Neutral Citation Number: [2007] IEHC 76

THE HIGH COURT

RECORD NO. 2003/6150P

BETWEEN

CATHERINE MARTIN AND DIARMUID DOORLEY

PLAINTIFFS

AND
THE LEGAL AID BOARD, IRELAND AND
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 23rd February, 2007.

The claim

1. In these proceedings the plaintiffs, who are solicitors employed by the first defendant (the Board), seek the following declaratory reliefs:

> (a) a declaration that the decision of the Board to permit, by itself and/or by its authorised officers, an unfettered right of access to case files is void, ultra vires and in breach of the provisions of the Constitution and the European Convention on Human Rights; and
>
> (b) if necessary, a declaration that s. 32(2) of the Civil Legal Aid Act, 1995 (the Act of 1995) is invalid and repugnant having regard to the provisions of the Constitution and, in particular, Articles 34, 38 and 40 thereof.

2. The issues in relation to the relief referred to at (a) arise between the plaintiffs and the Board. The issues in relation to the relief referred to at (b) arise between the plaintiffs and the second and third defendants (the State parties). However, the defences of the Board and the State parties overlap to a certain extent.

3. The factual identification of the impugned decision and its content, as pleaded, started with an assertion that on 4th April, 2001 the Board made a formal decision in purported exercise of the powers conferred by s. 32(2) of the Act of 1995 that authorised officers of the Board were entitled to access and to review reports, documents and communications contained in individual case files, notwithstanding that such information would normally attract the protection of solicitor-client confidentiality and/or legal professional privilege, and further decided that the right of access and review was absolute and that the Board did not need the consent of legal aid applicants to gain access to such files. The Board in its defence admitted that on 22nd March, 2001 (not on 4th April, 2001) it had made a decision, *inter alia*, that the process of access to files was to proceed in accordance with arrangements in place since the early 1980s, and that that decision was made in exercise of the powers conferred by s. 32(2). It was also admitted that some, but not all, of the information in the case files might enjoy legal professional privilege or be confidential. It was denied that the effect of the decision was that authorised officers would gain access to case files without the express or implied consent of the clients, or without the clients being aware of that possibility or unlawfully.

4. It was further pleaded by the plaintiffs that in or about June, 2001 the Board together with its authorised officers accessed case files in a number of Law Centres in the State, without prior consent, knowledge or waiver of the applicants for, or persons in receipt of, legal aid. The Board has admitted that such access occurred but has denied that it occurred without such prior consent, knowledge or waiver or, if it did, that such prior consent, knowledge or waiver was required.

5. Having referred to representations made by the first plaintiff and trade unions, acting on behalf of the interests of solicitors employed by the Board to the Board, it was pleaded by the plaintiffs that on 28th April, 2003 the Board decided to reaffirm its earlier decision in relation to entitlement to access case files and to confirm its intention to recommence access to case files as originally planned. This was admitted by the Board in its defence.

6. I have identified the impugned decision by reference to the pleadings primarily because the minutes of the relevant resolutions of the Board of 22nd March, 2001 and 28th April, 2003 were not put in evidence. There was a hiatus between the two decisions during which the parties consulted the Law Society, got legal advice and were in discussions with each other. The decision of the Board which precipitated these proceedings was the decision of 28th April, 2003, which on the pleadings and the evidence I consider to be the impugned decision.

7. These proceedings were initiated by plenary summons which issued on 21st May, 2003. As I understand the position, the Board has, effectively, suspended the implementation of the impugned decision pending the outcome of these proceedings.

What the impugned decision entails

8. Mr. Frank Brady, the Director of Legal Aid with the Board, testified as to how the implementation of the Board's decision would operate in practice. He explained the admission in the Board's defence that the Board's decision of 22nd March, 2001 was that access to case files was to proceed "in accordance with the arrangements in place since the early 1980s" by reference to a document which was put in evidence, which was dated 15th October, 1982, and was described as "Agreed Report of Meetings" on the topic of access to case files between representatives of the then non-statutory Legal Aid Board and representatives of solicitors employed by that board. The document was signed by the Chief Executive and Deputy Chief Executive and by four solicitors. The document recorded that "the following set of suggestions emerged as the basis for resolving the matter". The first three suggestions concerned the manner in which a solicitor might apprise an applicant for legal services that the non-statutory board or a member of staff of thereof might wish to access his file to carry out its functions under the non-statutory Scheme then in force, including explaining that the applicant's acceptance of the entitlement to access was a pre-condition to the granting and continuance of legal services. The fourth suggestion, broadly speaking, concerned a preliminary step to be taken before the initiation of normal disciplinary procedure where, as a result of the examination of a case file, any aspect of the case or of the solicitor's handling of the case was open to question. In relation to that suggestion, it is important to record that there is no industrial relations aspect to this matter. The position of the plaintiffs in these proceedings is that they accept the necessity for an independent review of the performance of the Board's solicitors generally, and, as I understand it, in relation to the handling of individual cases both in the context of the public service Performance Management & Development System and the Board's obligations to the insurer which underwrites the professional indemnity insurance maintained by the Board in respect of the solicitors employed by it. The fifth suggestion concerned accessing a file which contained material of an unusually sensitive nature and envisaged consultation between the solicitor involved and the Chief Executive, following which access would be provided to all or so much of the file as the Chief Executive, or his nominee, considered essential to enable the non-statutory board to discharge its functions and duties under the non-statutory Scheme.

9. Mr. Brady's evidence was that there was agreement between the solicitors and the non-statutory board for access to case files on the basis of those suggestions in 1982 or 1983 and that between then and 1995 or 1996 access to files was implemented in accordance with those arrangements. There was a conflict of evidence on that point, but it is not conflict which I consider it necessary to resolve, because the issues in this case fall to be considered in accordance with the statutory regime now in operation under the Act of 1995.

10. Mr. Brady's evidence was that, if the decision to access the case files was implemented, the approach set out in the document of 15th October, 1982 would be followed and regard would be had of the views of the solicitor in relation to a file which contained material of an unusually sensitive nature. The examination of the files would be carried out by authorised officers, who would constitute a limited number of people with special responsibility, although they would not be qualified solicitors. By way of example, the examinations which were carried out in 2001 were carried out by Mr. Brady and three members of the administrative staff of the Board: an Assistant Principal Officer, a Higher Executive Officer and an Executive Officer.

11. As regards the procedure to be followed, Mr. Brady testified that the managing solicitor of the relevant Law Centre would be contacted, either by telephone or in writing. A date would be agreed for the review at the Law Centre. The authorised officer would ask the solicitor, which I understand to mean the solicitor handling the relevant cases, for the files. Whether the authorised officer would view the files in the presence of the solicitor or in a separate room would be a matter for the solicitor to decide. The authorised officer would take whatever notes he considered necessary in relation to the files under review by using a laptop or otherwise as he saw fit.

12. The Board's position as to the parameters of the review was elicited in cross-examination of Mr. Brady. Its position is that, in principle, an authorised officer would have the right to inspect any document. The Board's position is that no document or category of documents is excluded in principle, whether generated in proceedings which, as a matter of law, are required to be held *in camera* or whether involving highly sensitive material, for example, allegations of child sexual or physical abuse. The entitlement to access includes, in principle, reports directed by the courts to be procured in relation to the welfare of children in family law matters. Mr. Brady acknowledged that the vast majority of documentation on case files would be covered by solicitor-client privilege.

13. The Board's position is that there is a duty on the solicitor to explain at the outset to the applicant the nature of the relationship being entered into and the implications of that relationship, including the Board's entitlement to access case files. Mr. Brady's evidence was that the Board regards the accessing of case files by authorised officers as permissible within the concept of solicitor and client confidentiality, being conducted within the organisation for the purpose of performance of the Board's statutory duties.

Section 32 of the Act of 1995 within the statutory framework

14. For a decade and a half before the enactment of the Act of 1995 the State provided civil legal aid and advice under the non-statutory Scheme to which I have referred earlier. The Act of 1995, as the long title indicates, was enacted to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases. By virtue of s. 3, the Board was established as a statutory corporation. Its functions are set out s. 5, the principal function being –

> "… to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act."

15. The operations of the Board are funded out of a fund established under s. 19 (the Legal Aid Fund), which consists of an annual grant-in-aid out of monies provided by the Oireachtas, contributions made by persons granted legal aid and advice, whom, for the sake of brevity, I will refer to hereafter as "clients", costs recovered in litigation and all other resources of the Board. The Board is obliged to keep accounts, which are audited by the Comptroller and Auditor General (s. 20).

16. Apart from general criteria set out in s. 24, which are based on reasonableness, very precise criteria are prescribed in the Act for eligibility for the grant of legal advice, as defined in s. 25, and legal aid, as defined in s. 27. In broad terms, the distinction is that legal aid means representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board in civil proceedings to which the Act applies, whereas legal advice means oral or written advice in relation to the application of the law of the State outside litigation. Both the grant of legal advice and of legal aid is subject to financial eligibility requirements set out in s. 29 and in regulations made under the Act, namely, Civil Legal Aid Regulations, 1996 (S.I. No. 273 of 1996), (the Regulations) and is also subject to the payment to the Board of a contribution towards the cost of the service, which is determined in accordance with the Regulations.

17. The precision and complexity of the criteria which the Board applies under the Act of 1995 may be illustrated by reference to the criteria for obtaining legal aid as set out in s. 28. The grant of legal aid is subject to a legal aid certificate being granted by the Board in respect of the legal aid sought. Certain types of proceedings are excluded (sub-s. (9)). Apart from compliance with the financial eligibility requirements, sub-s. (2) stipulates that the grant of legal aid is conditional upon the Board forming an opinion on certain matters: that as a matter of law reasonable grounds exist for instituting or defending the relevant proceedings; that the proceedings are the most satisfactory or a more satisfactory means of achieving the desired result; and, save in proceedings concerning the welfare of a child, that the proceedings are reasonably likely to be successful and that, having regard to all of the circumstances, including the probable cost to the Board measured against the likely benefit to accrue, it is reasonable to grant the certificate. Sub-section (6), which as regards legal advice, is mirrored in s. 26(6), provides that the Board may require the client to comply with such requirements as it reasonably considers expedient to assess his continued entitlement to legal aid. Sub-section (7) provides that a Legal Aid Certificate may be revoked by the Board where it considers that it is no longer reasonable to continue it in existence. Section 28 is augmented by the Regulations.

18. The provisions of ss. 24 to 29 inclusive, coupled with the Regulations, justify the generalisation that the Oireachtas has imposed a strict regime in relation to providing and continuing legal advice and legal aid.

19. The Act empowers the Board to provide legal aid and advice through solicitors employed by the Board in Law Centres or it may outsource the provision of the service to a solicitor on a panel (ss. 30 and 31). The expression "solicitor of the Board" is defined in s. 1 of the Act as meaning a solicitor employed by the Board.

20. The provision relied on by the Board as justifying the impugned decision, and the constitutionality of which is alternatively impugned by the plaintiffs, is sub-s. (2) of s. 32. The provision must be read in the context of sub-s. (1) of the same section, which provides as follows:

> "Save as otherwise specifically provided by this Act, the relationship between a solicitor or barrister and an applicant for, or a person in receipt of, legal aid or advice and the rights and privileges arising out of such relationship shall be the same

as the relationship between, and the rights and privileges arising out of the relationship between, a solicitor or barrister and his or her client not being an applicant for, or a person in receipt of, legal aid or advice."

21. Sub-section (2) provides as follows:

> "Notwithstanding the relationship between, or rights and privileges of, a solicitor or barrister and an applicant for, or a person in receipt of, legal aid or advice, a solicitor or barrister providing legal aid or advice shall, if so requested by a person authorised in that behalf by the Board, provide the person with any information, in such form as the person may specify, relating to legal aid or advice provided to or by an applicant or person in receipt of legal aid or advice, which is required by the Board for the purpose of enabling the Board to discharge its functions under this Act."

Outline of submissions on the challenge to the impugned decision

22. The core of the plaintiffs' case is that the implementation of the Board's decision would involve an infringement of the principles which govern the solicitor-client relationship, in that it would constitute a breach of the confidentiality of communications between a client and his solicitor and the legal professional privilege attaching to such communications and, in the case of files in relation to *in camera* proceedings, the obligations of the solicitor to the court in respect of such proceedings. Such infringement is not, and could not be, authorised by the limited derogation from the principles afforded by s. 32(2). As a matter of construction, what is intended to be done in the implementation of the decision is not expressly provided for. It could not arise by mere implication in the same way as the right to have legal advice could not be excluded by mere implication, as was held by MacMenamin J. in *O'Brien v. PIAB* (the High Court, 25th January, 2005). Legal professional privilege is a constitutionally protected dimension of the fair administration of justice, fair procedures and right of access to legal advice protected by Article 34.1, Article 38.1 and Article 40.3 of the Constitution. What Board proposes to do in implementation of the decision would constitute an unlawful abrogation or attenuation of legal professional privilege, which cannot have been intended by the Oireachtas in enacting s. 32(2).

23. In outline, the Board's answer to the challenge to the Board's decision is that, as a matter of ordinary construction of s. 32(2), it does allow the Board, acting through authorised officers, to access client information which is confidential and privileged. While acknowledging the importance of legal professional privilege and accepting that it has a constitutional dimension rooted in Article 34, the Board's position was that the implementation of its decision would not impact on legal professional privilege in a manner which would require the court to displace the ordinary meaning of the words in s. 32(2). Aside from reliance on s. 32(2) as justifying the decision, the Board justified its position on two other bases: that the relationship of the client and the Board rendered access to the client's case files in the manner proposed permissible; and, in any event, the client had waived his right to confidentiality in the information sought to be accessed. In relation to that last point, whether the client has waived his right, counsel for the Board raised a question mark over whether the court could adjudicate on it against the background of two objections which the Board made that the proceedings are not maintainable by the plaintiffs. First, it was submitted that, as the confidentiality and legal professional privilege attaching to the information is that of the client, the plaintiffs did not have standing to challenge the *vires* of the Board to make the impugned decision. Secondly, it was submitted that proceedings are moot. I have found it convenient to consider the proper construction of s. 32(2) before addressing the issues of *locus standi* and mootness.

"Unfettered access"

24. Before considering the proper construction of s. 32(2) and the other issues raised in relation to the impugned decision, I think it useful to identify what the plaintiffs' complaint of "unfettered access" amounts to in the light of the evidence. The complaint is that non-legal personnel, administrators, will be entitled to insist on access to case files, and all information in them, and to take notes or otherwise replicate the information contained in them irrespective of the views, and without the consent, of the solicitor on record for the client and without the express informed consent of the client. It was an integral part of the plaintiffs' case that the type of review which the Board wishes to conduct, which they fully accept is necessary, can be conducted by, or under the control of, a solicitor other than the solicitor on record. That alternative approach would constitute a less intrusive infringement of the solicitor-client relationship and the constitutionally protected rights associated with it. The Board's position was that that suggestion undermines the plaintiffs' argument, in that, in point of principle, there is no distinction between allowing access to client information by an administrator, on the one hand, and a solicitor not on record for the client, on the other hand.

Construction of s. 32(2).

25. Like every statutory provision, sub-s. (2) of s. 32 must be construed in the context of the Act as a whole. In the case of sub-s. (2), it is so intrinsically linked with sub-s. (1) of s. 32 that the latter provision must be the starting point for understanding sub-s. (2). Sub-section (1) puts the relationship between a solicitor and a legally-aided client, and the rights and privileges arising out of such relationship, on the same footing as that of a solicitor and a non-legally-aided or private client, thereby conferring special status not only on the legally-aided client but on his solicitor. As a matter of law, that relationship is a fiduciary relationship. It is founded on mutuality, in the sense that a privilege thereby enjoyed by the client imposes an obligation on the solicitor and, correspondingly, a right which the solicitor enjoys will give rise to a duty on the part of the client. The relationship gives rise to a whole panoply of rights and privileges and corresponding obligations and duties. It is significant that the Oireachtas saw fit to endow a legally-aided client and his solicitor with this status. But what I think is of particular significance in construing sub-s. (2) is that the Oireachtas, when reserving the right to narrow the effect of the status, rights and privileges conferred, provided that such narrowing must be "specifically provided for" in the Act. In my view, as a matter of construction, this leaves no room for implying into a provision which was intended to narrow the effect of sub-s. (1) something which is not expressly provided for.

26. As the introductory words to sub-s. (2) indicate, the Oireachtas intended that sub-s. (2) would narrow the effect of sub-s. (1). What sub-s. (2) does is that it mandates the solicitor of a legally-aided client to furnish certain information to the Board: information in relation to legal aid or advice provided to or by the legally-aided client. That is the type of information one would expect to find on a solicitor's case file. In general, it is information in respect of which the solicitor owes a duty of confidentiality to the client, unless confidentiality is waived, and it is likely to be privileged. In my view, it is clear from the words used that the Oireachtas intended that a solicitor should be under an obligation to provide to the Board information which a solicitor would not ordinarily be permitted to disclose without the consent of his client, on the grounds of confidentiality and privilege.

27. However, sub-section (2) circumscribes the Board's entitlement to request information and the solicitor's obligation to provide it. The information must be required by the Board for the purpose of enabling it to discharge its functions under the Act. It must be assumed that the Oireachtas considered that confidential information and information likely to be privileged, not just statistical information, would be required by the Board for the purposes of enabling it to discharge its statutory functions. Indeed, that it would be so required is borne out by an analysis of the provisions of the Act.

28. The manner in which the information is to be obtained by the Board is provided for in sub-s. (2). As one would expect, in general, the Board is empowered to perform any of its functions through any of its members or any member of its staff duly authorised (s.

5(3)). Sub-section (2) provides that the request for information is to be made "by a person authorised in that behalf by the Board" and the information is to be provided to that person. There is no requirement that the authorised person be a lawyer or have any particular qualification. All he requires is the specific authority of the Board to request the information and to receive it. The form in which the information is obtained is at the discretion of the authorised person. That discretion seems to me to be broad enough to cover, say, an audio recording of an interview with the solicitor in relation to relevant information of which he has no documentary or electronic record, or making manuscript, typed or lap-top generated notes in relation to documents on the file, or seeking photo-copies of paper documents or electronic copies of computer records.

29. Whether one adopts a literal or a purposive approach to the construction of sub-s. (2) without regard to the constitutional dimension, the intention of the Oireachtas is clear. The words of sub-s. (2) mandate the solicitor to provide information to an authorised person, who may be a civil servant or an administrator who has no professional legal qualification, even though the solicitor has a duty of confidentiality to the client and the information is likely to be privileged, irrespective of the views of the solicitor as to whether it should be handed over or not and whether or not the client has given express informed consent, subject only to the proviso that the information is required by the Board for the purpose of enabling it to discharge its statutory functions. The legislative purpose to be gleaned from s. 32 as a whole is that the ordinary solicitor-client relationship should apply to the Board's solicitor and his legally-aided client subject to clearly defined exceptions. The objective of the exception provided for in sub-s. (2) is to arm the Board with the information it requires to discharge its functions under the Act, for example, its principal function of providing a proper legal service for eligible persons, proper governance and management, including risk management, and the proper enforcement of the duties owed to it by those participating in its functions, whether legal or administrative staff, professionals and experts retained by it, and clients, and of the duties owed to it by third parties.

30. The questions I must consider now are whether, because of the acknowledged constitutional protection which attaches to legal professional privilege as a dimension of the protection afforded by Article 34, applying the double construction rule, that interpretation is inconsistent with the Constitution, as the plaintiffs contended, and, if it is, whether s. 32(2) is open to a different interpretation which is not.

31. It is proper to record at this juncture the position of the State parties, who had no role in these proceedings in upholding the impugned decision and whose role was to uphold the constitutional validity of s. 32(2), if that should become an issue. In their defence the State parties made no admission that the rights sought to be asserted by the plaintiffs are rights which are protected by the Constitution, but their counsel, in his submissions, did acknowledge that legal professional privilege has a constitutional dimension to the extent which I will clarify later. As I stated at the outset, there was a certain overlap between the defence of the Board and the defence of the State parties. The State parties advanced a construction of s. 32(2) which confers authority on the Board to have access to client case files, notwithstanding that they contain confidential and privileged information. However, they asserted that such access would not interfere with legal professional privilege. In considering the constitutional dimension, I have had regard to the submissions made by counsel for the State parties on those matters.

The constitutional dimension

32. Counsel for the Board submitted that at law a distinction is to be drawn between confidentiality *simpliciter* and the duty of confidence owed by a solicitor to his client, on the one hand, and legal professional privilege, on the other hand, in that, while the foundation of both concepts is confidentiality of communication within the relationship of the solicitor and client, the latter concept requires the fulfilment of criteria which go beyond those required to establish the former. That distinction undoubtedly exists, as the authorities later referred to illustrate, and I think it is apt to consider its implications in this case. As I have stated, what s. 32(1) does is to put the relationship of a solicitor and legally-aided client on the same footing as the ordinary solicitor-client relationship. Where, in the ordinary relationship, the solicitor discloses information in breach of his duty of confidentiality, the client can recover damages from him or, in the case of an anticipated breach, he can obtain an injunction to restrain the breach. The solicitor may also incur a disciplinary sanction imposed by the Law Society or the High Court under the Solicitors' Code. However, even though information communicated by a client to his solicitor in the ordinary relationship may have privileged status, that does not seem to me to be a sound basis for concluding that there is a constitutional imperative that every communication which a client makes to a solicitor in confidence should be protected from disclosure.

33. The rationale underlying the protection of confidential communications between a client and his solicitor to which there attaches legal professional privilege was explained by the Supreme Court in *Smurfit Paribas Bank Limited v. AAB Export Limited* [1990] 1 I.R. 469 in the context of adjudicating on a claim by a party in *inter partes* litigation that certain documents were privileged and, therefore, did not require to be discovered. In his judgment, Finlay C.J. identified the competing interests in the balance in such adjudication by reference to the decision of the Supreme Court in *Murphy v. Dublin Corporation* [1972] I.R. 215: the power to compel production of evidence, which is an inherent part of the judicial power and the ultimate safeguard of justice in the State; and the existence of a superior interest in the circumstances of the particular case, which gives rise to privilege from discovery. He quoted the following passage from the judgment of Jessel M.R. in *Anderson v. Bank of British Colombia* (1876) 2 Ch. D. 644 (at p. 649):

> "The object and meaning of the rule is this: that as, by reason of complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman with whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent and that communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

34. Finlay C.J. adopted that statement as identifying the requirement of the superior interest of the common good in the proper conduct of litigation which justifies the immunity of communications from discovery insofar as they were made for the purpose of litigation as being the desirability of correct and efficient trial of actions by the courts. Later in his judgement (at p. 477) he set out the following a more incisive proposition:

> "The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should therefore, in my view, only be granted by the courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all facts."

35. It was on the basis of the application of the principle stated in that passage that Finlay C.J. went on to draw the line between what is privileged (a communication for the purpose of obtaining legal advice) and what is not (a communication for the purpose of obtaining legal assistance) outside the area of actual or contemplated litigation. For expansion outside that area to be justified, he considered that it should be closely and proximately linked to the conduct of litigation and the function of administering justice in the courts. The material difference between legal advice and legal assistance was explained in the following passages:

> "Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation …
>
> Similar considerations do not, however, it seems to me, apply to communications made to a lawyer for the purpose of obtaining his legal assistance other than advice. There are many tasks carried out by a lawyer for his client and properly within the legal sphere, other than the giving of advice, which could not be said to contain any real relationship with the area of potential litigation. For such communications there does not appear to be any sufficient public interest or feature of the common good to be secured or protected which could justify an exemption from disclosure."

36. What the judgment of Finlay C.J. illustrates is that in this jurisdiction the existence and the definition of the parameters of legal professional privilege is predicated on there being a public interest requirement for it in the proper conduct of the administration of justice. It also identifies the nature of such requirement, which is the underlying rationale of the privilege – that the client should not be inhibited in the conduct of litigation or in obtaining legal advice by forced disclosure of communications and advice. Such inhibition might lead to the client not being "able to make a clean breast of it" (*per* Jessel M.R.), or holding "back half the truth" (*per* Lord Taylor of Gosforth in *R. v. Derby Magistrates Court: Ex parte B* [1996] 1 A.C. 487 (at p. 507)), or even tempt a client's counsel "to forgo conscientiously investigating his own case" until "the eve of or during the trial" (per O'Leary J. in *Ottowa-Carlton (Regional Municipality) v. Consumers Gas Company* (1990) 74 D.L.R. (4th) 742 at p. 748, or constitute "a prohibition upon professional advice and assistance" (per the U.S. Supreme Court in *Connecticut Mutual Insurance Company v. Schaefer* 94 U.S. 467 (1877)). It is to obviate such outcomes, which would undermine the proper, fair and efficient administration of justice, that legal professional privilege exists and has been elevated beyond a mere rule of evidence to "a fundamental condition on which the administration of justice as a whole rests" (*per* Kelly J. in *Miley v. Flood* [2001] 2 I.R. 50 (at p. 65)).

37. The question which arises from that analysis of the current law on legal professional privilege as laid down by the Supreme Court in the *Smurfit Paribas Bank* case is whether the implementation of the Board's decision would impact on the client in connection with the conduct of the legal business in which he is represented and advised by the Board's solicitor in a manner which is inimical to the fair, proper and efficient administration of justice. In addressing that question, in my view, one must have regard to the practical reality of the nature of the disclosure to the authorised person of privileged information which would result from the implementation of the decision and the consequences of such disclosure.

38. It was submitted on behalf of the Board that legal professional privilege is a privilege or exemption from disclosure to the "other side" or "the other party". Counsel for the plaintiffs submitted that the *dictae* relied on in support of that proposition (the reference in the passage from the judgment of Jessel M.R. quoted previously to "the other side", and a statement by Finlay Geoghegan J. in *Woori Bank & Anor. v. KDB Ireland Limited*, Unreported, the High Court, 21st December, 2005 that the purpose and effect of a claim to such privilege in a litigation context is to preserve confidentiality "as against the other party") were not intended to confine the privilege to disclosures to one's adversary. It was also submitted that, if the proposition advanced on behalf of the Board was correct, the corollary would be that legal professional privilege would end when the litigation ended. In my view, that submission blurs the distinction between the solicitor's duty of confidentiality and legal professional privilege, which I consider to be a real distinction. The privilege ceases to operate as a protective mechanism for the client when the litigation ceases, but the duty of confidentiality endures.

39. Legal professional privilege is usually, but not invariably, in issue in the context of discovery in *inter partes* litigation, where disclosure to an adversary is at issue. However, it also arises in other contexts, for example, in an inquisitorial process such as a tribunal of inquiry, as happened in *Miley v. Flood*. In this jurisdiction the Supreme Court in the *Smurfit Paribas Bank* case has decided the type of communication or information to which legal professional privilege applies. The privilege only becomes operative to shield a client against disclosure in a forum in which the law would otherwise mandate disclosure to a person who is pursuing an agenda adverse to the interest which the client is seeking to protect. That is the raison d'être of the privilege and it underscores the client interest which it protects.

40. The disclosure to an authorised person which the implementation of the Board's decision would involve is not a disclosure which requires the protection of legal professional privilege and it could not be regarded as a diminution of the protection afforded by that principle. It is a disclosure for the purpose of ensuring that the statutory functions of the Board are properly performed. It is possible that disclosure would result in adverse consequences for a client. For example, the disclosure might reveal that the circumstances were such as to justify the revocation of a legal aid certificate under s. 28(7), and might lead to a decision of the Board to revoke the certificate. However, in such a case, there would be no nexus between the client interest which legal professional privilege protects and the adverse consequence.

41. I think it is instructive to consider two questions in relation to receipt of privileged information by an authorised person. The first is whether he could voluntarily divulge the information in a manner which would adversely impact on the client interest protected by the privilege. The answer is that he could not, because any information received pursuant to s. 32 may only be used for the purpose of the performance of the Board's statutory functions. The Board and its members will be similarly bound. The second is whether he could be compelled to disclose the information at the suit of a third party, for example, the client's adversary in litigation. The answer is that he could not. The position of a solicitor employed by the Board under the Act of 1995 is *sui generis*. It is not analogous to that of a solicitor practising in-house in an organisation, be it a government department, a local authority, a bank or an insurance company, who is employed by his client and whose position is considered in the Law Society of Ireland "Guide to Professional Conduct, 2002" at para. 4.1. Nor is it analogous to that of a solicitor employed in an independent law centre, whose position will be considered later. The position of a solicitor of the Board is governed by the Act of 1995. In my view, the umbrella of legal professional privilege must extend to cover the solicitor's employer, the Board, and its members and its authorised officers, because that is patently what the Oireachtas intended in enacting s. 32. The clear intention discernible in sub-s. (2) is to make the information available for the purpose stipulated, but not otherwise. In effect, there is a statutory embargo on privileged information which passes to an authorised officer or the Board pursuant to sub-s. (2) being amenable to discovery.

42. Subject to one qualification, I find it impossible to conceive of a situation in which the disclosure involved in the implementation of the decision would in any way impact on the client interest which is protected by legal professional privilege. The qualification, which

I advert to only because of the sweeping nature of the conclusion which I have just articulated, relates to the manner of implementation of the decision rather than the principle underlying the decision. Solicitors employed by the Board may represent both sides in contentious matters, for example, both the husband and the wife in family law proceedings and this is expressly sanctioned by s. 30(6) of the Act of 1995. It was suggested that the implementation of the decision would lack "Chinese wall" type mechanisms to prevent the flow of information from one side to the other. I am unable to form a view on the evidence whether, as things stand, this type of issue has been adequately addressed. There must be proper procedures and protocols in place to ensure that the implementation of the decision does not involve any flow of information against the interest of any client. That is a matter for the Board, not the court.

43. Apart from the intra-organisation nature of the disclosure, there is another basis on which it can be confidently asserted that there is no danger that the disclosure of privileged information in the course of a review of a client's case file by an authorised person pursuant to s. 32(2) would breach the defence afforded by legal professional privilege. That basis is to be found in the decision of the Supreme Court in *Fyffes Plc v. D.C.C. Plc* [2005] 1 I.R. 59. The issue there was whether the disclosure by the defendant of documentation which otherwise would be privileged to a third party, the Irish Stock Exchange, which had conducted an investigation into, and reported to the Director of Public Prosecutions on, the share dealings which were the subject of the proceedings, with a view to persuading the Director of Public Prosecutions, with the assistance of the Stock Exchange, not to initiate a prosecution under Part V of the Companies Act, 1990, constituted a waiver of the privilege in relation to the documentation. The Supreme Court held that it did not. In his judgment, Fennelly J. dealt with the circumstances in which privilege may be lost in the following passage (at p. 67):

> "The law, therefore, attaches significant value and accords a high degree of protection to the principle of legal professional privilege. It can, of course, be lost if it is clear that it is being used as a cloak to cover fraud. It may also be overridden by express statutory provision.
>
> Waiver is another matter. Clearly a party to an action may waive privilege in express terms. A party may also be held to have waived it impliedly, as when a party does not claim privilege, but includes potentially privileged documents in the non-privileged schedule to the affidavit. Equally, a party waives the privilege attaching to documents passing between himself and a solicitor, when he elects to sue the latter … ."

44. Fennelly J. then considered the broad proposition contended for by the plaintiff, that any disclosure to a third party leads to loss of privilege, and his conclusion on that proposition is set out in the following terms (at p. 68):

> "The plaintiff has not established the existence of any such general principle as that privilege will be lost by any communication to a third party or that, in order to avoid that result, the communication would have to be made in pursuance of a public duty. Indeed counsel conceded in argument that communication, for example, by a party to its bankers in negotiating a loan to fund litigation would not lose the privilege."

45. Having quoted from an Australian authority, *Goldberg v. Ng* (1994) 33 NSWL 639, from the judgment of Clarke J.A. denying, at p. 67, the existence of any "universal rule that disclosure of documents produced for the sole purpose of seeking legal advice or litigation to a stranger to that litigation constitutes a waiver of the privilege in that document", Fennelly J. continued as follows (at p. 69):

> "I am quite satisfied that this is a correct statement of the law and that it undermines the first basic proposition advanced on behalf of the plaintiff. In the absence of a general principle that communication to any third party will lose the privilege unless it is made in pursuit of some public duty, no legal basis has been advanced for its loss in the circumstances of the present case, when the disclosure was made for a particular purpose and subject to express conditions of confidentiality."

46. The *obiter dictum* in the first passage of the judgment of Fennelly J. which I have quoted above indicates that the Oireachtas could have overridden the legal professional privilege which would otherwise attach to communications between a client legally aided under the Act of 1995 and his solicitor. For the reasons outlined earlier, I consider that the implementation of the Board's decision will not have that effect or even interfere with its application, and for the same reasons I consider that sub-s. (2) does not have that effect. The significance of the decision of the Supreme Court for present purposes is that it is an absolute assurance that disclosure under the Board's decision could not result in the loss of legal professional privilege.

47. While I have come to the conclusion that the implementation of the Board's decision will not override, or reduce the protection afforded by, legal professional privilege, as regards confidentiality, I consider that it will put the legally-aided client and his solicitor on a different footing from that which prevails in the ordinary relationship. The difference is that a solicitor in private practice is the ultimate arbiter of the range of persons to whom confidential client information may be disclosed. In reality, even in the ordinary relationship, of necessity confidential information may be disclosed to a wide range of people, from the secretary photo-copying the client's statement for inclusion in counsel's brief to the cost accountant considering the case file in the context of drawing a bill of costs. In the case of solicitors employed by the Board, the ultimate decision as to who will see confidential information rests with the Board when it determines to avail of the power conferred by sub-s. (2) of s. 32. That is a cause of concern to the plaintiffs in this case and, on the evidence, it is clear that the Board acknowledges that their concerns are *bona fide*.

48. If the power conferred on the Board is properly exercised, that is to say, if it is exercised for the purpose of enabling the Board to discharge its statutory functions, the only concern one could have is that the risk of a breach of confidentiality is increased because of the increase in the number and type of personnel who have access to confidential information. It seems to me that, in reality, that risk is borne by the Board, not by the solicitor because as a matter of contract and as a matter of law the solicitor must comply with a decision properly made under sub-s. (2) of s. 32.

49. The court was referred by counsel for the plaintiffs to the manner in which client confidentiality is addressed in regulations made by the Law Society in exercise of its statutory powers which govern independent law centres, such as the Free Legal Aid Centres: The Solicitors Acts, 1954 – 2000 (Independent Law Centres) Regulations, 2006. Article 7(2)(c) of those regulations provides that an employed solicitor shall not disclose without the consent of the client to any non-solicitor within the independent law centre, other than secretarial and legal support staff working under the direction of the employed solicitor, or any other person confidential information obtained in the course of acting for the client. This provision was put forward as a contemporary example of best practice. The appropriateness of the proscription on disclosure contained in the provision in relation to solicitors employed in independent law centres is obvious. However, in enacting s. 32(2) the Oireachtas obviously considered that a different approach was necessary in relation to solicitors operating under the statutory regime created by the Act of 1995. There being no constitutional impediment to the approach the Oireachtas adopted, the solicitors employed by the Board are bound by it.

50. That brings me to the alternative proposal made on behalf of the plaintiffs, that the access to case files be carried out by or under the control of another solicitor. Counsel for the plaintiffs submitted that a solicitor is more suitable for the role envisaged in sub-s. (2) than a civil servant for a number of reasons. First, the solicitor owes a fiduciary duty to the client, whereas the civil servant does not. Secondly, the disciplinary action which would be taken against a solicitor for breach of confidentiality is qualitatively different from the disciplinary action which would be taken against a civil servant, albeit that the civil servant is subject to the Official Secrets Act, 1963, as amended, because the solicitor risks loss of professional status. Thirdly, a solicitor will understand intuitively what is privileged and what is not because of his legal qualification and the ethical considerations which come into play in the practice of law.

51. It may well be that, for the reasons outlined by counsel for the plaintiffs, it would be prudent for the Board to appoint a solicitor as authorised person, either alone or in conjunction with others, for the purposes of requesting and receiving information under sub-s. (2). However, the Act leaves to the discretion of the Board whom to appoint and it is not open to the court to suggest that it thinks a solicitor is more appropriate than a civil servant to fill the role. An appointment would have to be so irrational as to fly in the face of reason and common sense before the court could interfere.

Conclusion on proper construction of s. 32(2) and vires issue
52. I have come to the conclusion that the intervention into the solicitor-client relationship which, on an ordinary reading of the words used by the Oireachtas, is permitted in sub-s. (2) and, in particular, the fact that an authorised person may insist on access to confidential information and legally privileged information without the approval of the solicitor representing the client and without the express informed consent of the client does not have constitutional implications which impact on the proper construction of sub-s. (2) of s. 32. Accordingly, the implementation of the Board's decision will be intra vires its powers under that provision.

Relationship of client and Board/waiver
53. Being satisfied that the Board is entitled to implement its decision by virtue of the power conferred by s. 32(2), it is not necessary to come to a conclusion on the alternative defences advanced on behalf of the Board: that the Board is entitled to access confidential and privileged information on a client's case file because of the relationship of the client and the Board, or because the client has given an express waiver to the Board. However, I propose to consider both issues to the extent that they amplify the conclusions I have come to on the construction of sub-s. (2) and on the validity of the Board's decision.

54. The relationship of the legally-aided client and the Board resides in the realm of public law. It is unquestionably a legal relationship. It is a relationship which is governed by the Act of 1995 and the Regulations made thereunder, and applicable principles and rules of common law, for example, the principles which govern the manner in which the client can claim redress if the Board acts in an unlawful manner towards him. When he is granted legal advice or legal aid under the Act of 1995, the client's rights and duties are governed by, and he is subject to the strictures imposed in, the Act and the regulations made thereunder. One of those strictures is that under sub-s. (2) of s. 32 a person authorised by the Board may access information in relation to him held by his solicitor, even if the information is confidential and privileged, subject to the proviso that the information is sought for the purpose of enabling the Board to discharge its statutory functions.

55. As the saying goes, that should be the beginning and the end of the matter. However, public bodies, being aware that persons with whom they deal may be misled as to their rights and duties, or claim to be misled, or may be put in a position which gives rise to expectations not in conformity with their actual rights and duties, prudently endeavour to apprise such persons of their rights and to procure from them acknowledgements that they have been so informed and understand their rights and duties. The Board in the computer-generated version of its form LAA3 (Application for Legal Services), which is completed and signed by the applicant at the commencement of the process, has included a declaration by the applicant in which he consents to the transmission to the Board of all information about his case which the Board may require. There was a conflict of evidence as to whether the computer- generated version of the form is in circulation in all Law Centres. That is a conflict which has become irrelevant. Irrespective of whether a client has initially signed such a declaration or not, he is bound by s. 32(2). Even if he has signed such a declaration, he merely has acknowledged what is the entitlement of the Board and he does not waive any right or entitlement by doing so.

56. Because of the fact that the risk lies with the Board for any wrong which the client suffers as a result of the inroad into the normal duty of confidentiality of a solicitor to his client permitted under s. 32(2), good governance and proper management dictates that the Board should have proper procedures in place for ensuring that a prospective client is fully and correctly informed of the Board's right under that provision, in the same way as there should be procedures for dealing with conflicts of interest and minimising the risk of disclosure to authorised persons who may not fully appreciate the implications of certain types of information. Regulation 24 of the Regulations, which sets out the duties of the staff of the Board, including its solicitors, requires that the nature of the commitment entered into by a client in accepting legal advice or legal aid is explained to him. Ensuring fulfilment of those duties is a matter entirely for the Board. The court has no function in relation to it.

***In camera* rule**
57. The evidence of the first plaintiff, who is employed by the Board in the Portlaoise Law Centre, was that more than two-thirds of her caseload relates to family law matters. It is common case that the case files which the Board seeks to access through an authorised person include documentation generated for the purposes of proceedings which are statutorily mandated to be held otherwise than in public, including expert and welfare reports which the court has directed be procured in such cases, for example, under s. 47 of the Family Law Act, 1995.

58. Section 40 of the Civil Liability and Courts Act, 2004 (the Act of 2004) has relaxed the rigours of the in camera rule in family law proceedings in a number of respects, including permitting production of a document prepared for the purposes of, or in contemplation of, or given in evidence in, such proceedings to certain bodies and persons. The plaintiff's counsel was correct in submitting that an authorised person under s. 32(2) does not fall within any of the categories set out in s. 40.

59. However, in my view, the real issue which arises in relation to files relating to family law matters is whether the Board, and an authorised person assigned by the Board, has a sufficient connection with the party to the proceedings, the legally-aided client, to be within the ambit of his private, that is to say, non-public, sphere for the purposes of the *in camera* rule. The court was not referred to any authorities on this point, but it seems to me, as urged by counsel for the Board, that as a matter of common sense they must be. While the solicitor employed by the Board is on record for the client, presumably as the holder of a practising certificate from the Law Society, the reality is that the legislative scheme for the provision of civil legal aid under the Act of 1995 necessitates the Board, members of the Board and authorised staff of the Board making determinations which, in the case of legal advice or legal aid sought in connection with a family law matter, must be made on the basis of information generated in contemplation of, or for, or during *in camera* proceedings. The system simply would not work if the effect of the *in camera* rule was to limit access to such documentation to the solicitor on record.

60. If that conclusion is incorrect, as regards each case file which the Board would wish to access which contains *in camera* material, an application would have to be made to the relevant court for authority to provide the information to the authorised person. Section 40(8) of the Act of 2004 gives the court a discretion to order disclosure. Indeed, as was held by Barr J. in *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399, such discretion existed at common law.

61. The concerns of the plaintiffs in relation to access to an expert or welfare report directed to be procured by the court having seisin of the family law matter, such as a s. 47 report, a copy of which is on a case file, are wholly understandable. Such a report differs from ordinary *in camera* documentation. The report is the court's report. The solicitor on record in the proceedings is an officer of the court. It seems to me that it is a matter for the court which directed the procurement of the report to determine whether in a particular case it is proper that disclosure of the copy be made to the authorised person. It is not a matter which this Court can determine in the abstract in these proceedings.

The *locus standi* and mootness
62. I think the Board's contentions that the plaintiffs lack standing to challenge the decision of the Board and that they have asked the court to decide a moot or express an opinion on a hypothetical situation is wholly misconceived. As I have already held, the intention of the Oireachtas in enacting sub-s. (2) of s. 32 was to diminish the rights and privileges afforded by sub-. (1) to the extent it specifically provided for in sub-s. (2). A solicitor of a legally-aided client has a duty of confidentiality to the client and a duty to uphold the client's legal professional privilege and, as such, in my view, clearly has an interest in whether any decision made which impacts on those duties is lawfully made. Moreover, the plaintiffs challenged a specific decision. The manner of intended implementation of that decision has been established with sufficient clarity on the evidence to avoid any hypothetical or moot element.

63. The *in camera* issue was not raised on the pleadings, a point made by counsel for the Board. Nonetheless it was argued and I have pronounced on it because, as a matter of law, I think it is not inappropriate to do so. The only issue on which I consider it would be inappropriate to pronounce, for the reasons already stated, is whether access should be afforded to court ordered reports, such as s. 47 reports.

The constitutionality of s. 32(2)
64. The foundation of the plaintiffs' challenge to the constitutionality of s. 32(2) is the assertion that the entitlement to legal professional privilege is constitutionally protected as a dimension of the protection of the administration of justice (Article 34.1), the right to legal assistance (Article 38.1 and Article 40.3.1) and the right to fair procedures (Article 40.3.1). Allowing the Board, through an authorised person, unfettered access to privileged information is a curtailment of that entitlement which does not pass the test of proportionality posited in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607. Accordingly, s. 32(2) is invalid having regard to the provisions of the Constitution.

65. Having found, in dealing with the challenge to the Board's decision, that s. 32(2) will neither override nor interfere with the application of legal professional privilege, the challenge to the constitutionality of the provision must fail.

66. While recognising that it is neither necessary nor appropriate in the circumstances to consider the constitutional challenge further, there are a number of points which I consider it appropriate to make in relation to the submissions made on behalf of the State parties for the sake of completeness.

67. First, I think it fair to clarify the extent to which counsel for the State parties acknowledged that legal professional privilege has a constitutional dimension, because of the abbreviated reference to it earlier. He accepted that it is clear from the authorities that the privilege is regarded as part of, and is fundamental to, the administration of justice and to that extent it is subject to the Constitution. However, he pointed to the policy underlying the privilege: that its purpose is the furtherance of the administration of justice. Without conceding that legal professional privilege is a constitutional right which can be asserted by an individual citizen, he submitted that, even if it is, such right cannot be greater than is required for the purposes of protecting or furthering the policy underlying the privilege, that is to say, the administration of justice.

68. Secondly, the State parties contended that the plaintiffs did not have *locus standi* to challenge the constitutionality of s. 32(2), in reliance on the decision of the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269. Even on the basis of the limited extent to which counsel for the State parties recognised that legal professional privilege has a constitutional dimension, in my view, a solicitor who has privileged information must have sufficient interest to challenge an enactment which he believes has the effect of interfering with the privilege adversely to the interest of his client, because he has a duty to uphold the privilege.

67. Finally, in my view, the contention of the State parties that the plaintiffs' claim, in substance, is in the nature of a judicial review application and, as such, has not been brought promptly or within the time limited by O. 84, r. 21 of the Rules of the Superior Courts, 1986, which was based on the assumption that the decision which was being impugned in the proceedings was a decision made in June, 2001, is not well founded. On the facts as they unfolded, I am satisfied that the challenge was to the decision of 28th April, 2003 reaffirming the decision made on 22nd March, 2001. The challenge to the impugned decision, in my view, which was brought within a month of that decision, was brought in time.

Order
68. There will be an order that the plaintiffs' claim be dismissed.