Neutral Citation: [2016] IEHC 1

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 508 JR]

MICHAEL P. FINGLETON

APPLICANT

AND

THE CENTRAL BANK OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 4th day of January 2016

Introduction

1. In these judicial review proceedings, the essential relief sought by the applicant is a declaration that a notice of inquiry dated the 9th of July, 2015, served upon him by the respondent is ultra vires the powers of the respondent pursuant to the Central Bank Act 1942 as amended and for an order of *certiorari* quashing the notice of inquiry. A number of ancillary declarations are also sought.

Relevant background

2. In 1971, the applicant joined Irish Nationwide Building Society ("INBS") as director and secretary. In 1974, the applicant became chief executive officer and managing director of INBS. He remained as managing director until the 26th of January, 2008, when he retired as a director. On that date, the applicant was appointed chief executive officer of INBS and he continued to hold that position and attend board meetings until his retirement on the 30th of April, 2009.

3. In the wake of the global economic crisis which commenced in 2008, INBS collapsed. In an affidavit sworn by Louise Gallagher, deputy head of the enforcement division of the respondent, on the 16th of September, 2015, Ms. Gallagher avers that the collapse of INBS resulted in a cost to the Irish tax payer in excess of €5 billion, although this figure is disputed by the applicant.

4. In her affidavit, Ms. Gallagher avers that a new enforcement directorate was set up within the Central Bank in 2010, at which time the respondent commenced an investigation of INBS and of certain persons concerned in its management. The investigation related to the period from the 1st of August, 2004, to the 30th of September, 2008. Ms. Gallagher says it was the most significant and extensive investigation ever conducted by the respondent and concerned multiple suspected breaches of financial services law and regulation by INBS over the said period. Ms. Gallagher avers that approximately 110,000 specific documents were identified during the investigation as relating to the suspected prescribed contraventions. She says the purpose of the investigation was to allow the respondent to decide whether there are reasonable grounds to suspect that INBS had committed a prescribed contravention(s) and whether certain persons concerned in its management had participated in the commission by INBS of a prescribed contravention(s). The investigation was conducted pursuant to the Central Bank of Ireland Act 1942, as amended, in particular by the Central Bank and Financial Services Authority of Ireland Act 2004 ("the Act").

5. On the 24th of February, 2011, all deposits of INBS were transferred to Permanent TSB and on the 1st of July, 2011, all remaining assets and liabilities of INBS were transferred to the Irish Bank Resolution Corporation ("IBRC"). It would appear since the latter date, at the latest, INBS has not carried on the business of providing financial services.

6. By letter of the 17th of January, 2012, the respondent wrote to the applicant in a letter captioned "Notice of Commencement of Examination Pursuant to Part IIIC of the Central Bank Act 1942, As Amended ('the Administrative Sanctions Procedure')" informing the respondent that the applicant suspected that INBS, being a regulated financial service provider for the purposes of Part IIIC of the Central Bank Act 1942, as amended, may have permitted prescribed contraventions for the purposes of s. 33 AO (1) of the Act. The letter went on to state that the respondent considered it necessary to examine whether there were reasonable grounds to suspect that as a person concerned in the management of INBS between the 1st of August, 2004, and 30th of September, 2008, the applicant may have participated in the commission of the suspected prescribed contraventions for the purposes of s. 33 AO (2) of the Act. The letter went on to give details of the suspected prescribed contraventions and of the administrative sanctions procedure ("the ASP") which came into force on the 1st of August, 2004, being the commencement date of the period under review.

7. On the 14th of March, 2012, solicitors for the applicant responded to this correspondence stating "we are instructed that it is our client's intention to fully assist and co-operate with the Central Bank in its inquiry in relation to Irish Nationwide Building Society ('INBS')."

8. However the applicant's position in that regard changed when in a further letter of the 10th of May, 2012, his solicitors said "our preliminary advice to our client, based on senior counsel's opinion, is that Mr. Fingleton is not a person who is now liable to administrative sanctions under Chapter 2 of Part IIIC of the Act, and we propose accordingly to advise our client not to participate in the process as a suspected person." The applicant has maintained that position since.

9. Further correspondence ensued between the parties and on the 12th of December, 2013, the respondent wrote what is described as an "investigation letter" to the applicant setting out in an appendix a list of suspected prescribed contraventions in respect of which the applicant was alleged to have participated. These were stated to supersede the contraventions in the earlier letter of the 17th of January, 2012. The letter invited the applicant to confirm whether he admitted or denied participation in the suspected prescribed contraventions by the 20th of January, 2014, following which the respondent intended to decide whether to refer the matter to inquiry pursuant to Part IIIC of the Act. The applicant responded through new solicitors on the 21st of January, 2014, repeating the earlier contention that he was not subject to the ASP and also drawing attention to the fact that the applicant is the defendant in proceedings in which he is being sued by IBRC and INBS for damages of the order of €6 billion in respect of alleged negligence and breach of fiduciary duty arising from the discharge of his functions as chief executive of INBS.

10. The solicitors go on to claim that there is a substantial overlap between the matters in issue in those proceedings and the suspected prescribed contraventions the subject of the ASP and accordingly it would be a breach of the applicant's right to fair procedures if the respondent were to make factual findings in relation to issues which are also the subject of the proceedings. The letter went on to suggest that any investigation into the applicant be suspended pending the outcome of the proceedings which had been admitted to the Commercial Court. This suggestion was declined by the respondent.

11. A Notice of Inquiry was issued on the 9th of July, 2015, pursuant to Part IIIC of the Act concerning INBS, the applicant and a number of named individuals. This notice states that the respondent has determined that it has reasonable grounds to suspect that INBS committed during the review period certain prescribed contraventions within the meaning of Part IIIC of the Act. The notice further states that the respondent has determined that it has reasonable grounds to suspect that the applicant and other named persons, being persons concerned in the management of INBS during the review period, participated in the commission of some or all of the prescribed contraventions by INBS.

12. The notice states that the respondent will hold an inquiry to determine whether or not INBS has committed prescribed contraventions and whether or not the persons concerned participated in the commission of some or all of the prescribed contraventions. It invites the applicant and the other persons concerned to attend the inquiry to commence on the 1st of February, 2016, at 10.30 am. The notice further states that the respondent has appointed three persons to act as members of the inquiry and identifies those persons.

13. Shortly thereafter on the 15th of July, 2015, the respondent published a document entitled "Settlement Agreement Between the Central Bank of Ireland and Irish Nationwide Building Society" with a sub heading "Following Central Bank Investigation INBS admits widespread breaches".

14. A lengthy publicity statement follows which says that INBS has entered into a settlement agreement with the Central Bank following the conclusion of the Central Bank's most significant and extensive regulatory investigation to date. It says that the Central Bank formally referred the case against INBS and the relevant individuals to inquiry which is the first such referral under the Central Bank Act 1942 as amended. On the first page of the document, the following appears:

> "As part of the settlement, INBS has admitted to having committed multiple breaches of financial services law and regulation, including persistent failure to comply with its own internal policies and procedures during the relevant period. As a result, the Central Bank has reprimanded INBS and imposed the maximum applicable fine of €5 million. As INBS does not have any assets, it would not be in the public interest to pursue the collection of the fine and, accordingly, the Central Bank will not do so on this occasion."

The document goes on to quote a statement from the respondent's director of enforcement and give details of the various breaches in respect of which admissions were made by INBS. The statement went on to say that the respondent will be holding an administrative sanctions inquiry to establish whether certain persons who were concerned in the management of INBS during the relevant period participated in the commission by INBS of the above breaches.

15. Leave to bring this application was granted by order of White J. on the 8th September, 2015.

The Legislative Framework.

16. The Central Bank of Ireland Act 1942 has been subject to very extensive amendment since its introduction. The ASP was introduced in 2004, by the insertion of a new Part IIIC in the 1942 Act by the Central Bank and Financial Services Authority of Ireland Act 2004. This took effect on the 1st of August, 2004. It was further subsequently amended by the Central Bank (Supervision and Enforcement) Act 2013 and since November, 2014, a number of supervisory responsibilities and decision making powers have moved to the European Central Bank. The Act provides that the respondent may prescribe guidelines with respect to the conduct of inquiries under Part IIIC. Accordingly administrative sanctions guidelines were published in 2005, together with an outline of the administrative sanctions procedure. The 2005 guidelines, which are the relevant ones for the purposes of these proceedings, have since been superseded.

17. The importance and relevance of the system of financial regulation both in this jurisdiction and worldwide is dealt with in the affidavit of Professor Niamh Moloney a leading expert in the field of international and European financial regulation, which exhibits Prof. Moloney's expert opinion report on enforcement by financial regulatory authorities. Her evidence, which is uncontradicted, places considerable emphasis on the credibility of enforcement powers of financial regulators and the essential public interest in the underpinning of the stability of the financial system by credible administrative sanctions which provide a powerful deterrent against financial misconduct.

18. Part IIIC of the Act, inserted by s. 10 of the Central Bank and Financial Services Authority of Ireland Act 2004, provides for the enforcement of designated enactments and designated statutory instruments. Chapter 2 deals with the power of the Regulatory Authority to hold inquiries.

19. Section 33 AO which is central to the issues that arise in these proceedings, provides as follows:

> "33AO.—(1) Whenever the Regulatory Authority suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.
>
> (2) Whenever the Regulatory Authority suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention. Such an inquiry may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider."

20. Section 33 AQ deals with decisions the Regulatory Authority may make following an inquiry under s. 33 AO:

> "33AQ.—(1) At the conclusion of an inquiry held under section 33AO, the Regulatory Authority shall make a finding as to whether the financial service provider concerned is committing or has committed the prescribed contravention to which the inquiry relates.
>
> (2) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Regulatory Authority shall make a finding as to whether the person is participating or has participated in the prescribed contravention to which the inquiry relates."

21. Subsection (3) goes on to provide for a range of sanctions that may be imposed on a regulated financial service provider ("RFSP") who is found to be committing or have committed a prescribed contravention. Subsection (5) is the equivalent provision relating to a person concerned in the management of a regulated financial service provider:

"(5) If the Regulatory Authority makes a finding that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission by the financial service provider of a prescribed contravention, it may impose on the person one or more of the following sanctions:

(a) a caution or reprimand;

(b) a direction to pay to the Regulatory Authority a monetary penalty not exceeding the prescribed amount;

(c) a direction disqualifying the person from being concerned in the management of a regulated financial service provider for such period as is specified in the order;

(d) if the person is found to be still participating in the commission of the contravention, a direction ordering the person to cease participating in the commission of the contravention;

(e) a direction to pay to the Regulatory Authority all or a specified part of the costs incurred by that Authority in holding the inquiry and in investigating the matter to which the inquiry relates.

(6) For the purpose of subsection (5) (b), the prescribed amount is—

(a) €500,000, or

(b) if the regulations prescribe some other amount of money for paragraph (a), that other amount."

The Applicant's Arguments

22. Mr. Shipsey S.C. for the applicant contended that the expression "person concerned in the management of a regulated financial services provider" in s. 33 AO (2) cannot apply to persons who were formerly concerned in such management, including the applicant. Accordingly he submitted that the respondent has no jurisdiction to inquire into the applicant. As the applicant has not been concerned in the management of INBS since 2009, there is no jurisdiction now to hold an inquiry into his conduct.

23. The applicant argues that reference in s. 33 AO to a person who "has participated" in a prescribed contravention refers to persons who are currently involved in management but who were previously involved in prescribed contraventions. In his oral submissions, Mr. Shipsey said that the ASP only applies to persons who are concerned in the regulated financial services provider at the time that the Regulatory Authority reaches its suspicion and decides to hold the inquiry, whereas the respondent's argument is that the word "concerned" means "is or was concerned" in the management of a regulated financial services provider.

24. Counsel submitted that there were nine interpretive "hurdles" as he described them which had to be overcome by the respondent if the court were to be persuaded that s. 33 AO (2) is to be construed as the respondent contends. A literal reading of the subsection demonstrates that it is clear that it does not address itself to persons who were formerly concerned in the management of a financial services provider. This is the logical interpretation in circumstances where the concern of the respondent is with regulation of the financial system as it currently stands and of persons who continue to be involved in that system. It is not concerned with retributive punishment which is more akin to the administration of justice.

25. The applicant's interpretation is consistent with the Act as a whole and other provisions contained therein. It better accords with fairness and fair procedures as a person currently concerned in the management of a RFSP will have access to relevant documentation and assistance from employees of the concern.

26. Second, the applicant argues that in order to sustain the interpretation contended for by the respondent, it is necessary to read into the subsection the words "who is or was" concerned in the management and this is impermissible. Reliance was placed on *Equality Authority v. Portmarnock Golf Club* [2010] 1 I.R. 671 in that regard.

27. Third, a number of other provisions in the Act use present tense definitions which shows that the legislature intended that the words "person concerned" were also to be read in the present tense. Thus s. 2 of the Act, the interpretation section, includes the following:

" 'financial service provider' means a person who carries on a business of providing one or more financial services;"

" 'regulated financial service provider' means—

(a) a financial service provider whose business is subject to regulation by the Bank or the Regulatory Authority under this Act or under a designated enactment or a designated statutory instrument…"

Similarly, s. 2 (4) provides:

"(4) For the purposes of this Act, a person is concerned in the management of a body corporate, or a firm, that is a regulated financial service provider if the person is in any way involved in directing, managing or administering the affairs of the body or firm."

28. The applicant submitted that an important change was brought about in relation to these definitions by the Central Bank (Supervision and Enforcement) Act 2013 s. 3 (2) of which provides:

"(2) References in this Act to a regulated financial service provider, or a related undertaking, shall, unless the context otherwise requires, be read as including a person who was a regulated financial service provider, or a related undertaking, at the relevant time."

29. The applicant submits that if the construction contended for by the respondent is correct, the 2013 amendment would not have been necessary.

30. Fourth, the applicant relies on the principle against doubtful penalisation as an aid to construing the subsection. Section 33 AO (2) is penal or related to a penal provision and must accordingly be construed strictly. If there is a doubt as to the meaning of the

words, it must be resolved in favour of the affected party.

31. Fifth, the interpretation of the subsection advanced by the respondent requires the court to adopt a purposive approach and this is not permitted by s. 5 of the Interpretation Act 2005, where the provision relates to the imposition of a penal sanction.

32. Sixth, the applicant referred to s. 41 of the Building Society Act 1989, which applies to INBS as a building society. Section 41 empowers the Central Bank to appoint a person to inspect or investigate the business of a building society. Section 41 (9) (c) provides:

> (9) In this section—
>
> …
>
> (c) any reference to an officer, employee or agent of a society or other body includes a reference to a person who has been but no longer is an officer, employee or agent of that society or body.

33. This provision is said by the applicant to support the contention that if the legislature had intended s. 33 AO (2) to have retrospective effect, it would have used such words in the 2004 Act some five years later.

34. Seventh, the applicant contended that there is ample authority for the proposition that a regulatory body exercising a disciplinary jurisdiction is assumed to be dealing with persons currently in the relevant profession or business. The applicant referred to an English textbook in that regard, *Disciplinary and Regulatory Proceedings*, Treverton-Jones et al 8th ed. and the authorities therein referred to. The applicant also pointed to analogous provisions in relation to the regulation of the pharmacy and veterinary professions.

35. The eighth hurdle referred to by the applicant on the issue of statutory interpretation is the double construction rule. The effect of the rule is that where two constructions of a statute are possible, the court must give effect to the construction that would render the statute constitutional. The applicant says that if the construction contended for by the respondent is correct, it would mean that there is no limitation period in respect of the very serious sanctions that might be imposed on a person subject to an inquiry. In the applicant's case, he is being asked to deal with matters that occurred up to eleven years ago at this juncture but in theory, the matters the subject of an inquiry could stretch into the very distant past. The applicant suggests that as there would be an evident constitutional frailty attaching to such a construction, the court must prefer the alternative advanced by the applicant.

36. The applicant's ninth point is that one of the constituent elements of the power to hold an inquiry into the actions of a "person concerned in the management of a regulated financial service provider" is that the RFSP must be in business at the time of the inquiry. This arose from the definition of the RFSP in s. 2 (1) of the Act above referred to. Accordingly since INBS is no longer carrying on the business of a RFSP and was not so engaged at the time the Notice of Inquiry issued, there is no jurisdiction to inquire into the applicant.

37. The second substantive ground upon which the applicant's challenge herein rests relates to the settlement of the 15th of July, 2015, entered into between the respondent and INBS. The applicant makes a number of points about this. The first is that by virtue of the definitions already referred to, INBS was no longer a RFSP at the time of the settlement which was thus unlawful. Apart from that, the applicant says that irremediable damage and prejudice has been inflicted on him as a result of the settlement and its publication. The fact that INBS has admitted prescribed contraventions which are described by the respondent in its press release as "breaches" means that these issues have already been determined before the inquiry into the respondent commences into whether he participated in the same prescribed contraventions. The applicant therefore says that this issue has been prejudged by the respondent. As a consequence, his ability to defend himself in respect of the suspected prescribed contraventions is severely hampered as he can now no longer contest that such prescribed contraventions in fact occurred.

38. The applicant says further that the imposition of the maximum fine of €5 million on INBS amounts to a determination in advance that the prescribed contraventions were of the most serious kind so that both the substance of the inquiry and the sanction to be imposed have been already decided in advance of the commencement of the inquiry into his conduct.

39. The applicant submits that the inquiry members, who are designated as agents of the respondent under s. 33BE of the Act must be considered to be aware of the terms of the settlement which gives rise to the appearance of objective bias. The applicant relies on *Bula v. Tara* (No. 6) [2000] 4 I.R. 412 in this regard. This could have been avoided by the simple expedient of adjourning any settlement with INBS until subsequent to the conclusion of the inquiry concerning the applicant. It could at a minimum have deferred publication. In addition the applicant contends that both the respondent and INBS ought to have invited submissions from the applicant before any settlement was entered into on the basis of the principles enunciated by the Supreme Court in *Dellway v. NAMA* [2011] 4 I.R. 1.

40. The applicant further complains that the acceptance of the settlement with INBS was unlawful in circumstances where INBS had every incentive to simply accept the charges. There was no disincentive by virtue of the fact that INBS is a shell entity and in reality not amenable to the sanction imposed, a fact recognised by the respondent in its press release indicating that it does not intend to collect the fine. The applicant suggests that the admissions assist and facilitate the case being made by INBS against him in the Commercial Court where there is very substantial overlap between the allegations in those proceedings and the suspected prescribed contraventions the subject matter of the inquiry.

41. The applicant also says that because he has advanced contentions relating to the respondent in the Commercial Court proceedings, the inquiry amounts to an infringement of the principle of *nemo judex in causa sua.*

42. The applicant's third substantive ground of challenge to the inquiry is delay. The notice of inquiry relates to matters going back to 2004, well outside any relevant statutory limitation period for civil proceedings. The applicant cites *State (O'Connell) v. Fawsitt* [1986] I.R. 362 as authority for the proposition that there is a constitutional right to a criminal trial with reasonable expedition. A similar right arises by virtue of Article 6 of the European Convention on Human Rights. The applicant does not have to point to a particular prejudice for the inquiry to be unfair – PM v. Malone [2002] 2 I.R. 560. The applicant also referred to *DPP v. Rice* [2000] 2 ILRM 363, *JL v. DPP* [2000] 3 I.R. 122, *P O'C v. DPP* [2000] 3 I.R. 87, *Allman v. Minister for Justice Equality and Law Reform* [2002] 3 I.R. 540 and *DPP v. Byrne* [1994] 2 I.R. 236.

43. The applicant's fourth substantial ground of challenge is that the interpretation of s. 33 AO (2) contended for by the respondent would render the section unconstitutional as amounting to the administration of justice by a body other than a court contrary to Article 34.1 of the Constitution. The applicant says that such an interpretation renders a sanction imposed by the inquiry against the

applicant akin to an exercise in punishment and retribution which would be characteristic of a court and offends the well established principles set out in *McDonald v. Bord na gCon* [1965] I.R. 217. Whilst the applicant concedes that certain of the provisions of Part IIIC of the 1942 Act require sanctions to be confirmed by a court, there are other provisions which do not. The applicant cited *CK v. An Bord Altranais* [1990] 2 I.R. 396 as support for the proposition that the powers of sanction are not vested "unequivocally in the court". In any event, the volume and complexity of the inquiry would render any appeal to the High Court impractically expensive for the applicant. The applicant also contends that the courts have applied a less strict test than that posited in *McDonald v. Bord na gCon in Keady v. Garda Commissioner* [1992] 2 I.R. 197. Even if that were not so, the McDonald tests are in fact satisfied in this case.

44. In answer to the respondent's contention in the grounds of opposition that this amounts to a collateral attack on the constitutionality of the Act, the applicant submits that there is no attack on the statute, constitutionally interpreted, as the applicant contends that the statute would be rendered unconstitutional if the respondent's interpretation were correct. The applicant says that it is perfectly permissible to advance his case on this basis in the light of *Minister for Social Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64. Here the applicant is challenging the process rather than the statute.

45. The next substantive ground advanced by the applicant is that of prejudicial publicity. This relates not only to the press release concerning the settlement with INBS but to wider media coverage of the applicant examples of which he refers to in his second affidavit. The applicant submits that the prejudicial publicity against him has been such as to render a fair hearing impossible and as such, satisfies the test in *D v. DPP* [1994] 2 I.R. 465 that there is a "real or serious risk of an unfair trial".

46. In that respect, insofar as hearings before professional bodies and tribunals are concerned, the applicant says that no other person to appear before such a body has been as well known, or has received as much negative publicity, as the applicant.

47. The sixth ground of challenge is the allegedly disproportionate breadth, burden and timing of the notice of inquiry. The applicant is 77 years of age and has recently undergone surgery on one of his eyes. There are some 110,000 specific documents which will have to be reviewed for the purposes of the inquiry and the applicant will incur very significant costs in participating. It would appear that the respondent cannot award him his costs irrespective of the outcome. The pending Commercial Court proceedings will involve the applicant effectively having to "fight on two fronts". The inquiry will take a significant personal toll on the applicant. The applicant says that all of this is disproportionate to the public interest involved in the inquiry as instanced by the judgment of Fennelly J. in *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701. The public benefit in having the inquiry at all is minimal being of historic interest only and disproportionate to the detriment to the applicant. The applicant suggests that the public interest is already sufficiently served by a banking inquiry conducted by a committee of the Oireachtais and the Commercial Court proceedings previously referred to.

48. Finally, the applicant relies on a number of miscellaneous matters in support of this application. These include that the applicant has been treated in an unfair and discriminatory fashion because he and other persons associated with INBS have been singled out for inquiry whereas other financial institutions are not being pursued. He claims he is effectively being scapegoated by this procedure. He does not have sufficient information to properly defend himself. He points to the fact that in the Commercial Court proceedings, a period in excess of one year has been afforded the plaintiffs to make discovery. Thus proceeding with the inquiry now amounts to a denial of fair procedures. The charges are unconstitutionally vague and seek to impose vicarious penal liability upon the applicant which is unconstitutional and in breach of Article 6 of the ECHR. He refers to *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 in that respect.

49. The fact that an appeal may be available, ultimately to the High Court, cannot cure the lack of jurisdiction ab initio. – *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 and *Stefan v. Minister for Justice* [2001] 4 I.R. 203.

The Respondent's Arguments

50. On behalf of the respondent, Mr. Gallagher S.C. made a number of general submissions before engaging with the specific contentions advanced by the applicant. He submitted that the within proceedings do not constitute a challenge to any decision made by the inquiry but rather were in effect a form of pre-emptive strike against the inquiry. The application was predicated on the assumption that the inquiry could not itself deal with many of the issues raised such as delay, publicity and the specificity of the suspected prescribed contraventions. It is well established that it is not the function of judicial review to direct procedures in advance. In that regard, he relied on *Carroll v. The Law Society* [2000] 1 ILRM 161 and *J. Murphy v. Flood* [2000] 2 I.R. 298. Accordingly the application is premature and ought to be refused by the court on well settled discretionary grounds. The applicant must in the first instance air these issues before the inquiry and this he has failed to do.

51. The claims made by the applicant herein that the ASP amounts to the administration of justice and imposes vicarious liability on the applicant constitute a collateral challenge to the constitutionality of the Act where no leave was sought or granted to mount such a challenge. Furthermore, such contentions could not be advanced in the absence of the joinder of Ireland and the Attorney General.

52. The Notice of Inquiry was issued pursuant to Part IIIC of the Act and the applicant does not suggest that it was issued otherwise than in accordance with the Act. Consequently the applicant cannot claim that anything done by the respondent pursuant to the procedure prescribed by the Act is unconstitutional. The same argument applies to any complaint of incompatibility with the European Convention on Human Rights.

53. Many, if not all of the issues raised by the applicant in these judicial review proceedings could be raised as preliminary issues before the inquiry itself.

54. Dealing then with the proper interpretation of s. 33 AO (2), counsel said that this did not depend on anything other than the plain and ordinary meaning of the words of s. 33 AO (2) which are clear and did not require anything to be supplied for their true meaning and effect. In fact, the construction advanced by the applicant gives rise to an absurd result despite the applicant arguing the converse. What the subsection envisages is an inquiry into the conduct of a defined person at a particular point in time. Where past prescribed contraventions are concerned, as here, this provides the temporal context for the words "concerned in the management of a regulated financial service provider". The subsection itself describes the wrong and what is relevant is the status of the person concerned at the time of the impugned conduct, and not at any subsequent time such as the date of formation of the suspicion or of service of the notice of inquiry. This is clear from the section when read as a whole.

55. Were the construction contended for by the applicant correct, it would give rise to the absurd result that a person who now happens to be concerned in management but was not so concerned at the time of commission of the prescribed contravention being merely an employee or clerical officer, becomes subject to the inquiry. Accordingly it is clear beyond doubt that what the statute is

concerned with is the status of the person concerned at the time of commission of the prescribed contravention.

56. With regard to the applicant's argument that the amendment to the definition of a RFSP introduced by the 2013 Act, there were many reasons why the Oireachtais may have considered it appropriate to introduce this amendment having regard to the very significant new powers introduced by that Act. However, it is well settled that the court may not have regard to subsequent amendments as an aid to the interpretation of a statutory provision. In that regard, reliance was placed on Clinton v. Dublin City Council [2006] IESC 58 and Carney v. Balkan Tours [1997] 1 I.R. 159. Counsel said that the respondent did not contest the principle of doubtful penalisation but that did not mean that the court could not have regard to the purpose of the statute as the authorities show and that was unrelated to s. 5 of the Interpretation Act 2005. Reliance was placed on DPP (Ivers) v. Murphy [1999] 1 I.R. 98 and DPP v. Moorehouse [2006] I.R. 421 in that regard.

57. On the issue of regulatory bodies of professions conducting disciplinary inquiries, counsel submitted that these were not on point particularly in the context of the jurisdiction of such bodies being dependant upon the subject of inquiry remaining on the relevant professional register. The suggestion that the court or body would prevent such person resigning in order to stymie the jurisdiction of the tribunal again pointed to the absurdity of the applicant's argument that the jurisdiction to conduct an inquiry conferred by s. 33 AO (2) could be defeated by the simple expedient of resigning at any time either before, during or after the conclusion of an inquiry right up to the final conclusion of an appeal before the High Court.

58. Dealing with the double construction rule, Mr. Gallagher said that there was no basis for the suggestion that merely because there is no limitation period for an inquiry that this raises a constitutional question. There is no limitation period for most criminal offences yet it was never contended that because of the absence of a limitation period, the constitutional right to a fair trial is absent.

59. Lastly on the interpretation issue, the respondent argued that the definition of a RFSP has no relevant temporal connection to s. 33 AO. The suggestion that a RFSP had to be in continuing business at the time of the notice of inquiry and subsequently also gave rise to the absurd result that conduct of sufficient seriousness to cause the RSFP to go out of business could not be inquired into. Statutory definitions frequently use the present tense to define the thing that is the subject matter of the definition. That however does not speak to the nature of the wrong described by s. 33 AO.

60. Mr. Gallagher then dealt with the issue of the INBS settlement and submitted that the applicant has no standing to challenge it, particularly in circumstances where INBS is not a party to these proceedings. This is a matter that should be addressed in the first instance to the inquiry. Underlying the applicant's submission is an assumption that the inquiry members will conclude that facts are established by virtue of their admission by a third party. As a matter of law, admissions made by INBS could not be admissible against the applicant. It is a matter for the inquiry as to what effect, if any, admissions made by INBS has.

61. Counsel argued that the proposition that INBS should have consulted its former management before deciding what it should do in relation to the Notice of Inquiry was unsupported by any authority. The suggestion by the applicant that the inquiry members' approach would somehow be affected by the fact that they are deemed to be agents of the respondent failed to take account of the fact that it is the respondent who has the statutory power to conduct an inquiry and accordingly the members of the inquiry must be agents of the respondent in order to exercise that power. That did not mean that inquiry members would be other than objective and independent in the exercise of their functions as provided for in Part IIIC of the Act.

62. There is no basis for the proposition that a person or body may be precluded from adopting a position in any form of proceedings which it perceives to be in its own interest where to do so may affect the reputation of a third party. The respondent relied on *DPP v Hegarty* [2011] 4 I.R. 635 in which a company director claimed he could not be prosecuted for an offence also committed by the company unless the company itself was prosecuted, a claim dismissed by the Supreme Court. If the applicant's argument here is correct, it would mean that in circumstances where a company and its directors were prosecuted for an offence, the company could not plead guilty without the consent of its former directors. In any event, if such a right existed, it could only exist against INBS, who is not a party to the proceedings, rather than the respondent.

63. What the applicant is contending for is that the respondent should have refused to accept admissions from INBS. However, there could be no basis for the respondent somehow deciding that it would not accept admissions from INBS who could then be compelled to participate in a full inquiry despite those admissions. The contention that the acceptance of admissions is somehow a pre-judgment ignores the fact that the admissions are made by somebody who is subject to the process. The Act provides for the making of admissions and settlements and is thus a statutory procedure which is valid in the absence of a challenge to the constitutionality of the Act. If the applicant is correct, it must follow that none of the parties who are subject to the inquiry could make an admission without his consent.

64. The respondent submitted that *Dellway* does not assist the applicant. That case concerned the right to be consulted in circumstances where the property rights of the person concerned were adversely affected by the decision in issue. The facts here are quite different. In any event, counsel submitted that even if *Dellway* applied, all that meant was that the applicant had to be consulted but even if he was, the respondent was still entitled to proceed with the inquiry. Thus any alleged failure to consult the applicant could not be a reason for preventing the inquiry proceeding. At the end of the day, the applicant still had to establish that there was a real risk of an unfair trial and *Z v. DPP* [1994] 2 I.R. 476 was relied on in that respect.

65. With regard to delay, the respondent submitted that the applicant had identified no specific prejudice, particularly in the context of an inquiry in which the evidence will be largely documentary and which would be available to the applicant. Delay in itself without any element of prejudice is insufficient to warrant prohibition of a trial – P.M. v. DPP [2008] 3 I.R. 172. In any event it was submitted that this is a matter that must be addressed by the inquiry itself.

66. With regard to the administration of justice, the respondent's primary contention is that insofar as the applicant argues that the ASP amounts to the administration of justice, this cannot be determined in these proceedings in the absence of a challenge to the constitutionality of the Act on notice to Ireland and the Attorney General. Without prejudice to that contention, the respondent submitted that all five tests enumerated in *McDonald* must be met before any process could be regarded as the administration of justice and this was clear from the decision of the Supreme Court in *Keady v. The Garda Commissioner* [1992] 2 I.R. 197. In *O'Connell v. The Turf Club* [2015] IESC 57, very significant penalties could be imposed by the Turf Club which included depriving a person of his right to earn a livelihood. Yet this was held by the Supreme Court not to amount to the administration of justice because it did not satisfy the fourth and fifth tests in McDonald.

67. The system of financial regulation here is not characteristic of a court. This is a inquiry whose functions are inquisitorial and it is not a *lis inter partes*. Enforcement of sanctions requires confirmation by order of the court. There is no dispute as to legal rights as in Keady. The imposition of a sanction with a punitive purpose does not equate to a criminal offence and thus in *McLoughlin v. Tuite*

[1989] 1 I.R. 82 the imposition of penalties under the Tax Code did not constitute the administration of justice. It was also argued by the respondent that the availability of an appeal to the High Court prevented the inquiry from being regarded as the administration of justice. The same reasoning applies in cases where no appeal is brought and the penalty has to be confirmed by the Court.

68. On the question of publicity, counsel said that this normally arises in the context of criminal cases which attract widespread publicity which might affect members of the public from whom the jury panel is drawn as for example in *Z v. DPP* where the claim failed. Here, the inquiry panel is made up of independent experts who must be assumed to carry out their statutory duty to accord fair procedures to the applicant and there is no evidence put before the Court to suggest otherwise.

69. As regards the alleged disproportionate breath, burden and timing of the notice of inquiry, counsel said these are matters which must in the first instance be addressed to the tribunal of inquiry. There is no unfairness as the applicant alleges in fighting on two fronts. The inquiry will be over long before the applicant's civil case commences. In any event that is a claim for damages whereas the ASP is a statutory procedure different from civil proceedings in court and is an inquiry rather than a lis inter partes. The conclusions of the inquiry can have no bearing on the applicant's civil claim and he does not explain otherwise.

70. Dealing with miscellaneous matters, counsel said that no evidence had been advanced by the applicant to support the contention that he was somehow singled out for investigation. A separate inquiry was being conducted in relation to IBRC which has been postponed because of the existence of criminal proceedings. In relation to the imposition of vicarious liability, there was nothing in the ASP to suggest that if the applicant were found to have participated in prescribed contraventions he would be liable for anything other than his own acts of participation.

Statutory Interpretation

71. At its heart, this case is essentially concerned with statutory interpretation. The court's task in construing any piece of legislation is to give effect to the intention of the legislature. The legislation in this case and in particular s. 33 AO (2) of the Act was minutely parsed and analysed by the parties by reference to a number of different well settled cannons of construction to assist the court in determining the legislative intent. The applicant referred to these and other matters as "hurdles" that the respondent had to surmount to establish the meaning contended for by the respondent. It was said that if the respondent fell at any of these hurdles, the court would be left with no option but to prefer the applicant's construction.

72. However, many, and perhaps all, of these aids to construction do not arise if the natural and ordinary meaning of the words of the section is otherwise readily ascertainable. In construing any statute, the provision as a whole must be examined to determine the context in which particular words or expressions are used so as to accord them their natural and ordinary meaning. Individual words or phrases may mean different things in different contexts and often cannot be analysed in isolation. To have regard to the scheme and purpose of a statute to construe its meaning is not necessarily the same thing as adopting a purposive approach to an otherwise doubtful provision. In construing statutes, as in understanding ordinary language, context is everything.

73. In establishing the ASP, Part IIIC of the Act is concerned with the regulation of conduct in the financial sector in a manner that is transparent. The rationale underlying the need for such regulation is clear and is well explained in the uncontroverted evidence of the Professor Moloney.

74. Section 33 AO (2) creates the wrong or misconduct of participation by a person in the commission of a prescribed contravention by a RFSP. It permits the holding of an inquiry by the respondent into such misconduct. It identifies the category of person whose misconduct may be the subject of inquiry, being a person concerned in the management of the RFSP that committed the prescribed contravention. It provides for when and in what circumstances such inquiry may be held, that is whenever the respondent suspects on reasonable grounds that the misconduct described is occurring or has occurred.

75. As referred to above, s. 2(4) defines what is meant by being concerned in management as being in any way involved in directing, managing or administering the affairs of the relevant entity.

76. It seems to me therefore that it is clear that the misconduct that may be inquired into under the subsection is participation in a prescribed contravention by a person concerned in management on the presumed basis that such managerial status renders the conduct potentially blameworthy. The subsection is self evidently concerned with participation in the wrongdoing of a RFSP by persons who, by virtue of their status, are in a position to influence the actions of the RFSP when it commits the wrong. This is what renders the conduct improper. It is difficult to see how a person employed in a subordinate non managerial position at the time the wrong is committed by the RFSP could be regarded as having a responsibility under the subsection for improper conduct merely on account of the happenstance of promotion to a managerial position at a time subsequent to the misconduct in issue. This would accord with neither logic nor common sense.

77. The applicant contends that the expression "person concerned in the management" in the subsection is an exclusively present tense definition. Thus to paraphrase the applicant's contention, he says that what the expression actually means is a "person [who is currently] concerned in the management" and this necessarily means so concerned at the time of formation of the suspicion on reasonable grounds, at the time of the hearing of the inquiry and indeed at all times up to the final determination, if applicable, of an appeal to the High Court. If at any time throughout that period the person ceases to be concerned in the management of the RFSP, whether through resignation, dismissal, retirement or other reason, the respondent looses jurisdiction and can no longer inquire into the person concerned. It follows therefore on the applicant's argument that since he ceased to be involved in the management of INBS in 2009, before the respondent formed any suspicion on reasonable grounds or issued the Notice of Inquiry, there is no jurisdiction to inquire under the subsection into the applicant's conduct.

78. The applicant says that the construction contended for by the respondent involves reading words into the subsection so that the definition must be read as a "person [who is or was] concerned in the management". Reading words into a section to supply its meaning is impermissible as the Supreme Court held in the *The Equality Authority v Portmarnock Golf Club* [2010] 1 I.R. 671.

79. Further, in support of his contention that the definition of "a person concerned in the management" is to be read as an exclusively present tense definition, the applicant relied on Dublin City Council v TEEU [2010] 21 ELR 232. The defendant was a union which was in dispute with Pickerings Lifts Limited, a company that serviced and repaired elevators. Pickerings had carried on business at the plaintiff's premises and the defendant commenced picketing those premises. Section 11(1) of the Industrial Relations Act 1990 provided:

> "(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at, or where that is not practicable, at the approaches to, a place where their employer works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating

information or of peacefully persuading any person to work or abstain from working."

80. The evidence established that at the time the picketing commenced at the plaintiff's premises, Pickerings were working and carrying on business there but they subsequently ceased to do so. The picketing however continued and the plaintiff sought to restrain it on the basis that it was no longer authorised. The High Court (Laffoy J.) held that the relevant date on which to test whether the picketers' employer "works or carries on business" at the location for the purposes of s. 11(1) was the date on which the picketing commenced and the fact that the picketers' employer was no longer working or carrying on business at the location at the time the court was considering the application was not relevant. In the course of her judgment, Laffoy J. said:

> "7.2 In order to find that, as a matter of law, the picketing by the defendants at the Ballymun premises is lawful by virtue of s. 11(1), as the defendants contend, the court must be satisfied that the Ballymun premises are 'a place where [Pickerings] works or carries on business' within the meaning of the subsection. The difficult question of construction to which these proceedings give rise is whether, in using the present tense in the expression 'works or carries on business' in s. 11(1), the Oireachtas intended the picketers to have the protection of s. 11(1) if the picketers' employer was working or carrying on business at the location of the picketing when the picketing commenced even if, for what ever reason, the employer ceased to be working or carrying on business at that location at a point in time thereafter before the court is required to adjudicate on the matter.
>
> 7.3 Counsel for the plaintiff referred the court to two authorities on the use of the present tense in a statutory provision which I have not found to be of any assistance in construing s. 11(1).
>
> 7.4 The first was the decision of the Supreme Court in *Iarnród Éireann v Halbrook* [2001] 1 IR 237. That decision concerned the construction of the definition of 'excepted body' in section 2 of the Trade Union Act 1942, which definition includes the requirement that the body is one 'which carries on negotiations for fixing wages or other conditions of employment of its own members (but of no other employees)'. One of the defendants in the action, the Irish Locomotive Drivers Association, was a registered trade union and the position of the defendants was that it was an 'excepted body' within that definition. It was not recognised by the plaintiffs' employer, which would not negotiate with it. In his judgment, with which the other members of the Supreme Court agreed, Fennelly J. stated:
>
> 'As I see it, the issue is whether a body can claim that it 'carries on negotiations' (noting the use of the present tense) where patently it does not and cannot do so because the employer refuses to negotiate.'
>
> On that issue, Fennelly J. found that the trade union in question could not be an 'excepted body'. Clearly, there was no other application of the definition open, as the trade union had only been registered in July, 1999 and it had never carried on negotiations.
>
> 7.5 The second authority was a decision of the Judicial Committee of the Privy Council in *Maradana Mosque Trustees v Mahmud* [1967] A.C. 13. That was an appeal from the Supreme Court of Ceylon, which raised an issue of the construction of a statute which regulated the governance of 'unaided' schools in what was then Ceylon. The provision in issue empowered the relevant Minister to make an order which effectively amounted to state takeover of the management of the school in the circumstances stipulated – that the Minister was satisfied that the school 'is being so administered in contravention of any provisions of this Act'. The Act required that teachers' salaries be paid not later then the 10th of the month following that in respect of which they were due. The appellants, in 1961, having failed to pay certain teachers' July salaries by August 10, were invited on August 11 to show cause why the school should not be taken over. The appellants showed cause on August 15, undertook to pay the teachers' by August 18 and followed through on that undertaking. On August 21 the Minister made an order under the section and the validity of the order was challenged by the appellants. On the use of the present tense in the relevant section, Lord Pearce, delivering the judgment of the Privy Council, stated (at p.25):
>
> 'Before the Minister had jurisdiction to make the order he must be satisfied that 'any school… is being so administered in contravention of any of the provisions of this Act'. The present tense is clear. It would have been easy to say 'has been administered' or 'in the administration of the school any breach of the provisions of this Act has been committed', if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school, not the past, when making the order.'
>
> What distinguishes the provision under consideration in that case from the aspect of s.11(1) with which the court is now concerned is that it was expressly provided in the section under consideration by the Privy Council that the conduct of the appellants was to be assessed at a particular point in time, namely, the date on which the Minister was making the order, whereas s.11(1) is concerned with the existence of a state of affairs which renders picketing lawful without expressly identifying the point in time at which the existence of the state of affairs is to be assessed."

81. Laffoy J. went on to consider whether grammatical rules might be of assistance in relation to the correct interpretation of s. 11(1):

> "7.7 In Fowler's, *A Dictionary of Modern English Usage* (Wordsworth Editions Ltd., 1994) in dealing with technical terms it is stated (at p. 608):
>
> 'H[istoric present] is, in any language, the present indicative used instead of the past to give vividness in describing a past event.
>
> (He says nothing, but ups with his fist and hits me in the eye).'
>
> In *The Shorter Oxford English Dictionary* (Third Edition) Vol.1, p. 968 the epithet 'historic' is referred to as applying Greek and Latin grammar to tenses used in the narration of past events and 'generally, to the present tense, when used instead of the past in vivid narration (1845)'. I think it is abundantly clear that, in using the present tense in the expression 'works or carries on business' in s. 11(1), the Oireachtas was not endeavouring to do what the 'historic present' is aimed at – to create a vivid narrative – as in the example given by Fowler, or in the example frequently giving in relation to titles, 'the Empire Strikes Back'. Therefore, in my view, the proper construction of s. 11(1) is not to be achieved by resorting to an arcane rule of grammar.
>
> 7.8 The proper construction is to be found in the language used in s. 11. To constitute lawful picketing for the purposes

> of s. 11, it is a requirement that the picketing is engaged in at the place where the targeted employer 'works or carries on business'. Clearly, at the time the picketing commences that requirement must be fulfilled. Accordingly, picketing cannot lawfully be engaged in at a place where the targeted employer had worked or carried on business, say, a week, or a month or a year previously. The question which the factual situation which arises in this case raises is whether, as a matter of construction of subs. (1) of s. 11, picketing which meets the requirement that the picketers' employer 'works or carries on business' at the location of the picketing when it commences will only continue to be lawful if the requirement continues to be complied with up to the time the application of s. 11 is considered by the court. To put it another way, if the picketers' employer ceases to work or carry on business at the location of the picketing after commencement of the picketing, does that mean that the picketing ceases to be lawful?
>
> 7.9 Subsection (2) of s. 11 gives an indication of what the Oireachtas intended in imposing in both subs. (1) and subs. (2) of s. 11 the requirement of the targeted employer working or carrying on business at the location of the picketing to render it lawful. This flows from the manner in which the Oireachtas dealt with the additional requirements which are required to be present to render secondary picketing lawful under subs. (2) – that the picketers must believe at the commencement of the picketing and throughout its continuance that the employer who is not a party to the trade dispute has directly assisted the picketers' employer for the purposes of frustrating the industrial action. As regards that additional element – the presence of a certain state of mind on the part of the picketers – the Oireachtas has expressly addressed the possibility that it may not continue. If it changes post – commencement, the picketing will cease to be lawful.
>
> 7.10 Having regard to the manner in which the Oireachtas has treated that additional requirement to render secondary picketing lawful, if it was the intention of the Oireachtas that the requirement as to the targeted employer working or carrying on business at the location of the picketing should apply not only at the commencement of the picketing but also throughout the continuance of the picketing, it is strange that this was not spelt out in both subs. (1) and subs. (2). The fact that it was not suggests that such was not the intention of the Oireachtas. It suggests that it is to be implied that the use of the present tense in both subsections, in imposing the requirement as to the targeted employer working or carrying on business at the location of the picketing, indicates that the requirement is to be complied with when the picketing commences. In other words, although the present tense is used, it is open to the construction that the point in time at which the state of affairs which is required to exist in order to render the picketing lawful that the target employer 'works or carries on business' at the location of the picketing – is to be assessed when the picketing commences."

82. The applicant also relied in relation to the use of the present tense on *Han v President of the Circuit Court* [2008] IEHC 160 in which Charleton J. had to construe s.19 of the Mental Health Act 2001 which provided:

> "19.- (1) A patient may appeal to the Circuit Court against a decision of a Tribunal to affirm an order made in respect of him/her on the grounds that he/she is not suffering from a mental disorder…
>
> (4) On appeal to it under subsection (1), the Circuit Court shall - …
>
> (8) Unless it is shown by the patient to the satisfaction of the court that he/she is not suffering from a mental disorder, by order affirm the order…".

83. In construing this provision, Charleton J. considered that the relevant time for determining whether the patient was suffering from a mental disorder was the time of the hearing before the Circuit Court and not before the Mental Health Tribunal whose order was under appeal. Charleton J. said:

> "[19.] The legislative purpose behind s.19 of the Mental Health Act 2001 is to allow those patients who are still detained, following on a hearing before the Mental Health Tribunal, to have the condition of their mental health reviewed before a judge of the Circuit Court. It is not to engage in an historical analysis. Whether there would be a point, or would not be a point, to such an historical analysis is irrelevant given the express wording of the section. I am obliged to give grammatical and ordinary sense to the use of the present tense in s.19, and to the choice giving to the Circuit Court of either affirming admission or renewal order or revoking it. Grammatical sense can only be modified so as to avoid an absurdity and even there, the modification can go no further then is necessary in that regard; Grey v Pearson (1857) 6HL Cas. 61 at 106 per Lord Wensleydale…"

84. Charleton J's logic is clear. The Mental Health Act of 2001 authorised the deprivation of personal liberty in certain circumstances where the person concerned was suffering from mental illness. Where the person concerned had recovered from that mental illness by the time the case came before the Circuit Court, it would clearly be absurd to suggest that his/her continued detention could be justified merely because at some point in the past, the patient suffered from a mental illness.

85. It seems to me that these authorities do not assist the applicant's case. Rather, to my mind they reinforce the proposition that the context in which a particular provision is employed is always of critical importance.

86. As previously noted, the applicant places reliance on the amended definition of a RFSP introduced by the 2013 Act to include a RFSP that was formerly a RFSP at the material time but did not change the definition of what it was to be a person concerned in the management of a RFSP. The applicant submits that this must be taken by the court to mean that the original definition of "a person concerned in the management" cannot be taken to include a person who was formerly so concerned on the basis of the *maxim expressio unis est exclusio alterius.*

87. In Carney v Balkan Tours Limited [1997] 1 IR 153, the appellant was dismissed from her employment by the respondent. Section 7(2) of the Unfair Dismissals Act 1977 provides that in determining the amount of compensation payable to an employee who has been unfairly dismissed, regard should be had, inter alia, to the extent (if any) to which any financial loss suffered by the employee was attributable to an action, omission or conduct by or on behalf of that employee. The Employment Appeals Tribunal, having found that the employee was unfairly dismissed, determined that compensation was the appropriate form of redress but that the level of that compensation was to be assessed having due regard to the conduct of the appellant which had contributed to her dismissal. The employee appealed to the Circuit Court which stated a case for the opinion of the Supreme Court as to whether or not the Employment Appeals Tribunal had been entitled to take into account the contribution of the employee to her dismissal in assessing compensation. Section 7(2) of the Unfair Dismissals Act 1977 was subsequently amended by the Unfair Dismissals (Amendment) Act 1993, so as to include the following additional paragraph to s. 7(2) providing for the factors to which regard should be had in determining compensation as follows:

> "The extent (if any) to which the conduct of the employee (whether by act of admission) contributed to the dismissal."

88. This amendment post dated the facts of the case and did not apply but nonetheless, it appeared that the EAT had in effect applied the amendment in construing the original s. 7(2). The employee argued in the Supreme Court that the introduction of the 1993 amendment must be taken to mean that the original s. 7(2) could not be interpreted so as to permit the EAT to have regard to the contributory conduct.

89. Murphy J., in delivering the unanimous decision of the court, said (at p. 157):

> "Furthermore, counsel on behalf of the appellant relied upon the provisions of s. 6 of the Unfair Dismissals (Amendment) Act 1993 which amended s. 7 subs. 2 of the Act of 1977 apparently for the express purpose of enabling the Employment Appeals Tribunal to act as they had done in the present case but prior to the introduction of that amendment."

90. Murphy J. went on to consider the terms of the original s.7, concluding (at p. 158):

> "That provision coupled with the discretion conferred upon the adjudicating Tribunal in the widest terms would seem to me compelling reason for inferring that the legislature intended that the body determining the nature or the extent of the redress to which the employee was entitled should look at all of circumstances of the case including the conduct of the parties prior to the dismissal. I am fortified in this view by the judgment of Ellis J. in McCabe v Lisney and Sons [1981] ILRM 289 and the jurisprudence which has evolved based thereon. The fact that the legislature in 1993, made express provision in that regard must in the circumstances be interpreted as a provision made *ex abundante cautela* and to avoid the doubts which might well and, indeed, have arisen in the circumstances."

91. Accordingly, the Supreme Court in effect concluded that the subsequent amendment of the 1977 Act could not be resorted to for the purposes of construing the original statute. Indeed as is clear from the outcome, the Supreme Court considered that the statute in its original form was capable of bearing the meaning which the amendment sought to introduce.

92. In *Clinton v. An Bord Pleanála* [2006] IESC 58 the Supreme Court was dealing with an appeal from the High Court for which leave had been given by the High Court pursuant to s. 50 of the Planning and Development Act, 2000 on a point of law of exceptional public importance in respect of which it was desirable in the public interest that an appeal should be taken to the Supreme Court. The High Court certified a single ground of appeal but a Notice of Appeal was submitted by the appellant containing ten grounds including the one certified. A preliminary issue arose as to whether or not the Supreme Court was entitled to consider any of the grounds of appeal other than the one certified by the High Court. In the course of argument, it emerged that a new s. 50 had been substituted by subsequent legislation in 2006 which expressly provided that the Supreme Court should have jurisdiction to determine only the point of law certified by the High Court. Denham J. (as she then was) considered this to be of no relevance to the issue before the court, saying (at p. 12):

> "However, the section does not apply to this case. Nor would I construe s. 50 of the Planning and Development Act, 2000 by reference to this new section."

93. Fennelly J. agreed with this approach, saying (at p. 9):

> "The section has been amended, with future effect, by sections 49 and 50 of the Planning and Development (Strategic Infrastructure) Act, 2006. (I agree with the observations of Denham J regarding that section.)"

94. The other three members of the court agreed with the judgments delivered by Denham and Fennelly JJ.

95. Having regard to these authorities, I am satisfied that I am not entitled to have any regard to the provisions of the 2013 Act as an aide to construing s. 33 AO (2). As the respondent submitted, it is the function of the court, not the Oireachtas, to construe legislation. Were it otherwise, it would mean that the Oireachtas could never pass an amending statute, possibly ex abundante cautela to use the words of Murphy J., without running the risk that to do so would have the effect of construing previous legislation. In any event, there may have been any number of reasons why it was thought desirable to introduce the amendment in the light of the significant new powers conferred on the respondent by the 2013 Act.

96. Although the subsection cannot be classified as one that imposes a penal sanction, it was I think conceded by the respondent in argument that it relates to such a provision and as such falls to be construed, if necessary, by reference to the principles applying to such legislation. These include the principle against doubtful penalisation or perhaps expressed in another way, penal statutes will be construed strictly in favour of the party subject to the penalty. Of course even where penal statutes are concerned, the court's function is to ascertain the meaning of the words used aided, if necessary, by the relevant rules of construction. This is clearly expressed in the words of Plowman J. in *HPC Productions Ltd*. [1962] Ch 466, at p. 485:

> "In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted."

97. In *Mullins v. Harnett* [1998] 4 IR 426, the High Court (O'Higgins J.) had to consider a number of canons of construction as they applied to a criminal statute. These included (at p. 432):

> "3. 'Common Sense Rule'
>
> I was referred by counsel (as indeed was McGuinness J. in Quinlivan v. Governor of Portlaoise Prison [1998] 2 I.R. 113) to the following passage in Bennion's book at p. 407:
>
> 'It is a rule of law . . . that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment.' "

98. The court continued, at p. 433:

> "6. 'The Principle Against Doubtful Penalisation' and 7. The so-called 'Principle of Strict Construction of Penal Statues'

It appears to me that the latter two canons of construction, which apply to penal statutes, are in addition to, and not in substitution for, other canons of construction. Penal statutes are not only criminal statutes, but any statutes that impose a detriment. In addition to the application of the principles set out above in 1 to 5, the latter two principles also apply.

6. The Principle Against Doubtful Penalisation…

According to Maxwell, 12th ed. pp. 239 to 240 'The strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction'. It would appear that the principle applies not only to criminal offences but to any form of detriment. At p. 572 of Bennion the nature of the principle is stated thus:

'Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. As Staughton L.J. said in relation to penalisation through retrospectivity, it is 'a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended'. However it operates, the principle requires that persons should not be subjected by law to any sort of detriment unless this is imposed by clear words.' "

99. The court continued (at p. 435):

"The so-called principle of 'strict interpretation of penal statutes'.

At p. 382 of Bennion 2nd Ed. the principle is explained as follows:-

'The true principle has never been that 'a penal statute must be construed strictly' (though it is often stated in such terms). The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all other relevant criteria. ' [my underlining]

The following passage occurs at p. 246 of Maxwell 12th ed. concerning this canon of construction:-

'The effect of the rule of strict construction might be summed up by saying that, where the equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve [my underlining], the benefit of the doubt should be given to the subject against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls clearly within the mischief of the statute, the construction of the penal statute differs little, if at all, from that of any other.'

In the case of Bowers v. Gloucester Corpn. [1963] 1 Q.B. 881 at p. 887 Lord Parker C.J. stated:-

'A provision can only be said to be ambiguous, in the sense that if it be a penal section it would be resolved in a manner most favourable to the citizen, where having applied all the proper canons of interpretation (my underlining) the matter is still left in doubt.'

It seems to me, therefore, that in construing penal (not only criminal) statutes the same principles apply as to other statutes, but additional criteria have been taken into account also."

100. In *DPP v. Moorehouse* [2006] 1 I.R. 421, in commenting on this principle in the Supreme Court, Kearns J. (as he then was) said (at p. 443):

"It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence [Maxwell on The Interpretation of Statutes, (12th ed.) at pp. 239 and 240].

If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."

101. Kearns J. went on to say (at p. 444):

"That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result."

102. In similar vein, McKechnie J., delivering the unanimous judgment of the Supreme Court in *DPP v. Hegarty* [2011] 4 I.R. 635, referred to in another context below, said (at p. 646):

"[37] There is no doubt but that s. 3(4)(a) of the Act of 1996 is a provision creating a criminal offence and, therefore, must be strictly construed. There can be no creation or extension of penal liability by implication by the use of obscure or imprecise language, or by the application of interpretive aids which otherwise would be available in a civil setting. As a result, the provision in question, expressly and in clear and unambiguous language, must have, by literal construction, the meaning contended for by the prosecutor. That provision, however, must be viewed and its true meaning ascertained by reference to its immediate context, properly derived from the scheme of the Act, or more accurately from that part of the Act which criminalised behaviour previously not so declared. It is only, if in accordance with this approach and if the ordinary meaning of the words can be so understood, that the result suggested by the prosecutor can stand."

103. These cases demonstrate that the court may have resort to the relevant canons of construction where the legislative intent is unclear or ambiguous. The same applies to the double construction rule referred to by the applicant. The substance of this rule is said to be that where two constructions of the statute are equally possible, the court must give effect to the one that does not raise a

constitutional issue. The constitutional issue that is said to arise in that context is that the interpretation proposed by the respondent provides for the imposition of a penal sanction without limitation as to time. I cannot see how that, without more, gives rise to any potential constitutional issue. Many criminal offences, including those of the most serious kind, are not subject to any statutory time limit. The court's judicial review jurisdiction is frequently invoked in relation to criminal offences of great antiquity, for example in the context of historic sex abuse cases, where it has never been suggested that the absence of a statutory time limit renders a trial constitutionally impermissible. Typically, issues of unfairness can arise from the long passage of time such as the potentially prejudicial unavailability of evidence. That does not of course arise here. Here again, the double construction rule only operates in the presence of two or more possible constructions of the statute.

104. None of these canons or rules avail the applicant in the absence of ambiguity, uncertainty or obscurity in the words of s. 33 AO (2). In my view, the meaning of the words is clear and does not depend on adding in anything to the section that is not there. The expression "person concerned in the management" is in itself time neutral and is given context and meaning by the words that follow it in the subsection. It is to my mind clear beyond doubt that the time at which the person concerned in the management of a RFSP must be so concerned is the time at which the RFSP commits the prescribed contravention in which the person concerned participated. Any other construction offends common sense and gives rise to absurd results.

105. I have identified some of these already. They include a situation in which the person the subject matter of the inquiry did not at the time of the prescribed contravention enjoy managerial status and thus the capacity to influence the actions of the RFSP that committed the contravention. However, by virtue of the random circumstance of that person's subsequent promotion to a management role at the time of the inquiry, unconnected in any way to the impropriety with which the statute is concerned, that person becomes subject to the inquiry. A similar anomaly arises in the context of the person concerned being entitled at any time during the currency of the inquiry to oust its jurisdiction by the simple expedient of resigning or retiring. One merely has to state the proposition to demonstrate its absurdity. Yet this is what the applicant contends is the intent of the legislature to be gleaned from the natural and ordinary meaning of the words used. It would also have the consequence that the respondent, having identified a possible contravention and the persons potentially responsible, would have to embark on an investigation, the formation of a suspicion and all the subsequent steps without ever knowing whether it would be deprived of jurisdiction at any moment at the will of the person being investigated.

106. The analogy drawn by the applicant with the regulation of professions by disciplinary tribunals is not in my view of assistance. Although the applicant suggests that the court will not permit such disciplinary inquiries to be frustrated by the voluntary removal of the person concerned from the relevant professional register, similar considerations do not apply here. Similarly I do not think any assistance can be derived from examining provisions of other statutes and definitions contained therein such as the Building Society Act, 1989.

107. The final interpretive hurdle on the issue of jurisdiction, according to the applicant, stems from the definition of RFSP contained in the statute. As with the definition in subsection 2 (4) of a person concerned in the management of a RFSP, the definition of a RFSP itself uses only the present tense. Thus a financial service provider is defined as a person who "carries" on a business of providing one or more financial services and a regulated financial service provider is defined as a financial service provider whose business "is" subject to regulation by the respondent *inter alia*. Again s. 2 (4) provides that a person is concerned in the management of a body corporate or firm that "is" a regulated financial service provider if the person "is" in any way involved in directing, managing or administering the affairs of the body or firm. The applicant contends that the effect of these provisions read together is that if the RFSP is not in business at the time the Notice of Inquiry issues, s. 33 AO (2) cannot apply as it relates solely to the management of an entity that is carrying on business and is thus a RFSP at the time of the Notice of Inquiry.

108. It seems to me however, that this is to confuse two different things. Definition sections in statutes frequently define persons or things in the present tense to identify the characteristics or attributes that the person or thing must possess to come within the definition. The Act here is no different. It seeks to define the characteristics necessary to identify what is a RFSP or who is a person concerned in the management of a RFSP. S. 33 AO is concerned with conduct and that section supplies its own temporal context. There is in my view no warrant for importing into s. 33 AO a different temporal context than the one it supplies itself by reference to the unrelated tense used in a definition section. To do so would again give rise to absurd results. As previously mentioned, it would mean that misconduct of such seriousness as to cause the business of the RFSP to fail and possibly being concealed until after that failure, could never be the subject of the ASP. If such were the intention of the legislature, very clear language would be required to express it and common sense readily supplies the reason for such language not being apparent.

109. Finally on the interpretation and jurisdiction issue, it is not in my opinion necessary to apply any purposive interpretation to arrive at the natural and ordinary meaning of the words of s. 33 AO (2) insofar as that could be said to conflict in any way with s. 5 of the Interpretation Act 2005, which is solely concerned with the construction of provisions that are obscure or ambiguous, or the literal interpretation of which would give rise to absurd results or would fail to reflect the plain intention of the legislature. None of that arises here, as I have already found.

110. Accordingly, I am satisfied that s. 33 AO (2) applies to the applicant.

The Settlement with INBS

111. Section 33 AR (1) of the Act provides that if, in a case where the respondent suspects on reasonable grounds that a RFSP is committing or has committed a prescribed contravention, the RFSP acknowledges that it is committing or has committed the contravention, the respondent may either dispense with an inquiry with the consent of the RFSP and impose a sanction or alternatively hold an inquiry limited to determining the appropriate sanction. Thus, a RFSP has the right to admit the contravention and avoid an inquiry into anything other than sanction, in much the same way as an accused person has the right to plead guilty and confine the trial to the issue of sentence. Section 33 AV (1) further provides that the respondent may enter into an agreement in writing with the RFSP to resolve the matter. Section 33 BC (2) provides that if the respondent imposes a sanction in accordance with s. 33 AR, it shall publish the details unless it determines that those details are confidential or would unfairly prejudice a person's reputation.

112. The applicant submits in the first instance that the settlement was unlawful because at the time it was entered into, INBS was not a RFSP because it was no longer in business. I have to some extent already dealt with this argument. However, I cannot see how it can be advanced in the absence of INBS being a party to these proceedings. The applicant is critical of what he characterises as a decision on the part of the respondent to accept the admissions and the settlement from INBS. However it is clear from the Act that INBS had the statutory right to make admissions if it deemed it appropriate to do so and this did not depend on any consent, agreement or decision on the part of the respondent. There was thus no question of the respondent agreeing to accept admissions from INBS. It certainly had no power to prevent INBS making admissions even if it wished to do so for some reason that is difficult to envisage. It is therefore difficult to understand the applicant's contention that he had a right to be heard before the respondent

decided to "accept" admissions from INBS. A right to make submissions cannot arise if the party to whom the submissions are addressed has no power to influence the outcome of the subject matter of those submissions.

113. If the applicant was entitled to make submissions to any party, it was to INBS before the latter decided to make its admissions. Such a right cannot be asserted in these proceedings again for the reason that INBS is not a party. The applicant complains that his defence to the inquiry is now irretrievably prejudiced by the fact that INBS has admitted the prescribed contraventions in which he is alleged to have participated. However, to what extent, if any, admissions made by INBS have any role to play in the inquiry concerning the applicant is in the first instance a matter for the inquiry. One would have thought that as a matter of law, any admissions made by INBS cannot bind the applicant. However, that is a matter that must first be addressed to the inquiry.

114. In *Carroll v. Law Society* [2000] 1 ILRM 161, the applicant applied to the respondent for admission as a solicitor having passed the necessary examinations. His application was refused on the basis of his failure to satisfy the respondent's Education Committee that he was a proper and fit person to be admitted as a solicitor. A meeting of the committee was convened to conduct an inquiry into the substance of a complaint made against the applicant. Before the meeting took place, the applicant applied for declarations by way of judicial review that the committee had no jurisdiction to hear and determine the complaint but if it did that certain procedural safeguards must be put in place and further that he had fulfilled the statutory requirements to be admitted as a solicitor. McGuinness J. refused the application on a number of grounds. On the procedural issue, she said (at p. 174):-

> "However, the Society submitted that it was not the function of judicial review to direct proofs or procedures in advance; the purpose of judicial review was to review conduct that had occurred rather than to direct procedures in advance. In this context counsel for the Society referred to the judgment of Carroll J. in *Phillips v. Medical Council* [1992] ILRM 469 at 475:
>
> 'Judicial Review does not exist to direct procedures in advance but to make sure bodies which have made decisions susceptible of review have carried out their duties in accordance and in conformity with natural and constitutional justice.'
>
> The Education Committee's inquiry in this case is not a court of law, but, as the Society itself acknowledges, it is crucial to the applicant's future professional career and it must act fairly and in accordance with the principles of constitutional justice.
>
> I would however accept the submission of Mr Hedigan that it is not the function of judicial review to direct procedures in advance and I regard the dictum of Carroll J. in *Phillips v Medical Council* as persuasive authority. I am not therefore prepared to make the declaration sought by the applicant."

115. Similar views were expressed in *J. Murphy v. Flood* [2000] 2 I.R. 298 and Bailey v. Flood (Unreported, High Court, 6th March, 2000). In *Kennedy v. DPP* [2007] IEHC 3, the applicant was a clerical officer in the Immigration Section of the Department of Justice, Equality and Law Reform. While so employed, he was alleged to have corruptly accepted gifts from applicants for residency permits in exchange for favourable treatment. While awaiting trial on charges brought under the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption Act 2001, he sought a declaration that s. 4 of the 2001 Act was unconstitutional. In the course of his judgment, MacMenamin J. said (at p. 20 – 21):-

> "[34] In the instant case this court accepts the submissions made on behalf of the Attorney General that what is in question here is a hypothesis which has not occurred and may never occur. As matters stand no presumption has been invoked against the applicant. This court is unaware, and can only speculate as to how the evidence will evolve at trial. It may be, hypothetically, that the prosecution may call witnesses to say that they paid money to the applicant as a reward for granting them favours. As matters stand the applicant has not put in issue any of the statements contained within the book of evidence. The applicant has not engaged with the evidence in any way nor identified the nature of his defence or which facts may be in issue. In the event that witness statements go unchallenged it may not be necessary for the prosecution to invoke the provisions contained within s. 4 of the Prevention of Corruption (Amendment) Act, 2001 at all.
>
> One must look too, to the role of the trial judge. As matters stand such judge has not been asked to give any ruling on the meaning of the term 'deemed' or the expression 'unless the contrary is proved' in the impugned section. The applicant's core complaint in these proceedings is based on the contention that 'unless the contrary is proved' means 'unless the contrary is proved on the balance of probabilities'. Whether that contention has any force or application remains to be determined at trial."

116. The applicant here appears to be proceeding on the assumption that the inquiry will have regard to the admissions of INBS and the agreement in a way that will be prejudicial to him. All of that remains to be seen and is, at this juncture, purely hypothetical. The court is, in effect, being asked to direct the inquiry prospectively as to how it should conduct its business. That is not the function of judicial review.

117. The proposition being advanced by the applicant here in reality is that INBS, and by necessary implication any other party before the inquiry, may not make admissions, without the applicant's consent. Such a far reaching proposition is, perhaps unsurprisingly, not supported by authority. In *DPP v. Hegarty* (op. cit.), the accused was a company director who was charged with an offence under the Competition (Amendment) Act 1996 of authorising or consenting to the commission of an offence by the company. The company was not charged with the offence and the accused contended that he could not be prosecuted in the absence of the company also being prosecuted and convicted of the offence. The Supreme Court rejected that contention. McKechnie J. delivering the unanimous judgment of the Supreme Court, said (at p. 648):-

> "[44] As a result, I am satisfied that, by applying the principles set forth above, the true meaning of s. 3(4) of the Act of 1996 is that the undertaking so referred to does not have to be convicted of a s. 2 offence before the director or manager so referred to can be found guilty of the offence created thereby. Rather, it is an essential ingredient of this offence that the company itself must have committed an offence. This can be established, like all other necessary facts, by placing before the jury such credible evidence as would, when properly charged and directed, enable it to find that a s. 2 offence has been committed. Such evidence is fully open to challenge by the accused. The jury would approach this task in exactly the same way as all other matters within its purview. The ultimate decision is, of course, a matter for the jury.
>
> [45] The accused also submits that the statutory condition in the subsection may be said to expose the undertaking to a

finding that it has committed a criminal offence and, therefore, in the absence of having the same rights as an accused person, its good name and reputation may be exposed. He goes on to suggest, by some unspecified route, that this proposition supports his construction of the section in question, relying in the process on the trial judge's views on this matter. As previously stated, the trial judge was heavily influenced by concerns regarding the undertaking, its position and its rights. He was of the view that were a jury to find the undertaking guilty of an offence without a trial in due course of law, the same would constitute a violation of its constitutional and legal rights. Disregarding the issue of guilt vis-à-vis conviction for a moment, it is quite clear that these comments were specifically focused on the company and whatever rights it might have and any prejudice it may suffer, they were not addressed to the accused or his position. It is, therefore, difficult to see how these could have been determinative of his decision. It has not been suggested that the failure to prosecute or obtain a conviction against the company, or the absence of its presence by representation in court, are factors which affected the trial process itself, in that by some means the right of the accused to a fair trial will be jeopardised. The accused retains the right of due process in respect of the charges which he faces. It is the duty of the trial court, which duty remains and continues throughout the trial, to ensure that such rights are not violated; if they are, they must be protected and vindicated. The nature and circumstances of any violation will determine the nature and scope of the protection. So, on the evidence, as disclosed on the case stated, the essence of the judge's opinion is not one sourced on process, impact or detriment, but rather one founded on principle. For the reasons given I cannot, with respect, agree with this.

[46] There is another aspect to this point which must be mentioned, which is that the accused person cannot, in my view, advance the company's position as being that of his own. The latter would be a classic illustration of the *jus tertii* principle which Hardiman J. in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88, at p. 165, described as '… the operation of the jus tertii rule [is that] a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see *Cahill v. Sutton* [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better.'

[47] Accordingly, the accused must respond to the charges as these affect him and cannot assert a prejudice, or plead a detriment, which is that of the company's alone."

118. As it is apparent from this decision, the Supreme Court considered that the fact that the offence had to be, in effect, proved against the company in its absence with the consequent implications for the company's reputation, in order to sustain a conviction against the accused, could not form a basis for prohibiting the trial of the accused. It also undermines the assertion by the applicant that the publication of the settlement with INBS by the respondent pursuant to its statutory obligation should not have occurred if that were in any way to impact negatively on his reputation.

119. As previously noted, the proposition that INBS was not entitled to have regard exclusively to its own interest in deciding to make admissions without first consulting the applicant is a surprising assertion. Although, as I have said, it must follow therefore that none of the other parties to the inquiry could make admissions either without the applicant's consent, the same must apply in equal measure to the applicant himself. Accordingly, were the applicant's contention sound, it would mean that he would not be entitled to make any admissions he considered to be in his own interest without first consulting the other parties to the inquiry. Here again, the proposition has only to be stated to demonstrate that it is, in truth, unstatable.

120. The applicant places significant reliance in this regard on *Dellway v. NAMA* [2011] 4 I.R. 1. The feature of that case which is relevant here and relied upon by the applicant is that in *Dellway*, the applicants claimed, and the Supreme Court accepted, that they had a right to be heard by the respondent, a public body before any decision adverse to their legal rights was made. The legal rights involved included the applicant's equity of redemption in relation to the loans in issue and the right to deal with their property portfolio and associated loan contracts as they wished. I do not find this decision to be of any assistance on the facts of the instant case. No identifiable legal right of the applicant was affected by the decision by INBS to make admissions. But, in any event, as I have already explained, none of this was or could have been the subject of any decision by the respondent.

121. Insofar as the applicant alleges that the settlement with INBS amounts to a prejudgment of the inquiry and gives rises to the objective appearance of bias, it is not in dispute that the members of the inquiry had no involvement in the settlement with INBS nor is their independence or objectivity directly impugned. However, the fact that they are in law are deemed to be agents of the respondent is said of itself to give rise to the reasonable apprehension of bias. This is really an allegation that the respondent cannot conduct an inquiry into the applicant having dealt with another party, the subject matter of inquiry, in a particular way. I have already held that this was in accordance with the statute. There is no suggestion that the inquiry members were appointed other than in accordance with the statute. In my view, it must follow therefore that in the absence of a challenge to the constitutionality of the relevant provisions of the Act, the applicant cannot advance this argument.

122. Apart altogether from the foregoing, underlying the applicant's complaint about the manner in which the respondent dealt with INBS is the assertion that he cannot get a fair hearing before the inquiry. He says, therefore, it should not proceed. An obvious analogy arises with the prohibition of criminal trials, a topic the subject of many decisions in recent times. One of the leading authorities is Z v. DPP [1994] 2 I.R. 476. The applicant was charged with unlawful carnal knowledge, sexual assault and indecent assault of a 14 year old girl, Miss X. She became pregnant as a result and intended to travel to the United Kingdom for an abortion. The Attorney General applied for an injunction to prevent her doing so on constitutional grounds. The ensuing X case attracted massive and protracted publicity in the media. It was extensively debated in the Oireachtas, led to the publication of several books and was the subject matter of an award winning play. It precipitated the enactment of the 12th, 13th and 14th Amendments of the Constitution. The applicant became widely known as the alleged rapist in the X case. In short, it is difficult to image a greater level of publicity than attached to Mr. Z's trial.

123. Mr. Z sought to prohibit his trial on the grounds that the publicity had irreparably prejudiced the prospect of a fair trial and violated his constitutional right to a trial in due course of law. Further, in an argument that bears some analogy to that of the applicant herein, Mr. Z argued that the decisions of the High and Supreme Courts in the X case had effectively determined the issue of his guilt in circumstances where he had not been afforded an opportunity to challenge such findings. He failed in both the High and Supreme Courts.

124. The unanimous judgment of a five member Supreme Court was delivered by the Chief Justice. In the course of his judgment, Finlay C.J. said (at p. 506):-

"This Court in the recent case of *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465 unanimously laid down the

general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial."

125. He continued at p. 507:-

> "With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this Court in *D. v. The Director of Public Prosecutions,* that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

126. The Chief Justice went on to note that having regard to the saturation publicity, it would not be possible to empanel a jury, the majority at least of whom, would not be aware of the X case and Z's alleged involvement. The Chief Justice was further satisfied that it was likely that such jurors would be aware of media reports that there was DNA evidence linking Z to the offence. Notwithstanding all of that, Finlay C.J. concluded that an unfair trial could be avoided by unambiguous and clear direction given by the trial judge to the jury. He dismissed the appeal.

127. Accordingly, having regard to the applicant's contention that the respondent's dealings with INBS have rendered a fair hearing before the inquiry impossible, I am satisfied that the applicant does not meet the requisite legal standard of showing that there is a real risk that he will not receive a fair hearing.

Delay

128. In paras. 35 to 40 of her first affidavit sworn on 16th September, 2015, Ms. Gallagher gives details of the nature and scale of the investigation conducted by the respondent from 2010 onwards into INBS and certain persons concerned in its management. This evidence is largely uncontroverted. As previously noted, the investigation covered a period of four years and two months from 1st August, 2004, to 30th September, 2008. It was necessary to review electronic data forensically copied from the INBS systems including network drives, emails, backup servers and archives. Over 200 statutory requests for information were issued to witnesses and 21 formal interviews were conducted including interviews in Ireland, Northern Ireland and England. Successive tranches of new evidence were identified as the investigation progressed, most recently in May, 2015. Approximately 110,000 specific documents were identified which now underpin the suspected prescribed contraventions.

129. The purpose of the investigation was to allow the respondent to decide whether there were reasonable grounds to suspect that INBS had committed prescribed contraventions and whether certain persons concerned in its management had participated. A thorough investigation was an essential prerequisite to the formation of the respondent's suspicion on reasonable grounds that a RFSP is committing or has committed a prescribed contravention or that a person concerned with the management of a RFSP is participating or has participated in the commission of such contravention. The exhibited correspondence shows that the respondent was aware of the investigation at least from the beginning of 2012, and quite possibly from the outset as he does not suggest otherwise. Although he complains of delay in a general sense, he does not identify any particular matter arising from Ms. Gallagher's affidavit that he suggests ought to have been pursued more expeditiously. The applicant has not satisfied me that there has been any undue delay by the respondent in this matter, less still any that is blameworthy.

130. Even if that were not so, the issue of prejudice would arise. In Kennedy v. DPP [2012] IESC 34, the applicant sought to prohibit his trial on charges of corruption involving allegedly giving sums of money to certain members of local authorities as an inducement to vote in favour of rezoning lands owned by the applicant. The applicant complained, inter alia, of irremediable prejudice arising from prosecutorial delay. The prejudice complained of included the deaths of a number of potential witnesses. At the outset of her judgment, Denham C.J. noted that the court would only intervene to prohibit a trial in exceptional circumstances and that the issue, therefore, to be considered was whether such exceptional circumstances existed. The Chief Justice considered the reasons for the delay, one of which was a determination by the DPP to await the conclusion of the trial on corruption charges of Mr. Frank Dunlop before proceeding with the prosecution against the applicant. She concluded that this was a reasonable course of action for the DPP to pursue and went to say (at p. 26):-

> "[66] Consequently, I do not find that there is blameworthy prosecutorial delay in this case. Therefore, there is no need to take any further step to analyse and balance conflicting interests on this aspect of the case as blameworthy prosecutorial delay is not of itself sufficient to prohibit a trial. An applicant would have to establish also that one of his interests protected by his right to an expeditious trial has been interfered with: see *P.T. v. Director of Public Prosecutions* [2007] IESC 39, [2008] 1 I.R. 701; *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465; *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172.
>
> [67] Even if I were satisfied that there was blameworthy prosecutorial delay by the respondent, a further analysis would be required to determine if there had been consequential prejudice to the applicant. While it is not necessary to take this further step, in the circumstances, I do address the matter.
>
> Prejudice
>
> [68] Counsel on behalf of the applicant submitted that as a consequence of the delay in the prosecution the trial of the applicant would be prejudiced.
>
> [69] Counsel on behalf of the applicant has submitted that his trial would be prejudiced by the deaths of a number of potential witnesses, being (i) Councillor Sean Gilbride on the 1st January, 2011, who was also charged with the applicant; (ii) Councillor Frank Smyth on the 24th May, 2003; (iii) Philip Monahan on the 3rd August, 2003; (iv) Dr. Brian Meehan on the 13th June, 2004, and (v) Liam Lawlor on the 22nd October, 2005. Other potential witnesses had died prior to Frank Dunlop's evidence to the Tribunal and the beginning of the criminal investigation arising as a result; these were Councillor Tom Hand who died in 1996; Fintan Gunne on the 9th October, 1997; Councillor Jack Larkin in May, 1998 and Councillor Cyril Gallagher in March, 2000.
>
> [70] In written submissions, the applicant referred to nine potential witnesses who have died and who might have corroborated his version of events surrounding the charges against him…
>
> [71] However, having heard the submissions on this issue, I am not satisfied that the prejudice alleged is such as to prohibit a trial, as the deaths of witnesses referred to relates to evidence, the essence of which can be obtained from

other sources. In fact, when this matter was addressed during the hearing it became clear that there was insufficient engagement with the facts so as to show that there was a real risk of an unfair trial. Indeed the argument fell apart and the prejudice was not established.

[72] This case is unlike a situation where many years after an event, without prior notice, an accused is charged with an offence from many years ago. The matters raised in this trial have been known to the applicant throughout the intervening years as they have been raised in other fora. Therefore, it is not a case where issues may have lain dormant for many years and then unexpectedly been raised out of the blue."

131. In the same case, O'Donnell J. drew a distinction between pre and post charge delay (at p. 3):-

132. "[5] I also tend to agree with Clarke J.'s approach to the question of prosecutorial delay. I think it is important to recall that the right to a speedy trial is a separate component of the overall right to a fair trial. The right to a speedy trial, like its comparable rights in the jurisprudence of the United States Supreme Court and the European Court of Human Rights, is focussed primarily on the period between charge and trial. While investigatory delay cannot be entirely divorced from the impact of post-charge delay, it is in my view important that it be recognised that there is no right to be speedily, or necessarily efficiently, investigated. The fact that an efficient investigation is extremely desirable as a matter of public policy does not mean that it has a status of a right enforceable by any court in other than exceptional circumstances, still less if that enforcement results in the prohibition of any trial."

133. In the present case, the applicant does not allege any specific prejudice arising from delay. He does not suggest that there is any missing evidence or that there are witnesses who are unavailable. On the contrary, it would appear that to a very significant extent, the inquiry will be concerned with evidence in documentary form which appears to be extremely comprehensive. Even if there had been any blameworthy delay in this case, it could only relate to the "pre-charge" investigation and would thus, as explained by O'Donnell J., have less significance, in any event, than "post-charge" delay.

134. In the event, the applicant has not, in my view, made out any ground based on culpable delay or prejudice, and certainly none that could justify any interference by the court with the holding of the inquiry.

The Administration of Justice
135. In these proceedings, the applicant mounted a detailed and lengthy challenge to the ASP on the basis that as interpreted by the respondent, Part IIIC of the Act is repugnant to Article 34.1 of the Constitution as it amounts to the administration of justice by a body other than a court. As previously noted, the applicant has not sought or been granted leave to challenge the constitutionality of Part IIIC and certainly cannot do so in the absence of Ireland and the Attorney General being joined as parties. However, the applicant claims to be entitled to put this argument forward on the basis that the court must prefer the applicant's construction of s. 33 AO (2) because that of the respondent renders it unconstitutional. In a sense, this is a subset of the double construction rule argument.

136. In my opinion, this argument is misconceived because it amounts to a submission that if the natural and ordinary meaning of the words used by the Act renders it unconstitutional, the court must find some other meaning, a novel proposition. I have already determined that the natural and ordinary meaning of the words of the section is not capable of bearing the construction advanced by the respondent. For the same reason, I concluded that the double construction rule has no application.

137. In that event, the applicant's argument, were it to be entertained, can only be viewed as a direct challenge to the constitutionality of the Act which cannot be brought in these proceedings. Accordingly, it would be inappropriate for me to express any view on this issue which must await a properly formulated claim by the applicant or some other party.

Publicity
138. I have already substantially dealt with this issue in considering *Z v. DPP* above. I would add that it seems to me that Z and the other cases which consider pre-trial publicity being concerned as they were with criminal trials where jurors, being ordinary members of the public, might be affected by such publicity, apply with even greater force to an expert body such as the inquiry whose members are composed of independent professionals each with particular expertise in their own fields. Their independence and impartiality is unchallenged and I reject the contention that there is any basis for the suggestion that any publicity surrounding the applicant could cause them to do other than carry out their statutory duty to accord him a fair hearing.

Disproportionate breadth, burden and timing of the notice of inquiry
139. The applicants complaint here is largely based on the fact that he says he is being required to "fight on two fronts" in dealing with both the inquiry and the civil proceedings in the Commercial Court. However, the applicant has demonstrated no real basis for that contention in circumstances where the inquiry is scheduled to commence on 1st February, 2016, and last approximately 45 days whereas the discovery process in the Commercial Court case will not conclude before the end of July, 2016, at the earliest, suggesting that a trial may be some way off thereafter. In any event, any perceived difficulty that the applicant encounters because of overlap is a matter that can readily be addressed by the inquiry or the court if necessary. It cannot reasonably be suggested by the applicant that the coincidental existence of civil proceedings can have the effect of somehow granting him immunity against a statutory inquiry.

140. The applicant further contends that pursuing the inquiry against him imposes a burden on him that is disproportionate to the public interest in having an inquiry. In fact, the applicant goes so far as to suggest that there is little or no public interest in such an inquiry being of historic interest only. The uncontested evidence of Prof. Maloney shows that contention to be without foundation.

141. Another prejudice complained of by the applicant is to be found in his second affidavit sworn in Marbella, Spain. In para. 9, he avers:-

"9. If the inquiry proceeds against me, I will have to engage legal representation – at least if I am to be able to defend myself properly and effectively. However, my financial position is by no means strong, particularly in respect of having available liquid funds. I have had difficulty in discharging legal fees in the recent past and in this regard had to rely on support from my family members. It would occasion significant hardship on me to have to bear the legal costs associated with preparing my defence in respect of an inquiry which I say and believe to be unlawful in respect of me. Moreover, expenditure on legal costs associated with preparing for the inquiry will deplete the limited resources that are available to me to pursue my judicial review of the respondent, very possibly to the extent that I will not be able to finance legal representation in both, which I respectfully say and believe would be a particularly invidious position."

142. This affidavit is responded to by Ms. Gallagher in her supplemental affidavit and in respect of para. 9 of the applicant's affidavit,

she refers to the fact that the annual reports of INBS for the years 2003 to 2008 inclusive, show that the applicant's remuneration package amounted to a total of €9,779,000. She further avers that when the applicant's pension fund from INBS matured, it was worth approximately €30m. She avers that in those circumstances, it is difficult to understand on what basis the applicant is averring to financial "hardship" on sworn oath. Despite swearing a subsequent affidavit, the applicant has elected not to respond to Ms. Gallagher's evidence. In the light of that, the applicant's complaints about equality of arms and the unfair costs burden on him of participating in the inquiry ring somewhat hollow.

Miscellaneous

143. The applicant concludes his submissions by raising a number of additional matters that he says render the inquiry unlawful. The first is a complaint of discrimination against the applicant in an attempt to make him a "scapegoat" for the banking crisis. No basis for this contention is advanced and it is in any event contradicted by the fact that there are a number of other parties who are the subject matter of the notice of inquiry.

144. The applicant then makes a complaint that he does not have sufficient information to properly defend himself against the charges in the notice of inquiry. That is entirely a matter for the inquiry and is without any merit in circumstances where the applicant has made no application to the inquiry itself. As with many of the other matters raised by the applicant, this is quintessentially a matter for the inquiry and not something which can properly be the subject of judicial review.

145. The same applies to the allegation that the charges proffered in the notice of inquiry are unconstitutionally vague. Finally, the applicant suggests that the notice of inquiry seeks to impose vicarious penal liability and is thus unconstitutional. This is another impermissible attempt by the applicant to introduce a constitutional challenge to the legislation.

Summary and Conclusion

146. I am satisfied that s. 33 AO (2) of the Act, when properly construed, applies to the applicant and he is thus lawfully subject to the inquiry. No rights of the applicant have been infringed by the settlement entered into by the respondent with INBS. There has been no culpable delay by the respondent in conducting its investigation into the applicant such as gives rise to any unfairness to him. The applicant is not entitled in these proceedings to mount an indirect challenge to the constitutionality of the Act on any of the grounds advanced, including those concerned with the administration of justice and the imposition of vicarious penal liability.

147. Much of the applicant's claim is an attempt to pre-empt in advance issues before the inquiry which may either never arise, or must first be the subject of determination by the inquiry itself. The suggestion that he will be subject to any prejudice is devoid of substance and without merit.

148. In the final analysis, the applicant has not satisfied me that there is any unfairness inherent in the inquiry process to which he is subject. The elaborate procedures provided for by the Act and the guidelines drawn up by the respondent, coupled with an appeal to an independent Tribunal and a further appeal to the High Court, to my mind ensure that the applicant's right to a fair hearing is guaranteed. It seems to me that the public interest is well served by a credible system of financial regulation and enforcement such as that provided for by the Act.

149. For these reasons, therefore, I must dismiss this application.