



The Registrar of La Chambre de Discipline v An Advocate
Royal Court
26th July, 2018

JUDGMENT
31/2018

An appeal by the Registrar of La Chambre de Discipline, concerning a decision of the Chambre in respect of a complaint referred to the Chambre, which it held had not been proved.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

On appeal from La Chambre de Discipline

Between:

**THE REGISTRAR OF LA CHAMBRE DE
DISCIPLINE**

Appellant

-and-

AN ADVOCATE

Respondent

Date of hearing: 5th July 2018

Judgment handed down: 26th July 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Appellant:

Advocate S H Davies

Advocate for the Respondent:

Advocate P T R Ferbrache

Legislation referred to:

The Guernsey Bar (Bailiwick of Guernsey) Law, 2007

Registrar of La Chambre de Discipline v An Advocate [2016] GLR 261

The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999

Practice Direction No. 2 of 1997

The Rules of Professional Conduct of the Guernsey Advocate

R v Smythe (1981) 72 Cr App R 8

Cross on Evidence
Blackstone's Criminal Practice 2018
Stack v Dowden [2007] 2 WLR 831
Phipson on Evidence (19th ed)
Attorney General v Sinel and Chiddicks [2015] JRC 049B; [2015] JCA 192
Brett v The Solicitors' Regulation Authority [2014] EWHC 2974 (Admin)
The Solicitors' Act 1974
The Matrimonial Causes (Amendment) (Guernsey) Law, 1997
The Matrimonial Causes Law (Guernsey), 1939
The Human Rights (Bailiwick of Guernsey) Law, 2000
The European Convention on Human Rights
The Royal Court (Bar Administration) Order, 1993
Sweet v Parsley [1970] AC 132
Taylor [2016] 1 WLR 500

Introduction

1. The Registrar of La Chambre de Discipline, who has been appointed pursuant to section 20 of the Guernsey Bar (Bailiwick of Guernsey) Law, 2007, has exercised his right of appeal against a decision of La Chambre de Discipline (“the Chambre”), which is conferred upon him by section 28 of that Law. The decision in respect of which he appeals by way of a Notice of Appeal dated 29 March 2018 is a decision dated 28 February 2018, but it is common ground that it was not sent to those having a right of appeal until 6 March 2018, by which the Chambre found that the complaint referred to it by the Registrar had not been proved. On this appeal, the Registrar contends that the Chambre should have concluded that the complaint made was proved and so should have proceeded to consider how to deal with the Advocate who is the subject of that complaint (to whom I will refer as “the Advocate Complained Against”). The Advocate Complained Against opposes the appeal, arguing that the Chambre did not fall into error, but raises a further question of law by way of a Respondent's Notice dated 18 May 2018 should this Court decide to depart from the findings of the Chambre.
2. Before this Court, the Registrar as Appellant has been represented by Advocate Davies and the Advocate Complained Against as Respondent has been represented by Advocate Peter Ferbrache. Both also appeared in those capacities before the Chambre. I am grateful to them both for their assistance.
3. Section 28(5)(a) of the 2007 Law provides that, when disposing of an appeal, this Court “*shall give a reasoned decision in writing*”. Accordingly, at the conclusion of the hearing on 5 July 2018, I reserved my decision and this judgment is the required reasoned decision in writing.
4. I have followed the approach taken by the Bailiff in *Registrar of La Chambre de Discipline v An Advocate* [2016] GLR 261 and decided that it is appropriate to publish this judgment. However, the hearing of the appeal took place in private, so I have written this judgment without including details from which the Advocate Complained Against, or others, can be identified. The appeal hearing took place in private because the hearing before the Chambre had been held in private in accordance with section 25(1) of the 2007 Law and one of the powers available if a complaint is found proved on an appeal is to administer a private reprimand to the Advocate in question pursuant to section 29(3)(b).

The grounds of appeal

5. There is little assistance in the 2007 Law as to how an appeal to the Court is to be conducted. The form and manner of appealing is for this Court to determine (section 28(2)). Unlike an appeal to the Court of Appeal, which is confined to being on a point of law, as set out in section 30(1), and where leave of the Court of Appeal is also required (see section 30(2) and (3)), the absence of any such qualification to the right of appeal in section 28 could mean that an appeal is capable of being pursued more broadly, possibly even by way of a complete re-hearing. In the present case, though, the Registrar has lodged a Notice of Appeal in what might be termed “traditional” form, containing the grounds on which he submits that the Chambre erred in its findings.
6. The first paragraph of the Notice of Appeal states:

“The Chambre erred in finding in the Judgment that:

- a. *The Registrar has not proved to the required standard that the Respondent misled the court and was in breach of Rules 1 and 74 of the Conduct Rules [32];*
- b. *Any alleged breach of Rule 1 of the Conduct Rules would fall away should a breach of Rule 74 of the Conduct Rules not be proved [31].”*

It is common ground that the reference to “*the required standard*” is to the standard of proof provided for in section 25(9)(b) of the 2007 Law, which applies to an allegation of misconduct which is not a breach of the Proceeds of Crime Regulations (being regulations made under section 49 or 49A of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999), and which is “*the criminal standard of proof (that is, beyond reasonable doubt)*”. The references in square brackets are to the paragraphs in the Chambre’s written decision, ie, the Judgment, where the particular findings can be found.

7. The second paragraph of the Notice of Appeal states:

“The Chambre further erred (to the extent that the usual practice found by the Chambre at [23] was considered appropriate conduct where there had been no prior unequivocal if informal agreement between divorcing parties that opposition would be withdrawn) in finding that it is the usual practice of matrimonial practitioners to file Forms 1 and 2 in advance of the respondent to matrimonial proceedings formally confirming in court that a Petition would no longer be opposed and that such confirmation would take place at the sitting of the Matrimonial Interlocutory Court [23].”

The reference to Forms 1 and 2 is to the now well-established procedure set out in Practice Direction No. 2 of 1997 and the two forms of document referred to therein.

8. The third paragraph of the Notice of Appeal states:

“The Chambre further erred in finding that:

- a. *They could not infer beyond a reasonable doubt from the written materials before them that the Royal Court had been misled [29]; and*
- b. *On the evidence before the Chambre, the Respondent did not breach Rules 1 and/or 74 of the Conduct Rules [29].”*

9. The fourth paragraph of the Notice of Appeal does not contain any further ground of appeal but sets out what the Registrar contends the Chambre should have found (and so, by implication, sets out the basis on which he invites this Court to conclude that the Advocate Complained Against had made written and oral statements which misled the Court in breach of Rule 74 and/or Rule 1 of the Rules of Professional Conduct of the Guernsey Advocate (“the Rules”)).

The complaint

10. The scheme of Part II of the 2007 Law (discipline of Advocates) is that upon a complaint being made, it is considered by the President of the Chambre, who is appointed in accordance with section 19 from amongst the panel of lay persons appointed pursuant to section 18, and the Bâtonnier. All complaints must be in writing and, if a complaint is not initially made in writing, the Bâtonnier may require the complainant to state the complaint in writing or cause it to be stated in writing on the complainant's behalf (section 21(6)). In undertaking their consideration of the complaint, the President and Bâtonnier may request the Advocate about whom the complaint is made to comment in writing and may also invite the complainant to respond to any such comment (section 21(3)). If the President and Bâtonnier agree that any complaint is vexatious, frivolous or not one of professional misconduct, the Bâtonnier is obliged to refuse to refer that complaint to the Registrar (section 21(4)) and, in all other cases, the Bâtonnier shall refer the complaint made to the Registrar, send to the Registrar any comments received by the President and Bâtonnier during the course of considering the complaint and inform the complainant, the Advocate who is subject to the complaint and Her Majesty's Procureur of the referral.
11. The complaint with which this appeal is concerned was made in writing by way of a letter dated 1 April 2016. That letter raised four complaints. I will refer to the person making the complaint as “the Complainant”. The Complainant had been the respondent in divorce proceedings brought by the Complainant's spouse as Petitioner. The Petitioner had been represented by the Advocate Complained Against. The Complainant was represented by another Advocate (to whom I will refer as “the Complainant's Advocate”). The complaint which was in due course referred to the Registrar appeared under the heading “*Inaccurate representations*” and was in the following terms:

“By letter dated 26th August my Advocate informed [the Advocate Complained Against] that my appearance at the contested divorce hearing would be withdrawn subject to certain conditions being agreed. Those conditions were not agreed by [the Petitioner].

Nonetheless [the Advocate Complained Against] on 27th August proceeded to lodge an application for a Provisional Order and indicated by letter on 28th August saying that my Advocate had confirmed that the matter could proceed on an uncontested basis. [The Advocate Complained Against] tried to apply for Provisional Order on 3rd September but my Advocate explained to the Court that the withdrawal of the Application was conditional and the conditions were not agreed. I question [the Advocate Complained Against's] professional conduct in this matter since [the Advocate Complained Against] knew that my withdrawal was conditional and that those conditions had not been met, yet [the Advocate Complained Against] chose to advise the court that I had withdrawn.

Subsequently, I took the view that the Appearance should be withdrawn reserving my position as to costs and the Provisional Order was granted. Notwithstanding the outcome, it is my belief that [the Advocate Complained Against] knowingly made a representation to the Court which he knew to be false.”

12. This complaint led to the Bâtonnier writing to the Complainant on 6 April 2016 drawing attention to the time limit for a complaint (other than one alleging misconduct by breaching the Proceeds of Crime Regulations) as specified in section 21(2) of the 2007 Law, which provides that a complaint shall not “*be entertained if it is received more than 6 months after the last of the events giving rise to the complaint, unless the President is satisfied that exceptional circumstances exist which justify the making of the complaint outside that period*”. At face value, the last of the events raised by the Complainant occurred on 3 September 2015, yet the complaint was only made on 1 April 2016. The Complainant's reply dated 13 April 2016 explained that the Complainant's Advocate had suggested that any complaint to be made “*should wait until the legal matters were substantially complete*”, adding that making a complaint in time “*risked further escalation of bad feeling and cost*” and that an issue such as making inaccurate representations to the Court was “*likely to be considered sufficiently serious for the Chambre to exercise its discretion to set aside the time bar*”. The Complainant further explained that the last date on which the division of a joint asset had taken place was 16 March 2016 and the letter of complaint dated 1 April 2016 had been submitted as soon as the Complainant had been able to do so.

13. By a letter dated 15 April 2016, the Bâtonnier invited comments on the complaints received from the Advocate Complained Against. In a letter dated 29 April 2016, the Advocate Complained Against replied (in respect of the complaint subsequently referred to the Registrar):

“I have checked my file note of the hearing on 3 September. I note that [the Complainant] was not present in Court. At that hearing, [the Complainant's Advocate] on behalf of [the Complainant] confirmed that [the Complainant] was not prepared to withdraw [the Complainant's] Appearance and that the application for a Provisional Order could not proceed. At no time did I mislead the Court.”

14. The Complainant was, in accordance with section 21(3)(b) of the 2007 Law, invited to respond to the Advocate Complained Against's comments. In a letter dated 14 May 2016, the Complainant wrote *inter alia*:

“The fact that [the Advocate Complained Against] knowingly attempted to mislead the court is, I suspect one of the easiest points to prove on account of the fact that [the Advocate Complained Against] knowingly ignored the conditional nature of my offer made through [my Advocate] on 26 August 2015 to cease to oppose [the Petitioner's] exaggerated petition for divorce.

At the heart of the matter is the fact that [the Advocate Complained Against] presented a Provisional Order which [the Advocate Complained Against] purported to be agreed when [the Advocate Complained Against] knew that was not the case. The fact that I was not present in court is irrelevant, as is the fact that [my Advocate] prevented [the Advocate Complained Against's] rouse [sic] from succeeding.

The fact that [the Advocate Complained Against] filed this misrepresentative order during a time when [my Advocate] was on leave is also, I suspect no co-incidence and a further example of [the Advocate Complained Against's] underhand approach to these proceedings.”

The Complainant enclosed a copy of a letter sent by the Complainant's Advocate to the Advocate Complained Against on 10 September 2015, which included the following paragraph as its second paragraph:

“I did indeed advise the Court that the appearance was not withdrawn because the conditions set out in my letter of the 26th August, 2015 had not been agreed. It is a

matter of some concern that, notwithstanding the fact that they were not agreed, you chose to inform the Court that it was agreed that the Memorandum of Appearance would be withdrawn and you made an application for a Provisional Order. I was out of the office in the period between receipt of your application for a Provisional Order and the 3rd September, 2015. Nonetheless I did contact your office on the 2nd September, 2015 to talk to you about your application either with a view to progressing matters to agreement or at least to indicate to you that there was a problem with your application. I left you both my home and mobile numbers but you did not return my calls. If there is to be any disagreement about costs in the future, the costs of your application for a Provisional Order will be disputed, bearing in mind that you should not have made that application to the Court, in view of the contents of our exchange of letters.”

15. The complaint with which the Chambre dealt was referred to the Registrar by way of a brief letter dated 9 June 2016 from the Bâtonnier, which enclosed a copy of a letter to the Complainant from the President dated 8 June 2016. The President’s letter begins “*Now that the allegations of professional misconduct you have made against [the Advocate Complained Against] have been fully set out*”. In respect of the complaint being referred, it includes the explanation that:

“You allege that [the Advocate Complained Against] misled the court by holding out that you had agreed a certain course of action when that was not in fact the case, in that [the Advocate Complained Against] presented a provisional order to the court as if it had been agreed. This would indeed amount to professional misconduct if proved.

The [Advocate Complained Against] forcefully denies the allegation.

We have had the benefit of seeing [your Advocate's] letter of 10th September 2015, in the second paragraph of which there appear to [be] concerns expressed regarding the [Advocate Complained Against's] actions.

Bearing in mind that ... it is not our job to chase down evidence, or indeed to weigh the evidence provided with regard to the substance of the allegations, we feel that this allegation can only be fully dealt with by investigation and further disclosure, and that can only be carried out by the Registrar. We shall therefore be referring this allegation accordingly.”

16. Once this complaint had been referred to the Registrar, a different phase of the process commenced. By section 22(1) of the 2007 Law, the Registrar is required to “*make such investigations in respect of [the complaint referred to him by the Bâtonnier] as he thinks fits*”. Subsection (2) enables the Registrar to “*take statements from any witness as to fact (including the complainant, the respondent and any third party)*” and to “*gather any document or other evidence*”, including from the Advocate who is the subject of a complaint, or from that Advocate’s firm or institution, and retain those documents until the Registrar’s investigation and any disciplinary proceedings are completed. The Registrar is also permitted to instruct any expert witness and request any legal advice. By section 22(8), the Registrar is expressly not precluded from exercising any of his powers on the ground that he has already referred the complaint to the Chambre.

17. By section 22(6)(a):

“If after the completion of his investigations the Registrar decides that a prima facie case is –

- (a) *disclosed, he shall –*
 - (i) *refer the complaint to the Chambre,*
 - (ii) *inform the complainant, the respondent, the President and Her Majesty’s Procureur of that referral, and*
 - (iii) *send a statement of facts to the respondent, the President and the Chambre”.*

Subsection (7) further provides:

“For the purposes of subsection (6), a statement of facts shall include –

- (a) *the name of the complainant,*
- (b) *the specific allegations in reasonable particularity, and*
- (c) *a summary of the evidence in support of the complaint.”*

18. The Registrar wrote to the Advocate Complained Against on 2 August 2016. In that letter, the Registrar indicated:

“I am hoping that it will prove possible for this matter to go forward without the need for detailed investigation on my part. I take the liberty to mention that proceedings before the Chambre are of an inquisitorial rather than an adversarial nature and I trust that together we may approach my investigations with this in mind.”

The Registrar also referred to a letter dated 29 June 2016 sent to him by the Advocate Complained Against, with which was enclosed a comprehensive response. That response, also dated 29 June 2016 and in the form of a witness statement, had appended to it documents from the file of the Advocate Complained Against, which included a copy of a transcript of a hearing before the Matrimonial Interlocutory Court on 3 September 2015. The complaint was characterised in this comprehensive response as being an allegation from the Complainant that the Advocate *“misled the Court by presenting”* a Provisional Order purporting it to be agreed when the Advocate Complained Against knew that was not the case.

19. Before sending this letter dated 2 August 2016 to the Advocate Complained Against, the Registrar had received from the President a letter dated 30 June 2016, in which the President dealt with the delay between the events the Complainant mentioned and the making of the complaint. This was prompted by an e-mail sent to the President and the Bâtonnier by the Registrar on 23 June 2016 raising this issue. The President referred to the response provided by the Complainant’s letter dated 13 April 2016, to which reference has already been made, and added:

“The Batonnier and I took this into account when considering whether the matter should be referred; we considered that it was quite reasonable not to raise a complaint during the course of matrimonial proceedings as these can often be difficult, and it would not be sensible to complicate matters further. We also noted that [the Complainant] took [the Complainant’s Advocate’s] advice on the matter. I therefore made the decision, in accordance with the power given to me under section 21(2) of the 2007 Law, that there existed exceptional circumstances allowing the complaint to be brought forward out of time.

Whilst that decision was clearly implicit by reason of the fact that the matter has been referred to you, I did not deal with it explicitly in my letter of 8th June to [the Complainant], when perhaps I should have done.”

20. As part of his investigation, having been permitted to do so by the Advocate Complained Against, the Registrar invited the Complainant's comments on the statement dated 29 June 2016 and the accompanying materials. The Registrar then wrote to the Advocate Complained Against on 6 September 2016, explaining that in doing so he was dealing "*with the allegation that you misled the Court*". The Registrar referred to the Complainant suggesting that the approach of the Advocate Complained Against "*was premeditated and originally contemplated as far back as 25 August when you were allegedly aware that [the Complainant's Advocate] was on leave over the Bank Holiday weekend.*" The Registrar quoted the Complainant referring to "*this underhand application*". The response from the Advocate Complained Against dated 6 October 2016 maintained that the letter from the Complainant's Advocate "*of 26 August agreed to withdraw [the Complainant's] Appearance. The same letter then sought to impose entirely random and irrelevant conditions that the Court had no power to grant. ... this was an open letter the effect of which was that the divorce hearing listed for 21 September was no longer required ... This is why, upon receipt ..., I was instructed to write to the Court to seek to vacate the divorce trial and to replace it with the financial hearing*".
21. On 31 January 2017, the Registrar sent to the Advocate Complained Against a copy of a letter dated the same day sent by him to the Complainant. This brief letter explained that the Registrar was referring "*this complaint*" to the Chambre "*as a possible breach of Rules 1 and 74*" of the Rules. The letter to the Complainant was slightly more expansive and explained that the Registrar had by then completed his investigation into a complaint made by the Complainant, which was described in terms reflected in the first paragraph of the statement of facts required by section 22(6)(a)(iii) and (7) of the 2007 Law and concluded with:
- "Your complaint is that [the Advocate Complained Against] therefore misled the Court.*
- Having investigated the matter I have decided to refer this complaint to La Chambre de Discipline. The President of La Chambre will in due course give directions to all concerned in connection with the forthcoming hearing of the complaint."*
22. The Registrar's statement of facts was enclosed with his letter to the Advocate Complained Against dated 31 January 2017. Having referred to the reference of a complaint by the President and the Bâtonnier, the Registrar describes that complaint in para. 1 as follows:
- "The Complaint was that, in the course of matrimonial proceedings in which [the Complainant] as respondent was represented by [the Complainant's Advocate] and [the Complainant's then spouse] as petitioner was represented by [the Advocate Complained Against], an Appearance on [the Complainant's] behalf was entered indicating an intention to defend the petition. The implication of such an Appearance was that the divorce could not proceed unless and until either that Appearance was withdrawn or a Court decreed otherwise. An offer, on terms, to withdraw that Appearance was made by [the Complainant's Advocate] on [the Complainant's] behalf. The terms of the offer were rejected, substantially, by [the Advocate Complained Against], but [the Advocate Complained Against] proceeded to inform the Matrimonial Court that [the Complainant's] Appearance had been withdrawn which, [the Complainant] alleges, was not the case."*
23. In para. 2, the Registrar refers to the investigations he made. He wrote to the Complainant, the Advocate Complained Against and the Complainant's Advocate, "*receiving responses, including supporting documents, from all of them*". From para. 3 onwards, the statement of facts refers to the "*essential correspondence*". The first item is a letter dated 26 August 2015 from the Complainant's Advocate to the Advocate Complained Against. The second item is a letter in reply from the Advocate Complained Against to the Complainant's Advocate dated

28 August 2015. The third item is a letter also dated 28 August 2015 sent by the Advocate Complained Against to the Greffe. Paragraph 6 refers to an application for a provisional order on 3 September 2015 being “*adjourned when, in Court, [the Complainant’s Advocate] contradicted [the Advocate Complained Against’s] statement to the Court that the divorce would proceed undefended.*” In para. 7, the statement of facts recites the matters raised by the Advocate Complained Against, which appear to be drawn from the comprehensive response enclosed with the letter dated 29 June 2016. The statement of facts concludes with the following paragraph 8:

“The facts set out in this Statement may evidence a breach by [the Advocate Complained Against] of Rules 1 and 74 of the Rules of Professional Conduct.”

24. On behalf of the Registrar, Advocate Davies accepted that this was the complaint with which the Chambre was seized and that the statement of facts had not been modified or supplemented prior to the hearing before the Chambre.

The Rules engaged

25. Rule 74 of the Rules provides:

“Advocates who act in litigation, whilst under a duty to do their best for their client, must never deceive or mislead the court.”

The commentary to that Rule states:

- “1. Although an Advocate is entitled to take every point, technical or otherwise, that is fairly arguably on behalf of the client, the court must be advised of relevant cases and statutory provisions by the Advocates on both sides; if one of them omits a case or provision or makes an incorrect reference to a case or a provision, it is the duty of the other to draw attention to it even if it assists the opponent’s case: see the Oath and Articles.*
- 2. Except when acting or appearing for the prosecution, an Advocate who knows of facts which, or of a witness who, would assist the adversary is not under any duty to inform the adversary or the court of this to the prejudice of his or her own client. But if the Advocate knows that a relevant affidavit has been filed in the proceedings and is therefore notionally within the knowledge of the court, then there is a duty to inform the judge of its existence.*
- 3. An Advocate would be guilty of unprofessional conduct if he or she called a witness whose evidence is untrue to the Advocate’s knowledge, as opposed to belief.”*

26. Rule 1 of the Rules provides:

“An Advocate shall not do anything in the course of practising as an Advocate, or permit another person to do anything on his or her behalf, which breaches, compromises or impairs or is likely to breach, compromise or impair any of the following:-

- (a) the Advocate’s Oath and Articles;*
- (b) the Advocate’s independence or integrity;*
- (c) the Advocate’s duty to the Court;*
- (d) a person’s freedom to instruct an Advocate of his or her choice;*

- (e) *the Advocate’s duty to act in the best interests of the client;*
- (f) *the good repute of the Advocate or of the Guernsey Bar;*
- (g) *the Advocate’s proper standards.”*

The commentary to that Rule states:

“Rule 1, apart from the Oath and Articles, comprises those ethical duties imposed on solicitors by the common law. The words should be given a common sense interpretation. Advocates should always refer to Rule 1 if they have an ethical problem.”

The Chambre decision

27. The Chambre hearing took place on 28 November 2017. There had been exchanges of correspondence between the Advocates representing the parties prior to this and written submissions prepared on behalf of the Registrar and the Advocate Complained Against dated 28 April and 11 May 2017 respectively had been provided to the Chambre. I have had the benefit of considering a full transcript of the proceedings before the Chambre. It shows that Advocate Davies opened on behalf of the Registrar, after which Advocate Ferbrache opened on behalf of the Advocate Complained Against. There was only one witness who gave oral evidence, namely the Advocate Complained Against, who was examined by Advocate Ferbrache and cross-examined by Advocate Davies. There was no re-examination but then each of the three members of the Chambre (Advocate Bailey, Ms S. Mason and Dr. L. Pannett) had a few questions to ask. Closing submissions were then made by Advocate Davies and Advocate Ferbrache.

28. I will gratefully adopt the summary of what the Chambre refers to the “*pertinent facts*”, which the Chambre understood not to be disputed and which it considered to be proved, as set out in para. 11 of its decision:

- “(i) *in or around 26 March 2015, [the Advocate Complained Against’s] client, [the Petitioner], commenced divorce proceedings by way of a Petition alleging [the Complainant’s] unreasonable behaviour;*
- (ii) *the Complainant, through [the Complainant’s Advocate], entered a General Appearance by which [the Complainant] opposed the granting of a divorce;*
- (iii) *by a letter dated 26 August 2015 to [the Advocate Complained Against], [the Complainant’s Advocate] informed [the Advocate Complained Against] that [the Complainant] disputed the allegations of unreasonable behaviour contained in the Petition but [the Complainant] was prepared to withdraw [the Complainant’s] General Appearance to enable the divorce to be granted on condition that [the Petitioner] agreed to all of the following:*
 - “1) *To acknowledge that [the Complainant] so doing is not acceptance of the allegations and that, if [the Petitioner] wishes, to raise them within the ancillary relief proceedings, they will have to be raised and determined;*
 - 2) *To make no claim against [the Complainant] in respect of the divorce;*
 - 3) *To provide reasonable assistance in [the Complainant] obtaining a Church annulment of the marriage;*

- 4) *To forego the costs awarded to [the Petitioner] at the last MIC and agrees not to raise that issue within the ancillary relief proceedings;*
- 5) *To vacate the hearing on 21st September so that the final hearing will be 30th November.”*
- (iv) *By a letter dated 28 August 2015 to [the Complainant’s Advocate], [the Advocate Complained Against] stated that: “we note that [the Complainant] now accepts that the divorce can proceed undefended”. [The Advocate Complained Against] went on to reject on behalf of [the Petitioner] conditions 2 to 4, inclusive, of the conditions set out in [the Complainant’s Advocate’s] letter dated 26 August 2015;*
- (v) *By a second letter dated 28 August 2015 to [the Greffe], which was copied to [the Complainant’s Advocate], [the Advocate Complained Against] stated:*
- “Please note that we have just received confirmation from [the Complainant’s Advocate], who works on behalf of [the Complainant], that the divorce can now proceed on an undefended basis. Indeed, we have listed the Provisional Order Application before MIC on 3 September 2015.”*
- (vi) *Unbeknownst to [the Advocate Complained Against], [the Complainant’s Advocate] was on leave at the time this letter was sent;*
- (vii) *[the Advocate Complained Against] subsequently filed a Form 1, stating that the Petition was unopposed and Form 2 in which [the Petitioner] made the statement on oath that [the Complainant] had confirmed that [the Complainant] would withdraw [the Complainant’s] Appearance to enable the divorce to proceed undefended;*
- (viii) *At the sitting of the Matrimonial Interlocutory Court before Lieutenant Bailiff Palmer on 3 September 2015, [the Advocate Complained Against] stated that:*
- “An appearance has been entered by [the Complainant] but my understanding is that that’s to be withdrawn to enable the divorce to proceed undefended as far as today is concerned.”*
- [The Complainant’s Advocate] replied that:*
- “We agreed to withdraw the appearance on the basis of certain conditions and my friend has written back rejecting those conditions so we need to have some further discussions.”*
- The matter was adjourned to the contested hearing of the divorce on 21 September 2015. [The Complainant’s Advocate] subsequently sent an email to [the Advocate Complained Against] at 16.03 the same day stating that [the Complainant] would withdraw [the Complainant’s] Appearance.”*

29. The paragraphs of the Chambre’s decision to which the Registrar cross-refers in his Notice of Appeal start with paragraph 23 (relating to the second ground of appeal):

“We heard evidence from [the Advocate Complained Against] that it is the usual practice of matrimonial practitioners before the Royal Court to file Forms 1 and 2 for

a particular sitting of the Matrimonial Interlocutory Court and in advance of the respondent having formally confirmed in court that the Petition would no longer be opposed; such confirmation would take place at the sitting of the Matrimonial Interlocutory Court. The Registrar did not call any evidence to contest this and so we accept [the Advocate Complained Against's] evidence that this is the usual practice of matrimonial practitioners. In addition, "judicial notice" is taken of the practice."

The next paragraph is paragraph 29 (relating to the third ground of appeal), which states:

"We do not find that the Registrar has produced any evidence that the court was in actual fact deceived and/or misled either by any of the documents filed by [the Advocate Complained Against] or by any submissions made by [the Advocate Complained Against]. We agree with Advocate Ferbrache's submission that we cannot infer beyond a reasonable doubt that the court was misled, nor do we do so. [The Advocate Complained Against] made an application which the court did not grant. In these circumstances, we do not consider it necessary to determine whether the letter from [the Advocate Complained Against] to the Greffe dated 28 August 2015 filing Forms 1 and 2 documents at the Greffe equates to misleading the court; however, we question why [the Deputy Greffier] was asked what "her understanding" was from the documents about how the divorce proceedings were to proceed, given that it is the Registrar's contention at paragraph 26 of his written submissions that "the statements in paragraph 25 above were untrue and necessarily misled the court"."

The final two paragraphs mentioned are paragraphs 31 and 32 (relating to the first ground of appeal). In order to make more sense of them, I will also refer to para. 30:

"30. It was unclear to us from Advocate Davies' submissions whether the Registrar's case was that [the Advocate Complained Against] had breached Rule 1 solely because [the Advocate Complained Against] had breached Rule 74, or whether he was contending that there were two breaches which were each capable of standing alone. In the Registrar's submissions he contends at paragraph 31 that any breach of Rule 74 would also breach Rule 1(b) so far as integrity is concerned and Rule 1(c), Rule 1(f) and Rule 1(g).

31. As this Panel's understanding of the Registrar's written case at the outset of the hearing was that any alleged breach of Rule 1 would fall away should the breach of Rule 74 not be proved, we have proceeded on the basis that this was the Registrar's case.

32. We do not find that the Registrar has proved to the required standard that [the Advocate Complained Against] misled the court and was in breach of Rule 74, nor that [the Advocate Complained Against] was in breach of Rule 1."

30. The aspect of the Chambre's decision that gives rise to the issue raised by the Respondent's Notice is set out in para. 20 as follows:

"We accept the Registrar's submission that, in terms, no mens rea is required for a respondent to have misled the court. We do not consider Rule 74 to be either silent or ambiguous such that it is necessary or appropriate to draw assistance as to its meaning from rules of professional conduct in other jurisdictions. That does not mean that the intention of the respondent should not be considered when the court has been misled, as an active intention to mislead will inevitably result in a more severe sanction than will inadvertently misleading the court. It may not be

satisfactory that inadvertently misleading the court will result in a finding of professional misconduct being made and we feel strongly that consideration should be given by the Guernsey Bar Council to bringing Rule 74 into line with the equivalent provisions in England and Jersey.”

Misleading the Court

31. The Registrar acknowledges that there is a degree of overlap between the grounds of appeal advanced in paragraphs 1(a) and 3 of his Notice of Appeal. Advocate Davies submits that the Chambre fell into error by not concluding that the Registrar had proved beyond reasonable doubt that the Advocate Complained Against had in fact misled the Court. This was a conclusion that the Chambre was invited to infer from the written materials submitted and the words spoken at the hearing before the Matrimonial Interlocutory Court by the Advocate Complained Against and the failure of the Chambre to draw what the Registrar regards as the inescapable conclusion that the Court was misled is, therefore, an unsustainable finding.
32. Advocate Davies submits that the conclusion of the Chambre at para. 29 of its decision is inconsistent with its earlier finding in para. 17, which was:

“We consider that it was quite clear from [the Complainant’s Advocate’s] letter dated 26 August 2015 that [the Complainant’s] willingness to allow the divorce to proceed uncontested was predicated on each of the five conditions in [the Complainant’s Advocate’s] letter being accepted and, accordingly, we reject [the Advocate Complained Against’s] explanation for proceeding to apply for a provisional order of divorce on the basis that there is no such thing as ‘a conditional divorce’ and find that, as frustrating as the situation may have been for [the Advocate Complained Against and that Advocate’s] client, the Petition remained opposed until such time as each of the conditions was fulfilled. As [the Advocate Complained Against] stated before the Matrimonial Interlocutory Court on 3 September 2015: “that’s an open letter so obviously this is going to be an issue for costs at the contested divorce hearing which will have to remain for the 21st September”.”

The Registrar’s case had always been put on the basis that the documents that the Advocate Complained Against lodged with the Court prior to the hearing on 3 September 2015 were incorrect at that time and so necessarily were misleading. What happened would have led anyone reading the materials and then hearing what was said on 3 September 2015 to have misunderstood the position and so it must follow that the only sensible and safe inference to draw is that the Greffe was misled and Lieutenant Bailiff Palmer was misled. The Advocate Complained Against accepted in evidence that the letter dated 28 August 2015 was sent with the expectation and intention that it would be read. Advocate Davies also submits that the Greffe and the judge are interchangeable for these purposes.

33. Advocate Davies relies on some English law decisions to demonstrate that the drawing of inferences is permissible, even where proof to the criminal standard is required. The first of those cases is *R v Smythe* (1981) 72 Cr App R 8. This was an appeal against conviction in respect of multiple dishonesty offences. The particular context in respect of which it was cited by Advocate Davies was that there can be an alternative count of handling stolen goods put in respect of a substantive offence (in that case) of robbery or burglary, on the basis that a jury may not be satisfied that the accused is the robber or burglar, but satisfied that he was the handler of the goods taken during the commission of such an offence. However, the only passage to which Advocate Davies drew my attention is at page 11 of the report:

“In Cross on Evidence (5th ed. 1979) the effect of all these authorities is cogently and clearly summarised at p. 49. We respectfully adopt the words there used: “If someone is found in possession of goods soon after they have been missed, and he

fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to be stolen, contrary to section 22 of the Theft Act 1968. The absence of an explanation is equally significant whether the case is being considered as one of theft or handling, but it has come into particular prominence in connection with the latter because persons found in possession of stolen goods are apt to say that they acquired them innocently from someone else. Where the only evidence is that the defendant on a charge of handling was in possession of stolen goods, a jury may infer guilty knowledge or belief (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue.”

34. As I pointed out to Advocate Davies during the course of the hearing, citing a case in order to rely upon a quotation within a judgment of some other material is not as desirable as citing directly the source material being quoted in the case. This is particularly so where the passage quoted is from a practitioner’s work or textbook where it is known that there is a later edition. For example, if the latest edition of *Cross on Evidence* includes the same passage, the principle set out therein can be treated as an accurate description of the principle. However, if there has been some change, relying on the unchanged passage would, at least *prima facie*, amount to misleading the Court. What matters most is the principle of law and then what matters next is the best authority available supporting that principle. Having raised this with Advocate Davies during the hearing, he did then take steps to obtain the most up-to-date edition of *Cross on Evidence* in order to try to meet my concerns, but without success from across his firm’s offices globally. Although what happened could arguably be treated as an example of misleading the Court, I explained that I would not be making any complaint about it because I did not feel I had been misled.
35. I understand Advocate Davies to be advancing the proposition that it is permissible to invite those who find the fact to draw inferences from the other material placed before those arbiters of fact. This is really an uncontentious proposition and might even be trite law. However, as an example, he chose to use the well-established principle deriving from a person being found in possession of recently stolen property. I am satisfied that this principle remains valid and could, by analogy, be advanced by the Registrar in relation to the complaint with which the Chambre was seized. The fact that the principle remains good law in England and Wales can easily be demonstrated by citing para. F3.63 from *Blackstone’s Criminal Practice 2018*:

“In cases of handling and theft, on proof or admission of the fact that the accused was found in possession of property so shortly after it was stolen that it can be fairly said that he was in recent possession of it, the jury should be directed that such possession calls for explanation, and if none is given, or one is given which they are convinced is untrue, they are entitled to infer, according to the circumstances, that the accused is either the handler or the thief and to convict accordingly (Schama (1914) 84 LJ KB 396; Garth [1949] 1 All ER 773; Aves [1950] 2 All ER 330; Williams [1962] Crim LR 54). It is desirable in most cases to direct the jury that the burden of proof remains on the prosecution, and if, therefore, the explanation given by the accused leaves them in doubt as to whether he came by the property honestly, the prosecution have not proved their case and they should acquit (Aves and Hepworth [1955] 2 QB 600, applied in Moulding [1996] Crim LR 440). The burden of proof is never on the defence (Aubrey (1915) 11 Cr App R 182; Brain (1918) 13 Cr App R 197; Sanders (1919) 14 Cr App R 11).

I also regard it as helpful to refer to the general principles found just the page before in *Blackstone’s Criminal Practice 2018* (at para. F3.60), because it emphasises the submission

made by Advocate Ferbrache that the burden of proof remains with the party seeking to rely on the inference:

“The phrase ‘presumption of fact’ has been used to describe certain frequently recurring varieties of circumstantial evidence, i.e. evidence of relevant facts from which the existence of some fact which is in issue may be inferred. Thus, presumptions of fact, sometimes referred to as provisional presumptions, operate in the following manner: on the proof or admission of a basic or primary fact, another fact may be presumed in the absence of sufficient evidence to the contrary. The party against whom the presumption operates bears neither a legal nor evidential burden in relation to the presumed fact; if he adduces no evidence to the contrary he runs a risk of losing on that issue, but he is not bound to lose on that issue.”

36. The second case to which Advocate Davies referred is *Stack v Dowden* [2007] 2 WLR 831, a decision of the House of Lords on the wholly unrelated subject of how to value joint interests in land in the absence of any express declaration as to the joint owners’ beneficial interests. The paragraph relied on by Advocate Davies is para. 126 in the speech of Lord Neuberger of Abbotsbury:

“An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.”

Given the Registrar’s position that there is no mental element involved in an allegation of misleading the Court, to which I will turn when dealing with the Respondent’s Notice, I was unsure exactly why this passage provided any assistance to the Court.

37. In the light of these principles, Advocate Davies submits that documents provided to the Court are necessarily provided with the expectation and intention that they will be read by the Court. Indeed, during cross-examination, the Advocate Complained Against accepted that this was so, which means that there is no need to draw any inferences on that issue anyway. What was in issue, and about which there was no direct evidence, was the question of whether the Court had in fact been misled. In relation to that, Advocate Davies further refers to the summary of principle contained in *Phipson on Evidence* (19th ed, at para. 28-32):

“A statement may be probative of a disputed fact not because of what it states (expressly or by implication) but because of what it is possible to infer from the fact that it was said (or written). The probative value of the statement does not depend on the credibility of the declarant; it derives from objective probability.”

38. In response, Advocate Ferbrache has acknowledged that it is theoretically possible to invite an arbiter of fact to draw inferences. He did not suggest to the Chambre that it could not draw the inference the Registrar invited it to draw, but that it was an inference that should not be drawn in this particular instance. He reminded the Chambre of the burden of proof to the criminal standard and questioned whether it was something about which the Chambre members could be sure where it was something that should not have needed to be left to inference. There had been no evidence adduced that the Court had been misled. These submissions were made at page 93 of the transcript. This was not a case in which direct evidence on a matter in issue was unavailable, because it had been open to the Registrar to ask the Court whether it considered it had been misled. It would be normal to expect that a complaint that the Court had been misled would emanate from the Court itself, as had, for example, happened in Jersey in one of the cases to which the Chambre had been referred.

39. That case was *Attorney General v Sinel and Chiddicks* [2015] JRC 049B and [2015] JCA 192. In that case, the complaint about the two Advocates had been made by Lord Jones in his capacity as a member of the Jersey Court of Appeal and was made on behalf of himself and the two other members of the Court of Appeal. The Royal Court of Jersey stated (at para. 34):

“This Court is clear that the gravamen of the complaint is first that the Court of Appeal had been misled on 24th January, 2012 into a concerned belief that there might be a need for them to accelerate their judgment if the standstill agreement were not effective; secondly that they had made the request for supplemental submissions on the standstill agreement point only (confirming further this Court’s interpretation of the interchanges on that date); thirdly that had they been apprised of the issue of the protective writ given its effect as described in para 14 above they would not have made the request (“the narrower element”). It also asserted that the protective writ was relevant to the issue of any prejudice to Leeds in any English proceedings by reason of limitation issues, as appears from the particulars of the complaint where it was stated:- “The Complaint therefore relates to actions following the date of the issue of the protective writ” and “As a general point it is considered that on each occasion that anyone from Sinels communicated with the Court of Appeal, they should have made the Court aware that the protective writ had been filed” (“the broader element”).”

In the Law Society of Jersey’s Code of Conduct, Rule 2(2) provides that “A member must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court”. It was this Rule that it was alleged the Advocates concerned had broken. Rule 19(2) also provides that “A member shall not consciously deceive the Court or state facts to the Court which the member knows to be untrue.” It is apparent that the Jersey provisions require proof of some mental element before a finding of knowingly or recklessly misleading the Court can be made.

40. On the issue of misleading, the judgment of the Royal Court of Jersey explains:

“45. As to misleading, the Court of Appeal judges clearly perceived themselves to be misled. That is compelling evidence that they were misled, given not only the stature of the members as eminent and experienced lawyers, but also their knowledge of the relevant factual circumstances. It is not, however, dispositive. This Court has to assess whether the perception of the Court of Appeal was correct.

46. This Court has no doubt at all that the Court of Appeal was misled in that way and for the reasons set out in the complaint itself. They were given only half of, and not the full picture as to matters which bore on the need or otherwise for them to give an accelerated judgment. They knew about the standstill agreement, as to whose efficacy from the perspective of the English courts, they were uncertain; hence they made the request. They did not know about the issue of the protective writ, whose efficacy up to 28th February, 2012, was indisputable, and the protraction of which beyond that date by service lay entirely in Leeds’ hands. The lack of knowledge was attributable solely to the fact that the respondents did not tell them about it.”

What had happened was further analysed in para. 52:

“It was, however, the first respondent who himself ventilated the issue of the timing of the delivery of the judgment. Had he not done so and allowed Leeds to take the risk that it was not delivered before 28th February, 2012, he would not have found himself in his present predicament. He was not obliged gratuitously to inform the Court of

Appeal of the issue of the protective writ at a time when it was of no consequence to that Court. But once he ventilated the timing issue he could not, either by commission or omission, mislead the Court as to the facts material to their decision as to when their judgment should be delivered because of the duty he owed them. He was hoist with his own petard.

In relation to the way to respond when an Advocate's duty to a client and to the Court conflict, the Royal Court of Jersey helpfully cited from two English law cases (at para. 55):

“As Lord Denning MR said in Rondel v Worsley 1967 1 QB 443 at p. 502 “He has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouthpiece of the client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice”. In Brett v SRA [2014] EWHC 2974 (“Brett”), Lord Justice Thomas (as he then was) observed that “Every lawyer must be alive to the fact that circumstances can arise during the course of any lawyer’s professional practice when matters come to his knowledge (or are obvious to him) which may have the effect of making his duty to the Court his paramount duty and to act in the interests of justice.” [para 110].”

The final sentence of para. 75 neatly encapsulates the position: “A Court misled is a Court which may, through no fault of its own, not do justice to the matter of which it is seized.”

41. When this case reached the Court of Appeal, the concern that Lord Jones had raised on behalf of what took place before him and other Judges of Appeal was summarised as follows at para. 52:

“The failure to mention the existence of the protective writ caused the Court of Appeal to believe that there was an issue about limitation when in fact there was none – or if there was any such issue it related only to possible causes of action predating the protective writ. In turn, that led the court to ask for written submissions, and to understand that there was an urgency about the production of its judgment that in fact did not exist. The fact that the court did not know the degree of the supposed urgency is irrelevant: it was misled into believing that something was required of it that in fact was not.”

The decision of the Royal Court of Jersey to find the complaint proved was upheld, although the sanctions imposed on the Advocates were adjusted.

42. I can also conveniently refer here to Brett v The Solicitors’ Regulation Authority [2014] EWHC 2974 (Admin), which the Chambre noted (at para. 27 of its decision) was the single authority on which the Registrar relied before it. This was an appeal from the Solicitors’ Disciplinary Tribunal (“the SDT”) made by a solicitor who had been Legal Manager at Times Newspapers Ltd (“TNL”) for over 30 years. The facts related to matters that were connected to the public inquiry held by Lord Justice Leveson as it related to journalists “hacking” the communications of others. A police constable published an internet blog under a pseudonym, which had a high public profile. A reporter at *The Times* informed Mr Brett that he had gained unauthorised access to the author’s private e-mail account and so had identified who the anonymous author was. The reporter wished to expose the author’s identity. Mr Brett told the reporter that it was not a story the newspaper could publish because it was based on unlawfully obtained information. The reporter went away and used publicly available information to deduce who the author was, and reverted to Mr Brett telling him that the identity of the blog’s author could be pieced together from such publicly available sources. The reporter contacted the author, who immediately instructed solicitors to seek an injunction preventing publication. Junior counsel who appeared on behalf of TNL was not informed that

the reporter had originally identified the author by hacking the author's e-mail account. The reporter provided a witness statement in which he demonstrated how the author's identity could be ascertained from publicly available information. This was provided to the solicitors for the author. There was concern raised that the reporter may have obtained information through unauthorised access to the author's e-mail account, with leading counsel for the author noting in his skeleton argument that there had been no confirmation that the reporter had not accessed the blog author's e-mail account. Counsel for TNL were still not informed that the reporter had identified the author by means of unauthorised access to the e-mail account and filed a skeleton argument on the basis that the reporter had established the author's identity from publicly available materials. The solicitors for the author wrote to Mr Brett and invited him, in the absence of anything express from the reporter that that was all he had done, to ask TNL's counsel to "*amend this passage in the skeleton argument lest the court be inadvertently misled.*" At the hearing before Eady J, counsel for the author indicated that they were proceeding on the basis that the author's identity had been discovered by detective work and not through a breach of confidence. This was dealt with in para. 3 of the judgment of Eady J as follows:

"It was asserted in the claimant's skeleton for the hearing of 28 May that his identity had been disclosed to The Times in breach of confidence. By the time the matter came before me, on the other hand, Mr Tomlinson was prepared to proceed on the basis that the evidence relied upon from [PF], the relevant journalist, was correct. That is to say that he had been able to arrive at the identification by a process of deduction and detective work, mainly using information publicly available on the internet."

43. The complaint before the SDT alleged a breach of Rule 1.02 of the Solicitors' Code of Conduct 2007 (failing to act with integrity) and rule 11.01 ("*knowingly allowed the Court to be misled*"). The particulars (as quoted in para. 39 of the judgment of Wilkie J) were:

"2.1 On or about 2 June 2009, while conducting litigation in the High Court ... the respondent caused or allowed a witness statement to be served and relied on in support of TNL's defence, which knowingly, and/or recklessly, created a misleading impression as to the facts and matters deposed to in the statement.

2.2 On or about 4 June 2009 during a hearing before Mr Justice Eady the respondent knowingly allowed the Court to proceed on the basis of an incorrect assumption as to the facts and matters set out in the witness statement referred to at 2.1 above."

44. The finding made by the SDT about whether the court had been misled was upheld. The witness statement of the reporter could only properly be read as an account of how he had first identified the blog's author. It was silent about the basis on which that had initially happened. Mr Brett could have remedied the position because he was aware that the witness statement was silent on this point. At the end of para. 56 of the judgment of Wilkie J, it records the finding of the SDT that "*The Court was misled, as evidenced by paragraph 3 of Mr Justice Eady's judgment, which Mr Brett had failed to correct between 12th and 16th June (paragraphs 44.14 and 15).*" As quoted by the Chambre in para. 27 of its decision, Wilkie J stated (at para. 95):

"... it is clear that the judge accepted the invitation of both parties to approach the case in that way and, accordingly, proceeded to analyse the case on the assumption that [the blog author] had been identified by [the reporter] by means solely within the public domain. In so doing the Judge, TNL's counsel and [the author's] counsel had been misled by a combination of the misleading nature of [the reporter's] witness statement, Mr Brett's apparent denial that there had been any unlawful access to [the

author's] email account and his failure to respond in any way to [the author's solicitors'] invitation to clarify the matter once and for all."

The only different conclusion reached by Wilkie J was that this misleading had been done recklessly rather than knowingly. It followed that, in so acting, Mr Brett was also guilty of breaching Rule 1.02 of failing to act with integrity (see para. 101 of the judgment).

45. There are two other passages from the judgment of Wilkie J that I consider helpful. At para. 74, the submission made on behalf of the Solicitors' Regulation Authority is set out, with no suggestion that it is anything other than an accurate description of the position:

"... the distinction between deceit and knowingly misleading the court is that the latter is apt to apply to a case where, as is alleged here, the solicitor permits the court to proceed on an incorrect assumption as to the facts, knowing that the court is so doing even though he may mistakenly believe that he has a good reason for doing so: such as mistakenly wanting to protect a witness who has confided in him on an occasion attracting a duty of confidentiality."

The second passage is a summary of the approach taken by the High Court of Justice on an appeal to it pursuant to section 49 of the Solicitors' Act 1974 (para. 9 of the judgment):

"It is common ground that the approach this court takes on hearing an appeal pursuant to Section 49 is that it will only allow an appeal if the SDT misdirected itself as to the law or the court concludes that the SDT, despite having seen and heard the evidence, and after according the SDT an appropriate measure of respect, reached a decision which was wrong (Langford v The Law Society [2002] EWHC 2802 at paras 14 and 15, and Salsbury v The Law Society [2009] 1 WLR 1286 at paragraph 30)."

46. I am satisfied that the Chambre did not conclude as a matter of law that it was impermissible for it to draw the inference that the Registrar invited it to draw. At para. 29 of its decision, when it states that there was agreement with Advocate Ferbrache's submission, it was in the context of doing so to the requisite criminal standard. Further, this sentence was prefaced with the Chambre's comment that the Registrar had not *"produced any evidence that the court was in actual fact deceived and/or misled either by any of the documents filed by [the Advocate Complained Against] or by any submissions made by [the Advocate Complained Against]."* Finally, having recorded its agreement with Advocate Ferbrache's submission, the Chambre then stated that it did not infer that the Court had been misled. It would not have stated that if it had accepted a submission that it had no power to draw such an inference. Consequently, it follows that the Chambre did not treat Advocate Ferbrache's submission as being that it lacked the power to draw inferences, which is also consistent with the way I read his written submissions and the transcript, but that it agreed with him that it was inappropriate to do so in this case. I regard the content of this paragraph as supporting a conclusion that the Chambre recognised that, in the absence of any direct evidence, it could not be sure that the Court had actually been misled. Accordingly, to this extent, I do not find that the Chambre fell into error in the way it directed itself because it accepted that it was possible to draw such an inference, but then chose not to do so.

47. I asked Advocate Davies what the Registrar suggested was misleading to the Court. His answer was that, instead of granting the provisional order sought by the Petitioner, the Court was obliged to adjourn. The Chambre's position is set out in para. 29 of its decision: *"[The Advocate Complained Against] made an application which the court did not grant."* In my opinion, that finding, with which I agree, is telling. It is supportive of the Chambre's finding that it could not be sure that the Court had been misled. Unlike in Attorney General v Sinel and Chiddicks, the Matrimonial Interlocutory Court was not misled into believing something was required of it that in fact was not. The Court did not reach a conclusion based on a false

premise that the Advocate Complained Against had allowed to exist. Unlike in *Brett*, the Matrimonial Interlocutory Court did not approach matters and reach a decision based on an incorrect factual matrix where a lawyer had the ability to remedy the misunderstanding under which the Court had laboured. In both of those cases, the court concerned took a step or reached a decision as a consequence of having been given an incomplete picture. In both, it could be said that the decisions reached were affected by the way in which it was found the court in question had been misled. In the present case, the position is quite different and there was no injustice in the way the Matrimonial Interlocutory Court dealt with the matter before it on 3 September 2015. An application was advanced in the belief, mistaken as it turned out, that the divorce could then proceed unopposed. Lieutenant Bailiff Palmer did not make any order that he should not have made. The question of whether there were wasted costs involved in making the application for a provisional order on 3 September 2015 was one that could be dealt with subsequently. In the absence of anything confirming that the Court felt it had been misled, in my judgment, the Chambre reached a decision not to draw the inference the Registrar invited that cannot be said to be wrong. Although I cannot speculate as to how Lieutenant Bailiff Palmer might respond had he been asked if he felt he had been misled, had I been faced with the application on 3 September 2015 and then been asked if I felt I had been misled, subject only to one possible matter to which I will return, I would not have regarded what happened as misleading, but I would probably then have thought about whether or not there might be a wasted costs order in respect of the hearing, possibly even against the Advocate Complained Against personally.

48. There was, of course, the option for the Registrar when investigating this complaint to have sought evidence of misleading, rather than leaving it to inference. Although some of my colleagues might not relish the idea of being asked to assist in that fashion, I take the view that it is open to the Registrar to make enquiries of a judge as to whether or not that judge thinks there has been a breach of Rule 74 of the Rules. Indeed, had a reply been forthcoming in the negative, I imagine that would have resulted in the Registrar deciding that no prima facie breach of Rule 74 had been established. As Advocate Ferbrache notes, in *Attorney General v Sinel and Chiddicks*, the Royal Court of Jersey was clearly influenced by the fact that the complaint had emanated from the Court of Appeal judges, through Lord Jones. However, as pointed out in para. 45 of that judgment, this in itself is not dispositive. As I understand it, none of the judges was called to give direct evidence in relation to the complaint. This was, therefore, an example of where the arbiters of fact were invited to draw an inference from the making of the complaint. However, it was one step closer that the position here, where it was the Complainant, as interpreted by the President and the Registrar, who suggested that the Court must have been misled. I am not persuaded that it is impossible for a complaint of a breach of Rule 74 to be made by a person other than a judge, or someone on behalf of the judge, but if it does come from a third party, then the Registrar needs to consider how best to investigate whether there is a complaint to be referred to the Chambre.
49. In the present case, the Registrar did seek evidence from the Deputy Greffier who had clerked the Matrimonial Interlocutory Court on 3 September 2015. Advocate Davies wrote to the Deputy Greffier on 19 April 2017 enquiring if the Deputy Greffier “*would be prepared to provide evidence before the Chambre, including a short written statement*”. In the context of referring to the letter dated 28 August 2015 and unsigned Forms 1 and 2 (defined by Advocate Davies as “the Documents”), the letter asked for confirmation of four factual issues:
- “1. *Whether or not you received the Documents from [the Advocate Complained Against]?*
 2. *Whether or not you read the Documents?*
 3. *What did you understand from the Documents about how the divorce proceedings were to proceed?*

4. *Whether or not you passed the Documents on to anyone else at the Court?"*

No statement was provided and the Deputy Greffier was not called as a witness before the Chambre. Instead, a letter dated 25 April 2017 was sent to Advocate Davies and this letter was before the Chambre (even though no change was made to the statement of facts that the Registrar had supplied on 31 January 2017). This reply confirmed that the letter dated 28 August 2015 from the Advocate Complained Against had been received at the Greffe, before it continued:

“The matter was then listed by [the Advocate Complained Against] for the hearing of a provisional order application in the Matrimonial Interlocutory Court on the 3rd September 2015. As part of the application, a Form 1 and Form 2, as referred to in your documentation, were filed as per Practice Direction 2 of 1997.”

A copy of the transcript of the hearing from 3 September 2015 was also enclosed.

50. In my view, this exchange adds nothing to the material that was before the Chambre in any event. The Advocate Complained Against gave evidence that there was an expectation that documentation provided in respect of the divorce proceedings involving the Petitioner and the Complainant would be read. There was no confirmation, as requested, that the Documents had been read within the Greffe, but it is a reasonable inference to assume that the letter will have been and the Forms 1 and 2 were included in the file of papers placed before Lieutenant Bailiff Palmer for the hearing on 3 September 2015. This latter point is of more relevance than the request for confirmation that the Deputy Greffier had read the Documents, but the absence of an answer to the question enquiring what the Deputy Greffier understood about the documents was of no relevance anyway. However one regards this late attempt to supplement the evidence on which the Registrar wished to rely, I take the view that it was an inadequate way of proceeding.
51. Advocate Davies has submitted that the Greffe and the Court are interchangeable for the purposes of Rule 74 of the Rules. I reject that submission. The Court is constituted by a judge and, in some circumstances, by the number of Jurats required for the Court to be constituted properly. It is this composition of the Court that matters and its composition does not extend to the person who clerks or those who administer the Court system from within the Greffe. As the cases from other jurisdictions point out, one element of a Court being misled is that the Court acts in a manner that it would not otherwise have done. In other words, it dispenses a different form of justice than that it would have dispensed had it not been misled (or, as the case may be, deceived). It would not, of course, be consistent with professional conduct for an Advocate to deceive or mislead the officers at the Greffe, but I do not regard Rule 74 as being engaged if the only personnel so misled or deceived are within the Greffe, rather than it being the presiding judge and/or the Jurats. By way of example, Counsel might be directed by the Court to liaise with the Greffe over the fixing of a date for a hearing. An Advocate might provide some dates to avoid and then be offered a hearing date that seems to be feasible, only to revert to the Greffe indicating that the Advocate had overlooked a particular problem with the date being fixed or offered and so request that an alternative date be identified. None of this will have involved misleading a Court, with the consequence that Rule 74 has not been engaged. However, if Advocate Davies' submission were correct, there would be a technical breach of Rule 74 in such a case. I am not persuaded that this is what is covered by Rule 74 in any event. In my judgment, it has to be someone who actually constitutes the Court who is misled (or deceived) before Rule 74 becomes relevant so this does not extend to officers within the Greffe.
52. For these reasons, I am not persuaded that the Chambre fell into error when declining to draw the inference the Registrar invited it to draw from the written materials placed before it that the Matrimonial Interlocutory Court, ie, Lieutenant Bailiff Palmer, had in fact been misled.

Accordingly, in the absence of such a finding in relation to an essential element of the complaint referred by the Registrar to the Chambre, the Chambre did not err in dismissing the complaint on this basis and the grounds of appeal in paragraphs 1(a) and 3 of the Notice of Appeal are rejected.

Relationship between rules engaged

53. Paragraph 1(b) of the Registrar's Notice of Appeal asserts that the Chambre erred in para. 31 in concluding that the alleged breach of Rule 1 of the Rules did not have any existence independent of the allegation that Rule 74 had been breached. Accordingly, the Registrar submits that once the Chambre rejected the allegation that Rule 74 was breached it should have gone on to consider whether Rule 1, on the basis of the same evidence, had been breached.
54. On behalf of the Advocate Complained Against, Advocate Ferbrache points out that the way the Registrar's case had been presented until Advocate Davies put it differently before the Chambre was always that any allegation about a breach of Rule 1 would fall away in the event that the alleged breach of Rule 74 was not proved.
55. In my judgment, the starting point has to be what the Registrar referred to the Chambre once he had completed his investigations. The theme running through the relevant sections in the 2007 Law is that the complaint involved is that made by the person complaining. Here, this is the complaint made by the Complainant. Although there were four complaints originally made by the Complainant, only two were referred by the Bâtonnier to the Registrar in accordance with section 21(5)(a). As a result of the Registrar's investigations, only one of those two complaints was then referred by him to the Chambre pursuant to section 22(6)(a). By virtue of section 22(7)(b), the statement of facts relating to that complaint had to include "*the specific allegations in reasonable particularity*". Paragraph 1 of the statement of facts, to which I have already referred, sets out the complaint with which the Chambre was then seized. Paragraph 8 summarises the position:

"The facts set out in this Statement may evidence a breach by [the Advocate Complained Against] of Rules 1 and 74 of the Rules of Professional Conduct."

Although the statement of facts does not explicitly state how the complaint was to be treated, the Registrar's letter to the Complainant, which was copied to the Advocate Complained Against, adds: "*Your complaint is that [the Advocate Complained Against] therefore misled the Court.*" In the letter to the Advocate Complained Against of 31 January 2017, the Registrar wrote that this complaint was being referred "*as a possible breach of Rules 1 and 74 of the Rules of Professional Conduct.*" It strikes me as being quite clear from these materials that the Registrar was referring a single complaint, namely that the Advocate Complained Against had misled the Court, in such a way that if the complaint were proved, the Chambre could find that there had been a breach of both Rules 1 and 74 of the Rules. Equally, if the complaint that the Advocate Complained Against had misled the Court were not proved to the requisite standard, there was no lesser complaint in the alternative that the Advocate Complained Against had broken Rule 1.

56. Advocate Davies sought to support his submission that Rule 1 had an independent existence by referring to the way he had addressed the relationship between the two Rules in his written submissions to the Chambre and in the manner in which the Registrar's case was opened and closed. Consequently, he argues that the Chambre misunderstood the case being advanced on behalf of the Registrar, and the Chambre should have sought clarification rather than determine the matter in the flawed way that it did.
57. Advocate Davies' written submissions included:

- “30. *It is submitted that Rule 1 reflects the common law duties imposed on Advocates and is a general rule which Advocates must comply with at all times in the course of practising Guernsey law. This is supported by the fact that there is a resemblance between Rule 1 and the ten mandatory principles of the SRA’s Codes of Conduct, 2011 ... , which must be complied with at all times by English solicitors across all areas of legal practice.*
31. *Whilst Rule 1 is a general rule applicable at all times, it is submitted that Rule 74 is a more specific rule as it only applies to Advocates acting in litigation before the Court, and is similar to Outcome (5.1) of the SRA’s Codes of Conduct. Under the SRA’s Codes of Conduct, Outcomes describe what law firms and lawyers are expected to achieve in order to comply with the ten mandatory principles. Therefore, it is submitted that a breach of a particular Outcome will subsequently result in a breach of the mandatory principles. It is further submitted that the same approach may be applied in Guernsey by analogy, in the sense that a breach of Rule 74 by an Advocate will also result in a breach of Rule 1, a mandatory rule. Specifically, it is submitted that any breach of Rule 74 in this case will also breach:*
- (a) Rule 1(b) so far as integrity is concerned;*
 - (b) Rule 1(c);*
 - (c) Rule 1(f);*
 - (d) Rule 1(g).”*

58. Advocate Davies has highlighted the references he made when opening the Registrar’s case before the Chambre to Rule 1 being wider than Rule 74, in particular by the inclusion of the words “likely to”. In that context, he summarised the position (at page 6 of the transcript) as being that “*in essence the complaint is that [the Advocate Complained Against] made written and oral statements that either did or were likely to mislead or deceive the Royal Court contrary to Rules 1 and 74*”. Advocate Davies submits that the way he put the Registrar’s case clearly made a distinction between the two Rules. He developed para. 31 of his written submissions in the fashion set out at page 9 of the transcript, pointing out that “*Rule 1 goes further, previous conduct which is likely to breach, compromise or impair the same four sub rules.*” Further, in closing the Registrar’s case, at page 73 of the transcript, there was again explicit emphasis placed on the inclusion of the words “likely to”. Advocate Davies added that “*by the very fact of submitting a letter to Her Majesty’s Deputy Greffier, Form 1 and Form 2 to the court, they are, by reason of their content, an inescapable agreed intention accepted by my friend that they are to be read by the court and likely to breach, compromise or impair the following four things*”, being the four paragraphs in Rule 1 to which reference has been made.

59. Advocate Ferbrache refers to the way in which the Registrar’s case had been put up to and including at the hearing before the Chambre, at least until Advocate Davies’ closing submissions, as always entailing consideration of an alleged breach of Rule 74, to which Rule 1 was incidental. He emphasises the need for an advocate facing a complaint referred to the Chambre understanding the case that that Advocate has to meet. This was addressed in correspondence between him and Advocate Davies between the Registrar’s referral of this complaint to the Chambre and the hearing. In his letter dated 6 March 2017, Advocate Davies wrote:

“The Registrar does not rely on any different facts for the breaches referred to the Chambre of Articles [sic] 1 and 74. They are set out in the Statement of Facts provided to your client with his letter of 31 January.”

After referring to the letter dated 26 August 2015, the two letters dated 28 August 2015, and the hearing before the Court on 3 September 2015, Advocate Davies quotes from the letter to the Greffe and comments that that written statement “*was incorrect and misleading*”. Later, he summarises the position as being:

“Accordingly, [the Advocate Complained Against] misled the Court in [the Advocate’s] letter of 28 August and further misled the Court at the hearing of 3 September 2015 when [the Advocate] stated [the Advocate’s] understanding which was completely at odds with the position taken by [the Complainant’s Advocate] in [that Advocate’s] letter of 26 August and [the Advocate Complained Against’s] response of 28 August.”

60. Having reviewed all the material, I have asked myself whether Advocate Davies did switch the Registrar’s position and, if so, whether he was entitled to do so. At para. 2 of the Chambre’s decision, there is a description of the complaint:

“The allegation against [the Advocate Complained Against] was that [the Advocate] deceived and/or misled the Matrimonial Interlocutory Court in breach of Rule 74 of the Rules of Professional Conduct and, as a consequence of such conduct, also breached Rule 1 of the Rules of Professional Conduct in that [the Advocate] breached, compromised or impaired [the Advocate’s] integrity, [the Advocate’s] duty of the court, [the Advocate’s] own good repute and that of the Guernsey Bar and [the Advocate’s] proper standards.”

61. I am satisfied that this description accurately reflects the complaint that was referred to the Chambre by the Registrar. In particular, it is consistent with the way that the 2007 Law requires the Registrar to investigate the complaint referred to him by the Bâtonnier in order to determine whether or not a prima facie case is established. The President and the Registrar had chosen to re-cast the complaint made by the Complainant, which is an issue to which I will return, so that the allegation was that the Advocate Complained Against had misled the Court in the manner set out in the statement of facts. If that allegation were found proven, it would mean that there had been a breach of Rule 74 and also of Rule 1. (This is similar to the position in *Brett v Solicitors Regulation Authority* and the finding recorded at para. 101 of the judgment to which I have previously referred.) Equally, if that allegation of misleading the Court were not found proven, there was no distinct allegation specified in the statement of facts that there was misconduct in breach of Rule 1. This is apparent from the wording used in para. 8 of the statement of facts, which referred to Rules 1 and 74 of the Rules and did not, for example, refer to Rules 1 and/or 74 of the Rules. Further, the final paragraph of the written submissions of Advocate Davies to the Chambre (numbered 22 when it should, I think, be 32) invited the Chambre “*to conclude that the [Advocate Complained Against] has acted in a manner that has breached Rules 1 and 74 of the Conduct Rules.*” Again, it was only put conjunctively rather than potentially disjunctively in the alternative. Accordingly, to the extent that Advocate Davies sought to put a distinct case in favour of a finding that Rule 1 had been breached even if no breach of Rule 1 were found, I am satisfied that it was impermissible for him to do so. In my opinion, there was only ever one complaint referred and that was specified by the Registrar in his statement of facts as being an allegation that the Court had been misled. Absent a finding that the Court had been misled, there was no basis on which the Chambre was required to enter into any separate consideration as to whether the Advocate Complained Against had, on the same factual basis, done anything contrary to Rule 1, because there was no specific allegation in any particularity that something that did not mislead the Court constituted such a breach set out on the face of the statement of facts.

There was no scope to invite the Chambre to find Rule 1 broken independently of its finding on Rule 74 and so the Chambre cannot, and did not, fall into error through failing to conduct that exercise. Further, the Chambre properly understood the complaint with which it was seized and so did not need to seek to clarify the Registrar's case. If anyone was labouring under a misunderstanding in this regard, it was Advocate Davies, because I think that the way he put the Registrar's case at para. 31 of his written submissions to the Chambre was exactly how it should have been put, whereas his oral submissions marked a departure from the consistent position adopted prior to the hearing.

62. For these reasons, I reject the ground of appeal found in para. 1(b) of the Registrar's Notice of Appeal.

Usual practice of matrimonial practitioners

63. The second paragraph of the Registrar's Notice of Appeal is the final aspect of his appeal to which I turn. This ground of appeal raises an issue about the Chambre's assessment of the evidence on this question. The approach I am choosing to take to such an issue reflects the approach set out in para. 9 of the judgment of Wilkie J in *Brett v The Solicitors Regulation Authority* to which I have already referred. It involves according the Chambre an appropriate measure of respect before considering whether its factual finding is wrong.

64. The difficulty for the Registrar is that he chose not to put before the Chambre any evidence other than the written materials on which he relied. The Advocate Complained Against gave evidence, both in the form of the witness statement dated 29 June 2016 and orally. That evidence described the process that the Advocate Complained Against regarded as the usual practice in a situation such as this. Because that evidence was unchallenged, the Chambre, therefore, had the choice between accepting that evidence or rejecting it. It chose to accept the evidence, adding that "*judicial notice*" is taken of the practice."

65. I interpret the reference to "*judicial notice*" as being that Advocate Bailey regarded the evidence of the Advocate Complained Against as being a proper description of the practice adopted by practitioners making applications for provisional orders in divorce proceedings when an appearance had been entered on behalf of the respondent but it was expected it would be withdrawn. I am not aware of either of the other two members of the Chambre having the experience of the Matrimonial Interlocutory Court required to have reached such a conclusion independently. Accordingly, treating this comment as confirmation through Advocate Bailey on behalf of the Chambre that it was a further reason to make the finding that the evidence of the Advocate Complained Against could sensibly be accepted, I have concentrated on whether there was anything in the evidence actually adduced before the Chambre that could lead to the conclusion that the finding was wrong.

66. Paragraph 30 of the witness statement dated 29 June 2016 stated:

"For the record, it is common practice for Provisional Order applications to be listed when an Appearance has been filed but has yet to be withdrawn. In practice, the Appearance is often withdrawn orally at Court. Here, the Court was made fully aware of the position."

What the Advocate Complained Against then said in evidence, in a passage highlighted by Advocate Davies (at page 38 of the transcript):

"But what does happen in a case where an appearance has been filed, such as [the Complainant] did, is that this document here, Form 1, and it is also confirmed in Form 2 as well, it is a sort of mirror document as far as that is concerned, is that those documents are actually filed seven days before the sitting of the Interlocutory

Court. Now, on the basis that an appearance can only be withdrawn by that court, that means that the time when you actually sign these documents off, that actually, technically, paragraph 4 of Form 1 is not correct because what happens, and this is exactly what ... if we just go back to the transcript, what actually happens is that the petitioner's advocate will introduce the application and will then say, "This is an application for a provisional order," and the other side will then say, "Yes, there is an appearance but that is to be withdrawn to enable the divorce to proceed undefended," but until you hear those words, you don't actually know that's actually going to happen."

At page 59 of the transcript, the Advocate Complained Against added:

"I've received the open letter of 26th August which says [the Complainant's] going to withdraw [the Complainant's] appearance and I've already explained – maybe you don't understand because you don't go to the Matrimonial Interlocutory Court – the way that this works, that you file those documentations in the expectation that the appearance is going to be withdrawn. I don't create the rules. That's just the rules. Those documents had to be filed seven days before but at the time you actually complete those documents, that appearance still sits on the court file."

67. The position taken by the Registrar before the Chambre was to seek to draw a distinction between a divorce case in which there was an unequivocal, albeit informal, agreement between the parties that a Petition will no longer be opposed and the position in the correspondence passing between the Advocate in late August 2015. In the present case, the offer to withdraw that opposition on behalf of the Complainant was made subject to agreement of all the conditions attached and, in the absence of confirmation that those conditions were agreed, or an opportunity for the Complainant to agree to drop any of them that the Complainant, upon reflection, no longer wished to insist upon, there was nothing amounting to an unequivocal agreement that the divorce could proceed unopposed.
68. In respect of that point, I take the view that the argument advanced by and on behalf of the Advocate Complained Against that the letter sent by the Complainant's Advocate dated 26 August 2015 sought to impose conditions that were not permissible is flawed. In doing so, I agree with the rejection of this point by the Chambre at para. 17 of its decision. As the Advocate Complained Against conceded when cross-examined by Advocate Davies, some of those conditions were capable of being agreed. This was not a case of inviting the Petitioner to agree to a divorce being granted subject to conditions, which is the way it was put by the Advocate Complained Against at para. 27 of the witness statement dated 29 June 2016 but rather the terms on which the Complainant would permit an application for a Provisional Order to proceed with the Appearance being withdrawn orally before the Court at the hearing of that application. To take just one example, the fourth element of the Complainant's Advocate's letter invited the Petitioner *"To forego the costs awarded to [the Petitioner] at the last MIC and agrees not to raise that issue within the ancillary relief proceedings"*. Put rather bluntly, the Complainant was including as part of the price of avoiding a contested divorce that the costs order made against the Complainant at a previous hearing should not be enforced by the Petitioner. I do not regard making the withdrawal of an Appearance subject to such a condition as something that cannot be done on behalf of a party; indeed, it can be seen as part and parcel of the ongoing negotiations in respect of financial matters. Consequently, on one view, the Advocate Complained Against appears to have misconstrued this letter, although that is not directly relevant to the question of whether the Chambre's finding at para. 23 of its decision is unsustainable.
69. In order to place the submission by the Advocate Complained Against of Forms 1 and 2 prior to the hearing on 3 September 2015 into context, it is necessary to consider the terms of Practice Direction No. 2 of 1997 and the primary legislation that led to it being issued.

Section 1 of the Matrimonial Causes (Amendment) (Guernsey) Law, 1997 inserted into the Matrimonial Causes Law (Guernsey), 1939 a new Article 60D, headed “EVIDENCE IN UNOPPOSED PROCEEDINGS”. That Article provides:

“In any proceedings under this Law in which a petition for divorce, judicial separation or nullity of marriage is unopposed by the respondent and, where applicable, by the co-respondent or any other party to the proceedings, as the case may be-

- (a) the petitioner shall not be required by the Court to attend the hearing of the petition; and*
- (b) an affidavit filed by or on behalf of the petitioner shall be accepted by the Court as unchallenged evidence upon which it may grant the decree or pronouncement sought,*

unless the Court otherwise directs.”

70. The Practice Direction was subsequently issued dated 11 December 1997. It provides that:

“Following the adoption of this legislation it is proposed that all undefended divorces should be dealt with in Chambers by affidavit, unless there is some special reason from the Petitioner’s point of view for doing otherwise or if the Judge decides he wishes to here [sic] oral evidence.

The Court will from time to time designate days on which such applications will be heard and the petitioner’s advocate must lodge with H.M. Greffier AT LEAST SEVEN DAYS before the appointed date an application following closely Form 1 hereto. The Court will also require a confirmatory affidavit from the petitioner as on the lines of Form 2 hereto. Sworn not more than twenty-one days before the date of the hearing.”

Templates for Forms 1 and 2 are appended to the Practice Direction.

71. Paragraph 4 of the Form 1 template reads:

“I confirm that the Petition is unopposed. [If an answer has been filed I attach a Notice from the Respondent’s Advocate withdrawing the answer.]”

(I suspect that there should be a colon after “*filed*” in the sentence in square brackets to indicate that those additional words, or something similar, can be added in appropriate cases.) The Form 1 filed with HM Greffier dated 27 August 2015 by the Advocate Complained Against follows closely the template. Paragraph 2 is slightly expanded, being:

“Please place the Petition before the Judge in Matrimonial Causes so that he/she may consider a grant of a Provisional Order and an Order that the Respondent shall pay the Petitioner’s costs on an indemnity basis.”

Paragraph 4 simply included the first sentence from the template. Paragraph 5 referred to an “*Affidavit of the Petitioner exhibiting the Respondent’s Memorandum of Appearance.*” There was an additional para. 6 in the following terms:

“I am aware of no reason to doubt the correctness of the information provided to the Court herein or as to why the prayer contained in the Petition should not be granted.”

The Petitioner’s confirmatory Affidavit also followed the style, and so was on the lines, of Form 2. The principal variation on the template Form 2 comes in para. (3), which reads:

“I attach hereto a copy of Memorandum of Appearance filed by the Respondent. The Respondent has now confirmed that [the Respondent] will withdraw [the Respondent’s] appearance to enable the divorce to proceed undefended.”

72. I appreciate that what was prepared and dated 27 August 2015 was not, on the date it was filed with HM Greffier, factually accurate. However, the explanation for that was given by the Advocate Complained Against as being consistent with usual practice and no evidence was adduced by the Registrar against that. The Registrar must have known that this would be the position taken by the Advocate Complained Against because it was expressly covered in the witness statement dated 29 June 2016. I also regard as significant what the Complainant’s Advocate wrote in the letter dated 10 September 2015, to which I have already referred, but I will repeat the particular sentences:

“I was out of the office in the period between receipt of your application for a Provisional Order and the 3rd September, 2015. Nonetheless I did contact your office on the 2nd September, 2015 to talk to you about your application either with a view to progressing matters to agreement or at least to indicate to you that there was a problem with your application. I left you both my home and mobile numbers but you did not return my calls.”

I regard these comments as being significant because I think it demonstrates that, even the day before the sitting of the Matrimonial Interlocutory Court at which the application for a provisional order was to be made, the Complainant’s Advocate considered that it was possible that agreement might have been capable of being reached to enable the divorce to proceed on an unopposed basis. In my opinion, that is entirely consistent with the practice referred to by the Advocate Complained Against, and which found favour with the Chambre. There was obviously still scope for the Advocates to discuss matters and one of the possible outcomes was that there would have been oral confirmation by the Complainant’s Advocate that the appearance was indeed withdrawn. Had that happened, I am confident that there would have been no complaint, or at least no complaint of breaching Rule 74, referred to the Chambre. Another possible outcome was that the Advocate Complained Against would have realised that the divorce could not proceed unopposed and would have alerted the Greffe before the sitting of the Matrimonial Interlocutory Court on the morning of 3 September 2015. This may have meant that the court file would have been removed from the list Lieutenant Bailiff Palmer was to deal with or there may just have been a simple oral application made that no provisional order was then being sought. In some respects, what actually happened was little different from that second possibility, in that, once the Complainant’s Advocate indicated there was no agreement, the Advocate Complained Against readily acknowledged, perhaps with some reluctance and, as noted by the Chambre, frustration, that the application could not be pursued. Once the application had been made but not granted, the issue became one for how to deal with the costs of that phase of the proceedings.

73. On the basis that what had been done by the Advocate Complained Against was not outside the realms of what was usual practice in such circumstances, and implicitly supported by the terms of the letter dated 10 September 2015, even though the Complainant’s Advocate raised concerns about what had taken place, I do not find myself able to conclude that the Chambre was wrong to accept the evidence concerning these practices in the manner it did. On behalf of the Registrar, Advocate Davies invited the Chambre to disregard that evidence and conclude that what had transpired went beyond the usual practice and he fully articulated why the documents submitted must be taken at face value to show there was no agreement and so no basis on which to act on the Petitioner’s instructions to apply for a provisional order. However, the Registrar did not call any evidence to rebut the position described by the Advocate Complained Against. In such a situation, according the Chambre, as the arbiters of fact an appropriate measure of respect, I do not consider I can properly set aside its finding.

74. For these reasons, I reject the ground of appeal found in para. 2 of the Registrar's Notice of Appeal.

Outcome of appeal

75. For the reasons I have given, the Registrar's appeal is dismissed.

76. As I have indicated, there was only one complaint made that the Registrar referred to the Chambre for its determination and that was the complaint that the Advocate Complained Against had misled the Court through written materials provided prior to the hearing on 3 September 2015 and oral statements then made at that hearing. As soon as the Chambre made a finding that it was not sure that the Court had been misled, that complaint was bound to be found not proven and dismissed. I have not been persuaded that the Chambre fell into error in reaching that conclusion. There was no contrary evidence advanced on behalf of the Registrar, so the Chambre's finding that what happened was within the compass of usual practice of practitioners before the Matrimonial Interlocutory Court is a finding with which this Court on appeal cannot interfere. Further, in the absence of any evidence of the Court actually being misled, the Chambre's further finding that it could not be sure of that fact is another finding with which this Court on appeal cannot interfere. In the light of the way in which the complaint was referred, I also cannot conclude that the Chambre fell into error and misdirected itself that it was required to consider separately the allegation that the conduct of the Advocate Complained Against breached Rule 1 of the Rules. In all the circumstances of this complaint, there was just the one complaint with which the Chambre was seized and that was an allegation that the Court had been misled which, if proved, would also entail a breach of Rule 1.

Respondent's Notice

77. Given that I have dismissed this appeal, I do not strictly need to deal with the Respondent's Notice. However, I will briefly explain why I would, had I needed to, have rejected the argument that there needs to be read into Rule 74 of the Rules some mental element in respect of an allegation of misleading the Court.

78. The references I have made to cases from England and Wales and Jersey show that the equivalent rules in those jurisdictions do include some mental element when the complaint is of misleading the Court. For example, in Jersey the rule engaged in *Attorney General v Sinel and Chiddicks* included "knowingly or recklessly" misleading the Court. The rule in *Brett v The Solicitors Regulation Authority* related to knowingly allowing the Court to be misled. The rules in England are now in the SRA Code of Conduct 2011, and the copy I have been shown is Version 18 of the Handbook in which they appear, which was published on 1 November 2016. The scheme of this Code of Conduct is that there are 10 mandatory principles, which are stated to:

"... apply to all those we regulate and underpin all aspects of practice. They define the fundamental ethical and professional standards that we expect of all firms and individuals (including owners who may not be lawyers) when providing legal services. You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma."

The Code is then divided into five sections, with the first section relating to "You and your client", which includes in Chapter 5 "Your client and the court". There is the explanation that *inter alia* the outcomes listed are mandatory. The first outcome listed in Chapter 5 that must be achieved is:

“O(5.1) you do not attempt to deceive or knowingly or recklessly mislead the court”.

79. Rule 84 of the Rules provides:

“Where these Rules are silent or ambiguous as to any matter of conduct, an Advocate shall be bound *mutatis mutandis* by the relevant rules and principles of professional conduct from time to time obliging English barristers and solicitors.”

It necessarily follows that, if a Rule already deals with something, and does so unambiguously, then there is no incorporation into the Rules of anything derived from the rules and principles of professional conduct applicable to English practitioners from either branch of the professions operating there.

80. Rule 74 makes provision for those Advocates who act in litigation and provides that they “*must never deceive or mislead the court.*” It is, therefore, not a situation in which the Rules applying to Advocates are silent about this issue. In my judgment, there is also no ambiguity in the wording either. I agree with the conclusion reached by the Chambre at para. 20 of its decision.

81. In developing his submissions in support of the Respondent’s Notice, Advocate Ferbrache referred to the terms in which the Complainant had made the complaint that was eventually referred to the Chambre, which clearly alleged that what had been done by the Advocate Complained Against had been done with knowledge and intent. This is an issue to which I will turn shortly but, in the context of what was actually referred to the Chambre by the Registrar, it was not an allegation of deceit, but of what on any assessment must be the less serious allegation of misleading. The distinction between the two concepts was helpfully explained in para. 74 of *Brett v The Solicitors Regulation Authority*, which I have already mentioned.

82. In Rule 74, deceit and misleading are both included, but the use of “or” between them shows that they are disjunctive. The President and the Registrar chose not to progress what the Complainant had alleged, which I read as being an allegation of deceit, but instead to refer a complaint of misleading. Within the context of Rule 74, albeit that I will expressly leave open this point for future determination should it arise in another case, my reading of the wording is that an allegation of deceit can be pursued and a finding of misleading made if the Chambre were to take the view that the mental element required for deceit had not been established to the required standard of proof. However, on an allegation of misleading, all that matters is whether or not the Court had in fact been misled, although it might (and I put it no higher than that) be an aggravating circumstance when it comes to how to deal with the Advocate involved against whom a finding of misleading the Court is made. Putting it another way, the greater “offence” of deceit encompasses the lesser “offence” of misleading, enabling an alternative finding to be made, but not vice versa, ie, the lesser allegation, if that is the extent of the complaint pursued, cannot be “enhanced” by the Chambre into a finding of deceit and could only ever be determined as a finding of misleading the Court.

83. The absence of any wording qualifying “mislead” in Rule 74 does not, in my view, render the wording ambiguous. All it means is that proof of such an allegation in Guernsey is easier than in England (or in Jersey) because there is no requirement to prove knowingly or recklessly. Misleading is an ordinary word and so I agree with the approach of the Chambre that Rule 74 is neither silent nor ambiguous and so Rule 84 cannot assist the Advocate Complained Against here.

84. Because it seemed to me that there was no ambiguity on the face of Rule 74, I asked Advocate Ferbrache whether he was inviting me to use some technique for construing provisions to

“read in” the requirement for some aspect of mental element or blameworthiness into the Rule. He accepted that this was not what he had in mind, but that his submissions were based on the way the Complainant had articulated the complaint in the first instance. What I had under consideration was the obligation contained in section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000 that, so far as possible, legislation “*must be read and given effect in a way which is compatible with Convention rights.*” The right to a fair trial in Article 6 of the European Convention on Human Rights includes certain minimum rights for those charged with a criminal offence. Again, without reaching any fixed conclusion on an issue that was not fully argued before me, I think it would be possible to regard proceedings before the Chambre as quasi-criminal, with the consequence that an Advocate facing disciplinary proceedings is entitled to be informed “*of the nature and cause of the accusation against him*” (Article 6(3)(a)). Indeed, this is clearly the purpose of the statement of facts required by section 22(6)(a)(iii) and (7) of the 2007 Law. If the accusation is one of misleading the Court contrary to Rule 74 of the Rules, this in turn gives rise to a question as to whether the starting point is that the Guernsey Bar Council, when making the Rules under the enabling powers conferred upon that Council by the Royal Court (Bar Administration) Order, 1993 must, even though omitting any words such as “*knowingly or recklessly*”, have not intended to punish a blameless individual, with the consequence that some words importing a *mens rea* must be read into the Rule. In essence, I raised the question as to whether the presumption that exists (certainly in England) against what are termed strict liability offences could be applied to Rule 74 and I referred to *Sweet v Parsley* [1970] AC 132 and my recollection of some more recent comments of high authority on the topic (which I now discover was intended to refer to the Supreme Court case of *Taylor* [2016] 1 WLR 500).

85. Because Advocate Ferbrache explained that he was not relying on any such principle or technique of reading words into a provision, I will say no more on the issue in this judgment. It suffices to say that the words used in Rule 74 are not, in my view, ambiguous and so Rule 84 cannot be prayed in aid. However, I endorse what the Chambre stated at the end of para. 20 of its decision:

“It may not be satisfactory that inadvertently misleading the court will result in a finding of professional misconduct being made and we feel strongly that consideration should be given by the Guernsey Bar Council to bringing Rule 74 into line with the equivalent provisions in England and Jersey.”

In the light of what happened in this case, I believe it would be appropriate to re-visit the terms of Rule 74.

86. For the reasons I have summarised, in the event that I had allowed the Registrar’s appeal, I would then have dismissed the Respondent’s Notice.

Final comments

87. There were a number of other issues raised during the course of the hearing in respect of which I offer the following comments in the hope that they might be of assistance in future cases.

88. In correspondence prior to the hearing before the Chambre, Advocate Ferbrache raised a concern that the President’s decision pursuant to section 21(2) to permit the complaint to be entertained even though received beyond the six-month deadline specified in that subsection was flawed. When Advocate Davies replied, he noted that this was not an issue for the Chambre, there did not appear to be any appeal under the 2007 Law against this decision and so enquired if the issue were to be addressed in the Royal Court. Advocate Ferbrache

responded that he intended to raise it with the Chambre rather than “*get involved in a somewhat arid, expensive and protracted argument before the Court at this stage*”. It was not, however, an issue that was developed in any particular way before the Chambre, but it has been raised in the context of this appeal.

89. If an Advocate in respect of whom a complaint has been made after the six-month deadline has expired is aggrieved by the decision of the President to grant an extension of time, it seems to me that the Advocate would probably have standing to challenge that decision by bringing an action in the usual way seeking leave to move for judicial review so as to set aside that decision. The consequence of doing so successfully may be that the complaint will progress no further. This may be the clearest and simplest course of action, although it inevitably entails some expense. As an alternative, I suppose it would be possible to invite the Chambre to consider whether what has happened amounts to some form of abuse of process and to reach a decision on the complaint referred to it in the light of whether an abuse is found. This may be less satisfactory because the task of the Chambre is to determine the actual complaint referred rather than review any procedural decision prior to its referral. It is almost in that context that the topic was ventilated at the hearing before me, because I wanted to know whether it was being suggested that, had I decided to allow the Registrar’s appeal, I could take any view on the legality of the President’s decision.
90. Although the issue does not arise in this appeal, I do entertain doubts as to whether the President’s decision could pass a test of rationality. The Bâtonnier quite properly raised the timing of the complaint with the Complainant. Because the last of the events about which the complaint ultimately referred to the Chambre took place on 3 September 2015, the six-month period expired in early March 2016 and the complaint was not sent until early April 2016. The explanation received in the Complainant’s letter dated 13 April 2016 was that the Complainant’s Advocate had suggested that the making of the complaint “*should wait until the legal matters were substantially complete*”. The implication is that the Complainant, therefore, knew full well that there was a time-limit within which the complaint needed to be made and knew that before it expired. The last date on which the division of a joint asset took place was stated to be 16 March 2016. As far as I can see in the letter of complaint dated 1 April 2016, there is nothing that could not have been written well in advance of the letter actually being sent. There was no explanation offered as to why it then took a further fortnight to send the complaint. Further, the Complainant’s Advocate had referred to delaying until matters were substantially complete, whereas the delay was until after they were finally complete. No enquiry was made by the President as to whether the final division of the asset to which reference was made was something that had been put in train earlier and finally completed. In short, there seems to me to have been an insufficient analysis of whether what the Complainant was asserting could properly be regarded as “*exceptional circumstances*” as required by section 21(2).
91. These problems are arguably compounded by the President’s omission to refer to his decision to permit the Complainant’s complaint to be entertained despite the expiry of the six-month time-limit when writing to the Complainant on 8 June 2016 and the fact that it was an issue that the Registrar invited the President to address once the complaint had been referred to him. The President’s response dated 30 June 2016 indicated that this was something that he and the Bâtonnier had taken into account and that “*we considered that it was quite reasonable not to raise a complaint during the course of matrimonial proceedings*”. Although the President then states that he took the decision in accordance with section 21(2) and correctly refers to “*exceptional circumstances*”, in the absence of further detail from the Complainant as to when it could be said that the matrimonial proceedings concluded and precisely how the final asset being divided was dealt with, and also enquiring as to the further delay of approximately a fortnight, the reasoning given may be regarded as incomplete and the President’s apparent joint decision-making with the Bâtonnier on an issue that has been

conferred solely on him by the legislature may have provided a basis for further submissions to be made about whether the complaint should even have been entertained.

92. In future, in respect of any complaint obviously made outside the prescribed six-month time-limit, I think it would assist for there to be as clear an analysis as possible by the President as to why the late complaint is to be permitted to be entertained rather than rejected on that basis and the Advocate facing the complaint should be so informed by being provided with a copy of the decision and the reasons for it. This will enable the Advocate who is the subject of the complaint to decide at an early stage whether or not that decision, which may well be susceptible to judicial review, should be challenged. Because any such application has to be made promptly, it would mean that this issue would be resolved one way or the other quite quickly.
93. The next issue relates to how the complaint made appears to have evolved through the referrals. In the President's letter of 8 June 2016, he is satisfied that the complaint had "*been fully set out*" by the Complainant. The Complainant had initially referred in the letter dated 1 April 2016 to the Advocate Complained Against knowing that the Complainant's withdrawal of the general appearance was conditional and that the conditions had not been met, yet choosing to advise the Court that there had been a withdrawal, which the Complainant believed amounted to knowingly making a representation to the Court which the Advocate Complained Against knew to be false. In the Complainant's further comments in the letter dated 14 May 2016 the description given is that the Advocate Complained Against "*knowingly attempted to mislead the court*", "*knowingly*" is repeated and there is further reference to there being an "*underhand approach to these proceedings*". Despite the Complainant expressing the view that the actions of the Advocate Complained Against were done knowingly, which seems to me to amount to an allegation of deceiving the Court through giving a false impression of how matters stood, especially in the light of the reference to it being "*underhand*", the President's letter of 8 June 2016 refers to the Complainant alleging that the Advocate Complained Against "*misled the Court by holding out that [the Complainant] had agreed a certain course of action when that was not in fact the case*".
94. The President may be forgiven for converting a complaint alleging that the Advocate Complained Against had acted knowingly into one that the Registrar would advance on the basis that no mental element needed to be proved (which, as I have explained, I agree is how the misleading element of Rule 74 is to be interpreted) because, when the Advocate Complained Against commented on the complaint, the letter dated 29 April 2016 included the statement that "*At no time did I mislead the Court.*" The complaint referred to the Registrar and then referred by him to the Chambre had become one of misleading rather than of deceiving.
95. Through Advocate Davies, the Registrar explained that he considers he has sufficient licence under the terms of the 2007 Law to re-cast a complaint in the light of his investigation. Although it has not caused any problem in the present case, save perhaps for the way in which submissions before the Chambre were advanced both on the basis of misleading and/or of deceiving, when the latter aspect of the Rule was not relevant to the complaint with which the Chambre was seized, it is possible that a decision by the Registrar to refer a lesser complaint than that made could result in the Registrar facing proceedings from a complainant that this was not the complaint actually submitted. The Registrar referred to one justification for having the ability to put the complaint differently from the way it was originally received being that some complaints are not worded with a specific breach of the Rules in mind and that they are submitted by members of the public who may not phrase matters in a particularly legalistic way. If that were to be the case, then I wonder if this is something more appropriately done at the filtering stage of a complaint being dealt with by the Bâtonnier and the President. Under section 21(6) of the Law, the Bâtonnier is empowered to cause a non-

written complaint received to be stated in writing on the complainant's behalf. Further, the process for the President and Bâtonnier considering a complaint set out in section 21(3) enables comments to be invited and this may result in the complaint being developed before it is referred to the Registrar. However, once the Registrar receives a complaint, the terms of section 22 do not appear to me to enable the Registrar to do anything more than investigate the complaint actually received. Further, in respect of what the Complainant submitted to the Bâtonnier, I do not think it can be said to be lacking in sufficient detail so as to justify re-casting it. Accordingly, it remains unclear to me why the complaint referred to the Registrar was not one of deceiving the Court. I recognise that that would have been a significantly more serious allegation for the Advocate Complained Against to have been facing, but it would, in my view, have been consistent with the way in which the Complainant made that complaint and would, quite possibly, have focused the investigation even more and so resulted in some differences from the investigation that was actually undertaken.

96. Advocate Ferbrache was critical of the investigation undertaken by the Registrar. During the course of the hearing I expressed my astonishment that the Registrar had not sought a copy of the Forms 1 and 2 as actually submitted to the Greffe and so as placed before the Matrimonial Interlocutory Court on 3 September 2015. This arose in relation to the submissions being made by Advocate Davies on the breadth of Rule 1 of the Rules, which refer to "*likely to*". Perhaps the most relevance of seeing the Form 2 submitted was to discover that the Advocate Complained Against took the Petitioner's oath in respect of that Affidavit. Without knowing that detail, a full picture of what had happened at the relevant time was not necessarily disclosed first to the Registrar and then to the Chambre. However, aside from explaining why I expressed my astonishment, I recognise that the extent of the investigation to be undertaken is a matter for the Registrar's discretion. The fact of seeking further information after referring the complaint to the Chambre is something envisaged by section 22(8), so the letter sent to the Deputy Greffier by Advocate Davies comparatively late in the day is not in itself something that can be criticised, but I do wonder about the wisdom of not asking directly whether or not the Court felt itself to have been misled so as to avoid the need to invite inferences to be drawn and doing that before completing the Registrar's investigations. Of course, had the response been in favour of the Advocate Complained Against, there may have been no referral to the Chambre.
97. Once a complaint is to be referred to the Chambre, the statement of facts becomes the key document. As I have already commented in relation to whether the alleged breach of Rule 1 of the Rules was dependent on a finding of a breach of Rule 74, the statement of facts must include "*the specific allegations in reasonable particularity*". Having seen the way in which complaints for determination by the disciplinary body are particularised in other jurisdictions, as set out in the authorities to which I have referred, I wonder whether the style of the Registrar's statement of facts would benefit from being modified so that there is a clear breach (or breaches) of the Rules alleged with particulars of the allegation given. I am not suggesting copying the level of detail found, for example, in an indictment, but I do believe there is scope for the particulars to be specified more clearly. Similarly, the evidence in support of the claim will either be a list of documents or may include reference to any witness who will give written and/or oral evidence. If there are later developments, perhaps resulting from the Registrar exercising his powers as set out in section 22(8), then I think it would be best to modify or supplement the statement of facts, as appropriate. The statement of facts can, I believe, be viewed as a form of "charge sheet" and "case summary" and so needs to be as clear as it can be so that the respondent as subject of the complaint is fully aware of the case that he or she has to meet.
98. In the present case, I am surprised that there is no express reference in the statement of facts to Forms 1 and 2. The correspondence mentioned includes the letter to the Greffe dated 28 August 2015, but it was not under cover of that letter that Forms 1 and 2 were submitted.

This is clear from its contents, which includes “*Indeed, we have listed the Provisional Order Application before MIC on 3 September 2015.*” I infer, therefore, that the two Forms were submitted on a separate occasion. Given the significance of the Forms, I would have expected them to be referred to expressly. Instead, there is reference in para. 2 to the Registrar “*receiving responses, including supporting documents*” from those to whom he wrote and reference in para. 6 to the hearing on 3 September 2015, but no reference to the Forms themselves.

99. Although it was not the complaint that was referred, it seems to me that the wording used by the Petitioner in the Form 2 at para. (3) could have been expressed differently and so have avoided some of the problems that have arisen. Indeed, having regard to the third paragraph of the commentary to Rule 74 of the Rules, there may have needed to be a fuller investigation as to the state of mind of the Advocate Complained Against because, at the time that evidence was sworn (and so given in readiness to be put before the Court on 3 September 2015) the Complainant had not confirmed that the appearance would be withdrawn. It is likely, though, that the Advocate Complained Against would have indicated that there was no knowledge of it being untrue, but this is something that could, had the complaint been put in that way, have been the subject of further investigation or exploration. The principal reason why I raise this particular point in the context of particularising an allegation is that the particular numbered 2.1 faced by Mr Brett, as quoted previously, is a style that could have been used in relation to the way Form 2 was submitted especially given the wording used therein at the time it was sworn. I am still unsure why it was that no discussion was had by the Advocate Complained Against with the Complainant’s Advocate prior to the sitting of the Matrimonial Interlocutory Court on 3 September 2015, whether by returning the telephone call made or outside the door of the courtroom. However, this was not something with which the Registrar or the Chambre dealt, but it seems to me to have been something that could have been considered further than it was.
100. Although I make no further comment on the investigation itself, I am, though, surprised at the length of time it took to determine this complaint. The initial phase of dealing with this complaint was undertaken quite quickly, especially given that clarification needed to be sought about whether the complaint should even be entertained. From referral to the Registrar until referral to the Chambre took longer than I think was desirable given the apparent extent of the investigation undertaken. In excess of six months to conduct what was, it seems, a paper investigation that did not generate reams of documentation requiring extensive review is, in my opinion, unduly protracted. This is particularly so given the nature of the complaint made. If found proved, as the disposals in cases from elsewhere demonstrate, there was a genuine risk that the Advocate Complained Against could be dealt with publicly, rather than through administering a private reprimand and may even have faced suspension from practice. That is a very significant matter for an Advocate and the delay would inevitably have an impact on anyone in those circumstances. The fact that it then took a further period of more than nine months from referral to the Chambre for there to be a hearing meant that, from the complaint being made and the Advocate Complained Against being made aware of it to the hearing was in excess of 18 months.
101. I appreciate that those performing these functions are busy people with other responsibilities, but I hope the significance of being the subject of a complaint is not lost on them. In the context of criminal proceedings, delay is a factor that can impact on the fairness of a trial. Staying the proceedings as an abuse of process is a remedy that can be sought by the person facing those proceedings. I leave open whether similar arguments could be advanced before the Chambre and also what the proper approach for the Chambre would be, but there is an old maxim that “*justice delayed is justice denied*” and it is important that public confidence in how complaints against Advocates are handled should not be undermined.

102. Partly in that context, I come to the final comment I feel I should make. Section 17(4) of the 2007 Law provides:

“The proceedings of the Chambre shall be inquisitorial in their nature.”

From reading the transcript of the hearing before the Chambre, it was readily apparent that the proceedings were conducted in the usual adversarial manner. Indeed, Advocate Ferbrache confirmed that it was his experience that this was always the way it was done. It may be counter-intuitive to Advocates well-versed in conducting litigation under our adversarial system, but the legislature must have wanted proceedings to be conducted before the Chambre differently otherwise section 17(4) would not have been included in the Law.

103. Section 25(10) provides that:

“The Chambre shall be master of its own procedure but in any event shall afford an opportunity to –

(a) the Registrar –

(i) to be heard,

(ii) to call evidence, and

(iii) to cross-examine any witness, and

(b) the respondent –

(i) to be heard,

(ii) to give and call evidence on his own behalf, and

(iii) to cross-examine any witness.”

I regard this subsection as providing procedural safeguards to ensure that the two sides appearing before the Chambre are afforded the entitlement to participate in these ways. However, I do not believe that these safeguards detract from the overriding obligation imposed on the Chambre by section 17(4). Whatever else it involves, I take the view that it means that the Chambre needs to be more proactive than it was in the present case when a complaint is referred to it.

104. Interestingly, the scheme of section 24 of the 2007 Law is that the function of giving directions once a complaint has been referred to the Chambre *“to ensure that the complaint is considered fairly and expeditiously”* is conferred on the President. The President is drawn from the panel of lay members. I am unsure whether the President in this case exercised the powers he has to give directions, but the exchanges of correspondence between Advocates Davies and Ferbrache indicate that they were minded to agree between themselves how the preparation for the hearing of the complaint should be handled. The correspondence shows how the inquisitorial nature of the proceedings was being overlooked, despite the Registrar’s first letter to the Advocate Complained Against having helpfully highlighted this requirement. In future, I would encourage the President to consider utilising the powers he has, possibly through liaising with the person who will chair the Chambre.

105. Section 26 enables the Chambre, acting through the person chairing it, to issue what in other contexts would be witness summonses, including for the production of documents. When coupled with the obligation to act inquisitorially, it seems to me that, once a complaint is referred by the Registrar, subject to the President giving directions to ensure that the hearing is concluded expeditiously, and fairly, the Chambre has the ability to take the lead on what it

considers to be the most appropriate way to proceed in order to have produced to it the material that it thinks it needs to have to determine the complaint with which it is seized, whilst always being conscious of the need to ensure compliance with section 25(10). In the same way that the Registrar could have sought direct evidence on the question of whether the Court was actually misled, I think the Chambre could also have taken that step as part of its inquisitorial process.

106. I end by expressing the Court's gratitude to everyone involved in handling complaints made against Advocates. The importance of ensuring adherence to professional standards prescribed by the Rules is vital to ensure the good standing of the profession and public confidence in it. The Court is well aware that those who put themselves forward to play a part in the process will necessarily have to deal with matters concerning professional colleagues with whom they may have to deal in other contexts and whom they are likely to know to some degree anyway. That is the nature of a small jurisdiction with what is still a relatively small profession, where there is not the same comfort that can perhaps be taken in larger places that those regulating a profession will be drawn from regions away from the place in which the subject of the complaint practises. To the extent that I have expressed concerns about the way this complaint was handled, I have done so not through any wish to be unduly critical but in the spirit of offering my thoughts on where things might have been done differently, and so possibly in a way that had a lesser impact on the Advocate Complained Against.