Neutral Citation Number [2006 IEHC 172]

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 45 J.R.]

BETWEEN

GILES J. KENNEDY PRACTISING UNDER THE STYLE AND TITLE OF GILES J. KENNEDY AND COMPANY SOLICITORS
APPLICANT

AND
THE LAW SOCIETY OF IRELAND

RESPONDENT

Judgment of Mr. Justice John MacMenamin delivered on the 23rd day of March, 2006.

1. This application for judicial review brought by the applicant marks a further chapter in the continuing series of proceedings initiated by the respondent against the applicant. To date the issues have given rise to two lengthy and substantive hearings in the High Court, a procedural hearings on pleadings, and to date three appeal hearing in the Supreme Court. At the conclusion of the hearing herein I indicated that the application for judicial review would be declined and I would furnish my reasons later. I now do so.

2. Background

The issue in suit in these proceedings

On 26th January, 2004 the applicant obtained leave to seek judicial review seeking to restrain the respondent and more particularly its Compensation Fund Committee from proceeding to consideration of what was described as 'Section B' of the report of Aisling Foley, an Investigative Accountant, originally delivered to the respondent on 19th December, 1995.

3. It is necessary to consider in some detail the grounds upon which the applicant obtained leave. Essentially the leave granted can be seen under two headings.

4. The first of these (grounds A to H) asserts that a decision of the Supreme Court of 20th December, 2001 and/or an earlier decision of that on the 4th April, 2001 now preclude the respondent and the Committee from having regard to Section B of the report.

The remaining grounds make complaint about the alleged actual conduct of the respondent and the Committee in context of fair procedures.

5. A consideration of the first set of grounds involves this court in the interpretation of the two judgments of the Supreme Court aforesaid. The parties and the issues in this case closely relate to those which have arisen before the Supreme Court. The applicants contends that the course of action sought to be adopted by the respondent (and now impugned) was in contravention of the orders of the Supreme Court arising from these two judgments. One might have thought common sense might dictate that an application be made to that court to speak to the judgments and orders if issues arose as to their ambit or interpretation. This did not occur. Instead an application was made on 26th January, 2004 leave was obtained to seek judicial review. No application was brought to set aside the leave application. Instead a little over two years later, the matter came on for full hearing as a judicial review proceeding. In the light of the facts and circumstances outlined below one of the consequences of this application has been the deferral of consideration of this issue by the Compensation Fund Committee for that period.

The General Background

6. This court will adopt with suitable adaptation the general background as summarised in the judgment of Murphy J. in *Kennedy v. The Law Society of Ireland* (No. 3) 202 I.R. at pg. 454 on appeal from the substantive judgment of Kearns J. delivered 5th October, 1999.

On 15th April, 1993, the Compensation Fund Committee of the first respondent the Law Society decided to investigate the professional practice of six solicitors (including that of the applicant) pursuant to the provisions of regulation 29 of the Regulations of 1984.

On 24th May, 1993 the second respondent the registrar of the Law Society assigned the third respondent, Ms. Aisling Foley one of a number of chartered accounts in the employment of the first respondent, to carry out that investigation. By letter dated 24th May, 1993, the second respondent wrote informing the applicant of the fact that the third respondent had been appointed to carry out the investigation and drawing the attention of the applicant to his obligations under the Account's Regulations of 1984. It is clear and Kearns J. so found that the third respondent was specifically instructed by the first respondent that, in addition to inspecting of the books of account, she was to look for evidence of fraudulent claims passing through the practice and, secondly that these instructions were not disclosed to the applicant at the commencement of the investigation or prior thereto. The third respondent was aware of the Lillicrap case (a case wherein it was alleged there had been a bogus personal injury claim) and was further informed by the second respondent of his suspicions in relation to other fraudulent claims which might have been processed by the applicant's office. The third respondent was required to investigate whether the applicant's firm had complied with the account's regulations of 1984 and whether his firm was involved in spurious claims. It was, as the learned trial judge held, a two pronged investigation.

The investigations carried out by the third respondent appear to have been challenged by the applicant at every stage and on a variety of grounds. Initially it was the first respondent which instituted plenary proceedings against the applicant on 29th July, 1993, claiming (amongst other things) a mandatory injunction directing the applicant to produce to the first respondent's agents certain documents required for the purpose of the investigation being carried out by the third respondent. The first respondent's claim was disputed in the defence delivered by the applicant which went on to counterclaim for damages then estimated at a sum in excess of €250,000 and on grounds which included the allegation that the investigation had "exceeded its lawful remit". By motion dated 29th April, 1996, the applicant sought and obtained leave for orders for judicial review by way of certiorari to quash (among others things), the appointment of the third respondent to carry out the investigation aforesaid, and for an order quashing a purported decision of the first respondent communicated to the applicant on 12th February, 1996, to seek an inquiry by the Disciplinary Tribunal of the first respondent into his professional conduct. These proceedings were pursued vigorously and gave rise to a variety of interlocutory applications and the preparation and exchange of voluminous documentation. Ultimately the plenary proceedings and the judicial review matter were consolidated by order of the High Court made on 5th March, 1998 and in pursuance of that order points of claim were delivered by the applicant on 26th March, 1998, and points of defence on behalf of the first respondent and the other respondents on 24th April, 1998. Those pleadings set out the issues which were heard by Kearns J. and determined by him in his judgment delivered therein on 5th October, 1999. It was from that judgment and the order made thereon that the applicant appealed to the Supreme Court.

7. Kearns J. in the High Court judgment held that Ms. Foley was appointed both to conduct a "traditional" accounts inquiry and also to investigate whether the respondents legal practice had been used for the purpose of prosecuting bogus road traffic claims. This judgment then came to be considered by the Supreme Court in two judgments the first on 4th April, 2001, and the second on 20th December of that year.

8. The issues considered in the first were the powers, duties and findings of an accountant appointed by the respondent; and subsequently, in the second, the effect of the first judgment, on the report. The final report was divided into sections. Section C dealt with the question of bogus or fraudulent claims; Section B dealt with what may be described as traditional accountancy matters.

9. The applicant's challenge to the Committee's referral was based on a number of contentions all but of one which ultimately failed. Allegations of bias, prejudice or malice were either withdrawn or not sustained. The focus of the applicant's argument, upon which he ultimately succeeded, was that the respondent in pursuing the investigation of bogus claims was acting *ultra vires* the Solicitors Accounts Regulations 1984. In the High Court Kearns J. had held as a fact, that the respondent had a dual purpose in appointing Ms. Foley. The purpose of investigating the involvement of the applicant's practice in bogus claims was itself, the High Court held, a proper investigation under the 1984 Regulations. However the first judgment of the Supreme Court delivered on 4th April, 2001 by Murphy J. held that the investigation of bogus claims was not *intra vires* the 1984 Regulations. That court then had to remit the matter for further argument as to the consequence of that finding.

10. The unanimous judgment of the Supreme Court on the latter issue was delivered by Fennelly J. on 20th December, 2001. The court held that the inclusion of the purpose of investigating bogus claims rendered the appointment of Aisling Foley invalid.

One turns then to the consequence of the later finding for the evidential status of the report as a whole as before the Committee. The report contained matters which in the light of the Supreme Court judgment should not have been the subject of investigation. These included bogus claims which were specifically dealt with in Section C. However it is submitted by the respondent that the also contained matters which clearly were, and could have been the subject of an *intra vires* investigation and which were contained in Section B. It is the Supreme Court's judgment on the latter issue which is the subject matter of the dispute between the parties in these proceedings brought way of judicial review.

11. Acting, it believed, on the outcome of the Supreme Court the respondent had established a special committee to carry out the functions of the compensation fund committee. While earlier issues arose as to the composition of that committee there is no challenge on that issue in these proceedings.

12. The Legal Position of the Committee
It is necessary to place this specific committee in context within the Law Society regulatory regime. Under the Solicitors Act, the Compensation Fund Committee has no power to discipline any solicitor. It may however decide to refer a matter which comes to its attention to a disciplinary committee (now the Disciplinary Tribunal). Before doing so, the Committee gives an opportunity to solicitors, either personally or by a representative to attend and make submissions. The Committee then takes the step either of referring the matter onto the Disciplinary Tribunal or not. If the committee does refer to the Disciplinary Tribunal, that tribunal must in turn consider whether a *prima facie* case is established. If it so considers, then a hearing is held under s. 7 of the Solicitors Act 1960. There is then provision for appeal from the decision of the Disciplinary Tribunal on referral to the High Court in the event that the Tribunal considers that severe sanctions are warranted. An elaborate and multi tiered procedure is provided for in the regulatory regime. The current procedure regarding the applicant herein is even now only at the starting point. Before the applicant can be made the subject of any disciplinary sanction it is necessary for a number of other steps and decisions to be taken. At each of these stages the applicant can attend and make submissions.

The Applicants Case
13. It is now necessary to refer to the submissions of the applicant made herein. By way of preface it will be helpful to set out the essential claims made by the applicant in the context of the order of the Supreme Court dated 11th January, 2002. This is based on that order itself; an interpretation placed upon the order, and the judgments of the court on the two issues to which reference has been made.

The Supreme Court Order
14. On 11th January, 2002 in the case of Giles J. *Kennedy v. Law Society of Ireland and Others* [2002] 2 I.R. 475 the Supreme Court *inter alia* made the following orders having considered and given judgment on both issues as earlier described:

> 1. *Certiorari* to quash the purported decision of the first named respondent to seek an inquiry by the Disciplinary Tribunal of the High Court into the conduct of the applicant and in lieu of directing that an order of certiorari do issue IT IS ORDERED that the first respondent on service of this order upon it do forthwith send before the High Court for the purpose of being quashed the said purported decision to seek an inquiry by the Disciplinary Tribunal of the High Court in the conduct of the applicant and all records relating to the said decision and that same be quashed on return without further Order.
>
> 2. *Certiorari* to quash the purported appointment in writing on or about the 24th day of May, 1993 of the third respondent as an accountant pursuant to Regulation 29(1) of the Solicitors Account Regulations (S.I. 304/1984) for the purpose of performing an inspection of the applicant's practice pursuant to Regulation 29 of the said Regulations and in lieu of directing that an Order of *Certiorari* to issue IT IS ORDERED that the said purported appointment in writing on or about the 24th day of May, 1993 of the third respondent as an accountant pursuant to Regulation 29(1) of the Solicitors Account Regulations (S.I. 304/1984) for the purpose of performing an inspection of the applicant's practice pursuant to Regulation 29 of the said Regulations be forthwith sent before the High Court for the purpose of being quashed and all records relating to the said appointment and that same be quashed on return without further Order.
>
> 3. Prohibition to prohibit the Respondents from relying on or seeking to make any use whatsoever of the evidence gathered by the third named respondent in investigating spurious claims and the material concerning the processing of spurious claims and in particular from relying on "Section C" of the Investigation Report of Aisling Foley the third named respondent dated 19th December, 1995 and identified by the heading "C OTHER MATTERS ARISING FROM AN EXAMINATION OF THE FILES" in the said Investigation Report and IT IS HEREBY ORDERED accordingly and that as so varied that the judgment and order do stand affirmed."

15. Before this court the applicants in particular refer to certain sections of the later judgment of Fennelly J. of 20th December, 2001. They contend that, the Supreme Court held therein that the appointing decision (of Ms. Aisling Foley) "in this case was a single one"

(at p. 488). It is contended on behalf of the applicant by his counsel Mr. Martin Hayden S.C. that it is not possible for the court to sever the report so as to effect a distinction between its lawful and unlawful objectives. The applicant submits that the Court reached this conclusion for three reasons; they paraphrase the judgment thus:

> "Firstly it does not distinguish between the valid and the invalid purposes it purports to authorise … Secondly, it is not possible to limit its prospective effect … Thirdly … because the Law Society engaged in a policy of deliberate concealment of its intentions, especially when, as this court has held, the concealed intention related to material which it was not authorised to investigate by means of the accounts regulation" (from p. 488/9).
>
> The applicants in particular rely on the statement "it is not possible to limit its prospective effect …".

Relying on the following quotation, Mr. Hayden S.C. submits that the Supreme Court therefore set aside the decision of the respondents to appoint Ms. Aisling Foley as Investigating Accountant and that the Court further held that the report of Ms. Aisling Foley was unauthorised:

> "If the appointment of the accountant was invalid, as I think it was, then the report of the accountant on her investigation was unauthorised, though part of the material contained in the report could legitimately have been gathered. While … a report, being a product of an inquiry cannot be quashed as if it were a decision, I think that it is indissociable from the decision of the Compensation Fund Committee based upon it which I think should be quashed". (Fennelly J. on p. 491 of the Report).

16. The applicant submits that the respondent now seeks to examine the applicant in relation to what it says are the "findings" of Ms. Aisling Foley contained in Section B of her report. His counsel submits that in the light of the Supreme Court decision and in particular what it is stated to be the "rationale" as expressed above and the Court Orders numbered 2 and 3 earlier recited, that the respondent cannot lawfully, and is prohibited from relying or using in anyway any of the findings or opinions reached or expressed by Ms. Foley in her report.

17. What then occurred was that the respondent sought to make use of or to rely on part only of the report of Ms. Foley. The Law Society has severed Section B from the remainder of the report. It has redacted certain portions of Section B (paragraph B9) considered to be unauthorised. The applicant takes exception to this course of action. He says that the Supreme Court held that the decision appointing Ms. Foley cannot "be rescued" by the severance of the lawfully obtained portion of the report from those which it held had been obtained unlawfully. In an interpretation of the section of Fennelly J's judgment to which reference has been made, counsel contends that the lawful and unlawful portions of the report are "indissociable"; cannot be severed and that no use whatever can be made even of the parts thereof which might otherwise have been lawfully obtained for the reasons set out below.

18. The applicants rely on a substantial number of authorities relevant to the issue of severance. These include:

Meagher v. Attorney General [1973] I.R. 140; *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297; *Pigs and Bacon Commission v. McCarron and Co* [1981] I.R. 451; *Desmond v. Glackin* (No. 2) [1992] 3 I.R. 67; *Glencar Exploration plc v. Mayo County Council* [1993] 2 I.R. 237; *Mallon v. The Minister for Agriculture Food and Forestry* [1996] 1 I.R. 517; *Reg v. Secretary of State for Transport exp Greater London Council* [1986] QB 556 and *Thames Water Authority v. Elmbridge Borough Council* [1983] 1 All ER 836. Essentially the applicant contends that if the lawfully obtained portions of the report are free standing and legally operable they may be deployed. But if what remains is inextricably bound up with the part held invalid to the extent that the remainder cannot survive independently, its use cannot be permitted. It is contended that severability can only be effected where the "good" and "bad" parts are clearly identifiable and the "bad" part can be separated from the "good" and rejected without affecting the validity of the remainder. The applicant contends that the intention of the respondents to utilise portions of the report cannot lawfully be permitted because they contend, no process of segregation and separation of good from bad is actually possible and that the invalidity of section C taints and invalidates the totality of the report, particularly having regard to some stated overlap in matter which occurs between section B and C. Counsel for the applicant has provided the court with a list of these issues where he contends there is such an overlap. I have considered these. It is important to note that while there might be some such overlap as regards the information or cases, such material, in the two sections is created from two entirely different standpoints. In Section B the issues which arise relate to breaches of accountancy regulations. In Section C the matters in question relate to bogus claims.

The Findings of Kearns J.

19. At p. 44 of the unreported judgment of Kearns J., he dealt with the issue of apparent irregularities of a financial nature identified from the books and accounts of the applicant by Ms. Foley. These were

> "(A) Failure to account for a sum of £17,600 received by the office in 1983 in respect of the proceeds of sale of a particular property.
>
> (B) Application of client funds to discharge other client liabilities without apparent general or specific authorisation.
>
> (C) Irregularities concerning undertakings given to the Bank of Ireland at Dublin Airport.
>
> (D) Delays in payment of counsel's fees and other professional fees following receipt of same.
>
> (E) Apparent Reduction in the amount of Payment of such fees by approximately 10% of the sum actually received by the applicant's office in certain instances.
>
> (F) Payments made to third parties for services which were never given, so as to facilitate in a fraudulent manner bonus payments to Mr. Ralph McConn, a Legal Executive in the firm, in some 30 cases.
>
> (G) An unexplained transfer of £75,000 from a particular client account on 18th August, 1993, which said funds were repatriated to the same account shortly afterwards, in circumstances which demanded an explanation but where no explanation was given."

Kearns J. continued:-

> "It is quite clear that examination and investigation of these matters took up a very considerable amount of time and included queries which gave rise to a great deal of acrimony and resentment, in particular in relation to third party verification of certain instructions from an insurance company and also in relation to an admittedly improper request by

the Respondent for sight of a professional case file which the Applicant was handling for a certain solicitor who had brought a case against the respondent in respect of which judgment of the High Court was then awaited.

There was agreement during the hearing before me that the effort and energy expended in the compilation of information divides approximately 50/50 as between what might be described as the irregularities within the accounts on the one hand and fraudulent claims on the other".

Ultimately that judge concluded at p. 45 of the judgment that the work time and effort components of the inquiry were incapable of any other assessment than 50/50 as between financial irregularities and fraudulent claims.

20. Against that backdrop, the issue which arose in the course of the hearing in the Supreme Court, was whether the evidence obtained, was attended with such circumstances of illegality that it would be unconscionable or unlawful to allow the respondents to rely thereon it. Adopting the balancing test proposed by Kingsmill Moore J. in *The People (Attorney General) v. O'Brien* [1965] I.R. 142 the Supreme Court decided, the applicant says, that the respondents should not in anyway be permitted to consider or make a decision based on the report of Aisling Foley. The applicants on the following statement in the judgment:

> "The court should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty or protecting the public from professional misbehaviour; secondly members of professional body should be protected from such clear abuse as would render it unfair that the evidence gathered as a result be received" (at p. 490).

21. The applicant further contends that in deciding which direction the scales tilted, Fennelly J. was heavily influenced by what is termed the alleged "hidden agenda" of the Law Society i.e. the investigation of fraudulent claims. Mr. Hayden S.C. refers to an interlocutory injunction application which came before Costello J. in 1993 wherein it is contended that judge was not informed of the dual motive of the Respondent. It is further stated that the Supreme Court was of the opinion that had this "agenda" been known to the applicant he would have been in a position to have asked the Court to desist from continuing that part of the investigation and the accountant's report would not have contained any material about the processing of spurious claims. The applicants then rely on the following statement of Fennelly J. (at p. 491 of the Report):

> "That factor weighs heavily in the scales against permitting the Law Society to use the report of the accountant, as it stands".

22. Then counsel contends that a second factor taken into account by that judge was the relationship between the report and the overall regulatory process:

> "The report of the accountant is an integral step in the regulatory procedure. If the appointment of the accountant was invalid, as I think it was, then the report of the accountant on her investigation was unauthorised, though part of the material contained in the report could legitimately have been gathered …"

23. It has been pointed out by Mr. Donal O'Donnell S.C. counsel for the respondent that the premise upon which that part of the applicants submission is made is incorrect. I agree. For confirmation of this erroneous premise one need only travel as far as a further judgment of the Supreme Court herein delivered by Geoghegan J. on 21st April, 2005 arising from a distinct issue in the claim: the basis in pleading upon which the applicant might seek damages arising from the earlier judgments of the Supreme Court. In the course of that judgment at (p. 24) Geoghegan J. quotes a number of findings made by Kearns J. at p. 13 of his judgment made on 30th July, 2003:

> "G. Insofar as the injunction application before Costello J. is concerned, I am satisfied that the fact that "other enquiries" were in contemplation by the Law Society was disclosed during that hearing. Furthermore, the actual nature of the "hidden agenda" was spelled out in open court by counsel for the applicant without demur from counsel for the Law Society. I am satisfied that there was no material non disclosure in the context of the injunction application which would establish actual knowledge or reckless indifference on the part of the Law Society that they lacked statutory authority to investigate the possibility of fraudulent claims".

In the same judgment Geoghegan J. stated at p. 19:

> "It became quite clear that there was no bad faith on the part of the Society in initially not disclosing the second reason why it wanted the files. The investigation could have been defeated if there was such disclosure and that appears to have been the only motive. Furthermore, the transcript of the hearing before Costello J. does not, in my opinion, support the view either that the Law Society knew that it was acting illegally or that there was any order or ruling by Costello J. that the Law Society had to return to the court for permission to carry out any investigations which went on beyond what is specified in the Accounting Regulations. All the findings of fact by Kearns J. on the issue of mala fides appeared to me to be well founded and were entirely open on the evidence. It is rather absurd, indeed, to suggest that the Law Society allegedly knowing at this very early stage that they were acting illegally but had then gone through all the processes of High Court and Supreme Court, purporting to establish otherwise".

That judge added (at p. 25 of the judgment of the Court).

> "I have deliberately included this lengthy quotation from the judgment of Kearns J. because the findings of fact contained within that passage would seem to me to be fatal to the appellants appeal. What clearly emerges from the judgment of the learned trial judge was his view that there was no evidence of bad faith on the part of the Law Society which would support an allegation by the appellant of deliberate or reckless behaviour. Insofar as he had made primary findings of fact these cannot be interfered with by this court. Insofar as he has drawn inferences it would seem to me that they were legitimate inferences."

24. It is impossible to avoid the conclusion that the premise upon which this part at least of the submissions made by the applicant is not tenable: it is quite incorrect.

25. The applicant suggests further that one reason as to why the Supreme Court in the second judgment held that the decision to appoint Ms. Aisling Foley could not be severed (as between the authorised and unauthorised purposes) was the fact that the

prospective effect of the decision could not be limited and the appointing decision had already been acted upon. Counsel relies on the statement of Fennelly J. (at p. 488 of the judgment) on the issue as to whether it is possible to sever the good from the bad that the question might arise:

> "As to whether a decision so heavily influenced by an impermissible consideration should be allowed to stand".

26. The situation which arises in the instant case involves an interpretation of the terms of judgments of the Supreme Court in a case which is still extant. It is a process which must be approached with caution it is arguably not a function of this Court at all; but to put the question at its simplest the question to be resolved is: did the Supreme Court conclude that the entire report contained matter which could not be deployed in anyway by the respondent?

It is helpful to look first at the judgment of Murphy J. delivered on 4th April, 2001 [2002] 2 I.R. 458 at p. 472. Dealing with the role of the accountant, that judge stated:-

> "The argument of the first respondent again accepted by the learned trial judge was that the use of the word "proper"-indeed the repeated use of the word "proper"-in connection with the accounts required to be maintained by the solicitor would justify the first respondent appointing an accountant to investigate the suspicion that a particular solicitor was processing legal proceedings in pursuance of what were fraudulent claims or alternatively that an accountant validly engaged in an investigation had implied authority to explore such matters*. In my view this argument was based on the transposition of the word "proper" from the accounts to the transactions which they recorded. Where a client is awarded damages in proceedings, however unmeritorious the claim and dishonest the evidence on which it is based, the propriety of the accounts of the solicitor would require to be tested and the nature of the records made of the moneys received and the distribution thereof: moneys received by a solicitor on foot of an unmeritorious claim or even a fraudulent one would still require to be recorded in accordance with the |Solicitors Accounts Regulations. Indeed in such cases, a proper record might be of particular value if and when investigations were undertaken by other persons and for other purposes*" (emphasis added).
>
> Clearly then, the Supreme Court had in mind the precise issue which is sought to be canvassed by the applicant in this judicial review proceeding; that is the report insofar as it relates to compliance with the Solicitor Accounts Regulations *as distinct* from the investigation of bogus or fraudulent claims.

27. At p. 473 of the same judgment it dealt with the "two pronged investigation".

> "… one prong of the investigation, that is to say, the ascertainment by her (Ms. Foley) of whether the applicant had complied with the Accounts Regulations was fully and properly disclosed: the other prong, the investigation of suspect litigation processed by the applicant's firm was concealed initially though quickly became apparent."

Murphy J. continued:

> "Both investigations proceeded and were completed in spite of the objection by the applicant to the production of certain confidential documents which, ultimately, he was required to produce by the order of Costello J. (as he then was), made on 29th July, 1993. The report of the third respondent formed the basis of the decision of the first respondent to seek an inquiry (in February 1996) by the Disciplinary Tribunal of the High Court into the conduct of the applicant. *Whether in reaching that decision the first respondent was entitled to rely on all or any part of the third respondents report is a matter which would require further consideration* but before taking up that matter it will be convenient to dispose of the other issues which arose on the appeal". Thereafter Murphy J. went on to the deal with the qualifications of the accountant (emphasis added).

28. At p. 474 of the same judgment Murphy J. returned to the issue at hand:

> "There remains the question as to what legal consequences flow from the appointment by the first respondent for two purposes one of which was *ultra vires* and other *intra vires.* The matter must be remitted to the High Court for the purposes of assessing damages (if any) to be awarded to the applicant. But it would seem appropriate for this court to determine, first, whether the appointment of the third respondent was defective in whole or in part and, secondly, whether the report prepared by her *or any part of it can be relied upon by the first respondent for any purpose. It will be necessary also to consider the nature of the order to be made by this court having regard to the complex history of the proceedings and the orders already made herein*" (emphasis added).

29. Thereafter the Supreme Court referred for further argument the question as to the admissibility of the report of the third respondent for the purposes of any disciplinary proceedings against the applicant. As recorded in the Irish Reports the matter came on for hearing before the court on 30th October, 2001.

30. At the very outset of his judgment, of 20th December, 2001 and speaking for a unanimous court, Fennelly J. stated at p. 476 of the report:

> "This judgment should be read with the judgment of Murphy J. delivered on 4th April, 2001. That was the unanimous judgment of the court. I do not propose to repeat the account of the facts and issues contained in that judgment except where necessary." (emphasis added).

The principal conclusion of the judgment of Murphy J. which is relevant, is set out at pp. 472 and 473. He rejected the submission of the first respondent that "the investigation of fraudulent claims is not an unauthorised purpose under the Solicitors Accounts Regulations 1984". He also held:

> "As an Investigating Accountant is not empowered by the Regulations of 1984 to investigate fraudulent claims processed by a solicitor he or she may not be appointed for that purpose".

The issue at present before the court flows from the ensuing passage at p. 473:-

> "In the present case it would seem that the third respondent was appointed for a duality of purposes on the basis of an ulterior motive. As the learned trial judge held, the third respondent was required to undertake a "two pronged investigation". One prong of the investigation, that is to say, the ascertainment by her of whether the applicant had

complied with the Accounts Regulation was fully and properly disclosed: the other prong the investigation of suspect litigation processed by the applicants firm, was concealed initially though quickly became apparent".

Both investigations proceeded and were completed in spite of the objection by the applicant to the production of certain confidential documents which ultimately is required to produce by the order of Costello J. (as he then was made on 29th July, 1993) …"

The Court at p. 477 then dealt with the concluding elements of Murphy J's judgment quoted earlier at paragraph 28 of this judgment commencing with the words: "There remains …

"The applicant relies strongly on the statement of Murphy J., already quoted, that the third respondent, the accountant appointed by the first respondent to investigate his practice, "was appointed for a duality of purposes or on the basis of an ulterior motive". Counsel for the applicant argued that the investigation of fraud was, in fact, the dominant motive for the appointment, but that even if it was not, the appointment was invalid because the first respondent took into account irrelevant considerations when making his decision. Consequently he claimed the reports of the Investigating Accountant so appointed could not be relied on for *any* purpose (emphasis added).

Continued;

" … The learned trial judge said he was unable to formulate as to which of the two purposes for which the Accountant was appointed was dominant. He acknowledged the distinction between the time and effort expended on the inquiry and its purpose and concluded that he could not form any different view as between the underlying purpose and a 50/50 apportionment between them. *The applicant asked this court to review this conclusion and to substitute a finding that the investigation of fraudulent claims was the dominant motive. In my view this court cannot accept that submission …*". (emphasis added). On the following page of the report the judgment again touched on the issue:

"The applicant also argued that a consequence of the invalidity of the appointment of the Investigating Accountant was that the evidence obtained by the Accountant and, in particular the report made to the first respondent could not be used by the decision maker …".

Thereafter their judge went on to deal with the authorities which were applicable regarding the admissibility or otherwise of the evidence of information.

31. At p. 480 of the report I find the following passage occurs where the court dealt with the first respondent's submissions:

"*The first respondent in his written submission, claimed that the report made by the third respondent could be severed, and that the parts concerned with fraudulent claims were readily distinguishable from those dealing with infringements of the Accounts Regulations. The report could, therefore, be severed. However at the hearing of the appeal, counsel for the respondents extended this severance argument to the decision appointing the Investigating Accountant*. The decision itself, can he claimed, be severed and what emerges is a body of information." (emphasis added). Here it will be noted that it was counsel for *the first named respondent* who then cited the judgment of Henchy J. in *Cassidy v. The Minister for Industry and Commerce* [1978] I.R. 297 (referred to earlier) as being one of the authorities now being relied on by the *applicant* in these judicial review proceedings). This demonstrates the very close relationship between the issues herein and those raised before the Supreme Court.

32. At p. 481 of the same judgment the following passage occurs which again is of importance:

"Insofar as the use of the accountant's report was concerned, it was submitted that the severance argument would apply. It was perfectly possible to exclude those parts of the report which represented the fruits of the impermissible parts of the investigation. The first respondent cited a number of examples of the severance of different types of legal instruments, though *Cassidy v. Minister for Industry* and Commerce [1978] I.R. 297 remained the principal authority. The decisions in *State (McKeown) v. Scully* [1986] I.R. 524 (a finding of suicide in an inquest verdict) and *Glencar Exploration plc v. Mayo County Council* [1993] 2 I.R. 237 one provision of a County Development Plan prohibiting the grant of any permission for mining were examples of courts deciding that they could annul severable parts of a decision. In other cases it has been decided that an impugned provision was not severable. In the case of legislation found to be repugnant to the Constitution, the question is one of interpretation of the legislative intent. If severance were to have the effect of leaving in force a legislative provision that would not represent the intent of the legislature, severance would not take place in spite of the provisions of Article 15.4.2 of the Constitution".

Thereafter the judgment discussed the authorities of *Pigs and Bacon Commission v. McCarron and Company* [1981] I.R. 451 and *Cassidy v. The Minister for Industry and Commerce,* (previously referred to) both authorities of which are now cited by the applicant.

33. At p. 488 the judgment of the court dealt with the appointment of the accountant thus:

"In the present case, the finding of the learned trial judge placed the dual objectives of the appointing decision on an equal level of importance. It is trite law that statutory powers must be exercised reasonably and in good faith and only for the purpose for which they were granted. The pursuit of the impermissible objective was as important to the first respondent as the permissible one. Such an exercise of delegated power cannot be allowed to stand."

The judgment continues:

"Neither do I think the appointing decision (emphasis added) can be rescued in part by severing the good part from the bad part. *In Pigs and Bacon Commission v. McCarron and Company* [1981] I.R. 451, O'Higgins C.J. at p. 469 distinguished *Cassidy v. Minster for Industry and Commerce* [1978] 1 I.R. 297 on the ground that " … the orders made by the Minister stood and continue to operate to the extent and in a manner contemplated by the empowering legislation.

In *Pigs and Bacon Commission v. McCarron and Co*., the authority had made an order for the payment of a specified amount of levy and the court could not re-write that by substituting a reduced levy."

Upon that basis the court concluded that the *appointing decision* in this case was a single one and that it was not

possible for a court to sever it.

34. At p. 489 having specifically recited that the decision of the first respondent to appoint the Investigating Accountant should be set aside, the court turned to the consequences of the invalidity of that decision:

> "… As it happens the investigating accountant has already reported to the first respondent. The Compensation Fund Committee, following a specially convened meeting on 9th February, 1996 at which the applicant attended, formed the opinion that there was evidence of misconduct including serious breaches of the solicitors Account Regulations which it considered warranted an inquiry by the disciplinary Tribunal of the High Court, to which the matter was thus referred. It is common ground that in reaching this conclusion the compensation fund committee considered the report of the Investigating Accountant."

35. The judgment adds:

> "As appears from the summary of the submissions of counsel for the applicant it is claimed that it follows from any decision setting aside the appointing decision, that the *material gathered* (emphasis added) *by the investigating accountant appointed cannot be used against the applicant for any purpose, relying on the criminal law cases referred to in this judgment*". Fennelly J. then proceeded to deal with the authorities on the exclusionary rule particularly the People (*Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110. Having dealt with the illegality attendant upon the investigation the judgment thereafter turned (on P. 491 of the Report) to the question of the so called "hidden agenda". Because of its particular importance this finding will also be quoted in *extenso*: even at risk of repetition.
>
> " … One of the circumstances which I believe had a particular influence in the present case was the concealment by the first respondent of the so called "hidden agenda", namely the investigation of fraudulent claims. The learned High Court judge has given an account of the hearing of an interlocutory injunction application brought by the first respondent before Costello J. at the end of July 1993. That learned judge granted an interlocutory injunction against the applicant requiring him to produce all files and other documents required. However the argument on behalf of the applicant was limited to the question of the privilege attaching to client files. Kearns J. found that he had no real opportunity of addressing other issues. In reality, the "hidden agenda" had not been admitted by the first respondent at that stage. Costello J. was not informed that the first respondent was engaged in an investigation of the pursuit of fraudulent claims. The absence of this knowledge deprived the applicant of the opportunity to ask the court to order the first respondent to desist from continuing that aspect of the investigation. If he had been in a position to challenge that part of the investigation, the third respondent's report would not have contained any material about the processing of spurious claims. That factor weighs heavily in the scales against permitting the first respondent to use the report of the accountant, as it stands."

36. That judge added:

> "Furthermore I think the report of the third respondent is an integral step in the regulatory procedure. If the appointment of the third respondent was invalid, as I think it was, then the report of the third respondent on her investigation was unauthorised, though part of the material contained in the report could legitimately have been gathered. While, as was pointed out at the hearing of the appeal, the report being the product of an enquiry, cannot be quashed as if it were a decision, I think it is *indissociable from the decision of the Compensation Fund Committee based upon it, which I think should be quashed. The Committee clearly had the entire report before it. It is not necessary to make any further order at this stage. The order I propose does not prevent the committee from making a new decision based on evidence properly gathered. Accepting as I do, by analogy the approach outlined by Kingsmill Moore J. to the use of illegally obtained evidence in criminal cases, I do not think that, in the absence of evidence of deliberate and knowing abuse, it inhibits a professional disciplinary body from relying on evidence, which could have been lawfully acquired but was in fact gathered as a consequence of a decision rendered invalid by the contemporaneous pursuit of an unauthorised person. On the other hand for the reasons already given I do not believe that the first respondent should be permitted to rely on the evidence of the processing of spurious claims*". (emphasis added).

37. It is clear that the decision which the court had in mind in the concluding passage was not the *appointing* decision but the decision made by the Compensation Fund Committee to refer to the Disciplinary Tribunal, because it contained material which the court had determined was unlawfully obtained that is the section dealing with bogus claims namely section C. The phrase "on the other hand" is self explanatory, and would be so to any objective reader.

38. These findings must also be seen in the light of the findings made by Kearns J. in relation to the generality of Ms. Foley's evidence, save in respect to the nature of her appointment. In his judgment Kearns J. considered that Ms. Foley's evidence on the issues that she was investigating was both truthful and precise. This primary finding of fact was undisturbed by the Supreme Court.

39. On the basis of the quotations to which reference is now made in full context this court can only conclude that the interpretation urged by the applicant is, both tenuous and contrived. Mr. Donal O'Donnell S.C. on behalf of the respondent has stated the case advanced on behalf of the applicant is an exercise in "self deluded semiotics in drawing critical distinctions between the terms "report" and "evidence"." The Court will not got that far. But when placed in context I do not consider that the case of the applicant can in any sense be seen as being premised on an objective or fair reading of the Supreme Court judgments. Furthermore, as is evident, the distinction which is now sought to be made between the "report" and "evidence" at no stage was made in the Supreme Court, nor is it a distinction that makes any sense.

40. The clear thrust of both judgments of the Supreme Court refute the artificial distinction now sought to be made between the terms "evidence"; "report;" "material"; and "information". The submission made by the applicant was that all three of the sections of the report, that is A B and C fell. That was not the finding. The Supreme Court held in two judgments that section C fell. Thus the distinction which can be made is as correctly described, a "vertical" division between the three sections.

Only at this hearing was it contended that there is any question of a *horizontal* distinction to be made so as to preclude the deployment of section B. This was not a point made to the Supreme Court (see, in this context *A v. Medical Council Supreme Court* [2003] IESC 70 (19 December 2003). But that court had the opportunity of considering in detail the totality of the report. It was not a point which arose during the course of the judgment wherein the dual purpose of the report was discussed, particularly in the passages from Murphy J's judgment of April 2001 to which reference has been made earlier. Moreover it is quite clear from the passages to which reference has been made from the first judgment, particularly those at p. 472, 473 and 474 of the report that what the court had in mind is what was thereafter reflected in its second judgment; that is a vertical distinction between section C and the remainder of the report. This was also reflected in a portion of the Order of the Supreme Court. At the bottom of p. 3 of the

order the following is recited.

> "And the same being listed for judgment on 4th day of April, 2001 and being called on accordingly in the presence of said respective Counsel.
>
> And Judgment having being delivered the court doth direct that the matter be re-entered on a convenient date to hear arguments on two issues namely
>
> 1. Whether the appointment of Ms. Foley by the Society for purposes which admittedly included the investigation of spurious or bogus claims by the applicants firm rendered her appointment wholly invalid in part only.
>
> 2. Whether the Society or any committee thereof is entitled (by reason of the judgment and order of Costello J. dated 29th July, 1993 or otherwise) "to make use of all or any part of the information obtained by it as a result of the investigation carried out by Ms. Foley".

It seems to me that this phraseology is precisely reflected at p. 474 of the second judgment. Moreover reference should again made to p. 6 of the Order which deals with the issues of prohibition. Among the orders granted by the court were:

> "3. Prohibition to prohibit the respondents from allowing or seeking to make any use whatsoever *of the evidence gathered by the third named respondent in investigating spurious claims and the material concerning the processing of spurious claims and in particular from relying on "section C" of the investigation report of Aisling Foley the third named respondent dated 19th December, 1995 and identified by the hearing* "C OTHER MATTERS ARISING FROM AN EXAMINATION OF THE FILES" in the said investigation report and IT IS HEREBY ORDERED accordingly and that as so varied the said judgment and order do stand affirmed."
>
> Quite clearly a distinction is made there between section C and the other portions of the Report in the order of the Court.
>
> A number of points arise therefore. These are: first that the Supreme Court had it considered necessary, would have distinguished between the terms "evidence" "report" and "information". Second, had it deemed it necessary the Court would have granted orders of prohibition in relation to the other portions of the report. Third, a distinction was clearly made on the basis of the authorities cited on the exclusionary rule between section C and the remaining sections.

41. In my view the argument advanced by the applicant fails entirely on these grounds.

Ruling on "the *Vires* Issue"
42. In the course of the written submissions the applicant sought to make an argument in relation to the question of vires. In essence the case made was as follows:

> "It is submitted that there is in fact no report by an accountant appointed under Regulation 29 of the Solicitors Accounts Regulations, 1984 (S.I. 302/1984). Neither is the report prepared by an authorised person pursuant to Regulation 28 of the Solicitors Account Regulations 2001 (S.I. 241/2001). Accordingly the decision of the Compensation Fund Committee (CFC) to direct the attendance of the applicant at a hearing of the CFC in order to examine him is *ultra vires* the powers of the respondent under the accounts regulations."

43. That Court declined to permit the applicant advance such submissions on the grounds that such an issue constituted a ground for which leave had not been granted. No case was advanced as to why the Court should extend this to add such an additional ground; nor was any ground and sufficient reason given as to why this ground had not been advanced in the leave application. A note of the ruling is appended to this judgment, agreed by Counsel.

Fair Procedures
44. A further argument was advanced by the applicant on the question of fair procedures. The authorities relied on by the applicant were *Glover v. BLN* [1973] I.R. 388; *O'Brien v. Bord na Mona* [1983] I.R. 255; *Flanagan v. University College Dublin* [1988] I.R. 724; *Gilligan v. Governor of Portlaoise Prison and Others* (Unreported, High Court, McKechnie J. 12th April, 2001); *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. p. 54. The applicant contends that the principle of fairness of procedures includes the right of the applicant to a proper and effective opportunity for him to meet the case against him and to be informed of and clarification made of the totality of the documentation which it had furnished, considered and relied on by the Compensation Fund Committee. This is particularly important, it was contended, in circumstances where the respondent had already been found by the courts to have allegedly misused its powers under the Accounts Regulations and (allegedly) to have done so in disregard of the applicants rights to fair procedure. The matters at issue for the applicant were potentially professionally serious. The consequences of a decision by the Compensation Fund Committee can include:

> a determination that there had been breaches of the Solicitors Accounts Regulations;
>
> > an opinion that there was evidence of professional misconduct; the imposition of a liability for the costs and expenses of an investigation; and the report and a referral of the matter to the Disciplinary Committee of the High Court for an inquiry.

45. In *O'Duffy v. The Law Society of Ireland* (Unreported judgment O'Neill J. 4th March, 2005) that judge identified the role of the Compensation Fund Committee:

> " … The disciplinary process was a staged process, which involved in the first place the gathering of information either from a complaint by a client or a routine inspection of a solicitors practice; a hearing before the relevant committee in this case, the Compensation Fund Committee; a referral to the Disciplinary Tribunal; a *prima facie* decision by the Disciplinary Tribunal; a full oral hearing before the Disciplinary Tribunal; a hearing before the President of the High Court, and finally a ruling by the President of the High Court. In this case the applicant has sought to interrupt the process at a very early stage namely the stage of referral by the Compensation Fund Committee to the Disciplinary Tribunal and before any decision has been taken by the Disciplinary Tribunal that a *prima facie* case is made out and before any charges of misconduct are formulated at all" (page 5 of unreported judgment).

46. In the instant case it may be observed that the order sought by the applicant is at a point earlier even than that arose in the case of *O'Duffy*. Here the Committee especially established for the task has not yet even been permitted to make any decision on the

question of referral to the Disciplinary Tribunal. It is impossible to avoid the conclusion that at this hearing such a challenge is premature and inappropriate until the procedures (including as they do ample opportunity for the applicant to appear and make submissions) have been allowed to proceed to conclusion whatever it may be. In the course of its second judgment the Supreme Court stated that the respondent can use evidence ("absent evidence of deliberate and knowing abuse") by the respondent. It is clear from the context that that Court considered that there was in fact an absence of such evidence before the Supreme Court. No such deliberate or knowing abuse is alleged in these proceedings. Furthermore the judgment of Kearns J. on 31st July, 2003, on the issue of pleading and the claim for damages, and Geoghegan J. (on appeal) in the Supreme Court on 21st April, 2005, both reject a claim for damages for misfeasance of public office, and reject any claim of deliberate and knowing abuse by the respondent. It is in this evidential context that the issue of fair procedures must now be seen even were such issues not raised prematurely.

47. The essential function of the committee in respect of disciplinary matters is to decide whether or not the matter should be referred to the Disciplinary Tribunal. There are further steps which must be taken before the Disciplinary Tribunal before there can be any adjudication on the substance of the complaint nonetheless the applicant complains that certain matters referred to in a letter from the Committee of August 2003 (received by his firm on 8th August of that year) do not in fact constitute matters which ought to be referred to the Disciplinary Tribunal. He contends that such material might tend to exonerate him. This considered of:

(i) Information gathered by the chartered accountants acting on behalf of Ms. Foley.

(ii) Attendance notes and other material regarding the estate of Charlotte McDonald deceased; the executor thereof.

(iii) The accountant to the estate, the purchaser of certain property and the accountant to the Dublin Archdiocese.

It is unnecessary to recite the contents of the letter in detail. The applicant required this information and material be considered. But the committee itself actually provides for him a forum to make those submissions regarding material omitted from the Report. Similarly if he contends that there are any other matters not adverted to in the report or documentation referred to in correspondence in August 2003 which when understood provide an acceptable explanation for the matters referred to in that letter, then once again the committee's deliberations offer an opportunity for the applicant to persuade the committee of the merits of his contention. If he were to fail to persuade the committee on any of these items he may still avail of the opportunity of making submissions to the Disciplinary Tribunal, and if necessary to the President of the High Court. The observations of O'Neill J. in *Duffy v. The Law Society* are apposite:

> "I would accept the submission of Counsel that this court should not in judicial review proceedings or indeed in any other proceedings seek to restrain in advance the admissibility of material to be offered in evidence before the Disciplinary Tribunal or indeed to regulate in advance the procedures to be followed. So far as the contents of the two accountants reports were concerned, in my view the admissibility into evidence of these reports or the contents of these reports is a matter which ought to be left to the determination to the Disciplinary Tribunal. The admissibility of this material can be argued before the Disciplinary Tribunal and it is entirely within their competence to make a determination on it. I am of the opinion that this conclusion is entirely in accordance with the well settled line of authority consisting of the case of *Byrne v. Gray* [1988] I.R. 31*, Berkley v. Edwards* [1988] I.R. 217, *Director of Public Prosecutions v. Windle* [1999] 4 I.R. 280 *and Blanchford v. Hartnett* [2001] I.R. 193."

48. These observations apply with even greater force in the instant case. On the basis of the findings made earlier, the Supreme Court has given guidance as to the criteria for admissibility of evidence in general. In as much as any specific point is now raised or sought to be raised by the applicant, it can and should be addressed in the first instance to the Committee, and thereafter (if necessary) to the Disciplinary Tribunal. The court rejects the contention that the utilisation of part B of the report constitutes an unfair procedure for the same reason.

49. In this context the court must now look at a number of other areas where it is contended by the applicant that he has been denied fair procedures (the respondent at all stages having been advised by senior counsel eminent in this aspect of law).

50. The first of these arises in relation to a letter of 18th December, 1995.

The applicant complains that a letter dated 18th December, 1995 was not included with the documentation which was referred by the respondent to the committee. This is dealt with in paragraph 5 of the affidavit of Joan O'Neill sworn on behalf of the respondent on 29th March, 2004. She explains that because the letter was received after the original report was furnished to the Compensation Fund Committee the letter aforesaid was furnished separately. It was not furnished to the present committee due to an oversight. However the applicant himself has had the letter since at least January 1996, and was, and is, fully entitled to refer it to the committee. The letter in question is one from Admiral Underwriting Agencies (Ireland) Limited. It is signed by a Mr. Campbell R. Scoones a director of that company. It relates to a question raised by an accountant acting on behalf of the Law Society that the applicant might have manipulated the "client" account held by him in the name of Admiral Underwriting Agencies. It is clear that the letter (which was received by the applicant on 22nd January, 1996) contains material which might arguably be beneficial to the applicant's case. But nowhere is it in anyway contended that the applicant is placed at a disadvantage or prejudiced by what has occurred. This must be seen in the context of the role of the committee in question. Its function is limited in nature. Secondly and more immediately there is no reason whatsoever advanced why the applicant himself could not furnish this letter to the Compensation Fund Committee for the purposes of its consideration and deliberation.

51. A further point raised by the applicant is in relation to section B(9) of the report. The court has been informed that this has been redacted by the respondent on the grounds that it could have been construed as containing evidence within the category of evidence upon which Fennelly J. had indicated the Law Society could not rely. Unlike the Committee, the applicant knows what is contained in paragraph B(9) since he has both the letter of August 2003 and the original unedited report. Nowhere has the applicant pointed to any information contained within section B(9) the omission of which is detrimental to him. If the applicant believed that the Committee should be aware of paragraph B(9) for some reason then it open to him to bring it their attention. However the extreme paradox of the applicant's position is that he places himself in the role of seeking to complain that a matter which might be construed as being prejudicial to him, and which has been ruled out on the basis of the Supreme Court judgment, was not brought to the attention of the Committee. The court does not consider that any persuasive grounds have been shown under this heading.

52. If there is any other relevant documentation which can assist the applicant in relation to this matter it is open to him to adduce this precise documentation before the committee and make such submission he deems appropriate in relation thereto, including submissions as to the relevance of the document, and as to whether the Committee should draw any conclusions or inferences from the fact that the documentation has not been produced by the respondent. It is difficult to understand how the applicant can advance a case that the court should be asked to undertake this task in advance of any submissions to the committee and furthermore what it might be expected to do so in the absence of the documentation in question.

53. It is further contended that paragraph B1, B3, B6, B8, B10, B11 and B12 of the report contains some material which is inadmissible in evidence. This contention is not accepted by the respondent. However it is a matter upon which the applicant is at liberty to make submissions to the Committee. If he succeeds he may persuade the Committee not to refer the material, or some portion of it to the Disciplinary Tribunal. It is self evident however that on its face section B does not deal with the question of bogus claims since section C of the report dealt with those matters. In this connection the court specifically rejects any contention made by the applicant to the effect that the fact that material arising in the guise of alleged accounting irregularities, as well as in the context of "bogus claims", precludes the utilisation of such material information or evidence in the context of alleged accounting irregularities per se. It is clear from the judgment of Murphy J. referred to earlier that this contention cannot succeed, although the applicant is at liberty to make such submissions or objections thereon as he may be advised.

54. This aspect of the argument of the applicant is based on the *authorities East Donegal Co-operative Limited v. Attorney General* [1970] I.R. 317; *The State (Lynch) v. Cooney* [1982] I.R.; *Cahill v. Sutton* [1980] I.R. 269; *Phillips v. The Medical Council* [1992] ILRM 469; *Donegal Fuel and Supply v. Londonderry Harbour Commission* [1994] I.R. 24; *Scarriff v. Taylor* [1996] 1 I.R. 242; *R. v. Criminal Injuries Compensation Board ex parte Lain* [1967] QB 864. However each of these authorities rely upon on the proposition that the court will intervene only where a person, who shows that a personal right of his has been breached or is liable to be breached by a decision purported to be made in the exercise of a power, has standing to seek, and the High Court has jurisdiction to give, a ruling as to whether the pre-conditions for the valid exercise of the power have been complied with in a manner that brings the decision within the express or necessarily implied range of the power conferred by the statute. The applicant must demonstrate that his interest has been adversely affected or stands in real or imminent danger thereof. For the reasons that have been outlined earlier such circumstances do not arise in the instant case. One of the authorities cited, that is *Phillips v. Medical Council* [1992] ILRM 469 which concerns investigation into the conduct of the applicant therein is particularly á propos. In that case a report had been prepared by an independent expert for the fitness to Practice Committee of the respondent which appeared to exonerate the applicant. He therefore sought to compel the respondent to discontinue the investigation. Carroll J. held the application to be premature:

> "Judicial review does not exist to a direct procedure in advance to but to make sure that bodies which have made decisions susceptible of review have carried out their duties in accordance with the law and in conformity with natural and constitutional justice. Since the High Court cannot anticipate or direct what the findings of the committee will be, the application for an order of prohibition against the holding of the inquiry on the grounds that it must of necessity be a nullity must also fail" (at p. 475).

The principles outlined in that decision are of equal application herein.

55. Some final assistance can be obtained on the issue of merits by reference to complaints made by a letter emanating from the Law Society on 20th January, 2004. In the course of that letter the Committee informed the applicant in relation to one query that: "the only matter which is before this division of the committee is part B of Ms. Foley's report. There is no other "evidence" whatsoever being relied upon by the committee". The applicants interpretation of this letter is that the committee's failure to consider and take into account the totality of the evidence lawfully gathered by Ms. Foley in the course of her investigation amounts to a denial to him of his basic constitutional rights to a fair hearing and fair procedures. This is neither a reasonable nor an objective construction of that portion of the letter which plainly deals with the evidence to be adduced "against" the applicant and in no way precludes him from adducing such material as he might wish which might exculpate him. Precisely similar considerations apply in relation to the earlier incidences cited of a want of fair procedures. Such unreasonable interpretations cannot be typified as the drawing of inferences from objective evidence. It may only be seen as the raising of procedural objections devoid of substance based on what can only be called a deeply flawed interpretation of the evidence.

The first question raised herein, that is the interpretation of the judgments of the Supreme Court should if it was thought to have merit, been raised before the High Court in the initial proceedings before Kearns J. and thereafter on appeal. This was not done, for reasons that are understandable. The question raised is devoid of substantive merit. Similar observations apply to the balance of the issues identified and raised herein

56. For the reasons outlined therefore the court will decline the application for judicial review.