THE COURT OF APPEAL

CIVIL

APPROVED
NO REDACTION NEEDED

Neutral Citation: [2023] IECA 18
Court of Appeal Record Number: 2022/65

Collins J.
Costello J.
Allen J.

BETWEEN/

CORMAC LOHAN

APPELLANT/
APPLICANT/

- AND –

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

-AND-

THE LAW SOCIETY OF IRELAND

NOTICE PARTY/
RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 1 day of February, 2023

Introduction

1. The appellant is a solicitor. The Solicitors Disciplinary Tribunal *("the Tribunal")* is an independent statutory tribunal appointed by the President of the High Court to consider complaints of misconduct against solicitors. The notice party *("the Law Society")* is an educational and regulatory body of the solicitors' profession in Ireland which exercises statutory functions under the Solicitors Acts 1954 to 2015.

2. The Law Society applied to the Tribunal for an inquiry into the conduct of the appellant on the grounds of alleged misconduct. The application arises from an inspection of the appellant's practice by two accountants from the Regulation Department of the Law Society *("the investigating accountants")* pursuant to the Solicitors Acts and The Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) and the findings of the investigating accountants.

3. At the inquiry before the Tribunal on 26 November 2019 the appellant made a preliminary objection that the investigating accountants were not properly authorised, that their investigation was unlawful and that the evidence arising from the investigation was inadmissible before the Tribunal. As is more fully set out below, on 12 March 2020 the Tribunal ruled that the investigating accountants were properly authorised and that their investigation was not unlawful and that the evidence arising from the investigation was admissible.

4. The appellant sought judicial review of the decision of the Tribunal and by a judgment delivered on 14 December 2021 the High Court refused the appellant the reliefs he sought. By a further ruling on 18 January 2022, the High Court ordered *inter alia*, that the Tribunal and the Law Society were each entitled to recover their costs of the proceedings from the appellant.

5. By notice of appeal dated 15 March 2022 the appellant appealed the entire decision on the seven grounds of appeal therein set out.

Background

6. The Law Society has responsibility for regulating members of the solicitors' profession and for monitoring compliance with the Regulations and the Solicitors Acts. The Regulation Department of the Law Society employs investigating accountants whose role is *inter alia* to inspect the accounts of the solicitors to ensure that they are maintained in accordance with the Regulations. Mr. John Elliot, Registrar of Solicitors and Director of Regulation, issued two memoranda dated 31 March 2016 to two investigating accountants, Ms. Mary Devereux and Mr. Rory O'Neill. Each memorandum was addressed to the individual accountant and identified the appellant and his practice. The memorandum then provided:-

> *"Please find attached copy of a letter of even date addressed to the above named solicitor(s). You are hereby appointed as the Society's "authorised person" within the meaning of Section 76(10) of the Solicitors (Amendment) Act 1994.*
>
> *You are authorised to attend at the solicitors place of business for the purpose of investigating whether there has been due compliance with the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) and with the provisions of Section 66 of the Solicitors' Act 1954 as substituted by Section 76 of the Solicitors (Amendment) Act 1994 and to report thereon to the Society".*

7. It is common case that the reference in the first paragraph to s. 76(10) of the Solicitors (Amendment) Act 1994 is an error. The memorandum ought to have referred to s. 66 of the Solicitors Act 1954 as substituted by s. 76 of the Solicitors (Amendment) Act 1994, as indeed is set out in the second paragraph.

8. The copy letter attached to the memorandum was addressed to the appellant and provided as follows:

"The Society has appointed Ms Mary Devereux, Chartered Accountant as an authorised person to attend at your place of business for the purpose of investigating whether there has been due compliance with the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) and with the provisions of section 66 of the Solicitors Act 1954 (as substituted by section 76 of the Solicitors (Amendment) Act 1994).

You are required to make available to Ms Devereux for inspection all or any part of your accounting records and to furnish to her such copies of your accounting records as she may deem necessary to fulfil the purpose of her investigation. You are also required to give Ms Devereux such written authority addressed to such bank or banks as she may require to enable her to inspect any account or accounts opened, or caused to be opened by you and to obtain from such bank or banks copies of such documents relating to such account or accounts for such period or periods as she may deem necessary to carry out the investigation."

A letter in identical terms referring to the appointment of Mr. Rory O'Neill was also sent to the appellant on 31 March 2016. The letters indicated that the examination would commence on 5 April 2016.

9. On 5, 7 and 8 April 2016 the investigating accountants inspected the appellant's accounting records at his offices. The investigating accountants prepared a report dated 7 June 2016. On 3 December 2018 pursuant to s. 7 of the Solicitors (Amendment) Act 1960 as substituted by s. 17 of the Solicitors (Amendment) Act 1994 as amended by s. 9 of the Solicitors (Amendment) Act 2002 the Law Society made an application to the Tribunal (Record No. 2018/DT 101) for an inquiry into the conduct of the appellant on the grounds of alleged misconduct. There was an exchange of affidavits (including two affidavits sworn by the investigating accountants) and, having reviewed the evidence, the Tribunal determined that there was a *prima facie* case for inquiry pursuant to ss. 7(2) and 7(3) of the

Act of 1960. On 26 August 2019, the Tribunal informed the appellant that it had found that there was a *prima facie* case of misconduct for inquiry and it fixed 26 November 2019 for an oral hearing.

10. On 26 November 2019 – for the first time – the appellant raised a preliminary objection to the validity of the appointment of the investigating accountants as *"authorised person[s]"* pursuant to s. 66 of the Solicitors Act 1954 as substituted by s. 76 of the Solicitors (Amendment) Act 1994 on the basis that Mr. Elliot purported to appoint the investigating accountants as the Society's *"authorised persons"* within the meaning of a section which did not exist: s. 76(10) of the Solicitors (Amendment) Act 1994. It was submitted therefore that their purported appointment was null and void and that the investigating accountants had acted without lawful authority and that the affidavits which they swore (on 27 November 2018 and 3 December 2018) should not be admitted as evidence before the Tribunal.

11. The Tribunal heard oral submissions from counsel for the appellant and counsel for the Law Society on the issue of the authorisation of the investigating accountants and the admissibility of their affidavits. It considered that it was neither fair nor appropriate to rule on the preliminary objection which had been made without prior notice to either the Law Society or the Tribunal. Accordingly, it adjourned the inquiry to 12 March 2020 and directed that the appellant was to deliver written submissions and that the Law Society was to reply to those written submissions, addressing the issues raised by way of preliminary objection. The Tribunal reconvened on 12 March 2020.

12. Mr. Niall Farrell, the Chairperson of the Tribunal, states in an affidavit sworn on 1 February 2021 in these proceedings that on 26 November 2019 the Tribunal heard the oral submissions of counsel and considered the written submissions delivered in accordance with the direction of the Tribunal. At para. 13 of his affidavit he avers:

"I prepared a draft decision on the preliminary issue using MS Word on my iPad, and this decision was discussed by me with, and approved by, the other Tribunal members before I entered the Tribunal room on 12 March 2020, with a view to delivering it. Only a single copy of this initial version of the decision was saved on my iPad in this Word document."

13. On 12 March 2020 the Tribunal said at the outset of the resumed hearing that it was in a position to deliver its determination on the preliminary objection. Counsel for the appellant objected and reminded the Tribunal that it had previously ruled that it would hear further oral submissions before making a decision on the objection. The Tribunal checked the transcript of the hearing of 26 November 2019 and agreed with the appellant's counsel that his point was *"well made".* The Tribunal then heard oral submissions from the parties. The transcript of the hearing records that following the conclusion of their submissions the chairperson of the Tribunal indicated that it would rise to consider *"your submissions this morning"*. The transcript then shows:

"Brief adjournment

Following a brief adjournment the hearing resumed as follows."

There was no evidence as to how long the Tribunal adjourned to consider the oral submissions of 12 March 2020.

14. The transcript continues with the resumption of the inquiry and the chairperson of the Tribunal stating:

"The decision of the Tribunal on the submissions made by the parties on the 26th November 2019, the subsequent written submissions and the submissions this morning is as follows." (Emphasis added)

He then delivered the decision. In his affidavit Mr. Farrell avers in paras. 18 and 19 as follows:

"18. As appears from the March Transcript, the hearing then re-convened, and I delivered the Tribunal's decision in respect of the Applicant's preliminary application, as prepared by the Tribunal Members and myself during the Recess (the "Decision"). I did so by reading same out from the revised document on my iPad. …

19. … As is apparent from the text of the Decision as exhibited at Exhibit NF2, specific reference is made to counsel's submissions on the morning of 12 March 2020, including counsel's reliance on the cases of DPP v. Henry Dunne and Simple Imports Limited. These revisions were introduced during the Recess and after having full and due regard to the submissions made on behalf of counsel for the Applicant during the morning."

15. The Tribunal held that the investigating accountants were validly authorised to investigate the appellant's accounts and were authorised persons within the meaning of s. 2 of the Solicitors (Amendment) Act 1994, and that their evidence was admissible at the inquiry.

The proceedings

16. The appellant sought judicial review to quash the decision of the Tribunal and on 15 June 2020 the High Court granted him leave to seek judicial review upon an amended statement of grounds. The statement of grounds was verified by the affidavit of the appellant sworn on 5 June 2020. The Tribunal and the Law Society each filed statements of opposition and verifying affidavits. Ms. Kay Lynch verified the statement of opposition of the Tribunal by an affidavit sworn on 2 November 2020 and Mr. David Irwin verified the statement of opposition of the Law Society by an affidavit sworn on 28 September 2020. In addition Mr. Farrell swore an affidavit setting out a detailed account of the preliminary application at the inquiry hearing on 26 November 2019; the Tribunal's subsequent consideration of the written submissions on the preliminary issue and his preparation of an initial version of the

decision on that issue for delivery on 12 March 2020; the Tribunal being reminded of and acceding to the appellant's right to make oral submissions at the inquiry on 12 March 2020; the consideration by Mr. Farrell and the other members of the Tribunal of the oral submissions made on 12 March 2020; the amendment of the original version of the decision on the preliminary issue that had previously been prepared, in light of those oral submissions; and then the delivery of the Tribunal's decision on 12 March 2020.

Decision of the High Court

17. The High Court considered that the allegation that the Tribunal had erred in finding that the investigating accountants were validly appointed as *"authorised persons[s]"* was effectively an appeal point rather than a challenge that could be made by way of judicial review proceedings which were concerned with whether the decision maker had jurisdiction to make the decision under challenge and whether the process by which it made the decision was lawful. On that basis the Court held that it would reject the ground of challenge as the Tribunal was properly seized of the matter and had heard and considered legal argument before making its decision.

18. Against the eventuality that the judge might have erred in this conclusion and in view of the *"able arguments of the counsel on the issue"* the Court nonetheless proceeded to determine the issue. The Court rejected the analogy drawn by the appellant between search warrants – where precision in the terms of the warrant is essential – because, while a search warrant formed the basis of the lawful authority to do acts which otherwise would constitute a breach of a person's constitutional rights, notably the right to liberty and protection of their dwelling, the power conferred on the investigating accountants was a power to attend at a solicitor's place of business and to inspect his accounts and records. He held that the appointment of such investigating accountants did not imply any wrongdoing on the part of

the appellant and that investigating accountants can be and often are appointed to do *"spot checks"* on solicitors' practices.

19. The Court noted that a similar argument had been considered by the Supreme Court in *Kennedy v. The Law Society (No.3)* [2002] 2 I.R. 458. Barr J. quoted from the judgment of Fennelly J. at pp. 478 – 479 as follows:

> *"All of these were criminal cases. They concerned the admissibility as against an accused person of the evidence that had been obtained by means of the infringement of his personal rights guaranteed by the Constitution… no authority was cited which applied this line of case law to invalid administrative acts."*

20. Barr J. relied upon a further quote from Fennelly J. who observed that the application of principles derived from criminal cases concerning the admissibility of evidence obtained in breach of constitutional rights to disciplinary hearings:

> *"…must necessarily be extremely limited. They do not in my estimation arise here. The excess of statutory powers was not a trivial one, but it occurred in the course of the conduct by the governing body of the profession of their supervisory role over solicitors. No comparison can be made with the illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or his dwelling. The applicant has not identified any constitutional rights of his which was affected by the investigation."*

21. The Court found that having regard to the *dicta* in *Kennedy (No.3)* the Tribunal was correct to *"have regard to the whole of the memoranda of appointment, rather than adopt any very technical approach, which would strike down the appointment due to the error in the first paragraph of the memorandum".*

22. Barr J. continued in para. 91:

"The Court is satisfied that when read as a whole, the memoranda clearly state that the investigating accountants were being appointed pursuant to and for the purposes of s. 66(10) of the Act. Accordingly, the Court is satisfied that the finding of the respondent that the accountants were validly appointed, was correct."

23. The Court found that the issue of the admissibility of the evidence of the investigating accountants did not arise in the circumstances.

24. However, against the eventuality that he had erred in holding that the investigating accountants had been validly appointed, the judge considered whether, *if* they had not been validly appointed, nonetheless the Tribunal had erred in admitting their evidence. He considered the decisions in *McManus v. Fitness to Practice Committee of the Medical Council* [2012] IEHC 350; *Borges v. Fitness to Practice Committee* [2004] 1 I.R. 103 and the judgment of Fennelly J. in *Kennedy v. The Law Society of Ireland (No.3).* He quoted from pp. 490 -491 of the report in *Kennedy (No.3)* as follows:

"The questions which Kingsmill Moore J. posed to himself suggest that a comparatively serious case of intentional illegality has to be established. I agree that an element of deliberate and knowing misbehaviour must be shown, before evidence should be excluded. It is not possible to render unknown something already known. The courts should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals receiving and hearing relevant and probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; secondly, members of a professional body should be protected from such clear abuse of power as would render it unfair that the evidence

gathered as a result be received. … Accepting as I do, by analogy, the approach outlined by Kingsmill Moore J. to the use of illegally obtained evidence in criminal cases, I do not think that, in the absence of evidence of deliberate and knowing abuse, it inhibits a professional disciplinary body from relying on evidence, which could have been lawfully acquired but was in fact gathered as a consequence of the [invalid] decision…"

25. The High Court concluded that the Tribunal was entitled to hold that, even if the investigating accountants had not been validly appointed, it could still act on their evidence in the absence of *mala fides* on the part of the Law Society in the purported making of the appointments.

26. The Court then considered and rejected the grounds of challenge alleging breaches of fair procedures. Barr J. was not satisfied that any realistic basis had been established for the assertion that the Tribunal failed to consider all or any of the arguments made on behalf of the appellant. He held that having regard to the ruling of the Tribunal, it was clear that the Tribunal did give consideration to the further arguments made by the appellant on 12 March 2020.

27. The Court also rejected the submission that the Tribunal failed to give any, or any adequate, reasons for its decision. The ruling ran for approximately three pages and referred to the arguments of both sides and set out why the Tribunal reached its conclusions. The High Court concluded that the level of reasoning was *"more than adequate for the level of reasons that would normally be required for a ruling on an issue concerning the admissibility of evidence that arose in the course of a hearing."*

28. At a subsequent ruling on costs, the Court held that the Law Society had a real interest in participating in the proceedings in particular because reliefs were specifically sought against it in the statement of grounds and because the challenge related not solely to the

conduct of the Tribunal in carrying out the disciplinary inquiry but also related to the memoranda issued by the Law Society appointing the investigating accountants as authorised persons at the outset.

Grounds of appeal

29. The notice of appeal sets out seven grounds on which it is asserted that the trial judge erred:

1) *"In considering that the first ground of relief was an appeal point and not amenable to Judicial review and failed to consider the established precedent in this regard. There is no appeal from the preliminary finding of the [Tribunal].*

2) *In considering that the authorised officers, Mary Devereaux and Rory O'Neill, were correctly appointed in the circumstances, as there was an accepted error on the face of the authorisation and it is submitted that this error is fatal to the appointment. The standard of evidence applied to this issue is submitted to correctly be the higher standard of beyond a reasonable doubt and/or the criminal standard. It is submitted that the appointment of these officers is a fundamental proof in the matter. It is argued that it is not appropriate to compare other powers that the [Law Society] may have in relation to "spot checks" on solicitors firms as this was not the legislative basis in which [t]he [Tribunal] (sic) entered and examined confidential documents of the [Appellant] and the confidentiality of the [Appellant's] files should not be breached save in strict accordance with legislation and the law.*

3) *In determining that the [Tribunal] complied with fair procedures in the reasons, or lack thereof, of their decision. The details of same are set out in the pleadings and inter alia relate to the standard applied to evidence, the failure to address an error on the face of the record, the failure to give adequate consideration to*

the submissions of the [Appellant], the pre-judgment of the matter in that the [Tribunal] had written its judgment prior to submissions of the [Appellant].

4) In considering that the evidence of the authorised officers, Mary Devere[a]ux and Rory O'Neill, could still be admissible before it, even if the appointment was invalid has breached the [appellant's] rights, including Constitutional rights, to fair procedures and natural justice by reason of failing to apply the correct standard of proof in the inquiry and by failing to consider the submissions of the [Tribunal] (sic) adequately or at all, in particular the [Tribunal] applied a test of mala fide was a necessary proof for the exclusion of evidence.

5) In determining that adequate consideration had been given by the [Tribunal] to the submissions of the [Appellant] in the circumstances.

6) In determining that the [Tribunal] was not (sic) ultra vires and/or erred in law in determining that the issue of authorised persons' authorisation and the admissibility of evidence, placing undue deference on the submissions of the [Law Society] and failing to properly consider the submissions and caselaw (sic) of the [Appellant], contrary to fair procedures.

7) *In granting costs to the [Law Society] in circumstances where it is submitted that their contribution did not warrant a full costs order and that the entire matter related to the actions of the [Tribunal] and that the submissions of the [Law Society] were primarily similar to that (sic) of the [Tribunal]".*

Discussion

30. In his submissions, both oral and written, the appellant did not press his first ground of appeal. However, in view of the fact that the trial judge proceeded to determine the substance of the issues, it is not essential to resolve this issue in order to resolve this appeal. Accordingly, I refrain from determining the point.

31. Insofar as it is argued in the sixth ground of appeal that the Tribunal acted *ultra vires* and *"exceeded their legislative authority"* in ruling that the investigating accountants were authorised persons, I would reject this ground of appeal. The appellant raised the issue of the validity of the appointment of the investigating accountants by way of preliminary objection and the Tribunal was bound, in my opinion, to rule upon the issue once it had been raised by the appellant. The appellant cannot now be heard to complain that in ruling on his objection it exceeded its jurisdiction. In any event, the Tribunal did not appoint the investigating accountants, so it cannot be said to have exceeded its "delegated authority", as was submitted by the appellant.

The authorisation of the investigating accountants

32. The first substantive issue argued by the appellant was the validity of the memoranda of appointment of the investigating accountants as authorised persons. As in substance they were in identical terms, I shall refer to one memorandum for the purposes of discussing the validity of the two memoranda. The Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) provides that: *"authorised person"* means:

> *"A person authorised in writing by the Society for the purpose of exercising any of the Society's functions pursuant to section 66 (as substituted by section 76 of the Act of 1994) of the Act or these Regulations; and shall include any authorised representative or assistant of the authorised person."*

The sole requirement for a valid authorisation is that a person is *authorised* in writing for the purpose of exercising any of the Society's functions.

33. Section 66(10) (as substituted by s. 76 of the Solicitors (Amendment) Act 1994) of the Principal Act provides:

> *"10. Where it appears to the Society that it is necessary for the purpose of exercising any of the Society's functions described under subsection (1) of this section for an*

authorised person to attend, with or without prior notice, at a place of business of a solicitor, an authorised person may so attend at such place for that purpose."

This section authorises an *"authorised person"* to attend at a solicitor's place of business where it appears to the Society that this is necessary for the purpose of exercising any of its functions under the subsection. Section 2 of the Solicitors (Amendment) Act, 1994 provides that *"authorised person"* means

"A person authorised in writing by the Society for the purpose of exercising any of the Society's functions pursuant to section 14 of this Act or pursuant to or as prescribed pursuant to section 66 (as substituted by this Act) of the Principal Act."

34. Thus, it is clear that for the investigating accountants to be *authorised persons* within the meaning of the Solicitors Acts and the Regulations, the sole requirement is that they be authorised in writing for the purpose of exercising any of the Society's functions pursuant to s. 66 of the Principal Act (as substituted by s.76 of the Solicitors (Amendment) Act, 1994).

35. The memorandum appointing the investigating accountants contains an error in the first sentence. This was accepted by all parties. However, the second paragraph authorises the investigating accountants to attend at the appellant's place of business *"for the purpose of investigating whether there has been due compliance with the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) and with the provisions of Section 66 of the Solicitors Act 1954 as substituted by Section 76 of the Solicitors (Amendment) Act 1994 and to report thereon to the Society".*

36. The memorandum clearly appoints the investigating accountant to carry out a function of the Society – to ensure that solicitors comply with the Solicitors Accounts Regulations. The authorisation is in writing and this paragraph identifies the correct statutory basis for the appointment. The appellant singularly failed to address the second paragraph of the memorandum in any of his submissions and never explained why he contended it was not

sufficient to comply with the statutory requirement. In my judgment the Tribunal and the High Court were both correct to conclude that the memorandum read as a whole - as, in my view, it should properly be read - complies with the statute and that the investigating accountants were validly appointed as authorised persons within the meaning of the Regulations and the Solicitors Acts.

37. If the first sentence of the memorandum were omitted then, having regard to the remaining text, there would be no question as to the validity of the authorisation of the investigating accountants. In my judgment the fact that there was a typographical error in the first paragraph of the memorandum referring to a non-existent subsection does not have the consequence that the memorandum as a whole does not validly appoint the investigating accountants as authorised persons. The court must consider whether the document purporting to appoint the authorised person does what it purports to do. In my judgment the memorandum authorises the investigating accountant to perform functions as an authorised person under the Acts and Regulations and is a valid authorisation.

Error on the face of the record

38. The appellant argued that the error, which was accepted by all parties, appearing in the first paragraph amounted to an error on the face of the record. This, it is said, was fatal to the validity of the authorisation. The appellant relied upon the decisions in *DPP v. Henry Dunne* [1994] 2 I.R. 537 and *Simple Imports Limited v. Revenue Commissioners* [2000] 2 I.R. 243 in support of his argument. Each of these cases concerned search warrants and the essence of the appellant's case is that the law in relation to search warrants applied to authorised persons entering the offices of a solicitor and inspecting the solicitor's books of account on behalf of the Law Society.

39. In *Dunne,* Carney J. was concerned with the validity of a search warrant obtained under s. 26(1) of the Misuse of Drugs Act, 1977 as amended, to search the accused's dwelling

house. The accused did not consent to a search of his dwelling house and the gardaí used force to enter the premises in reliance on their powers under the warrant. It was an express requirement of s. 26(1) that the District Court judge or Peace Commissioner issuing the warrant should be satisfied that there is reason to believe the controlled drug *"is on a particular premises"*. The phrase *"is on the premises"* had been crossed out in the impugned warrant. The prosecutor submitted that the warrant was valid on its face as the crossing out was *"manifestly inadvertent"* and should be excused as a slip. Carney J. held to the contrary stating:

> *"The constitutional protection given in Article 40, s.5 of the Constitution in relation to the inviolability of the dwelling house is one of the most important, clear and unqualified protections given by the Constitution to the citizen. If it is to be set aside by a printed form issued by a non-judicial personage it would appear to me to be essential that that form should be in clear, complete, accurate and unambiguous terms. It does not seem to me to be acceptable that the prosecuting authority can place reliance on words crossed out by asserting that that was an inadvertence or a slip. Such an approach would facilitate the warrant to be becoming an empty formula.*
>
> *Reading this Warrant many times I cannot make sense of it in terms of the English language without placing reliance on words which have been crossed out. Accordingly, I cannot find it to be an effective authority to breach the constitutional inviolability of [the defendant's] dwelling house."*

40. *Dunne* was decided on two points, neither of which arises on the facts in this case. First at issue was a forced entry by police into the applicant's constitutionally protected dwelling. The investigating accountants attended at the appellant's place of business, which

does not enjoy constitutionally guaranteed inviolability, and the appellant admitted them. They had no power to forcibly enter the premises and did not attempt to do so. Second, absent the deleted words the warrant made no sense as a matter of English; the words were essential to the understanding of the warrant. In this case, the second sentence in the memorandum is clear, correct and understandable and the error in the first sentence does not alter the clear meaning of the memorandum so the second basis upon which Carney J. quashed the search warrant in *Dunne* did not arise.

41. The second case relied upon was *Simple Imports Ltd. v. Revenue Commissioners*]2000] 2 I.R. 243. The Supreme Court quashed warrants upon which officers of the Revenue Commissioners had searched premises and seized goods on the basis that the warrant could not be regarded as valid as, on its face, it carried a statement that it had been issued on a basis which was not authorised by statute. The Act under which the warrant was issued required that the District Court judge, before issuing the warrant, should come to the conclusion, from the information on oath of the Customs Officer, not merely that he (the officer) suspected that there are uncustomed or prohibited goods on the particular premises, but that his suspicion is *"reasonable"*. The District Court judge must be satisfied, on the basis of the information provided by the officer, that, viewed objectively, the cause or ground relied upon by the officer for his suspicion was reasonable. The warrant showed on its face that this statutory pre-condition for the exercise of the jurisdiction was not satisfied. Keane J., speaking for the majority of the Supreme Court, held at p. 255:

> *"Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by the statute. It follows that the warrants were invalid and must be quashed."*

42. *Simple Imports* was decided on the basis of the *"draconian nature of the powers conferred"* which included a right to force entry of a premises and seize goods. The powers of an authorised person appointed by the Law Society to investigate the books of account of a solicitor and to take copies of documents and to inspect the solicitor's bank accountants in order to ensure compliance by the solicitor with the Solicitors Accounts Regulations cannot be described as draconian and are in no way comparable to the warrants at issue in these cases.

43. The appellant argued by analogy that the error in the first sentence of the memoranda authorising the investigating accountants to attend at his practice and to inspect his books of account amounted to an error on the face of the document which was comparable to an error on the face of a warrant and that accordingly it should be held to be invalid. The appellant submitted that the unlawful inspection of his books of account infringed his right to privacy in respect of his files and violated the privilege/confidentiality to which his clients were entitled in respect of their files. In oral submissions to this court, counsel for the appellant was unable to identify any constitutional right of the appellant which had been infringed by the actions of the investigating accountants. Quite apart from the fact that his grounding affidavit makes no case concerning the alleged breach of the rights to privacy and confidentiality of his clients, he could not have based his case on any alleged infringement of the rights of his clients as to do so would be to rely upon a *jus tertii*.

44. It is also important to emphasise that solicitors are regulated in their profession by the Law Society, and it follows that every solicitor may be subject to investigation by the Law Society as part of its statutory supervisory role. An authorised person is authorised to inspect the solicitor's accounting records. The Regulations define these in very wide terms as *"books of account and all other documents required to be maintained and kept by a solicitor…"* Documents includes *"deeds, wills, papers, books of account, records, vouchers,*

correspondence and files." Regulation 25(1) sets out the minimum accounting records to be kept by a solicitor, including *"(h) each matter file, each containing all documents generated in the course of such matter".* An inspection of a solicitor's accounts under the Regulations authorises and necessarily involves cross checking and thus accessing client files. There is no question of wrongful breach of client confidentiality or legal professional privilege where an authorised person accesses a client's file in the course and for the purpose of such investigation. Any such investigation cannot therefore *of itself* amount to a breach of any rights, still less any constitutionally protected rights of a solicitor. The possibility of such inspection is inherent in his or her practice of their profession and therefore the mere fact that the Law Society commences an investigation and authorises persons to inspect the books of account of a solicitor is not sufficient to give rise to a breach of any rights of the solicitor. As was correctly observed by the High Court, such investigations may take place as a matter of routine and do not imply any wrongdoing. The solicitor must point to an illegality and not just the fact of accessing his confidential files and accounts. It follows therefore that, unlike in *Dunne* and *Simple Imports*, there was no breach of any right of the appellant by the actions of the investigating accountants.

45. Furthermore, counsel was unable to identify any authority which applied the strict rules in relation to an error of law on the face of a record other than in the field of criminal procedures involving invasions of constitutionally protected rights. This is particularly significant in view of the observations of the learned authors in Hogan, Morgan and Daly, *Administrative Law in Ireland 5th Edition* (2019) at para. 10-146 where they state:

> *"There seems to be scant modern authority in this jurisdiction as to the scope of review for error of law on the face of the record. In particular, it is unclear whether authorities generated in the very strict field of criminal procedure ought to apply to the decisions of other bodies."*

46. Both *Dunne* and *Simple Imports* concerned warrants on foot of which a premises might be searched and goods seized in a context where a direct consequence of such search could be the levelling of criminal charges against the person concerned. The warrants conferred a right to forcibly enter the premises. In each, the warrant was defective on its face to a significant degree. In each case the judgments emphasised the breach of the constitutionally protected rights of the individual concerned. The context where investigating accountants are authorised to inspect the accounting records of a solicitor is very different. They have no power to force entry if it is refused[1] and no constitutional right of the appellant has been identified which was breached by the inspection of those book of accounts.

47. In *Kennedy v. Law Society of Ireland (No. 3)* [2002] 2 I.R. 458 the Supreme Court considered whether there could be such an analogy in the context of the application of the exclusionary rule of evidence in criminal proceedings to disciplinary proceedings under the Solicitors Acts. The invalidity of the appointment of the authorised person was established in that case[2]. In *Kennedy (No. 3)* the applicant had argued that a consequence of the invalidity of the appointment was that the evidence obtained by the accountant and, in particular, a report made to the Law Society could not be used by the Tribunal. The argument was based on cases concerning the exclusion of unconstitutionally obtained evidence as against an accused person. Fennelly J., speaking for the Court, noted at page 479 that no authority was cited which applied this line of case law to invalid administrative acts. The appellant's submission in this case that the investigating accountants' affidavits ought to have been deemed inadmissible flies in the face of the reasoning in *Kennedy (No.3)*. Fennelly J. stated at p. 489-490 of the report:

[1] Though it is an offence not to comply with the request to admit the authorised person and to permit them to inspect the books of account, and the Law Society may apply to the President of the High Court to order the solicitor to facilitate access.

[2] By contrast to this case where this is denied and I have concluded that it was valid.

"The exclusionary rule is not based on concerns about relevance or probative value of the impugned evidence….The constitutional rights at issue are typically the right to liberty or the inviolability of the person or of a dwelling. In the investigation of crime, the law confers on the police extensive powers, not normally possessed by disciplinary or administrative tribunals, to encroach on such fundamental rights. I do not exclude the possibility that such a situation may, depending on the facts of the case, calling for the application of those principles in the sphere of administrative and in particular disciplinary hearings. But the scope for such situations to arise must necessarily be extremely limited. They do not, in my estimation, arise here. The excess of statutory powers was not a trivial one, but it occurred in the course of the conduct by the governing body of the profession of their supervisory role over solicitors. No comparison can be made with the illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or of his dwelling. [The applicant] has not identified any constitutional right of his which was affected by the investigation." (emphasis added)

48. To my mind it is clear that Fennelly J. rejected any analogy between the extensive powers of the police, not normally possessed by disciplinary tribunals such as the Law Society, to encroach on fundamental rights such as the inviolability of the person or the dwelling, and the far more limited rights enjoyed by disciplinary and regulatory authorities to attend at the premises of the professional concerned and to inspect their books of account. The superficial parallel between the entry of authorised persons of a solicitor's premises to inspect the books of account and the entry and search of a premises by gardai on foot of a search warrant does not amount to anything like a meaningful equivalence in law. The suggestion to the contrary was rejected in *Kennedy (No.3)* and I too would reject it.

Admissibility of the evidence of the investigating accountants

49. I am satisfied that even if the appellant were correct in his submissions that the investigating accountants were not properly authorised as authorised persons to inspect the accounts at his practice, nonetheless the Tribunal was entitled to admit their evidence, and in particular their report, in the disciplinary proceedings. In *Kennedy (No. 3)* the Supreme Court accepted the possibility of the application of an exclusionary rule of evidence to disciplinary proceedings but distinguished between the exercise of search and detention powers in criminal law and the exercise of statutory powers of supervision by a governing body over professionals. The court held that a comparatively serious case of intentional illegality had to be established. Fennelly J. stated:

> *"I agree that an element of deliberate and knowing misbehaviour must be shown, before evidence should be excluded. It is not possible to render unknown something already known. The courts should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant and probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; secondly, members of professional body should be protected from such clear abuse of power as would render it unfair that the evidence gathered as a result be received."*

50. The Supreme Court thus established the test of deliberate and knowing misbehaviour before evidence should be excluded. There was no evidence of any deliberate and knowing misbehaviour on the part of either the Law Society in authorising the investigating accountants or of the investigating accountants in acting on foot of the memoranda

authorising them to inspect the appellant's books of account. On the contrary, I agree with the conclusions of the High Court that the error was no more than a typographical error and fell well short of the threshold established in *Kennedy (No. 3).*

51. It is to be borne in mind that the decision in *Kennedy (No.3)* was written on the basis of the law as it then stood in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110. Since then, the Supreme Court has delivered the judgment in *The People (Director of Public Prosecutions) v. J.C.* [2017] 1 I.R. 417. The Supreme Court modified the strict exclusionary rule in *Kenny* and held that if evidence has been obtained in circumstances of unconstitutionality but where any breach of rights was due to inadvertence then such evidence should nonetheless be admitted. On the facts in this case, it is clear that if there were any breach of the appellant's rights (and I do not so find), nonetheless same was clearly due inadvertence and therefore the evidence obtained by the investigating accountants is admissible in the disciplinary proceedings before the Tribunal. It follows that the Tribunal did not err in admitting their evidence and I agree with the conclusions of the High Court in this regard.

Fair procedures

52. The appellant alleged that there had been a want of fair procedures in that the Tribunal had prejudged the issue; that it failed to consider adequately or at all his oral submissions on 12 March 2020; and it failed to give any or any adequate reasons for rejecting his submissions.

53. The Tribunal accepted that Mr Farrell prepared a draft ruling which was considered and agreed by the members of the Tribunal before it resumed the hearing on 12 March 2020. It was prepared to deliver its decision based on this agreed draft when it was reminded that the parties were to be afforded the opportunity to make further oral submissions. The Tribunal did not deliver the draft decision, it heard further submissions and rose to consider

those submissions. The evidence of Mr Farrell – which was not challenged by cross examination – discloses that the submissions were considered and the draft decision was amended to reflect this. That is borne out by the express terms of the decision that was ultimately delivered. The fact that the Tribunal rejected the application after such consideration does not mean that the decision is invalid by reason of prejudgment. The purpose of providing written submissions in advance of a hearing is to allow the decision maker to consider the submissions in advance. It is always open to a decision maker to form a preliminary view of a matter which may or may not change in light of oral arguments. This is precisely what occurred in this case: the Tribunal formed a preliminary view, and it was not persuaded by the oral submissions to the contrary position. I see no want of fair procedures or impermissible prejudgment on the facts in this case. On the contrary, the evidence is that the draft judgment was amended to reflect the oral submissions. The fact that they did not result in a different outcome does not lead to the conclusion that there was impermissible prejudgment or a failure to consider the arguments advanced by the appellant in his oral submissions.

54. Counsel for the appellant submitted that the fact that the Law Society attended on 12 March 2020 with witnesses ready to resume the hearing when the appellant (and his counsel) believed that the only business to be conducted on that day was to determine the preliminary objection which had been raised on the opening day of the hearing amounted to evidence that the *Tribunal* had prejudged the outcome of the preliminary issue. This has only to be stated to be shown to be a *non sequitur* and utterly without merit. The Tribunal did not summon the Law Society's witnesses to attend on 12 March 2020. On the previous occasion when the matter had been adjourned until 12 March 2020, there was no ruling that the hearing would not resume with witness evidence once the preliminary issue had been disposed of. The appellant's understanding (or misunderstanding) of what was to occur on

the resumed date (which he did not address in evidence) cannot amount to *evidence* of prejudgment by the Tribunal.

55. Counsel for the appellant contended that his oral submissions were not adequately considered because the Tribunal rose for a very short time which was insufficient to properly and fairly consider his submissions. This submission was not based on any evidence. Counsel invited the Court to infer from the transcript that the recess was very brief based on the standard formula adopted by stenographers in circumstances where a court or tribunal rises to consider an issue. There was no evidence from the appellant, who was present on 12 March 2020, of the duration of the recess and it is impermissible for counsel to attempt to fill the void by purporting to give evidence on behalf of his client, *a fortiori* on an appeal. The submission in fact was contrary to the evidence of Mr. Farrell who deposed to the fact that the members of the Tribunal did consider the oral submissions, and this was stated to the parties prior to the delivery of the ruling. Mr. Farrell was not cross examined on this evidence and it is not open to the appellant in the circumstances in effect to invite the court to reject this uncontroverted evidence (see *RAS v. Medical Council* [2019] 1 I.R. 63).

56. The allegation that there was a failure to consider the arguments of the appellant is also based upon the contention that the Tribunal failed to give reasons for rejecting those arguments. It is not necessary that a decision maker address individually every single argument advanced to it on a particular matter. The decision maker is required to address the substance of the arguments advanced and the party is entitled to know why his or her arguments have not prevailed. The detail required for a valid, reasoned decision varies depending upon the nature of the decision in question: not every decision requires a detailed written judgment on all points raised. In some instances, a short decision is appropriate and sufficient. The issue in each case is whether the particular decision is adequately reasoned.

57. The nature of the decision in question is crucial. The issue before the Tribunal on 12 March 2020 was whether the investigating accountants were authorised persons and whether their affidavits should be admitted in evidence. It was a ruling in the course of a hearing which it was anticipated would continue and then conclude with a final decision to be delivered thereafter. It was not a final judgment. I agree with the trial judge that a decision amounting to three pages of transcript is sufficient in the circumstances, provided that it addresses the substance of the submissions.

58. In this regard it is important to note that the appellant does not say that he does not know what the decision was or the principal reasons for it. He was able to form a view of the decision and decide to seek judicial review. So, in effect his complaint is one of form not substance. His complaint is that the decision did not expressly address his argument that there was an error on the face of the record and the test for the exclusion of evidence allegedly unlawfully obtained. To consider these arguments it is necessary to review the decision of the Tribunal in detail.

59. Having outlined the details of the memoranda and the error in referring to s. 76(10) of the Solicitors Amendment Act, 1994, the decision continues:-

> *"Counsel for the respondent solicitor has argued that as a result the appointment is faulty and that any evidence obtained further to that appointment is inadmissible. He has referred the Tribunal this morning to the case of the DPP v Henry Dunne and Simple Imports Ltd &Another v Revenue Commissioners & Others.*
>
> *In those cases it was found that evidence obtained pursuant to warrants which were incorrect on their face were not admissible. Counsel for the Law Society argues that the two documents validly authorised Mary Devereux and Rory*

O'Neill to carry out inspections and she says that this is clear from the second paragraph of the documents which refer to section 66.

She also argues that the case law requires that there must be a deliberate and knowing misbehaviour before evidence will be excluded and she has referred the Tribunal to the judgment of Fennelly J in the case of Kennedy v Law Society. She argues that the Kennedy judgment which relates to the investigation of solicitors is more relevant that the criminal cases to which Mr Kennedy referred.

The Tribunal accepts the argument of counsel for the Law Society that the judgment of Fennelly J is applicable and that a Disciplinary Tribunal should not be prevented from hearing evidence unless there is an abuse of power by the investigating body. In this case it is clear that the section to which the memorandum was intended to refer was section 66(10) and the Tribunal is of the view that it is clear from the second paragraph of each memorandum that Mary Dereveux and Rory O'Neill were authorised under …the Solicitors Acts 1954 as amended to carry out an investigation…"

The Tribunal also stated that solicitors are subject to continuing supervision by the Law Society and that authorising an accountant to inspect files and records *"is not something which can be equated with the issuing of a search warrant authorising a search for evidence to ground a criminal prosecution."*

60. The first point to note is that this is not a free-standing judgment. It is a decision given after the parties have exchanged written submissions and after hearing oral submissions. The parties are all presumed to know the detail of the arguments advanced and their respective positions were presented in far greater detail than is set out in the brief summary of the Tribunal. When the Tribunal stated that it accepted the argument of counsel for the Law Society in relation to the admissibility of evidence it was not necessary for it to repeat that

argument or to quote from the judgment cited. The parties knew what was intended by this shorthand and there was no lack of reasoning: the Tribunal accepted the arguments of counsel for the Law Society and therefore adopted her reasons which were fully set out in her written and oral submissions.

61. The effect of accepting this submission was that the evidence of the investigating accountants was admissible as there was no evidence or even argument that the Law Society deliberately and knowingly abused its powers within the meaning of *Kennedy (No. 3)*. The Tribunal was of the view that the memorandum intended to refer to the correct section, which would preclude a finding that it purported to abuse its powers. Therefore, the evidence of the investigating accountants was admissible.

62. Further, the Tribunal held that the second paragraph of the memorandum authorised the investigating accountants to carry out an investigation which meant that there was no basis to exclude their evidence.

63. In light of the conclusion that the evidence was admissible (applying the test in *Kennedy (No.3)*), it was not necessary for the Tribunal to consider in detail the appellant's submissions that the investigating accountants were not validly appointed based on cases where warrants were held to be invalid for an error on the face of the record, as this would not alter their decision that the evidence was admissible. The Tribunal simply did not accept that the jurisprudence relating to warrants could be applied by analogy to the authorisation of investigating accountants to inspect a solicitor's books and records. It held that it was not something *"which could be equated with the issuing of a search warrant"*. This rejection of the equivalence necessarily disposed of the appellant's argument that the investigating accountants were not validly appointed because of an *"error on the [face of the] record"*. It was not necessary in a ruling on the admissibility of the evidence of the investigating accountants for the Tribunal to expand on its conclusion that the appellant could not rely

upon cases concerning warrants in support of his argument that the investigating accountants had not been validly appointed in order for it to comply with the requirement to give reasons for its decision. I therefore reject the argument that the decision should be quashed for failure to give adequate reasons or to address the arguments advanced by the appellant.

64. For completeness I should note that the appellant referred to the draft decision prepared by the Chairperson of the Tribunal as the *"original decision"* in the hope of buttressing his argument that he was not afforded fair procedures. There was no *"original decision"*. There was a draft which was amended after hearing oral submissions. There was no *"decision"* until it was given: thus, there was only one decision and the record of the decision is to be found in the transcript.

65. In addition, insofar as the appellant asserted that the validity of the authorisation should have been determined beyond reasonable doubt (the level of proof applicable to criminal matters) and the Tribunal did not apply this standard of proof, I would reject this argument also. These proceedings are civil proceedings and there is no basis to apply anything other that the standard which applies to such proceedings (the balance of probabilities). The failure of both the Tribunal and the High Court to *"apply the criminal standard of proof"* to the question of the validity of the appointments was not an error: it was correct.

66. For these reasons I agree with the decision of the High Court and would reject the argument that the decision of the Tribunal ought to be quashed for failing to afford the appellant fair procedures.

Arguments advanced which formed no part of the case

67. During the hearing of the appeal the appellant sought to argue that the Tribunal was biased or that there was a perception of bias such that this court should allow the appeal. This argument was not part of the case as it was not a ground upon which leave had been

either sought or granted. Further, I reject this argument as being completely without any foundation in the evidence. It should never have been advanced to this Court on appeal.

68. Likewise, it was inappropriate – to put it no higher – to suggest that the decision was not the decision of the Tribunal but solely that of Mr. Farrell on the basis that the draft decision was prepared by the Chairperson of the Tribunal and the draft existed only on his iPad and there was no affidavit from any other member of the Tribunal confirming that the decision was truly their joint decision. I mention this discreditable submission merely to dismiss it as being without foundation, forming no part of the case and unsustainable in light of the failure to cross examine Mr. Farrell on this scurrilous allegation.

Appeal in respect of the Law Society's costs

69. The High Court awarded the Law Society its costs of appearing at and participating in the hearing. In my judgment it was entirely within his discretion so to do, and I would not interfere with his decision. The Law Society was sued and had an interest separate to that of the Tribunal to uphold in the proceedings. The trial judge was best placed to assess whether its involvement in the hearing was unnecessary or in any way added unnecessarily to the cost of the proceedings. The appellant advanced no argument which suggests that he erred in the exercise of his discretion to such an extent that this court ought to overturn his decision. I therefore would reject the appeal in relation to the costs of the Law Society.

Conclusion

70. The High Court was correct in concluding that the investigating accountants were validly appointed in accordance with the requirements of the Solicitors Acts and the Regulations. The law in relation to an error on the face of the record which would result in the quashing of a search warrant did not apply by analogy to the authorisation of the investigating accountants to attend the premises of the appellant solicitor and to inspect his books of account and to report back to the Law Society.

71. There was no failure to afford the appellant fair procedures in the conduct of the hearings by the Tribunal. The appellant was afforded the opportunity to make written and oral submissions, the submissions of both sides were considered, and the Tribunal delivered a reasoned decision which was adequately reasoned in the circumstances. There is no issue of bias in these proceedings and such evidence as there is all suggests the contrary.

72. No basis for interfering with the High Court judge's exercise of his discretion in relation to the costs of the Law Society was advanced so I would reject this ground of appeal also.

73. The High Court was correct to reject the appellant's application for judicial review and for the reasons set out I would reject the appeal.

74. My provisional view is that the appellant has lost his appeal on all grounds and so the Tribunal and the Law Society are each entitled to their costs of the appeal against the appellant. If the appellant wishes to contend for a different order as to costs he may apply to the office of the Court of Appeal for a short hearing on the question of costs, bearing in mind that if the indicative order of the court is not varied he may be fixed with the costs of the additional hearing.

75. Collins and Allen JJ. have read this judgment in draft and have authorised me to indicate their agreement with it and the proposed order.