentation unrelated to client monies or monies comprised in controlled trusts."

[33] After setting out its findings, the Tribunal moved to consider issue (c), the abuse of process application. The Tribunal dismissed the application, although it expressed concern that the original allegations 2 and 3 "were only withdrawn a week before the scheduled hearing on 15th September." The Tribunal noted that these allegations formed "the mainstay of the Society's case … with the non-cooperation and non-production complaints ancillary to the 'main' allegations." The Tribunal elaborated that "an abuse of process application will be particularly appropriate where there is a concern that a fair process is impossible so that proceedings should be stayed" – such a concern did not arise on the facts of this case.

[34] Finally, on issue (d), costs, the Tribunal ordered that the Society pay a contribution of £10,000 towards to the respondents' costs but made no order in respect of costs for the Tribunal itself. The following points were advanced in support:

(i) The Tribunal has the power, pursuant to rule 35 of the Solicitors (Disciplinary Proceedings) Rules (Northern Ireland) 1990 to (a) order any party to pay the costs of the other or (b) order a party to make a contribution towards the costs incurred by any other party.

(ii) The applicable principles to be applied in considering an application for costs in professional regulatory context are: (a) there is no presumption that costs simply follow the event and (b) the Tribunal should have regard to the potential chilling effect of an adverse costs order against the Society. This is because there is a public interest in ensuring that the Society effectively carries out its regulatory function.

(iii) These principles do not apply if the proceedings were not reasonably/properly brought and the decision to refer was honest, reasonable and apparently sound.

(iv) The referring of a solicitor to the Tribunal is a matter of serious consequence and before doing so there needed to be "a focused consideration of the misconduct alleged."

(v) Although the Tribunal was critical of "an apparent lack of focused consideration and indeed rigour in the pursuance of the allegations" it declined to conclude that the allegations were improperly or dishonestly advanced by the Society.

(vi) The Tribunal considered that, following the decision of the Tribunal in a different case in March 2023 (Case C), in which it confirmed that the criminal standard of proof was applicable to the Tribunal's proceedings, the Society should have taken the opportunity to reconsider its position in March 2023. The Tribunal noted that a further six months elapsed before it determined that it should withdraw the central/core allegations.

(vii) In light of the Society's "conduct and pursuit of the proceedings in the period March 2023 onwards", the Tribunal considered that it warrants the imposition of a contribution towards costs incurred by the respondent in that period.

Grounds of appeal and relief sought

[35] The appellant's grounds of appeal are encapsulated in the following two grounds:

(a) The Tribunal erred in its interpretation of regulation 28 of SAR 2014. In this respect, the appellant contends that the Tribunal fell into error in four ways by finding that:

(i) Regulation 28 only permits requests by the Society for information and/or documents relating to matters concerning client monies or money comprised in controlled trusts.

(ii) Regulation 28 only permits requests for information and/or documents relating to transactions between client and office accounts only insofar as these might bear upon a possible misuse of client's funds.

(iii) Regulation 28 did not extend to include requests related to transactions within the office account for the purposes of assessing compliance with the 2014 Regulations, including obligations under regulation 26.2 of SAR 2014.

(iv) The appellant's requests fell outside the scope of powers under regulation 28.

(b) The Tribunal erred in its conclusion that the appellant's conduct and pursuit of the proceedings from March 2023 warranted the imposition of a contribution to the respondents' costs, notwithstanding the fact that the Tribunal found there to be no abuse of process on the part of the Society.

[36] Therefore, the appellant is seeking four orders of this court: (i) an order reversing the decision of the Tribunal; (ii) an order determining that each of the respondents have contravened the SAR 2014 by reason of their failure to comply with regulation 28; (iii) an order pursuant to Article 51 of the 1976 Order providing for a sanction against each of the respondents; and (iv) an order reversing the costs decision.

Consideration

[37] The first exercise this court must conduct is one of statutory construction. I therefore start with the preamble to SAR 2014 which states:

> "The Council of the Law Society of Northern Ireland in pursuance of the power conferred on them by Articles 74(1) and 75 of the Solicitors (Northern Ireland) Order 1976 (as amended) … hereby makes under Articles 33, 34 and 35 of the said Order the following Regulations."

[38] Next, I remind myself that the enabling provisions of the 1976 Order form a crucial part of the legislative context. The relevant provisions of the 1976 Order are, for the present purposes, Articles 33, 35 and 75. Article 33(1) provides:

"**Regulations as to keeping of accounts by solicitors**

33.—(1) The Society shall as soon as practicable make regulations—

(a) as to the opening and keeping by solicitors of accounts at banks or with building societies

(i) for clients' money;

(ii) for money comprised in controlled trusts;

(b) as to the keeping by solicitors of accounts containing particulars and information as to money received, held or paid by them—

(i) for or on account of their clients;

(ii) for or on account of any such trust as is mentioned in sub-paragraph (a);

(c) as to the investment in trustee of the money of any such trust as is mentioned in sub-paragraph (a);

(d) empowering the Society to take such action and collect such evidence as may be necessary to enable them to ascertain whether or not the regulations are being complied with."

[39] Article 35 of the 1976 Order deals with accountants' reports. Subsection (1) requires every solicitor to submit to the Society on an annual basis a report signed by an accountant, containing such information as may be prescribed. Finally, Article 75 states:

"75.—(1) Subject to the provisions of this Order, the Society may make regulations—

(a) for the purpose of the due execution of those provisions;

(b) with respect to any matter which under this Order may or is to be prescribed or is to be provided for by regulations;

and regulations may contain such provisions as the Society may think proper for facilitating the due enforcement thereof."

[40] Turning to the core provisions at issue, regulation 26 provides:

> "**Regulation 26 – Accounting records for client accounts, etc.**
>
> Accounting records which must be kept
>
> (26.1) Every solicitor shall at all times keep properly written up such accounts as may be necessary.
>
> (26.1.1) to show all his dealings with client's money received, held or paid by him;
>
> (26.1.2) to show separately in respect of each client all money which is received, held or paid by him on account of that client;
>
> (26.1.3) to distinguish all clients' money received, held or paid by him, from any other money and in relation to each transaction or matter undertaken for any client."

[41] Regulation 26.2 adds that:

> "(26.2) all dealings of the solicitor relating to his practice as a solicitor other than those referred to in paragraph 26.1 shall be recorded in such records as the solicitor shall maintain as are deemed necessary by the Council to show the true financial position of his practice at all times."

[42] Regulation 28 stipulates:

> "**Regulation 28 – Production of records**
>
> (28.1) Any solicitor must … produce to any person appointed by the Society any records, papers, client and controlled trust matter files, financial accounts and other documents, and such other information as may be required by the Society to assess compliance with these Regulations. The Society may also use any report or information obtained by its appointee to raise enquiries as to the solicitor's overall professional conduct."

[43] In addition to the above provisions, the Society has produced, pursuant to its powers under regulation 24 of SAR 2014, a Guidance Note to the SAR 2014. Whilst it does not form part of the regulations, it is instructive to refer to. The Guidance in relation to regulation 26.2 provides:

> "The Society, as a supervisor, pursuant to the Proceeds of Crime Act 2002 and the Anti-Money Laundering Regulations 2007, reserves the right to raise enquiries in relation to any transactions, in particular the receipt of client funds. The Society must always be able to satisfy itself that client monies have not been handled through the office account and that all client transactions have been made through the client account. Handling of unidentified or unidentifiable funds through the office account will give rise to enquiries to allow the Society to satisfy itself that all is in order.
>
> This will arise (but not exclusively) where a solicitor has non-practice dealings conducted through the office account and distorts the office account to such an extent that it cannot be regarded as providing a true position of all matters pertaining to the practice. If, however, non-practice dealings are through a separate ledger (or the solicitor's capital account) then the true position of all matters pertaining to the practice will, in all likelihood, be clearly identifiable."

[44] The Guidance in relation to regulation 28 contain the following narrative:

> "On the authority of *Parry Jones-v-Law Society* (England & Wales) (1968) (CH195) it has been held that the purpose of privilege is to protect a client in his dealings with a solicitor, not to protect the solicitor in his dealings with his regulatory authority.
>
> Solicitors are not, therefore, entitled to refuse on grounds of either confidentiality or privilege, any documentation required by the Society's investigating Accountant. Any refusal may be regarded by the Society as potential grounds for the operation of its statutory powers."

[45] Having identified the relevant provisions above the core question is - Was the information and/or documents requested by the Society permitted by regulation 28 of SAR 2014?

[46] As to the above question, Mr McLaughlin KC argued on behalf of the appellant that, on a straightforward reading of regulations 26 and 28, there has been a failure to comply with the Society's production request. Starting with regulation 26.2, the appellant submits that solicitors have a clear and express obligation under regulation 26.2 of SAR 2014 to keep accounting records which show the true financial position of the firm at all times. Therefore, an issue of compliance arises, the appellant contends, where expenditure was potentially made for a different purpose than that which is recorded on the office accounts.

[47] Furthermore, the point was made by Mr McLaughlin that regulation 28 of SAR 2014 is part and parcel of the Society's regulatory responsibility and public duty to protect clients and also the good standing of the profession. In the appellant's view, regulation 28 necessarily requires a power to inspect accounts, even in the absence of suspicion of wrongdoing. It was the appellant's contention that inaccuracies in JMK's accounting records provided an important indicator of concern which mandated the need for the Society to exercise its broad functions as a regulator in the public interest.

[48] In addition, the appellant argued that the Tribunal's interpretation of Article 33 of the 1976 Order is fundamentally flawed for several reasons. First, it is clearly contrary to the express language of regulation 28 which does not distinguish between client and office accounts. Second, the ancillary parent provisions (namely Articles 33, 34, 35, 74 and 75) indicate that a more expansive interpretation of Regulation 28 is to be preferred. In particular, the appellant identifies Articles 35, 75 and 26 of the 1976 Order as relevant provisions which are not restricted to client monies.

[49] All of the above said, it was accepted by the Society that the scope of the appellant's power under regulation 28 is not unlimited. Thus, in the appellant's view, a production of information request will only fall within the scope of regulation 28, "where it is supported by an accounting rationale, directed towards verifying the accuracy of any accounting records." Applying that principle to this case, Mr McLaughlin submitted that the Society raised legitimate queries in relation to "substantial sums" paid to CSML. Accordingly, he contended that any requirement to hold, and to explain, a valid accounting purpose was discharged. In this regard the appellant provided examples of additional records it suggests ordinarily would be available, such as: a framework contract; monthly service requisitions; communications with CSML about the services; payroll records; personnel records relating to individuals who supplied secretarial services; records relating to consultancy/accounting advice; details of the "accommodation" used etc.

[50] The appellant also took issue with the respondents' assertion that there must be some requirement for suspicion of wrongdoing. In this regard Mr McLaughlin pointed out that such a caveat is not found in the language of regulation 28. Rather

the appellant highlighted that the relevant constraint within regulation 28 goes to the purpose of the request, that is "to assess compliance with the regulations." This would include, for the present purposes, compliance with regulation 26.2 and the obligation to maintain accurate records.

[51] Going one step further, the appellant argued that is also clear from a purposive reading of the SAR 2014, that the Society has a statutory role in the regulation of the profession and that understanding the true financial position of solicitor firms is therefore essential to detect and assess risks to client funds, or the services provided to clients. The appellant makes the additional point that as a supervisory authority under the Anti-Money Laundering and Proceeds of Crime legislation, regulation 28 plays an important role in securing the Society's ability to discharge these statutory obligations.

[52] In its submissions, the Society also raised a 'what-if hypothetical' scenario. It was suggested that where very significant and regular cross border payments are being made by a firm of solicitors to a company, which are not supported by a clear and evidenced commercial purpose – what if the avowed purpose of the payments is not the true one? And, what if the funds emanated from a criminal enterprise…? Whilst the Society makes emphatically clear that it does not hold any such suspicion in this case it is contended that this potential scenario starkly illustrates how public interest objectives may be undermined if regulation 28 is interpreted in a restrictive manner.

[53] The respondents' reply to these arguments which was advanced by Mr Hubble KC (and adopted by Mr O'Donoghue KC and Mr Lyttle KC) is essentially twofold: first, that the appellant's interpretation of regulation 28 is incorrect applying the normal principles of statutory interpretation and second, even if the Society is correct in its interpretation, the burden was on the Society to prove beyond reasonable doubt that the requests were made for a legitimate purpose within SAR 2014, which it failed to do.

[54] Focusing on the interpretation point, the respondents began their submissions with an analysis of Article 33 of the 1976 Order. It was submitted that the express language of the provision makes clear that there is no power to make regulations relating to (i) the maintenance of accounting records which go to the financial position of the firm generally; or (ii) requests going to the accuracy and veracity of the firm's accounting records generally. The focus and limit of the power under Article 33 is, in the respondent's view, client money.

[55] In relation to regulation 26.2, the respondents advanced an alternative interpretation. It was argued that regulation 26, properly construed, reflects the Society's legitimate interest in (a) the protection of client money and (b) patrolling the interaction and boundary between client account and office account. The key phrase pinpointed by the respondents in regulation 26.2 is "as are deemed necessary

by the Council." Therefore, it was argued that all regulation 26.2 does is to enable the Society to identify the type of records to be maintained so that the financial position of the relevant practice is known. It is submitted that this is achieved by regulations 26.3 and 26.4.

[56] It was contended by the respondents that it cannot be correct that under regulation 26.2 every detail as to the general financial position of the solicitor's practice (outside of obligations related to client money) falls within the scope and remit of SAR 2014. It was also noted that such an interpretation would require solicitors to disclose commercially sensitive information such as the firm's business model and modus operandi.

[57] The respondents draw in aid the Guidance to Regulation 26.2, which they submit underlines that the purpose of the regulation is to protect client funds, and allowing the Society to raise enquiries, and inspect records, but only where it is necessary to ensure that all client transactions have been made through the client account. Where that is not the case, or where non-practice matters are dealt with through a separate office ledger, then the argument goes that no cause for enquiry arises.

[58] Turning to regulation 28, the argument was advanced that it only obliges a solicitor to provide records or information as may be required by the Society to assess compliance with the SAR 2014. As above, it was argued that this does not mean that a solicitor is obliged to provide "granular" records or information in respect of matters (i) unrelated to client account, and/or which (ii) are not records mandated by regulation 26. The respondents remind the court that, in this case, the appellants accepted there to be no issue in respect of client funds. Accordingly, the point was made that there can be no breach of regulation 28, where there was no obligation under regulation 26 to provide further documents and/or information. Mr Hubble suggested that, in fact, the "game was given away" by the Society's disclosure that the core claim against JMK concerned alleged, but unevidenced, referral payments for personal injury claims, which were ultimately dropped.

[59] It was further argued that the reliance placed by the appellant on the ancillary provisions of the 1976 Order do not support the Society's interpretation. In particular, it was argued that Article 26 of the 1976 Order is not aimed at the operation of client, let alone office, accounts at all. Rather, Article 26 is concerned with "professional conduct, practice and discipline" and cannot be construed as a catch-all provision entitling the Society to make intrusive demands. Similarly, in relation to Article 35 of the 1976 Order, the respondents point out that the relevant regulations contained within SAR 2014 dealing with the accountants' reports pursuant to Article 35 are, in actual fact, focused on the protection of client money.

[60] The respondents disputed the utility of reference to the Money Laundering Regulations 2007/2017 and the Proceeds of Crime Act 2002. As to this it was

contended that these pieces of legislation are only concerned with client money, and not office money (see regulation 12 of MLR; and sections 327(2), 328(2) and 329(2) of POCA), but they are in any event their own statutory regimes and not engaged in the present case given the Society's acceptance of there being no suspicion of a breach of either regime. Even if there was a "criminal enterprise", as suggested in the hypothetical scenario, the respondents note that a variety of different investigatory powers would arise. In any case, the respondents argue that the provisions of the MLR and the POCA do not alter (i) the express wording of Article 33 of the 1976 Order; (ii) the purpose of SAR 2014, which is to protect client money; and (iii) the ambit of regulations 26.2 and 28 of SAR 2014.

[61] The second limb of the respondents' argument focussed on the purpose of the Society's requests. The respondents underlined two key findings of the Tribunal, that:

> "no explanation for why the payments [to CSML] were considered to be unacceptable or worthy of examination was advanced";
>
> "It is clear that the information and documentation sought by the Society arose in an entirely different context, and not due to any perceived misuse of client funds or any suspicion regarding misuse of clients' funds – namely a desire to know what the business relationship was between the respondents' company and CSML. This is expressly stated in the correspondence directed by the Society to the respondents."

[62] Accordingly, the respondents argued that the Tribunal was correct to assert that the Society failed to demonstrate a valid purpose. The argument was made that the Society's alleged valid purpose was, as identified by the respondents, "to satisfy itself as to compliance by solicitors with their obligation to maintain accounting records which reflect the true financial position of the firm (even if entirely unrelated to client account and monies)." However, for the reasons identified above, the respondents argued that such an alleged purpose falls outside the ambit of the regulations.

[63] Mr Hubble suggested that, reading between the lines, the Society sought to use Regulation 28 impermissibly to seek documentation in relation to a separate speculation as to whether JMK might be paying referral fees to CSML. This it was said was supported by the abandonment of the original allegations 2 and 3. It was suggested that this was in effect proof in the pudding.

[64] The Society's argument that the sum of the payments to CSML was disproportionate is also contra indicated, in the respondent's view, by the finding of

the Tribunal to the effect that, given (i) the size of the firm; (ii) the annual turnover (£8m); and (iii) the administration costs (£5.59m) in 2019, there was nothing remarkable about the payments to CSML over a six month period which are under the spotlight in this case.

[65] The above summary of the respective arguments highlights the choice which is for this court to make as to the interpretation of regulation 26. This was not a situation involving client monies. However, the appellant maintains that the operation of the office account is captured within the regulatory structure which would effectively allow the Society to assess the financial picture of a solicitor at a given time. Thus, the Society contends for a wider interpretation of the regulation and maintains that this is enabled by the parent Act under which the entire scheme is operated. This argument is well motivated because the Society as a regulatory body must be assiduous in ensuring that solicitors comply with all of their professional obligations. However, any complaints must properly fall within the relevant statutory provisions in force as a matter of law. With these considerations in mind, I set out my conclusions as follows.

Conclusion

[66] My first finding is as to the abuse of process application which was raised against the Society for bringing these complaints. In my view the Tribunal was correct to refuse this application. The charges in this case were serious and affect the entire solicitors' profession. The Tribunal found at a preliminary stage that there was cause for inquiry as per article 46(4)(b) of the 1976 Order for good reason. In my view there can be no criticism of the Society for raising the issues it did as any regulator would reasonably raise a query.

[67] Following from this finding I briefly comment on the Society's approach. The letter from Francis Hanna Solicitors of 7 September 2023 states as follows:

> "The Law Society's position in relation to the complaints at Paragraphs 4.2 and 4.23 is entirely without prejudice to any future complaints which it may or may not make to the Tribunal in relation to the facts and matters which are referred to in the Affidavit of Mr Mackell. The Law Society considers that it is appropriate to approach these issues in a sequential fashion, at this time, with the Tribunal addressing the complaints about nonproduction and non-cooperation."

[68] I also note that part of the Society's rationale for withdrawal related to the standard of proof which was set in another case as the criminal standard. I am not being asked to adjudicate on this issue which will likely be for another day given some differences in approach on the applicable standard.

[69] Next is the issue as to whether the Tribunal was correct to refuse an amendment to the charges at para 4.1 in order to substitute a complaint of non-cooperation. I cannot say that the Tribunal was wrong on this. The Tribunal, having been seised of the case was best placed to adjudicate on what was a late application which could have been raised earlier. Also, in truth it seems to me that the complaint is more as to the substance of the correspondence received from the respondents rather than timeliness or non-cooperation which the Tribunal found could not be established. I have some sympathy with the Society on this issue as the correspondence from the respondents and the affidavit of the first respondent is to my mind overly adversarial and pedantic in places and clearly generated more correspondence in reply. However, overall, the Tribunal was within bounds in refusing the amendment for the reasons it gave.

[70] Turning them to the interpretation issue, it is clear to me that what I am dealing with is regulations made pursuant to Part III of the 1976 Order, Articles 33, 34, 35. This part of the1976 Order deals with client monies. The SAR Regulations were not made under Article 26 as the recital clearly states and so despite Mr McLaughlin's erudite and comprehensive submissions this provision simply cannot avail the Society as he suggests. Neither can reliance on other ancillary provisions assist the Society's position. Regulation 26.1 and 26.2 relate to the oversight of client money and cannot to my mind be more widely construed. Similarly, regulation 28 relates to the production of records needed to determine issues as to client money. I do not accept Mr McLaughlin's argument that regulation 28 confers an unconstrained and unconditional power to check the veracity of all transactions. I also record that the respondents referred to commercial sensitivities when it comes to business management and the need for confidentiality. In addition, as was canvassed at the hearing, checks can be made by auditors and HMRC if issues arise, or referrals are made in relation to any alleged malpractice.

[71] Overall, I agree with Mr Hubble that regulation 26 reflects the fact that the Society's legitimate interest is in:

(a) The protection of client money; and

(b) Patrolling the interaction and boundary between client account and office account so as to ensure that there is no danger that client money incorrectly ends up in an office account.

[72] Thus, it follows that regulation 26.2 does not bring within the scope and remit of the SAR 2014 every detail as to the general financial position of the solicitor's practice ie separate from obligations in respect of client money. That is not what regulation 26.2 provides. All regulation 26.2 does is to enable the Society to identify the records to be maintained so that the financial position of the relevant practice (ie the distinction between client and office money) is known. The records in question are then laid down in the remainder of regulation 26.

[73] This interpretation is directly reflected in the Society's own Guidance in relation to regulation 26.2:

> "The Society, as a supervisor, pursuant to the Proceeds of Crime Act 2002 and the Anti-Money Laundering Regulations 2007, reserves the right to raise enquiries in relation to any transactions, in particular the receipt of client funds. The Society must always be able to satisfy itself that client monies have not been handled through the office account and that all client transactions have been made through the client account. Handling of unidentified or unidentifiable funds through the office account will give rise to enquiries to allow the Society to satisfy itself that all is in order.
>
> This will arise (but not exclusively) where a solicitor has non-practice dealings conducted through the office account and distorts the office account to such an extent that it cannot be regarded as providing a true position of all matters pertaining to the practice. If, however, non-practice dealings are through a separate ledger (or the solicitor's capital account) then the true position of all matters pertaining to the practice will, in all likelihood, be clearly identifiable."

[74] The above determines the first question of law in favour of the respondents.

[75] The second question is described as one of fact as to the purpose of the production order. I have set out the competing arguments above. In addition, I note the context of this case particularly that the solicitor's firm at issue was solvent and there was no abuse of client money alleged.

[76] In my view, the true purpose behind the application was probably to try to gather evidence which the Society thought might assist in relation to establishing whether there was an illegal fee sharing arrangement. Thus, upon withdrawal of the related charges it is my view that the Tribunal was legally correct to find that the Society failed to demonstrate a valid purpose within the scope of the regulations. The purpose put forth by the Society, "to satisfy itself as to compliance by solicitors with their obligation to maintain accounting records which reflect the true financial position of the firm (even if entirely unrelated to client account and monies) falls outside the scope of the regulations.

[77] Overall, I find that, it was not procedurally open to the Society to utilise regulation 28 to seek the documentation it sought as when the related charges were

withdrawn the production order could not be made. Importantly, this case has highlighted a potential gap in the Regulations in relation to production of records. This all leads to a rather unsatisfactory conclusion to the case for both parties as some questions remain unanswered, and some issues are unresolved.

[78] Accordingly, this appeal must be dismissed as it cannot be said that the Tribunal was wrong. I will hear the parties as to the outstanding costs issue from the Tribunal and any issue of costs arising on this appeal.