**THE HIGH COURT**

**RECORD NO: 2015/86 SP**

**IN THE MATTER OF SECTION 39 OF THE NURSES ACT, 1985**

**Between**

**MARGARET MARIAN (RITA) DOWLING**

**Plaintiff**

**AND**

**AN BORD ALTRANAIS AGUS CNÁIMHSEACHAIS NA hÉIREANN (NURSING AND MIDWIFERY BOARD OF IRELAND)**

**Defendant**

**RECORD NO: 2015/87 SP**

**IN THE MATTER OF SECTION 39 OF THE NURSES ACT, 1985**

**Between**

**ELLEN TERESA ANNE CARROLL**

**Plaintiff**

**AND**

**AN BORD ALTRANAIS AGUS CNÁIMHSEACHAIS NA hÉIREANN (NURSING AND MIDWIFERY BOARD OF IRELAND)**

**Defendant**

**JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 25th January, 2017**

1. This case comes before the Court by way of an application pursuant to section 39(3) of the Nurses Act, 1985. The two plaintiffs, who are nurses, seek cancellation of a decision of An Bord Altranais (hereinafter 'the Board') made in March, 2015, that their names be erased from the register of nurses. The decision of the Board under challenge in these proceedings followed upon a Fitness to Practice Committee inquiry into certain allegations of professional misconduct on the part of the two nurses which arose in connection with the death of an elderly patient in a hospital in which they were working at the time. The Committee made certain findings of misconduct, and recommended that the two nurses be censured. However, the Board subsequently decided to impose the more severe sanction of erasure. In these proceedings, the plaintiff nurses do not challenge the findings of the Committee that they were guilty of professional misconduct, and confine their challenge to the sanction of erasure imposed by the Board. They do so on the ground that the Board failed sufficiently to take into account a number of distinct mitigating factors when considering what sanction to impose. The plaintiffs also contend that the decision of the Board imposing the sanction of erasure was invalid and unlawful because the Board lacked the necessary statutory quorum at the time of its decision. The latter point raises an issue with regard to the construction of certain provisions of the Nurses Act, 1985, and the Nurses and Midwives Act, 2011, as well an issue as to whether the Plaintiffs are estopped in the present proceedings from raising the issue of the Board's quorum in circumstances where the issue was not raised on their behalf at the time of the Board hearing in question.

**Chronology of Events**

2. As one of the complaints in this case is that the Board failed to take into account the lapse of time or delay in the case as a mitigating factor when considering the appropriate sanction, it is necessary to consider the chronology of events in some detail. There is no doubt but that a significant period of time has elapsed since the events which led to the inquiry, being the 22nd June 2006. This was the date of death of Ms. Hannah Comber, the elderly patient in the hospital in which the plaintiff nurses were working and in connection with whom the allegations of professional misconduct against the plaintiffs were investigated by the Fitness to Practice Committee. Accordingly, there was a period of almost 9 years between this event and the decision of the Board to impose the sanction of erasure.

3. On the 22nd June 2006, Ms. Hannah Comber, a long-term and highly dependent patient in the hospital in which the plaintiffs were on duty, died in the early hours of the morning. It subsequently transpired, on foot of the pathologist's examination and the other facts established, that the cause of her death was asphyxiation. It seems, from all the facts established, that this occurred because she slipped down in the chair in which she was sitting which had a restraint belt, which belt caused the asphyxiation . Some hours prior to her death, she had become agitated while in her bed, which was a frequent occurrence. The plaintiff nurses had arranged to take her from her bed and place her in the day room under the supervision of a care assistant, who remained with her at all times. Ms. Comber was placed in a chair which had a restraint belt. It seems likely that the care assistant fell asleep while supervising Ms. Comber and that the accident happened while she was asleep. In or about 5am, the care assistant raised the alarm that something had happened to Ms. Comber. The plaintiff Nurse Dowling arrived and made some efforts to resuscitate Ms. Comber using CPR, but discontinued these efforts shortly afterwards in the belief that Ms. Comber was already dead. The plaintiff nurse Carroll arrived on the scene shortly after nurse Dowling. The two nurses then transferred Ms. Comber to her bedroom, laid her out on her bed and changed her clothes. No doctor, ambulance or other person was summoned by them, and they went off duty at approximately 8am.

4. Before going off duty, Nurse Carroll completed two documents. Nurse Dowling was fully aware of the entries made by Nurse Carroll. The 'Heatherside Hospital night report' and the 'Communication Sheet' contained the following entries regarding Ms. Comber: *"remained restless, out to commode at 1.30am", "requested to get dressed and get up. Dressed and sat on chair in dayhall. Continued to talk loud until 4am. Dozed in chair until 5am. Slipped off chair. Unresponsive. Put back to bed. Vital signs absent RIP*". A nurse Crowley, who came on duty at 8am, was told that Ms. Comber had slipped down or slumped in her chair. She passed this information on to Dr. Kennedy, the doctor who subsequently attended the hospital at the request of Matron Moore, the Matron who came on duty the morning after the death of Ms. Comber. What is significantly absent from these entries and communications is any suggestion or hint that the death might have been caused by the restraining belt or that it might have been from anything other than natural causes.

5. Nonetheless, Dr. Kennedy was of the view that it was a coroner's matter because the death was unexpected and he contacted

the Gardai. Later that afternoon, the pathologist, Dr. Bolster, rang him to inform that the cause of death was consistent with asphyxia. This raised concerns, particularly in light of the absence of any information from the nurses that might have suggested anything unusual about Ms. Comber's death. Members of an Garda Siochana arrived at the hospital during the late afternoon of the 22nd June, 2006, to interview persons in connection with the death.

6. Nurse Dowling made a witness statement to the Gardai which was signed at 6.50pm. Nurse Carroll made a statement to the Gardai, which was signed at 10.35pm. The Gardai cautioned her during the taking of this statement, after she said that the care attendant had fallen asleep while looking after Ms. Comber. The Gardai then interviewed the care attendant who signed a statement at 1.00am on the 23rd June, 2006. The Gardai then decided to re-interview Nurse Dowling pursuant to caution by reason of differences between the other accounts given to them and her own account, and she signed this second statement at 2.15am on the 23rd June, 2006.

7. In addition to the Garda investigation, which, it should be said, did not lead to the preferring of any criminal charges, the events in question led to the holding of an inquest, the conduct of a HSE inquiry, and an inquiry by the Fitness to Practice Committee by the defendant Board. Obviously, the latter is the most relevant to these proceedings. The history of the proceedings before the Board and the Fitness to Practice Committee can be sub-divided into a number of separate periods.

*The first period: from the initial complaint to service of the documents for hearing (8th August, 2006 – 12th May, 2010)*

8. The first contact was made with the defendant Board on the 8th August, 2006. The Matron who came on duty the morning of the death of Ms. Comber, Matron Moore, wrote to the Board, making a preliminary inquiry as to who the appropriate persons or authorities were, to whom a complaint should be made. Apart from a holding letter, this letter was not responded to until the 19th December, 2006, over four months later, when the Board replied that, while a matter should be brought to the attention of senior nurse management, it was also open to any person to refer such a complaint to the Fitness to Practise Committee of the Board. The Board further noted a report in the Irish Times which referred to the death of Ms Comber and requested a copy of the report of any investigations carried out by the hospital into Ms. Comber's death. On the 28th December, 2006, Matron Moore again wrote to the Board, explaining that she had reported the death of Ms Comber to Senior HSE-South Management on 23rd June, 2006, and that an investigation process had commenced by the HSE-South in September and had not yet concluded. She indicated that the only report she had was her own written report into the death as submitted to the HSE. This was replied to by letter dated from the Board dated 18th January, 2007, seeking a copy of her report. A further letter from Matron Moore followed on the 22nd January, 2007, enclosing her own report and giving contact details for the person in the HSE dealing with the investigation. A meeting of the Board was held on the 15th February, 2007, at which the Board considered documentation furnished by Matron Moore together with copies of newspaper articles relating to the death of Ms. Comber. A decision was made to make an application for an inquiry into the fitness to practise nursing of the plaintiffs. This was communicated to the plaintiffs by letter dated the 2nd March, 2007. This early period of response to the letter of Matron Moore is not particularly impressive in terms of the speed of response on the part of the Board.

9. On the 4th April, 2007, the coroner's inquest into the death of Ms. Moore took place and evidence was heard from relevant persons, including the plaintiffs, the care assistant, the other nurses who took over duty from the plaintiffs on the morning in question, the Gardai, Dr. Kennedy, and the pathologist, Dr. Bolster. A verdict of death by misadventure was handed down.

10. On the 8th May, 2007, signed statements were furnished to the Board on behalf of the plaintiffs. On the 16th May, 2007, the Fitness to Practice Committee held a meeting and on the 24th May, 2007, the Committee wrote to the plaintiffs advising them that the Committee had decided that there was a *prima facie* case for the holding of an inquiry.

11. What is then notable is that it was not until 11th May, 2010 that a notice of an intention to hold an inquiry was served upon the plaintiffs, followed by service shortly thereafter of a book of documentation to be relied upon at the inquiry. This was three years after the Committee's decision that there was a *prima facie* case for the inquiry, and almost four years after the death of Ms. Comber. It has been argued on behalf of the Board that this lapse of time was due to the following factors: that the case was complex; that it was necessary to await the receipt of documentation from the HSE and the Garda Siochana; that for various reasons the Board is not anxious to deploy its compulsory statutory powers (such as the power to order production of documents) unless it becomes necessary to do so; and that the assembly of relevant documentation for the inquiry hearings must be comprehensive in order that the materials can be served on the parties prior to the hearing. I am not persuaded that the case was particularly complex, and indeed, most of the witnesses heard by the Fitness to Practice Committee were the same witnesses who had given evidence at the inquest. It might also have been possible to employ the Board's statutory powers of production at an earlier stage than they were, in order to speed up the process of obtaining documentation, for example, from An Garda Siochana. During one particular year, 2008, nothing appears to have taken place other than the sending of one letter to Matron Moore. Overall, the time lapse in this particular period appears to me to be excessive and responsibility for it can be laid almost entirely at the door of the Board.

*The second period: between the service of notice of intention to hold an inquiry to the commencement of the inquiry (May, 2010 – June, 2011)*

12. The hearings were originally scheduled for June, 2010, but were postponed on a number of occasions for a number of reasons. From my review of the correspondence in this period, it would appear that the adjournments were primarily granted at the request of the plaintiffs. One of the plaintiffs was suffering on an ongoing basis from stress, anxiety, and depression, and her husband also had surgery during the period. The other plaintiff also suffered from stress and anxiety, and underwent surgery herself. In contrast to the first period, this lapse of time cannot be laid at the door of the Board.

*The third period: the hearings before the Committee and the Committee's report (29th June, 2011 - 6th March, 2012)*

13. The inquiry was conducted by a Fitness to Practice Committee consisting of three members. The inquiry commenced with four members but, due to a family bereavement, the fourth member withdrew from further involvement in the inquiry after a certain point. A Senior Counsel acted as legal assessor on behalf of the Committee. Evidence was presented to the Committee by Senior Counsel acting on behalf of the CEO. The hearings took place between the 29th June, 2011, and the 6th March, 2012. The Committee heard evidence from a number of witnesses, including: the Sergeant and the Garda who had conducted the Garda investigations; the care assistant who was in the room with Ms. Comber when she died; four nurses; Mr. Ciaran Fahy, an engineer who gave evidence in relation to the restraining chair; Matron Mary Moore; Dr. Kennedy; and both of the plaintiffs. The report of Dr. Bolster, the pathologist, was agreed without her being called to give evidence. A large number of documents were also available to the Committee. Matron Moore gave evidence over a number of days and repeatedly expressed her view that the plaintiff's conduct amounted to a serious deficiency in a nurse's duty. Dr. Kennedy gave evidence, *inter alia*, as to why it was extremely important for nurses to keep proper records in relation to their patients, namely, because doctors and others rely heavily upon the information reported by nurses and that a relationship of trust between doctors and nurses is essential.

14. The Committee set out its findings in a report dated the 6th March, 2012. I will return to those findings in detail below. The Committee also made a recommendation that the appropriate sanction to be applied was one of censure.

15. Given the part-time nature of the work of committee members, and the number of hearing days that had to be held (10 in total), the period of time which elapsed during this period does not appear to me to be unreasonable.

*The fourth period: The period between the committee report and the first Board meeting (6th March, 2012 - 24th February, 2014)*

16. Most of the time lapse in this period is attributable to the fact that the plaintiff, Ms. Dowling, commenced judicial review proceedings in respect of the Committee's inquiry and report. Leave to bring these proceedings was granted on the 26th March, 2012. Ms. Carroll did not bring any such proceedings, but indicated that she would prefer her case to be kept together before the Board with that of Ms. Dowling. While the statement of opposition was not filed until the 11th June, 2013, it is also true to say that a complication was created by the fact that, in error, an incorrect version of the Statement of Grounds was initially sent to the Board on behalf of the plaintiff. This event led to a heated exchange of correspondence between the Board and the solicitor on behalf of Ms. Dowling. Ultimately, the proceedings were settled in such a manner as to enable the Board to proceed to consider the Committee's report. Having regard to all the circumstances as revealed by the correspondence in this period, I do not think the blame should be laid at anyone's door for this period of time. As indicated, the proceedings were settled and the settlement date was 6th January 2014. By letter dated 7th February, 2014, it was indicated that the Board proposed to hold a meeting on the 25th February to consider the committee report and this meeting duly took place.

*The Board meeting of the 25th February, 2014*

17. The transcript of this meeting was made available to the Court. There were more than 20 members of the Board present on this occasion. The significant events which took place on this occasion were as follows. The legal representatives on behalf of the plaintiffs accepted the findings of the Committee report and invited the Board not to depart from the recommended sanction of censure. The Board indicated that it was considering increasing the sanction to one of erasure. Following submissions on behalf of the plaintiffs, it was agreed that the Board would write to the plaintiffs setting out its rationale for doing so.

*The fifth period: between the first Board meeting and the second Board meeting (25th February 2014 - 24th March 2015)*

18. It is again, a striking feature of the history of the case that more than a year elapsed between the first and second Board meetings. A review of the correspondence indicates that this was for a variety of reasons. First, there was disagreement between the Board and the plaintiffs as to whether the Board had adequately set out its rationale for considering the sanction of erasure. Secondly, the plaintiffs raised a new legal issue concerning the validity of the Committee inquiry, namely that ministerial approval had not been obtained in respect of the committee's procedures. Thirdly, one of the plaintiffs became aware of the existence of an Irish Medicines Board report that might be relevant and asked the Board to obtain it and furnish it to them. Fourthly, certain adjournments were requested on behalf of the plaintiffs for a variety of reasons. Having reviewed the correspondence for this period, it does not seem to me that the Board can be faulted for the lapse of time, given the number of issues raised on behalf of the plaintiffs during this period.

*The Board meeting of the 24th March, 2015, and the letter communicating the Board's decision dated the 25th March, 2015*

19. Again, the transcript of the Board hearing was made available to the Court. Because of the quorum issue that has been raised by the plaintiffs in relation to this meeting, it is important to note that there were 9 Board members present on this occasion, in contrast to the attendance of over 20 members at the meeting the year before. Oral submissions were made on behalf of the plaintiffs relating to mitigation of sanction. Written submissions had previously been lodged on behalf of the plaintiff Ms. Dowling. The Committee did not indicate its decision on that date, the 24th March, 2015, but said that it would communicate its decision by letter.

20. By letter dated the 25th March, 2015, the next day, the Board communicated its decision to each of the nurses, stating, *inter alia*:

> "The Board, having confirmed the report of the Fitness to Practise Committee at its meeting on 25 February, 2014, and having considered submissions made on your behalf […] to include mitigating factors, decided that your name should be erased from the Register in accordance with Section 39 (1) of the Nurses Act, 1985.
>
> The Board was of the opinion that the sanction of censure as recommended by the Fitness to Practise Committee was not commensurate with the seriousness of the professional misconduct proven in the findings of the Fitness to Practise Committee of Inquiry. The Board was of the opinion that:
>
> - the proven allegations were of such a serious level as to undermine the reputation of the profession and the confidence of the public in the profession,
>
> - the misconduct was at the upper end of the scale of professional misconduct,"

It went on to state in relation to Ms Carroll, that:

> " - the withholding of information from relevant stakeholders i.e. Nurses, Dr. Kennedy and Southdoc and the omission of information from documentation was a very serious offence.
>
> The Board's rationale is based on the findings of allegation 1(b) and allegation 2 of the Fitness to Practise Committee of Inquiry Report"

And in relation to Ms Dowling that,

" - the failure to provide adequate care to the patient and the withholding of information from relevant stakeholders i.e. Nurses, Dr Kennedy and Southdoc and the omission of information from documentation was a very serious offence."

**The Findings of the Fitness to Practice Committee**

21. It is necessary to set out the precise findings of the Fitness to Practice Committee in relation to each of the plaintiffs. The findings were not identical in respect of each nurse. Further, each nurse was found guilty of some allegations, and not guilty of

others.

22. In relation to the plaintiff Nurse Dowling, she was found guilty of professional misconduct on a number of charges as follows:

> • Allegation 1(a): that she failed to provide adequate nursing care to Ms. Comber. This finding was based on evidence that, on finding Ms. Comber in the day hall, she failed to call an ambulance and failed to continue CPR until medical assistance arrived.
>
> • Allegation 1(b): that she failed to make a full and/or adequate record of relevant information, including Ms. Comber's condition, care, the circumstances of her death and/or events thereafter, and/or failing to ensure such records were made and/or kept.
>
> • Allegation 2: that she failed to inform nursing staff coming on duty after her and/or Dr Michael Kennedy and/or Southdoc and/or any other appropriate person of the full and/or true circumstances of Ms Comber's death either in a timely manner or at all. The Committee found that she had failed to notify others of important circumstances relating to Ms. Comber's death, including the fact that Ms. Comber was found with the lap belt around her neck or chest.
>
> • Allegation 3: that during investigations into the circumstances of the death of Ms. Comber, she furnished information to the Garda and/or hospital authorities which she knew was incomplete, inaccurate and/or untrue. The committee found that Nurse Dowling furnished inaccurate and/or untrue information to the Gardai in her first statement dated the 22nd June, 2006, in stating that she found Ms. Comber sitting on the floor with her back to the chair, having regard to the evidence of Ms. Margaret Bolster, Assistant State Pathologist, Mr. Ciaran Fahy, Consulting Engineer, and the conflicting and inconsistent evidence of Nurse Dowling herself.

23. It may also be noted that Nurse Dowling was found not guilty of a number of other charges. These were: that she had failed to accompany or keep a regular check on Ms. Comber throughout the night and/or ensure that this was done; that she had failed to ensure that Ms. Comber would be safe and/or secure whilst strapped in her chair; and that she failed to take any or any appropriate action to revive Ms. Comber by cardio pulmonary resuscitation (CPR), summoning an ambulance or medical assistance or otherwise. In relation to the latter charge, it was found that the evidence established that Nurse Dowling did take an appropriate action to revive Ms. Comber by initiating CPR, and that this was the precise scope of the allegation, notwithstanding that there were separate issues as to the adequacy of the CPR given and as to whether an ambulance or medical assistance should have been summoned. She was also found not guilty of a charge relating to moving Ms. Comber to her room following her death and/or changing her clothing. With regard to this allegation, the Committee said that it was not established that these actions were inappropriate, having regard to the lack of a stated policy to deal with unexpected deaths and the movement or otherwise of a deceased patient in those circumstances. She was also found not guilty of a charge that at the inquest into Ms. Comber's death, she made allegations that the Gardai and/or Matron Moore, had put inappropriate pressure on her to provide information to the death of Ms. Comber.

24. In relation to the plaintiff Nurse Carroll, she was found guilty of professional misconduct on a number of charges as follows:

> • Allegation 1(a): that she failed to provide adequate nursing care to Ms. Comber. The Committee found that there was an overall failure by Nurse Carroll to provide adequate nursing care to Ms. Comber, having regard in particular to the findings of the Committee under Allegations 1(b) and 1(d) as set out below.
>
> • Allegation 1(b): that she failed to make a full and/or adequate record of relevant information, including Ms. Comber's condition, care, the circumstances of her death and/or events thereafter and/or failing to ensure such records were made and/or kept. The Committee found that the night report was not a full and/or adequate record of all such relevant information, and had regard to the question which occurred to Nurse Carroll regarding the possibility that Ms. Comber had choked and the fact that Nurse Carroll had noticed that Ms. Comber's fingers were black.
>
> • Allegation 1(d): that she failed to take appropriate action to ensure Ms. Comber was properly observed and/or accompanied when she saw and/or heard that the care attendant with her was or might be asleep.

This finding was based on the evidence of Nurse Carroll herself, that she saw and/or heard that the care attendant, Ms. Keating, was or might be asleep.

> • Allegation 2: that she failed to inform nursing staff coming on duty after her and/or Dr Michael Kennedy and/or Southdoc and/or any other appropriate person of the full and/or true circumstances of Ms Comber's death either in a timely manner or at all. The Committee found that she had failed to inform these persons of important circumstances relating to Ms. Comber's death, including the question which occurred to Nurse Carroll regarding the possibility that Ms. Comber had choked and her observation of the blackened fingers.

25. Nurse Carroll was also found not guilty on a number of charges. These were: that she failed to accompany and/or keep a regular check on Ms. Comber throughout the night and/or ensure that this was done; that she failed to take any or any appropriate action to revive Ms. Comber by cardio pulmonary resuscitation (CPR), summoning an ambulance or medical assistance or otherwise; and that, following Ms. Comber's death, she had moved Ms. Comber to her room and/or changed her clothing when it was inappropriate to do so. It was not established that these actions were inappropriate, having regard to the lack of a stated policy to deal with unexpected deaths and the movement or otherwise of a deceased patient in those circumstances. She was also found not guilty of a charge that during investigations into the circumstances of the death of Ms. Comber she had furnished information to the Garda and/or hospital authorities which she knew was incomplete, inaccurate and/or untrue, which was referred to as allegation 3.

26. Having set out its findings, the Committee went on to recommend the sanction of censure, saying:

"The Committee felt that while this was a serious failure to deal with the aftermath of a serious incident, the Committee had regard to the fact that this was a once-off incident, the lack of a stated policy in the hospital to deal with unexpected deaths, and the insight displayed [by both nurses] at the Inquiry as regards the inadequacy of the documentation drawn up in the aftermath of Ms. Comber's death."

The Quorum Issue

*As to whether the quorum of the Board meeting on the 24th March, 2015, should have been 12 or 9 persons*

27. An issue raised in the case on behalf of the plaintiffs was whether the necessary quorum for the Board meeting of the 24th March, 2015, at which the decision was made to impose the sanction of erasure, was 12 Board members (as required by the Second Schedule to the Nurses Act, 1985, ('the 1985 Act')) or 9 members (as required by the Schedule to the Nurses and Midwives Act, 2011 ('the 2011 Act')).

28. Section 6 of the Nurses and Midwives Act, 2011, is also relevant to this issue which provides as follows:

> "6. (1) Notwithstanding the repeal of section 6 of the Act of 1985 by section 4—
>
> (a) the body known as An Bord Altranais, or in the English language as the Nursing Board, established by that section 6 shall continue in being and shall be known as Bord Altranais agus Cnáimhseachais na hÉireann or, in the English language, as the Nursing and Midwifery Board of Ireland, and
>
> (b) subject to subsections (5) to (7), anything commenced but not completed by that body, or the committee established under section 13(2) of the Act of 1985, before the repeal of that section by section 4 , may be carried on and completed by the Board (with its membership as constituted under this Act) or that committee (with its membership as constituted under section 13 of the Act of 1985), as the case requires, after such repeal as if sections 6 and 13 of the Act of 1985 had not been repealed."

29. The Board meeting on the 24th March, 2015, commenced with a hearing attended by legal representatives on behalf of the plaintiffs. The Board members introduced themselves and it was therefore plain that there were only 9 Board members present. Nothing was said by either side about this matter at that time. There were then addresses to the Board from their own legal adviser, the legal representatives on behalf of the plaintiffs, and the legal representative on behalf of the CEO of the Board. The Board then withdrew to consider the matter in private, and a decision was reached to impose the sanction of erasure. This decision was communicated to each of the Plaintiffs by letter dated the 25th March, 2015.

30. It was argued on behalf of the plaintiffs that a quorum of 12 applied and that the entire procedure was required to be conducted pursuant to the procedures laid down in the 1985 Act, up to and including the sanctions to be applied and the application to this Court, which was brought pursuant to section 39 of the 1985 Act. It was argued, more particularly, that the effect of s.6 (1) of the 2011 Act was that the entirety of the procedures of the 1985 Act applied to a proceeding commenced before the 2011 Act came into force, with a limited exception concerning membership only, and that the quorum issue was not a 'membership' issue, and therefore, that the quorum of 12 applied, as per the 1985 Act.

31. Counsel on behalf of the defendant Board argued in the first instance that the quorum point had not been pleaded by the plaintiffs with regard to the Board as distinct from the Fitness to Practice Committee. In this regard emphasis was laid on the wording of the relevant paragraph of the plaintiffs' pleadings which read as follows:

> "Without prejudice to any of the foregoing, the Defendant confirmed the findings of the Committee and proceeded to sanction the Plaintiff in circumstances where *the Committee lacked jurisdiction* to convene an inquiry under Section 38 of the Act by virtue of the following; (a) Ministerial approval for the regulations purporting to govern the Committee's procedures was not obtained as required by Section 26 of the Act; (b) the Committee lacked sufficient quorum to fulfill its functions under the Act; (3) The statutory quorum required for erasure from the register was not complied with by the Defendant."

It might indeed be said, strictly speaking, that the three sub-paragraphs are governed by the phrase italicised above, which would limit the issue pleaded to the quorum of the Committee only. On the other hand, subparagraph (c) clearly refers to the quorum required for erasure, and only the Board can impose the sanction of erasure (or indeed any sanction). I am inclined to give the plaintiffs the benefit of the ambiguity and to hold that the quorum issue should be considered by the Court and not excluded simply by reason of the manner in which matters were pleaded.

32. Counsel on behalf of the defendant Board also argued that the 2011 Act quorum of 9 applied, by reason of s6(4) which provides simply that "The Schedule applies to the Board", and that the phrase "with its membership as constituted under this Act" in section 6(1)(b) encompassed the quorum issue. It was also argued that the interpretation contended for by the plaintiffs would lead to an absurd situation, whereby the Board, if dealing with different cases, some commenced before and some after the 2011 Act, would have to employ different quorums. It was contended that this absurdity could be avoided by the application of s.5(1)(b) of the Interpretation Act 2005.

33. Extracting from section 6 of the 2011 Act the precise words which are applicable to the Board, the following are the relevant provisions; section 6(1) provides that, notwithstanding the repeal of section 6 of the 1985 Act, anything commenced but not completed by the Board (with its membership as constituted under this Act) before the repeal may be carried on and completed by the Board after such repeal as if section 6 had not been repealed. Thus, all of section 6 of the 1985 Act, which includes the Second Schedule with its quorum of 12, continues in force, unless the issue of quorum falls within the term 'membership'. It seems to me that the plaintiffs are correct that the number of persons necessary for a quorum is not a 'membership' issue and that 'membership' refers to the identity and qualifications of the persons who may sit on the Board. The 2011 Act reduces the Board's membership from 29 to 23 persons and alters the composition of the Board in various respects. It seems to me that the purpose of the words in brackets in section 6(1) of the 2011 Act i.e. 'with its membership as constituted under this Act', was to ensure that any changes in personnel on the Board arising from these changes would not render invalid anything being done by the Board which straddled the period before and after the commencement date of the 2011 Act. Other than this specific issue of membership, however, the position is that the Board must proceed 'as if section 6 had not been repealed', which means that the Second Schedule to the 1985 Act applied and therefore the quorum of 12 was required. I am not persuaded that the result is an 'absurdity' for the purpose of applying the Interpretation Act 2005; different quorums apply for different matters during a transitional period, but while perhaps logistically inconvenient, it is not all that difficult to achieve. It does not seem likely that applications involving erasure of a nurse from the register arise very frequently before the Board. In this particular case, it seems that the only issue for the Board meeting on the 25th March was this particular case, and if it had been thought that a quorum of 12 was required, no doubt it would have been arranged that the required number of persons be in attendance.

34. If I am correct that, strictly speaking, the statute required that this Board meeting required a quorum of 12, the next issue is whether the plaintiffs are estopped from raising this ground in the present proceedings by reason of the fact that the point was not raised at the hearing itself on their behalf.

*As to whether the defendants acquiesced in a hearing by a non-quorate Board and/or waived their right to object in that regard*

35. The defendant Board argued that, even if the plaintiffs were correct that the Board was non-quorate on the 24th March, 2015, they had acquiesced in the hearing and/or waived their right to raise this issue before the High Court, having failed to raise an objection at the Board meeting, in circumstances where it was clear to them that there were only 9 Board members in attendance on the occasion in question. The plaintiffs argued that what the authorities in this area condemned was a litigant keeping in reserve a point of objection of which he was actually aware at the time of the hearing, but they submitted that this was not the case here, as they were not aware of the defective quorum at the time of the Board meeting in question. Counsel for the Board objected that there was no evidence before the Court as to the state of knowledge of the plaintiffs or their legal advisers at the time of the hearing.

36. While the hearing was ongoing before the Court, additional affidavits were sworn on behalf of all parties. These dealt with a discrete issue, namely whether a document entitled 'Procedures of the Board when considering reports of the Fitness to Practice Committee pursuant to Part V of the Nurses Act, 1985' had or had not been sent by the Board to the plaintiffs by letter dated 7th February, 2014. This document made it clear that the Board took the view that the quorum of 9 provided for by the 2011 Act applied. An affidavit sworn on behalf of the Board averred that a letter of this date, enclosing the Procedures document, had been sent to the plaintiffs and their solicitors. The solicitor on behalf of Nurse Dowling averred that his electronic record of all correspondence received from the Board suggested that he did not receive the letter of 7th February, 2014 at that time, but he accepted that he received a subsequent letter dated 24th February, 2014 which enclosed the letter of 7th February, 2014 although not the attachment to that letter. Neither the solicitor nor his client and her husband had any recollection of ever seeing the Procedures document. A further affidavit sworn on behalf of the Board averred that that the usual practice was for a staff member to lift a Procedures document from a stack of such documents kept in the office for this purpose and to enclose it with what is a standard form letter inviting a nurse to a Board meeting following a Fitness to Practice inquiry. Further, the letters had been sent by registered post and the Board exhibited evidence showing barcodes, suggesting that both the solicitor and Ms. Dowling herself had received the letter. Nurse Carroll averred that she had received the letter of 7th February, 2014 but that she did not believe she had received the Procedures document and that her box of documents did not contain it. The Board produced barcode evidence relating to the receipt of the letter in her case also.

37. At the very least, the plaintiffs and their representatives were on notice that there was in existence a document setting out the procedures of the Board. Further, insofar as it is necessary to do so, I find on the balance of probabilities that both solicitors received the letter of the 7th February, 2014. I also find on the balance of probabilities that the Procedures document was enclosed with the letter, for two reasons. First, it was the usual practice for a staff member sending such a letter to lift a Procedures document from a stack in the main office of the department and to enclose it with the letter; there would have been no reason for this practice not to have been followed in this case. Secondly, there was no complaint from the solicitors for the plaintiffs that the enclosures had not arrived with the letters. Given the rigorous nature of the correspondence from solicitors on behalf of the plaintiffs throughout the process, I accept the Board's argument that it is highly unlikely that such an important matter would have been overlooked i.e. that they would not have followed up, at the time, on a letter which referred to an enclosure consisting of the Board's procedures, which was not accompanied by the enclosure itself. But perhaps most importantly of all, the relevant provisions concerning the quorum are set out in legislation, and the number of Board members present on the 24th March 2015 was, visibly, 9. Accordingly, it seems to me that the question of whether the plaintiffs and their legal representatives received the Procedures document in advance of the Board hearings is something of a side issue. The argument on the quorum issue is founded upon legislative provisions.

38. From all of the evidence in this part of the case, it seems to me that the most likely situation is that the matter of the necessary quorum for the Board hearing was simply not adverted to by the lawyers on behalf of the plaintiffs at the second Board hearing, through simple oversight. I take this view as a matter of inference from the totality of the evidence regarding the general approach of the plaintiffs and their legal teams, which was one of raising every possible point in relation to procedures throughout the process. For example, they had, interestingly, previously raised the issue of the quorum for the Fitness to Practice Committee in correspondence and they had also raised, both in correspondence and at hearing, an issue regarding ministerial approval for the procedures of the Committee. In general, it seems fair to say that all matters were keenly contested. I think it unlikely that, if they had been actually aware of the non-quorate status of the Board on the 25th March, 2015, they would have simply sat on their hands and raised no objection at that time. I note also that Nurse Carroll in her affidavit of 14th October, 2016, avers that on the date of the Board meeting, she was not aware of any issue relating to the quorum nor did her legal advisers discuss it with her.

39. It seems to me, therefore, that the issue of estoppel falls to be decided on the basis of the following matrix of facts which I find on the balance of probability: (1) that there was knowledge on the part of the plaintiffs of the essential fact which would have grounded an objection i.e. (the fact that there were only 9 members on the Board on the day of the hearing); and (2) that the legal advisers, through simple oversight, had probably not given consideration to the legal significance of the fact that there were only 9 members present. I do not consider it likely that they considered that they had a legal ground of objection and deliberately chose not to raise it at the hearing. The question is whether, in those particular circumstances, they are estopped from raising the jurisdictional issue at this stage. For guidance on this particular configuration of circumstances, I have considered the authorities to which I was referred.

40. In the landmark estoppel case of *Corrigan v. Land Commission* [1977] I.R. 317, it was held that the appellant was estopped by his conduct from questioning the competence of two lay commissioners to adjudicate upon his objection to the provisional list describing land to be acquired compulsorily because he had failed to raise any objection to them at the hearing. Key to this conclusion was that the appellant knew at the time of the Tribunal hearing that the two lay commissioners in question had signed the certificate that the land in question was required for that purpose. Henchy J. said, *inter alia*:-

> "I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, he expressly or by implication acquiesces at the time in that member taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had. The rule was bluntly and pithily expressed as follows by Lord Denman in *R. v. Cheltenham Commissioners* 19 :—
>
> > ". . . if all parties know that he [a magistrate] is interested, and make no objection, at any rate if there be any thing like a consent, . . . or if he take a part upon being desired to do so by all parties, in all these cases it would be monstrous to say that the presence of the magistrate vitiated the proceedings.""

41. He also referred to the point being 'knowingly waived by counsel for the appellant when they elected to accept the tribunal as they found it composed on the day of the hearing'. He went on to say, in a celebrated passage:

> "The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that

nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

It may be noted that the above quotations from this leading case refer both to knowledge of the 'facts' and to the issue of 'concealment' of a complaint. It does not seem to me that it addresses the specific difficulty in the present case, namely the disjunction between the plaintiff's knowledge of the relevant fact (that there were 9 Board members) and their oversight of the potential legal significance of this fact (that the Board might not be quorate).

42. The decision in *Kennedy v. DPP* [2012] IESC 34, is to my mind similar to Corrigan insofar as the issue concerned a complaint of objective bias which was based on facts which were known to the person at the hearing but not raised at that time. In that case, the High Court judge hearing the case had viewed certain documents and considered them 'highly prejudicial' to the applicant, but was not asked to recuse himself. The subsequent attempt to suggest that he should not have continued to hear the case failed by reason of the failure to raise objection at the time of the original hearing. Again, there was no issue as to a lack of awareness of the significance of a legal point, as arises in the present case.

43. The case of *Moran v. O'Sullivan* [2003] IEHC 35 involved racehorse owners who sought to complain in judicial review proceedings about the fact that they had not been notified of or entitled to attend a steward's inquiry which led to the suspension of their horse. However, they had appealed from the stewards inquiry to the relevant committee of the Turf Club without making any point about the absence of fair procedures, and it was held that having played a full part in the inquiry by the Committee without raising any question as to its jurisdiction, they were estopped from challenging the result. Again, the case is different from the present case insofar as there was no issue of inadvertence to a potential legal ground of objection based on a statutory provision.

44. In *Delaney v. Central Bank of Ireland* [2011] IEHC 212, a case in which the plaintiff, an employee of the defendant, challenged a decision by the Bank to the effect that he was not fit for work on grounds of his mental health, the plaintiff, with the benefit of legal advice, agreed to attend an interview with a psychiatrist on a direct referral by his employer Bank. It was held that in those circumstances, the direct referral of the plaintiff by the Bank to the psychiatrist was not open to challenge on the grounds of unfair procedures. In *Kelleher v. An Post* [2016] IECA 195, the appellant claimed a lack of fair procedures in relation to a disciplinary process which ultimately led to his dismissal as postmaster. The Court of Appeal held that the appellant, having fully participated at all stages of the procedure without objection, was estopped from complaining about the procedures. In neither of these cases was there any issue as to the person or his legal adviser being unaware of a potential jurisdictional problem by reason of a statutory condition, as arose in the present case.

45. There are, however, a number of cases which appear to me to be more pertinent to the issue arising in the present case. In *State (Byrne) v. Frawley* [1978] I.R. 326, the prosecutor failed to raise a legal issue of significance either at the time of his trial or on appeal. The decision in *de Burca v. Attorney General* [1976] I.R. 38 had been handed down before the prosecutor's trial had come to a conclusion, but no issue as to the composition of the jury was raised on his behalf either at his trial or on his appeal, or in his application for further appeal to the Supreme Court pursuant to s29 of the Courts of Justice Act 1924. For present purposes, it is important to observe that Henchy J, delivering the majority judgment of the Supreme Court in subsequent Article 40.4.2 proceedings brought by the prosecutor, laid considerable emphasis on the fact that the prosecutor had been defended at trial by one of the counsel who had successfully argued the de Burca case and therefore must have had clear knowledge and understanding of the de Burca decision but chose not to raise the issue. That being so, the prosecutor was debarred from raising the issue in subsequent proceedings brought by him pursuant to Article 40.4.2. Henchy J. said:

> "As to the prisoner in this case, his position is uniquely different from that of other persons convicted by a jury selected under the provisions of the Act of 1927. He was the first person entitled to plead successfully in the Circuit Court the unconstitutionality of such a jury. As a result of the decision in the de Burca Case, he was presented with that opportunity in the middle of his trial. An informed and deliberate decision was made to turn down that opportunity. His then counsel, instead of applying to have the jury discharged, elected—and I make no criticism of that choice—to allow the trial to proceed without any objection to the jury as constituted. It was obviously thought to be in the best interests of the prisoner that he should take his chances before that jury, notwithstanding its constitutional imperfection. Had he been acquitted by that jury, doubtless we would have heard no complaint that the jury was selected unconstitutionally.
>
> Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this Court in *Corrigan v. Irish Land Commission*. The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a volte face is impermissible. Having by his conduct led the Courts, the prosecution (who were acting for the public at large) and the prison authorities to proceed on the footing that he accepted without question the validity of the jury, the prisoner is not now entitled to assert the contrary. The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

The case might be thought to support the view that it is necessary, in order for estoppel to apply, that there be clear evidence that the person, or at least his legal adviser, must be shown to have had actual knowledge of the legal significance of the key fact about which he should have objected.

46. Also relevant are a number of cases which deal with the issue of estoppel in the context of the provisions in the Criminal Justice Act, 1999, ('the 1999 Act') dealing with preliminary examinations and returning an accused for trial. The 1999 Act abolished the requirement that a District Court conduct a preliminary examination before sending an accused forward for trial. In *Burns v. Judge Early* and others [2003] 2 I.L.R.M. 321, the applicant was arrested and charged with an indictable offence before the District Court. After a number of initial dates in the District Court, an issue arose as to whether the provisions of the Criminal Justice Act, 1999, or the Criminal Justice Act, 1967, applied to his case, and whether a preliminary examination should be conducted. A date was fixed for argument on this issue, but on this date, the applicant consented to being sent forward to the Special Criminal Court. He then pleaded guilty and was sentenced by that court. Seven months later, after the decision in *Zambra v. McNulty* [2002] 2 I.R. 351, he applied to the High Court seeking an order of certiorari quashing the order of the Judge sending him forward to the Special Criminal Court and quashing his sentence and conviction. The High Court (O'Caoimh J), refusing the relief sought, held that he had been in a

position at all relevant times to raise the issue of the non-applicability of the 1999 Act to his case but instead consented to being returned for trial without a preliminary examination and accepted the jurisdiction of the Special CC by pleading guilty, and was now precluded from claiming a lack of jurisdiction in the Special Criminal Court.

47. Interestingly, O'Caoimh J expressly distinguished the case of *Glavin v. Governor of Mountjoy Prison* [1991] 2 I.R. 421 on the ground argued by the DPP, namely that neither the infirmity nor potential infirmity were known to the applicant in that case at the time of the making of the order of return for trial or his trial. The Glavin case concerned the validity of a preliminary examination conducted by a District Judge who had reached retirement age and had not been continued in office by warrant, because of a mistaken belief as to his true age. This was not known at the time of applicant's return for trial. The High Court, and Supreme Court on appeal, held that the purported preliminary examination was therefore null and void and the applicant's subsequent trial and conviction were also null and void

48. In *Gorman v. Martin* [2005] IESC 56, there was also clear evidence of actual knowledge on the part of the applicant, at the time of his arraignment, of the legal point concerning whether a preliminary examination should be conducted. The case involved a man who discharged his legal team and then pleaded guilty to an offence, and who subsequently sought to challenge his conviction and sentence in judicial review proceedings on the basis that no preliminary examination had been held prior to his being sent forward. Kearns J referred to *State (Byrne) v. Frawley* and *Burns v. Judge Early*, and noted that at the time of his arraignment, 'the applicant himself was aware of his entitlements under the Criminal Procedure Act 1967. He apparently dismissed his legal advisors because they were not persuaded by the merits of his contentions at the time'. Notwithstanding this knowledge, he had not raised the point and instead chose to plead guilty. The Supreme Court set aside the order of certiorari granted by the High Court in those circumstances. These cases might also be thought to support the view that a person can only be estopped where there is clear evidence that either he or his legal advisers were aware of the significance of the legal point, upon which they subsequently seek to rely, at the time of the original hearing.

> 49. A decision which seems to me to be of considerable relevance in the present context is that in *Brennan & Ors v. Governor of Portlaoise Prison and Anor* [2008] 3 I.R. 364. In that case, the applicants were arrested and detained pursuant to s.4 of the Criminal Justice Act, 1984, then pursuant to s.30 of the Offences Against the State Act, 1939, and then released and re-arrested pursuant to s.4(3) of the Criminal Law Act, 1997, and brought before the Special Criminal Court to be charged with membership of the IRA. Their first appearance before the Special Criminal Court was on the 13th October, 2002. No objection was raised on their behalf at that stage as to the manner in which they had been brought before the Court. They applied for bail and were refused. They were remanded a number of times, on consent, until December, 2004. At this stage, for the first time, when they were about to be arraigned, they challenged the jurisdiction of the Court to try them. The jurisdictional point in question was two-fold; (a) that their arrests under section 4 of the Criminal Law Act, 1997 were unlawful because the only legitimate form of arrest for the purpose of bringing someone lawfully before the Special Criminal Court was an arrest pursuant to s.30 of the Offences Against the State Act, 1939; and (b) that they had not been brought 'forthwith' before the Special Criminal Court in accordance with s30A(3) of the Offences Against the State Act, 1939, which applied to re-arrests. These two legal points had first been raised by a Mr. O'Brien, who had been arrested much later than the appellants in the Brennan case. Mr. O'Brien had been arrested on the 6th April 2004 and re-arrested on the 8th April 2004, and immediately raised the jurisdictional point on being brought before the Court. In reality, the appellants Brennan and others raised their jurisdictional objection only as a consequence of Mr. O'Brien having raised this objection. The Special Criminal Court fixed the same date for hearing all objections and rejected all the challenges. Mr. O'Brien's case was adjourned pending an application for judicial review and he was ultimately successful in the Supreme Court on the second point raised, concerning the term 'forthwith' (*O'Brien v. Special Criminal Court & Anor* [2008] 4 I.R. 514). Meanwhile, the trial of Brennan and others had proceeded and they were convicted and sentenced. Their appeal to the Court of Criminal Appeal, in which the jurisdictional issue was one of the grounds of appeal, was rejected. They did not seek a further appeal to the Supreme Court under s.29 of the Courts of Justice Act, 1924. Two weeks after the Supreme Court decision in O'Brien, the Brennan applicants brought proceedings pursuant to Article 40.4.2 of the Constitution. The High Court (O'Neill J) held that the matter could be dealt with by way of Article 40.4 but, having examined cases such as *State (Byrne) v. Frawley*, and *People (DPP) v. Kehoe* [1985] I.R. 444, held that the right to complain about a constitutional or legal defect could be lost by a failure to exercise the right and by the passage of time. The Supreme Court dismissed the appeal on the basis that it was not open to a convicted person to challenge the legality of their detention pursuant to Article 40.4.2 where their case and appeal had been determined to a point of statutory finality, but also went on to say that the case would have failed on the merits in any event because no objection had been raised in the Special Criminal Court within a reasonable time. Geoghegan J, delivering the judgment of the Court, clarified an apparent inconsistency between *The People (Director of Public Prosecutions) v. Kehoe* [1985] I.R. 444 and *The People (Director of Public Prosecutions) v. Gilligan* (Unreported, Court of Criminal Appeal, 8th August, 2003) on this issue of when jurisdictional points should be raised before the Special Criminal Court, saying:
>
> "In *The People (Director of Public Prosecutions) v. Kehoe* [1985] I.R. 444, if the dicta of McCarthy J. were to be interpreted literally, it could be suggested that his view was that any objection to jurisdiction had to be taken on the very first day that the accused came before the court. There can be all sorts of circumstances where this could not reasonably be expected and I do not think that McCarthy J. ever intended the literal interpretation which has been given to his words. An unrepresented accused, for instance, could not be expected to raise jurisdictional objections until he had legal advice. This view coincides with the view of the Court of Criminal Appeal as expressed in the judgment of that court delivered by McCracken J. in *The People (Director of Public Prosecutions) v. Gilligan* (Unreported, Court of Criminal Appeal, 8th August, 2003). There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a bona fide exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time. That would, of course, be very much in line with the judgments in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 though that case covered a somewhat different factual situation and the principle applicable here long predated it.
>
> 22 For all these reasons, I am firmly of the view that even if the appeal was entertainable it would have to be dismissed."

50. Having regard to the above cases, it seems to me that *State (Byrne) v. Frawley*, *Burns v. Early*, and *Gorman v. Martin* can be distinguished from the present case because in those cases it was clear that each of those applicants knew of the precise legal point that they could have taken at the original hearing but chose not to do so. The significance of Brennan is that this was a case closer to the present case, namely, one where the legal point was overlooked by the legal advisers at the relevant time; the reality of the situation appears to be that the prisoners in the Brennan case and their legal teams simply did not advert to the jurisdictional point that might be made until the point was raised by another accused, Mr. O'Brien, following his arrest a considerable time later. This

seems to me to be the closest situation to that arising before the Court now insofar as it seems to me likely, as I concluded above, that the plaintiffs' legal team simply did not advert to the quorum requirement of 12 persons until after the hearing had concluded. The decision of the Supreme Court in Brennan was that the point could not be raised in the Article 40.4.2 proceedings, it not having been raised at the first reasonable opportunity in the Special Criminal Court.

51. It might be argued that Glavin favours the plaintiffs in the present case because he succeeded in his application in circumstances where he made no objection at the relevant time because he was unaware of the key circumstances; but it seems to me that Glavin is more properly characterised as a case where the applicant was unaware of key facts (that the District Judge had turned 65, and that he had not been re-appointed) rather than a situation where a legal point based upon the interpretation of a statute had not been adverted to. It therefore seems to me that the outcome in the present case should be same as that in Brennan. It seems to me implicit in the decision in Brennan that a failure to advert to a possible legal ground of objection is not treated by the courts in the same way as the absence of knowledge as to a fact which may ground an objection. Hence, the different outcomes as between the Glavin and Brennan cases.

52. It might be thought to be harsh that the plaintiffs in the present case, having raised many procedural points during the lengthy process before the Fitness to Practice Committee and the Board, are now precluded from raising this particular point about the Board's quorum in circumstances where they did not advert to the point at the time of this particular hearing, which took place on a single day. The plaintiffs argue that the procedural requirement of 12 members of the board is not purely technical but has a real and practical effect, insofar as 12 rather than 9 persons would have to have been persuaded of the need for the ultimate sanction of erasure. However, it should also be borne in mind that the practical consequence of their having raised the objection at the appropriate time would have been that it would have afforded the Board an opportunity to adjourn and obtain the necessary quorum; even if they disagreed with the plaintiff's interpretation of the law, the Board may have chosen to do so out of an abundance of caution. Indeed, even if the point had been raised after the Board hearing and before the present proceedings were launched, the Board might perhaps have re-convened and conducted a fresh hearing on the issue of sanction. The difficulty for a decision-maker, such as the Board, in a situation where there is a failure to complain about a procedural matter, such as a quorum, contemporaneously is that such a failure to raise the jurisdictional point at the time of the hearing prevents the decision-maker from considering, and possibly remedying, the problem complained of.

53. Accordingly, I am of the view that, even if I am correct that the statutory quorum applicable to the Board meeting on the 25th March, 2008, was 12 persons, the plaintiffs are estopped from raising this point in these proceedings because the objection was not made at the time of the hearing.

54. For completeness, I should perhaps say that I was referred to the case of *G v. An Bord Uchtala* [1980] 1 I.R. 32, which of course deals with the question of waiver of constitutional rights and the necessity for a consent to be a "fully-informed, free and willing surrender or an abandonment" of the rights. However, the factual matrix in that case is far removed from the present case, concerning as it does the validity of the consent of a young and vulnerable mother with regard to the adoption of her new-born baby, and who may have been motivated by fear, stress and anxiety, and I find it of little assistance in determining whether the plaintiffs in the present case, who were assisted by lawyers at every step of a protracted and hard-fought process, knowingly waived their right to raise an objection to the Board meeting in question. Similarly, I do not consider the decision in *Director of Consumer Affairs v. Governor and Company of the Bank of Ireland* [2003] 2 I.R. 217 to be of any great assistance. That case concerned the exercise of a statutory power to issue directions in relation to the imposition of charges for services to customers. Under a statutory provision, s 149(2) of the Consumer Credit Act, 1994, the power had to be exercised within certain time limits. The High Court (Kelly J., as he then was) held that the exercise of the power outside of the statutory time limit was voidable rather than void, and that the defendant could not be heard to complain of the validity of the directions in circumstances where it had acted upon the direction and neither ignored nor contested them. This was in a context of a close and detailed reading of the Consumer Credit Act, 1995, and the particular parameters of this function by the Director of Consumer Affairs.

**The Decision of the Board to impose the sanction of erasure**

55. As was set out in the chronology of events above, the Fitness to Practice Committee conducted oral hearings on 10 separate days over a period of 10 months. It set out its conclusions in a Report dated the 6th March, 2012, set out earlier in this judgment, and recommended that a sanction of censure be imposed on the two plaintiffs. It may be noted that the Committee has no formal statutory power or role in relation to the appropriate sanction; apparently the issuing of a recommendation by the Committee has simply developed as a matter of practice.

56. The Board held a meeting to consider the Committee's report on the 25th February, 2014. The reasons for the gap in time between the Committee's report and this Board hearing have been set out earlier in this judgment. The Board meeting consisted in part of a hearing at which the plaintiffs' legal representatives made submissions. The Board itself had a legal adviser, who gave his advice in the presence of the parties; while the CEO, whose role it had been to present the evidence to the Committee, was represented by Senior Counsel. A transcript of the hearing was available to the Court. Two relevant events took place at this meeting; (1) the findings of the Committee Report were accepted on behalf of the plaintiffs and the Board formally adopted its findings; (2) the Board indicated to the plaintiffs that it was considering the more severe sanction of erasure. It was agreed that the Board would write to the plaintiffs indicating the basis on which it was considering this sanction, and that the plaintiffs would have an opportunity both to make written submissions and to address the Board at another hearing.

57. There then followed considerable correspondence between the parties, characterised, *inter alia*, by the plaintiffs, complaining that they were not receiving sufficient particulars of why the more severe sanction was under consideration, and by the defendant Board indicating that it believed that it had made its position clear on the issue in a letter of 3 March, 2014, the details of which are set out below.

58. Written submissions were sent to the Board on behalf of Nurse Dowling by letter dated 19 March, 2015. The matter came on again for hearing more than a year after the first Board hearing, on the 24th March, 2015. Again, there is a transcript of that part of the meeting, at which the plaintiffs' legal representatives made oral submissions. Again, the Board received legal advice, on this occasion by a Senior Counsel, which was given in the presence of the parties; and the Senior Counsel representing the CEO was also heard on particular issues. The Committee then retired to consider its decision. On the next day, the 25th March 2015, the plaintiffs received a letter communicating the Board's decision to impose the sanction of erasure, which was in the following terms (which, for present purposes, may be useful to set out again):

> "The Board, having confirmed the report of the Fitness to Practise Committee at its meeting on 25 February, 2014, and having considered submissions made on your behalf […] to include mitigating factors, decided that your name should be erased from the Register in accordance with Section 39 (1) of the Nurses Act, 1985.

> The Board was of the opinion that the sanction of censure as recommended by the Fitness to Practise Committee was not commensurate with the seriousness of the professional misconduct proven in the findings of the Fitness to Practise Committee of Inquiry. The Board was of the opinion that:
>
> - the proven allegations were of such a serious level as to undermine the reputation of the profession and the confidence of the public in the profession,
>
> - the misconduct was at the upper end of the scale of professional misconduct,"

It went on to state in relation to Ms Carroll, that:

> " - the withholding of information from relevant stakeholders i.e. Nurses, Dr. Kennedy and Southdoc and the omission of information from documentation was a very serious offence.
>
> The Board's rationale is based on the findings of allegation 1(b) and allegation 2 of the Fitness to Practise Committee of Inquiry Report"

And in relation to Ms Dowling that,

> " - the failure to provide adequate care to the patient and the withholding of information from relevant stakeholders i.e. Nurses, Dr Kennedy and Southdoc and the omission of information from documentation was a very serious offence."

The present application was initiated pursuant to section 39 by the plaintiffs on the 13th April, 2015, seeking to have the decision of the Board quashed.

59. The provisions of the Nurses Act, 1985, concerning the powers of the Court on an application such as this are rather peculiar in some respects. Section 39 provides, in relevant part, as follows:-

> "(1) Where a nurse—
>
> (a) has been found, by the Fitness to Practise Committee, on the basis of an inquiry and report pursuant to section 38 of this Act, to be guilty of professional misconduct.... or
>
> (b) …
>
> the Board may decide that the name of such person should be erased from the register or that, during a period of specified duration, registration of the person's name in the register should not have effect.
>
> (2) ...
>
> (3) A person to whom a decision under this section relates may, within the period of 21 days, beginning on the date of the decision, apply to the High Court for cancellation of the decision and if such person so applies—
>
> (a) the High Court, on the hearing of the application, may—
>
> (i) cancel the decision, or
>
> (ii) declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase such person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's name in the register shall not have effect, or
>
> (iii) give such other directions to the Board as the Court thinks proper,
>
> (b) if at any time the Board satisfies the High Court that such person has delayed unduly in proceeding with the application, the High Court shall, unless it sees good reason to the contrary, declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase the person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's name in the register shall not have effect,
>
> (c) the High Court may direct how the costs of the application are to be borne.

60. One of the peculiarities within the above provision is that the numbered sub-paragraphs within s39(3)(a) are expressed to be disjunctive. On a literal interpretation, therefore, the High Court cannot cancel a decision and issue directions to the Board. Nor is there any explicit reference to remitting a matter to the Board for further decision. Thus, at least on a literal reading, the Court is not empowered to quash a Board decision and remit it for further decision with directions as to how this should be done. Another noteworthy aspect of the section is the lack of clarity as to the precise nature of the inquiry to be carried out by the High Court upon such an application; is it to review the merits of the decision, be it a finding of fact or a sanction imposed, or merely the process by which the decision was arrived at? In this regard, I note that in the High Court decision in *Perez v. An Bord Altranais* [2005] 4 I.R. 298, to which I will return in further detail below, O'Donovan J. appears to have taken a broad approach to the role of the Court on such an application, although in that case, the issue was not confined to sanction as it is in the present case. In Perez, the Court heard sworn evidence and considered other evidence that had been adduced before the Fitness to Practice Committee before making its own findings of fact and ruling that the sanction of erasure was appropriate in the circumstances of that case. That the section also envisages that expert evidence may be received by the Court, as occurred in Perez, would also support the broader view of the Court's role. Yet, it is incongruous, if the role of the Court is a broad rather than a narrow procedural one, that the Court does not have the power to substitute its own sanction for that imposed by the Board.

61. It may be noted that the provisions are also different to the provisions pursuant to which the High Court heard an appeal in

relation to a sanction imposed by the Medical Council in *Hermann v Medical Council* [2010] IEHC 414. There, it was clear that Court had ample powers to make various orders, including an order substituting any penalty it considered appropriate. Notwithstanding this difference as between the two regimes, I consider the comments of Charleton J. most useful insofar as he spoke of showing respect for the expertise of the Medical Council, which comments are set out below.

62. In the present context, it is worth noting the range of penalties that were potentially available to the Board pursuant to the Nurses Act, 1985. In addition to the power to erase a nurse from the register, the Board may, pursuant to s. 41 of the Act, "advise, admonish or censure" the person in relation to the professional misconduct. Another option, contained within s. 39 alongside with that of erasure, is that "during a period of specified duration, registration of the person's name in the register should not have effect", in other words suspension for a definite period. It is perhaps an unusual feature of this case that the option of suspension was favoured neither by the Committee or the Board, and yet it was a sanction occupying an intermediate position between censure and erasure.

*The proper approach of the Court to the issue of sanction in general*

63. In *Hermann v. Medical Council* [2010] IEHC 414, Charleton J. considered the appropriate principles to be applied in a case involving an appeal against sanction imposed by the Medical Council. It may be noted that the sanction imposed in that case was one of suspension for one year with certain requirements, including that the doctor undergo a period of retraining for 3 years. Charleton J. pointed out that the principles governing the imposition of sanction were considered by Finlay P in *Medical Council v. Dr. Michael Murphy* (High Court, Unreported, 29th June, 1994) in which Finlay P identified four principles:

> "First, I have to have regard to the element of making it clear by the order [made by the High Court on appeal] to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to declare him from being likely, on resuming practice to be guilty or like or similar misconduct. Secondly, it seems to me be an ingredient though not necessarily the only one that the order should point out to other members of the medical profession the gravity of the offence of professional misconduct and thirdly, and this must be some extent material to all these considerations, there is the a specific element of the protection of the public which arises where there is misconduct and which is, what I might describe as the standard in the practice of medicine. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances."

It may be noted that while the first three principles emphasise the seriousness of the conduct as well as issues of deterrence and protection of the public, the last principle, in effect, refers to the requirement of considering mitigating factors.

64. Charleton J. went on to describe the spectrum of sanctions contained in the Medical Council legislation and commented:

> "The scheme of the Act therefore involves, in its mildest form, correction as a first gradation. In such cases the Medical Council may admonish or fine a doctor or issue a written censure. Some of these incidents may involve bringing a doctor to his or her senses. It is clear that there is an overlap in the more serious of these milder cases with the necessity to mark in an appropriate way the nature of the misconduct or lack of competence through attaching conditions to registration, and restricting the practice by the doctor of medicine. These restrictions can include a requirement for retraining, perhaps coupled with an undertaking not to practice during that time. Where a doctor is shown not to be dependably safe in the practice of one form of medicine a transfer to another division is appropriate. This kind of response rarely if ever overlaps with the earlier division and moves into the most serious category of cases where a suspension of registration, cancellation of registration and a prohibition for a substantial time against a practitioner applying for re-registration can be involved. I see no reason why in the most serious cases that this cannot be a lifetime ban on the practice of medicine. Correction, rehabilitation and punishment mark out the potential approaches by the Medical Council within these three major but sometimes overlapping categories of appropriate response to misconduct or lack of competence. To rigidly divide these responses into categories would be to undermine the scheme of the Act whereby the Fitness to Practice Committee, in making a recommendation to the Medical Council, and the Council itself, are entrusted with the important task of ensuring that the practice of medicine delivers its expected service to the public through being highly competent, safe and reliable. In the mildest cases of admonishment little danger may be involved to the public. When that category shades into the instances where it is necessary to issue a censure in writing, or to attach conditions to registration while restricting the practice of medicine that may be engaged by the practitioner, the category of misconduct or lack of competence has become more serious. It is clear from the scheme of the Act of 2007 that the approach by the Medical Council should involve protecting the public and reassuring them as to the standards that medical practitioners will at all times uphold; requiring that medical practice is by those who are properly trained and appropriately qualified to safely engage in the areas of medicine where they hold themselves out to be experts. In that and the other more serious category, the protection of the public is paramount to the approach of the Medical Council. The reputation of the medical profession must, in those instances be upheld. This exceeds in importance, where the misconduct is serious, the regrettable misfortune that must necessarily be visited upon a doctor."

65. Charleton J indicated that, given the greater expertise of the Medical Council in the area, considerable deference should be paid to its views on sanction by the Court:-

> "10. The question arises as to what test should the court apply to the issue of sanction where that issue alone is appealed to the court under s. 75 of the Act? It is urged that some form of curial deference should be exercised by the High Court towards decisions of the Medical Council. The Fitness to Practice Committee of the Medical Council is a specialist body dealing with complaints of professional misconduct on a frequent basis. The members of the Committee have ready access to relevant precedents and are therefore in a position to assess both the nature of the conduct complained of, and where it fits as to category, gravity, and the type and severity of penalty that has been established as appropriate by prior decisions. I have no doubt that the Medical Council should take this approach as a general guide to the imposition of penalties. I am also satisfied that it is not the only principle which is applicable. Guidelines derived from previous sanctions establish both an appropriate level of knowledge among members of the Medical Council and also informs medical practitioners and their legal representatives as to what kind of sanction may be faced in an event of a finding being made of misconduct. That, while an appropriate guide, is not completely restrictive. No court exercising a sentencing jurisdiction ever regards itself as boxed in by sentencing precedent. Exceptional circumstances can arise which move one category of case from a particular band of gravity into a higher or lower category. Mitigation of circumstances should be considered to see if some particular factor lessens the gravity of the appropriate response. Consistency of appropriate sanction against medical practitioners is, however, important for the reasons which I have mentioned and to ensure the continued trust of the public in the medical profession; one of the fundamental purposes inherent in the relevant sections of the Act of 2007.

11. In *Marinovich v. General Medical Council* [2002] U.K.P.C. 36, Lord Hope of Craighead, giving the judgment of the Privy Council, was of the opinion that curial deference should be uppermost in the mind of any court or appellate tribunal considering an appeal as to sanction. At paras. 28 and 29 he stated:-

> '28. In the appellant's case the effect of the Committee's order is that his erasure is for life. But it has been said many times that the Professional Conduct Committee is a body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the Committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession.
>
> 29. That is not say that [the appeal body] may not intervene if there are good grounds for doing so. But in this case their Lordships are satisfied that there are no such grounds. This was a case of such a grave nature that a finding that the appellant was unfit to practise was inevitable. The Committee was entitled to give greater weight to the public interest and to the need to maintain public confidence in the profession and to the consequences to the appellant of the imposition of the penalty. Their Lordships are quite unable to say that the sanction of erasure which the Committee decided to impose in this case, while undoubtedly severe, was wrong or unjustified.'

12. This decision was made, however, under legislation that differs from that in force in this jurisdiction. Having taken the principles that I have referred to into account, and having considered the role that sanctions against medical practitioners fits within the scheme of complaint enquiry, finding and response inherent in the Act of 2007, I have to come to the view that the High Court, considering an appeal under s. 75 of the Act, is deliberately vested by the Oireachtas with powers of such an amplitude that it is required to exercise its own analysis of whatever evidence as to sanction is put before it. The Medical Council retains the burden of proving that the sanction was correct. The Court, in considering whether to cancel the relevant decision, to replace it with a different decision or to impose no sanction on the practitioner, is obliged to assess what is appropriate in light of the findings of fact which led to the imposition of the sanction by the Medical Council in the first instance. That decision, and the reasoning underpinning it, should not be ignored. Rather, that decision and the justification contained within the document imposing the sanction is the primary material under appeal and on which the hearing is based. In considering the question of the sanction, the Court's focus should be both on the conduct underpinning the sanction and the reasoning of the Medical Council in arriving at its decision. Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to relevant precedents and the expert nature of the task undertaken, the High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect. An independent view should be taken as to what ought to be done. Where an error has been made in the context of a sanction which is otherwise appropriate, then it should be corrected. If, however, the level of sanction is one which is justified by the material before the Medical Council, then the Court would need to find a specific reason for altering it on the evidence presented on the appeal."

66. Although the powers of the High Court in an application such as that in *Hermann* are not the same as those available to the Court in the present application, the concept of curial deference, in the sense of affording considerable respect to the decision of an expert professional body, nonetheless appears to me to be a sensible approach to adopt in nursing cases also. However, in the present case, the application of the concept does not necessarily point all in one direction, as there was a difference of view as between the Fitness to Practice Committee and the Board on the issue of sanction; the Committee having recommended censure, and the Board, erasure. The Committee had been present for the giving of oral evidence over 10 hearing days and had an intimate knowledge of the facts. However, the Board's view was that of nine members while that of the Committee's was that of three, and the Board has a statutory function in respect of sanction while the Committee does not. I would consider it important to give considerable weight to the views of the Board and to depart from its views only if those were clearly disproportionate or had been arrived at in a manner which was not legally sound.

**The nature and seriousness of the professional misconduct in the present case**

67. The first three matters referred to by Charleton J. in the *Hermann* case were matters relating to the seriousness of the conduct, the principle of deterrence and the protection of the public. These inter-related considerations reflect the inherent purpose of the Board. The Nurses Act, 1985, confers on the Board certain duties including the responsibility to promote high standards of professional conduct among nurses, and the scheme whereby the Fitness to Practice Committee conducts inquiries and the Board imposes sanctions sits squarely within that essential function. The Act does not, however, either define 'professional misconduct' nor does it set out any hierarchy of gravity into which different kinds of misconduct might be placed. The expression 'professional misconduct' was considered by Keane J, in the context of medical practitioners, in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 17th January, 1995), which was referred to with approval in the context of nurses by O'Donovan J. in *Perez* as follows:

> "In my view, the principles declared by Keane J. in *O'Laoire v. Medical Council* with regard to medical practitioners and by the Privy Council in *Doughty v. General Dental Council* with regard to dentists are equally applicable to the nursing profession so that "professional misconduct", so far as a nurse is concerned, is a serious falling short, whether by omission or commission, of the standards of conduct expected among nurses and it is irrelevant that such misconduct may be attributable to honest mistake. In that regard, I would adopt the statement by Lord Hoffmann in the course of a judgment which he delivered in a case of *McCandless v. General Medical Council* [1996] 1 W.L.R. 167 at p.169 that there was a "duty to protect the public against the genially incompetent as well as the deliberate wrongdoers"."

68. It is unfortunate that there is so little authority for the Court by way of guidance on the circumstances in which the different sanctions envisaged by the Nurses Act, 1985, are appropriate and, in particular, the circumstances in which the most serious sanction of erasure should be imposed. The only nursing decision cited to me, *Perez v. An Bord Altranais*, concerned a case of erasure. In *Perez*, the applicant, who had been employed as a staff nurse at a nursing home, was found guilty of professional misconduct following an inquiry by the Fitness to Practice Committee. The Board subsequently decide to impose the sanction of erasure and the applicant challenged the decision, including the findings made against her. The general allegation was that, despite long training, she had persistently failed to acquire adequate knowledge of her duties and had consistent difficulty with basic nursing skills. The High Court heard evidence from the applicant as well as five experienced nurses who had worked with her, and was referred to the transcript of the testimony before the Fitness to Practice Committee. O'Donovan J commented that the applicant did not impress him as a witness and that he "did not think that she was a very truthful person" or that "much reliance could be put on her evidence". On certain specific issues of fact, he found her to be "less than candid" to the Committee and "not telling me the truth" and said that there were other aspects of her evidence about which he had "considerable reservations". He found that, in addition to denying the allegations of incompetence, she made accusations against her colleagues that she had been bullied, which he found to be

groundless. His conclusions are set out in a passage which gives a graphic indication of the type of professional shortcomings in issue in that case:-

> "Insofar as the specific findings of the Committee with regard to the professional conduct of the applicant was concerned, I was persuaded beyond any doubt by the evidence of Nurses Gallagher, Tallon, Reyes and Ryan that, in the matter of communicating information about patients to her colleagues at the end of a tour of duty, or otherwise, and in the matter of aseptic techniques and hygiene; particularly in the context of dressings, the applicant's conduct fell seriously short of the standard of conduct expected among nurses. In particular, although I am satisfied that her colleagues regularly impressed upon her the importance of giving accurate and complete information about how patients were faring or what instructions doctors had given with regard to their care and the importance of observing aseptic techniques, especially those related to dressing wounds, I was persuaded by the testimony of her colleagues that the applicant frequently communicated imprecise and incomplete information with regard to the welfare of patients and that her aseptic techniques were extremely poor, in that, she regularly failed to wash her hands, or use, or change gloves in the course of dressing a wound in circumstances where it was a universal nursing practice that she should do so and this despite being constantly reminded to do so. Moreover, her dressing techniques were so poor that it frequently occurred that dressings applied by her fell off and had to be replaced at additional expense and, of course, adding to the workload of other staff.
>
> In the light of the testimony of Nurses Ryan, Reyes and Gallagher, I was again persuaded beyond any doubt, that, on the 14th April, 2003, the applicant not only gave medication to the wrong resident, but initially tried to persuade Nurse Reyes not to tell anyone about her mistake and, latterly, denied having made the mistake to both Nurse Ryan and Nurse Gallagher before, ultimately, admitting her default. I am also persuaded beyond any doubt by the testimony of Mrs. Gallagher that the applicant was seen to place dirty swabs on a patient's breakfast tray. Accordingly, I have no doubt that the Committee was quite entitled, as it did, to conclude that, by giving medication to the wrong resident and placing dirty swabs on a patient's breakfast tray the applicant's professional conduct fell seriously short of the standard of conduct expected among nurses.
>
> Apart from the foregoing, the nursing staff at the nursing home gave evidence which I accept and which pointed inexorably to the fact that, during the period when she was employed as a staff nurse at that nursing home, the applicant was anything but a competent nurse; a view which Mrs. Gallagher and Nurse Ryan, in particular, expressed in no uncertain terms. She found it difficult to make herself understood by other members of the staff, a problem which, as I have already indicated, I myself had when she was in the witness box and it would appear that she did not readily understand many instructions that were given to her although she rarely admitted as much. In that regard, it is also relevant to note that, during the period when she was a staff nurse at the nursing home, she was incapable of taking telephone calls, apparently, because she could not understand what was being said to her on the telephone and it was her invariable practice, when she had to answer the phone, to hand over the receiver to the person nearest to her. Moreover, in the course of her evidence, she conceded that while she was working in the nursing home, she undertook a test in English at University College Dublin which she failed. At no stage, while she was working at the nursing home did the director of nursing in the home, Mrs. Gallagher, consider that the applicant was sufficiently trustworthy to be permitted to dispense drugs and, although she spent ten months in the nursing home, it would appear that there was many a long-term resident in respect of whom she could not put a name on their face. She did not seem to appreciate the risk involved in giving medication to the wrong patient and, in that regard, appeared to be more concerned about her own reputation than she was about the wellbeing of the patient. Accordingly, it would appear that she could not be trusted. That would seem to have been Mrs. Gallagher's main concern about the applicant's suitability for nursing. Mr. Gallagher accepted that all nurses, being human, could make mistakes but that it was totally unacceptable that they would not acknowledge a mistake, particularly, when a patient's welfare was at stake. Accordingly, as I have indicated, there was much criticism of the applicant's competency as a nurse and, apart altogether from the evidence which I heard, it appeared from the transcript of the evidence which was given to the Committee that they heard sworn testimony from a Dr. Philip Ahearne, a general practitioner, who frequently attended the nursing home, who expressed the view that the applicant's competency as a nurse was below standard and that he felt it unsafe to give instructions to her and testimony from a Nurse Denise Canavan, who, at the material time, was also employed as a staff nurse at the nursing home, that she was of the view that the applicant required supervision at all times."

69. He went to say that her conduct not only fell far short of the standard of conduct expected among nurses, but did not accord with the code of professional conduct for nurses laid down by the Board. He went on to confirm the decision that her name be erased from the register of nurses. There was no discussion of the appropriateness of the sanction, and the judgment is concerned exclusively with the findings leading to that sanction. Noting that the most serious sanction of erasure was imposed in that case, I would observe the following matters in connection with the facts: (1) the applicant was incompetent in terms of her ability to care for patients at the most basic level of hygiene and dressings, and had on one occasion placed dirty swabs on a patient's breakfast tray; (2) she was incompetent in the matter of passing on relevant information concerning the welfare of patients; (3) she did not learn or correct her habits despite the repeated attempts of others to teach her; (4) she not only gave medication to the wrong resident on one occasion, but sought to persuade another nurse not to tell anyone about her mistake and later denied having made the mistake at all, before ultimately admitting the mistake. As already noted, the Judge was also highly critical of her evidence before him. The case is therefore very different in a number of respects from the present case: there was no insight by the Ms. Perez into her shortcomings even by the time the matter had come to the High Court and, indeed, she continued to contest the findings of misconduct; her incompetence was at the most basic level of nursing and impacted directly on the care of the patients; and she was not honest either with her colleagues when working, or when giving evidence to the Committee or the High Court.

70. Insofar as any appropriate comparisons may be made between cases involving allegations of professional misconduct against nurses and doctors, I note also that in the *Hermann* case, there were extremely serious deficiencies in the standard of care on the part of the doctor in question and that at least one of the patients suffered long-term serious injury as a result. In that case, the sanction was one of suspension for one year with conditions as to re-training. The sanction of erasure was never in issue, despite the seriousness of the misconduct. In the present case, the core allegations, and those apparently considered most serious by the Board, were the failure to report relevant information, rather than the deficiencies of care which were found (essentially, a failure to continue CPR on the part of nurse Dowling at a time when she considered the patient to be already dead, and a failure to rouse the sleeping care attendant who was supposed to be supervising Ms. Comber, on the part of nurse Carroll). The core of the misconduct in the present case, to put it bluntly, was a serious failure to record and pass on information which was clearly relevant, giving the impression of a natural and peaceful death when there had in fact been a sudden and unexpected death. It is a misconduct of a rather different kind to that in issue in the *Hermann* case. Nonetheless, it was a most serious failure and a significant breach of the trust reposed in nurses to carry out their nursing duties, a core part of which involves the keeping of proper records and passing on relevant information to others, including doctors. As Dr. Kennedy explained when giving evidence during the Committee's inquiry, it is

vital that doctors are given accurate and complete information because the actions they take may be different, depending on the different types of information they get. He said that he had organised a post-mortem in this case because he tended to be 'more forensically aware' than some other doctors, but that other doctors might not have done so. He said that if causes of death are not properly picked up, there can be no learning of lessons to prevent similar deaths from occurring in the future. He said that, as a doctor who was on the nursing home site only for short periods of time, he would be unable to do his job professionally and fully if he were not being given accurate information on an ongoing basis, and this would raise the possibility that patients may not be looked after to the best of the doctor's ability. He pointed out that if there was a concern about some information being inaccurate, this could cause a rift in the relationship between doctor and nurse and call into question information that the doctor might be given in the future. He said that trust was 'absolutely essential' to the relationship. He also said that a patient such as Ms. Comber was one of the 'most vulnerable patients in society'.

71. No matter what professional misconduct is in issue, it is always possible to conceive of even more serious cases. Such cases might involve grossly negligent care of a patient resulting in serious harm or death, or even deliberate harming of a patient, particularly if accompanied by repetition or a pattern of such conduct. But the fact that one can imagine even more serious cases is not a reason for saying that this case does not fall within the upper end of the scale, given the seriousness of the conduct. I would not disagree with the Board's view that the misconduct itself fell at the upper end of misconduct, involving, as it did, certain failures in relation to the care of Ms. Comber, coupled with a serious failure to keep proper records and to pass on information in relation to an elderly, vulnerable patient who had died a sudden and unexpected death. The real issue in this case is whether the various mitigating factors should have adjusted the penalty downwards. As Charleton J. pointed out in *Hermann*, the decision-making body must, in addition to the seriousness of the misconduct, the principle of deterrence, and the protection of the public, also consider mitigating factors. The plaintiffs' complaint in the present case is not that the Board considered the misconduct to be so serious, but that it failed sufficiently to take into account the relevant mitigating factors. I now turn to each of these individually.

*The lapse of time or 'delay' issue*

72. It is indeed a striking feature of this case that a period of nearly 9 years elapsed between the death of Ms. Comber and the decision of the Board to impose the sanction of erasure upon the plaintiff nurses. To put it at its most neutral, there has been a significant lapse of time since the event in question. The professional standing of the plaintiffs has been uncertain since that time. It is true, as was submitted on behalf of the Board, that the Board took no formal step to suspend them or prevent them from working in any way. But it is also true that, as a matter of fact, these two particular nurses were suspended from their employment shortly after the events in question and have not worked since. There was also medical evidence that each of the nurses had suffered from stress and anxiety since the death of Ms. Comber and while the process was ongoing. One of the plaintiffs adduced evidence that she was no longer allowed to act as a volunteer on trips to Lourdes, which caused her great personal distress. Thus, the ongoing nature of the proceedings over a period of 9 years has concrete effects in the real world, even if the Board itself is not responsible for taking any formal step against the plaintiffs during that period.

73. For the proposition that delay in a disciplinary process can be relevant to the penalty ultimately imposed, the plaintiffs rely on the decision in *Gallagher v. Revenue Commissioners* [1991] 2 I.R. 370. In that case, an officer of customs and excise was suspended from his duties in January, 1988, on the basis of suspicions that that he had fictionalised reports and grossly understated the value of vehicles seized. The delays in the investigation were criticised by the Court, there having been a delay of four and a half years between the events under investigation and charges being brought against him. The High Court held that the Court could not restrain the holding of an oral inquiry on grounds of inordinate delay where a person was charged not with a criminal offence but with misconduct in the performance of his duty as a civil servant. However, the court went to say that delay would be relevant in assessing his defence and to the imposition of any disciplinary measures should the charges be made out. Blayney J. said:

> "Such a delay will undoubtedly make it more difficult for the plaintiff to deal with the charges, and it is a delay for which the entire responsibility rests with the Revenue Commissioners. And while it is not a ground for the court to restrain the holding of an oral hearing, it clearly will be a relevant consideration for Mr. O'Callaghan to take into account in assessing the plaintiff's answer to the *charges and also a relevant consideration for the plaintiff's superiors if the charges, or any of them, are held to the established, in deciding what disciplinary measures should be imposed*." (emphasis added).

Counsel on behalf of the defendant Board sought to distinguish the Gallagher case on the ground that the present case did not involve an employer/employee relationship and the Board had not taken any direct action which had prevented the plaintiffs from working in the present case. The plaintiffs also rely on a decision of the European Court of Human Rights in *Malek v. Austria* (60553/00, 12th September, 2003), in which the Court granted declaratory relief that there had been a violation of Article 6(1) of the Convention by reason of delay in disciplinary proceedings involving a lawyer. The effect, if any, of the *Malek* decision on Irish law as it was set out in *Gallagher* is not straightforward, bearing in mind not only that the *Gallagher* case concerned an application to restrain a disciplinary proceeding whereas *Malek* concerned declaratory relief only, but also that European Convention principles are applicable in this jurisdiction only through the mechanisms provided for by the European Convention on Human Rights Act, 2003. I rely instead on the dictum in *Gallagher* that if there has been delay in a disciplinary process, it may be taken into account when the question of sanction is under consideration. I am not persuaded that the absence of an employer-employee relationship renders the principle irrelevant, because the principle seems to me to be simply one of fairness to the person whose professional position and other circumstances in the real world are likely to have been affected by the uncertainty hanging over him or her while the disciplinary process is ongoing. Further, I am of the view that a period of delay may be relevant to the imposition of sanction even where the overall delay or circumstances are not such as to warrant prohibition of the proceedings themselves.

74. That said, it seems to me clear that the only delay which should be taken into account is delay on the part of the disciplinary body, and not any delay caused by the person who is to be the subject of the sanction. Having set out the chronology earlier in this judgment, the only period where the Board's conduct of proceedings could be described as unreasonably long was the first four years of the proceedings; thereafter, a variety of factors caused the lapse of time, not least of which were applications made by the plaintiffs themselves and the bringing of judicial review proceedings by one of them and a request by the other that the Board not proceed with her case until the judicial review proceedings were determined.

75. If I am correct that there was at least some period of delay that should have been taken into account by the Board in considering sanction, the next question is how the Board in fact approached the issue of delay or lapse of time in this case. First, it may be noted that there is no explicit reference to the issue of delay in its letter of 25th March, 2015, communicating the reasons for choosing the sanction of erasure. It might be argued that the issue of delay, having featured so prominently in the submission of the legal representatives at the hearings before the Board, must logically be encompassed by the phrase 'to include mitigating factors' in the Board's letter of 25th March, 2015. However, the matter is not so straightforward, because the Board received different legal opinions and submissions on the relevance of delay at the hearing, and did not indicate which of them it was going to follow. At the hearing on the 25th February, 2014, after the legal representatives for each of the plaintiffs invited the Board to take the overall delay into

account, Senior Counsel for the CEO pointed out that there had never been any complaint of delay in the investigation either to the Board or the courts, and offered to prepare a chronology for the Board, if necessary, in order to demonstrate this. He went on to say that while delay might be relevant to the issue of publication he could not identify any issue relevant to sanction which would be affected by delay. Subsequently, at the hearing on the 24th March, 2015, Senior Counsel for the CEO said he was not aware of any authority where delay was found to be a reason to impose a less severe sanction, and he did not see the logic to the proposition. He then went on to deal with aspects of the time-line, effectively saying that the Board had not delayed in any way, and again pointing out that there had been no complaint of delay against the Board prior to this. However, Senior Counsel advising the Board disagreed with that position, and said that he was advising the Board that it could take delay into account in terms of the sanction to be imposed, based on what had been said in the *Gallagher* case. However, he also prefaced that by saying that the only reckonable period of delay in his view was the period between February 2014 and the date of the hearing, the 25th March, 2015. Thus, the Board had before it a considerable range of views on the question of lapse of time/delay; both as to whether it was legally relevant at all, and further, as to what periods might be taken into account, if it was deemed legally relevant. In those circumstances, the silence of the letter of the 25th March, 2015, on this issue is unhelpful. I am conscious of course that the Board's decision was a collective decision on behalf of nine people, and that it is not always necessary or appropriate for a decision-making body to set out its reasoning in detail. Nonetheless, I do think it should have been made clear, even in summary form, whether the Board was taking into account any period of delay and, if so, the extent to which this influenced the ultimate decision on penalty. Having regard to the chronology, as set out above, it seems to me that the first four years of the procedure before the Board were attended by delays which were not entirely justifiable and that this period of delay was something that should have been taken into account as a mitigating factor.

*The three mitigating factors referred to by the Committee*

76. As has been seen, in its Report, the Committee made it clear that three particular mitigating factors affected its decision to recommend the penalty of censure, referring to them as follows:-

> "this was a once-off incident, the lack of a stated policy in the hospital to deal with unexpected deaths, and the insight displayed [both nurses] at the Inquiry as regards the inadequacy of the documentation drawn up in the aftermath of Ms. Comber's death."

77. Again, the Board's decision, as communicated by the letter dated 25th March, 2015, did not explicitly refer to any of these factors. The plaintiffs say that this demonstrates that they paid no or no adequate attention to these significant mitigating factors. It was argued on behalf of the defendant Board that the phrase in the Board's letter, *"having considered submissions made on your behalf by [your legal representative] to include mitigating factors...."* makes it clear that, on the contrary, they did consider these mitigating factors.

78. While this is not a case in which a failure to give reasons has been pleaded by the plaintiffs in the present proceedings, it seems to me that the generalised manner in which the mitigating factors were dealt with in its letter may be indicative of inadequate weight having been placed on these factors.

79. As regards the first factor identified by the Committee, while the seriousness of the professional misconduct in the present case has been emphasised above, the context in which misconduct took place is also relevant. Both of the nurses had long careers prior to the night in question without their competence or integrity ever having been questioned. The events of the night were 'once-off', as the Committee described it; in other words, the plaintiffs came before the Board with completely clean records in all other respects. In this regard, the case was rather different to the situation in *Perez*, for example, where there had been repeated examples of the nurse engaging in behaviour which made her unfit to be a nurse over a significant period of time and had failed to respond to correction or advice from her colleagues. The present case involved a once-off incident on one particular night; that is not to say, of course, that it was not of itself very serious, or to compare the conduct here with that of Ms. Perez, but merely to point out that it was not part of a continuing course of conduct, as might arise in some cases. It is interesting that in a letter dated the 27th November, 2014, solicitors on behalf of the Board wrote, in emphasising their view that the misconduct was of the highest order: *'The Board have further instructed us to confirm that such gravity and seriousness is not in any way lessened by this being a once-off incident*'. The letter of the 25th March, 2015, communicating the decision of the Board, does not refer to the absence of any prior misconduct of the plaintiffs, but the comments in the letter of 27th November, 2014, would suggest that it was specifically rejected as a mitigating factor. In my view, this was an error and it should have been taken into account as a mitigating factor that: (a) neither nurse had ever been accused of or found guilty of misconduct before; and (b) this was a once-off incident and not a pattern of continuing conduct.

80. The second factor referred to by the Committee was the issue of insight. The question of insight appears to me to be also highly relevant to mitigation; it is relevant to such matters as whether a professional who has been found guilty of professional misconduct might require some form of rehabilitation (as was ordered in the *Hermann* case) as well as the likelihood of their engaging in any such misconduct again in the future (the risk of future offending). These factors must be relevant to whether it was appropriate to impose the ultimate sanction of erasure in the present case. At the hearing before the Court, it was pointed out on behalf of the Board that the Act's provisions allow for the restoration of a nurse to the register after being erased. It does not seem to me that the availability of the remedy of restoration removes from the Board the obligation of considering the question of the nurse's insight at the time of the imposition of the sanction. It would not be appropriate, in my view, for the Board to take the view that the seriousness of the offence warranted erasure and that the insight (displayed at hearings several years before the imposition of the sanction) could be subsequently dealt with by restoration. All mitigating factors should be considered at the time of the imposition of sanction.

81. The third factor referred to by the Committee was that there was no hospital policy in place to deal with unexpected deaths. It is worth pausing to consider the possible meaning of this somewhat terse statement. The Committee clearly took the view that there was a corporate background to the nurses' individual professional failures and that this was somehow relevant to the issue of sanction. It seems to me that what the Committee must have had in mind, and rightly so, was that the corporate context on the ground was relevant to the culpability of the nurses on the date of their misconduct. This is a completely separate matter to the question of insight subsequently displayed at the hearings because it concerns their state of mind at the time of the misconduct itself. The Board may not have agreed with the Committee on this point, and may not have considered that this factor was relevant to the individual culpability or responsibility of each of the plaintiff nurses or that it carried much weight, but in the absence of any comment by the Board in its letter of the 25th March, 2015, on the subject, it is impossible to know whether it rejected this as a mitigating factor, and, if so, why.

82. Thus, the three mitigating factors identified by the committee were all potentially relevant factors to mitigation, in my view, and it is disappointing that the Board saw fit only to refer to them in the general phrase "*to include mitigating factors*" in its letter of 25th March, 2015. The mere fact that the conduct was at the upper end of the scale did not necessarily dictate that the penalty

ultimately arrived had to be the most severe sanction. As with sentencing in the criminal sphere, the fact that the offence is at the upper end of severity is the starting point, but not necessarily the end-point, when considering the appropriate sanction. While I am highly conscious that this is not, as pleaded, a 'reasons' case, the impression from what was said at the two Board meetings and the correspondence on the plaintiffs' behalf between those dates is that the Board did not properly structure its thinking on sanction in order to strike a balance between the various matters referred to by Charleton J. in *Hermann*, and laid a disproportionate emphasis on the seriousness of the conduct, the principle of deterrence, and the protection of the public, without sufficiently considering, discussing or giving weight to potential mitigating factors.

*The argument in relation to dishonesty*

83. In addition to the arguments relating to the mitigating factors referred to above, counsel on behalf of the plaintiff Ms. Carroll contended that the Board had unfairly extrapolated findings of dishonesty on her part which were not supported by the facts and were inconsistent with her being found not guilty on certain charges. In order to evaluate this argument, it is necessary to consider certain specific findings of the Fitness to Practice Committee and then to consider how the Board subsequently dealt with those findings. Counsel on behalf of the plaintiff also argued that it was not clear on what information the Board had based its decision, and that the Court should not, in the absence of positive evidence to this effect, infer that the Board members had read the entire transcript of evidence. Counsel on behalf of the Board pointed out that, at the hearing on the 25th February, 2014, the Chairperson of the Board said that the Board had had 'lengthy deliberations' before that time and that, while mindful of the fact that they did not hear the witnesses, they were "very informed in the context of the documentation that has been made available to us and we rigorously go through all of the documentation...". Having regard to these comments, it seems to me that it would be wrong of the Court to infer that the Board members had not read the transcript which was made available to them.

84. I have set out above the totality of the charges on which Nurse Carroll was found guilty of professional misconduct, and those of which she was found not guilty. For present purposes, it is necessary to note that she was found guilty on charges 1(b) and 2, relating to her failure to note in the written records or to tell nursing staff coming on duty, or Dr. Kennedy or Southdoc or any other appropriate person, her view that Ms. Comber had possibly choked and her observation that Ms. Comber's fingers were black. She was found not guilty of a charge, referred to as allegation 3, that she furnished information to the Gardai or hospital authorities which she knew was incomplete, inaccurate or untrue. Counsel on behalf of Nurse Carroll argued that the Board, in reaching the decision that erasure was the appropriate sanction, had lost sight of the fact that she had been found not guilty of allegation 3, and that the Board had essentially elevated a finding of failure to keep a proper record to a finding of dishonest withholding of information involving a more serious form of professional misconduct involving moral turpitude.

85. It may be noted that none of the allegations 1(b), 2 (of which Ms. Carroll was found guilty) or 3 (of which she was found not guilty) used the term 'dishonesty'. However, when the Board wrote to the plaintiffs on the 3rd March, 2015, to explain why it was considering the more severe sanction of erasure, it said:

> "The Board considered that the said professional misconduct was of a sufficiently serious and grave nature to merit such a severe sanction as it demonstrated a level of dishonesty which constituted a fundamental breach of trust and went to the core of the relationship of trust between nurses and the public."

86. By letter dated the 3rd April, 2014, a letter on behalf of Ms. Carroll was sent to the Committee saying:

> "I find it astounding that the Board could extrapolate the findings of the Fitness to Practice Committee in respect of this allegation [i.e. allegation 2] to the extent of constituting dishonesty on the part of our member, Nurse Carroll, when the Fitness to Practice Committee made no such finding. Indeed it would be our contention that none of the evidence submitted by the Executive to the Fitness to Practice Committee or, more particularly, the case made by the Executive to the Fitness to Practice Committee was imputing dishonesty in relation to the allegation."

87. By letter dated the 19th May, 2014, the suggestion that the Board had not adequately set out it reasons to depart from the recommendation of the Committee was rejected by solicitors on its behalf. It was emphasised that the Board's view was not limited to allegation 2 but was instead based upon all of the findings of professional misconduct. In a further letter dated the 19th June, 2014, it again reiterated that it considered "that the said professional misconduct was of a sufficiently serious and grave nature to merit such a severe sanction as it demonstrated a level of dishonesty which constituted a fundamental breach of trust and went to the core of the relationship of trust between nurses and the public".

88. At the Board hearing on the 25th March, 2015, Senior Counsel advising the Board did not comment on the issue of dishonesty other than to note the different positions taken by Nurse Carroll and the Board. Mr. Sugrue, on behalf of Nurse Carroll, again complained that he had to 'extrapolate from some 10 days of hearing before the Fitness to Practice Committee the basis upon which Board has made a finding that certain acts or omissions constituted a level of dishonesty' and that this had not been clarified to a degree which his client was entitled to expect in the face of the severe sanction under contemplation. He drew the Board's attention to the fact that she had been found not guilty of allegation 3, and that there was nothing anywhere else in the evidence showing 'premeditated dishonesty and an intent of Nurse Carroll to mislead anybody'. Senior Counsel on behalf of the CEO said that he was 'not going to try and find instances of dishonesty in the evidence' but invited the Board to 'read the reasons given for the finding of facts under allegation 1(b)'.

89. Interestingly, in the Board's letter dated the 25th March, 2015, communicating its decision to impose the sanction of erasure, the Board did not use the term 'dishonesty' at all, using phrases such as 'very serious' and 'upper end of the scale', in describing the professional misconduct.

90. Having carefully examined the wording of allegations 1(b), 2 and 3; the correspondence between the Board and Ms. Carroll's solicitor; the oral submissions at the hearing on the 24th March 2015; and the final letter from the Board on the 25th March, 2015, it seems to me that a number of distinct questions arise. Was it intended or understood by the Board/CEO that allegations 1(b) and 2 would encompass an allegation of dishonesty? Was the difference in wording as between allegations 1(b) and 2, on the one hand, and allegation 3, on the other, intended or understood to mean that any allegation of dishonesty was confined to allegation 3? Did the Board ultimately base its view about sanction on a finding of dishonesty, or not, having regard to different wording used by it in correspondence on different dates? Was the sanction of erasure chosen by the Board on the basis of an erroneous understanding of the evidence and findings of the Committee? I do not consider it necessary to resolve these questions. It seems that there was, from the beginning, a potential for confusion by reason of the manner in which allegations 1(b), 2 and 3 were worded, although it has to be said that the drafters of allegations are faced with the difficulty caused by the absence of any guiding code as to the different types of misconduct that may be charged. Further, the Board did not assist matters when it used the word 'dishonesty' in correspondence and then resiled from using that word in its final letter. However, the most fundamental question is, whether one characterises the

motivation of Ms. Carroll as dishonesty or not, the misconduct found was at the upper level of the scale of seriousness or not. To put it plainly, the Committee found that Nurse Carroll had relevant information which she chose neither to write down nor to pass on orally at the time of her going off-duty. Given the importance of a nurse's duty to furnish all relevant information, this was a very serious matter, whether one describes it as dishonest or not. I would not, therefore, take issue with the Board's decision in placing the conduct at the upper end of the scale of seriousness, although I believe it was unfortunate that the correspondence on behalf of the Board introduced the term 'dishonesty' which was not used in the charges at all and thereby introduced an unnecessary layer of complexity into the situation.

91. By way of final comment on this issue, it might be that consideration should be given in the future to a slightly different format for Fitness to Practice Committee Reports. The form of the Report in the present case was simply to list all the pieces of evidence that had been heard or read, followed by a setting out, in short form, each allegation and the Committee's findings in relation to them. There was no narrative of the facts found, even in a simple form. This led to the arguments which arose in this case as to what precise facts had been found by the Committee as well as what facts had been relied upon by the Board. It would seem to be possible to devise, without making the matter overly complicated, some kind of a report which (1) contains a short narrative summary of the facts, including the identification of any key factual conflicts which arose and what factual findings the Committee has made in relation to those; (2) indicates the decision of the Committee as to which of the allegations are proved and why; and (3) if making a recommendation as to sanction, explains where on the scale of seriousness the Committee considers the conduct to fall together with any mitigating factors considered to be relevant. I appreciate that it is difficult enough to gather together the collective body that is the Committee in order to hear the evidence in a case such as this, let alone expect any kind of a formal written judgment, but the deprivation of a professional of their means of livelihood is a most serious matter and, in any event, a lack of clarity on key matters may ultimately lead to expensive and time-consuming court proceedings.

**Conclusion on the appropriateness of erasure as a penalty**

92. I would not disagree with the Board's view that the misconduct itself fell at the upper end of misconduct, involving, as it did, certain failures of care, and a failure to keep proper records and to pass on information in relation to an elderly, vulnerable patient who had died a sudden and unexpected death. The real issue is whether the various mitigating factors should have adjusted the penalty downwards. Having regard to the various matters discussed above, it is my view that the Court cannot be satisfied that the Board properly approached the matter of sanction with adequate regard to the various mitigating factors identified above.

**What the Court should do**

93. Having regard to the Court's view on how the matter of sanction was approached, the Court is faced with something of a conundrum in terms of how best to proceed. The Court does not have the power to substitute its own sanction for that imposed by the Board. Nor would it be appropriate for the Court merely to quash the sanction, leaving the misconduct entirely unpunished, particularly in circumstances where the findings of serious professional misconduct have been admitted. As noted earlier, on a literal interpretation of s. 39(3) of the Nurses Act, 1985, the Court cannot quash the decision and remit the case back to the Board, yet, it would seem absurd if the Court were simply to have the power to quash the sanction, in a case where the findings of misconduct are not in dispute, without having an ancillary power to send the matter back for reconsideration by the Board as this would leave the conduct, admitted to be professional misconduct, without any penalty. Accordingly, the Court considers that it is necessary to rely upon s. 5(1)(b) of the Interpretation Act, 2005, on the basis that the literal interpretation of s. 39(3) would be absurd. The Court will therefore quash the decision of the Board imposing the sanction of erasure and direct the Board to re-consider the question of sanction in light of the comments made in this judgment as to how the matter of sentencing, and, in particular, issues of mitigation, should be approached. I regret that the Court does not have the power to substitute a penalty for that imposed by the Board in order to bring finality to matters which have already gone on too long, but the Court clearly lacks the power to do so under the 1985 Act and thus, cannot do so.