[2019] IEHC 748

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 1049 J.R.

BETWEEN

NEAL DUGGAN

APPLICANT

AND

IRISH AUDITING AND ACCOUNTING SUPERVISORY AUTHORITY

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 8 November 2019

INTRODUCTION

1. These judicial review proceedings have their genesis in two related complaints made by the Applicant against a well-known firm of accountants, Deloitte. The complaints had been made to the Institute of Chartered Accountants of Ireland ("*the ICAI*" or "*the Institute*"). The ICAI dismissed the first complaint on the basis that there was no case to answer, and the second complaint on the basis that it did not concern a disciplinary matter.

2. The Applicant subsequently sought to have the manner in which the complaints had been dealt with by the ICAI enquired into by the Irish Auditing and Accounting Supervisory Authority ("*the Supervisory Authority*"). One of the principal objects of the Supervisory Authority is to supervise how prescribed accountancy bodies regulate and monitor their members. The Supervisory Authority has a statutory *discretion* to enquire into the conduct of an investigation by a prescribed accountancy body for the purpose of determining whether that body has complied with its investigation and disciplinary procedures. The Court of Appeal has characterised this discretion as falling at the wider end of discretionary powers. (*Nowak v. Irish Auditing and Accounting Supervisory Authority* [2016] IECA 301).

3. The Supervisory Authority declined to initiate a statutory enquiry in response to the Applicant's complaint on the basis (i) that the matters raised were not "sufficiently significant" to warrant the exercise of the statutory power, and (ii) that an alternative course of action could be followed within the Authority's general supervisory powers.

4. The Applicant now seeks, by way of these judicial review proceedings, to challenge the manner in which the Supervisory Authority exercised its discretion. For introductory purposes, the principal grounds of challenge can be summarised as follows.

5. First, it is said that the reasons provided for the decision are inadequate. This complaint is made notwithstanding the fact that—as part of its opposition papers in the judicial review proceedings—the Supervisory Authority has since exhibited the relevant extracts from the minutes of the Board meeting at which the decision was made, and has also exhibited the detailed paper circulated in advance of the Board meeting.

6. Secondly, it is said that the Supervisory Authority failed to meet the formal requirements governing the conduct of enquiries as prescribed under the relevant regulations (S.I. No.

96 of 2012). Specifically, it is said that the decision not to initiate an enquiry should have been made by a particular committee of the Supervisory Authority, and not by the Board itself.

7. Thirdly, it is submitted that the Supervisory Authority took into account irrelevant considerations. It is said that the Authority erred in applying a standard of "sufficient significance". It is also said that insofar as the Authority relied on the possibility of an alternative course of action being taken to prevent any recurrence of a breach on the part of the ICAI, this too was an irrelevant consideration.

EVENTS LEADING TO BOARD DECISION OF SEPTEMBER 2018

8. The Applicant, Mr Neal Duggan, is dissatisfied with the manner in which the Institute of Chartered Accountants of Ireland ("*the ICAI*" or "*the Institute*") dealt with two complaints made by him against Deloitte. In brief, the complaints relate to the notification of the resignation of Deloitte as auditors of Irish Press plc and their subsequent reappointment as auditors. Mr Duggan is a shareholder in Irish Press plc.

9. Deloitte is a member firm of the ICAI, and, as such, it is subject to the Institute's investigation and disciplinary procedures. These procedures are subject to approval by the Supervisory Authority.

10. The ICAI dismissed the complaints made by the Applicant. The first complaint had been dismissed on the basis that there was no case to answer, and the second complaint on the basis that it did not concern a disciplinary matter.

11. The Applicant then referred the matter to the Supervisory Authority and requested that the Authority initiate a statutory enquiry. The Applicant through his solicitors, Hayes Solicitors, sought to identify what were said to be breaches by the ICAI of its investigation and disciplinary procedures as approved by the Supervisory Authority. These alleged breaches are set out in detail in a letter dated 6 April 2018 from Hayes Solicitors to the Supervisory Authority.

12. By way of example only, one of the complaints made was that the ICAI had allegedly been "significantly influenced" by legal advice which had been received by Deloitte, and to which Mr Duggan had, initially, been denied access. (It seems that the legal advice was subsequently provided to Mr Duggan on 10 February 2017).

13. The complaints made on behalf of the Applicant were the subject of a detailed report (described as a "*Board Paper*") which had been circulated to the Board of the Supervisory Authority in advance of its meeting on 17 September 2018. This Board Paper has been exhibited as part of the affidavit of Mr Kevin Prendergast sworn on 1 March 2019.

14. The approach taken in the Board Paper was to review the manner in which the investigation of the two complaints had been conducted by the ICAI, with a view to identifying whether or not there had been non-compliance by the ICAI with its investigation and disciplinary procedures.

15. Section 4 of the Board Paper makes the following observations on the status of the Applicant as a complainant rather than the subject of the complaint.

> "4. Fair procedure and legal arguments
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> Hayes letter of 6 April 2018 alleges that ICAI did not act in accordance with '*fair procedures'* particularly with regard to the fact that the complainant was not provided with the member firm's response to the complaint, including legal advice submitted by the firm and which appears to have influenced the ICAI's decision to close the cases.
> The Section 933 process is focused on determining whether the PAB has complied with its approved investigation and disciplinary procedures. In this case, the ICAI's approved procedures do not provide complainant's with a right to be provided with documentation or to comment on legal advice and, therefore, no potential breach arises in this regard.
> Further, it is noted that the Executive has always understood the legal principle of 'fair procedures' including right of reply et cetera to apply mainly to the member under investigation rather than the complainant. That said, in the course of its general supervisory work, the Executive always seeks to ensure that reasonable rights are accorded to complainants in the PABs' processes. For Board members' information, we normally expect at least the following to be included in the PABs' disciplinary processes:
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> - right to complain;
> - right to reason(s) for decision(s) made;
> - right of review where a case is dismissed prior to hearing (i.e. no finding against member); and
> - right to be notified of hearing(s).
>
> It is outside IAASA's remit to assess the legal arguments on confidentiality and legal privilege in Hayes Solicitors' letter in this regard."

16. Section 5.1 of the Board Paper identifies one area of potential non-compliance with the ICAI's constitutional documents. More specifically, a question was raised as to whether the independent reviewer may have been relying on an earlier version of disciplinary regulations which had since been amended. Relevantly, this question was not one which had been raised by the Applicant.

17. Section 5.2 of the Board Paper sets out a number of other issues identified as areas where further clarification and engagement with the ICAI would be beneficial to the effective and efficient operation of the Institute's disciplinary system in the future. Crucially, the Board Paper makes it clear that these issues were not being presented as potential non-compliance with the disciplinary procedures.

18. The Board Paper then sets out, at Sections 7 and 8, the matters to be considered by the Board, as follows.

> "7. Considerations

In considering whether to exercise its discretion to carry out an enquiry pursuant to Section 933, the Board may wish to consider and have regard to the following:

I. the Section 933 process is a regulatory tool that may be used to address non-compliance with investigation and disciplinary processes whether by annulling all or part of a decision, directing the conduct of a fresh investigation and/or a fine. Therefore, if, following a Section 933 process, potential breaches of the ICAI's approved processes were confirmed, the Enquiry Committee may be able to provide a remedy for non-compliance that may have the effect of addressing some of the complainant's concerns in respect of the processing of the complaint;

II. whether the Board considers that the underlying matters are sufficiently significant to warrant the exercise of the Section 933 Powers of the Authority;

III. whether the Board considers that the potential breach of the approved investigation and disciplinary procedures noted in section 5.1 above may be significant and/or that it may have had a substantive impact on the outcome of the particular complaint; and

IV. whether the Board considers that there are any alternative actions that could be initiated with a view to preventing recurrence of the potential breaches identified.

In the event that the Board decides that the initiation of an enquiry under Section 933 is not warranted, the Executive will engage with the ICAI to ensure that its processes are amended to address the matters identified in section 5 above. Alternatively, should the Board decide to appoint a [Preliminary Enquiry Committee] , any revelatory engagement in respect of these matters will be deferred until the conclusion of the Section 933 process.

8. Board decisions requested

The Board is requested to consider whether, for the purposes of determining whether ICAI has complied with its approved investigations and disciplinary procedures, it wishes to enquire into the conduct of the investigation and decisions by ICAI into a possible breach of its standards by a member in case 16/01/004; and if so:

i) whether it wishes to appoint a PEC to determine whether the Authority should initiate a full enquiry into the decisions and conduct of an investigation by ICAI in case 16/01/004; and

ii) consider whether the Board wishes the Chairperson to revert with proposals for committee membership.

19. The Board Paper was accompanied by a document entitled *"Analysis of complaint per Hayes Solicitors' letter of 6 April 2018*". This document set out a table, the first column of

which contained extracts from the Applicant's solicitors' letter, and the second column set out the official's observations in relation to same.

20. By way of example only, the complaint made by the Applicant in relation to the legal advice received by Deloitte (and allegedly relied upon by the ICAI) is addressed in the analysis as follows.

- In forming a view as to whether or not there is a case to answer, the CC [the Conduct Committee] may consider legal advice provided by either party to the complaint or obtained by the CC itself. While the ICAI's constitutional documents (CDs) do not provide complainant's with a right of access to documentation submitted by the member, following lengthy correspondence, the Author Cox advice was ultimately provided to Mr Duggan.
- While it would seem preferable that ICAI would have obtained its own advice and/or formed its own view on this matter, this does not constitute a breach of its CDs. This matter will be raised as a supervisory matter with ICAI, i.e. its policy regarding situations where it is sufficient to rely on legal advice provided by the member and those where obtaining independent advice/evidence may be warranted.
- Hayes have argued that *'it is a fundamental precept of professional regulatory law that a complainant is entitled to make observations and comments on a respondent's express position upon receipt of the formal complaint*.' While the Institutes Disciplinary Regulations do not provide complainants with such a right, the complainant provided further submissions with his request for an independent review of the CC's decision, which were referenced in the Independent Reviewers report."

Board's Decision

21. The Board's decision not to initiate an enquiry is recorded as follows in the extract of the minutes of the Board meeting of 17 September 2018.

> "6. Consideration of whether to refer a matter to the S. 933 process (Paper 130.3)
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> The Head of RMS spoke to the above Paper, the contents of which were noted by the Board. She noted that an RMS file review on foot of a complaint had identified potential instances of non-compliance, hence under the current policy the matter is brought to the Board for decision. While it was noted that the instance of potential non-compliance identified by the file review was not one of the specific matters suggested by the complainant, she confirmed that the Independent Review process was an area about which the complainant had expressed significant dissatisfaction. She also advised members that, notwithstanding the imminent commencement of the 2018 Act, the extant S. 933 Regulations would apply.

> The Board discussed the content of the Paper, noting that while hugely detailed, there were no apparent issues of significance raised. It was noted that the Authority's supervisory function routinely dealt with matters such as those described. The Board also discussed its obligations in regard to S. 933 enquiries, noting that their initiation was a matter of discretion and that their threshold was enquiry being in the public interest.
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> The Board again considered the matters raised by the complainant, the matters identified by the RMS file review, and the discretion afforded by the S. 933 Regulations. Having considered the matter, the Board concluded that the matters raised lacked sufficient gravity to warrant the initiation of an Enquiry under Section 933, and that the potential issues identified in the RMS file review could be appropriately and proportionately dealt with *via* the Authority's routine supervisory processes. The Board directed that the complainant and the ICAI be advised accordingly."

22. As directed by the Board, notification was sent to the Applicant. The relevant letter is dated 1 October 2018 and reads as follows.

> "I confirm that following consideration of your complaint, the relevant Institute Complaint Files 16/01/004 and 16/065 were reviewed. Having considered the matter, the Board decided that the initiation of a Section 933 (of the Companies Act 2014) Enquiry was not warranted as the regulatory benefit of any such Enquiry would be limited.
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> In reaching its determination, the Board considered that:
>
> a) the matters raised were not sufficiently significant to warrant the exercise of Section 933 powers; and
> b) an alternative course of action could be followed within the Authority's general supervisory powers with a view to preventing any recurrence of the matters arising.
>
> I confirm that the Authority's file in relation to the complaint made by your client is now closed."

23. The solicitors acting on behalf of the Applicant, Hayes Solicitors, by letter dated 17 October 2018, sought further details of the reasons for the decision. The Authority declined to provide further reasons by letter dated 13 November 2018.

STATUTORY DISCRETION OF SUPERVISORY AUTHORITY

24. Before embarking upon a detailed discussion of the grounds of challenge advanced on behalf of the Applicant, it is necessary first to say something about the nature of the decision under challenge. The proceedings are directed to the exercise by the Supervisory Authority of its statutory discretion under Section 933 of the Companies Act 2014.

25. Section 933 insofar as relevant provides as follows.

"(2) Following a complaint or on its own initiative, the Supervisory Authority may, for the purpose of determining whether a prescribed accountancy body has complied with the approved investigation and disciplinary procedures, enquire into —

(a) a decision by that body not to undertake an investigation into a possible breach of its standards by a member,

(b) the conduct of an investigation by that body into a possible breach of its standards by a member, or

(c) any other decision of that body relating to a possible breach of its standards by a member, unless the matter is or has been the subject of an investigation under section 934 relating to that member."

26. The statutory discretion to initiate an enquiry under Section 933 must be seen in context. One of the principal objects of the Supervisory Authority is to supervise how the prescribed accountancy bodies regulate and monitor their members. (Section 904). As part of this remit, the Supervisory Authority has a function in approving the investigation and disciplinary procedures in the constitution and bye-laws of a prescribed accountancy body. (Section 905).

27. The ICAI is a prescribed accountancy body subject to supervision by the Supervisory Authority. The ICAI has established the Chartered Accountants Regulatory Board ("*CARB*"), and overall responsibility for ICAI's regulatory and disciplinary functions was transferred to CARB with effect from 30 September 2016. It was the CARB which considered—and ultimately dismissed—the two complaints made by the Applicant.

28. It is apparent from the language of Section 933 that the Supervisory Authority is not required to act as an *appellate body* to which a person dissatisfied with the outcome of disciplinary proceedings before a prescribed accountancy body can bring an appeal. The role of the Supervisory Authority—as its very title indicates—is to supervise compliance. The principal purpose of Section 933 is not necessarily to correct the outcome of *individual* disciplinary proceedings before a prescribed accountancy body, but rather to empower the Supervisory Authority to initiate, in the exercise of its discretion, an enquiry for the purpose of determining whether a prescribed accountancy body has complied with the approved investigation and disciplinary procedures. Upon completion of a statutory enquiry, the Supervisory Authority has a broad discretion as to the measures, if any, which it will direct. See Section 933(6)(b) as follows.

(b) Subject to section 941(4) and (4A) , the Supervisory Authority may advise, or admonish, the relevant body or may censure it by doing one or more of the following:

(i) annulling all or part of a decision of that body relating to the matter that was the subject of the enquiry;

(ii) directing that body to conduct an investigation or a fresh investigation into the matter;

(iii) directing that body to perform the function that was the subject of the enquiry again in accordance with any directions or terms and conditions that the Supervisory Authority considers appropriate;

(iv) directing that body, where it in future performs the function that was the subject of the enquiry, to do so in accordance with any directions or terms and conditions that the Supervisory Authority considers appropriate;

(v) requiring that body to pay to the Supervisory Authority an amount not exceeding the greater of the following:

(I) € 125,000;

(II) the amount prescribed under section 943(1)(e)."

29. As appears, the Supervisory Authority is not necessarily required to annul the disciplinary decision or direct a fresh investigation even where, after completing an enquiry, the Authority is not satisfied that the prescribed accountancy body had complied with the approved investigation and disciplinary procedures. The Authority might instead confine itself to issuing "advice" to the accountancy body, but leave its decision intact.

30. All of this is indicative of the broad discretion which the Supervisory Authority enjoys both in terms of the threshold decision of whether to initiate an enquiry, and the subsequent decision as to what action to take upon completion of the enquiry.

31. Leading counsel for the Applicant, Mr Remy Farrell, SC, had sought to emphasise that the complaints made to the Supervisory Authority as *per* the letter of 6 April 2001 were properly confined to criticism of the *procedures* followed by the ICAI. The implication being that, whereas the Supervisory Authority is not required to provide an appeal on the substantive merits of disciplinary proceedings, there is a presumption that the Supervisory Authority would entertain a complaint which was confined to procedural issues and that it would be expected to set aside a decision on procedural (as opposed to substantive) grounds.

32. With respect, there is no such presumption. The Supervisory Authority is not assigned an adjudicative function whereby it is required to determine disputes between an accountancy body and a third-party complainant albeit on limited grounds. Rather, the principal object is to supervise the accountancy bodies, and this can be achieved in some instances by measures falling short of a statutory enquiry and the subsequent setting aside of disciplinary decisions.

33. The breadth of the Supervisory Authority's jurisdiction to initiate an enquiry has been explained by the High Court and the Court of Appeal in *Nowak v. Irish Auditing and Accounting Supervisory Authority* [2015] IEHC 94; [2016] IECA 301 ("*Nowak*").

34. The proceedings in Nowak involved a challenge to a decision of the Supervisory Authority not to initiate an enquiry under what was then Section 23 of the Companies (Auditing and Accounting) Act 2003. This was the statutory precursor to what is now Section 933 of the

Companies Act 2014. The parties to the proceedings before me are both agreed that there is no distinction between the wording of the two sections.

35. The applicant in Nowak, Mr Peter *Nowak*, had sought to make a complaint in respect of the conduct of an accountancy body subject to regulation by the ICAI. The complaint had been dismissed as inadmissible on the basis that there were no facts evidencing that the member firm had breached professional or accountancy standards.

36. The Supervisory Authority subsequently declined a request to initiate a statutory enquiry. The reason stated for this decision was that the Authority had concluded that there were no issues identified which would warrant further examination in the context of the Authority's statutory functions.

37. Mr Nowak next sought to challenge the Supervisory Authority's decision by way of judicial review. The application was dismissed, at first instance, by the High Court (Noonan J.). For present purposes, the key findings of the High Court can be summarised as follows.

    (i). The discretion to initiate an enquiry is not expressly limited or circumscribed by the legislation, and appears to be at the wider end of discretionary powers afforded to public bodies.

    (ii). The standard for review of a decision not to initiate an enquiry is that of unreasonableness or irrationality, as per *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice and Equality* [2010] IESC 10.

    (iii). It must be at least questionable whether there is a duty to give reasons for a decision not to initiate an enquiry, by analogy with *H. v. Director of Public Prosecutions* [2006] 3 I.R. 575. Even if the decision did attract a duty to give reasons, then the brief reasons stated by the Supervisory Authority were adequate.

    (iv). Mr Nowak lacked the requisite "sufficient interest" or locus standi to maintain the proceedings.

38. The Court of Appeal upheld the judgment of the High Court. The Court of Appeal reserved its position on points (iii) and (iv) above in circumstances where it considered it was not necessary to decide same on the facts of the case.

39. Ryan P., giving the unanimous judgment of the Court of Appeal, described the nature of the statutory discretion as follows. (See paragraphs [18] and [19] of the judgment).

> *"[…] The Authority's function was not to rule on procedural correctness, but to decide whether to inquire into the decision by CARB* not to undertake an investigation into a possible breach of standards by one of its members. In accordance with the legislation, that purpose of such an inquiry would be to determine whether CARB had complied with the approved investigation and disciplinary procedures. The Authority was not hearing an appeal from the decision by CARB. It had its own separate function.*

> The functions of the Authority do not include hearing appeals from the decisions of the Board. The Authority has supervisory jurisdiction over the disciplinary process that Mr. Nowak complained about. The Authority was entitled and arguably obliged to look also at the factual basis on which Mr. Nowak's complaint was rejected. That was because the Board was of the view that the practices complained of by Mr. Nowak conformed with standard accounting and auditing procedures and so there was actually nothing to investigate. In those circumstances, it seems to me to have been quite reasonable of the Authority to decide not to proceed. The Authority was entitled to think that it would be wasting its time exploring an alleged departure from proper procedure in a case in which there was no basis for the complaint."
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> *The acronym "CARB" refers to the Chartered Accountants Regulatory Board which has overall responsibility for the ICAI's regulatory and disciplinary functions.

40. The judgment also emphasises the different functions of (i) the disciplinary board of the prescribed accountancy body, i.e. the Chartered Accountants Regulatory Board, and (ii) the Supervisory Authority. (See paragraph [22] of the judgment).

> "The application to the Authority fell to be considered against the statutory purposes that that body was required to fulfil. If there was insufficient matter of concern for the Authority, there was no reason why it should undertake an inquiry. When the different functions of CARB and the Authority are understood, it is clear, in my view, that the trial judge was correct in holding that there was nothing in the case that came near *Keegan, O'Keeffe* or Wednesbury unreasonableness."

ADEQUACY OF REASONS

41. The Supervisory Authority has adopted the position in its pleadings that it has "no obligation in law" to give the Applicant reasons for its decision not to initiate a statutory enquiry. In the alternative, the Supervisory Authority pleads that limitations are imposed on its ability to give reasons by Section 940 of the Companies Act 2014 which prohibits the disclosure of certain confidential information.

42. Notwithstanding the stark position adopted by it in its pleadings, the Supervisory Authority has, in fact, furnished a significant level of detail in relation to its decision-making. In particular, the minutes of the meeting of the Board of 17 September 2018, and the Board Paper setting out a careful consideration of the Applicant's complaint, have both been disclosed as exhibits to the affidavit verifying the Authority's Statement of Opposition. (The content of these two documents has been summarised at paragraphs 13 to 0 above).

43. Counsel on behalf of the Applicant submits that the disclosed documentation does not inform the reasons that were given, and that while the court does not have to ignore it, the documentation is of "fairly minimal relevance to the actual reasons for the decision". As explained presently, I cannot accept the correctness of this submission.

Detailed Discussion

44. The various arguments made in respect of the "adequacy of reasons" ground of challenge will be addressed as follows in this judgment. First, the judgment will consider whether the statement of reasons as *per* the letter of 1 October 2018, when read in conjunction with the more recently disclosed documentation, provides an adequate statement of reasons. It is only if this court were to find that the reasons were *inadequate* that it would then become necessary to consider the alternative arguments that (i) the Supervisory Authority is not obliged to give reasons to a complainant, such as the Applicant, or (ii) that the Supervisory Authority's obligation to furnish reasons is limited by Section 940.

45. The starting point for the appraisal of the adequacy of the reasons is the judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 ("Connelly"). The unanimous judgment of the Supreme Court was delivered by Clarke C.J. The Chief Justice identified two purposes which a duty to state reasons serves, as follows. First, to enable a person affected by the decision to understand why a particular decision was reached. Secondly, to enable a person to ascertain whether or not they have grounds upon which to appeal the decision (where an appeal lies) or to seek judicial review.

46. Having identified the purpose of the duty to give reasons, the court was then able to formulate the legal requirements against which the adequacy of reasons may be tested. First, any person affected by a decision is entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions, and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to apply for judicial review of a decision. The reasons provided must also be such as to allow a court hearing an appeal or reviewing a decision to engage properly in such an appeal or review.

47. The judgment goes on to explain that the application of this general approach will vary greatly from case to case.

> "[…] the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached."

48. The aspect of the judgment in *Connelly* of most immediate relevance to the present case is its discussion of what surrounding documentation can be relied upon in identifying the reasons for an administrative decision. The Supreme Court indicated that, in principle, the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. This is subject always to the requirement that the reasons must actually be ascertainable and capable of being determined.

49. The Supreme Court endorsed the approach taken in *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163; [2012] 2 I.R. 506. See paragraph [9.2] of the judgment in Connelly as follows.

> "The test is, in my view, that identified in Christian. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it seems to me that the trial judge has, put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."

50. On the facts of *Connelly*, the decision under challenge was that of An Bord Pleanála to grant planning permission. The Supreme Court accepted, in principle, that in assessing the adequacy of reasons it was appropriate to have regard not only to An Bord Pleanála's formal decision, but also the report prepared in respect of the planning appeal by an inspector employed by An Bord Pleanála. The inspector's report is made available to the public at the same time as the board's decision is notified. The Supreme Court further accepted that it might also be appropriate to have regard to the documentation accompanying the planning appeal, including documentation submitted by the applicant for planning permission, i.e. the developer.

51. The judgment indicates that it would be preferable in all cases if An Bord Pleanála made expressly clear whether it accepts all of the findings of its inspector or, if not so doing, where and in what respect it differs. Failure to do so is not, however, necessarily fatal if in the circumstances it is possible to reach a significantly clear inference as to what the board thought in that regard.

52. Applying these principles, by analogy, to the facts of the present case, I am satisfied that it is appropriate to have regard to the minutes of the meeting of the Board of 17 September 2018, and to the Board Paper setting out the consideration of the Applicant's complaint. The minutes of the meeting represent a contemporaneous recording of the Board's decision not to initiate a statutory enquiry. The minutes of the meeting make express reference to the Board Paper, and there is thus a nexus between the Board Paper and the decision. The requirement, as per *Connelly*, that the materials sought to be relied on actually provide the reasons which led to the decision concerned, is evidently met.

53. The further requirement that the materials not be "vast" or "excessive" is also met. The relevant extract from the minutes of the meeting consists of a small number of paragraphs, and the Board Paper runs to only six pages (excluding appendices).

54. The relevant extracts from these documents have previously been set out at paragraphs 13 to 0 above. It is clear, in particular, from the minutes of the meeting that the Board of the Supervisory Authority discussed the Board Paper and that it concluded that the matters raised "lacked sufficient gravity" to warrant the initiation of a statutory enquiry. It is also clear that the Board accepted the suggestion that the potential issues identified could be appropriately and proportionately dealt with via the Supervisory Authority's routine supervisory processes.

55. Further details as to the precise responses to the various complaints made in the letter from Hayes Solicitors are to be found in the table attached to the Board Paper *("the Table*").

56. Having regard to all of this material, it cannot be said that the Applicant would have been unaware of the reasons for the decision not to initiate a statutory enquiry pursuant to Section 933 of the Companies Act 2014.

57. That this is so may be illustrated by returning to the example of the Applicant's complaint about the belated disclosure of legal advice (cited at paragraph 12 above). The complaint was to the effect that the ICAI had been "significantly influenced" by legal advice which had been received by Deloitte, and to which Mr Duggan had, initially, been denied access. The Table appended to the Board Paper explains that failure to afford to complainants a right of access to documentation does not constitute a breach of the ICAI's approved investigation and disciplinary procedures. It is stated therefore that this matter as to the right of access would be raised as a supervisory matter. The Table also notes that the legal advice was ultimately provided to Mr Duggan.

58. A similar analysis is to be found at Section 5.2.2 of the Board Paper.

59. An informed participant, such as Mr Duggan, would thus understand the rationale for not pursuing a Section 933 enquiry and instead having the matter addressed by engagement with the ICAI. It is central to this rationale that there had been no breach of the approved investigation and disciplinary procedures, which is the litmus test for an enquiry under Section 933.

REASONS NOT RETROSPECTIVE OR *EX POST FACTO*

60. It has been suggested in the written legal submissions filed on behalf of the Applicant that the Supervisory Authority has purported to propound further reasons for its original decision *retrospectively*. Case law is then cited which warns of the danger of allowing decision-makers to add to the reasons once the decisions have come under judicial scrutiny. Reference is made, in particular, to *Deerland Construction Ltd v. Aquaculture License Appeals Board* [2009] 1 I.R. 673.

61. With respect, this submission fails to distinguish between the contemporaneous recording of, and the subsequent disclosure of, a statement of reasons. The evidence establishes that the decision not to initiate a statutory enquiry was made by the Board at its meeting on 17 September 2018. This decision was recorded in the minutes of the meeting. A shorter summary of that decision was then set out in the letter of 1 October 2018 sent to the Applicant. The reasons, as found in the minutes of the meeting and the referenced Board Paper, are contemporaneous with the Board's decision. There is no question, therefore, of the reasons being formulated *ex post facto.*

62. It is true, of course, that this documentation containing the reasons has only been *disclosed* to the Applicant subsequent to the institution of the judicial review proceedings. These documents were supplied to the Applicant, for the first time, in March 2019 by way of exhibits to the verifying affidavit. The subsequent *disclosure* of documents (which had been created contemporaneously with the impugned decision) does not give rise to the type of mischief which the case law relied upon by the Applicant is intended to avoid. The reasons had been reduced to writing at the time the Board made its decision, and there is no question, therefore, of the reasons being added to or improved in response to the judicial review proceedings.

63. The belated disclosure of this documentation might, in principle, have been relevant had the Applicant withdrawn his proceedings upon receipt of same. More specifically, the Applicant might have considered that the documentation disclosed for the first time in March 2019 explained the reasoning of the Supervisory Authority. The Applicant might have withdrawn the judicial review proceedings at that time. There would then have been an issue as to legal costs. The Applicant could, in principle, have argued that the taking of the judicial review proceedings was necessary in that it was only in response to same that an adequate explanation of the reasoning of the Supervisory Authority was forthcoming. In the event, however, the Applicant did not withdraw the proceedings, and, instead, maintains the position that even with the disclosure of this documentation, the Supervisory Authority has still failed to provide an adequate statement of reasons.

64. As set out above, I am satisfied that it is appropriate to have regard to this material in assessing the adequacy of the reasons.

REASONS: MISCELLANEOUS ISSUES

65. In light of my finding (i) that it is legitimate to have regard to the minutes of the Board meeting and the Board Paper in appraising the adequacy of the reasons for the decision not to initiate a statutory enquiry, and (ii) that the reasons disclosed are adequate, it is, strictly speaking, unnecessary to consider the threshold question of whether the Supervisory Authority is actually obliged to provide reasons to a complainant such as the Applicant. It is also unnecessary to address the question of whether the letter of 1 October 2018 would, if read in isolation from the other documents, have passed muster in terms of reasons.

66. Lest the matter go further on appeal, however, I propose to set out, very briefly, my conclusions in relation to these two issues.

Duty to give reasons

67. I have concluded, albeit with some hesitation, that there is an obligation on the Supervisory Authority to provide reasons to a complainant who has formally requested same. However, given the broad statutory discretion which the Supervisory Authority enjoys under Section 933, there is no requirement that the reasons be detailed or elaborate.

68. The leading judgment on the duty to give reasons is that of the Supreme Court in *Mallak v. Minister for Justice* [2012] IESC 59; [2012] 3 I.R. 297. The judgment locates the source of a duty to give reasons as lying within the general principles of natural and constitutional justice.

> "[54] The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed."

69. The judgment, at a later point, summarises the present state of the law as follows.

> "[68] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
>
> [69] Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

70. As appears from these passages, one of the principal determinants of whether a particular individual is entitled to a statement of reasons in respect of an administrative decision is whether that individual can be said to be a person affected by the decision. The individual does not necessarily have to establish that the decision has interfered with a "right" of theirs before they are entitled to reasons. It may be sufficient to trigger a duty to give reasons that the individual has an interest in ensuring that the decision had been reached in accordance with the statutory provisions.

71. The Applicant in the present case had made a complaint to the Supervisory Authority in respect of what he alleges were procedural and substantive failures in the investigation by the ICAI. The language of Section 933(2) expressly envisages that an enquiry can arise as a result of a matter being referred to the Authority by a "complainant". A person, such as the Applicant in the present case, who has made a complaint has a (limited) interest in the decision as to whether or not to initiate a statutory enquiry. This is because, as outlined at paragraphs 28 et seq. above, one possible outcome of an enquiry would be that the accountancy body *might* be directed to conduct a fresh investigation into the original disciplinary complaint. A person who is aggrieved by the manner in which his or her complaint has been dealt with at first instance has just about met the threshold of a person affected by a subsequent decision by the Supervisory Authority on whether or not to initiate an enquiry.

72. As explained under the next heading below, however, the nature and the extent of the reasons required is limited by reference to the type of decision at issue.

Reasons stated in letter of 1 October 2018

73. The statement of reasons as per the letter of 1 October 2018 would have been adequate even in isolation, i.e. without reference to the minutes of the Board meeting and the Board Paper.

74. In appraising the adequacy of the reasons, it is essential to have regard to the context and, in particular, the nature of the decision being made. (See *Connelly*, at paragraph [5.3]). The decision impugned in these proceedings involved the exercise by the Supervisory Authority of a broad statutory discretion. The wording of Section 933 does not impose any express limitations or constraints on the exercise of this discretion. The absence of specific criteria has the consequence that a brief statement of reasons will be adequate.

75. The Board of the Supervisory Authority were not carrying out an adjudicative function which might lend itself to a detailed parsing of competing arguments or submissions. Rather, the Board was exercising the broad statutory discretion conferred upon it. A decision on whether or not to initiate a statutory enquiry is, to an extent, subjective. A decision of this type does not readily lend itself to detailed elaboration or explanation.

76. Here, the Board of the Supervisory Authority decided that the complaints made were not "sufficiently significant" to warrant the exercise of its powers under Section 933 and that an alternative course of action could be followed. To an extent, these are "value" judgments.

Section 940

77. I turn next to consider, briefly, the arguments in relation to Section 940. Insofar as relevant, the section reads as follows.

> "940. (1) A person shall not disclose information that—

(a) comes into the possession of the Supervisory Authority by virtue of the performance by it of any of its functions under this Act; and

(b) has not otherwise come to the notice of members of the public.

(2) Subsection (1) shall not apply to—

(a) person specified in subsection (3) or a director of the Authority in the performance by the Authority, or him or her, of any of its or his or her functions under this Act or any other enactment, being a communication the making of which was, in the Authority's or his or her opinion, appropriate for the performance of the function concerned; or

(b) the disclosure of information in a report of the Supervisory Authority or for the purpose of any legal proceedings, investigation, enquiry or review under this Act or any other enactment or pursuant to an order of a court of competent jurisdiction for the purposes of any proceedings in that court; or

(c) a disclosure made where such disclosure is required by, or in accordance with, law; or

(d) a disclosure of information which, in the opinion of the Supervisory Authority, a member of its staff, any person specified in subsection (3) or a director of the Authority, may relate to the commission of an offence; or

(e) a disclosure to a person prescribed by regulations made by the Supervisory Authority as a person to whom a disclosure, or a specified class of disclosure, may lawfully be made.

78. It is suggested in the written legal submissions on behalf of the Supervisory Authority that the Authority's capacity to provide reasons to complainants is constrained by the statutory confidentiality provisions in Section 940. This argument was not, however, pressed at the hearing before me.

79. The fact of the matter is that the Supervisory Authority considered itself to be in a position to provide a significant level of detail in relation to its decision-making in this case. The minutes of the Board meeting and the Board Paper have been exhibited.

80. Whereas it is not strictly speaking necessary to resolve the question of the interpretation of Section 940, an argument that the section imposes any significant constraints on the capacity to state reasons would appear to be difficult to reconcile with the statutory language. The general rule ,as stated under subsection 940(1), is subject to a series of exceptions under subsection (2). If I am correct in my earlier finding that the Supervisory Authority is under an obligation to provide reasons to a complainant who has formally requested same, then it seems that this can be accommodated within subsection (2)(a), (b) or (c). Put otherwise, if there is a legal obligation to provide reasons, then it is "appropriate" to do so for the performance of the Authority's function or disclosure is "required by" and "in accordance with" law.

81. At all events, even on the strictest interpretation of Section 940, the most it would do is restrict the extent of the reasons which might be required, it would not preclude the giving of any reasons at all.

82. As I say, these issues of statutory interpretation are largely moot in circumstances where all of the relevant decision-making material has now been provided by way of exhibits to the verifying affidavit.

PRELIMINARY ENQUIRY COMMITTEE

83. The Applicant contends that the Supervisory Authority has failed to comply with the procedures prescribed under the Companies (Auditing and Accounting) Act 2003 (Procedures Governing the Conduct of Section 23 Enquiries) Regulations 2012 (S.I. No. 96 of 2012) ("*the 2012 Regulations").* Specifically, it is submitted that the Applicant's complaint should have been referred, in the first instance, to a Preliminary Enquiry Committee in accordance with Article 4 of the 2012 Regulations. The logic of this submission is that the *Board* of the Supervisory Authority does not have jurisdiction to make the threshold decision as to whether to initiate an enquiry pursuant to Section 933. Rather, that decision must be made by the Preliminary Enquiry Committee.

84. In order to assess the correctness or otherwise of this submission, it is necessary to examine the content of the 2012 Regulations in some detail. The 2012 Regulations were made pursuant to the Companies (Auditing and Accounting) Act 2003 ("*the 2003 Act*"). This Act conferred a rule-making power on the Supervisory Authority itself. Section 28(4) of the 2003 Act provided as follows.

> "(4) The Supervisory Authority shall make regulations respecting the procedures to be followed in conducting enquiries under section 23, investigations under section 24 and reviews under section 25."

85. As appears, the regulations are to be made in respect of the procedures to be followed in "conducting" enquiries under what was Section 23 of the 2003 Act.

86. The 2012 Regulations were made by the Supervisory Authority on 29 March 2012. The legislative background has changed since then, with the enactment of the Companies Act 2014. The power to conduct an enquiry is now to be found under Section 933 of the Companies Act 2014. Provision is made under Schedule 6 (paragraph 3) of the Companies Act 2014 for regulations to continue in force.

> "Any regulations made under section 28 or 48 of the Companies (Auditing and Accounting) Act 2003 and in force before the commencement of Chapter 2 of Part 15 shall continue in force as if made under the corresponding provision of that Chapter and may be amended or revoked accordingly."

87. The parties are agreed, therefore, that the 2012 Regulations apply *mutatis mutandis* to an enquiry under Section 933. The necessary modifications include, for example, reading the references in the 2012 Regulations to a "Section 23 Committee" as referring to a "Section 933 Committee".

88. Part 2 of the 2012 Regulations allows for the *possibility* of the Supervisory Authority delegating certain procedural matters to a committee. The 2012 Regulations thus give effect to what had been Section 27 of the 2003 Act, and is now Section 937 of the Companies Act 2014. Section 937(1) provides that the Supervisory Authority "may" delegate some or all of the functions under Sections 933 to 936 to a committee established for that purpose.

89. The relevant parts of Article 4 of the 2012 Regulations provide as follows.

> "Preliminary Enquiry Committee
>
> 4.(1) Where the Authority has reason to believe that a prescribed accountancy body may have failed to comply with its approved investigation and disciplinary procedures, the Authority may* appoint a Committee (a 'Preliminary Enquiry Committee') to determine whether the Authority should initiate a full enquiry into:
>
> (a) a decision by that body not to undertake an investigation into a possible breach of its standards by a member;
> (b) the conduct of an investigation by that body into a possible breach of its standards by a member; or
> (c) any other decision of that body relating to a possible breach of its standards by a member.
>
> (2) In appointing such a Preliminary Enquiry Committee, the Authority shall be *deemed to have delegated** to that Preliminary Enquiry Committee such of its functions and powers under section 23 of the Act as are required by the Preliminary Enquiry Committee to conduct the functions for which these Regulations provide, up to the point of making such a determination.
>
> (3) A full enquiry will be initiated where a Preliminary Enquiry Committee determines that:
>
> (a) there is a *prima facie* case that a prescribed accountancy body has failed to comply with its approved investigation and disciplinary procedures; and
> (b) the circumstances of the matter are such as to warrant the initiation of a full enquiry by the Authority.
>
> (4) Where a Preliminary Enquiry Committee forms the view that the matter under investigation is better dealt with by way of supervisory action by the Authority rather than through the initiation of a full enquiry, it will report its view and the facts and circumstances of the matter to the Authority and the Authority may, if it considers it appropriate to do so, direct that the Preliminary Enquiry Committee report such facts and circumstances to the Chief Executive and the Head of Regulatory and Monitoring Supervision."
>
> *Emphasis (italics) added.

90. As appears, the Supervisory Authority has a discretion ("may") to appoint a Preliminary Enquiry Committee. The threshold for the exercise of this discretion is that the Authority

has "reason to believe" that a prescribed accountancy body may have failed to comply with its approved investigation and disciplinary procedures.

Submissions of* the *parties on the delegation issue

91. The case made on behalf of the Applicant is elegant in its simplicity. It is submitted that there are certain procedural safeguards provided for under the 2012 Regulations which would be set at naught were the Supervisory Authority to by-pass the procedure in front of the Preliminary Enquiry Committee. Counsel places particular emphasis on the fact that the Chief Executive is not permitted to be a member of the Preliminary Enquiry Committee. (Article 3(2)). On the facts of the present case, it seems that the Chief Executive had been in attendance at the Board meeting on 17 September 2018 whereat the decision not to pursue an enquiry was made.

92. Counsel seeks to characterise the 2012 Regulations as imposing a "filtering mechanism", and submits that a decision on whether or not to initiate an enquiry must be made by reference to the "*prima facie* case" standard prescribed under Article 4(3). The Applicant's written legal submissions pose the rhetorical question as to how it is that both the Board and the Preliminary Enquiry Committee could have essentially the same function under Section 933(2), i.e. the function of deciding whether or not there is a *prima facie* case? It is further submitted that such a dual or parallel jurisdiction has the obvious effect of undermining the statutory scheme.

93. In response, leading counsel on behalf of the Supervisory Authority, Mr Rossa Fanning, SC, submits that the 2012 Regulations are enabling only. The Regulations are said to be in ease of the Authority, and facilitate a delegated structure whereby committees may be established at a sub-board level. Emphasis is placed on the use in Article 4(1) of the term "may", which is permissive, rather than the term "shall". The proposition that the Board should have set up a committee, when the evidence before the court is clear that the Board had, in fact, done the work itself, is rejected as a "non-point".

Findings of the court

94. The starting point for the analysis must be the primary legislation which confers the statutory power to conduct an enquiry. Section 933(2) of the Companies Act 2014 is unequivocal in its terms. The discretion to initiate an enquiry resides with the Supervisory Authority. The primary legislation goes on then to make provision for the possibility of *delegating* this function to committees below the level of the Board of the Authority. Section 937(1) provides that the Authority "*may*" delegate some or all of the functions under Sections 933 to 936 to a committee established for that purpose.

95. These provisions of the primary legislation are given effect to by the 2012 Regulations (as continued by Schedule 6 of the Companies Act 2014).

96. But for the existence of these provisions of primary and secondary legislation, any attempt on the part of the Board to delegate the exercise of its discretion under Section 933 might have been open to legal challenge.

97. However, it is a *non sequitur* to suggest—as the Applicant appears to do—that the conferring of a power upon the Authority to delegate its functions has the inevitable consequence that the Board of the Authority is divested of its statutory discretion in all cases.

98. Rather, in order for a delegation to occur, it is necessary first for the Board of the Supervisory Authority to "appoint" a committee. This flows from the language of Article 4(2) of the 2012 Regulations.

> "(2) In *appointing** such a Preliminary Enquiry Committee, the Authority shall be *deemed to have delegated** to that Preliminary Enquiry Committee such of its functions and powers under section 23 of the Act as are required by the Preliminary Enquiry Committee to conduct the functions for which these Regulations provide, up to the point of making such a determination."
>
> *Emphasis (italics) added.

99. As appears, the deemed delegation is contingent on a committee having actually been appointed. On the facts of the present case, of course, the Board did not appoint a committee. Rather, as explained in the affidavit of Mr Prendergast, and as evidenced in the minutes of the meeting exhibited, the Board of the Authority made a decision itself not to initiate an enquiry. This was lawful. Both the primary legislation (Section 937(1)) and the secondary legislation (Article 4(1) of the 2012 Regulations) confer a discretion on the Authority to delegate ("may"). It is not *mandatory* for the Board to do so in any particular instance. The Section 933 function resides with the Board unless and until it is delegated to a committee.

100. Put otherwise, the effect of the 2012 Regulations goes no further than allowing for the *possibility* of the delegation of functions to a committee. It remains open, at all times, for the Board itself to make the initial decision as to whether to initiate an enquiry. This is underscored by the language of Article 4(1). The use of the term "may" is significant, and cannot simply be brushed away, as counsel for the applicant gamely sought to do, by suggesting that the use of the term was "unusual". It is clear from the structure of the 2012 Regulations that same distinguish between permissive and mandatory provisions, and this distinction is indicated by the use of the terms "may" and "shall", respectively. The 2012 Regulations are enabling, rather than prescriptive, when it comes to the appointment of a Preliminary Enquiry Committee. There is no obligation upon the Board to invoke the procedure under Article 4 of the 2012 Regulations.

101. In summary, the appointment of a Preliminary Enquiry Committee is discretionary. Unless and until such a committee is appointed, there has been no delegation of functions. On the facts of the present case, the decision not to initiate an enquiry was lawfully made at Board level. Thus, the concern, raised by the Applicant, that the Board and a Preliminary Enquiry Committee would be exercising "dual" or "parallel" jurisdiction, does not arise.

IRRELEVANT CONSIDERATIONS

102. The Applicant has sought to argue that the Board took into account irrelevant considerations. More specifically, it is alleged that insofar as the Board had concluded that the matters raised were not "sufficiently significant" to warrant the exercise of Section 933 powers, the Board had taken into account an irrelevant consideration. It is submitted that there is nothing in the legislation which suggests that a complaint must be "sufficiently significant" and/or of "sufficient gravity" before an enquiry be initiated.

103. This argument overlaps, to an extent, with the "delegation" argument discussed under the previous heading. Both arguments have at their core an allegation that only the Preliminary Enquiry Committee can make the decision not to initiate an enquiry, and that the legal test for the preliminary decision is that set out under Articles 4(3) and 4(4). For the reasons set out earlier, I have concluded that the decision not to initiate an enquiry can lawfully be made at Board level.

104. Insofar as any aspect of the related argument that the Board had taken into account irrelevant considerations might have survived this conclusion, same can be disposed of shortly. It is entirely inconsistent with the broad nature of the statutory discretion under Section 933(2) to suggest that it would be *ultra vires* for the Board to have regard to the "significance" or "gravity" of the matters complained of. The Court of Appeal in *Nowak* has stated that if a complaint discloses insufficient matter of concern for the Authority, then there is no reason why it should undertake an enquiry. ([2016] IECA 301, [22]). I respectfully adopt and apply that principle here. The logic of the Applicant's argument is that a public authority, which has been conferred with a broad discretion by statute, is compelled to initiate an enquiry even in circumstances where the authority considers that the matter is not "sufficiently significant" to warrant such an enquiry. One only has to state this proposition to appreciate its absurdity.

105. Similarly, the Board is entitled to consider whether the circumstances warrant the initiation of a full enquiry or whether the matter under investigation is better dealt with by way of supervisory action.

106. If and insofar as the Applicant seeks to challenge the *correctness* of the decision that the matters were not "sufficiently significant", this challenge is also untenable. The standard of review governing a merits-based challenge is, as confirmed by the Court of Appeal in *Nowak*, unreasonableness or irrationality, as per *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice and Equality* [2010] IESC 10. The Applicant comes nowhere close to meeting this threshold. The evidence establishes that there had been ample material before the Board of the Supervisory Authority at its meeting of 17 September 2018 to justify its decision.

107. Finally, even if—contrary to my finding under the previous heading—the Board were constrained to apply the same test as would have been applicable to a Preliminary Enquiry Committee (had one been appointed), the result would be the same. It is clear from Articles 4(3) and 4(4) that even a committee enjoys latitude as to whether to initiate a full enquiry. The criteria to be considered include, relevantly, whether the circumstances warrant the initiation of a full enquiry or whether the matter under

investigation is better dealt with by way of supervisory action. These criteria allow the committee to take into account precisely the same type of matters which the Board did, in fact, have regard to in this case.

AN EXCEPTIONAL POWER?

108. Counsel on behalf of the Applicant had sought to make something of the fact that it is stated in the affidavit filed on behalf of the Supervisory Authority and in the Statement of Opposition that the Authority exercises its powers under Section 933 on an "exceptional" rather than a routine basis, and that only nine enquiries have been conducted since the establishment of the Authority in 2006. Counsel submits that the judgment in *Walker v. The Law Society* emphasises that when a preliminary proceedings committee or an equivalent body is making a determination as to whether to proceed, it should operate on the basis of a *presumption* in favour of proceeding rather than not.

109. Strictly speaking, the question of the historic use of Section 933 is not an issue in dispute in this case. It has not been expressly pleaded that the Authority has fettered its discretion by adopting a fixed and inflexible policy as to its use of the statutory power. Rather, this court has only been asked to review the legality of the decision made by the Board at its meeting on 17 September 2018. The decision does not appear to be based on any rule of thumb that the statutory power of enquiry will only be exercised in exceptional circumstances. Whereas this issue is mooted in the affidavit, it seems to me that, for reasons similar to those outlined in the case law relied upon by the Applicant himself in relation to *ex post facto* reasoning, that the review should be confined to the form of decision as evidenced.

110. Even if this issue were properly before the court, I am satisfied that the Supervisory Authority would not have erred in its interpretation and application of Section 933 in regarding the power as exceptional not routine. The specific sense in which the term "exceptional" is used is as follows, as per the Statement of Opposition.

> "14. The Authority's powers under Section 933 are used on an exceptional, rather than routine basis, having regard to the serious nature of the power and the alternative supervisory actions available to the Authority in many instances. In that regard, since its inception in 2006, the Authority has completed nine Section 933 Enquiries. Given that the Authority does not have an ombudsman's role, does not have any role in the resolution of individual complaints and does not have a statutory obligation to undertake Enquiries, the Authority must make a judgement as to what is appropriate to consider further for Section 933 Enquiries and how best to take matters brought to its attention forward. For example, it is often the case that the matters raised by a complainant about a prescribed accountancy body's processing of a complaint are not matters that relate to breaches of the approved investigation and disciplinary process and, therefore, are not matters that can be dealt with under the Authority's Section 933 powers of enquiry. Furthermore, even if potential breaches of a prescribed

accountancy body's approved disciplinary procedures come to the Authority's attention, it does not follow that a Section 933 Enquiry is initiated."

111. As appears, the Authority has not taken an overly narrow view of its discretion, but rather makes the obvious point that the power to enquire is serious in nature and that there are alternative supervisory actions available.

FAIR PROCEDURES

112. The written legal submissions on behalf of the Applicant include, as one of the grounds of challenge, an allegation that the omission of the Supervisory Authority to provide the Applicant with the ICAI's files and/or without giving him any opportunity to comment on same, represented a breach of fair procedures. This ground was, very sensibly, not pressed at the hearing before me.

113. There is no merit in the allegation that there had been a breach of fair procedures. The nature and extent of the procedural rights which an individual is entitled to in the context of any particular decision-making procedure is a function of the potential impacts of the decision on that individual. The most that the Applicant could assert is an entitlement to make a complaint to the Supervisory Authority. The Applicant is not entitled to demand documentation from the Supervisory Authority. This is because the Applicant's position is entirely different from that of an individual or firm the subject of disciplinary proceedings. The impact of a Section 933 decision on a complainant is minimal. Accordingly, a complainant's fair procedure rights lie at the lower end of the spectrum, and do not extend to a right to demand documents.

SUFFICIENT INTEREST / LOCUS STANDI

114. The High Court in *Nowak* had held that the complainant in that case did not have sufficient standing to maintain the judicial review proceedings. The High Court found that the complainant could point to no detriment suffered by him in consequence of a decision not to initiate a statutory enquiry.

115. The Court of Appeal expressly reserved its position on the question of standing. I propose to adopt a similar course. As set out under the previous headings, I have concluded that the application for judicial review must fail on its merits. Given this conclusion, it is not necessary to go further and to rule on the separate question of whether or not the Applicant has a sufficient interest to maintain the proceedings. My earlier findings are sufficient to dispose of the case, and even if I were to find that the Applicant did not have sufficient interest, this would simply be an *additional* ground for dismissing proceedings which are already destined to fail. The finding would not have any actual effect on the outcome of the proceedings.

116. Of course, the logical consequence of the imposition, under Order 84, rule 20(5) of the Rules of the Superior Courts, of a requirement for an applicant to establish a "sufficient interest" is that proceedings can, in principle, be dismissed *in limine* on the basis that the applicant lacks standing, without any necessity to embark upon a consideration of the

substantive merits of the case. Put otherwise, the upshot of a *locus standi* requirement is that even a good case will be dismissed if brought by the wrong person.

117. In principle, therefore, it would have been open to this court to have addressed the issue of standing as a *preliminary issue.* Had this issue been decided against the Applicant, it would then have been unnecessary to address the merits of the case. It seems to me, however, that in circumstances where this court has the benefit of a binding precedent of the Court of Appeal in *Nowak* which is immediately relevant to many of the *substantive* issues arising in the proceedings, then it is better to determine the case by reference to this precedent rather than to enter the uncharted waters of *locus standi*, an issue expressly left open by the Court of Appeal.

CONCLUSION

118. The application for judicial review is dismissed. By way of summary only, the principal findings of the court are as follows.

119. First, the Supervisory Authority has provided the Applicant with ample reasons for its decision not to initiate a statutory enquiry under Section 933 of the Companies Act 2014. In appraising the adequacy of reasons for the decision not to initiate a statutory enquiry, it is appropriate to have regard not only to the letter of 1 October 2018, but also to the minutes of the meeting of the Board of 17 September 2018, and to the Board Paper setting out the consideration of the Applicant's complaint. The minutes of the meeting represent a contemporaneous recording of the Board's decision not to initiate a statutory enquiry. The minutes of the meeting make express reference to the Board Paper, and there is thus a nexus between the Board Paper and the decision.

120. Secondly, the decision not to initiate an enquiry was lawfully made at Board level. The Board is not obliged to invoke the procedure under Article 4 of the 2012 Regulations. Rather, the appointment of a Preliminary Enquiry Committee is *discretionary*. Unless and until such a committee is appointed, there has been no delegation of the functions under Section 933 and the Board is entitled to make the decision itself.

121. Thirdly, the Board did not take into account irrelevant considerations in reaching its decision. The Board enjoys a broad discretion under Section 933, both in terms of the threshold decision of whether to initiate an enquiry, and the subsequent decision as to what action to take upon completion of the enquiry. The Court of Appeal has characterised this discretion as falling at the wider end of discretionary powers. (*Nowak v. Irish Auditing and Accounting Supervisory Authority* [2016] IECA 301).

122. It is entirely inconsistent with the broad nature of the statutory discretion for the Applicant to suggest that it would be *ultra vires* for the Board to have regard to the "significance" or "gravity" of the matters complained of. Similarly, the Board is entitled to consider whether the circumstances warrant the initiation of a full enquiry or whether the matter under investigation is better dealt with by way of supervisory action.