

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 141

**Record No. 2020/446JR**

**BETWEEN**

**LIDL IRELAND GMBH**

**APPLICANT**

**AND**

**CHARTERED ACCOUNTANTS IRELAND**

**AND THE INDEPENDENT REVIEW COMMITTEE OF THE CHARTERED ACCOUNTANTS  
IRELAND**

**RESPONDENTS**

**AND**

**GRANT THORNTON**

**NOTICE PARTY**

**Judgment of Mr Justice Cian Ferriter dated this 3rd day of March 2022**

**Introduction**

1. These proceedings involve a challenge by way of judicial review to a decision of one of the bodies established under the disciplinary regulations of Chartered Accountants Ireland ("CAI"). The body in question is an Independent Review Committee ("IRC"). An IRC in certain circumstances makes a final determination as to whether a complaint against a CAI member in relation to a disciplinary matter discloses a case to answer such as to warrant a full disciplinary hearing.
2. In a decision taken on 16th March 2020, which is the decision in issue in these proceedings, an IRC determined that the notice party to these proceedings, which is a member of the CAI, had no case to answer in respect of a complaint made by the applicant to the effect that the manner in which the notice party devised and conducted a retail price comparison survey (in which the applicant featured) involved a breach of the notice party's professional obligations.
3. The applicant contends that the decision was arrived at in breach of its entitlement to fair procedures under the relevant disciplinary regulations. It also contends that the decision breached a specific duty to give reasons imposed on the IRC by those regulations. CAI and the IRC seek to answer the case by disputing whether the decision in issue is one amenable to judicial review at all; by challenging the applicant's standing to bring the proceedings if the decision is so amenable; and by disputing that the applicant is entitled to fair procedures in the manner it contends for or that the reasons given in the decision were in breach of any duty to give reasons.

**Background**

4. The factual background to the proceedings is as follows. The notice party was commissioned by the PR consultants for the Aldi supermarket chain to conduct a price comparison survey into a basket of retail goods in five Irish supermarket chains, including the applicant and Aldi. It conducted this survey in February 2018. The outcome of the survey was that Aldi came out in first place, as being marginally cheaper than the applicant (who was in second place in the survey) in respect of a basket of consumer goods. The results of the survey were widely publicised.

5. The applicant was concerned that it was unfairly suffering adverse publicity vis-a-vis Aldi, a major competitor, where Aldi had been presented by the survey as the cheapest supermarket and where the applicant believed there were fundamental flaws with the methodology by which the survey was compiled. The applicant accordingly lodged a complaint with CAI on 17th April 2018 contending that "*the methodology used to compile this report was fundamentally flawed, and as a result [the notice party] have widely published inaccurate information at Aldi's behest, therefore misleading consumers*". The letter of complaint alleged that product selection for the survey was flawed in that the notice party had selected more expensive products in certain instances. The complaint also alleged errors in the consistency of prices selected. In essence, it was complained that the methodology of the survey was flawed in not comparing like with like.
6. Before detailing how CAI addressed and investigated the complaint, it is useful to briefly sketch the origin and structure of the disciplinary regulations pursuant to which the complaint was made and determined.

#### **The CAI and its disciplinary procedures**

7. The Institute of Chartered Accountants in Ireland, as CAI was formerly known, was established by Royal Charter in 1888. The Royal Charter granted to the Institute the power to make bye-laws regulating its affairs. The Royal Charter was amended by the Institute of Chartered Accountants in Ireland (Charter Amendment) Act, 1966. The "principal bye-laws" in force at the time of the events the subject of these proceedings were the bye-laws with an effective date of 5th October 2015, which had been amended with effect from 30th September 2016 and 21st March 2018.
8. There were also disciplinary bye-laws in force which empowered CAI to make or continue in existence, disciplinary regulations governing the process whereby the activities of its members may be investigated and its members may be disciplined. Disciplinary regulations pursuant to these bye-laws and the principal bye-laws were made with effect from 5th October 2015, the relevant version with which we are concerned in these proceedings being those amended on 30th September 2016.
9. As is now common in respect of the disciplinary processes applicable to members of regulated professions, CAI's disciplinary regulations involve a "preliminary screening" procedure whereby a complaint is assessed to determine whether it concerns a "disciplinary matter" and, if it does, the complaint is then investigated to determine whether it discloses a "case to answer" in respect of that disciplinary matter. The procedures involved in determining whether or not there is a case to answer on foot of an admissible complaint are quite elaborate and can involve, variously, the CAI's Head of Professional Conduct; a Conduct Committee; a review by an Independent Reviewer of a decision of a Conduct Committee that there is no case to answer; and, in the event that an Independent Reviewer remits a disciplinary matter following such a review, a consideration by an Independent Review Committee of the question of whether or not there is a case to answer in respect of the disciplinary matter.

10. If a complaint in respect of a disciplinary matter is determined to disclose a case to answer, the matter, if it is not dealt with on consent, may then be referred, on foot of formal allegations, for hearing and determination by a Disciplinary Tribunal.
11. As will become clear, the issues arising in this case concern aspects of the preliminary screening procedure applied by CAI, following its determination that the applicant's complaint did concern a disciplinary matter, and an ultimate decision of an Independent Review Committee that the complaint did not disclose a case to answer.

**The investigation of the complaint**

12. In accordance with the disciplinary regulations (the "Regulations"), the complaint was assessed as concerning a "*disciplinary matter*" within the meaning of the Regulations and the CAI's Head of Professional Conduct appointed an investigator to investigate the complaint in accordance with Regulation 20.3 of the Regulations. CAI wrote separately to the applicant and the notice party on 26th April 2018 informing them that CAI had determined that the complaint concerned a disciplinary matter and that an investigator had been appointed to investigate the complaint. The process that it proposed to follow was set out in broad terms in those letters. CAI's letter to the notice party of 26th April 2018 sought various information including information as to the methodology followed in carrying out the survey and a copy of the instructions provided to the persons carrying out the survey. This letter noted that "*any information provided by you may be sent to the complainant*".
13. The applicant wrote to the investigator on 4th May 2018 seeking to elaborate on some elements of its complaint by reference to alleged breaches of the Chartered Accountants' Code of Ethics and, in particular, those provisions of that Code relating to integrity, objectivity and professional competence and due care.
14. The investigator assigned by CAI to deal with the matter replied to the applicant by letter of 8th May, 2018. That letter stated as follows:-

*"Once a complaint is received and assessed as concerning a disciplinary matter we are responsible for the investigation of that disciplinary matter. Complainants are entitled to receive updates at various stages of the process as set out in the Institute's Disciplinary Regulations but complainants are not entitled to receive copies of all material produced during an investigation. You will therefore only be provided with copies of correspondence between ourselves and the member firm to the extent that we deem it necessary for the completion of our investigation of the disciplinary matter."*
15. In a letter not seen by the applicant until these proceedings, the investigator wrote to the notice party on 6th September, 2018 confirming that "*all documentation provided by you and/or your firm in relation to the above complaint will be treated as private and confidential and will not be shared with the complainant without your prior approval*".
16. The notice party acknowledged that letter on 30th September, 2018.

17. Ms. Aideen Mawe, Head of Professional Conduct at CAI, swore an affidavit in the proceedings on behalf of CAI setting out that:

*"The Disciplinary Regulations also provide for the preparation of an investigation report, its presentation to the affected member, together with an opportunity for the member to respond. I am in a position to confirm that each of these steps were taken in this case and the initial investigation process was concluded by 22 November 2018."*

These steps are found in Regulation 22.

18. Ms. Mawe averred that on 19th December, 2018, she decided to refer the matter to the Conduct Committee to allow that body to determine whether or not there was a case to answer. This step is provided for in Regulation 23.1.2.
19. The Conduct Committee determined on 5th February, 2019 that there was no case to answer and this decision was communicated to the applicant and the notice party on 21st February, 2019, in accordance with Regulation 24.11. In this decision, it was stated that:

*"The Conduct Committee, following a thorough investigation of the disciplinary matter by the appointed investigator, formed the opinion that there is no case to answer and that the member firm is not liable to disciplinary action. The Conduct Committee reasons that despite the weaknesses identified and the methodology used by the member firm in carrying out the price survey it would not appear to have been flawed to an extent that would amount to poor professional performance and there is no evidence that the survey was designed or carried out with bias in favour of Aldi."*

20. The applicant thereafter exercised the right available to it under Regulation 25.1 of the Regulations to seek an independent review of the Conduct Committee's decision.
21. The process in relation to the independent review of a decision of the Conduct Committee in that scenario is governed by the provisions of Regulation 25. Pursuant to those provisions, CAI engaged Andrew Webster QC as the Independent Reviewer. He prepared a report dated 27th May, 2019 in which he concluded that the Conduct Committee's decision was unsafe and remitted the matter to an Independent Review Committee for its consideration.
22. It appears from the contents of the Independent Reviewer's report that the notice party had taken issue in its correspondence with CAI during the course of the investigation as to the characterisation of the complaint as a disciplinary matter but that CAI had rejected that contention. The Independent Reviewer agreed with that view of CAI.
23. The Independent Reviewer in his report identified two issues that did not appear to have been considered by the Conduct Committee: firstly, whether there were in fact cheaper products available in the applicant's stores on the days the price comparison was conducted other than those identified in the survey and, secondly, whether the process of

comparing actual prices encountered in Aldi's competitor stores with prices comprised on an Aldi master price list represented a reliable comparison methodology.

24. In relation to the question of availability in the applicant's stores of cheaper products than those relied upon in the survey, the Independent Reviewer expressed the view that *"in short, there was an important issue of fact at the heart of the complaint which needed to be investigated: could Lidl prove that the cheaper item was actually available in the stores that were visited when they were visited? That does not appear to have been investigated by the case investigator. It does not appear that Lidl were asked to provide evidence that their cheaper lines were indeed available in the particular stores in question on the days the survey was carried out. Accordingly that information was not before the Conduct Committee. In my view that was a material evidential matter that ought to have been investigated in order to fully and reasonably comprehend Lidl's complaint. Clearly, were it to have been the case that the cheaper items were available in specific stores, the evidence gathering for the survey would fall, to say the least, to be considered carefully... Without the case investigator having fully investigated and reported on that matter, it seems to me that the Conduct Committee were materially hampered in their ability to express a properly informed view of the essence of the complaint"*.
25. He further noted that *"if [Lidl] were able to supply such information then it would at least call for an explanation from the notice party as to why the cheaper item was not selected and for a careful consideration to be undertaken by the Conduct Committee as to whether, in light of that evidence and any explanation that might be tendered in response to it, the information gathering exercise was arguably professionally sound."*
26. The Independent Reviewer then concluded on this issue that *"I am concerned that the investigation report placed before the Conduct Committee was not sufficiently robust in its information gathering to the effect that the decision of the Conduct Committee that proceeds upon it is unsafe"*.
27. As regards the price comparison issue, the Independent Reviewer noted that the Conduct Committee appear to have recognised that there was a weakness in the methodology and he expressed his agreement with that view. He then stated: *"there were two variables at play: different retailers and a different basis of calculating basket prices (in-store on the one hand; master list price on the other)"*. He then stated *"the Conduct Committee consider the weakness to be not material ("would not appear to be flawed to the extent that would amount to poor professional performance")*. *In the circumstances I am, and in my view any informed reader is, left to wonder: why?"*
28. The Independent Reviewer concluded on that issue that he had *"material concerns as to the validity of the methodology adopted and thus its fairness"*. He concluded that *"the investigation report placed before the Conduct Committee was not sufficiently robust in its information gathering to the effect that the decision of the Conduct Committee that proceeds upon it is unsafe"* and that:

*"The Conduct Committee do not provide an adequate explanation of why they considered that the methodology is not materially flawed to the exclusion of even a case to answer. For that reason also I do not consider that the decision of the Conduct Committee is safe."*

29. Following the Independent Reviewer's report, the matter was then referred, in accordance with the Regulations, to an Independent Review Committee ("the IRC"). This is provided for in Regulation 26.1 which states as follows:

*26.1 Following the remittance of a Disciplinary Matter by an Independent Reviewer, an Independent Review Committee shall consider whether or not there is a case to answer in respect of the Disciplinary Matter and, in doing so, may have regard to:*

*26.1.1 the information and any representations previously available to the Head of Professional Conduct, the Conduct Committee and the Independent Reviewer; and*

*26.1.2 the reasons given by the Independent Reviewer,*

*and it shall not make its decision until the Member, Member Firm, Student or Affiliate concerned has been given a further opportunity to make written representations to it.*

30. CAI then appointed three persons as members of the IRC (a Senior Counsel as chairperson, a junior counsel and an experienced accountant).
31. The IRC convened on 17th September, 2019 and specified the further investigation of matters arising from the Independent Reviewer's report. This is provided for in Regulation 26.2.1. CAI then sought information from the notice party, on behalf of the IRC, by letter of 3rd October, 2019.
32. CAI wrote to the applicant on 17th October, 2019 enclosing a copy of till receipts gathered by the notice party during the course of the survey, and asking the applicant to provide any evidence available to the applicant that there were cheaper goods in the applicant's stores within the period of 45 minutes before the checkout time on the till receipts provided by the notice party. There was a follow up reminder to this letter on 11th November, 2019. The IRC had been due to meet on 20th November, 2019, but adjourned its meeting until 11th December, 2019.
33. CAI sent a further follow up letter and emails to the applicant in relation to the request in its letter of 17th October, 2019. The applicant ultimately replied by letter of 9th December, 2019 furnishing detailed information in respect of the availability of what it maintained were cheaper products at the time of the survey and making further submissions in relation to the allegedly flawed methodology of the survey.
34. The IRC met on 11th December, 2019 and directed that the applicant's letter of 9th December, 2019 be forwarded to the notice party for its comments. This was done on 17th December, 2019 and the notice party responded on 8th January, 2020.

35. At its meeting of 28th January, 2020, the IRC formed the view that *"there were potentially significant weaknesses in the design and methodology in the survey carried out by the member firm"* and *"directed the executive to prepare a draft Formal Allegation for its consideration in accordance with Regulation 24.4.1."* (While there was no affidavit from the IRC before me in these proceedings, this quote is taken from the minutes of that meeting as reflected in the decision under challenge in the proceedings.)
36. CAI wrote to the notice party on 29th January, 2020 enclosing a copy of a draft Formal Allegation and inviting the notice party to make such representations as it wished to make in respect of same in accordance with Regulation 24.4.2 of the Regulations.
37. The draft Formal Allegation stated that the notice party *"did act in breach of the Institute's Code of Ethics for Members (2018): Fundamental Principles: (c) professional competence and due care in designing and carrying out a price survey in that the survey was materially flawed as:*
- 1) *the design of the survey failed to treat the supermarkets to be tested on an equal basis;*
  - 2) *the survey relied upon a pricelist which is only tested in one location when significant discrepancies have arisen in that testing; and*
  - 3) *personnel carrying out the survey may not have selected comparable goods in each location*
- and is thereby liable to disciplinary action in accordance with the Institute's disciplinary bye-laws."*
38. The notice party then responded by letter dated 4th March, 2020.
39. This letter contended that the applicant's complaint was, in essence, vexatious and questioned whether the complaint on the part of a competitor of Aldi constituted *"a bona fide appropriate use of the CAI's complaints procedure"*. The notice party then made representations by way of response to the draft Formal Allegation addressing in some detail the allegation that the design of the survey failed to treat all of the supermarkets to be tested on an equal basis, the allegation that the survey relied on a price list which was tested in one location when significant discrepancies had arisen in that testing and the allegation that personnel who had carried out the survey had not selected comparable goods in each location. New information and arguments were contained in this letter. In one section of the letter, the notice party sought to take issue with applicant's evidence as to the availability of cheaper products from those used in the comparison survey but then went on to submit that *"should the IRC ultimately find that the balance of probability favours the position of Lidl with regard to this factual dispute, GT contends that this does not undermine its professional competence nor the diligence with which it conducted the survey"*.

40. The letter of 4th March, 2020 was not furnished by CAI or the IRC to the applicant for its comments or response.

**IRC's decision of 16th March 2020**

41. The IRC reconvened on 16th March, 2020 and proceeded to determine that there was no case to answer. It produced a decision setting out the background to, and reasons for, the decision ("the Decision").
42. The minutes of the meeting of 16th March 2020 at which the decision was taken note that the matter came before it by way of a disciplinary matter referred by an independent reviewer. The minutes noted that *"the issue for the independent review committee ("IRC") pursuant to regulation 26.1 of the Institute's Disciplinary Regulations is whether or not there is a case to answer in respect of the disciplinary matter [described in the minutes as being "that a price survey carried out by the member firm, results of which were released to the media, was fundamentally flawed in its methodology and was biased in favour of Aldi, which had commissioned the survey"]*. This involves a consideration as to whether there is a real prospect of the member being found guilty by a Disciplinary Tribunal of Misconduct or Poor Professional Performance in relation to the disciplinary matters under the Bye-laws dated 5 October 2015 amended with effect from 30 September 2016."
43. The minutes then record that on 17th September 2019, the IRC deferred consideration of the case in order to enable further investigations pursuant to disciplinary regulation 26.3 and disciplinary regulation 24.3 of various specified matters including the question of whether it could be proven that less-expensive products were actually available on the shelves of the applicant's store for a period of 45 minutes prior to the purchases and questions, and investigation into the appropriateness of the design of the survey, in particular whether the reliance on a pricelist from Aldi, whilst physically shopping as competing stores, was appropriate.
44. The minutes note further steps taken by the IRC including a request to the Head of Professional Conduct to calculate the impact or potential impact of the material provided by the applicant's on 9th December 2019 on the results of the original survey.
45. The minutes note that the IRC reconvened on 28th January 2020 to consider the notice party's response of 8th January 2020.
46. The minutes stated that *"the IRC at that time considered that there were potentially significant weaknesses in the design and methodology of the survey carried out by the member firm and directed the executive to prepare a draft Formal Allegation from its consideration in accordance with Regulation 24.4.1. This draft formal allegation was provided to the member firm to allow it make such representations as it may which, in accordance with disciplinary Regulation 24.4.2. The member firm and affiliate responded by way of letter dated 4 March 2020. The IRC reconvened by conference call on 16 March 2020 and considered the response of the member firm and affiliate dated 4 March 2020."*



47. The minute then contains a heading "Decision" which states:

*"the IRC finds that there was no case to answer, in that there is no real prospect of the member firm and/or affiliate being found guilty by a Disciplinary Tribunal of Misconduct or Poor Professional Performance in relation to the disciplinary matters under the bye-laws dated 5 October 2015 amended with effect from 30 September 2016"*

48. The IRC in the section of its Decision headed "Reasons" stated as follows:-

*"In light of the further information provided by the member firm and affiliate to the IRC under cover letter dated 4 March 2020 the IRC has revisited its previous decision. This letter explored in significantly greater detail than before the methodology adopted by the member firm and affiliate and decisions made in the carrying out of the survey. In addition, further information was provided by way of annex to the said letter which was not previously available to the IRC. The further information and explanations provided make it more likely, in the view of the IRC, that a Disciplinary Tribunal would hold that decisions relating to the design and implementation of the survey reflected the exercise of reasonable professional judgment on the part of the member firm and/or affiliate.*

*As a result, the IRC has concluded, notwithstanding that questions still remain regarding the quality of the work performed, that, on balance, there is no real prospect of the member firm or affiliate being found guilty by a Disciplinary Tribunal of Poor Professional Performance in relation to the Disciplinary Matters under the bye-laws dated 5 October 2015 amended with effect from 30 September 2016.*

*The IRC therefore has decided that these matters be closed on the above basis in relation to the allegations set out above."*

The reference above to the IRC revisiting its previous decision is a reference to the fact that, as is clear from the minute of an earlier part of the Decision document, the IRC had decided on 28th January, 2020 that the notice party did have a case to answer and directed the preparation of draft formal allegations on foot of that decision.

49. The minute of the meeting and decision is signed by the Chairperson on 19th March 2020. The Decision was then communicated to the applicant and the notice party.

50. *Following receipt of the Decision, the applicant wrote to the IRC on 18th May, 2020 noting that it was at a loss to discover that the IRC "has effectively remade the decision to not proceed further – and has done so with little explanation". The letter sought further information as to how the IRC reached the decision and requested "clear and detailed reasons for same".*

51. The CAI responded on 25th May, 2020 to say that the decision of the IRC was final and that the IRC was *functus officio* (citing, in relation to the finality of the decision, Regulation 26.4).

### **Notice Party's position**

52. The notice party made clear in an affidavit filed in the proceedings and in brief oral submissions at the hearing from counsel on its behalf that, as the proceedings concerned the lawfulness of the process engaged in by CAI and IRC, it would not get involved in the arguments on those issues. The notice party make clear that in so far as the applicant's affidavits contained criticism of the methodology and general approach applied by it in relation to the survey, it did not believe that those criticisms were in any way valid. It is only proper that I should record the notice party's position in this judgment. The issues in relation to the validity or otherwise of the criticisms levelled against the notice party are clearly matters for CAI/IRC and not for the Court.

### **The principal parties' positions**

53. The applicant's case, in summary, is that the respondents acted in breach of its entitlement to fair procedures in the preliminary screening process by failing to furnish it, for its response, with a copy of the 4th March 2020 letter, or at least those aspects of the 4th March 2020 letter which sought to impugn the information which the applicant had furnished to CAI in December 2019 on the factual questions relating to how the survey was conducted and in particular how products were selected (these being the issues highlighted by the Independent Reviewer as requiring proper investigation to allow an informed decision on the question of whether or not there was a case to answer to be reached). The applicant contended that this was required at a minimum in order to allow the IRC conclude its investigations and arrive at a decision within jurisdiction on the case to answer issue. Having consulted with the applicant at an earlier stage of its investigations and having arrived, it seems, at a decision on 28th January 2020 that the notice party did indeed have a case to answer, following the provision by the applicant of relevant information, the applicant submitted that it behoved the IRC, through CAI, to further consult with the applicant before making its final decision on the case to answer issue.
54. The applicant separately contended that the Decision of 16th March 2020 was in manifest breach of its specific entitlement pursuant to Regulation 26.5 to notification of the IRC's decision as to whether or not there was a case to answer "*and the reasons therefor*".
55. The respondents, for their part, contended that, as a decision arising in a non-statutory process involving primarily CAI and its member, the IRC's decision was not amenable to judicial review. They submitted that the applicant did not have standing to bring this judicial review challenge, given that the applicant was only a complainant and not a party the subject of a complaint. They further submitted that, if the Decision was amenable to judicial review and the applicant had standing to maintain its challenge, there was no breach of fair procedures in circumstances where the applicant was confined to being consulted or furnished with information only in the very specific and limited situations expressly set out in the disciplinary regulations and where there was manifestly no express right of the applicant to be furnished with representations or submissions made by the notice party to the IRC. Finally, the respondents submitted that the threshold as to adequacy of reasons was a low one in the context of the type of decision in issue and that the Decision passed that threshold.

56. I propose to address the issues arising in the following order: amenability; standing; fair procedures entitlements; and duty to give reasons.

**Amenability**

57. It is clear from the case law that the question of the amenability of any given decision to judicial review is context specific. In *Geoghegan v The Institute of Chartered Accountants* [1997] 3 IR 86 ("*Geoghegan*"), a case in which the respondent was the same as the first named respondent in these proceedings, Denham J highlighted a series of factors which she believed relevant to the question of amenability of the Institute to judicial review as follows (at page 130):

*"In view of the public nature of the source of the Institute, the functions of the Institute and the nature of the contract between the applicant and the Institute the subject of judicial review becomes part of the question of constitutional justice of the relationship. There are a number of important factors:*

- (1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.*
  - (2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.*
  - (3) The functions of the Institute and its members come within the public domain of the State.*
  - (4) The method by which the contractual relationship between the Institute and the applicant was created is an important factor as it was necessary for the individual to agree in a "form" contract to the disciplinary process to gain entrance to membership of the Institute.*
  - (5) The consequences of the domestic tribunal's decision may be very serious for a member.*
  - (6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially."*
58. While in that case, only two of the five Supreme Court judges had been prepared to hold that the proceedings of the disciplinary committee of the Institute/CAI were susceptible to judicial review, as was noted by O'Donnell J (as he then was) in his judgment in *O'Connell v The Turf Club* [2017] 2 IR 43, the factors identified by Denham J in her judgment in *Geoghegan* have been favoured in subsequent decisions of the High Court when considering amenability questions (including in *Becker v Duggan* [2009] 4 IR 1 at 12 and *Eogan v UCD* [1999] 4 IR 390 at 398).

59. It was pointed out by counsel for the applicant that two judicial reviews involving decisions of appeal tribunals established under the CAI bye-laws (being *Hynes v Chartered Accountants Ireland* [2013] IEHC 220 and a second case between the same parties, *Hynes v Chartered Accountants Ireland* [2018] IEHC 138) proceeded on the assumption that CAI was amenable to judicial review. The applicant points out here that the members of the Independent Review Committee, under the Regulations, are drawn from the same Appeal Panel from which the appeal tribunals at issue in *Hynes* were drawn.
60. The applicant also pointed out that the statutory body with responsibility for overall regulation of CAI and other accountancy bodies, being the Irish Audit Accounting Supervisory Authority ("IAASA"), a body formed pursuant to the provisions of the Companies Acts, is given a formal monitoring role at various points in the disciplinary regulations including in relation to the IRC. Regulation 26.7 provides that "*An Oversight Authority shall have the right to appoint an observer to attend any meeting of the independent review committee*". IAASA is such an oversight authority thereby providing a formal nexus between the disciplinary procedures established under the Regulations and a statutory regulatory body.
61. In my view, a decision of an IRC under the Regulations as to whether or not a complaint on a disciplinary matter discloses a case to answer is amenable to judicial review at the hands of the complainant. This amenability to judicial review arises from the following factors.
62. Firstly, the IRC is a disciplinary body as part of the machinery for regulation of the conduct of chartered accountants which has been put in place in furtherance of the public interest. As noted by Denham J in *Geoghegan*, the accountancy profession has a special connection to the judicial organ of government in the courts, as well as having special auditing responsibilities; furthermore, the functions of CAI members come within the public domain of the State.
63. Secondly, as noted further by Denham J in *Geoghegan*, the original source of the powers of CAI is the Charter which has been the subject of subsequent legislation and which confers on CAI the power to alter and amend the bye-laws, including the bye-laws pursuant to which the disciplinary regulations are drawn up. This statutory (and therefore public) nexus is fortified by the fact that the IRC in exercise of its functions can be the subject of monitoring by a statutory supervisory authority, IAASA, which indicates a further important public dimension to its work.
64. Thirdly, a complainant (such as the applicant here) is entitled to make a complaint against a member firm in relation to a disciplinary matter even if the complainant has no contractual or other private relationship with the member firm against which the complaint is made.
65. Fourthly, the Regulations provide in detail for various procedural rights of a public law nature for both the subject of a complaint but also, importantly, for a complainant,

including at various points in the Regulations an express right for a complainant to receive decisions with reasons.

66. To take an extreme but obvious example, if CAI had received a *bona fide* complaint in relation to a disciplinary matter but had ignored that complaint or otherwise decided not to address it, it is difficult to see that CAI would not be amenable to challenge by way of judicial review for that course of action. Were it to be otherwise, an important body in the machinery of regulation of chartered accountants in the public interest could operate without effective corrective oversight by the courts. Likewise, if a CAI member was the subject of an IRC finding of a case to answer for poor professional performance when there was no stateable basis for same, given the adverse consequences for the member of such a finding, it would surely be the case that the member would be entitled in principle to resort to the remedy of judicial review to challenge such a decision.
67. Accordingly, in my view, the decision of the IRC under challenge by the applicant in this case is one which is amenable to judicial review.

#### **Locus Standi**

68. The next question that arises is whether the applicant has standing to challenge the IRC's decision of 16th March 2020 by way of judicial review.
69. The respondents submitted that the applicant has no interest or right which stood to be affected by the outcome of the complaint process. This contrasted, they said, with the position of a member of CAI whose interests and rights, including right to good name and rights to livelihood, stood to be affected by the outcome of the process. The respondents relied on *Cahill v Sutton* [1980] IR 269 and the recent Supreme Court decision in *Mohan v Ireland* [2019] 2 ILRM 1 ("*Mohan*") in this regard. Counsel for the respondents did fairly accept that a complainant who was granted an express entitlement under the Regulations and who sought to contend that that such entitlement was breached would, in principle, have standing to challenge that breach but maintained that the applicant was not in such a category on the facts here.
70. In my view, given that the provisions of the Regulations conferred on the applicant a right to make a complaint in relation to a disciplinary matter; a right to have that complaint investigated; a right to seek an independent review of a decision of the Conduct Committee that the complaint yielded no case to answer and a right to receive a decision of the Independent Review Committee with reasons as to why the IRC determined that there was no case to answer, the applicant clearly has a sufficient interest within the authorities to confer standing on it to challenge a decision addressed to it pursuant to the Regulations. This is particularly so where the applicant is alleging breach of an express obligation in the Regulations governing that decision (in this case, a breach of the obligation in Regulation 26.5 on the IRC to give reasons for its decision determining that the notice party had no case to answer). To deploy the formulation of O'Donnell J in *Mohan*, the notice party's interests are affected in a real way in that it has on the express terms of the Regulations a right to a decision with reasons and it contends that the

decision addressed to it is not reasoned to the level of adequacy required in law, by that Regulation.

71. While it might be said, on one view, that the applicant's economic or commercial interests were not affected in a real way by an alleged breach of the provisions of the Regulations pursuant to which they have entitlements, to my mind it cannot be said that its *legal* interests in having its complaint dealt with in a manner compliant with the Regulations were not affected or engaged in a real way. The public interest underpinning the proper and lawful implementation of the Regulations (which in broad terms are designed to advance the public interest in the proper regulation of an important profession) would be undermined in the event that the intended beneficiary of procedural safeguards under the Regulations was deprived of the entitlement to ask the High Court to exercise its supervisory jurisdiction, by way of judicial review, to ensure that those procedural safeguards are lawfully applied when it is maintained they have not been.

**Fair procedures rights – right to documents or to make representations?**

72. The applicant contends that it had a right as a matter of fair procedures, once it had been consulted by CAI in the investigative process leading to the determination of the question of whether or not its complaint disclosed a case for the notice party to answer, to be furnished with any representations made by the notice party in relation to the complaint and to be permitted to make representations itself. In particular, the applicant contends that it was a fundamental breach of fairness for CAI/the IRC not to furnish to it for its response the notice party's letter of 4th March 2020 or at least such parts of that letter that sought to challenge the applicant's evidence as to what products were available at cheaper prices in its stores on the dates of the survey.
73. The respondents answered that contention by submitting that a complainant does not in principle have a right to see any representations or information furnished by other parties to an investigation into the subject matter of the complaint, or to be afforded an opportunity to make representations beyond its complaint. They submit that a complainant is confined to the express entitlements conferred on it by the Regulations and has no freestanding right to documentation or information, or to make representations, beyond that stipulated in the Regulations.
74. In summary, in terms of matters expressly addressed by the Regulations, complainants are entitled to notification of the outcome of determinations and the reasons for same (Regulations 19.5; 23.11; 23.17), and they are afforded a right to request a further consideration of a decision that their complaint is not a disciplinary matter (Regulation 18.6) or not to open an investigation (Regulation 19.5), or alternatively a review of a determination of no case to answer (Regulation 25.1). A complainant can make representations only in relation to a decision as to whether their complaint concerns a disciplinary matter (Regulation 18.4) or a decision not to commence an investigation (Regulation 19.5). Complainants are not anywhere in the Regulations relevant to the issues in these proceedings expressly afforded a right of access to materials submitted by members nor to the investigation reports nor any other materials available to the

Executive, the Conduct Committee, the Independent Reviewer or the Independent Review Committee.

75. The Regulations provide no rights at all to complainant to be furnished with a member's representations. They provide no right to a complainant to be furnished with documentation submitted by any other party relating to the complaint or to be asked for information or representations, including information or representations in response to issues raised by the subject of the complaint.
76. I accept the core submission made on behalf of the respondents that while the Regulations do confer generous procedural entitlements on a complainant, a complainant's entitlements are confined to those expressly delimited in the Regulations subject, of course, to those entitlements being implemented in a lawfully fair manner.
77. While the respondents referred to a number of Canadian authorities in support of the proposition that the procedural entitlements of a complainant were extremely limited in the context of a professional disciplinary investigation (including *King v Yukon Medical Council* 2003 YSC 74), in my view the matter can safely be determined by reference to established principles of Irish law.
78. It needs to be borne in mind that the Regulations are primarily, and understandably, member-facing in the sense that they are concerned with addressing complaints in relation to disciplinary matters against members in circumstances where the fundamental rights of members stand to be adversely affected by the outcome of the complaints process. The provisions of the Regulations in issue in this case arise in the preliminary screening phase of the disciplinary process. It is well established that the subjects of complaints do not enjoy the full panoply of rights in this phase: see e.g. *Law Society v Walker* [2007] 3 IR 581, *Flynn v Medical Council* [2012] 3 IR 236 (at 240) and *BM v Fitness to Practice Committee of the Medical Council* [2019] IEHC 106 (at paragraph 37). The role of a complainant in the preliminary screening phase is more limited again and it follows that its procedural rights are also necessarily more limited. The preliminary screening phase involves some relatively limited investigation to establish the factual context in which the complaint arises, in order to assess whether or not there is a case to answer. A complainant expressly and by necessary implication has a limited role in that already limited process.
79. As noted above, the complainant is given specific entitlements to be kept informed of the process, to request a review of certain decisions and to be furnished with certain decisions with reasons. However, it is clear, both under the terms of the Regulations themselves and as a matter of sensible legal policy, that the complainant does not have a right to be furnished with information, evidence, documentation and representations furnished by or on behalf of a member who is the subject of a complaint and to make representations on such material. The complainant is not being accused of any wrongdoing. The complainant does not enjoy some form of supervisory or monitoring role in relation to how CAI or its disciplinary bodies conduct inquiries or investigations into

other parties at the preliminary screening phase. It has no right to dictate how the disciplinary bodies conduct their investigations.

80. In that regard, it seems to me that the contents of the CAI's letter of 8th May 2019, set out at paragraph 14 above, fairly and properly reflect the correct legal position i.e. *"Complainants are entitled to receive updates at various stages of the process as set out in the Institute's Disciplinary Regulations but complainants are not entitled to receive copies of all material produced during an investigation. You will therefore only be provided with copies of correspondence between ourselves and the member firm to the extent that we deem it necessary for the completion of our investigation of the disciplinary matter."*
81. The applicant sought to rely on a number of English authorities in support of the proposition that during a consultation process, once a decision making body sought to consult parties, it was obliged to do so fairly: *R (on the application of Capenhurst) v Leicester City Council* [2004] EWHC 2124 (Silber J, 15 September 2004) ("*Capenhurst*") and *R (on the application of Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA CI V4 38 (Court of Appeal, 1 May 2008) ("*Eisai*").
82. In *Eisai*, the court was concerned with the appraisal process for the determination of whether certain drug treatments for Alzheimer's patients could continue to be provided as had been up to that point. The relevant appraisal body (NICE) had operated an extensive consultation process with interested parties, including the pharmaceutical companies producing the drugs in question. The case centred on the extent to which, as a matter of fairness, the pharmaceutical companies were entitled to a fully executable cost model prepared by the appraisal body as part of the consultation process in order to be able to respond meaningfully to the model.
83. The relevant paragraphs of the judgment of Richards LJ in *Eisai* relied upon by the applicant were as follows:

*"[24] It is not in dispute that NICE is subject to the general principles of procedural fairness in relation to the appraisal process and, in particular, that it must act fairly in the consultation exercise. Mr Giffin suggested that NICE was under no duty to consult and had simply taken a voluntary decision that this was an appropriate way of performing its functions. Given the interests at stake and the obligation to comply with the Secretary of State's directions (which include requirements to develop a process to enable it to ascertain and take into account the views of the general public, and to make provision for an appeal on grounds of procedural fairness: see para 5 above), I very much doubt whether it would be open to NICE to dispense with consultation. In any event, whether or not consultation is a legal requirement, if it is embarked upon it must be carried out properly: R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213, per Lord Woolf MR at para 108.*



[25] Lord Woolf's judgment in *ex parte Coughlan* continues with helpful statements of general principle:

"108. ... To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken ....

112. ... It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

84. The reasoning of Richard LJ in *Eisai*, and the *dicta* relied upon by him as set out above, arose in a very different context to that before the Court here i.e. that of a consultation process with parties who stood to be significantly impacted by the outcome of the process. The court in *Eisai* was not dealing with an *investigative* process in the preliminary screening stage of disciplinary procedures where the process is directed to the question of whether or not there was a case to answer by the subject of a complaint in respect of a complaint of poor professional performance.
85. Likewise, in *Capenhurst*, the court was concerned with a decision-making process which led to the withdrawal of public funding to a number of voluntary organisations. That, too, involved consultation in a very different context to the preliminary screening investigative context at issue in the case before me.
86. In an alternative, but allied, line of argument, the applicant contended that once the IRC had made a decision on 28th January 2020 that the notice party did have a case to answer, and directed the CAI executive to prepare a draft formal allegation for its consideration in accordance with Regulation 24.4.1, the IRC's investigation into the complaint was concluded at that point and that it was not permissible for it to re-open the investigation, absent a formal decision to do so and an invocation of its powers pursuant to Regulations 26.3 or 24.4.1 to direct further enquiries and investigations on foot of the material disclosed by the notice party's letter of 4th March 2020.
87. In my view, that analysis represents an overly restrictive reading of the powers of the IRC. The applicant did not dispute that in principle the IRC, where it had made an initial decision on the question of whether or not there was a case answer but where the matter had not yet proceeded to formal allegations, could revisit that decision. That must be so, as the IRC is discharging its obligation to consider whether or not there is a case to answer in respect of the disciplinary matter and if new information comes to light before

its final determination on the matter which suggests that there is in fact no case to answer, it must be entitled, particularly having regard to the rights of the subject of the complaint, to revise its initial view and determine that there is no case to answer.

88. While Regulation 26.2 does confer on the IRC the power to require the executive to seek further information, it does not seem to me that the IRC is confined, in the information to which it may have regard in discharge of its functions under Regulation 26, to information acquired pursuant to a Regulation 26.2 request. In this case, new information and submissions were furnished by the notice party to the IRC. In my view, the IRC was clearly entitled to have regard to that information in discharging the mandatory obligation imposed on it by Regulation 26.1 to consider whether or not there was a case to answer; indeed, it is difficult to see how it could have been compliant with the IRC's procedural obligations to the notice party not to have regard to that information and submissions. While it would have been entitled to direct the CAI executive to conduct further investigations or indeed to direct the raising of further queries with the complainant, it had no *obligation* to do so.
89. I do not see that the bright line division between the investigative phase of the IRC's work and its decision as to whether or not there is a case to answer exists in the manner contended for by the applicant. In that regard, it is important to note that while the IRC had furnished draft formal allegations to the notice party, the process had not in fact moved to the point where those allegations had moved beyond draft allegations and become formal allegations which would ground the commencement of the post-"case to answer" phase under the Regulations.
90. Accordingly, in my view, CAI/the IRC did not act in breach of fair procedures in not furnishing the applicant, for its response, with the notice party's letter of 4th March 2020 or other documentation or submissions furnished by the notice party to CAI/the IRC in the course of the process leading to the decision in issue in these proceedings.

#### **Duty to give reasons**

91. As noted earlier, Regulation 26.5 requires the Head of Professional Conduct to notify both the member and the complainant of the IRC's decision "and the reasons therefor".
92. It is clear from the comprehensive analysis of the jurisprudence on the duty to give reasons contained in the judgment of Clarke CJ in *Connelly v An Bord Pleanála* [2018] IESC 31 ("*Connelly*"), that a core rationale for the duty to give reasons is to allow a party to whom a decision is addressed to assess whether the decision is lawful and to assess whether there is a basis to have the decision appealed or judicially reviewed as the case might be.
93. Following a survey of *dicta* in leading authorities as to the duty to give reasons (including *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, *Meadows v Minister for Justice* [2010] 2 IR 701, *Rawson v Minister for Defence* [2012] IESC 26, *EMI Records v Data Protection Commissioner* [2013] IESC 34 and *Oates v Browne* [2016] IESC 7), Clarke CJ stated as follows (at paragraph 6.15):

*"...it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least 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 bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."*

94. In a passage of significance to the issues in this case, Clarke CJ also observed at paragraph 6.17 that

*"Where a person has participated in a process it might potentially be open to a decision maker to point to information which would be obvious to someone who had so participated for the purposes of explaining a decision and this information might help to satisfy the requirement to give reasons. However, where the person who seeks to challenge the decision was not involved in the process, it may not be open to the decision maker to take this approach, as the same information might not necessarily be obvious or available to the 'outsider', and therefore the requirement to give reasons would not necessarily be met."*

95. He returned to emphasise this point later in his judgment (at paragraph 7.6) in the following terms:

*"The range of persons who are able to challenge a particular decision will vary from case to case, as will the extent of their involvement in the process. Thus...the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision. Clearly, the ability of a person who was not involved in the process, but who is nonetheless entitled to challenge the decision, to identify the reasons for a decision, where those reasons are to be derived from a diffuse range of sources, will differ greatly from the ability of a person who was involved in the process to do so."*

96. In *Flynn v Medical Council* [2012] 3 IR 236 in the context of a decision as to whether there was a *prima facie* case to answer of professional misconduct (i.e. a decision taken at an equivalent stage in the Medical Council disciplinary process to that taken by the IRC in the CAI disciplinary process here), Hogan J applied the test set down in *State (Lynch) v Cooney* [1982] 1 IR 337, that the reasons must enable the addressee to establish that the decision was "*bona fide, not unreasonable and factually sustainable*". That approach of Hogan J was cited with approval by Meenan J in a similar professional regulatory context in *BM v Fitness to Practise Committee of the Medical Council* [2019] IEHC 106 at p.14.

97. I am acutely conscious that a complainant under the Regulations in issue here has a very limited set of procedural entitlements; as the respondents put it in their submissions a complainant's rights are very much at the shallow end of the spectrum of procedural entitlements. However, the Regulations here impose an express duty on the IRC when giving a decision that a complaint yields no case to answer to give reasons for that decision. In my view, it follows that such reasons must, in accordance with the case law, enable all addressees (i.e. both the complainant and the notice party the subject of the complaint) to understand in broad terms why the decision was taken the way it was and to enable them assess whether the decision was lawful.
98. In my view, the requirement under the Regulations that the IRC give reasons for its decision as to why a complaint yielded no case to answer was breached on the very particular facts of this case.
99. From the minutes of the IRC's meeting of 16th March 2020, and the decision taken at that meeting, the following matters could be objectively understood:
- (i) an Independent Reviewer concluded that the Conduct Committee's decision on disciplinary matters was wrong which resulted in matters being referred to the IRC for determination
  - (ii) the IRC was tasked with determining whether or not there was a case to answer in respect of a disciplinary matter relating to whether the price survey was fundamentally flawed in its methodology and biased in favour of Aldi
  - (iii) the IRC procured investigation of the allegations in the applicant's complaint letter as to the selection of more expensive products when cheaper products were available in the applicant's stores at the time of the survey and investigations into whether reliance on a price list from Aldi whilst physically shopping at competing stores was appropriate
  - (iv) the IRC requested calculations on the impact or potential impact of the material provided by the applicant in its letter of 9th December 2019 on the results of the survey
  - (v) the IRC at a meeting of 28th January 2020 considered there were potentially significant weaknesses in the design and methodology of the survey such as to give rise to a case to answer and directed the preparation of draft formal allegations in relation to same and the provision of those draft formal allegations to the notice party to make representations
  - (vi) the notice party made representations by letter of 4th March 2020
  - (vii) in light of the further information in the 4th March 2020 letter, the IRC revisited its previous decision (of 28th January 2020) and had now decided that there was no case to answer

- (viii) the “further information and explanations” provided in the 4th March 2020 letter made it more likely in the IRC’s view that a Disciplinary Tribunal would hold that decisions relating to the design and implementation of the survey reflected the exercise of reasonable professional judgment on the part of the notice party
  - (ix) the IRC had concluded, notwithstanding that questions still remained regarding the quality of the work performed, that on balance there was no real prospect of the notice party being found guilty by a Disciplinary Tribunal of poor professional performance in relation to the disciplinary matters.
100. The letter of 4th March 2020 was clearly decisive to the IRC’s Decision. The notice party had that letter; the applicant did not. The Decision references “further information and explanations” in that letter without giving the applicant, as an addressee of the Decision, any even broad sense of the substantive content of such information and explanations. In my view, it was not objectively intelligible to the complainant from the terms of the Decision as to what it was in the contents of the notice party’s letter of 4th March 2020 (or otherwise) which led the IRC to arrive at the decision it did. This inadequacy is heightened by the fact that on the face of the Decision it is apparent that the IRC was now reversing a decision which it had taken on 28th January 2020 (following an assessment of the respective contentions on the underlying facts put forward by the applicant and the notice party to that point) that there was a case to answer. The applicant could not reasonably have divined from the terms of the Decision (including the minute of the meeting at which it was taken) the basis on which the IRC had effectively reversed the view it had arrived at some 6 weeks earlier.
101. Given that the applicant had not been furnished with the 4th March 2020 letter, the observations of Clarke CJ in *Connelly* about the heightened need for intelligible reasons when the decision affects an “outsider” are particularly apposite here; the applicant was not armed with any other documents or information from the process (other than the notice party’s till receipts from its in-store visits) such as to allow it understand the basis of the Decision from such other documents or information read with the Decision.
102. In the context of addressing the issue of the correct approach to determining whether there was a *prima facie* case of alleged professional misconduct to answer on the part of a solicitor subject to a disciplinary process under the Law Society’s disciplinary procedures, Finnegan P stated as follows in *Law Society v Walker* [2007] 3 IR 581 at paragraph 29:
- “In the light of the authorities which I mention I am satisfied that the function of the tribunal is to consider all matters on affidavit before it. While at this stage of the procedures the tribunal is not the fact finding body it may for the purposes of deciding on whether a prima facie case is disclosed make findings of fact where the facts are clear, for example, where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held.”*

103. In respect of the IRC's Decision here, it is simply unknown as to what key facts the IRC relied upon to ground its decision. It is not known, for example, whether the IRC took the view that even if the applicant's factual contentions were taken at their height, those facts coupled with the matters raised in the notice party's letter of 4th March 2020 did not in the IRC's opinion reached the necessary threshold of seriousness to warrant a determination that there was a case to answer. It is equally unknowable from the terms of the Decision whether the IRC accepted the notice party's contentions in the 4th March 2020 letter as to asserted inadequacies in the evidence which the applicant had tendered in support of its complaint, and, if so, why it preferred the notice party's position on those matters over the position of the applicant when those matters concerned what had factually happened in the applicant's stores and when it had apparently rejected the notice party's position on the same evidence in its earlier decision of 28th January 2020 on the same issue.
104. In the circumstances, I am driven to the conclusion on the very particular facts of this case that the IRC acted in breach of its duty to give reasons for its decision which were intelligible to the applicant and which would enable the applicant assess whether the decision was lawful.

#### **Remedy?**

105. Counsel for the respondents drew my attention to a passage in the 5th edition of *Hogan, Morgan and Daly on Administrative Law in Ireland* in relation to the question of the remedy for lack or insufficiency of reasons. The authors note, in answer to "the most practical question" as to the appropriate remedy for lack or insufficiency of reasons, that "*the two most likely alternative answers would be either an order quashing the decision, or an order to require provision of the reasons*" (at paragraph 16-51). They reference (at paragraph 16-53) the decision of Humphreys J in *Krupecki (No 2)* [2018] IEHC 538 in which he offered the following typology of courses open to a court in a case in which reasons are found to be lacking:

- "(a) *quash the decision;*
- (b) *make a final order declining to quash it but directing further reasons; if those further reasons are inadequate, there is the possibility of further separate proceedings being brought by a given applicant;*
- (c) *make an order directing further reasons and adjourning the application insofar as it seeks to quash the decision pending the outcome of that process;*
- (d) *adjournment simpliciter with the opportunity being given to the respondent to supplement the decision by way of a statement of reasons in whatever form, including by filing a further affidavit or by furnishing such reasons directly to the applicant;*
- (e) *deal with individual elements of the decision separately ...; and*

- (f) *combine one or more of the above with a process whereby the applicant can be facilitated in seeking to review, revisit or reopen the impugned decision.*

*The court has a discretion to exercise whichever of these is just and appropriate in any given set of circumstances; but in general there may be many circumstances where it would be inappropriate to quash in its entirety a decision that might otherwise be valid if the problem can be dealt with simply by directing reasons. The fundamental precept of separation of powers would suggest that the court should seek only a proportionate interference in executive power rather than a disproportionate interference ... The court can have regard to all such relevant circumstances, including the risk of retrospective creation of reasons, whether it is practicable to require the decision-maker to state the original reasons, whether the lapse of time since the original decision is such that reasons cannot be identified, and so on."*

106. As will be noted, Humphreys J identified as potentially relevant factors in weighing whether to simply direct reasons rather than quash the decision the "risk of retrospective creation of reasons" and also "whether it is practical to require the decision-maker to state the original reasons".
107. In my view, this would not be an appropriate case in which to direct the furnishing of reasons at this point. As noted earlier in this judgment, the applicants wrote to the IRC seeking reasons for the decision shortly after the IRC had furnished its decision. The IRC responded to state that it was *functus officio* and, in effect, that the decision spoke for itself. Given the range and number of issues the subject of submission by the notice party in its letter of 4th March 2020 to the IRC, I do not believe that this would be an appropriate case to direct reasons at this point. This is not a case where, for example, no reasons were furnished by the decision-maker to the subject of the decision but where the evidence suggests that contemporaneous reasons do exist on file which could now be furnished.

### **Conclusion**

108. In the circumstances, I will grant the order of *certiorari* sought and remit the matter for fresh assessment by a differently constituted independent review committee.