THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 272

Record No. 2016/126

Peart J.
Hogan J.
Whelan J.

BETWEEN/

LUCIAN PODARIU

APPLICANT/

RESPONDENT

- AND -

THE VETERINARY COUNCIL OF IRELAND

- AND -

THE FITNESS TO PRACTICE COMMITTEE

OF THE VETERINARY COUNCIL OF IRELAND

RESPONDENTS/

APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 24th day of October 2017

1. The applicant, Mr. Lucian Podariu, is a veterinary surgeon from Romania who has practised in Ireland for almost 10 years. Sixteen complaints were made against him in respect of his handling and treatment of small animals, namely dogs and cats, albeit that one of these complaints (complaint no. 14) related to the keeping of adequate contemporary veterinary records in relation to one or more of these animals and another (complaint no. 6) related to an alleged embellishment of his curriculum vitae. As the dates of certain events in this narrative assume some importance for reasons which will become clearer later in this judgment, it should be stated that the sixteen complaints in question all relate to events which took place between February 2010 and April 2012.

2. These complaints were made by the complainant, a Mr. Roarty (who was the former employer of Mr. Podariu) to the Registrar of the Veterinary Council ("the Council") on 1st May 2012. The complaints were considered by the Preliminary Investigation Committee ("PIC") of the Council and in July 2012 the matter was referred to an inquiry before the Fitness to Practice Committee of the Council ("FTPC") pursuant to the provisions of s. 76(6)(b) of the Veterinary Council Act 2005. Mr. Podariu was directed to produce veterinary records by way of production summonses issued by the FTPC in October 2012 and in May 2013. The notice of inquiry, dated April 2013, related to Mr. Podariu's management of a number of small animals but it also contained, as I have already noted, an allegation (allegation no. 14) to the effect that he had failed to maintain any or adequate contemporaneous records of his treatment of those small animals.

3. The inquiry before the FTPC commenced on 20th May 2013. During the course of the inquiry, Mr. Podariu produced original notebooks which he claimed were his contemporaneous handwritten records for the relevant years. In the light of this evidence, the Registrar (having concluded her evidence) then proposed adducing evidence before the FTPC to the effect that the handwritten records produced by the Respondent were not in fact contemporaneous records, as the notebooks in which they were written, sold by the supermarket chain, Lidl Ireland, were not on the Irish market and could not have been purchased on the relevant dates in the manner claimed by Mr. Podariu.

4. Mr. Podariu was notified by letter dated 27th June 2013 of a proposed application to amend the Notice of Inquiry to allege expressly that the Respondent acted dishonestly in producing the records and in giving evidence by reference to those records claiming that they were contemporaneous records.

5. The inquiry resumed on 1st October 2013 and at that hearing Mr. Podariu's legal representatives did not dispute that the FTPC was entitled in principle to allow the proposed amendment of the Notice of Inquiry. The FTPC decided to permit the amendment of the Notice of Inquiry to introduce the amendment (allegation no. 17) to the effect that the Mr. Podariu had acted dishonestly in purporting to produce contemporaneous handwritten records. The inquiry, which was then adjourned, subsequently resumed and concluded on 11th November 2013. The FTPC found Mr. Podariu guilty of professional misconduct by reference to the amended charge only (i.e., complaint no. 17) and recommended that he be censured.

6. On 17th November 2014, the Council considered the proposed sanction and decided instead to suspend the Respondent's registration for six weeks. Mr. Podariu then appealed that decision to the High Court pursuant to s. 80(3) of the Veterinary Practice Act 2005 ("the 2005 Act"). McCarthy J. heard the appeal in January 2016 and in an ex tempore judgment delivered on 20th January 2006 he found for Mr. Podariu on fair procedures grounds. The Council have now appealed to this Court against that decision pursuant to s. 80(6) of the 2005 Act pursuant to leave granted by McCarthy J. on the 11th February 2016.

7. Prior to considering the legal issues which now arise in respect of this appeal, it is appropriate in the first instance to consider the relevant legislation.

The relevant legislation

8. Part 7 of the 2005 Act establishes a disciplinary regime for veterinary surgeons broadly similar to that currently in place for other statutorily regulated professions. Section 76 of the 2005 Act provides that any person is entitled to apply for an inquiry into the fitness to practise veterinary medicine of a registered person on the grounds, inter alia, of professional misconduct. Such an application for an inquiry is directed, in the first instance, to the PIC. Pursuant to s. 76(5)(b) of the 2005 Act, the PIC then seeks observations from the registered person in respect of whom the application is made. The PIC may then decide, pursuant to s. 76(6), that the inquiry should proceed. In contrast to the statutory regime which obtains for other professionals, it may be noted that the 2005 Act provided for a timeframe within which this decision was required to be made. This time period was originally two months: see s. 76(8). This period has now been extended to four months, pursuant to the amendments effected by the Veterinary Practice (Amendment) Act 2012 ("the 2012 Act").

9. If a decision to hold an inquiry is taken by the PIC, then the matter is sent forward to the FTPC. Pursuant to s. 78(3), the veterinary surgeon is required to be given notice in writing by that Committee of the nature of the evidence "proposed to be considered at the inquiry". Although s. 78 does not provide in terms for the delivery of a notice of inquiry, it would appear that this is the procedure which – in common with other statutory regimes governing disciplinary procedures – is followed by the FTPC. In practice, the Registrar formulates the notice of inquiry.

10. At the conclusion of the inquiry, the FTPC is required to make a report on its findings to be delivered to the Council. The requirement to deliver a report and the powers of Council on receipt of such a report were provided for by ss. 79 and 80 of the 2005 Act. In particular, s. 80(1) of the 2005 Act provided as follows:

> "(1) Where the Council receives a report from the Fitness to Practise Committee under section 79(1), *in which that Committee gives as its opinion that the registered person to whom the inquiry relates is not fit to practise, or is not fit to practise a specified type of veterinary medicine, or veterinary nursing as appropriate*, it shall decide to do any of the following:-
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> (a) remove the name of the registered person from all or some of the parts of the Register or the Register of Veterinary Nurses where he or she is registered, as the Council considers appropriate,
>
> (b) direct that for a specified period the registration of the registered person in all or some of the parts of the Register or the Register of Veterinary Nurses where he or she is registered, as the Council considers appropriate, shall not have effect, or
>
> (c) attach such of the following conditions as it thinks fit, to the retention of the name of the registered person in all or some of the parts of the Register or the Register of Veterinary Nurses where he or she is registered, as the Council considers appropriate:
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> (i) that he or she should obtain specified medical treatment;
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> (ii) that he or she should have limits placed on the type of veterinary medicine or veterinary nursing, as appropriate, practised by him or her;
>
> (iii) that he or she should have geographical or temporal limits placed on the practice by him or her of veterinary medicine or veterinary nursing, as appropriate;
>
> (iv) that he or she should attend specified programmes of education or further education;
>
> (v) other specified conditions." (emphasis added)

11. As originally enacted s. 81 empowered the Council to advise, warn or censure a person on receipt of a report from the FTPC, and unlike s. 80, it was silent in relation to the fitness to practise of the veterinary practitioner. Critically, however, the 2005 Act was subsequently amended by the 2012 Act. The 2012 Act was signed by the President on 18th July 2012 and, in the absence of a provision to the contrary in that Act itself, it became law on that day by virtue of Article 25.4.1 of the Constitution.

12. The 2012 Act amended the 2005 Act in certain material respects. Section 4 of the 2012 Act operated to amend ss. 79 and 80 of the 2005 Act. In particular, the amended version of s. 80 of the 2005 Act removed the requirement that the FPTC should have expressed an opinion that the registered person in respect of whom the inquiry related was not fit to practise before the Council could impose the more serious sanctions such as removal or suspension or the attachment of conditions to a practising certificate.

The High Court proceedings

13. In the special summons before the High Court Mr. Podariu advanced three substantive arguments on the pleadings concerning the decision of the Council. These grounds related to:-

> (i) fair procedures;
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> (ii) the admission of certain evidence which it was contended amounted to hearsay and
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> (iii) that the Council erred in law by applying a sanction pursuant to s. 80 of the 2005 Act in circumstances where an application for an inquiry into the Respondent's fitness to practice veterinary medicine was made and was directed to the PIC prior to the commencement of the 2012 Act.

14. It seems that when matter came for hearing before the High Court, a wider argument was also advanced on behalf of Mr. Podariu that the FTPC breached his right to fair procedures and/or constitutional justice. While McCarthy J. accepted that the wider point was not pleaded, he nonetheless determined that it should be decided.

The High Court judgment

15. McCarthy J. noted that the new allegation added to the Notice of Inquiry was one of dishonesty which arose from an order compelling the production of materials before the FTPC. He found that in principle no one could doubt the entitlement of the FTPC to amend the Notice of Inquiry and to add what he described as a "charge" by way of amendment if there was jurisdiction to do so. He therefore rejected the first of the three points advanced by Mr. Podariu on the pleadings. The judge nonetheless noted that the power of amendment was not an unlimited power but was one:

"subject to the principles of constitutional justice, if and insofar as the additional matters emanate from, directly or indirectly, or perhaps I could put it this way, ultimately, from the issues which have triggered the inquiry in the first place or have caused the Fitness to Practice Committee's jurisdiction to be invoked".

16. McCarthy J. then went on to hold that by adding allegation no. 17 at the inquiry stage (i.e., without going through the PIC) there had been a breach of the rules of constitutional justice. He found that the real issue was whether there was what he descried as an "original or founding jurisdiction" *ab initio* in the FTPC to hear and determine the new allegation of professional misconduct which arose during the hearing of the matter before it. He concluded that the adjudication by the FTPC was a nullity as there was no jurisdiction from the beginning for the FTPC to adjudicate upon the matter as the wrongdoing ought to have been dealt with "in accordance with the process in question" and there was therefore a breach of the principles of natural justice.

17. McCarthy J. next rejected a submission that the evidence of the Registrar, Ms. Lorraine Brophy, was hearsay. McCarthy J. noted that it was well-established that the standards of strict application of the rule against hearsay, or indeed certain other rules of evidence, are not applicable in administrative tribunals, even those which conduct serious disciplinary inquiries. In any event, he did not accept that her evidence was hearsay. As this hearsay point is no longer an issue, I mention it only for completeness.

18. McCarthy J. then turned to the third issue of the statutory changes effected by the 2012 Act. The judge found that the applicable legislation was the 2005 Act, and therefore the Council was not entitled to apply the amendments introduced by the 2012 Act when deciding on sanction.

19. So far as the appropriate remedy issue was concerned, the Court rejected the submission that Mr. Podariu ought to have proceeded by way of judicial review at the time of the acts complained of. McCarthy J. found that Mr. Podariu was entitled to raise the issues as to jurisdiction by way of the statutory appeal albeit that the point would ordinarily be pursued by judicial review.

20. While counsel for the Council, Ms. Barrington S.C., maintained that some of these issues were not raised by Mr. Podariu in his pleadings, as they were so fully ventilated in the judgment of the High Court I propose to consider each of these issues in turn.

The addition of complaint no. 17 at the inquiry before the FTPC

21. The first issue which requires to be determined is whether the FTPC had jurisdiction to permit a new, additional charge to be added at the inquiry stage. The critical point here is that this particular complaint was never considered or examined by the PIC. In my view, however, it is absolutely central to the lawful operation of the disciplinary regime envisaged by the 2005 Act that a complaint must first be considered by the PIC, as the mandatory language of the relevant provisions of s. 76 admit of no other conclusion.

22. Section 76(4) provides that:

"Immediately upon receipt of an application for an inquiry, the Registrar shall:-

(a) direct it to the Preliminary Investigation Committee, and

(b) notify the Council that the application for an inquiry has been made and the date upon which it was made."

23. Here the mandatory and imperative nature of the language of the sub-section ("…the Registrar shall….") cannot, I think, be lightly ignored. All of this is underscored by the obligation imposed on the PIC by s. 75(b) of the 2015 Act to seek observations from the registered veterinary practitioner:

"(b) For the purposes of considering the application, the Preliminary Investigation Committee shall seek observations from the registered person in respect of whom the application was made, or from any other person whom it considers appropriate."

24. Here again the language is expressed in mandatory terms ("…the Preliminary Investigations Committee shall seek observations from the registered person…."). The obligation which the Oireachtas imposed on the PIC may also be regarded as providing a vital safeguard for the practitioner in order to ensure that the matter does not proceed to a full inquiry unless he or she has been given an opportunity to respond to the complaint.

25. The provisions of s. 76(6) of the 2005 Act are in a similar vein in that they state:

"(6) Following consideration of the application the Preliminary Investigation Committee may decide, in relation to it:

(a) that the inquiry should not proceed in whole or in part because:
(i) it does not satisfy the requirements of subsection (3);

(ii) it is frivolous, vexatious or made in bad faith;

(iii) it does not refer to any of the grounds set out in subsection (1);

(iv) there is insufficient evidence to warrant an inquiry;

or

(b) that the inquiry should proceed in whole or in part."

26. This sub-section thus envisages that the PIC will make a decision as to whether, for example, there is sufficient evidence to warrant an inquiry. It is necessarily implicit in this that this preliminary stage of the statutory investigation process must be completed before the matter proceeds to a full hearing before the FTPC. The same can be of the right of appeal given to an applicant for an inquiry who wishes to appeal to the Circuit Court against a decision of the PIC to the effect that should be no inquiry: see s. 77(3) and s. 77(4).

27. All of this is consistent with the provisions of s. 78(1):

"If a decision to proceed to hold an inquiry is notified to the chairperson of the Fitness to Practise Committee under

s.77(5), that Committee shall hold the inquiry as soon as practicable."

28. This pre-supposes that the FTPC has indeed received a notification that an inquiry shall be held before it can assume a jurisdiction in respect of any particular complaint. I do not overlook the fact that the Council itself can in some circumstances refer the matter to the Committee, namely, where the PIC has failed to make a decision within the statutory timeframe or, alternatively, where it has decided that there shall be such an inquiry, the decision of the PIC to the contrary notwithstanding: see s. 76(9). This sub-section further provides that the Council must in such circumstances furnish reasons for its decision to over-rule the decision of the PIC. None of this, however, can take from the fact that the entire statutory scheme contained in the 2005 Act would be set at naught if the FTPC could assume a jurisdiction in its own right to hear and determine a complaint without the complaint having been first assessed and considered by the PIC to see whether an inquiry is actually warranted.

29. This appeal, therefore, presents another version of the age old problem of how a court should approach a failure to comply with a mandatory statutory provision or provisions, even if it is accepted that there is little prospect that the result would have been any different had complaint no. 17 been considered in its own right by the PIC in the first instance and that the PIC would most likely have determined that there ought to have been an inquiry in respect of this complaint as well.

30. The *locus classicus* on this issue is, of course, the Supreme Court's decision in *Monaghan UDC v Alf-A-Bet Promotions Ltd.* [1980] I.L.R.M. 64. Here Henchy J., dealing with the admittedly separate question of whether a particular planning notice had sufficiently complied with the terms of the planning regulations, stated ([1980] I.L.R.M. 64, 69):-

> "In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

31. Viewed from that perspective, I find it hard to characterize that which has been prescribed by the Oireachtas in the 2005 Act as trivial or peripheral or insubstantial. The Oireachtas clearly sought to prescribe a precise and intricate statutory scheme with protections for the benefit of complainants and veterinary professionals alike.

32. These statutory requirements cannot be regarded as mere surplusage. Rather, they have been deemed by the Oireachtas to represent core protections for the professional person whose reputation and livelihood may be affected in a far-reaching way by a complaint of this nature. If the scope of these statutory protections is thought to be otiose, burdensome or unnecessary or if it is believed that they unduly hamper the effective prosecution of complaints against veterinarians, I fear that the Council have addressed their arguments in this respect to the wrong forum.

33. That brings us directly to the question of whether these procedures were followed in the case of allegation no. 17. It is clear that the requirements contained in s. 76, s. 77 and s. 78 of the 2005 Act were not complied with in that a new and entirely fresh complaint was now made by the Registrar of the Council in the middle of the inquiry. This was a very serious complaint indeed (involving as it did a charge of professional dishonesty) and the identity of the complainant was different to the complainant who had made the other 16 complaints. While the Council maintained in argument that allegation no. 17 had some similarities with the pre-existing allegation no. 14, they were in truth quite different: the latter related to allegations of inadequate record keeping, while allegation no. 17 involved a charge that records were deliberately falsified.

34. It could not be said that the failure to adhere to the statutory procedures prescribed by the 2005 Act by failing to refer the new, more serious charge of professional dishonesty to the PIC was anything other than a complete departure from the terms of the statutory scheme.

35. In these circumstances it is unnecessary to consider the extent to which (if at all) a notice of inquiry might otherwise be amended at the hearing before the FTPC. It is sufficient to say that by reason of the inter-locking nature of the provisions of ss. 76, 77 and 78 which I have just highlighted, the FTPC has no jurisdiction to consider a new or fresh complaint which has not been the subject of an initial reference to and (subject only to the special provisions of s. 77(8) and s. 77(9) which do not apply to the present case) determination by the PIC.

Whether Mr. Podariu is estopped or otherwise barred from challenging the validity of the decision of the FTPC

36. Even though it is clear that the FTPC acted *ultra vires* in permitting complaint no. 17 to be added at the inquiry stage without having been first referred to the PIC, this does not *in itself* mean that the appeal should be allowed on this ground because the Council argue that if that were so, Mr. Podariu is estopped by his own conduct from challenging this decision on that ground.

37. The law in relation to estoppel by conduct is illustrated by a trilogy of leading Supreme Court decisions from the 1970s: *Re Greendale Building Co. Ltd.* [1977] I.R. 256; *Corrigan v. Irish Land Commission* [1977] I.R. 317 and *The State (Byrne) v. Frawley* [1978] I.R. 326. It is quite clear from these cases that an entirely new jurisdiction cannot be created by estoppel. Thus, for example, a decision of the Medical Council purporting to sanction a veterinary surgeon would be wholly void and ineffective, even if the veterinarian in question had somehow submitted to the jurisdiction of that Council. It is likewise clear that the District Court cannot exceed its own geographical limitations by purporting to deal with offences which had not been the subject of a complaint made within the appropriate District Court district. In *O'Malley v. District Judge Kelly* [2015] IECA 67 this Court accordingly held that the District Court had no jurisdiction in such cases and quashed the ensuing convictions, the acquiescence of the applicant in the entire procedure notwithstanding.

38. It cannot be said, however, that the FTPC did not have jurisdiction in this particular sense in respect of Mr. Podariu. It was rather the case that the authority of the FTPC to deal with allegation no. 17 was itself contingent on compliance with the statutory pre-conditions to that jurisdiction contained in ss. 76, 77 and 78 respectively, not least the requirement (subject again to two exceptions not relevant here) that the PIC should first have determined that there was a case to answer in respect of that allegation.

39. It is next necessary to stress that these statutory provisions existed fundamentally as protections for the veterinary surgeon who was the subject of the allegations in question. It followed, therefore, that the veterinarian in question was entitled, in principle, at least, to waive these protections and it is this fact which distinguishes the present case from no subject matter jurisdiction cases such as *O'Malley*.

40. In this respect, the present case has many similarities with *The State (Byrne) v. Frawley*. In that case the trial of an accused charged with burglary had commenced with an all-male jury under the provisions of the Juries Act 1927. A few days into the trial the Supreme Court gave its decision in *de Búrca v. Attorney General* [1976] I.R. 38 holding that these provisions of the 1927 Act were unconstitutional because they (de facto) excluded women and non-property owners from juries. As the Supreme Court was later to find, the accused elected to proceed with the pre-existing jury even though it was now clear that it had been unconstitutionally empaneled. The accused was later convicted.

41. The Supreme Court subsequently held that the accused was bound by that election and could not be heard to assert that his conviction had been pronounced unconstitutionally or that he was now entitled to be released. As Henchy J. explained ([1978] I.R. 326, 349):

> "[The applicant] was the first person entitled to plead successfully in the Circuit Court the unconstitutionality of such a jury. As a result of the decision in the *de Búrca* case he was presented with the opportunity in the middle of his trial. An informed and deliberate decision was made to turn down that opportunity. His then counsel, instead of applying to have the jury discharged, elected – and I make no criticism of that choice – to allow the trial to proceed without any objection as to the jury as constituted. It was obviously thought to be in the best interests of the prisoner that he should take his chances before that jury, notwithstanding its constitutional imperfection….Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality…."

42. I consider that these principles apply to the present case. What is striking is that at no time during the hearing before the FTPC was it ever submitted on behalf of Mr. Podariu that Allegation No. 17 would first have to be brought before the PIC by way of an entirely fresh complaint. Indeed, it seems that the power of the FTPC to permit the amendment of the notice of inquiry was accepted by all the parties.

43. When the amendment was made by way of the addition of Allegation No. 17, the Chairman of the FTPC proposed that the inquiry be adjourned to allow Mr. Podariu to deal with the allegation in view of its gravity. Although Mr. Podariu's legal representative did not suggest that an adjournment was necessary, the Chairman decided to adjourn the matter and the hearing did not resume until approximately six weeks later on 11th November 2013. Again, neither on that date, nor at any subsequent date was the issue of the entitlement to amend the notice of inquiry by the inclusion of Allegation No. 17 raised as a legal issue by either party. Nor was it raised in the detailed written legal submissions furnished on behalf of Mr. Podariu at the end of the hearing. 44. In these circumstances one must conclude that there was sufficient acquiescence on the part of Mr. Podariu to the addition of allegation no. 17 at the hearing before the FTPC. In effect, therefore, he must be deemed to have waived the protection of statutory provisions which existed for his benefit and he is thus precluded from challenging the validity of the FTPC decision to permit such an amendment to be made.

The effect of the 2012 Act

45. Prior to the amendment of the 2005 Act by the 2012 Act, the Council had no power to vary the sanction recommended by the FTPC in a manner which was adverse to the professional concerned in the absence of a finding of unfitness to practice. As I have already noted, the 2012 Act was commenced on enactment on 18th July 2012. Section 80(1) of the 2005 Act required the FTPC to conclude that the registrant was not fit to practice before the FTPC could impose certain sanctions pursuant to s. 80(1), namely, removal from the Register, suspension and/or the attachment of conditions. This requirement was, however, amended by s. 4(b) of the 2012 Act so that this requirement was now removed.

46. The conduct giving rise to the new allegation no. 17 was alleged to have occurred during the course of the inquiry, namely, on or around 21st May 2013 and/or 22nd May 2013. Such conduct admittedly post-dated the commencement of the 2012 Act.

47. While the FTPC found that the charge against Mr. Podariu in respect of allegation no. 17 had been established, it nonetheless considered that there were many extenuating circumstances:

> "The Committee therefore find the two allegations within Allegation 17 as being proven beyond reasonable doubt and further find that the proving of such allegations amount to infamous or disgraceful conduct on the part of Mr. Podariu.
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> Whilst it is not for the Committee to speculate why Mr. Podariu should have fabricated these handwritten notes and be guilty of such misconduct, nevertheless, it is pertinent for the Committee to take into account by way of mitigation the fact that Mr. Podariu was facing a multitude of allegations against him none of which, with the exception of Allegation 17, were found to amount to misconduct. The Committee can only speculate that Mr. Podariu panicked in relation to his lack of contemporaneous handwritten notes and set about trying to rectify his situation in this regard.
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> If Mr. Podariu had not produced any handwritten notes at all and had admitted not having such notes the consequences would be far less than they are for him now in producing such handwritten notes which are proven to be a fabrication.
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> Furthermore the Committee accept that Mr. Podariu commenced practice dealing with farm animals and livestock only and not small animals. However the area is a geographically remote area, and owners not infrequently brought small animals to be seen by Mr. Podariu, often in emergency situations. Mr. Podariu has learned from his experiences and has geared himself up to deal with small animals in a much better manner.
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> The Committee also consider it very relevant to note that not a single owner of any of the animals involved had any complaint to make about Mr. Podariu, and, in fact, one travelled to give supportive testimony and a number of others provided written support.
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> Taking into account these mitigating factors and all of the circumstances of the case, the Committee strongly feel that any sanction, which would normally be very serious for a Veterinary Practitioner in cases where the Practitioner has engaged in infamous or disgraceful conduct, should in this case not be so severe.

RECOMMENDATIONS AS TO SANCTION

> In finding misconduct against Mr. Podariu in respect of Allegation 17 only and in dismissing all of the other allegations the Committee recommend that Mr. Podariu be censured in accordance with s. 81 of the Veterinary Practitioners Act 2005 – 2012."

48. Critically, however, as can be seen from this passage, the FTPC did not make a finding of unfitness to practice and it recommended that Mr. Podariu be censured only. When this recommendation came before the Council, however, it concluded that a period of six weeks suspension from the register was necessary to reflect the seriousness of the offence and the need to uphold the reputation and integrity of the profession. It is accepted that, absent the finding of unfitness on the part of the FTPC, the Council was not entitled to impose the more serious sanction of suspension (even for a relatively short period) unless the amendments effected by the 2012 Act properly governed the present case. The real question, therefore, is whether these amendments applied to the present case.

49. In the High Court McCarthy J. held that the Supreme Court's decision in *Buckley v. Attorney General* [1950] I.R. 67 applied to the instant case so "that it is not lawful by statute to interfere in actually pending proceedings, even proceedings pending before administrative tribunals". McCarthy J. relying on the judgment in Buckley concluded:

> "We know that that decision precludes by statute an intervention by the Oireachtas in pending proceedings in court. It seems to me that as a matter of principle there must be a similar constitutional inhibition on the Oireachtas from intervening in that way in pending proceedings of the present type because whilst the Council and it's committees here are not, of course, courts the root of the principle is the same."

50. In *Buckley* the Supreme Court held that the Sinn Féin Funds Act 1947 amounted to an unwarrantable interference by the Oireachtas with the operations of the courts in a purely judicial domain as the effect of the Act was, in substance, to determine the outcome of a dispute before the court. This constituted a breach of Article 34 of the Constitution.

51. In my view, it is unnecessary to determine the scope of *Buckley* or whether this decision could apply to administrative tribunals such as the Council. What is critical in my view is that at the time the first complaints were made in May 2012 the professional disciplinary regime in respect of veterinary surgeons was governed entirely by the 2005 Act. It could not have been suggested that had, for example, the FTPC found against Mr. Podariu in respect of one of the other original 16 complaints without a finding of unfitness to practice that the Council would have been entitled to invoke the new amending powers contained in the 2012 Act.

52. In my view it is clear from the authorities that in May 2012 Mr. Podariu enjoyed a vested right to have these disciplinary complaints deal with in accordance with the then prevailing disciplinary legislation, namely, the 2005 Act in the sense understood by s. 27(1)(c) of the Interpretation Act 2005. This sub-section provides that:

> "(1) Where an enactment is repealed the repeal does not –
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment …"

53. In this context much useful guidance can, I think, be gained by a consideration of a number of extradition/surrender cases where the question of the possible application of s. 27(1)(c) of the Interpretation Act 2005 (or earlier versions of that provision) have been considered: *Sloan v. Culligan* [1992] 1 I.R. 223, *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1 and *Minister for Justice and Law Reform v. Tobin* (No.2) [2012] IESC 37, [2012] 4 I.R. 147. All of these cases concerned the question of whether an application for extradition/surrender was governed by the law obtaining at the date of the alleged offence or whether subsequently enacted legislation could properly apply to a later extradition request.

54. In his judgment in *Tobin (No.2)* O'Donnell J. said ([2012] 4 I.R. 147, 352-352):

> "In identifying what can be said to be "vested" rights which trigger the presumption in s.27 there is I think much useful guidance to be gained in Bennion, *Statutory Interpretation* (4th Ed. Butterworths, 2002) which states that "the right must have become in some way vested by the date of a repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed". A similar point was made in the 9th edition of *Craies on Legislation* (Sweet & Maxwell 2008) at para. 14.4.12:-
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> > "The notion of a right accrued in s. 16(1)(c) requires a little exposition. In particular the saving does not apply to a mere right to take advantage of a repealed enactment (clearly since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or occurred to cause of a particular right to accrue under a repealed enactment."

55. In his judgment O'Donnell J. had referred to the earlier decisions in *Sloan* and *Bailey* as examples where it was not sufficient for this purpose for the individuals concerned to show that they had had "a mere right to take advantage of a repealed enactment." The situation in *Tobin (No.2)* was different because in the first case involving Mr. Tobin, *Minister for Justice, Equality and Law Reform v. Tobin (No.1)* [2008] IESC 3, [2008] 4 I.R. 32, the Supreme Court held that it should not order the surrender of Mr. Tobin to Hungary under the provisions of the European Arrest Warrant Act 2003 because he had not "fled" from Hungary (as the 2003 Act had then required the requesting state to demonstrate), but had rather left it voluntarily and in apparent co-operation with the Hungarian authorities.

56. The fleeing requirement was the removed by the provisions of the Criminal Justice (Miscellaneous Provisions) Act 2009. A further surrender request was then made by the Hungarian authorities and in *Tobin (No.2)* a majority of the Supreme Court (Hardiman, Fennelly and O'Donnell JJ.) held that an order for surrender should not be made, this legislative change notwithstanding. There was, admittedly some disagreement among the majority: two of the three considered that the fresh application amounted to an abuse of process (in that the Court had already ruled against the making of a surrender order), while two of the three (albeit not Fennelly J.) considered that a vested right protected by s. 27 of the Interpretation Act 2005 was at issue.

57. While making all due allowances for this divergence in the majority reasoning, the judgment of O'Donnell J. on the vested right point is nonetheless illuminating ([2012] 4 I.R. 147, 353, 355-356):

> "The outcome of the *Bailey* case on this point neatly illustrated the distinction made in these texts. Mr. Bailey's right during the currency of the Act of 2003 could properly be described as a "mere right to take advantage of a repealed enactment". In his case nothing had been done to cause a particular right to accrue under that enactment. The question then raised on this appeal was whether the decision of the Supreme Court in favour of Mr. Tobin in *Tobin (No.1)* was something which had been done or occurred which caused a particular right to accrue under and by virtue of the repealed enactment. ….As the quotation from Craies indicates, the question is whether something had happened which means that Mr. Tobin's entitlement was something more than to take advantage of the repealed legislation. In this regard, his case can usefully be contrasted with the decisions in *Sloan v. Culligan* and in the recent case of *MJELR v. Bailey*. In each of

> those cases, it was determined in effect, that nothing had happened during the currency of the repealed legislation to give the individuals concerned any vested right which required to be specifically addressed to any subsequent repealing legislation. Here however something has happened. There was an application for surrender hearing and a determination both by the High Court and this Court on appeal. The question therefore is whether that can be said to be *"something"* for the purpose of the law so as to trigger the provisions of s.27.
>
> It is here that the discussion on abuse of the process and separation of powers becomes helpful. I have no doubt that a full hearing and determination of a request for surrender is certainly *something*. I think it can also be properly said that the outcome of *Tobin (No. 1)* was to confer or create a right. In the aftermath of *Tobin (No.1)* Mr. Tobin could not have been extradited or surrendered to Hungary in respect of this sentence, so long as Irish law retained the fleeing requirement. That was a right, and not a privilege. ….when a binding judicial determination is made by reference to the law then in force, something of legal significance happens and a right is acquired or accrues within the meaning of s.27 Accordingly, I have no doubt that what Mr. Tobin had acquired as a result of the decision in *Tobin (No.1)* and can properly be described as a right acquired or accrued for the purposes of s.21 of the Interpretation Act 2005."

58. Applying this reasoning to the present case, it can equally be said that that something had happened which went beyond simply depriving Mr. Podariu of his right to avail of the pre-existing enactment, namely, the regime provided for by the 2005 Act. What had happened, of course, was that that disciplinary regime had been commenced by the laying of the complaints on 1st May 2012. At that point, I consider that Mr. Podariu had what amounted to a vested right to have the complaints heard and determined under the law as it stood at that date.

59. It is, of course, true to say that the events which give rise to allegation no. 17 occurred after the coming into force of 2012 Act. Had this been treated by the Council as an entirely separate complaint which was divorced from the other 16 (pre-2012 Act) complaints, then, of course, no issue as to a vested right could have arisen. But this, however, is not what occurred. The Council instead elected to prefer the additional charge at the inquiry stage and tacked on this charge to the pre-existing pre-2012 Act charges, thereby by-passing the PIC in the process. By taking this course of action the Council signalled that it was treating allegation no. 17 as if it were part of a grouping of the pre-2012 Act complaints which were then being heard and determined by the FTPC on that basis.

60. In these particular circumstances, Mr. Podariu had a vested right for the purposes of s. 27(1)(c) of the Interpretation Act 2005 that all these complaints would be dealt with pursuant to the substantive rules which obtained under the 2005 Act. One of those substantive rules – which the 2012 Act admittedly changed - was that the Council had no power to increase the sanction recommended by the FTPC unless there had been a finding of unfitness to practice. In these circumstances, the amendment by repeal of the relevant provisions of s. 80(1) of the 2005 Act by the 2012 Act must be held not to apply to the right vested in Mr. Podariu to have the complaints all dealt with by the 2005 Act disciplinary regime.

61. It follows, therefore, that the Council was obliged to deal with allegation no. 17 as if it were governed entirely by the provisions of the 2005 Act. This means in turn that the Council had no power to vary the sanction recommended by the FTPC in the absence of a finding of unfitness to practice. In the circumstances, the decision of the Council to impose a suspension of six weeks must be set aside. It would, however, be appropriate to remit the matter of sanction afresh to the Council in accordance with s. 80(1) of the 2005 Act for a fresh consideration of the matter in line with this judgment. This means, in effect, that the Council will be confined to the sanction recommended by the FTPC, namely, one of censure.

62. In view of these conclusions it is not necessary for this Court to consider the Council's submissions that Mr. Podariu ought to have challenged the validity of the ruling of the FTPC in respect of allegation no. 17.

Conclusions

63. In summary, therefore, I am of the view as follows:

64. First, the FTPC had no jurisdiction to permit an amendment of the notice of inquiry so as to permit an entirely fresh allegation to be advanced for the first time without having been first considered by the PIC. To that extent, the provisions of ss. 76, 77 and 78 of the 2005 Act were not complied with.

65. Second, Mr. Podariu is estopped by his own conduct from challenging or otherwise impugning the validity of the FTPC decision to permit allegation no. 17 to be added to the original complaints. In effect, therefore, he must be taken by his acquiescence to have waived statutory provisions which existed for his benefit.

66. Third, Mr. Podariu enjoyed a vested right within the meaning of s. 27(1)(c) of the Interpretation Act 2005 to have all the complaints (including allegation no. 17) heard and determined under the 2005 Act regime. This meant that as the FTPC made no finding of unfitness to practice, the Council enjoyed no power to vary the sanction recommended by the FTPC (namely, one of censure) to that of a six week suspension.

67. It follows that I would invite counsel to address the Court as to the precise form of the orders which should now be made in the light of these conclusions.