Neutral Citation: [2013] IEHC 438

THE HIGH COURT

Record Number: 2013 No. 507 JR

Between:

John Byrne

Applicant

And

Irish Sports Council

Respondent

Judgment of Mr Justice Michael Peart delivered on the 6th day of August 2013:

1. The applicant has given his professional life to sport in one way or another. In more recent times he was Director of Special Projects with the Football Association of Ireland ("FAI") from 2004 until 2011, and for the past 12 months has been Chief Executive Officer of the HSE Community Games.

2. In September 2009 he felt honoured to have been appointed by the then Minister for Arts, Sport and Tourism to the Irish Sports Council.

3. He has participated fully on that Council since his appointment, whose function consists of, inter alia, allocating funding to various National Governing Bodies, including the FAI. In fact the applicant was appointed to the National Governing Bodies Grant Committee and was Chairman of that Committee for a while.

4. Not unexpectedly, the applicant's previous connections to the FAI were known to the Minister as well as to Council members when he was appointed to the Council. Each year the applicant and all other members of the Council make a declaration of interests to the Standards in Public Office Commission, and each year, even after his employment with FAI ended in 2011, he continued to include the FAI as a declared interest.

5. In addition, whenever at a Council meeting an agenda item related to the FAI funding, the applicant will absent himself. This is in line with established practice, since many of the Council members have established connections with a particular sport, and it avoids any chance that a particular member might be considered to have influenced a vote on funding to the sporting organisation with which they have a declared interest. The Minutes of Council meetings record which members absented themselves in this way at any particular meeting.

6. The applicant has stated on affidavit that when he was appointed to the Council the Minister at the time stressed to him that he was appointed to represent the public interest and the best interests of the taxpayer, and he goes on to say that he took this very seriously, so much so that "*this may sometimes have resulted in me asking uncomfortable, unpopular or probing questions and may have caused vested interests to feel challenged but has never been improper and has always been properly motivated*".

7. Without any advance warning, he received a letter dated 12th April 2013 from the Chairman of the Irish Sports Council, Kieran Mulvey, which was delivered to him that day by courier. The letter was brief and to the point. It stated:

> *"I am writing to request that you make yourself available to meet with me privately in advance of the next Council meeting scheduled for 12 midday this coming Tuesday, 16 April.*
>
> *I have received a letter from the Football Association of Ireland, the contents of which I find troubling, and I would appreciate an opportunity to discuss it with you in advance of the Council meeting.*
>
> *I have set aside a slot in my diary at 11am on Tuesday, the morning of the Council meeting, and would appreciate it if you could indicate your availability to meet me at the offices of the Irish Sports Council] at that time.*
>
> *I look forward to hearing from you by return."*

8. The troubling letter was not enclosed. In fact the applicant diid not see the letter before he met Mr Mulvey on the 16th April 2013, because he had left his home in Galway that morning to come to Dublin before a copy of the letter was emailed to him.

9. It appears that two other Council members received a similar letter, namely JG and SA. In fact on the 16th April 2013 the applicant met JG as he, JG, was coming out of a meeting with Mr Mulvey, ahead of the applicant's meeting with Mr Mulvey. JG told the applicant that he had been asked to resign, and that he did resign as requested.

10. The applicant then went into the arranged meeting, and he says that from the outset Mr Mulvey was very hostile towards him, and requested that he too resign. The applicant was shown the FAI's letter dated 3rd April 2013 but was not given a copy thereof. The letter had enclosed two bundles of emails which formed the basis of the concerns being expressed by the FAI about the applicant, but according to the applicant's grounding affidavit, Mr Mulvey refused to show these emails to the applicant or give him copies thereof.

11. According to the applicant, Mr Mulvey asserted firmly that the applicant had breached the Council's Code of Conduct, the Irish Sports Council Act, 1999 ("the Act of 1999"), and the Standards in Public office requirements, but was unspecific as to how this had occurred. But the applicant states that he informed him that his position on the Council was untenable and repeated several times the demand for his resignation.

12. The applicant was shocked at this turn of events, and could not imagine in what way he had breached the rules, and stated that

he wished to take legal advice on the matter. Mr Mulvey informed the applicant that if he did not resign he would set up an investigation which would be conducted by "*a statutory officer of the State*" and which he believed would result in the applicant being "*personally at risk*".

13. Later that same day, the applicant prepared a memo of his conversation with Mr Mulvey and has exhibited this in his affidavit. The memo records that he asked to be shown a copy of the letter from the FAI, and that when he had read it Mr Mulvey told him that he had "*clearly breached the Code of Conduct of the ISC, the Act of 1999 and the Standards in Public Office requirements*". He notes also that he asked Mr Mulvey on what basis he was of that opinion, to which Mr Mulvey is noted as saying "*on the basis of the letter from the FAI and the emails provided in the file".* The applicant was shown a black folder whereupon he requested if he could look at the file, but this was refused on the grounds of confidentiality. According to this memo Mr Mulvey referred to emails concerning a named person, and also another email concerning the Chief Executive Officer of the ISC, John Treacy, in which there was said to be an accusation of mala fides made against Mr Treacy. It notes also that Mr Mulvey stated that the applicant was party to information about other National Governing Bodies which he should have brought to the attention of the Council, and that he had had access to information about ISC credit cards. It notes that Mr Mulvey stated that JG was a party to those emails some of which he said were actionable particularly in relation to comments about ISC staff. Some other matters are stated in the memo but none that matter for the moment at least.

14. Before setting out how matters proceeded after this meeting between the applicant and Mr Mulvey ahead of the meeting of Council members at 12 noon that same day, I will set out details of what was contained in this letter from the FAI. It was signed by the FAI Chief Executive, John Delany and by the Secretary of that organisation.

15. The letter stated that following a Freedom of Information Request made to the Irish Sports Council by an unnamed third party, the FAI had become aware that the Council and/or members of the Board of the Council had been in receipt of emails from the applicant regarding FAI funding matters. It enclosed a bundle of such emails marked "A" for perusal. The letter went on to say that FAI regarded these emails as being "*extremely serious*" for three stated reasons:

> - Despite the fact that the applicant had declared his previous interest in the FAI it was clear from the emails that despite that conflict he continued to be involved in and endeavoured to exercise an influence over funding decisions pertaining to the FAI.
>
> - The emails showed that the applicant improperly continued to involve himself in email communication with several ISC Board members regarding FAI funding matters.
>
> - The content of the emails was considered by FAI to amount to a grave and improper interference in the funding process.

16. The FAI stated that it was very concerned about what it saw in these emails as an attempt by the applicant to influence negatively the funding process in which the FAI engaged in, and it considered it right to bring the emails to the attention of Mr Mulvey.

17. The letter went on to state that it had been made aware of other email communications which relate to the ISC and some ISC member bodies which had been located on the FAI server and which had been either sent or received by the applicant while he was with the FAI. this bundle of emails was marked "B". It went on to state that it appeared from these emails that there had been a concerted effort to undermine not just the FAI but the ISC itself along with other member bodies.

18. The FAI went on in that letter to state that it was satisfied that it was entitled to examine all material on its server and to disclose it to the ISC, and was satisfied also that any person who communicated with another person using the FAI server could not rely upon privacy and confidentiality. Having said that, the letter stated that it had redacted the names of other persons mentioned in the emails who were not a party to the email unless such information was considered by it to be a matter of public interest, and suggested that the ISC take its own legal advice in relation to the material and its future use.

19. The emails enclosed with this letter were not given to or shown to the applicant, and in fact have been seen by the applicant to date only because redacted copies were exhibited by Mr Mulvey in his affidavit in reply to the present application. As I have mentioned, the applicant had not seen the FAI letter before his meeting with Mr Mulvey.

20. The formal meeting of the Council took place on the 16th April 2013 at 12 noon after the applicant's meeting with Mr Mulvey concluded. The applicant was requested not to attend the meeting given that the Council would be discussing the letter received from the FAI, and his was one of the names mentioned therein. Neither JG or SA were present at the meeting. The applicant says that he waited outside until that item on the agenda was dealt with and so that he could attend the remainder of the meeting. However it appears that having dealt with this particular matter the remainder of the items on the agenda were adjourned, and the meeting ended.

21. The applicant discovered later when he saw the Minutes of that meeting, after they were furnished to the applicant's solicitor, that the letter from the FAI had been circulated to members of the Council at the meeting, but not the enclosed emails. The Minutes suggest that the meeting was told by Mr Mulvey that he had forwarded the letter and the emails to the applicant's solicitor but in fact he had not done so. It appears also that the Council members were told that only the applicant was to be the subject of investigation despite the fact that two other Council members were named in the latter. It appears also that while Mr Mulvey may have referred to some matters mentioned in the emails during the meeting he did not share the emails with the members present. A number of issues were referred to by Mr Mulvey but at no stage does it appear from the Minutes that he explained in which issues the applicant in particular was implicated, and which related to JG and SA.

22. The applicant is very concerned that the emails were not provided to the Council members since it is clear that the basis of the FAI's concerns is the contents of those emails, and therefore the members were not given any opportunity to consider on what the allegations against him were based, and what part, if any, the applicant had in relation to the allegations.

23. The applicant is understandably upset and concerned about the damage to his reputation not only among his colleagues at that meeting of a statutory body but a wider audience via the Minutes of the meeting, and in circumstances where the meeting was invited by the Chairman to approve a decision to launch an investigation into the applicant's alleged involvement in matters complained about by the FAI, and where the members were not provided with the emails themselves, where he himself was not provided with the emails, and where he was provided with no opportunity to be heard at the meeting. In fact the applicant believes that to this day the members of Council have not been provided with these emails.

24. It appears that the meeting decided unanimously that Mr Paul Appelbe, former Director of Corporate Enforcement, should be appointed by the ISC to conduct an independent investigation in the matter, to make findings of fact, and to report back to the ISC when the investigation is concluded.

25. It appears from the Minutes of that meeting that Mr Mulvey explained that he could not circulate the emails at the meeting because of legal advice that some of the material was potentially defamatory. The legal advice itself was not provided in written form. He does not believe that this advice has ever been provided to the members. In fact the applicant notes that in his replying affidavit Mr Mulvey states at paragraph 19 thereof that he and John Treacy, the CEO decided that there was sufficient information in the letter alone for the meeting and that it was unnecessary to show the meeting the emails. In his second affidavit he states that the legal advice he received was not written advice and that he had "*a number of meetings with the Council's legal advisors*". Nevertheless the applicant is sceptical about the alleged advice, given the qualified privilege which he believes would cover a Council meeting in relation to such matters.

26. He is concerned that the members of the Council have been left with the impression that the transgressions alleged against the applicant are so serious that the Council meeting could not be continued with him being present. The applicant has stated that his professional reputation is very valuable to him, and that he regards it as very damaging to his reputation that the Minutes of the meeting should record allegations of this nature against him and in circumstances where the meeting was not provided with the full basis for those allegations and where he himself had no opportunity to address them at the meeting, prior to any decision to appoint an independent investigator.

27. Shortly after this meeting the applicant received a letter from Mr Mulvey dated 18th April 2013 telling him that he had presented the FAI letter to the Council on the 16th April 2013 and that "*having considered the matter, the Council were of the unanimous view that an immediate and thorough investigation is warranted*". The applicant submits that the Council members could nt have considered the matter fully and properly if they were not shown the emails which grund the allegations.

28. This letter informed the applicant also that Mr Appelbe had been appointed and that Terms of Reference were being prepared and that a copy of same would be provided to the applicant. However, the applicant has made the point that since he was not provided with copies of the emails, despite his requests in that regard, he was not in a position to have any meaningful input into the Terms of Reference given to Mr Appelbe.

29. By letter dated 4th June 2013 Mr Appelbe wrote to the applicant informing him of his appointment by the ISC. He also enclosed a copy of the Terms of Reference provided to him, and also a schedule of materials that had been given to him. He went on to say that he had considered those Terms of Reference and the materials given to him, and that he had decided to limit his investigation to two issues only, but that as further documents and information become available ti him he may restrict or expand the scope of the investigation where he deems it appropriate and where his terms of reference permit it.

30. He also enclosed copies of some of the materials in his possession which he considered to be material to the two issues he was investigating. He asked the applicant to let him have any information in his possession or under his control contained in digital, electronic or other format, including physical documents that might be relevant to his investigation, and he told the applicant that in due course he would want to interview him, and sought the applicant's co-operation, drawing his attention at the same time to paragraph 14.6 of the ISC Code of Governance and Business Conduct, and setting it out as follows:

> *"If any member [of the Council] or Staff Member has concerns about suspected irregularities involving the functions, property or services of the Irish Sports Council they should immediately bring those concerns to the attention of the Secretary so that the matter may be appropriately investigated. Members and staff in all categories are required to cooperate fully with any enquiries or investigations in relation to suspected irregularities."*

31. The applicant, through Counsel's submissions, says that this clause does not relate to an investigation by the Council into one of its own members in relation to conflicts of interest matters at the behest of an outside body such as the FAI.

32. The applicant was very concerned by this reduction by Mr Appelbe of his terms of reference and saw it at the time as a way of ensuring that he did not get sight of all the emails that had formed the basis of the investigation.

33. But having examined the contents of the emails which Mr Appelbe had enclosed with his letter dated 4th June 2013, the applicant cannot understand how they could have provided any evidential basis for the decision of the Council to initiate any investigation. Specifically he says that there is no evidence disclosed of any conflict of interest on his part in relation to voting on funding issues related to the FAI; that the emails in question emanate for the most part from persons other than him, and that he was merely the recipient or copied on same. However, he accepts that some are from him to staff members in the course of their duties and with the apparent knowledge of the CEO who is copied on them. Lastly he is satisfied that there is no evidence of improper or unlawful disclosure to any third party. In his first grounding affidavit the applicant sets out in considerable detail reasons why he cannot see any wrongdoing on his part on the basis of the emails disclosed by Mr Appelbe.

34. Mr Appelbe had already taken some steps in the investigation by the time these proceedings were commenced and the investigation halted, including interviewing some persons. He invited the applicant to interview but that invitation has thus far bee declined.

35. It is unnecessary to address most matters which postdate the Council's decision to appoint Mr Appelbe to investigate the complaints made against the applicant by the FAI, as it is that decision made on the 16th April 2013 that is challenged by the applicant. However, the applicant does complain that while he was sent draft Terms of Reference by Mr Mulvey after the meeting, he could not have any meaningful input therein in the absence of sight of the emails which form the basis of the FAI complaints. This, he submits, constitutes a breach of fair procedures.

36. However, in the event that the applicant does not succeed on the 'vires' issue which he is raising in relation to this investigation, it may be necessary, when dealing with fair procedures complaints, to deal with the fact that by the letter dated 4th June 2013 above referred to, Mr Appelbe communicated with the applicant and informed him that he had by then concluded that his investigation need deal only with the events associated with a minority of the emails enclosed with the FAI letter dated 3rd April 2013. He set forth what "material matters" he intended to investigate as being (1) the unauthorised disclosure to third parties of information relating to ISC business; and (2) participation in ISC business in prohibited circumstances relating to conflict of interest.

37. Kieran Mulvey in his first replying affidavit says that the issue in dispute is very straightforward and simple, being that he received a letter from the CEO of the FAI which made a number of serious allegations, and that the applicant among others was named. He

says that both he and Mr Treacy regarded it as a matter of priority that the Council should consider a comprehensive investigation into the allegations made. He says that the Council members took the same view at the meeting on the 16th April 2013. He goes on to say that in advance of the meetings on the 16th April 2013 in which he met JG, SA and the applicant, he met with the Minister for Transport, Tourism and Sport and appraised him of the FAI's letter, and indicated to the Minister that it was his intention to recommend to the Council that an independent investigation into the allegations take place, and that the CEO agreed. he states that "*the Minister raised no objection to this course of action*". He believes that it was entirely proper that the matter should be independently investigated and rejects the applicant's complaints about the procedures adopted.

38. Among the other matters deposed to by Mr Mulvey is the applicant's complaint that the emails sent with the FAI letter were not circulated to Council members for the meeting on the 16th April 2013. He says that the emails were received in two tranches, one on the 3rd April 2013 and the second tranche by letter dated 22nd April 2013. He says that he and John Treacy decided that there was sufficient information in the letter dated 3rd April 2013 alone to justify an investigation and that it was not necessary for the Council members to see the emails enclosed. He felt that the fairest course to adopt was for the Council to set up an independent investigation into (a) the allegations, and (b) if any member of the Council was guilty of inappropriate and/or illegal conduct. He did not consider that it was necessary for all Council members to see all the emails, and says in fact that he thinks it would have been unfair to them and the applicant had they done so.

39. Mr Mulvey has made the point also that the independent investigation by Mr Appelbe is limited to fact-finding, and that he has no power to sanction or censure any person and that his report is intended to be purely factual. He says that the Terms of Reference make that clear. The applicant certainly believes that the Terms of Reference go further than mere fact-finding since the questions which they seek to have answered require value judgments to be made by the investigator, and invite a finding as to culpability. The Terms of Reference were:

> a. Whether one, or more, ordinary Council members have acted in contravention of the provisions of the Irish Sports Council Act, 1999.
>
> b. Whether one, or more, ordinary Council members have acted in contravention of the Irish Sports Council's Code of Governance and Business Conduct.
>
> c. Whether one, or more, ordinary Council members have exposed the Irish Sports Council to risk of civil liability.
>
> d. Whether one, or more of the ordinary Council members have acted in a manner inconsistent with their duties and responsibilities as members of the Council.
>
> e. Whether there is sufficient evidence to warrant a notification to An Garda Siochana that an offence may have been committed pursuant to Section 21(1) of the Irish Sports Council Act, 1999.

40. It is not so clear that the revised Terms of Reference proposed by Mr Appelbe can be seen in the same light, but I am concerned only with what the Terms of Reference were following the Council's decision to appoint Mr Appelbe. I leave aside the question as to whether Mr Appelbe was entitled to amend the Terms of Reference himself unilaterally, based on emails which had not been furnished by the FAI until after the meeting of the 16th April 2013.

41. By way of justification for the need for an investigation, Mr Mulvey has referred to Section 21 of the Act of 1999 which makes it a criminal offence for a person, without the consent of the Council, to disclose any information obtained by him or her while performing, or as a result of having performed, duties as, inter alia, a member of the Council. This is nreferred to in the final term of reference above. A person found guilty of such an offence is liable on summary conviction to a fine of up to £1500. Mr Mulvey states in his affidavit that it is rare that such a provision should be contained in legislation of this kind establishing a statutory body, and that if the Council concluded that there were grounds to suspect that an offence had been committed under this section, then it would be incumbent upon the Council to make a report to An Garda Siochana. He believes that the existence of this section alone means that a thorough investigation was necessary before any decision to make such a report to An Garda Siochana would be taken.

42. There are three main planks to the applicant's challenge to the legality of the decision to appoint an investigator to conduct an investigation. Firstly, it is submitted that the Council has no power to decide to have such an investigation carried out, and that the decision to do so is ultra vires its statutory powers.

43. Unless the applicant is successful upon that issue, a number of other issues arise in relation to fair procedures.

44. Firstly, it is submitted that the applicant had a right to be heard by members of the Council before the decision to launch an investigation was made.

45. Secondly the applicant says that he was entitled to be provided with the emails enclosed with the FAI letter in order to fully and properly be in a position to consider his position and to be heard prior to the Council's decision.

46. Thirdly, he submits that the emails should have been provided to the members of the Council at the meeting, so that they could be in a position to properly understand the allegations levelled against him, and in respect of which they were being asked to decide that an investigation should be carried out, and so that they did not simply follow blindly what appears to have been the view of the Chairman, already formed ahead of the meeting in consultation with the CEO, that such an investigation should be conducted in the light of what was revealed in the emails.

47. Fourthly, he submits that the investigation is flawed given the fact that the applicant was denied an opportunity to have any meaningful input into the formulation of the Final Terms of Reference since his requests for copies of the emails were refused.

48. Fifthly, a point is raised that the partial documentation upon which the investigation is being conducted was obtained unlawfully, being in breach of the Data Protection Acts 1988-2003, as amended, and in breach of the applicant's right to privacy.

49. Sixthly, it is contended that even if the Council properly and lawfully decided to have Mr Appelbe conduct an investigation and provided Terms of Reference for that purpose, Mr Appelbe has unlawfully altered those Terms of Reference so that only two issues are being investigated, one of which was not even referred to in the original Terms provided to him, namely that relating to conflict of interest which is not mentioned in the Terms of Reference drawn up originally. Related to this complaint is that while Mr Appelbe has stated that he will deal only with events referred to in a minority of emails in his possession, the emails to which he is referring are emails which were obtained only after the decision of the 16th April 2013, and could not therefore have formed part of the decision by

either Mr Mulvey or by the Council to carry out the investigation. Those additional emails were provided by the FAI only on the 22nd April 2013.

The 'vires' issue:
50. Niamh Hyland SC has submitted that the Council is a creature of statute only, and has therefore only such powers as are conferred upon it by statute, or such as are necessarily and properly required for carrying out the functions of the Council, or which are to be regarded as incidental to or consequential upon what the statute authorises.

51. She has referred first of all to the fact that only the Minister may appoint a person to the Council pursuant to section 12 of the Act of 1999, and only the Minister may remove such a person under the provisions of section 13 (2) thereof in the event that in the opinion of the Minister the person has become incapable through ill health of effectively performing the duties of the office, or the member has committed some stated misbehaviour, or the removal appears to be necessary for the effective performance of the Council's duties. Other provisions relate to disqualification from holding office as a member, but those are not relevant to the present application.

52. Given these provisions it is submitted that the ISC itself has no role in those functions whatsoever, and therefore has no power, implied or otherwise, under the statute to investigate the actions of any member of the Council, and that such an investigation, if one is to be carried out is to be carried out by the Minister. Otherwise, a person properly appointed to the Council shall continue in office until the expiry of his term, and the Council has no role to play in either the appointment of a person to the Council, or the removal of a member from the Council.

53. Ms. Hyland has referred to the section 6 of the Act which sets out the clearly defined functions of the Council, and which nowhere refers to any power to investigate a member of the Council for any wrongdoing. In so far as section 6 (2) (g) enables the Minister, by order, to assign additional functions to the Council, she has stated that no such additional functions have been assigned by the Minister.

54. Section 7, it is submitted, limits the powers of the Council to those which are "necessary for, or incidental to, the performance of its functions", and Ms. Hyland submits therefore that before the Council could be deemed to have power to appoint an investigator, such an investigation would have to be necessary or incidental to the the performance of one of the Council's functions, but that it cannot be so as those functions have been clearly set forth in the section and do not include the investigation of a member of the Council.

55. In so far as section 7 (2) of the Act provides that the Council may, subject to any directive of the Minister, engage "*consultants and advisers*", it is submitted that such may be engaged only in relation to a specified function, and the appointment of Mr Appelbe does not relate to a prescribed function, and therefore this provision does not avail the respondent's arguments.

56. Ms. Hyland has submitted that while the Minister may by order direct the carrying out of an investigation pursuant to the provisions of section 6 (1) (g) of the Act, he has not done so, and that without such an order being made by the Minister the Council itself has no investigative power or function under the Act.

57. Ms. Hyland has referred also to the provisions of section 20 of the Act dealing with the obligations of disclosure upon Council members, members of a committee, staff members, consultants and advisers, and submits firstly that there has been no suggestion that the applicant has failed to honour his obligations of disclosure or has failed to absent himself when this is reasonably required of him; and secondly she has submitted in any event that the power of the Council to decide on appropriate action to be taken in relation to a non-disclosure is limited by section 20 (6) to cases of non-disclosure by "*a member of the Council's staff or a consultant or adviser*", and does not include non-disclosure by a Council member. She submits that this section gives no power to the Council to investigate the applicant.

58. Ms. Hyland has referred to section 21 which deals with the consequences for, inter alios, a Council member who without the consent of the Council discloses any information obtained buy him or her while performing his or her duties as a Council member, but points to the fact that even in such an event the Council itself has no investigative powers under the Act, since the section merely provides that such a person who has infringed that section shall be guilty of an offence which is punishable on summary conviction to a fine not exceeding £1500. She submits that it is clear that in such circumstances a complaint against such a person would have to made to An Garda Siochana either by the ISC or by the Minister so that a prosecution could be commenced in respect of the alleged breach of section 21. Again, it is submitted that this section provides no power for the Council to direct an investigation into any allegation about disclosure in respect of the applicant, even if there was considered to be substance to the allegations made by the FAI, which of course is strenuously denied by the applicant.

59. In so far as the respondent might rely upon the Council's Code of Governance and Business Conduct, Ms. Hyland has submitted that in so far as it is being suggested that there is a power under this Code to appoint an investigator in respect of the allegations made by the FAI, this is incorrect as the Code cannot not add to powers conferred on the Council by statute. In any event, it is submitted that no such power to investigate is contained within the Code.

60. It has been submitted that since the investigation which is underway with a view to ultimately achieving the removal of the applicant or at least a recommendation that the Minister do so, it has the capacity to interfere with the applicant's constitutionally protected right to his good name, reputation and privacy, and as such the statute under which it is contended by the respondent that a power to investigate exists must be construed strictly and by reference to the language used in the Act itself.

61. It is submitted also that given the fact that the Act has made provision specifically in section 20 (6) of the Act for determinations to be made in respect of non-disclosure of a conflicting interest by a member of staff of the Council or by a consultant or adviser, it is not possible to read into the Act an implied power to investigate and reach such determinations in respect of a Council member. It is submitted that if the Oireachtas had intended that such a power be given, it would and could easily have said so. It ought, in the applicant's submission, therefore be taken as not have intended to give the Council such a power.

62. Ms. Hyland has submitted that it is clear that nowhere either in the Act of 1999, or by permissible implication, is there any power given to the Council to authorise an investigation into a Council member, and that since the only person who can remove a Council member from office is the Minister, it is the Minister alone who may request or authorise such an investigation if he considers that one is required. In so far as Mr Mulvey has stated in his first replying affidavit at paragraph 7 that he met the Minister ahead of the Council meeting on the 16th April 2013 and appraised him of the FAI's letter, and indicated to the Minister that he intended to recommend to the Council that an investigation into the allegation should take place and that an independent investigator should be appointed, and further that the Minister "*raised no objection to this course of action*", Ms. Hyland submits that this conversation

cannot confer a power upon the Council which is not provided for in the statute, and does not meet the requirement in section 6 (6) of the Act whereby the Minister may "by order" confer an additional function upon the Council.

63. The applicant responded to what Mr Mulvey stated in paragraph 7 of his affidavit by stating that there was a lack of detail about the meeting which Mr Mulvey had with the Minister, and that it certainly does not appear that the Minister was shown the letter or the emails that accompanied it. It appears according to the applicant that the Minister made a response in the Dail to a parliamentary question in relation to this meeting. From that it appears that a meeting took place on the 11th April 2013 at which Mr Mulvey "*informed the Minister as a matter of courtesy*" what steps he (Mr Mulvey) proposed to take. The applicant submits that in so far as he told the Minister that he was going to commence an investigation, he did not say to the Minister that he would do so only if he could not procure the applicant's resignation. The applicant also notes that the Minutes of the meeting of the Council which took place on the 16th April 2013 make no reference to the Council members being informed that Mr Mulvey had spoken to the Minister.

64. In support of her submission that the ISC has no power under the Act of 1999, either expressly or by implication to conduct this investigation, and that it has therefore acted ultra vires in appointing Mr Appelbe to conduct the investigation into the matters raised by the FAI in respect of the applicant, given that it is the Minister alone who has the power to remove the applicant from office, Ms. Hyland has referred the Court to the judgment of Kearns J. (as he then was) in the Supreme Court in *Fanning v. University College Cork* [2008] IESC 1.

65. On behalf of the respondent Shane Murphy SC has accepted that the Act of 1999 contains no express power for the Council to appoint an independent investigator to conduct the investigation arising from the FAI's letter, but submits that by necessary implication there is such a power so that the Council can comply with the Code as well as its statutory obligations. He submits that the applicant in his submissions seems to accept that there is power to investigate matters, but that it does not extend to investigating allegations against a Council member. The respondent does not accept that the power is so limited. It is submitted that the Council must be permitted a margin of appreciation in order to ensure compliance with the Code of Governance and Business Conduct and its statutory obligations.

66. Mr Murphy has brought the Court through a number of the provisions in the Act of 1999 and the relevant passages from the Code which he submits are relevant to the question of implied powers to investigate. He has referred for example to section 7(2)(f) whereby the Council may engage consultants and advisers where same are necessary for or incidental to the performance of its functions. He has referred to section 7 (1) which provides that the Council "*shall have all powers necessary for, or incidental to, the performance of its functions*". He submits that the latter is broad enough to enable the Council to investigate matters of concern in order to ensure the proper carrying out by the Council of its functions. Those functions have been defined, and it will be recalled that Ms. Hyland submitted that no function to investigate a Council member is included. He has referred to section 21 which creates the offence already referred to. He has referred to the "whistle-blowing" provisions of the Code and in particular Clauses 10.8 and 10.9 whereby the Chief Executive Officer or the duly appointed whistle-blowing officer is empowered to deal with complaints that are made in relation to a financial irregularity or non-compliance with statutory obligations.

67. While it is accepted that there is no express statutory power to investigate, it is submitted that the Code is worded in such a way as to envisage such investigations as being necessary. Mr Murphy has submitted that the power to investigate into the alleged misconduct of a Council member is a power which is necessary to enable the Council to perform its statutory functions properly. He submits that without a power to investigate complaints of this kind the ability of the Council to function properly would be undermined by not being able to bring alleged misconduct to an end, such as by requesting the Minister to make a decision to remove a person from the Council. It is suggested that this could not have been the intention of the Oireachtas.

68. In support of his submission that there is an implied power to carry out an investigation such as that in the present case, Mr Murphy has referred the Court to the early authority *Attorney General v. Great Eastern Railway Company* [1880] 5 App. Cas. 473 in which Selborne LJ. stated at p. 478:

> *"Whatever may fairly be regarded as incidental to or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires."*

69. Mr Murphy has referred also to the judgment of Fennelly J. in *McCarron v. Kearney* [2010] 3 I.R. 303. One of the issues in that case was whether, where a superintendent was granted the power by statute to grant or refuse a firearms' certificate, he had also the power to impose conditions to the grant of such a certificate on the basis that it should fairly be regarded as incidental to or consequential upon the power to grant the certificate. In concluding that such a power could be implied, Fennelly J.stated at p. 315:

> *"It is true that s. 3(1) does not expressly grant a power to attach conditions; nor on the other hand does it exclude such a power. The power of each superintendent is, however, expressed to be 'subject to the limitations and restrictions imposed by this Act'. If the matter rested there, I would have thought that the proclaimed purpose of the Act 'to place restrictions on the possession of firearms', taken with the obvious dangers associated with the possession of forearms would strongly suggest that it would be perfectly normal for a garda superintendent to consider it appropriate to impose conditions designed to reduce the risk to the safety of the public".*

70. Fennelly J. went on to note in s. 2 (2) of the Firearms Act, 1925 made it an offence for a person to fail "*to comply with any condition subject to which a firearm certificate was granted to him",* and rejected the submission made that this referred to conditions related to the quantity of ammunition, or of animals or birds that may be killed. In such circumstances the learned judge was satisfied that a power to attach conditions to the grant of a certificate could be implied as incidental to the power to grant a certificate.

71. Ms. Hyland for the applicant herein submits that the present case is very different in as much as in McCarron there was at least a power to grant a certificate given by the Act, and to which another power to attach conditions could be implied, whereas in the present case there is no primary power to investigate vested in the Council by the Act to which there can be added an incidental and implied power to appoint an independent investigator. That, in her submission, is a distinguishing factor. Neither is there any other stated function or duty imposed upon the Council, in her submission, which justifies the implying of a power forr the Council to investigate the conduct or behaviour of a Council member.

72. Mr Murphy has referred also to the judgment of Murray J. in *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands* [2004] 1 I.R. 402 where he concluded that it was not ultra vires the Minister's power "*to do all acts and things as may be necessary or expedient for the preservation or protection [of a national monument]"* to impose a limit or quota on the number of boats permitted to land at Skellig Michael. Mr Murphy has submitted that Murray J. emphasised the purpose and policy of the Act when considering whether the power to limit the number of permits fell within the powers expressly conferred upon the Minister. Accordingly, it is

submitted in the present case that the overall purpose of the Act of 1999 should be considered to include the power to investigate a complaint against a Council member given the overall purposes of, and obligations under, the Act, and the importance of good governance in accordance with the Code referred to.

73. Again, Ms. Hyland counters this submission by pointing to the fact that the condition under scrutiny in Casey was one related to a power actually conferred by the Act in question, whereas the Act of 1999 confers no power upon the Council to which a power to investigate a Council member and appoint an investigator can be implied, or seen as intended by the Oireachtas.

74. Mr Murphy has referred also to the judgment in *An Blascaod Mor Teoranta and others v. The Commissioners of Public works in Ireland and others*, unreported, High Court, 18th December 1996 where Kelly J. concluded, inter alia, that even though the Act under scrutiny did not expressly provide that the relevant Minister could make regulations in relation to compulsory purchase of land, such a power could be implied by reference to certain provisions of the statute which referred to matters such as prescribed forms of notice and soforth. Each side has made similar submissions as they did in the two previous cases referred to above.

75. Mr Murphy has submitted that since the Minister has the power under the Act of 1999 to remove a member of the Council from office if in the Minister's opinion "*the member has committed stated misbehaviour*" the power of the Council to investigate such alleged behaviour in order to report same to the Minister should be implied into the Act. In that regard he has referred to the averment by Mr Appelbe that the investigation by Mr Appelbe in a fact-finding exercise only.

Conclusions on the 'vires' issue:
76. In my view it cannot be concluded that the Oireachtas intended that the Council should have the power to investigate the conduct of a Council member. Section 20 is very detailed and specific in relation to the disclosure of interests obligations. Subsection (4) thereof is very specific as to the power of the Council to determine whether a course of conduct, "if pursued by a person", would be a failure by him or her to comply with the disclosure obligations provided for in subsection (1). Subsection (6) is very clear that the Council may decide upon appropriate action whenever "a member of the Council's staff or a consultant or adviser fails to make disclosure". Clearly there would be an implied power to carry out an investigation in that regard before deciding upon the appropriate action to be taken.

77. However, the section is demonstrably silent in relation to any power of the Council to do likewise in relation to a Council member. One can presume that this is because a consultant, adviser or staff member is appointed by the Council under power given to the Council under the Act, and not the Minister, whereas the power to appoint and remove a Council member is a power vested in the Minister alone.

78. If the Council was given a power even to make a recommendation to the Minister that the conduct or behaviour of a particular member of Council merited consideration to remove that person, one could imply into the Act a power to investigate any complaint about such a member's conduct or behaviour before making any such recommendation, or indeed deciding not to. But there is nothing within the Act, or by reference to the functions conferred upon the Council by the Act, or any policies identifiable from the Act which contemplates or makes necessary a power for the Council to investigate one of its own members. The plain words of the Act make this clear in my view. There is nothing opaque or ambiguous in this respect which would entitle this Court through an exercise of judicial activism to read such a power into the Act. In effect this Court would be amending the legislation, and that is not permissible.

79. I cannot consider Mr Appelbe to come within any proper definition of consultant or adviser for the purpose of section 7(2) of the Act of 1999. An investigator is not a consultant or adviser. But in any event his appointment cannot be seen as being in relation to any function stated in section 6.

80. It is of course the case that the Council is bound by obligations of good governance like any other statutory body, and that is reflected in the Code referred to. But the implication of a power for the Council to investigate one of its own members is not a necessary corollary to such obligations, since the Minister has the power to remove a member. Any person or body may bring matters to the attention of the Minister for his consideration in relation to a Council member's behaviour, since section 13 (2) of the Act makes it clear that the Minister may remove a member from office if "in the opinion of the Minister" the member has committed stated misbehaviour. That is very clear and workable. For example, the FAI could have been told to bring its concerns to the Minister's attention when it wrote its letter dated 3rd April 2013. Alternatively, the CEO or even the Chairman could have forwarded the letter and emails to the Minister for his consideration for the purposes of section 13(2) of the Act. That is the mechanism provided for in, and contemplated by, the Act. There is nothing particularly problematic about such a procedure. It is easy to invoke. The Minister can clearly conduct such further investigation and inquiry as he feels appropriate before reaching a decision whether or not to remove a Council member from office. The person whose conduct is complained about to the Minister could be permitted by the Minister to make such representations as he/she may wish before the Minister reaches any opinion on the complaint. But the Act does not contemplate any input into that decision by the Chairman or CEO of the Council or the members of the Council, though the Minister could seek an input if he wished. That is how the scheme of the Act contemplates that a matter such as the FAI complaint should be dealt with.

81. I am satisfied that the decision of the Council made on the 16th April 2013 is ultra vires, and must be quashed.

82. **Fair procedures/constitutional justice**:

83. In view of my conclusions on the first issue of 'vires' it is unnecessary to reach conclusions on the question of whether fair procedures were afforded to the applicant prior to the Council reaching its decision on the 16th April 2013 to appoint Mr Appelbe to investigate the FAI complaints.

84. However, I will indicate now in a brief way given the constraints of time that in my view the manner in which matters proceeded to the decision by Council on the 16th April 2013 lacked fairness to the applicant.

85. In my view the applicant is in no different a position than for example a solicitor, doctor, nurse or other professional person whose reputation is important. The applicant has given many years of his life to sport in various capacities, but in recent years he has been appointed to important positions of great responsibility. He clearly has a reputation sufficient to have merited these appointments. He would not have been appointed to the Council of such a prestigious body as the Irish Sports Council if the Minister of the day did not hold him in high regard.

86. In my view the dictates of constitutional justice required that where a complaint was being made against him by the FAI suggesting at least by implication that he was no longer fit for office having breached the terms of the Act of 1999, the Standards in Public Office and the Code, by inter alia attempting to influence negatively funding decisions related to the FAI, the applicant be

afforded an opportunity to know precisely what was being alleged against him, and therefore what his colleague members on the Council would be considering at the meeting.

87. He was entitled in my view to an opportunity to be heard in relation to what allegations were being made. They are serious allegations. That does not mean that he was entitled as of right to make those submissions in person or orally, though that could have been facilitated without difficulty. But he was entitled, I believe, to an opportunity at a minimum to make written submissions or responses if he wished to do so.

88. At a minimum he needed to be given copies of the emails enclosed with the letter of the 3rd April 2013 so that he would be placed in a position to know the basis for what was stated in the letter from the FAI, before making a meaningful submission or response.

89. The very setting up of an investigation of this kind to be conducted by somebody of the stature of Mr Appelbe at the request of a statutory body such as the ISC has implications for the reputation of somebody who is the subject of the investigation. It gets into the public domain. The appointment by the Minister of a person to the Council of the ISC is an important appointment of national significance. That body receives a significant budget from public funds, and its allocation of those funds among national governing bodies is an important function. The setting up of an investigation and the appointment of a former Director of Corporate Enforcement carries with it the whiff of sulphur which will not easily be contained within the four walls of the room in which the decision to appoint him was made. It is clear that the applicant was the target of the investigation, especially since JG had resigned, and it appears that SA was not asked to.

90. Given the possibility of reputational damage to the applicant, not just among his Council colleagues but perhaps more widely, by even the decision to appoint the investigator, the applicant in my view was entitled to be heard in some way, and to be provided in advance with copies of the emails. In this instance he was not even shown them, despite requests to see them. In fact the first time he saw the basis of the allegations being made against him was when Mr Mulvey exhibited them in an affidavit in these proceedings.

91. It seems to me that the decision by the Council members to authorise the appointment of an investigator amounts to a prima facie finding against the applicant. He was entitled to be heard before that. The Terms of Reference as provided to Mr Appelbe go further in my view than mere fact-finding.

92. I would add that I cannot see any reason why those emails were not provided to the Council members at or before the meeting on the 16th April 2013. That meeting is certainly covered by the term 'qualified privilege' in my view, and should not have raised the concerns regarding defamation which appears to have been the reason why the emails were not provided to the members. In my view, it was not sufficient that the Chairman would simply give the members the letter itself, and then say whatever he wished to the members about what was in the emails, and ask them to vote for the appointment of Mr Appelbe to investigate the matter. The members were denied an opportunity to consider the emails and perhaps reach a conclusion that no investigation was justified, or perhaps a more limited investigation such as Mr Appelbe seems to have concluded by his reduction of the Terms of Reference.

93. I believe that certain judgments to which I have been referred support these conclusions, including that of McKechnie J. in *O'Sullivan v. The Law Society of Ireland* [2012] IESC 21, and those of Barron J. and Hardiman J. in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54.

94. I should state that the parties have agreed that in view of the urgency of the case the application before me would be what has become known as a telescoped hearing of the case.

95. I will therefore declare that the decision made on the 16th April 2013 to appoint an investigator to investigate the applicant was ultra vires the statutory powers of the respondent, and order that the said decision be quashed, and I will hear submissions as to any further order that may be considered necessary.