THE HIGH COURT

[2017 No. 68SP]

IN THE MATTER OF SECTION 71 OF THE MEDICAL PRACTITIONERS ACT 2007

AND IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER

AND ON THE APPLICATION OF THE MEDICAL COUNCIL

BETWEEN

MEDICAL COUNCIL

APPLICANT

AND

DEIRDRE NOELE MARY LOHAN-MANNION

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 23rd day of June, 2017

Background

1. On 22nd September, 2014 Mr. Frank Cowan, a 46 year old married man with two young children underwent an elective surgical procedure at the Santry Sports Clinic in Dublin. A cervical decompression and discectomy was performed with a view to relieving chronic neck problems which had not responded to non-surgical treatment.

2. Unfortunately, Mr. Cowan, during the course of the surgery, sustained a catastrophic hypoxic brain injury which has left him completely dependent, tube fed, and with no possibility of any meaningful recovery. Mr. Cowan's general practitioner was greatly troubled at what had happened to his patient. He was also the general practitioner to Mrs. Cowan (whom he described as "devastated") and the couple's two children. He made a complaint to the Medical Council on his understanding that there were "*a number of anaesthetic issues which do not appear to have been managed in an appropriate clinical manner*". In the course of his complaint he made it clear that the surgical management of Mr. Cowan was exemplary. He took a very different view of the anaesthetic management and expressed his belief that the professional standards of the anaesthetist in question fell below those expected of a consultant anaesthetist. The anaesthetist in question is the respondent to these proceedings.

3. The general practitioner made it clear that he did not make the complaint lightly but felt he had no other option but to do so in the best interests of his patient and also in respect of other patients who might undergo anaesthesia by the respondent.

4. Following receipt of the complaint, the applicant's Preliminary Proceedings Committee formed the opinion that there was a *prima facie* case to warrant further action being taken against the respondent in respect of the complaint. The matter was referred to the Fitness to Practise Committee (FTPC) of the applicant on the grounds of alleged professional misconduct and poor professional performance on the part of the respondent.

The FTPC

5. An inquiry under Part VII of the Medical Practitioners Act 2007 ("the Act") was conducted by the FTPC on 7th and 8th of November, 2016. The respondent was present and was legally represented.

6. The respondent faced nine different allegations arising from the anaesthetic care which she gave to Mr. Cowan. Two of the allegations were withdrawn and the respondent made admissions in respect of the remaining seven. In respect of allegations 1, 4, 5, 8 and 9 she admitted them and that they amounted to poor professional performance. In respect of allegations 2 and 7 she admitted them and that they amounted to professional misconduct. The FTPC had before it a good deal of documentary material including a report from Dr. Anna Maria Rollin, a Consultant Anaesthetist from the United Kingdom who provided a detailed report and also gave oral evidence before the Committee.

Findings of the FTPC

7. The Committee dealt with the following nine allegations.

> **Allegation 1**
> *"In the context of affording anaesthetic care to your patient, Mr. Frank Cowan ("the patient"), who was undergoing surgery at the Sports Surgery Clinic, Santry, Dublin ("the clinic") on or about 22nd September, 2014:*
>
> *(1) In circumstances where:*
>
> *(a) the blood pressure monitor indicated that the patient's blood pressure was low; and/or*
>
> *(b) the blood pressure monitor did not display a blood pressure reading; and/or*
>
> *(c) the blood pressure monitor issued warning messages such as 'long inflation time' and/or 'weak pulsation'; and/or*
>
> *(d) the blood pressure monitor alarm sounded,*

You failed, on one or more occasions, to take any or any adequate steps, during the course of the surgery, to include, but not limited to, one or more of the following:

(i) requesting the operating surgeon, Mr. Kelleher, to step back from the operating table and then re-checking the blood pressure; and /or

(ii) changing, within an adequate timeframe or at all,

(a) the position of the cuff connected to the monitor; and or

(b) the cuff itself or the monitor itself; and/or

(iii) taking the patient's pulse manually; and/or

(iv) ensuring that you had a continuous and reliable source of measurement of the patient's blood pressure; and/or

(v) informing the operating surgeon, Mr. Kelleher, within an adequate timeframe that you were experiencing difficulties in measuring the patient's blood pressure;"

The FTPC found this allegation proved as to fact having regard to the admissions made by the respondent. It also found that the allegation amounted to poor professional performance. It came to that conclusion having regard to the admissions made by the respondent and the evidence of Dr. Rollin.

Allegation 2
"Absented yourself, on one or more occasions, from the theatre during the said surgical procedure, at all but especially, in the circumstances set out at allegations 1(a) and/or 1(b) and/or 1(c) and/or 1(d)."

This allegation was held to be proven as to fact having regard to the admissions made by the respondent. It was also found that it amounted to professional misconduct on the part of the respondent having regard to her admissions and the unchallenged evidence of Dr. Rollin.

Allegation 3 was not proceeded with.

Allegation 4 was as follows.

"Failed to record in the anaesthetic chart:

(a) the lower blood pressure readings that appeared on the blood pressure monitor; and /or

(b) the blood pressure monitor having failed to display blood pressure readings."

This allegation was proven as to fact and it was held that it amounted to poor professional performance. These findings were again made on the admissions made by the respondent and the unchallenged evidence of Dr. Rollin.

Allegation 5 was that the respondent:

"Made entries in the patients anaesthetic chart of one or more blood pressure readings in respect of which:

(a) you had no accurate measurement; and/or

(b) were inconsistent with the readings that had been displayed on the blood pressure monitor".

This allegation was also proven as to fact and was held to amount to poor professional performance on the same basis as the other allegations.

Allegation 6 was not proceeded with.

Allegation 7 was that the respondent:

"Failed to record on one or more occasions the administration of ephedrine and its effects, if any."

This was proven as to fact and was held to amount to professional misconduct. These findings were made on foot of admissions made by the respondent and the unchallenged evidence of Dr. Rollin.

Allegation 8 was as follows:

"In your actions during the surgical procedure, you fell seriously short of the standards of clinical judgment and/or performance that might reasonably be expected from a Consultant Anaesthetist to include on the one hand conducting your anaesthetic care in a manner that would suggest you were comfortable that the patient's blood pressure was within normal parameters, despite the readings appearing on the monitor, and yet on the other hand, administering ephedrine to raise the patient's blood pressure".

This allegation was proven as to fact and was held to amount to poor professional performance on the admissions of the

respondent and the unchallenged evidence of Dr. Rollin.

Allegation 9 was that:

"Arising from one or more of the above, failed to have adequate regard for the patient's safety".

This was also proven as to fact and was held to amount to poor professional performance on the basis of the admissions and Dr. Rollin's unchallenged evidence. Having made those findings the FTPC made its recommendations to the Medical Council.

8. Before coming to those recommendations, it is appropriate that I should refer in part to the opinion of Dr. Rollin concerning the respondent's performance during the surgery on Mr. Cowan. On any view the opinion of Dr. Rollin was a devastating criticism of the performance of the respondent and the care given by her to Mr. Cowan. For the purposes of this judgment I will confine myself to reproducing Dr. Rollin's opinion on the two findings of professional misconduct.

9. The first such finding was that the respondent absented herself on one or more occasions from the theatre at all but especially in the circumstances set out in allegations 1(a) and/or 1(b) and/or 1(c) and/or 1(d). This is what Dr. Rollin had to say:

"By her own account, Dr. Lohan-Mannion absented herself from the theatre on two occasions.

The first was early after the case was underway, when she went to the desk to ask the secretary to do something for her and the second was when she left the patient in the care of the anaesthetic nurse while she went for a coffee.

Contemporaneous guidance from the Association of Anaesthetists of Great Britain and Ireland (AAGBI) says: 'The anaesthetist must be present and care for the patient throughout the conduct of an anaesthetic'.

It describes the situations in which the anaesthetist may leave the patient: 'very occasionally, an anaesthetist working single handedly may be called on briefly to assist with or perform a life saving procedure nearby. Leaving an anaesthetised patient in these circumstances is a matter for individual judgment. If this should prove necessary, the surgeon must stop operating until the anaesthetist returns. Observation of the patient and monitoring devices must be continued by a trained anaesthetic assistant'.

During neither of her two absences was Dr. Lohan-Mannion going to the aid of another patient. During the second absence, she left her patient with an unrecordable blood pressure, in the care of an anaesthetic nurse. Anaesthetic nurses are trained to observe, but not independently to treat, the patient.

Even if she believed that the problem with the blood pressure was a mechanical one, she still left her patient with no means to record the pressure.

This was an abrogation of her responsibility as a consultant anaesthetist to care for the safety of the patient, and thus a serious failure.

In my opinion, she did not meet the standards of competence expected, and this amounted to poor professional performance.

Because she put the anaesthetic nurse into an untenable situation, where his own standard of care might be compromised, my opinion is that it amounted to professional misconduct."

10. The other finding of professional misconduct was in respect of the failure to record the administration of ephedrine and its effects if any. This is what Dr. Rollin had to say:

"In her interview Dr. Lohan-Mannion mentioned giving ephedrine a number of times. For example, at 9.45am she gave ephedrine 3mg with a 'transient response'. A little later she 'gave some ephedrine in 3mg boli to see if the blood pressure recorded better – it didn't'. She then put 18mg ephedrine into the intravenous infusion of Hartmann's solution.

During the operation, she gave one or two more doses of ephedrine 3mg when giving morphine but noted no change in the patient observation.

There were three consecutive readings which recorded 'long inflation time' and two further readings which were 40-0 and 50-0. Dr. Lohan-Mannion gave 'one or two more doses of ephedrine 3mg'.

There is no record of ephedrine administration on the anaesthetic chart.

Giving repeated doses of a vasoconstrictor without maintaining a record of the dose, the frequency or the effect means that it is not possible to assess the overall effect of the drug, or to monitor trends in the physiological readings. This is substandard care, and poor professional performance.

Additionally, it would be important for other members of staff, especially recovery staff, to be aware that the patient had required multiple doses of ephedrine to maintain his blood pressure. They could then be more vigilant in monitoring the blood pressure, and also be alert to any potential side effects or complications of the ephedrine itself. Not to have ensured that recovery staff had easy access to this information via the anaesthetic chart put the patient at risk and was professional misconduct."

FTPC recommendation

11. The FTPC made its recommendations in the following terms:-

"Having regard to the findings above, the Committee makes the following recommendation to Council in respect of sanction:

The Committee acknowledges the tragic outcome for Mr. Cowan and his family and hope (sic) there will be improvement in his condition in the future.

In view of these serious admitted deficiencies in record keeping and clinical care the Committee is satisfied that Dr. Lohan requires re-education and training in the management of anaesthesia in a theatre setting to include pre and post operative care.

The Committee recommends that Dr. Lohan be censured and due to the admitted deficiencies that the following conditions be attached to the retention of her name in the Register.

- *You must inform the following parties that your registration is subject to conditions*
  (a) any organisation or person employing or contracting with you to undertake medical work

  (b) any locum agency or out of hours service you are registered with or apply to be registered with (at time of registration)

  (c) any prospective employer (at the time of application)

- *You must attend and successfully complete an appropriate course within twelve months and such course be a multi-disciplinary interactive crisis programme such as provided by the Royal Colleges and training bodies.*

- *You must work with a nominated person, acceptable to the Medical Council, to formulate a professional development plan acceptable to the Medical Council, specifically designed to address the deficiencies in the following areas of your practice:*

  (a) the management of anaesthesia in a theatre setting

  (b) record keeping

- *You must forward a copy of your professional development plan to the Medical Council within two months of the date on which these conditions become effective.*

- *You must meet with your nominated person acceptable to the Medical Council, on a regular basis to discuss your progress towards achieving the aims set out in your professional development plan. The frequency of your meetings is to set (sic) by the nominated person.*

- *You must agree to the nominated person, acceptable to the Medical Council, supplying reports to the Medical Council about your progress when requested.*

- *You be responsible for and discharge any and all costs involved in the implementation and compliance with the above mentioned conditions attached to the retention of your name in the Register.*

- *These conditions attached to the retention of your name in the Register remain in place for a minimum period of two years.*

Reason: The sanction of censure and the imposition of conditions is fair and proportionate and will allow objective monitoring of Dr. Lohan's practice and (sic) deemed sufficient to protect patients and the public interest."

12. It is right to recall that before making this recommendation the FTPC heard detailed submissions from counsel acting on behalf of the respondent and was made aware of her approximately 30 years as a consultant during which she had never been the subject of civil litigation or the subject of any complaint made to the Medical Council in relation to her clinical care. It also had before it the respondent's impressive curriculum vitae as well as testimonials from medical colleagues both in her own discipline and from consultant surgeons. These were framed in very laudatory terms and a number of the doctors expressed themselves happy to have themselves or members of their family anaesthetised by the respondent.

The Medical Council

13. In accordance with the statutory scheme the case then proceeded to the Medical Council where it was considered on 15th December, 2016.

14. The respondent was represented by counsel and submissions were made on her behalf.

15. The decision of the Council was announced on the same day and it followed the recommendation of the FTPC to the letter. It framed the reason for its decision in slightly different terms in that it said "*The reason for the Council's decision as to sanction is that the Council believe (sic) it is fair and proportionate having regards (sic) to the findings made*".

16. No appeal was taken by the respondent against that decision of the Council. The matter was brought before the court in accordance with s.76 of the Act. The Council asked the court for confirmation of its decision.

17. Before considering what next occurred it is appropriate at this stage that I should outline the sanctions which are available to the Council in circumstances where the FTPC finds any allegation against a medical practitioner proved. In such circumstances the Council may, pursuant to s.71 of the Act, decide that one or more of the following sanctions may be imposed:-

"(a) An advice or admonishment, or a censure, in writing;

(b) A censure in writing and a fine not exceeding €5,000;

(c) The attachment of conditions to the practitioner's registration, including restrictions on the practice of medicine that may be engaged in by the practitioner;

(d) The transfer of the practitioner's registration to another division of the Register;

(e) The suspension of the practitioner's registration for a specified period;

(f) The cancellation of the practitioner's registration;

(g) A prohibition from applying for a specific period for the restoration of the practitioner's registration."

18. None of the decisions referred to at (b), (c), (d), (e), (f) or (g) take effect unless such decision is confirmed by this court on an application either under section 75 or section 76. Thus, the only self-executing decision of the Council is either an advice or admonishment or a censure in writing.

19. The sanctions which are prescribed in s.71 are set forth in ascending order of seriousness.

Section 76
20. The application for confirmation of the decision of the Council was brought pursuant to s.76 of the Act. That section is only applicable where the registered medical practitioner does not appeal a decision to the court under s.75 of the Act. As there was no appeal in this case, s.76 was applicable. Section 76(2) provides that such an application may be made *ex parte*. That is what happened here.

21. Subsection (3) of 76 reads:-

"The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so."

The hearing of 27th February, 2017
22. The matter was first listed before me on 27th February, 2017 on an *ex parte* basis.

23. Having read the papers in advance of that hearing I was concerned at the low level of sanction that was sought to be imposed given that in a single surgical procedure there were two findings of professional misconduct and five findings of poor professional performance made against the respondent. I was also conscious of the fact that the FTPC had expressed itself as being satisfied that the respondent "*requires re-education and training in the management of anaesthesia in a theatre setting to include pre and post operative care*". I was concerned as to how the protection of the public and in particular that segment of it which constituted prospective patients of the respondent would be protected in circumstances where the respondent was free to continue the practice of anaesthesia whilst complying with the conditions in question. It is to be noted that she is not sought to be suspended, not even during the time when she is complying with the various conditions.

24. I was also concerned at a perceived ambiguity in the way in which the conditions were framed.

25. The conditions require the respondent to inform any organisation or person employing or contracting with her to undertake medical work that her registration is subject to conditions.

26. The respondent practises medicine solely in the private sector. She has no public appointment. Thus, every private patient who may contract with her for anaesthetic services is her employer. I wished to have clarity on whether the conditions that I was being asked to confirm required her to inform any such private patient that her registration was subject to conditions.

27. Having raised these matters with the solicitor for the Medical Council, he sought an adjournment of the matter so that he could take instructions.

28. The case was adjourned to the following day and on that occasion was further adjourned. The adjournment was sought in circumstances where I was informed that the President of the Medical Council took the view that the condition was "*not exactly unequivocal in terms of whether it might apply to patients or not*".

29. On the Council's application I adjourned the matter so that the President of the Medical Council who was abroad at the time might have a further opportunity to consider the matter.

30. In fact, the Medical Council was reconvened to consider the issue. It met on 8th March, 2017. I have been furnished with a transcript of that hearing. The purpose of the hearing was to provide clarification as to what the Council intended by its notification requirements in respect of a "person employing or contracting with" the respondent. I should make it clear that the Council met of its own volition. I did not and could not have asked it to do so and indeed the only element of its decision that it could consider was clarification of the notification provision. It was not open to it to reconsider the adequacy of sanction nor did it attempt to do so.

31. The decision of the Council was expressed by its President as follows:-

"Just to recap a little bit, the President of the High Court asked the Council to clarify its meaning of condition 1(a) and that is that Dr. Lohan-Mannion must inform the following parties of her registration that it is subject to conditions and 1(a) is specific:-

'Any organisation or person employing or contracting with you to undertake medical work.'

Council has deliberated on this and Council decided or has decided that it took the view at the sanction hearing that Council expected and expects Dr. Lohan-Mannion to inform any hospital or organisation conferring working privileges on her of the sanctions and conditions applied to her registration. The Council considered the totality of the conditions imposed would serve to protect the public adequately and did not intend that Dr. Lohan-Mannion specifically and individually notify patients."

32. The Council also dealt with one other matter which is not immediately pertinent to this application but which I will address at the conclusion of this judgment.

33. Following that decision of the Medical Council the matter returned to court with an affidavit from Professor Wood setting forth the

decision of the Council as enunciated by him at the conclusion of its hearing on 8th March. He also exhibited certain further material which was placed before the Council on the occasion of that hearing. I should point out that the respondent was again represented by counsel and made submissions before the Council on 8th March, 2017.

34. Having considered the contents of Professor Wood's affidavit and the decision made by the Council I declined at that juncture to make the order sought. I indicated that three issues would require to be addressed before I could consider making the orders sought. They were:-

> (i) the adequacy of the sanction recommended to the court by the Medical Council having regard to the findings made and the evidence given to the FTPC;
>
> (ii) assuming that the recommended sanction is adequate, is the protection of the public appropriately addressed by the respondent being permitted to continue to practise medicine whilst the conditions attaching to her registration remain unfulfilled?;
>
> (iii) even if those two issues were decided in a manner favourable to the respondent whether notification of the imposition of these conditions in the limited way intended by the Medical Council is adequate since individual patients coming to contract privately with the doctor would not be notified by her of those conditions.

35. Having expressed these concerns, I directed that the respondent be put on notice of the proceedings and be given an opportunity to address the court concerning those matters. That is what happened and a full *inter partes* hearing took place with the respondent being represented by senior and junior counsel and adducing affidavit evidence.

Section 75 / Section 76 – a contrast

36. A decision of the Medical Council by way of imposition of a sanction following a report from the FTPC does not take effect unless its decision is confirmed by this court. The only exceptions to that are comparatively minor sanctions such as advice, admonishment or censure.

37. Confirmation by this court is obtained in one of two ways. Either the registered medical practitioner can appeal the decision of the Medical Council pursuant to s.75 or, in the absence of such an appeal, an application is made by the Medical Council itself under section 76.

38. I have already reproduced s.76(3) which requires that the court shall confirm the decision unless the court sees good reason not to do so.

39. A much wider jurisdiction appears to be given to the court when an appeal is brought by a medical practitioner. Section 75(3) provides:-

> *"The court may, on the hearing of an appeal under subsection (1) by a medical practitioner –*
>
> *(a) either –*
>
> > *(i) confirm the decision the subject of the application, or*
> >
> > *(ii) cancel that decision and replace it with such other decision as the court considers appropriate, which may be a decision –*
> >
> > > *(I) to impose a different sanction on the practitioner, or*
> > >
> > > *(II) to impose no sanction on the practitioner,*
> > >
> > > *and*
>
> *(b) give the Council such directions as the Court considers appropriate and direct how the costs of the appeal are to be borne."*

40. Thus it can be seen that the powers given to the court by the legislature under s.75 are more extensive than those conferred under section 76.

41. Because the court is given such a wide discretion under s.75 it appears to me that on such an appeal the court is placed in the position of hearing the appeal on the merits. It is at large as to the evidence which may be adduced before it and as to the sanction, if any, which it may impose.

42. This is to be contrasted with s.76 where the court is mandated to confirm the decision of the Medical Council "unless the court sees good reason not to do so".

43. I have already had to address how s.76 (3) falls to be interpreted. I did so in the course of an extempore judgment delivered on 19th December, 2016 in the case of *Medical Council v. M.A.G.A.* [2016] IEHC 779.

44. That decision was delivered in the context of an application under s.76 since there was no appeal by the medical practitioner in that case and he was not represented before the court. Thus, the decision was given with the benefit of argument only on behalf of the Medical Council.

45. I came to the conclusion that when the Act speaks of "good reason", that expression has to be given a restricted meaning. In the course of my judgment I said:-

> *"I accept the argument made by Mr. Butler that the jurisdiction which is conferred under s.76 (3) is not an unfettered one and it does not constitute the High Court as an appeal tribunal on the merits in respect of an application of this sort. Rather, the obligation of the court is to deal with the issues of the type identified, such as adherence to correct procedural norms, adherence to the requirements of natural and constitutional justice and the making of a decision by*

> *the Medical Council which is a reasonable one or to put it another way is one which cannot be said to be one which no reasonable council would come to. By the use of that expression, I am importing concepts of reasonableness which are well known to legal practitioners on the judicial review side of the court, namely "Wednesbury unreasonableness" or "Stardust" type unreasonableness. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223; State (Keegan & Lysaght) v. Stardust Victims' Compensation Tribunal [1986] I.R. 642.)"*

46. I identified the strongest line of argument made to me in the *M.A.G.A.* case in support of that construction as being the fact that under s.6 of the Act the Medical Council is the body which is charged with the obligation of ensuring that the practice of medicine in this jurisdiction is conducted by competent practitioners in whom the public can repose trust. That is the whole object of the existence of the Medical Council. That responsibility rests with the Medical Council.

47. Interesting questions arose in the course of this hearing as to what might happen if the court were to be satisfied that it should not make the s.76 confirmation order. It was argued that in such circumstances the court has no power to do other than refuse the order. Thus, a medical practitioner with serious findings of misconduct against him, should this court refuse to confirm a decision of the Medical Council for good reason, would walk away scot free. Such an absurd result could hardly have been the intention of the legislature but may, nonetheless, be one unwittingly ordained by it. However, before one gets to consider any of these questions the first issue that falls to be dealt with is whether the decision of the Medical Council before me is so unreasonable as to warrant this application being refused.

48. If I conclude that it is not so unreasonable as to justify that course being taken, then other issues including issues of construction of the Act do not arise for consideration.

Discussion

49. Both sides argue that the construction which I placed upon the provisions of s.76 (3) of the Act in *Medical Council v. M.A.G.A.* is the correct one. The ability of the court to refuse to confirm a decision of the Medical Council is limited to circumstances where it can identify "good reason" not to do so. Given the contrast between the jurisdiction conferred by s.75 and that conferred by s.76, coupled with the fact that the obligation to protect the public by ensuring that medicine is practised by competent practitioners in whom the public can repose trust is that of the Medical Council, the only basis upon which the court can refuse an order under s.76 is that outlined in *M.A.G.A.* Thus, the court would have to be satisfied of either a procedural impropriety, a lapse from the norms of constitutional and natural justice or a decision on the part of the Medical Council which is one which no reasonable Council could come to.

50. In the present case there is no question of procedural impropriety or any failure to observe the standards of natural and constitutional justice. The only issue is whether the decision of the Medical Council here is so unreasonable as to warrant the court refusing its confirmation. Consideration of this encompasses all three of my concerns as set out in para. 34.

51. There is no doubt but that the sanction imposed here is at the lower end of the scale of sanctions that might have been applied. There is no element of suspension of the respondent from medical practice even during the time that she is satisfying the various conditions applied against her. Nonetheless, it is said that the Medical Council has adequately addressed its obligations and that its decision cannot be regarded as so unreasonable as to warrant the court refusing the application.

52. On behalf of the Medical Council my attention was directed to the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 64 where at pp. 71-72 Finlay C.J. held:-

> *"The court cannot interfere with the decision of an administrative decision making authority merely on grounds that it (a) is satisfied that on those facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authorities was much stronger than the case for it. … Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction nor is it expected to nor can it, exercise discretion with regard to planning matters. I am satisfied that in order for an applicant for judicial review to satisfy a court that a decision making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."*

53. The Medical Council submits that when one asks whether the applicant's decision is one which no reasonable medical council would have made or, to use the *O'Keeffe* formulation, where the decision was made with no relevant material to support it, the answer in both instances is "no".

54. I am asked to take into account that the decision was taken by a body with considerable competence and experience in making decisions of this sort. Council members and members of the FTPC, whose recommendation as to sanction the Council considered and accepted, have undergone appropriate and regular training in this specialised field of decision making. That is undoubtedly so having regard to the affidavit evidence from the President of the Medical Council.

55. The Medical Council members were informed by their own legal advisor in respect of the correct legal principles to apply particularly having regard to the decision in *Hermann v. Medical Council* [2010] IEHC 414 and *Medical Council v. Murphy* (Unreported) (29th June, 1994). The members had the benefit of detailed written guidance on sanctions being imposed in a document which was updated on a regular basis. When clarification was sought in respect of its decision concerning notification to employers the Council reconvened and considered the matter in detail. The Council expressed the paramount consideration of the protection of the public which is its statutory mandate and explained why in its view that was adequately provided for in the sanction decided upon. It is correct to say that although the FTPC found the respondent to be in need of retraining it did not find that until such retraining was successfully completed that she would be unfit to practise medicine.

56. The Medical Council considers it to be particularly relevant to the consideration of public protection that, in order to comply with the conditions sought to be confirmed, the respondent must liaise closely and regularly with her approved nominated person who will determine the frequency of such contact. Both the respondent and the nominated person must in turn keep the Medical Council fully informed of her re-education and progress. The respondent must, in addition, successfully complete the specified course in the form of a multi-disciplinary interactive crisis programme such as those provided by the Royal Colleges and training bodies. These obligations, combined with the requirement to notify specified categories of people of the existence of the conditions serve to ensure, as far as reasonably possible, that in the event of non-compliance, or of concern about the respondent's performance as a

practitioner for any reason, that such would be quickly identified and appropriate and immediate action could be taken by the Council. Thus, it is said, that it considered the public interest to be protected appropriately and is the reason why a harsher or more restrictive sanction would not it its view be necessary in the public interest or proportionate in all the circumstances of the case.

57. Thus, it is argued on behalf of the Council that the totality of the conditions provide an appropriate level of protection to the public and that they are rigorous and comprehensive.

58. The respondent supports all of the arguments made by the Medical Council. In addition, she filed evidence demonstrating courses that she has taken to date and her intention in the future to comply fully with the conditions the subject of the recommendation.

59. She also pointed out that in order to comply with a number of the conditions it is necessary that she do so whilst at work. Thus, to suspend her from practice would make a number of the conditions incapable of being given effect to thereby rendering her unable ever to practise medicine. It was also argued that the notification provision concerning employers was correctly intended by the Medical Council as not to extend to every private patient who may contract with the respondent. If she were required to notify every such patient then, it is said, that would amount to, in effect, a suspension from the Register for all practical purposes. Instead, she has given notice to the Santry Sports Clinic where she works. The Chairman of its medical advisory committee on 10th May, 2017 wrote in laudatory terms concerning her and indicated that that clinic was "*fully supportive of her during this difficult time and look forward to continue working with her for a number of years into the future*". Thus, it is said, that individual notification to every prospective patient would be disproportionate and oppressive and that the Medical Council was correct in its intention to limit the notification.

Conclusions
60. In *Hermann v. Medical Council* [2010] IEHC 414, Charleton J. said this:-

> *"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 in by the practitioner, the category of misconduct or lack of competence has become much 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."*

61. Thus it can be seen that the protection of the public is a paramount consideration for the Medical Council and the court on an application of this sort.

62. In carrying out the function which is prescribed under s.76 (3) of the Act, I have to have regard to the limited jurisdiction which is vested in this court. As I have already pointed out I can only refuse the order sought in this case if I am of opinion that the Medical Council came to such an unreasonable decision that no reasonable medical council could have so done.

63. I am unable to come to that conclusion and thus cannot refuse to confirm the Medical Council's decision. The threshold which has to be achieved in order to demonstrate such unreasonableness is similar to that required to quash the decision of any administrative body on judicial review. It is a high threshold and has not been achieved here.

64. Given the limited jurisdiction conferred upon the court, my views as to the adequacy of the sanction, having regard to the serious failures of the respondent and the findings made against her, are not relevant.

65. Although the sanction might be considered to be lenient or one which does not address the public interest and provide protection to the public as comprehensively as it might, it nonetheless cannot be regarded as so lacking in that regard as to warrant a refusal of this application. The Medical Council is of the view that the sanction proposed by the FTPC and affirmed by it is proportionate and adequately protects the public as it is framed and without the necessity of any suspension being visited upon the respondent. For the reasons urged upon me by both the Medical Council and the respondent, I conclude that the Council's decision addresses all relevant issues in such a way as would not justify a refusal of this application.

66. In these circumstances it is not necessary for me to consider the powers which the court would have if the order were to be refused. Would the court be confined to a mere refusal thus resulting in the respondent not having to face any sanction at all? Would it have power to refer the matter back to the Medical Council for reconsideration by it? Or could it be that in order to ensure that an absurd result was not brought about the court could proceed to impose a sanction which it thought appropriate?

67. These interesting questions do not arise for answer here in the light of my findings. It would be neither prudent or appropriate for me to suggest the answers to these questions.

Premises
68. There is one other matter that I should mention since it arose during the course of the earlier hearings.

69. In the course of my consideration of the papers in this matter it became clear that when the unfortunate Mr. Cowan was in need of an MRI scan after his surgery it could not be carried out at the Santry Sports Clinic because of an inability on its part to scan anaesthetised patients. An ambulance had to be sent for and Mr. Cowan was taken to Beaumont Hospital for that procedure. I confessed surprise at discovering that to be the position given the substantial surgical work of the clinic. As the Medical Council does have certain limited functions pertinent to such an issue it was one of the matters which I raised in February of this year. I note that the Council has written to the clinic, has received a response and has been in further correspondence on the matter.

70. This is not a matter which arises directly on this application but I am grateful to the Medical Council for taking up the matter on foot of the concerns expressed by me.

Disposal
71. This application is granted. The court will, pursuant to s.76(3) of the Act, confirm the decision of the Medical Council to attach the conditions recited in this judgment and set out at para. 8 of the special endorsement of claim of the special summons.