[2020] IEHC 319

THE HIGH COURT

[No. 2020/3649 P.]

BETWEEN

JOHN MADDEN

PLAINTIFF

AND

LOUTH COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 30th day of June, 2020

Introduction

1. This is an application by an unsuccessful candidate in a closed competition for promotion for an interlocutory injunction restraining the appointment of one of the successful candidates pending the hearing of a challenge to the validity of a decision of an independent referee, appointed by agreement of the parties, on an appeal by the plaintiff against the outcome of the competition.

2. As far as the plaintiff is concerned, the conduct of the appeal was unfair and the outcome unjust and his challenge to the impugned decision is unanswerable. As far as the defendant is concerned, there was no unfairness in the process and the plaintiff has not met the threshold test of establishing even that there is a *bona fide* issue to be tried, much less, as the defendant contends is the applicable test, a strong case that he is likely to succeed at trial. The plaintiff and the defendant contend, respectively, that the balance of justice is clearly in favour of, and against, the making of the order sought.

3. The plaintiff's grievance can be shortly stated to be that his appeal was conducted otherwise than in accordance with the agreed procedure, unfairly, and in breach of the requirements of natural justice. The legal issues, however, are more complicated.

The evidence

4. The plaintiff, Mr. John Madden, is a firefighter. He worked as such for Clare County Council from 2002 to 2006 and has since then been employed by the defendant, Louth County Council, on a full-time basis as a firefighter/driver. Over the years Mr. Madden has undertaken a good deal of professional training and development and has earned many certificates. He has for many years aspired to be promoted to the rank of sub-officer and has from time to time acted up in that capacity.

5. By notice circulated by e-mail on 21st August, 2019 Louth County Council Fire and Rescue Service invited applications from suitably qualified persons who were full-time personnel in the service for the filling of positions as Fulltime Station Officer and Fulltime Sub-Officer.

6. The service is made up of ten station officers, ten sub-officers and 35 firefighters. The object of the competition was to create panels of suitable persons from which vacancies in each of the higher ranks would be filled as they arose. The notice of the competition showed that by direction of the Minister for Housing, Planning and Local Government

pursuant to article 8 of the Local Government (Appointment of Officers) Regulations, 1974 the life of the panels was to be for no more than one year, unless extended.

7. The notice of the competition set out the method of selection. To qualify for the competition candidates were required to have completed five years of fire brigade service and to pass a psychometric test. Mr. Madden met these criteria.

8. The competition was to be in three stages: a written examination, a five-minute presentation, and an interview on general suitability. The method assigned marks to each stage – 200 to the written test, 150 to the presentation, and 150 to the interview. Candidates who qualified for inclusion on the panel would be ranked by their overall score out of 500 but to make the panel they had to achieve at least 50% at each stage. To qualify for interview candidates were required, in addition to passing the written examination, to demonstrate in their application form to the satisfaction of a short-listing board that they possessed sufficient skills and experience in operational competency, team-leading, and personal effectiveness to be called for interview.

9. Candidates short-listed for interview were to be assessed at interview under each of those three competencies – operational, team-leading, and personal effectiveness – using some or all of a number of indicators listed for each competency.

10. On 5th September, 2019 Mr. Madden submitted his application. He sat and achieved a high mark in his written examination and was short-listed and called to make his presentation and for interview on 4th October, 2019 at the County Hall, Dundalk.

11. An interview board was assembled made up of Mr. Ned O'Connor, retired County Manager of South Tipperary County Council – who would chair the panel – Mr. John Guilfoyle, a senior officer in Dublin Fire Brigade, and Mr. Brian Sweeney, retired Chief Fire Officer of Strathclyde Fire Service. All had extensive experience of sitting on interview panels. Messrs. Guilfoyle and Sweeney had extensive experience and expertise in firefighting. There were eight firefighters who had qualified for interview.

12. The members of the interview board were provided with directions or guidance – there is an issue as to which it was – as to the conduct of the interviews, and blank forms for the marking of the candidates. The forms for the interviews showed that candidates were to be marked separately on operational competency, team-leading, and personal effectiveness and, in separate boxes, in respect of each competency, the indicators which had been listed on the notice inviting applications, some or all of which were to be taken into account.

13. The blank forms showed – as the advertised method of selection had – that the candidates were to be marked out of a total of 150. They also showed or suggested – and this is the nub of Mr. Madden's grievance – that candidates were to be marked separately out of 50 for each of the three competencies, and were required to achieve a minimum qualifying score of 25 marks for each competency, and a minimum overall qualifying score of 75 marks out of 150.

14. The breakdown of the marks in this way was not in terms part of the method of selection which had been advised to prospective candidates, but the forms provided to the interview board were the same as those which had been used in a competition in 2014 in which Mr. Madden had participated and in which he had been successful and following which he had been listed on a panel for promotion to sub-officer made up at that time, but not reached before the panel expired.

15. In an e-mail of 24th September, 2019 the interview board members were advised generally of the selection process. It was noted that the competition was particularly important because it would fill two station officer positions and three sub-officer positions arising from retirements over the coming ten months and that the new officers and sub-officers could be in place for between ten and fifteen years.

16. Mr. Madden presented himself at the County Hall on the afternoon of 4th October, 2019, made his oral presentation, and was interviewed. At about 6.00 p.m. Mr. Madden telephoned the Human Resources Department of the Council to ask whether the results would be available that afternoon. The results were not then available but Mr. Kieran Lawless, an Administrative Officer in the HR Department called him back at, Mr. Madden says, approximately, 7:03 p.m. that evening to tell him that, as Mr. Lawless recalls, he had been unsuccessful in the interview or as Mr. Madden recalls, that he had failed. Three of Mr. Madden's colleagues were similarly unsuccessful. Four were successful and were put on the panel for promotion in the order in which they had ranked in the competition overall.

17. Mr. Madden was bitterly disappointed, particularly as he had achieved a high score in the 2014 competition and had been put on the panel established at that time. By e-mail on the following day he asked for details of the process for appeal and a full copy of all documents relating to his application.

18. On the following Monday morning, 7th October, 2019, Mr. Madden met with Mr. Lawless and Ms. Gráinne Tuomey from the Human Resources Department and was provided with copy score sheets which showed that he had achieved (as he had been told previously) 172 marks out of 200 for the written examination, 95 out of 150 for the five-minute presentation, and 70 out of 150 for interview. He was also provided with a complete copy of his interview notes.

19. The sheet used to mark the interview was not the same form that had been provided to the interview board and which had been used for the 2014 competition. Specifically, it did not list the three competencies or any of the indicators and did not show marks out of 50 for each of the three competencies but only that Mr. Madden had scored 70 marks out of a total of 150 and that he had been assessed to have *"demonstrated insufficient evidence".*

20. The score sheet which had been used for the interview was plainly not in the form which Mr. Madden expected it would be. Mr. Madden in his grounding affidavit does not spell out that he pointed out to Mr. Lawless that the sheet was not in the form which he had

expected and did not show individual marks for each of the three competencies, but he clearly did because on the following day Mr. Lawless contacted the members of the interview board to convey to them Mr. Madden's request for clarification regarding the assessment of the competencies.

21. In an e-mail of 8th October, 2019 sent at 16:40 Mr. Lawless reported back to Mr. Madden that the interview board had awarded an overall mark to each candidate by reference to the board's assessment of the level of experience and expertise displayed at interview by each candidate in the competencies of operational competency, team-leading, and personal effectiveness. Mr. Lawless indicated to Mr. Madden that if he wished to appeal he should submit the grounds of his appeal.

22. Late in the evening of 8th October, 2019 at 22:43 Mr. Madden sent an e-mail to *inter alia,* Mr. Lawless recalling the meeting on the previous day at which he had been told that the board had been instructed to mark the three competencies individually and had been provided with a form of score sheet requiring a breakdown and demanding his individual marks for each of the three competencies.

23. I pause here to observe that at the time that e-mail was sent Mr. Madden knew since the previous day that the mark of 70 recorded on the form of score sheet actually used was not broken down, and since Mr. Lawless's e-mail of 16:40 on the same day, that the board had not marked the competencies individually but rather had awarded an overall mark.

24. Mr. Madden instructed solicitors who wrote initially on 16th October, 2019 asking for details of "*the full appeals process and right to review policy*" and making a data request under the Freedom of Information Act. They wrote again on 25th October, 2019 challenging the competition process as having been fundamentally flawed by reference to a non-exhaustive list of fourteen grounds, including that Mr. Madden had not been provided with a breakdown of the three competency scores. The solicitors asserted that Mr. Madden had been informed by HR – as it is common case he had been – that the board had been provided with score sheets which they had been "*instructed*" to complete and went on to complain that "*no evidence had been provided despite requests*". The solicitors noted that Mr. Madden had been provided with an interview marking sheet which showed that he had scored 70 out of 150 but, despite requests, no evidence as to how the score was reached. While the persistent request for a breakdown which Mr. Madden well knew had not been made was futile, it is important to note that the alleged failure to adhere to the competition rules and specifically the absence of a breakdown was very much a live issue from the start.

25. Mr. Madden's solicitors' letter demanded an undertaking that Louth County Council would not make any appointment to the position of sub-officer pending a full review by an independent adjudicator of the interview process and the selection of candidates and threatened proceedings in default.

26. By letter of 31st October, 2019 Mr. Lawless suggested that in accordance with Louth County Council's general procedure for dealing with employee grievances he would examine all documentation and ask the members of the interview board to review their decision and if, following that review, Mr. Madden was not satisfied, he could refer his case to the Workplace Relations Commission for independent adjudication. As to the undertaking requested, Mr. Lawless indicated that no permanent appointment would be made to fill a vacancy which would arise on 11th November, 2019 pending the determination of Mr. Madden's internal appeal and for a month thereafter to allow sufficient time for a reference to the Workplace Relations Commission.

27. I will not dwell on the issue in the correspondence as to whether, although Mr. Madden had been told that he had a right of appeal and invited to submit the grounds of his appeal, the absence of a formal appeals process specifically for the competition meant that Mr. Madden did not have a right of appeal.

28. Mr. Madden took the view that Louth County Council had *"abjectly failed to provide a proper appeals process"* and on 7th November, 2019 instituted High Court proceedings claiming declarations that the conduct of the competition was tainted with irregularity and flawed; a declaration that he was entitled to be placed on the panel for sub-officer; an injunction restraining the Council from pursuing or progressing the competition or making any appointment; an injunction requiring the Council to appoint the plaintiff to the panel; and damages for breach of contract and breach of duty.

29. By order of the High Court (O'Connor J.) Mr. Madden was granted leave to give short service of a motion for an interlocutory injunction restraining the further progress of the competition. A motion was duly issued originally returnable for 13th November, 2019. That motion was adjourned from time to time until 12th December, 2019 when – following discussion in the meantime – the motion and action were settled upon terms reduced to writing and signed by Mr. Madden and on behalf of Louth County Council.

30. The settlement was that Mr. Ger Murphy, who is a senior executive officer with Meath County Council, would be appointed to conduct an independent appeal into the decision of Louth County Council not to place Mr. Madden on the panel for sub-officer. It was provided that both parties might make written submissions to Mr. Murphy; that such submissions would be shared; and that there would be no oral submissions. A draft of the terms of settlement expressly contemplated that Mr. Murphy would make such enquiries, conduct such interviews, seek and be provided with such documentation and information, and engage in correspondence as he considered relevant and appropriate for the purposes of his investigation and that all information provided would be shared with both parties but, in the event, the settlement provided that Mr. Murphy would write his own terms of reference within five days of his appointment. The settlement contemplated that the process would be completed within three weeks and the parties agreed that Mr. Murphy's decision would be final and binding on both parties. The action and motion were struck out by consent with an order for Mr. Madden's costs.

31. The settlement agreement expressly provided that it was a full and final settlement, and the settlement agreement and the terms of reference both provided that Mr. Murphy's decision would be final and binding on both parties.

32. On 19th December, 2019, Mr. Murphy set out his brief and terms of reference. He stipulated that he would at all times adhere to the principles of natural justice; he required and assured the parties of confidentiality; and he insisted that on the commencement of the appeal he would be in sole charge of the procedure/process and would be the final arbitrator on all matters relating to the procedure. He said, however, that during the course of the appeal, he would maintain contact with a nominated representative of Louth County Council and might seek relevant information from and/or the assistance of that person in line with the demands of the appeal.

33. The terms of reference provided, under the heading *"Process":-*

> *"1. The appeal will consist of a review of all documentation in relation to the appellant's application and subsequent interview for the post of Sub Station Officer and also of all documentation issued by Louth County Council in relation to the Sub Station Officer competition and any submissions made by parties to the appeal.*
>
> *2. The parties will be permitted to make written submissions in relation to the appeal. Oral submissions will not be permitted.*
>
> *3. All submissions in relation to the appeal will be shared with both parties.*
>
> *4. There will be no legal representation in relation to the appeal.*
>
> *5. My decision in relation to the appeal will be final and binding on both parties."*

34. On 14th January, 2020, Mr. Madden made his submission to Mr. Murphy. It started with a summary of 36 points over thirteen pages and ran altogether to ten folders. I think that it is fair to say that the submission was a root and branch attack on the competition and selection. *Inter alia* Mr. Madden challenged the marks awarded for his written examination (in which he had achieved the highest score in the competition); the failure of the interview panel to mark his five-minute presentation (which he had passed with flying colours) on a broken down basis; and the failure of the interview board to mark the interview in accordance with the interview appraisal sheet which had been provided to it. Mr. Madden pointed to alleged inconsistencies in, and ink marks on, the interview notes; complained that the board had asked leading questions; and complained that he had been moved on by the interview board while he was endeavouring to explain a connection between his aviation photography and North Korea, and the most drastic decision he had ever made. Mr. Madden challenged the qualifications, competency and training of the members of the interview board and complained that, by contrast with previous years, he had been asked to submit his application by e-mail rather than on paper.

35. On 21st January, 2020 Louth County Council made its written submission (in three folders) which was duly copied to Mr. Madden. In response, Mr. Madden made a further

submission (in three folders) to Mr. Murphy on 27th January, 2020; a further submission (in another folder, his folder 14) on 13th February, 2020; and what he described as a closing statement on 27th February, 2020.

36. On 18th March, 2020, Mr. Murphy issued his report.

37. From the small mountain of paper that the appeal had generated, Mr. Murphy identified the essence of the appeal as being the interview stage, and specifically the marking scheme documentation and the appraisal of competencies outlined in the method of selection. In that, Mr. Murphy is acknowledged to have been correct. Mr. Madden had, after all, as Mr. Murphy spelled out step by step, passed all stages of the competition bar the interview.

38. Having so identified the essence of the appeal, which he dealt with in the body of his report, Mr. Murphy nevertheless, in an appendix, dealt seriatim with the 36 points made in Mr. Madden's summary, many of which he found were not relevant to the appeals process and on which he could offer no view and make no finding.

39. In the body of his report Mr. Murphy set out that he had conducted what he described as *"this appeal review"* in accordance with the principles of human resource practice in the local authority sector, bearing in mind the principles of sections 7 and 8 of the Commission for Public Service Appointments Code of Practice for Appointments to Positions in the Civil Service and Public Service. He identified the material he had examined, which included the marking scheme issued to the interview board and the scheme actually used by the interview board; a sample of three sets of notes and marking scheme documents for other candidates; and the submissions of the parties. Mr. Murphy said that he had spoken with the chairperson of the interview board with regard to the general proceedings at interview stage and, particularly, in relation to the marking scheme used by the board.

40. Mr. Murphy found – and it is acknowledged to be the fact – that the interview board was provided with a marking scheme which called for the separate scoring of three competency headings but, rather than awarding a separate mark for each competency, had awarded an overall mark, based on an overall consideration of the candidates' abilities under the three competencies. That is what Mr. Madden might have inferred from the completed scoresheet he was given on 7th October, 2019 and precisely what he had been told on 8th October, 2019 by Mr. Lawless and it was what had been set out in the Council's submission to Mr. Murphy.

41. What was news, perhaps, to Mr. Murphy was why what had been done had been done. Mr. Murphy set out that he had spoken to the chairperson of the interview board (Mr. O'Connor) who had explained that the board had changed the marking scheme so as to award to each candidate an overall mark and had requested a revised form of marking sheet to show that. The revised marking sheet was said by Mr. O'Connor to have been requested *"to remove a situation where a candidate might fail to reach the required level in a single competency and, therefore, fail in the process entirely due to a single*

competency area at the interview stage having passed all previous stages and potentially two out of [the] three competencies at interview".

42. Mr. Murphy, I think that it is fair to say, was not entirely happy that the interview board had diverged from the marking scheme set out by the Council and anticipated by Mr. Madden but was satisfied that the method of selection had been adhered to in the main, and that the interview process and marking scheme had been implemented consistently across all candidates, including Mr. Madden. While he thought that ideally the final marking scheme would have been made available to the candidates prior to the interview, Mr. Murphy did not believe that the omission to do so affected the overall outcome of whether the candidates, specifically Mr. Madden, qualified or not.

The claim now made

43. These proceedings were commenced by plenary summons issued on 20th May, 2020. The primary relief claimed is a declaration that Mr. Murphy's decision of 18th March, 2020 is, variously, irregular and flawed, and that it was reached in breach of natural justice and otherwise than in accordance with the terms of reference and/or procedures. The summons goes on to claim substantially the same reliefs as were claimed in the 2019 action, namely, a declaration that the conduct of the competition was irregular and flawed and a declaration that the plaintiff is entitled to be placed on the panel of firefighters entitled to go forward to be appointed as sub-officer, as well as damages for breach of contract and breach of duty.

44. The focus of the claim now made is on the procedure adopted by Mr. Murphy in arriving at his decision. The complaint is that he departed from the agreed procedure and breached the rules of natural justice by discussing the case with Mr. O'Connor, or, if in principle Mr. Murphy was entitled to contemplate discussing the case with Mr. O'Connor (which he was not) that Mr. Murphy acted in breach of the requirements of natural justice in doing so without first canvassing the views of Mr. Madden as to whether he could or should and/or without informing Mr. Madden of what he had been told by Mr. O'Connor and allowing Mr. Madden an opportunity to be heard. If, so the argument goes, the court is persuaded at the trial of the action to condemn Mr. Murphy's decision on procedural grounds, Mr. Madden will be entitled to have his appeal either reconsidered by Mr. Murphy or, perhaps, considered by someone else. If Mr. Madden's appeal is so reconsidered and is successful, it is not suggested that he will be promoted or put on the panel for promotion but that the selection process will be condemned, and the panel dismantled. It is to this prospect that the interlocutory order now sought is directed.

45. In argument, the court explored with counsel, Mr. Andrew Walker for the plaintiff and Ms. Siobhan Phelan S.C. for the defendant, the jurisdictional basis of the substantive claim.

46. The action is an attack on the decision of Mr. Murphy. Mr. Murphy, however, is not named as a defendant but as a notice party. The action is, in substance, a private law action but, in form, very much looks like a judicial review. It is not suggested that the decision is amenable to judicial review or that it was an award under the Arbitration Act. The cause of action is said to be a breach of contract but the alleged breach of contract by

the defendant has not been clearly identified. The defendant, says Ms. Phelan, did all that was required of it by the terms of the settlement agreement. Mr. Murphy has been named as a notice party because, says Mr. Walker, it is his decision that is impugned, and the case would otherwise be a production of Hamlet without the prince. But no relief is claimed against Mr. Murphy who, it seems to me, is not really on the stage but a sort of cardboard cut-out in the wings. The notice of motion was directed to Mr. Murphy as well as to Louth County Council, but the order sought is directed only to the Council and Mr. Murphy did not appear.

Mr. Murphy, in an affidavit sworn on this application and filed on behalf of the defendant, has presaged an application to remove him as notice party which application, it is said, will be made at the trial of the action.

47. The court was referred to two cases in which the High Court considered applications by persons to be joined as notice parties*: Yap v. Children's University Hospital Temple Street Limited* [2006] 4 I.R. 298 and *McElvaney v. Standards in Public Office Commission* (Unreported, High Court, MacGrath J., 1st March, 2019), [2019] IEHC 128. Yap was a private law action by a doctor against her employer in which the clinical director of the department in which the plaintiff was employed – and who appears to have been the object of much of the plaintiff's complaint – applied to be joined as a notice party. *McElvaney* was an application by way of judicial review by a county counsellor to restrain an investigation under the Standards in Public Office Act, 2001, in which another county counsellor who was the subject of a similar complaint sought to intervene. I am unconvinced that either decision will be particularly helpful in resolving any issue that may later arise as to the circumstances, if any, in which a person against whom no relief is claimed and (as far as I can see) has no direct interest in the outcome of the action may be named as a notice party in a private law action but it seems to me that the issue of Mr. Murphy's status does not arise in the application before me.

48. Mr. Walker accepts, as he must, that the basis of any challenge to Mr. Murphy's decision must be very narrow. Whatever, if any, case there may have been to be made in the earlier action that the High Court should make an order condemning the competition, or that Mr. Madden was entitled to be put on the panel, or that he should be put on the panel, was overtaken by the settlement of those proceedings by which the parties agreed that Mr. Madden's appeal would be decided by Mr. Murphy: whose decision would be final and binding on both parties. Mr. Walker accepts that it was highly unlikely that Mr. Murphy, a senior executive officer – still less the High Court – would ever have contemplated overruling or overreaching the assessment by an expert interview board of Mr. Madden's competency as a potential sub-officer in the fire service. In any event, although the plenary summons in this case claims the same reliefs as were claimed in the earlier action, it is accepted that those are not orders which Mr. Murphy can hope to secure.

49. As to the practical effect of the interlocutory order, it is necessary to return briefly to the evidence. The object of the competition advertised in August, 2019, it will be recalled,

was to establish a ranked panel for promotion which would be used to fill at least three positions of sub-officer which it was known would become vacant over the one year or so life of the panel. The result of the competition was that Louth County Council put together a ranked panel of four qualified firefighters. All of the candidates were told on the evening of 4th October, 2019 whether they had made the cut. Mr. Lawless has deposed that those on the panel have an expectation that any jobs that come up will be awarded to them according to their place on the panel. While it is not unequivocally said that the successful candidates were told that the panel was a panel of four, or where they were ranked, I cannot see why they might not have been. It must have been well known in the service that there were three planned vacancies coming up and I cannot see that there would have been any point in keeping those on the panel on tenterhooks, especially the candidate ranked fourth whose prospects of promotion from that panel depended on the prospect of an additional unplanned vacancy arising during the course of the year. While it is not absolutely clear, I understand that one vacancy was filled before the commencement of Mr. Madden's first action but that the filling of any further vacancy was postponed pending the resolution of that action. Immediately following Mr. Murphy's decision and before Mr. Madden's challenge to it, a second vacancy was filled. The court was told that another vacancy (the third of the three anticipated when the competition was advertised) will arise in July of this year. The evidence of Mr. Joe McGuinness, Director of Services, Corporate and Emergency Services with Louth County Council is that a further competition for a sub-officer panel is likely to be advertised in early 2021, from which I infer that a vacancy or vacancies are expected to arise some time in 2021 or early 2022.

50. It is not suggested that there is any prospect that the action could be brought to trial in what remains of this law term. The practical effect of an interlocutory injunction restraining further appointments would be, from the Council's point of view, to thwart a planned and expected promotion and it would leave those on the cusp of promotion in the position of having to compete again for inclusion on, and for the top places on, the next panel.

51. From Mr. Madden's point of view, the effect of the interlocutory order sought would be to keep open a position which otherwise would be put forever beyond his reach. As I have said, it is not suggested that Mr. Madden can ever hope to be put on the 2019 panel but what is said is that the life of the panel is not absolutely limited to twelve months and that Louth County Council might decide to extend it pending a trial of the action. Pending the trial of the action, it is said, firefighters – perhaps those on the panel – could be asked to act-up as sub-officers. If the life of the panel were to be so extended, and if the action were to fail, those who are on the panel and prima facie entitled to be promoted could be promoted. If the action were to succeed and Mr. Madden secured a rehearing of his appeal, and won, and the 2019 panel were to be condemned, the prospect of promotion to the unfilled position would be available to Mr. Madden if he were to successfully come through a new competition and be ranked sufficiently high on the new panel to qualify for one. Rather peculiarly, what is contemplated on Mr. Madden's

side is that the life of a panel which he says was irregularly constituted might or should be prolonged in the hope that it will eventually be condemned.

52. Having so identified the substantive claim and the object of the interlocutory order sought, I turn to the legal principles to be applied in dealing with this application.

Legal principles

53. The principles to be applied in deciding whether to grant or refuse interlocutory relied are tolerably well established.

54. Mr. Walker argues that the applicable threshold test is whether the plaintiff has made out a fair issue to be tried and that the court should move from there to a consideration of the balance of justice. The order sought, it is said, is a purely negative injunction to preserve the status quo as it stood before Mr. Murphy embarked on his consideration of the appeal. Mr. Walker relies on the decision of the Supreme Court in *Merck Sharp & Dohme v. Clonmel Healthcare Limited* (Unreported, Supreme Court, 31st July, 2019), [2019] IESC 65 and in particular on the summary at paragraph 64 of the judgment of O'Donnell J. of the steps to be followed in deciding a motion for an interlocutory injunction. He also relies on two decisions of Clarke J. (as he then was) in *Evans v. IRFB Services Ireland Ltd.* [2005] 2 I.L.R.M. 358 and O'Sullivan v. Mercy Hospital Cork Ltd. (Unreported, High Court, Clarke J., 3rd June, 2005), [2005] IEHC 170.

55. Ms. Phelan argues that the circumstances of this case are such that the plaintiff is required to go beyond merely establishing a fair issue to be tried and that the correct test is whether he has made out a strong case which is likely to succeed at trial. She submits that the relief sought is in the nature of a mandatory order and that in practical terms Mr. Walker is asking for a permanent order frustrating the operation of the 2019 panel.

56. I do not understand the decision of the Supreme Court in *Merck Sharp & Dohme v. Clonmel Healthcare Limited* (Unreported, Supreme Court, 31st July, 2019), [2019] IESC 65 to have established any new principle but to have restated and explained the jurisprudence as it has developed since American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 and *Campus Oil v. The Minister for Industry (No. 2)* [1983] I.R. 88. The judgment of O'Donnell J. clearly and carefully explains the basis and reasons why the court, in considering whether to grant an interlocutory injunction, very often should not, but sometimes should, go beyond an assessment as to whether the plaintiff has established that there is a *bona fide* issue to be tried. In particular, O'Donnell J. emphasised that the approach in a case which is unlikely ever to come to trial may often be different to that which is appropriate in a case which is likely to be tried. There may very well be in *Merck* some indication of a nuanced movement towards (or back to) an analysis in which, in appropriate cases, the strength of the parties' respective positions is to be examined as part of the balance of justice rather than the threshold test, but that argument was not made before me and any such move would in any event be a matter for the appellate courts.

57. The essential question considered in *Merck* was the interaction between the adequacy of damages and the balance of convenience in a case in which there was a *bona fide* issue which was likely to go to trial – essentially whether the court should first consider the adequacy of damages before making an assessment of the balance of convenience or whether the adequacy of damages was part of the balance of justice. The Supreme Court emphasised that the importance of *American Cyanamid* was that it dismantled what had become an almost immutable rule that a plaintiff seeking an interlocutory injunction was required to establish a prima *facie case*, and to reassert the essential function of an interlocutory injunction as being to find a just solution pending the hearing of an action. To do that, the court must weigh all of the relevant factors to minimise the risk of injustice.

58. In his summary in *Merck* the first step identified by O'Donnell J. was to assess whether if the plaintiff succeeded at trial a permanent injunction would be granted. If not, he said, it is extremely unlikely that an interlocutory injunction would be granted granting the same relief which would end upon the trial. In the course of his judgment, starting at para. 36, and again in the summary at para. 64, O'Donnell J. emphasised that in cases in which it is unlikely that there will ever be a trial, it is not sufficient to confine the assessment to whether there is a fair question to be tried. The consideration of whether there is a fair issue to be tried involves an assessment as to whether there will be, or will likely be, a trial. Going back to the decision of the House of Lords in *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294, which had been approved by Clarke J. in *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549, [2011] IEHC 505, O'Donnell J. said that in a case in which it is unlikely that there will ever be a trial on the merits, the court must make its best assessment of the strength of the respective parties' cases.

59. The judgment of Clarke J. in *O'Sullivan* is entirely consistent with the approach spelled out in *Merck*. That was a case in which a senior employee sought an interlocutory injunction restraining the progress of a disciplinary investigation which was said to be tainted by an earlier legally flawed enquiry. In restraining the continuation of the enquiry as it was presently constituted, Clarke J. clearly contemplated that the enquiry might be reconstituted in terms that would be immune from attack and so, it seems to me, that the plaintiff's challenge to the enquiry as it was then constituted would never come to trial. The foundation of the order was a finding that the plaintiff made out a *prima facie* case, and that on the evidence before the court the earlier enquiry was legally flawed.

60. The decision of Clarke J. in Evans is no less consistent with the approach spelled out in Merck. Mr. Evans sought to restrain *pendente lite* what he said would be a clear breach of a five year fixed term employment contract which included a detailed job description. Clarke J. crafted an interlocutory order which would preserve the plaintiff's position pending a full trial at the earliest opportunity, saying that he would impose strict terms to ensure that there was an early trial.

61. As to the principles of natural justice, Ms. Phelan rather tentatively argued that they do not apply to an administrative review of a competition for promotion. Whatever the general rule might be, I find it difficult to contemplate that Mr. Murphy might not, after all, have been bound to adhere to principles to which he had declared he would adhere. On the assumption that those principles did apply, counsel are agreed that the requirements of natural justice will vary with the circumstances of the case. Reference was made to *Mooney v. An Post* [1998] 4 I.R. 288. Ms. Phelan drew particular attention to the decision of Keane J. in *Fanning v. Public Appointments Service* [2015] IEHC 663. That, incidentally, was an application for an interlocutory injunction by a disappointed applicant for promotion but Keane J. emphasised a point of general applicability that the principles of constitutional justice require fair procedures, not perfect procedures.

Discussion

62. I have devoted some time to analysing the legal nature of the plaintiff's claim and the factual circumstances in which this application is made.

63. It is difficult to see, in principle, how anything done or not done by Mr. Murphy could have amounted to a breach of contract by the Council. It could be said, I suppose, that once the terms of reference were issued it was a term of the settlement, and perhaps before that that there was an implied warranty by the Council, that Mr. Murphy would deal with the appeal in accordance with the requirements of natural justice but if, for the sake of argument, there was a breach of contract, what is the remedy? The settlement was that the appeal would be conducted by Mr. Murphy, personally. I cannot see how the court could properly impose someone else on the parties or what jurisdiction the court might have to require Mr. Murphy to reconsider his decision. No less to the point, no order is sought to require a rehearing of Mr. Madden's appeal, whether by Mr. Murphy or by anyone else.

64. In *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549 Clarke J. noted that most interlocutory injunctions seek to preserve the position of the parties pending a full hearing at which the court is likely to consider whether the plaintiff is entitled to a permanent injunction in the same terms. That is the first step in the analysis propounded by O'Donnell J. in *Merck*. In my view, this is not such a case. Mr. Walker's declared object is not that the court should ever review the regularity of the competition but that it should review the regularity of Mr. Murphy's decision with a view (although this is not spelled out in the indorsement of claim) to remitting the substantive review of the conduct of the competition to someone other than Mr. Murphy or, perhaps, to Mr. Murphy. The permanent injunction contemplated by *Diamond* and *Merck* need not, of course, be a perpetual injunction. It may compel compliance with, or enjoin departure from, a covenant of fixed duration. Or it may be directed to the doing or not doing of something in a manner which has been found to be unlawful: for example the conduct of a disciplinary enquiry. In such a case the injunction will be perpetual as to the unlawful conduct, but the subject of the injunction will be entitled to start again, or, perhaps, to restart from the point at which the process went wrong. This, it seems to me, is not such a case. Mr. Madden's ultimate objective may be to upend the conduct of the

competition but his immediate – and in the action his only – attack is on Mr. Murphy's decision.

65. It seems to me that this action is highly unlikely ever to come to trial. Mr. Walker declares that if the order now sought is not made the action will not be tried – or perhaps more correctly that Mr. Madden will not bring it to trial. Presumably there is a pay differential between a firefighter and a sub-officer but there is no evidence of what that is, and it is clear that Mr. Madden's real quest is for the rank and not the additional pay. Mr. Madden's case is that without an injunction there will be nothing for him in the declaration which he seeks.

66. If the order is not now made, the upcoming vacancy will be filled during the remainder of the life of the panel and Mr. Madden will have to apply for inclusion on the next panel for promotion to such vacancies as may arise during the life of that panel. It will be recalled that there are altogether ten positions of sub-officer in the Louth County Council Fire Service and that the expectation was that three positions of sub-officer would be filled from the 2019 panel by candidates who were expected to serve for between ten and fifteen years. There is no clear evidence as to what vacancies are expected to arise after October, 2020 although, as I have said, Mr. Joe McGuinness has deposed that a further competition is likely to be advertised in early 2021, from which it can be inferred that a further vacancy or vacancies are anticipated during 2021 or early 2022.

67. The immediate effect of the making of the order sought by Mr. Madden is clear – it would block the imminent promotion – but the effect beyond that is not clear. It is common case that by direction of the Minister under the Local Government (Appointment of Officers) Regulations, 1974 and according to the notice circulated in August, 2019 the life of the panel was to be for no more than one year, unless extended. Unless extended, then, the panel will expire on 4th October, 2020. Mr. Walker in argument suggested that if the order now sought were to be made, Louth County Council might extend the life of the panel but there was no evidence as to the circumstances, under the regulations or the Minister's direction, in which that might be done. Logically, the only purpose of extending the life of the panel would be to allow further promotions to be made from it but that is precisely what Mr. Madden does not want to happen. The Council is determined to stand over the propriety and fairness of the establishment of the panel and of Mr. Murphy's decision and to protect the interests and expectations of those who are *prima facie* entitled to promotion in the short term but to my mind it is something of a stretch to contemplate the Council (on the assumption that it would be permissible to do so under the regulations) would prop up the panel to allow Mr. Madden the opportunity to try to knock it down. Balancing principle against practicality, particularly in circumstances in which Mr. Madden's declared position is that the case is not about the money, the Council could avoid the distraction and expense of a trial and get back to the business of managing its fire service by allowing the panel to expire, or even, perhaps, abandoning it early and advertising a new competition.

68. What is critical for present purposes is that unless the Council is entitled to extend the life of the panel and decides to do so – which are matters over which the court has no control – there is no possibility of a trial before the 2019 panel will expire. The object of the interlocutory order sought is to prevent the filling of the upcoming vacancy from the 2019 panel. The effect of the order, as matters stand, would be that no further promotions would ever be made from the 2019 panel. On the view that I take that it is unlikely that there will ever be a trial of this action on the merits, it is necessary to do justice between the parties that I should make the best estimate I can of the strength of the respective parties' cases.

69. The grounding affidavit of Mr. Madden recalls the progress of the competition, his previous action, and his appeal to Mr. Murphy, exhibits all the paperwork, and summarises his challenge to the decision. Affidavits were sworn and filed on behalf of the Council by Mr. Lawless, Mr. Murphy, Mr. Sweeney, Mr. Guilfoyle, Mr. O'Connor, Mr. McGuinness and Ms. Sheila Cooney, the Council's solicitor. In the end, however, there was little contest as to the facts, and the thrust of the replying affidavits was to confirm the facts as found by Mr. Murphy and to seek to justify the conduct of the competition and the decision on Mr. Madden's appeal.

70. Mr. Madden's complaint is that Mr. Murphy contacted Mr. O'Connor and decided his appeal by reference to what he established from Mr. O'Connor – or perhaps what Mr. O'Connor told him – without telling Mr. Madden what that was and allowing Mr. Madden an opportunity to comment on it.

71. For completeness I mention that in his grounding affidavit, Mr. Madden made reference to the appeal process having been "*ostensibly established on an independent and fully transparent basis*". Mr. Murphy, in his affidavit, mentioned that he had previously worked for Louth County Council at one point in his career. In the course of the hearing reference was made to this averment in the context of the requirement that the appeal should be independent, but the reference was in the nature of a kite rather than an argument. The fact that Mr. Murphy had previously, at some unspecified time and for some unspecified period and in some unspecified capacity other than in the fire service, worked for Louth County Council is not a basis upon which his independence might properly be impugned, or a basis upon which a reasonable person might apprehend partiality.

72. The foundation of the principled objection that Mr. Murphy discussed the case with Mr. O'Connor is the first point of the five point process set out in his terms of reference. That sentence, on its own, indicates a purely paper based review but in my view the stipulation earlier in the document that Mr. Murphy would be in sole control of the procedure and process and the final arbiter on all matters relating to procedure is inconsistent with any argument that Mr. Murphy was not to go beyond a purely paper review. It was known to the parties, if not to Mr. Murphy, before the appeal process started that the interview board had marked Mr. Madden's performance in interview otherwise than in the manner which he, and the Council, had anticipated. It seems to

me that all that a paper review could have done was to have confirmed what everyone knew already. What the paperwork did not show was why the interview board had done what it had done. Neither would a review of the paperwork limited to Mr. Madden's application and interview have shown how the other candidates in the competition were dealt with. It is clear from Mr. Murphy's decision that he took the view that the interview board's departure from the marking scheme which it had been asked to use was not, by itself, unfair and that he set out to establish whether Mr. Madden had been otherwise dealt with fairly, and in the same way as the other candidates. I do not believe that Mr. Madden has made out a fair issue to be tried that Mr. Murphy's decision was invalidated by the fact that he spoke to Mr. O'Connor. If I am wrong in that, it is certainly not a sufficiently strong case.

73. As to how, otherwise than he did, Mr. Murphy might have communicated with Mr. O'Connor and how, otherwise than he did, Mr. Murphy might have dealt with the information which he elicited, it is common case that the requirements of natural justice vary according to the circumstances of the case and depend upon what is involved. This was not a disciplinary process and the outcome of the appeal would not impact on Mr. Madden's good name. The objection to what Mr. Murphy did is a principled one. Specifically, there is no attempt to identify any practical unfairness or any suggestion as to what Mr. Murphy might have done other than what he did or how the outcome of the appeal might have been different.

74. The terms of reference expressly precluded any oral hearing or legal representation and made Mr. Murphy the master of the process. Mr. Walker, in argument, sought to compare what Mr. Murphy did with the hypothesis that a judge might interview a witness in a case otherwise than in the presence of the parties, but I accept the submission of Ms. Phelan that any analogy with judicial process is fundamentally flawed. Mr. Murphy was not a judge. He was not in truth adjudicating upon, or enquiring into, a contest between Mr. Madden and the Council but conducting an administrative review into the fairness of a departure by the interview board from the process it had been asked to follow in marking Mr. Madden's interview. The express exclusion of lawyers and oral hearings precluded any involvement by or on behalf of Mr. Madden in Mr. Murphy's communication with Mr. O'Connor. The information elicited by Mr. Murphy from Mr. O'Connor – if I will be forgiven the dreadful cliché – was what it was. Mr. Madden might have agreed or disagreed with the reason given for the departure from the marking scheme, but he could not have changed it. He might have doubted that all of the candidates in the interview were treated in the same way but there was nothing that he could have done about that either. Mr. Madden was not entitled, by himself or counsel, to cross-examine Mr. O'Connor.

75. In the course of argument there was some debate as to the difference between flawed procedure and unfairness. Ms. Phelan relied in particular on the observation of Keane J. in *Fanning v. Public Appointments Service* [2015] IEHC 663 that the principles of constitutional justice require fair procedures rather than perfect procedures but save for the argument that Mr. Murphy departed from his terms of reference by communicating

with Mr. O'Connor at all, I am entirely unclear as to what the alleged flaw was or precisely how or why the process or outcome of the appeal are said to have been unfair.

76. On the view I have taken of the applicable threshold test and the relative strength of the parties' cases it may not strictly speaking arise, but I will say something about the status quo and the balance of justice.

77. Mr. Walker submits that the making of the interlocutory order sought would preserve the status quo as at the beginning of the appeal process. Ms. Phelan submits that the status quo is that a panel stands established since October, 2019 from which two appointments have been made and from which a further appointment is to be made in the four months left to run of the twelve months life of the panel. In my view, it is the Council's position that is correct. The measure of that is that Mr. Madden's ultimate goal is to upend the panel from the time of its establishment and that but for Mr. Madden's appeal the promotions would have been made from the panel as they arose. It is true that the Council suspended promotions from the panel pending the determination of Mr. Madden's appeal, but its position has at all times been that the panel was properly and fairly constituted. If it had come to it, I would, as Keane J. did in *Fanning* in the context of a recruitment campaign for the appointment of a Deputy Commissioner of An Garda Síochána, have given considerable weight to the public interest in the maintenance by Louth County Council of its fire service, and as Clarke J. did in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 in the context of a judicial review, to the public interest in the implementation of decisions made in the context of public service appointments which are *prima facie* valid. While it is true that the office of Deputy Commissioner of An Garda Síochána is a statutory office, I believe that the same considerations apply when it comes to ensuring discipline and stability in the front line operation of a fire brigade. As Keane J. found in *Fanning*, I find that prior delay in permanently filling a position serves to emphasise the need to conclude the recruitment process with all due promptness. I do not accept the argument that vacancies can be just as well filled on an acting up basis as by permanent promotion, and I do not accept the argument that the fact that promotions were suspended pending the determination of an appeal which was expected to take three weeks goes to show that the promotions should be further postponed or permanently blocked.

78. As to the balance of convenience or the balance of justice, I think that it is fair to say that the focus of the evidence of Mr. Lawless and Mr. McGuinness is on the unfairness of a further postponement of promotion on the person next in line to be promoted, rather than on any immediately apprehended operational or industrial relations difficulties. Counsel did not address the question (which was touched on for example in *Lynch v. Health Service Executive* (Unreported, High Court, Irvine J., 12th August, 2010), [2010] IEHC 346) of the extent, if any, to which, weight can properly be given to the interests of, or risk of injustice to, third parties in striking a balance of convenience or justice between the parties before the court and I am content in this case to leave that question aside. The evidence of Mr. McGuiness that the next two candidates on the panel have a clear expectation that they are in line for the next available promotions is not contradicted.

Ms. Phelan, in argument, portended the possibility of legal challenge or other unrest if the expected promotion were to be prevented which I think probably goes too far, but I accept that the Council, as an employer, has a legitimate interest in ensuring that the expectations which it has fostered are met. That too, if it had come to it, would have gone into the balance.

79. On the other side of the scales, the making of the interlocutory order sought would have kept open the position that would otherwise be filled. That is not a position for which Mr. Madden can assert any claim of right or even a probability that he would get it if it were kept open. That one position is one for which, irrespective of the outcome of his challenge to Mr. Murphy's decision, Mr. Madden would have to compete on an equal footing with all other qualified firefighters in the service. The eventuality against which Mr. Madden urges the court to keep the position open is that he will win his appeal, somehow or other secure a rehearing of his administrative appeal, and win that new appeal. Thereafter Mr. Madden would have to compete for inclusion on a new panel, succeed in the competition, and be placed second on the new panel. If Mr. Madden were to be ranked first on the new panel, he would fill the new vacancy which is expected to arise in 2021. If he were to be ranked third on the new panel, the position kept open would be filled by his colleague ranked immediately ahead of him. The variables are so many and the prospects so uncertain that I am wholly unconvinced that the balance of justice would be resolved in favour of keeping the position open on the off-chance.

Summary and conclusions

80. For the reasons given, I am not satisfied that the plaintiff has made a sufficient link between the interlocutory order sought and the substantive relief claimed in the action.

81. For the reasons given, I have come to the conclusion that – whether the interlocutory order is made or not – the action is unlikely to come to trial, and further, that the making of the order sought would effectively determine the issue as to whether the remaining promotion should be made from the panel established in 2019. Accordingly, the threshold test applicable is whether the plaintiff has made out a strong case that would be likely to succeed at trial.

82. For the reasons given, I am not satisfied that that threshold test has been met.

83. In any event, the risk of injustice to the defendant if the order were to be made is clear and measurable, while any risk of injustice to the plaintiff if the order were not to be made is entirely uncertain and I find that the balance would have been tilted very much against the making of the order.

84. Accordingly, the plaintiff's motion must be refused.