THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 183 JR.]

BETWEEN

LIAM McCAFFREY

APPLICANT

AND

CENTRAL BANK OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[2016] 184 JR

BETWEEN

KEVIN LUNNEY

APPLICANT

AND

CENTRAL BANK OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of October, 2017

Introduction

1. These proceedings arise out of the collapse of Quinn Insurance Limited ("QIL"). Both applicants were directors of QIL and following its collapse, the first respondent ("the Bank") conducted an investigation of QIL with a view to establishing whether or not regulatory breaches had occurred. Arising from that, the activities of the applicants were also examined. This culminated in the service of a Notice of Inquiry by the Bank on the respondents on the 10th November, 2015, whereby the Bank determined to hold an inquiry into whether the applicants had participated in the commission of prescribed contraventions by QIL. In these proceedings, the applicants seek, *inter alia*, an order quashing the Notice of Inquiry on a variety of grounds.

Background Facts

2. On the 26th October, 2011, the Bank wrote to the respondents notifying them that the Bank suspected that QIL, being a regulated financial services provider ("RFSP") for the purposes of Part IIIC of the Central Bank Act, 1942, as amended, ("the Act"), may have committed prescribed contraventions for the purposes of s. 33AO(1) of the Act. The respondents were advised that the Bank considered it necessary to examine whether there were reasonable grounds to suspect that they, as persons concerned in the management of QIL between the 10th October, 2005, and the 31st October, 2008, may have participated in the commission of the suspected prescribed contraventions for the purposes of s. 33AO(2) of the Act. Details of the alleged contraventions were provided.

3. This correspondence was replied to by Messrs. Daniel Spring & Co., solicitors acting on behalf of both respondents. A lengthy chain of correspondence ensued and while it is not necessary to refer to all of this in any detail, it would appear to demonstrate that the applicants and their legal team at an early juncture carried out a detailed analysis of the relevant provisions of the Act and familiarised themselves with it.

4. The Notice of Inquiry also informed the respondents that the Bank had appointed three persons to conduct the inquiry as inquiry members ("IMs") with the chairperson being a former High Court Judge. In a letter of the 23rd December, 2015, Messrs. Spring responded to the Notice of Inquiry with certain observations. The letter appears to demonstrate an awareness of other litigation then ongoing in relation to the provisions of the Act being *Fingleton v. Central Bank* [2016] IEHC 1, in which judgment was subsequently delivered on the 4th January, 2016.

5. The letter goes on to make a number of complaints about the inquiry process and the short timeline afforded the applicants to provide a response. The letter complained that the process was entirely oppressive and unreasonable and questioned whether it could be regarded as being in compliance with the applicants' rights under the Constitution. The applicants reserved their rights in that regard, presumably suggesting the potential for a constitutional challenge to the legislation.

6. A follow up letter was sent by the applicants' solicitors to the Bank on the 24th February, 2016. In this letter, the solicitors suggested that the proposed estimate of ten days for the hearing of the inquiry was very unrealistic. They went on to say:

> "Our clients are very concerned about the question of costs and they have asked us to raise a specific issue with you. Our clients suffered greatly by Quinn Insurance going into administration and we are instructed they would not be in a position to cover the costs of their legal representation at any such inquiry.
>
> On reading s. 33AQ of the Central Bank Act, 1942, our clients are concerned that there appears to be no provision for the inquiry to make a costs order in favour of our clients in respect of the costs of their legal representation. In fact, the section appears to provide that our clients can be fixed with the Central Bank's costs of not just the inquiry but also the investigation.
>
> This seems to be very unfair and irregular and, in our view, unconstitutional. Even if our clients were to be acquitted of the offences alleged against them, there appears to be no facility whereby our clients can seek an order for their costs.
>
> In case our clients have missed or overlooked a section in the Act or a provision in the administrative sanctions procedure, we would be most obliged to hear from you with your confirmation that our clients would be entitled to seek an order that the costs of their legal representation will be paid by the inquiry."

7. The letter was immediately replied to by the Bank on the 25th February, 2016, in the following terms:

> "The Inquiry Members have considered your query regarding your clients' costs. As you are aware, Part IIIC of the Act sets out the legislative framework for the conduct of administrative sanctions procedure inquiries. While Part IIIC of the Act provides that persons who are the subject of an inquiry may have legal representation, it does not appear to the Inquiry Members that the Act gives them any power to pay or provide for the payment of the costs of such representation."

8. On the 14th March, 2016, the applicants applied to this court (Humphreys J.) for leave to seek a judicial review of the Notice of Inquiry.

9. The grounds upon which leave was granted may be summarised broadly as follows:

> (i) There was unreasonable delay by the Bank in issuing the Notice of Inquiry.
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> (ii) The Bank has no jurisdiction to conduct an inquiry into the applicants because neither applicant is 'a person concerned in the management of QIL' within the meaning of s. 33AR (2) of the Act.
>
> (iii) The Bank is not an appropriate body to conduct the inquiry by reason of apparent bias and/or a perception of bias and because the Bank has prejudged the outcome.
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> (iv) The inquiry is tainted by a want of fair procedures by virtue of, *inter alia*, the issuing of new guidelines by the Bank after the event radically altering the procedures by which the inquiry might be conducted. There was a further want of fair procedures by virtue of the Bank constantly amending not only the rules but the prescribed contraventions.
>
> (v) Part IIIC of the Act and in particular certain identified sections within that Part are unconstitutional as representing an impermissible exercise of judicial power.
>
> (vi) Part IIIC of the Act is further unconstitutional because it contains no provision for the payment of the applicants' costs of participating in the inquiry.

10. In relation to the last ground, it is relevant to note that it was advanced, and leave was granted, on the following basis as appears in the statement of grounds:

> "69. There is no provision for the payment of any costs to the applicant, even if the inquiry is abandoned or all charges are dismissed. Unfairly, the inquiry can order the costs of the inquiry itself and the costs of the investigation against the applicant. The applicant suffered greatly as a result of Quinn Insurance Ltd going into administration and he is not in a position to cover the costs of his legal representation for such an inquiry. Given the nature of the issues, the breadth and complexity of the issues concerned, the material pertaining to the inquiry and the probable/possible length of the inquiry it is likely that the costs involved for the Applicants' representation will be enormous."

11. This ground is contained in identical terms in the statement of grounds of both applicants.

12. It is relevant to note that this latter ground is clearly one of oppression based on the alleged fact that neither applicant can from their own resources fund the costs of legal representation before the inquiry.

13. In addition to the substantive reliefs sought in the statement of grounds, the applicants also seek, if necessary, an extension of time for seeking judicial review and a stay on the conduct of the inquiry pending the determination of the judicial review. The grounds advanced for the extension of time are to be found at paras. 70 and 71 of the statement of grounds. The grounds essentially are that the applicants had engaged positively with the inquiry by way of correspondence culminating in the letter of the 25th February, 2016 confirming the IMs' view on costs. The applicants plead:

> "It is contended that the three month time limit for bringing judicial review should be adjudged to run from no earlier than the date of receipt of the aforesaid correspondence."

14. Accordingly, the applicants in these paragraphs appear to be contending for two mutually exclusive positions. The first is that time should be extended because it was reasonable for them to cooperate with the inquiry and engage in correspondence on the issues arising. The second is that time only ran from the 25th February, 2016, presumably on the basis that this is when the cause of action accrued. Of course if the latter position were correct, there would be no need for an extension of time.

15. Following the grant of leave, the applicants issued originating notices of motion pursuant to the leave granted and also a notice of motion seeking a stay on the hearing of the inquiry pending determination of the proceedings. However, while the stay application was pending, the applicants continued to engage fully with the inquiry process and interacted with the IMs on a number of issues. Between the 3rd May and 17th November, 2016, the IMs made seven different written determinations on various issues arising in the course of the inquiry, some of which I will refer to in more detail below. In advance of each such determination being made, all parties to the inquiry including the applicants through their legal team participated fully by making oral and written submissions to the IMs in advance of each determination.

16. One such determination was made by the IMs on the 17th October, 2016, concerning the relevant standard of proof in respect of the inquiry. The issue for determination was whether the IMs should for the purposes of the inquiry adopt the civil standard, proof on the balance of probabilities, or the criminal standard, proof beyond reasonable doubt.

17. Section 33BD of the Act enables the Bank to prescribe guidelines for the conduct of inquiries and the Bank has from time to time adopted such guidelines. Those adopted for the purpose of the inquiry in issue here were signed by the Bank's Governor on the 3rd November, 2014 ("the Guidelines"). Paragraph 4.3 of the Guidelines provides that the standard of proof before an inquiry shall be on the balance of probabilities. All parties however accepted that the IMs were free to depart from the terms of the Guidelines and adopt a higher standard if they considered it appropriate to do so.

18. Written submissions on this issue were made by the applicants' legal team on the 8th June and 25th August, 2016. On the 15th June, 2016, the applicants applied to this court by way of notice of motion for an order amending their grounds to include a number of new reliefs including an order quashing para. 4.3 of the inquiry Guidelines and further a declaration that the criminal standard should

apply before the inquiry. It would appear that the applicants abandoned the claim to quash the Guidelines and instead, an order was made on consent confined to the declaration and associated grounds. This was without prejudice to the respondents' contention that the application is out of time. The order was made on the 8th December, 2016.

19. While that motion was pending, the IMs gave their decision on the standard of proof on the 17th October, 2016, holding that the civil standard applied and giving reasons for reaching that conclusion.

The Legislation

20. The Central Bank of Ireland Act, 1942 was substantially amended by the Central Bank and Financial Services Authority of Ireland Act, 2004. This created for the first time in 2004, a process for the regulation and where necessary investigation of RFSPs which are subject to control by the Bank. There are currently over 9,000 such entities in the State. That process is known as the administrative sanctions procedure ("ASP") by which the Bank can investigate suspected regulatory breaches and apply sanctions to institutions and individuals found to have breached the regulations.

21. The power to enquire into such suspected breaches derives from s. 33AO which provides as follows:

> "33AO.—(1) Whenever the Regulatory Authority suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.
>
> (2) Whenever the Regulatory Authority suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention. Such an inquiry may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider."

22. At the conclusion of an inquiry, if the Bank determines that the person concerned participated in the prescribed contravention, it can impose a range of sanctions including a caution or reprimand, a fine up to a maximum amount, in the case of the applicants €500,000, a direction disqualifying the person from being concerned in the management of a RFSP for such period as it may specify and it may direct the person to pay the costs incurred by the Bank in holding the inquiry and in conducting the investigation. It is common case that there is no provision in the statute which permits the Bank to award costs to a party subject to inquiry irrespective of the outcome.

23. The Act provides for an alternative form of procedure where the contravention is acknowledged and the party concerned consents to the inquiry being dispensed with and the imposition of a sanction. Although there is an absolute limit on the monetary penalties that may be imposed, the Act further provides that the Bank may not impose a penalty which would be likely to cause the RFSP to cease business or if an individual, to be adjudicated bankrupt.

24. Section 33AY is of significance in the context of the standard of proof issue arising in these proceedings. It provides:

> "33AY.—(1) The Bank shall conduct an inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.
>
> (2) At an inquiry, the Bank shall observe the rules of procedural fairness, but is not bound by the rules of evidence…"

25. A range of powers is conferred on the Bank for the purposes of the inquiry including the summoning of witnesses and taking evidence on oath. Section 33BB is also of particular relevance in this case:

> "33BB.—(1) The Bank may, on its own initiative or at the request of the financial service provider or other person concerned, refer to the Court for decision a question of law arising at an inquiry…"

26. Section 33BF deals with the issue of time limits for seeking judicial review:

> "33BF.—An application for leave to apply for judicial review of a decision of the Bank under this Part must be made—
>
> (a) within 2 months after the date on which notice of the decision was first notified to the financial service provider or the person concerned, or
>
> (b) if the High Court makes an order extending that period, within that extended period."

27. Part IIIC of the Act further establishes the Irish Financial Services Appeals Tribunal which can hear appeals from decisions of the Bank following the holding of an inquiry. Decisions of the Tribunal can in turn be appealed to the High Court which again is a full appeal on the merits.

Recent Challenges to the ASP

28. In *Fingleton*, the applicant, as here, was served with a Notice of Inquiry which he sought to challenge by way of judicial review. In that case, the grounds of challenge included grounds (i) to (iv) advanced by the applicants in these proceedings. Each of those grounds was determined against Mr. Fingleton. In addition, he contended that the ASP amounted to the exercise of judicial power and was thus unconstitutional but he did so indirectly without asking the court to deem the relevant sections unconstitutional on notice to Ireland and the Attorney General. For that reason, I determined that this was not an argument that the applicant was entitled to make.

29. In *Purcell v. Central Bank* [2016] IEHC 514, the facts were very similar to those arising in *Fingleton,* both cases having arisen from the collapse of the Irish Nationwide Building Society. The same issues were raised in *Purcell* as had previously been raised in *Fingleton* but additionally in *Purcell*, the applicant did directly challenge the constitutionality of the statute on the ground that the ASP constituted the administration of justice by a body other than a court.

30. A number of issues were raised in *Purcell* which were identical to those raised in *Fingleton*. Hedigan J. identified eleven issues which had been determined in *Fingleton* and considered that he was bound to follow the decision in *Fingleton* in relation to those issues. He then went on to identify a number of other issues which had not been decided in *Fingleton* but were now before the court in *Purcell*:

> "[8.3.] The issues raised in these proceedings and not dealt with by Noonan J. in [*Fingleton*] are as follows:
>
> (i) Whether the statutory inquiry proposed is an administration of justice and therefore unconstitutional.
>
> (ii) Whether the inquiry seeks to impose vicarious penal liability on the applicant herein and is unconstitutional.
>
> (iii) Whether the financial burden on the applicant is oppressive.
>
> (iv) Whether the burden imposed on the applicant in pursuing an inquiry was disproportionate to the public interest in holding an inquiry where, it is alleged, there is little or no public interest in holding such an inquiry."

31. Hedigan J. went on to consider the basis upon which he felt bound to follow *Fingleton* and referred to the well established jurisprudence on judicial comity discussed in cases such as *Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189. Having reached the conclusion based on these authorities that he was bound to apply the court's findings in *Fingleton*, he went on to consider and decide each of the four issues identified in turn above that had not been dealt with by *Fingleton.* Issues (i) and (iii) also arise for determination in these proceedings.

32. Dealing with issue (i), Hedigan J. held that the proposed inquiry did not amount to an administration of justice and the statute was therefore not unconstitutional. In reaching that decision, he applied the five well settled criteria identified in *McDonald v. Bord na gCon* [1965] I.R. 217. It is common case here that all five criteria must be satisfied before a process would be considered to be an administration of justice. In the event, Hedigan J. held that none of the five criteria was satisfied and accordingly the statute is not unconstitutional.

33. On the third issue as to whether the financial burden on the applicant was oppressive and unfair, he held as follows:

> "[8.9.] I think this argument is in the nature of a *quia timet* . The inquiry may impose no sanction or it may impose one up to €500,000. It may order the applicant to pay the inquiry's costs or a part, or none of its costs. It is true it cannot award him his costs. It is, however, a matter for the applicant whether he incurs any costs. He could decide he did not wish to be legally represented before this entirely independent inquiry. Moreover, it is open to persons in his position to take out insurance cover against such costs. I know the applicant did this and the extent of the cover has been exhausted. The inquiry, however, cannot be saddled with any level of unfairness or oppression due to the applicant not taking out adequate insurance to cover all the costs he might incur. Inquiry costs were a foreseeable risk which was not adequately covered."

The Issues Arising on this Application

34. As I have noted above, the applicants have raised seven different grounds upon which they claim that the Notice of Inquiry should be set aside, the last being the one most recently added on foot of the amendment application. The applicants however accept that issues (i) to (iv) have already been decided in *Fingleton* and *Purcell* and that consequently this court is not free to depart from those earlier determinations. This concession is of course made without prejudice to the right of the applicants to canvass these issues before an appellate court which will not be bound by this court's decisions in *Fingleton* and *Purcell*.

35. What remains therefore are issues (v), (vi) and (vii).

36. Up until the morning of the trial, the applicants in their written submissions had indicated that they proposed only to pursue the last two issues relating to costs and the standard of proof. The respondents were led to believe that this was the only case they had to meet. However, at the eleventh hour, on the morning of the hearing the applicants introduced an additional issue, issue (v), without notice to the respondents or leave of the court.

37. No satisfactory explanation was forthcoming for this change of tack which clearly took the respondents by surprise and to which they took strong objection. The respondents were confronted with a second set of extensive written submissions. However, they indicated that they did not wish the matter to be adjourned and with considerable hesitation and misgivings, I permitted the applicants to introduce the fifth issue being that the inquiry constitutes the administration of justice by a body other than a court rendering the statute unconstitutional in that respect.

38. While the applicants accept that this issue was determined in *Purcell*, they nonetheless invite this court to determine it afresh on the basis that *Purcell* was wrongly decided and ought not be followed.

39. In addition to these issues raised by the applicants, the respondents rely on a number of discrete grounds to defeat the application. First and foremost, they say that the application is out of time and no adequate reasons had been advanced for an extension of time. Secondly the respondents contend that this application cannot be pursued in the manner in which it has been brought because it is in effect premature as the applicants must await the inquiry's determination before seeking to challenge its outcome. Alternatively the respondents say that the manner in which this application has been brought is an abuse of process because it amounts to a collateral attack on determinations of the IMs which have neither been the subject of the case stated procedure in the Act or an application for judicial review.

Is the Application Out of Time?

40. Order 84 of the Rules of the Superior Courts provides that an application for judicial review must be made within three months. In *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1, the Supreme Court held that the Rules are a form of secondary legislation and the time limits therein have the same effect as if in primary legislation. The court further held that this time limit amounts to a legal barrier to the bringing of proceedings outside the time limit subject only to the power contained in the Rules themselves to extend the time.

41. Of course a number of statutes provide by way of primary legislation for an even shorter time limit for seeking judicial review. Thus under the planning code for example, applications for judicial review of decisions of planning authorities must be brought within eight weeks of the impugned decision. In delivering the unanimous judgement of the Supreme Court in *Shell*, Clarke J. (as he then was) discussed the rationale for short time limits in judicial review:

> "[7.11] The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their

affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period."

42. As noted above, the Act in this case does provide for a shorter time frame of two months for seeking judicial review. Here also, the time limit is not absolute in that the section expressly empowers the High Court to extend the two month period. The Act is silent on the criteria for such an extension. It seems to me that in providing for a shorter time period for seeking judicial review than that provided by the Rules, the Oireachtas has evinced a clear intention to restrict rather than broaden the time frame for seeking judicial review. I think it must follow that the power to extend time contained in s. 33BF was not intended to be broader than that contained in the Rules.

43. The challenge brought in these proceedings is to the Bank's decision to hold an inquiry. That is the first relief sought in the statement of grounds. As such, the two month period commences on the date on which notice of the decision was first notified to the respondents pursuant to s. 33BF. That date was the 10th November, 2015. It seems to me that it is therefore inescapable that the time for bringing an application for judicial review of the Notice of Inquiry expired on the 10th January, 2016.

44. Although as I have noted above, some suggestion was made in the applicant's submissions that the time should only be considered to run from the 26th February, 2016, being the date of the Bank's letter advising that the IMs took the same view as the applicants of the cost provisions in the Act, it seems to me that the letter of the 26th February, 2016, cannot be regarded as a "decision" but even if it is, it is not being challenged here. It would appear therefore that if this letter has any relevance to the time issue, it can only be in the context of an application to extend time.

45. Although the applicants attach significance to this letter as a justification for delay, it is merely a statement by the IMs of something which ought to be evident to any person reading the Act, and particularly someone like the applicants who had over a period of years carefully considered and analysed the Act. There could therefore be no realistic suggestion that some sort of decision or advisory opinion was being sought from the IMs as to what interpretation they placed on some obscure or opaque provision.

46. Accordingly, in my opinion this application was clearly brought outside the time limited in that behalf by the Act and must fail unless the applicants are entitled to an extension of time.

Are the Applicants Entitled to an Extension of Time?
47. As I have already noted, it seems to me that the court, in considering this question, must apply the provisions of O. 84 r. 21 whether they are directly applicable or applicable by analogy. Sub rule 3 provides as follows:

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—
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> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension."

48. The applicant must therefore satisfy two criteria to be entitled to an extension of time. First there must be a good and sufficient reason for extending the time and second, the failure to apply must have been due to one or other of the types of circumstance described. I have already alluded to paras. 70 and 71 of the applicants' statement of grounds. The case made by the applicants in those paragraphs is that they engaged in a positive and proactive manner with the Bank following receipt of the Notice of Inquiry through correspondence from their solicitor. They further suggested that the time limit, incorrectly referred to as being three months, should only commence on the 25th February, 2016, on the basis that this was when they were notified of the IMs' position on costs. I have already dealt with this.

49. The affidavits of both applicants grounding the application for judicial review are in substantially identical terms and the issue of an extension of time is dealt with at para. 48 as follows:

> "48. As regards any delay which might be alleged on my behalf in bringing this application I believe that no such delay occurred and/or if such delay occurred then same was justifiable in the overall circumstances. My solicitor communicated with the Central Bank from November 2015 on my behalf and sought reasonable information from the inquiry as regards its procedures for my case. That included the letter of the 25th February, 2016 whereby it was confirmed that costs could not be ordered in my favour in the inquiry even if I am exonerated of the prescribed contravention against me. I had to take advices and consider all of the documentation in the case to come to a considered position about this matter. I have only been able to do so at this time and I have brought the application at the earliest opportunity thereafter."

50. Thus the reason then being advanced for the extension of time by the applicants was that they needed time to take advice and to consider the matter. Particular reliance is placed upon the Bank's letter of the 25th February, 2016, in response to a letter from the applicants' solicitors on the 24th February, 2016. It is notable that when this letter was written by the applicants' solicitors, the time for seeking judicial review had already expired two weeks previously. It is not suggested that the applicants were unaware of the relevant time limits.

51. In essence then, the grounds upon which the applicants were given leave by the court to seek an extension of time were that their solicitor was corresponding with the Bank and it was reasonable to await the outcome before deciding to seek judicial review. It is difficult to see how this could ever form the basis for the court granting an extension of time even if it did amount to a good and sufficient reason, which is in itself doubtful, because it could not on any view be regarded as a circumstance which was either outside the control of or could not reasonably have been anticipated by, the applicant. The pursuit of such correspondence was of course directly controlled by the applicants. For the same reason, there could be no suggestion that the pursuit of such correspondence somehow could not have been anticipated by the applicants as they themselves were the instigators of it.

52. In this latter regard, it should be remembered that as is evident from the chronology I have referred to above, at the time of service of the Notice of Inquiry, the applicants had had the benefit of legal advice from solicitors and counsel for some four years. That advice evidently included a detailed analysis of the provisions of the Act. In December 2015, the month following the service of the Notice of Inquiry, the applicants' solicitors flagged the possibility of a constitutional challenge to the Act. It would be surprising therefore if the applicants and their advisors had not been keenly aware both of the possibility of seeking judicial review and the time for doing so.

53. Furthermore, the additional ground based on the standard of proof was raised by the applicants for the first time in their notice of motion of the 15th June, 2016, some seven months after the Notice of Inquiry. The affidavit grounding that application was sworn by the applicant's solicitor, Rose Alice Murphy, who said at para. 12:

> "The failure to refer to this matter in explicit terms in the initial judicial review application arose from inadvertence on the part of the applicant's legal advisors in assessing the inquiry guidelines at that time against s. 33BD of the 1942 Act insofar as it related to this specific matter concerning the standard of proof. However, I believe and am so instructed that it would be unfair to prevent the applicant from arguing these additional points at this juncture when the matter has not yet been set down for hearing and it relates to a net point. The fact that Part IIIC of the Central Bank Act, 1942 is challenged in full terms in the instant judicial review application is also relevant as s. 33BD is contained in that part of the Act."

54. Thus the only reason advanced for the late inclusion of this ground is inadvertence by the applicants' legal advisors which could not conceivably come within the ambit of O. 84 r. 21 (3). Perhaps somewhat tellingly, the affidavit and notice of motion both appear to envisage an application to quash the relevant portion of the inquiry Guidelines introduced several years earlier. As already noted, that claim was unsurprisingly abandoned.

55. Nor could it be said in my view that the inadvertence of the applicants' lawyers could amount to a good and sufficient reason in the particular circumstances of this case. The applicants' lawyers clearly conducted a detailed analysis of the relevant provisions of the Act over a four year period prior to the Notice of Inquiry issuing. Throughout all of that period, they were furnished by the Bank with copies of the inquiry guidelines since 2004 when the ASP was first introduced. Since that time, successive inquiry guidelines have been introduced most recently in 2014. However, the standard of proof stipulated in the guidelines for inquiries has always been the civil standard. This must have been known to the applicants and their lawyers for several years. It is also the position that the applicants through their lawyers have throughout the process of lengthy correspondence made the case that the inquiry is a form of quasi criminal trial. In the light of that, the rather bald assertion that the applicants' lawyers failed to advert to this issue until June 2016 is somewhat difficult to credit.

56. As previously indicated, both applicants advanced the same grounds in their statement of grounds for seeking an extension of time and made the same averments in their grounding affidavits in that regard.

57. It is important for every applicant for judicial review to be mindful of the requirements in O. 84 to plead specifically the grounds upon which each individual claim for relief is based. The applicant is also required to identify the facts relied upon in support of each such ground. Thus O. 84 r. 20 provides in relevant part as follows:

> "20. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.
>
> (2) An application for such leave shall be made by motion ex parte grounded upon—
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> (a) a notice in Form No. 13 in Appendix T containing…:
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> (ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought…,
>
> (3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

58. The requirements of the rule are clear and form the basis upon which the court reaches a determination at the leave stage to grant or refuse leave to seek judicial review. The applicant is accordingly confined at the trial of the application not only to the grounds upon which leave was granted but also to the facts relied upon supporting that ground. Thus the applicant is not free to introduce new grounds or entirely new facts in support of existing grounds without the leave of the court and the Rules provide the court with a wide measure of discretion in relation to amendment applications.

59. I have set out above in the context of the applicants' application for an extension of time both the grounds upon which the court gave leave to seek such extension and also the facts supporting those grounds. Those facts were deposed to in the original grounding affidavits of both applicants. Those affidavits were replied to in an affidavit of Claire McGrade, the Deputy Head of the Enforcement Division of the Bank which also verified the statement of opposition and was sworn on the 3rd May, 2016. At paras. 37 – 39 of that affidavit, Ms. McGrade took issue with the application for an extension of time in the following terms:

> "37. I note that the applicant attempts to justify his delay in issuing these proceedings at para. 48 of his verifying affidavit. The only explanation advanced for not seeking leave to bring those proceedings within two months of the Notice of Inquiry as required by the Act or even within three months thereof, as required by the Rules of the Superior Courts, is that his solicitor corresponded with the Central Bank and he had to take advices and consider the documentation.
>
> 38. I say that the extensive engagement between the applicant and the Central Bank since October 2011 is evidenced by the correspondence listed at para. 9 of the applicant's verifying affidavit and exhibited at 'LM2' to 'LM32' inclusive thereof. Throughout this time the applicant was legally represented and had adequate opportunity to consider and take advice on the issues raised at Part IIIC of the Act, the guidelines, and the terms of the investigation. There is no good or sufficient reason for the applicant to have delayed until 14 March, 2016 to challenge matters of which he was aware since 10 November, 2015 at the latest.

> 39. Insofar as the applicant relies on the letter of 25 February, 2016 as a justification for not seeking leave to bring these proceedings sooner, I say and believe that this is wholly without merit. The provisions of the Act were known to the applicant and his legal advisers at all material times."

60. Both applicants swore replying affidavits to Ms. McGrade's affidavits on the 14th June, 2016. Both applicants introduced for the first time in these affidavits entirely new facts and new grounds for seeking an extension of time. They say that during the period between December 2015 and the grant of leave on the 14th March, 2016, they were subjected to a campaign of abuse, intimidation and threats connected to their work for Quinn Industrial Holdings Ltd, an apparently associated company of QIL. Instances of these threats and intimidation are given in the affidavits of both applicants.

61. This intimidation included postings on Facebook which apparently gave rise to separate injunction proceedings by the applicants against Facebook seeking an order directing Facebook to reveal the identities of the parties behind the offending posts. It would appear that these separate chancery proceedings were ongoing in the first half of 2016 until an order was ultimately made on the 11th May, 2016.

62. Both applicants suggest that the various issues of intimidation that they identify impacted on their capacity to provide instructions about the Notice of Inquiry herein. They say that the delay accordingly arose from matters which were outside their control. Although both applicants say that their capacity to provide instructions about the Notice of Inquiry was affected by these matters, they concede that they did instruct their solicitors to engage in correspondence about the Notice of Inquiry and that they considered that when time allowed.

63. In a further replying affidavit sworn by Ms. McGrade on the 27th July, 2016, in response, she points to the fact that neither applicant gives any information as to when the possibility of seeking judicial review was first considered, when they gave instructions for the proceedings to be prepared and when they took the decision to issue them. Ms. McGrade goes on to suggest that the applicant's explanation of delay now put forward is entirely inconsistent with that initially advanced.

64. She points also to the fact that the applicants appear to have been able to give instructions to their solicitors not only to correspond with the Central Bank about the Notice of Inquiry but also to pursue the injunction proceedings against Facebook during the same period when his ability to pursue the within proceedings was allegedly impaired. At para. 12 of her affidavit, she avers as follows:

> "12. I further say that there is an inconsistency in the applicant's explanation of the delay. He states at para. 30 of the applicant's replying affidavit that it was reasonable for his solicitor (presumably on the basis of his instructions) to raise queries with the Central Bank in correspondence and states that *'I wished to obtain responses to same before I decided on a course of action'*. He therefore presents what he calls *'a reasonable position to adopt'*. He then refers to a campaign of abuse, intimidation and threats and states at para. 39 that he was 'not concentrating on the Notice of Inquiry at all stages'. He states at para. 41 of the applicant's replying affidavit that the events impacted on his *'capacity to provide instructions about the Notice of Inquiry at that time'*. I say and believe that the applicant can seek to justify the delay in issuing proceedings, by claiming that he acted reasonably by instructing his solicitors to engage in correspondence with the Central Bank about the Notice of Inquiry, which is the justification relied upon in his verifying affidavit. Alternatively, he can claim that he was unable to give instructions in relation to the Notice of Inquiry, because of external events. I do not however believe he can rely on both the explanation that he acted reasonably in giving instructions for correspondence to be exchanged, and the explanation that he was unable to give instructions, to explain the same period of delay."

65. As Ms. McGrade suggests, it seems to me that the new explanation being offered by the applicants for their delay in seeking judicial review is entirely at odds with the first explanation being the one upon which leave was granted. It seems to me that each explanation necessarily undermines the other. Further, Ms. McGrade's averment that the applicants have not explained how they were able to give instructions in the Facebook litigation, but not in these proceedings, during the relevant period is unanswered.

66. In my view, the applicants are not entitled to advance this new ground for seeking an extension of time having been given no leave by the court to do so. Even if that were not the case, I am quite satisfied that this new explanation does not satisfy the requirements of O. 84 r. 21 (3). The authorities establish clearly that the onus is on an applicant for an extension of time to satisfy the court in clear terms why that extension should be granted. Prior to the introduction of the current O. 84 r. 21, under the terms of its less stringent predecessor, the applicant simply had to establish the existence of a good reason to extend time. The old rule was analysed in a number of cases including *De Roiste v. Minister for Defence* [2001] 1 I.R. 190 and other authorities reviewed by Irvine J. in her judgment in *Ernst & Young v. Purcell* [2011] IEHC 203.

67. Having analysed those judgments, Irvine J. went on to observe (at para. 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."

68. Further, as cases such as *McKevitt v. Minister for Justice* [2015] IEHC 499 demonstrate, there is a particular onus on an applicant for relief to move promptly where his claim is one in a series of similar claims. It appears from the correspondence from the applicants' solicitor to which I have already referred that the applicant and his legal team were aware of the litigation in *Fingleton* even before judgment was delivered and presumably of the related *Purcell* claim. This ought to have provided an additional impetus to the applicant to move with expedition.

69. Accordingly I am driven to conclude that the applicants have not satisfied the onus of establishing their entitlement to an extension of time to seek judicial review and these applications must accordingly fail *in limine*.

70. However, if I were to be wrong in reaching that conclusion and in deference to the arguments advanced by the parties, I propose to consider the other issues that have been raised.

Is the Application Premature?

71. The respondents argue that this application is premature and/or moot in circumstances where none of the potential prejudices which might befall the applicants have yet occurred and might never occur. They accordingly argue that the applicants must await

the outcome of the inquiry before seeking to judicially review its finding. The applicants on the other hand argue that following upon the service of the Notice of Inquiry, they are now on risk of incurring the relevant penalties and as that risk has, as the applicants characterise it, crystallised, they have *locus standi* to bring this challenge. They argue further that the respondents are adapting contradictory positions in that on the one hand, they say that the proceedings are out of time and on the other that they are premature.

72. Dealing with the latter point first, it seems to me that the respondents are entitled to make the case that the application to challenge the Notice of Inquiry has been brought out of time, as indeed I have found. That cannot preclude them from arguing that even if that were not the case, the application in its entirety is premature and ought not be entertained in any event. In support of their arguments, the applicants place particular reliance on the decision of the Supreme Court in *Osmanovic v. DPP* [2006] 3 IR 504. The applicants were charged with illegally importing goods contrary to s. 186 of the Customs Consolidation Act 1876, as amended. The penalty for conviction on indictment was fixed in the amount of treble the value of the goods imported or €12,700 which ever is the greater. The court could also at its discretion impose a term of imprisonment. However, the fine was mandatory.

73. In advance of their trial, the applicants challenged the constitutionality of the section on the grounds that it imposed a fixed penalty contrary to the principal of the separation of powers. The respondents argued that the application was premature and moot in advance of the trial taking place. The Supreme Court rejected this argument and held that the applicants were entitled to bring the challenge but found that it failed on the merits. The prematurity argument was considered by Geoghegan J. in his judgment in the Supreme Court where he said (at p. 511):

> "In each of these three cases, however, I am of the opinion that if the applicants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted… I believe that the case most in point is *Curtis v. the Attorney General*. In that case, there was a prosecution under s. 186 of the Customs Act 1876, as amended, and by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J. took the view, at p. 458, that the plaintiff had *locus standi* to challenge the constitutionality of the provisions in question, 'as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights.' In my opinion, Carroll J. applied the law correctly. Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."

74. As against that, the respondents rely on the recent decision of the Supreme Court in Rowland v. An Post [2017] IESC 20. In that case the plaintiff, who was a sub-postmaster, was subjected to a disciplinary process by his employer, An Post, pursuant to the terms of his contract of employment. Consequently it was not a public law matter amenable to judicial review but rather, an injunction was sought by the plaintiff to restrain the process. The unanimous decision of the Supreme Court was delivered by Clarke J. who made the following observations concerning the issue of prematurity in such proceedings (commencing at p. 4):

> "[2.3] Those facts raise the question of the standard by reference to which a court should intervene, whether by injunction, declaration or any other means, in a process having a disciplinary or similar character, which is still ongoing…
>
> [2.4] However, it seems to me that the underlying principle behind *Becker* is equally true in the context of a full hearing of an application designed to prevent any ongoing process from continuing. In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.
>
> [2.5] Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded.
>
> [2.6] However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the Court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed.
>
> [2.7] However, in order for that latter consideration to become the dominant factor in the Court's assessment, it follows that the Court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the Court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed."

75. It seems to me that on its facts, this case is more analogous to the facts in *Rowland* than *Osmanovic*. Here a regulatory process is being conducted which is not a criminal trial. One of the salient features of *Osmanovic* was that the legislation in issue provided for a fixed penalty so that in the event of conviction, the court would have no role to perform in relation to sentencing and to that extent it might be said that the case turned on very particular facts which of course do not arise here. In *Osmanovic* the die was cast upon conviction, the court having no discretion as to penalty and no function in relation to mitigating factors such as would be the norm. It is perhaps easy to understand why the Supreme Court concluded that this gave rise to an immediate right to challenge the legislation without awaiting the outcome of the prosecution. In contrast, there is no mandatory sanction here.

76. Both of those cases were concerned with whether or not one challenges the relevant process at the outset or at the conclusion. The unusual feature of the present case is that the applicants have done neither. Instead the applicants have elected to participate

in the inquiry on an ongoing basis while at the same time pursuing a claim for judicial review and indeed amending that claim during the currency of the inquiry. The pursuit of this course has given rise to practical and significant difficulties. Although the applicants initially sought a stay on the inquiry pending the determination of the judicial review, that was not proceeded with. Instead the applicants elected to participate in the inquiry while at the same time pursuing the judicial review.

77. I have already referred to the fact that the IMs have made seven different determinations in respect of which the applicants have fully engaged and made submissions, all during the currency of these judicial review proceedings. In their written and reasoned ruling on the 17th October, 2016, the IMs determined that they would apply the civil standard of proof to the inquiry. The applicants have not challenged that determination.

78. They appear however to have anticipated it because almost simultaneously with the making of submissions to the IMs on this issue, they also brought a motion to incorporate the issue by way of amendment in their judicial review grounds. Following upon this decision by the IMs, it was open to the applicants if they were dissatisfied with it to apply to the IMs for a case stated on the point to the High Court. Alternatively they could have sought to judicially review the decision or in the further alternative, they could have allowed the process to come to a conclusion and then appealed on this ground among others. They however did none of these things. Rather they now seek a ruling from this court on the standard of proof issue which would have the effect of setting at nought the IMs' decision without either challenging that decision or the IMs having the opportunity of being heard in relation to it.

79. It seems to me that this can only be viewed as an impermissible attempt to collaterally attack the decision of the IMs and must therefore constitute an abuse of process. Moreover, it also represents a similarly impermissible attempt to impugn the relevant provisions of the Guidelines which have obtained for many years and of which the applicants must have been well aware. As I have already noted, the applicants abandoned an attempt to directly challenge the guidelines in their amendment motion but now seek to do so by the back door as it were.

80. The same perforce applies to other submissions made by the applicant which have already been the subject matter of determination by the IMs. Thus in a further determination on the role of Enforcement in the inquiry also made on the 17th October, 2016, the IMs determined that there was no merit in the submission that the Guidelines ought to have been created by an entity other than the bank. In the same determination the IMs held that the inquiry was inquisitorial rather than adversarial. Both of these issues were canvassed by the applicants in these proceedings in the course of argument and submission despite the fact that they have been the subject of unchallenged determinations by the IMs.

81. The applicants have thus adopted a strategy of riding two horses at once and pursuing issues before the IMs which, when determined against them, continue to be separately pursued in these proceedings. It seems to me that such a mode of proceeding is not one that can be countenanced by the court. The court's judicial review jurisdiction may be invoked to challenge the lawfulness of a decision or process. In bringing such a challenge, the applicant is making the case that the decision or process to which he has been made subject is one that is without jurisdiction. That may arise because either there was no jurisdiction *ab initio* or the process went awry and this resulted in a loss of jurisdiction.

82. It appears to me therefore that an applicant cannot on the one hand make the case that there is no jurisdiction *ab initio*, which is what these applicants contend, while at the same time submitting to that jurisdiction by engaging in the process, allowing the other parties involved to incur cost and detriment, in order to see which approach may be the more advantageous.

83. In *Fingleton*, as here, the respondents argued that the issue of which the applicant complained might never arise and was thus hypothetical. I referred to the judgment of McGuinness J. in *Carroll v. Law Society* (No. 2) [2000] 1 ILRM 161 in which she held that it was not the function of judicial review to direct procedures in advance and went on to say:

> "[115.] Similar views were expressed in *J. Murphy v. Flood* [2000] 2 I.R. 298 and *Bailey v. Flood* (Unreported, High Court, 6th March, 2000). In *Kennedy v. DPP* [2007] IEHC 3, the applicant was a clerical officer in the immigration section of the Department of Justice, Equality and Law Reform. While so employed, he was alleged to have corruptly accepted gifts from applicants for residency permits in exchange for favourable treatment. While awaiting trial on charges brought under The Prevention of Corruption Act 1906, as amended by the Prevention of Corruption Act 2001, he sought a declaration that s. 4 of the 2001 Act was unconstitutional. In the course of his judgment, MacMenamin J. said (at p. 20 – 21):-
>
> > '[34] In the instant case this court accepts the submissions made on behalf of the Attorney General that what is in question here is a hypothesis which has not occurred and may never occur. As matters stand no presumption has been invoked against the applicant. This court is unaware, and can only speculate as to how the evidence will evolve at trial. It may be, hypothetically, that the prosecution may call witnesses to say that they paid money to the applicant as a reward for granting them favours. As matters stand the applicant has not put in issue any of the statements contained within the book of evidence. The applicant has not engaged with the evidence in any way nor identified the nature of his defence or which facts may be in issue. In the event that witness statements go unchallenged it may not be necessary for the prosecution to invoke the provisions contained within s. 4 of the Prevention of Corruption (Amendment) Act, 2001 at all.
> >
> > One must look too, to the role of the trial judge. As matters stand such judge has not been asked to give any ruling on the meaning of the term 'deemed' or the expression 'unless the contrary is proved' in the impugned section. The applicant's core complaint in these proceedings is based on the contention that 'unless the contrary is proved' means 'unless the contrary is proved on the balance of probabilities'. Whether that contention has any force or application remains to be determined at trial.'
>
> [116.] The applicant here appears to be proceeding on the assumption that the inquiry will have regard to the admissions of INBS and the agreement in a way that will be prejudicial to him. All of that remains to be seen and is, at this juncture, purely hypothetical. The court is, in effect, being asked to direct the inquiry prospectively as to how it should conduct its business. That is not the function of judicial review."

84. I am therefore satisfied that the applicants are not entitled to pursue this judicial review for these reasons also.

Does the Inquiry Constitute the Administration of Justice?

85. As previously noted, in his judgment in *Purcell*, Hedigan J. specifically identified at para 8.3 four issues that had to be decided and that not been dealt with in *Fingleton*. The first was the administration of justice. There can be no doubt therefore that this issue was confronted foursquare by Hedigan J. and determined by him. That much is conceded by counsel for the applicants. Hedigan J.

determined that the ASP did not amount to the unconstitutional administration of justice by a body other than a court. He reached that decision after a consideration of all the relevant authorities and in particular *McDonald v. Bord na gCon*.

86. The case before Hedigan J. lasted some six weeks. All parties were represented by full legal teams led by senior counsel. Extensive submissions on all issues were made both orally and in writing. I am satisfied from the evidence and submissions of the parties in this case that there was no significant authority on this issue that was not opened to the court or to which the court's attention was not drawn.

87. It would of course be absurd to suggest that because a particular authority is not explicitly referred to in a judgment, it has been overlooked. Judgments are written not only for the parties but are published for the benefit of the public. If a judge were to be tasked with recording and analysing every single authority opened or referred to in argument in, for example, a six week trial like *Purcell*, judgments would become so turgid as to be virtually incomprehensible. It seems to me that it is to be assumed, unless the contrary is very clearly demonstrated, that the court has taken account of all the evidence, authorities and submissions put before it in coming to a conclusion.

88. Counsel for the applicants, in a very late change of tack, argued that while the point was decided in *Purcell*, I am not bound to follow that determination because it was wrong. There was initially some suggestion that significant relevant authorities were not opened to the court in *Purcell* but I am satisfied there is no substance in that point. Counsel engaged in a detailed analysis of the five criteria in *McDonald v. Bord na gCon* which were in turn considered by Hedigan J. He came to the conclusion that the ASP satisfied none of the criteria for, or characteristics of, the administration of justice. Of course even if it had failed to satisfy one of the five criteria, it could still not be regarded as an administration of justice.

89. Counsel sought to analyse in detail the findings of Hedigan J. so as to demonstrate that in each instance, they were wrong. He accordingly urged on the court that I was bound not to, and should not, follow *Purcell*. The issue that thus emerges is one that has tended to arise with more frequency in recent years as an apparently ever increasing volume of complex litigation occurs, demanding equally complex and lengthy written judgments.

90. The recent jurisprudence on this issue finds a useful starting point in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] ILRM 50 in which Parke J. said (at p. 53):

> "I fully accept that there are occasions in which the principle of *stare decisis* may be departed from but I consider that these are extremely rare. A Court may depart from a decision of a Court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the Judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authority cited or in some other way departed from the proper standard to be adopted in judicial determination."

91. In *Worldport*, Clarke J. considered the same issue in a passage coincidentally cited with approval by Hedigan J. in *Purcell* (at p. 51):

> "I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in *Industrial Services*. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority -v- Watson* [1947] K.B. 842 at 848, Re *Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

92. Subsequently, Clarke J., this time in the Supreme Court, reiterated similar views in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 where he said (at p.2):

"2. The Binding Nature of Consistent High Court Case Law
[2.1] The *jurisprudence* of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, by Kearns P. in Brady v. D.P.P. [2010] IEHC 231, and most recently by Cross J. in *B.N.J.L. v. Minister for Justice, Equality & Law Reform* [2012] IEHC 74 where *Worldport* was expressly followed.

[2.2] It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing.

[2.3] In his judgment Fennelly J. referred to the series of judgments of the High Court on the point in issue in this case. The trial judge considered himself bound by that line of authority. In the light of the case law to which I have earlier referred it seems to me that the trial judge was correct in that approach unless he viewed that line of authority as obviously wrong or having been arrived at without proper consideration of relevant case law or the like. In my view the trial judge was correct in the approach he took."

93. These dicta were considered by me in circumstances not dissimilar to this case in *McKillen v. Information Commissioner* [2016] IEHC 27 where I was expressly invited by counsel for the applicant not to follow an earlier judgment of the High Court on the basis that the latter was wrongly decided. I declined the invitation, concluding (at para. 76):

> "[76.] Accordingly, I am satisfied that I am bound to follow the judgment of O'Neill J. in *EH* unless it contains a clear error or fails to take into account any relevant authority which ought to have been considered. None of that appears to me to arise here. Rather the appellant simply seeks to argue that, on principle, it was wrongly decided. That does not in my view amount to a sufficient basis to justify me in departing from the well settled principles of judicial comity and *stare decisis* and I decline to do so in this instance."

94. Indeed an almost identical issue arose in *Purcell* itself where Hedigan J. was invited not to follow *Fingleton*, on the basis that the matter was wrongly decided. He said (at para. 8.5):

> "There was little or nothing advanced by the applicant herein to argue against the first respondent's submission that all the issues that arose in this case have in fact been adjudicated upon in *Fingleton* and should be followed by this Court. The most that was offered was the simple proposition that Noonan J. was wrong. I have outlined above four issues that were not in fact determined by Noonan J. in his comprehensive judgment in the all but identical *Fingleton case*. That detailed judgment was written following an extensive hearing involving learned submissions by senior counsel on behalf of both the applicant and the respondent. I have not been pointed to nor have I been able to identify any key judgments or statutory provisions that were not opened to that court. The judgment clearly was based upon a review of significant relevant authority. There is no error in the judgment apparent to me and it is a very recent decision. For these reasons, save for the four issues identified by me, I must and I do follow the decision in *Fingleton.*"

95. Unlike the civil law systems that obtain is most European jurisdictions, ours is a common law system shared with countries such as the United Kingdom, the United States, Canada and Australia. All have their roots in the common law of England. Common law is sometimes defined as judge made law or the law of judicial precedent. Its origins are ancient. *Stare decisis* is at its core. Students of law and lawyers alike study decided cases to learn the law. The common law evolves to mirror societal changes but it does so slowly. Lawyers speak in terms of the law being settled by virtue of long standing and long followed authorities. It need hardly be stated that there is a vital public interest in certainty in the law. Everyone, be they lawyer or not, must be able to ascertain with reasonable certainty what the law is and order their affairs accordingly.

96. It is for these reasons that judicial comity requires that judges must follow the decisions not only of courts of superior jurisdiction but also of equal jurisdiction, subject only to a small number of exceptions illustrated in the cases to which I have referred. It is thus immaterial if a particular judge disagrees with a colleague's decision or would have reached a different decision him or herself or even if firmly convinced that the previous case was wrongly decided.

97. These judgments emphasise that an earlier judgment may be departed from only where there are substantial or strong reasons for believing that it was wrongly decided. There must be something in the nature of a fundamental and obvious error involved such that had it been adverted to, it is likely that a different conclusion would have been reached. An example would be a statutory provision or recent authority that was determinative of the issue but was overlooked so that there could be little doubt but that the wrong result ensued.

98. Were it otherwise, the courts would be confronted with a never ending process of examining earlier judgments to see if some flaw could be found to justify departing from it. The ensuing chaos would be the antithesis of what the common law represents. This type of examination and analysis is properly a matter for an appellate court which is free to come to its own conclusion as to whether the judgment appealed was correctly decided or not.

99. Indeed, as counsel for the applicants analysed the judgment of Hedigan J. in *Purcell* in an attempt to deconstruct it, I was struck by the similarity of those submissions to those one might expect to hear argued by way of appeal.

100. In summary, I am satisfied that nothing approaching an error in the *Worldport* sense in the *Purcell* judgment has been established by the applicants and I am obliged to follow it. Accordingly it is unnecessary to consider this issue further.

The Issue of Costs

101. It will be recalled that the costs issue was raised by the applicants in their statement of grounds and supporting affidavits on the basis of oppressive unfairness, which was identified as their inability to pay their own legal costs of participating in the inquiry. This was compounded by the jurisdiction of the IMs to order the applicants to pay the costs of the inquiry and investigation as a form of sanction. Precisely the same issue arose in *Purcell* and was identified by Hedigan J. as issue (iii) in the list of four issues undecided in *Fingleton*. He determined it in the following way (at p. 57):

> *"Is the financial burden on the applicant oppressive and unfair?*
>
> [8.9.] I think this argument is in the nature of a *quia timet*. The inquiry may impose no sanction or it may impose one up to €500,000. It may order the applicant to pay the inquiry's costs or a part, or none of its costs. It is true it cannot award him his costs. It is, however, a matter for the applicant whether he incurs any costs. He could decide he did not wish to be legally represented before this entirely independent inquiry. Moreover, it is open to persons in his position to take out insurance cover against such costs. I know the applicant did this and the extent of the cover has been exhausted. The inquiry, however, cannot be saddled with any level of unfairness or oppression due to the applicant not taking out adequate insurance to cover all the costs he might incur. Inquiry costs were a foreseeable risk which was not adequately covered."

102. It is difficult to see how I am not bound by this finding which again, the applicants argued was wrong.

103. Leaving that point aside, the applicants in their submissions sought to introduce a new ground to the effect that because the IMs could order the costs of the inquiry to be paid by the applicants but could not make an order for costs in their favour, this amounted to a breach of the principle of *égalité des armes* which rendered the process unconstitutional. As before, this was not a ground on which leave was granted.

104. It is notable that in their original written submissions, the applicants devoted less than 200 words to this issue. It was simply said that it was unfair and unconstitutional that costs could be awarded against but not in favour of the applicants and Hedigan J. was wrong to conclude otherwise. No authority was cited for the proposition being advanced. No provision of the Constitution was even identified which it was said had been violated.

105. At the trial however, in circumstances to which I have already alluded, the applicants produced new written submissions incorporating a substantially more elaborate treatment of this issue principally placing reliance on the judgment of Hardiman J. in *J.F.*

v. DPP [2005] 2 I.R. 174. In the course of that judgment, Hardiman J. referred to the well known principles on the minimum protection to which an accused person is entitled established in *Re Haughey* [1971] I.R. 217. Hardiman J. went on to say:

> "[21.] In O'Callaghan v. Mahon [2005] IESC 9 (Unreported, Supreme Court, 9th March, 2005), I said:
>
> > 'A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of *'égalité des armes'* which might be regarded as the opposite of that state of imbalance and disadvantage described by Ó Dálaigh C.J. as clocha ceangailte agus madraí scaoilte.'
>
> [22.] The point here is that *égalité des armes* is not a new concept but rather a new and striking expression of a value which has long been rooted in Irish procedural law. In *Steel and Morris v. United Kingdom* (Application 68146/01) (Unreported, European Court of Human Rights, 15th February, 2005), the European Court of Human Rights said:-
>
> > '50 The adversarial system … is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality…
> >
> > 59 The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland* (1980) E.H.R.R. 305). It is central to the concept of fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.'
> >
> > At para. 61, addressing the question of legal aid, the court went on:-
> >
> > 'The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself or herself effectively.'

106. The applicants rely on these passages in support of their contention that the provisions of the Act unconstitutionally deprive them of equality of arms. However, it is necessary to bear in mind the background against which the comments of Hardiman J. were made. J.F. had nothing to do with costs. It was an historic sex abuse case where the applicant was charged with offences of some antiquity and sought judicial review on the grounds of delay. This complaint was answered by the respondent on the basis that any delay was the direct result of the alleged assault on the complainant and to support that contention, evidence of a psychologist who had examined the complainant was relied upon.

107. The applicant sought to have the complainant assessed by his own expert. That request was denied. Accordingly the applicant sought to strike out the relevant paragraphs of the statement of opposition and the supporting affidavits of the psychologist. Perhaps unsurprisingly, the Supreme Court concluded that the psychological evidence gave the prosecution an unfair advantage over the accused and accordingly, if the complainant refused to consent to an assessment by an expert for the accused, the prosecution would have to suffer the loss of the unfair advantage that had accrued to it. It is thus readily apparent how the principle of equality of arms came into play in that case.

108. In the present case, the applicants seek to extend that principle to the costs provisions in the Act and argue that, for example, when issues such as negotiating a settlement with the Bank, which the Act permits, are concerned, the person concerned and the Bank are not on an equal footing because of the potential threat of costs which places an unfair and undue pressure on the person to settle. However, the logic of that proposition somewhat escapes me as it is akin to arguing that the fact that a person accused of a criminal offence may go to prison if convicted whereas the prosecutor cannot gives rise to an unfair inequality between the parties.

109. It must be remembered that insofar as the IMs can award costs against the applicant, they cannot do so as a matter of course but only as a sanction or penalty and to that extent such an order would of course be subject to all the relevant jurisprudence on penalties such as proportionality. It would of course also be subject to confirmation by a court of competent jurisdiction.

110. While the costs issue was canvassed by the applicants in the context of equality in criminal proceedings, it would appear that there is a well established jurisprudence on the issue of costs involving tribunals and public inquiries. In *Condon v. CIE* (Unreported, High Court, 16th November, 1984, Barrington J.) a statutory inquiry was established into a train crash which resulted in the deaths of some eighteen people.

111. The plaintiff was a rail worker employed by the defendant, CIE, who sought representation at the inquiry on the basis that he had been identified as a person with putative responsibility for the accident. At the conclusion of the inquiry, the plaintiff applied for his costs but the inquiry decided that it did not have power to award them. The plaintiff instituted proceedings and claimed that the State had a constitutional duty under Article 40.3 to meet the costs of his representation. Barrington J. held that while the guarantee of fair procedures contained in Article 40.3 requires that the plaintiff be allowed to defend himself, it did not go so far as to give him a right to have those costs paid by the State. He observed (at p. 18):

> "Even if one accepts that the Plaintiff was placed in the position of a party before the Court of Inquiry one most also accept that he was given a full opportunity to defend himself. That, it appears to me, is as far as the *Haughey* case takes the Plaintiff. It is one thing to say that a man must be allowed to defend himself but quite another to say that the State must pay the cost of his defence."

112. Similar views were expressed by Murray C.J. in his judgment in *Lawlor v. Planning Tribunal* [2010] 1 I.R. 170 (at 189-90):

> "[54] What the case law does establish, in the context of the criminal law, is the right to be provided with legal representation for accused persons in criminal cases or for persons whose liberty is otherwise at stake (see *The State (Healy) v. Donoghue* [1976] I.R. 325). Otherwise it is well settled that even if fair procedures entitle a person to be legally represented there is no obligation on the deciding body to fund such representation (see *Corcoran v. Minister for Social Welfare* [1991] 2 I.R. 175; *K. Security Ltd. v. Ireland* (Unreported, High Court, Gannon J., 15th July, 1977) and *Condon v. C.I.E.* (Unreported, High Court, Barrington J., 16th November, 1984)

> [58] The court considers that there is no general principle that legal costs may be claimed in proceedings pending before a tribunal of inquiry with which this case is concerned. Furthermore, and this is not contested, the tribunal itself has no funds and no power to make provision for persons appearing before it.
>
> [59] Moreover, although it is not essential to the court's conclusion on this ground of appeal, at no stage has the applicant put evidence before the court to satisfy the court that she is not in a position to defend her interests before the tribunal without having her costs paid in advance. No evidence of the applicant's means was placed before the High Court, nor was any evidence tendered to the High Court as to the value of her late husband's estate."

113. I would note in relation to the latter remarks of the Chief Justice that a similar position obtains in this case. Although the applicants have claimed in their statement of grounds and their affidavits that there is a general hardship in meeting their costs, neither of the applicants gives any specific factual information as to his means to support their contentions.

114. In *State (Plunkett) v. Registrar of Friendly Societies* (No. 1) [1998] 4 I.R. 1, the registrar through an inspector carried out an investigation of the affairs of the applicant under the provisions of the Industrial and Provident Societies (Amendment) Act, 1978. That Act empowers the registrar to direct that the parties investigated pay the costs of the investigation. The applicants challenged this provision on the basis that it was an unconstitutional exercise of judicial power. This contention was rejected by the Supreme Court. O'Flaherty J., in giving judgment, said (at p. 6):

> "It is clear that the proper exercise of that regulation may involve the regulatory body itself in costs and expenses. It is right that the interests of depositors should be safeguarded by some body established under the appropriate legislation. Conversely, those with the benefit of incorporation and other privileges should have the responsibility of meeting the costs of any proper investigation carried out by the appropriate regulatory authority where their misconduct has brought about the need for an investigation.
>
> The Court concludes that the provision is in accord with the State's obligation to afford protection to depositors and others dealing with incorporated bodies who are empowered to take money on deposit and is perfectly proportionate with that objective. There is no question of any invasion of the judicial power of the State contained in the impugned provision."

115. The authorities suggest that the constitutional guarantee of equality before the law does not always necessarily equate to parties being treated in the same manner, especially where the State is concerned. In *Dillane v. Ireland* [1980] ILRM 167, the plaintiff was prosecuted in the District Court but the prosecuting Garda withdrew the complaint and the plaintiff sought his costs. Rule 67 of the District Court Rules 1948 expressly prohibited such an award of costs against a member of An Garda Síochána acting in discharge of his duties as a police officer. The applicant challenged this provision in reliance on the Article 40 guarantee of equality before the law. The unanimous decision of the Supreme Court was delivered by Henchy J. who said (at p. 169):

> "When the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Art. 40, if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of… Whether the Court supports or approves of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded."

116. In commenting on *Dillane* in his dissenting judgment in *Minister for Justice v. Devine* [2012] 1 I.R. 326, at 368 – 369, O'Donnell J. observed:

> "[113] *Dillane v. Ireland* [1980] ILRM 167 which was not referred to in the parties' written submissions but was discussed in argument, is a formidable obstacle to the respondent's contention in this case. A defendant, against whom a claim is dismissed, is put to an expense which *ex hypothesi* he ought not to have incurred. An order for costs is a compensation for that loss. The law, however, while providing for the possibility of this compensation against all other litigants, permits a distinction to be made in the case of the State as a litigant.
>
> [114] The examples can be multiplied. A related and powerful example was that proffered by Lord Reid in *Hoffman La Roche v. Trade Sec*. [1975] A.C. 295. An accused who has been refused bail pending trial is deprived of his or her liberty. In the event of his or her subsequent acquittal, there is no provision for the payment of compensation or damages to such an individual. Similarly, there is no automatic right for the payment of damages on the quashing of a conviction on appeal even when, as will often be the case, the successful appellant has been in prison pending appeal. A warrant authorising the gardaí to enter a premises, or to search and seize property, permit something which would otherwise be trespass to a property or goods or both. However, it is the normal rule that the invalidity of such a warrant will not expose the gardaí to damages for trespass for which any other entrant would be liable. Section 50 of the Constabulary (Ireland) Act, 1836 is one long standing example of such a statutory protection …
>
> [115] All these examples are inconsistent with the assumed principle of equality, and go to show that the law distinguishes clearly between the position of State authorities carrying out public duties and other litigants, and does so in particular by protecting the State from exposure to claims for damages which private litigants pursuing private interests may face. The rationale appears to be that, if law enforcement bodies must also take into account the risk of damages claims of unquantifiable amounts, then they may be deterred from performing the duty which they owe to the public of pursuing and, if possible, prosecuting wrong doers. *Hoffman LaRoche v. Trade Sec*. [1975] A.C. 295 and *Kirklees MBC v. Wickes Building Supplies Ltd* [1993] A.C. 227 cannot therefore be said to be anomalies. On the contrary, they are consistent with other features of the law."

117. It seems to me on the basis of these authorities that the *égalité des armes* principle does not extend to statutory bodies such as the Bank in conducting a statutory inquiry insofar as the inability of the applicants to recover costs or their possible exposure to an order for costs is concerned. The provisions of the Act in this regard appear to represent a legitimate recognition by the legislature of the difference in the social function performed by a State entity such as the Bank as opposed to private litigants. To that extent it seems to me that the *égalité des armes* principle has no application to the costs issue in this case.

The Standard of Proof

118. The applicants have, from an early juncture made the case throughout that the ASP is in substance and form akin to a criminal trial and should attract a criminal standard of proof. Insofar as the Act purports to entitle the Bank to adopt a lower standard, it is unconstitutional. There are however a number of preliminary difficulties with that argument from the applicants' perspective.

119. The first is one I have adverted to already. This issue has already been the subject matter of an unchallenged determination by the IMs in which the applicants participated fully. I have found that this constitutes an impermissible collateral attack on that decision. Secondly, the Guidelines prescribe the standard of proof at inquiries as the civil standard and have done so for over a decade. If the applicants' argument is correct, it also represents an impermissible attack on the Guidelines, noting that the applicants have already initiated, and abandoned, such a challenge. It seems to me that on both of these issues, an insurmountable obstacle is placed in the path of the applicants.

120. However, if I were to be wrong in reaching this conclusion, I propose to consider the substantive merits of the argument. A useful starting point is the unimpeached decision of the IMs of the 17th October, 2016. It is I think worthy of some note that most if not all of the arguments that were advanced to the court in support of this proposition were also advanced to the IMs. In their determination, the IMs noted an argument repeated in these proceedings:

> "5. The [applicants] urge the IMs to depart from the Guidelines by adopting the standard of proof that applies in a criminal trial, namely of proof beyond a reasonable doubt instead of proof on the balance of probabilities, as prescribed in the Guidelines. The basis of their submission [*regarding the standard of proof*] is that the contravention alleged against them is also a criminal offence, and a finding that they had committed the contravention question is, for their reputations, tantamount to a verdict of guilty brought in by a jury in a criminal trial. They say that as the sanctions resulting from a finding that they had committed the contravention are so far reaching, that a finding of guilt against the [applicants] based on the lower standard of proof as applies in civil proceedings will breach their right to fair procedures and natural justice. They contrasted potential outcomes of this inquiry to tribunals of inquiry set up under the Tribunals of Inquiry Act, 1921, which they characterise as being sterile in terms of outcomes. They submit further that the standard of proof that applies in similar professional disciplinary inquiries, following the judgment of Keane J., as he then was, in the case of *O'Laoire v. The Medical Council* (Unreported, High Court, 27th January, 1995) Keane J., in which judgment was delivered on the 27th January, 1995, is the criminal standard of proof. In this respect they instanced the practice of the Medical Council, the Law Society, An Bord Altranais and some accountancy bodies. They submit that this is the applicable law of the land and that the IMs are bound to follow it.
>
> 6. The key question for determination is whether, as was submitted, that the 'law of the land' requires the IMs in this inquiry to apply the criminal standard of proof. If this were the case, the IMs would be obliged to disapply para. 4.3 of the guidelines, as to follow para. 4.3 of the guidelines would bring the IMs into conflict with the law, a position which would be wholly unacceptable.
>
> 7. Notwithstanding several judicial opinions which have disagreed with the judgment of Keane J., including opinions expressed in the appeal on other grounds by judges of the Supreme Court in the *O'Laoire* case, the judgment of Keane J. has not been overturned and hence remains 'good law'. The real question which arises here is whether this inquiry is to be considered as so similar to a Medical Council inquiry as to draw this inquiry within the ambit of the judgment of Keane J.
>
> A starting point in this comparative analysis is s. 33 AY of the Act which is as follows:
>
> *'33AY.—(1) The Bank shall conduct an inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.*
>
> *(2) At an inquiry, the Bank shall observe the rules of procedural fairness, but is not bound by the rules of evidence…'*
>
> 9. The application of the criminal standard of proof is inextricably bound up with a burden of proof resting on a prosecutor and with strict adherence to the rules of evidence. All of this appears to be wholly at odds with the clear statutory provision in s. 33AY of the Act. The inquiry in which we are engaged is inquisitorial in nature and obviously different to a criminal trial. There is no prosecutor who carries any burden of proof to whom the criminal standard of proof can be applied. Whilst it is the case that the subject matter of the contravention alleged in this inquiry is also a criminal offence, that fact cannot in effect convert this inquiry into a criminal trial or something closely akin thereto.
>
> 10. The fact is that this inquiry is not a criminal proceeding in any sense. In the first instance, there is no question of the IMs making a determination which would expose the [*applicants*] to a criminal sanction. The High Court in *Fingleton v. Central Bank of Ireland* [2016] IEHC 1 has determined that an inquiry such as this one is not the administration of justice and does not impose a criminal liability. Secondly, the manner in which the inquiry is set up in the Act and the guidelines, manifestly differs from the procedural attributes of all criminal trials. It is true that if there is a finding that the alleged contravention occurred, a very large fine could potentially be imposed and also a disqualification from participation in the management of a regulated entity. There is, however, a wealth of judicial authority to the effect that the severity of sanctions is not a ground for departing from the usual civil standard of proof and introducing the criminal standard.
>
> 11. It is trite to observe that the criminal law applies to all citizens, whereas the financial regulations at issue in this inquiry apply only to those persons who chose to engage in a regulated entity. This is not an unimportant distinction, as it tends to highlight the entirely separate and distinct functions of the criminal justice system and the regulatory functions of the Bank. For each of these functions, the law sets out procedural frameworks which are appropriate to enable the proper discharge of these different functions. In the case of the criminal justice system, the criminal trial as we have known it for centuries has been evolved to meet the essential requirements of the criminal justice system. For the purpose of discharging its regulatory function for financial service providers, the inquisitorial process of inquiry is manifestly suitable to enable the Bank to conduct the necessary inquiry to enable it to determine whether there has been compliance with relevant regulations or not, and to impose appropriate sanctions as provided in the Act, where there has been a failure of compliance.
>
> 12. Apart from the few professional bodies whose inquiries are affected by the judgment of Keane J. in the *O'Laoire* case, all other tribunals of inquiry adopt the civil standard of proof, not withstanding the serious consequences that flow from their decisions.
>
> 13. The IMs are persuaded by the factors discussed above that this inquiry is readily distinguishable from the few tribunals of inquiry that are affected by the judgment of Keane J. and hence that judgment is not the 'law of the land'

governing this inquiry. The IMs are not persuaded by the matters raised by the [*applicants*] as warranting the adoption of the criminal standard, outweigh the factors discussed above, which tilt the balance in favour of the civil standard of proof. The IMs take note of the several judicial opinions which caution against extending the criminal standard of proof beyond the confines of criminal trials.

14. Accordingly the IMs determine that they will follow para. 4.3 of the Guidelines and adopt the civil standard of proof."

121. It will be seen therefore that the arguments advanced by the applicants in this application are in large measure identical to those put before the IMs. It is difficult to find any fault with the logic of this decision or the analysis of the law. To the extent that the decision is unchallenged, the applicants appear to agree, while at the same time arguing precisely the same points before the court.

122. It seems to me that the inquiry is patently not a criminal process. It is not a trial or a *lis inter partes*. There is no prosecutor and no onus of proof on the Bank. It is an inquiry and thus by definition inquisitorial rather than adversarial. As befits such a process, the Act at s. 33BA provides that the Bank shall have power to summon witnesses to give evidence or to produce documents. Indeed the section permits a witness to give evidence by means of a written statement, something that would be entirely impermissible in the criminal context. It is of course correct to say that the High Court judgment of Keane J. (as he then was), in *O'Laoire* held that the appropriate standard of proof in a fitness to practice inquiry before the Medical Council was the criminal standard. A small number of other professional bodies adopt the same standard in disciplinary inquiries but it is by no means universal and other disciplinary inquiries adopt the civil standard.

123. As the IMs' decision points out, there are significant judicial dicta expressing reservations about the criminal standard being applied outside the confines of the criminal law. Indeed, in *O'Laoire* itself, although the Supreme Court did not overturn the decision of Keane J. in the High Court, it did express some misgivings in that regard. Thus O'Flaherty J. observed (Unreported, Supreme Court, 25th July, 1997, at pp. 5-6):

"In the first place, it is better that the standard of proving a case beyond reasonable doubt is confined to criminal trials. This is because the concept of 'reasonable doubt' is peculiarly appropriate to a criminal trial…

It seems to me that it is better that we preserve the civil standard for all civil proceedings and leave the criminal standard to the arena to which it is best suited. As Barrington J. (speaking for the Court) said in *Mooney v. An Post*… 'to attempt to introduce the procedures of a criminal trial into an essentially civil proceedings serves only to create confusion.'"

124. In *O'Keeffe v. Ferris* [1997] 3 I.R. 463, the court was concerned with the provisions of s. 297 of the Companies Act, 1963 which provided for the establishment of civil liability for fraudulent trading. The plaintiff, who was a director of the company, sought a declaration that the section was unconstitutional because it purported to amount to the trial of a criminal offence without due procedures for a criminal trial. In particular it was argued that the criminal rather than civil standard of proof should be applied. The Supreme Court rejected this argument, O'Flaherty J. saying (at p. 472):

"It is clear, in the first instance, that the subsection in question does not create a criminal offence. To hold that it did would be to disregard the provisions of both subs. 3 and subs. 4 of s. 297. Further, none of the indicia of a criminal offence identified in *Melling v. Ó Mathghamhna* [1962] I.R. 1 are present: there is no prosecutor; there is no offence created; there is no mode of trial of a criminal offence prescribed and there is no criminal sanction imposed. Indeed, the court did not understand counsel for the plaintiff to press this point. Rather, the plaintiff's case was put on the basis that the civil proceedings were really a disguise for what was truly an attempt by the Oireachtas to impose a criminal sanction in a civil context. The Court rejects this construction of the section. It holds that the section is clearly within the policy entitlement of the Oireachtas to enact, it is designed to protect creditors and others who may fall victim of people engaged in fraud."

125. In *Georgopoulus v. Beaumont Hospital Board* [1998] 3 I.R. 132, the plaintiff was a doctor against whom a disciplinary process was initiated by his employer, the hospital. The outcome was potentially serious for the plaintiff and in fact resulted in his dismissal. However, the Supreme Court held that the seriousness of the issues involved for the plaintiff did not mandate the engagement of the criminal standard of proof. In delivering judgment, Hamilton C.J. said (at p. 149-150):

"As already pointed out in this judgment, the proceedings before the defendant were in the nature of civil proceedings and did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature.

It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation.

This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

126. It seems to me that in coming to its decision, the IMs correctly recognised the importance of s. 33AY in the context of the standard of proof to be applied. The wording of the section is in itself strongly suggestive that the legislature did not intend to import into the ASP the criminal standard requiring as it does strict adherence to the rules of evidence and strict and formal proof of every matter in issue. By contrast, s. 33AY expressly provides that at an inquiry the Bank shall not be bound by the rules of evidence. That seems to me to be entirely inconsistent with the wholesale importing of the paraphernalia of a criminal trial into an ASP inquiry.

127. It must be borne in mind that the ASP applies across a huge range of potential infringements ranging from the relatively simple and trivial to the complex and serious, as here.

128. The evidence suggests that the majority of ASP inquiries will fall into the minor end of the spectrum. Indeed the giving of oral evidence in an ASP inquiry is very much the exception rather than the rule with most inquiries being determined on paper. It is impossible to see how such inquiries could be undertaken if the criminal standard is to apply to each and every one of them, which is the case made by the applicants.

129. I am therefore of the view that the applicants' argument on the standard of proof issue fails on the merits.

Summary and Conclusion
130. I am therefore of the view that these applications are brought out of time and further that the applicants are not entitled to an extension of time. I consider that the applications are in any event premature and hypothetical and the applicants must await the outcome of the inquiry before seeking to bring a challenge of this nature because none of the adverse consequences of which they complain may ever eventuate. The issue raised concerning the administration of justice has already been decided in *Purcell* and I am bound to follow it. There is no constitutional infirmity in the ASP by virtue of the fact that the applicants may not recover their costs, at first instance at any rate, or because costs may be awarded against them as a sanction.

131. The IMs correctly determined that the onus of proof to be applied at the inquiry is the civil standard on the balance of probabilities and the constitutional complaint about this fails. Finally, I am satisfied that the applicants are not entitled to adopt a procedure of participating in the inquiry while at the same time maintaining these judicial review applications. These proceedings constitute an impermissible attack on unchallenged decisions of the IMs and also on the Guidelines and are thus an abuse of process.

132. Accordingly, for the reasons I have explained I will dismiss these applications.