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(subject to editorial corrections)

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

H

Petitioner;

and

W

Respondent.

GILLEN J

Application

[1] This is an application by the petitioner("H") for an order for an injunction restraining the Law Society of Northern Ireland("the Society") from using materials allegedly obtained unlawfully and in breach of the implied undertaking to the court in these matrimonial proceedings in separate and unrelated proceedings before the Solicitors Disciplinary Tribunal (SDT).

Statutory and regulatory background

[2] For ease of reference I shall now set out the relevant extracts from a number of Orders, Regulations and Rules adverted to by the parties during the course of this hearing

[3] *Family Proceedings Rules (Northern Ireland) 1996 Rule 7.12:*

> "7.12.-(1) A party to any family proceedings or his solicitor … may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the court office in those proceedings.
>
> (2) Except as provided by paragraph (1) of this Rule no document filed or lodged in the court office … shall be open to inspection by any person without

the leave of the Master, and no copy of any such document, or an extract from any such document, shall be taken by, or issued to, any person without such leave."

[4] *The Rules of the Court of Judicature at Order 24, Rule 17*:

"Use of documents

17. Any undertaking, whether expressed or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the court, or referred to, in open court, unless the court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs."

I pause to observe that I do not consider this Rule relevant to any of the matter that I have to determine.

[5] *The Solicitors (Northern Ireland) Order 1976*

"25--.A solicitor shall bring to the notice of the Society (having where necessary first obtained his client's consent) any conduct on the part of another solicitor which appears to him to be a breach of these regulations.

Applications and complaints to Tribunal

44.-(1) the following applications and complaints shall be made to and heard by the Tribunal –

…

(e) A complaint by the Society or any other person –

(i) that a solicitor has been guilty of professional misconduct or of other conduct tending to bring the solicitors' profession into disrepute; or

(ii) that a solicitor has contravened a provision of this Order or of any Regulation or Order made thereunder

(including an Order made by or on appeal from the Tribunal), ……."

[6] *Solicitors' Practice Regulations (Northern Ireland) 1987*

Regulation 23(a) provides:

"23 – A solicitor shall -

(a) Reply with reasonable expedition to all letters addressed to him by the Society in relation to his professional conduct or any matter or thing arising out of or in connection with the Society's functions under Legal Aid Advice and Assistance (Northern Ireland) Order 1981."

[7] *Solicitors' Accounts Regulations (Northern Ireland) 1998*

"2(1)(iv) 'Client's money' shall mean money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or in connection with his practice as a solicitor, as agent, bailee, stakeholder, or in any other capacity, including monies received by the solicitor for the disbursement of professional fees and outlays including, without prejudice to the generality of the foregoing, counsel's fees, professional fees and witnesses expenses: provided that the expression 'client's money' shall not include –

(a) Money held or received on account of the trustees of a trust of which the solicitor is a solicitor-trustee; or

(b) Money to which the only person entitled is a solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm.

….

4. There may be paid into a client account –

(a) Trust money;

(b) Such money belonging to the solicitor as may be necessary for the purposes of opening or maintaining the account;

(c) Money to replay any sum which for any reason may have drawn from the account in contravention of paragraph (3) of Regulation 9; and

(d) A cheque or draft received by the solicitor which under paragraph (b) of the Regulation 5 he is entitled to split but which he does not split.

….

(7) No money other than money which under the foregoing Regulations a solicitor is required or permitted to pay into a client account shall be paid into a client account, and it shall be the duty of a solicitor into whose client account any money has been paid in contravention of this Regulation to withdraw the same without delay on discovery."

Background Proceedings

[8] On 16 November 2006 I delivered an anonymised judgment in ancillary relief proceedings between the petitioner and the respondent in this matter. These proceedings were conducted in chambers in accordance with Rule 2.69 of the Family Proceedings Rules (NI) SRO [1996] No 332 ("the 1996 Rules"). In the course of these proceedings H was required to make disclosure of certain accounting records maintained by him as part of his accounts as a practising solicitor. My judgment, found at [2006] NI Fam 15, was unsuccessfully appealed by H.

[9] However the solicitor who had acted for W in these proceedings ("the solicitor") had concerns about certain features of the accounts which had been compulsorily disclosed by H and, in particular, as to whether on their face those accounts had been maintained in compliance with the requirements of the Solicitors Accounts Regulations 1998.The impugned material was part of a questionnaire recorded by H during the disclosure process. Believing that he was professionally and/or legally obliged under the provisions of regulation 25 of the Solicitors

(Northern Ireland) Order 1976 to report the information he had learned to the Society and/or some other agency, he contacted Ms Bryson, Deputy Secretary of the Society with his concerns. Following that meeting he disclosed to her copy documents which detailed the information which had come to light in the earlier proceedings. Ms Bryson confirmed these would be reported to the Society.

[10] Ms Bryson and the solicitor proceeded on the assumption that as the society had an interest in knowing about these matters the solicitor was obliged to furnish the materials under the provisions of Regulation 25.

[11] Once these materials came into the possession of the Society it then raised certain queries with the petitioner to which the replies provided were not regarded by the Society as satisfactory. It then referred the whole matter to the Professional Ethics and Guidance Committee of the Society on 13 April 2007 who, after further correspondence with the petitioner, then referred it to the SDT on 26 July 2007. The charges preferred against the appellant are:

- Pursuant to art.44 (1)(e)(ii) of the Solicitors Order 1976(as amended) that he had contravened the provisions of reg 23(a) of the Solicitors' Practice Regulations 1987 in that he had not replied with reasonable expedition to all letters addressed to him by the Society in relation to his professional conduct.

- Pursuant to art 44 (1)(e)(ii) of the 1976 Order that he had contravened the provisions of reg 2(1)(vi)(b) in that he lodged money into a client account in the name of W in circumstances and for purposes he was not entitled or permitted to do as the said money belonged to him as opposed to a bona fide client for the purposes of a legitimate transaction.

- Pursuant to art 44(1)(e)(1) of the 1976 Order he was guilty of professional misconduct tending to bring the solicitors profession into disrepute in that contrary to reg 12 of the 1987 Regulations he acted in a manner that compromised or impaired or was likely to compromise or impair his integrity and his duty to act in the best interests of his client, the good repute of solicitors in general and his proper standard of work as he operated the said client account for his own purpose and benefit.

[12] The application to the SDT dated 23 April 2008 was grounded upon the materials that had been supplied to the Society by the solicitor and the alleged refusal to answer correspondence. The SDT held an inquiry on 6 and 20 November 2009. H appeared and submitted that there was an implied undertaking on the part of the solicitor that information obtained in the course of the ancillary relief proceedings could not be used without the leave of the court for any other purpose than that of the proceedings in and for which it had been provided. The SDT

refused this submission on 20 November 2009("the decision"). Its reasoning included the following paragraph:

> "Even if the Society did not seek permission to use the `protected material' (which it is agreed it did and still has not) it was open to H at any point from mid 2008 when he received the complaint to go to the High Court to seek a declaration or injunction from the Judge Mr Justice Gillen to restrain the use of the "protected material". He chose not to do so, so far, but can still do so, at any time before the full hearing".

[13] In H v W (2010) NI Fam 12 delivered on 18 June 2010 Weir J declined to retrospectively or otherwise discharge the solicitor and W from their implied undertakings to the court and to the petitioner not to use any documents discovered during the course of the proceedings for a purpose other than the conduct of those proceedings.

[14] Considering the issue was governed by Rule 7-12 of the Family Proceedings Rules (Northern Ireland) 1996, Weir J's decision was made within the narrow confines of the concern expressed by the solicitor that he was obliged to make the disclosure he did to the Society by reason of Regulation 25 of the Solicitors' Practice Regulations. Weir J concluded:

> "It does not seem to me that the strong public interest in encouraging candour and maintaining the confidentiality of materials obtained under compulsion for the purposes of proceedings conducted in chambers can begin to be outweighed as being in the overall public interests by a theoretical but entirely unreal fear that the solicitor and W may be subjected to some court sanction unless they are granted retrospective consent to disclose the materials that they have already made available to the Law Society. "

[15] Subsequent to the decision of Weir J and being dissatisfied with the decision of the SDT to proceed to a full hearing of the complaint, H brought judicial proceedings to challenge the decision of the SDT on the basis that the courts have long recognised that any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the court impliedly undertakes to the court that he will not use them or any information derived from them for a collateral or ulterior purpose without the leave of the court or consent of the party providing such discovery. It was argued that the material was being used

in breach of either the implied undertakings to the High Court that it is not to be used for any ulterior or collateral purpose or alternatively Rule 7.12(2) of the Family Proceedings Rules (Northern Ireland) 1991.

[16] The application for judicial review was dismissed by Treacy J in a judgment delivered on 17 September 2010 (unreported TRE7943). The court found at [25] that the existence of an implied undertaking in ancillary relief proceedings would not restrict a Tribunal enquiring into disciplinary allegations from examining documents that had been improperly obtained. The court also found that the Society and the SDT were not in any event parties bound by any undertaking given by W or her solicitor. Finally Treacy J found at [27] that it was a matter of public interest that the SDT and the Society not be impeded in the exercise of their vital powers of investigation, prosecution and punishment.

[17] It is worthy of note that Weir J did not deem it necessary to enter into the balancing exercise invoked by Treacy J that it is in the public interest, now that the SDT and the Law Society are fixed with knowledge of documents which supports serious disciplinary charges, that they are not impeded in the exercise of their vital powers of investigation, prosecution and, if justified, disciplinary conviction and punishment.

[18] H then lodged a Notice of Appeal with the Court of Appeal dated 29 September 2010 against the decision of Treacy J. That appeal came on for hearing on 11 February 2011. I had before me a transcript of that hearing. In the course of that hearing, the Lord Chief Justice observed that if, as the appellant asserted, the Society was subject to an implied undertaking not to release the documents furnished to or by H before me, then the merits of whether the Society should be released from that undertaking would perhaps be best decided by the trial judge, namely me. That judge would know what the case was about and would recognise the public interest in relation to the family aspect and ancillary relief proceedings in general and also the public interest in relation to the concept of disclosure.

[19] The court raised the possibility that there may well be a difference between the test that a court will impose in relation to the conduct of the SDT and the test which the court would apply in relation to the conduct of the Society in using those documents.

[20] In short the Court of Appeal posed the possibility of the appellant bringing the issues back before me, the original trial judge, to resolve the matter.

[21] Accordingly on 21 December 2011 H made an application to the court for an order for an injunction restraining the Society from using materials obtained unlawfully and in breach of the implied undertaking to the court in the proceedings which had been heard before me in separate and unrelated proceedings before the SDT.

[22] I pause to observe at this stage that the impugned material was part of a questionnaire recorded by H as part of the disclosure process. My understanding of such a questionnaire is that following general discovery, and usually with the approval of the Master, a party may be required to answer questions in a questionnaire dealing with issues that arise out of the discovered documents. Conventionally a Master regards that questionnaire as being part of the disclosure process and once provided to the court, becomes part of the court documents and part of the court file.

[23] I note that the Court of Appeal mentioned en passant that such documentation was perhaps not part of the court file. This was on the basis that H had his own documents and had not sought a copy from the court documents. Hence the court was of the view that neither Order 24 Rule 17 of the Rules of the Court of Judicature nor the provisions of Rule 7-12 of the Family Proceedings Rules applied. I respectfully hesitate to concur with such a conclusion. I consider it is arguable that such documentation is part of the court file and is governed by Family Proceedings Rule 7-12, a view apparently shared by the matrimonial Masters (see above) and by Weir J. However in the event, as it will be clear from my judgment, I consider the tests governing both the disclosure of documents under Rule 7-12 and under the inherent jurisdiction of the court are governed by the same principles.

The issue before me

[24] I therefore must determine if it is appropriate to grant injunctive relief against the Society from using such materials which it is alleged were obtained unlawfully and in breach of the implied undertaking to the court.

Principles governing this matter

[25] The fundamental principle which has long been recognised is that any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the court impliedly undertakes to the court that he will not use them or any information derived from them for a collateral or ulterior purpose without the leave of the court or consent of the party providing discovery. That is such a long established principle that it is unnecessary for me to dilate upon the authorities which have predicated this other than to record that it is found in Matthews and Malek "Disclosure" paragraph 15.01, Riddick v Boardmills Limited [1977] QB 881 at p. 896 and in Harman v Home Office [1982] 2 WLR at p. 341 and 349B.

[26] This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the

relevant person or body obtained the documents or information. Where one party compels another, either by enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosures is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties and the pending litigation between them. It follows that the results of such compulsion should be limited to the purpose for which the order was made, namely the purposes of that litigation before the court between the proposed parties and not for any other litigation or matter or any other collateral purpose.

[27] The obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties. It is an obligation which the court has the right to control and can modify or release a party from. Being an obligation which arises from a legal process, it is within the control of the court and can give rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court. It is thus a formulation of an obligation which has merit and convenience and enables it to be treated flexibly having regard to the circumstances of any particular case.

[28] Treating the duty as one which is owed to the court and breach of which is contempt of court also involves the principle that such contempt of court can be restrained by injunction and that any person who knowingly aids a contempt or does acts which are inconsistent with the undertaking is himself in contempt and liable to sanctions (see Prudential Assurance Company v Fountain Page Limited [1991] 1 WLR 756 at pages 764/765 and Distillers Co. (Biochemicals) Ltd v Times Newspapers Limited [1975] QB 613).

[29] This principle carries a particular resonance in matrimonial and family proceedings. The public interest demands that in proceedings for ancillary relief the parties should feel free to make full and frank disclosure of the resources and thus often of aspects of their financial history. Candour is imperative if justice is to be done.

[30] Accordingly in my view Rule 7.12 of the Family Proceedings (Northern Ireland) Rules 1996 translates into regulatory form a principle that is long established under the inherent jurisdiction of the court. Mr McGleenan QC, who appeared on behalf of the petitioner, correctly drew my attention to the fact that the disclosure process in these matrimonial proceedings took place in the course of in-camera ancillary relief proceedings. No question of the material having been read out in a public forum consequently arose and hence Order 24 r 17 is irrelevant.

[31] I am satisfied that this general rule must be properly extended to include any person into whose hands the documents have come unless that was directly connected with the action in which they are produced. Clear authority for that

proposition is found in Distillers v Times Newspapers Limited [1975] 1 All ER at p. 48 where Talbot J said:

> "Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced."

[32] Since the rationale is based on the need to do justice it is unsurprising therefore to find that exceptions to the principle may arise where there is a clear public interest in favour of disclosure overriding the public interest in preserving the confidentiality of documents disclosed on discovery.

[33] Two authorities make the basis of that exception clear. First, Rank Film Distributors Ltd v Video Information Centre [1982] AC 380. In that case the plaintiffs, who were owners of the copyright and of some films, obtained Anton Piller Orders against the defendants on the basis of evidence that the latter were making and selling video copies of the films. The order also required the defendants to give discovery of relevant documents and to answer interrogatories relating to the supply and sale of infringing copies. The House of Lords held that the defendants were entitled to rely on the privilege against self-incrimination by discovery or by answering interrogatories since, if they complied with the orders of that nature, there was in the circumstances a real and appreciable risk of criminal proceedings for conspiracy to defraud being taken against them. Lord Fraser of Tullybelton stated at pp. 446-447:

> "At one stage, the argument seemed to depend on the possibility that the court which ordered the discovery might place an express restriction on the use of any information disclosed. In my opinion, any argument on that basis must be rejected. A restriction by the court making the order would no doubt, be effective to bind the party who obtained the order, but it can hardly be suggested that it would be effective to prevent a prosecutor in the public interests from using … or admitting the information in evidence at a trial. All evidence which is relevant is prima facie admissible in a criminal trial, although the trial judge has a discretion to exclude evidence which, though admissible, has been obtained by unfair means from the accused after commission of the offence."

[34] The judge, dealing with the principle mentioned above, went on to say:

> "The principle is, that information is not to be used by the party who gets discovery for purposes other than that for which production was ordered. But the case of Riddick has nothing to do with the use of information for prosecution in the public interest. On the contrary, both Denning MR … and Stephenson LJ (in Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133) referred with approval to the observations of Talbot J in (the Distillers case) recognising that there might be a public interest in favour of disclosure which would override the public interest in the administration of justice which goes to preserve the confidentiality that is clearly correct. If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there will be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had obtained first leave from the court which ordered that the interrogatories, and probably without such leave."

[35] Secondly in Attorney General for Gibraltar v May and Others [1999] 1 WLR 998 the court cited with approval the comments of Lord Fraser in the Rank case. However in circumstances where the Attorney General for Gibraltar had obtained a Mareva injunction to prevent the first defendant and members of his family from disposing of certain assets in the jurisdiction and where the defendant had sworn an affidavit of assets, the court held that the Attorney General was bound by the implied undertaking given in the Mareva proceedings and required the leave of the court to depart from it. Such leave was granted for the purpose of criminal proceedings and its use as evidence for the prosecution at the defendant's trial in Gibraltar. The court recognised that the trial judge in Gibraltar would have full power to exclude the evidence covered by the undertaking in the event of unfairness.

[36] It thus emerges that there is clearly a balancing exercise to be made by a judge in deciding whether to release a party from his implied undertaking when he recognises that there might be a public interest in favour of disclosure potentially overriding the public interest in the administration of justice which preserves the confidentiality of documents disclosed on discovery.

[37] Mr McGleenan helpfully drew my attention to S v S [1997] 2 FLR 774 where precisely that balancing exercise was carried out. In financial relief proceedings following divorce the judge observed that the husband had evaded income and capital taxation. The wife's brother had obtained a copy of the judgment and sent it to the Inland Revenue. The Inland Revenue, accepting that the possession of the transcript was irregular, applied to keep the transcript and also sought leave to inspect affidavits and documents produced at the substantive hearing and to bespeak a transcript of the oral evidence.

[38] At page 777, Wilson J said:

> "It is greatly in the public interest that all tax due should be paid and that in serious cases, pour encourager les autres, evaders of tax should be convicted and sentenced. It feels unseemly that a judge to whose notice tax evasion is brought should turn a blind eye to it by not causing it to be reported to the Revenue. In one sense that would almost cheapen the law. On the other hand it is greatly in the public interest that in proceedings for ancillary relief the parties should make full and frank disclosure of the resources and thus of aspects of their financial history. Were it to be understood that candour would be likely to lead – in all but very rare cases – to exposure of under declarations to the Revenue, the pressure wrongfully to dissemble within the proceedings might be irresistible to a far bigger congregation of litigants than is typified by the husband in these proceedings."

The applicant's case

[39] Mr McGleenan relied on the circumstances of the finding of Wilson J in S v S. He emphasised in particular the need to consider this application within the paradigm of family and matrimonial law where the premium placed on the concepts of confidentiality and candour is crucial. It was his argument that Treacy J had given too little regard to this contextual factor.

[40] Counsel submitted that both the Society (which he contended was bound by the implied undertaking) and the solicitor had without the leave of the court made improper use of these documents thus breaching the statutory provision in the Family Proceedings Rules.

[41] Counsel contended that the attempt to obtain retrospective authority for the breach had been rejected by Weir J when he refused to grant leave to Mr Campbell

to release these documents and that in the event the decision of Treacy J was in conflict with that of Weir J. Counsel submitted that I should follow the line of reasoning of Weir J and accede to the present application against the Society.

[42] Mr McGleenan argued that no viable comparison could be made between the vexatious use of discovery materials in the present case and the exceptionality rule which permits such use in serious criminal proceedings. The exceptions in Rank and May related to the prosecutorial function in respect of serious criminal offences which contrasted with the disciplinary process in this case on charges which he contended were in parts incoherent and in any event could not be characterised as serious disciplinary charges given his client's contention that the Law Society and the solicitor at all material times were aware that the impugned account which had been opened, and into which money had been placed, was a genuine account of H's ex-wife. This was wholly remote from the mischief that the legislation governing the disciplinary proceedings had sought to address.

The Society's case

[43] Mr Daly on behalf of the Society contended that whilst the solicitor on behalf of W was subject to the implied undertaking no such undertaking was ever given by the Society. It was not a party to the matrimonial proceedings and was therefore not bound by any implied undertaking.

[44] The fact that documents or evidence may have been made available to the Society in breach of that implied undertaking by W's solicitor would permit the SDT, in the exercise of its discretion, to refuse to consider such documents but that it was entitled, as it did, to balance the competing public interest and decide to use them. Treacy J had refused to strike down the decision to do that.

[45] He argued that the Society had come into possession of these documents and in its prosecutorial role had laid them before the SDT who was charged with the function of enquiring into disciplinary allegations. In terms the Society was a prosecuting authority who had not been involved in the original case. He invoked the conclusion of Treacy J that it was therefore not bound by the implied undertaking.

[46] Mr Daly asserted that it is a serious matter for a solicitor to lodge money into a client account in circumstances and for purposes that he was not entitled or permitted to do merely on the ground that the money belonged to him. Hence the charges preferred are serious and prima facie constitute a grave breach of professional conduct. Whether or not those charges are likely to be proven in front of the SDT is not for this court to determine. If it turns out that the account belonged to his former wife and was a bona fide account, then that is something which the SDT will take into account in determining the case.

Conclusions

[47] Applying the principles which I have set out, I have come to the following conclusions in this case. First, I am satisfied that the material in issue, namely the questionnaire documents, come within the principles set out in paragraph [25]et seq above. Whether they come within the ambit of rule 7-12 of the Family Proceedings Rules (NI) 1996 or the inherent jurisdiction of this court has no effect on the principle that these documents enjoyed protection from disclosure outside the relevant litigation unless leave to do so was granted by the court. Clearly the solicitor on behalf of W fell within that principle and Weir J refused to release him from his undertaking.

[48] In my view there is a distinction to be drawn between the role of the Society in this matter and that of the SDT. I consider that the Society did come into possession of these documents, at least in the early stages, at a time when it must have been aware that the solicitor was under an implied undertaking not to disclose such material without leave of the court. At that stage I consider the Society came within the ambit of that category of persons described by Talbot J in the Distillers case (see para [31] above) as "persons into whose hands they come and whose use of such documentation is prevented without the leave of the court". It may well be that the Society eventually became a prosecutor in this matter before the SDT, but in the early stages when Ms Bryson received these documents, she was either simply a person in whom the solicitor was confiding or at most a potential investigator. I am satisfied at that stage at least the Society ought to have recognised the strength of the implied undertaking and to have sought the permission of the court to make further use of these documents. In this context I observe that in both S v S and May's cases the Inland Revenue and the Attorney General respectively sought the leave of the court.

[49] I consider the role of the SDT to be completely different. Evidence has been led before it as a statutory tribunal charged with the function of enquiring into and determining disciplinary allegations. It has the right to admit this material in evidence even if it was improperly obtained. I agree entirely with Treacy J's conclusion that for the SDT at that stage to close its eyes to this material is "so clearly inimical to the public interest that it is unsurprising that the authorities do not support such a proposition".

[50] Turning then to the balancing exercise that I must carry out in order to determine if the court should discharge the Society from its implied undertaking (and grant it leave to use the material as it has done) or to grant the injunctive relief sought by the applicant I have come to the conclusion that I should grant such a discharge and refuse the injunctive relief sought by the applicant. Notwithstanding that I consider the Society ought to have sought permission from the court, I am of the opinion that the court would undoubtedly have granted permission to the Society to use this material in its investigatory process and later to use it when it

acted as a prosecutor before the SDT. I share entirely the views of Treacy J that it is in the public interest, and indeed in the interests of transparency and accountability, that solicitors who may have infringed the disciplinary code are fairly and robustly investigated.

[51] The SDT is not only the watchdog of the profession but also of the public at large. Whilst these charges do not amount to criminal matters, breach of the Solicitors' Disciplinary Code is nonetheless potentially a serious matter and one that cannot be lightly dismissed or underestimated. Whether or not there is substance to these charges - or indeed whether or not this evidence should be admitted by the SDT – is entirely a matter for the SDT. It would be quite wrong for this court to second guess the nature of or the weight of the evidence that is to be presented before that tribunal and in particular whether it is likely to be proven or unproven, or if proven, a minor or a weighty matter. That lies entirely in the gift of the SDT. I am satisfied however that the public interest in having such matters determined overrides the public interest in protecting these documents within the terms of the implied undertaking.

[51] I have therefore carried out the same balancing exercise as that carried out by Wilson J in S v S. This is a case which is fact specific and does not in any way influence or determine the outcome of the instant case before me. I cautiously observe that I am unconvinced that the outcome of that case would have been the same today as it was 13 years ago given the current emphasis on transparency and accountability in the legal process and the legal profession.

[52] In all the circumstances, I therefore refuse the injunctive relief sought.