Neutral Citation Number: [2009] IEHC 54

THE HIGH COURT

RECORD NO. 2005 1052 JR

BETWEEN:

DEIRDRE DE BURCA

APPLICANT

AND

WICKLOW COUNTY MANAGER and CHAIRPERSON OF WICKLOW COUNTY COUNCIL

RESPONDENTS

AND

FACHTNA WHITTLE

NOTICE PARTY

Judgment of Mr. Justice Hedigan, delivered on the 4th day of February, 2009

1. The applicant was elected to Wicklow County Council for the Bray constituency in 1999. She served in that capacity until 2007, when she was selected by the Taoiseach as a member of the 23rd Seanad Éireann.

2. The first named respondent is an appointed public official with responsibility for the executive functions and operational activities of Wicklow County Council.

3. The second named respondent is a publicly elected representative whose functions include presiding over meetings of Wicklow County Council.

4. The notice party is a member of Wicklow Town Council, having been first elected in 1999. In 2004, he was re-elected in that capacity and was further elected to Wicklow County Council. He is also a practising solicitor, being the principal of Haughton McCarroll solicitors.

5. The applicant seeks the following reliefs:

(a) an order of *certiorari*, quashing a report dated the 15th of June 2005 and prepared by the respondents pursuant to Part XV of the Local Government Act 2001 ('the 2001 Act'), on the basis that the respondents misconstrued the provisions of section 176(2) of the 2001 Act, which deals with 'beneficial interests' requiring disclosure.

(b) a declaration that a professional person has a beneficial interest which falls to be disclosed under Part XV of the 2001 Act, specifically section 176(2) where the said professional person has an interest in a particular motion or resolution by reason of his profession; and

(c) a further declaration that the respondents erred in law in concluding that the notice party had no beneficial or pecuniary interest in lands at Ballylusk Quarry then proposed for re-zoning and/or that the notice party had adequately declared his interest for the purposes of Part XV of the 2001 Act.

I. Factual and Procedural Background

7. On the 12th of July 2004, the notice party attended a meeting of Wicklow County Council ('the County Council') for the purposes of discussion of the Wicklow County Development Plan. At that meeting, he proposed the re-zoning of certain lands at Ballylusk, Ashford in the County of Wicklow in order to extend the scope of an existing quarry and to develop a small Enterprise Park. This proposal was seconded and adopted as a material amendment to the draft Development Plan. However, it should be noted that the amendment was ultimately deleted from the Plan at a meeting of the County Council on the 1st of November 2004. It is not disputed that, at all times, the notice party disclosed the basic fact that he was a solicitor practising in the local area.

8. On the 17th of August 2004, the applicant made a complaint against the notice party to the designated Ethics Registrar for the County Council, Mr. Tom Murphy, requesting that an investigation into the matter be carried out. In her complaint, the applicant contended that the notice party's firm were the solicitors on record for the owner of the lands and that the notice party had personally acted for the owner in judicial review proceedings against An Bord Pleanála in respect of a ruling relating to the quarry.

9. The applicant further contended that the failure to declare such an interest was in contravention of Part XV of the 2001 Act. She submitted that the notice party ought to have declared his professional involvement with the quarry and recused himself from any re-zoning decision in relation to the land.

10. Upon receipt of the complaint, the Ethics Registrar advised the respondents that they were the appropriate parties to investigate the complaint pursuant to section 174 of the 2001 Act.

11. The original complaint made reference to a number of supporting documents evidencing the notice party's role in both

proposing the motion to the County Council and also acting for the quarry owner in matters which at the time remained extant before the courts. This documentation, however, was not included with the complaint and copies of same were requested in writing by the respondents on the 2nd of September 2004. The material was ultimately provided by the applicant on the 11th of October 2004, following a series of further written requests.

12. On the 14th of December 2004, the Ethics Registrar forwarded to both the applicant and the notice party a copy of all correspondence in relation to the complaint. The Ethics Registrar further indicated that the respondents would be asking for written submissions from both parties, following which it was proposed to hold a meeting at which both parties and their representatives would be present.

13. The applicant replied to the Council on the 22nd of December 2004, indicating that she had nothing further to add to her previous correspondence and could not be of further assistance to the investigation. The applicant submitted that her complaint was now a matter of public record and had been substantiated by the documentation submitted by her. The applicant was further of the opinion that the facts of the case were largely uncontroverted and, as such, the issue for consideration by the respondents was the proper construction of Part XV of the 2001 Act. This position was confirmed by the applicant on the 7th of January 2005 and on the 2nd of March 2005.

14. The respondents specified the 15th of April 2005 as the cut-off date for written submissions. The notice party prepared written submissions but the applicant chose not to do so. A meeting was then arranged for the 18th of May 2005 ('the meeting'), to which both parties were invited. The applicant declined to attend but the notice party attended and made submissions through the medium of his legal representative.

15. Among the submissions made by the notice party at the meeting were: that although he was the principal in Haughton McCarroll solicitors, he was only aware of the judicial review proceedings between the quarry owner and An Bord Pleanála in a general way; that the re-zoning proposal, even if ultimately adopted, would have no effect on the judicial review proceedings; and that the failure of the applicant to participate fully in the investigation undermined the fair procedures adopted.

16. Following the meeting, the respondents compiled a draft report on the complaint which was circulated to the applicant and the notice party on or about the 10th of June 2005. The parties were given 5 days during which to make observations on or objections to the content of the report. Neither the applicant nor the notice party availed of this opportunity.

17. On the 15th of June 2005, the final report on the complaint ('the report') was issued by the respondents. This report included, *inter alia*, the submissions made by the notice party at the meeting and the submissions of the applicant which were made in earlier correspondence. The report concluded that although the proposal of the motion by the notice party was "unwise" and "an error of judgment" on his part, it did not amount to a breach of the requirements of Part XV of the 2001 Act. In particular, the report found that there was no evidence that the notice party had a beneficial or pecuniary interest in the outcome of the motion. The report did, nonetheless, proceed to make a number of general recommendations as to the procedures to be adopted under Part XV of the 2001 Act. It also criticised the applicant for her failure to attend the meeting.

18. Arising out of these facts, the applicant now seeks *certiorari* in addition to certain declaratory reliefs. The applicant first came before the High Court on the 5th of October 2005, at which point the matter was adjourned for a number of days. Leave to proceed by way of judicial review was ultimately granted by O'Neill J. in the High Court on the 10th of October 2005.

II. The Submissions of the Parties

(a) Delay

19. The respondents and the notice party have submitted, by way of preliminary objection to the applicant's case, that the applicant has failed to comply with the requirements of the Rules of the Superior Courts ('the Rules') in bringing this application before the Court. In particular, they place reliance on Order 84 rule 21 of the Rules which provides as follows:-

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

20. It is important to note at this juncture that the Rules prescribe different limitation periods in respect of the different categories of relief being sought by the applicant in the present case. In respect of the application for *certiorari* of the report, a maximum period of 6 months is provided for, whereas the declarations sought are subject to a limitation period of 3 months duration. In both cases, however, the Rules make clear that there is a supervening requirement that the applicant should make her application for leave 'promptly'. These limitation periods may only be avoided in circumstances where the Court is of the opinion that there are 'good reasons' for doing so.

21. The report was delivered to the applicant on the 15th of June 2005, while the applicant first came before the High Court on the 5th of October 2005, some 3 months and 20 days later. The respondents and notice party therefore submit that the expiry of this period prior to the making of the application for leave is evidence that the applicant did not act 'promptly' for the purposes of the application as a whole and, furthermore, that she was clearly out of time in respect of the declaratory relief. They further contend that there are no good reasons for extending time in the present case.

22. By way of a response to the allegation that she did not act promptly, the applicant submits that the respondents and the notice party are required to demonstrate the existence of some form of prejudice before an application brought within

the designated time period can be dismissed on the grounds of delay. She submits that no attempt has been made on the part of the respondents, or indeed the notice party, to mount such a contention.

(b) Justiciability
23. The respondents and the notice party argue that the report does not constitute a decision by a public body which is amenable to judicial review. If they are correct in this contention, they further submit that the within proceedings are *per se* inadmissible.

24. The main basis on which the respondents and the notice party make this contention is that the report had no material effect on the rights of any party, in particular the applicant. They contend that such a lack of legal consequences amounts to a state of 'legal sterility' in the context of which judicial review would be a futile and inappropriate exercise.

25. This argument is contested by the applicant who submits that the report did in fact have serious implications for her legitimate interests. Firstly, she points to the criticism to which she was subjected both in the report and in the general media subsequent to its release, which she suggests was unjustified and acutely injurious to her reputation as a publicly elected representative. She places particular importance on the fact that the report occurred in the context of an ethics investigation, during which reputations are necessarily subjected to scrutiny, and also on the fact that the report is now a matter of public record. Secondly, the applicant submits that she has an entitlement to ensure that her complaint made under Part XV of the 2001 Act should be dealt with in accordance with law. In this regard, she submits that the deficiencies in the methodology adopted mean that inadequate consideration was given by the respondents to her concerns.

26. Further on the point of justiciability, the notice party advanced an argument to the effect that the subjecting of the report to judicial scrutiny would be contrary to the purposes of Part XV of the 2001 Act, which establishes an 'Ethical Framework for Local Government Service'. He suggests that Part XV evidences, through its terminology, a clear intention on the part of the legislature that local authorities be afforded a broad discretion in determining the principles and procedures to be invoked when considering a complaint made under its provisions. To this end, he submits that Part XV involves decisions of public policy which require assessments of an essentially political nature.

27. By way of a response to this argument, the applicant dismisses any suggestion that Part XV of the 2001 Act is some class of isolated regulatory regime which is alien to the workings of the courts. She points, by way of illustration, to the potential civil and criminal sanctions which may arise for a violation of Part XV under section 181. It should also be noted that section 182 provides for the disqualification of individuals convicted under section 181 from serving as a member of a local authority. Furthermore, she points to the strong public interest element to the legislation, which she suggests impels the Court to exercise supervisory jurisdiction.

(c) Locus Standi
28. Order 84, rule 20(4) of the Rules provides as follows:

> "The Court shall not grant leave [to apply by way of judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

29. The respondents and the notice party submit that the applicant lacks the requisite interest in this application to bring it before the Court. In particular, they submit that although she was a County Councillor at the time of the impugned act, she was not materially affected by the motion brought by the notice party, since she is not a landowner or member of the immediately adjacent community.

30. The respondents and the notice party further submit that the applicant has waived any standing which she might have had through her refusal to participate fully in the investigative process, in particular the meeting. They contend that the applicant is not now entitled to come to Court seeking *certiorari* of the report on foot of legal arguments which were not adequately raised by her throughout the complaint process.

31. The applicant replies by stating that she has more than sufficient interest to bring her application for judicial review. She does so by reference to the heavy criticism to which she was subjected in the report, which she submits has significant implications for her reputation, especially in light of the fact that the report forms part of the the public record of the State. Furthermore, she affirms that she had an entitlement to have her complaint dealt with in accordance with law. In support of this, she points to the strong public interest in the accurate and diligent investigation of ethics complaints.

32. Regarding her participation in the investigative process, the applicant submits that, having made her complaint, she was entitled to involve herself or not, as she chose, in the further process thereby initiated. She contends that her role in the process was as a trigger mechanism, prompting the investigation by the appropriate authorities, and nothing more. The applicant suggests that in the early phases of the investigation, she provided the respondents with all material within her possession or procurement which could be of assistance to the inquiry, following which she had nothing further to contribute since her factual account of events was not controverted.

(d) Error of Law
33. The applicant seeks to challenge the report of the respondents on the basis that the findings contained therein were premised on a fundamental misconstruction of Part XV of the 2001 Act, specifically section 176(2). She contends that the respondents failed to address properly the question which they were required to consider and, as such, the findings which they reached were *ultra vires*.

34. Section 175 of the 2001 Act deals with declarable interests. It provides inter alia as follows:

> "Each of the following interests is a declarable interest for the purposes of this Part:
>
> (a) any profession, business or occupation in which the person concerned is engaged or employed, whether on his or her own behalf or otherwise, and which relates to dealing in or developing land during the appropriate period;

(b) any other remunerated trade, profession, employment, vocation, or other occupation of the person concerned held by that person during the appropriate period…"

35. Section 176 of the 2001 Act considers beneficial interests. It provides as follows:

"(1) In respect of a resolution, motion, question or other matter which is proposed, or otherwise arises from or as regards the performance by the local authority of any of its functions under this or any other enactment, "beneficial interest" for the purposes of this Part, in relation to a person, includes an interest in respect of which:-

(a) he or she or a connected person, or any nominee of his or her or of a connected person, is a member of a company or any other body which has a beneficial interest in, or which is material to, any such matter,

(b) he or she or a connected person is in a partnership with or is in the employment of a person who has a beneficial interest in, or which is material to, any such matter,

(c) he or she or a connected person is a party to any arrangement or agreement (whether or not enforceable) concerning land which relates to any such matter,

(d) he or she or a connected person in the capacity as a trustee or as a beneficiary of a trust has a beneficial interest in, or which is material to, any such matter,

(e) he or she or a connected person is acting with another person to secure or exercise control of a company which has a beneficial interest in, or which is material to any such matter.

(2) A person shall also be deemed to have a beneficial interest which has to be disclosed under this Part if he or she has actual knowledge that he or she or a connected person has a declarable interest (within the meaning of section 175) in, or which is material to, a resolution, motion, question or other matter which is proposed, or otherwise arises from or as regards the performance by the authority of any of its functions under this or any other enactment.

(3) A person shall not be regarded as having a beneficial interest which has to be disclosed under this Part where section 167(3) is applicable or because of:-

(a) an interest which is so remote or insignificant that it cannot be reasonably regarded as likely to influence a person in considering or discussing, or in voting on, any question with respect to the matter or in performing any function in relation to that matter,

(b) being a ratepayer or a local authority tenant and in common with other ratepayers or tenants, or

(c) any other circumstances which may be prescribed by regulations made by the Minister."

36. Section 177 of the 2001 Act deals with disclosure by members of local authorities of pecuniary or other beneficial interests. It states:

"(1) Where at a meeting of a local authority or of any committee, joint committee or joint body of a local authority, a resolution, motion, question or other matter is proposed or otherwise arises either:-

(a) as a result of any of its functions under this or any other enactment, or

(b) as regards the performance by the authority, committee, joint committee or joint body of any of its functions under this or any other enactment,

then, a member of the authority, committee, joint committee or joint body present at such meeting shall, where he or she has actual knowledge that he or she or a connected person has a pecuniary or other beneficial interest in, or which is material to, the matter:-

(i) disclose the nature of his or her interest, or the fact of a connected person's interest at the meeting, and before discussion or consideration of the matter commences, and

(ii) withdraw from the meeting for so long as the matter is being discussed or considered,

and, accordingly, he or she shall take no part in the discussion or consideration of the matter and shall refrain from voting in relation to it.

(2) Where a member of a local authority, committee, joint committee or joint body of the local authority has actual knowledge that a matter is likely to arise at a meeting at which that member will not be present and which, if he or she were present, a disclosure would be required to be made under subsection (1), then that person shall in advance of such meeting make such disclosure in writing and furnish it to the ethics registrar.

(3) There shall be recorded in the minutes of any meeting referred to in subsection (1) or (2) a reference to any disclosure made for the purposes of either of those subsections and of any subsequent withdrawal from the meeting and such disclosure shall be recorded in the register of interests.

(4) A member of a local authority or of any committee, joint committee or joint body of a local authority shall neither influence nor seek to influence a decision of the authority in respect of any matter which he or she has actual knowledge that he or she or a connected person has a pecuniary or other beneficial interest in, or which is material to, any matter which is proposed, or otherwise arises from or as regards the performance by the authority of any of its functions under this or any other enactment."

37. The applicant accepts that the notice party satisfied the ordinary requirements of section 175 of the 2001 Act by means of his declaration that he was a practicing solicitor. However, she submits that he failed to comply with section 176(2) in that he did not declare prior to tabling the re-zoning motion that he had a professional connection with the quarry-owners in respect of the planning status of the very same piece of land.

38. The applicant contends that the effect of section 176(2) is to convert a declarable interest to a beneficial interest in circumstances where a councilor has actual knowledge that he has a declarable interest (within the meaning of section 175) in, or which is material to, a motion such as that proposed by the notice party. The applicant further submits that the professional connection between the notice party and the quarry owners could not be regarded as 'so remote or insignificant' as to fall within the exception prescribed in section 176(3) of the 2001 Act.

39. The applicant suggests that section 177(1) of the 2001 Act envisages that a local authority member in the same position as the notice party should make a declaration of their beneficial interest in respect of the particular motion before the discussion of the matter commences. They are then obliged to withdraw from the relevant meeting and to take no part in any debate or vote on the issue.

40. It is on the basis of this suggested construction of Part XV of the 2001 Act that the applicant contends that the respondents were guilty of so manifest an error of law as to render their report a nullity. She asserts that the respondents failed to recognise that section 176(2) imposes a discreet legal obligation on professional persons in respect of motions or resolutions before the Council where, depending on the nature of that professional relationship, such persons may have separate and distinct obligations of disclosure. She further submits that it is evident from the report that the respondents did not even purport to adjudicate on the appropriate question of whether the notice party's conduct constituted a violation of section 177(1) of the 2001 Act. In light of this, she suggests that the report was based on a fundamentally erroneous view as to the jurisdiction being exercised by the respondents and must therefore be set aside.

41. The respondents and the notice party dispute the interpretation of the provisions of Part XV of the 2001 Act proffered by the applicant. They also contend that there is no evidence in the report to suggest that the respondents failed to consider the appropriate question and that, in the absence of such evidence, a presumption of regularity must arise.

42. The respondents and the notice party submit that, irrespective of whether a literal or a purposive approach is adopted to the interpretation of the 2001 Act, the provisions of Part XV cannot be construed as having the effect suggested by the applicant. They contend that were professional persons, who have been chosen by the electorate to serve as local authority members, obliged to make declarations of interest and withdraw from meetings every time a motion or resolution involved one of their private clients, it would be extremely difficult for professional persons to continue to so serve. This, in their submission, would be inimical to the proper functioning of the public service and would make it impossible for local authorities to carry out their statutory functions.

43. The respondents and the notice party further contend that the question of whether a particular connection or activity falls within the provisions of section 176(2) of the 2001 Act is fundamentally a determination of fact which is more appropriately left within the province of the investigators. They submit that the generality of the provisions of sections 176(2) and 177 is clear evidence that the Oireachtas intended that this question was one which would depend heavily on the circumstances of the individual case. In response to this point, the applicant submits that section 176(3) of the 2001 Act negatives any possibility that the legislature intended that there be such a broad discretion afforded to decision-makers in the position of the respondents. The express exclusion of what she calls *de minimis* interests from consideration implies, by logical inference, in her submission that all other interests *are* covered.

44. As noted already, the respondents and the notice party suggest that there is no evidence in the report that the respondents failed to consider the correct question. To this extent, they seek to invoke the administrative law maxim of *omnia praesumuntur rite esse acta*; all acts are presumed to have been done correctly until the contrary is shown. The applicant replies by contending that to uphold a report, which affords no meaningful treatment to the appropriate statutory provisions, based on such a presumption would be an unjustifiable exercise in legal formalism.

III. The Court's Assessment

(a) Delay

45. The respondents and the notice party rely on the cases of *O'Flynn v. Mid-Western Health Board* [1991] 2 IR 223 and *Slattery's Ltd. v. Commissioner of Valuation* [2001] 4 IR 91 as authority for the proposition that delay is not a matter to be dealt with exclusively at the leave stage, and must also be addressed at the substantive hearing. I am satisfied that this is the correct approach.

46. In respect of the declaratory relief, the applicant sought leave to apply by way of judicial review several weeks after the expiry of the outer limit of 3 months prescribed by the Order 84, rule 21(1) of the Rules. In *Solan v. Director of Public Prosecutions* [1989] ILRM 491, Barr J. commented at page 493 that:

> "In the absence of evidence explaining delay, there is no basis on which the court can exercise its discretion to grant an extension of time for the making of applications."

47. No evidence has been produced before the Court to explain this delay. No case has been made that there were special circumstances justifying such an extension of time in the present case. In light of this, I am of the opinion that the applicant must fail in her application for the declarations set out in her statement of grounds.

48. Having regard to the applicant's claim for *certiorari* of the report itself, it is clear that her application for leave was made well within the 6 month period prescribed by the Rules. It therefore falls for consideration as to whether she acted 'promptly' in the circumstances of this particular case. In the Supreme Court decision of *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] 2 IR 270, Fennelly J. considered the requirement and stated at page 302:-

> "[A] claim cannot normally be defeated for delay if it is commenced within the relevant period. There would need to be some special factor such as prejudice to third parties…"

Fennelly J. re-iterated this approach while speaking for the majority of the Supreme Court in *O'Brien v. Moriarty* [2006] 2

IR 221 where he stated at page 237 that:-

> "[M]atters have not reached the stage where an application made within time can be defeated in the absence of some special factor."

49. Applying this principle to the present case, no suggestion has been made on behalf of the respondents or the notice party that any of them have been unduly prejudiced in any way. Therefore, taking into account the conduct of the applicant, the position of the other parties and the general circumstances of this case, including the part of the year throughout which the delay is alleged to have occurred, it seems clear to me that the applicant should not be prevented from bringing her application for certiorari on this basis.

(b) Justiciability

50. It is well established that formal reports or other investigative determinations reached by public bodies may be subject to judicial review in certain circumstances. The fact that a report such as that in the present case is portrayed as a mere fact-finding exercise does not, of itself, prevent it from impacting upon the rights of the parties involved. In *Maguire v. Ardagh* [2002] 1 IR 385, Hardiman J. was unconvinced by the argument that an Oireachtas Committee Inquiry into a fatal shooting by members of An Garda Síochána was 'legally sterile' and therefore immune from judicial review. He stated at page 670:-

> "I have to say that I find the phrase "legally sterile" extremely unattractive in any realistic human context. Counsel for one of the respondents, on being asked whether he would repeat the phrase without the qualifying adverb said, very naturally, that he could not do so. One is therefore left with an entity described as a "finding of fact or conclusion" which, it is agreed, could in practice have an adverse affect on an individual. But that, the respondents contend, does not take away from the central truth that "in law" it is of no effect at all. I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law. If this is the law then it can only be described as a legal fiction. No ordinary person, such as one of the applicants, on receiving the letter of directions to attend, could possibly interpret it in the artificial sense suggested. Even more significantly, no ordinary person hearing that a parliamentary committee had found as a fact that a named person had unlawfully killed another would be expected, by anyone other than a small minority of lawyers, to reflect that that of course was merely a matter of opinion. It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any persons rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has "no" effect. Not merely is it conceded that it would have effects: these effects would sound,inter alia , in the area of the affected person's constitutional rights. When, later in this judgment, I consider the United States cases on the House un-American Activities Committee, it will be seen that many persons have been economically ruined and socially outcast by virtue of decisions which are "legally sterile"."

51. A similar approach was taken by Quirke J. in de Róiste v. Judge-Advocate General [2005] 3 IR 494. In that case, the High Court held that an inquiry into the reasons for the applicant's dismissal from the Defence Forces could not be regarded as a simply inquisitive process and therefore unamenable to judicial review. In particular, Quirke J. placed emphasis on the aspersions which could be cast on the conduct and character of an individual in such a report. At pages 511-512, he cited the comments of Hardiman J. in *Maguire* and continued thus:-

> "The instant proceedings concern a process established by statute by the government of a sovereign State. It was conducted by a statutory personage entitled "The Judge-Advocate General". The process was concerned directly with matters relating to the reputation and good name of the applicant. The report which resulted from the process was adopted on behalf of the government and published. It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name whether favourably or adversely. He enjoys the right to a reputation and a good name. That right is constitutionally protected. I am satisfied that since the process undertaken directly concerned matters relating to the applicant's reputation and good name, its findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings."

52. In support of their arguments, the respondents and the notice party rely on the decision of this Court in *Ryanair v. Flynn* [2004] 2 IR 240. In that case, Kearns J. found that a report issued pursuant to an inquiry into an industrial dispute was not justiciable since there was no decision capable of being quashed and no legal rights of the applicant were affected by a purely fact-finding exercise. It seems to me, however, that a clear distinction can be drawn between that decision and the circumstances of the present case. In *Ryanair*, the applicant was a limited liability company and therefore did not enjoy the same personal rights under the constitution as the applicant does in the present case. Furthermore, the findings of the report in that case simply posed internal management difficulties for the applicant, rather than making particular negative findings against its conduct or character.

53. As a public representative, the reputational rights guaranteed to the applicant by Article 40.3.2º of the Constitution maintain particular importance. It seems to me that, following the publication of the report, much of the criticism which was levelled against her in the print and audiovisual media was unfair and vitriolic. The findings of the report, especially its criticisms of her, were at the foundation of this assault on her reputation.

54. The fact that the criticisms contained in the report now form part of the public record of the State serves only to amplify the ramifications for her, in particular should she wish to continue her career in public office. To allow such undue criticism of a conscientious local councillor to go unconsidered on the basis that it is of no consequence, or that it has no implications, would in my view involve a kind of legal fiction with potentially far-reaching consequences for the public service as a whole. In my view, therefore, the report did have material implications for the applicant.

(c) Locus Standi

55. The importance of the principle that applicants for judicial review should have a sufficient interest in the impugned determination has received considerable judicial attention. In Cahill v. Sutton [1980] IR 269, Henchy J. explained the rationale behind the requirement of locus standi as follows at page 283:

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

56. In *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 IR 270, Keane J. articulated the competing interests which exist when considering the question of standing. He stated at pages 308-309:

> "The authorities reflect a tension between two principles which the courts have sought to uphold: ensuring, on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of the absence of indisputably qualified objectors and, on the other hand, that the critically important remedies provided by the law in these areas are not abused. In the latter area, the courts have dwelt on occasions on the dangers of giving free rein to cranks and busy bodies. But it is to be borne in mind that the citizen who is subsequently seen to have performed a valuable service in, for example, bringing proceedings to challenge the constitutionality of legislation, while exposing himself or herself to an order for costs, may at the outset be regarded by many of his or her fellow citizens as a meddlesome busybody. The need for a reasonably generous approach to the question of standing is particularly obvious in cases where the challenge relates to an enactment of the Oireachtas or an act of the executive which is of such a nature as to affect all the citizens equally: see, for example, *Crotty v. An Taoiseach* [1987] I.R. 713. But it is also the case that a severely restrictive approach to *locus standi* where the decision of a public body is challenged would defeat the public interest in ensuring that such bodies obey the law. Nevertheless the requirement that, as a general rule, *locus standi* must be established where a person seeks to challenge the decision of a public body remains, although the criteria have changed over the years, a "sufficient interest" in the matter having replaced the somewhat more restrictive concept of a "person aggrieved". In the particular case of challenges by way of *certiorari*, with which these proceedings are concerned, the insistence on the party having such an interest reflects the policy of the courts which is intended to ensure that this most potent and valuable of legal remedies is not resorted to by the merely officious or men or women of straw who have nothing to lose by clogging up the courts with ill-founded and vexatious challenges."

57. At the outset, it should be noted that many of the arguments which have been rehearsed above in relation to justiciability apply with equal force under this heading. In that regard, I do not accept the argument that the alleged 'legal sterility' of the report serves to negate the putative standing of a party subjected to heavy criticism in its contents. The mere absence of civil or criminal legal consequences flowing from the report does not mean that the rights of parties can not be adversely affected.

58. Furthermore, the applicant in the present case is not a mere crank seeking to disturb the stability of the administrative regime, nor is she acting frivolously or vexatiously in the manner contemplated by Keane J. in *Lancefort*. I am satisfied that, quite apart from the implications for her constitutional right to a good name, the applicant as a public representative has a well-founded, actionable interest to ensure that high ethical standards in public office are maintained.

59. The applicant's standing in the present case is considerably enhanced by the fact that she was the complainant who initiated the entire investigative process. If the complainant in such circumstances were not permitted to challenge a purportedly erroneous report into allegedly unethical practices, the question would arise as to whether anyone could.

60. In respect of the issue of participation in the investigative process, I share the view of the respondents and the notice party that, while a party has no obligation to involve themselves, this does not mean that their decision not to do so will be without consequence. In *Lancefort*, the Supreme Court held that the fact that a party affected by a proposed development did not participate in the statutory appeal was not in itself a reason for refusing *locus standi*. However, Keane J. went on to state:

> "[I]t would, in my opinion, be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings."

61. The respondents in this case have no power to compel the delivery of testimony or the discovery of documents. As such, it would be unfair to permit a complainant to remain anonymous throughout an inquiry, thereby handicapping the respondents' ability to make determinations of fact, only to emerge again by bringing applications before this Court if he or she were unsatisfied with the outcome of that process.

62. However, this unpalatable prospect is not what occurred in the present case. The respondents and the notice party have suggested that the failure of the applicant to make the legal arguments which she now presents to the Court gives rise to what might be called a class of 'issue estoppel', preventing her from placing reliance thereupon. They point to the multiple letters which she sent to the respondents, contending that none of those proffered the interpretation of section 176(2) of the 2001 Act which she now seeks to advance. This cannot be correct. There may well be circumstances in which an applicant will negate his or her *locus standi* through inaction or silence; for example, if the applicant in the present case had been in possession of a particularly damning piece of factual evidence against the notice party but had refused to disclose same, waiting to expose it at the judicial review stage in order to invalidate an unfavourable determination.

63. It seems to me that there is a clear distinction to be drawn between a failure to contribute to the facts and evidence to be put before a decision making body and a failure to present legal arguments based thereon in the most coherent and cogent fashion. In the present case, the applicant felt that she had nothing further to contribute to the investigation, a

view which I am satisfied she was entitled to hold. As far as she was concerned, the facts which were of importance to the respondents were well-settled by the time of the meeting and as such, absent any dispute as to their veracity, there was nothing else to be gained from further intervention on her part.

64. To penalise a lay person such as the applicant in the present case for the deficiencies in what might loosely be called the 'legal submissions' which she made to the respondent would be to impose too onerous a burden. In respect of matters of fact, I am convinced that the applicant acted honestly and *bona fide* at all times and that she assisted the respondents in whatever way she could. I do not think that she can be said to have surrendered her *locus standi* for her failure to direct them as to the appropriate principles of statutory interpretation.

65. In light of this, I am satisfied that the applicant does possess a sufficient interest in, and connection to, the subject matter of the present application. No aspect of her conduct throughout the investigative process was such as to inhibit her from forwarding the arguments which she now presents for the Court's consideration.

(d) Error of Law

66. It is clear that the determination reached by an administrative tribunal may be quashed in circumstances where that determination is premised on a manifest error of law. The *locus classicus* of the Court's jurisdiction in this regard is the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. In that case, Lord Reid considered the supervisory jurisdiction being exercised by the Court and stated the following at page 171:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

67. That statement of legal principle was approved in this jurisdiction by the Supreme Court in Killeen v. Director of Public Prosecutions [1997] 3 IR 218. In that case, Keane J. identified the significance of an error of law impacting upon the jurisdiction of a decision maker. He stated at page 229:

> "The question posed in this case can now be stated as follows. If the District Judge in the present case discharged the applicants because he considered he was precluded from sending them forward for trial by reason of the defect in the warrant, was that an error of law which it was within his jurisdiction to make? I am satisfied that it was not. If the District Judge was of that view, it follows that he failed to determine the precise question assigned for decision to the District Court i.e. as to whether, on the materials before the court, there was a sufficient case to put the applicants on trial. If that was his decision, it constituted an error of law which rendered his order a nullity in accordance with the legal principles already set out."

68. The question before this Court, therefore, is whether the respondents misdirected themselves as to the inquiry required by Part XV of the 2001 Act to such an extent as to have deprived them of jurisdiction to produce the report. No party to the proceedings was in a position to refer to any legal authority in which the correct construction of sections 176(2) and 177 of the 2001 Act had been previously considered. As such, it falls to this Court to interpret the provision based on first principles and the well-settled rules of statutory interpretation.

69. The default rule of statutory interpretation in Irish law is that a literal approach must be taken to the provision being examined. It is only in limited circumstances that this principle may be departed from. The primacy of the literal method was recognised by the Supreme Court in *Keane v. An Bord Pleanála* [1997] 1 IR 184. In that case, Hamilton C.J. pronounced as follows:

> "In the interpretation of a statute or section thereof, the text of the statute or section thereof is to be regarded as the pre-eminent indication of the legislator's intention and its meaning is to be taken as that which corresponds to the literal meaning."

70. Section 5 of the Interpretation Act 2005 ('the 2005 Act') now gives formal recognition to the power of the courts to depart from the literal meaning of a statute where it would produce obscure results or where it would undermine the plain intention of the legislature. It provides:

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction):-
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of:-
>
> (i) in the case of an Act to which paragraph (a) of the definition of Act in section 2(1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or

parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

71. In *Monahan v. Legal Aid Board* [2008] IEHC 300, Edwards J. considered the significance of section 5 of the 2005 Act and held as follows:

> "Section 5 implicitly recognises the literal rule as the primary rule of statutory interpretation, and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. The language of the Bill is close to that set out in the recommendations of the Law Reform Commission Report on *Statutory Drafting and Interpretation: Plain Language and the Law*, LRC 61-2000, at 21, which was largely derived from the judgment of Keane J. in *Mulcahy v Minister for the Marine* (unreported, High Court, 4th November, 1994) where he stated as follows:-
>
> > "While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."
>
> As such, s.5 largely reflects the approach adopted by the courts prior to its enactment in any event. The main departure from the common law position occasioned by s.5 is the creation of an exception to the general rule where a literal interpretation would defeat the intention of the Oireachtas. This exception to the literal rule of interpretation now applies, together with the traditional common law ambiguity and absurdity exceptions. It is important to note that there is an important limitation built into the language of s.5; the purposive rule provided for in s.5 may only be applied where the intention of the Oireachtas "can be ascertained from the Act as a whole." Thus, the wording of the s.5 limits the possibility of reliance on external materials to ascertain the legislative intent behind a particular provision. Interpretation in light of the intention of the enacting body is permissible only "where that intention can be ascertained from the Act as a whole"."

72. Adopting a literal approach to the provisions of Part XV of the 2001 Act, it does not seem to me to be conceivable that the Oireachtas intended that the concept of materiality should be construed in the manner put forward by the respondents and the notice party. Their suggested approach, it seems to me, would set too low a threshold. This is especially true in light of the inclusion of the exception contained in section 176(3). By expressly excluding interests of a "remote or insignificant" nature, the Oireachtas clearly intended that any interest rising above this level of relevance should be declared and treated in the usual way under section 177. This express enunciation of a statutory exception gives rise to the principle of expressio unius est exclusio alterius; the express mention of one thing excludes all others.

73. The evidence presented by the parties in this case points inevitably to the conclusion that the respondents failed to adequately apply their minds to the appropriate question. It should be emphasised that in so finding, the Court does not purport to act as an appellate body, substituting its own view for that of the respondents. That is not the Court's function, nor is it something which the Court is entitled to do.

74. The Court is, however, entitled to examine the appropriate construction of Part XV of the 2001 Act in determining whether a serious error of law has been made by the respondents. It seems to me that, in order for a declarable interest to become elevated to the status of a beneficial interest under section 176(2) of the 2001 Act, the tribunal of fact must be of the opinion that the relationship or connection being considered would give rise to a reasonable apprehension on the part of the public that the elected representative in question was not acting solely in the public interest. On the facts, it seems that the notice party's conduct, which was described variously as 'unwise' and 'an error of judgment', would certainly have been considered to generate such an apprehension, had the respondents directed themselves appropriately. This conclusion will not necessarily arise in every case where a public representative maintains a professional relationship with a person who is likely to benefit from a particular motion. It is possible to imagine a professional relationship which would be too tenuous or removed to give rise to such a reasonable apprehension.

75. Even were one to view the provisions of Part XV of the 2001 Act as being so obscure or unclear as to merit a purposive approach, I do not think that this would affect the outcome in the present case. It seems to me that the importance of probity, when considering the actions of publicly elected representatives, cannot be over-emphasised. In light of recent history, this statement is all the more valid when considering matters within the planning sphere. The legislature cannot have intended that an individual such as the notice party would be permitted to tacitly maintain a private, professional connection with the planning status of a particular area of land while simultaneously tabling a motion to re-zone it and without revealing that connection.

76. I do not find merit in the argument of the respondents and the notice party to the effect that the Court is entitled to presume that the respondents adverted themselves to the correct questions, in the absence of clear evidence to the contrary. In this respect, I agree with the submissions of the applicant that the Court ought not to engage in excessive rituals of legal formalism. In light of the observations already made as to the correct interpretation of Part XV of the 2001 Act, it does not seem possible to me that the respondents could have reached the conclusions which they did had they properly construed the relevant provisions.

77. The respondents failed to specifically engage with section 176(2), apart from one passing reference in the report. This reference should not be allowed to distract the Court from the fact that the respondents patently failed to consider the concept of a deemed beneficial interest. On the contrary, I consider that the lack of any specific reference to section 176(2) within the report serves only to fortify the conclusion that they failed to address the provision and, in doing so, made a serious error of law.

IV. Conclusion

78. In light of the foregoing, I am satisfied that it is appropriate for the Court to exercise its discretion to grant the applicant certiorari of the report. The matter will be remitted to the Ethics Registrar for further consideration pursuant to section 174 of the 2001 Act. In respect of the declaratory relief sought by the applicant, it is clear that she first came to Court after the expiry of the time limit prescribed in the Rules. No reasons justifying an extension of time have been proffered and no extension can therefore be granted. There will therefore be no declaratory relief granted but there will be *certiorari*.