

THE JUDGMENT OF THE COURT OF APPEAL IN *PODARIU V. THE VETERINARY COUNCIL OF IRELAND AND THE FITNESS TO PRACTICE COMMITTEE OF THE VETERINARY COUNCIL OF IRELAND*¹

1. Introduction / Factual Background

- 1.1. A complaint was made to the Veterinary Council about the conduct of Mr. Podariu, a veterinary surgeon originally from Romania in May 2012 by Frank Roarty, who was the former employer of Mr. Podariu in Donegal. There were a number of allegations of professional misconduct made against Mr. Podariu, most of which were in relation to his treatment of small animals, thirteen different cats and dogs. There was also an allegation that Mr. Podariu had failed to maintain contemporaneous veterinary records in relation to one or more of these animals and an allegation that he had embellished his CV when applying for a job with Mr. Roarty.
- 1.2. The complaints were considered by the Preliminary Investigation Committee of the Veterinary Council and in July 2012 the matter was referred to an inquiry before the Fitness to Practise Committee of the Council pursuant to the provisions of Section 76(6)(b) of the Veterinary Council Act 2005.
- 1.3. Mr. Podariu was directed to produce veterinary records by way of production summonses issued by the Fitness to Practise Committee in October 2012 and in May 2013. The inquiry before the Fitness to Practise Committee commenced on 20th May 2013. During the course of the inquiry, Mr. Podariu produced notebooks which he claimed were his contemporaneous handwritten records for the relevant years, having previously provided copies of same.
- 1.4. Following certain investigations which were carried out in relation to the origin of the notebooks, the Registrar who had at this stage concluded her evidence then proposed adducing evidence before the Fitness to Practise Committee to the effect that the handwritten records produced were not in fact contemporaneous records. This was based on evidence from a purchasing manager in Lidl, which it was proposed to call, that the notebooks in which they were written, sold by Lidl Ireland, were not on the Irish market and could not have been purchased on the relevant dates as claimed by Mr. Podariu.
- 1.5. The evidence which was subsequently given by Ms. Brophy was that every product ordered by LIDL had its own IAN number and barcode which only came into existence once orders of the products were placed with LIDL International. She gave evidence in relation to the creation of IAN numbers by virtue of her role as purchasing manager, that each product has its own IAN number and that no product

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bearing the relevant IAN numbers could have existed before the orders for the product were placed and none existed before mid-2012.

- 1.6. Given that dishonesty was to be alleged against Mr. Podariu, it was decided by the Registrar to amend the Notice of Inquiry to specifically plead these allegations of dishonesty as against Mr. Podariu² namely that he had acted dishonestly:
 - i. In purporting to produce contemporaneous hand-written records for 2010, 2011 and/or 2012 on foot of directions made by the Fitness to Practise Committee dated the 1st October 2013 and/or the 3rd May 2012, in circumstances where he knew that the documents produced were not contemporaneous records and/or;
 - ii. In giving evidence to the Fitness to Practise Committee during the course of this Inquiry by reference to the said records on the basis that they were contemporaneous records when he knew this not to be so.
- 1.7. Mr. Podariu was notified by letter of the proposed application to amend the Notice of Inquiry to allege expressly that he had acted dishonestly in producing the records and in giving evidence by reference to those records claiming that they were contemporaneous records. When the inquiry resumed Counsel for Mr. Podariu accepted that the Fitness to Practise Committee was entitled in principle to allow the proposed amendment of the Notice of Inquiry, whilst raising issue in general with the number of allegations preferred against Mr. Podariu. The Fitness to Practise Committee permitted the amendment of the Notice of Inquiry to introduce the allegation to the effect that the Mr. Podariu had acted dishonestly in purporting to produce contemporaneous handwritten records and adjourned to allow Mr. Podariu to deal with this additional allegation.
- 1.8. The inquiry subsequently resumed and the Fitness to Practise Committee found Mr. Podariu guilty of professional misconduct in relation only to the allegation of dishonesty as to the records, not in relation to the original allegations. The Veterinary Practice Act 2005, like other similar regulatory legislation, reserves the role of imposing sanction to the Veterinary Council rather than the Fitness to Practise Committee but the Fitness to Practise Committee made a recommendation that Mr. Podariu be censured.
- 1.9. When the matter came before the Veterinary Council, it considered the recommended sanction but decided instead to suspend Mr. Podariu for a period of six weeks. In

² In *Fish v. General Medical Council*, [2012] EWHC 1269 (Admin) Foskett J. emphasised the significance of making an allegation of dishonesty. While he noted that it was an allegation that should not be made without good reasons, he also emphasised that when it was made, it should be clearly particularised so that the person against whom it was made knew how the allegation was put and so that when a hearing took place at which the allegation was tested, the person against whom it was made should have the allegation fairly and squarely put to him so he could seek to answer it.

doing so it applied the amendments made to the Veterinary Practice Act 2005 by the Veterinary Practice (Amendment) Act 2012 which had been commenced on the 18th July 2012, after the initial complaint of misconduct was made by Mr. Roarty about Mr. Podariu but before the date of the dishonest conduct of which Mr. Podariu was found guilty of misconduct.

1.10. Mr. Podariu brought an appeal to the High Court which was heard by McCarthy J in January 2016. In an *ex tempore* judgment McCarthy J. found that that by adding the new allegation at the inquiry stage and without going through the Preliminary Investigation Committee, there had been a breach of the rules of constitutional justice, describing the real issue as “*not whether or not there was a power of amendment, but rather whether or not there was an original or founding jurisdiction ab initio in this Committee on this occasion to hear and determine the new, fresh and unrelated allegation of professional misconduct which arose during the hearing of the matter before it*”. McCarthy J. also held that the legislation applicable as to sanction was the Veterinary Practice Act 2005, and that the Council was not entitled to apply the amendments introduced by the Veterinary Practice (Amendment) Act 2012.

1.11. The Court of Appeal (Peart, Hogan and Whelan JJ) determined the matter on the three following grounds:

- (a) Whether the Fitness to Practise Committee had jurisdiction to permit a new allegation to be added at inquiry stage;
- (b) Whether Mr. Podariu was estopped from challenging the validity of the decision of the Fitness to Practise Committee and;
- (c) The application of the Veterinary Practice (Amendment) Act 2012.

2. Jurisdiction to Add New Allegation

2.1. Under Part 7 of the Veterinary Practice Acts, an application for an inquiry into the fitness to practise veterinary medicine of a registrant is to be directed to the Preliminary Investigation Committee. The Preliminary Investigation Committee shall seek observations from the registered person in respect of whom the application was made, or from any other person whom it considers appropriate³. Following consideration of the application, the Preliminary Investigation Committee may decide that it should proceed or should not proceed for reasons *inter alia* that it is frivolous, vexatious or made in bad faith or because there is insufficient evidence to warrant an inquiry⁴.

³ Section 76(5)(b)

⁴ Section 76(6)

- 2.2. In *Podariu*, despite the fact that the dishonest conduct alleged arose during the course of the inquiry, the Court of Appeal held that the decision to amend the Notice of Inquiry at the inquiry stage and without the complaint first being considered by the Preliminary Investigation Committee was flawed and a departure from the terms of this statutory scheme. Hogan J. described the consideration of a complaint by the Preliminary Investigation Committee as “absolutely central” to the lawful operation of the disciplinary regime envisaged by the 2005 Act⁵.
- 2.3. The Court of Appeal concluded that what it described as the mandatory and imperative language of Section 76 of the 2005 Act admitted of no other conclusion; it described the obligation imposed by the Oireachtas on the Preliminary Investigation Committee to seek observations from the registrant as providing a vital safeguard in order to ensure that the matter does not proceed to a full inquiry unless they have been given an opportunity to respond to the complaint.
- 2.4. The court also found that it was implicit in the provisions of Section 76(6), whereby the Preliminary Investigation Committee must make a decision as to whether there is sufficient evidence to warrant an inquiry, that the Preliminary Investigation Committee actually make such a decision before the matter proceeds to a full hearing before the Fitness to Practise Committee.
- 2.5. They concluded that the entire statutory scheme contained in the 2005 Act would be “set at naught” if the Fitness to Practise Committee could assume a jurisdiction to hear and determine a complaint without it having been first assessed and considered by the Preliminary Investigation Committee to see whether an inquiry is actually warranted⁶.

3. Estoppel - Whether Mr. Podariu was estopped from challenging the validity of the decision of the Fitness to Practise Committee

- 3.1. Notwithstanding the finding that the Fitness to Practise Committee had acted *ultra vires* in allowing the addition of the new allegation, the Court of Appeal went on to hold that Mr. Podariu was deemed to have waived the protection of statutory provisions which existed for his benefit and was therefore precluded from challenging the validity of the decision to permit such an amendment to be made.
- 3.2. The High Court had found that one could not confer jurisdiction by waiver, estoppel or acquiescence. Whilst the Court of Appeal accepted that an entirely new jurisdiction could not be created by estoppel⁷ it found that it couldn't be said that the Fitness to Practise Committee didn't have jurisdiction in relation to Mr. Podariu but

⁵ Paragraph 21

⁶ Paragraph 28

⁷ Using the example of a veterinary surgeon who submitted to the jurisdiction of the Medical Council as an example

rather that its authority to deal with the allegation was contingent on compliance with the statutory pre-conditions, including the requirement that the Preliminary Investigation Committee should first have determined that there was a case to answer in respect of that allegation.

- 3.3. Even though the Fitness to Practise Committee had acted *ultra vires* in allowing the addition of the new allegation, those statutory provisions existed fundamentally as protections for the registrant and therefore they were entitled, in principle, at least, to waive these protections. This, the court found, distinguished it from other cases on estoppel which were raised including *O'Malley v. District Judge Kelly*⁸ where it was held that a District Court could not exceed its own geographical limitations by dealing with offences committed outside their district notwithstanding the acquiescence of the applicant. The Court of Appeal instead found similarities with *State (Byrne) v. Frawley*⁹ where there was a knowing and free election in light of the *de Burca* decision to accept to continue to be tried by the empanelled jury, despite them being an all-male jury.
- 3.4. The court described it as “striking” that at no time during the hearing before the Fitness to Practise Committee was it ever submitted on behalf of Mr. Podariu that the new allegation would first have to be brought before the Preliminary Investigation Committee by way of an entirely fresh complaint finding that he must be deemed to have waived the protection of statutory provisions which existed for his benefit and was therefore precluded from challenging the validity of the decision to permit such an amendment to be made¹⁰.

4. The Application of the 2005 Act

- 4.1. The third and final point raised was the question of whether the Veterinary Council, in considering sanction, was entitled to apply the Veterinary Practice Act 2005 as amended by the Veterinary Practice (Amendment) Act 2012.
- 4.2. The Veterinary Practice (Amendment) Act 2012 was enacted and commenced on the 18th July 2012. The new allegation on the Notice of Inquiry, of which Mr. Podariu was found guilty, related to his dishonest conduct during the course of the inquiry on or around the 21st May 2013 and/or the 22nd May 2013, therefore after the commencement of the 2012 Act. The remainder of the allegations on the Notice of Inquiry dated back to dates between 2009 and 2011 and the complaint was made in May 2012, prior to the commencement of the Veterinary Practice (Amendment) Act 2012.

⁸ [2015] IECA 67

⁹ [1978] I.R. 326

¹⁰ Paragraphs 42 and 43

- 4.3. Prior to the amendments made by the Veterinary Practice (Amendment) Act 2012, it was required by Section 80(1) of the Veterinary Practice Act 2005 that the Fitness to Practise Committee gave as its opinion that the registrant was not fit to practise, or was not fit to practise a specified type of veterinary medicine before the Veterinary Council could impose sanctions pursuant to Section 80(1) including removal from the Register, suspension and/or attachment of conditions. Section 4(b) of the Veterinary Practice (Amendment) Act 2012 amended Section 80(1) to remove this requirement.
- 4.4. In respect of Mr. Podariu, the Fitness to Practise Committee had made no finding of unfitness to practise and recommended censure. When the matter came before the Veterinary Council it concluded that a period of six weeks suspension was necessary to reflect the seriousness of the offence and the need to uphold the reputation and integrity of the profession. The question which arose was whether this sanction could be imposed and the advice given to the Veterinary Council by its legal assessor was that it could only be imposed if the Veterinary Council applied the amendments effected by the Veterinary Practice (Amendment) Act 2012.
- 4.5. If the amendments were not applied, the Veterinary Council was limited to advise, warn or censure Mr. Podariu. Given that Mr Podariu’s dishonest conduct post-dated the commencement of the Veterinary Practice (Amendment) Act 2012, the Veterinary Council concluded that it could apply the amended provisions and imposed the sanction of a six week suspension.
- 4.6. The Court of Appeal held that what was critical was that at the time the first complaints were made in May 2012 the professional disciplinary regime was governed by the Veterinary Practice Act 2005 and therefore that Mr. Podariu enjoyed a “vested right” to have these disciplinary complaints deal with in accordance with the disciplinary regime in place under the Veterinary Practice Act 2005¹¹.
- 4.7. The court relied on Section 27(1)(c) of the Interpretation Act 2005 and a number of extradition/surrender cases where that provision had been considered in the context of whether application for extradition/surrender was governed by the law obtaining at the date of the alleged offence or whether subsequently enacted legislation could properly apply to a later extradition request.¹²

Section 27(1)(c) provides that:

‘(1) Where an enactment is repealed the repeal does not –

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment ...’

¹¹ Paragraph 52

¹² *Sloan v. Culligan* [1992] 1 I.R. 223 , *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16 , [2012] 4 I.R. 1 and *Minister for Justice and Law Reform v. Tobin (No.2)* [2012] IESC 37 , [2012] 4 I.R. 147

4.8. The Court of Appeal concluded that the Veterinary Council was obliged to deal with the allegation of dishonesty on which Mr. Podariu was found guilty of misconduct as if it were governed entirely by the provisions of the Veterinary Practice Act 2005, meaning that they had no power to impose a suspension in the absence of a finding of unfitness to practise. Had the additional allegation been sent back to the Preliminary Investigation Committee as the court found it ought to have been, Mr. Podariu would then have been subject to the provisions of the Veterinary Practice (Amendment) Act 2012 and if found guilty of misconduct, could have been lawfully subjected to such a suspension as proposed by the Veterinary Council.

5. Costs & Orders

5.1. Having delivered judgment the Court of Appeal adjourned for submissions to be made as to the precise form of the orders to be made and as to costs. It was agreed that the matter would be remitted to the Veterinary Council for its consideration as to sanction per Section 81 of the Veterinary Practice Act 2005, i.e. limited to advise, warn or censure, in accordance with the judgment of the court.

5.2. After hearing submissions in relation to costs, the Court of Appeal with what it described as some reflection and “not little hesitation” granted the costs of the appeal to Mr. Podariu. Hogan J. noted that in such multi-issue cases where the parties both prevailed on certain issues it was not always easy to say who had won or lost.

5.3. However the court concluded that the “event” for the purposes of Order 99 of the Rules of the Superior Courts, was the decision of the Veterinary Council to prefer the additional allegation and that the question of *vires* and the by passing of the Preliminary Investigation Committee was the most central issue in the case.

6. Conclusion

6.1. The judgment of the Court of Appeal is significant in the context of other regulatory schemes with similar preliminary screening bodies such as the Preliminary Proceedings Committees of the Medical Council¹³ and the Nursing and Midwifery Board.¹⁴ Each requires initial consideration by their Preliminary Proceedings Committee as to whether there is sufficient cause to warrant further action being taken in relation to the complaint.

6.2. It is clear from the judgment in *Podariu* that regardless of whether there is little prospect of any different result if the complaint is not considered by the Preliminary Investigation Committee, the statutory provisions represent “core protections for the

¹³ Section 59, Medical Practitioners Act 2007;

¹⁴ Section 57, Nurses and Midwives Act 2011

professional person whose reputation and livelihood may be affected in a far-reaching way by a complaint of this nature¹⁵” and therefore cannot be bypassed.

- 6.3. The judgment also poses a warning to practitioners in terms of raising and/or preserving points prior to an appeal or judicial review and of the risk of acquiescence during the course of a regulatory hearing barring future relief on those issues.

¹⁵ Paragraph 32