APPEALS FROM PROFESSIONAL REGULATORY TRIBUNALS –

A FRESH LOOK IN LIGHT OF THE DECISION OF THE SUPREME COURT IN FITZGIBBON v. LAW SOCIETY

Fitgibbon v Law Society

1. Ms. Fitzgibbon got into trouble with the Complaints and Client Relations Committee of the Law Society. Section 11(1) of the Solicitors Amendment Act 1994 provides that a person in respect of whom a determination or direction has been made by that Committee may:-

> *"…..apply to the High Court for an Order directing the Society to rescind or to vary such determination or direction…..and on hearing such application, the Court may make such order as it thinks fit."*

The matter came before the President, who determined on a preliminary issue that the format of the hearing before him would be that of a review of a specialist tribunal, whereby the finding would be reviewed and oral evidence would be called only if necessary. He said:-

> *"I think that the Committee here can be regarded as an expert Committee in respect of which curial deference should be extended, and I think that the test for a review of this particular decision is that as indicated by Mr. Justice Finnegan on the 1st November 2006 in the Ulster Bank case.*
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> *Even if I am mistaken in that view, I am quite satisfied that the section of the Act, in other words Section 11(1) of the Solicitors Amendment Act 1994, in its terminology clearly envisages something other than a de novo appeal because, if it intended such an appeal it would have simply said that an appellate would enjoy a full right of appeal from any decision of the Complaints and Client Relations Committee to the High Court, and the same shall consist of a rehearing. I believe in respect of an appeal from the Circuit Court to the High Court, from recollection, a similar form of wording appears in the relevant legislation. The very terminology of the section itself, whereby, on review, this Court can rescind or vary a determination, I think is very suggestive that the Court has a relatively limited role and, indeed, that approach makes perfect common sense, because otherwise the High Court might be involved in endless re-hearings of matters which have been fully ventilated and considered, and in respect of which the material is available for the Court from the proceedings before the Complaints and Client Relations Committee."*

2. Ms. Fitzgibbon appealed to the Supreme Court. Two judgments were delivered, by Denham C.J. and Clarke J. respectively, both confirming the decision of the High Court. Denham C.J. considered a number of previous cases,[1] and held that the case fell within the category of cases for which an appeal was provided from a decision of an expert tribunal, in which the standard applicable to judicial review was not appropriate, but in which the question was whether the decision reached "*was vitiated by a serious and significant error or a series of such errors*". In the application of this test, the Court should have regard to the degree of expertise and specialist knowledge of the tribunal.

3. The decision of Clarke J. contained a structured analysis of the various types of appeal for which the law provides. He pointed out that, in most cases, the form of appeal allowed will be a question of the proper interpretation of the relevant legal measures: if those are sufficiently clear, then it is unlikely that any difficulty will arise. [2] He added however that the measures to be interpreted are often not clear. He categorised the various types of appeal that might arise as follows:-

(a) A de novo appeal, as in the appeal from the Circuit Court to the High Court. The use of that term or similar terminology carries with it two consequences. First, there is a requirement that the appellate body exercise its own judgment on the issues before it, without any regard to the decision made by the first instance body. Secondly, and in the absence of any specific rules to the contrary, the default position is that all materials on which the appellate body is to reach its adjudication are properly re-presented to that body in whatever form may be appropriate to the type of proceedings concerned. Thus, where the proceedings involve oral evidence, witnesses will have to be called again.[3]

(b) The term "appeal on the record*"* describes a recognised form of appeal which shares one but not both of the fundamental characteristics of a de novo appeal. In an appeal on the record, the appellate body must come to its own conclusions as to the proper result of the issues before it, but the default

[1] *Orange Communications Limited v. The Director of Telecommunications Regulation (No.2)* [2000] 4 IR 159; *Carrigdale Hotel Limited v. The Comptroller of Patent Designs and Trade Marks* [2004] 3 IR 410; *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323.
[2] See paragraph 2.2 of his Judgment.
[3] The latter proposition is subject to some qualifications, because, for instance, the process at first instance may have reduced the scope of issues which are properly before the appeal body, and there may be circumstances in which statements made or evidence given at first instance may in themselves be properly admissible as party to the appellate process.

position is that the evidence and materials which are properly relied on by the appellate body are the same as those which are before the first instance body. Clarke J. pointed out that there may be some limitations on the proper availability of an appeal on the record, stemming from the fact that it may not be legitimate for an appellate body to reach an independent conclusion in relation to such issues solely by considering the first instance record. Where a decision on contested facts is truly necessary to enable a decision maker to adjudicate on the rights and obligations that require to be determined, a party potentially affected by a finding of fact in such contested matters is entitled to test the evidence which might lead to such an adverse finding. In that sort of case, an appeal on the record, which relies simply on a recording of the evidence that was given in the first instance tribunal, may simply not be available.

(c) An appeal against error is a third type of appeal. In an appeal against error, the appellate body has regard to the determination of the first instance body and must, in order for the appeal to be allowed, be satisfied that the first instance body was in some way in error. The default position is that the appellate body considers the record of the proceedings at first instance, and determines whether the first instance body came to a correct or sustainable decision on the basis of that record. So far as facts involving an assessment of the credibility of witnesses are concerned, the role of the appellate body is to decide whether there was sufficient basis disclosed on the record for such findings of fact. The appellate body cannot reassess questions of pure credibility, for it will not have had the opportunity of assessing evidence given by witnesses. Furthermore, depending on the level of expertise in the area concerned which is brought to bear by the first instance body, the appellate body may accord an appropriate weight to any expert determinations of the first instance body. Thus, in statutory appeals from expert bodies, the courts have often determined that significant weight should be given to the expertise of the body concerned.[4]

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[4] Clarke J pointed out that there may be a hybrid between the second and third type of appeals: an appeal may be against error or on the record, but the appellate body may (whether expressly or by necessary implication) be allowed to conduct an oral hearing limited to hearing evidence which the appellate body would need to hear itself in order to be able to come to an independent judgment on questions of contested facts. At the level of principle, either the appellate body must be bound by any sustainable finding of fact at first instance, or it must have the facility to hear evidence itself

(d) Finally, there is an appeal on a point of law, as in the appeal to the Supreme Court from the High Court. Clarke J. pointed out that there is an established jurisprudence on what this term means.[5] As regards facts, the appellate body cannot set aside findings of primary fact unless there is no evidence to support them; it ought not to set aside inferences drawn from such facts unless they are ones which no reasonable decision making body could draw; but it can reverse such inferences if they are based on the interpretation of documents, and should do so if the inferences are incorrect. As regards law, the decision ought to be set aside if the conclusion reached by the first instance body shows that it has taken an erroneous view of the law. The erroneous view of the law may either be a substantive error of law in the determination of the first instance body, or a legal error in the way in which it reached its conclusions. Clarke J. pointed out that it follows that a higher degree of deference, so far as the facts are concerned, is accorded by the appellate body to the decision of the first instance body in an appeal on a point of law only as opposed to an appeal against error: in the latter case the court is entitled to form its own view on the proper inferences to be drawn, although not on primary facts.

4. Most recently, and subject of course to the precise statutory wording, the tendency of the courts has been to see statutory appeals as most likely to be appeals against error (Clarke J.'s third category), with significant deference paid to the view of specialist tribunals.[6]

The Re Solicitors Act 1954 line of authority

5. Appeals from professional regulatory bodies however have a special legal provenance: where do they fall in this categorisation? The traditional answer to that question has been heavily influenced by the decisions of the Supreme Court in 1960 in *Re The Solicitors Act 1954*[7], the High Court in 1984 in *Re M* [8] and *M v*

[5] *Mara v. Hummingbird* [1982] ILRM 421, 426; *Henry Denny & Son (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34; *Deely v. The Information Commissioner* [2001] 3 IR 439, 452.
[6] See for instance the cases mentioned by Denham CJ in her judgement in *Fitzgibbon*, namely *Orange Communications Limited v. The Director of Telecommunications Regulation (No.2)* [2000] 4 IR 159; *Carrigdale Hotel Limited v. The Comptroller of Patent Designs and Trade Marks* [2004] 3 IR 410; *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323
[7] [1960] IR 239

The Medical Council[9] and the Supreme Court again in 1990 in *CK v An Bord Altranais*.[10] These have frequently been relied on as authority for the proposition that such appeals should ordinarily proceed as de novo appeals, the first category identified by Clarke J. But the true approach is more subtle than this.

6. These decisions depend on the proper interpretation of article 34.1 of the Constitution, which provides that, subject to certain exceptions, "*justice shall be administered in courts established by law by judges….*" Article 37 provides an exception to this principle, in that it permits the Oireachtas to vest "*limited functions and powers of a judicial nature in matters other than criminal matters"* in a body which is not a court.

7. In *Re the Solicitors Act 1954*, the Supreme Court determined that the power of the Disciplinary Committee of the Law Society to strike off solicitors who had been found guilty of serious disciplinary offences was an administration of justice, and therefore forbidden by article 34. It was also that, even if there was a full appeal by way of rehearing from the decision of the Disciplinary Committee to the High Court, this appeal would not restore constitutionality to the decision of the Committee.

8. This led the Oireachtas to put in place a somewhat different system for doctors in the Medical Practitioners Act 1978. The Fitness to Practice Committee (FPC) of the Council was given the power to conduct elaborate inquiries into whether professional misconduct had taken place, and the Medical Council was given the power to impose sanctions up to and including erasure. A practitioner against whom a sanction was imposed (save in the case of the "minor" sanctions of advice, admonishement and censure) was entitled to apply to the High Court to cancel the decision of the Council.[11] Although the appeal was in terms only an application to cancel the decision in relation to sanction, it was held that it might involve an analysis of the finding of professional misconduct reached by the FPC. Discussing the nature of the application by a practitioner, Finlay P. said:-

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[8] [1984] IR 479
[9] [1984] IR 485
[10] [1990] 2 IR 396
[11] See also *M v. The Medical Counci*l [1984] IR 485, where Finlay P said that one criterion for "*administration of justice*" is that it must be "*final and conclusive"* as opposed to recommendatory. Since the decision of the Council was not final and conclusive, it follows that the Council was not administering justice and that the system therefore did not offend against Article 34. Nor was there any constitutional invalidity in a system in which the High Court was obliged to accept the decision of the Medical Council unless it saw good reason to do otherwise.

> *"The Council must present to the Court such evidence as it may see fit in order to discharge the onus which is upon it, first, to establish the facts which it alleges prove the misconduct, secondly to establish that such facts do constitute misconduct and, thirdly to support the decision it has made. The applicant is entitled to present such evidence on all these topics as he shall see fit. The Court must then, it seems to me, proceed to reach a conclusion as to whether professional misconduct has been proved. If professional misconduct has not been proved, the proceedings are then terminated and the decision of the Counsel must be cancelled. In the event of the finding being that professional misconduct has been proved, the court should give a further opportunity to the applicant and, if necessary, he Council to be heard and to present evidence on the appropriate penalties to be imposed in the light of such finding of misconduct."*

While the decision in *Re M* suggested that an appeal would normally proceed by way of a full rehearing, it did not specifically address the question of whether this was always the case.

9. That issue was more specifically addressed in *CK v. An Bord Altranais*.[12] The Supreme Court affirmed the decision of the High Court in *Re M.* Finlay C.J. said:-

> *"In a case such as this undoubtedly is, where the whole question as to whether the applicant is a fit person to remain as a registered nurse depends upon the truth or falsity of evidence as to her conduct and not on any question of standards or rules or principles of professional misconduct, it seems to me essential that the High Court must reach its own conclusion as to the truth or falsity of those allegations. In order for it to do so, it must, it seems to me, hear the witnesses, for not on any other basis could it safely reach any such conclusion. Were the matter now to be tried on affidavit, as is contended on behalf of the respondent, and the High Court to be bound by the findings of fact made by the Fitness to Practice Committee, then the effective decision with regard to the erasure of the applicant's name from the register would necessarily have been made by that Committee. The High Court would, in the particular circumstances of this case, if it confined itself to affidavit evidence, be merely endorsing the procedures of that Committee and, of necessity, accepting its findings of the facts.*
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> *I appreciate that there are a great number of cases, and indeed, with regard to the disciplinary proceedings in professional bodies possibly the great majority of cases, in which the issues are not direct issues of fact but rather are questions of propriety, professional conduct, professional standards and the consequences of undisputed facts. In all those cases no necessity may arise in any proceedings under S. 39 of the Act of 1985 for any oral evidence in the High Court, but in the case of the description*

[12] [1990] 2 IR 396

in which I am satisfied this case is, such a necessity, in my view, arises. I reject the submission that this conclusion has the consequences of making futile or useless the hearing before the Committee. Such a hearing may well in many cases lead to a dismiss of all charges or to a finding acceptably dealt with by advice, admonition or censure. In addition, a guarantee of consideration of a charge of professional misconduct by professional colleagues in the first instance is an important contribution to the independence of professions.

I would, therefore, allow this appeal and direct that the evidence of the disputed facts arising in this case should be tried orally before the High Court."

10. Although these decisions were reached as a matter of statutory interpretation, they are largely based in the tradition of *Re the Solicitor's Act 1954* and the perception that it has to be the High Court that makes the decision imposing serious regulatory sanction. That is apparent from *M v. The Medical Council*, where Finlay P said that one criterion for administration of justice is that it must be final and conclusive as opposed to recommendatory. Since the decision of the Council was not final and conclusive, it follows that the Council was not administering justice and that the system therefore did not offend against Article 34.[13] In *CK*, Finlay CJ said expressly that the necessity for the court to hear all the evidence in cases of disputed primary facts arose from the decision in *Re the Solicitors Act 1954.*[14]

11. Leaving aside for the moment the question of the correct interpretation of these decisions, it may legitimately be doubted whether the same result would be reached if the matter was to be considered by the Supreme Court today. In *Keady v. Garda Commissioner,*[15] it was determined that the Garda Disciplinary Tribunal was not engaged in the administration of justice. The Supreme Court distinguished *Re the Solicitors Act 1954* and *CK. v. An Bord Altranais*, on the grounds that, unlike the powers of tribunals established to regulate the professions, with powers of disqualification or striking from the register, and powers to make further professional practice in the absence of proper certification or registration a criminal offence, a garda was appointed to or dismissed from his office by the Commissioner in accordance with statutory regulations. Emphasis was led on the historical role of the courts in the supervision and disciplining of solicitors.[16] According to O'Flaherty J.,

[13] Nor was there any constitutional invalidity in the aspect of the whereby the High Court was obliged to accept the decision of the Medical Council unless it saw good reason to do otherwise.
[14] See page 403 in *CK*
[15] [1992] 2 IR 197
[16] See the judgment of McCarthy J. at pages 205 to 206.

the distinction lay in the fact that a garda who is dismissed loses his immediate employment, but does not lose any qualification by virtue of his dismissal. [17]

12. The distinction is somewhat unconvincing distinction: it cannot make a great deal of difference to a garda who is deprived of his livelihood that he has merely been dismissed as opposed to being taken off a professional register. It is logically difficult to how the question of whether justice has been administered can depend on whether the person under investigation will lose a qualification, as opposed to losing his job together any chance of employment in the area in which he has been trained. One might add that, even if one accepts that the professional disciplinary bodies are engaged in the administration of justice within the meaning of Article 34, it is not clear why they are not entitled to benefit from the exception for which Article 37 provides.[18]

13. Notwithstanding these reservations, the understanding of the law set out in these cases will continue to be applied unless and until the issue is reconsidered by the Supreme Court.

14. In the meantime, however, it seems clear that the logic of *Re the Solicitors Act 1954* will not be extended beyond the professions. That is evident from *Keady*, but also from the decision of the Supreme Court in *Minister for Social, Community and Family Affairs v. Scanlon*[19]. That case concerned a deciding officer. Fennelly J. said:-

> *"Implicit in this submission is the consequence that all deciding and appeals officers are exercising judicial functions. I am quite satisfied that this argument is devoid of merit. Such decisions are inherently administrative. They deal with the administration of the statutory social welfare code. The fact that such officers are bound to act judicially…..does not alter the character of their functions."*

Thus, outside the ambit of the traditional professions, there is no obligation to provide for an appeal to the High Court at all, still less to provide that it is the High Court alone that can make the operative decisions. In those cases, if the legislation provides for a right of appeal, the interpretation of any legislative

[17] See the judgment of O'Flaherty J. at pages 210 to 212.
[18] In *M v Medical Council*, Finlay P said that the aspect of the system whereby the minor sanctions of advice, admonishment and censure were not subject to High Court confirmation, so that equally no appeal was available against the finding of professional misconduct that might have been made by the FPC, was not constitutionally invalid, because the Council in imposing such sanction was not involved in the administration of justice, but that even if it was, it was entitled to the benefit of article 37. There is no analysis of why that is not so in respect of the more serious sanctions, but presumably that is thought to follow simply from the decision in *Re the Solicitors Act 1954.*
[19] [2001] 1 IR 64.

provision permitting an appeal will be largely uninfluenced by the logic of *Re The Solicitors Act* and *CK.*

Appeals from professional regulatory bodies

15. Assuming (as one must) that the decisions in *Re M* and *CK* are correct, the important question for the moment is their proper application in the interpretation of statutory provisions relating to appeals.

16. As Clarke J pointed out in *Fitzgibbon*, the statutory provision may provide a clear answer, and there will be no real room for interpretation. This is the case for instance with appeals by solicitors from decisions of the Disciplinary Tribunal. The present system for solicitors involves, in effect, the Disciplinary Tribunal conducting an inquiry, determining whether there has been misconduct on the part of the solicitor, but (save in the case of a relatively minor sanctions) embodying those findings in a report to the High Court so that the issue of sanction can be considered by the latter.[20] Solicitors have a right of appeal against a finding of misconduct. The parameters of that appeal are set out in the Rules of the Superior Courts as follows:-

> *"Where the respondent solicitor is appealing to the court against the finding or findings of misconduct on his or her part, the President shall direct that the appeal shall proceed as a full rehearing of the evidence laid before the Disciplinary Tribunal, unless a less than full rehearing is contended for by the respondent's solicitor and concurred in by the Society and (if applicable) concurred in by any other person other than the Society who made the application in relation to the respondent's solicitor to the Disciplinary Tribunal and unless agreed to by the President."* [21]

Thus, in the case of solicitors at least, the statutory position is clear. There is a right to a de novo appeal, unless all parties consent to a "less than full rehearing". An appeal that is less than a full rehearing may presumably be an appeal of whatever nature is considered appropriate by the parties.[22]

[20] Solicitors (Amendment) Act 1960 as amended by the Solicitors (Amendment) Act 1994 and Solicitors (Amendment) Act 2002.

[21] See the Rules of the Superior Courts (Solicitors(Amendment) Act 2002) 2004 (SI No. 701 of 2004) Rule 12(h)(i)

[22] In *Kean v. Solicitors Disciplinary Tribunal* [2014] IEHC 432, it is recorded that the appellant elected to confine his appeal to an appeal on the record, although it is clear from the text of the judgment that in fact it proceeded as an appeal against error. The question addressed by the President was that of whether there was sufficient evidence to enable the Tribunal to have reached a finding of misconduct.

17. The position in relation to other disciplinary appeals is less clear. For many years, the template for most professional disciplinary bodies was that first found in the Medical Practitioners Act 1978, which was adopted by the Oireachtas for use in a number of other professions.[23] The Medical Practitioners Act 1978 and the other Acts that followed its model have been repealed and a new model of legislation put in place. The range of professions covered by legislation along this new template has also expanded.[24] Whereas under the initial template the application by a professional adversely affected by a decision was one for cancellation of that decision, under the new model the practitioner generally (but not always) simply has an "appeal" against the decision.[25] The change in wording is unlikely in itself to affect the nature of the appeal hearing that is suitable.

When is a de novo hearing on appeal required?

18. The previous template was the subject matter of the decisions in *Re M* and *CK*. Most appeals to the High Court under this model of legislation proceeded by way of de novo hearing.[26] It has become increasingly clear that a de novo hearing however is not required in all appeals from professional bodies. *Fitzgibbon* is an important development in a trend that has been developing for some years.

19. First, in so far as *M* and *CK* are based on the logic of *Re the Solicitors Act 1954*, it seems unlikely that that logic would require a full rehearing in cases involving sanctions falling short of erasure, suspension and (perhaps) the imposition of conditions. All three of the main cases arose from erasure decisions. If the reasoning behind the decisions in those cases is that exclusion from the professions is the administration of justice, which is reserved to the courts under article 34, then a de novo hearing in cases where primary facts are contested must be available in cases of erasure, and by logical extension in cases of suspension. It is less obvious that it

[23] Including the professions of nursing (Nurses Act 1985), veterinary medicine (Veterinary Practice Act 2005), and dentistry (Dentists Act 1985)

[24] Teaching Council Act 2001, Health and Social Care Professionals Act 2005, the Veterinary Practice Act 2005, the Building Control Act 2007 (architects, quantity surveyors and building surveyors), .Medical Practitioners Act 2007, Pharmacy Act 2007, Nurses and Midwives Act 2011. The Dentist Act 1985 remains unreformed.

[25] Appeals in respect of disciplinary findings are mentioned in the Health and Social Care Professionals Act 2005, Veterinary Practice Act 2005, Medical Practitioners Act 2007, Building Control Act 2007**,** and the Nurses and Midwives Act 2011. Section 44 of the Teaching Council Act 2001 refers to an application for annulment of a decision, and section 51 of the Pharmacy Act 2007 refers to an application for the cancellation of the decision of the Council. Some of these Acts provide for an internal appeal process prior to a right to appeal to the High Court while others do not.

[26] See for instance *O'Laoire v. Medical Council* (Keane J. 27th January 1995) where the nature of the appeal is analysed at pages 93 to 99; *Moore v. Medical Council* [2006] IEHC 439; *O'Connor v. Medical Council* [2007] IEHC 304; *Perez v. An Bord Altranais* [2005] 4 IR 298; *Cahill v. Dental Council* [2001] IEHC 97*; Millett–Johnston v. Medical Council* [2001] WJSC-HC 4322.

should apply in cases of the imposition of conditions, which expressly do not involve the deprivation of the right to practice, although some dicta in *M v Medical Council*[27] would suggest that it does apply to such cases. However, it was also determined in the same case that the unavailability of a right of access to the High Court where the only sanction imposed was one of advice, admonishment or censure does not offend article 34.[28] If that is so, then a de novo appeal may not be required in cases involving new "lesser" sanctions introduced in the new template for which a statutory appeal is available, including in particular the imposition of fines which is made available as a sanction in some professions under the newer legislation.[29] In such a case, it is suggested that the presumption of constitutionality that requires the appeal provisions to be interpreted in accordance with article 36 does not require a de novo appeal. Rather, assuming that this result is consistent with the specific statutory wording, there may be no reason to provide more than an appeal against error.[30]

20. Secondly, in recent times, the courts have been more willing to contemplate that an appeal against a disciplinary finding by a professional body might not necessarily involve a full rehearing. That of course is no more than what was expressly contemplated by *CK v. An Bord Altranais,* although that part of the decision was for many years largely ignored. Thus, in *Brennan v. An Bord Altranais* [2010] IEHC 193, the appellant challenged neither the accuracy of the evidence nor the applicable standards of professional misconduct, but rather raised a question of law. Is this something that can be raised only in judicial review proceedings, or can the statutory appeal process as a matter of interpretation encompass something akin to an appeal on a point of law, Clarke J.'s fourth category? Dunne J considered the case on the

[27] At page 500 to 501, Finlay P appeared to lay some emphasis on the fact that a full rehearing is available in cases of erasure, suspension and imposition of conditions. Furthermore, in *Millett–Johnston v. Medical Council* [2001] WJSC-HC 4322, it was unsuccessfully contended on behalf of the Council that, because the Medical Council could impose conditions on a practitioner irrespective of whether the FPC had found professional misconduct or not, the court did not have to inquire into whether professional misconduct had taken place in an appeal against the imposition of conditions only.

[28] This approach has generally been followed through into the new template legislation. The constitutionality of such a provision has been questioned, but never determined. It was for instance an issue raised in judicial review proceedings in *Corbally v Medical Council*, but not determined by the President because he quashed the decision of the FPC and Council on other grounds: see [2013] IEHC 500. A determination of the appeal is awaited. Leaving aside for the moment the question of whether there is any necessity on constitutional grounds to accord an appeal in the case of "minor" sanctions, the probability is that many professional regulatory bodies would be content if such an appeal was available. In many cases, it is the finding of professional misconduct or poor professional performance that has caused offence to the practitioner, so that both the practitioner and the regulatory body might well prefer if there was an appeal (of whatever nature) against that finding rather than run the risk of judicial review proceedings

[29] The fines, where available, are generally of a relatively limited nature in the new template legislation.

[30] It must be acknowledged that, in general under the new template, the one section governs all appeals, so that the approach suggested above would lead to the same words being interpreted in one way when there is an appeal against erasure and in a different way when there is an appeal against the imposition of a fine, which some courts may see as a logical difficulty.

basis of a preliminary decision that had been reached by Hedigan J, whereby the case was ordered to proceed not on the basis of a full oral hearing, but on the basis of the affidavits filed. The Nursing Board nevertheless argued that, because the hearing before Dunne J. had to be a de novo appeal, it did not matter if there had been errors of law in the proceedings before the FPC or the Board: they could simply be cured by the de novo hearing. Dunne J. does not appear to have accepted this argument. Instead, she reviewed the evidence that had been given before the FPC, and assessed whether legal errors had been made by the FPC or Board. Thus, the appeal in *Brennan* for practical purposes fell into the fourth category of appeal contemplated by Clarke J. in *Fitzgibbon*, namely an appeal on a point of law. It is instructive that the structure contemplated by C*K* was able, in a suitable case, to encompass an appeal on a point of law.

21. Likewise, in *T v. The Medical Council* [2011] IEHC 52, Kearns P. determined an appeal under section 75 of the Medical Practitioners Act 2007 against a finding of professional misconduct. In essence, the point raised by the appellant was that the patient had delayed in making a complaint of sexual abuse. The parties agreed that the evidence before the FPC could form the basis of the court's consideration of whether the FPC correctly decided the delay issue. The practitioner succeeded in the appeal. This approach falls most comfortably within Clarke J.'s second category, an appeal on the record.[31] It is in another instructive example of the relative flexibility of the principle in *K. v. An Bord Altranais* in terms of accommodating different sorts of appeal.

22. In *Hermann v. The Medical Council* [2010] IEHC 414, the appeal was one on sanction only. Charleton J. said:-

> *"The court….is obliged to assess what is appropriate in light of the findings of fact which led to the imposition of the sanction by the Medical Council in the first instance. That decision, and the reasoning underpinning it, should not be ignored. Rather, that decision and the justification contained within the document imposing the sanction is the primary material under appeal and on which the hearing is based. In considering the question of the sanction, the courts focus should be both on the conduct underpinning the sanction and the reasoning of the Medical Council on arriving at its decision. Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to the relevant precedents and the expert nature of the task*

[31] Although, in so far as the proper consequence of delay is a legal issue, it might also be seen as an appeal on a point of law, Clarke J.'s fourth category.

> *undertaken, the High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect….if the level of sanction is one which is justified by the material before the Medical Council, then the Court would need to find a specific reason for altering it on the evidence presented on the appeal."*

Thus, it appears that, on an appeal against sanction alone, the case might appropriately be treated as an appeal against error, the third category envisaged by Clarke J. in *Fitzgibbon*.

23. In *Kudelska v. An Bord Altranais* [2009] IEHC 68, Hedigan J. set out some of the factors that are appropriately considered when determining whether to conduct an appeal by way of full rehearing. He said:-

> *"It is therefore clear that there may be cases……which could appropriately be disposed of on affidavit alone. However, the adequacy of such a procedure will depend heavily on the circumstances of the individual case, in particular the level of contest that led to the facts in issue. In the present case, the applicant submits that a number of the findings of the Fitness to Practice Committee were fundamentally erroneous. Having regard also to the fact that the applicant is a foreign national with a limited understanding of English, the seriousness of the findings of the Committee, the severity of the potential consequences of the present proceedings and the limited scope for any further appeal, I am satisfied that the correct approach in the present case was to proceed by way of a plenary re-hearing of the matter."*

24. One might anticipate that, following the approach adopted by the court in *Brennan* and in *T*, and considered by the court in *Kudelska*, more attention will in future be paid to the possibility that appeals from disciplinary bodies can proceed otherwise than by way of full rehearing. If the primary facts are in dispute, the authorities discussed above mean that there must be a de novo appeal. If they are not, but issues of propriety and so on are the only ones in dispute, then a de novo appeal is not necessary, although even then there may be a necessity to hear evidence as to professional standards. In between these two extremes, there are cases in which a more structured analysis might enable the court to determine that primary facts are not really in dispute, or (perhaps more often) that the range of facts in dispute is in fact relatively limited, so that the amount of oral evidence that has to be received by the appellate court can be limited to the minimum necessary. Such an approach may in principle remain an appeal de novo, but it may bear some characteristics of an appeal on the record.

25. Thirdly, one has to bear in mind that many disciplinary and quasi-disciplinary appeals from professional bodies may not be governed by the *Re the Solicitors Act 1954* line of authority at all. The courts have recognised that a de novo appeal may not be necessary in such cases. That was the case in *Fitzgibbon* itself, where the appeal was from a disciplinary body, but not one with the power to determine issues of professional misconduct.

26. Similarly, many of the new template Acts provide for appeals to the courts in respect of registration issues. Are these governed by *Re the Solicitors Act 1954* principles, and if not, into which of Clarke J.'s categories do they fall? In *Langley v. The Teaching Council* (Kearns P., 21st June 2012), the President considered the scope of an appeal under section 31(8) of the Teaching Council Act 2001, which provides for a person to have the right to apply to the High Court for an annulment of a decision to refuse to register him or her. Kearns P. said:-

> *"The word appeal is not even mentioned in the Act, the use of the words 'annul' by definition indicates a judicial review type remedy. There are no words stating that there shall be a re-hearing. This is entirely consistent with a limited right of appeal.*
>
> *I do not want to be taken as going too far. It appears to be that the test laid down by the Supreme Court in Orange Communications Limited v. Director of Telecommunications Regulation [2000] 4 IR 159, which is derived from the earlier test laid down in M. & J. Gleeson v. Competition Authorities [1999] 1 ILRM 401 i.e.*
>
> > *'in order for the applicants to succeed, they had to establish a significant erroneous inference which was critical to the grant of the licence'.*
>
> *or in this case the refusal to register, is a sensible one. I am satisfied that this is an appropriate summary of this particular view. In practical terms, an appellant must establish a significant erroneous inference which is critical to the grant or refusal, which went to the root of the decision. This is the nature of the review."*

It would be incorrect to suggest that there is a dissonance here with the decision of the Supreme Court in *CK v. An Bord Altranais*. That case concerned section 39 of the Nurses Act 1985, which provides for a person to have the right to apply for "cancellation" of a decision erasing him or her from the register. This was said to give rise, in most cases, to a right of full re-hearing. The use of the word "annul" in section 31(8) of the Teaching Council Act 2001 was said in *Langley* only to give rise to a form of appeal on error. The point is however that the basis

of the finding in *CK* was not so much the words used, but rather the perceived constitutional requirement that a professional could not be erased from the register other than by the High Court. The same constitutional imperative does not apply, or at least may not apply, in relation to a registration decision.

Conclusion

27. The legal significance of *Fitzgibbon* is that it marks an important point in the receding tide of the *Re the Solicitors Act 1954* approach in the area of professional regulation. The mere fact that a professional person was subject to discipline by a professional body did not mean that an appeal against the decision of that body had to proceed on a de novo basis. *Langley* is along the same lines: the mere fact that the decision of the professional body might mean that a practitioner does not get on the register in the first place does not mean that an appeal against that decision had to proceed on a de novo basis. Furthermore, *Fitzgibbon* is likely to provide an impetus for courts to recognise that de novo appeals are not always necessary, and to classify such appeals more precisely, thereby assisting in understanding the characteristics that are typical of the appeal under consideration.

28. On the basis of the authorities at present, the following can be said to apply to professional regulatory appeals:-

(a) The primary source to be consulted in determining the nature of an appeal in any individual case is the wording used in the statutory provision creating or governing the appeal.

(b) However, in cases in which a disciplinary decision places the right of a professional to practice in issue, that primary rule must be considered in light of article 34 of the Constitution, and the requirement that it is the court itself that must determine the primary facts that will enable it to decide the issue of professional misconduct and the sanction to be imposed. Thus, in disciplinary cases involving serious sanctions, the court must conduct a de novo appeal if there are contested facts in issue that require to be determined in order whether or not professional misconduct took place.

(c) Even in disciplinary cases involving serious sanction, there is no automatic requirement for a de novo hearing if the primary facts are not in issue. In such cases, the nature of the appeal may vary depending upon the circumstances. An appeal might fall into any of the other three categories identified by Clarke J. If the issue is whether, on the evidence before the FPC, the court would reach the same decision as was reached by the first instance body, the appeal might comfortably be described as one on the record, Clarke J's second category.[32] Where sanction only is an issue, the appeal may in effect be one against error, Clarke J.'s third category.[33] If a legal issue only is in dispute, then the appeal can in effect be an appeal on a point of law, Clarke J.'s fourth category.[34]

(d) There are cases, as expressly contemplated in C*K.*, where the appeal may be on the record, Clarke J's second category: if primary facts are not in issue, but the questions are ones of propriety, professional conduct, professional standards and the consequences of undisputed facts, it may be that the court would appropriately simply act on the evidence that was before the FPC without having particular regard to its conclusions on that evidence. As identified above, there may also be cases where a restricted range of primary facts are in issue, and the court could act on a combination of evidence heard by the first instance body and evidence heard by the court. Such a procedure may still be in principle a de novo appeal, but it may bear elements of an appeal on the record.

(e) The position appears to be different in appeals involving (for instance) registration as opposed to discipline,[35] or minor disciplinary matters.[36] In those cases, even where the primary facts are in issue, and depending upon the wording of the relevant statute, the court may conclude that the appeal is properly an appeal against error, Clarke J.'s third category. One may expect that, as more and more statutory appeals against the decisions of professional bodies are provided, the courts will be more likely to determine that those appeals fall into this category. Such an approach would be consistent with the relatively limited use to which the *Re the Solicitors Act 1954* line of jurisprudence has been put to in recent years.

[32] As in *T. v. The Medical Council* [2011] IEHC 352.
[33] As in *Hermann v. The Medical Council* [2010] IEHC 414.
[34] As in *Brennan v. An Bord Altranais* [2010] IEHC 193 and perhaps in *T. v. The Medical Council*
[35] As in *Langley v. The Teaching Council*.
[36] As in *Fitzgibbon v Law Society*

(f) Outside the professional disciplinary context, it is not necessary in the first place to provide a right of appeal to the courts in the case of decisions made by administrative bodies, even when those decisions affect the right to earn a livelihood.[37] In such a case, the remedy of judicial review is always available.

(g) In cases outside the professional disciplinary context where a statutory right of appeal has been provided, and subject always to the precise wording of the statutory provision, the recent tendency has been to interpret the statute as providing, in effect, for an appeal against error, Clarke J.'s third category. That is especially so in the case of expert tribunals.[38] The question is those cases is that of whether the decision reached was vitiated by a serious and significant error or a series of such errors. In the application of this test, the Court should have regard to the degree of expertise and specialist knowledge of the tribunal.

Eoin McCullough S.C.

31 October 2014

[37] *Keedy v. Garda Commissioner*

[38] See for instance *Orange Communications Limited v. Director of Telecommunications Regulation* [2000] 4 IR 159; *M & J Gleeson v. Competition Authority* [1999] 1 ILRM 401*; Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323. While such appeals therefore often concentrate on whether serious factual errors were made, it should however be pointed out that the mistake can equally be a legal one, for which one presumes that the court will have less tolerance: see for instance *O'Neill v. Financial Services Ombudsman* [2014] IEHC 282.