

## THE HIGH COURT

## JUDICIAL REVIEW

[2013 No. 973 JR.]

BETWEEN

E .G.

APPLICANT

AND

THE SOCIETY OF ACTUARIES IN IRELAND

RESPONDENT

**JUDGMENT of Mr. Justice McDermott delivered on the 16th day of June , 2017**

1. The applicant was granted leave to apply for judicial review (Kearns P.) on the 20th December, 2013 to seek orders of *certiorari* quashing a determination by the respondent communicated to the applicant by letter dated 26th November, 2013 that there was *prima facie* evidence of misconduct based upon a complaint made against him by his brother J.D.G., and a further decision to refer the matters contained in a "Case Report" of the Investigative Committee established to investigate the complaint to a Disciplinary Tribunal of the Society of Actuaries in Ireland in accordance with rule 4.27(b) of the Disciplinary Scheme of the Society. Time was extended for the issuing of the notice of motion in accordance with the order granting leave (Peart J.) on 17th February, 2014. Subsequently, by consent, an order was made (Kearns P.) on 21st July, 2014 granting liberty to the applicant to deliver an amended statement of grounds and permitting the case to proceed by way of plenary proceedings having regard to the raising of an issue that the decisions of the respondent were not amenable to judicial review as they were matters of private law. The applicant delivered an amended statement of grounds on the 30th July, 2014 and an amended statement of opposition was furnished on 11th September, 2014.

**Background**

2. The respondent Society is a company incorporated in Ireland limited by guarantee. The applicant is an Associate Member of the Society under Article 8 of its Articles of Association. The applicant became an Associate Member of the Society under the terms of Article 9 and has been a member since 2nd September, 1993. Article 9(a)(iii) provides that:-

"Every member of whatever category shall be bound to further to the best of his ability the objects, interests and influence of the Society and shall observe all Bye-laws."

The bye-laws are defined in Article 1(b):-

"Bye-laws" means unless the context otherwise requires, all bye-laws, rules and regulations of the Society made pursuant to the provisions contained in these articles, as such bye-laws, rules and regulations may be amended and be in force from time to time and for the time being".

3. The Council of the Society is vested with the management of the Society's affairs under Article 38. Article 46 provides:-

"In addition, the Council may make, alter and repeal such Bye-laws, rules and regulations relating to professional conduct (including professional discipline) to be observed by all Members as the Council may consider necessary for attaining the objects of the Society, ... provided that no Bye-laws, rules and regulations so made by the Council and no alteration or repeal thereof so made by the Council shall be operative or have effect until the same shall have been approved at a meeting of the Council specially convened for that purpose, and subsequently approved and adopted by a special resolution of the Society and provided further that no Bye-laws, rules or regulations made under this Article shall be repugnant to or inconsistent with the Society's Memorandum of Association or with these Articles, ..."

4. A Disciplinary Scheme for the Society was approved by the members and came into effect on 1st September, 2006. That Scheme was amended at an extraordinary general meeting held on 15th September, 2011: the amended scheme became operative on 16th September.

5. The applicant, as a member of the Society was bound by the bye-laws, rules and regulations of the Society including the "Disciplinary Scheme" as adopted.

**The complaint**

6. The respondent wrote to the applicant enclosing documentation which had been received from his brother J.D.G. dated 13th June 2012, making allegations of misconduct against him in respect of his handling of the financial affairs of his late mother, C.G., and her estate and the financial affairs and estate of his late brother J.G.G. The allegations were considered by the Society's Committee on Professional Conduct pursuant to the rules of the Society's Disciplinary Scheme a copy of which was attached. The letter informed the applicant that the Committee on Professional Conduct was establishing an Investigating Committee to examine the matter pursuant to the Rules of the Scheme.

7. On the 5th August, 2012 the respondent wrote again to the applicant pursuant to rule 4.16 of the Disciplinary Scheme to inform him of the appointment of an Investigating Committee under rule 2.3 to investigate the complaint. The complaint related to his alleged professional conduct in dealing with the affairs of his late brother J.G.G. A copy of the complaint together with a copy of the Disciplinary Scheme was enclosed and copies of the Society's Code of Professional Conduct and the Professional Conduct Standard that applied prior to the Code coming into effect in November 2010. The applicant was informed of the identity of the three individuals who were appointed to the Investigating Committee in accordance with rule 4.9 of the Scheme and that it would convene as soon as possible. The writer Mr. Alfie Shaw was appointed as executive secretary to the Investigating Committee.

8. By letter dated 17th September, 2012 the applicant was informed that the Investigating Committee had considered the complaint and was seeking clarification from J.D.G in respect of a number of issues. The Committee also raised a number of issues with the applicant. These concerned the applicant's dealings with his late brother prior to his death. In particular, he was asked to confirm

whether he asked his late brother to sign a statement(s) on 18th September, 2008 (set out below) and if he did, to set out the circumstances in which that occurred and whether he advised his late brother to seek independent legal advice before signing it and whether he received such advice. Further queries were raised in relation to his state of knowledge in relation to his brother's medical condition. He was asked whether he knew that his brother had been hospitalised with motor neurone disease and whether he considered that the document of the 18th September 2008 should have been witnessed. He was asked to explain the statement in the document "that ( J.G.G's) financial affairs were properly dealt with in accordance with his mother's will". The Committee sought confirmation as to whether the late J.G.G. was the applicant's client or that of his company and if so, whether he provided a mandate to act on his behalf. Information was requested concerning an alleged failure to reply to a request by J.D.G in 2007 for information concerning J.G.G's assets in circumstances where he had given permission for the provision of this information to his brother J.D.G. It also sought comment in relation to an alleged failure to reply to requests made by his late brother on 6th May, 2008 and his late brother's solicitors of 8th September, 2008 for information concerning his financial affairs. Information was also requested in relation to funds said to have been held in the joint names of the applicant and the late J.G.G. with Irish Life and how the proceeds of that investment came to be credited to a joint account maintained by him and his late brother and were subsequently withdrawn. The Committee also sought information about what was done with these funds and details of any other funds invested on behalf of the late J.G.G. Records in relation to any funds received from the late J.G.G. or from others on his behalf or monies paid to him or others on his behalf were also sought. Further information was sought in relation to the administration of the estate of the applicant's late mother C.G.

9. The applicant furnished an eleven page reply by letter dated 5th November, 2012. He set out an account of his involvement in his late mother's and late brother's financial affairs. He stated that his mother requested that he make certain investments on her behalf during her life-time for her benefit and that of his brother J.G.G. up to the date of her death on 1st December 1998. Her wish was that these and further investments should be made to secure her and J.G.G's welfare in the future. The applicant invested assets given to him by his mother which were held jointly with her and J.G.G. He stated that his mother invited him to open bank accounts and investments in the joint names of his brother, his mother and himself. She did not wish other members of the family to be given information concerning these arrangements. These arrangements were instigated following a meeting in 1988 attended by the applicant, his mother, his sister E.G and his elder brother T.V.G. Following his late mother's death, the applicant continued to make investments on behalf of his late brother in a number of policies of insurance and investment funds in their joint names between 1999 and 2008. These investments were managed by him from his Dublin address and all correspondence went to that address. The arrangement with his mother continued between October 1988 and her death on 1st December 1998.

10. Following his mother's death, the applicant acted as executor of her will and in that capacity paid out a number of cash bequests to the various named beneficiaries. He also inherited the joint bank accounts and investment policy that he held with his mother by way of right of survivorship and these accounts constituted most of his mother's estate. He claimed that when he explained to other members of the family that they were only to receive a small cash payment pursuant to the terms of his late mother's will relations between them became increasingly strained.

11. The late J.G.G. executed a will on 6th May 2008 as a result of which O.G. (another brother) and J. G, O.G.'s son, inherited land and property said to be valued at €500,000.00. His brother J. D. G and his nephew J. G. who benefited under the will were appointed executors of J.G.G.'s estate. He died on the 1st November 2008. As executors they sought from the applicant the payment to the estate of the proceeds of any joint account or insurance policy held by the applicant with his late brother. The financial institutions concerned acting on the basis of mandates signed by the late J.G.G. and the applicant declined to do so. There was extensive correspondence between the parties in relation to issues which each raised with the other concerning the assets of their late mother and the late J.G.G. The applicant clearly believes that the complaint made to the Society is vexatious. He considers it to be an attempt by his brother to cause him and his company as much difficulty as possible with his professional association.

12. Previously on the 18th December 2006, J.D.G. wrote to the applicant concerning the late J.G.G.'s finances. He was concerned that his late brother did not know anything about his financial affairs for which the applicant had responsibility. He requested information about a sum of €57,000.00 and other monies which had accumulated over the years. He sought confirmation that the monies were in a fund invested on behalf of J.G.G. for his future benefit.

13. J.D.G. then wrote to his brother J.G.G. on 15th August, 2007 concerning pension rights. It was proposed that J.G.G. would apply for a non-contributory state pension. In his application J.G.G. was obliged to provide financial information to the Department of Social Protection. He suggested that J.G.G. seek a letter from the applicant stating that financial information to be submitted in support of his application was correct. He asked for confirmation that the information supplied to date was correct and that if the welfare authorities required further information they should contact the applicant concerning J.G.G's assets.

14. On 6th May, 2008 a letter was written by J.G.G. to the applicant which outlined that he was in the process of making his will. He requested an account of his financial assets which had been under his control since their mother died in 1998. The letter stated that these accounts comprised monies left by their mother, funds from another estate, monies from the sale of cattle and numerous cheques from the Department of Agriculture and SSIA accounts. He also stated he had been paying into a life insurance policy but could not recall who was named as beneficiary on the policy and indicated that he wished his estate to be the beneficiary.

15. On the 8th January, 2009, following J.G.G's death, the applicant wrote to Mr. Halpin of Kerin Hickman and O'Donnell solicitors (who had advised on the drafting of the will) enclosing a copy of a letter/statement dated 18th September, 2008 addressed to the applicant and signed by his late brother in which he stated:-

"I ... wish to confirm that I am satisfied that all my financial affairs which have been the subject of much unnecessary prying by [J.D.G.] and others have always been properly dealt with by [E.G.] in accordance with my mother's will and my own wishes, as I, [J.G.G.], have always agreed with [E.G.] at every stage of our dealings during the last ten years.

I ... hereby acknowledge and accept that under Irish data protection laws I am NOT entitled to confidential information about other people's personal affairs and this includes the information that I was given illegally by Irish Life about [E.G.'s] money, that [E.G.] very kindly put aside for my possible future needs before [E.L.G.] died eight years ago, when I declared that I had no financial resources of my own.

I ... wish to refer to the attached letter addressed to Irish Life dated 12th May, 2008 which was handwritten by Mrs. [J.L.G.] and I confirm that I signed this letter on the instructions of my late brother [J.D.G.].

I ... wish to irrevocably withdraw without reservation the statement made in the letter of 12th May, 2008 "do not communicate with my broker [E.G.]". I now declare that this is a vexatious and mischievous statement composed by my brother [J.D.G.] and handwritten by his wife Mrs. [J.L.G.], while on a visit to ... Kildysart and I declare that I have had no

hand, act or part in either the composition or writing of same.

I ... wish to confirm that the attached faxed letter addressed to Irish Life dated 27th May, 2008 was signed in the presence of Mrs. [B.G.] on the instructions of my brother [J.D.G.] in Canada who composed and typed the letter in Canada and it has his name and telephone number along the top of it.

I .... wish to irrevocably withdraw without reservation the statement made in that letter of 27th May, 2008 "I was surprised to find out that my plan had been cashed out on ... 2008 as it had not been discussed with me". I declare that this is a false, mischievous and vexatious statement composed and typed in Canada by my brother [J.D.G.] and I declare that I had no hand, act or part in either the composition or typing of same.

I ... accept unreservedly that all the money invested under Irish Life Assurance Policy No. 03051005 always did and still does belong exclusively to [E.G.] alone to do with whatever [E.G.] pleases and I, [J.G.G.], declare that I have no claim whatsoever to any part of that money, which was invested by [E.G.] alone with Irish Life Assurance Plc."

16. J.D.G. made a number of specific and serious allegations in his letter of 13th June 2012. He alleged that the applicant mismanaged the late J.G.G.'s financial affairs. He maintained that a substantial sum of money was left to J.G.G. in his mother's will and that joint accounts were set up in Bank of Ireland and Allied Irish Banks and with insurance companies Friends First, Standard Life and Irish Life. A joint current account with Bank of Ireland was opened in 2000. There were regular payments from the joint account into a "personal portfolio unit linked funds plan". This plan was en-cashed on 8th January, 2008 but the funds were not put into a joint account but paid into a private account controlled by the applicant. It is alleged that J.G.G. found out when he contacted Irish Life at the suggestion of J.D.G., in May 2008 that this had occurred. J.D.G. was later surprised to discover that the applicant had procured J.G.G.'s signature on the letter of 18th September, 2008 stating that all funds belonged to [E.G.] and not to J.G.G. He was unhappy because J.G.G. was terminally ill when he was asked to sign a number of documents and he alleged this was procured under duress by the applicant. He claimed that records later obtained revealed that €76,068.47 was not deposited to their joint account in the Bank of Ireland on 8th January, 2008 but to a Private Client Financial Services account. On 13th May, 2008 these funds were deposited to their joint account with Bank of Ireland but removed on 20th May. He believed that these funds were paid into a private company account run by E.G. and his wife T.G. who acts as secretary and is the joint owner of the private company (A. R. Ltd.). He did not understand why this was done but he believed it to be connected to J.G.G.'s letter of 9th May which requested an account of his assets.

17. On 6th May, 2008 J.D.G. stated that he helped J.G.G. to make his will which was drawn up under the guidance of Mr. J. Halpin solicitor. On the same date the late J.G.G. wrote to the applicant asking for an account of his assets and this letter was accompanied by a letter from his solicitor, Mr. Halpin. The late J.G.G. requested that a copy of the reply be sent to his solicitor. No reply was received. J.D.G. alleges that the applicant was removing funds from a joint account at that time. He had no permission from J.G.G. to do this as he had not seen him since January 2008.

18. Following the deterioration in the late J.G.G.'s health he was admitted to hospital in Limerick on 16th September, 2008. J.D.G. alleges that his signature on documents which he signed on 18th September 2008 was obtained without legal advice even though he was in effect signing away his financial assets. He had limited education and was incapable of writing or understanding the letters and had no part in their composition. It is alleged that he was in a very vulnerable state and that the applicant was made aware of his condition by a physician and informed that he might only survive to the end of the year. It is said that the applicant knew that the late J.G.G. was suffering from motor-neurone disease which affected his speech and resulted in extensive muscle weakness and weight loss. J.D.G. believed that his brother was rushed into signing the letter when he was quite ill and under duress.

19. J.D.G. summarised his complaint by stating that the applicant's treatment of his brother and his financial affairs was unethical, unprofessional and unbecoming an associate of the Society of Actuaries in Ireland. He claimed that he took advantage of an unsophisticated person who trusted him. The applicant is alleged to have ignored his brother's request for information about his assets, his solicitor's request for same and any other proper requests made for information concerning investments made supposedly for the benefit of the late J.G.G.

### **The Applicant's Response**

20. The applicant's reply to the queries raised by the Investigating Committee was extensive and supported by three booklets of supporting documentation amounting to 226 pages.

21. He accepted that he asked his late brother to sign the letter/statement(s) of 18th September, 2008. He also accepted that he did not advise J.G.G. to seek independent legal advice before asking him to sign the document. He claims that at the time his late brother had not been hospitalised. He states that he did consider that the document should be witnessed but that it was witnessed by his sister E.M.G. He noted that no money was put aside for J.G.G. by his late sister E.L.G. before she died. The only money put aside for his late brother was by the applicant on 17th January, 2000. This was a sum of IR£30,000.00 invested in the Irish Life Property Investment Fund in the joint names of J.G.G. and the applicant under Policy No. 3051005. Although the sum of IR£30,000.00 came from their joint account, he had placed the IR£30,000.00 into that account from his own personal account.

22. The applicant accepted that J.G.G. had a claim on monies held in all investment policies in which he was a joint payee. He accepted that the late J.G.G. was a client of his company. The applicant wished to use certain funds from a joint bank account to invest in policies of life insurance and investments and the rules governing the procurement of such policies required that J.G.G. be a client of his company. He received a mandate to act from J.G.G. on 31st October, 2005. He said that he declined to provide information about his client J.G.G.'s policies to his brother J.D.G. on his client's express instructions. He believed a request for information of 6th May, 2008 did not emanate from his late brother but from J.D.G. as it was not signed by his late brother.

23. He stated that on 17th January, 2000 he purchased a IR£30,000.00 single premium investment policy in the joint names of his late brother and himself from funds in their joint account. That policy was surrendered in January 2008 due to concerns which the applicant had about the Irish commercial property market. The surrender value of the policy was lodged into the applicant's account so that he could use it for further investments which he would personally fund but would benefit both himself and his late brother.

24. He claims that other funds were invested on the late J.G.G.'s behalf and that all assets and funds held jointly and in his sole name were disclosed to Mr. John Halpin, solicitor, during the course of a meeting on 7th February, 2009. A monthly deduction of €63.49 from the joint account related to payments by the applicant on his late brother's behalf in respect of a Standard Life Policy No. 69430136 which was in his late brother's sole name. The applicant stated that he maintained records which were sent to his own Dublin address of all funds received from his late brother or from others on his behalf and funds paid to his late brother and to others on his behalf. These were all processed through their joint account with Bank of Ireland pursuant to a mandate as evidenced by a

Bank of Ireland letter dated 20th February, 2012. He rejected any allegation of wrongdoing.

#### **Further Details Requested**

25. On 4th December, 2012 the respondent sought the applicant's further response to a number of questions. These concerned the nature of the business relationship between the late J.G.G. and the applicant, the source and movement of money and assets between the late J.G.G. and the applicant, the source and movement of money and assets between the late E.L. G. and the applicant and relevant supporting documentation. He was asked whether there was a document dated 18th September, 2008 containing a signature of E.M.G as a witness. She was said to have been present at the time.

26. Further queries were raised with the applicant and the complainant by letters dated 4th December, 2012. By letter dated 23rd January 2013 the Committee was informed that the applicant's solicitors had advised him not to make further disclosures to the Investigating Committee because of his involvement in a High Court case "*In the Matter of Abbey Construction Ltd: Garry v Garry & Others*" (Record No. 2012/690 COS). In those proceedings the applicant, E.G., sought the leave of the High Court to initiate an action against the directors of the company of which he and his brother O.G. held the entire issued share capital. The respondents were his brothers O.G., C.G. and his nephew, J.G. He alleged that the respondents had misappropriated or directed property and investment opportunities away from the company. The case was dealt with by mediation between February and May 2013. The proceedings were compromised on 2nd May 2013 pursuant to agreed terms which included a confidentiality clause. It was agreed that J.G. as part of the compromise would issue a written acknowledgement that the estate of the late J.G.G. had no complaint against the applicant.

27. In the course of those proceedings an affidavit was sworn by O.G. making allegations regarding the applicant which he claimed were similar to those being investigated by the Committee.

28. The Committee then wrote to the applicant's solicitors on 29th January, 2013 requesting a copy of these proceedings and the relevant affidavits so that it could determine whether or not they were relevant to its investigation. No reply was received to this letter by 12th February, 2013. The Committee then wrote to the applicant again seeking a copy of the proceedings and affidavits in order to determine whether and to what extent the proceedings affected the investigation and informing him that it was not prepared to suspend its investigation without being able to make this determination. He was informed that he was obliged to cooperate with the investigation and that failure to do so could itself amount to misconduct and that the Committee would have to continue its investigation in the absence of a response. The Committee indicated that if he failed to provide the requested documentation within three weeks or withdraw the letter of the 23rd of January and answer the Committee's previous correspondence it would continue with the investigation.

29. The applicant's solicitor then wrote to the Committee on 15th March, 2013 explaining the background to the High Court proceedings as outlined above. The Committee was informed that in an affidavit filed in the case the respondents referred to the use of joint accounts by the applicant and the late J.G.G. and because this matter was now a matter of public record the applicant had been advised not to engage further with its investigation.

30. By letters dated 29th March, the Committee advised that it was not prepared to suspend its investigation without sight of the High Court proceedings and indicated that the allegations against the applicant amounted to more than the operation of joint accounts. The Committee stated that the applicant should be in no doubt that if he failed to either provide the requested documentation within the period allowed and answer the Committee's previous correspondence it would proceed with its investigation without his response.

31. By letter dated 19th April, the applicant replied stating that he had cooperated with the investigation even though he considered the complaint to be frivolous and vexatious. He expressed alarm at the Committee's statement that he could be liable to a finding of misconduct if he did not provide the requested documentation. He indicated that he was simply following the legal advice given to him by his solicitor. He wished to seek further legal advice as to how he should proceed in relation to the Committee's request and indicated that he would be in contact with the Committee on its receipt. He requested that the Committee confirm that this was satisfactory and would not cause him to be found guilty of misconduct.

32. On 26th April, 2013 the Committee unanimously determined that it would proceed to consider the complaint and that the applicant should be so informed. On 29th April, 2013 the Committee wrote to the applicant informing him that it did not agree that the complaint was frivolous and vexatious and that it was proceeding with its consideration of the complaint including whether his failure to provide the documentation or decline to answer its letter of 4th December amounted to misconduct of itself.

33. The Committee then wrote to J.D.G on 13th May requesting that he provide the Committee with any documentary proof that monies paid to the late J.G.G. as a State pension had to be returned to the Department of Social Welfare together with any documentary evidence that he made an application for a pension on the basis of information supplied by the applicant that was incomplete or erroneous. A document was furnished attached to an e-mail from the Department which raised the possibility that the late J.G.G. had been paid a pension to which he was not entitled and that those monies might have to be repaid.

#### **Determination of Investigating Committee**

34. An Investigating Committee may be established in accordance with the Disciplinary Scheme and prepares a Case Report in accordance with rules 4.23 to 4.25. This should contain a statement of all relevant facts thought to be material to the issue of misconduct and set out the determinations of the Committee. The Committee is obliged under rules 4.26 and 4.27 to:

"4.26 ... at the conclusion of its investigation, unanimously determine either

(a) that there is no *prima facie* case of Misconduct and no disciplinary action shall be taken against the respondent; or

(b) that there is *prima facie* evidence of Misconduct.

4.27 If, pursuant to rule 4.26, the Investigating Committee unanimously determines that there is *prima facie* evidence of Misconduct, the Investigating Committee, having regard to the gravity of the alleged Misconduct, shall further unanimously determine either:

(a) to recommend that the respondent accept that there has been Misconduct and where the Investigating Committee considers it appropriate that he agree to a sanction in accordance with the procedure in rules 4.32 and 4.33; or

(b) to refer the matters referred to in the Case Report to a Disciplinary Tribunal.”

34. The Investigating Committee furnished a draft Case Report to the applicant under cover of letter dated 26th June, 2013 which stated that the Committee had concluded its consideration of the matters and was currently of the view that there was *prima facie* evidence of misconduct by the applicant. The Committee afforded the applicant an opportunity in accordance with rule 4.30 to make any representation he might wish to the Committee prior to finalising its Case Report.

35. The referral of a Case Report to the Disciplinary Tribunal under Rule 4.34 of the Scheme takes the matter to the next stage. The Investigating Committee is responsible for framing the charges to be laid, a copy of which must be delivered to the applicant. A hearing is convened before the Tribunal at which the applicant may be legally represented and is entitled to call witnesses and cross-examine any witnesses called against him in respect of the alleged misconduct or mitigation as to sanction should that arise. The applicant must be given copies of all documents upon which it is intended to rely. There is provision for control by the Tribunal of its procedures. Rule 5.16 provides that the hearing be conducted in accordance with the principles of natural justice. A range of sanctions applicable to a finding of misconduct are set out in Rule 5.21 and the Tribunal may also make an award of costs against either party under Rule 5.23. The determination of a Tribunal may be appealed to an Appeal Tribunal under the procedures set out in Rule 6 which has the power to re-hear the case in whole or in part. The findings may be the subject of publication. These latter stages have not been reached in this case but the provisions demonstrate its tiered nature and the existence of extensive procedural protections provided by the Society under the Disciplinary Scheme to ensure that the principles of natural justice considered to be appropriate to each stage are observed.

#### **Applicant's Representations under Rule 4.30**

36. By letter dated 17th July, 2013 the applicant's solicitors addressed the draft findings set out in the Case Report which were substantially the same as those set out in the final Case Report set out below. The applicant claimed that he was not practicing as an actuary in respect of any of the matters complained whether by giving oral advice to or in discussions or meetings with his brother. He stated that the Committee's finding of *prima facie* evidence and misconduct were unlawful and that the terms of the complaint did not amount to misconduct as a matter of law. It was submitted that since the conduct was not connected with their client's activity as an actuary it would have to amount to infamous or disgraceful conduct for a *prima facie* finding to be made of professional misconduct which was unsupported by the evidence.

37. In respect of the estate of the late J.G.G. the applicant's solicitors submitted a copy of a signed statement made by the executor of his estate J.G., in which he stated that he had no complaints against either E.G. or his company.

38. The applicant's solicitors pointed out that he had never practiced as an actuary and no actuarial services were provided by him in respect of these matters. It was submitted that as a matter of law where a regulatory body disciplines a member it must differentiate between those acting in the course of their profession and those acting otherwise. Furthermore, the impugned behaviour must be significantly more egregious to qualify as professional misconduct when a regulatory body investigates the member acting outside the course of the relevant profession.

39. It was submitted that a regulatory body should exercise caution in a case where an individual is acting outside his profession and the individual has already been pursued in the High Court by a person having *locus standi* to do so. It was submitted in that context that the executor of the late J.G.G.'s estate settled the estate's action against the applicant on terms advised by senior counsel. It was submitted that terms of settlement were agreed and required implementation over an agreed period of one year. These terms remain confidential. J.D.G, the complainant to the Society was not a party to the settlement and it was submitted that this was in effect an attempt to pursue the applicant through different avenues notwithstanding the settlement of the estate's claim.

40. Each of the findings at para. 5 of the Draft Report was addressed. In particular, it was submitted that the nature and effect of the right of survivorship were explained to the late J.G.G. by the applicant on numerous occasions and that the applicant was also present when other persons explained the concept of survivorship including E.L.G (now deceased) and three other named persons.

41. In its reply to the submissions on 7th August, 2013 the respondent noted the claim that the applicant had previously advised J.G.G. as to the nature and legal effects of joint accounts and requested that the applicant provide any evidence corroborating that statement. In particular, it noted that the applicant had suggested certain named persons could confirm that they explained the concept of survivorship to the late J.G.G. The Committee sought supporting evidence of this.

42. In a letter dated 23rd August, 2013 the applicant's solicitor set out further submissions and in particular, stated that the best evidence available in proceedings of this nature was *viva voce* evidence which the applicant was willing to provide to the Committee. Copies of diary entries were also furnished demonstrating that the applicant met with the late J.G.G. for the purpose of providing oral advice in relation to the operation and legal effect of joint accounts before the Bank of Ireland joint account application form was signed by him and witnessed by Ms. E.L.G., dated 30th July, 1999. Furthermore, other diary entries in relation to a meeting on 30th January, 2000 concerning the operation of joint accounts with J.G.G., the concept of survivorship and the possibility of setting up an Irish Life policy were also furnished. The applicant was also willing to provide oral evidence that he explained the operation of joint accounts and principal of survivorship to the late J.G.G. at various times.

43. In a reply dated 30th September, 2013 the Society noted that the preliminary stage of the investigation had been conducted on the basis of correspondence and documentary evidence and was satisfied to continue the investigation on that basis. It would give full consideration to the documentation enclosed and the particular points raised.

44. The applicant's solicitors by letter dated 10th October, 2013 expressed disappointment that the Committee intended to continue the investigation on the basis of correspondence and documentary evidence and suggested that oral evidence was required in respect of certain matters which were central to the investigation in respect of which there was only sparse documentation. The applicant's solicitor also submitted that the absence of an oral hearing and an opportunity to cross-examine the complainant meant that the applicant's case could not be fully and fairly considered by the Committee particularly in respect of the issue of whether the principle of survivorship was explained to the late J.G.G.

45. By letter dated 1st November, 2013 the respondents acknowledged the offer made to give oral evidence to the Committee in which the question of cross-examination of the complainant was also raised. The Committee indicated that it considered that any oral evidence which the applicant might wish to tender on the advice given to his late brother on the effect and consequence of joint accounts could be given as effectively in writing. It requested that any additional evidence be submitted within seven days. It did not consider that the question of the cross-examination of the complainant was appropriate "at this investigative stage of the Disciplinary Scheme process which is seeking to determine whether or not there is *prima facie* evidence of misconduct on the part of your client".

46. In a further reply on 15th November, the applicant's solicitors stated that in the light of the Committee's continuing refusal to hear oral evidence from the applicant, they had decided to prepare a detailed written Witness Statement. The applicant contended that significant portions of J.D.G's complaint were untrue and as a result the applicant was prejudiced by the denial of an opportunity to cross-examine him. The Committee declined to delay matters any further.

47. The Investigating Committee having considered these submissions, in accordance with rule 4.26(b) determined that there was *prima facie* evidence of misconduct by the applicant. It decided to refer the matter in the Case Report to a Disciplinary Tribunal under rule 4.27(b). By letter dated 25th November, 2013, the Investigating Committee notified the applicant in accordance with rule 4.31 of the Disciplinary Scheme of this fact. On 26th November, a copy of the Investigating Committee's notification in accordance with rule 4.31 of the Scheme was sent to the applicant, the Committee on Professional Conduct and the Society.

### **The Findings**

48. Having set out the definitions of misconduct and unprofessional conduct under the Disciplinary Scheme the final Case Report stated the relevant facts as follows:-

"... the failure of the respondent to cooperate with the investigation has meant that the Committee has had to determine the relevant facts without having some answers and explanations sought from him but the Committee had extensive information before it in so doing. Bearing the above definitions in mind the Committee has determined the following facts to be relevant.

4.2 The respondent failed to answer the queries put by the Committee to him in its letter of 4th December, 2012 or to provide the Committee with the documentation relating to the High Court case as requested from him in its letter of 12th February, 2013. 4.3 In addition to holding joint bank accounts with [J.G.G.] in Bank of Ireland and An Post, while acting as his financial adviser, the respondent, by his own admission, through his company..., also entered into a broker/client relationship with his brother. While in a broker/client relationship with [J.G.G.], the respondent added his own name to the policies with Irish Life and Friends First. ...

4.4 The respondent withdrew the monies in the joint account he had with [J.G.G.] in Irish Life on 8th January, 2008. He lodged those monies in the joint account he held with [J.G.G.] in the Bank of Ireland on 13th May, 2008. On 20th May, 2008, while [J.G.G.] was still alive, he withdrew those monies from the joint account and lodged them in an account in his own name. There is no evidence that [J.G.G.] was advised in advance of that withdrawal or of the ultimate destination of these funds ...

4.5 The respondent maintains that he was entitled to the monies in the Irish Life joint account because the initial investment which was paid out of the joint Bank of Ireland account he held with [J.G.G.] was paid into the latter account entirely by him. There is no evidence available to the Committee to verify this. To the contrary the respondent has acknowledged to the Investigating Committee in his reply of 5th November, 2012 that [J.G.G.] had a claim on these monies along with all other monies held in joint accounts .... The respondent further maintains ... that in making the investment he did so in circumstances "when [J.G.G.] had no assets of his own". He has stated that he was "concerned at that time (January 2000) that he [J.G.G.] might need some help from me in his old age, as nobody else in the family seemed to be in a position to provide for him in those years after our mother died. However, [J.G.G.] at this stage owned all the stock on the farm ..... and a sum of €6,082.00 which had been left to him by his mother. If, as stated, the respondent was making provision for his brother's possible future needs, then it is not clear why he found it necessary to invest the money in joint names at that point. Either way, this statement suggests that the respondent gifted all or half the IR£30,000.00 to [J.G.G.] in 2000, so the basis for subsequently claiming it back seems unclear.

4.6 The respondent held a mandate from [J.G.G.] dated 31st October, 2005 to lodge any cheques addressed to [J.G.G.] in the joint account in the Bank of Ireland [J.G.G.] had with the respondent ... The proceeds of the Standard Life Policy were paid into this account as were cheques for farm payments from the farm ..... and cheques in respect of the sale of cattle. There is no evidence that the respondent at any time accounted for the monies in this account to [J.G.G.] nor is there any evidence that he at any time lodged any of his own money into this account.

4.7 There is no evidence that the respondent, as financial adviser, at any time explained to his client the survivorship consequences of holding money in a joint account with another person despite the fact that the respondent understood that his client was an unsophisticated person who had little comprehension of financial matters and the fact that he, the respondent, stood to benefit significantly if his client, who was older than him and in frail health, predeceased him...

4.8 The respondent sought and obtained [J.G.G.]'s signature to documents of significant legal import on 8th September, 2008, while [J.G.G.] was hospitalised. The respondent acknowledges that he did not advise [J.G.G.] to get independent legal advice before signing those documents despite the fact that the respondent was of the opinion some three weeks earlier that [J.G.G.]'s health had deteriorated to such an extent that he was, or had been, receiving strong medication that his capacity for decision making was affected (B27 and B29/30).

4.9 The respondent failed to reply to requests from [J.G.G. and his] ... solicitor for information concerning J.G.G.'s assets required by him for the purpose of completing [his] will. The respondent states that he decided not to provide this information because he had concerns that the solicitor had not been properly appointed. The respondent took no steps to resolve any concerns that he had about the solicitor being properly appointed...

4.10 The respondent acknowledges that he did not extract probate of his mother's will and that he refused to show that will to the complainant who was a beneficiary of it...

4.11 The respondent acknowledges that he dealt with the financial affairs of his deceased sister [E.L.G.]. However, the Investigating Committee has not been provided with any evidence to support a claim that her affairs were mismanaged by the respondent."

48. The findings of the Investigating Committee were stated at para. 5 of the Case Report:-

### **"5. Findings**

The Investigating Committee unanimously makes the following findings in accordance with rule 4.23 of the Disciplinary Scheme of the Society of Actuaries. Having regard to the gravity of the alleged misconduct the Investigating Committee has unanimously determined to refer the matter in this Case Report to a Disciplinary Tribunal in accordance with rule 4.27(b).

5.1 The Investigating Committee finds that the respondent placed himself in a conflict of interest situation in holding joint accounts and investments with his client and brother. The Committee considers that the respondent's failure to bring the conflict to his client's notice in writing was not acting in his client's best interest, was a breach of the Memorandum on Professional Conduct of the Society (Ref. 712. Paras. 8,12 and 13) and is *prima facie* evidence of misconduct.

5.2 The Investigating Committee finds that the placement of monies which the respondent held jointly with his client in an account in his own name without the advance written consent of his client or advising his client that this was going to be done was a breach of the Professional Conduct Standards of the Society (Ref. 713. Paras. 5, 1-3 and 6.1) and is *prima facie* evidence of misconduct.

5.3 The Investigating Committee finds that the respondent's claim to sole ownership of monies held in a joint account with a client without any documentary proof of that sole ownership, particularly when he was on notice from his client through his client's solicitor that he wanted these funds to form part of his estate (Ref. C26/27), is *prima facie* evidence of misconduct on the part of the respondent.

5.4 The Investigating Committee finds that the failure of the respondent to provide his client with any written account of his handling of monies held by them jointly was not acting in his client's best interest and is *prima facie* evidence of misconduct.

5.5 The Investigating Committee finds that the failure of the respondent to explain in writing to his client the consequences of the survivorship rules which governed the joint accounts he held with his client was not acting in his client's best interest, was a breach of the Memorandum on Professional Conduct of the Society (Ref. 7.12. Paras. 8 and 13) and is *prima facie* evidence of misconduct.

5.6 The Investigating Committee finds that the respondent's conduct in having his brother and client sign documentation of significant legal importance, while the respondent was aware that:

- (i) His brother was an unsophisticated person who had little comprehension of financial matters;
- (ii) The respondent stood to benefit significantly if his client predeceased him;
- (iii) His brother was hospitalised and seriously ill; and
- (iv) His brother was, or had been, receiving such strong medication that his capacity for decision making was affected, without advising him to seek independent legal advice before signing them is *prima facie* evidence of misconduct.

5.8 The Investigating Committee finds that the failure of the respondent to take any steps to resolve concerns which he had about the appointment of his client's solicitor so that his client's efforts to complete his will might be advanced was not in the best interest of his client and is *prima facie* evidence of misconduct. ...

5.9 The Investigating Committee finds as a matter of fact that the respondent refused to share information with the Complainant and with the late [J.G.G.]'s solicitor, despite having [J.G.G.]'s permission to obtain it and that this refusal is *prima facie* evidence of misconduct ...

5.10 The Investigating Committee finds that it does not have sufficient information to determine whether or not the respondent mishandled the financial affairs of his deceased sister [E.L.G.], and concealed certain assets regarding her affairs from the Revenue Commissioners.

5.11 The Investigating Committee finds that the respondent dealt with the application for a Non-Contributory Old Age Pension on behalf of [J.G.G.] [and] that the Committee has not been provided with sufficient evidence to support the allegation that in so doing the respondent withheld information from social welfare thereby causing the payment of a pension to [J.G.G.] to which he was not entitled. ...

5.12 The Investigating Committee finds that the respondent failed to extract probate of his mother's will and refused to show that will to the Complainant who was a beneficiary of it. However, the Committee finds that it is not sufficiently clear that the respondent was obliged to extract probate or to show or disclose the contents of the will in its entirety to a beneficiary.

5.13 The Investigating Committee finds that the failure of the respondent to answer the questions put to him in the Committee's letter of 4th December, 2012 or to provide it with a High Court documentation requested of him in its letter of 12th February, 2013, is a breach of his obligation as an associated member of the Society of Actuaries in Ireland under rules 1.12 and 1.14 of the Disciplinary Scheme of the Society to cooperate with an investigation established under the Scheme and is *prima facie* evidence of misconduct."

49. The reasons for the determination were set out at paragraph 2 of the notification of 26th November 2013 and are substantially reflected and stated in paragraph 5 set out above. The Committee considered from the evidence available that the Applicant mis-conducted the business affairs of his late brother [J.G.G.], his client in:

- "(i) placing himself in a conflict of interest situation by holding joint accounts and investments with his client and brother and failing to bring the conflict to his client's notice in writing;
- (ii) placing monies which he held jointly with his client in an account in his own name without the advance written consent of his client or advising his client that this was going to be done;

(iii) claiming sole ownership of monies in a joint account with his client without providing any documentary proof of that sole ownership, particularly when on notice from his client through his client's solicitor that his client wanted these funds to form part of his estate.;

(iv) failing to provide his client with any written account of his handling of monies held jointly with his client;

(v) failing to explain in writing to his client the consequences of the survivorship rules which governed the joint accounts he held with his client;

(vi) having his client sign documentation of significant legal importance while he was aware that;

(a) his client was an unsophisticated person who had little comprehension of financial matters;

(b) he stood to benefit significantly if his client pre-deceased him;

(c) his client was seriously ill and

(d) his client was, or had been, receiving such strong medication that his capacity for decision making was affected and without advising his client to seek independent legal advice before signing them.

(vii) failing to take any steps to resolve concerns which he had about the appointment of his client's solicitor so that his client's efforts to complete his will might be advanced;

(viii) refusing to share information with the Complainant and with his client's solicitor, despite having his client's permission to obtain it;

(ix) failing to answer the questions put to him in the Committee's letter of 4th December, 2012 or to provide it with the High Court documentation requested of him in its letter of 12 February, 2013."

50. Having considered the Investigating Committee's determination, the applicant's solicitors by letter dated 29th November, 2013, complained that the decision had been made in breach of the principles of natural justice. They also sought an undertaking that there would be no publication of the decision and that it would not be circulated to any other party pending initiation of High Court proceedings by way of judicial review.

51. A detailed response to this letter was furnished by the Society on the 9th December, 2013. It noted that it had already notified the respondent, the Committee on Professional Conduct, the Director of Professional Affairs and the complainant of its determination by letters dated 26th November. It stated that the applicant would have full opportunity to cross-examine all witnesses and call oral evidence at any hearing before the Disciplinary Tribunal. The Society rejected any allegation or breach of fair procedures or natural justice.

52. An application was made for leave to apply for judicial review shortly thereafter on 20th December, 2013.

### **Grounds**

53. The grounds upon which leave was granted raise a number of substantive issues.

54. The applicant complains that the definition of misconduct employed by the Investigating Committee is too vague and does not indicate with any particularity what conduct is covered. Furthermore, the applicant submits that the issue of misconduct did not arise as he was not acting as an actuary in the course of his dealings with his late brother. It is submitted that the Committee failed to consider representations made on his behalf and in particular, to consider those made in letters of 17th July, 23rd August and 10th October, 2013 referred to above. The applicant complains that he received no or no adequate reply to these submissions by letter and they were not addressed adequately or at all in the Case Report. It is submitted that the Committee failed to explain the elements of misconduct present in the case to warrant a finding of a *prima facie* case. It is claimed that the Committee failed to address or consider the claim made by the applicant that he never claimed sole ownership of monies held in joint accounts during his late brother's lifetime. It also failed to consider the submission made and the materials furnished in support of the proposition that he had maintained written records and produced and discussed those with the deceased. It is therefore submitted that the findings of fact in that regard are unsustainable. It was submitted that the Committee incorrectly accepted the veracity of the complainant's statements, submissions and correspondence and ignored contrary facts presented by the applicant. It is claimed that the applicant was prejudiced by the failure by the Committee to allow him to adduce oral evidence of the occasions upon which his brother was instructed on the nature and meaning of the right of survivorship and other dealings with his brother.

55. It is submitted that the Case Report is not confined to those matters which are properly the subject of a Case Report under paras. 4.26 and 4.27 of the Disciplinary Scheme but contains findings of fact which were prejudicial to the applicant without affording the applicant an opportunity to test the truth of those allegations. In addition, there was a failure to provide reasons or adequate reasons for findings of fact which lead to the finding of a *prima facie* case in each instance of alleged misconduct.

### **Is the Decision Amenable to Judicial Review?**

56. The Society is a company limited by guarantee. Article 2 of its Memorandum of Association sets out its objects which include the encouragement and promotion of principles of sound actuarial practice and the encouragement and assistance of study of actuarial science, the provision of training and the conduct of examinations. Article 2(v) provides that its object is also to "exercise professional supervision over the members of the Society". The Society derives its standing solely from its existence as a company limited by guarantee. Article 3 of the Articles of Association provides for five categories of membership of which "associates" is one. An associate under Article 4 may use after his names the initials ASAI. The applicant as an associated member of the Society is bound under Article 9(a)(iii) to further to the best of his ability the objects, interests and influence of the Society and to observe all Bye-laws. Any member who fails to observe the Articles of Association or the Bye-laws may be expelled from the Society by resolution but this is "without prejudice to any proceedings that may be had under any Bye-laws relating to professional conduct". A member may cease membership if he fails to pay the annual subscription for any year, subject to a resolution of the Council of the Society that the person should cease to be a member. A member may be removed from the Register of Members for the reasons set out at Article 13. This includes expulsion from membership pursuant to Bye-laws, rules or regulations made in accordance with Article 46 to which reference has already been made. Article 46 empowers the Council to make Bye-laws, rules and regulations relating to



"professional misconduct (including professional discipline) to be observed by all members ..."

57. The respondent submits that the Case Report of the Investigating Committee the subject of challenge is not amenable to judicial review under O. 84 because the Society is not a public law body and does not exercise public functions. It derives its existence solely from private law. The applicant is a person who applied to become an associate member of the Society, was accepted as such and paid his subscription in accordance with the rules of the Society. In doing so he agreed pursuant to contract and solely as a matter of private law to be bound by the Bye-laws, rules and regulations of the Society including its Disciplinary Scheme. It is submitted that if he has any remedy it lies in private law by way of declaration or claim for damages rather than by way of judicial review.

58. The principles governing this issue were considered by the Supreme Court in *Geoghegan v. the Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86. The respondent was incorporated by Royal Charter in 1888 which granted power to make bye-laws regulating its affairs provided these should not enter into effect unless permitted by the Privy Council in Ireland. The Royal Charter was amended by the Institute of Chartered Accountants in Ireland Act 1966 which provided that bye-laws made, altered or amended by the Institute should not have effect until they had been submitted to and allowed by the government. Resolutions were passed by the respondent which made alterations and amendments to its bye-laws concerning disciplinary matters and procedures in 1989 and were allowed by the government by instrument under seal. This permitted an amendment under which a Disciplinary Committee could impose penalties ranging from admonishment to exclusion from membership of the respondent if a complaint were upheld. It also provided for the rehearing of the complaint by an Appeal Committee with powers to affirm, vary, alter or rescind the order of the Disciplinary Committee. The applicant was a member of the respondent Institute and all members agreed to abide by the provisions of the Charter and the bye-laws. The applicant was referred by an Investigating Committee to the Disciplinary Committee of the Institute and sought orders quashing this decision and restraining any further action.

59. It was submitted by the Institute that the decision of the High Court (Murphy J.) was correct in holding that there was an insufficient public element in the affairs of the Institute to make it amenable to judicial review. Denham J. (as she then was) in dismissing the appeal, concluded that the Institute had a public law source and was satisfied that a decision of its Disciplinary Committee could be the subject of judicial review under O. 84. In reaching that conclusion the learned judge stated:-

"In view of the public nature of the source of the Institute, the functions of the Institute, and the nature of the contract between the applicant and the Institute, the subject of judicial review becomes part of the question of constitutional justice of the relationship. There are a number of important factors:-

- (1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.
- (2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.
- (3) The functions of the Institute and its members come within the public domain of the State.
- (4) The method by which the contractual relationship between the Institute and the applicant was created is an important factor as it was necessary for the individual to agree in a "form" contract to the disciplinary process to gain entrance to membership of the Institute.
- (5) The consequences of the domestic tribunal's decision may be very serious for a member.
- (6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially." (at page 131).

60. In that case the Disciplinary Committee was empowered under the Institute's bye-laws if it thought appropriate following proof of a complaint to apply various sanctions and publish them against a member. These included exclusions from membership, suspension from membership, the withdrawal of a practicing certificate, censor, reprimand, admonishment and/or fine. As was the case in respect of accountants who are members of the Institute, members of the respondent Society in this case are not authorised to practice as actuaries by statute. Though the disciplinary process was held to be reviewable under O.84, the reasons articulated by the members of the court for rejecting the institute's arguments were not uniform.

61. O'Flaherty J. (at p. 120) determined that though the High Court had decided this was not an appropriate case to be brought by way of judicial review, nevertheless he was satisfied that "the actual form of procedure used to judicially review an action by a body entrusted with great powers which can affect the livelihood of persons is of secondary importance. It may be that the most appropriate procedure in any given case is the one that gets the case on quickest ...". O'Flaherty J. dismissed the appeal. Blayney J. concurred with O'Flaherty J. Egan J. stated that judicial review could be brought in respect of any decision arrived at by the Committee and Hamilton C.J. concluded that the resolution of the issue between the two judgments was unnecessary for the determination of the applicant's appeal.

62. The factors relevant to the availability of the public law remedy is were further considered by the Supreme Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 which concerned the dismissal of a fire station officer from his post with no right of appeal. He obtained leave to apply for judicial review. It was submitted by the respondent that as a contract of employment existed between the applicant and the respondent, the matter was one of private law and therefore not amenable to judicial review. It was held that the decision was amenable to judicial review because the applicant was retained as an officer as distinct from an employee, his seniority in his place of work, the fact that the respondent was a public authority and that a fire service was an essential service which had to be provided or delegated by the State. Furthermore, the source of the respondent's powers were found in legislation and the consequences of the decision were very serious for the applicant. Although there was a contract between the applicant and the County Council it had a significant public element having regard to functions carried out by the County Council and the station officer which were "manifestly in the public domain of the State".

63. In *O'Connell v. the Turf Club* [2015] IESC 57 the Supreme Court considered the status of the Turf Club following the enactment of the Irish Horseracing Industry Act 1994. The court determined that the Act did not change the essential legal character of the Turf Club and did not render it a creature of statute though it was giving a certain disciplinary role under the Act within a "racing regulatory body". The Turf Club's ability to enforce compliance with its rules was grounded on the law of contract. Members of the club were bound by the rules of the club as a matter of contract and those who participated in races under its auspices were required to accept its rules. (*Rogers v. Moore and others* [1931] I.R. 24). However, that position had been altered by the 1994 Act which

gave it a recognised statutory role.

64. In a previous High Court decision Barr J. in *Murphy v. the Turf Club* [1989] I.R. 171 having reviewed the authorities concluded that judicial review did not then lie against the Turf Club because its jurisdiction arose purely from the fact of voluntary association. This of course predated the coming into force of the 1994 Act. The learned judge concluded that judicial review was not applicable because of the fact that "the relationship between the applicant and the respondent derives solely from contract, and in purporting to revoke the applicant's license, the respondent was not exercising a public law function".

65. The approach adopted by Barr J. was approved by the Supreme Court in *Beirne v. Commission of An Garda Síochána* [1993] ILRM 1. Finlay C.J. stated:-

"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of public law by persons or tribunals whose authority derives from contract is, I am quite satisfied, confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where the right to make it derives solely from contract or solely from consent or the agreement of the parties affected. Where the duty being carried out by a decision making authority as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of jurisdiction in judicial review if it can be shown that it solely and exclusively derived from individual contract made in private law."

66. In *O'Connell* the Supreme Court was satisfied that the position had changed by reason of the 1994 Act. O'Donnell J. in considering the effect of the decision in *Geoghegan* and the status of the *Turf Club* under the 1994 Act stated:-

41. The fact that the Court ( in *Geoghegan*) divided, and did so only tentatively, suggests that the case of the legal status of the Institute of Chartered Accountants, in 1994 at least, was on the very boundary of the line between those bodies subject to judicial review and those bodies which were not. It has been said, correctly I think, that the difference of emphasis depends on whether one views the issue as one determined largely by the source of the power, or whether one also should take account of the functions performed. Subsequent decisions of the High Court have tended to favour the approach of Denham and Egan JJ. I would have sympathy with the view that where it can be said that significant power is being exercised in respect of citizens with the approval of the legislature, whether express or tacit, that judicial review may lie to ensure that the exercise of such powers remains within their proper scope. It is however not necessary to decide the precise nature of the test which may be applied because in this case, on any view, it is clear that in the aftermath of the 1994 Act, the Turf Club as the Racing Regulatory Body is more clearly in the domain of public law than the Institute of Chartered Accountants was in *Geoghegan v Institute of Chartered Accountants*, and sufficiently within the field of public law and within the public domain, as to have the consequence that judicial review lies. Accordingly, even if this matter is approached simply as a matter of principle, I would conclude that the decisions of the Turf Club, as the Racing Regulatory Body after 1994, are amenable to judicial review although for the reasons set out above, that decision may have little practical consequence for the Turf Club since it is already obliged to operate fair procedures, and does so as a matter of private law, and to give reasons for its decisions."

67. In the present case the court is satisfied that there is no public law element in the source of the power vested in the Investigating Committee or any other designated body under the Disciplinary Scheme. There is no statutory oversight of the Society of the Actuaries. It has no disciplinary powers conferred by statute or statutory instrument in the public interest. It is a creature of private law the existence of which depends only upon the agreement of its members entered into freely on payment of a subscription. In addition, the court is satisfied that there is no public law element in its function. There may well be a public benefit from the existence of the Society of Actuaries in relation to the objects contained in its Memorandum and Articles of Association but that does not of itself confer upon it a public law function. It seems to me that its functions and existence are more analogous to those of the *Turf Club* pre-1994 which exercised a much more wide- ranging influence on the national economy and life when exercising its function than might be ascribed to the Society of Actuaries. The Society has no connection with the three organs of government other than that a member may be retained as an expert witness on occasion. An adverse finding and its publication may result in a negative effect on a member's standing and business but I am not satisfied that the Society and its members have that special connection with other organs or aspect of government described by Denham J. such as to require or permit its decisions to be the subject of relief under O.84 and it is some distance removed from the boundary reached by the Institute of Chartered Accountants between public and private law as described by O'Donnell J. in *Connell*. Accordingly, I am not satisfied that the decision of the Investigating Committee is amenable to judicial review.

68. The case falls to be considered as a matter of private law in respect of the reliefs sought in the plenary proceedings following the making of the order of Kearns P. on the 21st July, 2014 in accordance with the principles set out in *Glover v B.L.N Ltd.* [1973] I.R. 388. The court is satisfied that under the contract/agreement pursuant to which the applicant was granted membership of the Society he was entitled to the application of fair procedures in the taking of any decision which may affect his rights or impose liabilities. It is clear that if an allegation of misconduct, including professional misconduct, is made such as may lead to an adverse decision affecting the applicant's professional reputation, exclusion from the Society or other more limited sanction, the Society must conduct its investigation and consideration of the allegation in accordance with fair procedures appropriate to the nature of the allegation and each stage of the process. The court is satisfied that there is no difference in the standard of fair procedure to be applied in the applicant's case whether it is considered under an application under O. 84 or under the *Glover* principles.

69. The agreed basis upon which allegations of misconduct were investigated by the Society are set out in the Disciplinary Scheme the provisions of which were applied in the applicant's case.

### **Misconduct**

70. The 2006 Disciplinary Scheme defined "misconduct" in the following way:-

"... misconduct means any conduct, by a Member, whether committed in Ireland or elsewhere, in the course of carrying out professional duties or otherwise, constituting failure by that Member to comply with the standards of behaviour, integrity, competence or professional judgment which other Members or the public might reasonably expect of a Member having regard to any advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Society and to all other relevant circumstances."

71. In the 2011 Disciplinary Scheme "misconduct" is defined in slightly different terms as any conduct in the course of carrying out professional duties or otherwise constituting failure by a member to comply with the standards of behaviour, integrity, competence or professional judgment which other members or the public might reasonably expect of a member:-

"...having regard to any code, standard, advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Society, including but not limited to the Society's Articles of Association or Bye-Laws or Code of Professional Conduct or Actuarial Standards of Practice, and to all other relevant circumstances."

72. The applicant submits that the Investigating Committee was limited in its consideration to allegations of "professional misconduct". It was submitted that there were two broad headings under which misconduct could arise; the first, involved infamous or disgraceful conduct involving moral turpitude, fraud or dishonesty in a professional respect and the second, conduct which in a non-professional might ordinarily be regarded as infamous or disgraceful but which because it involves some moral turpitude, fraud or dishonesty and the members professional duties towards colleagues or clients, is capable of being regarded as infamous or disgraceful conduct in a professional respect. It is necessary to establish a "serious falling short" of the expected standards of the profession if the conduct is to be regarded as "connected with" the member's profession as an actuary.

73. The respondents submit that the definition of "misconduct" in the Disciplinary Scheme is not confined to "professional misconduct". It is not restricted to conduct involving actuarial services or advices. It is submitted that in a Disciplinary Scheme relating to a private professional body it is open to it to define misconduct by way of a broader definition. The applicant as a member of the Society agreed to be regulated by the Society to that standard. Misconduct in the Disciplinary Scheme is not restricted to a member's professional activities as an actuary.

74. A number of statutory bodies have been vested with authority to consider allegations of "professional misconduct". For example, under s. 45(1) of the Medical Practitioners Act 1978, the Medical Council or any person could apply to the Fitness to Practice Committee of the Council for an inquiry into the conduct of a registered medical practitioner on the grounds of alleged "professional misconduct". Under s. 45(3) if the Committee formed the opinion that there was a *prima facie* case for holding an inquiry or had been given a direction by the Council under subs. 2 to hold an inquiry, it must proceed to hold one. If it were proposed to hold an inquiry under subs. 3, the person who is the subject thereof must be given notice in writing of the nature of the evidence proposed to be considered at the inquiry and an opportunity of being present at a hearing convened in respect of the allegation.

75. The nature of what constitutes "professional misconduct" was considered by Keane J. in *O'Laoire v Medical Council* (unreported High Court, 27th January 1995) who set out the following principles:-

1. Conduct which is "infamous" or "disgraceful" in a professional respect is "professional misconduct" within the meaning of s. 46(1) of the Act.
2. Conduct which would not be "infamous" or "disgraceful" in any other person, if done by a medical practitioner in relation to his profession, that is, with regard to either his patients or to his colleagues, may be considered as "infamous" or "disgraceful" conduct in a professional respect.
3. "Infamous" or "disgraceful" conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.
4. The fact that a person wrongly but honestly forms a particular opinion cannot of itself amount to infamous or disgraceful conduct in a professional sense.
5. Conduct which could not properly be characterised as "infamous" or "disgraceful" and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute "professional misconduct" if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected among medical practitioners."

The learned judge did not ascribe any significance to the fact that the phrase "professional misconduct" was not qualified by the word "serious". It was only conduct which seriously fell short of the accepted standards of a profession that could justify a finding by his professional colleagues of "professional misconduct".

76. These principles were applied by Kelly J. (as he then was) in *Prendiville v. Medical Council* [2008] 3 I.R. 122. The learned judge in that case noted that s. 69(2) of the 1978 Act provided that it was the function of the Medical Council to give guidance to medical practitioners generally in all matters relating to ethical conduct and behaviour. A guide was issued in 1998 which defined professional misconduct as "conduct which doctors of experience, competence and good repute repudiate, upholding the fundamental aims of the profession, consider disgraceful or dishonourable", a definition which the learned judge considered to be the "perfect articulation of the 'moral turpitude' standard". A further edition of the guide post-dated the judgment in *O'Laoire* by three years and in the sixth edition Professional Misconduct was defined as:-

- (a) Conduct which doctors of experience, competence and good repute consider disgraceful or dishonourable; and/or
- (b) conduct connected with his or her profession in which the doctor concerned has seriously fallen short by omission or commission of the standards of conduct expected among doctors."

Subparagraph (b) articulated the "expected standards" test which was derived from *Doughty v. General Dental Council* [1988] A.C. 164. Kelly J. rejected the contention that this test could have been enforced at the time of the events in *Prendiville* as the guide had not been amended in that regard at that stage. The learned judge noted that the guide was published pursuant to statute which imposed a function on the Council to give guidance to the medical professional generally on all matters relating to ethical conduct and behaviour. It was acknowledged that one would not find absolute precision in a guide. However, he stated:-

"The notion of professional misconduct can change from time to time because of changing circumstances and new eventualities. It would be unreasonable to expect the Council to publish a catalogue of the forms of professional misconduct which may lead to disciplinary action. But if a new test is to be applied or a new species of conduct is to be regarded as amounting to professional misconduct, then one would expect the Council to notify its members of that. Indeed, that is precisely what it did by the publication of the sixth edition of the guide in 2004. ..."

It followed that the "expected standards" ought not to have been applied prior to the Council amending its guidelines.

77. The principles in *O'Laoire* were also applied to inquiries into professional misconduct in the nursing profession (*Perez v. An Bord Altranais* [2005] IEHC 400, [2005] 4 I.R. 298 and *Brennan v. An Bord Altranais* [2010] IEHC 193) which operated under similar statutory procedures overseen by An Bord Altranais.

78. The "misconduct" alleged in this case does not arise under any statutory provision or procedure of a disciplinary nature. The respondents Disciplinary Scheme offers a much broader definition of "misconduct". It means any conduct by a member "in the course of carrying out professional duties or *otherwise*, which constitutes failure to comply with the standards of behaviour, integrity, competence or professional judgment ... which other members of the public might reasonably expect". It is assessed having regard to any guidance or advice on professional conduct to practice or duties which may be given and published by the Society "*and to all other relevant circumstances*". As noted the Scheme was amended in 2011 and allows the conduct to be assessed having regard to any code standard, advice or guidance on professional conduct, practice or duties which may be given and published by the Society including but not limited to the bye-laws or code of professional conduct and all other relevant circumstances.

79. The applicant became amenable to the Disciplinary Scheme by virtue of his membership of the respondent Society. In becoming a member, the applicant submitted to the Society's disciplinary standards and processes and agreed *inter alia* to be bound by the terms of the Disciplinary Scheme. In particular, a member agrees to be liable to disciplinary action under the Scheme if he has been guilty of misconduct (para. 1.3) as defined under its provisions.

80. From time to time the respondent issued advices or memoranda on professional conduct. This took the form of a memorandum or statement of principles to which the Council expected all members to conform. The Society issued memoranda on professional conduct or advices from time to time between 1993 to 2012. The events the subject matter of the complaint occurred between 1998 and 2008 and thereafter in the course of the administration of the estate of the late J.G.G.

81. The findings of the Investigating Committee referenced the memorandum on professional conduct of the Society approved on 5th April, 1993 and subsequently revised on 8th October, 1997 and in particular, paras. 8, 12 and 13 thereof. Paragraph 8 provides that advice to a client must be unaffected by interests other than those of the client. Where there is or might appear to be a conflict of interest involving a member or his/her firm and the client, the member must consider the extent of the conflict and whether it is such as to make it improper for him to act. If he is satisfied that it is proper for him to act he should only do so after there has been full disclosure to the client of the conflict of interest. Paragraph 12 provides that a member must make full and timely disclosure to the client of any financial interests which he or his firm may have in any assignment he undertakes for the client. Para. 13 states under the heading "Independence" that if a member is to describe the advice he offers as independent he must be free and be seen to be free of any influence which might affect his advice or limit its scope. These paragraphs are referenced in the findings at paras. 5.1 and 5.5. The finding at para. 5.2 references the advice on professional conduct in its amended form to be used with the memorandum on professional conduct in respect of conflict of interest at para. 5.1-3 in respect of financial interests. It also refers to para. at 6.1 which obliges a member to make full and timely disclosure to the client of any financial interest which he or his firm may have in any assignment a member undertakes for that client or its outcome including direct remuneration, direct and indirect benefits, commission or fees paid by or to member or the members firm.

82. The court is satisfied that the allegations which were the subject of J.D.G's complaint and the findings by the Investigating Committee are such as to potentially amount to "professional misconduct" in the narrow sense canvassed by the applicant and certainly qualifies as "misconduct" under the definition set out in the Disciplinary Scheme. There is a clear implication from the complaint that the applicant has acted improperly in relation to funds which were not his own up to and including transferring funds which were jointly held with his late brother to his own account. It is clearly an allegation of dishonesty and at least improper behaviour and breach of trust. It is the type of conduct which may for a member of the Society amount to the "moral turpitude" giving rise to professional misconduct referenced by Kelly J. in *Prendville*.

83. The court is also satisfied that the scope of the activity relating to misconduct contemplated by the Disciplinary Scheme may be regarded as extending beyond the strict confines of "professional misconduct" as discussed in *O'Laoire* and *Prendville*. The applicant as a subscriber to membership of the Society has entered into an agreement to submit himself to the Disciplinary Scheme as a member of the Society and has agreed to be regulated by the Society pursuant to a definition of "misconduct" set out in the Scheme and subject to the advices and memoranda of guidance to which reference has already been made. The court is satisfied that a private professional body may regulate its membership and for that purpose may define misconduct in a manner which it deems to be appropriate. Thus a professional body may subject "discreditable conduct" to discipline and sanction. (see *Harris Disciplinary and Regulatory Proceedings 7th Ed.* (2013) p. 57.) The court is therefore satisfied that the definition of misconduct employed by the Investigating Committee is not vague. It is rooted in the definition set out in the Disciplinary Scheme and the advices and memoranda issued in respect of same. The elements of misconduct relied upon in the findings are clearly set out. The court is satisfied that these findings were made within the terms of the powers vested in the Investigating Committee and concern matters which are clearly capable of amounting to professional misconduct or misconduct as defined by the Scheme.

#### **Fair Procedures**

84. In *O'Sullivan v. Law Society* [2009] IEHC 632 the level of fair procedures appropriate to an inquiry in respect of an allegation of overcharging under s. 9 of the Solicitors Act 1994 was considered. Edwards J. stated:-

"What level of fair procedures and natural justice rights was the applicant entitled to?

It seems to this Court that the answer to this question depends upon the nature of the investigation being conducted by the Law Society. In very broad terms it can be stated that if an investigative process, or investigative processes (if two or more investigations are being run in parallel), has the potential to result directly in the making of an adverse finding or findings against, and/or the imposition of sanctions upon, the person under investigation that person must be afforded the level of fair procedures and respect for his/her natural justice rights appropriate to a formal disciplinary inquiry. If, however, an investigative process is in the nature of a preliminary step, in which the investigator does not have the power to make adverse findings against, or impose sanctions upon, the subject under investigation, and which involves merely the gathering and sifting of information which requires to be assessed in order to determine if there is a basis for the initiation of some further process in the course of which the subject will have a full opportunity to deal with relevant complaints or concerns, e.g. a formal disciplinary inquiry, then less formal procedures may be quite adequate and appropriate. ...

In the courts view it was not necessary for the first named respondent to afford to the applicant the full panoply of natural justice rights in the course of any investigation into his conduct (outside of and/or in parallel with, any s. 8 or s. 9 process that may also have been underway) prior to their invocation of s. 17. They were of course, obliged to treat him fairly but they were entitled to adopt less formal and more abridged procedures than in circumstances where s. 17 had actually been invoked."

85. The Supreme Court in dismissing an appeal against the judgment of Edwards J. [2012] IESC 21 was satisfied that the full panoply of natural justice rights does not inexorably apply at every phase of an investigative process. An appropriate standard of fair procedures must be applied at all stages of a tiered process. There may be situations in which a stronger degree of procedural

protection may be required having regard to the decision to be taken at an investigative stage or its potential consequences. The court should consider the nature of the decision made on its own terms but also in the context of the overall Disciplinary Scheme in that " successive steps must be considered not only separately but also as a whole" (Wade and Forsyth, Administrative Law (Oxford: University 10th Ed 2009 p.466) quoted with approval by Mc Kechnie J. at par. 76). A distinction may be drawn between the standard of fair procedures applicable to an investigation which is in essence "information gathering" and that applicable to the making of a finding that could lead to the conclusion of a complaint by its dismissal or sending it forward as in this instance to a further stage on a finding of a *prima facie* case. The court is satisfied that the Investigating Committee was involved in an information gathering process but also a decision as to whether a *prima facie* case existed in relation to a complaint of serious misconduct. The court is also satisfied that the procedures applied under the Scheme and in the instant case were fair, reasonable and proportionate to the issues raised and the consequence for the applicant of the finding of a *prima facie* case (see Mc Kechnie J. at paras 67-98). The court is equally satisfied that a full panoply of rights including an opportunity to cross-examine witnesses is not required at that stage.

86. A person subject to an allegation of misconduct must be informed of an intention to conduct an investigation and the basis upon which it is proposed to do so. In this case the Investigating Committee was vested with power to enquire into allegations made against the applicant and to consider whether there was a "*prima facie*" case established on the basis of the statements and materials submitted. The court is satisfied that the applicant was given full and detailed notice of the allegations made by his brother and a reasonable opportunity to respond by making such representations and furnishing such documentation in support of his case before the Committee determined whether there was a *prima facie* case. A full oral hearing will be required before the Disciplinary Tribunal following the referral in the course of which the full panoply of rights will be available as set out in the Scheme as already described.

### **Prima Facie Case**

87. The role and purpose of a preliminary inquiry into professional misconduct under s. 38 of the Nurses Act was considered in *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54. The Nursing Board received four complaints against the applicant, a mid-wife. In respect of the first complaint the applicant was informed of the complaint. Following a meeting of the Fitness to Practice Committee of the Board it decided that there was a "*prima facie*" case for the holding of an inquiry pursuant to s. 38. In respect of the other three complaints the Board made a decision to conduct an inquiry into the applicant's conduct without notifying her of their nature or intention to consider so doing. The applicant challenged the procedures adopted in relation to the three additional complaints. It was submitted that proper procedures were not followed because, unlike the first complaint, she was not notified of them and asked for her comments before a decision was made to set up an inquiry.

88. Hardiman J. delivering the judgment of the court on this issue noted that the decision to hold an inquiry under s. 38 required the Nurses Board to be satisfied that there was a *prima facie* case. If such a case were found to exist, the applicant would be faced with an inquiry at which she would have to defend herself at her own expense. Hardiman J. noted that a decision to hold an inquiry into the alleged misconduct of a professional person in the applicant's position was a "very grave matter". The consequences were clear including a potential restriction on her practice: this could be very damaging for a self-employed person rather than a public official who would be paid while under suspension. In addressing the role and purpose of the preliminary inquiry under s. 38, the learned judge stated that the Board ought to have notified the applicant of the complaints having regard to the nature and importance of the preliminary inquiry. It was a filtering process designed to avoid frivolous, vexatious or unnecessary inquiries. No reason had been advanced for failing to inform the applicant of the three complaints and the investigative process would not have been compromised or prejudiced by giving her notification and inviting submissions within a reasonable time.

89. The court held that the right to fair procedures required a process by which representations could be made but "not necessarily by oral hearing but in whatever way was necessary for her reasonably to make her reply". This was particularly important having regard to the expense and disruption of the applicant's practice, the distress and anxiety that she might suffer having regard to the likelihood of the complaint coming to the attention of various persons in the medical profession, her own profession as a mid-wife and the general public. Though there might be circumstances in which a Board will have to act rapidly and it is not practically possible to give notification of the complaint, such circumstances would be "extremely rare" and did not rise in that case.

90. I am satisfied that the procedures applicable to the investigation conducted by the Committee as to whether there was a *prima facie* case of misconduct were fair and appropriate to that stage of the disciplinary process. The applicant was given full notice of the allegations made against him. The correspondence exhibited in the affidavits and the decision itself indicates that extensive representations were received from and considered by the Committee before reaching its determination that a *prima facie* case existed. The applicant availed of his right to make representations personally and through his solicitors. He was furnished with and in reply, supplied relevant and significant documentation in respect of the issues raised. No decision was reached of a final nature against the applicant nor was any sanction imposed upon him. The Committee made no finding of fact or determination of veracity. That process is dealt with at the next stage under the Disciplinary Scheme. There will be an oral hearing before the Disciplinary Tribunal. The applicant is not entitled at the investigative stage under the Scheme or under the rules of natural justice to an oral hearing. The court is satisfied that the Investigating Committee was not obliged to conduct an oral hearing or to give the applicant an opportunity to cross-examine others in determining whether a *prima facie* case existed. The court is satisfied that the decision to proceed on the basis of the statements and documents furnished was reasonable and fair in the circumstances (see *O' Callaghan v Disciplinary Tribunal* [2002] 1 I.R.1).

91. The court also rejects the submission that the Committee failed to consider the representations made in the correspondence submitted to it by the applicant's solicitors: it is clear that it considered all materials and submissions. The function of the Investigating Committee was to determine whether there was a *prima facie* case. It had to consider whether the case has any real prospect of being established on the basis of the material placed before it (per Finnegan P. *Law Society v. Walker* [2007] 3 I.R. 581). There was an ample basis upon which to reach that conclusion. However, it is also clear that the Committee does not and did not make any findings of misconduct against the applicant. That decision could only be made in this case at the Disciplinary Tribunal.

### **Reasons**

92. The court is satisfied that the Investigating Committee had a duty to give reasons for its decision that there is *prima facie* evidence of misconduct and to refer the matter to a Disciplinary Tribunal (*Mallak v Minister for Justice Equality and Law Reform* [2012] 3 I.R. 297; *FP v Minister for Justice* [2002] 1 I.L.R.M.16; *Zatreanu v Dublin City Council* [2013] IEHC 556 and *Sandys v Law Society* [2015] IEHC 367). While it is not necessary in all cases to give an exhaustive analysis of every aspect of the case the decision-maker must make clear the "broad basis for a decision" and that it directed its mind to the issues before it.

93. The court has considered the extensive affidavits and exhibits in the case, the detailed correspondence and documentation and the extensive engagement between the complainant, the applicant and others and the Committee much of which has already been set out. The court is satisfied from the terms of this engagement and the contents of the determination reached and notified to the

applicant that the reasons given by the Committee were clear. The court is also satisfied that the Committee directly and fully addressed the issue of whether there was a *prima facie* case of misconduct by the applicant.

### **Conclusion**

94. The Court is satisfied that the Investigating Committee has complied with all of its obligations to accord fair procedures to the applicant under the Disciplinary Scheme to which he has subscribed and to which he is entitled as an associate member of the Society. It is an implied term of the applicant's agreement with the Society that he would be treated fairly and in accordance with the principles of natural justice under the Scheme and appropriate to the various stages of the disciplinary process including the investigative stage. For the reasons set out above I am satisfied that the decision reached by the Investigating Committee was not reached in breach of the applicant's rights to fair procedures or natural justice or in breach of the membership agreement between the applicant and the respondent or was otherwise contrary to law. The application is therefore refused.