THE HIGH COURT
JUDICAL REVIEW

[2017] IEHC 777

[Record No. 2014/246 J.R.]

BETWEEN

COLM O'FLAHERTY

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGEMENT of Mr. Justice Moriarty delivered the 22nd day of May, 2017.

INTRODUCTION.

1. Since this matter is one of judicial review, substantive attention must necessarily be given to the procedures that were followed in the dealings between the parties. But in this instance, other evidential material requires close consideration, primarily the content of cross examination of three witnesses upon their affidavits sworn, pursuant to earlier interlocutory orders made in the proceedings. What is primarily in issue between the parties is the conduct and legality of Garda disciplinary proceedings, a sphere that has become something of a subgenre of Judicial Review proceedings. Before proceeding to judgment, it would be convenient to set forth relevant matters under the following broad headings:

   (a) A summary of the relevant statutory provisions applicable to the investigation of disciplinary complaints made against serving members of An Garda Síochána such as the Applicant;

   (b) A synopsis of the matters alleged against the applicant which, given that pleas of guilty were entered by the applicant subsequent to an initial day of contested legal argument, need not be lengthy;

   (c) An account of what transpired in the disciplinary proceedings leading up to and following upon those pleas of guilty, necessarily referring to some contested matters which became the focus of affidavits filed on behalf of the parties, and cross examination upon portions of their content, as already referred to;

   (d) Submissions and Judgment.

(A) As to the procedures required to be followed where breaches of discipline are alleged against garda members, these are set forth in the Garda Síochána (Discipline) Regulations, 2007. Ignoring matters of lesser seriousness, which are separately provided for in the Regulations, allegations involving serious breaches of discipline, into which category the matters presently under review undoubtedly fall, carrying potential sanctions ranging from

dismissal to substantial reduction in pay, are provided for in the relatively elaborate provisions contained in Part 3 of the Regulations. If the Commissioner forms the opinion that such sanctions may be warranted, if such more serious breaches of discipline are sustained, he or she shall appoint an Investigating Officer to carry out an investigation. On completion, that Officer will submit to the Commissioner a written report containing his or her recommendation as to whether the facts disclosed warrant the establishment of a Board of Enquiry, together with copies of any statements made, or other relevant documentation or information. Pursuant to Regulation 25, if it seems from the report of the investigation that the member may have committed a serious breach of discipline, the Commissioner establishes a Board of Inquiry, which is charged with determining whether such a breach has been committed and, if so found, to recommend to the Commissioner the disciplinary action to be taken. Such a Board consists of three persons, firstly the Chairperson appointed by the Minister from a panel of Judges of the District Court and practising barristers or solicitors of not less than ten years standing. The other two members must be a garda not below the rank of Chief Superintendent, and lastly, a garda not below the rank of Superintendent. The Board must formulate particulars of the serious breach of discipline alleged and notify the member accordingly, together with a statement of the facts that have emerged, and any written statements made. Within 21 days from concluding the Inquiry, the presiding member must submit a written report to the Commissioner, and forward a copy to the member concerned. This shall include

(a) Copies of any statements made, including any admissions made and any other documents provided to the Board, together with the verbatim record of the proceedings,

(b) The determination of the Board as to whether the member concerned is in breach of discipline and, if so, as to the act or conduct constituting the breach, and

(c) Its recommendation as to any disciplinary action to be taken in respect of the breach. Where a difference of opinion arises among the members of the Board in relation to any relevant matter, only the opinion of the majority regarding that matter shall be included in the report.

Within fourteen days of receipt of the report, the Commissioner decides on the appropriate disciplinary action. Given the rank of the applicant, it was for the Commissioner to decide on the disciplinary action save that, under Regulation 32, where the Commissioner proposes a more severe sanction than that recommended by the Board, the member is to be given the opportunity to make representations in that regard. Regulation 33 provides for an appeal against the determination of the Board of Inquiry in relation to the breach of discipline and/or the disciplinary action decided on or to be recommended. Regulation 33 (3) provides for grounds of appeal under specified categories. Provision is then made for the membership of the Appeal Panel, which will be comprised of three persons, with a presiding member of similar legal qualifications to those applicable to the initial hearing, accompanied by the Commissioner or a person selected by him or her and, in the case of a member who is a member of a representative body, a member selected by that association.

Provision is then made for the procedure on Appeal, including a time limit, in addition to a provision enabling the Appeal Board to decline jurisdiction where it considers the grounds of appeal raised to be frivolous, vexatious or without substance or foundation. Having conducted a full hearing, the powers of the Appeal Board include quashing the initial determination and substituting an alternative disciplinary action, or quashing the determination and deciding that another Board of Inquiry should be established to determine whether the member committed a breach of discipline.

(B) Moving to (b), the complaints made against the applicant, in the light of the importance of the factual controversy as to the circumstances in which pleas of guilty to all complaints came to be made by the Applicant on the second day of hearing, I propose to set forth only a brief summary of the complaints made against him. I have already indicated my view that, if duly proved, the complaints could not realistically be viewed as being trivial and, in any event, initial complaints comprised in pleadings as to alleged infirmities relating to such preliminary matters as the role of the Garda Síochána Ombudsman Commission and the procedure by which the Board of Inquiry was established were withdrawn on the first day of hearing in this Court. At the time of institution of these proceedings, the applicant was a garda aged 38 years with eighteen years of service in An Garda Síochána, latterly serving in Togher Garda Station, in the city of Cork, but had been suspended from duty following an allegation of sexual assault made against him, which had been notified by his Superintendent to the Garda Síochána Ombudsman Commission ("GSOC"). He had been investigated by GSOC between November 2010 and November 2011 in that regard, following which a file had been forwarded to the Director of Public Prosecutions, who had in or about June, 2012, directed that there should be no criminal prosecution brought against him. A further review had then been carried out by GSOC to determine if evidence of breaches of the Garda Discipline Regulations was disclosed. It was found that there was such evidence, and GSOC commenced an investigation under s. 95 of the Garda Síochána Act, 2005, into six specific matters. In December, 2012, it appears a report was furnished to the Commissioner of An Garda Síochána recommending the taking of disciplinary action against him in relation to six matters. These comprised

(1) "discreditable conduct" concerning an alleged inappropriate sexual relationship with a named female,

(2) "discreditable conduct" concerning alleged harassment of that person by telephone,

(3) "corrupt or improper practice" concerning the demand of sexual acts from that person on the threat of issuing summons and taking other legal action,

(4) "abuse of authority" in the form of assessing PULSE records in relation to that person which did not form part of his duties,

(5) "abuse of authority" in the form of accessing PULSE records in relation to another person which did not form part of his duties, and

(6) "neglect of duty" in failing to execute warrants issued for the arrest of a named person.

(C) On 29th April, 2013, a Board of Inquiry was established by Assistant Commissioner John Fintan Fanning to determine whether the applicant had committed a "serious breach" of discipline and, if so, to recommend to the Commissioner the disciplinary action to be taken. This development was notified to the applicant by Ms. Maureen Cronin, B.L., who had been appointed as Presiding Officer over the Board of Inquiry. The breaches of discipline alleged against the applicant had by this juncture become somewhat differently formulated, amounting in all to eight, but substantively relating to the same contentions, and in the circumstances it is not necessary to detail these alterations. There was also some delay in getting the Board of Inquiry hearing underway over the summer months of 2013, due to a change of membership of one of the three members following a representation made on behalf of the applicant, and it was on Tuesday, 3rd September, 2013, that the Board of Inquiry first sat. The applicant attended along with his solicitor, Mr. Dan Murphy, a practitioner with very wide experience of conducting defences on behalf of Garda members charged with disciplinary breaches. The membership of the Board now consisted of Ms. Cronin B.L. Presiding, together with Chief Superintendent Patrick Mangan and Superintendent Dan Flavin. Following initial formalities, the eight alleged breaches were put to the applicant, who pleaded "not guilty" in relation to all of them. The remainder of the hearing on that occasion consisted of Mr. Murphy making comparatively detailed legal submissions on behalf of the applicant, following which Ms. Cronin adjourned the matter until 2 pm that afternoon. On that resumption, Ms. Cronin as Chairperson indicated that the Board was finding against Mr. Murphy's submissions, and the hearing was adjourned until the following day at 10 am. When the sitting resumed somewhat belatedly on the following day, Mr. Murphy indicated to the Board that the applicant was disposed to plead guilty to each of the eight charges. Each was put separately to the applicant, who entered pleas of guilty in each instance. Mr. Murphy thereupon sought a short adjournment to enable him call some character witnesses and make submissions in mitigation, following which the matter was adjourned until the morning of the following Tuesday, 10th September, 2013. The overriding factual controversy in the case is the widely divergent accounts of the circumstances in which the guilty pleas came to be offered, and the widely divergent recollections of Mr. Murphy and Superintendent Flavin must necessarily be returned to, but for purposes of noting matters of record, it need now only be set forth what took place at the resumed hearing.

While nothing realistically turns on the matter, it appears that the resumed hearing took place on Monday, 9th September 2013, rather than the following day as envisaged. Although no starting time of the hearing is contained in the transcript of the proceedings, it appears beyond doubt that there was some considerable delay before the hearing resumed, rather than commencing at 10 am, which was the starting time set out at the end of the previous sitting, but this need only be alluded to when later addressing the differing versions as to what transpired between Mr. Murphy and Superintendent Flavin in advance of that latter sitting. In any event, on the eventual resumption, Mr. Murphy made a detailed plea in mitigation on behalf of the applicant, furnishing supporting documentation to the

Board in relation to such matters as his considerable service to Gaelic games over many years, his service as a garda, accommodation, his unhappy marital circumstances, culminating in a recent divorce, his involvement with his young children, one of whom was autistic, his difficult financial position and other matters. He also addressed the circumstances in which the applicant came to have dealings with the person who would have been the principle witness against the applicant had the matter proceeded to full hearing. A further matter dealt with by Mr. Murphy involved the circumstances in which the applicant had been sexually molested as a child by a male family member, giving rise to criminal proceedings that had then only very recently been disposed of. Following questions addressed to the applicant by each of the members of the Board, Ms. Cronin adjourned matters for a short period to deliberate on the outcome. On resumption, Ms. Cronin referred to the various mitigatory aspects, and stated that, in the light of all relevant factors including the pleas of guilty, the Board intended to recommend to the respondent the taking of the following disciplinary actions:

On breach number 1, a reduction in pay of three weeks.

On breach number 2, a reduction in pay of three weeks.

On breach number 3, a reduction in pay of four weeks.

On breach number 4, a reduction in pay of three weeks.

On breach number 5, a reduction in pay of three weeks.

On breach number 6, a reduction in pay of three weeks.

On breach number 7, a reduction in pay of four weeks.

On breach number 8, a reduction in pay of four weeks.

Following some concluding formalities, Ms. Cronin stated that these recommendations and some relevant documents would be sent to the Respondent in early course, and the hearing concluded. A detailed report on the entire proceedings of the Board was in due course prepared and furnished to the Respondent by Ms. Cronin as Chairperson. From this apparently mutually satisfactory resolution of the disciplinary complaints against the applicant, matters significantly escalated in early October when the applicant received a letter, dated 2nd October, 2013, from the Respondent as the then incumbent of the office of Commissioner of An Garda Síochána. In that letter, the Respondent noted that the Board of Inquiry had recommended that a total temporary reduction in pay of €22,693.23 had been recommended by the Board as a sanction in respect of the eight breaches of discipline. He went on to state that "having considered the report of the Board of Inquiry, I propose to impose a disciplinary action which is more severe than that recommended by the Board of Inquiry, namely requirement to resign as an alternative to dismissal in respect of four breaches of discipline. The disciplinary action now proposed will apply in respect of each of the breaches 3, 4, 7 and 8". In further notification from the Respondent to the Applicant, reference was made to an entitlement to advance within ten days any comments that the

Applicant might wish to make in relation to the more severe proposed sanctions, and further to an entitlement to appeal the proposed revised sanctions in each instance in accordance with the relevant Regulations of the Garda Síochána (Discipline) Regulations, 2011, As Amended." In reply, Mr. Murphy wrote to the Respondent, referring to his recall of what transpired on the final day of the Board hearing, summarising the main matters that had been offered in mitigation, and urging that in all the circumstances, the Respondent would not impose a sanction greater than that recommended by the Board of Inquiry. The Respondent was not disposed to alter his disposition, and while matters dragged on until the early part of 2014, the parties were plainly embarked upon collision course. Mr. Murphy instituted the present Judicial Review proceedings, and duly obtained leave in relation to the grounds advanced from Hogan J. on 24th April, 2014. Mindful of his entitlement to request a further hearing from an Appeal Board, in which a more favourable outcome from his client's viewpoint would be binding upon the Respondent, Mr. Murphy had also invoked that form of relief, but his preferred option was that of Judicial Review, and it is that that he has pursued diligently on behalf of his client. Before taking up the significant issue of the factual discrepancies between Mr. Murphy and Superintendent Flavin as explored at hearing both on affidavit and in cross examination, it is noteworthy that Mr. Murphy, in his initial letter to the respondent in response to the increased sanctions proposed, drew attention to what he contended was a significant error in the report received from the Board of Inquiry at page 4. Addressing the resumed hearing of 4th September, 2013, the following was stated:

> *"The Board resumed on Wednesday 4th September at 10 am. Mr. Murphy informed the Board that the member concerned was disposed to take a certain course in relation to the allegations. The Board adjourned and considered the matter for several hours. The Board decided to accept the change to pleas. Ms. Crawshaw, the complainant and primary witness was attending Mallow Family Law Court on a separate matter when the Board of Inquiry resumed and formally put the allegations to Garda Flaherty again….."*

Mr. Murphy then continued in his letter:

> *"The foregoing passage is of significant error. The fact is that the Board did not resume at 10 am on Wednesday, 4th September, as is stated, rather it sat at 11 am and adjourned until 2 pm when the change of plea was formally communicated to the Board. That guilty plea reflected a major change of course as the proceedings had hitherto been contested and serious legal and procedural issues were vented, with serious implications for the jurisdiction of the Tribunal that might have had to be litigated in the High Court. Instead, Mr. Murphy of this office and Superintendent Flavin held discussions and on the understanding that it was "guaranteed from the top" that a fine would be the ultimate outcome of the disciplinary process Garda O'Flaherty indicated a willingness to plead guilty. To that end he was required to plead guilty to all the charges and he accepted that requirement. There was contact with Garda Headquarters during this process and it is in that context and on his strict understanding and reasonable expectation that the Commissioner would not demur*

from that agreement that Garda O'Flaherty entered a guilty plea to the charges. The Tribunal report does not address that at all and when that is factored into the equation we hope that the agreement will be honoured".

This to a large degree encapsulates the essence of the appellant's complaints, and it is to the differences that arose on affidavit and in cross examination that it is now necessary to turn.

2. Affidavits were sworn by Mr. Murphy, in his instance three, and one by Superintendent Flavin. A brief affidavit was also sworn at a later stage by Ms. Cronin, but the primary controversy in the matter related to the widely diverging accounts advanced by Mr. Murphy and Superintendent Flavin in their affidavits and in cross examination with regard to the events at and adjacent to the second day of hearing, on Wednesday, 4th September, 2013, at Ballincollig Garda Station.

(D) Affidavits and cross examination.

As one would expect, when it came to cross-examination on their affidavits, Mr. Murphy and Superintendent Flavin both presented as intelligent and articulate witnesses, the former perhaps somewhat more terse in his manner of delivery, and the latter of a marginally more affable manner. Taking firstly Mr. Murphy's initial affidavit, sworn on the 23rd April, 2014, its content largely replicated what had already been conveyed by him in his letter to the respondent of 11th October, 2013. He stated that on the morning of 4th September, 2013, he entered into negotiations with Superintendent Flavin as one of the members of the Board of Inquiry inquiring into the breaches alleged against the applicant. These negotiations followed upon detailed submissions made by him on the previous day of hearing in relation to the jurisdiction of the Inquiry, and contended elements of unfairness in the proceedings. The negotiations sought to establish whether a monetary penalty would ultimately be imposed, should the applicant plead guilty to the charges. Mr. Murphy was conscious that, if found guilty after a contested hearing, the applicant might be exposed to being required to resign from An Garda Síochána as an alternative to dismissal. Mr. Murphy went on to state that he received some comfort from the fact that Superintendent Flavin indicated to him that he had previously negotiated such deals with a solicitor in Limerick. Mr. Murphy outlined to the Superintendent what he perceived to be the strength of the applicant's case and the weaknesses in the case against him, including the possibility of successful judicial review proceedings. The prospect of saving time and expense was discussed if the applicant pleaded guilty to certain matters, however Mr. Murphy emphasised that any deal would have to receive prior approval at the highest level of An Garda Síochána in light of the provisions of the Regulations, whereby the Respondent could effectively overrule a recommendation of the Board. He further swore that the Superintendent then went away for a period of approximately 20 minutes, and on return informed Mr. Murphy that they were in a position to deal with the case in the manner suggested. The Superintendent also indicated that it had to be on the basis of a plea to all matters, as there was no provision to take matters into account or to dismiss matters without hearing evidence. Mr. Murphy was satisfied by the Superintendent's assurance that contact had been made at the highest

level, at which it had been sanctioned that a plea would be accepted and dealt with by way of fines. Mr. Murphy advised the applicant accordingly, who agreed to plead guilty and duly did so. Mr. Murphy believed that the applicant had been given a legitimate expectation in this regard, and he was absolutely certain that no guilty plea would have been forthcoming except for these circumstances. Subsequently he was amazed when, contrary to the understanding he had been given, the Respondent conveyed his proposal to require the Applicant to resign in lieu of dismissal. Mr. Murphy had already conveyed to the Respondent, in his letter of 11th October, 2013, the background to the case and the agreement and understanding surrounding the guilty pleas. Of two supplemental affidavits sworn in the matter by Mr. Murphy, that of 27th November, 2014, in substance raises matters of procedure and argument, and need not be considered at this juncture. A final affidavit was sworn by Mr. Murphy on 25th April, 2016 (a reference to 2106 is obviously a typing error). Insofar as this affidavit alluded to factual matters, Mr. Murphy swore that he had attended Ballincollig Garda Station on 3rd September, 2013, in good time for the projected commencement at 10 am. He there met with the applicant and with a senior official of the Garda Representative Association. They were satisfied that they had gained a considerable advantage through the arguments presented to the Board the previous day, such as might have enabled a successful challenge by way of judicial review. In that context it was decided to approach a member of the Board to address the possibility of a plea bargain, whereby the applicant might proffer a plea to some matters if assured that only a monetary penalty would be imposed. From his experience in garda disciplinary matters, Mr. Murphy was well aware of the Disciplinary Regulations, including the provision that any decision made by the Board would merely be a recommendation, and could be overruled by the Respondent. In this context, they were unanimously of the view that any proposed resolution of the Inquiry would require prior approval from Garda Headquarters. It was before the 10 am scheduled start that Mr. Murphy approached Superintendent Flavin and asked to speak privately with him. He agreed, and it was not the case that Mr. Murphy had asked the Board for permission to speak with him, as getting the prior approval of the Respondent for the ultimate sanction was more appropriately addressed by one of the Garda Officers on the Board, who would also know the Board's position. Although Superintendent Flavin in his replying affidavit denied indicating to Mr. Murphy that he had previously negotiated a similar deal with a Limerick Solicitor, Mr. Murphy swore that he had a clear recall of this being stated by the Superintendent, which had led him to believe that the Superintendent had the capacity to deliver upon the proposal. The relative strengths and witnesses of each side of the case were discussed, and Mr. Murphy had suggested to the Superintendent that there was a likelihood that an application to have the Inquiry halted by way of Judicial Review would be successful. Mr. Murphy had been adamant that, before a guilty plea could be proffered, he would be in a position to assure the Applicant that a monetary fine would be the ultimate penalty, hence the references to any deal having to be "approved at the highest level", and that the approval would have to "come from the top down". Superintendent Flavin had then left, presumably to confer with the Board and make such other enquiries and contacts to secure approval as were necessary. He had been away for a lengthy period, and on his return discussions were resumed. The Superintendent had stated that they were in a position to do the "deal", but he indicated

that it would have to be on the basis that the Applicant pleaded guilty to all matters. This he had stated was for the reason that there was no provision in the Regulations to take some matters into account, or to dismiss matters without first hearing evidence. Mr. Murphy was not happy about this, but after some further discussions with the Superintendent, he returned to the Applicant and took further instructions from him. The Applicant had not been agreeable to pleading guilty to everything, and further discussions between Mr. Murphy and the Superintendent ensued. Despite further efforts by Mr. Murphy to limit the plea to a number of charges, the Superintendent was adamant that the deal would have to be on the basis of the guilty plea to all of the charges. It was correct that the Superintendent had indicated to Mr. Murphy that it was still open to the Applicant to appeal the decision of the Board but he had so indicated in a context whereby it was also intimated that because a monetary fine was to be the proposed sanction, it was likely to have to be a very substantial fine. It was in that context that the Superintendent had referred to a right to appeal. Mr. Murphy had been aware that the right of appeal concerns the disciplinary action decided upon by the Respondent, and Mr. Murphy believed it was envisaged by both of them that, because of the level of the fine the Board intended to impose, the right of the Applicant to appeal the decision of the Respondent would be invoked at a later date. On the basis of the assurances given, Mr. Murphy received an authority from the Applicant to agree to the course proposed and to enter a guilty plea on all charges. Mr. Murphy's recollection was that the negotiations lasted close until 1 pm, and it was agreed that the pleas would be entered after lunch. Returning at 2 pm, the pleas were then entered to all charges, and this was the first occasion that the Board had sat on that day. In conclusion, Mr. Murphy swore categorically that the Applicant would not have countenanced the acceptance of any deal that did not carry with it a guarantee that the Respondent would not later overturn a decision of the Board. Whether or not it was the case that the Superintendent had made contact with the Office of a Deputy or Assistant Commissioner, as opposed to the Respondent, Mr. Murphy at all times had acted on the basis that approval had been secured. On the day of notification of the Respondent's decision to vary the decision of the Board, and require resignation in lieu of dismissal, Mr. Murphy had been shocked, and immediately telephoned the Superintendent at Crumlin Garda Station. The Superintendent had simply denied that he had had any negotiations with Mr. Murphy on that day.

A number of short additional affidavits were also sworn, none of which need to be examined in any great detail. There was an affidavit of Mr. Edward Carey, a colleague of Mr. Murphy in the firm of Carey Murphy and Partners, sworn on the 25th day of April, 2014, which dealt largely with legal and procedural matters. In addition, and close to the date of hearing, Sergeant Stephen Nolan of the Legal Affairs and Human Rights Section, Garda Headquarters, Dublin 7, swore a short affidavit of 28th April, 2014, addressed to the initial contention on behalf of the Respondent that Mr. Murphy's initial affidavit had never been received by any State agency.

Sergeant Nolan acknowledged that this averment had in fact been made in error, the affidavit had been received along with the other papers in the case, and he apologised for the oversight and any inconvenience caused. Further there was a short affidavit sworn by

Ms. Maureen Cronin B.L., the Chairperson of the Board of Inquiry, in which she referred to Mr. Murphy having informally asked the Board of Inquiry for an opportunity to speak to Superintendent Flavin on the morning of 4th September, 2013. The Board agreed to this. Insofar as any discussion between Mr. Murphy and Superintendent Flavin was relayed to the Board, it was stated that Ms. Cronin's recollection conformed to that of Superintendent Flavin. The Board had considered whether on a plea of guilty a monetary fine or other sanction was appropriate. Superintendent Flavin had then informed Mr. Murphy of the view of the Board, and this was carried into effect when the applicant did enter a plea in due course. There was no consultation with the Office of the Commissioner or the Garda Commissioner as to this course of action. It was very appreciably later, and close to the actual full hearing, that a replying affidavit was received from Superintendent Flavin, sworn on the 11th April, 2016. In it, he referred to the affidavit of Mr. Murphy sworn on 23rd April, 2014 "not having been sent to An Garda Síochána" with "the other papers in the case", so that he only learned of it when informed of its existence after the initial hearing date on March 15th, 2016. As to its content, he swore that Mr. Murphy had during the course of the Inquiry sought permission to speak to him, which was agreed, but categorically stated that no negotiations were entered into with him, although he did seek to ascertain whether the Board would deal with the alleged breaches by way of a monetary fine on a plea of guilty. Continuing, he acknowledged that he had made Mr. Murphy aware that he was not the first solicitor to approach him in respect of the Applicant. He did not inform Mr. Murphy that he had negotiated any deal with any solicitor, since he had never done so. He agreed that Mr. Murphy had outlined what he perceived to be the strengths and weaknesses of the Applicant's case, and that the prospect of saving time and expense should the Applicant plead guilty was discussed. He strongly disagreed with the averment that Mr. Murphy emphasised that any deal would have to have prior approval at the highest level of An Garda Síochána. Mr. Murphy had sought to ascertain whether the Board would deal with the alleged breaches by way of a monetary fine on a plea of guilty. He had informed Mr. Murphy that he would make the Board aware of this, and that Mr. Murphy thought he would still be in a position to appeal any decision the Board would make. Mr. Murphy did not raise any requirement for prior approval of the Garda Commissioner for his proposed course of action, and nor would the Superintendent have agreed to this. Nor did he make the Superintendent aware that he wished to have the Garda Commissioner consider the proposed course of action. The Board of Inquiry had considered whether on the plea of guilty a monetary fine or other sanction was appropriate, and therefore he had informed Mr. Murphy of the Board's view on the matter. He categorically stated that there was no consultation with the Office of the Commissioner or the Garda Commissioner as to this proposed course of action. He had informed Mr. Murphy that there was no provision for the Board of Inquiry to take matters into account or to dismiss no provision for the Board of Inquiry to take matters into account or to dismiss matters without leaving submissions or evidence, and had again reminded him that his client could appeal any decision of the Board of Inquiry.

CROSS-EXAMINATION ON AFFIDAVITS

4. Further to leave that had previously been granted, Mr. Murphy and Superintendent Flavin were cross-examined on their affidavits by Mr. McDonough S.C. and Mr. Power S.C. on

behalf of their respective clients, and Mr. McDonough also put a number of questions to Ms. Cronin. Unsurprisingly, while some matters emerged which merit consideration in a final appraisal of the case, the witnesses adhered substantially to what had been already sworn by them. Regarding the three affidavits sworn by Mr. Murphy, but primarily the more substantial first one, when put by Mr. Power that his relevant conversations with Superintendent Flavin did not extend beyond being merely talks, Mr. Murphy was adamant that they amounted to negotiations, and they extended over a long period. Superintendent Flavin had left Mr. Murphy and then returned on a number of occasions, and finally stated that they could do a deal. Before committing his client, Mr. Murphy had to be satisfied that there was approval at the highest level. On the assurance given, Mr. Murphy stated that he was satisfied. It was the case that Superintendent Flavin had returned from seeing his colleagues on the Board and stated to Mr. Murphy that matters could only be disposed of if there were pleas of guilty on all charges. As soon as it became apparent that the respondent proposed to impose penalties more severe than those imposed by the Board, Mr. Murphy had been shocked and had telephoned the Superintendent in that regard at the earliest opportunity. He had also made it clear to the Superintendent that if no deal was agreed, he would have been off to the High Court for judicial review on the basis of his initial submissions to the Board.

5. Mr. McDonough then cross-examined Superintendent Flavin on the content of his affidavit. He maintained his assertion that all that had transpired between himself and Mr. Murphy were talks, and did not amount to negotiations. When this agreement between the two of them became apparent he did not recall contacting Ms. Cronin, but did ring Chief Superintendent Mangan. When put by Mr. McDonough that contact had taken place with Ms. Cronin, he stated that he had no recall of any such conversation. Both Mr. Murphy and himself were well familiar with the provisions of the Garda Disciplinary Code, and the Superintendent had previously dealt with Mr. Murphy, possibly on three separate occasions. When put by Mr. McDonough that Mr. Murphy had stressed that any deal would have to be approved at the highest level, Superintendent Flavin disagreed. When put by Mr. McDonough that the two had discussed matters together over approximately two hours, the Superintendent responded that there was no plea bargain, and at that stage the Board had no knowledge of the applicant's circumstances. Put that Mr. Murphy had conveyed above all that his client feared the ultimate sanction of dismissal, the Superintendent agreed that what had been discussed were pleas of guilty followed by a financial sanction. The applicant would in any event have been entitled to appeal a harsher sanction. The Superintendent agreed that he had conveyed to Mr. Murphy that any resolution before the Board would have to be on the basis of pleas to all matters. It was correct that in the course of their discussions Mr. Murphy had mentioned the possible course of bringing Judicial Review.

6. The final witness to be cross-examined was Ms. Cronin B.L. She agreed with Mr. McDonough that the respondent had no way of knowing how the Board reached the view that matters could be met by financial sanctions on foot of pleas of guilty. On the day that the pleas were entered before the Board, she recalled Superintendent Flavin leaving the room where the Board was sitting to speak to Mr. Murphy and later returning to tell them

what had been suggested, whereupon they then considered the position. The possibility of dealing with the matter upon pleas of guilty by a financial sanction was discussed in detail between them, for one and a half hours or more, and all three were then content to proceed on that basis.

7. Finally, the Superintendent was briefly recalled. He had located an entry in his journal, dated 10th December of the same year, noting that he had spoken to Ms. Cronin. Whilst some additional matters were touched upon in the various affidavits and the cross-examination upon them, the foregoing seems to summarise adequately the main matters upon which determination of the outcome of the proceedings is likely to be significant.

(D) Submissions and judgment.

8. As indicated at the outset, this case is one of a limited minority of judicial review claims in which a significant factual issue requires to be determined in addition to the claims for relief on procedural grounds. I have received and read with care over sixty pages of detailed legal submissions in which both sides have set forth their respective contentions, in addition to two sizeable books of legal authorities. The factual issue of course relates to the divergent evidence of Mr. Murphy and Superintendent Flavin as to the circumstances in which changed pleas in relation to the disciplinary matters alleged against the applicant came to be entered following an initial day in which all matters appear to be fully contested. Given the context in which their detailed affidavits were placed before the court, in addition to thorough cross examination on their respective contents by Mr. Power and Mr. McDonagh, plus similar recourse to Ms. Cronin's affidavit on a more limited basis, I believe there is little to be gained in reciting all that was said or argued in this context, and I accordingly propose forthwith to indicate the view that I have formed on these factual matters. Given the unfortunate delays that have arisen on either side of the oral hearing in this Court, I have had careful regard to my own notes of the days at hearing, and also to the Digital Audio Recording that was made of the relevant passages.

9. The conflicting versions advanced on affidavit and in cross examination as to what transpired between Mr. Murphy and Superintendent Flavin, adjacent to the room in which the third day of hearing was being held in Ballincollig Garda Station, on 9th September, 2013, the third day of hearing, are at the heart of this crucial issue of fact. What seems to be broadly agreed is that the Board was about to take up the further hearing of the matter that or about 10 am when Mr. Murphy indicated that he would like to speak with Superintendent Flavin privately. Discussions then ensued between the two over a considerable period, such that the hearing did not actually recommence until 2 pm, although a portion of the latter part of the delay was attributable to the three Board members considering events privately before resumption. Undoubtedly there were discussions between the two men with a view to resolving the matters at issue before the Board of Inquiry, and it is also agreed that at some stage of their discussions Superintendent Flavin briefly rejoined his colleagues and returned to stipulate that any pleas of guilty would have to be on all eight charges. The two men differed as to whether their exchanges could properly be described as "negotiations" or "talks", but the crux of the issue was more one

of substance than nomenclature. Mr. Murphy was adamant that the Superintendent had left him for limited periods on a number of occasions, and not just when he went to confer with his Board colleagues in relation to whether some or all charges would have to be met by a guilty plea. In what was undoubtedly some form of plea-bargaining, the immediate concern of Mr. Murphy was to ensure that the Board would confine its sanctions to financial penalties, albeit substantial ones. But more than that was at stake. Both men had appreciable past experience of Garda disciplinary matters, and were aware that even substantial financial penalties imposed were not the end of the day but, in a process somewhat akin to undue leniency appeals in criminal law, could be challenged by the Respondent as Commissioner, with a view to substituting the graver penalty of resignation as an alternative to dismissal from the Garda Síochána, albeit with potential further recourse to a Board of Appeal. It was in this context that Mr. Murphy made it clear, in his Affidavits and testimony, that any final resolution of differences had to encompass any such potential intervention by the respondent, as opposed to extending on to a possible final decision of a Board of Appeal. The most crucial averment in the Affidavit sworn by Mr. Murphy was that he had fully adverted to these legal provisions in the course of his discussions with the Superintendent, emphasising the prerequisite of finality, and that the latter, on return from one of his absences, had unequivocally stated to him that he could do "the deal", and that it was "guaranteed from the top" that monetary penalties in this event would be the ultimate outcome of the entire disciplinary process. When the Respondent indicated that he nonetheless proposed to require the Applicant to resign from An Garda Síochána in lieu of dismissal, Mr. Murphy indicated that he was amazed, and promptly instituted the present judicial review proceedings, with detailed Affidavits from the Applicant and himself. Presumably due to Mr. Murphy's initial detailed Affidavit having been mislaid while in garda custody, Superintendent Flavin only came to swear a replying Affidavit on 11th of April, 2016, largely traversing Mr. Murphy's account of material events, as already summarised earlier in this Judgment.

10. Whatever finding is to be made, the relatively lengthy dialogue between Mr. Murphy and Superintendent Flavin was undoubtedly of the nature of plea-bargaining, and although initiated by Mr. Murphy, involved the Superintendent combining an extended dialogue with Mr. Murphy while primarily engaged in a quasi-judicial role as one of the members of the Board, a situation requiring caution.

11. Both Mr. Murphy and Superintendent Flavin were thoroughly familiar with the Garda Disciplinary Code, and had frequent experience from prior cases of this nature. They were self-evidently aware of the Respondent's entitlement to intervene on a basis akin to reviewing undue leniency, if dissatisfied with the Board's sanctions, and in turn the Applicant's entitlement to take matters to an Appeal Board, whose findings would bind the Respondent.

12. From Mr. Murphy's standpoint, he clearly knew that pleas of guilty from his client in relation solely to the Board hearing would necessarily entail the end of pursuing relief by way of judicial review in relation to his lengthy but unsuccessful legal submissions to the Board on the previous day. Even if the Superintendent indicated, after consulting his colleagues,

that the Board would see fit to limit its sanctions to substantial financial ones only, that on the face of matters would not debar the Respondent from availing of the procedure to seek harsher penalties. Even if one is to accept, as suggested by Ms. Cronin, that consultation between Board members in relation to financial sanctions only occupied in the vicinity of one and a half hours, this leaves a gaping hiatus of two and a half hours between the intended commencement on that day at 10 am and the actual resumption at 2 pm. Given two intelligent and experienced professionals who knew the applicable procedures thoroughly, it seems to me to be virtually inconceivable that any discussions specifically limited to an outcome within the Board could conceivably have occupied such a time-frame, and from my appraisal of the evidence and the inherent probabilities, I find myself driven to conclude that the lengthy exchanges between the two extended to what might transpire on the part of the Respondent, that this enlargement was initiated by Mr. Murphy, and that Superintendent Flavin did not demur. Otherwise no sense can be put on their extended exchanges, and in the ultimate I find Mr. Murphy's detailed evidence in accordance with his prompt initial affidavit to be more persuasive and probable than the account provided by Superintendent Mangan. Also, although not determinative, and capable of giving rise to more than one inference, it is noteworthy how much the dynamic of the Board of Inquiry hearing changed on 9th September, 2013, which was the third and concluding day of the hearing. After Mr. Murphy had made a detailed plea in mitigation on behalf of the applicant, all three Board members in succession, commencing with Superintendent Flavin, addressed a number of questions directly to the applicant which on their face appeared clearly designed to explore and enhance matters of mitigation that had already been touched upon. These ranged over such matters as the Applicant's accommodation, assistance given in relation to past alcohol consumption, his current limited duties and family life, and his regret at any discredit that the matters under consideration had brought upon An Garda Síochána. These were entirely proper enquiries to make prior to imposing financial penalties a short time later and are noted as showing the latterly cordial relations between all the participants which, in whatever exact context, had replaced the hitherto mildly adversarial atmosphere of the initial day of the hearing.

Submissions and judgment.

13. Both sides helpfully furnished written submissions both prior to and after the days at hearing.

14. Taking first the submissions made on behalf as the Applicant, what was contended for by Mr. McDonagh on his behalf was, firstly, an Order of certiorari quashing the Respondent's decision of 31st January, 2014, requiring the applicant to resign from An Garda Síochána as an alternative to dismissal in relation to the alleged breaches of discipline numbered 3, 4, 7 and 8, and in default ordering his dismissal. Secondly, a further Order of certiorari was sought, quashing the decision of the Respondent of 2nd October, 2013, wherein he ordered temporary reductions in pay for the applicant in the sum of €2,521.47 in respect of the other four breaches of discipline 1, 2, 5 and 6. Thirdly, a like Order of certiorari was sought quashing the decision of the Board of Inquiry dated 9th September, 2013, and the report and recommendations subsequently forwarded to the Respondent, such Order also extending to any decisions taken or procedures followed in consequence of that Board

decision or report. Fourthly, a declaration that the Respondent acted *ultra vires*, contrary to law and fair procedures in the manner in which the Board of Inquiry was appointed and/or it negotiated with the ostensible authority of the Respondent and/or in the decision ultimately made. Fifthly, a declaration that there had been a breach of the Applicant's legitimate expectation. Leave in relation to each of these matters was duly granted by Hogan J. on 24th April, 2014. Upon the Respondent indicating on 31st January, 2013, that "having regard to the recommendation of the Board of Inquiry" he had decided that the Applicant should either resign or be dismissed from An Garda Síochána in relation to Counts No. 3, 4, 7 and 8, Notice of Appeal against the decision of both the Board and the Commissioner was lodged, but this was on a precautionary basis only. Pursuant to the basic contention that fair procedures had not been accorded to the Applicant, a number of decisions of the Irish Superior Courts ranging over the past two decades were cited, ranging up to the Supreme Court decisions of Clarke J. in *Cromane Seafoods Ltd &: Anor v. The Minister for Agriculture and Fisheries and Food* [2016] IESC 6, and Hardiman J. in *Oates v. Judge Browne & Anor* [2016] IESC 7. These range primarily over fair procedures and legitimate expectation. Further recent Irish decisions were also cited, emphasising the Supreme Court decision of Fennelly J. in *Mallak v. Minister for Justice* [2012] 3 I.R. 297 at p. 322:

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision….. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."*

15. A further recent case relied upon, here in the specific sphere of Garda Disciplinary Litigation, was the Supreme Court decision of O'Donnell J. in *Kelly J. v. Commissioner of An Garda Síochána* [2013] IESC 47. On somewhat different facts to those in the present case, O'Donnell J. held that both the Board of Inquiry and the further appeal, which in that instance had been invoked, had failed to give adequate reasons. At para. 41, it was stated:

> *"The only possibility for challenging the decision is by way of judicial review, and in my view, it is required that the Appeal Board provide reasons for its decision which has the effect of upholding the dismissal of a garda from the force. I consider that this conclusion follows from an analysis of the Regulations, particularly when approached in the light of the common law principles outlined so clearly in Mallak ."*

At para. 42, O'Donnell J. further states:

> *"Normally a failure to provide reasons where required will lead to the quashing of the unreasoned decision.".*

16. As to the appeal that had been entered, Mr. McDonagh submitted, relying on *Stefan v. Minister for Justice* [2001] 4 I.R. 203 and *Herlihy v. Commissioner of An Garda Síochána*

[2012] IEHC 531, that both the Supreme Court and High Court had held that on the facts of those particular cases the existence of a right of appeal did not debar the instant Court from exercising jurisdiction.

17. In all the circumstances, Mr. McDonagh submitted at the end of his primary written submission that his client was entitled to succeed on either or both of the doctrines of legitimate expectation and failure to furnish adequate reasons.

18. In a short supplemental written submission, after the hearing before myself, Mr. McDonagh primarily argued some further factual aspects that had transpired, and while I do not ignore these, there is no need to set them forth here. He also canvasses a range of possible outcomes in favour of his client that could be open to the Court, dependant on its view of the evidence.

19. Turning to the submissions of Mr. Power on behalf of the Respondent, he commences with some observations in relation to the initial complaint against the Applicant having been referred to the Ombudsman Commission. Little appears to turn on this, and it was scarcely if at all referred to at the High Court hearing, but I certainly accept that s. 102 of the Garda Síochána Act, 2005, required the Respondent to refer the matter to the Ombudsman Commission. In any event, it is common case that having received a file in relation to the Garda investigation of the matter, the Director of Public Prosecutions directed that there be no prosecution. Some of the related legal matters adverted to by Mr. Power in his submission may or may not have given rise to some debate, but have scarcely been at the heart of the case since Mr. Murphy elected not to pursue Judicial Review on the first day of the hearing in Ballincollig.

20. Turning to the matters presently at the heart of the case, Mr. Power argued that there was no evidence to substantiate the claim that the Applicant was induced into admissions of guilt through promises of lesser sanctions of a monetary fine only, mediated through a member of the Board of Inquiry. In any event, the Board of Inquiry did not recommend the sanction of dismissal, imposing only monetary fines. Mr. Power also argued that the Applicant admitted the charges, that there was no evidence to suggest that he was coerced into doing so, and that he was legally advised at all material times. There were, it was contended, no legal infirmities pertaining to the Inquiry. When the Respondent received the report and recommendation of the Board of Inquiry, he made a proposal in relation to a sanction that involved a more serious penalty than that recommended by the Board, and in so doing he complied fully with Regulation 32 of the Disciplinary Code. It was argued that he did consider submissions on behalf of the Applicant before making his decision in relation to that graver sanction. As the person in charge of discipline within An Garda Síochána, it was his duty to make the decision as to the sanction to be imposed, and he was entitled to and had to determine the appropriate sanction. The decision in that regard was one manifestly open to the Respondent given the admissions made by the Applicant.

21. As to arguments based on legitimate expectation, any contention that there was an agreement to bind the Respondent from imposing any particular sanction was denied. Nothing had been shown that was specific or clear enough to ground a claim that the

Respondent could not act in accordance with statutory discretion. Nor could any such representation, if made, which was denied, bind the Respondent.

22. It was further argued that neither the Board of Inquiry nor the Respondent could be bound by a legitimate expectation as to the manner in which they would exercise their discretionary statutory powers or functions. Primary reliance in this regard was placed upon a decision of Costello J., in which he stated:

> *"In cases involving the exercise of a discretionary statutory power the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely that a benefit will be conferred provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest".*
>
> *Gilheaney v. Revenue Commissioners* [1998] 4 I.R. 150, at p. 169

23. Mr. Power then turned to time issues. He submitted that all of the impugned steps that were taken in advance of three months prior to the initiating of the proceedings were out of time and accordingly were time barred, pursuant to O.84, r. 21 of the Rules of the Superior Courts. This provides that the Court may extend the period within which an application for leave to apply for Judicial Review may be made, but only if satisfied that:

"(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension."

24. As to the provision of reasons on the part of the Respondent for utilising the procedure in relation to proposing an increased sanction, there was no requirement in law to this effect, and the appropriate provisions were duly followed. In any event, the applicant could and did appeal the said sanction as imposed by the Respondent, and the outcome of any such appeal was in law binding on the Respondent. There was no application on the part of the Respondent to give reasons, and this was not affected by either the alleged jurisdictional issue, or the alleged "deal".

25. Since the applicant had admitted to serious breaches of discipline, any alleged necessity for reasons was diminished. There was a full report from the Board of Inquiry as to the reasons for the outcome, which the applicant had admitted. There was no indication in the decision of the Supreme Court of O'Donnell J. in Kelly the *Commissioner of An Garda Síochána* [2013] IESC 47 that the respondent had to provide reasons when imposing sanctions on foot of a Report. Only the Board of Inquiry is bound in this regard. There was no element

of any pre-judgment on the part of the Respondent, and any allegation in this regard was no more than a bald assertion. The applicant had not been unlawfully prejudiced or put in jeopardy, and his position resulted from his own admitted misconduct. The Respondent is responsible for the regulation of discipline within An Garda Síochána, and is entitled to take appropriate disciplinary action in cases of admitted or proven misconduct. An appeal to an Appeal Board was in any event an adequate and effective remedy.

JUDGMENT.

26. I have read and considered the preponderance of the respective Books of Authorities that were furnished by each side. A limited number in each instance seemed to me of no particular assistance, given the specific circumstances of the present case. In addition, there was a measure of overlapping between the two Books of Authorities. Apart from consideration of both the oral and written submissions furnished by each side, I have also had regard to *Brian Colbert v. The Commissioner of An Garda Síochána* Judgment of O'Malley J. delivered on 10th July, 2015 (High Court), and *Rawson v. the Minister for Defence*, Judgment of Clarke J. delivered on 1st May, 2012 (Supreme Court).

27. Taking first what was in essence a preliminary point made by Mr. Power in the course of his submissions, I do not accept that the Applicant is estopped from pursuing Judicial Review proceedings by virtue of his Solicitor having filed a Notice of Appeal to an Appeal Board, in addition to pursuing the present Judicial Review proceedings. Three members of the Appeal Board were nominated, but no dealings of any substance have taken place, the battleground on both sides has emphatically been that of Judicial Review, and I am prepared to accept that in the circumstances, what was done was a legitimate precautionary or belt and braces step taken by Mr. Murphy to protect the position of his client overall. Adopting the test postulated by Barron J. in the High Court in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at p. 509, I am clearly of the view that Mr. Murphy has not proceeded sufficiently far down the Appeal route to estop him from concentrating on the Judicial Review proceedings, which have been the focus of attention of both sides.

28. As already stated, this case is unusual for a Judicial Review listing by reason of the high importance of the factual issue arising from the conflicting evidence of Mr. Murphy and Superintendent Flavin, in a room in Ballincollig Garda Station, that has already been referred to in some detail. What occurred between them, no doubt embarked upon in good faith, was clearly different to what transpired in the case of *The People (Director of Public Prosecutions) v. Heaney* [2001] 1 I.R. 736, where Keane C.J. felt constrained to comment adversely on the hazards of plea-bargaining in the Judge's Chambers as opposed to business being conducted in open Court, but the risks of what may transpire when private discussions produce conflicting recollections are not dissimilar. Given the conflicting accounts of the totality of what was discussed between them, the view that I have formed as to its true intent, already expressed, is one that I have not taken lightly, and reflects close observation of the witnesses, inferences that appear reasonably drawn and inherent probabilities. From consideration of all relevant matters, I simply cannot accept the contention on behalf of the Respondent that the totality of what transpired between the two

was confined to how the Board of Inquiry would address sanctions in the event of pleas of guilty by the Applicant.

29. Mr. McDonagh, S.C., has argued persuasively on behalf of the Applicant that he is entitled to succeed on both of the grounds advanced by him, firstly the failure to give reasons for the significantly sterner sanctions proposed and then imposed by the Respondent, in contrast to what was imposed by the Board of Inquiry, and secondly, based primarily upon the interaction between Mr. Murphy and Superintendent Flavin, infringement of legitimate expectation.

30. The former of the two grounds advanced, the failure to give reasons, has already been to some degree addressed, and apart from the considerable number of cases already cited, the Supreme Court has given extensive guidance in this regard in the two cases of *Kelly v. Garda Commissioner* [2013] IESC 47 (O'Donnell J.) and *Oates v. Judge Browne & Anor* [2016] IESC (Hardiman J.).

31. Much argument and authorities have already been ventilated on the absence of reasons in the present case, and at a minimum a format whereby the Respondent is enabled to indicate tersely that having considered the Board of Inquiry report, he is disposed to impose a vastly more serious sanction, jars somewhat in the light of all the recent authorities.

32. However, the more I have deliberated upon this troubling case, the more persuaded I am that what lies at its heart is the doctrine of infringement of a legitimate expectation.

33. The leading expression of this doctrine in Irish law appears to be that set forth by Fennelly J. in the Supreme Court in the case of *Glencar Exploration PLC v. Mayo County Council (No. 2)*. What was stated by Fennelly J. at p. 162 and 163 was as follows:

> *"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected.*

However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

34. Courts should not lightly or capriciously intervene in Garda disciplinary matters, and there is a clear public interest in seeking to ensure that complaints against individual Garda members are investigated and ruled upon in a fair, professional and prompt manner. However, in the light the factual findings that I have felt constrained on the evidence to make, I believe the elements required to ground a successful claim based on failure to respect legitimate expectations, as set forth by Fennelly J., have been established. This, rather than more peripheral ongoing arguments as to failure to state reasons, seems to me the essence of the case. Given the considerable delays that for various reasons that have arisen to date, I would be anxious to adopt the form of relief deployed by O'Donnell J. in the *Kelly* case already referred to. In his conclusion he held that it would be both wasteful and unhelpful to require a further first instance rehearing of these matters, since it was in the interests of all parties that the matter be brought to a conclusion. I respectfully agree that this should also apply in the present instance, and I would accordingly quash the decision of the respondent substituting his sterner sanction in place of what was imposed by the Board of Inquiry. The matter should then be remitted to the present incumbent of the position of Commissioner for due consideration of appropriate sanction in the light of all that has transpired. Lastly, given the form of the Leave Order made by Hogan J. at the outset of the proceedings, and the wording of O. 84, r. 21 of the Rules of the Superior Courts, I consider the arguments made on behalf of the Applicant are properly before the Court.

35. I will hear Counsel in relation to any outstanding aspects that may arise.