THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 300 J.R.]

BETWEEN

INDEPENDENT NEWS AND MEDIA PLC

APPLICANT

AND

THE DIRECTOR OF CORPORATE ENFORCMENT

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of June, 2018

Introduction

1. Was the respondent obliged to consult with the applicant prior to making application to the High Court for the appointment of inspectors pursuant to s. 748 of the Companies Act 2014 ("the 2014 Act")? That is the essential issue that arises for determination in these judicial review proceedings by which the applicant seeks to quash the decision of the respondent to make such application. By order of the President, the matter proceeded before me as a "telescoped" hearing, that is to say the application for leave to seek judicial review and the substantive application for judicial review were heard together.

Relevant Facts

2. The applicant is a public limited company which has been described as the largest media organisation in the State. It publishes a number of well-known newspapers. It directly employs over 800 people and has over 7,800 shareholders.

3. In November, 2016, the applicant's Chief Executive Officer, Robert Pitt, made a number of protected disclosures first to a director of the applicant and subsequently on 18th November, 2016 to the respondent. Among the allegations of wrongdoing within the applicant company made by Mr. Pitt was a claim that he had been put under improper pressure by Leslie Buckley, the applicant's then Chairman, to influence the price to be paid by the applicant to acquire Newstalk, a radio station owned by Communicorp and in respect of which there had been discussions between the applicant and Communicorp for its purchase. A further claim by Mr. Pitt related to the sale by the applicant of its interest in an Australian media company called APN. Mr. Pitt alleged that there had been an improper attempt made by Mr. Buckley to procure a payment to a party called Island Capital in the nature of a success fee, from the proceeds of the sale of the applicant's shares in APN.

4. Arising from this disclosure, the respondent commenced an investigation into the affairs of the applicant. This investigation was underway for a number of months when on the 10th August, 2017, Mr. Pitt made a further protected disclosure to the respondent which has been referred to as the "Data Interrogation Issue". This concerned the removal in 2014 of a large quantity of tapes containing data from the applicant's IT system out of the jurisdiction where they were subjected to analysis by a company in the United Kingdom. This was done at the behest of Mr. Buckley without the knowledge of Mr. Pitt or the Board of the applicant.

5. Mr. Pitt in his disclosure alleged that the applicant's Head of IT had been expressly instructed by Mr. Buckley not to disclose this event to Mr. Pitt. Mr. Buckley subsequently offered the explanation to the Board that this had been done as part of a cost saving exercise particularly in relation to one specific contract for the supply of legal services, about which there was said to be some lack of clarity. It subsequently emerged that the invoice for this work was discharged by a third party company unrelated to the applicant.

6. In the course of his investigation, the respondent in October, 2017 obtained from an individual involved in the removal of the data a spreadsheet document which suggested that targeted searches of the data in question had been conducted in relation to 19 individuals identified as "persons of interest". This document suggested that the explanation given by Mr. Buckley to the Board of the applicant of the circumstances of the Data Interrogation Issue was not correct. Of importance, the applicant says that it never saw or was aware of this document prior to the application by the respondent to the High Court for the appointment of inspectors. That application was made by the issuing of a notice of motion on 23rd March, 2018 and currently stands adjourned pending the outcome of this judicial review.

7. In the course of his investigation, the respondent made 14 statutory requirements for information and documents pursuant to s. 778 of the 2014 Act. The applicant complied with all of these, as it was obliged to on pain of criminal sanction. The applicant says that it had no notice of either the fact that the respondent intended to make the court application or that he had concluded his investigation. Both of these matters came as a surprise to the applicant. It should be noted that the Data Interrogation Issue is also now the subject of an investigation by the Data Protection Commissioner.

8. In the affidavit grounding this application sworn by Leonard O'Hagan, a director of the applicant, he avers that the applicant received no notice of the concerns identified by the respondent following the completion of his investigation and had such concerns been identified, they could have been addressed by the applicant. Dr. O'Hagan avers that this has had a damaging effect on the applicant. In the context of the Data Interrogation Issue, he avers at para. 17:

> "As I have explained below, in circumstances where INM is a media organisation, its ability to control and protect data is hugely important to its reputation and the fact that it was deprived of the opportunity to address these issues in advance of the inspectorate application being made has had damaging consequences for its reputation."

9. Elsewhere in his affidavit, Dr. O'Hagan identifies other adverse impacts on the applicant of the respondent's decision to make the inspectorate application. These include a risk of disruption to the conduct of the applicant's business, the likelihood of damage to the applicant's reputation, business and shareholder value and the fact that the respondent's failure to notify the applicant of the issues surrounding the spreadsheet deprived it of the opportunity of notifying the individuals concerned and the Data Protection Commissioner. In particular, the applicant relies on an expert affidavit of Kim Greene which offers the view that the applicant's share price has been adversely affected by the making of the inspectorate application. In his second affidavit, Dr. O'Hagan also refers to the fact that the making of the inspectorate application has caused disquiet amongst the applicant's shareholders, employees and other stakeholders.

The Applicant's Case
10. As pleaded in its statement of grounds, the applicant contends that because of the potential adverse impact of the inspectorate application on the applicant, it was entitled to notice of the respondent's intention to make the application and thereafter the opportunity to make representations and/or submissions before the application was brought. It is said that the respondent's failure to afford that opportunity amounts to a breach of natural and/or constitutional justice and the applicant's right to fair procedures.

11. There is a separate plea to the effect that the respondent failed to take relevant considerations into account before applying to the court. Those considerations are said to be the information that would have been made available by the applicant had it been consulted and so this ground is in reality a sub category of the primary ground. In its written submissions, the applicant argues that the decision to bring the inspectorate application is amenable to judicial review being a discretionary decision taken by a public body pursuant to a statutory power with the potential to adversely affect the rights and interests of the applicant. Although the applicant concedes that in general the right to fair procedures is not triggered at a preliminary investigation stage where such procedures are available at a later stage, there are exceptions and each case is fact specific. The facts here are such that fairness required a right to be consulted. A number of authorities were relied upon in that regard to which I will refer further.

12. In the course of argument, counsel for the applicant accepted as a general proposition that a State body bringing litigation, even where that fact of itself causes damage, is not obliged to consult in advance the party being sued, and that reputational damage alone arising from such circumstances could not form the basis of a claim. However, in an expansion of the written submissions, counsel argued that the applicant's case could be distinguished because first, it involved the compulsory obtaining of information from the applicant, secondly that even when the inspectorate application came to court, the court would not find any facts at that stage and thirdly, in the affidavit grounding the inspectorate application, the applicant had made findings and reached conclusions.

The Respondent's Reply
13. In his statement of opposition, the respondent pleads that the decision to issue proceedings in the High Court is not amenable to judicial review. The issuing of the notice of motion does not affect any rights or liabilities of the applicant. If the issuing of the proceedings has had or will have any adverse effect on the applicant, that is remedied by the hearing before the court. The respondent pleads that there was no legal obligation on him to give prior notice of his intention to apply to the High Court or to afford the applicant any right to make submissions in relation to such proposed application. It is pleaded that the requirements contended for by the applicant would represent an unprecedented and disproportionate interference with the right of access to the court and with the administration of justice.

14. To summarise very briefly the written and oral arguments advanced by counsel for the respondent, he contended that the authorities establish that first, there can be no right to be consulted in advance in respect of a decision by a statutory body to institute legal proceedings, secondly that the harm allegedly suffered by the applicant is not legally cognisable and thirdly there is no right to be consulted in the first stage of a two stage process where the second stage, as here, affords full fair procedures to the applicant.

Some Relevant Cases
15. It is not in dispute that the touchstone in this case is the judgment of the Supreme Court, delivered by Walsh J. in *East Donegal Co-operative Livestock Mart Limited v. the Attorney General* [1970] I.R. 317. The Livestock Marts Act, 1967 empowered the Minister for Agriculture and Fisheries to grant or refuse a licence to sell cattle, sheep or pigs. Section 3 enabled the Minister to grant or refuse a licence at his discretion, to attach to a licence such conditions as he should think proper, to amend or revoke a condition if he thought fit and, if he thought fit, to revoke a licence if the holder was guilty of an offence under the Act. The plaintiffs who operated marts pursuant to licences granted under the Act sought a declaration that the Act was unconstitutional. Dealing with the presumption of constitutionality Walsh J. observed (at p. 341):

> "At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts".

16. In treating of the Minister's power to grant or refuse a licence at his discretion, Walsh J. said (at pp. 343 – 344):

> "All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."

17. The applicability of the *East Donegal* principles to a decision by a public body to institute legal proceedings was directly considered recently by the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25. The local authority brought an application for an order pursuant to s. 160 of the Planning and Development Act, 2000, which is a form of statutory injunction, restraining the carrying out of unauthorised development on lands. The High Court granted the order and the Murrays appealed to the Supreme Court. One of the grounds of appeal was that the trial judge had failed to properly consider whether the council's decision to institute s. 160 proceedings was a proportionate response to the facts of the case. Delivering the judgment of the court, McKechnie J. dealt with this argument in the following manner (at pp. 29-31):

> "58. When one comes to the issue of how the court's discretion under section 160 of the 2000 Act should be exercised, the appellants have submitted that proportionality is a significant element in any decision so reached. That is a point later addressed in this judgment. In addition, however, the submission has also been made that in deciding whether or not to institute section 160 proceedings, the Council at that point is likewise obliged to engage in and to conduct a similar or at least an analogous exercise before arriving at that decision.
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> 59. It is claimed that even if the planning authority should have a view that a particular development is unauthorised, it is not axiomatic that section 160 proceedings follow. There is no legislative prescription to that end. Thus, even when a *prima facie* infringement appears, a decision must still be made whether to institute or not. As part thereof it is asserted that the various factors which feed into the proportionality test which must be conducted by the High Court should also

> form an integral part of that consideration. Because there is no evidence that this occurred in this case, it is suggested that the issue of the grounding Notice of Motion is unlawful, although on what precise basis remains unclear…
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> 61. In my view, this submission is to over characterise what the institution of these proceedings actually means, what the step entails and what relationship that has with the principles of constitutional justice. Save for the obvious consequences of putting in train a course of action which might possibly lead to a court hearing, such a move, of itself, does not impact on any of the rights of the individuals concerned. Such rights remain entirely intact and no decision with any legal consequences has been taken in that regard. It is but the commencement of a process which itself might never go much further…
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> 62. Further, to impose a requirement such as that agitated for would create major problems if one was to analyse the practical difficulties which would inevitably arise. Would a moving party be obliged to search and seek out the intended respondent and afford him or her an opportunity to make what would in effect be submissions? Would there be a right to make an oral presentation, even to give evidence? Would there have to be some form of appeal mechanism? These are but some of the obvious difficulties which it might be said could debilitate the system, at least in its current structure. I therefore reject this submission.
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> 63. It follows from what I have said that I cannot accept that the institution of these proceedings in and of itself is an example of '…proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas' as that phrase is used in *East Donegal Co-op v. Attorney General* [1970] I.R. 317 at 341. Consequently, apart from the major practical issues which such a submission would give rise to, I cannot accept that there is any obligation on the Planning Authority to engage in this elaborate process with intended respondents to a section 160 application."

18. This is a clear statement of principle by the Supreme Court which held that a decision by a public body to institute legal proceedings is not one which is captured by East Donegal. It is difficult to see how the applicant's case here can be distinguished from that of the Murrays, involving as it did an application for an order demolishing their family home.

19. In *Dunnes Stores v. Maloney* [1999] 3 I.R. 542, the High Court (Laffoy J.) considered the powers of the Minister for Enterprise, Trade and Employment under the provisions of the Companies Act, 1990, which gave the Minister certain functions relating to the oversight of companies similar to those of the respondent now. The Act empowered the Minister, if of opinion that there were circumstances suggesting that it was necessary to examine the books of a company to decide whether an inspector should be appointed to investigate the affairs of the company, to appoint an "authorised officer" to obtain information from the company. The Minister appointed such an officer and the officer sought certain information and documents from the company to which objection was taken.

20. The company brought judicial review proceedings in which it sought an order of *certiorari* quashing the decision of the Minister to appoint the authorised officer on a number of grounds which included an alleged failure on the part of the Minister to allow the company to put forward reasons as to why the appointment should not be made. Laffoy J. noted that the power to appoint an authorised officer which was conferred by s. 19 of the Act was a discretionary power, the exercise of which was subject to the constraints identified in *East Donegal*. In a passage in her judgment captioned "Entitlement to Make Representations" Laffoy J. noted (at p. 557):

> "The applicants contended that the requirement that the Minister follow fair procedures in the exercise of the power conferred by s. 19 necessitated the giving of advance notice to the applicants before the Minister appointed an authorised officer, so as to enable the applicants to make representations to the Minister as to why the appointment should not be made".

21. As in the present case, counsel for the applicant identified the representations that the applicants might have made had they been on notice of the Minister's intention to appoint an authorised officer. The court continued (at p. 559):

> "Counsel for the applicants submitted that the appointment of an authorised officer of itself was detrimental to the applicants, in that it was of necessity preceded by the formation of an opinion as to the existence of one of the states of affairs catalogued in sub-section (2). It was submitted that it would be deleterious to the reputation of the applicants if knowledge of the making of the appointment came into the public domain. Fair procedures require that the applicants should have been given advance notice of the appointment and an opportunity to make representations to obviate that detriment, he argued."

22. I pause here to note that of course in that case, an authorised officer was actually appointed as distinct from here where there is at present a pending application for the appointment of inspectors. Laffoy J. continued:

> "Notwithstanding the safeguard contained in s. 21 and the fact that officers in the Minister's department are bound by the Official Secrets Act, 1963, no one can guarantee that the existence of an authorised officer appointed under s. 19 will not become public knowledge. An obvious source of a leak could be s. 19(4), which empowers an authorised officer to seek an explanation from any person who is or was a present or past officer or employee of the body in question. Be that as it may, in my view, the possibility of public exposure of the existence of an authorised officer does not give rise to a detriment the nature of which requires that notice of an intended appointment and an opportunity to argue against such appointment be given. I accept the argument advanced by counsel for the respondents that with the privilege of incorporation comes obligations and duties and statutory impositions and that the impositions embodied in Part II of the Act of 1990 become, in effect, part of the constitution of the company, which the company has to endure. The Minister is the regulator of companies and, given that the privilege of incorporation is open to abuse in a myriad of ways, the Minister's investigative role is essential. When that investigative role is performed by an authorised officer under s. 19, he merely investigates and obtains information. He makes no finding or decision in relation to the company or its officers which is final or conclusive or could be detrimental in any real sense. All he does is procure and inspect documents and obtain explanations. The risk that his investigation will become public knowledge and that the company may be perceived as being 'tarred with the same brush' as other companies which have been subject to the s. 19 procedure, which is the gist of the applicants' argument, is part of the price which the company's proprietors pay for the benefits of incorporation.
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> There are no doubt ministerial powers which can only be exercised if advance notice and an opportunity to make representations is given to the person affected. … in my view, the power conferred on the Minister by s. 19 is not a power the exercise of which requires advance notice or the giving of an opportunity to make representations."

23. Here again the parallels with the present case are obvious, noting however that although the court held that *East Donegal* applied to the exercise of the power to actually appoint an authorised officer, that did not include a right to be consulted in advance. Reputational damage potentially suffered by *Dunnes* seems to fall squarely into the same category as that contended for by the applicant in this case. Unlike *Dunnes*, the applicant here is a public company which places particular emphasis on the alleged damage to its share price. Although the evidence of Mr. Greene in that regard is not controverted, it is common case that a company's share price may fluctuate for any one of a number of reasons which one would have thought in the present case would not necessarily relate solely to the decision to apply to appoint inspectors but also as pointed out by counsel for the respondent, the fact that undisputed information has come into the public domain which could be viewed as detrimental to the applicant's interests.

24. The respondent further argued, in my opinion correctly, that the alleged damage to the applicant's share price is in reality a form of reputational damage being a reflection of how the stock market views the company. The respondent contends that such damage is not legally cognisable. In *G. v. Collins*, [2005] 1 ILRM 1, a protection order was granted *ex parte* in family law proceedings against the applicant on 18th September, 2002. On 21st November, 2002 the protection order was discharged by consent of the parties. On 17th December, 2002, the applicant brought judicial review proceedings seeking an order quashing the protection order on the basis that despite the argument that the issue was moot, the applicant had suffered damage to her reputation by the making of the order. Giving the judgment of the Supreme Court, Hardiman J. noted (at pp. 10-13):

> "In my view it would be utterly unreasonable in the legal sense of that term for any person to regard another as lowered in his or her reputation purely because he had been the subject of an interim order. …
>
> In those circumstances, any person who formed a view adverse to the good name or reputation of another on the basis that he or she had been the subject of an *ex parte* order of any kind would be acting unreasonably in the legal sense of that term. Such a conclusion would be logically and legally insupportable, would fly in the face of common sense and would be most unjust. The role of defamation, which is the major mechanism provided for the vindication of the right to a good name, requires that the reputation of a plaintiff has been shown to have been damaged in the eyes of 'right thinking' people. No right thinking person could be justified in drawing any conclusion or inference adverse to a person's good name on the basis that he had been the subject of an *ex parte* order of any kind …
>
> I would add a further observation about the plaintiff's claim to have suffered reputational damage as a result of the making of the protection order. I have already held that she could not suffer legally cognisable reputational damage on foot of the making of an *ex parte* order against her, for the reasons set out above."

25. It seems to me that if, as the Supreme Court held in *G. v. Collins*, the making of an *ex parte* order by a court cannot give rise to legally cognisable reputational damage, it must follow that neither can the antecedent step of simply suing a party give rise to damage of which the law can take cognisance.

26. Similar views are to be found in the judgments of the Supreme Court in the complex case of *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54. Nurse O'Ceallaigh was the subject of a number of complaints concerning her professional practices to the Fitness to Practice Committee of the Nursing Board. The Fitness to Practice Committee decided that there was a *prima facie* case for the holding of an inquiry pursuant to s. 38 of the Nurses Act, 1985. In reaching that decision, the Committee did not afford Nurse O'Ceallaigh an opportunity to respond to the complaints. At the same time, the Board determined to apply to the High Court *ex parte* under s. 44 of the Act for an injunction restraining Nurse O'Ceallaigh from practising as a midwife. She sought to quash the decisions of the Board both to hold the inquiry pursuant to s. 38 and to apply for the injunction pursuant to s. 44. The Supreme Court in effect held that she had a right to be consulted before the decision to launch the s. 38 inquiry was arrived at whereas she had no such right in relation to the injunction application.

27. On the issue of whether she was entitled to be consulted before the s. 44 application was brought, Barron J. observed (at pp. 90-91):

> "Clearly, as in *Parry-Jones v. The Law Society* [1969] 1 Ch. 1, where the right to proceed does not arise until a particular opinion has been formed, it is not the law that the person who may be affected by the proceedings based upon that opinion should be informed prior to the issue of those proceedings so as to be able at that stage to argue to the contrary. … the cases show that where the commencement of proceedings is dependent upon an opinion that a *prima facie* case exists, notice to the person affected is not required. But that only sets the process in train."

28. Similar views were expressed by Murphy J. who was in the minority on the s. 38 issue but the majority on the s. 44 issue (at p. 104):

> "The fact that litigation, whether criminal or civil, may of itself and independent of its outcome cause embarrassment and inconvenience, or even damage, to the intended defendant is not of itself sufficient reason for imposing on the intended plaintiff an obligation to consult with the intended defendant before instituting the proceedings. In many cases it would be appropriate and desirable to warn the intended defendant of the threatened litigation and afford him an opportunity of meeting the claim without the necessity for proceedings. But the failure to adopt that course would not invalidate the proceedings or impinge upon the constitutional rights of the defendant. Inappropriate or precipitated action might be penalised by the order of the courts in relation to costs or otherwise but would not go to the validity of the action. If the Board is precluded from instituting proceedings under s. 44 without first hearing the intended respondent, that extraordinary restraint must be found in s. 44 itself."

29. It is of course important to note that in present case, s. 748 of the 2014 Act, which empowers the respondent to apply to the High Court for the appointment of inspectors to a company, places no obligation on the respondent to consult with the company prior to making such application. Had the Oireachtas thought it desirable that the respondent should do so, it could have so provided. The fact that it did not is in my view of considerable significance.

30. In the course of his submissions, counsel for the applicant placed reliance upon the recent decision of Supreme Court in Cr*ayden Fishing Company Limited v. Sea Fisheries Protection Authority* [2017] IESC 74. Before considering that case, it is useful to look at some of the earlier authorities considered by the Supreme Court in *Crayden*.

31. *Gammell v. Dublin County Council* [1983] ILRM 413 concerned an order made by the council under the Local Government (Sanitary Services) Act, 1948 prohibiting the erection or retention of any temporary dwelling on a caravan park owned by the plaintiff. The Act provided that any person aggrieved by the making of the order could apply to the Minister for the Environment to have the order annulled stating reasons and the order would not come into effect during the period for such application. The High Court (Carroll J.)

held that there was no want of natural justice arising because the order did not become effective until the party affected had an opportunity of being heard. This was to be distinguished from cases where the order became effective before any right to be heard arose even if an appeal was provided. In the course of her judgment, Carroll J. said (at p. 497):

> "However in this case we are not dealing with an Order effective when made and an appeal therefrom to an appellate body. Under Section 31 of the Act the Order has no effect until the person aggrieved has been given an opportunity of stating reasons why it should not come into effect. There is no 'appeal' to the Minister from an operative order. There is machinery set up under the section whereby an aggrieved party can make representations why the order should not come into operation. If successful, the order is annulled by the Minister and it never becomes operative. This is very different to the Ingle case and the Moran case where the revocation of the licence became operative immediately and of necessity there had to be a time lag between the revocation and the determination of an appeal in the District Court."

32. She then went on to consider the judgment in S*tate (Duffy) v. the Minister for Defence* (Supreme Court unreported 9th May, 1979) and concluded (at p. 418):

> "This case appears to me to establish that provided representations can be made before a decision becomes effective the *audi alteram partem* rule is not breached…
>
> Accordingly I am satisfied that it was not necessary under the requirements of natural justice to give the Plaintiff an opportunity to make representations to the Council before it made the order with delayed effect."

33. A similar conclusion was arrived at in *McNamee v. The Revenue Commissioners* [2016] IESC 33. Here, a nominated officer of the Revenue Commissioners formed an opinion pursuant to s. 811 of the Taxes Consolidation Act, 1997 that a particular transaction was a tax avoidance transaction, a determination which had potentially significant consequences for the taxpayer applicant. Although the applicant had no right to make representations prior to the nominated officer forming the opinion, the High Court held that there was no want of procedural fairness arising because of the availability of an appeal where fair procedures applied. As in *Gammell*, the impugned decision did not take effect until the appeal had been heard or the appeal period expired. Giving the judgment of the Supreme Court, Laffoy J. upheld the High Court on this point following the judgment of Carroll J. in *Gammell*. Laffoy J. summarised the arguments (at p. 73):

> "103. Essentially, the Taxpayer contends that the Revenue Commissioners failed to afford the Taxpayer a meaningful opportunity to make representations on the Report and that such failure constituted a breach of fair procedures. The Taxpayer relies on a line of authority which, as it was put, culminated with the judgment of this Court in *Dellway Investments v. NAMA* [2011] 4 I.R. 1 (*Dellway*), which was followed by the High Court in *Treasury Holdings v. NAMA* [2012] IEHC 297 (*Treasury Holdings*). The Revenue Commissioners' response is that the circumstances in this case are distinguishable from the circumstances in *Dellway* and in *Treasury Holdings*. Further, their position is that the approach taken by the High Court (Carroll J.) in *Gammell* is the appropriate comparator to this case and that it should be followed."

34. Laffoy J. went on to embark on a very helpful analysis of the decisions in *Dellway* and *Gammell* considering first *Dellway* (at p. 74):

> "105. In the light of the foregoing arguments and counter arguments it is useful to compare the circumstances in the *Dellway* case with the circumstances in this case. The decision under challenge in *Dellway* was a decision of the National Asset Management Agency (NAMA), which was said to be made under s. 84 of the National Asset Management Agency Act 2009, to acquire loans of Patrick McKillen and companies partly or wholly owned by him, without notice to, or consultation with, him. One of the grounds on which Mr. McKillen sought to challenge the decision was that he enjoyed certain rights connected to his bank loans and that he had the right to be heard prior to the making of the decision to acquire his loans due to interference, or potential interference, with these rights. The distinguishing feature which emerges in the comparison of the jurisdiction invoked by NAMA in *Dellway* and the jurisdiction invoked by the Revenue Commissioners under s. 811 in this case is that a borrower, such as Mr. McKillen, affected by a decision of NAMA pursuant to s. 84 to acquire eligible bank assets, has no right to appeal against the decision of NAMA. However, in this case, the Taxpayer, on whom the Notice was served pursuant to s. 811(6), had a right to appeal under s. 811(7) by way of a full *inter partes* hearing and the opinion embodied in the Notice would not be final and conclusive within the time limited to appeal or, in the event of an appeal, until the appeal was finally determined. It is from that distinguishing feature that it is contended by the Revenue Commissioners that the analogy with the decision in *Gammell* flows."

35. Laffoy J. then went on to analyse *Gammell* and having done so, concluded that the argument advanced by the Revenue was correct. She said (at p. 78):

> "By virtue of subs. (7) of s. 811 the Taxpayer, as a person aggrieved by the opinion formed by the Nominated Officer, had the right to appeal to the Appeal Commissioners, but only on the grounds set out in subs. (7). Those grounds cover the opinion which the Nominated Officer was entitled to form and every determination and calculation which he was empowered to make by virtue of subs. (4), in respect of all of which he was obligated to notify to the Taxpayer by virtue of s. 6(a). Accordingly, the structure of s. 811 is such that the right of the Taxpayer to appeal following receipt of the Notice under subs. (7) entitled him to challenge the formation of the opinion on the ground that the transaction specified in the Notice was not a tax avoidance transaction and to challenge all the other determinations and calculations made by the Nominated Officer, broadly speaking on the basis that they were wrong. Given that the structure also, by virtue of subs. (5)(e), effectively stalled the opinion and the determinations and the calculations of the Nominated Officer becoming effective in the event of an appeal until its final determination, it is not the case that the right of appeal which the Taxpayer had under subs. (7) was not an effective remedy. In summary, it was an effective remedy because it gave the Taxpayer the right to challenge the formation of the opinion on the basis that it was wrong and the consequential determinations and calculations which the Nominated Officer was entitled to make and which required to be notified to the Taxpayer, so that pending the final determination of the appeal the Taxpayer was wholly protected."

36. She accordingly concluded that the inability of the taxpayer to challenge the opinion of the nominated officer before it was given did not breach the requirements of natural or constitutional justice.

37. Both *Gammell* and *McNamee* therefore suggest that where there is a two stage process where the first stage does not become effective until the second has been exhausted, the availability of fair procedures at the second stage will cure any want of such procedures at the first.

38. Two of the authorities referenced by Laffoy J. in *McNamee* were *Dellway* and *Treasury Holdings*, both decisions here relied upon by the applicant. As explained by Laffoy J., in *Dellway*, Mr. McKillen's loans were compulsorily acquired by NAMA without him being afforded any right to make representations. As she pointed out, the important distinction between *Dellway* on the one hand and *Gammell* and *McNamee* on the other was that Mr. McKillen had no right of appeal and thus no right to make representations at any stage of a process which detrimentally affected him. One of the arguments advanced by NAMA in *Dellway* was that the acquisition of the loans did not interfere with any legal rights of Mr. McKillen. This argument was rejected. In his judgment Fennelly J. observed in that regard (at p. 328):

> "[460] It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interest in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be an injustice to exclude me from being heard. For the purposes of the right to be heard, I would not draw a sharp line, what is sometimes called a 'bright line', of distinction between an effect which modifies the legal content of rights and a substantial effect on the exercise or enjoyment of rights."

39. Fennelly J. went on to note that there was credible evidence that Mr. McKillen's business was likely to be significantly affected by the acquisition. He said (at p. 329):

> "[462] The applicant's case for effects on their interests can be summarised as follows. Their experts say that the mere fact of transfer of the loan to NAMA will result in immediate and lasting adverse economic consequences for the applicants. It is not like a mere change of bank manager. Professor Stiglitz contends that NAMA's 'incentives for dealing with preforming assets like the McKillen loans are fundamentally different than those of a commercial bank' ".

40. The applicant placed considerable reliance on passages in the judgment of Fennelly J. such as those I have identified as supporting the proposition that the requirement for fair procedures is fact specific and not amenable to rigid definition. In that context, it is important to note what Fennelly J. considered to be decisive in Mr. McKillen's situation (at p. 331):

> "[467] … The central point is in my view, that the transfer to NAMA puts the applicants and Mr. McKillen in a fundamentally different situation. NAMA, a statutory body, with statutory powers and objectives replaces his banks with which he has had up to now, a commercial relationship. His long term business model is not compatible with NAMA's statutory remit, which is essentially short term. Where NAMA is in a position to rely on default by any of the applicants under their loan agreements, it is not only likely but obliged to take action in pursuance of its statutory objectives, where a bank either would, or at least might, not do so. *The consequence of an acquisition decision is to make a substantial change in the way in which the applicants are in a position to exercise their property rights. Their ability to manage their properties independently is reduced."* (emphasis in original).

41. Other judgments of the court also considered the manner in which Mr. McKillen's ability to manage his affairs was affected by the acquisition so that even if it might be said that his strict legal rights were not affected, the practical reality was that his ability to carry on his business was significantly adversely affected in a lasting way.

42. *Treasury Holdings* was another case involving NAMA, this time making a decision to enforce a security without giving the borrower any opportunity to make representations. The High Court (Finlay Geoghegan J.) upheld Treasury's argument that it had a right to be heard before this decision was taken. She said (at p. 45):

> "88. If I am correct in deciding that NAMA, in making the decision to enforce, was taking a discretionary decision pursuant to a power conferred on it by statute, it is commoncase that the existence of a duty on it to give Treasury an opportunity to be heard or Treasury's right to be heard, is dependent upon its status as a person who is or may be affected by such decision. Such principle was restated in several of the Supreme Court judgment in *Dellway*, deriving both from the well known statements of principle by Walsh J. in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 at p. 341, and a consideration of the common law principles, in particular, by Hardiman J."

43. The court therefore considered in both *Dellway* and *Treasury Holdings* that the applicants had brought themselves within the rubric of East Donegal. In *Treasury Holdings*, as in *Dellway*, a crucial consideration was that the effect of the decision under challenge was to significantly impact negatively on the ability of the borrower to control its own business. Thus Finlay Geoghegan J. said (at p. 51):

> "103. I have come to the conclusion that Treasury did have a right to be heard in December, 2011 before NAMA took the decision to enforce by making demands, and if, as was inevitable, such demands were not met, by appointing receivers. If considered from the perspective of NAMA obligations, I am of the view that NAMA was under an obligation by reason of the then factual circumstances to give Treasury an opportunity to be heard prior to taking a decision to enforce.
>
> 104. Treasury in my judgment did have rights and interests, the practical exercise and enjoyment of which are effected by the decision to enforce. Treasury and each of the applicant companies had custody and control of any assets owned by them, albeit mortgaged or charged to NAMA, and were each managing their respective business though its board of directors. The business included management of properties and it was in receipt of management fees and rental income from these properties, 8% of which was not mandated to NAMA."

44. Dealing further with the impact on Treasury's business, Finlay Geoghegan J. said (at p. 53):

> "108. I reject the floodgates argument. The right to be heard is as has been determined fact specific. On the facts herein, it is dependent on the nature of the rights held by Treasury and its property and development businesses and the entering into the MoU and subsequent exchanges with NAMA in relation to the potential term sheets.
>
> 109. Finally, it defies common sense in a commercial context to consider that Treasury is not adversely affected by the decision to enforce incorporating, as it does, the inevitable appointment of receivers. Even an insolvent company, if it has significant property and other business interests, including, as in this instance, developments, is able to exercise its rights to manage and control its business through its board of directors, albeit it must also do so with due regard for the obligations which flow from insolvency. It ceases to be able to do so on the appointment of receivers.

> 110. The Treasury deponents have deposed, in addition to interference with the conduct of its business, to the adverse reputational effect. Whilst that, of itself, would not, in my judgment, be sufficient to establish a right to be heard, I am satisfied that on the evidence before me, even for a company within NAMA, there is a different perception of those companies to which NAMA offers refinancing and which appear to be working with NAMA, albeit for the purpose of disposing of assets, and those against whom NAMA determined it is necessary to enforce and appoint receivers."

45. Notably, in the latter passage Finlay Geoghegan J. was of the view that the reputational effect on Treasury's business was not of itself sufficient to give it a right to be heard. It seems to me that the situation that pertains in relation to the applicant's position here is very far removed from those arising in both *Dellway* and *Treasury Holdings*. In both of those cases, a decision was made, without hearing the applicants and without any possibility of appeal, which significantly and permanently adversely affected their rights to control and manage their own business and property. That does not arise in the present case.

46. For the same reason, I think the applicant's reliance on the decision in *Custom House Capital* [2011] 3 I.R. 323 is misplaced. The Central Bank applied to the High Court *ex parte* for the appointment of two inspectors to the company pursuant to Regulation 166(2) of the European Communities (Markets and Financial Instruments) Regulations, 2007. Custom House Capital had no notice of the application which sought a final order appointing the inspectors with the company being given liberty to apply to have it set aside. The High Court (Hogan J.) held that it was not constitutionally permissible to make a final order of the kind sought on an *ex parte* basis as to do so would be inconsistent with the company's right to fair procedures. He noted (at pp. 331-332):

> "[24] In the light of these authorities, I could not constitutionally sanction the appointment of inspectors by means of the making of a final order on an *ex parte* basis. It cannot be said that such an appointment represents merely some routine procedural step and that the company will have its opportunity of defending its position before the inspectors. It is rather a step which will have significant reputational issues for the company, whose business may be severely affected by the publicity attendant on such appointment. This is much more comparable to a decision by a professional body to commence an investigation into a professional person, a decision which in itself attracts the right to fair procedures: see, e.g. *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54.
>
> [25] It follows, therefore, that the application of Regulation 166(2) must be re-fashioned somewhat beyond its bare language in order to make it operate, pursuant to the principles as enunciated in *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, in a constitutional fashion by, if necessary, interpolating appropriate safeguards in order to vindicate the company's constitutional right to fair procedures and, indeed, the protection of its property rights in the manner required by Article 40.3.1 and 2¸ of the Constitution."

47. Of course the important point of distinction in *Custom House Capital* is that it involved the actual appointment of inspectors on an *ex parte* basis as opposed to a decision to make an application on notice for the of appointment inspectors, as here. The two situations are clearly not comparable.

48. In *Crayden Fishing Company Ltd v. Sea Fisheries Protection Authority and Others* [2017] IESC 74, Crayden owned a licensed fishing vessel subject to European Regulations limiting the quantities of fish it could catch. The vessel was boarded by Sea Fisheries Protection Officers who reported that it carried a large quantity of fish not recorded in the log it was obliged to maintain under the Regulations. Those Regulations provided for the allocation of points to the vessel's fishing licence for infringements assigned by a panel who did not afford any right to make submissions. The Regulations provided for an appeal within 21 days of being notified of the imposition of the points. If no appeal was brought within that period or any such appeal was brought and subsequently withdrawn the points applicable would be notified to the licensing authority and become effective. *Crayden* lodged an appeal but before proceeding with it sought to judicially review the decision of the panel that initially imposed the points on the basis of a want of fair procedures.

49. The respondents argued that the case was analagous to *Gammell* and *McNamee* in that the points did not become effective until *Crayden* had been afforded fair procedures and that it was a single process in two stages. *Crayden* on the other hand argued that there were two distinct processes involved each requiring fair procedures and the case was therefore comparable to *O'Ceallaigh* and *Dellway*. The judgment of the court was delivered by O'Donnell J. who analysed many of the authorities to which I have already referred.

50. He noted that the judgment of the majority on the fair procedures issue in *O'Ceallaigh* was delivered by Hardiman J. who relied on the decision of the Privy Council in *Rees v. Crane* [1994] A.C.173, in which the Privy Council held that where a judge in Trinidad and Tobago had been suspended by the President from his position pending a full inquiry into his conduct, he was entitled to have been informed of the proposed suspension and invited to make submissions on it. He also noted that the High Court judge (O'Malley J.) had considered that *O'Ceallaigh* and *Dellway* represented the modern law as opposed to *Gammell* and the High Court decision in *McNamee*. At p. 8, he said:

> "12. The State authorities argue, correctly in my view so far as it goes, that the question of fair procedures is heavily dependent on the issue to be decided on the surrounding circumstances of the case. It is indeed important that there is no one size fits all requirement that elaborate procedures akin to a criminal trial are necessary before any administrative decision whatsoever can be taken. It is also correct I think, that the question involves a functional analysis rather than one determined, at least exclusively by the description of the process or the specific language used. The essence of the question is whether, if an individual or business had its rights or interests affected that consequence has occurred only after a procedure which is seen to be fair."

51. O'Donnell J. discussed the potential tension between *Gammell* and *McNamee* on the one hand and *O'Ceallaigh* on the other. He said (at p. 10):

> "The decisions in *Gammell*, *O'Ceallaigh* and *McNamee* are of more immediate relevance. They all involved statutory processes in which it was argued (successfully in *Gammell* and *McNamee* and unsuccessfully in *O'Ceallaigh*) that a decision to initiate a procedure, having as its terminus a process carried out in accordance with fair procedures, did not itself require fair procedures, and more particularly did not require that the affected party be notified and have a right to make submissions before the decision to imitate the process was made."

52. He carried out a detailed analysis of each of these cases and went on to discuss the issues arising (at p.17):

> "24. There is no doubt that it is difficult to reconcile the decisions in *O'Ceallaigh* and *Rees v. Crane* on the one hand, with *Gammell* and *McNamee* on the other. This difficulty is compounded if, as the authors Gwynn Morgan and Hogan suggest, *Gammell* is treated as authority justifying the practice in relation to the grant of planning permission. If so, and the High

> Court judgment herein is correct to doubt the continued vitality of the *Gammell* approach that might raise doubts over the procedure adopted on planning applications, which would have wide ranging consequences. However, I do not think it is now possible to uphold the High Court's approach that *O'Ceallaigh* together with *Dellway* represents a more modern view, with the implicit suggestion that the authority of *Gammell* and *McNamee* is questionable. The recent decision of this Court in upholding the decision of the High Court in *McNamee* demonstrates that the principle in that case is still alive and in full force. It is true that all the authorities emphasise that fundamentally the question is one of fairness in the particular facts of the case, but that itself provides little guidance."

53. O'Donnell J. then undertook the difficult task of reconciling the apparently conflicting approaches in *Gammell* and *McNamee* on the one hand and *O'Ceallaigh* on the other. He felt that the explanation lay in the fact that in *O'Ceallaigh* the initiation of the inquiry put in train a process that had as its end result Nurse *O'Ceallaigh* being prevented from practicing her profession of over 2 years. Both her profession and that of the judge in *Rees v Crane* were professions requiring a high degree of public confidence in the public who dealt with them The public might well form an adverse view concerning the suspensions from which the professionals involved might never recover. The factual context in each case was critically important. Drawing these threads together, the judge said:

> "31. I do not consider it appropriate, necessary or indeed possible at this stage to offer a single bright line rule resolving all these issues. That may have to be addressed in circumstances where the issue arises and where it may be necessary to consider a wider range of authority than arose in this case. Even then there is no reason to be optimistic that a single rule may be discerned. I would however hesitate to accept, without careful and detailed analysis the contention that *O'Ceallaigh* represents a trend towards greater fair hearing rights at a preliminary stage, which should in turn be expanded upon. Rather I would approach the case on the basis that the default position is that a person conducting a preliminary investigation which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with a requirement of a fair hearing. On this view *O'Ceallaigh* is an example of the qualifying observation in the passage from De Smith that is, that it may have been seen as an integral and necessary part of a process which could terminate in an action adverse to the interests of the person claiming to be heard.
>
> 32. It is also worth considering why the courts have remained slow to require the full panoply of a fair hearing at a preliminary stage. First, it might be observed that even if this is so, any preliminary procedure is not without legal constraint. It must be conducted *intra vires*, and if for example conducted with actual bias or the appearance of bias, could be restrained and/or quashed. It may be that there are other examples of cases where the procedure will be subject to judicial review. Accordingly, the question is really whether fair procedures require notification and an opportunity for submissions at a preliminary stage, initiating a procedure which itself is obliged to be conducted in accordance with fair procedures. If however fair procedures apply without qualification at the preliminary stage, then as the decision in *Re Haughey* [1971] I.R. 217, and its progeny show, it is a very short step to requiring that process to be conducted by analogy with the demands of fairness observed in a full criminal trial. If for example there is a right to be consulted, then it may be argued that there is a right to be provided with the evidence, a further entitlement to demand disclosure or discovery of additional documentation, and if a factual dispute is asserted, to confront and cross-examine the accuser. Not only does this create a risk of endlessly self-replicating procedure, but any uncertainty as to what is required may lead to elaborate, costly and time consuming procedures being conducted at an early stage in an inquiry. This may extract a very high price in terms of efficiency, effectiveness and most of all, justice to all the parties concerned and the public. For this reason and others, it is critical to consider if the procedure as a whole has been fair to the individual concerned."

54. *Crayden* shows that it is neither desirable, nor possible, to attempt to divine or devise a rule that will apply in all cases. The conflict in the cases discussed by O'Donnell J. is testament to that. It does however emphasise that there is no evolving jurisprudence towards a requirement for fair procedures at the preliminary stage of a process which is not of itself conclusive of anything but the ultimate stage of which does afford such procedures. In the foregoing passage, the Supreme Court drew particular attention to the dangers of a mandatory requirement for fair procedures at early stages of such processes before what might be described as the "main event". Importantly Crayden decides that the default position in such situations is that fair procedures are not required at the preliminary stage.

55. Although it is true to say that every case is fact specific, Crayden suggests that the proximity between the preliminary investigation and a decision directly adverse to the applicant may be such that, exceptionally, a right to a fair hearing could be said to arise at such early stage. In the present case the decision to apply to the court to appoint inspectors cannot automatically result in an outcome that will be adverse to the applicant. The outcome will in this instance be a matter for the court after giving the fullest hearing available under our law to the applicant.

Discussion

56. The fundamental proposition advanced by the applicant that it had a right to be consulted prior to the institution of legal proceedings by a public body is novel and without precedent. I am satisfied that as a matter of law, such a proposition cannot be sustained. I am bound by the decision of the Supreme Court in *Meath County Council v. Murray,* which held that a decision by a public body to institute legal proceedings cannot be regarded as a decision which attracts the requirement to afford fair procedures as identified in *East Donegal*.

57. Whilst the applicant contends that the making of the decision to apply to the court is the exercise of a discretionary power that involves the respondent forming an opinion that certain issues arise and which decision may cause harm to the applicant, precisely the same considerations must also apply to the commencement of the investigation itself, yet the applicant concedes that this does not give rise to any right to consult. It is not easy to see how these two positions can be reconciled.

58. The applicant submitted that its position was distinguishable from those that arose in the cases under discussion for three reasons. The first was that the decision to go to court was the culmination of a process involving the compulsory extraction of information from the applicant pursuant to statutory power. I do not believe this to be a valid point of distinction as there are many instances of regulators and law enforcement authorities litigating issues arising directly from compulsory legal processes where there is no prior right to consult. In any event, counsel for the applicant ultimately suggested that even if powers of compulsion had not been exercised, the same right would still arise although on what basis is unclear.

59. The second point of distinction relied upon is that at the inspectorate application before the court, the court makes no findings of fact at that stage and presumably by this the applicant means that it cannot be vindicated by the determination. But of course if the applicant is correct in submitting that it has an answer to all of the respondent's concerns, it now has the fullest opportunity of putting this before the court which may well be persuaded that it should decline the application. Were that to happen, it is difficult to see how this would not be a vindication of the applicant. Much of the applicant's complaint in truth appears to concern the

appointment of inspectors as distinct from the application to do so, but of course if inspectors are appointed, that can only occur if the court is satisfied that the respondent has made out his case.

60. Thirdly, the suggestion that the respondent had reached conclusions and made findings in the affidavit grounding the inspectorate application is one that is somewhat surprising. Although this argument did not find its way into the applicant's written submissions, it seems to be couched in terms that would suggest the triggering of a right to fair procedures such as would arise where a statutory body prepares a report containing such findings and conclusions. I think this characterisation of the respondent's affidavit is incorrect. In our adversarial system, virtually every claim by the State or indeed any other party involves an assertion of wrongdoing on the part of the opposing party. Every claim is predicated on assertions of fact or law and it is difficult to see how the respondent could ever make an application for the appointment of inspectors without expressing some views on the state of affairs with which he is confronted. These are plainly not determinative of anything and it will ultimately be a matter for the court to accept them or not as the case may be.

61. I therefore reject the submission that the applicant's case is in some sense exceptional or unique such that it falls outside the authorities to which I have referred. These authorities also to my mind establish that the damage which the applicant claims to have suffered as a result of being sued is not damage of which the court may take cognisance. Clearly if no legally cognisable damage is suffered as a result of the impugned decision, there can be no right to fair procedures. Every party exposed to litigation suffers to a greater or lesser extent damage in the form of inconvenience and expense. The most serious allegations may be levelled against parties to litigation which may or may not ultimately be proven but the mere making of such allegations can have a very significant adverse impact on the reputation of the party against whom they are made.

62. As the cases show, however, the law cannot take account of such damage, being as it is the unavoidable consequence of the administration of justice in public mandated by the Constitution. This is part and parcel of the legal system the people have chosen.

63. In my view, the correct analysis here, contrary to what the applicant contends, is that the respondent is engaged in a two stage process, the first stage of which involves the preliminary investigation and information gathering exercise and the second is the court application for the appointment of inspectors. As such, it seems to me that the default position identified by O'Donnell J. in Crayden is the one that applies i.e. that a person conducting a preliminary investigation which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with a requirement of a fair hearing. To my mind, the applicant has advanced nothing that would take it outside the default position.

64. Although in the course of submissions, counsel for the applicant said that all that was required was a brief statement of the reasons for the application and a few days to give a response, it is difficult to accept that in reality this is what would occur. If the applicant is entitled to fair procedures and a right to consult, it must surely follow as night follows day that the full spectrum of the *In Re Haughey* rights would be routinely sought in every case. Were that to be the position, the prospect looms large of the respondent becoming embroiled in lengthy, complex and costly procedures akin to quasi criminal trials held entirely in private. As he himself points out, it is hard to envisage how in practice such a system could be workable.

65. It is also difficult to see how this could be regarded as consistent with the public interest in the important corporate oversight functions performed by the respondent and the discharge of those functions as provided for in the 2014 Act. Not only would this ultimately become the endlessly self-replicating procedure identified by O'Donnell J. but it would debilitate the system, to use the words of McKechnie J. It would also be entirely unnecessary in circumstances where all of these procedures are available as of right to the applicant before the court.

66. I think it may also fairly be said, as already noted, that it is equally inconsistent with the choice made by the Oireachtas, which must be presumed to be deliberate, not to provide for the right of consultation asserted by the applicant.

67. Ultimately, in my view, any damage allegedly suffered by the applicant is but an incident of incorporation, the consequences of which, both positive and negative, must be accepted by the applicant.

Conclusion

68. In summary, therefore, while I am satisfied that the applicant has made out a sufficiently arguable case to meet the low threshold of obtaining leave to seek judicial review, on the substantive issue, for the reasons I have given, I must dismiss this application.