Neutral Citation: [2014] IEHC 173

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2013 No. 662 J.R.]**

**BETWEEN**

**CATHERINE MCGOWAN**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**JUDGMENT of Ms. Justice Baker delivered on the 3rd day of April, 2014**

1. The applicant is a serving member of An Garda Síochána who is alleged to have committed various breaches of discipline in the course of her investigation, commenced in the year 2005, into a complaint of sexual abuse made by an identified individual against a Catholic priest.

2. On 4th August, 2011, Chief Superintendent Thomas Conway was appointed under the provisions of the Garda Síochána (Discipline) Regulations 1989 ("1989 Regulations") to investigate these alleged breaches of discipline on the part of the applicant. At the conclusion of his investigation, he formed an opinion that the alleged breaches of discipline were of such a serious nature that they warranted the holding of a sworn inquiry, and on or about 19th June, 2013, the applicant was given notice of the respondent's intention to hold such a sworn inquiry and of the appointment of Chief Superintendent Catherine Kehoe, Superintendent Mary Delmar, and Superintendent Patrick Murray to preside over that inquiry which was scheduled to open on 23rd July, 2013.

3. The applicant was notified of the intention to hold the sworn inquiry by a letter of 19th June, 2013, which was accompanied by a so-called "witness notification" which set out the alleged breaches of discipline in respect of which the investigation was to happen. This document requested the attendance of the applicant at the inquiry and it is clear from the recitals in the documents that the purpose of the inquiry was to establish material facts in relation to the alleged breaches.

4. By letter dated 19th July, 2013, Sean Costello & Company Solicitors who acted, and continue to act, for the applicant wrote to the Assistant Commissioner of An Garda Síochána raising a preliminary point that the inquiry proposed to be held under the Regulations was invalid as it was proposed to hold it under the 1989 Regulations, which had by then been replaced by the Garda Síochána (Discipline) Regulations 2007 ("2007 Regulations"). The reply from An Garda Síochána suggested that the matters should be raised by way of submission to the sworn inquiry and Mr. Costello appeared at the opening of the sworn inquiry on Tuesday, 23rd July, 2013, and made this preliminary objection.

5. It is not in doubt that the sworn inquiry proposed to conduct its investigations under the procedures and rules set out in the 1989 Regulations. The applicant argues that as these Regulations had been repealed and as the repealing provisions had the effect of requiring the new 2007 procedures be used in all investigations commenced after 2007 that, even in respect of matters which were alleged to have occurred before that date, the proposed inquiry was invalid.

6. The respondent argues that the effect of the repeal is not as argued by the applicant and that in truth the investigation started in 2005, before the 2007 Regulations came into force and that as the investigation was underway at the time of the repeal of the 1989 Regulations, it was saved, *inter alia*, by the provisions of s. 27(2) of the Interpretation Act 2005 ("Act of2005").

7. Counsel for the respondent also argues by way of preliminary objection that the applicant is out of time for bringing this judicial review and/or that the review is barred by delay, and points in particular to the fact that the investigation commenced on 4th August, 2011, and that it was clear from the documentation then served on the applicant that the appointment of the investigating officer was being made under the 1989 Regulations. She states that the applicant acknowledged this by her signature in receipt of this notice and may not at this stage seek to impugn the basis of the inquiry.

8. On 23rd July, 2013, Mr. Costello attended at the inquiry and made objection to the holding of the inquiry on the ground that the regulatory regime pursuant to which it was proposed to conduct the inquiry had been repealed and replaced by the new 2007 regime.

9. The Board of Inquiry heard the objection and held against Mr. Costello's objection and in so doing relied on a judgment of the Supreme Court, also relied on by counsel for the respondent in this case, *McGrath v. Commissioner of An Garda Siochana* (Unreported, Supreme Court, Finlay C.J., 26th January, 1993) which held that a disciplinary hearing in that case was not properly constituted as it was purported to be brought under regulations which had not been in force at the time of the alleged breaches. I will deal below more fully with the judgment of Finlay C.J. in that case.

10. Application for leave to apply for judicial review was then made on 2nd September, 2013, and leave was granted by White J. for the following reliefs:-

> (a) an order of *certiorari* by way of application for judicial review quashing the respondent's decision to commence and continue the disciplinary proceedings;
>
> (b) a declaration by way of application for judicial review that there exists no jurisdiction or lawful authority for the disciplinary proceedings which had been commenced concerning the applicant; and
>
> (c) an order of prohibition by way of application for judicial review restraining the holding of a sworn inquiry proposed to

be held on 24th September, 2013.

11. An order of prohibition was made placing a stay on the continuation of the sworn inquiry pending the outcome of the within proceedings.

**First preliminary objection: the applicant is out of time**
12. Counsel for the respondent submits that the proceedings were brought outside the time allowed by the Rules of the Superior Courts as the application for leave to apply for judicial review was not made within three months from the date when the grounds for the application first arose. Counsel submits that the relevant date at which time began to run was 11th August, 2011, being the date on which the applicant was notified of the investigation, receipt of which she acknowledged in writing. It is argued that from the date of the receipt of this notice, the applicant was aware that the investigation intended to be carried out by the respondent was under the 1989 Regulations.

13. Counsel for the respondent relies on the decision of Irvine J. in *Ernst & Young v. Purcell & The Institute of Chartered Accountants Ireland* [2011] IEHC 203 where the applicant sought to challenge the appointment of the first named respondent by the second named respondent as a special investigator to investigate alleged disciplinary breaches by the applicant of the rules of his professional body. Irvine J. held that the time for the bringing of an application to challenge the legitimate basis for the appointment commenced on the date when the applicant was notified and given a copy of the relevant instruments of appointment. Counsel argues that as the applicant seeks to challenge the lawfulness of the entire disciplinary process, time commenced to run when the first stage of that process was commenced and notified to the applicant.

14. Counsel for the applicant argues that time began to run at the date the applicant was given notice of the intention of the respondent to hold a sworn inquiry on 23rd July, 2013. Immediately upon receipt of the notice for the sworn inquiry, the solicitor for the applicant wrote to the inspectors raising the point made in these proceedings that as the 1989 Regulations had been revoked the intended sworn inquiry was not properly constituted.

15. Counsel for the applicant argues the applicant might well have taken the view that the holding of the initial inquiry by Chief Superintendent Thomas Conway and the appointment by the respondent of an investigating officer on 4th August, 2011, were matters in respect of which she did not wish to make complaint. The respondent had allowed a period of eighteen months to elapse before determining to establish an inquiry on 18th January, 2013, and the applicant might reasonably have taken the view in the context of earlier delay that the respondent might not convene a Board of Inquiry at all, and in the events this did not occur until 19th June, 2013, six months later. The applicant might have considered that the risk she faced became less with the passage of time.

16. I do not accept that this case may be decided in the light of the authority of the decision of Irvine J. of *Ernst & Young v. Purcell & The Institute of Chartered Accountants Ireland* and it seems to me what the applicant is challenging in this case is the decision of the respondent to convene a Board of Inquiry into the alleged breaches of discipline. Certain other procedural steps had taken place before the formal inquiry was convened and the applicant was entitled to, and did in fact, take a view that these may not have led to the holding of a sworn inquiry and was prepared not to challenge the earlier procedural steps taken by the respondent. The decision of Irvine J. was based on the fact that the inspector was appointed by instruments of appointment made on an identified date and that the process of investigation was commenced at that date and not at an earlier date.

17. The process available to the respondents under the relevant Regulations contains various stages, any one of which might lead to a decision to proceed or not proceed to the next stage, as the case may be. Those procedural stages have individual and separate procedural requirements and do not lead inexorably to the next. A determination to proceed from one of these procedural stages to the next is one that must be made and that decision to so proceed from one stage to the next is one which is capable of being impugned in proceedings before this court.

18. No application was brought to this court to extend the time for the bringing of this judicial review. It is my view that no application is required and the applicant was entitled to sit back at individual stages in the process in the hope that it would end at a preliminary stage and not proceed to a sworn inquiry. The matters sought to be investigated dated back as far as 2005 and an investigating officer was appointed on 4th August, 2011. Between August 2011 and 18th January, 2013, nothing happened, and again the applicant was entitled to reasonably assume or hope that the matter would end there. Given that the respondent delayed for a total of some eight and a half years between the happening of the events complained of and the final establishment of a sworn inquiry, the applicant could reasonably, and it seems did, take a considered decision not to challenge any of what might be called less formal or potentially less damaging procedures. My view is the applicant is entitled to challenge the individual and separate decision made on 19th June, 2013. It was at that point in time that a real risk to her had crystallised and at that time it was clear that the respondent intended to hold a formal investigation and establish a sworn inquiry for that purpose.

**Second preliminary objection: delay**
19. Counsel for the respondent argues that if this court determines that the application for judicial review was brought within time that the applicant should be denied relief on the grounds that she has been guilty of inordinate delay, such that the court should exercise its discretion to refuse the relief sought. In this she relies on the Supreme Court decision of *De Roiste v. Minister for Defence* [2001] 1 I.R. 190 where Denham J., at p. 210, emphasised the fact that "[t]ime is more of the essence, more urgent, in judicial review proceedings." Counsel argues that because the applicant has sat back and not asserted her rights by commencing these proceedings for judicial review at the time she became aware of the legal basis intended to be invoked by the respondent and that these were intended to be instituted under the repealed 1989 Regulations, prejudice has been caused to the respondent who has acted as if no such challenge should be brought.

20. Counsel for the applicant urges me to accept the conclusion of Edwards J. in *Gibbons v. Commissioner of An Garda Síochána* [2007] IEHC 266, where the learned judge rejected a similar argument by the respondent that the applicant was fully aware of all relevant matters for the purposes of instituting judicial review proceedings some years before the relief was sought by way of judicial review. He accepted the argument of the applicant that the respondent had suffered no prejudice by reason of any alleged delay, and that the applicant had acted promptly and within the three months specified in the Rules of the Superior Courts for the seeking of leave. The facts of that case are sufficiently similar to the instant case and I follow and accept the authority of the decision of Edwards J.

21. In the circumstances, I hold that the application was brought within time, and that the court should not exercise its discretion to strike out the proceedings for delay. I say this in particular for the reasons outlined above and because, in my view, the respondent did not suffer actual prejudice in the matter as the 1989 Regulations had been repealed some years before the procedure commenced and this is not a case where the procedural rules had been newly changed.

**The relevant disciplinary regimes**
22. The 1989 Regulations set out a procedure for the conduct of disciplinary inquiries into alleged breaches of discipline by a member of An Garda Síochána. The Regulations were procedural and substantive in nature and the schedule to the Regulations set out a number of classes of acts or omissions which might be characterised as a breach of discipline and in respect of which the inquiry might be had. Those 1989 Regulations came into operation on 1st June, 1989.

23. S.I. No. 214 of 2007 enacted the 2007 Regulations which made very substantial changes both to the procedure and substance of the 1989 Regulations. The 2007 Regulations came into force on 1st June, 2007, and Regulation 51 expressly revoked the 1989 Regulations.

24. Regulation 13 contains transitional provisions and provides as follows:-

> *Any proceedings in relation to a member under the Garda Síochána (Discipline) Regulations 1989 (S.I. No. 94 of 1989) which were commenced but not concluded before the commencement of these regulations may be continued as if these regulations had not been made.*

25. S.I. No. 620 of 2011, which came into force on 22nd November 2011, substituted a new Regulation 13 by, *inter alia*, adding subpara. (2) and (3):-

> *(2) Subject to paragraph (3), these regulations shall apply to any disciplinary proceedings initiated after the commencement of these regulations where the proceedings relate to a breach of discipline which is alleged to have occurred prior to the commencement of these regulations.*
>
> *(3) Where, in any disciplinary proceedings referred to in paragraph (2), it is determined that there has been a breach of discipline by a member, any disciplinary sanction imposed on the member in respect of the breach shall not exceed the sanction that could have been imposed in respect of that breach at the time the breach occurred.*

26. The question in these proceedings is whether the investigation in respect of this applicant was properly constituted, in that it was brought and sought to be continued under the repealed 1989 Regulations.

27. The relevant Regulation is the substituted 13(2) and it is not argued that Regulation 13(1), which was the saving provision found in the 2007 Regulations before the substitution, has any application as disciplinary proceedings were not commenced before the commencement of those Regulations in 2007. Regulation 13(2) has the effect that the 2007 Regulations apply to disciplinary proceedings initiated after the commencement of the Regulations in 2007 where the proceedings relate to a breach which occurred prior to the commencement of those Regulations.

28. The events which gave rise to the investigation occurred, or at least began, in the year 2005 and disciplinary proceedings were commenced after the coming into operation of the 2007 Regulations. The respondent argues that as Regulation 13(2) did not come into operation until November 2011, the respondent was entitled to conduct the inquiry under the 1989 Regulations and that the repeal of those Regulations in 2007 did not have the effect of leaving a lacuna in procedure for the conduct of garda disciplinary inquiries. She argued that in August 2011, when the investigation commenced, there was no mechanism available for the conduct of the investigation except the 1989 Regulations. She states that in those circumstances, the investigation was commenced lawfully in August 2011, in accordance with the law that then existed. The 2007 Regulations were amended in November 2011 but the amending provisions of Regulation 13(2) were not in force nor capable of being used in practice at the time this investigation commenced in August 2011. She relies on the saver provisions contained in s. 27 of the Act of 2005 which provides as follows:-

> *(1) Where an enactment is repealed, the repeal does not-*
>
> *(a) revive anything not in force or not existing immediately before the repeal,*
>
> *(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or*
>
> *(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.*
>
> *(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed.*

29. Counsel for the respondent submits that the 1989 Regulations are saved in the circumstances of this case in that the disciplinary proceedings commenced by the respondent are "legal proceedings...in respect of a right, privilege, obligation or liability acquired, accrued or incurred" under the repealed 1989 Regulations. She relies on the Supreme Court in *McGrath v. Commissioner of An Garda Síochána* (Unreported, Supreme Court, Finlay C.J., 26th January, 1993). This was an appeal brought by the applicant against a decision of the High Court refusing to prohibit the continuation of certain disciplinary proceedings commenced against the applicant pursuant to the 1989 Regulations. The complaints constituting the alleged breaches of discipline had occurred at a time when the Garda Síochána (Discipline) Regulations 1971 ("1971 Regulations") were in force, those Regulations having been revoked by the 1989 Regulations. The Supreme Court found that the respondent had acted unlawfully by purporting to maintain disciplinary proceedings against the applicant under the 1989 Regulations, when those Regulations were not in force at the time the alleged breaches occurred. The court held that the 1989 Regulations were, as were the 1971 Regulations, and indeed as are the 1989 Regulations and those of 2007, the subject matter of this application, twofold in their purpose and effect in that they provided procedures for an investigation of disciplinary offence and provided the offences themselves. The court held, at p. 8 of the judgment, that the substantive offences created by the 1989 Regulations "cannot possibly be applied...to conduct or events which have occurred before they were brought into force." The court considered the meaning of s. 22(2) of the Interpretation Act 1937, which is broadly similar to s. 27(2) of the Act of 2005, and held that that it was quite clear that the Commissioner had sought to bring disciplinary

proceedings under the 1971 Regulations. As that had not occurred, the applicant was entitled to an order of prohibition.

30. Counsel argues that the relationship between the 1989 Regulations and the 2007 Regulations is similar to that described by the Supreme Court as existing between the 1971 Regulations and the 1989 Regulations in *McGrath v. Commissioner of An Garda Síochána*. She says this is because the purpose and effect of both sets of Regulations is to create offences and to provide for procedures and, that applying the reasoning of the Supreme Court, the Act of 2005 saved the old procedural and substantive regime and for the same reasons as explained by Finlay C.J.

31. It is noteworthy that the judgment of Finlay C.J. in *McGrath v. Commissioner of An Garda Síochána* was to the effect that the creation of the offences by the 1989 Regulations could not apply to conduct and events before they were brought into force. The learned Supreme Court judge did not consider the procedural regimes sought to be created by the new 1989 Regulations and the Supreme Court's reasoning related to the substance of the allegations of misconduct and not the procedural regime created by the 1989 Regulations. To that extent it seems to me that *McGrath v. Commissioner of An Garda Síochána* raises different questions from those raised in this application where the plaintiff challenges the unlawfulness of the holding of the investigation itself rather than the substance of the alleged breaches of discipline. Further, that case concerned the purported application of Regulations not yet enacted at the time an alleged infringement occurred and the corollary of what occurred in this case, where repealed enactments were sought to be relied on.

**Are there accrued or acquired rights?**
32. Counsel for the respondent argues that the right of the respondent to bring disciplinary proceedings were rights that had been acquired at the time of the alleged breaches of discipline, albeit that the right to investigate did not accrue to the respondent until, to use the words of the Regulation, "it appears that there may have been a breach of discipline", *i.e.* at the time that the alleged breach of discipline carne to light. She argues that the right to investigate had been acquired in 2005 and is saved by s. 27(1)(c) of the Act of 2005 and under s. 27(2) of the same Act, proceedings could be instituted under the repealed Regulations.

33. Counsel for the applicant argues that the Act of 2005 does not save the proceedings and that the purpose of that Act is not to create a cause of action. He says the express saver provisions in the Regulations themselves preclude the operation of any saver provisions ins. 27 of the Act of2005.

**Discussion**
34. Section 27(2) of the Act of 2005 saves only rights and privileges which had been acquired or accrued at the time of the repeal. The question I must ask is whether the Commissioner had an acquired right or privilege to commence the disciplinary procedures at the time the 1989 Regulations were repealed. The respondent relies on the judgment of Dunne J. in *O'Sullivan v. Superintendent in Charge of Togher Garda Station* [2008] IEHC 78, related to the entitlement of the plaintiff to apply for the restoration of his driving licence and where the court held, as a matter of fact, that this right had been acquired on the conviction and consequential disqualification from driving as a result of the District Court order. The court looked to the definition in the concise Oxford Dictionary of the word "acquire" and noted it was defined there as meaning "come into possession of', and held that the plaintiff had on conviction a vested right to apply, in accordance with law, to have his licence restored on the making of an application, and that right had been acquired at the date of repeal and was saved by the Act of 2005. Nothing more needed to be done by the plaintiff to acquire the right which was fully vested on conviction.

35. The effect of the general saver provisions in the Act of 2005 was considered in a number of cases concerning applications for compensation under s. 55 of the Local Government (Planning and Development) Act 1963 ("Act of 1963"), which had been repealed by the Local Government (Planning and Development) Act 1990 ("Act of 1990"). In *J. Wood & Co. Ltd. v. Wicklow County Council* [1995] 1 I.L.R.M. 51 the applicant had sought planning permission before the Act of 1963 was repealed and sought compensation arising from the refusal to grant planning permission under the repealed Act of 1963. Costello J. held, at p. 56, that an applicant who had applied for development permission under the Act of 1963 "had acquired no right to compensation under the 1963 Act until a decision on the application had been made."

36. A similar decision was reached by the Supreme Court in *McKone Estates Ltd. v. Dublin County Council* [1995] 2 I.L.R.M. 283 and on a different statutory point in *O'Flynn Construction Ltd. v. An Bard Pleanala* [2000] 1 I.R. 497, relied on by counsel for the applicant, where the Minister for the Environment and Local Government made a new replacement statutory instrument, the Local Government (Planning and Development) General Policy Directive (Shopping), 1998 (S.I. No. 193 of 1998), which, *inter alia*, repealed the Local Government (Planning and Development) General Policy Directive, 1982 (S.I. No. 264 of 1982), on which the applicant sought to rely. Finlay Geoghegan J. stated, at p. 502:-

> *In other words, in a case where say the Statutory Instrument of 1982, was in force at the time of a decision made by the planning authority but revoked at the time the decision on appeal by the respondent, there would be no question of the decision of the planning authority being rendered void thereby avoiding the subsequent appeal procedure. Anything previously done under the revoked statutory instrument remains lawful. But that is of no help whatsoever to the respondent because it tried to apply the statutory instrument subsequent to its revocation.*

37. The planning cases where the Act of 2005 was held not to have saved rights under repealed legislation dealt with rights which were no more than a right to commence a process of application for compensation or planning as the case may be and I find the analysis in those decisions highly persuasive.

38. I am also persuaded by the judgment of Dunne J. in *Start Mortgages Ltd. & Ors. v. Gunn & Ors.* [2011] IEHC 275, in which she further considered the question of the preservation of rights. She distinguished her own judgment in *O'Sullivan v. Superintendent in Charge of Togher Garda Station* and held that the right to apply for an order for possession under the repealed s. 67(2) of the Registration of Title Act 1964 ("Act of 1964") was not an acquired or accrued right on the date of registration of the charge. She held that certain secured creditors who had the benefit of a registered charge could seek relief under s. 67(2) of Act of 1964 if proceedings had been commenced or the monies secured by the charge had become due in one of the number of ways in which she, and later judgments, identified. In explaining her decision in *O'Sullivan v. Superintendent in Charge of Togher Garda Station*, she pointed out that the applicant acquired the right to apply for a restoration of the driving license immediately upon the conviction and the consequential disqualification. As she put it:-

> *No further procedural step was necessary or required. After the relevant period of time had elapsed, the applicant had an accrued right and was entitled to apply for the restoration of the driving licence.*

39. In *Start Mortgages Ltd. & Ors. v. Gunn & Ors*., Dunne J. placed reliance on a proposition stated in *Bennion on Statutory Interpretation* (Lexis Nexis, 5th ed., 2010) at p. 309, and quoted the following with approval:-

*The right etc. must have become in some way vested by the date of repeal, ie. it must not have been a mere right to take advantage of the enactment now repealed.*

40. Of particular importance to the issue before me is that she distinguished a right and "a mere hope or expectation" and held that the right of the holder of a registered right to apply for possession was a right capable of being, but was not always in individual circumstances, preserved by s. 27 of the Act of 2005. She then went on to quote with approval a passage from the judgment of Lord Morris of Borthy-Gest in the case of *Director of Public Works v. Ho Po Sang* [1961] 3 W.L.R. 39, at p. 53 of the judgment, as follows:-

*It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act.*

**Application of the law to the facts of this case**

41. The investigation by the respondent of the alleged breaches of discipline on the part of the applicant commenced on 4th August, 2011. The investigation was purported to be held under the 1989 Regulations which had been repealed with effect from 1st June, 2007. The question I am asked is similar to that of Dunne J. in *Start Mortgages Ltd. & Ors. v. Gunn & Ors*., namely did the respondent have a vested right at the date of the repeal of the 1989 Regulations, on 1st June, 2007, to commence the process of investigation. Regulations 8(1) and 10(1) & (2) of the 1989 Regulations provide:-

*8(1) Subject to Regulation 7, where it appears that there may have been a breach of discipline, the matter shall be investigated as soon as practicable by a member not below the rank of inspector (in these Regulations referred to as an investigating officer) ....*

*10(1) Upon completion of an investigation under Regulation 8, the investigating officer shall as soon as may be submit to the appointing officer a written report of the investigation, together with copies of any statements made.*

*(2) Upon receipt of a report under this Regulation, the appointing officer shall without avoidable delay-*

*(a) decide whether or not to continue the proceedings under these Regulations, and*

*(b) if he decides to continue the proceedings, cause to be entered on a form (in these Regulations referred to as a discipline form) such particulars of the breach of discipline alleged as will leave the member concerned in no doubt as to the precise nature of it.*

42. The right to commence a statutory inquiry arose under the Regulations once the respondent had formed an opinion that the alleged breaches of discipline were of such a nature as to warrant the appointment of Chief Superintendent Thomas Conway, pursuant to Regulation 8(1), to carry out the investigation. While investigations, gathering and analysis of data occurred before August 2011, a decision needed to be made by the respondent to set in motion the inquiry and it was this decision that triggered that the right to avail of the statutory scheme created by the Regulations. It is at this point the right to commence the statutory process became vested and this occurred after the repeal of the 1989 Regulations. In light of the two lines of authority outlined above, I find that the respondent did not have an acquired or vested right to commence the inquiry at the date of the repeal that was capable of being preserved by s. 27 of the Act of 2005.

43. In the circumstances I find that the respondent did not at the date of repeal have a right to avail of the repealed enactment which could be saved by the Act of 2005.

**The express transitional provisions in the 2007 Regulations**

44. Counsel for the applicant also points to the fact that s. 27 of the Act of 2005 must be read in the context of s. 4(1) of the Act which provides:-

*A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.*

45. The 2007 Regulations contain express transitional provisions which I have detailed above. The amended Regulation 13(2) quite clearly makes those new Regulations applicable to all disciplinary proceedings initiated after the commencement of those Regulations in 2007. This was explained in David Dodd's text of *Statutory Interpretation in Ireland* (Tottel Publishing, 2008), at para. 4.47, as follows:-

*A contrary intention may arise in the enactment itself, in which case it takes precedence over the 2005 Act. An example of such a contrary intention being accepted arose in the Australian case of R. v. Gallagher [1986] 421 SASR 73, the court was satisfied that a contrary intention was made out and that the Repeal of the Evidence Act 1929 SA represented a change of heart and was intended to return the law to its State before the enactment of the 1929. To have held otherwise would have rendered nugatory the repeal and, in effect, perpetuated the repealed enactment. The factor at work in that case was the 'need in the public interest to have a governing legal rule ' and the degree of unlikelihood of the legislature intentionally creating a legal vacuum.*

A clear intention appears in Regulation 13, and this means, as a matter of law, that even were s. 27 of the Act of 2005 to save the provision, no saver would occur as a matter of law.

**Conclusion**

49. In the circumstances I am satisfied that the applicant has made out a case for an order prohibiting the holding of the sworn inquiry and I will hear counsel as to the form of the order.