Neutral Citation Number: [2021] EWHC 1069 (Admin)

Case No: CO/1773/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2021

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE QUEEN on the application of DAVID WARREN HANNAH	**Claimant**
- and –	
THE CHARTERED INSTITUTE OF TAXATION	**Defendant**
-and-	
(1) THE TAXATION DISCIPLINARY BOARD LIMITED and (2) CORNERSTONE TAX LIMITED	**Interested Parties**

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Richard Clayton QC and Julian Hickey (instructed by **Levy and Levy**) for the **Claimant**
Rupert Paines (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 2nd – 3rd March 2021

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Approved Judgment

Mr Justice Holgate:

Introduction

1. The claimant, David Warren Hannah, brings this claim for judicial review to quash the decision by the defendant, the Chartered Institute of Taxation ("the CIOT"), on 19 February 2020 to refer a complaint against him to the Taxation Disciplinary Board ("the TDB") in relation to advice he has given clients on Stamp Duty Land Tax ("SDLT").

2. The claimant has been a member of the CIOT since May 1988 and is a chartered tax adviser. He is the founder and sole owner of the second interested party, Cornerstone Tax Limited, ("Cornerstone"), a specialist practice dealing with SDLT. Mr Hannah is also a chartered accountant.

3. Cornerstone and The Tax Disciplinary Board Limited were served as interested parties but did not take part in the proceedings.

4. The claimant submits firstly, that the defendant is amenable to judicial review, at least in relation to its function of referring any complaint about the conduct of one of its members to the TDB. Secondly, he submits that the CIOT acted unfairly by referring the complaint to the TDB without giving him any opportunity to make representations on the matter. The defendant accepts that no such opportunity was given.

5. The defendant submits that it is not amenable to judicial review as a body, nor, more particularly, in relation to its function of referring a complaint against one of its members to the TDB for consideration. All such matters are subject to control under private law, in particular by the law of contract. However, if it is amenable to judicial review, there was no requirement to give the claimant an opportunity to make representations before deciding whether to refer the complaint to the TDB. But if the court should decide that the CIOT is amenable to judicial review and did act unfairly, then the defendant submits that relief should be refused under s. 31(2A) of the Senior Courts Act 1981.

6. Accordingly, the court is asked to determine the following issues:-

    (i) Whether CIOT's function of referring a complaint to the TDB is amenable to judicial review;

    (ii) If it was, whether procedural fairness required the claimant to be given an opportunity to make representations;

    (iii) If the answer to (ii) is yes, whether relief should be refused under s. 31(2A), because it is highly likely that the outcome for the claimant would not have been substantially different if he had been given an opportunity to make representations to the CIOT before any decision to refer was taken.

7. Other issues, such as whether the defendant acted in breach of article 1 of the First Protocol to the ECHR and whether, the quashing order sought by the claimant should be refused because the claimant has an adequate alternative remedy, were not pursued.

8. I am grateful to all counsel for their helpful submissions.

9. This judgment is set out under the following headings:-

- The Chartered Institute of Taxation
- The disciplinary framework
- The allegation against the claimant
- Whether the defendant is amenable to judicial review
- Whether the claimant was entitled to make representations before the referral
- Whether relief should be refused under s. 31(2A) of the Senior Courts Act 1981.

The Chartered Institute of Taxation

10. The defendant is a membership organisation for tax professionals. It is one of the leading bodies in the field of tax advice. It has over 19,000 members and 5,500 students. Membership is by examination, an attainment which is said to represent a gold standard in UK tax education. A member is referred to as a Chartered Tax Adviser and is entitled to add the initials CTA after his or her name.

11. There are at least 14 professional bodies operating in this field. It is estimated that about two thirds of tax agents hold a recognised accountancy or tax-based qualification and are members of one or more of these professional bodies. However, a tax adviser is not required to be a member of a professional body such as the CIOT.

12. Each member enters into a membership contract with the CIOT under which he or she is obliged to comply with its Bye-laws, Members' Regulations, Council Regulations and disciplinary rules and is also obliged to accept the jurisdiction of the TDB.

13. The defendant is a registered charity. On 29 April 1994 the Institute of Taxation, a company limited by guarantee, was granted a Royal Charter. By paragraph 1 the members of the Institute from time to time are made a body corporate.

14. The objects of the CIOT are set out in paragraph 2 of the Charter:-

> "(1) to advance public education in and promote the study of the administration and practice of taxation and the principles of economic and political science in relation to taxation;
>
> (2) (i) to prevent crime and
>
> (ii) to promote the sound administration of the law for the public benefit by promoting and enforcing standards of professional conduct amongst those engaged in the provision of advice and services in relation to taxation and monitoring and supervising their compliance with money laundering legislation."

15. Paragraph 3 of the Charter confers a number of powers on the CIOT including:-

> "(5) To formulate and promote high standards of professional conduct and competence for all those engaged in the administration and practice of taxation, to frame and establish rules for observance in all matters pertaining to professional practice therein, to develop the technique of taxation and to discipline members either under the Institute's internal regulatory provisions or by referring complaints under joint disciplinary arrangements entered into with other bodies, to contribute to the costs of such joint arrangements and to pay and indemnify the members of any boards or committees set up for the purpose of such arrangements."

The CIOT does not have any internal procedures for disciplining its members. Instead, it relies upon the "joint arrangements" it has made for the establishment of the TDB (see below).

16. CIOT's income is derived from membership subscriptions, student registrations, examination fees, conferences, events and investment income and the income from charitable activities. It receives no Government funding (save for an amount restricted to the work of the Low Income Tax Reform Group). The defendant does not have any general statutory powers. It has a limited role as a "supervisory authority" under anti-money laundering legislation.

17. Byelaw 2(12) of CIOT's byelaws provides:-

> "(a) The Institute shall establish and maintain a code of conduct for Members and students, including professional rules and practice guidelines, and breach of such code or of any other Laws of the Institute shall constitute grounds, but not exclusive grounds, for disciplinary action by the Institute, and shall be an offence for the purposes of such action under any disciplinary scheme established by the Institute in co-operation with other bodies. A complaint about the conduct of a Member or student whilst a Member or student of the Institute may be raised with or by the Institute, or addressed or referred to the TDB, at any time.
>
> (b) The Institute shall adopt (and may amend from time to time) such disciplinary schemes, and rules and provisions in connection therewith, as Council sees fit. All complaints against Members or students received by or raised by the Institute shall be dealt with in accordance with such schemes, rules and provisions by the TDB. Decisions arrived at under such scheme shall have effect as if the scheme were part of the Laws of the Institute."

18. It is to be noted that under byelaw 2(12) a complaint about the conduct of a member may be raised with or by the Institute, or addressed or referred to the TDB at any time. Thus, complaints dealt with by the TDB do not have to emanate from the CIOT. The court was told that many complaints are made directly to the TDB by clients of

members and in some cases by HMRC. Byelaw 2(12) does not make the referral of a complaint by the CIOT to the TDB subject to the member in question being given a prior opportunity to make representations.

The disciplinary framework

The Taxation Disciplinary Scheme

19. Both the Royal Charter and the byelaws allow the CIOT to deal with the disciplining of members through joint arrangements with other professional bodies. In 2008 the CIOT and the Association of Taxation Technicians ("the ATT") jointly established the Taxation Disciplinary Scheme ("the TDS"). Together they formed The Taxation Disciplinary Board Limited to deal independently with disciplinary matters affecting their respective members. The TDB is jointly funded by the two professional bodies.

20. Paragraph 1.5 of the TDS states:-

> "This Scheme, to be known as the "Taxation Disciplinary Scheme" ("the Scheme") is established for the purpose of dealing on an independent and impartial basis with complaints against Members regulated by the participants. The TDB will have jurisdiction over allegations of breaches of professional standards and guidance, provision of inadequate professional service, or conduct unbefitting a Member."

21. Section 3 of the TDS defines the jurisdiction of the TDB and the bodies constituted for the purposes of the scheme, including an Investigation Committee, the Disciplinary Tribunal and the Appeal Tribunal. Under paragraph 3.1 the TDB is to "arrange for the fair and expeditious handling, investigation and adjudication of complaints." The TDS defines "complaint" as "an allegation of a breach or a series of breaches" of *inter alia*:-

> "in relation to the Institute, the Charter, the Byelaws and/or the Regulations and/or any other provisions regulating the activities of Members, or their conduct, including any disciplinary scheme established by the Institute alone or in co-operation with other bodies;…."

A "complainant" "means a person or body who has made a complaint against a member to the TDB or the TDB itself when investigating matters of its own volition." Thus, it is plain that a complaint need not emanate from the CIOT. A person or body may make a complaint directly to the TDB, or the latter may act of its own motion.

22. Section 5 of the TDS confers power on the TDB to make regulations regarding (inter alia) the procedures to be followed and the sanctions that may be imposed.

The Taxation Disciplinary Scheme Regulations

23. The Taxation Disciplinary Board Limited made the Taxation Disciplinary Scheme Regulations 2014 ("the Regulations") pursuant to the powers conferred on it by the TDS. The Regulations are therefore non-statutory.

24. The Regulations employ the same definitions of "complaint" and "complainant" as the TDS (regulation 2.1).

25. The disciplinary process involves up to four stages. First, a complaint is considered initially by a Reviewer under part 3 of the Regulations. If the Reviewer considers that a complaint does not fall within the compass of the scheme, or, even if proved, would not merit a sufficiently serious sanction to justify prosecution, he may determine that no further action be taken (regulations 3.4 to 3.6). Otherwise, the Reviewer may refer the complaint to an Investigation Committee, subject to having previously given the relevant member 21 days within which to comment on the complaint (regulation 3.8). Thus, the first stage is a form of triage, similar to that found in other disciplinary schemes.

26. Part 4 of the Regulations deals with the second stage which involves the Investigation Committee. Its role is to consider whether the complaint discloses a prima facie case (regulation 5.1), defined as "a factual allegation, or series of factual allegations which, if proved would result in the Defendant's being guilty of a disciplinary offence" (regulation 2.1). Under regulation 5.2 a prima facie case may include (a) a breach of professional standards and guidelines, or (b) inadequate professional service, or (c) "conduct unbefitting" (that is conduct which tends to bring discredit upon the member and/or harm to the standing of the profession and/or the relevant professional body). Before reaching its decision, the Committee must be satisfied that the member the subject of a complaint has been given "a reasonable opportunity to make written representations to it" (regulation 4.6).

27. If the Committee finds that a prima facie case has not been made out, it must reject the complaint (regulation 5.3). If the Committee finds that there is a prima facie case, but the complaint is of such a minor nature or would not merit a sanction sufficiently serious to justify prosecution, it may order the complaint to lie on the file for 3 years. If the Committee considers that, although there is a prima facie case, the evidence is of insufficient strength to establish the facts before a Disciplinary Tribunal, it may order that no further action be taken. Finally, if a prima facie case is made out, the Committee may refer the complaint to a Tribunal (regulation 5.4).

28. Part 6 of the Regulations sets out the procedure to be followed if a complaint should reach the third stage, a Disciplinary Tribunal. The chair must be a legally qualified person (regulation 12.2). The Regulations provide for the exchange of witness statements and documents. The procedure is adversarial. At the hearing the defendant may appear in person or be represented. He must be given a fair and reasonable opportunity of being heard (regulation 17.1). A person appointed by TDB presents the case against the defendant. Witnesses are called and may be cross-examined. The defence case is then heard in a similar manner. Closing submissions may be made. The burden of proof to the civil standard lies on the presenter. A charge which the Tribunal finds is not proven must be dismissed. In that event, the Tribunal has a limited power to order the TDB to pay the defendant's costs, but only if it considers that the charge was brought "maliciously or without justification" (regulation 20.5). If the Tribunal finds the charge proved, a wide range of sanctions is available to it, from ordering the complaint to lie on the file or the defendant to make an apology, through the giving of a warning or censure, to suspension or expulsion from membership (regulation 20.6(f)). The Tribunal must give reasons for its decision (regulation 20.8).

29. Under the fourth stage, either the TDB or a defendant may appeal against the decision of a Disciplinary Tribunal to an Appeal Tribunal (see part 7 of the Regulations). The grounds of appeal may challenge the finding of a Disciplinary Tribunal as having been wrong or the sanction it imposed as unreasonable, or may raise a serious procedural or other irregularity (regulation 21.4). The Appeal Tribunal may rely upon evidence given below or may re-hear such evidence or, in some circumstances, may allow new evidence to be given (regulations 21.4 and 23.6). An appellant has a right to make written representations or to appear before the Appeal Tribunal, whether in person or by a representative (regulation 23.2).

30. Regulation 30.1 requires proceedings before the Investigation Committee and any Tribunal to be conducted "in a manner consistent with the principles of natural justice."

31. The structure of the Regulations is similar to other disciplinary codes. The claimant has not suggested that the procedures laid down by the Regulations involve any unfairness. The complaint in this case is limited to the prior stage at which the CIOT has decided to refer a complaint to a Reviewer.

Professional Rules and Practice Guidelines

32. The CIOT and the ATT have jointly adopted the Professional Rules and Practice Guidelines ("the Rules"). Their aim is "to create an educational and ethical framework of the highest standard to produce tax advisers of the best quality for the general public" (paragraph 1.1). The document sets out principles and rules with which members must comply (paragraph 1.2). It has been "designed to protect both the public and members by aiming to preserve public confidence in the tax profession and assisting members to maintain appropriate professional standards." Members who fail to comply may face disciplinary action (paragraph 1.3). A member owes a duty not to act in such a way as to bring the CIOT or the ATT into disrepute or so as to harm their reputation or standing (paragraph 1.7).

33. Paragraph 1.4 explains that chapter 2 of the Rules contains the five fundamental principles that a member is required to observe. The following parts of the document expand upon those principles. Paragraph 2.1 identifies the five fundamental principles under the headings: integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. The second part of chapter 2 of the Rules sets out certain obligations imposed on members, including having professional indemnity insurance (2.7) and compliance with anti-money laundering legislation (2.10). A member is subject to the disciplinary processes of the TDB and must comply with its orders (2.13).

34. Of particular importance in this case is paragraph 2.9 which requires a member to conduct their tax work in accordance with the document entitled "Professional Conduct in Relation to Taxation" ("PCRT").

35. The Rules cover a wide range of professional conduct issues, including practice governance (chapter 3), dealings with new clients (chapter 4), client service (chapter 5), objectivity and conflicts of interest (chapter 6), dealings with HMRC, third parties, other professional advisers client money and tribunals (chapter 7), charging for services (chapter 8), ceasing to act for a client (chapter 10), documents, electronic data and records (chapter 11) and advertising, publicity and promotion (chapter 12).

36. Chapter 9 deals with complaints. Paragraph 9.2.1. states:-

> "TDB is legally and operationally independent of CIOT and ATT and manages the Taxation Disciplinary Scheme which is the practical mechanism for handling complaints made against members."

Professional Conduct in Relation to Taxation

37. The PCRT has been produced by seven professional bodies whose members provide tax advice, including the CIOT and the ATT. It was first introduced in 1995 and has evolved to take account of changing practices. The Foreword to the current edition (republished on 1 March 2019 but effective from 1 March 2017) records that HMRC incorporated the PCRT into its own Standards for Tax Agents published in January 2018.

38. The PCRT comprises five fundamental principles (chapter 2) and five standards for tax planning (chapter 3). The principles reflect those set out in the Rules adopted by the CIOT and the ATT.

39. Paragraph 3.1 explains that in order to protect the reputation of members, the wider profession and the public interest, the seven professional bodies have developed Standards that members must observe when advising on UK tax planning. They build on the "fundamental principles", focusing in particular on integrity, professional competence and professional behaviour. The standards are set out under the following headings listed in paragraph 3.2:-

- Client Specific
- Lawful
- Disclosure and transparency
- Advising on tax planning arrangements
- Professional judgment and appropriate documentation.

40. The "lawful" standard requires *inter alia* that:-

> "Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. "

Paragraph 3.6 states:-

> "The requirement to advise clients on material uncertainty in the law (including where HMRC take a different view) applies even if the practical likelihood of HMRC intervention is considered low. Clients should be told what would be reasonable, at the time of the transaction, to expect HMRC to believe the application of the law to be (assuming HMRC was fully apprised of all the facts

> of the transaction). Where the likely view of HMRC is uncertain or not known, the member should include this fact as part of their advice."

41. Of particular significance in the present case is the following standard in paragraph 3.2 for giving advice on tax planning arrangements:-

> "Members must not create, encourage or promote tax planning arrangements or structures that: i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation; and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation."

The allegation against the claimant

42. The allegation is clearly set out in CIOT's decision letter dated 19 February 2020. This is the decision which the claimant seeks to challenge:-

> "The CIOT has referred you to the Taxation Disciplinary Board (TDB) following information drawn to its attention which suggests that SDLT tax planning devised and promoted by Cornerstone may breach the new standards for tax planning contained in Professional Conduct in relation to Taxation.
>
> From the information available to the CIOT it would appear that the planning as described below may breach the following standard "Advising on tax planning arrangements Members must not create, encourage or promote tax planning arrangements or structures that: i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation; and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation."
>
> The CIOT's understanding of the planning in question is as follows:
>
> **SDLT tax planning scheme promoted by Cornerstone**
>
> **Aim of the scheme**
>
> The aim is to purchase a residential property paying SDLT at non-residential rates instead of the much higher residential rates.
>
> Residential rates of SDLT apply where only residential property is acquired. If, instead, what is bought is a mixture of residential and non-residential property in a single or linked transaction, the purchase price is subject to non-residential rates.
>
> The difference in rates is considerable. Two sets of SDLT rates apply to a purchase of residential property by individuals,

ordinary rates and higher rates, that is the ordinary rates plus a 3% surcharge. (Very broadly, the 3% surcharge applies in some circumstances where the buyer already owns another residential property.)

The top rate of ordinary SDLT on a residential purchase for £1.5m or more is 12% (increased to 15% if the surcharge applies). The top rate of SDLT for a non-residential or mixed purchase is only 5%.

Summary of scheme (based on anecdotal evidence only)

- The approaches the vendor and offers, say £10,000 as a non-refundable fee for a reservation agreement deductible from the purchase price. The reservation agreement gives a right equivalent to an option to purchase a property. (A variation might be an exclusivity agreement that gives a right of first refusal to buy a property.)

- The scheme provider offers to draft the reservation/exclusivity agreement.

- The user is told that the reservation agreement is considered a commercial (non-residential) element as the buyer would be buying a right to buy a property rather than the property itself. There are therefore two linked transactions;

    - an option (or pre-emption agreement in the case of first refusal) over the residential property which is held out as a non-residential transaction and

    - the purchase of the residential property itself.

- The mixture of non-residential and residential allows the lower non-residential SDLT rates of tax to apply to the whole purchase price.

- Guidance is given as to what should be said to the seller.

  The CIOT has also asked the TDB to consider whether your actions have breached the fundamental principles of Integrity and Professional Behaviour."

43. The CIOT based its understanding of the claimant's SDLT-saving scheme on the description given in documents produced by Cornerstone for its client. Not surprisingly, therefore, the claimant does not take any significant issue with the summary of the scheme given in the referral letter.

Whether the defendant is amenable to judicial review

44. In *R v Panel on Take-Overs and Mergers ex parte Datafin plc* [1987] QB 815 the Court of Appeal held that judicial review is not restricted to bodies which derive their powers from legislation or the prerogative. If the source of power is legislation, then the body in question will generally be subject to judicial review. If at the other end of the scale the source of power is purely contractual, as for example in the case of a private arbitration, judicial review is not available. In the area between those two poles, it is relevant to look not only at the source of the power but also its nature, to see whether the body is exercising public law functions, or whether the exercise of its functions has public law consequences. The essential distinction is between on the one hand, a purely domestic or private tribunal and on the other, a body which is under a public duty. It is also relevant to consider whether the body was established under the authority of the Government. (pp. 838, 847 and 849 – 850).

45. Although the Panel lacked any authority *de jure*, it exercised "immense power *de facto*" by making and interpreting the code on take-overs and mergers, determining whether breaches had occurred and laying down sanctions. A finding by the Panel of non-compliance with the code amounted *ipso facto* to misconduct under the rules operated by bodies represented on the Panel and affected the Stock Exchange's statutory functions for the listing of securities under regulations giving effect to an EEC directive. The Panel's procedures were quasi-judicial. Its code and rulings applied to anyone wishing to make a take-over bid or to promote a merger, whether or not they were a member of a body represented on the Panel. Central government had incorporated the Panel into its own regulatory framework established by legislation (pp 826, 834-6, 838 and 850-852). Accordingly, the Panel was amenable to judicial review.

46. Mr Richard Clayton QC, for the claimant, placed heavy reliance upon the decision of Popplewell J in *R v Code of Practice Committee of the Association of the British Pharmaceutical Industry ex parte Professional Counselling Aids Limited* (1991) 3 Admin. L.R. 697. The respondent was a trade association which relied upon a code of practice to secure high standards in the marketing of medical products designed for use under medical supervision. The code was binding on members of the association, but in practice both the code and decisions of the respondent's committee concerning breaches of the code were also followed by non-members.

47. Following *Datafin*, the judge held that the committee was amenable to judicial review (pp. 709 – 720). The relevant Government department had issued proposals for a combination of statutory regulation and amendments to the respondent's code of practice. The respondent had agreed to amend its code so as to ensure compatibility with the proposed regulations. The department was given the opportunity to comment on the suitability of proposed appointments of independent persons to be members of the committee. The committee's decisions were to be notified to the department. In *YL v Birmingham City Council* [2008] 1 AC 95 Lord Mance summarised the decision in this case as relating to an association which had agreed to develop a code of practice in conjunction with a Government department, where the code was binding on its own members and followed in practice by any non-member operating in the sector (see [101]).

48. In some cases the court has decided that a body without any statutory underpinning was amenable to judicial review, because it was clear from the context in which it operated

that if it did not exist its functions would be carried out by an existing authority exercising statutory powers (*R v Advertising Standards Authority Limited ex parte Insurance Service plc* (1990) 2 Admin L.R. 77).

49. The case law following on from *Datafin* was reviewed by the Court of Appeal in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909. Sir Thomas Bingham MR (as he then was) explained *Datafin* in these terms at p. 921B:-

> "The effect of this decision was to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers. *Reg. v. Advertising Standards Authority Ltd., Ex parte Insurance Service Plc.* (1989) 2 Admin. L.R. 77 appears to me to be a precise application of the principle thus established to analogous facts."

50. He accepted that the Jockey Club effectively regulated a significant national activity, exercising powers in the public interest which affect the public and that, if it did not exist, the Government would probably create a public body to carry out those functions. But those considerations were insufficient to render the Jockey Club amenable to judicial review (p. 923H):-

> "It has not been woven into any system of governmental control of horseracing, perhaps because it has itself controlled horseracing so successfully that there has been no need for any such governmental system and such does not therefore exist. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental."

51. Hoffman LJ (as he then was) stated that whilst the absence of a formal public source of power, such as a statute or the prerogative, is not fatal to the amenability of a body to judicial review, because governmental power may be exercised *de facto* as well as *de jure,* "the power needs to be identified as governmental in nature" (p. 931D). He described the functions undertaken in *Datafin* and in the *Advertising Standards Authority* as "a privatisation of the business of government" (p. 931H). The regulation of racing was not "the business of government" (p. 932H).

52. Mr Paines for the defendant relied on a number of authorities, of which I shall refer to only three. First, *R v Insurance Ombudsman Bureau ex parte Aegon Life Assurance Limited* [1994] CLC 88 concerned an ombudsman service established by three insurance companies to resolve complaints from customers. An independent council appointed the ombudsman whose powers over the insurance companies were entirely contractual. Membership of the scheme was voluntary and could be terminated on 6 months' notice. Under s. 10 of the Financial Services Act 1986 the Life Assurance and Unit Trust Regulatory Organisation ("LAUTRO") was recognised as a self-regulating organisation for the regulation of investment business. LAUTRO in turn recognised the ombudsman as performing a complaints investigation function for the purposes of the 1986 Act and encouraged, but did not compel, its members to join the scheme.

53. The Divisional Court held that the ombudsman was not subject to judicial review. There was no governmental underpinning for the scheme. The ombudsman's jurisdiction depended entirely on the contractual consent of its members. Membership of the scheme was not obligatory for insurance companies. The scheme provided a method of alternative dispute resolution. Customers were not obliged to use it. They could instead rely upon the courts. The ombudsman was not exercising governmental functions. Even if it could be said that the scheme had subsequently been woven into a governmental system, that was not determinative. The scope of the ombudsman's power remained contractual and his decisions were of an arbitral nature in private law.

54. *R v Association of British Travel Agents ex parte Sunspell Limited* (12 October 2000), concerned a trade organisation, the members of which were bound to comply with a code of conduct solely by virtue of their contractual relationship with that organisation. Membership of ABTA was voluntary. Most of the large tour operators and travel agents were members, but many operators were not. Sunspell sought to challenge a fine imposed upon it under the Association's disciplinary code.

55. Keene J (as he then was) regarded the fact that the disciplinary powers derived solely from the contracts between the Association and its members, and not from any public law source, as a very important factor. He stated that where a body's power derives wholly from a voluntary submission to its authority, it is difficult to see how a decision of that body could be regarded as governmental or public in nature. He distinguished cases in which the entering into of such a contractual relationship was a necessary condition of being allowed to pursue a particular activity, where the function of the body in question may be seen as sufficiently woven into a system of governmental control. In this case, however, an individual company could operate as a travel agent without being a member of ABTA and so the Government had not chosen to rely upon the Association's processes as a substitute for regulation. Parliament had enacted regulations to control some aspects of the travel industry, but they were enforced by bodies other than ABTA. The Association's code of conduct and disciplinary procedures went further than those regulations in order to protect the good name and reputation of the Association and its members. The mere fact that the public derived some benefit from that system did not render it amenable to judicial review.

56. In *R (Holmcroft Properties) Limited v KPMG Limited* [2020] Bus LR 203 a bank had voluntarily given an undertaking to its regulator, the Financial Conduct Authority, to provide redress to customers who had been mis-sold interest rate hedging products. The bank undertook that it would not make an offer of redress unless a "skilled person" appointed by the bank, and approved by the regulator under its statutory powers, considered the offer to be appropriate, fair and reasonable. In addition, the regulator used its powers to require the "skilled person" to provide it with a report on the operation of the scheme, so that it might consider whether further powers should be exercised. The bank appointed KPMG to be its independent reviewer and the "skilled person" reporting to the regulator.

57. The Court of Appeal held that a decision by KPMG to approve an offer made by the bank to the claimant was not amenable to judicial review. The Court emphasised the need to consider carefully the nature of the power and functions being exercised to see whether the decision has a sufficient public element or character to bring it within the scope of judicial review (*R (Beer) v Hampshire Farmers' Market Limited* [2004] 1 WLR 233 cited at [47]). The Court also had regard to the principle that a body which

has not been established by governmental power, may nonetheless be subject to judicial review if its functions have been interwoven into the fabric of public regulation or governmental control ([43]).

58. The Court accepted that KPMG had no statutory power to make an assessment. Its power derived exclusively from the contract it had entered into with the bank ([48]). The Court then went on to analyse the position of the independent reviewer as part of the wider regulatory context. The bank had provided the voluntary undertaking to the regulator following an investigation by the latter which had led it to conclude that products had been mis-sold and to require that investors should be compensated under a scheme which included independent review by a "skilled person". But the regulator had chosen not to become involved in that scheme, which remained with the bank and was essentially for the pursuit of private law rights applying private law principles. The regulator had not required a decision of the reviewer to be subject to a process of challenge (([50]-[52]). The Court held at [53]:-

> "The requirements of the FSA merely overlaid, or sat alongside, a private dispute. They did not change the character of that dispute, which was fundamentally, a private law matter."

The possibility that regulatory sanctions might still be imposed in the future if the regulator considered that to be appropriate did not mean that the decisions of the independent reviewer were amenable to judicial review ([54]).

59. In my judgment, the function of the CIOT in deciding to refer a complaint against a member to the TDB is not amenable to judicial review for a number of reasons.

60. There is no statutory scheme regulating the conduct of tax advisers or providing for disciplinary proceedings to address professional misconduct. The TDB scheme is operated voluntarily by the CIOT and the ATT. The operation of the scheme may be suspended or terminated by agreement of the participants at any time, subject to giving 6 months' notice to the TDB, and a participant may withdraw on giving 6 months' notice. If the number of participants falls to one, the scheme lapses (see section 8 of the TDS).

61. The relationship of the members to the CIOT is purely contractual. The establishment and operation of the TDS, and the relationship between on the one hand, the CIOT and ATT and on the other, the TDB, is also purely contractual.

62. The CIOT is not involved in disciplining its members. Disciplinary proceedings against its members are entirely a matter for the TDB.

63. Disciplinary action against a member of the CIOT may be based upon the Professional Rules and Practice Guidelines (see [32] above). That document covers a wide range of subjects going far beyond "Professional Conduct in Relation to Taxation" or the giving of advice on tax planning. The document is aimed at maintaining professional standards in the delivery of services, public confidence in Chartered Tax Advisers, and the collective reputation of the Institute's members. That is beneficial not only to clients and to the public, but also to those who aspire to what the claimant has rightly called the "kite-mark" conferred by membership of the CIOT. It is advantageous for an agent to be able to promote himself as someone with the professional standing and reputation

of a Chartered Tax Adviser. The same considerations apply to the ATT and other bodies with similar disciplinary codes. It is in the interests, not only of clients and the public, but also of the collective membership of the CIOT, that there is a code of conduct and a disciplinary system to maintain professional standards and reputation. These features are entirely compatible with the position of a member under the disciplinary scheme being the subject of purely private law principles.

64. The TDB may receive complaints about a member of the CIOT or ATT directly from a member of the public, for example a client. There can be no question of a referral by such a person being amenable to judicial review. The function of referral to the TDB is no different where that is performed by the CIOT. The CIOT may decide, as in the present case, that it is appropriate to transmit a complaint which it has received from a member of the public. Alternatively, where that situation arises, the CIOT could advise the complainant to contact the TDB directly.

65. The absence of any public law underpinning for the TDS, or for referrals by the CIOT to the TDB, is reinforced by the fact that there is no requirement for any person or body giving tax advice to belong to the CIOT or any other professional body. It is permissible to practise as a tax adviser without submitting to the disciplinary powers of, for example, the CIOT. Many tax advisers do indeed operate without being subject to the code of conduct, backed by disciplinary sanctions, of a professional body.

66. In February 2016 HMRC issued a Standard for Agents (updated in January 2018) setting out what it expects of all agents with whom it deals. The 2018 revision has added a standard for the provision of advice on tax planning. Much of the document is similar to the PCRT, which has been in existence for many years. HMRC's "Standard" mentions criminal sanctions and civil penalties, but they are available to deal with offences and with dishonesty, and are not related to non-compliance with either the PCRT or that Standard. For breaches of standards dealing with professional behaviour, HMRC does not operate any sanctions regime, other than the possibility of it refusing to deal with a particular tax agent. It can refer cases of suspected misconduct "to professional bodies for them to investigate further and consider disciplinary action." That is simply a reference to the entirely contractual procedures operated by those bodies in respect of their members. There is no other procedure available to HMRC, or indeed to anyone else, where the misconduct relates to a tax agent who does not belong to a professional body, in particular one with a code of conduct enforceable by disciplinary procedures.

67. Similarly, the TDB can only make decisions in respect of misconduct on the part of members of either the CIOT or the ATT. Unlike the Panel on Take-overs and Mergers in *Datafin*, the TDB is unable to make decisions affecting the activities of non-members or the tax advice sector as a whole.

68. Mr Clayton QC sought to rely upon a number of documents in an attempt to demonstrate that the CIOT's standards of conduct, specifically the standard for advice on tax planning, and the disciplinary procedures (the TDS) are woven into the fabric of public regulation. In my judgment, this line of argument fails.

69. The PCRT produced in November 1995 was prepared in conjunction with the Institute of Chartered Accountants. Certain parts were reviewed by HMRC's predecessors, who

concluded that they provided an acceptable basis for their dealings with members (paragraph 1.1).

70. In March 2015 the Chief Secretary to the Treasury presented a paper to Parliament "tackling tax evasion and avoidance" (Cm 9047). Most of the document was concerned, not surprisingly, with the operation of substantive tax law. For example, measures were to be taken against a small minority of tax payers who persistently enter into tax avoidance schemes which HMRC defeats. The Government also announced (see paragraph 3.15) that it was asking the "regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance *to protect the reputation of the tax and accountancy profession and to act for the greater public good* " (emphasis added). This was a reference to professional bodies such as the CIOT.

71. The Government did not suggest, whether in this or any of the subsequent documents shown by Mr Clayton QC to the court, that it intended to introduce any statutory form of regulation, for example if the steps taken by professional bodies were considered to be insufficient. More importantly, the Government, fully aware of the fact that there is no requirement for a tax adviser to belong to a professional body, has not indicated that it is inclined to introduce such a requirement. It is also important to note that much of the focus of this passage in the 2015 paper was on the protection of the reputation of the profession. No doubt the Government had well in mind the straightforward point that the promotion of tax avoidance schemes with little prospect of success is damaging to that reputation and the level of service which consumers are entitled to expect.

72. The revised version of the PCRT issued in March 2017 contained a new standard for tax planning (see [40]-[41] above). The "Frequently Asked Questions" document which accompanied it explained that this was a response to the "challenge" which Government had set in March 2015. The authors made it clear that this was intended to avoid action which discredits the profession or, in other words, to maintain its reputation. One of the objectives was to encourage advisers to take "a reasonable and realistic view of the facts" with which they are dealing.

73. Mr Clayton QC drew attention to paragraph 1.1 of the current version of the PCRT which refers to the "tri-partite relationship between a member, client and the HMRC." That is entirely consistent with the other passages to which I have referred and does not indicate any inclination on the part of Government to introduce regulation or control of a governmental nature. Indeed, section 5 of HMRC's Standard for Agents states that:-

> "HMRC does not regulate agents. The commercial tax services market is self-regulating."

Even that last statement is only correct for those agents who choose to be a member of a professional body with a disciplinary code.

74. This point was expressed more accurately in paragraph 4 of HMRC's call for evidence document entitled "Raising Standards in the Tax Advice Market" (19 March 2020). This consultation exercise arose from an independent review of "the loan charge" which found that many members of the public had been introduced to such schemes by tax advisers (paragraph 6). It was suggested that where a tax payer employed a tax adviser to act on their behalf who gives poor advice, he should be able to access a robust

complaints process to put right any problems. That is possible where the tax adviser is a member of a professional body, but one third of such advisers are not (paragraph 61). On the other hand, increased protection for consumers should not erode the principle that the taxpayer remains accountable for his own affairs (paragraph 62). The document put forward a number of alternative options for consideration, including a requirement for all tax advisers to belong to a recognised professional body (paragraph 85). The document also put forward a further option of introducing a government regulator by whom all tax advisers would have to be licensed (paragraphs 87 to 90).

75. The CIOT's response was that if lesser interventions would not suffice then Government should consider extending self-regulation *by professional bodies* to all tax advisers. But they recommended proceeding cautiously because of the lack of hard information on those who do not belong to such bodies, in relation to the nature of their work and their business and financial structures (paragraphs 5.8 to 5.9).

76. The Government gave a summary of the responses it had received and an indication of "next steps" in a document published in November 2020. It noted that the PCRT is more comprehensive than HMRC's own "Standard for Agents". There was broad support for the use of HMRC's document as a "baseline standard", but it was suggested that HMRC should improve awareness of it, particularly amongst non-affiliated advisers. As regards new measures, the Government suggested that a first step would be to consult on a general requirement for all tax advisers to hold professional indemnity insurance. The Government showed no inclination to go any further by requiring all tax advisers to join a professional body or to be licensed by a new external regulator.

77. Accordingly, the excursion through this additional documentation, which was only lately introduced by Mr Hannah's witness statement dated 9 February 2021, does not advance his case one iota. The position remains that the CIOT's code of conduct and the TDS are not woven into a fabric of public regulation.

78. For completeness, I also mention a further point which arose from one sentence in the February 2020 version of the PCRT. This suggested that each of the professional bodies to which that document applies has entered into a memorandum of understanding with HMRC, by virtue of which a report from HMRC is expected to result in the body instigating its complaint procedure. This point turned out not to lead anywhere. The defendant's solicitors have explained that there is no such memorandum in place between the CIOT and HMRC. Instead, there is a memorandum between HMRC and TDB. Essentially, it addresses how TDB may handle material provided to them by HMRC in the context of HMRC's obligations regarding data protection and "client confidentiality".

79. For all these reasons, the CIOT's decision to refer a complaint about one of its members to the TDB is not amenable to judicial review and the claim must be dismissed. However, for completeness I will go onto address the remaining issues in the claim.

Whether the claimant was entitled to make representations before the referral

80. If, contrary to my conclusion, the CIOT's decision of 19 February 2020 is amenable to judicial review, there is no challenge to the substance of the decision. Rather it is submitted that it should be quashed on the grounds of procedural unfairness, because the claimant was not given any opportunity to make representations about the complaint

received by the CIOT before it decided to refer the matter to the TDB. There is nothing in the rules of the CIOT or the disciplinary scheme which would give the claimant, or someone in his position, any such entitlement. On the other hand, the requirements of fairness are not necessarily exhausted by the express provisions of such a scheme.

81. I should immediately clear out of the way a bad point that was repeatedly made in the claimant's skeleton, namely that the CIOT had expressly conceded that it had breached a duty to act fairly to Mr Hannah. This was said to have been admitted in an email dated 25 February 2020 from Mr John Cullinane, the defendant's Tax Policy Director. But the claimant's submission involved wrenching the first sentence of that email out of context. Read properly and together with the remainder of the communication, Mr Cullinane was simply saying that the claimant would have an opportunity to make representations *under* the TDB scheme before any decision is made on whether to formulate a charge for determination by a Disciplinary Tribunal (i.e. the first and second stages – see [25]-[26] above). Mr Clayton QC rightly did not rely upon this point in his oral submissions.

82. It is necessary to understand the nature of the decision which was taken by the CIOT when referring the complaint to the TDB and to put it into the context of the overall disciplinary scheme (*Lloyd v McMahon* [1987] AC 625, 702; *R (Durand Academy Trust) v Ofsted* [2019] PTSR 1144 at [63]).

83. The letter dated 19 February 2020 merely stated that the CIOT had decided to refer an issue to the TDB because it *would appear* that the SDLT planning advice *may* breach the relevant standard in the PCRT. The purpose of the referral was to ask the TDB to investigate and consider the matter. The CIOT's act of referral did not involve any conclusion that the standard had been breached, or even that there was a prima facie case as defined under the TDS, nor, plainly, was it a decision that a sanction should be imposed. Mr Hannah's assertion that the email amounted to a finding that he has breached the PCRT is misconceived (see also paragraph 43 of Mr Cullinane's witness statement).

84. The action taken by the CIOT precedes the first stage of the TDS scheme, the triage carried out by a Reviewer, and the second stage by the Investigation Committee to determine whether there is a prima facie case which merits being placed before a Disciplinary Tribunal (see [25] – [26] above). In each of these two stages the member concerned has the right to make representations on the matter being alleged before a decision is taken. No criticism is made by the claimant about the fairness of those procedural provisions.

85. Mr Clayton QC relied on the requirement under the TDS to give a member an opportunity to make representations in order to justify imposing the same requirement on the CIOT at the earlier stage when it is considering whether to refer a matter to the TDB. This was linked to his assertions that the CIOT had relied upon paragraph 5.1 of its policy for referring matters to the TDB, and that required a "prima facie case" to be shown. Both assertions were wrong. As the relevant documents (including the defendant's minutes) plainly state, and as Mr Cullinane has confirmed in his witness statement, the referral was made under paragraph 5.3, not paragraph 5.1, of the policy. Paragraph 5.1 relates to referral by the CIOT of its own motion. Paragraph 5.3 relates to external complaints received by the CIOT. At the time the impugned decision was taken, paragraph 5.1 stated that the member concerned could be "asked to explain how

their proposed planning complies with PCRT". However, paragraph 5.3 gave no opportunity for representations to be made by a member about the allegations against him. For completeness, I would add that paragraph 5.1 did not require a "prima facie" case to be shown. It would appear that the claimant has misunderstood the minutes about the decision taken in a second, and different, case.

86. Putting to one side these misunderstandings by the claimant and looking at the issues as a matter of principle, I see no legal justification for imposing a requirement that a member should be able to make representations before the CIOT may refer an external complaint to the TDB.

87. It is well-established that decisions on whether the duty to act fairly has been breached are fact-sensitive, but Mr Clayton QC very fairly accepted that he could not cite any analogous authority to support his proposition. The decision in *R (Balajigari) v Secretary of State for the home Department* [2019] 1 WLR 4647 was essentially concerned with the requirements of fairness in the context of substantive decision-making, in that case the determination of a person's immigration status. By contrast, Mr Paines cited two decisions of the Privy Council, *Furnell v Whangerei High Schools Board* [1973] AC 660, 680-2 and *Lawrence v Financial Services Commission of Jamaica* [2009] UKPC 49 at [33] – [38], which lend support to the defendant's contention that no unfairness occurs if a member has no opportunity to make representations before the CIOT refers a complaint to the TDB.

88. The action taken by the defendant was only a preliminary step. It did not involve any adverse decision that a breach had occurred, let alone any suspension or penalty or other sanction. It was simply a decision that the matter should be investigated by the independent body responsible for operating the disciplinary scheme.

89. Mr Hannah expresses concern about the damage to his reputation because of the referral to the TDB and that he should not come under pressure to put into the public domain arguments that relate to the merits of the tax advice relied upon by his clients and which may need to be considered in other proceedings involving them.

90. There is no merit in these points. As explained in Mr Cullinane's witness statement, referrals to the TDB and the first and second stages of the TDB process are not publicised. If a complaint reaches the third stage, a Disciplinary Tribunal *may* publish details of a forthcoming hearing, including brief details of the charge and the name of the person accused (regulation 28.6). Hearings are generally held in public (regulation 29). The written reasons for a decision are normally published, but if the member is successful, he is generally not named. There is therefore no legitimate concern in relation to harm to the reputation of a member or his firm. The concerns relating to client confidentiality are matters which can be raised before a Tribunal if that stage is reached, but that issue has nothing to do with whether any duty of fairness is owed by the CIOT at the referral stage to a member against whom a complaint has been made.

91. In the final analysis, there is no justification for adding a further requirement for a member to be able to make representations to the CIOT before it refers a complaint to the TDB. If a complaint is made directly by a client or by HMRC directly to the TDB, the member criticised has no entitlement to make any representations to that party before that step is taken. Moreover, the CIOT has no role to play in that process. The requirements of fairness are well satisfied by the TDB's procedural rules, which include

opportunities for the member to make representations in stage 1 and in stage 2. The position is no different if the CIOT decides to refer a complaint made to it by another party or decides to refer a matter of its own motion.

92. Even if, contrary to my earlier conclusion, the CIOT's function of referring a complaint to the TDB is amenable to judicial review, the sole ground of challenge upon which the claimant relies upon must be rejected.

Whether relief should be refused under s. 31(2A) of the Senior Courts Act 1981

93. Section 31(2A) of the Senior Courts Act 1981 requires the Court to refuse to grant relief if it appears to the Court "to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (subject to s.31(2B)). Here the conduct complained of is the referral by the CIOT to the TDB of a complaint against the claimant by a third party without having given the claimant an opportunity to make representations on the complaint before it was decided to take that step. So, the issue is whether it is highly likely that the external complaint made in this case would not have been referred to the TDB if the claimant had had an opportunity to make representations.

94. It is well-established that an allegation of a breach of a duty to act fairly depends upon the claimant showing that he has thereby been caused significant prejudice. As Lord Denning MR stated in *George v Secretary of State for the Environment* (1979) 77 LGR 689 "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made". Likewise, in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595 Lord Wilberforce stated that "[a] breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure" (see also *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49]).

95. It is for that reason that a person in the claimant's position is normally expected to provide evidence as to what they would have said to the decision-maker if they had not been denied the opportunity to make representations. Indeed, Mr Hannah has done so. The court can then assess whether the defendant can show that it is highly likely that the outcome for the claimant would not have been substantially different.

96. In the present case I have rejected the sole ground of challenge as a matter of principle, by deciding that there was no legal requirement for the CIOT to afford the claimant an opportunity to make representations before referring an external complaint to the TDB. In reaching that conclusion it was unnecessary for me to go further and to consider whether the claimant had demonstrated that he had suffered material prejudice through not having had the opportunity to make the representations to which he refers in his evidence. I have not yet addressed that issue. Accordingly, it is relevant here to take that material into account when applying the test in s. 31(2A).

97. In such a situation, the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345, 402C-E is often cited. But it should be borne in mind that that case was concerned with the denial of an opportunity to make representations before a substantive decision was

made, not a procedural decision. Here, it is not the function of the CIOT to determine an allegation against the claimant, or even to determine whether he has a *prima facie* case to answer. Those are functions which belong to the TDB. The CIOT simply has to consider whether there is sufficient information to support a complaint. In procedural terms the CIOT has merely referred a complaint to the TDB so that the Board can consider independently whether the complaint should be investigated and taken further. The issue under s. 31(2A) here is whether it is highly likely that the CIOT would have taken that initial step of referral, and nothing more, if the claimant had made representations to the Institute as summarised in his witness statement.

98. When applying s.31(2A) the Court must not cast itself in the role of the decision-maker, but it must necessarily make its own objective assessment of the decision-making process and what the result would have been if the legal error in question had not been made (*R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161 at [55]. I also bear in mind the principles set out by the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446.

99. I have already referred to the common ground between the parties that the CIOT's decision letter gave an accurate summary of Cornerstone's scheme (see [43] above). It has not been suggested that anything of significance to the CIOT's decision was omitted in this respect.

100. In his witness statement Mr Hannah says that he would have wished to make a series of points which, in essence, would have shown that he had acted on the basis of advice from Counsel, correctly interpreted SDLT legislation and had not therefore offended the PCRT.

101. However, I have reached the firm conclusion that, notwithstanding the material provided by the claimant, it is highly likely that the defendant would still have referred the external complaint to the TDB for consideration under the TDS. I have no doubt that it would still have been appropriate for that purely procedural and initial step to have been taken.

102. Mr Paines referred to para. AA36 of Sergeant and Sims on Stamp Taxes which says:-

> "In determining which set of rates to apply to the chargeable consideration given for an option, HMRC argue that the nature of the underlying property that is the subject-matter of the option is relevant: …… Consequently, an option over a dwelling would be taxed at the residential standard rates. The author agrees. The argument that the acquisition of such an option is taxed at the non-residential rates because it is 'distinct from any land transaction resulting from the exercise of the option' (see FA 2003 s 46(1)(b)) is, in the author's opinion, artificial, strained and contrary to common sense."

I am bound to say that I formed essentially the same view when I read the legislation in preparation for the hearing. However, it should be noted that the court has not heard argument on the merits of these rival points of views and I am not to be taken as deciding which is to be preferred. It is sufficient for me to say that this was, and remains,

a proper issue for referral to the TDB. I also note the evidence that schemes of this kind have been challenged. Indeed, Cornerstone themselves expected challenges to be made.

103. No argument was advanced to the court that s.31(2B) should be applied, and I see no justification for disregarding the requirements of s.31(2A) in this case.

104. For these reasons, the defendant also succeeds on this third issue in the case. I should just add that in reaching this conclusion, I have not found it necessary to rely upon Mr Cullinane's evidence as to what view the decision-makers would have reached on referral if they had taken into account Mr Hannah's summary of the representations he would have wished to make.

Conclusion

105. For the above reasons, the claim must be dismissed.