UNAPPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Edwards J.

Noonan J.

Ní Raifeartaigh J

Neutral Citation Number [2020] IECA 314

Record No: 2018/42

VEHICLE TECH LIMITED

Appellant

V

COMMISSIONER OF AN GARDA SÍOCHÁNA

CRIMINAL ASSETS BUREAU

THE APPEALS COMMISSIONERS

JUDGES OF THE DUBLIN METROPOLITAN DISTRICT COURT

IRELAND, AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Edwards delivered on the 18th of November 2020.

Introduction

1. This is an appeal from a judgment of the High Court (Meenan J) of the 19th of December 2017, and Orders of the High Court arising therefrom, in respect of two motions and an adjournment application brought in these proceedings by the appellant (as applicant

and moving party). For simplicity it is intended henceforth to refer to the appellant throughout this judgment as being "the applicant". The respondents before this Court were also the respondents before the High Court and will still be referred to as such.

2. In the first of these motions, dated the 14th of December 2017, the applicant sought, *inter alia*, the recusal by the High Court judge from any further consideration by him of the matter, upon grounds advanced in an affidavit of Francis McGuinness, a Director of the applicant, sworn on the 15th of December 2017 and filed in support of the motion. In summary, the applicant was claiming objective bias on the part of the High Court judge, arising from certain in-court exchanges between counsel for the applicant and the bench. The motion had been opposed by the respondents, relying on an affidavit of James P Moloney, a Solicitor in the Chief State Solicitor's Office, sworn on the 18th of December 2017 and filed in opposition to the motion. The motion was refused on the 19th of December 2017.

3. The second motion was a motion dated the 16th of June 2017, seeking substantive relief in the proceedings by way of judicial review, which had been adjourned from time to time before coming on for hearing on the 19th of December 2017. This was the standard originating motion which issues following the grant of leave in judicial review proceedings. Following the refusal of the motion seeking the High Court judge's recusal, counsel for the applicant sought an adjournment of the hearing of the motion dated the 16th of June 2017 (in reality the substantive judicial review hearing), pending an appeal against the High Court judge's order refusing to recuse himself. This application for an adjournment was refused.

4. Counsel for the applicant then indicated to the court that, notwithstanding the refusal of the adjournment, his client was not prepared to partake further in the matter before the court as then constituted. In the circumstances the court ordered that the motion of the 16th of June 2017 be dismissed.

5. The costs of both motions were awarded to the respondents against the applicant, said costs to be taxed in default of agreement.

6. A third motion, or more correctly a purported motion, features significantly in the procedural history of the case, even though that did not ultimately result in any order requiring it to be appealed. In this purported motion the applicant sought (*inter alia*) the attachment and committal of the Garda Commissioner (as first named respondent) and a named garda, for alleged contempt of orders said to have been made in the High Court by Peart J. (in 2011) and by Charleton J. (in 2012), respectively, and by the District Court by Judge Larkin (on two occasions in 2013).

Background to the matter

The Constitutional Action

7. The present proceedings, in which the two motions now under appeal were brought, are judicial review proceedings that follow on from the applicant's success in earlier proceedings before the High Court (Laffoy J) in 2010, in having s.31(8) of the Criminal Justice Act 1994 (the Act of 1994), as substituted by s. 21 of the Criminal Law (Theft and Fraud Offences) Act 2001 (the Act of 2001), declared unconstitutional. For a full account of the constitutional action the reader is referred to the judgment of Laffoy J, delivered on the 4th of October 2010 in *Vehicle Tech Limited v Allied Irish Banks Plc, Commissioner of An Garda Síochána, Ireland and the Attorney General* [2010] IEHC 525 ("the judgment of 2010"). For the purposes of providing necessary background in the context of the present judgment, a brief summary will suffice.

8. Prior to the events which gave rise to the proceedings culminating in the judgment of 2010, the plaintiff (the applicant in the present proceedings) was involved in the business of the repair and sale of commercial motor vehicles. It maintained two accounts in the

Ashbourne branch of the first defendant (AIB). Up until certain events of July 2008 which gave rise to the proceedings, they were operated in a satisfactory manner.

9. In February 2008, the relevant Irish authorities received a mutual assistance request from the Belgian authorities in relation to trucks which were stolen in Belgium, transported to this jurisdiction, sold here and, it was suspected, the proceeds of sale of which were laundered here. Arising from this mutual assistance request the Garda Bureau of Fraud Investigation (the Bureau) opened an investigation into suspected related criminal activities in this jurisdiction, including money laundering.

10. In the context of that investigation the Bureau identified an account to which the proceeds of sale of some of the trucks had been lodged, which, in turn, led the Bureau to the aforementioned accounts of the plaintiff in the AIB's Ashbourne branch.

11. On the 10th of July, 2008 a Direction (the July 2008 Direction) was issued to the AIB's Ashbourne branch by the Bureau under s. 31(8) of the Act of 1994, as substituted, in relation to the accounts in question, which at the time contained approximately €150,000, informing the bank that the Bureau was *"conducting an investigation into suspected criminal activities, including money laundering"*, and requiring that the accounts in question be, in effect, frozen. The bank complied with the direction. The plaintiff maintained that it suffered damage in consequence of this, resulting in it being effectively put out of business.

12. This precipitated a plenary action by the plaintiff claiming diverse reliefs against the named defendants, including as against the State a declaration that s. 31(8) of the Act of 1994, as substituted, was unconstitutional, and a further declaration that in consequence of that the July 2008 Direction was invalid, as well as damages against the AIB and the State defendants on various bases. It was successful in obtaining the declaratory relief claimed on the basis that s. 31(8) of the Act of 1994, as substituted, infringed the plaintiff's right to fair procedures under Article 40.3 and its property rights under Article 40.3 and Article 43 of the

Constitution. The claims for damages were unsuccessful. The plaintiff obtained its declaration of unconstitutionality notwithstanding that the High Court's conclusion had become largely redundant; because, in the interval between the case being heard and judgment being delivered, s. 31 of the Act of 1994 had been repealed in its entirety by s. 4 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ("the Act of 2010"), which came into operation on 15th July, 2010 and introduced new legislative provisions in relation to directions, orders and authorisations relating to investigations.

13. On the 28th of October 2010 the High Court ordered that the monies from the said accounts, which on the 18th of May 2010 had been lodged in court by AIB, should be returned to the plaintiff, and the sum of €153,977.40 was duly paid back into the applicant's bank accounts in two tranches, the first being paid on the 14th of April 2011 and the second being paid on the 9th of May 2011.

The Present Judicial Review Proceedings.

14. On the 31st of January 2011 the Criminal Assets Bureau ("CAB"), the second named respondent in the present proceedings, pursuant to its functions under s. 5(1)(b) of the Criminal Assets Bureau Act 1996 as amended by s.15 of the Proceeds of Crime (Amendment) Act 2005. became the applicant's effective Inspector of Taxes and raised an assessment to VAT in the sum of €270,650 in respect of the year 2007. The applicant did not pay the sum assessed but rather sought to appeal it to the third named respondents, i.e., the members of the Tax Appeals Commission.

15. On the 12th of May 2011, a member of An Garda Síochána not below the rank of superintendent issued a Direction ("the May 2011 Direction") to AIB's Ashbourne branch to again freeze the applicant's previously mentioned accounts, and on this occasion the Direction was pursuant to s.17(1) of the Act of 2010. The statute permitted the issuing of such a Direction, to last no more than seven days, to enable the Garda Síochána to carry out

preliminary investigations into whether or not there were reasonable grounds to suspect that a transaction or transactions on those accounts would, if it or they were to proceed, comprise or assist in money laundering or terrorist financing.

16. The May 2011 Direction was followed by a 28-day freezing order sought, and obtained, on an *ex parte* basis, from the District Court on the 16th of May 2011 pursuant to s. 17(2) of the Act of 2010. In circumstances where s.17(3) of the Act of 2010 provides that a s.17(2) freezing order can be made on more than one occasion, successive s.17(2) orders were applied for and obtained covering the period between the 16th of May 2011 and the 9th of November 2011 when the applicant's tax appeal was due to be heard. For reasons it is unnecessary to go into, on the 9th of November 2011 the applicant sought an adjournment of its tax appeal, which was refused. In the circumstances the VAT assessment for 2007 raised by second named respondent in respect of the applicant was affirmed.

17. On the 21st of November 2011 the applicant lodged an appeal to the Circuit Court against the affirmation of the said assessment. There was subsequently controversy as to whether it could validly maintain an appeal in circumstances where the applicant was no longer on the Companies Register, and the appeal was struck out by the Circuit Court (Her Honour Judge Linnane, presiding) on the 15th of February 2012.

18. Also, on the 21st of November 2011, the applicant applied successfully to the High Court (before Peart J.) and obtained an Order ("the Peart J. Order") for leave to apply for relief by way of judicial review, and in doing so commenced the present proceedings. The original Statement of Grounds (which has since been amended, a matter to which I will return) sought (*inter alia*):

1. Declarations that the successive freezing orders that had been obtained were
    i. not in conformity with the relevant statutory regime and/or
    ii. an abuse of the processes of the District Court and/or

iii. an actionable breach of statutory duty to the applicant

2. Declarations that s.17(3) and s.21(1), respectively, of the Act of 2010 were invalid as repugnant to the Constitution and/or incompatible with the European convention on human rights and/or the EU charter of fundamental rights.
3. Orders of Certiorari quashing:
    i. the determination of the third named respondent (who at that point was an Appeal Commissioner individually named in the title to the proceedings) on the 9th of November 2011 upholding the VAT assessment raised by the second named respondent;
    ii. such attachment or other process of enforcement adopted by the second named respondent against the frozen funds in respect of that assessment, including an interlocutory stay;
    iii. the order of the fourth named respondent (who at that point was an individually named District Judge) of the 3rd of November 2011under s.17(2) and (3) of the Act of 2010, freezing the funds in question for further twenty-eight days or otherwise (this being the freezing order that was current at the time at which leave was sought).
4. Damages, on various grounds
5. Further and other relief
6. Costs.

19. Various grounds for seeking those reliefs are then set out in the statement, as is required under Order 84 of the Rules of the Superior Courts. It is unnecessary to set them out for the purposes of this sketch of the background to the present appeal.

20. It is relevant in the context of some of the issues arising in this appeal, and should be noted, that at the time these proceedings were commenced the applicant was represented by

Fahy Bambury McGeever, Solicitors, as the firm was then known. More recently it is known as Fahy Bambury.

21. An Amended Statement of Grounds was filed on the 10th of December 2012, an Order granting leave to do so having been obtained from the High Court (Charleton J) on the same date ("the Charleton J. Order"). This order permitted, inter alia, a change in the title to the proceedings to substitute the third and fourth named respondents as presently described for the individual Appeals Commissioner and District Judge previously named. The amendments to the title are not underlined or highlighted in the Amended Statement of Grounds that was filed, unlike relevant amendments in the body of that document, but nothing turns on it as the changes made were authorised and clearly appropriate.

22. What appears to have precipitated the seeking of leave to file an Amended Statement of Grounds was: firstly, the fact that the applicant had been struck off from the Companies Register at the time at which the Peart J Order was obtained, a matter concerning which its officers claim to have been unaware until much later on, necessitating the taking of steps by them to have the company restored to the Register (which had been achieved by the time the Charleton J order was sought); and secondly, the fact that the second named respondent, using Revenue powers of attachment, had issued an Attachment Notice on the 13th of March 2012 in respect of the funds which remained frozen in the previously mentioned accounts of the applicant in AIB's Ashbourne branch. The substantive amendments, which are identified by underlining in the Amended Statement of Grounds filed, seek to extend the reliefs claimed to include a claim for an Order of Certiorari to quash the said Attachment Notice, for related directions in relation to the disposition of the monies that had been attached, and an Order of Prohibition covering any further attachment or enforcement action in respect of the applicant's tax liabilities *"until such further time as its intended appeal, last listed for 9 November 2011, is heard and determined in accordance with law"*. The grounds relied upon

as supporting the claim for relief, were in turn expanded to cover the additional reliefs now being claimed.

23. Notices of Opposition were in due course filed by the respondents joining issue with the applicant in respect of all claims, the second named respondent filing its Notice of Opposition on the 7th of January 2013, and the first, third, fourth, fifth and sixth respondents filing a joint Notice of Opposition on the 15th of March 2013. There were then applications for discovery by the respondents, and for cross-discovery by the applicant, and there was an appeal to the Court of Appeal in regard to a discovery issue, which was ultimately determined on the 10th of November 2016.

24. Ultimately, on the 2nd of May 2017, a trial date of the 7th of November 2017 was fixed for the hearing of the substantive judicial review action.

Events precipitating the present appeal

The purported Notice of Motion of the 16th of June 2017

25. On the 16th of June 2017 the applicant issued a document purporting to be a motion on notice seeking, inter alia, the attachment and committal of the first named respondent and two named gardai, for alleged contempt of stays on any further attachment or enforcement action against the applicant said to have been contained in the Peart J. Order, and in the Charleton J. Order; and for alleged related contempt of two Orders of the District Court directing them, in the context of applications brought by the applicant under the Police Property Act, 1897, as amended by s.25 of the Criminal Justice Act 1951, to return a Kobelco excavator and a Volvo truck, to the applicant.

26. Manifestly, because of the nature of the intended reliefs, a motion of this type requires to be a motion on notice to other interested parties. It transpires that the document issued by the applicant on the 16th of June 2016, a copy of which we have been provided with, was not

in substance a notice of motion in the commonly understood sense of a document that puts other interested parties on notice of an intended application that may affect them. Notwithstanding that it was headed "Notice of Motion", and commenced with the words "TAKE NOTICE", it was not in fact addressed to anybody. Accordingly, insofar as it flagged that the applicant intended to make applications to the court (other than on notice) it was in substance an *ex parte* docket.

27. Moreover, the document at issue is not in the form one would expect to see in the case of a Notice of Motion seeking attachment and committal.

28. First, although not addressed to any specific person or persons, it says:

> *"TAKE NOTICE that on the 6th of July 2017* (an earlier date of the 28th of June has been manually changed, a matter upon which I will comment later) *at 10.30 o'clock … etc etc … counsel on behalf of the applicant will apply … for the following reliefs:*

29. Secondly, the reliefs then listed as being sought commence with a request to the High Court for directions as how the manner in which the four court orders, which the applicant was contending had been breached, namely the Peart J. Order, the Charleton J Order and the two Orders of District Judge Larkin, *"are to be served upon the first named respondent and two of her subordinates"*. The document goes on to explain that this request for directions is made *"in the absence of appropriate Orders in the aforesaid rules* [i.e., the Rules of the Superior Courts]*"* and *"so that they may be properly and procedurally be before this honourable court for the purpose of moving the applicant's motion for attachment and committal."*

30. Thirdly, the document next proceeds to seek yet further directions concerning *"the manner in which all subsequent pleadings and proceedings in this matter are to be served upon the first named respondent and/or her subordinates given the practical and realistic near but impossibility of serving them in ordinary course"*

31. Fourthly, after then going on to ask the court in specific terms, in paragraphs 3. 4, 5, 6, 7, and 8 of the document, for orders for the attachment and committal of the first named respondent, and two named gardai; and for the immediate return of all property seized from the applicant, it concludes:

> *"WHICH SAID NOTICE OF MOTION will be grounded upon the proceedings and pleadings already had herein, the certified copies of the relevant Court Orders, the Affidavits of Service of the aforesaid Orders subject to such Orders as this Honourable Court shall make, the nature of the case and the reasons to be offered.*
>
> *WHICH SAID APPLICATION will be set out by the plaintiff* (sic) *herein,* ***this Ex Parte Docket****,* (my emphasis) *the nature of the case and the reasons to be offered.*
>
> *Dated this 16th day of June 2017.*
>
> *Signature*
>
> *J.V. Geary Solicitors*
> *Solicitors for the Applicant,*
> *Linenhall Street,*
> *Castlebar,*
> *Co Mayo.*

32. According to the chronology provided by the respondents (the applicant's chronology is silent on the issue) on "22 June 2017 - Applicant applied *ex parte* for liberty for short service of Notice of Motion, which application was granted (Noonan J)". The source of the respondent's information (since the application for liberty to effect short service was made *ex parte* as would be usual) was a handwritten letter received by the Chief State Solicitor from JV Geary, Solicitors, dated the 22d of June 2017, and in the following terms:

> *"Your client: the Commissioner of an Garda Siochána*
>
> *Dear Sirs,*

We confirm we now act for Vehicle Tech Limited in respect of High Court proceedings 2011/1120JR.

We enclose the following by way of service upon you:

1. *Notice of Change of Solicitor;*
2. *Notice of Motion returnable before the High Court on Wednesday next, 28 June 2017.*
3. *Ex Parte Docket;*
4. *Affidavit of John Geary, solicitor;*
5. *Exhibits Referred to in Said Affidavit*

please note that counsel on behalf of our client made an ex parte application before Mr. Justice Noonan today, Thursday 22nd June.

Mr. Justice Noonan read the papers in chambers and he then ordered us to serve the within papers on the first named respondent only (i.e. your client; the Commissioner of An Garda Siochána) and that you attend before the court next Wednesday, 28 June 2017.

We draw your attention in particular to pages 189, 193, 201 and 202 of the booklet we enclose herewith.

Yours faithfully,

JV Geary, Solicitors.

Although the Court of Appeal has not been supplied with a copy of the booklet referred to, it is surmised that the page numbers to which the addressee's attention was likely directed were those at which copies of the Peart J Order, the Charleton J Order and the two Orders of Judge Larkin were to be found.

33. We have also been supplied with an Affidavit Of Service sworn by Mr John Geary on the 26th of June 2017, in which he deposes that *"pursuant to the direction of Mr Justice*

Noonan of the High Court on the 22nd of June 2017" he personally served *"true copies of the Notice of Motion returnable for the 28th day of June 2017, Grounding Affidavit of your deponent and exhibits thereto, Ex Parte Docket and Notice of Change of Solicitor"* on the first named respondent by delivering them to and leaving them with a Ms Alison Morrisey, an agent of the first named respondent, at 4.40pm on the Thursday the 22nd of June 2017, at the offices of the CSSOLR.

34. While the respondent's chronology would appear to be supported by the handwritten letter from JV Geary, Solicitors, dated the 22nd of June 2017, and the said Affidavit of Service, there is an inconsistency between the procedural status of the intended motion as therein described, and the copy of the purported Notice of Motion in controversy with which the members of this Court have been provided. The copy which the court has been provided with bears two important stamps. The first indicates that the document in question (whatever its status might be) was filed in the central office on the 28th of June 2017. The second stamp states:

> *"Leave to issue and serve short notice of motion for Thursday the 6th day of July 2017 granted by Ms Justice Baker by order dated 28 day of June 2017.*
>
> *Signed: MMN, Registrar*
>
> *List Code NJ FM"*

Moreover, the originally inserted return date of 28th June 2017 has been manually altered to read 6th of July 2017, and the alteration is initialled *"(MMN)"*.

35. These inconsistencies are unexplained.

36. What is clear is that the document dated the 16th of June 2017, in circumstances where it was not addressed to anybody, and was described internally as *"this ex parte docket"* would not, in the terms in which it was drafted, have been adequate to put the respondents on formal notice of an intended application for attachment and committal of the

first named respondent and/or her servants or agents the named gardai in question. In a matter where personal liberty may be at stake the requirement to put all persons whose liberty may be in jeopardy on formal notice is a *sine qua non*. Some lesser "informal" form of notice would not have sufficed.

37. The document dated the 16th of June 2017 does seem to have been accepted by the Central Office on some basis, in circumstances where it bears a stamp indicating that it was "filed" on the 28th of June 2017. What is not clear is whether it was accepted by the office as being a formal Notice of Motion (a person might easily be misled into thinking that it was such by the title "Notice of Motion" on the front page, and the fact that it commenced with the words "TAKE NOTICE"), or as an *ex parte* docket either in connection with an application for short service, or for directions, both of which were matters capable of being dealt with *ex parte*. I am satisfied that this uncertainty as to what status was in fact afforded to the document dated the 16th of June 2017 by the Central Office lies at the root of much subsequent confusion. As we will see later in this judgment, the confusion alluded to becomes manifest at a subsequent hearing before Meenan J in the High Court on the 7th of November 2017.

38. The purported motion was grounded upon an affidavit sworn on the 16th of June 2017 by John V Geary, Principal Solicitor of J.V. Geary, Solicitors, who by this point was representing the applicant, and the documents therein exhibited.

39. While I am loath to have to comment adversely, I feel obliged to say that the contents of this affidavit, sworn by an officer of the court, were by any standards extraordinarily and inappropriately polemical. By way of example, the deponent asserts at paragraph 19 thereof:

> *"The 1st named respondent is responsible for the actions of her subordinates and in this instance she has whether by act or omission permitted various Orders of the Courts to be infringed and in fact, absolutely ignored. Whilst they, and she, believe*

themselves above the law, the established law provides that all are bound equally irrespective of rank or position so whether the person be a politician, a member of an activist group complaining about water charges or the activities of a multinational company in an isolated part of County Mayo they are all considered as one under the law and Court Orders apply equally to all, without discrimination. The time has long passed where the Gardaí can behave in a manner indifferent of the law and its application and one wonders how many instances have to be placed before the Courts or before Tribunals before they are, as would any other one of us, be held to account. The recent events relative to this body of people and their superiors demonstrates a force out of control, indifferent and contemptuous of all who seek to scrutinize them for their incomprehensible shortcomings and predispositions to lie and disguise from society, the shambolic nature of what and who they have become. Their constant bleat that they put their lives on the line and do a hard job has lost its currency as they have lost the respect they once held and if for no reason than not one would in the event that was required, swear up against the other."

40. Be that as it may, if the polemics are stripped away the grounding affidavit contains several potentially material factual assertions in support of the relief claimed in the document entitled Notice of Motion and dated the 16th of June 2017.

41. The first is that the Peart J. Order contained a stay which the first named respondent (who at the time was Commissioner Noirín O'Sullivan), her servants or agents, had acted in disregard of. The Peart J Order is exhibited, and does contain a stay in the following terms:

"IT IS ORDERED that

(iii) the issue of attachments or any other process of enforcement by the second named respondent on foot of the VAT assessment raised by the said second named

respondent and the determination thereof as aforesaid be stayed until after the seventh day of December 2011 or until further Order.

42. Certain matters are immediately apparent. The stay in that Order is in respect of *"the issue of attachments or any other process of enforcement"* by **the second named respondent** (my emphasis). Clearly it would extend to any actions in that regard by the first named respondent (or anyone else) acting on behalf of, or as agents for, the second named respondent. However, the purported Notice of Motion does not seek the attachment or committal of any representative of the second named respondent, nor does it allege explicitly that the first named respondent, or the named gardai, or any of them, acted as agent for the second named respondent in respect of *"the issue of attachments"*. Neither does it, nor does the affidavit of Mr Geary, identify what (if any) attachments were alleged to have been issued by the first named respondent in breach of the stay.

43. It is again the case that the purported Notice of Motion does not seek the attachment or committal of any representative of the second named respondent, nor does it allege explicitly that the first named respondent, or the named gardai, or any of them, acted on behalf of, or as agent for, the second named respondent in respect of *"any other process of enforcement"*, save to the extent that it appears to be alleged in paragraphs 5 and 6 of the said Notice of Motion that the first named respondent and the two named gardai may have had some knowledge of the sale by an unspecified party (but implicitly the second named respondent) in May/June 2013 of a Kobelco excavator and a Volvo truck, the property of the applicant, and which it is claimed the District Court had ordered should be returned to the applicant in response to applications made by it to that court under the Police Property Act 1897 as amended; and, further, some knowledge of the off-setting of the proceeds realised therefrom against the applicant's VAT liability as assessed by the second named respondent.

44. The affidavit of Mr Geary goes further and asserts that the two gardai in question *"deliberately ignored the Order of the Court and in fact moved the property in order to frustrate the [Appellant] when he attended to collect, in particular, the Kobelco excavator"*.

45. Another matter which ought to be commented upon is that the stay in the Peart J. Order was time limited *"until after the seventh day of December 2011 or until further Order"*. It is not alleged anywhere in either the Notice of Motion or in Mr Geary's grounding affidavit that there was a *"further Order"* either extending or reducing the period of the stay. The Charlton J. Order, for example, is completely silent on any alteration to the stay granted in the Peart J. Order. Absent a *"further Order"*, the stay in the Peart J. Order would arguably have expired at midnight on the 7th of December 2011.

46. The second potentially material factual assertion is that the Charleton J. Order contained a stay which the first named respondent, her servants or agents, had acted in disregard of. The Charleton J. Order is also exhibited but, notwithstanding the assertion made, it contains no stay whatever. The Charleton J. Order refers to the Amended Statement of Grounds as including a claim (at para 3D) to be granted prospectively and following the hearing of the judicial review, *"an Order prohibiting any further attachment or enforcement action in respect of the company's tax liabilities until such further time as its intended appeal, last listed for 9 November 2011, is heard and determined in accordance with law"*, but the curial part of the order, apart from permitting the substantive amendments sought and directing that these proceedings be heard together with the plenary proceedings bearing record no 2008 No 6170P (i.e., the constitutional action, in which certain ancillary claims for damages remained outstanding, notwithstanding that the main issue had been dealt with by Laffoy J in her judgment of the 4th of October 2010), merely (1) grants an extension of time (2) sets a date by which the respondents should file a Statement of Opposition, (3) sets an initial return date , (4) grants leave to amend the title to the proceedings and (5) directs that

costs in the application are to be costs in the cause. It neither grants any new stay, nor continues any existing stay. Moreover, there is nothing in the Order to suggest that interlocutory relief of any kind was granted, either in terms of the relief claimed in paragraph 3D or on any other basis.

47. A third potentially material factual assertion is that the first named respondent and her servants or agents (including the two specifically named gardai) had breached orders made by District Judge Mary Larkin at Newcastle West District Court in May and June 2013, in the context of separate applications to the District Court under the Police Property Act 1897 as amended, for the return to the applicant of a Kobelco excavator, and a Volvo truck, respectively, directing that they be returned to the applicant. The substance of these claims has already been alluded to the extent that they are relied upon as alleged breaches of the Peart J and Charlton J Orders. However, both the Notice of Motion, and the grounding affidavit of Mr Geary, suggests that they were also being relied upon separately and in their own right as representing contempt of Orders of the District Court and, in that way as supporting a case generally being made by the applicant that the first and second named respondents, in particular, had engaged in a maliciously motivated campaign of harassment and intimidation of the applicant and its principal owner, one Francis McGuinness. This understanding arises from a passage in paragraph 18 of Mr Geary's affidavit, which states:

> *"The disposal of the Kobelco and the proceeds being offset are in direct violation of the two High Court Orders, the Peart and Charleton Orders referred to throughout and are a contempt of not alone those Orders but additionally of the specific Orders made by the judge in Newcastle West in relation to those specific items of property made four years ago* (sic)*."*

48. A fourth assertion, related to the matter just discussed, arises from averments contained in the affidavit of Mr Geary to the effect that (a) the alleged breaches of Judge

Larkin's orders were only discovered by Mr Geary's office in the summer of 2016, and (b) that on the 6th of September 2016 there was an attempt at Newcastle West District Court to apprise Judge Larkin of the alleged contempts, "*with a view to discussing with the judge, whose orders were the ones which had been breached, what steps, if any, should be taken, or if she wished a penal endorsement grafted onto the orders and such like, given the rather unusual and certainly infrequent nature of the application being made."*

49. In his affidavit Mr. Geary, again in polemical terms, and not confining himself to essential facts, goes on to state:

> *"The application and the attempt of the applicant's counsel to properly put the matter before the court were treated with judicial hostility of a like not experienced by my counsel who has practiced at the Irish bar for approximately 25 years to such an extent that he having indicated that she did not wish to hear my client in relation to the matter* (sic) *he all but had to push his client into the witness box and force his swearing for the purpose of giving sworn evidence, designed to assist the court in relation to the complaint of contempt."*

50. Mr Geary's affidavit goes on to tell us that the judge adjourned the matter back to the 1st of November 2016, and it further goes on to assert:

> *"I say believe and am informed that the court was addressed at length in relation to what the Gardaí had to say, save that neither the applicant nor his legal representatives attended before the court, proceeding on the premise as identified above as to the hostility clearly evident to the application and to all those associated with it and further, no formal steps, other than to advise a disinterested court of a contempt of its order having occurred. The Gardaí had no locus standi to address the court on the matter and certainly not in the colourful terms in which I believe they did."*

51. Later in the same paragraph (paragraph 16), Mr. Geary states:

> *"... it would appear that in the absence of the applicant ..., the court was addressed with reference being made to the involvement of the CAB but I am unable to state with particularity what was said and will be, in due course be* (sic) *applying for all DAR recordings as have arisen in our absence. However, I believe that I can say with some conviction that no mention was made of all properties seized, of which the applicant's affidavit in proposed plenary proceedings sets out the list in detail, having been sold to be offset as against the applicant's purported tax liability."*

52. The affidavit is silent as to whether the judge considered that her orders had in fact been breached, and as to whether at the end of the day she felt it necessary to take any action or make any order. It appears implicit, from that silence, that both questions fall to be answered in the negative.

53. Finally, the affidavit of Mr Geary asserts in a general way that members of the gardaí have over the intervening years since the constitutional action *"engaged in a campaign of watching, besetting, harassing and intimidating the company's owner, one Francis McGuinness, ... , by engaging in a multiplicity of disguised lawful activities, ... , by using and abusing various provisions of the road traffic act, money-laundering legislation and such like to wreak as much havoc on Mr. McGuinness's life as they possibly could using and abusing powers entrusted to them to be lawfully and faithfully applied"*. He adds: *"the same coterie or servants and/or agents have through the same time repeatedly and without lawful or other authority, repeatedly seized property owned by the applicant, whether they be motor car, truck, excavators or other such machinery and in one instance, in excess of some three years ago, they seized a top class Mercedes CL sixty-three AMG from the applicant's business premises on the basis that there was 'no way a scumbag' such as the applicant could afford such a car."*

54. No specifics are given beyond identifying one of the cars referred to as being the Mercedes in question. It is presumed that the truck mentioned may have been the Volvo truck the subject matter of one of the District Court's police property orders, and that one of the excavators may have been the Kobelco machine identified in the same context. Nothing else is mentioned with particularity. The affidavit does go on, however, to particularise incidents of alleged harassment of the said Mr. McGuinness on occasions in April/May 2016 when he was travelling to and from Dublin Port, but asserts that the applicant would be seeking injunctive relief in respect of the complaint of harassment in separate plenary proceedings. In relation to other property allegedly seized, the Court of Appeal has not been furnished with a copy of the intended (or possibly at this stage, the actual) pleadings in what Mr Geary referred to, at paragraph 16 of his affidavit, as his client's *"proposed plenary proceedings"*, or with the list to which he refers.

55. Somewhat unsatisfactorily, this Court has been provided with an otherwise less than complete set of papers in as much as reference has been made in the written chronologies which we requested, and in certain of the correspondence with which we have been furnished, to affidavits filed on behalf of the respondents in reply to Mr Geary's said affidavit. However, we have not been supplied with copies of those affidavits by the applicant who bore the obligation to provide them to this Court as moving party in the appeal. In particular, it appears that affidavits were sworn by Garda Eugene O'Sullivan on the 31st of July2017, by Garda Dermot Hallett on the 15th of August 2017, by a Mr Tom Victory on the 15th of August 2017 and the 6th of November 2017, and by an anonymous deponent, namely Revenue Bureau Officer 34, on the 12th of July 2017. While it would have been helpful to have this material in order to form an overview as to where the balance of justice might lie in respect of the matters in controversy, it will not ultimately inhibit us from dealing with this appeal, because it is not an appeal from a dismiss on the merits. There was no consideration

of the merits at first instance. Rather, the motion was dismissed, in effect, for want of prosecution on the day that it was listed for substantive hearing. But I will get to that.

56. The purported motion for attachment and committal was initially allocated a return date of the 28th of June 2017, which date was seemingly later altered to the 6th of July 2017. According to the respondent's chronology it was adjourned on the return date to the Deputy Master's list on the 20th July 2017. It is unclear what exactly happened before the Deputy Master, save for an indication in the respondent's chronology that it was adjourned on that occasion to (what we now understand to have been a judicial review management list to be presided over by a High Court judge) on the 5th of October 2017, and that the Deputy Master gave the applicant leave to issue a Notice of Motion seeking to be allowed to cross-examine the respondents' deponents. We are told that no such motion in fact issued.

57. On the 5th of October 2017 the list in question was being presided over by Noonan J. It is unclear whether Noonan J had any paperwork before him or was simply informed when the matter was called that it related to a motion for attachment and committal in judicial review proceedings in which there was to be a substantive hearing on the 7th of November 2017. At any rate, we were told that he directed that the applicant's motion for attachment and contempt in the proceedings should be listed for hearing on the same date as the substantive judicial review, and (according to the applicant) with the intention that it should be heard first. Further, we understand that the applicant was also granted liberty by Noonan J to issue a Notice of Motion for the same date seeking leave to cross-examine the respondent's deponents as to their affidavits. Again, we understand that no such motion was ever filed.

Legal Representation

58. As indicated at paragraph 19 above, when these proceedings were commenced the applicant was represented by Fahy Bambury McGeever, Solicitors. However, on the 16th of

June 2017, i.e., the same day as that on which the motion for attachment and committal was issued, a Notice of Change of Solicitor was filed on behalf of the applicant indicating that the firm of J.V. Geary, Solicitors was coming on record instead of Fahy Bambury McGeever.

59. In an affidavit sworn subsequently on the 15th of December 2017 by the previously mentioned Francis McGuinness, in his capacity as a Director of applicant, the following matters are stated with respect to the change. He averred:

> *"4 The applicant had retained the services of the same solicitor and senior and junior counsel for the duration of the period: 2008 until 2017 and they had always been, and were, instructed to conduct the judicial review on November 7th on behalf of the applicant herein;*
>
> *5. I say that certain other matters had arisen over the course of the intervening period, which were of grave concern to the applicant: including conduct by state agents which I am advised amounts to a breach of rights and duty and amounts to contempt of court. In this regard the services of JV Geary solicitors were engaged to pursue these matters only. Declan Fahy, Solicitor, of Fahy Bambury McGeever McGeever liaise with John Geary, Solicitor, in this regard and provided documentation relevant to those issues only to Mr. Geary and counsel retained in that matter: Mr. Alan Toal BL for the purpose of prosecuting the contempt matter and it alone.*
>
> *6. I say that Mr. Geary was instructed and came 'on record' so to speak solely to deal with the contempt motion issued on the applicant's behalf by his office in June 2017 and it was expressly agreed between the two solicitors that Mr. Geary and Mr. Toal's involvement was to be limited to that matter and, it was expressly agreed in writing that the original legal team were pursuing all other matters - particularly the current judicial review as listed for hearing on November 7th and*

there neither is nor has there ever been any suggestion made that this is not the case by any party in court or the previous legal team of the applicant. Fahy Bambury McGeever, Solicitors, and their senior and junior counsel were aware of all matters relating to the contempt matter from the time it was first mooted and in fact endorsed it."

60. We have been furnished with email exchanges between the aforementioned Declan Fahy and J.V. Geary solicitors from in about that time which do tend to confirm the existence of this unorthodox arrangement, although no explanation for why it was thought necessary to enter into it has ever been provided. In particular, we were provided with two emails from Mr. Fahy to Mr. John Geary dated the 15th of June, 2017; in the first of which, sent at 3:33 PM, it is stated that, *"we confirm as solicitors for Vehicle Tech Ltd that we have no objection and consent to JV Geary solicitors coming on record for the company"*; and in the second of which, sent at 5:35pm, Mr Fahy confirms *"that we shall deal with the case of Vehicle Tech Ltd listed for the High Court in November and come on record to deal with that case."*

61. While the Chief State Solicitor's office, representing the respondents, received a letter from JV Geary, Solicitors, dated the 16th of June 2017, indicating that that firm was coming on record, that letter did not refer to any continuing retainer of Fahy Bambury. This letter was handed into the High Court on 7th of November 2017 by counsel for the respondents. However, in fairness to the applicant, the affidavit of Mr. Geary sworn on the 16th of June 2017, a copy of which we understand to have been sent to the Chief State Solicitor under cover of the handwritten letter from Mr. Geary dated the 22nd of June 2017 (which I quoted in full at paragraph 32 of this judgment) did refer (at paragraph 3 thereof) to an intention that representation should revert to Mr Fahy's firm upon completion of the contempt proceedings.

Events leading up to the 7th of November

62. According to the affidavit of Mr. McGuinness, at paragraphs 8 and 9 thereof:

"8 …unfortunately and in totally unforeseen circumstances and with absolutely no prior warning or any indication whatsoever, two weeks prior to the hearing of the matter [the chronology filed on behalf of the applicant fixes the date more precisely as being the 20th of October 2017,] *the applicant was sent a letter by Mr. Fahy informing him that they – his legal team – were no longer willing to act for it if it were to proceed with its content motion.* [A copy of the letter in question was handed in to court at the hearing of this appeal.] *This accordingly left the applicant in an entirely invidious and totally unanticipated position whereby it, and the case, now of some considerable antiquity due to the failure on their parts to expeditiously prosecute the matter felt, and was, wholly prejudiced;*

9 Correspondence issued between solicitors as a result and ultimately the applicant, not wishing to abandon its action for contempt and having therefore no legal team in the substantive judicial review, was left in a position where it had to ask John Geary if his office and Mr. Toal would be in a position to take over the judicial review also at that late stage. This accordingly resulted in the highly undesirious (sic) *and unacceptable situation where by Mr. Geary had to request the papers in the judicial review – which had a 6+ year history – to immediately be furnished to his office by Mr. Fahy and this eventually occurred on the afternoon of Tuesday, October 31st : whereupon the voluminous papers had to be immediately copied and briefs prepared -which were then couriered to counsel on the afternoon of Thursday, November 2nd, 2017. There was no apparent urgency apparent* (sic) *in the manner in which the papers were transferred across indeed, their dispatch was with complete indifference. In circumstances where the hearing of the matter was due to occur the following Tuesday: November 7th and where the case involved inter alia a constitutional challenge to the legislation in question and wherein it additionally was*

discovered that no legal submissions had been either furnished with the papers or filed/in existence at all the task and the position into which the applicant and his now solicitor and counsel had had visited upon them nothing short of a legal nightmare"

63. The letter of the 20th of October 2017 from Mr Fahy to Mr. McGuinness was in the following terms:

"Dear Fran,

As you know, the company's judicial review (JR) is listed for hearing on November 7th, 2017.

Last week I learnt that it is listed to be heard along with it a contempt application (sic), where Mr. Geary was the instructing solicitor and Mr. Toal BL was the Counsel. This contempt application is in the very same proceedings as the JR. This firm has always been the solicitors on record for the JR.

Mr. Ford and M Masterson BL have considered the papers in the contempt motion and have concluded that there is no realistic prospect of the motion succeeding. In their view, with which I agree, the essential basis for the contempt application is entirely misconceived. Their and my view is that the motion should immediately be withdrawn.

If I am not instructed to withdraw the motion, my firm will apply to come off record and permit Mr. Geary to take over the JR. Both counsel will not act in the JR if you insist on it proceeding in conjunction with the contempt motion. Their view is that this utterly unstateable motion will sabotage what otherwise is a fairly winnable JR.

Please contact this office ASAP with a view to resolving this issue.

Yours sincerely,

Fahy Bambury Solicitors"

The events of the 7th of November 2017

64. On the 7th of November 2017, counsel for the applicant, Mr. A. Toal B.L. leading Ms B McKeever B.L., instructed by JV Geary, Solicitors, appeared before Meenan J. in the High Court who was presiding over the judicial review list, and requested an adjournment of the substantive judicial review proceedings. All of the respondents were represented by the Chief State Solicitor but with Mr R. Barron S.C. leading Mr G. Gibbons B.L., instructed as counsel for the first, third, fourth, fifth and sixth named respondents, and Mr B O'Floinn B.L., instructed as counsel for the second named respondents.

65. We have been furnished with the transcript of the hearing on the 7th of November 2017 which sets out what transpired.

66. The hearing commenced with appearances being announced, following which counsel for the applicant informed the court that there was a problem with the case. The presiding judge stated that he had no papers and commented, *"so, before I hear any problems with it, I'd better find out in general terms what it's about"*. Counsel for the applicant then attempted to hand in some correspondence, but the judge declined to accept it at that point, reiterating *"I think before I read any correspondence I'd like to have some idea as to what the matter is about."*

67. Counsel for the applicant then began to map out the background to the matter commencing with the July 2008 Direction, and bringing of the successful constitutional action. He moved then to the issuing of the May 2011 Direction, and circumstances in which repeated 28 day freezing orders were obtained on an *ex-parte* basis in respect of the

applicant's funds in its accounts in AIB's Ashbourne branch. He alluded to the raising of a VAT assessment by the second named respondent in early 2011 and stated that *"throughout the currency of that year the applicant's solicitor continued to try and return or retrieve paperwork that was required without success to such an extent that in November of 2011 an application for Judicial Review was made, initially before Mr. Justice Peart."*

68. He then alluded to the fact that that application was made at a point when, unbeknownst to the applicant, itsdirectors or legal representatives, the company had been struck off the Companies Register, and further alluded to the steps that were taken leading to its restoration to the Register in July 2011. He referred again to the fact that a VAT assessment had been raised by CAB, and then stated:

> *"The Orders of Mr. Justice Peart and then laterally Mr. Justice Charleton stayed that process, in our respectful submission. So that there could be no action taken on foot of that purported -- that assessment that had arisen".*

69. He stated that the assessment had been affirmed by an Appeals Commissioner and that an appeal before Her Honour Judge Linnane in the Circuit Court *"had availed the applicant nothing."*

70. Counsel went on to say that, *"in so far as Mr. Geary instructs me, he instructs me specifically in respect of a contempt that he alleged has arisen in respect of the various different Orders of Mr. Justice Peart, Mr. Justice Charleton and a Judge Larkin who sat in Newcastle West in 2013 and who directed, specifically directed, the return of two items of property … which had been seized, we say unlawfully, from the applicant"*.

71. Counsel then directed the presiding judge's attention to copies of the relevant court Orders, and opened certain passages from some of those Orders, and in the case of the Peart J. Order the entirety of that Order. The following exchanges then ensued:

"MR. TOAL: … something I do want to point out. We say that - and this is the initial application, if you like - that is by way of background. Mr. Geary was instructed by the applicant in respect of several matters including what ultimately presented itself as these contempts which we prosecuted fully in the knowledge of and at the assistance of Mr - [Fahy].

JUDGE: Do you mind --, you got leave for an application by way of judicial review, so what happened those judicial review proceedings, were they ultimately heard?

MR. TOAL: No, Judge, they are in for hearing today.

JUDGE: Oh, I see, so that is what is before me today?

MR. TOAL: Yes, Judge, it is.

JUDGE: I see, okay.

MR. TOAL: But in parallel with that, there is the contempt proceedings and this is where it gets a little bit confusing.

JUDGE: Yes.

72. Counsel went on to explain that Mr. Geary had been instructed by his client to represent it in respect of the contempt matters but that he had worked in conjunction with and with the assistance of Mr. Fahy, who had previously been the solicitor on record, to prepare an affidavit setting out the applicant's complaint. Mr. Fahy had now come off record and, he said, *"it's in those circumstances another difficulty has been created"*.

73. Counsel alluded to the application brought before Newcastle West District Court on the 6th of September 2016, and to what had been the applicant's intention in bringing it. The High Court judge inquired, *"did anything happen in respect of this order of the District Court between the 23rd of May 2013 and September 2016"*, and was told: *"He* [Mr McGuinness] *made an attempt to recover both the Volvo and the Kobelco but when he appeared or attended at the places where he was led to believe they were at, they were being*

kept, they had been moved. So he was not able to recover them." It was stated that Mr McGuinness had left it to Mr. Geary and counsel to deal with this matter and that it was in the course of addressing those matters that they had come upon what they believed to be default in respect of the Orders in question. It had been in that context that they had sought to apprise the District Judge of what had occurred on the 6th of September 2016, and to invite the court to give such directions as it might see fit to do. The High Court judge inquired as to whether it would not have been be appropriate to put the respondents on notice of the alleged breach(es) before doing so, and counsel opined that it would not have been appropriate at that point, stating:

> *"MR. TOAL: It was something that was to have been done after the first application.*
>
> *JUDGE: All right.*
>
> *MR. TOAL: Because it may have been that the judge might have requested or demanded that the order be endorsed with a penal endorsement. It is not that we were seeking the judge to advise proofs. But, nevertheless, this was a breach of the court order of this judge in this court and by bringing it to her attention --*
>
> *JUDGE: Well, how do you know that without hearing from the Respondents?*
>
> *MR. TOAL: I beg your pardon, Judge?*
>
> *JUDGE: How would you know that without hearing from the Respondents?*
>
> *MR. TOAL: Because I have taken my client's very careful instructions.*
>
> *JUDGE: All right, okay.*
>
> *MR. TOAL: And he informed me that he had not had the Kobelco returned to him.*
>
> *JUDGE: I see.*
>
> *MR. TOAL: Nor had he the Volvo returned to him.*

74. This gave rise moments later to the following further exchanges:

*MR. TOAL**:** It was always and had always been the intention to put the respondents on notice but it was important, in my respectful submission, to put the court on notice first which we did.*

JUDGE: Right. So anyway what happened after that then?

MR. TOAL: What happened after that was the court was not disposed to entertain the application at all.

JUDGE: Right.

MR. TOAL: And what we decided to do then we decided to bring a contempt Motion before this court which we did.

75. At this point, counsel for the applicant sought to draw the High Court judge's attention to the affidavit of Mr Geary sworn on the 16th of June 2017, but before he could open it Mr Barron SC interjected to say:

MR. BARRON: He is telling you all about his Contempt Motion and now it would appear he is about to open to you the Affidavit in support of the Contempt Motion. He hasn't told you anything about the Replying Affidavits. I am not unduly concerned about that but I do wonder where we are going. At the moment, I gather you asked him and you would like to know what the case is about.

JUDGE: Yes.

MR. BARRON: And it is now 5 past 12 and we are about to engage in arguing an affidavit and a motion and you haven't been told much about the case, that's all. I am just trying to put some sense on where we are going.

76. The judge indicated that it was his understanding that the applicant had a contempt motion arising out of what it contended were breaches of two Orders of the District Court. This elicited the following exchanges:

MR. TOAL: But I had indicated at the start there was a difficulty and the difficulty arose in the following manner, and this is what I was trying to get to and this is why the history of the case is important to this point. I am glad Mr. Barron interjected as he has because the difficulty that has been created is as follows.

If you'll just allow me read out one paragraph of the Affidavit, which is at paragraph 3, Mr. Geary makes the following averment. He says that: "Mr. Declan Fahy, the solicitor of the firm Fahy Bambury McGeever has been the solicitor on record for the company heretofore in the proceedings conducted thus far, a chronology of which I will shortly list hereunder. However, it is considered prudent that for the purpose of this application and this application only that I become the solicitor on record for the company with representation immediately reverting upon the completion of the proceedings herein to Mr. Fahy's firm".

JUDGE: What does that mean?

MR. TOAL: As I understand the rules concerning solicitors, Judge, two solicitors can't act for the one client at the same time. So, in the context of the contempt motion that was considered appropriate to be brought and identified by Mr. Geary and by myself and in discussions with Mr. Fahy we decided --

JUDGE: What I understand -- and I think you've told me this -- is I have listed before me a Judicial Review hearing arising out of the orders of Peart J and Charleton J; is that correct?

MR. TOAL: Yes, Judge.

JUDGE: Are you proceeding with those applications?

MR. TOAL: This is where we get into difficulty.

JUDGE: Yes.

77. Counsel for the applicant went on to explain that Mr. McGuinness had received a letter by registered post on the 20th of October 2017 from Mr. Fahy (i.e., the letter quoted at paragraph 63 of this judgment) and a copy was proffered to the court, eliciting a series of exchanges in the course of which the High Court judge sought to understand the exact position with respect to what was before him and who at that point represented the applicant in respect of the substantive judicial review proceedings that were listed before him:

JUDGE: Can I ask you a very straight forward question

MR. TOAL: Yes, Judge.

JUDGE: Presumably there is a Notice of Motion arising out of this Judicial Review, is there?

MR. TOAL: Yes, Judge, there is.

JUDGE: Well maybe you could direct me towards that because that, presumably, is what is before the Court, isn't it?

MR. TOAL: Just bear with me.

JUDGE: Sorry, thank you. In the Statement of Grounds.

MR. TOAL: Yes, Judge. See, Judge, this is where we have a problem --

JUDGE: No, I think this is actually where I have a problem.

MR. TOAL: Well, let me --

JUDGE: I'd like to know what you're asking me to hear today? As I understand it this is an application for judicial review based on a leave granted by Peart J in 2011 and Charleton J in 2012. That's as I understand what I have to hear. So, I understand you are instructed by the applicant to move those applications for judicial review; is that correct?

MR. TOAL: No, Judge. We were --

JUDGE: Well, if you're not, what are you doing here?

MR. TOAL: Well, Judge, would you allow me to finish, please?

JUDGE: All right.

MR. TOAL: Because if you do it might bring some clarity to it.

JUDGE: Yes.

MR. TOAL: The position was that we were only ever to conduct the contempt proceedings before this or any court. It was always the case and position that Mr. Fahy, Dr Forde and Mr. Masterson were to conduct the judicial review."

78. The court was told that JV Geary, Solicitors, were on record at that point; but that representatives of the solicitors who had previously been on record, Fahy Bambury, were at the back of the court. Counsel for the applicant then sought to introduce a bundle of correspondence, giving rise the following exchanges:

"MR. TOAL: It may assist the court if I could -- there is a bundle of correspondence that the court might be interested in considering, in so far as this aspect of the case is concerned.

JUDGE: This aspect being …?

MR. TOAL: The aspect where we were asked to come into a judicial review - we were asked because of the late withdrawal by Mr. Fahy on the 30th and 31st of October receiving papers on the following Thursday --

JUDGE: Has Mr. Fahy then come off record? Has J V Geary come off record for the applicant?

MR. TOAL: No, Mr. Geary is still on record --

JUDGE: All right.

MR. TOAL: -- because the paragraph in the affidavit that I read out to you makes that clear but it was for the purpose of the contempt motion only.

JUDGE: Is the contempt motion listed here this morning also?

MR. TOAL: Yes, Judge, it was travelling in tandem with --

REGISTRAR: It is not.

JUDGE: No, it doesn't appear to be.

79. The registrar's interjection at this point serves to expose the uncertainty previously alluded to as to the status of the document of the 16th of June 2017 purporting to be a Notice of Motion, and the basis upon which it had been received by the Central Office. It also represents the start of the confusion previously alluded to. It was to emerge that although the applicant's legal team believed they had validly issued and filed a Notice of Motion seeking attachment and committal for contempt and believed that such a motion was properly in the judge's list that morning pursuant to the earlier direction of Noonan J, the Central Office had a different understanding. Their view was, it seems, that no valid Notice of Motion had ever been filed and accordingly there was no motion before the court for it to adjudicate on. The difficulty unfolded in the following way.

80. Following the registrar's interjection, the High Court judge inquired of Mr. Barron S.C. as to whether he could shed some light on why the case did not appear to be listed. Mr. Barron speculated initially that it might be because Noonan J, in addition to directing that the supposed motion be listed on the same day as the trial of the action, had also on the 5th October 2017 granted liberty to the applicant to bring a motion for cross-examination and no such motion had in fact been filed. Mr. Barron then went on to make this point:

MR. BARRON: I just want the court to know this case has been listed for a considerable period of time. Another firm of solicitors came in and served Notice of Change of Solicitor in June. They seemed to think they could bring a Contempt Motion, it was before Mr. Justice Noonan in October, they were given liberty to issue a Motion to seek to cross examine, they didn't do so. And we land up here today with

the predictable outcome, whatever actually happened Fahy Bambury Solicitors said 'well, we won't be acting if that is going on' and here we are today.

JUDGE: Very good.

MR. BARRON: I hope that picture is clear enough.

JUDGE: All right.

81. The High Court judge then went on to ask: *"is there any legal representative in court who are* (sic) *going to move these applications for Judicial Review on the part of Vehicle Tech Limited?"* Rather than answer the question immediately, and succinctly, counsel for the applicant invited the court to consider certain further correspondence that had passed between Mr Geary and Mr Fahy. The judge then remarked: *"All right, if you want to carry on, but I'm going to have to have that question answered and preferably sooner rather than later."*

82. Counsel then opened the emails between the solicitors to which reference was made earlier in this judgment at paragraph 60, and further opened the letter of the 20th of October 2017 from Mr Fahy to Mr McGuiness. The High Court judge queried whether it had been proper of counsel to introduce the letter of the 20th of October 2017, in the following exchanges:

JUDGE: ... I wonder should this even be handed in to me, this document? You're hardly waiving legal privilege, are you?

MR. TOAL: I am not doing anything that hasn't been done already. We are being vilified by the court.

JUDGE: Well now actually I want to, I want firstly to know who is on record for Vehicle Tech Limited as regards the Judicial Review proceedings?

MR. TOAL: If you'd allow me to finish, please

JUDGE: Okay.

83. Counsel then opened further correspondence between the solicitors during late October 2017 and early November 2017, concerning the handover from Fahy Bambury, Solicitors to J.V. Geary, Solicitors, culminating in a letter from Mr John Geary to Fahy Bambury dated the 2nd of November 2017, in circumstances where Mr. Geary's firm had only received the files and papers in the substantive judicial review case on the afternoon of 31st of October 2017, expressing astonishment as having discovering that there was nothing in the papers received to suggest that legal submissions had been filed on behalf of the applicant in the substantive judicial review case, and demanding confirmation that the non-inclusion of these submissions had been due to some oversight and that they would be sent on forthwith. The author of the letter had further remarked:

> *"We have advised our client of the absence of the submissions and we can assure you that he is apoplectic with rage and if for no other reason than that this is a case your office has had carriage of since 2008.*
>
> *In those circumstances not alone would an adjournment not be applied for because it can't be but equally it would be vehemently resisted by the other parties to the action.*
>
> *We will make our position abundantly clear to the court".*

84. This led counsel to remark: *"And that is exactly what we are trying to do, Judge"*, which in turn led to the following exchanges:

> *JUDGE: So J.V. Geary are now appearing for --*
>
> *MR. TOAL: Can I continue with the letter, Judge.*
>
> *JUDGE: Well --*
>
> *MR. TOAL: To answer your question, yes.*
>
> *JUDGE: Sorry J.V. Geary are appearing for Vehicle Tech Limited in the Judicial Review proceedings; is that correct?*
>
> *MR. TOAL: Yes, Judge.*

JUDGE: And you are instructed by them?

MR. TOAL: Yes, Judge.

JUDGE: Very good. Well let's get on then with the Judicial Review proceedings and then you say you have a Contempt Motion; is that correct?

MR. TOAL: That is the position, yes.

JUDGE: All right. I understand it hasn't been filed but I presume it was --

MR. TOAL: It was filed.

JUDGE: It was filed? Well, apparently it wasn't.

MR. TOAL: Judge, it was always going to be my application, although it's taken an awful lot more time than I had imagined it would, to state the following.

JUDGE: Yes.

MR. TOAL: In relation to our ability, professional or otherwise, to open up properly and run the Vehicle Tech case before you this morning, a case that is listed for several days is an impossibility for the following reasons. Both Miss McKeever and I have spent the last several days working on it

JUDGE: Was this matter called over in the list last week?

MR TOAL: No

JUDGE: Are you applying for an adjournment, is that where we're heading?

MR. TOAL: Yes, Judge.

JUDGE: I see. Well, was there an application when this matter was called over last week for an adjournment?

MR. TOAL: No, because we were working on the papers at that stage –

JUDGE: I see.

MR. TOAL: -- in the hope that we might have been in a position not to discommode the court --

JUDGE: All right

MR. TOAL: -- and not to discommode the other parties.

JUDGE: So then I take it now the first application you want me to deal with is an application for an adjournment; is that correct?

MR. TOAL: Yes , Judge.

85. Picking up from where he had left off in reading out the letter of the 2nd of November, counsel for the applicant then read out a further two paragraphs in which Mr. Geary had said:

"Whilst we can't 'crystal ball gaze' what the outcome might be [in relation to an application for an adjournment] *you can rest assured that we will not be, in any sense, be* (sic) *your champions in so far as any decision the court might make extending to any costs application that might arise.*

If an adverse costs order is made, it will not rest against our client. You can take from that as you wish."

86. The judge then interjected:

JUDGE: Well before we even reach the matter of costs we would have to have a ruling on an adjournment. So, your application for an adjournment, I understand is -- that your solicitor, Mr. Geary, has only recently come into the matter and there are voluminous papers involved in the action and in the short period of time neither yourself not your solicitor nor your co junior counsel have been in a position to come to, as it were, grips with the papers and on that basis you are seeking to have the matter adjourned; is that correct?

MR. TOAL: It is not that simple.

JUDGE: All right.

87. Counsel for the applicant then went on to outline that the case is a complex one involving a constitutional challenge. The was a further exchange between counsel and the

judge in relation to whether or not the Attorney General had been made a party. Both seemed to be mistakenly of the belief that he had not, but in fact he is the sixth named respondent. At any rate nothing turns on that. Counsel for the applicant then stated that in mentioning the constitutional aspect he had been trying to emphasise the significance of the issues to be litigated. He then concluded his application for an adjournment by referring the court to a letter from Mr. Geary to the Chief State Solicitor apprising her of the fact that his client would be applying for a late adjournment, and of the circumstances giving rise to the need to do so.

88. Mr. Barron SC was then invited to respond and he indicated that he was opposing the application for an adjournment. He pointed out that the case went back to 2011 and, referring to the notice to the Notice of Change of Solicitor dated the 16th of June 2017, then asserted that *"it's incomprehensible that anyone would think that coming on record in the case is not actually going to move it"* (sic). Mr. Barron then went on to point out that, at the same time as being served with the Notice of Change of Solicitor, his client had also been served "*with an ex parte – though it's with a very lengthy affidavit from the solicitor and not from the client, director or officer of the company"*, leading him to further remark: *"So, certainly they knew all about the case. They had court orders."*

89. He then went on to refer to the letter from Fahy Bambury, Solicitors, dated the 20th of October (quoted at paragraph 63 above). He suggested that it was manifest from this that the applicant's legal team had failed to fulfil their responsibilities, and now wanted an adjournment. He commented, *"I appreciate the consequences for the applicant but they've had the papers for five days and I took these papers yesterday, as it happens."*

90. The High Court judge then asked counsel for the applicant to once explain again the justification being put forward for purportedly bringing a motion for contempt in respect of District Court Orders in the context of a High Court judicial review, leading to the following:

MR. TOAL: If you are satisfied that there is a contempt in respect of the two District Court Orders in which we are properly instructed, then there is an effect backwards to the - in relation to the High Court Orders and what they provided could and couldn't be done. So that if the guards had to be in default in respect of the District Court Orders and you are satisfied then that in respect of that particular paragraph within the High Court Orders that that falls within a breach of the High Court Order, then that is what I mean by, if you like, default backwards. Does that make - are you any clearer?

JUDGE: Not really, no.

91. Moments later, there were the following further exchanges:

JUDGE: But what you seem to be telling me is this, that because you are dealing – or rather as a result of dealing with the alleged contempt of the District Court Orders, that, in effect, you would be fully conversant with what the High Court Orders were?

MR. TOAL: No, I'm not saying -- I am not making that case at all. And Mr. Barron is very disingenuous when he seeks to suggest that because we might have been prepared to deal with the contempt application, which we were, we had no sight of the mountainous bundle of paperwork that were associated with the Judicial Review. They formed no part of our instructions in relation to the bringing of the contempt motion, either before the District Court in Newcastle West or before this honourable court.

JUDGE: Is there any reason why the Contempt Motion cannot proceed?

MR. BARRON: Sorry, I beg your pardon?

JUDGE: Is there any reason why the Contempt Motion can't proceed now irrespective of what I decide to do in respect of the Judicial Review proceedings?

MR. BARRON: No, I don't see a problem with that.

JUDGE: Very good. What I propose to do is, I am not going to give a ruling as yet on the adjournment but seeing as you have listed a motion for contempt, assuming the parties who are in receipt of this motion are in a position to deal with that, I propose to embark on dealing with that. So I am going to deal now with the contempt motion.

92. The Court then broke for lunch with the intention of taking up the contempt motion at 2pm, and before rising the judge directed that *"in the interim I want you to file all the papers in court, so the registrar of the court has those papers"*.

93. Upon resuming after lunch, Mr. Toal informed the court that he had been unable to comply with the court's direction because it had been established over the lunchbreak that a Notice of Motion seeking attachment and committal had neither been filed nor served. The judge then asked:

JUDGE: So you are not in a position then to move it?

MR TOAL: It would appear not.

94. Counsel for the applicant did point out to the court that on the 5th of October Noonan J *"had returned the matter"* to the date of the trial, and that in circumstances where the applicant had indicated that they would be seeking to cross-examine the respondents' deponents as to their affidavits, the applicant had sent the respondents a Notice of Intention to Cross-Examine. This elicited the exchange:

JUDGE: But I understand no Affidavit was served. Have any Affidavits or any documentation been served in respect of any contempt motion?

MR. TOAL: The court is clearly of the view that none was.

JUDGE: I mean what are these

MR. BARRON: There is an ex parte docket.

JUDGE: I understand that.

MR. BARRON: I have a folder here -- I don't know what's going on, but I have a folder here --.

JUDGE: I don't either but I'm the one who has to understand.

MR. BARRON: Indeed. But an ex parte docket with affidavits and correspondence and exhibits.

JUDGE: Yes.

MR. BARRON: So I don't know what you've been given or what you haven't been given, that's --

JUDGE: I haven't been given anything. What I am just wondering is I've asked about the contempt motion, no contempt motion appears to have been served, so therefore you are not in a position to move any contempt motion. And I've also now been told that there was also an application, either intended or proposed, to cross examine certain deponents of affidavits and I just want to know what that's all about?

95. Mr Barron SC then referred the court to a letter from J.V Geary to the Chief State Solicitors dated the 6th of October 2017, the relevant paragraphs of which were in the following terms:

"We refer to the above matter which came before Mr. Justice Noonan at the High Court yesterday Thursday 5th of October. Unfortunately, when the matter was mentioned the writer was delayed at the Central Office and was not in attendance to take a note. Our client's counsel Alan Toal BL has advised us that court has ordered that if we are to bring a Motion to cross examine certain of the Deponents who swore Affidavits for and on behalf of your client, that we are to do so within one week.

The matter remains listed for hearing for the 7th of November 2017 and it has been allocated three days. We understand that our client's contempt Motion will be dealt

with first as a preliminary issue to the substantive Judicial Review matter. We will be very grateful if you could check your note from yesterday and advise us if the foregoing is what Mr. Justice Noonan ordered yesterday or if there is anything further that is your understanding on how the matters be dealt with by the court".

96. Mr Barron SC informed the court that the applicant did not in fact issue a motion seeking to cross-examine. [Correspondence which this court has been provided with does indicate that a Notice of Intention to Cross-Examine was served as opposed to a motion seeking leave to do so. This was done by a letter of the 10th of October 2017, which asserted, *"it is our understanding that the Rules of the Superior Court (sic) provide us with this mechanism by which to serve you with a notice of cross-examination and that the issuing of a motion does not arise."*]. Mr Barron continued:

MR. BARRON: And they didn't issue a notice of motion seeking contempt, they just served this ex parte docket and all the affidavit (sic) *to the court. I hope that --*

JUDGE: Well, what perturbs me about the contents of this letter is it does seem to indicate a considerable involvement on the part of J V Geary, certainly as of Thursday the 5th of October in respect of the Judicial Review proceedings and I have been told in a letter that they sent subsequently to the Chief State Solicitors Office basically to the effect they've only just recently become involved in the matter when that doesn't seem to be the case.

97. The letter referred to as having been sent "subsequently", was the letter referred to in paragraph 86 above flagging the intention of the applicant to apply for a late adjournment, and setting out the circumstances giving rise to the need to do so.

98. The court enquired of counsel for the applicant:

JUDGE: ... --Mr. Toal, have you seen a copy of that letter from Mr. Geary to the Chief State Solicitors office? It's dated the 6th of October.

MR. TOAL: I haven't read it, sorry.

JUDGE: And could I get – I'd like an explanation for that letter in light of the submission which you've made to me concerning an adjournment: "We refer to the matter which came before Noonan J in the High Court yesterday, Thursday 5th of October. Unfortunately, when the matter was mentioned the writer was delayed at the Central Office and was not in attendance to take note". Fine. "Our client's counsel, Alan Toal B.L., has advised us that the court has ordered that if we are to bring a motion to cross examine certain of the deponents who swore affidavits for and on behalf of your client, that we do so within one week. The matter remains listed for hearing for the 7th of November and it has been allocated three days".

Now that letter would certainly indicate to me that you and your solicitor had knowledge of this action, certainly as of the 5th of October, and that your application to me to adjourn the matter on the basis that you have only recently come into it and therefore are not in a position to deal with it appears to me to be inconsistent with the letter which your solicitor has sent.

MR. TOAL: We have been dealing at all times with the contempt part of this case only. That was made clear. That has been made clear from the moment that Mr. Geary swore the averment in the affidavit that he did that I opened to you earlier on. Now, I don't know what you want me to say at this stage in respect --

JUDGE: Well, I'd like you to tell me --

MR. TOAL: No, let me finish please, if you would?

JUDGE: All right.

MR. TOAL: I don't know what you want me to say in respect of my state of knowledge, but the state of knowledge that we had has been clearly identified in the e-

mails that seem to have been forgotten about and that passed between Mr. Fahy and Mr. Geary that were opened up to you before lunch time in relation to what Mr. Fahy said he would do relative to coming back on record to take up the wronging of the Vehicle Tech case or judicial review listed for today. Our only involvement at that point, and up to the point at which the authority was signed by Mr. McGuinness given to Mr. Geary, which was then given to Mr. Fahy, was in relation to the contempt matter and the contempt matter only. Now, if the Court is unhappy with the manner in which the contempt is or is not before the Court -- if the Court is unhappy with the manner in which the contempt is before the Court it would appear trite at this stage, in light of everything else that's been said, for me to apologise for the manner in which that's happened.

JUDGE: Yes.

MR. TOAL: I can't un-ring a bell that's been rung. But what I can -- what the Court -- the inference from what the Court is suggesting is that we are attempting in some way to either dupe the Court or mislead the Court which is absolutely untrue.

JUDGE: Well, unfortunately, I find it very hard to come to terms with what is in the second paragraph of that letter with what you told me was the basis for an application because that letter has clearly indicated –

MR. TOAL: That letter – sorry.

JUDGE: It cites the action and it refers to yourself and your solicitor being involved as of the 6th of October, well, the 5th of October.

MR. TOAL: We were involved on the 6th of October in the contempt matter only.

JUDGE: Right, okay. All right.

MR. TOAL: And Noonan J put the contempt matter into today.

JUDGE: Can I just say in respect of the contempt matter, no motion has been served as ought to have been served so there is no matter of contempt before the Court.

99. The judge further enquired of counsel for the applicant:

JUDGE: So, Mr. Toal, I just wonder what, have you any comments to make on that letter of the 22nd of June where your solicitor confirms that they act for Vehicle Tech Limited in respect of the High Court JR proceedings and they enclose a Notice of Change of Solicitor.

MR. TOAL: That is in respect of the contempt only, Judge.

JUDGE: Okay.

MR. TOAL: The affidavit that was sworn in the contempt matter was sworn by Mr. Geary on the 16th day of June 2017. The confusion --

100. At this point the High Court judge interjected to indicate that he was going to deal with the adjournment application. He said:

"Firstly, I'm not at all happy as to the basis upon which the adjournment was sought, namely that the solicitors who are apparently on record for Vehicle Tech Limited say they only came on record recently and only recently came into the documentation which apparently is very voluminous in respect of the JR application. The explanation given is that in fact the solicitors who are now on record for Vehicle Tech Limited were only involved in the contempt proceedings. I have to say I do find that a little fanciful.

However, I'm prepared to accept, as has been said -- and it is only a provisional acceptance at this stage -- that the solicitors and counsel have only recently come into the JR aspect of it. I have very, very serious misgivings about it. So what I propose to do is to adjourn this matter to come back before me before the end of this term, and I

should say if in the course of the hearing I have cause to revisit the basis upon which the application for an adjournment was sought I'll take a very serious view of it and will take whatever steps are appropriate and open to me to deal with it."

101. The High Judge then fixed the 19th of December 2017 as the date to which the substantial judicial review was to be adjourned, following which there were the following exchanges with counsel for the applicant:

JUDGE: So, Mr. Toal, I am adjourning this matter peremptorily to Tuesday the 19th of December.

MR. TOAL: I take gravest of exception to your comments. I have never once in my career of 26 years misled any court, and certainly not the High Court and certainly not this Court.

JUDGE: I have said I have taken a provisional view on your application for an adjournment.

MR. TOAL: The comments, Judge, with respect --.

JUDGE: I am acceding to your application. I am adjourning the matter peremptorily to Tuesday the 19th of December. Do you understand that?

MR. TOAL: Perhaps on that date I might be able to dissuade you from the view you presently hold.

JUDGE: Very good. ...

102. The proceedings concluded with the High Court judge granting leave to the applicant to issue a motion for attachment and committal also for the 19th of December, and fixing dates for the filing of written submissions. Although costs were sought by counsel for the second named respondent on a thrown away basis, the issue of costs was reserved by the judge *"until I can take an overall view of the whole matter"*.

The events of the 8th of December 2017

103. Coincidentally, on the 8th of December 2017, both Mr Geary, as solicitor and Mr Toal, as counsel, were instructed to represent a party in a wholly unrelated judicial review matter that was due to be heard before JUDGE: in the High Court. At the sitting of the court, Mr. Toal made an application for the High Court judge to recuse himself in the light of what had occurred on the 7th of November 2017. The application was put in these terms:

> *MR TOAL: Yes, Judge, good morning. Judge, I have a very unpleasant application to make.*
>
> *JUDGE: Yes*
>
> *MR TOAL: Which I take no pleasure from it.*
>
> *JUDGE: Sorry?*
>
> *MR TOAL: I take no pleasure from having to make the application I'm about to make.*
>
> *JUDGE: All right. Fine. Yes.*
>
> *MR TOAL: I appeared before you on the 7th of November in a case called Vehicle Tech Limited instructed by Mr. John Geary, solicitor.*
>
> *JUDGE: Yes.*
>
> *MR TOAL: And the proceedings throughout the day were unpleasant.*
>
> *JUDGE: Yes.*
>
> *Mr TOAL: They were tetchy. I concern myself that I was bullied for the day to such an extent that I was physically unwell that afternoon and that at the end of the day you made a determination, albeit one that you may revisit, but only may, where you determined that both Mr. Geary and I were both liars and that we had sought to mislead your Court. I objected in the strongest possible terms on the basis that I have never in the number of years I've been at the bar, either lied to a Court nor sought to mislead the Court. I think you -- it was your assessment that you may as a future time*

revisit that but for the moment, if you like, the Sword of Damocles very seriously hangs over the head of both Mr. Geary and myself in terms of your assessment of the and I both as professionals and the designation of us as liars is probably the most damning of indictments that can be made about any professional in a court. You directed certain things in that case. One was a submission, and I can indicate to this court this morning that a submission has been put in in respect of that matter, but in it it seeks that insofar as that case and Mr. Geary and I are concerned that you recuse yourself from any further participation.

104. Counsel then urged the court to recuse itself in respect of the unrelated matter that was then before the court and about to start. He said:

MR TOAL: … my application this morning is that insofar as this case is concerned and until such time as the issues where we have been called liars is disposed of one way or the other.

JUDGE: Yes

MR: TOAL: That you similarly recuse yourself from hearing this case, at least until such time as the other matter is resolved.

105. The High Court judge addressed the request that he recuse himself from hearing the unrelated matter, stating:

" … as I recall it, I acceded to your application for an adjournment, but I pointed out to you that there appeared to be an inconsistency between the letter your solicitor had sent and what was submitted to me. So I said that the matter -- obviously which is a matter of concern, and that it would be a matter which I may have to revisit in the course of the hearing but notwithstanding that I granted your adjournment. And the one thing which I'm absolutely clear in my own mind is that I never called either yourself or Mr. Geary a liar. And it seems to me that in the course of an application

for an adjournment I, as a judge, and fully entitled and indeed have a duty to point out what I believe to be on the face of it inconsistencies in submissions that are made to me. And that's exactly what I did. And in those circumstances I see no basis whatever for me to recuse myself from these proceedings and I don't propose to do so."

106. However, while making it clear that he saw no reason to recuse himself, the High Court judge, who was the judge in charge of the judicial review list during that week, ultimately sent the unrelated case to another judge for hearing.

107. The High Court judge then continued:

JUDGE: … . Right. That's the first matter. And the second matter is I do note that the other matter of Vehicle Tech, is that the name of the case, Mr. Toal, that that is listed before me.

MR. TOAL: That's right.

JUDGE: And can I -- I assume that's also an application that I recuse myself from that hearing?

MR TOAL: There will be an application, yes.

JUDGE: Well, unfortunately I'm not sitting next week, so I assume -- can I take it that the application you're making to me this morning is also an application that I recuse myself from that hearing?

MR: TOAL: I'm not going to go that far. I said that a submission has been filed in respect of that matter in accordance with the directions you gave.

108. The High Court judge then acknowledged the entitlement of the applicant to make an application that he should recuse himself but suggested that such an application should be on notice to the other parties and that the application ought to be made immediately. He indicated that even though he was not scheduled to sit during the following week he was

prepared to sit specially to hear recusal application if required. Counsel for the applicant indicated that he was going to make such an application.

109. Despite counsel for the applicant's indication, no such application was in fact made during the following week.

The events of the 19th of December 2017

110. Counsel for the applicant appeared again before Meenan J in the High Court on the 19th of December 2017. The court was informed that between the 8th of December 2017 and that date his solicitor had attempted to file a motion in accordance with what had previously been flagged to the court requesting the court to recuse itself from further involvement in the applicant's case, but that there had been some difficulty in getting the Central Office to accept it. Nevertheless, the intended motion (dated the 14th of December 2017) together with a grounding affidavit of Francis McGuinness, which had been sworn on 15th of December 2017, had been served on the respondents and an affidavit of James Maloney, a principal solicitor in the Chief State Solicitor's office, sworn on the 18th of December 2017, had been served on the applicant in reply. The High Court judge indicated that he would allow counsel to file his client's motion in court and the motion to proceed.

111. The transcript is unclear as to whether the applicant had availed of the leave granted to it on the 7th of December 2017 to file a proper and valid notice of motion seeking attachment and committal, returnable for the 19th of December 2017. However, it was implicit in the application for recusal that the applicant's legal team would not have wished to proceed either with the substantive judicial review or with any intended motion seeking attachment and committal before Meenan J, and that they would (assuming the committal motion was now validly before the court) be seeking that both of those matters should be heard by another judge.

112. Counsel for the applicant then began to open his motion for recusal. He sought to rehearse the events of the 7th of December. In doing so he asserted that the High Court judge had repeatedly interrupted him on that occasion, had prevented him from making salient and relevant and material points that might have assisted the Court, and that at one point when a document was handed to the Court by counsel for the applicant *"the Court in its displeasure towards me as much as threw the document back at me in disgust".*

113. Counsel for the applicant further stated:

> *"You seemed to have some difficulty in accepting that we were instructed only in relation to the contempt and we knew nothing of the Vehicle Tech matter. It was attempted at all times in the course of addressing the Court to point out that even insofar as the contempt matters were concerned we were so careful as to go so far as to put in to the affidavit that was sworn in support of the contempt motions, two arising out of two High Court Orders, one of your colleague Mr. Justice Peart, one of your colleague, Mr. Justice Charleton, and two belonging to a District Court Judge who sits in Newcastle West, all of which had an impact on the substantive judicial review proceedings and it was in that context that we were instructed by Mr. McGuinness and Vehicle Tech in respect of the contempt matter and the contempt matter alone."*

114. Amongst the complaints made were that:

> *"…, notwithstanding the fact that counsel who was engaged in the case sat in the court, no inquiry was made of them when the Court might have considered it appropriate as to why certain steps may or may not have been taken, but that was not done. But what was done was the following. I complained to you, Judge, on 8th December -- and I find it very very distasteful in having to do this -- that it was my perception … that from the minute the case started or shortly after it I was bullied for*

the duration of the time I on was feet by you to such an extent that I felt physically unwell by lunchtime."

"I complained to you on the 8th of December and that you went so far as to call Mr. Geary and I liars and that the clear inference from everything that was said and done that day was that we were liars, both he and I, the ultimate sanction to be levelled by a judge of the High Court to a practising barrister and solicitor who trade on their reputations such as they may be. But to have a judge condemn them as liars who had deliberately and consciously set out to mislead the Court is a shocking accusation. And it's even made more so by virtue of fact that we are in a position where we can do little or nothing to defend ourselves against that acquisition. You made it clear on the 8th of December that the Court is entitled having identified consistencies or inconsistencies to deal with those. I couldn't agree more and from my perspective I would have done anything that the Court requested to assist the Court in reconciling or identifying, dealing with and unravelling those inconsistencies. I wasn't given an opportunity. What was done was the bullying of which I complain and I do not do this or say this lightly."

115. Following his opening remarks counsel for the applicant sought to open the affidavit of Francis McGuinness sworn on the 15th of December 2015. In that affidavit the deponent asserts, *inter alia*, (at paragraph 10) that in applying for an adjournment on the 7th November 2017 the applicant's counsel, *"while attempting to advise the court of a very complex factual case extending as he did since 2008 was repeatedly shut off, close down and interrupted by the judge who refused to let Mr. Toal either make a point or, finish one."*

116. The deponent went on to say (at paragraph 13):

"*When the Court appeared to be initially confused by the chronology, Mr. Toal repeatedly explained that he and Mr. Geary were instructed regarding the contempt matter only, nothing else. He then handed up the pivotal letter received from Mr. Fahy, solicitor, of 20th October 2017 which spoke of itself to the fact that Mr. Fahy and counsel were of that date, some two weeks prior to the hearing date, issuing us with an ultimatum or that they would cease to act for us in the within judicial review. Mr. Toal handed this up in a bid to demonstrate to the Court just what had happened as it seemed that the Court was not convinced or believing what Mr. Toal was relaying to it. In fact, it was abundantly clear that Mr. Toal was being deliberately misbelieved and every utterance was met either with vitriol or at one point having a document he had handed in for the benefit of the Court essentially thrown back at him."*

117. At paragraph 14 of his affidavit the deponent states (*inter alia*):

"The Court, instead of noting as referred to at 13 above, the point contained within the letter, and its overall importance in the context of the application being made ignored that position and the relevance of the letter and he threw it down towards Mr. Toal in disgust as the judge, without inviting any explanation thought it ought not to have been handed in due to the previous legal team negatively referring to our motion for contempt."

118. The court then broke for lunch, and upon the matter resuming the judge indicated that he had read the remainder of Mr. McGuinness's affidavit. Counsel for the applicant then referred the court again to the handwritten letter of the 22nd of June 2017 from Mr. Geary to the Chief State Solicitor's office, and also to the letter of 6th of October 2017 again from Mr. Geary to the Chief State Solicitor's office. Counsel for the applicant suggested that he would not open the affidavit filed on behalf of the first named respondent i.e., the affidavit of Mr.

Maloney, suggesting that in circumstances where he had only received it at 4.30 on the previous afternoon he had not had an opportunity to read it. The High Court judge responded to this by saying that he was prepared to give counsel an opportunity to read there and then, in circumstances where it was not a long affidavit, running to only three pages. The hearing was then briefly adjourned to facilitate that.

119. When the matter resumed counsel for the applicant suggested to the judge that, in circumstances where the judge had already indicated on the 8th of December that he had no intention of recusing himself, *"this is an application that already been predetermined by you. It's moot insofar as I'm concerned, so I have to go through it for the purposes of legal propriety and correctness."*

120. Counsel then proceeded to refer to, and in some instances to open in detail, a great number of authorities, which included: *Wallace v. Beggan* [2017] IEHC 86; *O'Driscoll v. Hurley and Health Service Executive* [2016] IESC 32; *Promontoria (Aran) Limited v Hughes & Ors* [2017] IEHC 592; *Commissioner of An Garda Síochána & Ors v Penfield Enterprises Limited* [2016] IECA 141; *Ganley v RTE* [2016] IEHC 217; *Goode Concrete v CRH plc* [2015] 3 I.R. 493; *The People (DPP) v Conmey* [2012] IECCA 75; *Kelly v. National University of Ireland & Anor* [2012] IEHC 169; *Blehein v St John Of God Hospital & Anor* [2001] IESC 73; *DD v District Judge Gibbons* [2006] IEHC 33; *AD v Judge Donagh McDonagh* [2009] IEHC 316; *Bedford County Council v M* [2017] IEHC 583; *Towey v Director of Public Prosecutions* [2016] IECA 185; and *Bula Limited v Tara Mines Ltd* (No 6) [2000] 4 I.R. 412.

121. In the course of quoting from the judgment of Humphreys J in the case of *Bedford County Council v M* [2017] IEHC 583 (at paragraph 100), counsel for the applicant precipitated the following exchanges with the High Court judge:

MR. TOAL: At paragraph 100 it says: "The fair procedures challenge can be summarised under the following headings:

(i) It is pleaded that Judge O'Leary, the Judge in question in that case, from the inception and through the hearing made inappropriate and derogatory comments towards counsel and solicitor (to a lesser degree) ..." -- as you did in this case, Judge.

JUDGE: I see.

MR. TOAL: "… for the applicant's herein in a way which was insulting, unfair and attacking/undermining of their professional competence" --

JUDGE: And could I just stop you there? Do you mind me stopping you there, Mr Toal?

MR. TOAL: I beg your pardon, Judge?

JUDGE: You just said that I made insulting remarks. Could you possibly identify those to me?

MR. TOAL: What I will do, Judge, in the fullness of time because much reference is made by my friends on the other side to not wanting to say anything, in the absence of having the DAR, I think it would be inappropriate for me to nail my colours to the mast in that respect --

JUDGE: Well, I'm sorry. I think you're going to have to nail your colours to the mast. You told me that I made insulting remarks to you and I --

MR. TOAL: And I've also told you that you've bullied me throughout --

JUDGE: Sorry, would you just bear with me for a moment? I want you now to identify those remarks.

MR. TOAL: I beg your pardon?

JUDGE: I want you to identify what those remarks were.

MR. TOAL: The remarks were -- well I can continue because the paragraph is a mirror image of exactly what --

JUDGE: Well I'm going to ask you for a second time.

MR. TOAL: Okay, but – I'll answer it, then.

JUDGE: It's a serious matter. Excuse me. Just bear with me. It's a very serious matter. You have told me --

MR. TOAL: It is a very serious matter.

JUDGE: You have told me that I made insulting remarks towards you.

MR. TOAL: Yes, you did.

JUDGE: I am now asking you for the third time to identify what those remarks were.

MR. TOAL: The essence of the insults were that from the minute that I stood on my feet to the minute I sat down, you didn't believe a word that came from my mouth. You insinuated, implied, inferred, -- or use whatever other word you wish to describe it -- that both myself and my solicitor had lied to you and that we had deliberately and consciously sought to mislead this Court, to which I say exception was taken. It was then, it is now.

JUDGE: Very good.

122. Counsel the applicant then continued opening the *Bedford County Council* case, pausing every now and then to point out similarities, as he perceived them, to the hearing in controversy before the High Court judge in the Vehicle Tech case. Counsel for the applicant levelled the charge that:

"In terms of tone, remarks and the manner in which the Court addressed both myself and my instructing solicitor you made it very clear, Judge, that on the determination of the issues when you did adjourn the case back that (1) you were making it

peremptory against me (2) you directed that submissions were to be filed in almost impossible circumstances (3) –"

At this point the High Court judge interjected:

JUDGE: Could I stop you there? As I recall, I gave you until the 30th of November to file submissions. How was that impossible?

MR. TOAL: Very well, Judge, if you will dispute that --

JUDGE: No, I've asked you. You told me that was impossible. Could you explain that to me?

MR. TOAL: I said "in almost impossible circumstances".

JUDGE: Yes, okay, well, almost impossible. Now could you explain to me how that's almost impossible?

MR. TOAL: Well the shortcomings, then, are mine, not anybody else's.

JUDGE: I see. All right. Thank you.

MR. TOAL: The tone continued that you were -- you thought that the matters that were put before the Court were fanciful, that there were inconsistencies which had arisen, which I already identified earlier on. Yes, paragraph 20 of the affidavit, which you indicate you've read.

JUDGE: Yes.

123. Counsel added:

"…as you indicated on the 8th of December, as a Judge of the High Court, it is your obligation, which is not disputed, that in the event that there are inconsistencies before the Court that you are dissatisfied with that you have every entitlement to pursue them, which is not disputed. What is disputed is the manner in which you treat counsel who attempts to assist the Court in resolving those inconsistencies."

124. After opening further passages from the *Bedford County Council* case, counsel then submitted:

MR. TOAL: ... I don't complain to be overly sensitive, I do complain that I was bullied.

JUDGE: I see.

MR. TOAL: I made that allegation on the 8th of December.

JUDGE: Yes.

MR. TOAL: And I stand over it now.

JUDGE: Yes, I understand that.

MR. TOAL: And I also went on to point out that I was bullied to the extent where I felt physically sick.

JUDGE: I understand that too.

MR. TOAL: Yes. Paragraph 101 continues as follows.

JUDGE: I am just wondering what is the relevance of Paragraph 101 because it does appear to be directed towards the specific facts of that case?

MR. TOAL: I wonder again if this is perhaps example of it, I will go through it and perhaps maybe at the end of it all the Court might be satisfied unless you are concerned that I am wasting the Court's time.

JUDGE: Make what submissions you like. Do you feel a Judge has any role in the conduct of proceedings?

MR. TOAL: Absolutely.

JUDGE: Good.

125. When counsel for the appellant had finished referring to the *Bedford County Council* case, he addressed the Court as follows:

"MR. TOAL: The concern, Judge, is that Mr. McGuinness and Vehicle Tech Limited are entitled to a fair hearing and an impartial hearing free from bias. For whatever reason that I don't understand some form of animosity would appear to have been generated between the Bench and his representatives. I am not going to say it is not our fault that we were not briefed in time, … ."

"… it seems quite clear that very regrettably an impasse would appear to occur between you and I, which I very much regret, as I do having to make this application."

"MR TOAL: Can I emphasise one point please?

JUDGE: Yes.

MR. TOAL: At no point did Mr. Geary nor I ever lie to this Court.

JUDGE: Yes. As I think as I've told you on three or four occasions, at no point did I ever accuse you either Mr. Geary or yourself of lying to the Court.

MR. TOAL: Judge, but the inference was very clear from what you said. It was that that was what you believed us to have done and that we had sought to mislead the Court which, again, I would like to strenuously emphasise that at no stage throughout any of the proceedings before you have we done that. You asked me do I believe that a Judge has an entitlement to control his own court, essentially? Absolutely. I have never resiled from that, and nor will I, nor my pleas as counsel, and my deference to the bench that you were entitled to by virtue of your position. But these matters occur, Judge, perhaps because we're human beings or as lawyers or as a combination of both. And in the greater interests and to protect what is a very precious system, protect it by making the application as I have in the hope that you might be compelled

by the arguments that I've made, one, if I've satisfied you that you have not at any stage been misled, to recuse yourself.

JUDGE: Yes.

126. The Court then received replying submissions from both Mr Barron and Mr O'Floinn representing the respondents. Mr Barron SC asserted that counsel for the applicant's characterisation of what had occurred during the hearing on the 7th of November was *"simply not correct and the application is groundless"*. Referring to the affidavit of Mr Moloney, Mr Barron submitted that his clients disputed that a letter was thrown back at counsel for the applicant, that there had been any bullying or any allegations of lying. It was said that the judge, in characterising as *"fanciful"* the explanation advanced by counsel for the applicant as to why the solicitors on record were not ready to deal with the substantive judicial review, namely that they were only involved in the intended contempt motion, had expressed himself in moderate terms. Mr O'Floinn B.L. submitted independently that *"I am bound to make the submission that I deprecate and distance myself from the characterisation of that hearing that's been employed today and the language that has been used in terms of bullying, vitriol, being picked upon, and things of that sort, and I distance myself from that language."* He concluded:

"…there is nothing that is in the apprehension of a reasonable person that was said previously or, indeed, at any point, certainly when the Bureau has been represented and present that would give rise to the apprehension that is alleged and certainly not in the terms in which it has been couched."

127. In submissions in rejoinder, counsel for the appellant sought to refer again to the letter allegedly thrown at counsel, giving rise to the following further exchanges:

"MR. TOAL: The letter you referred to, with emphasis, I think, at paragraph 14 in relation to throwing it back --

JUDGE: That's correct, yes.

MR. TOAL: Yes. We enjoy on the instructions of our client an entitlement to waive privilege in the event that our client considers that appropriate or not in any given situation.

JUDGE: Yes, but, as I recall, no such privilege was waived when that letter was handed into me.

MR. TOAL: Well, had the Court inquired -- but the Court didn't inquire -- the Court would have informed that in fact privilege had been waived

JUDGE: I see.

MR. TOAL: And accordingly, it was on that basis that the letter was handed in. The letter was handed in. When the Court deliberately refuses to accept the point that it was done with a view to assisting the Court, the Court takes instead offence by it being handed in rather than the assistance that it was sought to achieve and the position that it put the plaintiff in by his former legal advisors. Had the letter been taken in the spirit in which it was offered, that might have become abundantly clear, but, regrettably, it was an easier thing to do to reject it on the basis of privilege. But as I said, had you asked, you would have been advised that privilege had been waived.

The High Court's Rulings on the 19th of December 2017

128. The High Court judge commenced by referring to the suggestion that he had prejudged the motion for recusal in this matter in his ruling on the application made on the 8th of December 2017 that he should also recuse himself in the unrelated case due to be heard that day. He stated that it had to be made very clear that the basis for seeking his recusal in respect of the unrelated case had absolutely nothing to do with his conduct of that case because the matter had never come before him previously. Rather it related to the manner in

which he had dealt with an application in the Vehicle Tech Limited case. It had been necessary for him to give a ruling on the application made in the related case and he did so on the basis of his belief that his conduct of the proceedings in Vehicle Tech had been entirely appropriate, and in accordance with law and with fair procedures. However, at the same time, the judge pointed out, he had indicated to Mr. Toal that if he wished him to recuse himself from the Vehicle Tech case such an application should be made on notice to the respondents, and he had offered to make himself available on the following week to hear such an application. However, no such motion was brought. In the circumstances the judge did not accept that by ruling in the unrelated case he had prejudged the motion to be brought in the Vehicle Tech case. Rather, by directing that any intended motion be brought on notice he was giving the applicant a further opportunity to make whatever application it might wish to make so far as recusal was concerned.

129. The High Court judge went on to reject any suggestion of bullying in the course of the application on 7 November. He observed that when Mr. Toal has said he was instructed in the contempt proceedings but not in the judicial review proceedings he had found that to be a little odd, given what he would have imagined would be the overlap between the judicial review proceedings and the contempt proceedings. The judge expressed the view that in his view it was hardly surprising, in the context of Mr. Toal's application for an adjournment, that he would seek to tease out exactly what the situation was vis-à-vis representation both in respect of the motion for contempt and the judicial review proceedings. Moreover, he expressed the view that it was entirely appropriate and normal for the judge in his position to seek to satisfy himself as to the factual position, including making inquiries of counsel, given the complex nature of the proceedings and, in this case, the somewhat confused position that had seemed to emerge.

130. The High Court judge emphatically rejected the idea that he had thrown the letter [of 20th of October 2017] back at counsel in disgust. He described the suggestion as *"entirely fanciful"* and stated that it *"simply didn't happen"*. He recalled that having been handed in the letter he had noticed that there was a reference in it to legal advice given by counsel. He stated, *"I have to say I take the view that I will treat any document containing legal advice has been privileged until I was told otherwise, and that certainly was not told otherwise in the course of the application."* The High Court judge expressed view in his ruling that he had acted entirely correctly in not reading that particular letter once he reached the paragraph which clearly contained the advice. However, he reiterated, *"any suggestion that I threw the letter down or towards Mr. Toal, I have to say, is entirely fanciful and fictitious."*

131. The High Court judge then moved to deal with a matter which he felt was central to the application for the adjournment. He pointed out that the application for an adjournment was made on the basis that the solicitor and Mr. Toal had only recently come into the matter. The matter was listed on 7 November. He stated, *"it would have been called over the previous Thursday and certainly the indication was given that both Mr. Toal and his solicitor had really only become involved in the matter in that somewhat short timeframe and, therefore, they said the documentation was voluminous and in the time available to them they did not have sufficient time to come to grips and to come to terms with the various issues involved. Now I took that at face value."* The High Court judge then went on to say that two letters had been handed into him, being the letters of 22th of June 2017 and that of the 6th of October 2017, respectively, in both cases from Mr. Geary to the Chief State Solicitor, in those letters had indicated to him, taking the letters at face value, that there was an involvement by the existing legal team in the judicial review proceedings as early as the 22nd of June 2017. The High Court judge maintained that he had characterized those letters not as solicitors or barristers telling lies. Rather he had characterised those letters, somewhat

neutrally, as being inconsistent with an application that the existing legal team only became involved in the matter effectively between the call over on the Thursday and the date for hearing the following Tuesday or Wednesday. He stated that he did as he believed any judge was entitled to do and requested of counsel that he should explain the matter he stated that explanations were given and that he had acceded to the application to adjourn the matter on the basis that they were not prepared for the matter and were maintaining they had only come into it recently. He again rejected the idea that what had occurred could in any way be characterized as the court accusing either Mr. Toal or his solicitor of telling lies. He had simply been pointing out what appeared to him to have been an inconsistency between letters sent by the solicitor and the submission that they had only recently become involved. The High Court judge opined that he was entitled and probably obliged to point out such inconsistencies. He made the point that the application for an adjournment was being strongly opposed and the respondents were entitled to have matters which were in support of their submission referred to. In the High Court judges view the contents of those letters did tend to support the respondent's position.

132. The High Court judge accepted the authorities that had been open to him in regard to the law on recusal and expressed the view that the law was reasonably well settled in the area. He ultimately concluded:

> *"I'm perfectly satisfied myself that the manner in which I dealt with the application for the adjournment, in acceding to the adjournment and allowing the matter to come before this court some weeks later couldn't remotely be characterised as being biased or that any reasonable person or reasonable bystander who was in court on that day could have regarded that in any sense as being biased. So, for those reasons, I'm not going to recuse myself and the matter will proceed."*

133. At this point counsel for the applicant indicated that his instructions were to withdraw. The judge then indicated that that was *"a matter entirely for yourself"*, but that as far as he was concerned the matter was listed for hearing *"and I propose to proceed with the hearing."* Counsel then asked if the court would permit him to appeal its decision, and the judge informed Mr. Toal that he was fully entitled to appeal that matter but that the case was going on. Counsel for the applicant then made a further application for adjournment pending an appeal by the applicant against the judge's refusal to recuse himself. This application was opposed by counsel for the respondents. This opposition seems to have then precipitated the following exchanges:

> *"MR. TOAL: Do you know what I am sick and tired of? I am actually sick and tired of being kicked up and down this courtroom, and the previous courtrooms, because of the indifference of the other counsel who sat in your Court, and you could have asked any one of those what the position was, but you chose not to. You have kicked me around, like my friend has just done now, and it is a bit tiring and wearing. My instructions are withdrawn, and with the greatest of respect, I will withdraw from your Court.*
>
> *JUDGE: It is matter for yourself, Mr. Toal, but maybe --*
>
> *MR. TOAL: I have asked you to appeal a decision that's appealable --*
>
> *JUDGE: Maybe you'd like to wait until I've given my ruling on the adjournment, and my ruling -- do you, by the way, have you anything in response to – you've made an application for an adjournment. You've heard Mr. Barron and Mr. Ó Floinn as to their opposing the adjournment. And I don't know: do you ave any matters you wish to say in reply?*
>
> *MR. TOAL: Yes. I said I am sick and tired of being kicked up and down this courtroom because of what other people didn't do. We tried to come into this Court*

to do the best we could possibly do, and all that we've gotten in return for that is to being castigated from start to finish. Now either you are going to accede, which I would be very grateful for, to my application to appeal the matter to the Court of Appeal, or you're not. I can't persuade you more than I have. I've said as much as I've been able to say to attempt to have that done, because I'm tired of being kicked because other people didn't do their job.

JUDGE:: Very good. Thank you, Mr. Toal. Now there's an application before me to adjourn the matter on the basis that I have not acceded to the applicant's application to recuse myself. I do not propose to adjourn the matter, and I will not adjourn the matter on a number of grounds.

Firstly, the previous application for an adjournment, which I did accede to, was done on the basis that it was peremptory as against the applicant.

Secondly, it was indicated on the 8th of December that an application was going to be made that I recuse myself from the matter. I invited that a Notice of Motion be issued as soon as possible, and also indicated that I would deal with the matter the following week, even though I wasn't sitting. No such motion was issued. There was no such application for short service or a Notice of Motion.

And thirdly -- and maybe possibly most importantly from a procedural point of view -- it often does arise in the course of a hearing that a Judge is required to make certain rulings, including rulings on recusal, and where those applications are not granted, the case can still and does still continue. And at the conclusion of the case, whatever appeal the applicant or the aggrieved party, may wish to make, can be made. So it seems to me that there is absolutely no injustice being done. The right of appeal is

not in any way being interfered with. So, in those circumstances, I am not granting the adjournment and the matter will now proceed.

MR. TOAL: I'll withdraw.

JUDGE:: Very good.

134. Following Mr. Toal's withdrawal the court inquired of his junior and of the solicitor as to whether they would be proceeding with the case. He was informed by junior counsel, *"we are not proceeding with it before this court, no, Judge"*. Mr. Barron SC then applied to have the judicial review proceedings dismissed with costs against the applicant, as did Mr. O'Floinn B.L. The High Court judge invited junior counsel for the applicant, who was still in court, to make any response that she might wish to make in respect of the applications for costs but she declined to do so. The court then ruled:

"Well, it seems to me in the circumstances, as the action is not proceeding, that the appropriate order I make is to strike out the action, and I will strike out the action and grant the respondents their costs, to include reserved costs. As far as the motion for contempt was concerned, the costs to include whatever costs are attributable to that motion."

Submissions

135. The notice of appeal filed by the appellant on the 2nd of February 2018 lists eighteen discrete grounds of appeal, with eleven points of law relied upon in support of them. We have had regard to all of these. While the grounds of appeal are pleaded across more than ten pages of text in single line spacing, and the points of law relied upon are detailed across another five pages of similarly presented text, the legal submissions that have been filed on behalf of the applicant sensibly distil all of this to a single core complaint, namely that:

"the issue that arises on this appeal is as to whether it was reasonable for the applicant to have apprehended bias on the part of the trial judge based on the facts as pleaded

and recorded in the DAR transcripts and accordingly whether the trial judge erred in law in so refusing to recuse himself, or otherwise in his handling of the matter including refusing to adjourn the matter pending the appeal of the court's refusal to recuse."

136. Although both sides have referred extensively to the law on recusal on the grounds of objective bias in a given case, there is in truth very little dispute between them as to the law. Both sides accept the test is that set out and reiterated in a series of decisions of the Supreme Court in recent years, from *Orange Communications Ltd v Director of Telecommunications Regulation (No 2)* [2000] 4 IR 159; per Keane C.J. at p.186; to *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 I.R. 412, per Denham J at p. 441; to *Kenny v University of Dublin* [2008] 2 I.R. 40, per Fennelly J at p.45; to *O'Callaghan v Mahon* [2008] 2 IR 514, per Fennelly J at pp 672/673; to *Goode Concrete v CRH Plc* [2015] 3 I.R. 493, per Denham CJ at pp 505 to 507 and pp 517 to 521, and per Hardiman J at p 529.

137. While the test has been expressed at different times in slightly different wording there is little controversy about it. In *O'Callaghan v Mahon,* Fennelly J framed it in these terms [at p. 672]:

> *"[551] (a) objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;*
>
> *(b) the apprehensions of the actual affected party are not relevant;*
>
> *(c) objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*

> *(d) objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or which showed prejudice, hostility or dislike towards one party or his witnesses."*

In *Goode Concrete v CRH Plc,* Denham CJ cited this passage from the judgment of Fennelly J with approval, at p 507, while Hardiman J, quoting (a) and (b), stated that he agreed with Fennelly J's formulation and considered it *"an apt epitome of the modern Irish law on objective bias."*

138. To the extent that there is some apparent disagreement between the parties to the present case as to the law it relates to the applicant's interpretation of Fennelly J's judgment in *Kenny v. University of Dublin* as requiring the court to apply *"the most favourable interpretation of the facts from the appellant's point of view."*

139. In response to this proposition, the respondents make the point that Fennelly J did not decide that taking the most favourable interpretation of the facts for the plaintiff was a principle of general application. He applied that approach in that particular case and erred on the side of caution because of the special fact in that case that the Supreme Court was being asked to adjudicate on whether one of its own judgments was tainted by objective bias. Furthermore, the passage to which Fennelly J was referring when offering that observation, that of Finlay CJ in *O'Neill v. Beaumont Hospital* [1990] ILRM 419 at p. 439, was itself clearly *obiter dicta* because in that case Finlay CJ very clearly stated that he would have found objective bias on any interpretation of the facts.

Discussion and Decision

140. I have considered the transcript of the proceedings on the 7th of November in great detail. Notwithstanding having done so, I am not persuaded that the applicant has established objective bias on the part of the High Court judge. There is also no evidence whatever of

bullying, of vitriol or of an allegation having been made of lying. Neither is there anything on the transcript to suggest that a letter was thrown back at counsel for the applicant in disgust. While of course this is a physical action which would not necessarily be recorded on the transcript, it is to be expected that if it occurred it would have elicited some protest at the time, yet there is none. Moreover, the assertion that this incident occurred is strongly disputed.

141. The applicant bears the onus of proof on an application for recusal on the grounds of objective bias, and to quote from the judgment of Denham J in *O'Callaghan v Mahon* at p 552, *"there is no doubt with the burden rests upon the applicants to prove their case on the balance of probabilities."* Moreover, as to the discharge of that standard of proof, in *Bula Ltd v Tara Mines Ltd (No 6),* McGuinness J, observed at p.509:

> *"If the test of reasonable apprehension by a reasonable person (which is the correct test) is to be applied, I consider that it requires a strict interpretation. The apprehension must be reasonable and realistic; over scrupulous, fanciful or fantastic apprehension or a vague worry is not sufficient. While this is not of course, a criminal trial, there is, I think, some parallel with the standard explanation of a "reasonable doubt" contained in the judge's charge to the jury - a fanciful, exaggerated or over scrupulous doubt is not enough."*

142. I consider that in this context the observation of Fennelly J in *O'Callaghan v Mahon* in setting out the relevant test that *"the apprehensions of the actual affected party are not relevant"* is important. One is concerned with a reasonable and fair-minded observer, <u>who is not unduly sensitive,</u> but who was in possession of all the relevant facts. There is no doubt but that Mr. Toal and his instructing solicitor believe that the High Court judge went beyond mere criticism of how the application had been presented, and concerning the inconsistencies, as the court perceived them, between the correspondence that had been submitted and the

basis for the application as presented orally. The question is, were they being unduly sensitive? I am satisfied that they were.

143. Consideration of this aspect of the matter has not been helped by Mr. Toal's tendency towards exaggeration and hyperbole. It was asserted numerous times by him in the subsequent applications on 8th of December 2017, and on the 19th of December 2017, that he and his solicitor had been called liars. That was simply not the case and when this was pointed out to him repeatedly by the High Court judge he only reluctantly conceded that that was so but maintained that the judge's words had implied that they were liars. I will come back to this.

144. Mr. Geary's readiness to engage in polemics on behalf of his client is also a factor I have taken into consideration because it is indicative of a want of the professional detachment which is required of a solicitor and an officer of the court. It suggests that Mr. Geary may lack objectivity in respect of this case and that in those circumstances what he may have apprehended from the judge's ruling cannot be assumed to align with what would be the reasonable apprehension of a reasonable person, not unduly sensitive, and in full possession of the facts.

145. Further, the transcript reveals that while the proceedings were business-like, and the judge was clearly anxious to make progress in terms of his busy list, Mr. Toal was treated with courtesy throughout. It has been asserted that the High Court judge repeatedly interrupted him and prevented him from making salient and relevant and material points that might have assisted the Court. This is not borne out by the transcript. Mr. Toal was allowed to make submissions at length and was not excessively interrupted. The suggestion that he was is simply untrue. On a number of occasions, the judge did make interjections, as he was entitled to do. Convention and professional etiquette require that where a judge interjects in the course of counsel's submission, either to seek clarification of a point being made or for

some other legitimate purpose, that the Bar yields right of way to the Bench and listens politely to the interjection before responding and then resuming. In this instance, on several of the occasions where the judge sought to interject, Mr. Toal did not observe this convention and etiquette, but rather, with it seems to me unnecessary abruptness, demanded *"Will you let me finish?"* or *"if you will just let me finish"*, and the transcript reveals that these requests were in every instance received courteously and acceded to. Counsel was not prevented him from making salient and relevant and material points, and indeed was afforded every opportunity to do so. Moreover, the assertiveness of counsel in insisting on being allowed to finish on occasions where the judge sought to interrupt him, and his ability to respond in that way, does not suggest that he felt bullied or oppressed in any way. Quite the contrary, indeed. Moreover, I am satisfied that a reasonable and fair-minded observer, in possession of all the relevant facts and not unduly sensitive, would not have perceived bullying or bias of any sort in the course of these interjections, or the prevention of counsel from making salient and relevant and material points.

146. The suggestion is made that the judge displayed *"vitriol"*. The transcript reveals nothing of the sort. The suggestion is made that there was bullying. The transcript does not disclose anything of the sort. Further evidence of what I am satisfied is Mr. Toal's tendency towards oversensitivity, and exaggeration and hyperbole, is to be found in the transcript of what occurred on 19 December 2017. As we have seen, on that date Mr. Toal stated expressly that he had been "*kicked up and down this courtroom and previous courtrooms"* by the High Court judge. Again, the transcript reveals that nothing of the sort occurred, either literally or figuratively. He further suggested that he and his solicitor had been *"castigated from start to finish"*. I am satisfied on the basis of the transcript that that was simply not the case, whether Mr. Toal and his solicitor perceived it to be so or not.

147. Mr. Toal is quite correct in his belief that the High Court judge was likely not best pleased with how the proceedings were conducted by him and his solicitor on the 7th of November 2017. There was indeed a legitimate basis for criticism. The supposed Notice of Motion seeking attachment and committal had never been filed. The contempt proceedings were not properly constituted, or properly before the court. Moreover, the situation presented with respect to legal representation was highly unorthodox. As was acknowledged by counsel in the course of his exchanges with the High Court judge, it is not possible for a party in a case to be represented by more than one legal team at a time. While it might be legally possible for a party to engage more than one legal team to do different modules of a case, with one legal team stepping out, and another legal team stepping in, before stepping out yet again and the original legal team stepping back in again, evoking the chorus of "Lanigan's Ball", it is most unusual and unorthodox. An obvious hazard in doing so is the possibility of a falling out between the legal teams, as appears to have occurred in this case; and a party assuming that risk cannot reasonably expect his opponents, or indeed a court, to come to its rescue should the arrangement break down. Moreover, somebody needs to be in overall charge of the case, maintaining the case file throughout, and co-ordinating management of the case. That can only be the solicitor on record, and if there is chopping and changing in that respect there is every risk that the necessary overview will not be maintained with potentially serious or even disastrous consequences. One thing is certain. If such a strategy is to be engaged in, whatever team happens to be on record at a particular time is responsible for every aspect of the proceedings during the time that they are on record, and it is no answer to a claim that they have failed to fulfil a duty in that regard to suggest that they had only committed to doing a particular task, or to progress a particular module of the case. A solicitor cannot be half on record. He/she is either on record or they are not, and any solicitor coming on record is obliged to familiarise himself or herself with every facet of the case so as

to be able to deal with any issue that might need to be dealt with during the time that he/she is on record. Moreover, he/she has a professional duty to immediately update themselves when coming on record with the procedural status of the case, and where it is at in terms of forthcoming hearings and matters of that sort. The firm of J.V. Geary had come on record in this matter in June 2017 and at that stage a trial date of the 7th of November had already been fixed. It was the duty of Mr. Geary and counsel instructed by him, following J.V. Geary coming on record, to immediately take up the file and familiarise themselves with the substantive judicial review claim and to be ready to do the case if they were still on record on the trial date.

148. Despite there being, as I have said, a very legitimate basis for criticism, the fact of the matter is that the applicant was ultimately facilitated with an adjournment. The crux of the present application is that the applicant's counsel and solicitors seemingly took umbrage at the fact that the judge had seen fit to point out inconsistencies between the basis being put forward for seeking an adjournment, namely that the existing legal team had just come into the substantial judicial review and had had insufficient time to prepare for the hearing having regard to the volume of documentation involved, and the fact that no written submissions had been filed on behalf of the applicant, on the one hand; and correspondence of the 22nd of June 2017 and of 6th of October 2017 tending to confirm that J.V. Geary was on record in respect of the entire proceedings since as far back as June 2017. The High Court judge's characterisation of the notion put forward by Mr. Toal that his solicitor, as the solicitor on record, and he as counsel instructed to act in the matter, bore no responsibility for the proceedings beyond their acceptance of instructions to present an intended application for attachment and committal, as being "fanciful", was entirely justified. The proposition was legally untenable. It must be reiterated that it is not possible for a solicitor to be half on record. A solicitor who comes on record is on record for all purposes, regardless of any

arrangement with the client and regardless of any private arrangement with colleagues. Responsibility for the entire action extended to Mr Toal, in his role as counsel instructed by the solicitor on record for Vehicle Tech Limited, once he had accepted instructions to appear for the applicant in the matter.

149. I indicated that I would come back to the allegation that the High Court judge had insinuated that the applicant's counsel and his solicitors were liars. It is part of the role of a judge to assess the merits of a contested application. This was a contested adjournment application. A basis was put forward for the requested an adjournment and it was the judge's task to assess whether that basis was meritorious, and what the justice of the case required. I have already expressed the view that in circumstances where the correspondence established that Mr. Geary had come on record as far back as June 2017 it was legally untenable to suggest that the solicitor on record, and the counsel he had instructed, bore no responsibility to act in the matter listed that day for trial, and that their responsibility was confined to the contempt aspect of the proceedings. Given that he was faced with this situation, what the High Court judge said must be considered in that context and against that background. It is appropriate to consider the exact words used by the High Court judge. He said:

> "*I'm not at all happy as to the basis upon which the adjournment was sought, namely that the solicitors who are apparently on record for Vehicle Tech Limited say they only came on record recently and only recently came into the documentation which apparently is very voluminous in respect of the JR application. The explanation given is that in fact the solicitors who are now on record for Vehicle Tech Limited were only involved in the contempt proceedings. I have to say I do find that a little fanciful.*

However, I'm prepared to accept, as has been said -- and it is only a provisional acceptance at this stage -- that the solicitors and counsel have only recently come into the JR aspect of it. I have very, very serious misgivings about it."

150. First, the High Court judge was perfectly entitled to express the view that he was not happy as to the basis upon which the adjournment was sought. There had been inconsistencies which called for explanation.

151. Secondly, he correctly identified the basis on which the adjournment application had been put forward, namely that JV Geary had only recently come on record, and that they had only recently come to possession of the required documentation, which was very voluminous. Implicit in this was that they had not had time to adequately brief themselves and to prepare adequately for the purposes of presenting the substantive case. It is clear that the High Court judge fully appreciated that this was the case that was being made.

152. Thirdly, he regarded the explanation proffered for the inconsistencies that he had identified, i.e. that *"the solicitors who are now on record for Vehicle Tech Limited were only involved in the contempt proceedings"* to have been *"a little fanciful"*. That explanation had extended to the excuse that the solicitor on record and his counsel had not expected to have to present the substantive case because they believed that their instructions extended only to dealing with the intended contempt motion. The judge indicated that he was prepared to accept provisionally *"that the solicitors and counsel had only recently come into the JR aspect of it"* although he had *"very, very serious misgivings"* about it.

153. To have characterised the said explanation as *"a little fanciful"* and to have expressed such *"misgivings"* was not to say that counsel for the applicant or his instructing solicitor had put forward a false basis for seeking an adjournment, or that they had lied in respect of some factual matter. The circumstances before him were highly unusual, and the suggested arrangements with respect to legal representation were very unorthodox. He had been entitled

to approach the application with a degree of scepticism, and to seek to be satisfied that the asserted excuses had a basis in reality. It seems to me that the judge was saying no more than that it was his view that the basis put forward for the adjournment was legally untenable or certainly very legally questionable, and therefore it was, to use his word, *"fanciful"*; in circumstances where there was objective evidence, so far as the court and the respondents were concerned, that J.V. Geary, having served a notice of change of solicitors in June 2017, were legally speaking on record for all purposes from that point, regardless of what may have been Mr. Geary's or counsel's belief or understanding. Accordingly, he was placing it on the record that while he would accept at face value what had been urged upon him and would reluctantly grant the adjournment, he was doing so notwithstanding considerable misgivings as to whether he had been provided with an adequate justification for doing so.

154. The applicant makes the case that because the judge had suggested that he might revisit the issue, that this was tantamount to him suggesting that Mr. Geary or Mr. Toal might not genuinely hold the belief that they claimed to hold, namely that their retainer and duty extended only to dealing with the contempt motion. Moreover, the High Court judge had added that *"if in the course of the hearing I have caused revisit the basis upon which the application for an adjournment was sought I've take a very serious view of it and will take whatever steps are appropriate and open to me to deal with it"*.

155. It seems to me that the High Court judge, who had not been impressed by the application, and who was in effect stretching a point in favour of the applicant, was entitled to set down such a marker. To have done so was not to disbelieve Mr. Geary or Mr. Toal, or to imply that they were possibly lying. However, it was to recognise that the scales had only marginally tipped in favour of the applicant on the adjournment application, and that was in circumstances where the High Court judge necessarily only had part of the picture at that stage in the proceedings. It was not beyond the bounds of possibility that something could

emerge at the trial of the judicial review which might alter the understanding which the court had at that point, and on foot of which it had seen fit to grant the adjournment. The judge was saying, as was his entitlement, that if evidence were to emerge tending to contradict his understanding of the essential facts on which the adjournment application had been based, and which were for the most part within the peculiar knowledge of the applicant's legal team or teams, and would not have been within the knowledge of the respondents, the court would take a serious view of it. That did not imply that he held the view that either Mr Toal or Mr Geary had possibly misled the court, or that they had possibly lied. On the contrary, it was precisely because the court had been prepared to accept what had been advanced as a belief held in good faith, notwithstanding that it was a belief based on a legally untenable or certainly legally questionable proposition, that the scales had tipped in favour of the granting of the adjournment.

156. I am satisfied that the reasonable observer, in possession of the full facts, and not unduly sensitive, would not have construed the High Court judge's remarks as implying that Mr. Toal and/or Mr. Geary had lied, or that they had misled the court. There was therefore no basis for an apprehension of bias. Equally, the complaints with respect to bullying, to a display of vitriol, to vilification, and to throwing a document back to counsel in disgust, are not made out and in those circumstances could not have provided a basis for an apprehension of bias. In my judgment the recusal application was rightly and correctly refused. In circumstances where an adjournment had been granted on 7th of November 2017 until the 19th of November 2017, there was adequate time for the applicant's legal team to prepare to proceed with the substantive judicial review case in the event of the intended recusal application being unsuccessful. It was their professional duty to proceed with the case in the event of the application being unsuccessful and without prejudice to their right to appeal. There was no justification for refusing to proceed with the matter and for withdrawing

following the adverse ruling on the recusal application on the 19th of December 2017. In the circumstances there is no basis for interfering with the High Court judge's order dismissing the substantive proceedings with costs to the respondents.

157. Further, it is clear that the purported motion seeking attachment and committal was never at any stage properly before the court, and notwithstanding the applicant being given leave on the 7th of November 2017 to file and serve a properly constituted Notice of Motion seeking attachment and committal returnable for the 19th of November 2017, that was never done. Accordingly, because it was not properly before the court the High Court could make no order either adjourning that motion or as to the merits of the motion. However, the High Court judge took the view when dealing with an application for the costs of the substantive proceedings that *"clearly it was intimated that there was going to be a motion for contempt and that there apparently was an ex parte docket. So, there may well -- costs may well have been incurred in dealing with that aspect so I make such an order."* I see no basis to interfere with this aspect of the judge's order.

158. The appeal is accordingly dismissed. My provisional view with regard to costs is that since the respondents have been entirely successful, they should be entitled to the costs of this appeal. If the appellant wishes to contend for an alternative form of order, it will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have suggested will be made.

159. As this judgment is being delivered electronically, Noonan and Ni Raifeartaigh JJ. have indicated their agreement with it.