Neutral Citation Number: [2011] IEHC 203

THE HIGH COURT

2011 330 JR

BETWEEN

ERNST & YOUNG

APPLICANT

AND

JOHN PURCELL

AND THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND

RESPONDENTS

Judgment of Ms. Justice Mary Irvine, dated the 13th day of May, 2011

1. This is an application for leave to apply for judicial review of certain decisions made by the first and second named respondents in the course of their current investigation into the role of the applicant as auditor of Anglo Irish Bank plc during a period of financial irregularity. The *ex parte* application initially came before the President of the High Court on 15th April, 2011. He directed that the respondents be put on notice of the application. Consequently, the matter came before me on 18th April, 2011 when the court heard submissions from both parties as to the relief sought.

2. Pursuant to the Bye-Laws of the second named respondent and the disciplinary procedures stipulated therein, the second named respondent appointed the first named respondent as Special Investigator into the relevant affairs and conduct of the applicant. The applicant objects to the appointment of the first named respondent as *ultra vires* the powers of the second named respondent under the relevant Bye-Laws and seeks an order of *certiorari* quashing the decision underlying the appointment. Alternatively, the applicant seeks a number of other reliefs which can be summarised as follows, namely:-

> (i) a declaration that the first named respondent discharge his functions in accordance with natural justice and fair procedures and in accordance with the applicant's legitimate expectations;
>
> (ii) an order of *mandamus* requiring the first named respondent to furnish a report to the applicant containing his proposed findings and the evidence, facts and matters relied upon in support of any opinion that there is a *prima facie* case that the applicant is liable to disciplinary action;
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> (iii) a declaration that the applicant's rights include the right to make submissions in relation to the proposed findings;
>
> (iv) an order of *mandamus* directing the first named respondent to produce all material, documents and transcripts of interviews relevant to his investigation; and
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> (v) a declaration that in the event of the first named respondent finding a *prima facie* case exists that the supporting material to be furnished with his report to the second named respondent should exclude any report compiled by third party advisers.

3. Finally, if necessary, the applicant seeks an extension of time to maintain the within proceedings pursuant to O. 84, r. 21 of the Rules of the Superior Courts.

4. The respondents submit that the applicant has not made out an arguable case in respect of any of the grounds of relief sought and that the court should refuse to grant it leave to pursue any remedy. In addition, in respect of each relief sought, the respondents maintain that the application to this Court has been brought outside the timeframe provided for by O. 84, r. 21 and that in the circumstances of this case the court should not exercise its discretion to extend that time limit.

The appropriate test for the present leave application which was on notice to the respondents

5. Mr. Sreenan, S.C., on behalf of the applicant submitted that the appropriate threshold to be applied by the court on the present application was that it should be satisfied that the applicant had made out an arguable case in relation to each of the grounds in respect of which leave was sought.

6. Mr. McCullough, S.C., having advised the court that there was a line of authority which suggested that an argument could be made that a higher standard of proof should be applied on an *ex parte* application where the respondent was on notice, stated that he was not going to argue the issue. I have presumed, in this regard, that what Mr. McCullough was referring to was the line of authority which emanates from the decision of the Court of Appeal in *Mass Energy v. Birmingham County Council* [1994] ENV LR 298 where, on a leave application on notice, the court concluded that the applicant had to prove not merely an arguable case but that it was one which had a strong chance of succeeding. This approach was not favoured by the majority of the Supreme Court in *O'Brien v. Moriarty* [2005] 2 ILRM 321, with Kearns J. being the only member of the court in favour of applying a higher threshold to an *ex parte* leave application made on notice to the respondent.

7. Having stated that he was not going to argue the issue of the applicable standard, Mr. McCullough, S.C., nonetheless proceeded to make his submissions based on an onus of proof requiring the applicant to prove that his case was "reasonable, arguable and weighty". That is a standard of proof a little higher than that contended for by the applicant and is one which is normally confined to cases of statutory judicial review.

8. It appears to be almost settled law that there are two standards applicable in judicial review leave applications which can be

summarised as follows:-

> (i) In an *ex parte* application for leave to grant judicial review of a conventional nature, the standard is as set out by Denham J. in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374:-
>
> > "The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a statable case, an arguable case in law."
>
> (ii) There are a number of statutory schemes which require an applicant seeking leave to challenge designated decisions to place a specified person or body on notice of the making of such application creating an *inter partes* hearing at the initial filtering phase. The relevant statutory threshold for granting leave in such cases appears to be raised from "arguable grounds" to "substantial grounds", the test first addressed by Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 and which standard requires the applicant to prove that its case is reasonable, arguable and weighty.

9. There is still some uncertainty surrounding the standard of proof to be applied in a conventional non-statutory leave application where the respondent has been put on notice of the application. Clarke J. in *Potts v. Minister for Defence* [2005] 2 ILRM 517 favoured the application of the statutory judicial review threshold in such circumstances and rejected the even higher threshold adopted by the Court of Appeal in *Mass Energy*. Also, Kelly J. in *Gorman v. Minister for Environment* [2001] 1 I.R. 306 expressed doubt as to whether the appropriate standard of proof in a case where an *ex parte* application was adjourned so that the intended respondent could be heard was the low standard of an arguable case. Nonetheless, in *Irish Haemophilia Society v. Lindsay* [2001 No. 307 J.R.] (High Court, 16th May, 2001) Kelly J. applied the ordinary standard of proof whilst again reiterating the possibility that a higher standard could be applied.

10. Insofar as the standard of proof is concerned, this court considers itself bound by the decision of the Supreme Court in *D.C. v. D.P.P.* [2005] IESC 77. That was an appeal from a decision of O'Caoimh J. where he refused leave to bring judicial review proceedings and where argument had been heard on the applicable standard of proof. Denham J. at para. 6 of her judgment stated as follows:-

> "Reference was made in the High Court to a different standard of proof in cases where the respondent is on notice of the application. However, I do not apply such an approach in this appeal. It appears to me that there is a real danger of developing a multiplicity of different approaches, that of *G. v. Director of Public Prosecutions*, the test applied in specific statutory schemes, and that governing the position where a respondent is on notice in a particular area of litigation. Not only may there be legal difficulties in identifying and applying each different standard, but such an approach would also take up further valuable court time. In voicing this opinion I note that in both *Gorman v. Minister for the Environment* [2001] 1 I.R. 306 and other cases cited reliance was placed on English case law. However, it appears to me that the appropriate law is that which was well established in this jurisdiction based on *G. v. The Director of Public Prosecutions*. It is that standard which I apply to this application."

11. Having regard to the aforementioned decisions, I am satisfied that this Court should not apply a standard which is higher than the lowest of the three standards to which I have already referred, namely that of an arguable case, notwithstanding the fact that the respondent is on notice of the present application. This seems to me to make sense on the present application particularly in circumstances where the evidence before the court is no different to that which would have been before the court had the respondents not been put on notice. However, it is undoubtedly the case that having heard counsel for both parties, the court has been placed in a much better position than it would otherwise have been in to assess whether or not the applicant has discharged the appropriate onus of proof.

Background

12. The first named respondent came to be appointed by the second named respondent pursuant to Chapter IX of the Bye-Laws of the second named respondent which became effective on 18th December, 2007 ("the 2007 Bye-Laws"), which Bye-Laws have since been updated with effect from 24th January, 2011. The transitional provisions permit the member under investigation the right to elect for the disciplinary procedure under either set of Bye-Laws but it is clear that the member's liability to disciplinary action and the sanctions that may be imposed are governed by the Bye-Laws as they existed as of the date of the relevant events. Suffice to state that for the purposes of this application both sets of disciplinary Bye-Laws are effectively indistinguishable save for a slight variation in the definition of "complaint".

13. Pursuant to the 2007 Bye-Laws, the second named respondent established the Chartered Accountants Regulatory Board ("CARB") to regulate its members. The applicant is one such member.

14. On 19th December, 2008, CARB issued a press release advising that it would be examining the circumstances surrounding the issue of inappropriate directors' loans at Anglo Irish Bank plc and the role played by any member of the second named respondent.

15. At a meeting on 16th January, 2009, the Complaints Committee of CARB formed the opinion that the matters to be investigated were of complexity and importance giving rise to questions of public concern such as to bring into play the possibility of the appointment of a Special Investigator in accordance with Bye-Law 71.

16. The Complaints Committee met again on 13th February, 2009 when, having apparently considered a Report from the Head of Professional Conduct of the second named respondent outlining a complaint, it executed an Instrument of Appointment appointing the first named respondent as Special Investigator to enquire into, inter alia, certain directors loans at Anglo Irish Bank plc and the performance of the applicant as the bank's auditors in relation to the said loans. The Instrument of Appointment of the Special Investigator was forwarded to the applicant on 18th February, 2009.

17. At a meeting on 16th March, 2009, the Complaints Committee considered further matters which had arisen in relation to Anglo Irish Bank plc and the role played by members and a member firm of the second named respondent. The Complaints Committee again apparently considered a report from the Head of Professional Conduct which outlined a complaint in relation to these issues following which it resolved to appoint first named respondent as Special Investigator to enquire into these additional matters. A second Instrument of Appointment was executed and notified to the applicant on the same date.

18. On 22nd July, 2009, the Complaints Committee approved an application by the Special Investigator made pursuant to Bye-Law 72.3, to extend his remit to enquire into certain additional facts and matters which had come to his attention in the course of his enquiries.

19. Both of the aforementioned Instruments of Appointment are stated on their face to be based upon decisions made by the Complaints Committee following the receipt of Reports from the Head of Professional Conduct which outlined, *inter alia*, a complaint. Each Instrument records that the Complaints Committee empowered the first named respondent to investigate the facts and matters specified in the schedules thereto.

20. I do not intend to set out the facts and matters stated to give rise to the appointment of the first named respondent as these are set out in Part I of the Schedule to each Instrument of Appointment. Suffice to state that in respect of the first Instrument, reference is made to a number of press releases concerning the resignation of a number of members from the board of Anglo Irish Bank plc, namely Mr. Seán Fitzpatrick, Mr. David Drumm and Mr. William McAteer and to certain loans of Mr. Seán Fitzpatrick which were current during a period when the applicant was the auditor to Anglo Irish Bank plc. In respect of the second Instrument of Appointment, Part I of the Schedule thereto includes extracts from a number of press reports which make reference to, *inter alia*, the support provided to Anglo Irish Bank plc by Irish Life and Permanent plc during a period of what is described as unprecedented turmoil and in respect of which period the applicant was the auditor to Anglo Irish Bank plc.

21. In each case, on the basis of the facts and matters outlined in the Schedule to the Instrument of Appointment, a number of questions were specifically raised for investigation in relation to the applicant.

22. It appears that from the outset of the investigation by the Special Investigator the first named respondent was represented by Whitney Moore, solicitors and the applicant by A & L Goodbody, solicitors. In May 2009 the first named respondent engaged a firm of forensic accountants (FTI) to assist him in relation to his investigation into the conduct of the audit of Anglo Irish Bank plc by the applicant, as permitted under the Bye-Laws.

23. In March 2010, Whitney Moore, informed the applicant by letter of the indicative process the first named respondent proposed to follow. It appears that the applicant fully engaged with the investigation and to this end participated in a number of meetings, made several presentations, produced numerous witnesses for interview and delivered a vast array of documents to FTI and/or the first named respondent.

24. By letter dated 8th October 2010, the first named respondent notified the applicant that he intended to slightly alter the indicative process. At all stages the applicant was advised that it would be furnished with a summary/synopsis ("Synopsis") of his findings. In that letter the applicant was advised :-

> "Once those interviews are completed and having considered the Report of FTI together with all the documentary and the oral evidence available to him, Mr. Purcell will provide your client with a summary/synopsis together with relevant material for the purpose of their making written submissions. Your client will have 28 days within which to make such written representations. Thereafter Mr. Purcell will proceed to finalise his Report to the Complaints Committee.
>
> Mr. Purcell believes that this is a fairer approach as it ensures that all interviews are conducted before your clients are given the summary/synopsis and relevant material and are expected to respond with their representations. Only after receipt of those representations and having considered them will Mr. Purcell then proceed to report to the Complaints Committee."

25. The Synopsis was furnished to the applicant by letter of 9th February, 2011 with certain supporting documentation. At that stage, the applicant, by letter dated 11th March, 2011 made wide ranging complaints regarding the fairness of the process which had been adopted by the first named respondent and made demands that the applicant be afforded the extensive rights summarised at par. 2 of this judgment. Subsequently, the first named respondent delivered a comprehensive reply to the applicant's protestations of unfairness by letter dated 28th March, 2011. It was the failure on the part of the first named respondent to yield to the wide ranging demands made in the applicant's letter of 11th March, 2011 that has led to the present application.

Relief

1. Certiorari

26. The first and perhaps most significant relief which the applicant seeks leave to pursue is an order of *certiorari* quashing the decision of the second named respondent to appoint the first named respondent as Special Investigator.

27. The Reports prepared by the Head of Professional Conduct, to which reference is made in both Instruments of Appointment, were received by the applicant following a request to CARB on 7th March, 2011. The applicant now argues that those reports do not in fact set out what may be described as valid "complaints" against the applicant and that they do not contain allegations of misconduct, incompetence, inefficiency, breach of legislation, regulation, codes or standards. It is submitted that as a valid complaint must be conveyed to the Complaints Committee before it has any jurisdiction to act, the Committee acted *ultra vires* when it appointed the first named respondent.

28. The respondents argue that the definition of "complaint" in the relevant Bye-Laws is extremely wide and that there is no basis to contend that a complaint, to be valid, must be a type of formal complaint which sets out particulars of perceived wrongdoing or particulars of the disciplinary action to which the member may have become subject. It is necessary simply that the complaint sets out the facts and circumstances which are material. If it was otherwise, members of the public could never raise a proper complaint. They can't be expected to have knowledge of matters such as the relevant rules, regulations, obligations and Bye-Laws that may have been infringed and will usually only be in a position to set out the facts and circumstances causing them concern.

29. In addition, the respondents submit that the application for leave to apply for *certiorari*, has not been brought within the time provided for by O. 84, r. 21 of the Rules of the Superior Courts. Consequently the court was urged not to exercise its discretion to grant the applicant the extension of time required to maintain its right to that relief or indeed any other relief.

Delay

30. I think it is appropriate to deal with the delay point in relation to the application for leave to apply for an order of *certiorari* before considering whether the applicant has made out an arguable case for any of the relief sought.

31. Order 84, rule 21(1) of the Rules of the Superior Courts provides that:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made."

32. In relation to delay, the first issue to be considered is the date upon which the time limit provided for in Order 84, rule 21 commenced insofar as leave is sought to apply for an order of *Certiorari* to quash the appointment of the first named respondent as Special Investigator.

33. The relevant Instruments of Appointment were forwarded to the applicant by letters dated 18th February, 2009 and 16th March, 2009 respectively. On the face of each Instrument of Appointment it was stated that the appointment of the first named respondent was based upon a Report prepared by the Head of the Professional Conduct of CARB outlining a complaint. This being so, I accept the submission made by counsel for the respondents that it cannot reasonably be argued that the time for maintaining a challenge to the validity of the relevant appointments did not start to run on the date when the applicant received the Instruments of Appointment. The fact that the applicant's legal advisers, based on an assumption as to the existence of what they consider to be valid complaints in the Reports of the Head of Professional Conduct, waited until 7th March, 2011, almost two years into the investigation, prior to commencing consideration of the validity of the relevant appointment, cannot arguably form a legitimate basis from which it may be contended that the operative date for the purposes of O. 84, r. 21 was 7th March 2011. The time for making any enquiries into the lawfulness of the appointment of the first named respondent was when the applicant was notified and given a copy of the relevant Instruments of Appointment and time for any challenge to that appointment commenced on the same date. According, I am satisfied that the applicant requires an extension of time to pursue an order of *certiorari*.

34. The evidence available to support an application for an extension of time under O. 84, r. 21 is skeletal to say the least. There is a bald averment at para. 11 of Mr. McKerr's grounding affidavit stating that the Report prepared by the Head of Professional Conduct was received by the applicant following a request made to the CARB on 7th March, 2011. Mr. McKerr analyses the relevant reports scheduled to the Instruments of Appointment. He further refers to the extensive engagement between the applicant and the first named respondent over the two years of the investigation and advises the court regarding the vast amounts of documents furnished by the applicant and also of its involvement in meetings and presentations. However, his affidavit is deafingly silent as to why a period of two years was allowed to elapse before any consideration was given to the lawfulness of the first named respondent's appointment.

35. In relation to his assertion that no valid complaint existed at the time the first named respondent was appointed, he makes the following averments:-

> "88. As has been seen, the documents surrounding the appointment and scope of investigation of the first Respondent, are largely premised on press statements and media articles. There is no reference therein to codes of conduct, rules, regulations or professional standards.
>
> 89. While the Instruments of Appointment describe the Reports from the Head of Professional Conduct as outlining a "Complaint", the Reports (copies of which were recently received from CARB in response to a request) do not in fact set out what could be described as a "complaint" against the Applicant. No allegations of misconduct, incompetence, inefficiency or breach of legislation, regulation, codes or standards, are contained in the Reports of the Head of Professional Conduct.
>
> 90. There was therefore no "complaint" before the Complaints Committee of CARB at the dates of the appointment of the first Respondent. It is, and has at all material times been, a requirement of the Bye-laws of the second Respondent, that a "complaint" must be conveyed to the Complaints Committee before that entity has any jurisdiction to act. The Instruments of Appointment refer to "a report which outlined a complaint". The Applicant therefore believed that there was a properly formulated Complaint before the Complaints Committee when it exercised its functions under the Bye-laws. However, having now seen the "report" on which the Complaints Committee purported to base the decision to appoint the first Respondent, it is clear that there was no "Complaint" before the Committee. The Committee therefore lacked the jurisdiction to appoint the first Respondent and the purported exercise of that power was *ultra vires* the Committee and the second Respondent."

36. The evidence adduced in Mr. McKerr's affidavit has to be addressed in the context of the relevant case law in relation to the time limits which apply in judicial review proceedings. In *Solan v. Director of Public Prosecutions & District Justice Herbert Wine* [1989] ILRM 491, Barr J. at p. 493 of his judgment, in relation to an *ex parte* application to extend the time provided for under O. 84, r. 21, stated as follows:-

> "In this instance the application was made long out of time and, therefore, the applicant is obliged to satisfy the court that in all the circumstances, it is in the interest of justice that time for making the application should be extended and that the court should exercise its discretion accordingly. This entails providing by way of evidence on affidavit an explanation for the delay which is sufficient to merit the indulgence of the court."

37. There are also a number of relatively recent decisions in which the principles to be applied by the court when considering the time limits provided for in both O. 84, r. 21 and O. 84, r. 4 of the Rules of the Superior Courts, on an *ex parte* basis or at the *inter partes* stage of judicial review proceedings, have been set out.

38. In *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, Denham J. summarised the principles to be applied in any case where O. 84, r. 21 is relied upon by a respondent as a basis for refusing the relief sought. Whilst these principles were outlined in the course of an inter partes hearing they are nonetheless of relevance on this ex parte application particularly as the respondents were on notice of the application and proceeded to raise the issue of delay in their submissions. At p. 208 of her judgment she stated as follows:-

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive. It

is clear from precedent that the discretion of the court has ever been to protect justice. When criminal convictions are in issue the matter of justice may be very clear. However, it is the circumstances of each case which have to be considered."

39. The decisions of Fennelly J. in *De Róiste* and *Dekra Éireann Teo v. Minister for the Environment* [2003] 2 I.R. 270 give further guidance as to the approach to be adopted by the court where an applicant has failed to institute proceedings within the timeframe provided for under Order 84, r. 21. He made a number of important statements to which I will briefly refer.

(i) At p. 304 of his decision in *Dekra* he referred to the legislative tendency towards the imposition of stricter time limits and to the fact that this tendency had been met with a corresponding approach from the judiciary. He stated as follows:-

> "There has been a tendency in recent legislation to impose comparatively short time limits for the challenge of administrative decisions. The case of *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 is a notable example. In delivering the judgment of the court in that case, Keane C.J. drew attention to the public policy in this field at p. 392:-
>
> > 'There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible'."

(ii) the burden of proof generated by O. 84 remains upon the applicant at the substantive hearing even if the court grants an extension of time at the *ex parte* stage and the applicant cannot establish "good reason" for delay by relying, without more, upon an assertion that the respondent is not prejudiced by the delay that has occurred; (*Dekra* p. 304)

(iii) the onus is on the applicant to show that there are reasons which both explain and afford a justifiable excuse for the delay, as per the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301;

(iv) a short period of delay may require only slight explanation whereas a longer delay would require a more cogent explanation (*De Róiste* p. 221);

(v) the applicant must show good reason for all of the period of delay, including that which falls within the time provided for by the relevant rule. In *Dekra*, Fennelly J referred to the provisions of O. 84A, r. 4 which requires the application to be made "at the earliest opportunity" and "in any case" within three months from the date when grounds for the application first arose. He relied upon the clear link forged between the first and second parts of the rule by the use of the words "in any case" to support this requirement; and

(vi) differing levels of importance may be attached to an explanation in respect of the period of delay falling within the timeframe provided for in the Rules and an explanation furnished in respect of the period outside the permitted time limit. Fennelly J indicated that a greater degree of explanation would be required in respect of the period falling outside the time provided for by the Rule. (*Dekra* p.302).

40. The application for an extension of time is sought so as to enable the applicant pursue a relief designed to effectively torpedo and thus fatally terminate an investigative process which has been ongoing for over two years and which investigation has undoubtedly involved both parties in substantial time and expense. In these circumstances, the onus is on the applicant to provide, on affidavit, a cogent, weighty and meritorious explanation for its delay in seeking to quash the appointment of the first named respondent as invalid. This has not been provided. The Instruments of Appointment on their face record that the Complaints Committee made the Appointment based on Reports from the Head of Professional Conduct which referred to complaints concerning the applicant. Why, if the applicant felt it necessary or desirable to satisfy itself as to the validity of the appointment of the Special Investigator, did it not immediately pursue those investigations by seeking copies of the Reports of the Head of Professional Conduct? At no stage does the applicant, in its grounding affidavit, seek to explain or justify its failure to take any steps to inquire into the lawfulness of the appointment for a period in excess of two years, during all of which period it was apparently in receipt of legal advice. All that is forthcoming is a bald statement that the applicant had proceeded on the assumption that what it considers to amount to valid complaints were before the Complaints Committee at the time the first named respondent was appointed.

41. It is also clear and relevant to this application that as soon as the respondents were asked for a copy of the Reports from the Head of Professional Conduct that these were furnished immediately. Accordingly there is no conduct on the part of the respondents that might excuse any portion of the delay in maintaining this application for leave to apply for an order *certiorari*. Further, the applicant has engaged with the investigation of the first named respondent up to the point where he is now about to report to the Complaints Committee and has done so from the outset with the benefit of legal advice, conduct that is all relevant to the court's consideration under the relevant principles.

42. Having regard to the appropriate legal principles and the relevant public policy considerations which require an application of this nature to be made promptly, I am satisfied that the application for an extension of time is wholly without merit and that if the court were to exercise its discretion in favour of the applicant to do so would operate a manifest injustice to the respondents in all of the relevant circumstances.

43. In relation to the other relief which is sought at par. 4 of the Statement Required to Ground the Application for Judicial Review, having regard to the chronology of events set out in the grounding affidavit, I have concluded that the applicant has at least made out an arguable case that the proceedings were commenced within the time frame provided by O. 84, r. 21. Accordingly, is not necessary for me to consider the exercise of my discretion to extend the time under Order 84, rule 21**.**

Is it arguable that the appointment of the first named respondent was *ultra vires*?

44. Lest I have fallen into error in relation to the delay argument and the provisions of Order 84 r.21, I will briefly consider whether the applicant has, in any event, made out an arguable case that the appointment of the first named respondent was ultra vires the powers of the second named respondent.

45. "Complaint" is defined Bye-Law 61 in the following manner:-

> "'Complaint' means any complaint, allegation, expression of concern, matter or event touching or apparently touching upon the conduct (whether by act or omission) behaviour, performance or affairs of any member, affiliate, student, or member firm in respect of any of the matters mentioned in Bye-Laws 63 or 64 whether brought to the attention of the Head of Professional Conduct by a Complainant or otherwise coming to the attention of the Head of Professional

Conduct."

46. Bye-Laws 63 and 64, which are referred to in the definition of "complaint", render members liable to disciplinary action in a wide range of circumstances. Any act or default likely to discredit the member, the Institute or the profession or the performance by a member of his/her work or duties inefficiently or incompetently, leaves that member exposed to disciplinary action.

47. It is clear from the Reports of the Head of Professional Conduct that matters which may comfortably be described as "expressions of concern touching or apparently touching upon the conduct (whether by act or omission)" of the applicant, and which had been referred to in many newspapers articles, had come to his attention. These in turn were brought to the attention of the Complaints Committee in his Reports, where extracts from the various newspaper reports were set out in the appendices thereto. One such extract, by way of example, states that the applicant, according to a named accountancy expert, should have spotted that Mr. Fitzpatrick had engaged in a process of temporarily concealing directors' loans by transferring them to another bank prior to Anglo Irish Bank plc's group year end.

48. There is no requirement in the definition of "Complaint" that the specific standards, laws or regulations to which the member may have become subject must be particularised, as is submitted on behalf of the applicant. The definition is drafted in very wide and clear terms so that any behaviour which may be suspect will be caught by the definition. Under Bye-Law 69 it is the right of any person to bring any complaint to the attention of the Head of Professional Conduct. If the specific Bye-Laws or regulations allegedly breached had to be referred to along with the facts and matters supporting the complaint in order that a complaint could be considered to be valid, the vast majority of complaints made by members of the public, even if wholly meritorious on their facts, could never be investigated for want of their reference to the rules and regulations that may have been breached. The applicant, on the submissions made, is in effect seeking leave of the court to pursue a claim to quash the appointment of the first named respondent in reliance upon a definition of "complaint" which is wholly different and substantially more demanding than the definition in the Bye-Laws which govern the appointment.

49. Whilst the threshold to be met by the applicant on a judicial review application of this nature is relatively modest, the court is well placed to assess whether or not this threshold has been met by the applicant having heard the submissions of both parties and having had the benefit of examining the evidence produced by the applicant relevant to the *ultra vires* argument. Having considered this evidence, I am satisfied that it is not possible to argue in any rational way, having regard to the very broad definition of complaint within the relevant Bye-Laws that there was no "complaint" before the Complaints Committee such as to contend that the appointment of the first named respondent could b*e ultra vires* the powers of the second named respondent.

50. For the aforementioned reasons, irrespective of the delay on the part of the applicant in seeking leave to apply for an order of *certiorari*, I have concluded that there is no substance to the argument made.

2. The Bye-Laws and Natural Justice

51. The next relief in respect of which leave is sought is a declaration that the first named respondent is required to discharge his functions under the Bye-Laws in accordance with the rules of natural justice and fair procedures and in accordance with the applicant's legitimate expectations. That proposition is one with which the respondents do not disagree. They submit, however, that neither natural justice and fair procedures nor the doctrine of legitimate expectation, on the facts of the present case, can arguably be stated to require the respondents to meet the demands outlined in the relief sought at 4.1(b) (ii) – (iv) inclusive of the statement required to ground the application for judicial review.

52. The reliefs sought a paragraph 4.1(b)(i) – (iv) may conveniently be dealt with together. In this regard the applicant maintains it has an arguable case to claim, at this stage of the disciplinary process, that it enjoys the following rights, namely –

(1) the right to be furnished with a report of the proposed findings of the Special Investigator and the evidence, facts and matters supporting that opinion;

(2) to be provided with all materials, documents, and transcripts which are or may be relevant to the investigation; and

(3) the right to make submissions in relation to the proposed findings based upon receipt of the materials, documents and transcripts referred to in (1) and (2) above.

53. For reasons of confidentiality the applicant has not placed the Synopsis furnished by the first named respondent before the court. However, from the correspondence exchanged between the parties and from the affidavit grounding this application the following seems to be the accepted position namely:-

(i) That the Synopsis, at para. 1.2 (A) to (E) thereof, sets out the issues to which the investigation relates.

(ii) That in the Synopsis the first named respondent addressed each of the issues and questions which were referred to him for investigation and set out what he considered to be the facts most relevant to the applicant's performance in relation and those issues.

(iii) That in addressing the specific question as to whether aspects of the applicant's conduct of the audit disclosed a *prima facie* case that it might be liable to disciplinary action, the Synopsis set out a list of matters which the first named respondent considered to be apposite.

(iv) That the first named respondent cross referenced his Synopsis to the summary of principal facts and matters in the FTI report and/or the main body of the Report where appropriate.

(v) That the Synopsis included the material and documentation which the first named respondent considered relevant to his findings and this included the FTI report together with two volumes of exhibits.

(vi) That following a complaint from the applicant's solicitors that they were not in a position to ascertain the standard being applied by the first named respondent in the course of the investigation, Whitney Moore advised that the issues referred to the Special Investigator in the Instruments of Appointment would be assessed in the context of misconduct, inefficiency and incompetence as described in Bye-Law 64.1 of the Bye-Laws and that regard might also be had to a number of statutory and regulatory provisions which they then identified.

(vii) That after the Synopsis was delivered, and on receipt of a complaint from the applicant's solicitors, additional

documentation, including excerpts from relevant transcripts, was forwarded to the applicant's solicitors on the 7th March, 2011

Conclusions

54. In assessing the extent of the applicants rights in the context of natural justice and fair procedures there are a number of matters which are of particular relevance. These include the phase of the disciplinary process within which those rights are asserted, in this case, the Special Investigator or *prima facie* stage of disciplinary process; the consequences to the party under investigation which flow from any finding made during that stage and the rights which that party enjoys should matters proceed to a formal inquiry. The Bye-Laws are of some relevance in this respect and I will refer to them briefly. In this regard the parties are agreed that the disciplinary procedure relevant to this application is to be found in the Bye-Laws which came into effect on 24th January, 2011 and which are exhibited at "MMCK 22" to the grounding affidavit.

55. From a perusal of the Bye-Laws it is clear that the present application is brought during the Special Investigator or *prima facie* decision stage of the disciplinary process. This is very much a preliminary phase in the overall context of the relevant disciplinary procedure. It is therefore perhaps not surprising that pursuant to Bye-Law 19.1, the Special Investigator is stated to be permitted to conduct his investigation in such a manner as he, in his absolute discretion, shall see fit. There is no provision in the Bye-Laws entitling a member under investigation to an advance copy of the proposed findings of the Special Investigator for the purposes of permitting the member make submissions thereon. Neither is there an entitlement on the part of the member to be furnished with the material relied upon by the Special Investigator in reaching his proposed findings, not to mention what is contended for in this present application namely the right to sight of all material, documents and transcripts which are or may be relevant to the investigation. Even in investigations where no Special Investigator is appointed and where the Complaints Committee itself decides whether or not there is a *prima facie* case, the entitlement of the party against whom a complaint is being investigated is confined to receiving "a synopsis prepared by the Head of Professional Conduct of the Complaint together with brief details of the material then before the Committee and upon which it proposes to base its decision as to whether or not a *prima facie* case has been made out" .

56. However, the fact that the rights contended for by the applicant on the present application are not provided for in the Bye-Laws does not mean that it is not arguably entitled to rights beyond those therein provided. Guidance as to the extent of those rights is to be found in the decision of *O'Callaghan v. Disciplinary Tribunal, Ireland and Attorney General* [2002] 1 I.R. to which I will shortly refer.

57. The consequence of a finding that a *prima facie* case has been made out against a member is also a matter to be considered by the court when weighing the applicant's alleged entitlement to the relief sought. Under the Bye-Laws, if a Special Investigator concludes that there is a *prima facie* case then the Complaints Committee will refer the *prima facie* case by way of formal complaint to the Disciplinary Panel. At that stage, the Complaints Committee has the discretion merely to publish a statement that such a finding has been made and to name the member, but nothing further. This fact is confirmed by Mr. McKerr in his affidavit where, at para. 60 and 61, he confirms that because the investigation is still ongoing at that stage that confidentiality is paramount.

58. Another matter of relevance to the court is the extent of the rights enjoyed by a member in the event of a formal complaint proceeding before a duly constituted Disciplinary Tribunal. In this regard, Bye-Laws 21 and 23 provide the member with very significant rights to enable it to safeguard its interests. For example, in the applicant's case, should a formal complaint be ultimately laid before a Disciplinary Tribunal it will be entitled to receive the formal complaint and also the report of the Special Investigator. It will have to be furnished, in advance of any hearing, with all documents to be relied upon by the prosecution and to receive a list of all potential witnesses. The applicant will be entitled to cross examine the prosecution witnesses, to call its own witnesses, to produce documents and make submissions as it may deem appropriate and of course it will enjoy the right to be legally represented.

59. Not only has the applicant has produced no legal authority to support its entitlement to the rights it contends for at this stage of the process but its argument flies in the face of the authority relied upon by the respondents, namely that of *O'Callaghan v. Disciplinary Tribunal, Ireland and Attorney General* [2002] 1 I.R. That decision deals with the rights of a party in the course of a disciplinary investigation when what is under consideration by the decision maker is whether or not a *prima facie* case of misconduct exists.

60. In *O'Callaghan*, Geoghegan J. concluded that all that was required by way of natural justice and fair procedures was that the party under investigation be notified of the complaint and given the opportunity to respond to it and that any such response would be before the Tribunal before it made its decision as to whether or not there was a *prima facie* case for the holding of a formal inquiry.

61. The decision in *O'Callaghan* concerned the rights to be afforded to a solicitor against whom a complaint had been made at the time when the Solicitors Tribunal was examining whether or not there was a *prima facie* case made out for the holding of a formal disciplinary inquiry. The applicant, a solicitor, had been notified by the Law Society of a complaint made against him and he had been afforded and had availed of an opportunity to respond to the complaint. This correspondence was before the Disciplinary Tribunal when it made its decision that such a *prima facie* case existed. The applicant sought an order of *certiorari* quashing the decision of the Disciplinary Tribunal which had found him guilty of professional misconduct on the basis, *inter alia*, that when the Disciplinary Tribunal was holding its *prima facie* inquiry, he ought to have received formal notification and particulars of the original complaint from the Tribunal so that he could be afforded a proper opportunity to rebut it before any decision was made to hold a formal inquiry. The applicant conceded that he had been sent the letter of complaint and had availed of an opportunity to write a reply which was before the Tribunal when it decided to hold a formal inquiry. The applicant argued that this was not sufficient and that there ought to have been formal notification and that the absence of such procedure rendered the inquiry unlawful.

62. In the High Court, McCracken J. refused the relief sought describing the *prima facie* procedure as a type of weeding out process rather than one of enquiry. The Supreme Court, however, considered the *prima facie* procedure to be of somewhat greater significance and referred to the potential adverse consequences for a solicitor should a decision be made to hold a formal disciplinary inquiry. Nonetheless, Geoghegan J. concluded that the rights to be afforded to the party under investigation at the *prima facie* stage of the disciplinary process were minimal.

63. In following the decision in *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, Geoghegan J. concluded that there were no hard and fast rules as to the procedure to be adopted when a professional body was considering whether or not a *prima facie* case existed for the holding of a formal inquiry in relation to a disciplinary matter. There was no formal technical requirement upon any Tribunal to serve notice of a complaint and wait for a reply. At p. 8 of his judgment he stated as follows:-

> "But all that is required, in my view, is that the solicitor be notified of the complaint and be given an opportunity of

> responding to it and that that notification and any response that may have been given to it should be before the Tribunal before it makes its decision as to whether there is a *prima facie* case for an inquiry."

64. He went on to conclude that having regard to the fact that as the applicant had been furnished with the initial complaint and had replied thereto in writing, the fact that he had not been formally notified of the holding of the inquiry by the Fitness to Practice Committee into whether or not there was a *prima facie* case to hold a formal inquiry, did not amount to a breach of natural justice or fair procedures.

65. The applicant's complaint that the Synopsis furnished is a narrative account which fails to crystallise the first named respondent's views of the investigation and its assertion that it would be fundamentally unfair to expect it to make submissions without sight of his preliminary findings and all of the materials and evidence upon which he and FTI have relied, is to fail to recognise any limitation to its rights at this stage of the process. The applicant has had details of the issues under investigation for a period of two years. It has now received a Synopsis of all of the facts, materials and documents which the first named respondent considers are material to each of the issues under investigation. The applicant is thus in a position to make wide ranging and significant submissions to the first named respondent. It can, inter alia, address any omissions, errors or inaccuracies in the facts outlined; it may offer its own account of the findings of fact that it considers ought to be made based on the materials and evidence of which it has knowledge; it can make submissions as to whether the facts found are sufficient to justify a recommendation that the applicant is liable to disciplinary action in relation to any issue under investigation and it can make submissions as to the professional standards to be applied.

66. The rights now contended for by the applicant are entirely at variance with the process as envisaged by the Bye-Laws and are far in excess of what was provided for in the Indicative Process. However, most significantly, the decision in *O'Callaghan* is, in my view, fatal to the applicant's assertions that it has made out an arguable case to pursue the relief now sought. There is nothing unfair to my mind in the procedure adopted by the first named respondent at the present preliminary phase of the disciplinary process. The Special Investigator has afforded the applicant rights substantially in excess of what was demanded in *O'Callaghan* in entirely analogous circumstances.

67. Having regard to the rights which have been afforded to the applicant, the fact that the applicant has not been given a report containing the proposed findings of the Special Investigator or all of the documents and evidence sought in its letter of 11th March, 2011, so that it may direct its submissions thereto, does not give the applicant any basis from which to argue that it has not been afforded natural justice and fair procedures.

3. Legitimate Expectation

68. The doctrine of legitimate expectation has its origin in this jurisdiction in the important Supreme Court decision in *Webb v. Ireland* [1988] I.R. 353 and has been revisited over the years in a number of decisions including that of the Supreme Court in *Glencar Exploration v. Mayo County Council* [2002] I.R. 84 where Fennelly J. sought to formulate what seemed to him to be the preconditions to the right of a party to invoke the doctrine. At para.168 of his judgment he stated:-

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

69. Accordingly, in determining whether the applicant has made out an arguable case to contend that it had a legitimate expectation of being afforded each of the rights now contended for at para. 4.1(b)(ii) – (iv) inclusive of the Statement Grounding the Application for Judicial Review, it must first be determined if the applicant can argue that there was some explicit statement or established practice, assurance or representation made by the first named respondent that he would provide the applicant with the rights now sought. Accordingly, I will refer briefly to the facts.

70. The indicative process intended to be adopted by the first named respondent was initially notified to the applicant by letter dated 4th March, 2010. Therein, the first named respondent stipulated that after he received the FTI report he would crystallize the issues arising and forward them to the applicant who would then be entitled to respond.

71. Very much later, by letter dated 13th September, 2010, Messrs. A&L Goodbody, sought confirmation that the applicant would be notified of the applicant's proposed recommendations and would be afforded an opportunity to make submissions in relation thereto. In the penultimate paragraph of that letter the following assurance was sought, namely:-

> "We would also request confirmation that we will be notified of Mr. Purcell's proposed recommendation and offered the opportunity to make submissions prior to the Special Investigator finalising his report, and after all interview processes are duly concluded. We should be obliged if you would confirm that our client will have such an opportunity to consider and respond to Mr. Purcell's draft report before it is finalised and we should also appreciate clarification of the probable timescale in that regard."

72. By letter dated 8th October, 2010, the solicitors for the applicant were informed that there would be a slight change to the indicative process. I have referred to this change at para. 24 of this judgment. That letter did not give any of the assurances sought by the applicant's solicitors in their letter of 13th September, 2010. Thereafter, throughout the months of October, November and December 2010, correspondence passed between the applicants and respondent's solicitors in which it would appear that the issue of the Special Investigators potential recommendations was not raised by the applicant.

73. On 9th February, 2011, the first named respondent's Synopsis and FTI report were forwarded with additional exhibits to the solicitors for the applicant. They then wrote to Whitney Moore on 22nd February, 2011 stating in para. 3 thereof that "Ernst & Young understood and expected that this document would indicate the results of the investigations…including the factual basis for such a view and the standards being applied".

74. The position of the first named respondent was reiterated in a letter from Whitney Moore to A&L Goodbody dated 7th March,

2011, in which it is stated at the penultimate paragraph of p. 2:-

> "This [the provision of preliminary findings] was never in contemplation by Mr. Purcell and, at no stage was it suggested by Mr. Purcell that he would provide 'preliminary findings'."

75. Rejecting the clarifications given in Whitney Moore's letter dated 7th March, 2011, the applicant's solicitors responded by letter dated 11th March, 2011, where at p. 5, para. 2 of its letter it insisted "We therefore await an account of the second stage of this process, setting out the precise factual and legal basis upon which it is proposed to make a finding that there is a *prima facie* case of liability to disciplinary action in respect of our clients (if any)". This letter was responded to on 28th March, 2011, wherein Whitney Moore once again restated the indicative process.

76. Based on the evidence presented to the court on this application and in particular the correspondence just mentioned there is no evidence that any representation whatsoever was made by the first named respondent, express or implied, that could have given the applicant the impression that it would receive a copy of the Special Investigator's draft report with findings or the extensive documents, materials and transcripts now demanded. In *Re "La Lavia"* [1996] 1 ILRM 194, O'Flaherty J., rejected a plea of legitimate expectation due to the absence of an explicit representation causing the applicants to act to their detriment, stating that the "whole idea of a promise is that it has to make an impression on the mind of the promise". The applicant has not demonstrated that there is any legal basis upon which it could argue that the failure on the part of the first named respondent's solicitors to reply to a request seeking an assurance in a letter could ever meet the standard required to generate an arguable case based on the doctrine of legitimate expectation.

77. Accordingly the applicant has not established an arguable case for leave to seek the relief sought at par 4.1(b)(ii)-(iv) of the Statement Required to Ground the Application for Judicial Review, based either upon the laws of natural justice and fair procedures or based on the doctrine of legitimate expectation.

4. FTI Report

78. In the course of its investigation, the Special Investigator retained a forensic accountancy firm, FTI to assist him in carrying out that aspect of his investigation which relates specifically to the conduct of the applicant in its audit of Anglo Irish Bank plc. The applicant seeks leave to apply for a declaration that the report prepared by FTI cannot be forwarded by the first named respondent to the second named respondent in the event of a finding by him of a *prima facie* case that the applicant is liable to disciplinary action.

79. On 25th May, 2009, the first named respondent informed the applicant that he was engaging FTI in accordance with Bye-Law 72.4(a) of the 2007 Bye-Laws. His entitlement to retain FTI is not disputed.

80. Bye-law 19.5 of the 2011 Bye-Laws provides as follows:-

> "The Special Investigator shall report to the Complaints Committee and in such report he or she shall certify whether or not, in his or her opinion, as a result of his or her investigation, there exists a *prima facie* case…and, if so, he or she shall specify such *prima facie* case and stipulate the evidence, facts and matters which he or she has ascertained in the course of his or her investigation and which, in his or her opinion, supports such *prima facie* case."

81. Mr. Sreenan, S.C., on behalf of the applicant submits that it is arguable, based upon this Bye-Law, that the first named respondent, if reporting to the Complaints Committee that a *prima facie* case exists that the applicant is liable to disciplinary action, cannot forward the FTI report to the Committee.

82. From the letter of Whitney Moore dated 7th March, 2011, it appears that in the Synopsis, the first named respondent stated as follows:-

> "1.5 I set out in summary form the facts and matters that appear to me to be most relevant to the consideration of E & Y's performance in relation to each of the said issues. I have cross referenced my Synopsis to the Summary of Principal Facts and Matters in the FTI Report and/or the main body of the Report where appropriate."

83. In my view, having regard to the provisions of Bye-Law 19.5 there is no construction of that Bye-Law that allows the applicant argue that the FTI report falls outside what might be considered to constitute "the evidence, facts and matters" which in the opinion of the Special Investigator support the existence of a *prima facie* case.

Conclusion

84. The applicant is out of time for the purposes of applying for leave to seek an order of *certiorari* quashing the appointment of the first named respondent as Special Investigator. Having regard to the evidence before the court, I am satisfied that the court should not exercise its discretion to extend the time limit provided for in O. 84, r. 21 so as to permit that relief to be pursued. To do so would not only be contrary to the relevant legal principles but would be manifestly unjust to the respondents.

85. I am further satisfied that the applicant has not made out an arguable case for leave to apply for judicial review to seek any of the relief identified at para. 4.1(b) (i) – (v) inclusive of the Statement Required to Ground the Application for Judicial Review either on the grounds of natural justice and fair procedures or based upon the doctrine of legitimate expectation. The procedure which has been adopted by the first named respondent in his role as Special Investigator, has afforded the applicant rights significantly beyond those to which it is entitled either under the relevant Bye-laws to which it, as a member of the second named respondent has subscribed or to those which it is entitled to as a matter of natural justice and fair procedures. In this regard, I am satisfied that the type of rights presently demanded on behalf of the applicant at this preliminary stage of the disciplinary process are the type of rights to which a party against whom a *prima facie* case has been found may contend they are entitled in the course of defending a formal complaint. However there is no legal authority supporting the existence of any such rights at the present stage of the process.

86. For the aforementioned reasons, I will refuse the present application.