APPROVED **[2024] IEHC 626**

THE HIGH COURT
JUDICIAL REVIEW

2023 1358 JR

BETWEEN

ADRIAN IVERS

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 8 November 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to restrain disciplinary proceedings taken against a member of An Garda Síochána. The principal ground of challenge is that the Garda Commissioner is precluded from establishing a *second* board of inquiry into an alleged breach of discipline in circumstances where there has already been a "*determination*" by a first board of inquiry. The term "*determination*" is used guardedly at this point in the judgment: the parties are in disagreement as to the precise status of the outcome of the first board of inquiry and it will be necessary for the court to resolve that dispute. The Garda Commissioner submits that a *res judicata* can only ever arise

where the determination of the first board of inquiry had been "*final*" and "*on the merits*".

PROCEDURAL HISTORY

2. These judicial review proceedings have their genesis in events which occurred in January 2020. The events concern the removal of certain items from a motor vehicle which had been impounded at a Garda Station. The items consisted of a Bluetooth speaker and cables or leads ("*the items*"). The Applicant is a member of An Garda Síochána and had been on duty at the relevant Garda Station. The Applicant asserts that he had removed the items from the motor vehicle and had brought them home for safekeeping, with the intention of returning them to the Garda Station when he was next on duty. The allegation against him is that the removal was improper and that he had intended to retain the items for his own use.

3. The incident had been referred to the Director of Public Prosecutions who ultimately directed that no charges should be brought. The incident was also the subject of an investigation by the Garda Síochána Ombudsman Commission ("*GSOC*").

4. During the pendency of the GSOC investigation, the Commissioner of An Garda Síochána had issued a notice of termination in May 2020. This purported to dismiss the Applicant pursuant to section 14(2) of the Garda Síochána Act 2005. The notice of termination was successfully challenged in judicial review proceedings. The notice of termination was ultimately quashed by the Court of Appeal in a judgment delivered on 18 August 2022: *Ivers v. Commissioner of An Garda Síochána* [2022] IECA 206.

5. GSOC issued its investigation report, pursuant to section 97 of the Garda Síochána Act 2005, on 18 October 2021 ("*the GSOC investigation report*"). The GSOC investigation report recommended that disciplinary proceedings be instituted against the Applicant in relation to the following alleged breaches of discipline: discreditable conduct, neglect of duty, and misuse of money or other property belonging to a member of the public that is in the custody of the Garda Síochána.

6. In circumstances where GSOC has recommended disciplinary proceedings, the Garda Commissioner is required to establish a board of inquiry where it appears to the Commissioner, having regard to the statement of the facts established by the investigation and included in the investigation report, that the member may have been in breach of discipline and may be subject to one of the disciplinary sanctions applicable to a serious breach of discipline. This is provided for under regulation 46 of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007).

7. The Assistant Commissioner established a board of inquiry on 16 March 2023. The board of inquiry, as it was required to do, prepared particulars of the alleged serious breaches of discipline and served notice of same on the Applicant. These particulars largely replicate those proposed in the GSOC investigation report. It has since emerged that, at the time the board of inquiry was preparing the particulars of the alleged breaches of discipline, the only documentation before it was the GSOC investigation report. The original statements and materials underlying that report were not available to the board of inquiry.

8. The Applicant, through his solicitors, objected to the manner in which the particulars had been prepared. These concerns are set out in correspondence culminating in a letter dated 8 June 2023.

9. The board of inquiry convened on 22 June 2023. The transcript of that hearing has been exhibited as part of these judicial review proceedings. The presiding officer of the first board of inquiry made the following statement:

> "And thank you for attending everyone. So having considered the papers that we've been supplied with – and those papers have been supplied and served on Garda Ivers through his solicitor – we've considered and it's our view that we can't proceed due to the absence of supporting documentation and we're returning our file to Internal Affairs. We are leaving this Inquiry there. We thank you for attending and we want to say nothing further. So thank you very much."

10. Thereafter, the board of inquiry issued its formal report as required under regulation 30 of the Garda Síochána (Discipline) Regulations 2007. This report, which is dated 5 July 2023, will be referred to in this judgment as "*the statutory report*".

11. The operative part of the statutory report reads as follows:

> "The GSOC Report and CCTV footage were furnished to the Board in relation to the preparation of the Form IA 35 allegations. No supporting file or statements were to hand when the IA 35 was prepared. It was decided by the Members of the Board of Inquiry that we had insufficient information and supporting documentation to deal with the matter properly and we declined to proceed with the hearing in those circumstances.
>
> By letter received on the 13 June 2023 which is attached herewith, from Hughes Murphy Solicitors, Ms. Hughes indicated that she would be making submissions and outlining the nature of her concerns. That letter was not opened into the Record of the hearing but I indicated that it would be forwarded to IA and is attached to this Report.
>
> Ms. Hughes also commented at the end of the very short hearing as per the Transcript that it was of assistance to her

> that there was a convening of the Board of Inquiry in any format."

12. The letter referred to as having been received on 13 June 2023 is a letter of 8 June 2023 from the Applicant's solicitor to the presiding officer of the board of inquiry. The letter indicated that the solicitor would be making a preliminary submission to the board of inquiry. The intended submission was then outlined. The broad gist of same was that (i) the board of inquiry misdirected itself if and insofar as it formulated the particulars of the alleged breach of discipline based solely on the GSOC investigation report, and (ii) it would be in breach of fair procedures for the board of inquiry to proceed to hearing based solely on the GSOC investigation report and some CCTV footage the provenance of which had not been established. I return to consider the significance, if any, of this letter at paragraphs 46 to 50 below.

13. The Assistant Commissioner has since purported to appoint a second board of inquiry on 5 October 2023. The Applicant instituted the within judicial review proceedings on 24 November 2023 seeking to challenge the legality of that appointment.

14. The judicial review proceedings initially came on for hearing before me on 11 July 2024. The proceedings were part-heard and then adjourned to allow the parties file further written submissions addressing the question as to the circumstances in which a board of inquiry can be said to have made a determination sufficient to attract the principles of *res judicata*. Both parties subsequently filed very helpful written submissions. These were elaborated upon at a short oral hearing on 18 October 2024.

DISCUSSION

DOCTRINE OF RES JUDICATA

15. The term *res judicata* is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of *res judicata* is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of *res judicata* is issue estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.

16. Put otherwise, notwithstanding that the judgment in earlier proceedings may not have entailed a final determination on the legal right asserted in subsequent proceedings, it may nevertheless have determined an *issue* which is common to both sets of proceedings. Provided that the determination of this issue had been an essential part of the rationale for the earlier judgment, then the finding on the issue will, generally, be binding in the subsequent proceedings.

17. There is a third species of *res judicata*, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in *Henderson v. Henderson*.

18. The parties to the present proceedings are agreed that the doctrine of *res judicata* is, in principle, capable of applying to disciplinary proceedings under the Garda Síochána (Discipline) Regulations 2007. Counsel for the Garda Commissioner

has, very helpfully, referred the court to the decision of the UK Supreme Court in *R. (on the application of Coke-Wallis) v. Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, [2011] 2 AC 146. There, the UK Supreme Court confirmed that the doctrine of *res judicata* was not confined to court proceedings but extended to disciplinary proceedings. Both parties accept that the same approach applies under Irish law.

19. The rationale for, and the values sought to be protected by, the doctrine of *res judicata* have been discussed in detail by the Supreme Court in *Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29, [2012] 2 IR 99. Relevantly, these include the public policy that an individual has a right to be protected from a vexatious multiplication of suits and the public interest in the finality of litigation. The risk of conflicting decisions has been identified elsewhere as an additional rationale.

20. The proper approach to determining whether a particular decision has given rise to *res judicata* has been considered recently by the Supreme Court in *Munnelly v. Hassett* [2023] IESC 29. O'Donnell C.J. explained that the principal focus of a claim of *res judicata* is "*what*" was decided, not "*how*" it was decided. In the first place at least, an assessment of whether *res judicata* applies should be addressed by as forensic a scrutiny as possible of what case had been pleaded, and what the court decided, and a subsequent court should be reluctant to accept an invitation to go behind what the documents show.

THE GARDA COMMISSIONER'S POSITION

21. Counsel on behalf of the Garda Commissioner submits that a cause of action estoppel can only arise where the decision of the first court or tribunal had been

"*final*" and "*on the merits*". It is further submitted that the first board of inquiry did not reach any determination on the merits. This is said to be apparent both from the terms of the transcript of the hearing and from the statutory report.

22. Counsel places particular emphasis on the provisions of regulation 30 of the Garda Síochána (Discipline) Regulations 2007 as follows:

> "(1) Within 21 days after the conclusion of the inquiry, the presiding officer shall submit a written report to the Commissioner and forward a copy of the report to the member concerned.
>
> (2) The report shall include –
>
> (a) copies of any statements made, including any admission made by the member concerned and any other documents provided to the board, together with the verbatim record of the proceedings,
>
> (b) the determination of the board as to whether the member concerned is in breach of discipline and, if so, as to the act or conduct constituting the breach, and
>
> (c) its recommendation as to any disciplinary action to be taken in respect of the breach.
>
> (3) Where there is a difference of opinion among the members of the board regarding any matter dealt with in its report, only the opinion of the majority regarding that matter shall be included in the report."

23. It is submitted that these provisions indicate that the board of inquiry must record any "*determination*" reached as to whether the member of An Garda Síochána concerned is in breach of discipline or not. The absence of an express statement to the effect that the board of inquiry determined that the Applicant is not in breach of discipline is said to be fatal to the application of *res judicata*.

24. It is accepted, in the Garda Commissioner's supplemental written legal submissions, that were a board of inquiry to decide that it could not proceed to hear the substance of particular allegations due to a period of excessive delay

that would be tantamount to a dismissal. In such a scenario, the member of An Garda Síochána concerned would be entitled to a "*determination*" that the case against them had not been proven. It is implicit in these submissions that the Garda Commissioner accepts that a decision not to proceed to a full hearing is one which is, in certain circumstances, capable of giving rise to *res judicata*. Put otherwise, something short of a full hearing can nevertheless represent a decision on the merits.

25. Two further aspects of the Garda Commissioner's submissions are addressed at paragraphs 41 to 51 below.

ANALYSIS

26. The principal issue for resolution in these judicial review proceedings is whether the "*outcome*"—to use a neutral term—of the first board of inquiry has rendered the question of the alleged breach of discipline *res judicata*. The parties are in broad agreement that the doctrine of *res judicata* applies to the disciplinary proceedings. The dispute between the parties centres, instead, on the *nature* of the determination which must have been made by the first decision-maker in order to attract *res judicata*.

27. The necessity for the imposition of a requirement that a first decision must have been "*on the merits*" in order to create a *res judicata* has been queried: see Paul Anthony McDermott, *The Law on Res Judicata and Double Jeopardy*, Bloomsbury Professional, 1999 (at §4.32). Neither party in the present proceedings has sought to challenge the orthodox view. Accordingly, this judgment proceeds on the working assumption that an essential element of a claim of *res judicata* is that the first decision must have been on the merits.

28. Before turning to consider the domestic case law in relation to the requirement that the first decision have been on the merits, it may be helpful to consider, briefly, the approach adopted in the neighbouring jurisdiction. Two versions of the test for assessing whether there has been a determination on the merits are to be found in the speeches of the House of Lords in *The Sennar (No. 2)* [1985] 2 All ER 104, [1985] 1 WLR 490.

29. Lord Brandon of Oakbrook posited an elaborate test as follows:

> "Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. […]".

30. Lord Diplock formulated the test more narrowly:

> "It is often said that the final judgment of the foreign court must be 'on the merits.' The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher Jurisdiction."

31. It is instructive to have regard to these subtly different formulations of the legal test. The first version indicates that the court or tribunal must have engaged with the facts and legal principles of the dispute between the parties; the second focuses, instead, on the finality of the decision of the court or tribunal. Of course, neither version is binding on the Irish Courts. A decision of the House of Lords is, at most, a persuasive precedent. Nevertheless reference to the legal test posited by the House of Lords helps provide a framework for the discussion of the approach which should be adopted by the Irish Courts.

32. In interpreting the "*on the merits*" requirement, it is salutary to have regard to the rationale for, and the values sought to be protected by, the doctrine of *res judicata*. These include the public policy that an individual has a right to be protected from a vexatious multiplication of suits and the public interest in the finality of litigation.

33. A rule which stipulated that *res judicata* would only arise where there had been a determination of the underlying dispute on the merits following a full hearing would advance the public interest in the finality of litigation. It might not, however, mitigate against individuals being vexed with a multiplication of suits. To allow a litigant to issue a second set of proceedings where a first set has been dismissed on the basis of something less than a full hearing runs the risk of a series of suits.

34. The rationale would be better served by conceiving of the "*on the merits*" requirement in terms which capture all decisions where the court or tribunal has had to engage with the underlying merits for the purpose of reaching its decision, notwithstanding that the decision may have been reached *other than* following a full hearing.

35. One example has been provided by the Garda Commissioner in his supplemental written legal submissions. It is acknowledged therein that a decision by a board of inquiry not to proceed to a full hearing on the grounds of delay would preclude the establishment of a second board of inquiry into the same alleged breach of discipline.

36. A second example is where proceedings have been dismissed, on a preliminary motion, on the basis that they are bound to fail. The High Court (Clarke J.) held, in *Moffitt v. Agricultural Credit Corporation* [2007] IEHC 245,

[2008] 1 ILRM 416, that the dismissal of proceedings as being bound to fail, following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, gives rise to *res judicata*.

37. In each of these examples, the court or tribunal has had to engage with the merits in circumstances short of a full hearing. In the first example, the determination is that the court or tribunal's ability to reach findings of fact fairly has been compromised by delay. In the second example, the court or tribunal has been able to conclude, on a summary consideration of the facts and the law, that the claim is bound to fail.

38. I turn next to apply these principles to disciplinary proceedings under the Garda Síochána (Discipline) Regulations 2007. There are a number of scenarios in which a board of inquiry might bring its inquiry to a conclusion without there having been a full hearing. In some instances, there will have been no engagement by the board of inquiry with the underlying merits of the alleged breach of discipline the subject-matter of the inquiry. One obvious example is where the board of inquiry might have become inquorate prior to an adjudication as the result of the incapacity or unavailability of one of the appointed members. An instance of this is provided by the facts of *Broughall v. Commissioner of An Garda Síochána* [2018] IEHC 243. In that case, the individual, who had been nominated as the presiding officer of a board of inquiry, ceased practice as a solicitor subsequently. Accordingly, that person no longer met the eligibility criteria required of a presiding officer. The High Court (Coffey J.) held that if a board of inquiry cannot, for good reason, complete its work, then the Garda Commissioner has an implied power to establish a new board of inquiry with

different members to deal with the matter *de novo*. In such circumstances, there is no question of the conclusion of the first inquiry giving rise to *res judicata*. This is because the conclusion of the first inquiry has not been as the result of any determination by the board of any aspect of the underlying merits of the alleged breach of discipline.

39. The concept of a determination on the merits is not confined to circumstances where the board of inquiry has addressed and resolved all of the allegations. It may be, for example, that a board of inquiry concludes that it cannot safely reach findings of fact because of inordinate delay. In such a scenario, the board of inquiry would be required, in the interests of justice, to determine that the allegation had not been proven. Such a determination would properly be characterised as a determination on the merits. The board of inquiry would have concluded that its ability to reach findings of fact has been compromised because the probative value of evidence has been undermined in consequence of the delay. Witnesses may no longer be available, recollections may have been dimmed, or real evidence may have been lost. Put otherwise, notwithstanding that a dismissal on the grounds of delay would not necessarily involve a granular adjudication upon the substantive issues, it would nevertheless be sufficiently close to the merits to attract *res judicata*. As explained earlier, at paragraph 24 above, the Garda Commissioner accepts that a determination not to proceed due to a period of excessive delay would be tantamount to a dismissal.

40. The conclusion of the inquiry in the present case falls on the same side of the line. The formal decision of the board of inquiry, as recorded in the statutory report, had been that the board had insufficient information and supporting documentation to deal with the matter properly. The only sensible interpretation

of the statutory report is that the board of inquiry had determined that, having regard to the insufficiency of the evidence, the alleged breach of discipline was unproven. Regulation 9 provides that proof of a breach of discipline is to be established on the balance of probabilities. It follows that if there is insufficient evidence, the alleged breach of discipline cannot be held to have been established. The board of inquiry did not, as it might have done, adjourn the hearing to allow further evidence to be adduced. Nor did the board of inquiry seek to exercise its powers under regulation 28 of the Garda Síochána (Discipline) Regulations 2007 to require the attendance of witnesses and the production of documents. Rather, the board brought the inquiry to a conclusion. The board of inquiry clearly regarded itself as *functus officio*. All of this can only be characterised as a dismissal of the allegations as unproven. The board of inquiry had been entrusted with the function of inquiring into a specific incident, and, having drawn up particulars of the alleged breach of discipline, was not ultimately satisfied that the evidence before it supported those allegations. It is inherent in the board's decision not to receive oral evidence or to direct the production of documentary evidence that the board of inquiry considered that the evidential deficit could not be rectified.

41. Counsel on behalf of the Garda Commissioner sought to attach significance to the fact that no oral evidence was adduced before the board of inquiry. It was submitted that this indicated that there was no adjudication upon the merits. With respect, the calling or otherwise of oral evidence has no special significance in this context. This is because the proceedings of a board of inquiry are partially inquisitorial in nature. The position has been described as follows by the

Supreme Court in *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47 (*per* O'Donnell J. at paragraph 32):

> "As counsel for the appellant has pointed out, the Board of Inquiry does not conform to the model of the decision maker coming to a dispute with no prior knowledge, which can be encountered in other areas of the law. There is an inquisitorial element to this procedure. It is for the Board of Inquiry to formulate the breaches of discipline alleged and provide particulars thereof, and to provide notice of such allegations to the member concerned. It follows therefore that the Board of Inquiry will have had some degree of prior engagement with the facts, and importantly in the present context, will have made some assessment of their significance. […]"

42. The inquiry in the present case had been triggered pursuant to regulation 46 of the Garda Síochána (Discipline) Regulations 2007 following the recommendation by GSOC that disciplinary proceedings should be instituted. By dint of the statutory procedure, the board of inquiry will already have been in possession of potentially admissible evidence prior to any oral hearing. The GSOC investigation report is *deemed* to be evidence of the facts stated in the document *unless* the contrary is proved (Garda Síochána Act 2005, section 97). A board of inquiry would be entitled to decide, prior to an oral hearing, that taking these (presumptive) facts at their height, there is insufficient evidence to reach a finding that there has been a serious breach of discipline.

43. The same result, in terms of *res judicata*, would have eventuated even if the board of inquiry had heard from one or more witnesses and had then brought the inquiry to a conclusion on the basis that there was insufficient evidence to support the allegations. In each instance, the logic of the board of inquiry's position would be the same, namely that the allegations were unproven.

44. It should be emphasised that the outcome of these judicial review proceedings turns on the fact that the board of inquiry, having identified an evidential deficit,

chose to bring their inquiry to a conclusion. This judgment does not stand as authority for the proposition that a board of inquiry would never be entitled *to adjourn* the inquiry before it to allow further written or oral evidence to be adduced. The distinguishing feature of the present case is that the board of inquiry had rendered themselves *functus officio*.

45. It is not open to a board of inquiry to attempt to circumvent an evidential deficit by peremptorily bringing the inquiry to a conclusion in the anticipation that the evidential deficits might be rectified by the time a subsequent board of inquiry came to be convened. This would involve precisely the type of duplication of proceedings which the doctrine of *res judicata* is intended to safeguard against.

46. Counsel on behalf of the Garda Commissioner has sought to argue that the board of inquiry's determination not to proceed further should be interpreted by reference to the correspondence from the Applicant's solicitor. More specifically, it is said that it would be reasonable to infer that the board of inquiry had accepted the concerns raised in the letter of 8 June 2023.

47. With respect, I cannot agree with this submission for the following reasons. First, it appears from *Munnelly v. Hassett* (cited above) that the question of whether *res judicata* applies should be addressed by a forensic scrutiny of what case had been pleaded and what the court or tribunal had decided. These *obiter dicta* arose in the context of a discussion of whether the relevant decision of the Circuit Court had given rise to *res judicata*. In contrast, the proceedings said to give rise to *res judicata* in the present case entail disciplinary proceedings. There are no formal pleadings as such. Nevertheless, the particulars of the alleged breach of discipline fulfil a function analogous to formal pleadings. The particulars identified the scope of the inquiry being embarked upon by the board

of inquiry. The stated reason for the board of inquiry's decision to decline to proceed is that the board had insufficient information and supporting documentation to deal with the matter properly.

48. It is not permissible to go outside the formal record of the board of inquiry and to seek to infer a more elaborate reason for the decision not to proceed. It is not legitimate to treat the letter of 8 June 2023 as part of the formal record. Whereas the letter is briefly referenced in the statutory report, it is expressly stated that the letter had not been part of the record of the hearing.

49. Secondly, even if it were legitimate to have regard to the letter of 8 June 2023, same does not bear the meaning now sought to be attributed to it by the Garda Commissioner. The statutory report does not imply that the board of inquiry had interpreted the letter as a request to halt the disciplinary proceedings, still less that the board of inquiry considered that the objections raised were well founded and had determined, in consequence, to halt the inquiry. There is nothing in the board of inquiry's statutory report which indicates that the board determined that it had misdirected itself in preparing the particulars of the alleged breach of discipline, still less that this was the reason for concluding the inquiry. In truth, the explanation offered in the statutory report is much more straightforward: the board of inquiry considered that it had insufficient information and supporting documentation. Rather than seek to remedy this by the exercise of its discretionary powers under the Garda Síochána (Discipline) Regulations 2007, the board instead brought its inquiry to a conclusion.

50. The Supreme Court has held that the Regulations require that reasons be given for any determination made by a board of inquiry unless it can be said that the issue is so self-evident and narrow that the mere fact of the decision discloses

the reason (*Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47 (at paragraph 36)). Here, the board of inquiry has provided the reason for bringing the inquiry to a conclusion. It is not open to the Garda Commissioner to seek to provide *additional* reasons.

51. For completeness, it should be explained that the Garda Commissioner had sought to rely on hearsay evidence as to the rationale supposedly underlying the decision of the board of inquiry. More specifically, the deponent swearing the affidavit verifying the statement of opposition purports to rehearse the details of a conversation between a third-party and the presiding officer. Neither of these individuals has sworn an affidavit in the proceedings. The deponent does not purport to have heard the conversation himself nor has any contemporaneous documentary evidence of same been exhibited. In the circumstances, this aspect of the affidavit is inadmissible hearsay.

CONCLUSION AND PROPOSED FORM OF ORDER

52. The first board of inquiry had been—and remained at all times—properly constituted. The first board of inquiry had jurisdiction, under the Garda Síochána (Discipline) Regulations 2007, to reach a determination on whether the Applicant had been in breach of discipline.

53. The formal decision of the board of inquiry, as recorded in the statutory report, had been that the board had insufficient information and supporting documentation to deal with the matter properly. The only sensible interpretation of the statutory report is that the board of inquiry had determined that, having regard to the insufficiency of the evidence, the alleged breach of discipline was unproven. It is inherent in the board's decision not to receive oral evidence or

to direct the production of documentary evidence that the board of inquiry considered that the evidential deficit could not be rectified.

54. This represents a final decision on the merits in respect of the alleged breach of discipline. It would be contrary to the rationale for, and the values sought to be protected by, the doctrine of *res judicata* to allow the same alleged breach of discipline to be reagitated before a second board of inquiry. A member of An Garda Síochána, who has disciplinary proceedings against him dismissed by a properly constituted board of inquiry because of an insufficiency of evidence, should not be subject to a second board of inquiry in respect of the same alleged breach of discipline.

55. Accordingly, the Applicant is entitled to an order of *certiorari* setting aside the decision of 5 October 2023 to appoint a second board of inquiry. I will discuss with counsel whether an order of prohibition is required restraining any further disciplinary proceedings arising out of the events of January 2020.

56. As to legal costs, my *provisional* view is that the Applicant, having been entirely successful in the judicial review proceedings, would be entitled to recover his costs against the other side in accordance with the default position under section 169 of the Legal Services Regulation Act 2015.

57. This matter will be listed before me on 19 November 2024 at 10.30 o'clock for submissions on the form of the final order and on legal costs.

Appearances

Mark Harty SC and Eoin Lawlor SC for the applicant instructed by Hughes Murphy Solicitors
Shane Murphy SC and Vincent Nolan for the respondent instructed by the Chief State Solicitor