THE HIGH COURT

[2001 No. 2442 P]

BETWEEN

MICHAEL SCANLON

PLAINTIFF/APPLICANT

AND

IRISH CANOE UNION LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Roderick Murphy delivered the 13th day of May 2011

1. **Motion**

By notice of motion filed on the 14th February, 2011, and heard by this Court on the 29th March, 2011, the plaintiff, as applicant, applied for an injunction to restrain the defendant from considering a report, dated the 23rd November, 2010, concerning an investigation of complaints about the plaintiff's conduct of his office as Chief Executive of the respondent for any purpose relating to the employment of the plaintiff. The plaintiff also applied for an injunction restraining the defendant from taking any steps and furtherance of any disciplinary procedure against the plaintiff.

2. **Grounding Affidavit**

The application was grounded on the plaintiff's affidavit dated the 14th February, 2011. The plaintiff is employed by the defendant as its Chief Executive Officer reporting to the President and to the Executive Committee of the Board of the defendant. His association with the defendant dates from the late 1980s when he held

the position of Honorary Secretary for four years and, on the 1st January, 1990 was employed as national administrator.

The plaintiff avers that on the 21st January, 1998, the Executive Committee of the defendant mandated an annual increase of his salary and of his pension fund as referred to in the minutes of the Executive Committee. Around 2003 the title of his position was changed to that of Chief Executive. He referred to a copy of his employment contract which he himself drafted in 2006 notwithstanding its effective date being the 1st January, 2005. The contract was signed by Brendan O'Connell and by the plaintiff and dated the 1st January, 2005.

A previous unsigned contract dated January 1990, was also exhibited by the plaintiff though not signed dated January 1990, in respect of the plaintiff's employment as National Administrator.

The minutes of the Executive Committee on the 21st January, 1997 under the heading of Staffing: Michael Scanlon had provided as follows:

> "It was agreed by the Executive that a single retrospective payment of £3,000 be made to Michael Scanlon's pension fund in lieu of a salary payment for 1997. It was further agreed that from the 1st January, 1998, Michael Scanlon's salary be increased by £4,000 per annum and that payment to his pension fund be increased by £3,000 per annum, also on the 1st January, 1998."

The contract of employment effective from the 1st January, 1995, provided, in relation to termination, as follows:

> "The union reserves the right to terminate this contract summarily and without notice for the Chief Executive has, the opinion of the Board of Management,
>
> (a) been guilty of serious or persistent conduct;

(b) been incompetent or unsatisfactory in the performance of his duties;

(c) becomes incapable of performing his duties;

(d) been guilty of a failure in carrying out his duties or to carry out reasonable instructions to him by the President.

In addition to the above, the contract may be terminated summarily, and without notice, if some other substantial reason, in the view of the Board of Management justifies such."

Provision was made for a code of conduct requiring the Chief Executive's actions "should constitute honesty, impartiality, and integrity at all times". Therefore all actions by the Chief Executive should be above suspicion and any dealings with funded agencies, commercial, and other interests should stand up to the closest possible scrutiny.

Grievance, disciplinary procedures and dispute handling are provided for in para. 14 of the agreement which provided as follows:

"In the interests of fairness and justice, to ensure the proper conduct of business, certain provisions to deal with matters of grievance and discipline are necessary, as follows:

In the event that an action that could be categorised as disciplinary procedure is required on the part of the union, it will be accepted that before such action is taken it will be the responsibility of the President:

(a) to communicate the substance of the issue in a clear and timely manner to the Chief Executive. In the first instance this will be done verbally by the President to the Chief Executive.

(b) in the event that the matter not being resolved the President should address the issue with the Chief Executive in writing.

(c) in the event of the matter still remaining unresolved the Chief Executive will be asked to discuss the issue in question with the Unions Board Management.

(d) in the event of the matter not being resolved internally the issue will then be referred to an independent panel of arbitrators.

(e) should the matter remain unresolved and involve premature termination of the contract each party to this contract agree if required to refer the issue to normal industrial relations procedures to reach a final resolution.

(f) each party to this contract agrees to accept as a final resolution of an issue any decision reached at the conclusion of normal industrial relations procedures.

(g) normal industrial procedures referred to above would include reference to the Rights Commissioner, the Labour Relations Commission, the Labour Court, the Employment Appeals Tribunal or an Equality Officer as appropriate."

The contract provided that in the event that there existed conflict within the terms of the contract or there was a need to refer to alternative procedures to resolve issues the Irish Canoe Union Human Resources Handbook would be used to resolve any issues arising.

The defendant's governance policy referred to expectations of officers whose duties included a fiduciary duty to the company to act competently, honestly, in good

faith and in the best interest of the company. Further details were given and reference was made to the officer's code of conduct.

The governance policy dealt specifically with the role of the Chief Executive to develop operational policies that compliment the governance policies of the Board and to implement actions to achieve the results stated in those policies. It stated specifically:

> "When management/operational policies are 'owned' by the Chief Executive they must be aligned with the Board's governance policy. The Board should seek to satisfy itself that all operational policies are effective and appropriate. The ability of the Chief Executive to make operational policy changes should not be restricted or delayed through a need to refer them for executive or Board approval."

Delegation to the Chief Executive of the day to day operation and administration of the company was delegated to the Chief Executive who in turn was ultimately accountable to the Board. The extent of the delegation and its limitations were to be outlined in the contract between the Chief Executive and the company. Only decisions of the Board and Executive acting as a body were to be binding on the Chief Executive. These decisions could not contravene or contradict any statutory or legal requirement.

It was further provided that the President, on behalf of the Board, "monitors the Chief Executive via the Chief Executive's internal reports, external reporting by third parties, and Board and Executive assessments.

The plaintiff averred that successive Boards, Executive Committees, Presidents had delegated to him considerable autonomy in the performance of his duties in addition to the strictly operational issues.

He referred to several statements which he had obtained from a past President and members of the Executive Committee. Mr. O'Connell had been President of the Union for nine years from 1997 to November 2005 and continued as a member of the Executive Committee and subsequently treasurer for a period for three years as well as being a director of the Union. He made a written statement on 21st October, 2010. He stated that practices and working relationship between the Chief Executive and the Executive Committee tended on the whole to be of an informal basis. The Chief Executive was allowed a considerable degree of latitude by the Executive Committee in relation to the management of budgets, grants and other revenues. He was also allowed to mange staff remuneration including his own albeit within the operational budget of the annual administration grant. As President and subsequently treasurer he had complete confidence in the Chief Executive to deal with staff remuneration with the same professional integrity that characterised all the work he undertook for the Canoe Union.

Mr. O'Connell's statement said that the plaintiff had asked him if he could recall discussing the plaintiff's health insurance in 2004 when he had suggested transferring his pension payment to his health insurance premium to the Canoe Union in order to address a shortfall in the Canoe Union's contribution to his pension. He said as follows:

> "I do vaguely recall having this conversation but unfortunately cannot recall the context or exact date. I do not recall having objections or reservations about him doing this."

Gillian Devlin, a member of the executive for just under three years in 2005 onwards, stated that everything to do with staff including salaries, pensions, expenses etc. was left entirely to the Chief Executive to decide on the basis that the Executive

were confident that he could be relied on to keep staff costs within the funds made available. Her statement was dated the 23rd October, 2010.

About the same time John Keogh, an executive member from 1997 to 2004 and Honorary Secretary and subsequently Honorary Treasurer stated that "We kept a general overview of Canoe Union finances at those meetings, but did not spend much time on finance other than to discuss the size of the grants we got from the Sports Council and the audited accounts before each AGM. Day to day running costs and finances were left to the (plaintiff) to decide and manage and we were confident that he was the best placed person to look after this side of the Canoe Union with the money that was available.

Mr. Van Lonkhuyzen, treasurer for two years from 2008 to 2010, did not recall any occasion where there was any substantial discussion about salaries. His understanding was that this was always looked after by the Chief Executive and he saw no reason nor was he instructed by the Executive or Board to change this practice.

The plaintiff said that the defendant was financially dependent on grant aid from the Irish Sports Council and that grant aid for the year 2009 amounted to €625,833.

3. **PriceWaterHouse Report**

He said that in September 2006, he was informed that Price WaterHouse Coopers (PWC) were contacted by the Irish Sports Council to undertake governance review of the Union and its compliance with the terms and conditions attached to the grant aid awarded. The Sports Council selected approximately three sports bodies on an annual basis for the purposes of carrying out such reviews. He said that that

review had been completed during November 2006 and issued a largely positive report. The Executive summary concluded:

> "We have completed our review of the Irish Canoe Union. As mentioned above the standard overall control is adequate within the ICU. They have established formal governance processes and have a number of indicators of leading practices.
>
> The Irish Canoe Union Board of Management met to consider the review and subsequently the Chief Executive has provided agreed actions in response to the recommendations contained within the report. It is anticipated that these actions (would be effective) within the next twelve months.
>
> The detailed findings and recommendations refer to the absence of purchase order systems and findings recommendations referred to no formal purchasing order system, informal controls over technical committee's revenue, inconsistent voting procedures in terms of reference for technical committees, annual budgeting process, management reviews performed on an informal basis and lack of formal performance reviews of the Board."

4. **Letter of 23rd September 2010**

The plaintiff then refers to a letter of the 23rd September, 2010, from the President, Mr. Devoy and Mr. Tallon, directors of the defendant, referring to a meeting the previous day at which a number of questions were put to the plaintiff and queries raised over a number of matters. The letter then continued:

> "The company has sought advice and has been advised to commence an independent investigation in respect to those matters and have requested Mr. Ulton Courtney, Managing Director of the Courtney HR to undertake the investigation.

In the meantime you are suspended on full pay with immediate effect pending the conclusion of the investigation. You will during the course of this investigation be offered a full opportunity to deal with the matters raised in this investigation.

During the investigation you should not enter the offices of Canoeing Ireland (Irish Canoe Union) you should not communicate with any member of staff, or any member of Canoeing Ireland (Irish Canoe Union).

You are assured that this investigation is now prejudiced to your position and that the rules of natural justice will apply.

We will communicate with you further as soon as the investigation has commenced."

The events preceding his suspension were that Mr. Noel Tallon had been elected to the Executive Committee and appointed to the post of honorary treasurer at the AGM on the 29th May, 2010. During the summer he made a number of inquiries of him about the staff and his own remuneration. The plaintiff said that he gave Mr. Tallon the information he sought and informed him the staff salaries were linked to public service pay grades. Mr. Tallon pointed that, unlike public services workers, the defendants employees had not suffered a reduction in their incomes. He said he agreed to reduce his own remuneration and to negotiate reductions with other members of staff but by September he had not done either and Mr. Tallon reminded him of the omission by e-mail. He said that during the month of September, before his meeting with Mr. Devoy and Mr. Tallon, the authors of the letter of the 23rd of September, 2010, he made requisite adjustment to his salary, by cancelling the standing order relating thereto.

He said that he asked at a meeting with the President, Mr. Devoy, and showed him a copy of the contract of 2006 already referred to. He confirmed to the President that he had anti dated all staff contracts to 1st January, 2005 and countersigned the staff contracts other than his own, in his capacity as Chief Executive. He had asked the President in office in January 2005 to sign his contract. He said that in linking the salaries to the public sector he was in effect waiving his entitlement, in accordance with the decision of the Executive in 1998, to an annual increase of €5,080.

He said that on inquiry by the President regarding his pension funds and his VHI he advised him that the pension funds had been in existence for some considerable time and it was set up and authorised under a previous Executive Committee and that his VHI plan was funded from monies diverted from the defendant's contribution to his pension. He confirmed that he had not the Executive Committee or the Board ratified this arrangement.

He averred that the President had stated that he, the President, had considered the anti dating of his contract and the signing by a past President to be a matter of serious concern to him. He stated he considered that the payment of the VHI without the ratification of the Executive Committee or Board to be an equally serious matter of concern and suggested that it would be best to have Mr. Tallon and both of them to discuss the matter.

He said he told the President that he was uncomfortable about meeting Mr. Tallon until he was better informed and fully prepared. He was unaware at the time that the President, Mr. Devoy, considered the issue as so serious as to warrant the presence of the company's solicitor at their meeting with Mr. Tallon.

5. **Meeting 22nd September, 2010**

On the 22nd September, the President, Mr. Tallon and he met for about an hour. Mr. Tallon said he found the issues to be extremely serious and needed to be reported to the Board on the following September 29th.

The plaintiff said that he believed his recording equipment had been switched off at the beginning of the meeting but that it in fact recorded throughout as could be seen from the transcript. He said that Mr. Tallon had requested that no recording should take place.

The following evening the President and Mr. Karl Dunne, the Honorary Secretary, entered his office unannounced and instructed him to immediately hand over his mobile phone, laptop computer and office keys and told him that he was suspended from the employment with pay.

He said he was handed a letter by Mr. Dunne signed by the President, Eamon Devoy and Mr. Dunne, the Honorary Secretary already referred to.

The transcript exhibited in the plaintiff's affidavit began in an informal manner and referred to a chat raised by a number of questions. The plaintiff referred to the issue if his salary and said that he had refunded the money for the current year. Mr. Tallon placed the issue of the contracts and suggesting that they have been signed in the absence of any authorisation and a member of the company and the automatic payment of annual increases on foot of his contract. There were no predetermined measurable targets or objectives for anyone. While every civil servant in the country taking a pay reduction the plaintiff's own salary managed to go up which is of serious concern, as was the issue of pension and the most expensive of all the medical insurance. The remuneration package of the plaintiff was described as unsustainable at a time when the money available for the non Olympic disciplines was seriously in

decline. Everything about Canoeing Ireland was going except for the plaintiff's remuneration of foot of a contract that as far, as Mr. Tallon could tell was never authorised by anybody. He was concerned about the absence of any verification in relation to credit card expenses generally and that the plaintiff was verifying his own expenses. Mr. Tallon was concerned that the plaintiff's remuneration package was continually increasing notwithstanding the fact that the overall financing available to the sport was reducing.

The plaintiff replied that he would have to go away and think about (these matters) and prepare something. He said that it had to be accepted that he had to protect himself as well to which Mr. Tallon agreed.

The plaintiff said that things happened over the years, things were added, such as pensions and various things like that, they were not contained in the contract. So there was an old contract there and he said he continued along without a contract and it was part of the process to regularise things, a contract was written up. He continued as follows:

> "But the contract in fact was not a new contract it was only a recording that was already in place, you know. Now, while there is an issue about it was – and I accept that the contract – when it was written up it wasn't (inaudible) but to me it was a record of what was actually there already, there was a lot of the benefits predate (as I see) what was in the contract anyway. And had been ratified going back to years ago. So, there are issues, I don't disagree but they are more to do with governance issues than anything else in terms of there being a process by which either the Boards or Executives – there was if you like a very casual approach and to some extent it was a pity you weren't here sort of eight or nine years ago when that sort of stuff was put under the sort of

scrutiny that we are now and that sort of stuff. To be honest, I – I am not sure which – which way to approach it. I wouldn't have thought now, my salary as such, in comparison what other people I know are paid in this building – is that generous, you know. It is a reasonable . . . ."

It was put to him that in a sense he was writing his own contract he replied: "Yeah, but what I am saying is – save if there was no contract ever written – whatever my salary had been – it had only recorded what my salary was at that time."

He was asked was this being recorded and answered no no, no no.

Later he said that the contract in 1990 – his original contract in which he was referred to as the administrator did not suggest that he was the Chief Executive and had to deal with high performance. There was no mechanism for whom he was responsible or who was his line manager. There was nothing about pension which he said it came at some stage between 1990 and 2005. It was only when they got linked to the civil service rates that he actually had a proper structure in terms of an incremental increase each year. He said that the decision to link to the civil service rates had been discussed with Eamon (Devoy) and he had previously spoken to Brendan O'Connell.

Mr. Devoy said he was President and that the question of pay, something significant as linking pay to the public service which occurred in June 2006, was never discussed with him. The plaintiff replied that the audited accounts for 2007 had salaries linked to the civil service rates and the audited accounts were signed off.

Mr. Tallon said that he had been involved in Canoeing for 25 years and had a background in accountancy and could not look at that favourably and did not see it as his role to provide suggestions as to how to deal with it. He was positing the position

as he found it. If he stood up at the AGM and reported this as part of the treasurer's report, people from the floor were going to fire questions.

The plaintiff said that taking a step backwards if the contract produced in 2005 was not ratified by the Board and was not signed off, was there anything that Mr. Tallon could suggest could be done about it now. Mr. Tallon said he had already pointed out in the long e-mail from the figures that the plaintiff had overpaid himself in 2010 and in the previous four years as well. The plaintiff said that that was based on the information which he had given to Mr. Tallon.

The plaintiff said that the money to the Union had actually increased, that high performance money had gone up and that it was not his fault that performance of athletes did not attract money from the Union. For a long period the Union had got money way ahead of what it should have been getting. That was the Sports Council fault. He said he spent a long time getting money out of the Sports Council.

The plaintiff said that they were in a different world then and that he would be doing things very differently and that it was a pity that he was not (in this position) that was years before hand and that he would not be in this situation years ago and "I wouldn't be in this situation and to some extent if am in this situation because – because of the PriceWaterHouse audit and what I felt was the need to regularise things as they existed. And now, if I did it wrong, I did it wrong and I know what you are going to say

"Well, this is irrelevant, I should have done it the right way . . .

Mr. Tallon concluded by saying that the matter was extremely serious and that when it went to the Board meeting there would be a lot of opinions around the Board table and that the issues were not going to go away unless the plaintiff could come up with adequate explanations.

The plaintiff replied as follows:

"Well, I can tell you now Noel, in that case I am in trouble because I know it was not ratified by the Board and I know it wasn't minuted at a Board meeting or anything like that, you know so . . ."

Mr. Devoy finally said what was he going to say to the plaintiff and added :

"Noel (Tallon) asked about the recording and I have to say it is inappropriate to make a recording of a meeting without the knowledge and consent of the participants at the meeting so if I find anything on that accidentally or anything else recorded in error I would ask you to share copies with us."

The plaintiff agreed.

6. Investigation

On the 24th September, Mr. Courtney, having been appointed as investigator, wrote to the plaintiff stating that he had asked the Union to provide a submission in writing and detail the complaints against the plaintiff and would arrange for a copy to be sent to the plaintiff for his written submissions and reply. He indicated the procedure in relation to the right of reply to each of the submissions and stated that he would follow the rules of natural justice and that the plaintiff had a right to be represented and to have chosen a legal representative.

The report of the investigation dated the 23rd November, referred to the terms of appointment, the procedures, parties and meetings and summarised the submissions. Having done so Mr. Courtney made a number of findings, sixteen in total.

The first related to the backdating of the contract by the plaintiff and found that his failure to notify or seek authorisation for those actions and for backdating the contract was a serious matter and was referred to the Board for a disciplinary hearing.

In relation to the second complaint, the changes in salary of the CEO a finding was made that the change was made without the proper knowledge and consent or authorisation of directors of the company, the senior officers of the Executive or the officers of the Board. There was no record of that authority properly devolving on him nor that the failure to properly report was inexplicable, not acceptable standard where public monies were involved, was a significant management failure and not excused by claims of that the Board ought to have known or could have known by reading the accounts. It was a serious matter that was referred to the Board for a disciplinary hearing.

The plaintiff, in his affidavit had said that the finding that he benefited financially from the changes he effected the rate and method of payment to his salary was wrong and that he suffered a loss of in or around €104,000 over a thirteen year period rather than a benefit. He referred to the mandate of an Executive Committee meeting held on the 21st January, 1998 already referred to. He also referred to a table detailing the particulars of his mandated remuneration and his actual remuneration exhibited to his affidavit which indicated an increase of €5,080 by way of annual salary increments from the salary in 1997 of €30,660. He further said that no account had been taken of the witness statements provided to the investigator which confirmed the authority vested in him as Chief Executive to act in the best interest of the defendant.

Complaints 3, 4 and 5 related to the signing of the 2005 CEO contract, consent and provision regarding pensions.

Complaint No. 6 in relation to the VHI Plan E led to a finding by the investigator that he could find no proper written authorisation from the directors allowing the plaintiff to implement the VHI Plan E to his financial benefit and that,

accordingly, the changes were made without proper authorisation and did not report it. This was a serious matter and was referred to the Board for disciplinary hearing.

The plaintiff stated, in his affidavit, that the finding that he had benefited financially was wrong. He said that in 2004 he initiated an annual payment to the VHI to address the considerable and growing divergence between what had been authorised by the 1998 mandate for investment into his pension funds and what was actually invested. The investigator failed to view the implementation of the VHI Plan in the context of the accumulated shortfall in the defendant's contribution to his pension. He referred to exhibit 13 showing an annual increase of €3,810 added to the existing pension contribution in 1997 of €3,080 and showed that over the years from 1997 to 2010 there was a shortfall of €151,248.

7. **The Plaintiff's Case**

The plaintiff said that during the course of his meeting with Mr. Courtney he made reasoned and reasonable responses and explanations for all of these matters.

He said that he was advised and believed that he was not afforded the benefit of fair procedure and natural justice and was knowingly mislead and that he should have told to consider carefully any responses made by him and that he should be advised of his right to have representation at the meeting.

He said that the procedure followed was flawed in that it did not adhere to the policy of the defendant and disciplinary matters and that the defendant's witnesses were biased and judgmental in relation to his evidence.

The plaintiff said that several of the complaints were not upheld by the investigator. Complaint No. 7 regarding the meeting between the President and the plaintiff, No. 8 on the credit card statements, No. 9 unvouched expenses, No. 12, 13,

14 and 15 being day to day control and auditors report, auditors committee and capital grant application and management of accounts were not upheld.

In relation to complaint No. 16, the investigator referred to the plaintiff recording the meeting, whether by accident or by design, without the consent of either Mr. Devoy or Mr. Tallon. When asked, the plaintiff said that the meeting was not being recorded. He could have reasonably checked but did not do so, nor did he inform Mr. Devoy or Mr. Scanlon once he realised that the recording had been made. He did not disclose the existence of the recording which only came to light when the Union forwarded a copy to the investigator. This was a serious matter and was referred to the Board for disciplinary hearing.

The plaintiff said that by letter of the 9th December, 2010, the solicitors of the defendant wrote to him informing him that at a meeting of the Board of Directors on 8th December, 2010, the finding of Mr. Courtney's report was presented and that a disciplinary committee was established and that he was to be suspended pending the conclusion of the disciplinary process.

By letter dated the 17th December, solicitors for the defendant wrote to him requesting that he make himself available to meet with the defendant's disciplinary committee on the 22nd December. He instructed his solicitors to inform them of his unavailability before Christmas and to give further details of their disciplinary procedure.

He said that on the 6th January, 2010, his solicitors wrote to the defendant's solicitors pointing out the deficits that he perceived in the procedures adopted by the defendant. The defendant's solicitors asked whether the plaintiff was willing to meet with the disciplinary committee on Friday the 21st January 2011, and that failing a reply, they would proceed in the plaintiff's absence.

The plaintiff said and believed that and was so advised that the defendant's refusal to discontinue the procedure and refer the matters to the Labour Relations Commission and not provide a process by which the findings of Mr. Courtney could be challenged or appealed. He feared to participate in the process any further.

At that stage an application was prepared and made to the High Court.

Correspondence between 31st January, 2011, giving the names of the members of the disciplinary committee and a reply of the 2nd February, that the issues raised by the plaintiff could only be dealt with through the disciplinary process was unwarranted. The defendant's solicitors replied that it was a disciplinary matter, not a matter which was in the legal forum and referred to SI No. 146/2000 regarding representation.

His solicitors wrote on the 9th February, 2011, saying that the procedures led him to conclude one or more members of the Board had designed to end his employment; that the investigator had demonstrably based his finding on a misunderstanding of figures and a finding of wrongdoing worked for the benefit of the defendant not for the benefit of the plaintiff; appeared to ignore the governance and management of the defendant for a period of 25 or so years being which time the defendant had prospered; that the plaintiff had been dishonest and took advantage of his position to obtain the salary increase and health insurance and asked that the Board prepared to engage with him on any concerns it had without regard to the investigators report or its history. In the absence of confirmation notice was given of a proposed application for injunctive relief.

The plaintiff believed that on the 8th December, 2010, the defendant's Board was for the first time presented orally with the investigators findings some sixteen complaints.

The plaintiff said that the investigation was founded on the statement of Eamon Devoy on the 26th September, 2010 and that of Noel Tallon of the 27th September, 2010, referring to admissions that he was said to have made at the meeting of the 22nd September, 2010. He said that the transcript of the meeting of the 22nd September did not support certain of the complainant's assertions. He said that the investigator had reformulated certain of the original complaints.

He said that he would suffer irreparable harm as a result of the actions of the defendant if the defendant were permitted to continue with the process. The actions of the defendant had traumatised him. His health has suffered. He was not afforded a fair, proper and independent investigation and hearing into the investigation made by him in accordance with the principles of natural justice. His reputation and career of over twenty years with the defendant would be irreparably smeared in the eyes of society. Damages would not be an adequate remedy.

8. The Defendant's case

Mr. Eamon Devoy's affidavit, sworn 28th February 2011, said that the plaintiff's application was premature and without justification. At para. 44 of his grounding affidavit the applicant stated that he was apprehensive that there would be an attempt to have him dismissed.

Mr. Devoy referred to the independent investigation which concluded on 23rd November 2010 and whose findings were presented to the defendant's board of management on the 8th December 2010. A decision was taken by the Board to set up a disciplinary committee to consider the findings of the investigation report and to make recommendations to the Board in respect of whether or not disciplinary sanctions should be imposed. The plaintiff's refusal to meet with the disciplinary

committee at all and subsequently without legal representation. The disciplinary committee had to proceed in the absence of the plaintiff.

Mr. Devoy described the organisation of the defendant as hybrid structure being a company limited by guarantee with a Board of volunteers who met monthly to discuss matters relating to canoeing. There were two directors.

The Board had included the Executive Committee which comprised five members, the President, the Honorary Secretary, the Honorary Treasurer and two ordinary members elected at the AGM, the chair person of each of the seven technical committees, the chair person of the training unit and the Chief Executive Officer as ex officio member.

The defendant had main three main income streams being a grant funding from the Irish Sports Council, membership contributions, and commercial training.

He said he was President and one of the two directors of the defendant and had been a member of the defendant for twenty-three years and the Board member since 2003. He was President in 2005, 2007 and again in May 2009 where his current term runs into May 2011. The other director was Karl Dunne, who had been Honorary Secretary since the 29th April 2009.

The Court notes that both Mr. Devoy and Mr. Dunne were the authors of the letter of 23rd September 2010 which suspended the plaintiff on full pay.

Mr. Devoy said that Noel Tallon had been elected to the position of Honorary Treasurer on the 29th May 2010 after contested election. He was in charge of public finance and an accountant, employed by the Department of Finance as Assistant Principal (Higher).

In accordance with Article 49 of the defendant's Articles of Association in all management of the defendant's affairs is delegated by the Board to the executive except in relation to disciplinary matters which are reserved. He cited Article 29.

He referred to the suspension of the plaintiff with pay and averred that up to the time the swearing of the affidavit, the plaintiff continued to receive his salary. These suspensions imposed a facility the carrying out of an independent investigation into various matters of concern regarding the plaintiff's conduct as Chief Executive Officer. These matters came light in the proceeding months from July 2010 from Noel Tallon, as treasurer, undertook an assessment of the financial controls in place. He examined the accounts, employees' salaries and contracts of employment and in September 2010 brought a number of matters to the deponent's attention. Mr. Tallon requested to him to write to the plaintiff to clarify pay scales used in determining salaries. That was done by way of e-mail on 15th September 2010. He had a meeting with the plaintiff on the 21st of September where the plaintiff showed him a contract employment dated the 1st January 2005 which the plaintiff said he had created in November, 2006 and pre-dated it to 2005 to satisfy PWC's Corporate Governance audit being undertaken at the time on behalf of the Irish Sports Council. Both he and Brendan O'Connell, former President in May 2005, and had signed it. He said he did this in order to ensure that the defendant would be complied with statutory corporate Governments obligations. The plaintiff confirmed that he did this without the knowledge of consent of the Executive Committee of the Board. He confirmed that in January 2006, in consultation with another employee, he had aligned staff salaries with public sector pay grades. He linked his salary to that of Assistant Principal (standard) which had the effect of increasing his annual salary from around €56,000 to €65,000 and to guarantee an automatic pay increase in addition to the annual

increment that had not previously existed. The plaintiff confirmed that he did this without the knowledge or consent of the Executive Committee of the Board.

He said he asked the plaintiff about other benefits, including two pension plans, one of which was 100% funded by the defendant and the other 98.6% funded by the defendant and about the VHI contribution at Plan E on behalf of the defendant. The plaintiff confirmed that the pension funds and the VHI contribution were introduced without the knowledge or consent to the Executive Committee of the Board.

Mr. Devoy deposed to the plaintiff's suggestion that it would be helpful for him if he, Mr. Devoy, would say that he was aware of all those matters as otherwise he had no justification for what he had done. The deponent said he made no comment and he considered the matter to be very serious and perhaps the best thing would be for him, Noel Tallon and himself to sit down and attempt to deal with the matters. They agreed to have that conversation after the executive meeting, the following evening on 22nd September 2010. At that meeting Mr. Tallon put a number of questions to the plaintiff who confirmed the matter of the pre-dating of the contract of the employment and the introduction of the public sector pay scales without the knowledge or consent of the President, Executive Committee or the Board. The plaintiff indicated that he intended to take advice and the meeting concluded.

The following day Karl Dunne and himself, the two company directors, discussed the matter and obtained legal advice. As a result of that legal advice they decided that they would protect themselves as directors and protect the company and that they would avoid the risk of putting future funding or support from the Sports Council in jeopardy. They decided they would appoint an independent investigator to investigate matters of concern and that he would make a full report to the defendant

and to facilitate the investigation they decided that the suspension of the plaintiff with pay was an appropriate and necessary course. He approached the treasurer of the Chartered Institute of Personal and Development in Ireland, who had been former national chairman of that body and who suggested that they should ask Mr. Ultan Courtney, the former IBEC executive and then an independent consultant who agreed to undertake the investigation. He denied that he instructed the plaintiff to hand over his mobile phone, laptop and office keys or that he instructed him to leave the office forthwith. Karl Dunne and himself had agreed to leave the plaintiff alone in his office for about fifteen minutes and agreed to him making a private phone call.

The letter of suspension on 23rd September was with immediate effect and on full pay and stated that the investigation was without prejudice to his position and the rules of natural justice would apply.

On 24th September, Mr. Dunne, Mr. Tallon and he met Mr. Courtney and engaged him to undertake an independent investigation on the entire matter. He said that no discussion had taken place on the events to date. It was agreed that only Karl Dunne would communicate without Alton Courtney throughout the course of the investigations, both Noel Tallon and he were now witnesses in the case.

A board meeting took place on 29th September at which the decision to appoint an independent investigator was ratified. At that meeting the defendant's solicitor and council were in attendance and Karl Dunne read out a statement which was recorded in the minutes referring to the assessment by Noel Tallon, as treasurer, the meetings with the plaintiff, the taking of legal advice and the appointment of Alton Courtney to carry out the investigation. The statement said that the plaintiff had been suspended on full pay pending an investigation and that they looked forward to conclusions as soon as possible. The statement further said that no judgment had

been made in respect of whether there is substance to any of the concerns raised and neither had any judgment being made as to whether the plaintiff had any case to answer. The decision to carry out an investigation was ratified by the Board and Karl Dunne requested that the matter be not discussed or speculated upon. He stated that the confidentiality of the process was vital and the plaintiff was entitled to the full benefit in principles in natural justice.

He referred to the investigation report dated the 23rd November 2010. He understood that throughout the investigation, the plaintiff was accompanied and advised by his solicitor.

The report referred to nine matters and referred to Mr. Courtney for investigation, together with seven matters that arose during the course of the investigation. In relation to seven of the sixteen matters of the investigation, the investigator concluded that the matter was a serious matter and referred to the Board for disciplinary hearing. The investigator did not uphold the remaining nine complaints.

Mr. Devoy's affidavit deals with issues that the plaintiff had with a number of findings and he said that it was not an appropriate form for the plaintiff to challenge findings of fact made by an independent investigator. That was the function of the disciplinary committee to examine the investigators report and decided what course of action, it would result therefrom. Had the plaintiff met with the disciplinary committee he could have highlighted any issues he had with the investigation report. The plaintiff however refused to meet with the disciplinary committee and has chosen instead to initiate the within proceedings.

Mr. Devoy said that the plaintiff in para. 13 of his affidavit that "the investigator in holding... the contract between the parties drawn up in 1990 had no

standing and his investigation was a serious misstatement of law". The investigators report stated that the defendant did not accept the 1990 contract as being an agreed contract and the investigator concluded that there was a reference to the contract between the parties drawn up in 1990 and an unsigned copy was provided by the plaintiff. However in the absence of the Union accepting that this was an agreed contract it had no standing for the investigation.

It does not seem necessary for the Court to deal with each and every of the issues raised by the plaintiff and replied to by Mr. Devoy.

The Court is satisfied that the plaintiff was afforded the opportunity to respond in full to all the matters under investigation.

The Court is of the view that the investigator was independent and skilled in dealing with the investigation and was best able to assess the defendant's witnesses as to whether they were biased and judgmental in their evidence. In any event the investigator has no record of this being a complaint made by the plaintiff.

Mr. Devoy says that at the Board meeting held on 8th December, as he was a witness in the investigation and it would not be appropriate for him to chair that part of the meeting, counsel for the defendant chaired the meeting. Counsel advised that the Board should have selected a disciplinary committee or panel prior to the Board having knowledge of the report and that Mr. Tallon, Mr. Dunne and himself should be excluded from the disciplinary committee.

The following motions were passed on the 8th December board meeting:-

"The Board resolves to carry out a disciplinary hearing into those matters in the investigators report which constitutes serious matters to be referred to the Board for disciplinary hearing.

The sub-committee consisting of members of the Board be established to carry out the disciplinary hearing. The three members were named.

The CEO (the plaintiff) be suspended on full pay and without prejudice pending conclusion of the disciplinary process.

The Board resolved if necessary that an appeal mechanism will be put in place to comprise of members of the Board or of an independent representative(s) nominated by the Board".

Mr. Devoy said that the reason why the Board did not examine the investigators report in full was to prevent any prejudgment or any appearance of prejudgment occurring to the disciplinary committee having been selected and prior to it having had an opportunity to examine the investigators report. Furthermore, not examining the report in full was conducive of a possible appeal to be heard by others members of the Board, should that course of action be required.

Mr Devoy said that neither he, nor Mr. Tallon, nor Mr. Dunne contributed to the discussion regarding the investigation and did not vote on the motions. They had no involvement in the disciplinary procedure adopted by the Board.

Mr. Devoy later on his affidavit said it was not correct to say that the plaintiff had no appeal from findings of the investigation report. The plaintiff was entitled to make any arguments he wished to the disciplinary committee who would decide to recommend the sanction which could be appealed.

Mr. Devoy said that the plaintiff was requesting the defendant to disregard the independent investigator's report and therefore, in effect, to recommence the entire process. He said that the plaintiff had not identified any substantive flaws in the conduct of the investigation. It was not appropriate to seek to have the report the disregarded in the absence of any procedural flaws.

Mr. Devoy said that the plaintiff's concern for the financial consequence for him if the defendant were permitted to continue with the process was not properly based and he continued to paid, and did not suffer any financial consequences as a result of the defendant's actions.

The plaintiff's second affidavit on 14th March 2011 referred to Mr. Devoy and Mr. Courtney serving as lay members on the *Complaints and Client Relations Committee of the Law Society of Ireland.*

The plaintiff referred to his responsibilities, including the overall management in control of activities which "are within the remit of the Chief Executive or allocated to the Chief Executive from time to time by the Board or executive and had authority to enter into contracts or agreements were such revenue or expenses had been budgeted.

The plaintiff said that when the investigator repeated the questions that Mr. Devoy and Mr. Tallon had put to him on 22nd September 2010 he was able to put his hand on the resolution of the Executive Committee made in 1998 which was the authority for his conduct. He said that had he been given an opportunity after the meeting of September 22nd to explain further his position in relation to his salary, pension via his life situation, he could have explained same quickly and simply.

The plaintiff takes this view with the Board meeting of December where Mr. Devoy as President, was complainant and the witness, that it was appropriate to have another as chairperson.

The plaintiff averred that the Board was not informed that the plaintiff had been denied legal representation at the disciplinary committee hearing and that the averment by Mr. Devoy that he was legally represented throughout the process was not correct.

The plaintiff said that the complainant officers of the defendant appointed preferred solicitors to the defendant in circumstances where they had no authority to do so and had he orchestrated the proposed investigation in circumstances where the defendant's board was not informed of the basis for such investigation, or who the legal advisor to the complainant was. Moreover, in breach of the defendant's own procedures, the meeting of December 8th 2010 was prevented from examining the content of the investigation report. Despite requests, neither the Board nor the plaintiff had been advised or informed of the brief terms of reference given to the disciplinary committee.

The plaintiff concludes that the disciplinary committee as set up will more likely than not arrive at a decision that he is to be dismissed.

9. **The Legal Position**

Clarke J. in *Carroll v. Bus Átha Cliath* [2005] 4 I.R. 184 at 189 stated, in relation to the disciplinary process, as follows:-

> "The final matter in respect of which the plaintiff seeks interlocutory relief concerns a disciplinary process which has been put in place by the defendant. It seems to me that the Court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process. To do so, would to be invite a situation were recourse might be well had to the court at many stages in the course of what otherwise would be relatively straight forward and expeditious set of disciplinary procedures."

Clarke J. referred to exceptions to the general rule. Where an employer had, in clear and unequivocal terms, indicated that procedures would be followed which would be manifestly unfair, that might be a circumstance where it would be appropriate for the Court to intervene at that stage.

In *Mary Becker v. The Board of Management of St. Dominics Secondary School, Cabra and Others* [2006] IEHC 130, Clarke J. stated at p. 6 as follows:-

> "In coming to a view as to whether that stage had been reached, it is important to note that the Court should not assume that unfairness will occur on the future, nor should it make assumptions about the likely future course of the process. The Court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue."

Later in that judgment, in relation to selection of disciplinary committees, Clarke J. said:-

> "I should not assume that the person selected to conduct any such investigation would not be entirely independent and would not carry out their role in accordance with the fair and agreed procedures and come to reasonable conclusions on the basis that the evidence before them. Those persons are entitled to make findings and to report those findings to the parties in accordance with Clause 2.4 of the agreement".

He concluded by saying that:-

> > "In all those circumstances, I am not satisfied that this is the sort of clear case in which it is appropriate to intervene at this stage. It does not necessarily follow that the process will be unfair. In respect of this particular complaint, no steps in substance had been taken in relation to it. Effectively to conclude that it would necessarily have to be unfair would require me to conclude that there is no way in which it could be

completed in a proper way. For the reasons which I have indicated this does not seem to me to be the case."

It is clear that the criterion, as enunciated by Hedigan J. in *Turner v. O'Reilly* [2008] IEHC 92 is that the only question is whether the process regarding the plaintiff's employment as been so tainted with an absence of fair procedures that it cannot be allowed to continue.

Moreover, Kearns J. in *Morgan v. Trinity College* [2003] 3 I.R. 157 at 167 referred to the defendant's submitting that all the complaints made by the plaintiff in the proceedings were premature and stated:-

"Any complaints of procedural defect could be made by the plaintiff to the disciplinary panel. The disciplinary panel is strictly governed and subject to principles of natural justice and fair procedures. The defendants submit that all of the complaints now advanced by the plaintiff at this hearing could and indeed should have been advanced by him in the first instance to the disciplinary panel. In the event the disciplinary panel failing in its duties in respect of any complaint, it would have at that stage had been open to the plaintiff either to appeal the decision of the panel to visitors or apply to this tort. It is submitted that there is not one iota of evidence that the panel had acted improperly or is likely to act improperly".

At p. 176 Kearns J. concluded:-

"I accept the defendant's case that the plaintiff's complaints in this instance are premature. It seems to me that all matters can be dealt with fully and adequately by the disciplinary panel will come to this matter unfettered by the prior history with which this judgment is largely concerned. The college

statutes and procedures are particularly well framed to ensure fairness at every stage."

10. Findings of the Court

10.1 The plaintiff is apprehensive that the disciplinary committee so set up, having met and considered the report, will more likely than not arrive at a decision that he be dismissed.

The court is satisfied that the defendant had not indicated that procedure would be followed which, in the court's view, would be manifestly or at all unfair. The exceptions referred to in *Carroll v Bus Éireann* do not apply and this Court, following that authority, will not intervene in a disciplinary process which is, as yet, incomplete.

The court should not assume that unfairness would occur in that process.

Any complaints of procedure defect can be made to the disciplinary panel.

In coming to this view the court has had regard to the following findings of fact.

The plaintiff would seem to have pre-judged the disciplinary committee in a manner which would appear to this court to be unwarranted.

10.2 Comparing the exhibit (Tab 12) regarding annual salaries due to be paid in annual salaries actually paid and the equivalent in relation to pension contributions the court, while acknowledging that this is a matter for the disciplinary panel rather than for this Court, notes that there is an issue as to whether the increase in the former €5,080 a year and of €3,080 for pensions (Tab 13) was to be paid for that year only or for all years as applied by the plaintiff. Moreover, the proportion of the pension contribution in 2010 of €50,610 as compared to the salary in 2010 of €96,700 which the plaintiff claims were due and owing to him would appear to be disproportionate

and unusual. The 1997 figures show a pension of some 10% plus when compared to salary.

10.3 The Court is satisfied that Mr. Scanlon was treated fairly and that the rules of natural justice applied in that there was an informal meeting between himself and Mr. Devoy and Mr. Dunne who were directors of the company that the matter was referred to an independent investigator and a report made to the Board. It is of particular significance that the plaintiff was afforded the right to apply and in the latter stages of the investigation was accompanied and advised by his solicitor.

It is of further significance that the investigator upheld seven of the sixteen matters under investigation as being a serious matter which was to be referred to the Board for disciplinary hearing.

10.4 The court is uncertain as to the significance of the 1990 contract, and, in any event, it does not seem to have been accepted by the defendant. It seems to the Court that the investigator was entitled to make this finding which could, of course, be reviewed, at the disciplinary committee in so far as it has any relevance to the contract which was subsequently pre-dated to the 1st January 2005.

10.5 The Court is satisfied that the references to breaches of fair procedure and natural justice by the defendant prior to the carrying out of the investigation lacks foundation. To say that the plaintiff was misled at the meeting of the 22nd December 2010 would appear to be a subsequent position which was not evidenced in the transcript nor grounded in the plaintiff's affidavit.

10.6 It is unclear why the plaintiff referred to Mr. Devoy and Mr. Courtney serving as lay members of a Law Society Committee dealing with complaints and client relations. There is no allegation of collusion, bias or of influence, nor are there grounds for any such averment.

10.7 The averment in the second affidavit of the plaintiff that he had overall responsibility for control and activities and authority to enter into contracts cannot, in the court's view at this stage of an interlocutory hearing, form the basis of avoiding the agreed procedure which equally applied to the plaintiff as Chief Executive.

10.8 The court is of the view that the plaintiff was given an opportunity before the investigator of referring to the resolution of the Executive Committee made in 1998 even where this was not referred to in his meeting with Mr. Devoy and Mr. Tallon on 22nd September. Accordingly it seems to the court that fair procedures were followed even in the event that it was not dealt with in the meeting of the 22nd September 2010.

10.9 The court is satisfied that the meeting of the Board of directors on 8th December, 2010, in its material aspects of receiving the report from the investigator, was not chaired nor contributed to by Mr. Devoy. The uncontroversial evidence of the minutes, as accepted by the plaintiff, was that the legal advisor chaired the said board meeting in order that there be no conflict between Mr. Devoy's role and that of the Chairperson.

10.10 The court is satisfied that the plaintiff was not informed that he was to be denied legal representation at any disciplinary committee hearing.

10.11 The court is satisfied that the summary of complaints in the plaintiff's second affidavit do not justify the Court intervening in a matter which accords with the procedures of the defendant and in relation to which the plaintiff makes no complaint, other than to say that the procedures were not properly followed. The Court is not satisfied that there is any evidence that the complainant officers of the defendant had appointed preferred solicitors or that they had no authority to so do. That allegation appears to be unfounded.

10.12 The reference to the complainant officer's "orchestrated the ratification of the proposed investigation in circumstances where the defendant's board was not informed the basis for such investigation" seems also to be unfounded. The statement made by the Board clearly refers to the reason why the investigation was undertaken and properly states that the rights of the plaintiff were being preserved.

10.13 To say that the Board and the plaintiff had not been advised of the terms of reference given to the disciplinary committee, is somewhat contrived given the ample documentation referred to governing disciplinary matters, the resolution on the Board and the availability to the plaintiff of the findings of the investigator.

11. Conclusion

In the circumstances the Court declines to grant any injunctive relief restraining the defendant from considering the investigator's report relating to the plaintiff's employment and will also refuse any injunctive relief restraining the defendant from taking any steps in furtherance of any disciplinary procedure as against the plaintiff.