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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/09/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

CHRISTOPHER McGETTIGAN

Plaintiff

and

MANNOK HOLDINGS

Defendant

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Mr Gary McHugh KC and Mr Rory Fee (instructed by Gibson Solicitors) for the Plaintiff
Mr David Dunlop KC and Mr Wayne Atchison (instructed by Mills Selig Solicitors) for the Defendant

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FRIEDMAN J

Introduction

[1] The defendant has applied under RsCJ Order 33 r.3 that it is appropriate to determine the correctness of the following proposition that by order of Master Bell dated 27 January 2023 is a preliminary issue now before the Court:

> "In circumstances whereby the Law Society of Northern Ireland is empowered pursuant to the Solicitors (Northern Ireland) Order 1976 to investigate and regulate the conduct of Solicitors that the publication of the correspondence by the defendant referenced in the plaintiff's Statement of Claim and sent to the Law Society of Northern Ireland was published on an occasion of absolute privilege."

[2] The general principles at stake are well explained by the editors of *Gatley on Libel and Slander* Thirteenth Edition (May 2022) p. 444 §14-01:

> "The law recognises that there are certain situations ("privileged occasions") in which it is for the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given to reputation by the law of defamation. In most cases the protection of privilege is qualified, i.e. the defence is displaced by "malice", but there are certain occasions on which public policy and convenience require that a person should be wholly free from even the *risk* of responsibility for the publication of defamatory words and no action will therefore lie even though the defendant published the words with full knowledge of their falsity and even with the express intention of injuring the claimant. A statement of case which alleges publication on any such occasion of "absolute privilege" will be struck out as disclosing no legally recognisable claim (or as it would formerly have been said, disclosing no cause of action)."

[3] Consequently, if absolute privilege applies then the claim in this case must be dismissed regardless of whether the impugned publications are in fact defamatory. For present purposes, I proceed on the basis that they could be, but make no finding that they are, nor that any criticisms that are made by the defendant of the plaintiff or anyone else referred to in the publications are substantially true or justifiable opinion. This approach is agreed by the parties.

Outline: parties, claim, defence

[4] The plaintiff is a practising solicitor in Northern Ireland. He has an unblemished professional record. He has issued a Statement of Claim dated 15 August 2021 in which he asserts a series of allegations that the defendant company through its director Mr Liam McCaffrey was guilty of defaming him in publications made to the Law Society for Northern Ireland's ("the LSNI") professional conduct committee and staff. The Claim concerns three publications to the LSNI in letters dated (i) 13 April 2021 (albeit under cover of a letter dated 29 April 2021), (ii) 25 August 2021 and (iii) 16 September 2021. The single cause of action is defamation.

[5] The defendant is a company registered in the Republic of Ireland. It accepts that it sent correspondence on those three occasions to the LSNI with a view to complaining about the plaintiff's professional conduct concerning his allegedly inappropriate contact with shareholders in the defendant company and otherwise becoming improperly involved in a local community group protesting against the defendant's business activities. There was a recent background, not in any way blamed on the plaintiff, of serious violence against the company's officers, including an episode of kidnap and torture of one man. The relevance of the background is that it made the defendant company particularly sensitive to undue interference in

its affairs. The defendant maintains that by choosing to address its complaints to the LSNI who duly purported to consider them under its complaint's procedure, its statements are covered by absolute privilege.

[6] The way in which the LSNI dealt with the defendant's correspondence can be summarised as follows.

(i) On 14 June 2021 an assigned Solicitor Caseworker from the LSNI's Professional Conduct Department ('PCD') acknowledged the defendant company's initial complaint of 29 April 2021.

(ii) Also, on 14 June 2021 the PCD Solicitor Caseworker wrote to the plaintiff's law firm to seek its comments and/or explanations for the letter sent to its offices by the defendant on 13 April 2021 that had been attached to the defendant's 29 April complaint. The letter from the PCD was marked "Complaint by Mannok Holdings DAC."

(iii) In his reply of 16 June 2021, the plaintiff denied any wrongdoing and asserted that parts of the defendant's letter to him were libellous.

(iv) On 13 August 2021 the defendant was informed that the Professional Conduct Committee of the LSNI ('PCC') had formally met on 5 August 2021 and resolved based on the evidence available to it not to uphold the complaint and to close the matter.

(v) The defendant then sent the second and third impugned publications of 25 August and 16 September 2021 to the PCD Caseworker at the LSNI together with additional materials with a view to persuading the PCC to reconsider its decision.

(vi) In the course of the defendant's letter of 16 September the PCD Caseworker was informed that P J Flanagan (the firm in which the plaintiff is a partner) had sent pre-action correspondence to the defendant on 26 June 2021 threatening to issue defamation proceedings against the company.

(vii) On 22 September 2021 the PCD Caseworker wrote to the defendant to inform it that the PCC had met again on 16 September 2021 and having considered the further material had determined that their original decision not to uphold the complaint remained unchanged.

The narrowness of the dispute

[7] Bearing in mind that it is for the defendant to establish that the privilege exists, the dispute before me by the time of the hearing was nevertheless narrow.

(i) Both sides agreed that the publications by the defendant under the LSNI's professional conduct procedures were capable in principle of being covered by absolute privilege.

(ii) The defendant took me through the detail of the correspondence that made it obvious that a complaint was being made, considered by the PCD and then determined by the PCC, with further consideration of the defendant's additional information culminating in the PCC standing by its original determination.

(iii) None of this reading of the letters was seriously disputed. The letters were treated as a complaint, although upon preliminary investigation it was determined that there was no case to answer. However, the plaintiff submitted that because the defendant had used the 'wrong' process, absolute privilege could not apply.

(iv) That was the case according to the plaintiff even though (as outlined in §6 above) neither the assigned Solicitor Caseworker of the PCD nor the PCC itself ever indicated that the defendant had used the wrong process.

(v) The plaintiff's case about why the process was wrong emerged incrementally. Although the plaintiff's pleading and affidavit in reply for this hearing impugned the motive of the defendant, as well as his sending to the PCD additional letters after the original determination not to uphold the complaint, neither the plaintiff's affidavit evidence, nor pre-action or post-action correspondence detailed any technical criticisms of the process that the defendant used to make his complaints. Rather in initiating the complaint and then continuing to pursue it exclusively with the PCD by the provision of additional information the plaintiff accused the defendant of "vexatious and gratuitous behaviour."

(vi) The plaintiff's process objections were made partly in the skeleton argument dated 16 June 2023 (1 week before the hearing) and then developed in the hearing itself by reliance on Guidance taken recently from the LSNI's website (downloaded on 22 June 2023 and not adduced by way of affidavit evidence): hereafter 'the Guidance.'

[8] Perhaps not surprisingly, Mr Dunlop KC and Mr Atchison on behalf of the defendant were unhappy about the mainstay of the argument emerging in the hearing. Their instructing solicitors had informed the plaintiff repeatedly in pre-action correspondence on 12 August 2021, 22 April 2022, 30 September 2022, and 17 October 2022 that the defendant had made a confidential complaint to LSNI that was covered by absolute privilege. Despite asking for reasons to analyse the issue to the contrary, the defendant's representatives received no detailed response, either when the plaintiff's own firm was threatening suit in July 2021, or after the matter was passed to separate solicitors in 2022. The last pre-action letter dated 19 October 2022 from those acting for the plaintiff stated only "you are free to take whatever course you deem appropriate."

[9] When the legal basis for dismissing the defendant's privilege claim was finally put into writing much of what was submitted was incorrect, or not seriously

advanced before me. The plaintiff's skeleton argument had referred to Part 2 of the Legal Complaints and Regulation Act (Northern Ireland) 2016 which was not in force. There was reference to the Guidance, but without clear explanation of when it was created and upon what basis. Indeed, in the written argument it appeared that the Guidance flowed from the 2016 Act which was not the case. I was taken to parts of the Guidance relating to a complaint made by someone against their *own* lawyer that were not applicable; and likewise, to process requirements contained in Article 44 of the Solicitors (Northern Ireland) Order 1976 relating to full disciplinary proceedings before a Tribunal, which were also not applicable because that stage was never reached. Further, submissions raised in the skeleton argument about legal personhood were retracted at the hearing.

[10] Although initially looked at by the Court *de bene esse*, and then by agreement of the parties admitted without affidavit support, there was no evidence that this Guidance existed in the same form in 2021. Even if it did the PCD and PCC did not refuse to proceed on that basis. On a fuller examination of the Guidance during the hearing much of the process described is what happened in this case. There was triaging by the PCD, assignment of a caseworker, the exercise of discretion to request information from the subject of the complaint, and referral of the matter to the PCC for determination. The differences were that the Guidance provided for the use of a template complaint form (with a hyperlink) and a dedicated online facility to lodge the complaint. If either the form or the online pathway existed at the time, the defendant had not used them.

The plaintiff's process objections

[11] The plaintiff's argument as to why the process used by the defendant was wrong such as to render absolute privilege nugatory is made under a general plea that as absolute privilege is an exceptional bar capable of protecting conduct that would otherwise be subject to sanction, it therefore requires scrupulous management and oversight by a Court before a defendant is allowed to enjoy its protection. Mr McHugh KC and Mr Fee distilled their argument before me under two headings (i) form and (ii) standing.

[12] As to form, it was urged by reference to the extant 2023 Guidance that the defendant ought to have registered the complaint online or otherwise used a template from. As indicated above, the starting premise of the argument is questionable, because there was no evidence that the form and/or the online facility existed at the time of the complaint. Even if they did, counsel for the defendant counted that this was an argument that unduly places form over substance. The defendant wrote to the LSNI's main address expressing a wish to "register a complaint" and in addition using an email address of "complaints@lawsoc-ni.ord" [*sic*]. Once notified of her details, the defendant used the provided email address of the assigned case officer in the PCD. The PCD and the PCC did not object to their processes being initiated in this manner. The irregularity, if there was one, would have been in relation to not using the right form or lodging the complaint in the right way.

[13] As to standing, the plaintiff argued that even if absolute privilege applied to the initial publication to the LSNI in April 2023, it fell irrevocably away after the decision not to uphold the complaint and closure of the case on 5 August 2021, and communicated to the defendant on 13 August. It was submitted that the additional letters of 25 August and 16 September 2021 could consequently not enjoy such protection, because the PCC was *functus*, the defendant had no standing to write again, and even though the PCD and PCC were prepared to consider the later letters, the fact that they did could not protect the defendant under defamation law. To support this argument, the plaintiff submitted that the Guidance was breached as it requested "that all aspects of the complaint are included in the conduct complaint form as new issues cannot be raised at a later date."

[14] In opposition to the arguments the defendant relied on the fact that the PCD, its case officer, and then the PCC readily examined the initial information contained in the letter of 29 April and then went on to examine the additional information contained in the letters of 25 August and 16 September. The follow up letters were not obviously raising new issues but adding information for the PCC's consideration as to whether to revisit its previous determination of the original issue. The PCC chose to consider the additional information. Once it refused to alter its initial determination, the defendant did nothing more. Mr Dunlop's primary case was that no procedural error had occurred. However, whether or not the LSNI had adopted the right procedure, public policy dictated that statements processed under the procedure could not be subject to a claim in defamation.

Approach to the dispute

[15] In order to determine the matter, I consider the law of absolute privilege (§§16-26), the course of correspondence concerning the defendant's complaint (§§27-28) and then conclude on the narrow dispute as to whether the form and continuation of the correspondence removes the substance of the defence (§§29-36).

Absolute Privilege

[16] The plaintiff is right to characterise absolute privilege as exceptional because it provides for immunity from suit for defamation irrespective of malice. The modern articulation of the rule is contained in the speech of Lord Hoffmann in *Taylor v Serious Fraud Office* [1998] UKHL 39 [1999] 2 AC 177 p. 208E:

> "The immunity from suit…is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made, and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and

> cannot be removed by the court or affected by subsequent publication of the statement."

[17] Although absolute privilege has long roots in the common law it has developed in stages to extend not only to words said by judges, advocates and witnesses during the course of a trial (*Munster v Lamb* (1883) 11 QBD 558, pp 604 and 607), but to what is said in statements provided in preparation for trial (*Watson v M'Ewan* [1905] AC 480, p. 487) as well as communications between witnesses and investigators and between investigators and each other during the course of primary enquiries irrespective of whether those statements are relied upon at trial (*Taylor v SFO*, pp 214E-215B, 219C-H, and 221B-D).

[18] It has been warned that any extension of the immunity merely by analogy should be considered with care, but subject to equal caution to protect the underlying rationale of the privilege (*Taylor v SFO* p. 213E-214E). For that rationale, I refer to the following:

(i) As stated in *Munster v Lamb* p. 604 "The rule of law is that what is said in the course of the administration of law is privileged."

(ii) As thereafter recognised in *Watson v M'Ewan* p. 487: "The public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice…because people would [otherwise] be afraid to give their testimony."

(iii) In *Taylor v SFO* (aside from the statement of Lord Hoffmann above) the House of Lords (at p. 215A-B) adopted the dicta of Drake J in *Evans v London Hospital Medical College* [1981] 1 WLR 184, 192, that "… the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."

(iv) In *Taylor v SFO* Lord Hoffmann added that Drake J's formulation "excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other" (p. 215B). Lord Hutton agreed (p. 221G).

(v) Since at least *Munster v Lamb* in 1883, courts have recognised that the price of potential defamers escaping sanctions is better than the chilling effect that would be caused to honest informants and witnesses if an absolute immunity were not in place. In *Munster*, Lord Brett MR emphasised at p. 604

> "If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and

> therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

So too as Lord Hutton put it in *Taylor v SFO*, pp 222B "whilst the immunity may on occasions benefit a malicious investigator, I consider that the balance of public advantage lies in allowing it to the defendants." In so finding, his Lordship cited *D v National Society for the Prevention of Cruelty Against Children* [1978] AC 171, p. 223 (*per* Lord Simon) and its protection of the identity of informants in social services investigations on public interest grounds:

> "Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public advantage lies in generally respecting it."

[19] The privilege, while initially born to protect the judicial trial process and statements leading up to it, has been extended to a range of regulatory law enforcement fields where the investigation could lead to a tribunal, commission or inquiry procedure exercising judicial-type functions with concordant judicial attributes: see, generally, *Gatley on Libel and Slander* §14-017 and case law cited therein, for instance *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, p. 442, *per* Lord Esher MR who held that the immunity applies to any "authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes."

[20] Examples of procedures having functions of a judicial nature to which the privilege applies include a Disciplinary Committee constituted under the Solicitors Act 1957 (*Addis v Crocker* [1961] 1 QB 11, 28-29) and its successor 1974 Act including in relation to the conduct of the Office for the Supervision of Solicitors (*Baxendale-Walker v Middleton* [2011] EWHC 998 §§88-95); a Bench of the Inns of Court investigating the conduct of a barrister under previous common law procedures (*Lincoln v Daniels* [1962] 1 QB 237, pp 250, 254, 269) now replaced by the separate jurisdiction of the Bar Standards Board ('BSB') (*Mayer v Hoare* [2012] EWHC 1805 §11-12); investigations by The Securities Association as to fitness to conduct investment business pursuant to the Financial Service Act 1986 (*Mahon v Rahn (No 2)* [2000] EWCA Civ 185 [2000] 1 WLR 2150 §194); and the work of the Fitness to Practice Directorate of the General Medical Council (*White v Southampton University Hospitals NHS Trust* [2011] EWHC 825 (QB) [2011] 120 BMLR 81 §§13-21).

[21] While it was not in issue before me, it is comparatively more recently that case law has made it abundantly clear that absolute privilege applies to statements made to various enforcement authorities with the purpose of instigating an investigation, as opposed to statements that are made in relation to an investigation that has already begun. In *Mahon v Rahn (No 2)* in 2000 Brooke LJ noted (at §195) that the issue of spontaneous proffering of information to statutory bodies required

adjudication in a later case. In *Westcott v Westcott* [2008] EWCA Civ 818 [2009] QB 407 (at §1) the Court of Appeal described the issue as "*surprisingly novel.*"

[22] Arguably the roots of protection for spontaneous statements proffered in an appropriate context lie in *Watson v M'Ewan*, decided in 1905, in which absolute privilege was held to apply to the process in which a solicitor took a proof of evidence from a potential witness. As Lord Halsbury LC put it, "I do not care whether he is what is called a volunteer or not" (p. 489). The principle was further applied in *Beresford v White* (1914) 58 Sol Jo 670, TLR 591 to what was said during an interview conducted by a solicitor with a person who might or might not be a witness on behalf of his client in proceedings that were contemplated but not afoot. This line of authority was affirmed in *Lincoln v Daniels* in 1961 (p. 258) to the effect that it is immaterial whether a statement is taken during actual initiated proceedings.

[23] In *Lincoln v Daniels* (pp 250-252, 256-259 and 269) the Court of Appeal held that the making of a complaint to the Secretary of the Bar Council with a view to it being passed on to the Inns of Court was not covered by absolute privilege, because the Bar Council was not the agent of the Inn, or otherwise constitutionally responsible to determine complaints. Citing *Lilley v Roney* (1892) 61 LJQB 727, 8 TLR 642 the situation was different with the Law Society where a complaint about a solicitor sent to the Registrar of the Society with a view to it being adjudicated upon by its dedicated complaints procedures was deemed to initiate proceedings. In those circumstances the initial letter sent in accordance with the prescribed form issued under relevant statutory rules and accompanied by a required affidavit would be covered by absolute privilege. I return to this precedent below (see §30).

[24] In *White v Southampton University Hospitals NHS Trust* (the foremost case relied upon by the defendant before me) the High Court in England held that a letter sent by a medical director of the defendant NHS Trust to the Fitness to Practice Directorate of the GMC was covered by absolute privilege. Prior to the sending of the letter there was no GMC investigation. The complaining defendant was a volunteer. The Court (at §7) relied on the "public policy objective…to enable people to speak freely, without inhibition and without fear of being sued, whether making a complaint of criminal conduct to the police or drawing material to the attention of a professional body such as the GMC or the Law Society for the purpose of investigation" adding that "the policy would be undermined if, in order to obtain the benefit of the immunity, [a complainant] was obliged to undergo the stress and expense of resisting a plea of malice."

[25] Although concerning a volunteered complaint to the police, rather than a professional body with quasi-judicial powers, *Westcott v Westcott* contains a detailed analysis of why there can be no rational distinction between an alleged malicious witness and a malicious complainant. Its facts are that an estranged spouse told the police that her father-in-law had assaulted her and in light of the allegation the father-in-law brought an action in defamation. In ruling that absolute privilege applied to the wife's initial complaint to the police the Court of Appeal (at §§26 and

43) cited with approval *Buckley v Daniels* [2007] EWHC 1025 (QB) [2007] 1 WLR 2933 §21 "in giving priority to the need to protect those who provide evidence to police officers (or other investigatory agencies) in the course of inquiry into possible illegality or wrong doing" and so holding that "The public policy consideration applies with equal validity to those who are mere witnesses and to those who are initial complainants." Based on the line of case law from *Taylor* to *Buckley*, Warby LJ concluded (at §36):

> "There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. [Counsel's] distinction between instigation and investigation is flawed accordingly. In my judgment, any inhibition on the freedom to complain will seriously erode the rigours of the criminal justice system and will be contrary to the public interest. In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged."

[26] Returning to the present case, and subject to the plaintiff's criticism of the way in which the defendant lodged its complaints, having drawn the parties' attention to *Westcott v Westcott* I did not understand either of them to suggest that the above reasoning applied to the criminal justice system did not equally apply to the LSNI's professional conduct system.

Application to the defendant's complaint letters

[27] Repeating my opening remarks that no aspect of this judgment should be taken to adjudicate upon the criticisms that are made by the defendant of the plaintiff, or third parties otherwise referred to, the salient relevant parts of the course of correspondence with the LSNI between April and September 2021 are set out and analysed below:

(i) The letter of 13 April 2021 was in substance a letter of complaint sent by the defendant to the plaintiff. It alleged that Mr McGettigan had "recently made a number of unsolicited telephone calls to selected shareholders and directors of QRBC Ltd and Mannok DAC." Although accepting that "the full extent of your calls remains unclear", it was said to be apparent that the plaintiff had suggested that "community disquiet" about the work of the defendant could be allayed by the making of a donation to an unspecified trust. The defendant referred to "a persistent history of violence and intimidation that had surrounded these matters." Its concern was that the plaintiff's firm was known to act for both Mr Sean Quinn, a previous owner and founder of a group company now owned by the defendant, and a number of other individuals in legal dispute with it. While accepting that whom the plaintiff

acted for was his business, the complaint concerned the purported conflict of interest of acting for those clients and appearing to broker a financial solution to the economic benefit of a trust entity with which he was said to be associated. The defendant indicated that the matter had been reported to the police. It was further under consideration whether there was a duty to refer the matter to the LSNI. The plaintiff was invited to have input to those considerations by the end of the week.

(ii) Correct procedure aside, the letter then sent to the LSNI on 29 April 2021 was a volunteered complaint inviting the designated professional disciplinary body to investigate its content. Mr McCaffrey for the defendant company was "writing to register a complaint." The statements in the letter itself and attached in the letter dated 13 April 2021 that was sent to the plaintiff but had not then been answered, sought to initiate a quasi-judicial investigation (as in *White v Southampton University Hospitals NHS Trust*). They were not proffered in response to a pre-existing investigation (as in *Mayer v Hoare*).

(iii) The essence of the complaint of 29 April 2021 (elaborating upon the 13 April letter) was that the plaintiff's approach to now named shareholders in the defendant company was professionally wrong. It was said to be in conflict with the plaintiff acting for various persons who were in legal and broader local community conflict with the defendant company and its officers. It was suggested that the approach could re-aggravate a previously inflamed situation which had included civil harassment and criminal conduct. Reference was made to the abduction and torture of Kevin Lunney, the company's Chief Operating Officer, in September 2019. The letter ended with Mr McCaffrey indicating that he was available to meet and provide any further detail required "in connection with the complaint."

(iv) The letter of acknowledgement of receipt by the LSNI on 14 June 2021 informed the defendant that the correspondence with enclosure had been "brought to the attention of the Society's Professional Conduct Department." A process was then described that Mr Dunlop KC in his oral submissions to me characterised as "triaging", by which the PCD indicated that a Solicitor Caseworker had been assigned to initially deal with the matter and that it was general practice to prioritise the more important cases worthy of fuller investigation. It is worth noting that the Guidance relied on by the defendant at the hearing calls this correspondence "the Society's triage letter." At that stage – given the triaging process - the defendant was informed that it was being treated "as a source of information rather than a complainant."

(v) Be that as it may the letter of 14 June 2021 also informed the defendant that its letter of 13 April 2021 was understood as "setting out your allegation" and "wherein you have clearly set out your concerns" would be forwarded to the plaintiff for comment, as "It is unclear if Mr McGettigan has ever replied to this correspondence and as such the Society intends to contact him for his comments and/or explanations in respect of the allegations raised." The

Solicitor Caseworker added "Thereafter the matter may be referred to the Society's Professional Conduct Committee for consideration."

(vi) In terms of subsequent communications, it is relevant that the 14 June 2021 letter informed the defendant that it would be told of any action in due course, but acknowledged the possibility that the defendant might in the meantime be "able to provide … further information or contribute to the matter" and ended by positively inviting the provision of "any further information, including any response received from Mr McGettigan that you wish to draw to the attention of the Society."

(vii) Mr McCaffrey replied to the PCD letter on 17 June 2021 indicating that he had received no reply to the letter of 13 April and that he could provide contact details of the shareholders that the plaintiff had called. He also provided additional details about the background of intimidation and violence which he said were relevant to understanding the ethical error of the unsolicited contact. Material post-dating the letter of 25 April was provided by way of a press article and correspondence relating to another person. Both documents apparently concerned acrimonious boundary disputes attaching to the defendant's place of commercial operations.

(viii) Meanwhile, on 14 June 2021 the plaintiff was sent the defendant's letter of 13 April by the PCD asking for comment. The plaintiff's firm wrote back to the PCD on 16 June explaining that no reply had previously been made to the defendant's letter, because "We did not feel the same warranted a response." It was nevertheless denied that there was any wrongdoing. Acting for "a local community organisation" it was explained that the firm had sought a meeting with a shareholder, or if appropriate all officers and shareholders, and when the offer of the meeting was rejected, there were no further communications. The plaintiff's firm could not "see any legitimate complaint or wrongdoing" contained in the letter. The comments were considered defamatory, and the firm was currently considering its position. I mention at this juncture that in his affidavit for these proceedings, the plaintiff adds that the contact was made in good faith, in an attempt "to calm the waters."

(ix) On 22 July 2021 the plaintiff's firm wrote to the defendant alleging defamation contained in the letter of 13 April that was published to the Law Society and sought immediate proposals in terms of damages and/or amends. It was suggested that "By addressing correspondence to my regulating body, [the LSNI], you have published details of this libel as the information that you addressed to [the LSNI] has been circulated to a number of individuals on this issue."

(x) The defendant's lawyers replied to the letter on 12 August 2021 rejecting the accusation, referring to the fact that the defendant had made a "confidential complaint" to the LSNI and that "this complaint was being dealt with in the usual course by [the LSNI] and absolute privilege applies."

(xi) On 13 August 2021, the Solicitor Caseworker at the PCD wrote to the defendant to inform him that the matter had been considered at a meeting of LSNI's PCC on 5 August. The defendant was informed that the PCC had taken account of the correspondence from both sides and had "noted the history of the particular complaint and relevant history raised." The plaintiff's response was summarised that he had "simply" offered "to facilitate a meeting that was rejected and thereafter no further communication was made." Given that PCC decisions were required to be based on "available papers", it was said that "There was no indication, based on available information, that the solicitor repeatedly made efforts to make unsolicited calls and there was nothing to dispute the version of events presented by the solicitor, in writing, to the Society." The salient part of the letter concluded, "The Committee did not consider that his conduct was tantamount to professional misconduct and resolved not to uphold the complaint and close the matter." The plaintiff's firm was to be informed and it duly was on the same date in the same terms.

(xii) On 25 August 2021 the defendant wrote to the Solicitor Caseworker. He acknowledged receipt of the letter of 13 August beginning "While I appreciate the considerations of the Committee, I have several concerns that I would like to bring to the Committee's attention regarding the process and Mr McGettigan's subsequent action." For context he provided additional detail on the community group that the plaintiff acted for, now named as the Cavan Fermanagh Leitrim Community Group. The letter referred to "a long history of antagonism towards the Mannok team" and defamation proceedings in the Republic of Ireland, asserting that if the plaintiff was acting for the group when he called the shareholders then he should have disclosed as much. Mr McCaffrey informed the PCD that further to the detail set out in the letter of 29 April that the two shareholders were available to give sworn statements as to the content of the calls "should the Committee consider this to be of use." By way of addition, he referred to a news article (post-dating the letters of 29 April and 17 June) further indicating the plaintiff's association with the relevant community group. He ended, "I do not want to pester the committee, but it would be remiss of me not to point out the issues that concern me. Should you require any further detail I am happy to be of assistance."

(xiii) The defendant wrote a final time on 16 September 2021 referring to previous correspondence and acknowledging that the PCC had "determined that there is no evidence of misconduct." Mr McCaffrey repeated his "previous offer to adduce evidence in the form of statements from the two individuals whose encounters with Mr McGettigan gave rise to my initial concerns." He further informed the PCD that he had received pre-action correspondence threatening to issue defamation proceedings in connection with "my complaint to you", commenting "I can only surmise that this correspondence was issued in the hope that it would lead to the withdrawal of the complaint." He then referred to a statement said to be released by the community group

on 6 September which the defendant was said to be acting on behalf of and a press article dated 8 September saying more about the group. It was suggested that this "pattern of behaviour" represents a "conflict" and demonstrates "the unprofessional and ethically questionable nature" of Mr McGettigan's association with the group. The PCD was then referred back to the manner in which the plaintiff had approached the shareholders, as per the previous correspondence.

(xiv) The PCD wrote to both the defendant and the plaintiff on 22 September 2021 to indicate that the PCC had met on 16 September and considered the correspondence received from the defendant dated 25 August and 16 September. The PCC "having considered the matter in detail" was said to be "satisfied that this additional correspondence did not materially impact or introduce any new evidence relevant to the original decision of the Committee." It had been resolved that there was no evidence of any professional misconduct "based on the papers to hand and determined that their decision not to uphold the complaint remained unchanged." That was the end of the correspondence adduced by way of the affidavit evidence.

[28] Based on the above summary, the following further features of what occurred are of note:

(i) While it may not matter either way, I do not see the additional information supplied in the letters of 17 June (not part of the claim), 25 August or the 16 September to constitute additional complaints. They are attempts to provide further information in relation to the original complaint. The PCC does not appear to have characterised them otherwise.

(ii) In the letter of 13 April 2021, the defendant informed the plaintiff that it had reported the fact of the unsolicited calls to the PSNI and An Garda Síochána. The fact that both police forces were being kept informed was reiterated in the letter to the PCD of 16 September. I have not seen any further correspondence in relation to that contact.

(iii) Other than the reference of contact with the two police forces, it appears to be the case that all impugned statements published by the defendant about the plaintiff were made to the LSNI, and after her assignment, only via the Solicitor Caseworker. The defendant is not alleged to have unlawfully published its allegations elsewhere, or to have published the fact that a complaint was made to the LSNI. Equally, the impugned statements were apparently treated in confidence by the LSNI.

Conclusion

[29] As outlined in §§7-10 above, it is important to keep in mind the narrowness of the issue raised by the defendant as to whether the form and continuation of the correspondence served to remove the substance of absolute privilege which, bar the alleged irregularities, would otherwise apply.

[30] Mr McHugh KC's argument was that as a matter of principle formalities mattered given the exceptional consequence of an immunity from suit. Although he did not address me on the case directly the submission is somewhat supported by the emphasis placed by Devlin LJ in *Lincoln v Daniels* at pp 258-259 on the very specific requirements that pertained to the prescribed form and the need for the accompanying affidavit in the equivalent Law Society process examined in *Lilley v Roney*. Once the formalities were complied with, in that case absolute privilege was held to apply to the initiating complaint. However, Devlin LJ was not prepared in his analysis of the issue back in 1961 commenting on the Law Society procedure dating back to the 19th century to accept that "all proceedings must be regarded as initiated when first a letter of complaint is written to the body authorised to try them." To quote his Lordship:

> "On such a point form is of the first importance; it is by form rather than by the substance of the complaint that a writ is to be distinguished from a letter before action. When the body to whom the letter is addressed has many other functions besides that of investigating complaints, it may not be easy to say when "proceedings" begin." [Emphasis added]

[31] While those obiter comments (including the parts underlined) capture the spirit of the plaintiff's submissions before me, I conclude that they cannot assist him for the following reasons:

(i) The alleged irregularities of form alleged here are truly minor. The template document provided for under the Guidance downloaded in the week of the hearing is basic, requiring the identification of the complainant and a summary of the complaint, all of which were supplied in the letter of 29 April. It ends with a pro-forma agreement requiring a signature to confirm that it is understood that the complaint could be made available to the PCC, third parties such as agents of the LSNI and the Solicitor's Disciplinary Tribunal. There is no requirement to serve an affidavit or sign a declaration of truth.

(ii) Whatever statute-based condition precedent type formalities existed in terms of initiating complaints to the Law Society under the regime of Sch. 1 to the Solicitors Act Rules 1889 considered in *Lilley v Roney*, the Court was informed of no such similar requirements under the modern law. Rather the plaintiff pointed only to process requirements contained in Article 44 of the Solicitors (NI) Order 1976 which concern the bringing of disciplinary charges in tribunal proceedings at the culmination of an investigation rather than at its outset (see §9 above).

(iii) The Court of Appeal in *Westcott v Westcott* held at §32: "Since public policy provides the answer, it is the public policy considerations of the 21st century not those of the 19th century which prevail." Adopting that outlook, I find

that an insistence of form over substance markedly contrasts with the modern public policy approach to complaints made in anticipation of criminal, civil or disciplinary proceedings, including statements that could possibly lead to such proceedings. It conflicts with the underlying policy rationale relied upon in the principled evolution of the case law for extending the protection to spontaneous statements made by third party witnesses to lawyers, unsolicited allegations made to the police, or letters unilaterally volunteered to professional bodies.

(iv) The above conclusion is based upon first principles. However, the plaintiff could point to no case where some minor error in the form in which a complaint was made was said to remove the privilege. By contrast in *Addis v Crocker* (a case concerning Law Society regulation and adjudication) the Court found at pp 27-28 that irregularity in the proceedings does not destroy the privilege.

[32] I therefore reject the plaintiff's argument that alleged minor errors of form of not using the supplied template or uploading the complaint on the online platform were sufficient to remove the absolute protection of the privilege. In doing so, I assume that which was not strictly proven, that the Guidance downloaded in June 2023 was in existence in 2021. Further, although the PCD and thereafter the PCC made no reference to errors of form, I do not decide the issue primarily on what those bodies and the assigned case officer were prepared to countenance. Rather I decide the matter primarily on the basis that I have seen no error of form that was so significant as to justifiably impact the application of this public policy-based protection. At least in this context I find that to allow formalism of that nature to effect application would positively undermine the policy.

[33] The plaintiff submitted in the alternative that even if the initial complaint was covered by absolute privilege, the further letters of complaint were not. I do not agree for the following reasons:

(i) I was shown no statutory rule, regulation, or any part of the Guidance to indicate that once a decision was made by the PCC both it and the PCD were *functus*. The high point of the submission was the request in the Guidance "that all aspects of the complaint are included in the conduct complaint form as new issues cannot be raised at a later date." That text reads as somewhat advisory not mandatory, but even if intended otherwise, I do not find that it constitutes an estoppel. It also did not stop the PCD in the triage letter of 14 June positively inviting from the defendant the provision of "any further information…that you wish to draw to the attention of the Society."

(ii) The correspondence, thereafter, starting with the defendant's letter of 17 June but repeated in the letters of 25 August and 16 September, referred to the two shareholders that were contacted by the plaintiff being willing to provide signed statements. It provided further detail in relation to the original complaint, and repeated the criticism that the plaintiff should not have called

the shareholders because of his association with certain clients and the community group, or at least, it was improper not to have informed the shareholders about the association during the calls.

(iii) Whether the publications contained in the letters of 25 August and 16 September were new complaints (which I conclude not), or the supply of information in relation to the original complaint, the second and third letters could not be described as "wholly extraneous to the investigation - irrelevant and gratuitous…" (*Cf. Taylor v SFO* p. 215B). Whether asked for or not, they were statements designed to assist the relevant professional body.

(iv) As above, it does not fit with the public policy rationale for the immunity to draw bright line formalities in this way. That is particularly the case, because the PCD and the PCC are investigatory bodies. They do not act as the final tribunal. They investigate matters that may possibly be referred to such a tribunal. It would positively undermine the policy rationale for the privilege if would-be complainants restrained themselves from offering additional information to the LSNI's bodies under its structured triage system for fear of having to undergo the stress and expense of resisting a plea of malice (*Cf. White v Southampton University Hospitals NHS Trust* §7).

[34] Consequently, I do not accept that the defendant lost 'standing' (as the plaintiff puts it) to say anything more under the cover of privilege after receiving the letter of 13 August 2021. The fact that the PCC considered it necessary to consider the further letters of 25 August and 16 September indicates that they did not regard themselves as lacking jurisdiction to do so. However, and as above, the primary basis for my decision is that the communications remained exclusively between the defendant and the assigned Solicitor Casework under a professional conduct complaints system and to that end the public policy rationale for the immunity does not allow sanction for defamation.

[35] If that produces a harsh result, and I make no finding whether it does or does not in this case, the review of the case law shows that such an outcome is to be tolerated in the interest of the public (see §18(v) above). This is one of the "privileged occasions" – as *Gatley* puts it in the text quoted at the outset of this judgement - "in which it is for the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given to reputation by the law of defamation." By way of comment, the case law on this issue also confirms that, bar future argument, absolute privilege arises only under the law of defamation. For instance, it has been repeatedly held not to extend to malicious prosecution: see, *eg Taylor v SFO* p. 215E and 219E-G affirmed in *Buckley v Daziel* §§21-24 and *Westcott v Westcott* §§28-29 and 37. However, that cause of action was not pleaded in this case; nor have I seen any evidence that the tort was committed.

[36] For these reasons I answer the preliminary issue in the defendant's favour and dismiss the claim.