[2020] IEHC 491

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2018/1068 JR]

BETWEEN

T.

APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER OF THE NURSING AND MIDWIFERY BOARD OF IRELAND, THE FITNESS TO PRACTICE COMMITTEE OF THE NURSING AND MIDWIFERY BOARD OF IRELAND AND THE NURSING AND MIDWIFERY BOARD OF IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 2nd day of October, 2020

Introduction

1. The applicant is a qualified psychiatric nurse. In these judicial review proceedings, he is seeking *certiorari* of a report issued by the Fitness to Practice Committee, being the second named respondent, on 11th October 2018, wherein the Committee found him guilty of professional misconduct and went on to make a recommendation that the appropriate sanction which should be imposed by the third named respondent, was the sanction of erasure.

2. The applicant does not object to the findings of professional misconduct, due to the fact that they were based upon certain admissions that were made by him before the committee on Day 10 of its hearings. However, he objects to the report, and in particular to the recommendation of the committee in relation to sanction, due to the fact that certain documents were placed before the committee during its deliberations, which the applicant maintains were in breach of an express agreement which he had reached with the first named respondent as to what evidence would be admitted before the committee in relation to the admissions that had been made by him. He further argues that by having regard to the challenged statements without his having had an opportunity to challenge the makers of the statements, the Fitness to Practice Committee acted in breach of his constitutional right to fair procedures.

3. The applicant also alleges that the report of the second named respondent is bad in law, because it did not deal with an offer that had been made on his behalf to give an irrevocable undertaking not to take his name off the inactive register of nurses, in lieu of sanction. The applicant maintains that the second named respondent did not deal with that issue at all and in particular did not give any reasons why that offer had been rejected. On both of these grounds, the applicant maintains that the committee's report should be struck down.

The Inquiry Procedure under the Nurses Act 1985

4. The Nurses Act, 1985 was repealed and replaced by the Nurses and Midwives Act, 2011.

5. The inquiry, which is the subject matter of these proceedings, was held under the Nurses Act, 1985. Part V of the Act deals with the holding of inquiries into whether a nurse is fit

to continue practising in that profession. It will be helpful to set out a brief description of the inquiry procedure that is provided for under the Act.

6. The Board, or any person, may apply to the Fitness to Practice Committee for an inquiry into the fitness of a nurse to practice nursing on the grounds of alleged professional misconduct, or alleged unfitness to engage in such practice by reason of physical or mental disability. Where the Committee, after consideration of the application, is either of the opinion that there is a *prima facie* case for holding the inquiry, or has been given a direction by the Board to hold the inquiry, the Committee must proceed to hold the inquiry.

7. The CEO, or any other person with the leave of the Committee, presents to the Committee the evidence of alleged professional misconduct or unfitness to practice by reason of physical or mental disability, as the case may be. In this case that was done by the CEO. On completion of the inquiry, the Committee must prepare a report to include its findings specifying the nature of the application for an inquiry and the evidence laid before it and any other matters in relation to the nurse which it may think fit to report. In its report, the committee invariably makes a recommendation as to what sanction should be imposed by the Board.

8. The Committee's report is then sent to the Board and the function of the Board is confined to the issues of confirmation of the Committee's report and, if the report is confirmed, a decision as to what sanction, if any, should be imposed on the nurse.

General Background

9. The applicant is a psychiatric nurse. In 2007 he was employed by the HSE to provide psychiatric services in the form of counselling at an outpatients' mental health facility.

10. In the period 2007 – 2008, the applicant provided counselling to a female service user (hereinafter referred to as "*the complainant*") for an anxiety disorder. She was aged approximately 30/32 years at the time.

11. In or about 2008 the applicant moved to another part of the country to take up a different position of employment. He continued to have contact with the complainant after his therapeutic engagement with her had ceased.

12. On 18th June, 2009, the complainant made an allegation to a counsellor at a different mental health facility, that she had had a relationship, including having sexual relations, with the applicant between March 2007 and June 2009. The person to whom the statement was made reported the matter to her supervisor, who in turn reported it to the HSE. They carried out an inquiry which resulted in a Trust in Care report being issued on 15th December, 2011.

13. That report made a number of adverse findings against the applicant in relation to the therapeutic care that he had given to the complainant. Although it appears that some of the more serious complaints made by the complainant of there being a sexual relationship

between her and the applicant, may not have been upheld in that report. However, the Court has not seen a full copy of this report.

14. The Trust in Care report was furnished to the Nursing Board, which is now the third named respondent, on 31st January, 2012. On 9th February, 2012 the Board determined that it would become the applicant for an inquiry pursuant to s. 38 of the Nurses Act, 1985 into alleged professional misconduct and alleged unfitness to engage in the practice of nursing by reason of physical and/or mental disability on the part of the applicant. On the same date, the Board also determined that it would issue proceedings before the High Court seeking the suspension of the applicant from the register of nurses. In the course of an application brought before the High Court pursuant to s. 44 of the Act, to have the applicant suspended from the register, he gave an undertaking that he would not attempt to have his name taken off the inactive register of nurses. That undertaking was given by the applicant in April, 2012. He had been on the inactive register since 2008, when he had taken up his new position of employment.

15. On 20th June, 2012, the Fitness to Practice Committee (hereinafter referred to as "*the FPC*") determined that there was a *prima facie* case to warrant the holding of an inquiry.

The Fitness to Practice Inquiry

16. A Fitness to Practice Inquiry was set up under the Nurses Act, 1985. On 18th September, 2014, the formal notice of inquiry was signed by the CEO of the nursing board. On 16th February, 2016, the applicant moved his first set of judicial review proceedings to block the holding of the inquiry on grounds of delay and that due to such delay, he was prejudiced in the conduct of his defence and therefore the inquiry should not be allowed to proceed. An order was made by the High Court staying the holding of the inquiry, pending the determination of the judicial review proceedings.

17. Those judicial review proceedings were stayed on agreement that the applicant would raise the delay point by way of a preliminary issue for the determination of the FPC. A consent order to that effect was made by the High Court on 4th March, 2016, which included a provision lifting the stay on the holding of the inquiry for the purpose of determining the preliminary issue.

18. On 17th and 18th May, 2016, the FPC held a hearing to determine an application by the applicant that two members of the Committee should recuse themselves on grounds of bias. As a result of that hearing, a determination was reached that one member of the committee would recuse herself therefrom, as she had had an involvement in the s. 44 application.

19. Days 3 – 9 concerned the hearing of the preliminary issue of delay/prejudice. Those hearings took place on various dates between 20th October, 2016 and 3rd March, 2017. This resulted in a written determination from the FPC, dated 20th September, 2017, wherein they held that notwithstanding that there had been delay on the part of the FPC in holding the inquiry, there was no irremediable prejudice to the applicant in the conduct of his defence. They ruled that the inquiry could proceed.

20. In the course of that hearing, there was considerable debate as to whether a number of documents, primarily the Trust in Care report compiled by the HSE and various witness statements could be put before the FPC. The applicant contended strongly that such documentation should not go before the committee, as he wished to challenge the veracity of the statements made by various witnesses. In the course of the hearings, it was made clear by Mr. Woulfe SC (as he then was), the legal assessor advising the committee, that the documents could be put before the FPC, but only for the purposes of deciding the preliminary issue. He emphasised that the challenged documents were not being admitted as evidence and were solely being put before the FPC for the purpose of enabling it to decide whether, due to the passage of time, the applicant was prejudiced in dealing with the case that was being made against him. On Day 6 of the hearing on 8th December, 2016, Mr. Woulfe SC made the point in the following clear terms:

> *"Again, I just want to repeat the advice to the committee so that it is on the transcript and there is no doubt about it that the committee are conscious that we are dealing with preliminary issues at the moment and that the matters that are being opened to the committee in the Trust in Care report are not in any way evidence of the facts stated in the allegations or in any way proof of the allegations which will be a potential future stage of the inquiry and they simply are recording, they are a record of a state of affairs as recorded in the Trust in Care report of things that were detailed or things that were recorded having been said in interview and they are simply material that is relevant to the preliminary applications now being dealt with by the committee and that they are not evidence or proof of the actual substance of the allegations. I think the committee appreciate that, but, Chairman you can confirm that.*
>
> *Chairman: Yes, and on behalf of the committee I certainly agree with what you have said, Mr. Woulfe."*

21. The FPC went on to rule that the challenged documents could be put before it for the purposes of considering the preliminary issue.

22. Arising out of the determination of the FPC on the preliminary issue, the applicant brought a second set of judicial review proceedings, seeking to have that determination overturned. It is not necessary to go into the grounds on which that set of judicial review proceedings were brought. The two sets of judicial review proceedings were consolidated into a single set of proceedings by order of the High Court dated 17th January, 2018. The consolidated proceedings were settled between the parties on 26th June, 2018; the agreement being reduced to writing and signed by the parties. The terms of settlement provided that all stays on the Fitness to Practice process were lifted on consent; the consolidated judicial review proceedings would be dismissed with no further order; the Fitness to Practice Inquiry would proceed to a full hearing as soon as reasonably possible in accordance with the committee's preliminary ruling dated 20th September, 2017 and the respondent would pay a once off contribution in respect of the applicant's costs to that date in the sum of €225,000. The agreement provided that those terms represented

a full and final settlement of the consolidated judicial review proceedings and all costs incurred in the ongoing s. 44 proceedings.

23. The hearing of the substantive inquiry was scheduled to resume on 5th September, 2018. In the weeks leading up to that hearing the applicant's solicitor wrote indicating that: (i) the applicant objected to the composition of the FPC on the grounds that some members thereof were biased because they had been involved in the earlier hearing on the preliminary issue; (ii) the applicant objected to the committee's legal assessor for the same reason; and (iii) the applicant objected to the FPC having access to documentation that was placed before it solely for the purpose of hearing the preliminary issue.

24. It was decided that the FPC would sit to hear the objections on 5th and 6th of September, 2018. By letter dated 3rd September, 2018, the applicant made an offer through his solicitor that he would give an irrevocable undertaking not to seek to take his name off the inactive register of psychiatric nurses in lieu of a sanction being imposed. The solicitors acting for the CEO declined that offer, but stated that if the applicant were to make admissions to the allegations contained in the notice of inquiry, they could enter into discussions generally.

25. On 5th September, 2018 (Day 10), negotiations were held between counsel for the applicant and counsel for the CEO. Agreement was reached that the applicant would make admissions to certain of the allegations in the notice of inquiry (some of which had been amended) and would concede that the allegations admitted by him constituted professional misconduct on his part. The applicant made admissions to the following allegations against him, which are numbered in accordance with their numbering in the original notice of inquiry:-

> *"1. While you were employed as a nurse by the HSE and/or subsequent to your said employment you breached the parameters of a normal therapeutic relationship with [name redacted] a patient or client under your care.*
>
> *2. On one or more occasions you took [name redacted] to locations outside of the normal HSE clinical settings.*
>
> *3. You failed to have sufficient regard for the fact that [name redacted] was an emotionally and/or psychologically vulnerable person.*
>
> *4. You failed to maintain appropriate records of your care and treatment of and meetings with [name redacted].*
>
> *5. You wrote and amended records of your care and treatment of, and meetings with, [name redacted] without justification.*
>
> *11. You engaged in communications with [name redacted] which were outside the parameters of a normal therapeutic relationship.*

12. *You failed to make a full and adequate report to your supervisors and/or colleagues and/or employers and/or take all appropriate steps having regard to the volume and nature of the text messages and phone calls between yourself and [name redacted], a patient or client under your care."*

26. It was agreed that the admissions and certain redacted documents (22 pages in total) would be placed before the FPC for the purpose of it making findings of professional misconduct on the part of the applicant and for the purpose of recommending an appropriate sanction for consideration by the Board. As this agreement is central to the applicant's case, it is necessary to set out some of the comments that were made by counsel during the hearing by the FPC on Days 10 and 11 of the hearing.

27. At the outset of the hearing before the FPC on 5th September, 2018 (Day 10), both counsel thanked the Committee for their patience in permitting them some considerable time to reach agreement. Ms. McKechnie BL on behalf of the CEO, then read into the record the allegations to which the applicant was prepared to make admissions and which would be contained in an amended notice of inquiry. Counsel for the applicant then formally indicated to the FPC that the applicant was making admissions to each of those allegations and further admitted that each of the allegations met the threshold for professional misconduct. Ms. McKechnie BL then dealt with the documents that had been agreed between the parties would be put before the FPC as evidence in the following terms:-

> *"The next thing that I wish to address you on is a number of documents that we agreed between the parties, they can be handed up to the committee as agreed between the parties as evidence to set the context within which first of all the allegations set out in the notice of inquiry have been now made and also the admissions, which Mr. [T] has now read into the record. I'm going to hand these documents up one by one to explain just the context of them."* [Same handed in].

28. Ms. McKechnie BL indicated that the first document was a letter dated 2nd February, 2012 addressed to Ms. Ursula Byrne, the Acting Director of Regulations at An Bord Altranais from Mr. P., Director of Nursing at a mental health clinic. She read that letter into the record. The second document which she handed up by agreement, was the first page of a statement of one Ms. O'L.. The third document handed in constituted a redacted version of the Trust in Care report. Counsel stated that the redacted report had been agreed between the parties as evidence that would be uncontested and could be admitted before the committee for them to rely upon when making their findings. She stated that those were the three documents which were agreed and could be relied upon by the committee. She went on to confirm for the record that the other allegations that were contained in the initial notice of inquiry were not being proceeded with by the CEO. Further on in the transcript on the same day, Mr. Quirke BL (as he then was) confirmed that the documents which had been handed in could be received by the committee as evidence before it.

29. On the following day, 6th September, 2018, (Day 11), Ms. McKechnie BL confirmed that the three documents which had been handed in as agreed evidence, being the letter from

Mr. P., the first page of the statement by Ms. O'L. and the redacted version of the Trust in Care report, could be given exhibit numbers 18, 19 and 20 respectively.

30. A great deal of the hearing on the remainder of Day 11 was taken up with a discussion concerning whether the FPC was entitled under the statute to even consider, or if appropriate, recommend, acceptance by the Board of the undertaking offered by the applicant, either in lieu of sanction, or as a factor to be taken into account in mitigation of any sanction which they might recommend to the Board. There was considerable argument and debate as to whether the FPC had jurisdiction under the 1985 Act, to accept such an undertaking, assuming it was minded to do so. I think it is fair to say that the new legal assessor to the committee, Mr. Ó hOisín SC (Mr. Woulfe SC having been appointed Attorney General in the interim) was somewhat equivocal as to whether the FPC had jurisdiction to accept an undertaking, having regard to the fact that there was no provision for that in the 1985 Act. In relation to the question of the committee's jurisdiction to accept an undertaking, senior counsel stated as follows:-

> *"I have to say that it is not clear to me that that sits easily with the language of the 1985 Act, it's not clear to me that the Board has an entitlement to do that and if that's not clear the committee will have to make a decision itself as to whether, if that situation arises, whether that's something that it is appropriate for it to do. So what I am saying is, those are my advices. I can't be more definitive than that. If there was any particular authorities on it, I have to say I'm not aware of them, but maybe counsel can direct me to them, if there is anything I am missing out on there and perhaps they might be given an opportunity to comment on that advice, particularly if they disagree with any aspect of it and then ultimately you will have to make your decision on that point."*

31. On 11th October, 2018, the FPC issued its report in which it (i) made findings against the applicant of professional misconduct in line with the admissions made by him and (ii) recommended the sanction of erasure of his name from the register of nurses. They gave eight reasons in bullet point form as to why they had made that recommendation of sanction, as follows:-

- *The seriousness of professional misconduct admitted by the Registrant.*
- *The Registrant was fully aware that [name redacted] was a service user availing of the [redacted] mental health services.*
- *The volume of text messages between the Registrant and [name redacted] and the fact that those communications continued after the Registrant had left the [redacted] mental health services.*
- *The vulnerable nature of [name redacted].*
- *The importance of maintaining public confidence in the nursing profession.*
- *The failure of the Registrant to express any remorse for his actions.*

- *The mitigating factors include the following: the Registrant made admissions thereby avoiding the need for a number of witnesses, including in particular [name redacted] to give evidence; the fact that the Registrant has not worked as a nurse for a considerable time and following the bringing of a s.44 application in 2014 [sic] had given an undertaking not to do so.*

32. The report of the FPC did not mention the offer of an undertaking that had been made by the applicant.

33. The applicant was very shocked and upset when he learned that all the documentation which had been put before the FPC for the purpose of the hearing of the preliminary issue, in particular the statements which he had agreed with the CEO would be excluded and to the content of which he vehemently objected, had been before them when considering what sanction to recommend and had also been furnished in advance to the Board, which has yet to hold a hearing to decide whether to confirm the FPC report, and if so, what sanction to impose.

34. When the applicant learned that the challenged documentation had been sent to the Board, his solicitor wrote directly to the Board complaining about this fact. In response to that letter, the Board's solicitor, Messrs Beauchamps, replied by letter dated 23rd October, 2018, wherein they stated that it was normal practice for the Board to receive a copy of all documentation which had been placed before the FPC during the entirety of its proceedings and to consider such documentation in advance of the hearing which it would hold subsequently to decide (a) whether to confirm the report of the FPC, and (b) if so, what sanction to impose. In that letter, the Board's solicitor stated as follows:-

> *"Your letter, received on the afternoon of last Friday, was received a number of days after the various papers were circulated to the Board. Board papers are typically circulated at least one week before the Board meeting to allow the Board sufficient time to review the various papers. In the case of the FTPC Reports this of course includes the transcripts of the hearings and all exhibits made available to the FTPC. In this case all of the exhibits have, along with the transcripts, being provided to the Board as is standard practice. The Board in its consideration will be advised, again as is normal practice, to consider only the allegations which were proved against your client and not allegations which were not pursued or not found to have been proven. However, in considering the report of the FTPC and its findings and in considering the appropriate sanction to impose the Board exercises a separate and independent function. In exercising this function, the Board considers all the circumstances of a case, which consists of the report, the transcripts, the exhibits and any submissions which you or your clients make. This can of course include a submission to disregard and/or exclude matters from its consideration but that is something which the Board itself must consider."*

The Present Judicial Review Proceedings

35. The applicant was so concerned by the production of the challenged documents to the FPC and to the Board, that he instituted the present judicial review proceedings prior to

the matter coming on for hearing before the Board. In these proceedings, which are the third set of judicial review proceedings to be instituted by the applicant arising out of this inquiry, he seeks to set aside the FPC report on the following grounds:-

(a) That in breach of the agreement reached with the CEO on Day 10 of the hearing, the FPC were given all of the documentation which had been placed before it on the preliminary issue, including the documentation which had been expressly agreed would be excluded, when considering what sanction to recommend to the Board.

(b) The applicant claims that the FPC are irretrievably tainted by the disclosure of such documentation to them.

(c) The applicant also complains that their decision of what sanction to recommend made no mention of his offer of an irrevocable written undertaking not to take his name off the inactive register of nurses and therefore their decision was bad as lacking adequate reasons as required by law.

(d) The applicant seeks an order of prohibition against the Board on the grounds that they have been tainted by being provided with all the documentation which had gone before the FPC on the hearing of the preliminary issue, when it had been specifically agreed that only very limited redacted documentation would go before the FPC as evidence and by extension, only such documentation should have gone before the Board. It was submitted that as the Board had been given all the challenged documentation, they too were irretrievably tainted and therefore should be prohibited from considering the issue of sanction in this case.

Submissions on Behalf of the Applicant

36. The applicant submitted that there were in fact three separate Fitness to Practice Committees in this case. The first Fitness to Practice Committee had sat on Days 1 and 2 of the hearings, to deal with the issues of the recusal of two members of the committee. Thus, the original committee was made up of Messrs Maguire, Godfrey and Kennedy. Ms. Godfrey recused herself after Day 2 and was replaced by Ms. McHugh. The FPC which considered the preliminary issue from Days 3 to 9, was made up of Messrs Maguire, Kennedy and McHugh. After the determination of the preliminary issue, Ms. Kennedy had to step down from the committee as a member of her family had become ill. She was replaced for the remainder of the hearings by Ms. Orla O'Reilly. Thus the composition of the committee for the substantive hearings comprised Messrs Maguire, McHugh and O'Reilly.

37. It was submitted that at the time of the first judicial review proceedings, the court had placed a stay on the holding of the inquiry. That stay was only partially lifted by consent for the purpose of holding the hearings in relation to the preliminary issue. It was only after the determination of that issue and the compromise of the second judicial review proceedings, that the stay on the holding of the inquiry proper was lifted. Thus, it was submitted that the substantive inquiry only commenced with the hearings conducted on 5th and 6th September, 2018 (Days 10 and 11), at which time a comprehensive

compromise was reached between the parties, which resulted in an amended notice of inquiry being produced, admissions thereto by the applicant, together with an admission that such allegations constituted professional misconduct and an agreement as to the evidence that would be placed before the committee for the purpose of its report. It was submitted that in these circumstances, the hearings before the FPC were separate and distinct. It was submitted that it was entirely unreasonable that because documentation had been put before the FPC for the purpose of the preliminary issue, that that documentation should be placed before the newly constituted FPC, which sat for the purpose of the substantive inquiry in September 2018.

38. Counsel submitted that at all stages, the applicant had strongly objected to the disputed witness statements going before the FPC. It was only in the light of the advice given by the legal assessor on Days 6 and 7, to the effect that the documentation would only be put before the committee for the purpose of the preliminary issue, that the committee confirmed that it understood that position and ruled that the documentation could be placed before it, notwithstanding the objection of the applicant.

39. Mr. Quirke SC on behalf of the applicant submitted that the critical point was that at the outset of the substantive hearing on Day 10 in relation to the allegations of wrongdoing against the applicant, there had been protracted negotiations between the parties, which had led to the admissions being made and in particular had led to an agreement that the challenged witness statements would be excluded. In this regard, it had been agreed that the statements made by Mr. P., Ms. L.M., all but the first page of the statement made by Ms. O'L., the report furnished by Mr. M., a handwriting expert, and large parts of the Trust in Care report, would be excluded. It was agreed that only the redacted documentation would be put before the FPC as evidence relating to the allegations which had been admitted by the applicant. It was submitted that the nature of that agreement was unambiguous, as was clear from the statements made by counsel on behalf of the CEO on Days 10 and 11 of the hearings. In these circumstances, it was submitted that it was absurd and in breach of the express terms of the agreement, for the unredacted Trust in Care report and the disputed statements to have been put before the FPC and the Board.

40. Counsel submitted that in having the unredacted Trust in Care report and the challenged witness statements before it when making its decision on what sanction to recommend, the FPC had acted in breach of the applicant's right to a fair hearing, which was a right protected by the Constitution, because he had not had an opportunity to challenge by way of cross-examination, the highly prejudicial assertions that had been made against him in the challenged witness statements. In this regard, counsel relied on the decision in *Borges v. the Fitness to Practice Committee of the Medical Council* [2004] 1 I.R. 103 and in particular to the following dicta of Keane C.J. at page 113:-

> *"It is also not in dispute that the practitioner concerned is entitled to have the hearing conducted in accordance with fair procedures and natural justice. That is not to say that a body of this nature may not depart from procedures which would*

be essential in a court of law, as was made clear by this court in Kiely -v- Minister for Social Welfare [1977] IR 267: in particular, they may act on the basis of unsworn or hearsay evidence. But, as was also made clear in that case, their freedom from the constraints to which courts of law are subject does not permit them to act in a way which is inconsistent with the basic fairness of procedures guaranteed by implication by Article 40.3 of the Constitution.

It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court in In Re Haughey and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practicing as a doctor, either for a specified period or indefinitely."

41. Counsel also referred to the following dicta of Henchy J. in *Kiely v. Minister for Social Welfare* [1977] I.R. 267 at page 281:-

"Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."

42. Counsel submitted that as a result of the breach of the express agreement that had been reached between the parties on Day 10 of the hearing by the introduction of the documentation which it had been agreed would be excluded, not only had the applicant been deprived of the opportunity of challenging by cross-examination the prejudicial assertions made against him in the Trust in Care report and in the witness statements, but the FPC had been irremediably tainted by having considered this material when making their report and in particular when making their recommendation on sanction.

43. Counsel also relied on the decision of the Supreme Court in *RAS Medical Limited v. Royal College of Surgeons in Ireland* [2019] IESC 4, where a dispute arose as to the evidential status of documents that had been provided in discovery. In the course of his judgment, Clarke CJ highlighted the need for there to be clarity in relation to the admission of documents as evidence, at paragraphs 6.14 – 6.15:-

"6.14. The purpose for making all of these general observations is to emphasise the need for there to be considerable clarity achieved as to the basis on which any agreement to depart from the rules of evidence has been made. Again, any lack of clarity in this regard is only likely to lead to confusion and potential injustice. It is, quite frankly, inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented. It may, at one end of the spectrum, be the case that the documents are merely being

presented on the basis that they will be properly proved in evidence but will have to be disregarded entirely if not so proved. If the agreement between the parties goes beyond that, then there should be absolute clarity as to the precise basis on which the documents are being presented to the judge.

6.15. Indeed, the starting point for clarity in any case in which documents are presented to the judge is that the judge is informed as to the basis on which the documents are being made available."

44. Counsel submitted that in this case, there had been absolute clarity in the agreement reached by the parties. There was clarity that only the documents which were specifically handed in by Ms. McKechnie BL on Day 10, would be put before the FPC as evidence. All other documentation, including the redacted parts of the Trust in Care report and the pages, other than page 1 of the statement of Ms. O'Leary, were excluded. It was submitted that in these circumstances, there was absolutely no justification for the excluded material having been placed before the FPC or the Board.

45. Insofar as it had been argued on behalf of the respondents that the unredacted portions of the Trust in Care report and the challenged witness statements only constituted "*intended evidence*", which had had to be served on the applicant in advance of the hearing and which had been put before the FPC for the purpose of the hearings on the preliminary issue, that therefore the FPC could distinguish between intended evidence and admitted evidence before it; it was submitted firstly, that there was no such thing known to the law as "*intended evidence*" which could be put before a decision maker. A decision maker could only consider evidence that was properly admissible before it. That meant that it could only consider evidence that was either proven in a formal manner, or unproven evidence, which was put before it by agreement of the parties.

46. It was submitted that it was unrealistic to submit that the FPC had not had regard to the entirety of the documentation placed before it and had confined itself to the agreed evidence comprising the 22 pages of documentation that was placed before it on Day 10, when there was no affidavit from any member of the FPC that that was in fact the position. It was submitted that it was significant that in light of the concerns raised by the applicant in his statement of grounds and in his grounding affidavit, that there was no affidavit sworn by a member of the FPC to simply state that while documentation may have been put before it in the course of the hearings on the preliminary issue, they had not had regard to that documentation when considering their report and recommendation on sanction, but had confined themselves to the agreed evidence.

47. Counsel pointed out that the only affidavit which had been sworn on behalf of the respondents had been sworn by the CEO, who was the prosecutor for the purposes of the inquiry. She was supposed to be totally independent of the FPC and of the Board. In such circumstances, it was unclear how she could give any evidence as to what material had, or had not been, considered by the FPC in the course of its deliberations. It was submitted that having regard to the fact that the challenged material had been put before the FPC, the CEO could not say what regard, if any, the FPC had paid to it. It was further

submitted that the court could not determine that question either, because there was no evidence before it as to what parts of the material that had been before the FPC, had actually been considered by it when making its decision as to what sanction to recommend.

48. In relation to the Board, it was submitted that having regard to the letter from Messrs Beauchamps, Solicitors, dated 23rd October, 2018, it was clear that the Board had considered all the documentation supplied to it in advance of the hearing which it proposed to hold in the matter. That material included the unredacted Trust in Care report and the challenged statements, which the CEO through her counsel, had expressly agreed should be excluded.

49. Having regard to the fact that this material had been placed before the FPC and the Board, it was submitted that they were irremediably tainted, because they had been provided with a large volume of extremely prejudicial material, which the applicant had wished to challenge at every stage of the procedure, and which had been agreed by the CEO would be excluded, such that he was unable to challenge the prejudicial assertions that had been made by the witnesses against him; which assertions had been placed before the FPC and the Board. It was submitted that having read and considered that material, the FPC and the Board had been tainted and could not be relied upon to give a fair and unbiased decision in the matter. Counsel characterised the situation by saying that "*the apple of knowledge cannot be uneaten".*

50. In this regard, counsel referred to the decision of the English Court of Appeal (Civil Division) in *R (on the application of Mahfouz) v. the Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233, where the court held that the respondent committee would have to stand down due to having had sight of prejudicial newspaper reports concerning the applicant. In the course of his judgment, Carnwath LJ stated as follows at paragraph 33:-

> *"At the end of the day, of course, the underlying question is the same: Whether the proceedings were fair and seen to be fair. But there is an important difference. Bias or apparent bias on the part of the Tribunal cannot be corrected. On the other hand, as was emphasised in Mountgomery, knowledge of prejudicial material need not be fatal; its effects must be considered in the context of the proceedings as a whole, including the likely impact of the oral evidence and the legal advice available."*

51. It was submitted that in the circumstances of this case, having regard to the highly prejudicial nature of the unredacted portions of the Trust in Care report and the witness statements, it was not possible to be confident that the FPC, or the Board, would be able to expunge that material from their mind when dealing with the matter. It was submitted that it would be inappropriate to remit the matter to the FPC for a further determination, or to allow the Board to continue with its role in the inquiry. Furthermore, it was urged upon the court that having regard to the delay that had occurred in the investigation of this matter, in particular, having regard to the fact that the events which gave rise to the

allegations occurred in 2007 – 2009, and having regard to the effect that the long drawn out inquiry had had on the applicant's mental health, it was reasonable to make an order preventing any further inquiry into the matter.

52. Turning to the second main issue in the case, being the fact that the offer of an irrevocable undertaking had not been mentioned at all by the FPC in its report, counsel submitted that this was an important part of the plea in mitigation that had been made on behalf of the applicant in relation to the sanction that might be applied. As had been made clear by the legal assessor, this issue had been left to the FPC for its determination. The legal assessor had been clear in his advice that the FPC had to make a decision on it. Counsel submitted that the FPC could have adopted a number of courses in this regard: it could have decided that it did not have jurisdiction to recommend such a sanction to the Board under the terms of the 1985 Act; it could have decided that it did have jurisdiction to make such a recommendation, but declined to do so, if it felt that such an undertaking was not an appropriate sanction to recommend in this case; or it could have declined to make a decision on the question of jurisdiction, if it was of the opinion that even if it did have jurisdiction it was not appropriate to recommend the acceptance of such an undertaking as an appropriate sanction. However, the FPC had done none of these things. It had simply not mentioned the offer of the undertaking at all.

53. Counsel submitted that the offer of the undertaking was an important issue for the applicant in relation to the question of sanction. It represented a very real sanction against the applicant, because it prevented him from ever seeking registration as a nurse in the future. It therefore protected the public and sent out a strong message in relation to the allegations that had been admitted by the applicant. It was submitted that insofar as it had been argued on behalf of the respondent that there was no provision for such an undertaking in the Act and that same could not be policed in the same terms as an undertaking could be when given in the course of a s. 44 application, counsel pointed out that under s. 40 of the Act there was provision for the Board to impose conditions on the registration of a nurse, which conditions could be confirmed by order of the High Court. The applicant would be prepared to consent to any such order being made by the High Court and therefore the undertaking would be enforceable against him for the rest of his life.

54. Counsel submitted that it was well settled in Irish law that there was a duty on judicial and quasi-judicial tribunals to give reasons for the decisions which they made. In *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, Finlay C.J. was critical of the Tribunal's failure to furnish reasons as to why the applicant's claim for compensation had been refused. In the course of his judgment he stated as follows:-

> *"For a Tribunal of this nature, even though it is not of statutory origin and is set up as an administrative decision by the Government, to reach a conclusion rejecting in full the claim of an applicant before it and not to give any reasons for that rejection, is not an acceptable and proper form of procedure… I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice*

should appear to be done, necessitates that the unsuccessful applicant before it, should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi-judicial nature."

55. *In McAllister v. Minister for Justice, Equality and Law Reform* [2008] 4 I.R. 35, the respondent had failed to give reasons for his decision to refuse a grant of temporary release from prison to the applicant, Finnegan P. stated as follows at page 44:-

> *"It has long been recognised that it is desirable that a quasi-judicial or administrative decision capable of judicial review or appeal should be accompanied by reasons. That is not to say that a discursive judgment is required."*

56. It was submitted that a similar obligation exists in medical inquiries. In *Prenderville v. Medical Council & Ors*. [2008] 3 I.R. 122, Kelly J. stated at paragraph 200:-

> *"In my view, the Fitness to Practice Committee was obliged to give reasons for coming to the conclusion which it did. It was not obliged to provide a discursive judgment, but I accept the applicant's complaint that they were left 'absolutely in the dark' as to the basis for the committee's findings."*

57. Counsel also referred to the decision of the Supreme Court in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297 and to the decision in *Brennan v. An Bord Altranais* [2010] IEHC 193.

58. It was submitted, that while the FPC had given reasons in bullet point fashion why they had recommended the sanction of erasure, they had not dealt with the important plea raised by the applicant in mitigation of sanction, being the offer of an irrevocable undertaking. It was submitted that failure to give a decision on that issue constituted a failure to give reasons and on this basis the decision should be quashed. It was submitted that it was not sufficient to argue, as the respondent had done, that it was implicit in the FPC report that it had rejected the offer of an undertaking made on behalf of the applicant. It was submitted that the applicant was entitled to a decision on an important issue that had been raised by him. Such a decision could not be read implicitly into the decision, merely due to the fact that it had not been mentioned at all.

59. Nor was it sufficient to argue that the issue of sanction was at large before the Board and therefore the applicant could reargue the point in relation to the offer of an undertaking at that stage. That was not satisfactory due to the fact that the recommendation of the FPC was a matter which carried considerable weight with the Board. Therefore, if the applicant was required to go before the Board on the basis of the current FPC report, he would be doing so at a considerable disadvantage because no decision had been made by the FPC on his offer of an irrevocable undertaking.

60. Finally, in relation to the estoppel issue raised by the respondent, to the effect that the applicant was estopped from bringing these judicial proceedings by virtue of the fact that he had participated in the hearings before the FPC on Days 10 and 11, it was submitted that he was certainly estopped from raising any point in relation to the composition of the FPC by virtue of the fact that he had participated in the hearings before it on those days. He did not seek to set aside their report on that basis. However, he was entitled to object to the introduction of the challenged documents, because he had never waived his objection to the introduction of that documentation. He had not had to pursue that objection due to the fact that on Day 10, counsel for the CEO had expressly agreed to its exclusion. Therefore, it could not be argued that his continued participation in the hearing before the FPC without objection, constituted a waiver by the applicant of his objection to the introduction of such material. Simply put, it was not necessary for him to pursue that objection, because the CEO agreed to the very thing that he wanted, namely, the exclusion of the challenged documentation.

61. For the reasons outlined above, it was submitted that the court should quash the report of the FPC and direct that there should no further inquiry held in the matter.

Submissions on Behalf of the Respondents.

62. In opening his submissions on behalf of the respondent, Mr. Butler SC, accepted that the proceedings before both the FPC and the Board had to be carried out in a fair manner. He submitted that in looking at the fairness of the inquiry, one had to have regard to the entire circumstances of the case. It was necessary to have regard to the fact that the applicant had admitted to having had a wholly inappropriate relationship with a patient over a two-year period. He had further admitted that that amounted to professional misconduct on his part. Thus the essential purpose of the procedures that were being looked at in these proceedings, concerned the appropriate sanction that should be applied in respect of the serious professional misconduct that had been admitted by the applicant.

63. It was submitted that the court also had to have regard to the functions of the FPC and the Board under the 1985 Act. In carrying out their functions in relation to recommending and applying the appropriate sanction to the admitted professional misconduct on the part of the applicant, they had to have regard to the obligation not only to provide an appropriate sanction for the misconduct, but also to have regard to the public interest in maintaining trust and confidence in the nursing profession.

64. In this regard, counsel referred to the decision in Phillips v. The Medical Council [1991] 2 I.R. 115 where the court had regard to the primary function of the Medical Council, which performed a similar function to that performed by the respondent in respect of nurses. In the course of that judgment it was stated as follows:-

> *"The Council is not a body established to manage the affairs of the medical profession or to protect its interests; it is a statutory body entrusted with important statutory functions to be performed in the public interest. In particular, the register of medical practitioners which it is required to maintain has been established to*

ensure that those who practise medicine in the State are properly qualified to do so."

65. In *Perez v. An Bord Altranais* [2005] 4 I.R. 298, O'Donovan J. referred to the "*duty to protect the public against the genially incompetent as well as the deliberate wrongdoers*". Thus, it was submitted that in considering the exercise of its discretion, the court should have regard to the public interest, as well as to the private interests of the parties before it.

66. Secondly, counsel submitted that the court should have regard to the fact that the inquiry process in relation to the applicant was still in being. It had not concluded. It had reached the stage where, in light of the admissions that had been made by the applicant, the FPC had made certain findings of professional misconduct and had gone on to recommend what it regarded as being the appropriate sanction. The next step was for the matter to be transferred to the Board, which would firstly consider whether to confirm the FPC report and findings in relation to professional misconduct and if it did, it would then go on to make a decision as to what sanction was appropriate in the circumstances. The applicant had a full right of audience before the Board to make whatever submissions he wished in relation to the appropriate sanction that should be imposed. It was submitted that in these circumstances, the application herein was premature.

67. It was submitted that it was well established in law that where there were proceedings that were ongoing before a specialist tribunal, the court should exercise curial deference towards such bodies and should be slow to interfere with decisions made by them in the course of the proceedings. For example, in *Philips v. The Medical Council*, Costello J. had refused to intervene by way of judicial review to direct a decision making body as to how it should carry out its functions in advance of the outcome of the process. Similar views were expressed by Ní Raifeartaigh J. in the High Court in *Dowling v. An Bord Altranais* [2017] IEHC 62, where she stated as follows at paragraph 66:-

"Although the powers of the High Court in an application such as that in Herman are not the same as those available to the Court in the present application, the concept of curial deference, in the sense of affording considerable respect to the decision of an expert professional body, nonetheless appears to me to be a sensible approach to adopt in nursing cases also."

68. Similar views were expressed by Ousley J. in the English High Court in *R (on the application of Squier) v. The General Medical Council* [2015] EWHC 299 (Admin), where the following dicta were made:-

"There is, in my judgment, a general principle but not an exclusive rule that proceedings to challenge decisions of a tribunal should await the conclusion of the hearing and should be made by way of statutory appeal. After all, judicial review is a remedy of last resort. A tribunal should not find its case management decisions, its interlocutory rulings and other procedural decisions challenged until the effect of any adverse decision of that sort is made manifest through the final decision.

Proceedings of the sort here are potentially wasteful and very disruptive to the integrity of tribunal proceedings. They have the potential to put this court in the position of running the procedures of tribunals with no benefit to the integrity of the tribunal or of the reviewing or appellate judicial process."

69. The learned judge in that case made the following remarks in relation to the occasions on which a court might be prepared to intervene in an ongoing process before a tribunal:-

"I am satisfied that before any relief is granted, I have to be clear that relief is necessary to avoid a clear and significant injustice, which would probably not be remedied during the process of the hearing and which would probably cause real harm, if not now remedied."

70. Counsel also referred to the decision of Humphreys J. in *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2016] IEHC 300, where the learned judge had made similar observations in relation to the undesirability of the court interfering in ongoing disciplinary or administrative processes by way of judicial review at paragraph 131 of the judgment. Counsel also referred to the decision of the Supreme Court in *Rowland v. An Post* [2017] IESC 20 where the following was stated:-

"(i) That a court should only intervene in an ongoing disciplinary process where it was clear that the process had gone irremediably wrong and that it was more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law. Where a plaintiff could not establish that the case met that standard, it would ordinarily be inappropriate for a court to intervene and instead the process should be allowed to continue to its natural conclusion, at which stage it could be reviewed

(ii) That a decision maker in a disciplinary process had a significant margin of appreciation as to how the process was to be conducted subject to any specific rules applying by reason of the contractual or legal terms governing the particular process…"

71. It was submitted that as the Board was not bound in any way by the recommendation of the FPC and ultimately the question of sanction was solely within the remit of the Board; accordingly, any perceived errors and/or omissions in the FPC report as alleged by the applicant, could be the subject of submissions at the Board hearing. It was further submitted that even taking the applicant's case at its height, it could not be said that the process had gone irremediably wrong and that it was more or less inevitable that the decision of the Board was bound to be unsustainable in law. It was submitted that in these circumstances the court should refuse the reliefs sought and should allow the process continue to its conclusion, at which stage the applicant could challenge such result by way of judicial review if he wished.

72. Turning to the substantive arguments raised by the applicant, Mr. Butler SC stated that it was important for the court to understand that there was only ever one FPC and one

inquiry. The composition of the FPC had changed slightly during its lifetime, when Ms. Godfrey recused herself after the second day of the hearings and when Ms. Kennedy stepped down for personal reasons after Day 9 of the hearings, which dealt with the preliminary issue. Mr. Maguire had been present for all the hearings. Ms. McHugh, who had taken over from Ms. Godfrey, had been present from Day 3 to Day 11 and Ms. O'Reilly had been present for Days 10 and 11. However, there was only ever one notice of inquiry, although it had been amended by agreement on Day 10. There had only ever been one inquiry, notwithstanding that part of the hearings had related to the preliminary issue raised by the applicant in relation to delay and prejudice.

73. It was submitted that the agreement that was reached on Day 10, had to be seen in the context of there being only one inquiry before one FPC, which had commenced its inquiry on Day 1 and continued until the conclusion of Day 11. It was in that context that the documentation, which had been presented to the FPC during the course of the hearings in relation to the preliminary issue, had been mentioned in the report issued by the FPC in October 2018, because that evidence had in fact been placed before it during the course of the inquiry. However, the report also made it very clear that there was no oral evidence put before the FPC and that by agreement the evidence was contained in the redacted documentation that had been handed in on Day 10 of the hearings.

74. Counsel further submitted that it was important to note that s. 38 (3) of the Act provided that on completion of the inquiry, the FPC should submit a report of its findings on the evidence laid before it and any other matters in relation to the nurse which it may think fit to report. In its report, the FPC had merely outlined all of the evidence that had been put before it at various stages of the inquiry. It was clear from the transcript in relation to Days 6 and 7 of the hearings, where the challenged documents were put into evidence for the purpose of the preliminary issue, that that was only done in the context of the preliminary issue and was not evidence of the matters stated therein.

75. That had been made very clear by the legal assessor to the FPC at the time and was explicitly confirmed as having been understood by the chairman. It was submitted that in these circumstances, where the FPC was a very experienced specialist body, they were well aware of the difference between the documents that had been handed in during the hearing of the preliminary issue and the purpose for which they had been handed in during that hearing and the agreed documents that were submitted to it as evidence in relation to the admitted allegations. It was submitted that there was no basis on which the court could infer that the FPC had had regard to materials for a purpose other than for which they had initially been put before the Committee.

76. Counsel further pointed out that at the outset of the inquiry, the nine core books comprising pleadings in the first judicial review proceedings, were furnished to and accepted by the FPC as an exhibit in the inquiry with the applicant's consent. It was submitted that for the applicant to expressly assert that he was in some way biased or prejudiced by this, was quite astonishing. Furthermore, when the inquiry resumed on 5th September, 2018 and when the applicant made admissions in the course of those

hearings, the entirety of the intended evidence was once again before the Committee. Indeed, as the applicant was aware, two of the Committee members had dealt with the preliminary issue hearings before the Committee and therefore already had direct knowledge of the circumstances of the inquiry. Accordingly, the applicant's claim that this intended evidence should have been in some way retrospectively struck from the record of the inquiry, had no basis in law. It was submitted that in these circumstances, where the applicant was aware that the challenged documents had already been put before the FPC, he had no grounds for alleging that there was any misfeasance, or breach of agreement by virtue of the fact that those documents remained before the FPC when it issued its report.

77. In relation to the provision of the challenged materials to the Board, it was submitted that in furtherance of the Board's role under the 1985 Act, it was proper that the Board should be provided with all materials that were before the committee for the purpose of the inquiry, together with a copy of the report and the transcripts of the inquiry. That was in accordance with the procedures of the Board, that all documentation relevant to that report should be furnished to each Board member in advance of the meeting. It was submitted that it was inconceivable that the Board could fully and fairly consider the matters which arose for its determination, without the fullest review of the material furnished to it, all of which was relevant to these issues. To limit or restrict the materials so furnished to the Board in the manner contended for by the applicant, would constitute an unlawful interference with the proper discharge of the functions of the Board and with the process provided for under the 1985 Act.

78. Mr. Butler SC submitted that insofar as the applicant maintained that the Board had already prejudged any of the issues that would come before it, there was no such plea in the applicant's statement of grounds. Accordingly, this was not an issue in the proceedings. It had not been pleaded and there was no evidence to support such an allegation. The Board was completely independent in its consideration of the report and more particularly in relation to its determination of what sanction should be imposed. It would conduct a hearing into the matter, at which the applicant could make whatever submissions he wished, accordingly he was not prejudiced in any way by the content of the FPC report.

79. Counsel further submitted that the applicant was estopped by his conduct from maintaining that the FPC was tainted by the documentation which had been presented to it in the course of the preliminary issue. That had been one of the objections raised by him in his correspondence prior to the resumed hearings on 5th and 6th September, 2018. However, in the events which transpired, the applicant entered into negotiations with the CEO, which lead to an agreement on his part to make certain admissions and thereafter to make submissions through his counsel in relation to sanction. In these circumstances by participating in the hearing on that basis, when he knew what documentation had already been put before the FPC, he had to be taken to have waived his objections as set out in the correspondence prior to the hearings. Accordingly, he was estopped from now making the same objections.

80. Finally, in relation to the issue of the offer of an irrevocable undertaking not to seek to remove his name from the inactive register, in lieu of the imposition of a sanction, or in the alternative, that such offer should be taken into account in mitigation of sanction; it was submitted that while there was no explicit reference to such offer of an undertaking in the FPC report, it was absolutely clear from the content of the report that the FPC had rejected that offer as being an appropriate sanction in the circumstances of the case. They had clearly set out in the report all of the allegations that were admitted by the applicant and had gone on to explain in brief, but clear terms why they considered the sanction of erasure to be the appropriate sanction in this case.

81. It was submitted that in making the recommendation on sanction, there was no significant error of a material matter leading to that decision. The decision of the FPC was not grounded on an erroneous view of the law, nor was there an error as to jurisdiction. It was absolutely implicit in the report that the FPC decided not to recommend that an undertaking be accepted in lieu of sanction in circumstances where the Committee's determination was that erasure was the appropriate sanction. In view of the admissions of serious professional misconduct made by the applicant, there was nothing unusual, irrational or unlawful about the Committee's recommendation. It was unstateable to say that no other reasonable decision maker would have come to a similar conclusion.

82. In line with the express legal advice given to the Committee by the legal assessor, the Committee should only recommend something it regarded as appropriate or lawful. The Committee did not recommend that the Board accept an undertaking in lieu of sanction. Therefore, the Committee had simply refused to recommend something to the Board which had no express legal basis in the 1985 Act. That was entirely rational, reasonable and indeed fully within the jurisdiction of the Committee to do.

83. It was submitted that just because the applicant may have been disappointed that his offer of an undertaking had not been accepted or recommended as a possible sanction by the FPC, that did not mean that in rejecting that offer the FPC had acted irrationally or without jurisdiction. Their function was to recommend an appropriate sanction. They had done that and had set out in very clear terms their reasons for recommending the particular sanction that they had. It was submitted that in these circumstances, there was simply no basis on which the court should quash the recommendation of the FPC on sanction. It was submitted that there was no basis for the court to intervene in the inquiry process and it should allow the matter to continue on its path and go before the Board in the ordinary way.

84. Finally, Mr. Butler SC submitted that even if the court should hold with the applicant on either, or both, of the grounds put forward by him in relation to the FPC report, the court should have regard to the fact that both the FPC and the Board are specialist bodies, who have expertise in carrying out the functions required of them under the 1985 Act. In these circumstances, if the court held that the FPC may have had regard to documentation which it ought not to have had regard to when reaching its conclusions and recommendations, the matter should be remitted to the FPC for reconsideration, with

such directions as the court might think proper. Similar directions could be given to the Board, which would consider the matter at some future date. Counsel submitted that if such steps were taken, this inquiry process, which was extremely important not only from the point of view of the parties, but also having regard to the public interest in maintaining trust and confidence in the nursing profession, could be brought to a conclusion within a relatively short period of time. Accordingly, it would be inappropriate for the court to make any order bringing the inquiry process to an end.

Conclusions

85. The parties were agreed that an inquiry under the Nurses Act, 1985, must be carried out in compliance with the dictates of constitutional and natural justice. It was agreed that the right to a fair hearing continued to apply, whether or not admissions were made by a person in the course of the inquiry.

86. It has long been established that where proceedings may affect the good name or reputation of an individual, they have a right to a fair hearing: see in *Re Haughey* and *Borges v. Fitness to Practice Committee*. Essentially, the right to a fair hearing gives a person against whom allegations have been made the following rights: the right to be informed of the allegations against him; the right to be told of the evidence that will be led against him; the right to challenge that evidence by cross-examination and the right to call evidence in his defence. It is against that backdrop that the issues in this case fall to be determined.

87. In this case a preliminary issue was raised by the applicant to the effect that due to the delay in carrying out the inquiry, he had been prejudiced in the conduct of his defence to the allegations laid against him, such that it was not possible for him to get a fair hearing and that it was oppressive and unfair that the inquiry should be allowed to continue. In order to determine such an issue, it is necessary for the decision maker to be given some idea of the case which the person will have to meet at the trial, or inquiry. This is because where a person alleges that due to delay he has been prejudiced in the conduct of his defence, the validity of that assertion can only be assessed by having regard to the nature of the evidence and the nature of the allegations that have been made against him. To that end, it is necessary for the court, or tribunal, or other decision maker, to be given some idea of the evidence which is intended to be led against the person at the trial, or other inquiry. This can only be done by showing the court the statements of witnesses, whom the prosecutor intends to call at the trial, or inquiry.

88. It was for that purpose, and that purpose only, that the challenged statements were admitted before the FPC at the hearing in relation to the preliminary issue. As has been seen from the portions of the transcript quoted earlier in the judgment, the legal assessor made it very clear to the FPC that the challenged documents were only being admitted for this purpose and they were not evidence of the matters stated therein. The chairman of the FPC confirmed that he understood that position. In those circumstances, the FPC ruled that the documents could be put before it for the purpose of the hearing in relation to the preliminary issue, notwithstanding the objection of the applicant.

89. Normally, but not exclusively, when issues of prejudice due to delay are raised in relation to pending criminal trials, they are raised by means of a judicial review application that is brought before the civil courts. This means that the judge who decides the preliminary issue in relation to whether the trial can proceed having regard to delay, is not the decider of fact at the criminal trial. That is the jury, who would be unaware of any of the intended prosecution evidence, which had been put before the court in the course of the judicial review proceedings. Accordingly, there would be no question of any contamination arising by their having had sight of material that it was intended would be led as evidence on behalf of the prosecution at the trial of the action. Even if such application was made in the course of the trial, the application would be made to the trial judge and not to the jury. So they would never be "*contaminated*" or "*tainted*" by having had sight of the prejudicial material, which the accused may wish to challenge if it were led in evidence.

90. This case was somewhat unusual in that the preliminary issue was heard before the same FPC as went on to hold the substantive inquiry. I do not accept the applicant's contention that there were three separate FPCs. I accept the argument put forward by the first respondent that there was only ever one FPC and one inquiry, albeit that the composition of the FPC changed on two occasions, when one member recused herself due to a perception of bias and another recused herself for personal reasons. However, I am satisfied that it was the one FPC that dealt with the matter from Day 1, to the conclusion of the hearings on Day 11.

91. One also has to remember that there are no specific provisions in the 1985 Act governing the hearing of a preliminary issue by the FPC. That was something that had been suggested by counsel for the CEO in the course of the first judicial review proceedings. Those proceedings had been stayed and the stay on the inquiry had been partially lifted to enable the hearing in relation to the preliminary issue to proceed. It is important to note that the stay on the inquiry had only been lifted for that particular purpose. It was not until the compromise of the second judicial review proceedings, that it was agreed that the stay would be lifted and that the inquiry could proceed to deal with the substantive issues. In that regard, counsel for the applicant is correct in stating that Days 10 and 11 constituted the commencement of the substantive inquiry.

92. At the hearing on Day 10, extensive negotiations were carried out between counsel on behalf of the applicant and counsel on behalf of the CEO, which ultimately led to admissions being made by the applicant in respect of certain allegations against him and that each of those admitted allegations reached the threshold for professional misconduct. It was further expressly agreed between the parties that the FPC would have certain documents before it as evidence, so as to enable them to make the necessary findings of professional misconduct and to make a recommendation on sanction in respect of such misconduct.

93. As a result of that agreement, the applicant succeeded in excluding the vast bulk of the material to which he objected; being certain parts of the Trust in Care report, the

statements from Mr. P. and Ms. L.M., the report from Mr. M. and all except the first page of the statement of Ms. O'L.. By agreeing to the admission of limited redacted documentation, the CEO expressly agreed to the exclusion of the challenged material. The negotiations lasted a considerable period of time, according to the applicant's affidavit the negotiations lasted for a number of hours. That would certainly appear to be the case, having regard to the length of the transcript in respect of Day 10 of the hearings. The terms of the agreement were expressly confirmed by counsel for the CEO.

94. It is very difficult to see how the CEO, having expressly agreed to the exclusion of certain documents, could then justify those very documents being placed before the FPC. That begs the question, what was the purpose of the lengthy negotiations and resultant agreement that they would be excluded and that only certain redacted documents would be put before the FPC, if the entirety of the challenged documentation was to be placed before the FPC for its deliberations? The terms of the agreement reached between the applicant and the CEO, are completely contradictory to the assertion that such documents could be placed before the FPC.

95. The first respondent attempts to get over this by asserting that there is a distinction between the "*intended evidence*" and the "*admitted evidence*", both of which were put before the FPC. I accept the submission made by counsel for the applicant, that when it comes to making a decision on the substantive issue, there is no such distinction known to the law. A decision maker can only act on admissible evidence that is placed before it.

96. In her affidavit sworn on 19th March, 2019, the first respondent has attempted to deal with this dichotomy between admitted and intended evidence in the following way:-

> *"30. What was agreed between the parties is that a number of limited documents and/or extracts thereof would be formally admitted into evidence and could be relied upon by the Committee for the purpose of its findings. It appears that the Applicant is asserting that the Committee were unable and/or failed to distinguish between the intended evidence that was before it by way of Exhibits for the purpose of the Inquiry and the admitted evidence that the committee were entitled to rely on for the purpose of their findings. This assertion is simply incorrect as is readily apparent from the Committee's report."*

97. At para 47, Ms Byrne stated as follows:-

> *"The fact that a limited number of documents were admitted into evidence by agreement does not somehow prohibit the Committee from listing the documents in their possession for the purpose of this report. Moreover, in circumstances where admissions were made on day 10 of the inquiry, the purported assertion that the Committee should somehow erase the first nine days of the inquiry from their memories and/or knowledge together with all of the information and intended evidence already before it, is entirely irrational and without merit. The obligation on the Committee in such circumstances is to ensure that the findings it makes are confined to the admissions made and the admissible evidence before it. The*

Committee's findings and recommendations are entirely lawful in this regard. Legal submissions will be made in relation to same at the oral hearing.

98. The CEO has argued that the materials were put before the FPC and the Board, because all materials and exhibits handed in during the course of an inquiry are always considered by the FPC and are always furnished to the Board. That may be appropriate in the generality of cases where there is only one substantive hearing, perhaps over a number of days. However, the evidence that would be put before the FPC in the course of such a hearing, would only be evidence that was either formally proven, or documents that were handed in as evidence by agreement of the parties. In such circumstances it would be appropriate for the FPC to have regard to all the material that was laid before it in the course of the hearing, because the registrant would have had the right to object to the admission of statements and documents during the course of the hearing.

99. Where it was an inquiry in relation to serious allegations of professional misconduct, the registrant would have had the right to insist on witnesses giving evidence, so that he could cross-examine those witnesses. That is a fundamental right of the registrant and is inherent in the concept of a fair hearing.

100. In this case, there was a somewhat unusual procedure in that there was a hearing on a preliminary issue as to whether the inquiry should be allowed to proceed on grounds of delay. In the course of that hearing, certain documents were admitted despite the objection of the applicant, but they were only admitted for a particular purpose. That had been made very clear by the legal assessor to the committee. Those documents should not have been before the committee on the substantive hearing which commenced on Day 10. If there had not been any agreement in relation to the making of admissions, the applicant could have insisted on Mr. P., Ms. L.M., Ms. O'L. and Mr. M. being called to give evidence, so that he could exercise his right to cross-examine them. There would be no question of their statements being admitted in evidence against his wishes. In the events which transpired, that was not necessary, because he succeeded in getting their statements excluded.

101. The respondents are equivocal as to the purpose for which the documents were put before the FPC when making its deliberations at the conclusion of the hearings. While Ms. Byrne has argued that the FPC and the Board could distinguish between "*intended evidence*" and "*admitted evidence*" in carrying out their deliberations and reaching their decisions, it is not at all clear why the intended evidence was put before either the FPC, or the Board, if they were not to have regard to it. Indeed, in their legal submissions, the respondents appear to have taken a different view of the matter, because they stated as follows in relation to the consideration of such material by the Board:-

"It is inconceivable that the Board could fully and fairly consider these matters without the fullest review of the material furnished to it, all of which was relevant to these issues. To limit or restrict the materials so furnished to the Board in the manner contended for by the applicant would therefore constitute an unlawful

interference with the proper discharge of the functions of the Board and with the process."

102. That assertion is also supported by the letter written on behalf of the Board by Messrs Beauchamps, Solicitors, on 23rd October, 2018, which confirmed that all of the materials, including the challenged statements and other documents, had been furnished to the Board in advance for their consideration.

103. It is also significant that there is no affidavit from any person on the FPC to state that they did not have regard to the challenged documents when making their report and recommendation. It is difficult to understand how the CEO could make an averment that they did not have regard to such documentation, notwithstanding that it was before the committee, given that she was the "*prosecutor*" in this inquiry and is supposed to be independent of the committee and the Board during the carrying out of the inquiry.

104. At the end of the day, the court is satisfied that there was an express agreement between the CEO and the applicant, that only certain redacted documentation would be put before the FPC for the purpose of enabling it to make the necessary findings of professional misconduct, which had been admitted by the applicant. In breach of the terms of that agreement, the entirety of the challenged documentation was placed before the FPC. Much of that documentation was highly prejudicial to the applicant. If the FPC had regard to those documents and in particular to the challenged statements, that would have been in breach of the applicant's right to a fair hearing, as he had not been given an opportunity to challenge the content of those statements by cross-examination of the relevant witnesses. It is a fundamental right of a person accused of serious professional misconduct, that they be given the opportunity to test the evidence against them by cross examination.

105. As the court cannot exclude the possibility that the FPC had regard to all of the documentation before it, including the challenged documentation, when the applicant had not had an opportunity to challenge that evidence, the court must grant certiorari of the FPC report dated 11th October, 2018.

106. The court accepts that two members of the FPC already had had sight of that documentation, because they had been part of the committee which dealt with the preliminary issue in 2017. However, if it were the fact that they and Ms. O'Reilly, did not have regard to the challenged statements when making their recommendation on sanction, they ought to have put in an affidavit stating that to be the case. It also begs the question why the documents were put before Ms. O'Reilly if she was not to have regard to them. In the absence of such an affidavit, the court cannot exclude the possibility that the two members and Ms. O'Reilly had regard to the challenged documents and statements when making their report and recommendation on sanction. For this reason, the court must quash the report.

107. In relation to the estoppel point raised by the respondents, the court accepts the submission made by Mr. Quirke SC on behalf of the applicant, that having regard to the

express agreement that had been reached between the parties, which effectively excluded all of the challenged documents, there was no need for the applicant to continue with his objection in this regard. He had obtained what he was seeking, namely the exclusion of that documentation. In these circumstances, his continued participation in the hearings on Days 10 and 11, cannot be seen as a waiver of his objection to the admission of such documentation. Therefore there is no question of any estoppel arising in this regard.

108. As a justification for placing all of the documentation before the Board, which had been before the FPC, it was submitted that the provisions of s.38 (3) of the Act specifically provided that this should be done. Section 38 (3) provides that on the completion of the inquiry, the FPC shall embody its findings in a report to the Board specifying therein the nature of the application and the evidence laid before it and any other matters in relation to the nurse which it may think fit to report including its opinion, having regard to the contents of the report, as to (i) the alleged professional misconduct of the nurse, or (ii) the fitness or otherwise of that nurse to engage in the practice of nursing by reason of alleged physical or mental disability, as the case may be.

109. Counsel submitted that that section contained a clear obligation to put all of the evidence that had been before the FPC before the Board. It had been in compliance with that statutory obligation, that all of the material which had been placed before the FPC in the course of the hearing in relation to the preliminary issue, which included the various statements referred to, had been placed before the Board. It was submitted that it would not have been appropriate for the CEO, or the FPC to have cherry picked which pieces of evidence should be placed before the Board.

110. While the court can readily understand the validity of that interpretation of s. 38 (3) in the normal run of inquiries that would be held before the FPC, where evidence would be admitted either by formal proof, or informally by agreement of the parties and such evidence, no matter how it came to be before the FPC, would be considered by it when considering its report; in such circumstances it is entirely appropriate that the same body of evidence should be placed before the Board. However, in this case there was an unusual procedure in that there was a separate and distinct hearing in relation to the preliminary issue, in the course of which prejudicial evidence against the registrant was admitted, but only for the purpose of determining the preliminary issue; namely whether due to the delay that had occurred, he was in a position to properly defend himself against the case that he had to meet at the inquiry.

111. In these somewhat unusual circumstances, it was necessary to depart from the usual interpretation of s. 38 (3), so as to ensure that only evidence in respect of which the applicant had been given an opportunity to test by way of cross examination, or had agreed to its admission as evidence, should be placed before the Board for its consideration. That did not happen. Instead, prejudicial material, which the applicant had not been given an opportunity to challenge by cross examination, was placed before the Board. If the Board were to consider such material, that would be in breach of the applicants right to a fair hearing before it.

112. Notwithstanding that the inquiry process has not yet come to an end, the court is satisfied that having regard to the fundamental right to a fair hearing that is enjoyed by a person against whom allegations are made, and inherent in that right, being the right to cross-examine those who make allegations against them, the court is of the opinion that it is appropriate in this case to intervene at this juncture and strike down the FPC report, notwithstanding that the inquiry process has not yet reached its ultimate conclusion.

113. Turning to the lack of reasons point raised on behalf of the applicant in relation to the failure of the FPC to address, or even mention, his offer of an irrevocable undertaking in lieu of sanction; it is now well settled at law that judicial and quasi-judicial bodies must give reasons for the decisions that they reach. This duty to give reasons was applied in the area of medical enquiries in *Prendiville v. The Medical Council* [2008] 3 I.R. 122 and by the English Court of Appeal in *Southall v. The General Medical Council* [2010] EWCA Civ 407.

114. The duty on the determining body to give reasons when considering the issue of sanction in the context of an offer made by the subject of the inquiry to do certain things, or abide by certain conditions, was addressed by the English High Court in *Madan v. The General Medical Council* [2001] EWHC 577 (Admin), where Newman J. stated as follows at para. 64:-

> *"An essential point which, in my judgement, emerges from the cases is that adequate reasons will inform the recipient of the basis for the decision. A reason expressed as a conclusion will frequently not disclose the underlying basis for the decision. It follows that the applicant in this case, who had advanced a specific submission, not simply to the first initial committee but to the review committee, to the effect that the public interest would be adequately protected and met by a conditional registration order as opposed to a suspension order, was entitled to expect illumination as to why that particular argument had been rejected. Mr Shaw has taken us through the reasons and broken them down in a way which is incontrovertibly correct. He submits that it is obvious the committee had concluded that there was prima facie evidence of inappropriate and irresponsible prescribing; secondly, that a serious series of allegations had been made, and further that they had concluded that there was a risk to the public if the applicant was to continue prescribing. But in my judgement the reasons given do not shed any light on the reasons why the committee reached the conclusion that the public interest did require a suspension rather than conditional registration and equally importantly, why the committee had decided that weighing as they were bound to do the interests of the applicant against the need for public protection, the suspension order was one which they considered proportionate to the risk which they had identified."*

115. In relation to the lack of any reference in the FPC report to the offer of an irrevocable undertaking by the applicant, the offer of such an undertaking was a very significant matter. It represented an offer by the applicant to give an irrevocable undertaking never

to seek to have his name removed from the inactive register of nurses, in lieu of the imposition of a sanction. That meant that he would never be able to work as a nurse. As such, it was a significant matter to be considered in the context of the appropriate sanction to be imposed. The court is of the opinion that it should have been addressed by the FPC in its report, even if the FPC was going to reject it as being an appropriate sanction in all the circumstances.

116. The court accepts the point made by counsel on behalf of the applicant that while the FPC only makes a recommendation in relation to sanction, having regard to the standing of the FPC, their report and recommendation on sanction will carry a lot of weight with the Board, which will ultimately determine the issue of sanction.

117. The court is satisfied that when addressing the issue of sanction, the FPC should have addressed this issue. A person who has made such an offer in the context of the imposition of a sanction against them, is entitled to know that their submissions in that regard had been taken into consideration by the FPC when determining the issue of sanction. In this case there was no mention of the offer at all. It is not sufficient to say that it was "*implicit*" in the decision that the FPC had rejected the offer of such an undertaking as being an appropriate sanction. The court is satisfied that having regard to the case law mentioned by counsel in the course of argument as outlined earlier in the judgment, there is a duty on decision makers to give reasons why a submission made on behalf of a party has been rejected.

118. In this case there had been considerable discussion at the hearings before the FPC as to whether it even had jurisdiction to recommend the acceptance of such an undertaking as being an appropriate sanction. While the advice of the legal assessor had been somewhat equivocal in this regard, he had been clear in his advice that the FPC had to make some decision on the matter.

119. The FPC could decide that it did not have jurisdiction under the 1985 Act to recommend the acceptance of such an undertaking as an appropriate sanction; or they could hold that they did have jurisdiction to do so, but that it was not appropriate to recommend the acceptance of such an undertaking having regard to the circumstances of this case; or they could come to the conclusion that they did not have to decide the jurisdiction issue, because even if they did have jurisdiction, they would not recommend it as an appropriate sanction. It is a matter for the committee whether they feel the acceptance of such an undertaking is a matter that could be recommended as being an appropriate sanction or not. However, given the importance of the matter to the applicant on the issue of sanction, it is incumbent upon them to make some decision in relation to it. Because the FPC did not mention the issue of the offer of the undertaking and did not give any reasons as to why it had been rejected, the court must quash the FPC report on this ground as well.

120. Having regard to the findings made by the court that it must quash the report of the FPC on the grounds set out above, the court must now consider the question as to what is the appropriate relief to grant in the light of such findings. In considering whether to remit

the matter back to the original decision-maker, in this case the FPC, the court has a wide discretion: see dicta of Kelly J. in *Prendiville v. The Medical Council*, supra, at pages 174 – 176.

121. The court is satisfied that both the FPC and the Board are bodies with specialist knowledge and expertise in the area of inquiries under the 1985 Act. The court has also had regard to the fact that the "*liability*" aspect of this case has been decided, in that the applicant has made admissions in relation to a number of allegations that were laid against him and the CEO has withdrawn the remainder of the allegations. Thus the only question that arises for determination is the question of sanction.

122. The court is satisfied that having regard to the expertise of the FPC and to the nature of the issue that remains to be determined, being the issue of the recommendation of a sanction, it is appropriate to remit the matter back to the FPC with appropriate directions, so that they can furnish a fresh report and make a recommendation of sanction to the Board. That sanction may or may not be the same as the sanction that was recommended in the previous report. However, the court gives the following direction to the FPC: that in considering the appropriate sanction to recommend in relation to the professional misconduct that has been admitted by the applicant, the FPC should only have regard to the documents that it was agreed should be admitted in evidence and were furnished to the FPC on day 10 of the hearings. The FPC should not have regard to any other material that was laid before it in the course of its earlier hearings.

123. In relation to the Board, while they may have considered the challenged documentation, as asserted by the letter furnished by Messrs Beauchamps Solicitors, nevertheless, the court is satisfied that having regard to the fact that the Board is a very experienced professional body, they will be in a position to put such documentation out of their minds when they are called upon to consider the fresh report which will be issued by the FPC in the course of this inquiry.

124. When considering whether to accept that report and in particular, when considering the question of sanction, the applicant will have the opportunity to make submissions to the Board, both in relation to the offer of the undertaking that was made by him and in relation to the question of sanction generally. Again, the court will give the direction to the Board that in considering the question of sanction, it should only have regard to the agreed evidence that was admitted before the FPC on Days 10 and 11 of the hearings. It should not consider any other evidence laid before the FPC. The court is satisfied that with the issuance of these directions to the FPC and to the Board, that the rights of the applicant to a fair hearing in this inquiry will have been maintained.

125. Accordingly, the court will make an order quashing the report of the FPC herein dated 11th October, 2018; it will remit the matter back to the FPC for fresh consideration based exclusively on the agreed evidence submitted to it on Days 10 and 11 of the hearings and thereafter the matter can proceed for consideration by the Board, which can consider the fresh FPC report and the agreed evidence that was presented to the FPC.

126. The parties can make written submissions on the terms of the final order and on the issue of costs and in respect of any other matters that may arise, within two weeks of the date of this judgment.