

**THE HIGH COURT
JUDICIAL VIEW**

[2021] IEHC 782

Record No. 2020/361 JR

BETWEEN:

C.L.

APPLICANT

AND

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

AND

THE LAW SOCIETY OF IRELAND

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 14th day of December, 2021.

Introduction.

1. These proceedings arise from an inquiry held by the respondent into the conduct of the applicant in his capacity as a solicitor, pursuant to s. 7 of the Solicitors (Amendment) Act 1960, as amended.
2. The Law Society of Ireland (hereafter referred to as "the Law Society") is the notice party in these proceedings. It had purported to appoint Ms. Mary Devereux and Mr. Rory O'Neill, chartered accountants, as "authorised person[s]" to conduct an investigation into the applicant pursuant to s. 66 of the Solicitors Act 1954 (as inserted by s. 76 of the Solicitors (Amendment) Act 1994).
3. Ms. Devereux and Mr. O'Neill attended at the applicant's place of work on 5th, 7th and 8th April, 2016 to investigate due compliance with the Solicitors Accounts Regulations 2014 (S.I. No. 516 of 2014) and with the provisions of s. 66 of the Solicitors Act 1954, as amended. They prepared a report and sworn affidavits in the matter.
4. Relying on Form D.T.1 drawn up by Mr. John Elliot, Registrar of Solicitors and Director of Regulation, the respondent began an inquiry into the conduct of the applicant in respect of matters reported in the affidavit of Ms. Devereux dated 27th November, 2018.
5. At the hearing before the respondent, counsel on behalf of the applicant objected to the admission of the accountants' report and affidavits as evidence before the Tribunal, on the basis that they had not been validly appointed. This assertion was based on an error on the face of the memorandum, prepared by the Law Society, purporting to appoint the accountants as "authorised person[s]" pursuant to the Act.
6. This assertion was rejected by the respondent by way of a preliminary decision on 12th March, 2020. The accountants were held to have been validly appointed, and therefore their report and affidavits were held admissible as evidence before the Tribunal.
7. The applicant seeks, by way of judicial review, an order of *certiorari* quashing that preliminary decision of the respondent.

8. Further, the applicant seeks an order of mandamus compelling the respondent to provide complete and adequate reasons for that same decision made on 12th March, 2020.

Background.

9. It will be helpful to set out the main statutory provisions at this stage. Section 2 of the Solicitors (Amendment) Act 1994 defines an "authorised person" as:

"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."

The reference to the Principal Act in this section means the Solicitors Act 1954.

10. Section 66(10) and (11) of the Solicitors Act 1954, as substituted by s. 76 of the 1994 Act and s.2 of the 2002 Act, provides as follows:

"(10) Where it appears to the Society that it is necessary for the purpose of exercising any of the Society's functions prescribed 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.

(11) Where an authorised person attends pursuant to subsection (10) of this section at a place of business of a solicitor, he shall inform the solicitor or any clerk or servant of the solicitor of the purpose of his attendance as specified in subsection (10) of this section and may thereupon or thereafter, in pursuance of that purpose, require the solicitor or any clerk or servant of the solicitor to do any one or more of the following things:

- (a) to make available to him for inspection all or any part of the solicitor's accounting records;*
- (b) to furnish to him such copies of the solicitor's accounting records as the authorised person deems necessary to fulfil the purpose specified in subsection (10) of this section;*
- (c) to give such written authority addressed to such bank or banks as the authorised person requires to enable the authorised person to inspect any account or accounts opened, or caused to be opened, by the solicitor at such bank or banks (or any documents relating thereto) and to obtain from such bank or banks copies of such documents relating to such account or accounts for such period or periods as the authorised person deems necessary to fulfil the purpose specified in subsection (10) of this section."*

11. The Solicitors Accounts Regulations 2014 (S.I. 516/2014) were made pursuant to s. 66 of the 1954 Act. Regulation 2 defines an "authorised person" as follows:

"[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”.

12. Memoranda in identical terms were sent to Ms. Devereux and Mr. O’Neill on 31st March, 2016 from Mr. Elliot, on behalf on the Law Society, purporting to appoint each as an “authorised person” within the meaning of the Solicitors Act 1954, as amended. The memoranda sent to Ms. Devereux and Mr. O’Neill, were in the following terms:

“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.

John Elliot”

13. The investigating accountants duly attended at the applicant’s place of work on 5th, 6th and 7th of April, 2016 and prepared a report dated 7th June, 2016. This report identified 17 alleged breaches of the Solicitors Accounts Regulations.
14. As a result of these findings, a form D.T.1 was completed by Mr. Elliot, on behalf of the Law Society, and submitted to the respondent along with form D.T.2, the supporting affidavit of Ms. Devereux, for the purposes of applying for an inquiry into the conduct of the applicant.
15. That inquiry was initiated on 26th November, 2019. Counsel for the applicant, Mr. Rory Kennedy BL, raised a preliminary issue of there being an error on the face of the memoranda which purported to appoint the investigating accountants as “authorised person[s]” to attend his client’s place of work and investigate his compliance with the Solicitors Accounts Regulations 2014. It was submitted that, owing to the error on the face of the document, the accountants were appointed in an incorrect manner and therefore were not validly authorised within the meaning of s. 66 of the Solicitors Act 1954, as amended, to carry out the investigation into the applicant’s accounts.
16. The error to which counsel referred was in the first paragraph, which read:

“You are hereby appointed as the Society’s “authorised person” within the meaning of Section 76(10) of the Solicitors (Amendment) Act 1994.”

It was accepted by both parties that this sentence contained an error; the error appears on the face of both authorising memoranda. The parties are agreed that there is no s. 76(10) in the Solicitors (Amendment) Act 1994. The authorising provision is s. 66(10) of the Solicitors Act 1954, as inserted by s. 76 of the Solicitors (Amendment) Act 1994.

17. The applicant submitted that, owing to this error, the investigating accountants were not validly appointed and, therefore, they were not “authorised person[s]” within the meaning of s. 66 of the Solicitors Act 1954, as amended, to conduct the investigation into the applicant’s accounts and records.
18. It was submitted that the report and affidavits of the accountants were inadmissible as evidence before the Tribunal because of this invalidity.
19. At the hearing before the respondent, counsel for the Law Society, Ms. Neasa Bird BL, submitted that the error was merely typographical. It was submitted that this error did not mean that the investigating accountants were not validly appointed. It was further submitted that s. 66 of the Solicitors Act 1954, as amended, merely required that the authorisation be in writing, rather than requiring that the appointment be in writing. It was submitted that the second paragraph redeemed the error in the first paragraph, by giving the accountants the necessary authorisation in writing.
20. The Tribunal decided that it was appropriate to adjourn the matter to allow both parties to make written submissions on the preliminary issue.
21. The hearing resumed on 12th March, 2020, after the Tribunal had received the written submissions of both parties. The Tribunal attempted to begin delivering judgment on the preliminary issue, having considered the submissions in relation to that matter.
22. However, counsel for the applicant asked to respond to the written submissions of the Law Society, before the delivery of judgment on the preliminary issue. The Tribunal initially refused that request; however, having reviewed the transcript of the previous hearing, in which it was indicated that further submissions could be made on the next hearing date; the respondent permitted the applicant to make further submissions.
23. The applicant opened two new cases to the Tribunal in further submissions. The Law Society then responded to these further submissions.
24. The transcript of the hearing states that “Following a brief adjournment the hearing resumed”. The respondent then proceeded to deliver judgment in the preliminary matter in favour of the Law Society. The respondent held that the accountants were validly appointed and, therefore, that their evidence (both the report and their affidavits) was admissible. The respondent also accepted the arguments of counsel for the Law Society on the admissibility of evidence; that the Tribunal should not be prevented from hearing evidence unless there was an abuse of power by the investigating body.
25. It is this decision of the respondent that the applicant seeks to have set aside by way of judicial review. The submissions of the applicant in that regard are set out below.

The Applicant’s Submissions.

26. The applicant’s submissions can be broadly split into two main arguments; an error on the face of the record and a breach of fair procedures.

(a) Error on the Face of the Record

27. Counsel for the applicant, Mr. John Kennedy SC, submitted that the decision of the respondent to find the investigating accountants to have been validly authorised, despite an error on the face of the memoranda of appointment, should be set aside. The applicant submitted that the error on the face of the record was more than a mere typographical error. It was submitted that the actions of the accountants were unlawful and exceeded their jurisdiction in circumstances where the statutory precondition to their appointment had not been met, owing to the erroneous reference to s. 76(10) on the face of the memoranda.
28. It was submitted that where an authorised officer was appointed in an incorrect manner, there was no need to prove *mala fides* in the making of a mistake on the face of the record, in order for the Court to set aside that appointment.
29. Counsel relied on the dicta of Fennelly J. in *Kennedy v Law Society of Ireland (No. 3)* [2001] 2 IR 458, wherein the appointment of an investigating accountant was ultra vires in respect of the applicable Solicitors Accounts Regulations and was impugned on that basis. Fennelly J. stated at p. 489;

"In saying this, I am not saying that the first respondent was acting mala fide, in the sense of knowingly exceeding their powers. That has not been claimed in the present case other than by advancing the "colourable device" argument.

I would, therefore, set aside the decision of the first respondent to appoint the investigating accountant."

30. It was further submitted that where regulatory bodies have express powers, they are expected to exercise them properly and accurately. Reliance was placed on the dicta of Carney J. in *DPP v Henry Dunne* [1994] 2 IR 537, wherein he stated at p. 540;

"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 becoming an empty formula."

31. In the *Dunne* case, a search warrant was held invalid in circumstances where the Gardaí had, through inadvertence, crossed out words on the face of the warrant. Carney J. stated, at p. 541:

"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."

Counsel for the applicant submitted that this principle was applicable to the authorising document in the present case; that the document could not be sensibly read without placing reliance on words which were not included. Counsel submitted that the

authorising document in the present case was akin to a search warrant, and referred to same as a 'warrant' throughout his submissions, on the basis of the far-reaching consequences for the applicant that could arise following such investigation.

32. Counsel also referred to *Re Zwann* [1981] IR 395, wherein Barrington J. accepted that an order of a Peace Commissioner authorising the detention of a sea fishing boat and its crew, was bad on its face and in express conflict with the wording of the statute from which it originated. The order was set aside by an absolute order of certiorari together with an absolute order of habeas corpus.
33. Counsel also relied on immigration and asylum cases in which misdescriptions on the record had also formed the basis of successful judicial review applications. One such case was *Wu v Minister for Justice* (25th January, 2002, unreported High Court) in which a deportation order of the Minister was quashed on the basis of an error on the face of the record. The case of *ABM v Minister for Justice, Equality and Law Reform* (23rd July, 2001, unreported High Court) was also relied on, in which O'Donovan J. quashed a decision of an appeals authority which incorrectly stated the applicant's country of origin. O'Donovan J. stated that the implications of the error were such that the decisions were made without jurisdiction.
34. In light of those cases, counsel for the applicant submitted that the decision of the Tribunal should be quashed, as the authorities cited established that the consequences of an error on the face of the record, are such as to deprive the decision-maker of jurisdiction to make the impugned decision, or take the impugned step.
35. In light of the purported invalidity of their appointment, counsel asserted that the accountants' report and corresponding affidavits should not have been held admissible as evidence before the Tribunal, as they were based on information obtained through an unlawful search of the applicant's place of work.
36. Counsel submitted that the standard of proof to be applied by the Solicitors Disciplinary Tribunal was the criminal standard of proof beyond a reasonable doubt. Reliance was placed on the decision of Keane J. in *O'Laoire v Medical Council* (Unreported, High Court, 27th January, 1995) wherein he stated at p. 115:

"I was satisfied that the onus lay upon the Council to prove beyond reasonable doubt every relevant averment of fact which was not admitted ... and to establish beyond reasonable doubt that such facts, as so proved or admitted, constituted professional misconduct."

Counsel submitted that in light of this, the criminal standard, as set out in *Director of Public Prosecutions v JC* [2015] IESC 31, should have been applied to the procedure of obtaining and admitting evidence before the Tribunal, because of the possible far-reaching consequences for the applicant which could arise following the admission of the evidence.

37. On this basis, the applicant submitted that the standard applied by the respondent in accepting the evidence had been incorrect in law. The respondent had applied the standard, as submitted by counsel for the Law Society, namely; that the Tribunal should not be prevented from hearing evidence, unless there was an abuse of power by the investigating body.
38. On the basis of the foregoing, counsel submitted the decision of the respondent should be set aside.

(b) Breach of Fair Procedures

39. Counsel for the applicant submitted that the respondent failed to adequately consider the oral submissions of the applicant made on the 12th March, 2020. The applicant submitted that at the beginning of the hearing on that date, the respondent was reluctant to allow further oral submissions in relation to the written submissions presented on the preliminary issue. It was only after reading the transcript of the previous hearing, that the respondent allowed the applicant and the Law Society to make further oral submissions.
40. Subsequent to this, the Tribunal rose to consider the submissions made. The applicant submitted that this brief adjournment was merely a few minutes in duration; after which the respondent returned and delivered its decision in favour of the Law Society. Further, the applicant submitted that the respondent read the decision from the same iPad, from which it had originally begun to read its determination.
41. No copy of the respondent's original decision exists, as any amendments thereto, were made to the original document saved on the iPad, before the Tribunal reached their final decision.
42. Counsel submitted that the determination was essentially a *fait accompli* prior to the final submissions being made. While the respondent mentioned both of the cases that had been cited by the applicant in their final determination, the applicant submitted that that was merely a token reference to his argument, without any real substance.
43. Counsel asserted that this inadequate consideration of the final submissions on behalf of the applicant, amounted to a breach of fair procedures, and on that basis, the decision of the respondent should be set aside.
44. To bolster this argument, counsel relied on a passage from 'Judicial Review' by Mark DeBlacam SC, in which it is stated as follows at para. 16.70;

"From the standpoint of the person affected, it is, however, just as important that the decision-maker 'consider' the case, in other words, that the decision-maker should think about it and then come to a reasoned conclusion based on what he has heard. So far as the law is concerned, it is axiomatic that a decision-maker must in any case give proper consideration to it; and if it can be shown that, for whatever reason, he has not done so, there is no question but that the decision ... is liable to be quashed."

45. Counsel also submitted that the respondent failed to provide adequate reasons in their determination and failed to address the issue of an error on the face of the record. It was submitted that the case of *Kennedy v Law Society (No. 3)* [2001] 2 IR 458, did not deal with the issue of an error on the face of the record. That case had been relied on by the respondent in making its decision that the report and affidavits of the investigating accountants were admissible in evidence. The applicant submitted that the respondent should have adequately explained why the Kennedy case was the relevant decision to deal with an error on the face of the record.
46. Counsel for the applicant submitted that it was not clear from the determination how the other cases, put forward by the applicant, were disregarded in the course of the decision. It was submitted that the reasons given for the determination were sparse and seemed not to consider the final submissions of the applicant (in this way linked to the failure to give adequate consideration).
47. Counsel submitted that this lack of reasoning by the respondent amounted to a breach of fair procedures. The applicant relied on the decision in *Mallak v Minister for Justice* [2012] IESC 59, in which it was held that the duty of decision-makers to give reasons for their decision ensures fairness in the administrative process. The applicant submitted that, in light of the asserted breach of the applicant's right to fair procedures, the respondent's decision should be set aside.

(c) Affidavit of Ms. Kay Lynch

48. A point raised in the written submissions of the applicant, but not strenuously pursued in oral submissions, was that the affidavit grounding the statement of opposition of the respondent, was invalid. This was asserted on the basis that Ms. Lynch, who swore the affidavit, was not present at the hearing of Tribunal and therefore, her affidavit amounted to hearsay evidence. On this basis, counsel submitted that the affidavit should be disregarded by the court.
49. Counsel relied on the case of *Gavin v Criminal Injuries Compensation Tribunal* [1997] 1 IR 132, wherein the court held that affidavit evidence of the secretary to the Criminal Injuries Compensation Tribunal, providing reasons for the Tribunal's decision, was inadmissible, as the Tribunal should have spoken for itself.
50. Counsel also cited Order 40, rule 8 of the Rules of the Superior Courts, which specifies that an affidavit should be confined to facts within the first-hand knowledge of the deponent and an affidavit containing hearsay evidence is inadmissible before the court, with the exception of interlocutory applications. Counsel referred to the dicta of Hardiman J. in *Cosgrave v DPP* [2012] IESC 24, wherein he stated at para. 45 of his judgment:

"the unfairness ... of including hearsay in an affidavit is that it is impossible to challenge by cross-examination."
51. On that basis, counsel submitted that the affidavit of Ms. Lynch amounted to hearsay evidence, as Ms. Lynch had not been present on the day of the hearing, meaning that her

affidavit was inadmissible and the respondents had failed to properly ground their notice of opposition.

The Respondent's Submissions.

(a) Error on the Face of the Record

52. Counsel for the respondent, Ms. Ailbhe O'Neill BL, submitted that the authorising memorandum sent to both investigating accountants was not a warrant, as suggested by counsel for the applicant. It was submitted that the statute did not require a warrant, but merely required authorisation in writing. Counsel relied on s.2 of the Solicitors (Amendment) Act 1994, wherein it is stated that an "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."
[emphasis added]

53. Counsel for the respondent acknowledged that the first paragraph of the authorising memorandum contained an error, but contended that the second paragraph clearly authorised the accountants to act and was obviously in writing.
54. Counsel submitted that the second paragraph of the memorandum had authorised the accountants in writing and that being the sole statutory requirement, the appointment of the investigating accountants was valid, notwithstanding the typographical error in the first paragraph.
55. Counsel submitted that error on the face of the record is a very contextual point. The consequences of such an error largely depended on the type of document in which it appeared. Counsel referred para. 10-146 in 'Administrative Law in Ireland' by Hogan, Morgan and Daly, in which the authors noted the lack of decided cases in relation to this issue. The authors also noted that it was not clear whether authorities in the criminal sphere should apply to decisions of other bodies.
56. Counsel submitted that the cases cited by the applicant in relation to an error on the face of the record, were not relevant to the present case. Counsel submitted that because *Re Zwann* dealt with the very different factual issue of habeas corpus, which arose in a specific context, it could not be equated to an error on an authorising memorandum, such as in the present case.
57. In reference to *Wu v Minister for Justice*, which related to a challenge to a deportation order, counsel submitted that a higher standard is used in the context of the technicalities of a deportation order, because the consequences are far greater, impinging on people's freedom of movement and other constitutional rights. This, counsel submitted, meant that an error on the face of an order of that type, was contextually different to an error on an authorising memorandum of the type in this case. For that reason, the same standards could not be applied to them.

58. Counsel acceded to the point made by the applicant that court orders and statutory instruments must show jurisdiction on their face, and should be quashed without that jurisdiction. However, counsel submitted, firstly, that these authorising memoranda are of a different nature to documents such as court orders and warrants under statute, for example; a search warrant, and therefore the same principles did not apply. Secondly, counsel submitted that, although not required, the memoranda did show jurisdiction on their face, as the only statutory requirement of authorisation being in writing, had been met.
59. In relation to the admissibility of evidence, counsel submitted that the applicant's assertion that the court should apply the criminal standard to the procedure of admitting evidence in disciplinary tribunals, such as the present case, was incorrect. Counsel outlined the test for the admission of evidence as it was set out by Fennelly J. in *Kennedy v Law Society (No. 3)* and stated that that was the correct test to be applied in relation to the admission of evidence in disciplinary proceedings.
60. Counsel noted that while Fennelly J. in the *Kennedy* case had referred to an acceptance of the criminal standard for the admission of unlawfully obtained evidence as outlined in the judgment of Kingsmill Moore J. in *The People (Attorney General) v. O'Brien* [1965] IR 142, she submitted that subsequent caselaw has affirmed a different test to be applied to the specific context of disciplinary matters.
61. Counsel cited the decision of *The Competition Authority v Irish Dental Association* [2005] IEHC 361, in which McKechnie J. outlined that the *Kennedy* case has its own, very specific, context, being that of disciplinary matters and the role of a supervising professional body over its members. Counsel relied on this case to show that the standard to be applied by disciplinary tribunals is that outlined in the *Kennedy* case, and therefore, the respondent was correct in its application of that decision.

(b) Fair Procedures

62. The respondent challenged the applicant's assertion that the Tribunal had failed to properly consider the submissions of the applicant made on 12th March, 2020. This challenge was made by reference to the transcript of the hearing from that date, in which the decision handed down by the Tribunal referred to both of the cases that counsel for the applicant had raised in his final submissions, being *DPP v Dunne and Simple Imports Ltd v Revenue Commissioners*.
63. Counsel for the respondent submitted that this reference to the authorities that had been cited by the applicant for the first time in his oral submissions at the second hearing, clearly showed that the Tribunal had considered the matter in the light of the further submissions made on behalf of the applicant.
64. Counsel also challenged the applicant's assertions in relation to the adequacy of the respondent's reasoning for its decision. Counsel for the respondent submitted that this decision was one which fell outside of the types of administrative decision-making that

are subject to a duty to give detailed reasons under *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

65. Counsel submitted that in light of the nature of the decision to be made by the Tribunal, the respondent met the requisite level of reasoning. It was submitted that the Tribunal specifically addressed, considered and gave adequate reasons for distinguishing the criminal cases regarding search warrants which had been mentioned by the applicant.
66. In light of the foregoing, counsel for the respondent submitted that all fair procedures relating to administrative proceedings had been afforded to the applicant, including adequate consideration of all submissions and the outlining of the reasons for its decision.

(c) Affidavit of Ms. Kay Lynch

67. Counsel for the respondent expressed difficulty with the challenge to Ms. Lynch's affidavit, given that there were no issues of fact involved in this case. The facts between the parties were largely agreed. There was a full transcript of the hearing before the Tribunal on both dates.
68. Counsel challenged the applicant's reliance on the case of *Gavin v Criminal Injuries Compensation Tribunal*, as in that case the judicial review application was in relation to a failure to give adequate reasons and the secretary, who had sworn the affidavit, had attempted to retrospectively provide reasons for the Tribunal's decision. It was submitted that in that case, Carroll J. had taken issue with the secretary attempting to provide the reasons for the Tribunal's decision on their behalf, after the decision had been delivered. It was held that the Tribunal should have spoken for itself at the appropriate time.
69. Counsel submitted that the circumstances in this case did not preclude Ms. Lynch from swearing an affidavit, where her affidavit did not purport to provide any more information than was set out by the Tribunal during the course of the inquiry, as referred to on the transcript.
70. Further, counsel asserted that the Chairperson of the Tribunal, Mr. Niall Farrell, who was present at the hearing on both dates, also swore an affidavit of the factual background of this case, which was sufficient to ground their statement of opposition.

The Submissions of the Notice Party.

71. The notice party adopted all of the points made by the respondent, namely; that all fair procedures were followed during the course of the hearing and delivery of judgment on the preliminary matter and that the authorisation of the investigating accountants was valid.
72. Counsel for the notice party, Ms. Neasa Bird BL, submitted that merely because a criminal standard of proof was required to establish misconduct before a disciplinary tribunal, the proceedings themselves were not necessarily criminal in nature. Therefore, it was submitted, not all the procedural rules of evidence that apply in the criminal process, apply to disciplinary hearings, notwithstanding that they apply the criminal standard of proof.

73. Counsel relied on the Kennedy case, wherein Fennelly J. at p. 490 drew a distinction between conduct of a governing body in excess of statutory power and “*illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or of his dwelling.*” Fennelly J. stated the application of the principles of procedural criminal law in the sphere of administrative decision-making should be extremely limited, and that no comparison should be made between administrative wrongdoing and unconstitutionally obtained evidence.
74. Counsel also relied on the decision of *McManus v Fitness to Practice Committee* [2012] IEHC 350, in which Kearns P. stated at p. 28:
- “Although the standard of proof for both processes is that of proof beyond a reasonable doubt, it does not follow that the two processes are in all other respects identical.”*
75. Counsel for the notice party relied on these decisions to show that the respondent had been correct in law to apply a different standard to the admission of evidence during the course of the hearing, than that of the criminal standard set out in *DPP v JC*.
76. Counsel submitted that there was no evidence as to the period during which the respondent considered the oral submissions made by counsel on 12th March, 2020. Although counsel for the applicant had asserted that this adjournment was merely 2/3 minutes, the notice party noted that the transcript merely read; “Following a brief adjournment the hearing resumed”. It was submitted that that was a fairly standard phrase used by stenographers to indicate in general terms that there had been an adjournment in the hearing. It did not indicate the exact duration of the adjournment.

Conclusions.

77. Before embarking on a consideration of the issues in this application, the court should make the following observations. Firstly, this is a challenge to a ruling made by the respondent in the course of its inquiry. The court is uneasy, to put it no further than that, that a party who is dissatisfied with a ruling given in the course of a disciplinary inquiry, should go to the courts to try to set aside the ruling of the Tribunal, before it has concluded its hearing.
78. However, the circumstances of this case are perhaps somewhat out of the ordinary. When the matter was put in for ruling by the Tribunal on 12th March, 2020 and when the respondent had heard further submissions that morning, and after having delivered its ruling, it adjourned briefly to allow the parties consider developments that had occurred outside of the hearing chamber. Those developments were connected to the Covid-19 pandemic. On the date of the resumed hearing before the respondent, the public transport network had begun to introduce restrictions in relation to the number of people allowed on public transport. It was against that background, that the parties agreed that it would be unfair to expect witnesses to attend at the hearing, given the uncertainty that existed in relation to what public transport would be running. On that basis, the hearing

was adjourned to an unspecified future date. In fact, as things turned out, the country was placed into a lockdown some short time thereafter.

79. As there has been a considerable hiatus in the hearing of the matter before the respondent and as this aspect was not raised in the oral or written arguments of the parties, the court will proceed on the basis that it is appropriate for it, in the circumstances of this case, to embark on a review of the ruling of the respondent, notwithstanding that that ruling was made in the course of an ongoing investigation before the respondent.
80. The second point that should be mentioned, is that the first ground of challenge to the ruling of the respondent is effectively that the respondent got it wrong in finding that Ms. Devereux and Mr. O'Neill had been validly appointed as "authorised person[s]" under the Act. That is effectively an appeal point, rather than a challenge that can be made by way of judicial review proceedings. This court, when hearing a judicial review application, is not a court of appeal from decisions of an administrative tribunal. As has been said many times, judicial review is concerned with whether the decision maker had jurisdiction to make the decision that is challenged and whether the process by which the decision maker reached his or her decision, was lawful; meaning that it did not contravene the dictates of constitutional justice and the parties concerned were afforded fair procedures.
81. Once the decision made by the decision maker was made *intra vires* and did not breach the dictates of constitutional or natural justice, this court cannot intervene by way of judicial review of the decision.
82. On that basis alone, this court would dismiss the first ground of challenge to the ruling. The respondent was properly seized of the matter. It heard and considered legal argument as to whether the accountants had been properly appointed. They made their decision on that matter. That the applicant may be of the view that they got it wrong, is not a basis on which this court can interfere with their ruling.
83. However, even if the court is wrong in that view, and in deference to the able arguments of counsel on this issue, the court will determine the issue. The court is satisfied that when looking at the memoranda of appointment in this case, one has to consider the circumstances in which the accountants were being appointed.
84. Under the Solicitors Acts, it is a condition of holding a practising certificate, that solicitors are under the supervision of the Law Society. The Law Society is given authority under the Acts and the regulations to appoint accountants to do "spot checks" on solicitors' accounts to ensure that all aspects of the accounts are being dealt with in accordance with all relevant accounting norms and practices. That is a fundamental protection for those members of the general public who are clients of solicitors' firms
85. It is accepted that there was an error in the first paragraph of the memoranda of appointment of Ms. Devereux and Mr. O'Neill. The issue before the court is whether the respondent was correct to determine that that error did not vitiate the appointment of the

investigating accountants, due to the presence of the second paragraph in each memorandum.

86. While the applicant relied on dicta from a number of criminal cases, where it was held that when considering the exercise of police powers under various forms of authority, notably search warrants, precision in the terms of the warrant was essential, because it formed the basis of the lawful authority to do acts that would otherwise constitute a breach of a person's constitutional rights, notably the right to liberty and protection of their dwelling.
87. One is not dealing with the same circumstances when considering the memoranda of appointment in this case. The investigating accountants were merely given the power to attend at the applicant's place of business and inspect his accounts and records. The appointment of such investigating accountants did not imply any wrongdoing on the part of the applicant. Investigating accountants can be, and often are, appointed to do "spot checks" on solicitors' practices. Therefore, the fact of their appointment and their attendance at the offices of a solicitor, does not constitute any adverse implication on the conduct of the solicitor. It is merely part of the exercise of the normal supervisory function of the Law Society over solicitors generally.
88. In *Kennedy v The Law Society (No. 3)*, Fennelly J. considered a similar argument in relation to the admissibility of evidence in criminal cases where there had been a defect in the underlying warrant and whether such principles were applicable in similar circumstances concerning administrative enquiries; he stated as follows at p. 478 – 479:

"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."

89. Fennelly J. went on to consider the matter further at p. 489 – 490:

"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, call 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."

90. The court is satisfied that having regard to the circumstances in which investigating accountants can be appointed as authorised persons under the Act, and having regard to the dicta in the *Kennedy* case, the respondent was correct to hold that in looking to see if Ms. Devereux and Mr. O'Neill had been validly appointed, they should 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 memoranda.
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.
92. Having regard to the finding of the court on that issue, the issue of the admissibility of the evidence of Ms. Devereux and Mr. O'Neill, does not arise.
93. However, even if the court was wrong to hold that the respondent had been correct in holding that the investigating accountants had been validly appointed; the court is satisfied that the respondent was correct in holding that even if they had not been validly appointed, their evidence could still be admissible before it.
94. The fact that the respondent in reaching its ultimate decision following the holding of its inquiry, may have to adopt the criminal standard of proof, does not mean that the criminal rules of procedure, and in particular, those governing the admissibility of evidence, apply in the same manner to the proceedings before the Tribunal.
95. In *McManus v Fitness to Practice Committee of the Medical Council* [2012] IEHC 350, the court had to consider the position where the FPC had to apply the criminal standard of proof in reaching its ultimate determination, to the issue of whether the same rules of procedure as applying in a criminal trial, would apply to an inquiry before them. Kearns P. held that the criminal rules of procedure did not necessarily apply to procedures before the respondent in that case. He stated as follows at p. 28:

"While the assessor described in the course of his advices the procedural milestones which might attend a criminal trial, it must be remembered that this was, in fact, an inquiry. Although the standard of proof for both processes is that of proof beyond a reasonable doubt, it does not follow that the two processes are in all other respects identical. The fact that the committee rejected a request for a direction at the conclusion of the CEO's case on the basis that they wished to hear the applicant might transgress the rules of a criminal trial, but in the context of an inquiry does not strike me as being an objectionable course for the Committee to have adopted. This is not to say that the applicant was obliged to give evidence, or that the onus of proof was reversed or altered in any way."

96. In the course of his judgment in *Borges v Fitness to Practice Committee* [2004] 1 IR 103, Keane C.J. expressed similar views about the ability of disciplinary tribunals to adopt

procedures that were different to those applicable in a criminal trial. He stated as follows at para. 25:

*"25. It is also not in dispute that the practitioner concerned is entitled to have the hearing conducted in accordance with fair procedures and natural justice. That is not to say that a body of this nature may not depart from procedures which would be essential in a court of law, as was made clear by this court in *Kiely v. Minister for Social Welfare* [1977] I.R. 267 in particular, they may act on the basis of unsworn or hearsay evidence. But, as was also made clear in that case, their freedom from the constraints to which courts of law are subject does not permit them to act in a way which is inconsistent with the basic fairness of procedures guaranteed by implication by Article 40.3 of the Constitution."*

97. In *Kennedy v Law Society of Ireland (No. 3)*, Fennelly J. considered that the essential question in relation to the admissibility of evidence before a disciplinary tribunal was whether there had been some element of deliberate and knowing misbehaviour on the part of the investigating officers. He stated as follows at p. 490-491:

"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 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 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 decision rendered invalid by the contemporaneous pursuit of an unauthorised purpose."

98. Based on these authorities, the court is satisfied that the respondent was entitled to hold that, even if the investigating accountants had not been validly appointed, the respondent could still act on their evidence, in the absence of any evidence of *mala fides* on the part of the notice party in making the appointment. Accordingly, the court would not set aside the respondent's ruling that it was entitled to receive the evidence of Ms. Devereux and Mr. O'Neill.

99. The court turns now to two grounds which properly come within the ambit of judicial review proceedings. These are the challenges made by the applicant alleging breach of fair procedures in the hearing before the respondent.
100. The first allegation of breach of fair procedures concerns the respondent's ruling and in particular, what is alleged by the applicant to have been the very short period that the further submissions made by counsel on behalf of the applicant, were considered, prior to the respondent delivering its ruling on 12th March, 2020.
101. In essence, it was submitted on behalf of the applicant, that as the respondent had turned up at the hearing on 12th March, 2020 with the intention of delivering their ruling on the issue of the validity of the appointment of the investigating accountants and on the issue of the admissibility of their evidence, the Tribunal had merely adjourned for a very short period and then delivered the judgment that they had already prepared, without giving any proper consideration to the further submissions that had been made by Mr. Kennedy BL on behalf of the applicant.
102. It is accepted that the members of the Tribunal had reached a decision on the preliminary issue prior to going into the hearing on 12th March, 2020. The details of how that decision was initially arrived at and what transpired after the hearing on 12th March, 2020 and prior to the delivery of its ruling in the matter, has been set out in detail in the affidavit sworn by Mr. Niall Farrell, chairperson of the Tribunal, sworn on 1st February, 2021.
103. It is clear both in that affidavit and from the transcript of the hearing before the Tribunal on 12th March, 2020, that having heard oral argument on the previous occasion and having received written submissions in the interim and having considered same, the Tribunal had reached a decision, which they intended to deliver that morning.
104. It was only due to the persistence of Mr. Kennedy BL and having reviewed the transcript of the previous hearing, that the respondent allowed counsel to make further submissions, in which he raised for the first time two cases on which he rested the further submissions made on behalf of the applicant.
105. The Tribunal retired to consider its ruling in light of these further submissions. The Tribunal is noted on the transcript as returning after a "brief adjournment" and delivered its ruling.
106. The court is not satisfied that any realistic basis has been established by the applicant for its assertion that the respondent failed to consider all, or any, of the arguments made on his behalf. The phrase "following a brief adjournment" which appears in the transcript, is not indicative of any particular length of adjournment. There was no evidence before this court as to the length of time spent by the respondent considering its ruling on 12th March, 2020. The court is satisfied, having regard to the matters set out in Mr. Farrell's affidavit and having read the Tribunal's ruling, as set out in the transcript, that the tribunal did give consideration to the further arguments raised by Mr. Kennedy BL on behalf of the applicant.

107. The ruling of the respondent refers to the cases that had been cited for the first time that morning. The tribunal reached a decision on the issue that was open to it on the evidence before it, which evidence was not in dispute. They were effectively ruling on a net legal point, as to the effect of the admitted error in paragraph 1 of the memoranda of appointment of the authorised persons.
108. Having regard to the content of the ruling, this court cannot conclude that the respondent failed to consider the arguments raised before it on the legal issue and instead just went through the motions and merely delivered the ruling that they had already prepared. The fact that the ruling that they actually delivered, may have been in very similar terms to the ruling which they had already prepared and may have reached the same conclusion, is not indicative of a failure by the respondent to properly consider the further arguments made by counsel on behalf of the applicant. It merely establishes that the further arguments of counsel were not sufficient to persuade the Tribunal to find in his favour.
109. Accordingly, the court holds that there is no basis on which it can conclude that the respondent failed to afford the applicant fair procedures by failing to properly consider the arguments made by counsel on his behalf, prior to delivering its ruling.
110. Turning to the second ground of complaint concerning breach of fair procedures, being the submission that the respondent failed to provide any, or any adequate, reasons for its decision; the court does not find this submission well-founded.
111. The range of cases and matters and decisions in which reasons must be given, are spread across a wide spectrum. The degree of reasons necessary to ensure that fair procedures are afforded to the parties, can vary greatly from case to case and from one forum to the next.
112. For example, in criminal cases, it is recognised that the degree or extent of reasoning required of a District Court judge, who may be administering a busy criminal list, where he or she may be deciding many summary trials in one day, is not the same as the level of reasons that may be required in other fora.
113. This was set out in the judgment of Charleton J. in *Lyndon v Collins* [2007] IEHC 487, where he stated that in such circumstances it is not necessary for a District Court judge to give extremely detailed reasons for their decisions. Charleton J. stated that it is merely essential that an individual know, from the reasons given by the District Court judge, what they have been convicted for and why they have been convicted. He outlined that:

"[T]he extent of which judicial bodies are required to give reasons for their decisions depends upon the nature of the case that they are dealing with and the nature of the remedies that flow from such a decision."

See also, the *dicta* of Charleton J. at paras. 10 and 11 of his judgment.

114. Similarly, the extent of reasons which an administrative decision maker has to provide can vary considerably from one case to the next. Where a decision-maker, such as An

Bord Pleanála, is giving a decision on a very large planning application, such as for a windfarm, or shopping centre, which may have effects on the environment and on protected European sites, and where considerable expense may have been incurred in preparing a detailed environmental impact statement and Natura impact statement, the degree of reasoning required in the inspector's report and in the decision of An Bord Pleanála, may be very extensive.

115. The golden rule in all the cases is that the person addressed must be furnished with reasons that are sufficient to enable them to know what has been decided and why the decision was reached; so that they may know whether they have grounds to appeal the decision, or to challenge it by way of judicial review.
116. Nearly all of the cases which have come before the courts, involve final decisions by a decision-maker. It is noteworthy that what is challenged here, is a ruling on the validity of the appointment of the investigating accountants and a consequential ruling on the admissibility of their evidence. When one is dealing with rulings on the admissibility of evidence given in the course of a hearing, it is unrealistic to expect such a ruling to be of the same level of reasoning as the ultimate decision of a person or body at the end of the process, much less needed it be of the level of detail expected in a High Court judgment.
117. In the present case, it is clear from the transcript that the respondent gave a detailed reasoned ruling on the issue before it. The ruling runs to approximately three pages in its substantive content (excluding discussion about transport difficulties). It refers to the arguments of counsel for the applicant and the Law Society. It sets out why the respondent had reached the decision that it did.
118. The court is satisfied that the level of reasoning in this case 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. Accordingly, the court declines to hold that adequate reasons were not provided by the respondent for its decision.
119. Finally, an issue was raised in relation to the capacity of Ms. Lynch to swear the verifying affidavit in respect of the statement of opposition, due to the fact that she had not been present at the hearing before the respondent. The court does not regard this submission as being well-founded. The matters deposed to by Ms. Lynch were not greatly in dispute between the parties. In fact, there was no factual dispute between them. Her affidavit merely set out the basis on which the statement of opposition had been drafted. The court does not see that there is any realistic defect, or want of fair procedures in having Ms. Lynch swear the affidavit.
120. The applicant accepted that an affidavit had been sworn by Mr. Farrell, who had been present at the hearing and who had participated in the decision-making process, as chairman of the Tribunal; but stated that his affidavit was deficient because it did not specifically state that it was verifying the content of the statement of opposition. The court is satisfied that this argument is without substance as well.

121. For the reasons set out herein, the court refuses all the reliefs sought by the applicant in these proceedings.
122. As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions in relation to the terms of the final order and on costs and on any other matter that may arise.