THE COURT OF APPEAL

APPROVED

NO REDACTION NEEDED

Record Number: 2014/871, 2014/872, 2014/874

High Court Record Number: 2012/116MCA

Haughton J. **Neutral Citation Number [2023] IECA 93**

Binchy J.

Pilkington J.

IN THE MATTER OF IRISH LIFE & PERMAMENT PLC AND IN THE MATTER OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2020, AND IN THE MATTER OF AN APPLICATION BY THE MINISTER FOR FINANCE FOR A DIRECTION IN RELATION TO IRISH LIFE & PERMANENT PLC PURSUANT TO SECTION 9 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 AND ANCILLARY ORDERS

BETWEEN/

GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS, SCOTCHSTONE CAPITAL FUND LIMITED, JOHN PAUL MCGANN, GEORGE HAUG, TIBOR NEUGEBAUER, AND J. FRANK KEOHANE

APPELLANTS

-AND-

THE MINISTER FOR FINANCE

RESPONDENT

-AND-

PERMANENT TSB PLC (FORMERLY IRISH LIFE AND PERMANENT PLC)

NOTICE PARTY

RULING OF THE COURT delivered on the 25th day of April 2023

1. This is the Court's judgment and ruling on the application of Piotr Skoczylas, John Paul McGann, and Tibor Neugebauer (together "**the applicants**") by Notice of Motion dated 22 December 2022 seeking the following orders:

"(1) A declaration that the Members of the Court (Haughton, Binchy, Pilkington JJ) have exhibited objective bias while adjudicating upon these proceedings; and

(2) an order that said objective bias ought to be remedied by the Court in accordance with the applicable established case-law/jurisprudence, in the manner that ensures a fair conduct of these proceedings and a just adjudication upon these proceedings; and

(3) an order that said Members of the Court should recuse themselves from further adjudication upon these proceedings; and

(4) such further or other orders or directions as this Court may seem fit; and

(5) an order that costs of this application be paid by the respondents."

2. The application is grounded on an affidavit sworn by Mr. Skoczylas on 22 December 2022, and the exhibits therein referred to. The applicants also rely on/refer to the proceedings already had in this appeal, and in particular the following: -

- the transcripts of the substantive hearing of the appeal on 10 and 11 November 2020;
- the substantive judgment delivered on 8 November 2022 (Haughton J., with whom Binchy and Pilkington JJ. concurred) ("**the Principal Judgment**");
- the applicants' application by Notice of Motion dated 24 November 2022, seeking various orders by way of review of the Principal Judgment, and the affidavit grounding that motion sworn by Mr. Skoczylas on 24 November 2022 and the exhibits therein referred to ("**the Review Application**"); and
- the ruling of this Court on 13 December 2022 rejecting the Review Application ("**the December 2022 Ruling**")

3. In advance of the oral hearing of this application on 22 March 2023, the applicants by email dated 17 February 2023 requested a short preliminary hearing for the purpose of persuading the Court that a different panel should hear the objective bias motion. That request was considered, and the Court declined to hold a separate preliminary hearing, notifying the applicants as follows: -

> "The request for a preliminary hearing is refused. It is the general practice that where assigned judges are asked to recuse themselves the decision on such an application is for those judges to make. The motion has been case managed and the hearing date for the motion has been fixed, and your submissions are noted. The issue raised in paragraph 2 of your Submissions - that the judges concerned should not decide the motion, and hence that the court should depart from the general practice - is a matter that you are free to pursue in argument at hearing on 22 March, 2023, and is not one being decided by this refusal of a preliminary hearing."

4. At the hearing of the present motion the applicants moved their preliminary application for the motion to be heard by another panel. Having heard argument from all the parties the Court rose and on resitting delivered an *ex tempore* judgment ("**the Preliminary Ruling**") in which it refused the preliminary application. A transcript of the Preliminary Ruling is appended to and should be read with this judgment. The Court accordingly proceeded to hear the substance of the objective bias motion.

5. This judgment should be read with/in the context of the Principal Judgment, the December 2022 Ruling, and the Preliminary Ruling.

6. The Court has the benefit of written submissions from each of the applicants[1], the Respondent and Notice Party. At the hybrid hearing on 22 March 2023, the Court also heard oral submissions from Mr. Skoczylas, who attended remotely. Mr. Neugebauer, who also attended remotely, rested on his own written submissions, and adopted Mr. Skoczylas' submissions. Mr. McGann attended remotely at one point during the hearing, and the Court took into account his written submissions. Counsel for the Respondent (Mr. McCullough S.C.) and the Notice Party (Ms. Geoghegan B.L.) also addressed the Court.

7. At the outset it is important to note what issues are left in this appeal, following the Principal Judgment. What remains to be heard and determined are: -

(i) the appellants' appeal against the costs orders made by Peart J. in the High Court,

(ii) the costs of the appeal, and

(iii) a stay (sought as part of the Review Application and currently standing adjourned before this Court).

8. The applicants' contention of objective bias is centred on the fact that, notwithstanding Mr. Skoczylas' objection on which the Court ruled against him at the appeal hearing, the then Attorney General was allowed to appear in a personal capacity on behalf of the Notice Party at

[1] The short written submissions of Mr. Neugebauer and Mr. McGann primarily addressed the preliminary issue and were considered in that context.

the substantive hearing of the appeal in November 2020. The core assertion, as appears from the heading to para. 8 of Mr. Skoczylas' grounding affidavit, is that: -

> "…the Members of the Court (Haughton, Binchy, Pilkington JJ) exhibited objective bias by ignoring a manifest conflict of interest that the Court had vis-à-vis the Attorney General, who represented in his alleged "personal capacity" ILP against the Appellants who are the ILPGH shareholders (where ILPGH is a 100% and the only shareholder in ILP) while at the same time the Attorney General was representing in his official capacity the Minister for Finance who had been sued by the ILPGH shareholders herein, before Judges whose careers were subject to the Attorney's General [sic] subsequent decisions."

9. The Attorney General referred to is Paul Gallagher S.C., who served as Attorney General from 27 June 2020 to 17 December 2022[2]. It is a matter of record that Mr. Gallagher appeared (with Ms. Caren Geoghegan B.L.) for the Notice Party, instructed by Bloom Solicitors, at the substantive hearing in November 2020. The Respondent was represented by Mr. McCullough S.C. and Ms. Ailbhe O'Neill B.L., instructed by solicitors Arthur Cox.

10. In broad outline the appellants contend that the Court ignored a conflict of interest constituted by the Mr. Gallagher "*wearing two hats*"[3], and permitting him as "*an emanation of the State and its powers*" to lend "*the weight of his office*" to representing "*simultaneously distinct interests*"[4]. At paragraph 9.B -10 of his submissions Mr. Skoczylas submits:

> "B. Concurrently – and equally importantly, if not more importantly – AG Gallagher had an extremely important role regarding careers of judges. His role was pivotal in respect of judges' promotion prospects. He was a member of the Judicial Appointments Advisory

[2] He also served as Attorney General between 2007 and 2011, which the applicants note spanned the period when the Credit Institutions (Stabilisation) Act, 2010 was promulgated. The Direction Order made by the Respondent and challenged by the applicants in these proceedings was made under that Act, and the applicants' application to the High Court to set aside the Direction Order was made pursuant to section 11 of that Act. In the Principal Judgment this court affirmed the first finding of the High Court that the appellants did not have *locus standi* to make a section 11 application.
[3] Para.9 of Mr. Skoczylas' Affidavit.
[4] Mr. Skoczylas Submissions, para.9A.

Board; thus, he was co-responsible for selecting the candidates eligible for judicial appointments to be sent to the Cabinet. Sitting at Cabinet meetings, he played an important role in nominating judges who were to be promoted. The government would not have nominated for a promotion/advancement any judge of whom AG Gallagher disapproved. There was thus an obvious conflict of interest when it came to the AG representing ILP against the ILPGH shareholders while at the same time representing the Minister against the same shareholders, **before Judges whose careers were subject to the AG's decisions and whose careers could be meaningfully influenced by the AG's decisions.**

C. Relevantly, Mr. Gallagher was already AG between 2007 and 2011. He thus held the office, and might hold the office again in the future, periodically from time to time. In that capacity, he was thus one of the co-authors/draughtsmen of the draconian emergency legislation, the 2010 Act under which the March 2012 *Ex Parte* Direction Order was made and which is the very subject of these proceedings. Hence, he had 'skin in the game' (to use a colloquialism) from his previous spell as AG, when defending the State actions regarding the March 2012 *Ex Parte* Direction Order. In those circumstances, his representation of ILP while in office as AG (again) brought about an additional reinforcing aspect of the conflict of interest in question.

10. The appellants were on the receiving end of that web of AG's influence contaminating – with the approval of the Judges concerned – the administration of justice."

11. In support of these contentions Mr. Skoczylas exhibits extracts from the transcript of the appeal hearing on Day 1 when he raised objection to Mr. Gallagher representing the Notice Party as "*an abuse of the process*", and when, following submissions, the Court declined to interfere with the Notice Party's representation. The relevant parts of the transcript will be referred to later in this ruling.

12. Mr. Skoczylas also exhibited two newspaper articles under the name of former ministers: one by a former Minister for Justice Alan Shatter was published in irishtimes.com on 6 October 2021 and is entitled: "*Attorney General should not maintain a private legal practice*", and the other is by Shane Ross a former Minister for Transport published on 3 October 2021 by Independent.ie and entitled "*Drop your briefs, Paul, and stick to job we're paying you to do*". He relied on these articles in two ways: firstly he relied on their views in relation to Mr. Gallagher acting as a barrister in private practice while holding the office of Attorney General; and secondly, he relied on the authors' views as representative of the "*the reasonable person who would reasonably apprehend bias*".

13. In their reply submissions the Respondent and Notice Party contend that the time to bring forward allegations of objective bias was on 10 or 11 November 2020, at the appeal hearing, or alternatively in the Review Application in November 2022, and that it is now too late. They contend that this application is an abuse of process that falls foul of the rule in *Henderson v. Henderson*, and/or that the applicants must be deemed to have acquiesced in this panel hearing the appeal or waived any right they had to object on grounds of objective bias. They further contend that in any case the claim of objective bias is not made out.

14. According two broad issues arise:

(i) Is the application an abuse of the process under the rule in *Henderson v. Henderson* or are the appellants otherwise estopped from now raising a complaint of bias due to acquiescence/waiver?

(ii) If not, have the applicants made out objective bias such that relief should be granted?

If the applicants succeed on these issues a further issue arises as to what orders the Court should make.

***Henderson v. Henderson*/abuse of process**

15. The Respondent and Notice Party seek to rely on the principle established in *Henderson v. Henderson* [1843] 3 Hare 100, in the well-known passage from the judgment of Sir James Wigram V.C. where he stated: -

> "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

16. Secondly, and relatedly, the Respondent and Notice Party submit that it is not proper for a litigant to permit two applications to proceed to final judgment, and then, on facts that the applicants have always known, to complain of objective bias and ask judges to recuse themselves. They submit that the point must be regarded as waived, on the basis of the well-established principle that a litigant who fails to raise bias as an issue cannot then subsequently make a claim of bias to impugn a decision. They refer to the decision of the Supreme Court in *Corrigan v. Irish Land Commission* [1977] IR 317, where Henchy J. (with whom O'Higgins C.J., Griffin and Parke JJ agreed, Kenny J. dissenting) held that: -

> "The rule that a litigant will be estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the

hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the Tribunal will decide in his favour, while reserving to himself the right, if the Tribunal gives an adverse decision, to raise the complaint of disqualification. That is something that the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

17. The Respondent and Notice Party contend that this is the third time that the applicants have complained about the participation of Mr. Gallagher as counsel in these proceedings, *but the first time that they have raised this as an issue of bias*, or suggested that the judges should recuse themselves. They point out that the allegation of bias was not raised by the applicants until after they had been unsuccessful in their appeal.

18. They submit that on Day 1 of the appeal hearing, on 10 November 2020, Mr. Skoczylas while not making any particular application, complained about the participation of Mr. Gallagher, and sought to exclude him from acting as counsel for the Notice Party. That complaint was rejected by the Court at the end of Day 1. They point out that on Day 2 there was no complaint of conflict of interest or objective bias before Mr. Gallagher addressed the Court on the substantive appeal, and the hearing proceeded to a conclusion and in due course proceeded to the point where judgment was delivered.

19. The Respondent and Notice Party further submit that following the Principal Judgment delivered on 8 November 2022 the applicants then issued the Review Application in which they argued that the Court, by allowing Mr. Gallagher to continue to represent the Notice Party, acted in breach of fair procedures and/or contrary to natural justice such that the judgment should be revisited/reviewed. The Respondent and Notice Party submit that the applicant's complaint about the participation of Mr. Gallagher, raised for the second time in the Review

Application, was based on facts/averments that are similar if not identical in wording to the material averments by Mr. Skoczylas in his affidavit grounding the present application. However, Mr. Skoczylas and his co-applicants in the Review Application characterised Mr. Gallagher's participation as a conflict of interest, which they claimed should lead to the judgment being set aside, but they made no express claim of bias and did not ask this panel to recuse itself. In the December 2022 Ruling, this Court noted at para. 60 that: -

> "No complaint is made by Mr. Skoczylas that he was not afforded an adequate opportunity to address this court fully when he was permitted to raise the question of representation during a hearing, and invited to make submissions. While referring at that time to an abuse of process, he made no express reference to conflict of interest (at least not until after the Court's ruling). None of the arguments that he now makes were made by Mr. Skoczylas, at that time when he could have made them, and for that reason alone they cannot now be relied on to seek a review of the Judgment. In any event the Court is of the view that the point now made does not demonstrate a "*clear breach of the principles of natural justice*" (per Barron J. in *Greendale*) such as to warrant a review."

20. It is therefore submitted that the applicants, in the present motion, complain for the third time about the participation of Mr. Gallagher as counsel in the main hearing, but only now suggest that the panel are guilty of objective bias and that they should recuse themselves. This they say is an abuse of the process and contrary to the principle in *Henderson v. Henderson*, or alternatively breaches the principle that a litigant who fails to raise bias as an issue cannot then subsequently make a claim of bias to impugn a decision (per *Corrigan v. Irish Land Commission*).

21. Counsel also referred the Court to the wording of the Review Application motion which sought in the first instance an order varying or setting aside or rescinding the Principal Judgment. It

was submitted that the present motion, in seeking firstly a declaration that the members of the Court have exhibited objective bias "*while adjudicating upon these proceedings*", and secondly an order that this should be "*remedied by the court … in a manner which ensures fair conduct of these proceedings and a just adjudication upon these proceedings*", the applicants were not just seeking an order that the panel recuse itself from determining the outstanding issues of costs and a stay, but were also seeking to have the Principal Judgment set aside - a relief that has already been refused.

22. In response Mr. Skoczylas, whose submissions were adopted by his co-applicants, argued that the principle in *Henderson v. Henderson* should not be applied rigidly. He relied on the judgment of Hardiman J. in *AA v. The Medical Council* [2003] IESC 70. Hardiman J. referred with approval to the approach advocated by Lord Bingham in *Johnson v. Gore Wood* [2002] WLR 72 where he said: -

> "I do not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the Court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceedings *necessarily* abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad merit based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue, which could have been raised before. As one cannot comprehensively list all possible forms of

abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

Hardiman J. then proceeded: -

"In **Woodhouse v. Consigna** [2002] 2 AER 737 Brooke L.J. referred to the public interest in the efficient conduct of litigation and continued: -

> 'But at least as important is the general need, in the interest of justice, to protect the Respondents to successive applications in such circumstances from oppression. the rationale of the rule in *Henderson v. Henderson* that, in the absence of special circumstances, parties should bring their whole case before the Court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based upon the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do…'

The position is still more succinctly expressed in **Gairy v. Attorney General of Grenada** [2001] 3 WLR 779 where, speaking of the principle in **Henderson** and its offshoots Lord Bingham said: -

> '… These are rules of justice, intended to protect a party
>
> (not necessarily a defendant) against oppressive and vexatious litigation'.

Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities. This point has a particular

resonance in terms of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, 1950. In **Ashingdane v. U.K.** [1999] 27 EHRR 249 at 271: -

> '… The right of access to the Court is not absolute but may be subject to limitations: these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals"'.

Considering the nature of permitted limitations, the same Court said in **Tinneally and Sons Limited v. U.K.** [1999] 27 EHRR 249 at 271: -

> '… A limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved.'"

23. Mr. Skoczylas argued that this Court, when hearing and adjudicating on this appeal, was not "*a court of competent jurisdiction*" for the purposes of the rule in *Henderson v. Henderson* on the basis that it found (as had the High Court) that the appellants did not have *locus standi*. That argument is misconceived because when the appellants first made their application pursuant to s. 11 of the 2010 Act to set aside the Direction Order, and the Respondent and Notice Party raised the issue of *locus standi*, that was a justiciable issue which the High Court, and later this Court on appeal, had to determine. The High Court and this Court were clearly courts of "*competent jurisdiction*" to determine that as a preliminary issue arising in the section 11 application.

24. Next, Mr. Skoczylas argued that if the purpose of the principle in *Henderson v. Henderson* was to prevent one party "*hurting the other party*", then it existed to protect the Respondent and Notice Party, but, since they had in no way been prejudiced or disadvantaged by the failure to

raise objective bias on earlier occasions, they were not entitled to invoke the rule. In tandem he argued that the onus of showing abuse of the process rested with the Respondent and Notice Party. Relying on the *dictum* of Lord Bingham in *Johnson v. Gore Wood* he argued that it was not "*necessarily*" an abuse of process not to have raised the issue of objective bias at the appeal hearing, or in the Review Application.

25. Mr. Skoczylas submitted that the Review Application fell to be considered on a different basis, not on the basis of objective bias, and should not therefore be viewed as an occasion when the objective bias ought to have been raised/argued.

26. In response to the acquiescence/waiver argument, he referred the Court to the dissenting judgment of Kenny J. in *Corrigan v. Irish Land Commission*, where he stated, at p. 344: -

> "It was argued by counsel for the respondents that the appellant had waived the objection that the two commissioners who signed the certificate were adjudicating on the objection. I am convinced that we should not hold that there was a waiver. The basis of the rule that a person with prior knowledge of the facts should not sit to determine an objection is one based upon public policy and not upon the rights of the party. The Courts are concerned that their reputation for impartiality should be preserved and they are equally interested in ensuring that administrative tribunals of all types should observe the same standard. The matter was put concisely by Cave J. in *R. v. Fraser* [1893] 9 T.L.R. 613, 614: -
>
> > 'The question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?'
>
> The Courts should enforce these rules in their control of all proceedings before inferior courts and administrative tribunals. It is not competent for the parties to waive a rule of public policy."

Mr. Skoczylas submitted that the appellants could not have waived their right to assert objective bias, because that would be contrary to public policy.

27. In relation to whether he ought to have raised an objective bias when first objecting to Mr. Gallagher representing ILP, Mr. Skoczylas asserted that he did not have sufficient time or a proper opportunity to research or assert objective bias when the matter came on for hearing on 10 November 2020. He claimed that he was taken by surprise when Mr. Gallagher appeared in Court for the Notice Party, notwithstanding that written submissions on behalf of the Notice Party bearing his name had been filed in January 2020; Mr. Skoczylas point out that was before he was appointed Attorney General. Although submissions on his objection were put back until the end of Day 1, Mr. Skoczylas said this did not give him sufficient time to research the position of Attorney General and prepare a submission – either then or on Day 2 (it being recalled that Mr. Gallagher did not commence his substantive oral submission to the Court until Day 2).

28. Finally, in response to a question from the Court as to why objective bias was not raised in the Review Application, Mr. Skoczylas responded that it was because it was an application made under "*the specific jurisdiction*" (a reference to the *Greendale* jurisdiction) and –

> "… It was very clear to me that you could have chosen the path that you have chosen, i.e. you could have chosen not to engage with the subject matter on merits because you could have determined that you did not have jurisdiction… It was very clear to me that that was the path you could have taken and you, indeed, did take." (Transcript, p. 139).

By way of further response Mr. Skoczylas proceeded –

> "The question is not why I did not do that because that, in and of itself, is not determinative. The question is was there any abuse of process in my not doing that, and there wasn't because

there couldn't have been because, first of all, what I did was logical, as I just explained to you. Number 2, nothing would have changed. Abuse of process only results from actions where alternative actions would have had a different outcome. In that case, an alternative action wouldn't have had a different outcome. I say for the third time that that would have happened had I done what you just said, Judge, nothing would have changed. Nothing. You still would not have engaged with reliefs 1 and 2 of the *Greendale* motion and you still would have engaged with this relief, obviously in a separate process organising an *inter partes* process whereby reliefs 1 and 2 did not have *inter partes* process. so nothing would have changed." (Transcript, p. 139 line 28 – p. 130 line 16).

Discussion

29. The Court considers that the rule in *Henderson v. Henderson* applies in principle to circumstances that could potentially give rise to an allegation of objective bias, and where the party who might have relied on such circumstances fails, on one or more earlier opportunities in the same proceedings, to raise objective bias. The Court accepts that it is a rule of public interest to ensure the efficient conduct of litigation, but also accepts, as stated by Brooke L.J. in *Woodhouse v. Consigna*, that it is "*to protect the respondents to successive applications in such circumstances from oppression*."

30. In approaching its application to this motion, the Court is also mindful of the advice of Hardiman J. in *AA v. Medical Council* that the principle should not, in its nature, be applied in an automatic or unconsidered fashion, and that sympathetic consideration must be given to the position of an applicant who is exercising a right of access to the Courts.

31. It is also appropriate to state that the Court is cautious about applying the principle of waiver/estoppel in relation to raising a complaint of bias, as that principle is enunciated by Henchy J. in *Corrigan v. Irish Land Commission,* for a couple of reasons. Firstly, the context

there was Mr. Corrigan's objection to a provisional list for the compulsory acquisition of his land that was heard and disallowed by the same two lay commissioners who had certified that his land was required for the relief of congestion. Mr. Corrigan *had been represented by a solicitor and counsel* at the hearing, but no objection was then made to the membership of that Tribunal; rather it was only raised later in the High Court, which rejected it.

32. Secondly, and relatedly, *Corrigan v. Irish Land Commission* was considered by Fennelly J. in his judgment in *Kennedy v. Director of Public Prosecutions* [2012] IESC 34. Fennelly J. referred to the statement of principle by Henchy J. at p. 324 of his judgment in *Corrigan*, where Henchy J. stated: -

> "I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the Tribunal, he expressly or by implication acquiesces at the time and that member taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had."

Fennelly J. proceeded: -

> "[119] … In the particular case, Henchy J. held, at pp. 325 and 326, that any objection to the participation of a particular commissioner had been 'mainly waived by counsel for the appellant when they elected to accept the Tribunal as they found it composed on the day of the hearing'.
>
> [120] Griffin J., who agreed with Henchy J., cited authority to the effect that a waiver must be intentional and emphasised the need for knowledge of what was being waived. For my part, I would be slow to hold that counsel had knowingly waived a ground of objection

available to his or her client in the course of a hearing and without the opportunity for consultation. In *Corrigan* … Henchy J. went to great lengths to infer from the status of counsel and their advance knowledge of the composition and procedures of the Land Commission that they had knowingly and deliberately waived any objection by their acquiescence.

[121] The present case is, I think different, there can be no suggestion, nor has one been made, that counsel made the sort of calculated decision which arose in *Corrigan v Irish Land Commission*…"

33. By November 2020 Mr. Skoczylas had considerable experience as a lay litigant before the Irish Courts. However, he is not a barrister, and it would not be fair to compare him to a senior counsel and ascribe to him the sort of "*calculated decision*" made by Counsel in *Corrigan* in deciding not to raise an objection of objective bias before the Tribunal. This is particularly so when the Transcript from Day 1 of the substantive hearing is considered. At the commencement of the appeal hearing Mr. Skoczylas did raise complaint over Mr. Gallagher representing the Notice Party. His first mention of this appears at p. 10 of the Transcript, Day 1 where he stated –

"And, by the way, Mr. Gallagher is right now Attorney General, who is obviously an officer of the State. I reserve my position as to whether he can represent Notice Party in this case. *I will have to make enquiries on that point*, but I raise this point at the beginning so it is clear that I have my doubts as to whether he can represent in the circumstances the notice party."

34. The highlighted words show that what Mr. Skoczylas said then does support his claim that he was not properly prepared to make a reasoned objection – he wanted to make further enquiries on that point. The Court put it back for debate at the end of the day, in circumstances where Mr. Gallagher was not scheduled in any event to make substantive oral submissions until the

following morning. In his oral submissions at the end of Day 1 Mr. Gallagher submitted that as a practicing barrister he was entitled to appear before the Courts, and "*protect the interests of a client that I have represented continuously for nine years in excess of ten related cases begun by Mr. Skoczylas in relation to these Direction Orders*" (Transcript, Day 1 p. 225). He referred to a "*long-standing tradition going back to the 18th Century that just because somebody is appointed Attorney General does not mean they are not entitled to appear in practice before the Courts*", noting that it is done from time to time. Noting that the State still owned approximately 74.9% of the shareholding in the Notice Party, he observed that the State's interests were very much involved in the outcome of the proceedings and were aligned with those of the Notice Party.

35. Mr. Skoczylas had an opportunity to reply. He commenced by saying "*I wasn't making per se any application*" (Transcript, p. 228), but was pointing out "*an abuse of process that is being perpetrated by the State*". He submitted that the Notice Party was joined to protect its interests and make arguments that the Respondent Minister might not otherwise make – and he submitted that Mr. Gallagher was now resiling from this position and "*aligning himself fully with the State confirming that he is indeed representing the State, he is Attorney General of Ireland, he is manifestly abusing the process, turning these proceedings into a travesty of justice in my respectful submission, this Court must not allow it because it will be a cloud hanging over this judgment*." (p. 228). Mr. Skoczylas confirmed to the Court on that occasion that he had received the Notice Party's written submissions prepared by Mr. Gallagher before he became Attorney General, and reiterated that "*he is abusing the process by aligning the interests of the State with the interests of the company by abusing his own position as Attorney General to support the State in representing the State owned company*" (Transcript, p. 229). He stated: "*The court should rule on it because we will obviously take action upon it*" (Transcript, p. 229).

36. The Court rose and shortly afterwards ruled on the matter – see pages 230 – 232 of the Transcript. The primary finding was that the Court "*has no function in relation to the representation of the parties. It is a matter for the party as to who it instructs as its solicitors and its counsel and it is not a matter for the court and certainly not a matter for another party*." The Court also noted that "*this is not a case where Mr. Gallagher is representing the State. He is representing a Notice Party. In no terms could it be suggested that this could be an abuse of process. It is merely suggested by Mr. Skoczylas that this may be a general abuse*." (p. 231). The Court also held that –

> "This is a case too where it must be emphasised that there is no suggestion that there could be any conflict of interest, none is suggested by Mr. Skoczylas and there can't be any such suggestion."

The Court therefore rejected the suggestion of abuse of the process, or that Mr. Gallagher could not represent the Notice Party. Mr. Skoczylas responded that he was "*very much making the suggestion that there is a conflict of interest*" (p. 232). However, he had not argued that, or certainly not in any coherent manner.

37. What is clear is that Mr. Skoczylas did not bring forward any allegation of objective bias on Day 1 of the appeal hearing. Insofar as he made any reference to conflict of interest it seems to have been more of a general comment on an Attorney General continuing to act in court on instructions from a private client, ILP, when a Minister was also a party and the interests of the Minister and ILP were aligned. He did not point up any *conflict* of interest as such between Respondent and Notice Party, which in any case would have been a matter between them, and not one that could trouble the Court or one that should have concerned the applicants. He may have been referring to a conflict between the original reason for allowing ILP/PTSB plc to be joined as a Notice Party and the indication now given by Mr. Gallagher that the interests of the

Notice Party were aligned with the State. Two things however are clear: Mr. Skoczylas did not raise objective bias on Day 1. Nor, following the ruling against his objection to Mr. Gallagher representing the Notice Party, did Mr. Skoczylas raise objective bias on Day 2 as he might have done before Mr. Gallagher commenced his substantive submissions.

38. On balance the Court is not satisfied in all the circumstances that Mr. Skoczylas or his co-applicants could fairly be regarded as having waived an opportunity to raise objective bias at the appeal hearing, on Day 1 or Day 2, or that they could thereby be said to have acquiesced in this panel hearing and in due course determining the appeal. There are a number of reasons for this. Firstly, the Court accepts that Mr. Skoczylas may have been surprised when Mr. Gallagher appeared at the appeal hearing on behalf of the Notice Party. Secondly, neither Mr. Skoczylas nor his co-applicants were represented by solicitors or counsel at the appeal hearing. This differentiates the case from *Corrigan* where Mr. Corrigan had the benefit of a solicitor and counsel who made a deliberate choice not to raise objection on grounds of bias in respect of the two lay commissioners. Thirdly, the Court accepts that Mr. Skoczylas and his co-applicants did not have an opportunity in advance of submissions on the issue at the end of Day 1 of the appeal hearing to undertake research in relation to the role of the Attorney General, and to make more detailed submissions. It might be said that Mr. Skoczylas and his co-applicants had an opportunity to undertake research and make submissions on Day 2, and raise objective bias, but the Court is mindful that due to the Covid 19 pandemic the appellants attended remotely on 10 and 11 November 2020, and that Mr. Skoczylas was outside the jurisdiction, and the Court is of the view that it would be unrealistic and unreasonable to expect a renewed application and argument on objective bias to have proceeded on Day 2.

39. However, in light of subsequent events, including the Review Application and the present motion, the Court has concerns that, following the appeal hearing, none of the applicants saw

fit to bring an application before the Court asking it to disqualify itself from determining the appeal. This concern arises in particular having regard to the fact that in October 2001 the articles upon which Mr. Skoczylas relies and which are exhibited in his grounding affidavit were published in the Irish Times and Independent.ie respectively.

40. This was not an argument pushed to any degree by counsel for the Respondent or Notice Party. There does not appear to be any authority on the question of whether, in the interval between hearing and judgment, a party who comes into possession of information that suggests to them that the judge/judges were objectively biased or should have recused themselves, has an obligation to make an application *forthwith* based on alleged objective bias, and without awaiting the preparation and delivery of judgment. In principle, and given the importance of judicial impartiality and the seriousness of allegations of bias (subjective or objective), it is hard to see why a person coming to possession of such information should be permitted to "*wait and see*" what decision is made before showing their hand and bringing an appropriate application. While the Court has serious concerns, it considers that this point should be left for fuller argument in a future case.

41. Turning next to the Review Application, the Court has come to the view that it was incumbent on the applicants to have raised objective bias in that application, and that not to do so was an abuse of process.

42. In the December 2022 Ruling this Court set out in some detail the principles relating to the review of judgments under what is known as the *Greendale* jurisdiction. It is a jurisdiction invoked in only the most exceptional circumstances where, as Clarke C.J. recently stated in *Student Transport Scheme Limited v. The Minister for Education and Skills and Bus Eireann* [2021] IESC 35: –

"… There has been a clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, in the manner in which the process leading to the determination in question was conducted."

Contrary to what was argued by Mr. Skoczylas, the *Greendale* jurisdiction can be and has been invoked precisely on the basis of allegations of objective bias. In *Talbot v. McCann Fitzgerald & Ors* [2009] IESC 25, the plaintiff/appellant brought a motion seeking to set aside a final judgment and order of the Supreme Court on the basis of alleged bias of judges in various jurisdictions in which decisions went against him. Denham J. (as she then was) stated: -

"9. The circumstances must be such as to justify disregarding the primary principle that the order is final. in **Bula Ltd v. Tara Mines Ltd (No. 6)** [2000] 4 I.R. 412 the applicants initially appealed against the judgment and order of the High Court (Lynch J.) of the 6th February, 1997. The appeal was heard, determined, and dismissed by the Supreme Court (Hamilton C.J., Barrington and Keane JJ.). Subsequently the applicants applied seeking to have the judgment of the Supreme Court set aside on the grounds of objective bias. The applicants alleged that Barrington J. and Keane J., when practicing at the Bar, had had links with the respondents which were of such a character as to give rise to a perception of bias. Barrington J. had acted for the fifteenth respondent in two sets of proceedings, relating to the Tara respondents in one case and the applicants in another; had advised on legislative reform in the area of mineral mining; had acted against Tara in a case; and had prepared two sets of advices for the first named respondent. Keane C.J. had advised the first named respondent as to an exempted development under the planning legislation and had undertaken to appear for the first named respondent in an anticipated hearing before An Bord Pleanála, which in the end he did not do so as he was appointed to the High Court. The

applicants contended that objective bias arose from these connections between these judges and the respondents.

The Supreme Court held that it had an inherent jurisdiction to protect constitutional rights and justice. This jurisdiction may arise on an application relating to a final judgment of the Supreme Court, but only in rare and exceptional cases would it be invoked to protect a constitutional right or justice.

This Court exercised that jurisdiction in **Bula Ltd v. Tara Mines Ltd No. 6** and considered the application alleging perceived bias. It held that the test was whether an ordinary reasonable member of the public would have a reasonable apprehension that an appellant would not have a fair hearing from an impartial judge. It was pointed out that barristers were independent and did not become espoused to a litigant's ambitions in providing the litigant with legal services. The reasonable person would be aware of that. A prior relationship of legal advisor and client did not generally disqualify the former advisor on becoming a member of court sitting in proceedings to which the former client is a party. There must be additional factors establishing a cogent and rational link between the previous association and its capacity to influence the decision to be made in the particular case. A reasonable apprehension would arise where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court. In that case I referred to the fact that there were seventeen alleged links between the respondents and the two judges, and that it was alleged that there was a reasonable apprehension of bias because of the links alleged. I found that none of the seventeen alleged links raised an issue so as to ground such an application. The Court dismissed the application."

43. Denham J. considered Mr. Talbot's various allegations of bias against judges, and "*activities of legal representatives contrary to law*", none of which she considered warranted reopening a decision of the Supreme Court which was final and conclusive.

44. It therefore well established that the *Greendale* jurisdiction can be invoked where there is a sustainable allegation of objective bias. The Court is satisfied that the applicants could and should (if they wished to rely on it) have a raised objective bias front and centre in their Review Application.

45. This is all the more so because the applicants put forward in the affidavit sworn by Mr. Skoczylas to ground the Review Application essentially the same facts and arguments in relation to the Attorney General as now form the basis of the present motion. The matters averred to by Mr. Skoczylas on pages 10 – 16 inclusive of the affidavit which he swore on 24 November 2022 are repeated almost *verbatim* in the affidavit which he swore on 22 December 2022 in support of the present application, at pages 4 - 9 – and of course the December 2022 Affidavit was sworn after this Court had delivered its December 2022 Ruling. Both affidavits exhibit the same newspaper articles from October 2021 upon which the applicants place reliance. It is quite clear that precisely the same factual material that is set out in the Review Application is again relied upon by the applicants in the present application to support the contention of objective bias. Thus for example, in his earlier affidavit at para. 19B (on p. 13), Mr. Skoczylas avers –

> "There is thus an obvious conflict of interest when it comes to the Attorney General representing in court ILP against the ILPGH shareholders in his alleged "personal capacity" while at the same time representing in his official capacity the Minister. Attorney General Gallagher was in this case making submissions before judges whose careers might depend on his subsequent decisions."

Precisely the same wording appears in para. 14B on p. 7 of the affidavit sworn by Mr. Skoczylas to ground the present motion.

46. In fact, while the Notice of Motion in the Review Application made no mention of objective bias, and that was not the expressed basis for seeking a review, bias was mentioned by Mr. Skoczylas in para. 24 of his grounding affidavit sworn on 24 November 2022: -

> "24. Having regard to the long-standing jurisprudence recognising the "beneficial ownership", it is possible – and indeed, given the facts, likely – that the Court is plainly biased against the appellants, despite the glaring facts and unequivocal provisions of the law. However, even if a bias of this Court existed and could be shown to be self-evident to any objective informed outside observer, it would be merely a contributory factor as far as this motion is concerned (cf. *Nash*, O'Donnell J., para. 10). This motion is driven primarily by more fundamental matters – see para. 6 – 8, elucidated in paragraphs 10-23 above herein."

This is important because it shows that the applicants, in preparing and lodging their review application, were conscious of the allegation that they wished to make in relation to bias, and raised it as merely as "*a contributory factor*".

47. In the December 2022 Ruling this Court took into account all of the factual circumstances and arguments raised by the applicants in Mr. Skoczylas' grounding affidavit, but did so in the context of the application to set aside/rescind the Principal Judgment. If the appellants considered there was objective bias then that was the occasion when they should have raised it front and centre in support of their contention that the Principal Judgment should be set aside. The attempt to raise it now, on foot of a separate notice of motion, and after this Court has already declined to set aside or revisit the Principal Judgment in a considered 37 page Ruling, is an abuse of the process.

48. It is also significant that in the present motion the applicants are not merely seeking an order that the members of the Court recuse themselves from further adjudication in these proceedings. That is solely sought at relief 3 in the Notice of Motion. The first relief sought is "*a declaration that the members of the court… have exhibited objective bias while adjudicating upon these proceedings*". As a second relief they seek an order that "*that said objective bias ought to be remedied by the court in accordance with the applicable established case-law/jurisprudence, in the manner that ensures a fair conduct of these proceedings and a just adjudication upon these proceedings*". It is plain from this that what the applicants seek is a declaration of objective bias which they will then use as a springboard to seek to set aside the Principal Judgment. There is thus an additional element to their application. It is a collateral attack on the Principal Judgment. This renders the present motion more obviously abusive, and not simply a matter that could have been raised at an earlier stage in the proceedings. Leaving aside any argument that they might have been raised even earlier, the allegations of objective bias could (and should, if they were to be pursued at all) have been raised at the Review Application, when the appellants sought to set aside the Principal Judgment; they cannot now be brought forward as a basis for vacating the Principal Judgment.

49. At paragraph 13 of his grounding affidavit for the present motion Mr. Skoczylas avers –

> "13. The claim of objective bias, the subject of the distinct motion grounded on this Affidavit – which is subject to jurisdiction distinct from the *Greendale* jurisdiction – has not been addressed by the Court, nor could it be addressed by the Court as part of its adjudication, outside of an *inter partes* process, on said unique *Greendale* – type reliefs."

It is apparent from this that Mr. Skoczylas/the applicants deliberately did not advance an objective bias point in the Review Application. This was confirmed by the answer that Mr. Skoczylas gave to the Court when asked why objective bias was not used in the *Greendale*

application as a basis upon which to ask the Court to review and set aside its judgment. The full response has been quoted earlier but in essence it was a deliberate choice, which Mr. Skoczylas claimed was logical, and he asserted that if they had brought forward objective bias at that stage "*nothing would have changed. Nothing. You still would have not engaged…*" with the reliefs claimed at 1 and 2 of the Review Application i.e. a set aside of the Principal Judgment or correction of errors.

50. The Court is satisfied that this demonstrates that the present motion is a clear abuse of the process. The applicants could have brought their objective bias claim before the Court on the Review Application, based on the same facts, but chose not to do so. In doing so now they make a collateral attack on the Principal Judgment which this Court has already decided, in the December 2022 Ruling, should not be revisited. The public interest in the efficient conduct of litigation, and in the efficient use of court time, requires that the appellants should have brought forward their objective bias allegations at an earlier point in time, and to do so now is an abuse of process.

51. It is, in the Court's view, also in the interests of justice that this application be dismissed in order to protect the Respondent and Notice Party from successive applications which are oppressive in nature. While Mr. Skoczylas tried to argue that the Respondent and Notice Party were not "*prejudiced*" by it being raised at this point in time, rather that in the Review Application, we cannot agree. The Respondent and Notice Party attended and made submissions at the substantive hearing, and they were successful in the determination in the Principal Judgment. This is now the second application in which the applicants are attempting to have that determination set aside. In the circumstances it is a form of oppression for the Respondent and Notice Party to have to consider and respond to an application that could and should have been brought at an earlier point in time, and to have to engage their legal teams for

that purpose. It should also be recalled that the Respondent and Notice Party felt compelled to respond to the Review Application, and a replying affidavit was filed, even though the Court did not need to consider it or require reply submissions because the threshold for a *Greendale* application was not met.

52. Another contention made by Mr. Skoczylas was that the Review Application was not an *inter partes* process, and therefore the rule in *Henderson v. Henderson* should not apply This is also rejected. The Review Application was commenced by Notice of Motion served on the Respondent and Notice Party, and the grounding affidavit and exhibits were a mixture of fact and legal argument; it was only because the application did not meet the high threshold for a *Greendale* application that no hearing was required and the Respondent and Notice Party were not called upon to make submissions – but it had the potential to lead to an *inter partes* engagement and a hearing.

53. Accordingly the Court will order that the application in the present motion be dismissed as being an abuse of the process.

54. In light of this determination it is not strictly necessary for the Court to proceed to consider the test for objective bias, and whether the allegations of objective bias are made out by the applicants. Nevertheless, lest the Court has fallen into error in dismissing this application as an abuse of the process, the Court has considered the substance of the application and what follows is its determination of that issue.

Objective bias

55. There was no real dispute as to the principles of domestic law in relation to objective bias, and the principles governing the recusal of judges (which is forward looking but essentially the other side of the same coin). The test for objective bias was recently fully explored in the judgment of Dunne J. in the Supreme Court in *O'Driscoll (a minor) v. Hurley* [2016] IESC 32.

In that case, the Applicant applied to have one of the judges in the Court of Appeal recuse herself on grounds of objective bias. The judge had chaired and addressed a conference organised by the firm of solicitors on record for the State Claims Agency (the agency which was defending the appeal). On the firm's website, there was a photograph of the judge sitting under the solicitors' name and logo as a member of the firm was delivering a speech. There was also a photograph of the judge with the head of the State Claims Agency.

56. Dunne J considered the authorities, including *O'Callaghan v. Mahon* [2008] 2 I.R. 514. In that case, Fennelly J. had held as follows:

> "(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 show prejudice, hostility, or dislike towards one party or his witnesses."

57. Dunne J. cited with approval the test set out by Denham C.J. in *Goode Concrete v. CRH Plc & Ors* [2015] 2 ILRM 289 (at paragraph 54) as follows:

> "…whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

58. Dunne J. noted that the tradition of recusal in the Irish courts is reflected in the *Bangalore Principles of Judicial Conduct* (United Nations 2002, adopted in Geneva 2003)[5], in which the formulation "*may appear to a reasonable observer*" was agreed upon on the basis that "*a reasonable observer*" would be both fair-minded and informed.

59. Dunne J. quotes the declaration made by a judge on appointment to office in accordance with Article 34.6.1 of the Constitution:

> "In the presence of Almighty God, I…do solemnly and sincerely declare that I will duly and faithfully and to the best of my knowledge and power execute the office of [judicial position] without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me."

She then states –

> "The importance of that solemn declaration and undertaking cannot be overstated. It is in compliance with the declaration that judges will, when the need arises, recuse themselves from hearing particular cases. Thus to give a very obvious example a judge will recuse him or herself from hearing a case in which a close relative is directly involved as plaintiff or defendant.

60. In para. 46 Dunne J. quoted Denham J.'s words in *Bula Ltd v. Tara Mines Ltd (No.6)* [2000] 4 I.R. 412 at p. 449:

> "A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. The test is objective. This has been analysed by the Constitutional Court of South African : *President*

[5] The Bangalore Principles are cited and relied upon by Mr. Skoczylas in his written submissions.

of the Republic of South Africa v. South African Rugby Football Union 1999 (4) S.A. 147 as follows:

> "…the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial."

19. Dunne J. observed:

> "It would be difficult to improve on the observations made in those passages to the responsibility of a judge in approaching an application for recusal. After all, the first duty of the judge is to sit and hear cases. The administration of justice would grind to a halt if judges regularly recused themselves by responding in an over scrupulous way to an invitation to recuse. It is important to bear in mind that the test involved is an objective test and that the onus of establishing the grounds for recusal rest upon the applicant."

61. While accepting that *O'Driscoll* restates the domestic law on objective bias and recusal, Mr. Skoczylas in his oral submissions urged on the Court what he contended was a somewhat different and more exacting test adopted by the ECHR when considering cases where objective bias is claimed to give rise to breach of Article 6.1 of the European Convention on Human Rights, which confers the right to a fair hearing "*by an independent and impartial tribunal established by law*". He raised this initially in course of the preliminary argument, and the authorities that he opened are addressed in the Preliminary Ruling at paras. 7 – 12. We concluded then:

> "11. Mr. Skoczylas emphasises that, under the ECHR wording, objective bias entitles the Court to give greater consideration to the subjective view of the litigant fearing bias.
>
> 12. The Court does not accept that there is any real difference in the test. The ECHR test is a test of objective bias and, therefore, requires objective justification, and the words "legitimate reason to fear" lack of partiality import the idea that what the Court does **not** have in mind is a subjective concern over lack of partiality that is not borne out by objective facts."

62. In the course of his later argument Mr. Skoczylas opened further passages from one of the cases he had opened earlier, *Cosmos Maritime Trading and Shipping Agency v. Ukraine* (ECHR, 27 June 2019) where the Court in para. 71 elaborated on the "*objective test*":

> "71. …The objective test mostly concerns hierarchical or other links between judges and other protagonists in the proceedings. In this connection even appearances may be of a certain importance or, in the words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public...
>
> 72. The concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination (see *Ramos Nunes d Carvalho,* cited above, § 150).

73….

74….

75. It remains therefore to ascertain whether the judges and the courts met the test of objective impartiality."

63. It must be said that "*hierarchical link*", and "*links between judges and other protagonists in the proceedings*", are undoubtedly the sort of connections that may give rise to a reasonable apprehension of a risk of impartiality under Irish domestic law. The sentiment that "*justice must not only be done, it must also be seen to be done*" underpins a fundamental tenet of objective bias in Irish law, namely that even if there is no actual bias, the reasonable perception of such by the fair-minded observer in possession of all relevant facts is enough to establish objective bias.

64. Mr. Skoczylas also relied on the earlier decision in *Micallef v. Malta* (ECHR 15 October 2009). Article 734 of the Maltese Civil Code provided that a judge "*may*" be challenged or abstain from sitting in a cause where he or his spouse was directly or indirectly interested, or an advocate in the case was a son, daughter, spouse or ascendent of the judge. The Chief Justice of Malta had presided over a Court of Appeal in a matter[6] where one party, Mr. F, was represented by a lawyer who was a nephew of the Chief Justice; further, and at first instance the Chief Justice's brother had represented Mr. F. The Grand Chamber said:

"96. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important *but not decisive*. What is decisive is whether this fear can be held to

[6] The matter originated in 1985 when a Mr. F obtained an injunction restraining Mrs. Micallef from hanging out clothes to dry over the courtyard of his apartment.

be objectively justified (see Wettstein, cited above, § 44, and Ferrantelli and Santangelo v. Italy, 7 August 1996, § 58, Reports 1996-III).

97. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see court martial cases, for example, Miller and Others v. the United Kingdom, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004; see also cases regarding the dual role of a judge, for example, Mežnarić v. Croatia, no. 71615/01, 15 July 2005, § 36, and Wettstein, cited above, § 47, where the lawyer representing the applicant's opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see Kyprianou, cited above, § 121). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see Pullar, cited above, § 38)." [emphasis added].

At para. 100 the Court observed:

"100. …that Maltese law as it stood at the time of the present case was deficient on two levels. Firstly, there was no automatic obligation for a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, at the time of the present case the law did not recognise as problematic – and therefore as a ground of challenge – a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Grand Chamber, like the Chamber, considers that the law itself did not give adequate guarantees of subjective and objective impartiality."

65. The decision in *Micallef* must, as with all these cases, be viewed on its own facts, and be read in the context of Maltese law as it stood in 1985. On its facts there were familial links between the presiding judge and one party's lawyers. It is undoubtedly the case that if the same facts

arose in this jurisdiction, it would lead to recusal on grounds of objective bias under Irish domestic law principles[7].

66. Mr. Skoczylas also relied on extracts from the ECHR decision in *Agrokompleks v. Ukraine* [2011], one of a number of cases concerning the Ukraine courts. This was a decision which involved protracted claims by the applicant against Lysnychansk Oil Refinery. In the course of the proceedings there was direct interference with the Higher Arbitration Court (HAC) by prominent politicians including the Prime Minister, and also from within the Court when HAC's President gave direct instructions to two fellow judges of the Court. This prompted the ECHR to state:

> "129. The Court notes that – as confirmed by documentary evidence – various State authorities did indeed intervene in the judicial proceedings in question on a number of occasions. Moreover, those interventions took place in an open and persistent manner and were often expressly solicited by the applicant company's adversary."

The Court held at para. 132 that its task was not to decide the soundness of the relevant constitutional arrangements in Ukraine, but rather to decide whether the domestic courts "*had the requisite "appearance" of independence, or the requisite "objective" impartiality*". It observed:

> "133. The Court has already condemned, in the strongest terms, attempts by non-judicial authorities to intervene in court proceedings, considering them to be *ipso facto* incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6.1 of the Convention….".

67. It is no surprise that the ECHR found, *inter alia*, that Article 6.1 was breached by the State authorities' interference and failure to respect the authority of the courts. It also unsurprising

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[7] See for example *O'Reilly v. Cassidy (No.2)* [1995] ILRM 311 where an order of *certiorari* was granted in circumstances where the trial judge was the father of counsel for one of the parties, and the relationship between counsel and the judge became entangled with other issues.

that the Court held that the influence brought to bear by a judicial superior was contrary to the principles of judicial independence and impartiality which "*as viewed from an objective perspective, demand that individual judges be free from undue influence – not only from outside the judiciary, but also from within.*" (para. 137).

68. The circumstances that gave rise to that decision would also demonstrate to any objective observer clear attempts by the executive arm of government to interfere with the administration of justice. As such they are far removed from the present case and do not assist the applicants. The present application does not involve any evidence of outside political interference, nor any attempt at interference from a judicial superior.

69. Whilst we have no statutory provision that mandates that a judge withdraw in any defined circumstances, the advice set out in the *Bangalore Principles* relating to "*Value 2 Impartiality*" applies to Irish judges[8]. In particular Irish judges will observe the advice on disqualification given in Value 2.5:

> "2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
>
> (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or

[8] The Bangalore Principles, which are relied on by Mr. Skoczylas in his written submissions, are highly respected international principles that underscore the *Guideline for Judges Conduct and Ethics* adopted unanimously by the Irish judiciary voting under the umbrella of the Irish Judicial Council in 2022. In his forward to the Guidelines Chief Justice O'Donnell states:

> "The Bangalore Principles state standards which the judiciary and people of this country have long expected of our judges and which form the basis of the draft guidelines…"

(c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

70. Moreover the test of objective bias is a well-established and well-understood part of judge made law, and the awareness of judges that justice must be administered without fear or favour – and the declaration that they all make to that effect before taking up office - underscores the application of the test.

71. The further authorities opened by Mr. Skoczylas do not lead us to conclude, at least in this case, that the domestic law principles governing objective bias are materially different to those adopted in the "*objective test*" as applied by the ECHR in Article 6.1 cases, and we have no reason to depart from the views we expressed in the Preliminary Ruling.

72. It should also be said that the Court has no reason to doubt that *subjectively* Mr. Skoczylas holds a genuine and deeply held apprehension of bias. Indeed the Court could not but note this because, quite apart from his written word, the depth of his belief is very evident from his choice of language and the committed way in which he delivers his oral submissions and responds in Court. But even basing this ruling on the "*objective test*" as adopted by the ECHR that would still require this Court to examine whether there is a "*legitimate reason to fear that a particular body lacks impartiality*", and it must be accepted, *per* the ECHR in *Cosmos* and *Toziczka*, that:-

"…the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified."

Discussion and decision

73. The onus is on the applicants to show objective bias. This is not a case where there is any suggestion of subjective bias. The starting point is that the parties are entitled to assume that there are no grounds for reasonable apprehension of bias in the eyes of a reasonable person.

74. The applicants' core argument is that this panel should not have "*permitted*" Mr. Gallagher to advocate for the Notice Party, and that, having ruled against Mr. Skoczylas' objection at the substantive hearing on Day 1, the panel must thereafter be regarded as objectively biased.

75. Accordingly in considering the primary relief sought in the Notice of Motion - a declaration of objective bias – it is appropriate to apply the test by reference to the reasonable or fair minded observer in possession of all relevant information at the time the Court took the decision to reject Mr. Skoczylas' objection.

76. Before doing so it is helpful to identify the independent role and professional duties and obligations of a barrister, because in our view these were not properly understood by the applicants. These were described by Denham J. in *Bula (no.6)* at page 443:

> "A barrister in his work or her work is an independent sole practitioner. He or she is a legal advisor and advocate. The professional services rendered by the barrister do not establish an affiliation to the client or a sharing of kindred causes and objectives, as submitted on behalf of the applicants. The work is as a professional to give legal advice and/or to be advocate. The work does not espouse him or her to the litigant's cause, no matter how controversial, emotional or hostile the litigation; nor does he or she espouse the ambitions of the litigant, as submitted by the applicants.
>
> The work done by barristers is of the nature of a professional service. By advising or advocating for a client, a barrister does not become 'associated' with the client's cause. Barristers operate what is colloquially called "the cab rank" principle. Having completed a case they move on to the next client – who may have been on an opposing side in the previous

case. … Indeed, a person who has been on the receiving end of a barrister's skill (whether it be by way of advices or cross-examination or whatever) often decides that the next time he or she will need counsel he or she will ask his or her solicitor to seek out that particular barrister. Choice of counsel is an important matter.

The barrister is a source of legal advices and services and is approached, not by clients, but by solicitors for professional expertise. In giving the legal expertise barristers do not become 'associated' or establish 'a prior special relationship' with a client."

77. In *Bula* the Supreme Court came to the conclusion that a prior relationship of legal advisor and client did not generally disqualify a judge from hearing a case where the judge had formerly provided legal advice or legal representation to a party in relation to an issue or subject which had no connection with the subject matter of the proceedings in question. At p. 445 of her judgment Denham J. expressly approved the following passage from the judgment of Merkel J. in *Aussie Airlines Pty Limited v. Australian Airlines Pty Limited & Ors.* [1996] 135 ALR 753, where he said: -

"55. In my view, as with the cases considering personal, family and financial interests the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular, they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In

the absence of such a link it is difficult to see how the test for disqualification as stated in *Livesey* can be satisfied."

Denham J. went on to state, at p. 446 that –

"… The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant."

78. Counsel for the Notice Party also helpfully referred the Court to the decision of McDonald J. in *Allied Irish Banks & Anor. V. McQuaid, Gilroy & Ors.* [2022] IEHC 224. McDonald J. referred extensively to *Bula (No. 6),* but also to the decision of this Court in *Fitzpatrick v. Behan* [2020] IECA 324. In that case the applicant was dissatisfied with a decision made by the Taxing Master on the taxation of costs, and sought to judicially review the decision on grounds of objective bias due to an alleged pecuniary interest that the Taxing Master held in the business name of Behan & Associates and also on the basis of his previous working relationship with that firm. The applicant failed in the High Court and his appeal was dismissed. In para. 67 of the judgment of the Court, Donnelly J. made it clear that there must be a real, and not a hypothetical or speculative link between the association or relationship under consideration and the apprehension of bias alleged. This led McDonald J. to state, at para. 26:-

"26. Bearing the case law discussed above in mind, I can see no plausible basis to suggest that a reasonable apprehension of bias could be said to arise from the fact that a solicitor and barrister appearing for a party in court proceedings had previously acted for the spouse of the judge hearing those proceedings. As the decisions of the Supreme Court and Court of Appeal make clear, a previous professional relationship between the judge and one of the parties is not, of itself, sufficient to give rise to a reasonable apprehension of bias. … A person seeking to question the impartiality of the judge must go further and show that some specific aspect of that relationship has the capacity to influence the decision of the judge. That requirement will only be satisfied where there is a cogent and rational basis to believe

that the particular circumstances of the relationship are such as to lead a reasonable person to be concerned that the decision of the judge might be influenced by it."

79. To this should be added that under their professional Code of Conduct all barristers owe duties to the court of respect and courtesy. They must not deceive or knowingly mislead the Court, or assert their personal opinion on the facts or law, or act as "*mere spokesperson*" for the client or instructing solicitor; they must exercise independent judgment, and must advise the Court of any relevant authority that may bear on a point of law, whether it is for or against their contention. They are not permitted to habitually practice in any Court where their parent, spouse or near blood relative is a judge; they must not discuss the case in private with the trial judge(s) (save where necessary and with the consent of the judge(s) and in the presence of solicitor or counsel for the opposing parties), and must not approach a judge to discuss any matter then pending hearing.

80. The Court's view is that a reasonable and well-informed observer would have been fully aware of the independent role and professional duties of a barrister as explained by Denham J. and set out in their Code of Conduct.

81. In addition the Court is of the view that the reasonable and well-informed observer would –

- have been aware of the constitutional role of the Attorney General. Under Article 30.1 of the Constitution he/she is –

  "…the advisor of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law."

- Have been aware that under Article 30.4 "*The Attorney General shall not be a member of Government*" – and hence does not take part in the exercise of the executive power of the State (reserved to Government under Article 28), and does not have a *vote* at cabinet.

Having said this the observer would be aware that the Attorney General attends cabinet meetings and his/her advice could influence the appointment of judges.

- Have been aware that, while the Attorney General sits on the Judicial Appointments Advisory Board, which Board receives and considers applications for appointment to judicial office and recommends names to Government, it is the Government that decides on whom to nominate for appointment to judicial office by the President.
- Have been aware that no law prohibits an Attorney General from maintaining a private practice as a barrister while still in office.
- Have been aware that previous Attorneys General have maintained some private practice, and have also appeared in court advocating on behalf the State in their capacity as Attorney General.
- Have been aware that an Attorney General must fulfil the obligations of his/her office, and avoid any conflicts of interest that continuing in private practice might present.
- Have been aware that Mr. Gallagher had represented ILP/the Notice Party in court on numerous occasions over an extended period of years, including opposing Mr. Skoczylas in the High Court in these and related proceedings and on many other occasions.

82. The informed observer would also have been aware that in many cases, for example where the Government or State sues or is sued, or there are challenges to the constitutionality of legislation, or disputes over public rights of way, the Attorney General will be required to be named as a party, or Notice Party, to proceedings. In the Court's view this is of particular significance because, if the applicants were to succeed in this application, it would at least cast doubt on the ability of any sitting judge or panel of judges to adjudicate in the many cases where the Attorney General or a minister is named as a party. Mr. Skoczylas was at pains to say that this was not the applicants' intention, but he cannot avoid the implication that if the applicants' core argument is to succeed it raises this broader issue, and an argument that if the Attorney

General cannot advocate as a barrister for a client (including the State or a State party) then *a fortiori* no judge can hear a case in which the Attorney General is a party.

83. In his written and oral submissions Mr. Skoczylas repeatedly asserted that Mr. Gallagher "*wore two hats*" and acted in his "*official capacity*" as Attorney General for the Respondent as well as the Notice Party, and he argued that this gave rise to a conflict of interest. This submission is deeply flawed and based on a false premise; it confuses Mr. Gallagher's status as Attorney General with that of the party (ILP) whom he actually represented in court. As the reasonable observer would have been aware because it is a matter of court record, Mr. Gallagher appeared (with Ms. Caren Geoghegan B.L.) for the Notice Party, instructed by Bloom solicitors, at the substantive hearing. He did not appear in his official capacity. This is not merely a matter of form – it is central, because it is *qua* a barrister that Mr. Gallagher owes duties to the Court, to his instructing solicitors, and to the party he represents. The Respondent had different counsel, Mr. Eoin McCullough S.C. and Ms. Ailbhe O'Neill B.L., instructed by solicitors Arthur Cox. Accordingly Mr. Gallagher did not advocate on behalf of the Respondent, and the Court did not perceive him as doing so; he only represented the Notice Party. The fact that the interests of the Respondent and the Notice Party were aligned (and not, as Mr. Skoczylas appeared at times to suggest, in "*conflict*"), or that submissions made on behalf of the Notice Party overlapped with submission made on behalf of the Respondent, does not alter this.

84. To this should be added a number of observations. Firstly, the Court has no function in relation to the regulation of the barristers' profession. That is a matter for the Legal Services Regulatory Authority (established under the Legal Services Regulation Act, 2015) and the Bar Council of Ireland which, in addition to the Code of Conduct to which reference has been made, has a Disciplinary Code.

85. Secondly, as we stated in the December 2022 Ruling, it is a matter for the Oireachtas to regulate the Office of the Attorney General through legislation, and the primary legislative provision is

s.6 of the Ministers and Secretaries Act, 1924 (as amended); it is not a matter for the courts. Equally, if the Civil Service Code of Standards and Behaviour applies to the office of the Attorney General – and it is not clear that it does, and no submissions were directed to this point – it is quite clear that the Court has no role in the policing of that Code.

86. Having regard to the foregoing, as a general proposition we consider that the action of an Attorney General in representing as a barrister a private client at a public court hearing, in circumstances where the same rules of engagement and professional code of conduct apply to him/her as to any other counsel, cannot, without more, be categorised as "*interference*" with the judicial process, or as having any effect on the independence or impartiality or the judges concerned – whether this is viewed under the domestic law test of objective bias, or under the ECHR Article 6.1 "*objective test*".

87. Moreover we cannot see any "*cogent or rational link*" between the Attorney General of the day representing a party before the Court, and the capacity of that representation of itself to create a judicial bias in favour of that party, when the Attorney General in conducting the case owes the same duties to his client and solicitor and to the Court as any other barrister. We therefore do not accept the argument that the "*weight of office*" of itself is sufficient to establish objective bias. The subjective view of the applicants to the contrary is hypothetical and unrealistic, and their fears are not objectively justified.

88. It is also notable that the applicants did not adduce any authority for the proposition that while Mr. Gallagher was Attorney General he could not, in law, continue to represent the Notice Party.

89. The articles exhibited by Mr. Skoczylas are relied on by the applicants as representative of the apprehensions of the reasonable and well-informed observer. In the courts view this is problematic as they are articles by political commentators, and it is apparent from reading them that both authors take a political stance in relation to Mr. Gallagher's continued involvement in

private practice after being appointed Attorney General. Indeed Mr. Shatter goes so far as to include a section setting out his own *"declaration of interests*" detailing Mr. Gallagher's particular involvement as Attorney General with "*the critical Guerin Report which resulted in my forced resignation from Government*"[9]. The political and partisan nature of the second article is apparent from its title, along with statements such as *"Attorney General Paul Gallagher has been having a ball*", and "*The Attorney General has been mixing it in court with a Russian oligarch*". It also, incorrectly, asserts that the Attorney General "*has a veto*" over appointment of any candidate for judicial office of whom the Attorney General disapproves; legally and constitutionally that is not correct. If there was any "*reply*" to these articles in either of these publications - and it would be understandable if there was not - it is not exhibited. It is noteworthy that Mr. Shatter (a lawyer, as well as having served as Minister for Justice) in his article acknowledges that no law prohibits an Attorney General maintaining a private practice while in office.

90. Whilst not excluding these reports from its consideration, the Court is of the view that at their height they do no more than raise public awareness of an issue that may be deserving of public debate, and which might in the future lead to legislation – which is, of course, a matter for the Oireachtas. It is ultimately a matter for the Court deciding on an allegation of objective bias to exercise its own judgment as to what the reasonable observer would apprehend having knowledge of all relevant facts.

91. As we indicated earlier there are many circumstances in which "*the Attorney General*" will be named as a party in Court proceedings, and in any of these cases it would be open to the Attorney General to advocate on behalf of the Office of Attorney General, or the State. In such cases it cannot reasonably be contended that a judge or panel should recuse itself from hearing the case because of the involvement of the Attorney General of the day in the process by which

[9] Which Mr. Shatter succeeded in having quashed in the Supreme Court, with a redacted copy (with the offending criticism of him deleted) being place in the Oireachtas Library

the judge or judges come to be nominated and appointed as judges, or because of the contention that the promotional prospects of the judge or judges may at some stage in the future be influenced by the Attorney General or some eminent barrister who might become (or be re-appointed) to that office. If it was otherwise then self-evidently no judges would be in a position to hear cases in which the Attorney General was a party, and the Attorney General could never represent the State in litigation. Having said this the Court recognises that there could be additional facts that might tip the scales in favour of recusal under the test for objective bias.

92. There is no suggestion of subjective bias in this case, and the Court has not been asked to make any disclosure of interest. Moreover the question of whether there could be any obligation on a judge or members of a Court to make disclosure was not addressed in submissions. There may well be cases where a presiding judge has an obligation to make disclosure e.g. of a familial interest, or of a shareholding or other property interest in a company party to litigation that comes before them. This is a difficult question that which may fall to be considered more fully in future cases, after appropriate argument, and the answer is likely to vary depending on the facts.

93. Notwithstanding that we have decided in this instance to make the following voluntary disclosure, in the interests of transparency and in light of the applicants' repeated contention that our "*careers were subject to the Attorney General's subsequent decisions*" – a contention that has already been rejected. In so doing we do not consider that this is required of us, or should be cited as a precedent. Our joint declaration is as follows:

> *"None of the members of this court that heard and determined the appeal herein, either at the time of the hearing in November 2020 or on any subsequent date, has had any application for elevation (to the Supreme Court), or for appointment to any other public office, pending before Government."*

94. In conclusion the Court finds that the applicants have failed to satisfy the onus of proof of objective bias. The Court is satisfied that the reasonable and fair-minded observer, who is not unduly sensitive, but who was in possession of all the relevant facts before and during the appeal hearing, would **not** have reasonably apprehended that this panel would be objectively biased. The first and second reliefs sought in the Notice of Motion are therefore refused.

95. It follows that the third relief sought in the Notice of Motion – the recusal from hearing this appeal further – must also be refused. There is a further reason for this - Mr. Gallagher is no longer Attorney General, and it is highly unlikely that he will hold that office when the remaining issues in this case come to be addressed and determined in the near future. The suggestion that he "*might*" again hold that office is pure speculation of a sort that could never form the basis for recusal. As stated earlier, as a matter of law it is not the case that the Attorney General takes part in Government's decisions on the appointment or promotion of judges, but even if he/she influences that process it cannot reasonably be said that this could be a basis for recusal from hearing the balance of this appeal (assuming, as we have determined, that objective bias arising from past events has not been shown). It is well-established that in these circumstances the Court has a duty to hear the balance of the appeal and should not permit unfounded and unrealistic allegations of objective bias to be used by appellants to "*chose*" the members of the Court.

96. The Court has decided to reserve the costs of the present motion to hearing of the balance of the appeal.

Outstanding issues in the appeal

97. In the interests of clarity, the issues that remain to be decided by this Court are now as follows:

i. The appellants appeal from the costs orders made by Peart J. in the High Court.

ii. The costs of the appeal (following the Principal Judgment).

iii. The costs of the present recusal motion.

iv. The stay sought by the applicants in the Notice of Motion in the Review Application (seeking a stay pending the conclusion of cases rec. no. 2013/2708P and 2013/2709P (the "**Constitutional Proceedings**").

98. The Court gives the following directions in relation to bringing these outstanding issues to hearing:

A. The parties have already lodged written submissions in relation to issue (i), but the Court recognises that that was some time ago, and that the parties may wish to update them and make submissions in relation to issues (ii) to (iv).

Accordingly the Court directs as follows:

A.1 That Mr. Skoczylas have liberty within 21 days from electronic delivery of this judgment to deliver a written submission not to exceed 6,500 words addressing issues (i) to (iv), *in substitution for any existing submissions or rebuttal submission or speaking notes on these issues.*

A.2 That if any other appellant wishes to rely on Mr. Skoczylas' submissions, written or oral, or wishes to make their own oral submissions, in respect of issues (i) to (iv), they can do so when attending the resumed oral hearing.

A.3 That the Respondent and Notice Party each have liberty within 21 days after receipt of Mr. Skoczylas' submission to deliver reply submissions not to exceed 6,500 words addressing issues (i) to (iv), *in substitution for any existing submissions on these issues*.

A.4 The parties word count of 6,500 is to include all footnotes and appendices. The Court considers that, while 5000 words would normally be ample for a costs submissions, in this instance it should allow an additional 1500 words to allow for submissions in relation to the stay.

B. The Court fixes 10.30 on 11 July 2023 as the hearing date for the remaining issues, and is allocating 2 ½ hours. As the first outstanding issue is the appeal in respect of the High Court costs order Mr. Skoczylas should go first, but should also address issues (ii) to (iv) in his oral submissions as he will be aware of the stance taken by the Respondent and Notice Party on these issues from their written submissions.

C. The members of the Court retain the Books of Appeal originally lodged. However the solicitors for the Respondent and Notice Party should seek to agree with the appellant Mr. Skoczylas (1) a Core Book relevant to the remaining issues, and (2) an index for a Book of Authorities limited to those that are relevant to the issues, and the Court requests that the Respondent's solicitors take responsibility for lodging four copies of these books at least 14 days in advance of the hearing date.

D. *Inter partes* correspondence or correspondence with the Court arising from these directions should (unless covered by privilege) be copied to all other parties.

E. If any party seeks to have any of the foregoing directions varied, and consent is not forthcoming, they should in the first instance email the Court of Appeal office, and copy the other parties, and this panel will consider and address the request.

APPENDIX

Dowling & others v. Minister for Finance & another

Preliminary ruling of Haughton J. in delivered *ex tempore* on 22 March 2023

This is the Court's ruling in relation to the preliminary application made by the Appellants that this panel should not hear and determine the Appellants' application, that the panel recuse itself from hearing the balance of this appeal on grounds of objective bias.

The panel heard the substantive appeal over two days in 2020 and delivered judgment Haughton J, with whom Binchy and Pilkington J.J. agreed, on 8th November 2022. What remains to be heard is the Appellants' appeal as to the costs orders made in the High Court, the costs of the appeal and a stay application.

The essence of the bias application is that the panel exhibited objective bias by ignoring a conflict of interest that the Court had vis à vis the now former Attorney General, Paul Gallagher SC, who represented the Notice Party, then ILP, in his alleged personal capacity against the Appellants, shareholders in ILPGH, where ILPGH was 100% shareholder in ILP, while at the same time, it is contended, the Attorney General was representing the Minister for Finance, the Respondent, at a time when the panel were "judges whose careers were subject to the Attorney General's subsequent decisions".

The preliminary application is based primarily on a ruling by the Court in the course of the substantive hearing where the Court declined to intervene in the Attorney General representing the Notice Party, and in its substantive judgment and in the Court's ruling in December 2022 wherein it refused a Greendale or review application made by the Appellants. In written and oral submissions, the Appellants assert that, under ECHR case law, the Court should not hear the recusal application because it is based on the same facts or behaviour

which it is contended was condoned by the panel in its judgments. It is also contended that the fair trial guarantee in Article 6 of the Convention is such that the Court can have regard to the fears of the Appellants that they will not get an impartial hearing.

The Respondent and Notice Party opposed the preliminary application and argued that there is no good reason why this panel should not hear the recusal motion. The Appellants refer to certain decisions of the European Court of Human Rights. The first of these is Toziczka v Poland, a judgment from Strasbourg on the 24th of July 2012, and Mr. Skoczylas has referred the Court, in particular, to certain paragraphs. At paragraph 35:
"As to the second test, when applied to a body sitting as a bench, it means determining"

The second test, I should say, is the objective test of bias.

"As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect, even appearances may be of some importance...
When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified."

And paragraph 36:

"The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case to case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case."

As pointed out by counsel for the Notice Party, the Toziczka case is very different on its facts because the same judge in that case was Rapporteur on the court below that had heard the appeal on its merits. Thus, we see at paragraph 37:

"Turning to the circumstances of the present case, the Court observes that the applicant's concerns regarding the Supreme Court's impartiality originated in the fact that the same judge, D.Z., who had previously examined the merits of the applicant's appeal, sat on its bench. It can be accepted that this situation could raise doubts in the applicant's mind about the impartiality of that court."

However, Mr. Skoczylas also refers us to the decision in Cosmos v Ukraine where there is a similar formulation of the test of objective bias utilised by the ECHR and set out in paragraph 35 of Toziczka. The Cosmos case it's Cosmos Maritime Trading and Shipping Agency v Ukraine is reported from Strasbourg at 27th June 2019. And at paragraph 71, the Court addresses the objective test. It addresses, firstly, a subjective test. Now, this is not a case where there is any suggestion of subjective bias, so, passing on from that, the Court next refers to an objective test:

"(ii) an objective test that is to say by ascertaining whether the tribunal itself (and, among other aspects, its composition) offered sufficient guarantees to exclude any legitimate doubt

in respect of its impartiality (see, for example, Morice v. France [GC], no. 29369/10, § 73, ECHR 2015). As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge, or a body sitting as a bench, lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified..."

So we can see that that is precisely the same wording as was used in Toziczka.

Counsel for the Respondent argues that the European Court of Human Rights test is, in substance, no different to the domestic test of objective bias in this jurisdiction, and it is useful to recall this test, which is variously set out, but fairly consistently, in the parties' written submissions on the recusal motion. The test is whether 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 was not fair and impartial. The apprehensions of the actually affected party are not relevant. Objective bias may not be inferred from legal or other errors made within the decision making process. It is necessary to show something external to that process. Objective bias may be established, inter alia, by showing that although there was no actual bias, the decision maker has ignored potential prejudice or apprehension of bias. It should be noted that the starting point is a presumption against bias due to the declaration of office made by judges and the duty to decide cases assigned and, therefore, the onus is on the party alleging bias to prove it.

Mr. Skoczylas emphasises that, under the ECHR wording, objective bias entitles the Court to give greater consideration to the subjective view of the litigant fearing bias. The Court does not accept that there is any real difference in the test. The ECHR test is a test of objective bias and, therefore, requires objective justification, and the words "legitimate reason to fear", "lack of partiality" import the idea that what the Court does not have in mind is a subjective concern over lack of partiality that is not borne out by objective facts.

The Appellants rely, in particular, on the ECHR decision in Mironov. This is a decision handed down in Strasbourg on 6th October 2020, so just recent in origin. It is a case where the Court held that Judge A was wrong to consider Mr. Mironov's challenge to his rehearing a civil appeal on grounds of bias. However, the facts are very particular. There, Mr. Mironov's father, while mayor of Gdovskiy district, sold a plot of land to his son, Mr. Mironov. The claim to set aside the sale was dismissed at first instance. In June 2008, Judge A heard and determined an appeal against Mironov and in his absence. In July 2008, in respect of a parallel criminal proceeding against Mironov Senior, Judge A declared that, in the civil matter, he had already expressed his view that the sale of the plot of land to the accused mayor's relatives was unlawful and so withdrew from hearing the criminal matter. Later that month, the regional court, a higher court, referred the criminal matter to another court of three but would not allow Judge A to withdraw. Some months later, the regional court quashed Judge A's civil decision on the grounds that neither Mr. Mironov nor his lawyer had been present and remitted it to Judge A. Judge A heard and refused a bias challenge brought by Mr. Mironov and, in January 2009, Judge A reheard the civil appeal and again allowed the claim against Mr. Mironov. It was in these circumstances that the ECHR held that it was not appropriate for Judge A to decide the bias challenge himself, but it is clear from paragraph 29 that the decision was made in light of his self declaration that he had already come to and

expressed a view, as well as the fact that Judge A had decided the civil appeal against Mironov twice, having rejected his bias challenge.

There are, undoubtedly, instances where it is not appropriate for a judge or panel, who have heard a case previously, to undertake a further hearing, or, indeed, continue with the hearing that's in being, such as the circumstances of the Mironov case or in a case where an appellate court allows an appeal and remits the matter to the court below for it to be heard by a different judge. It is also possible to envisage cases where subjective bias, based on facts, the nature of which would make it inappropriate for the same judge to decide the recusal application, as being cases where it would be inappropriate for them to embark on such an application. This is not one of those cases. The panel was assigned to hear the appeal, and did so, and it remains the assigned panel to hear and determine the outstanding and follow up issues. The essence of the preliminary application is that the panel has already made its mind up on the factual basis that underlines the recusal application. That submission does not stand up, when you consider that we actually what we actually determined at the substantive hearing and in the ruling on 13 December 2022.

In the course of the substantive hearing, we heard Mr. Skoczylas' objection to the Attorney General being permitted to represent the Notice Party, and we heard the Attorney General in response. The essence of our ruling was that the Court had no role in dictating what counsel were engaged by a party. We did not decide any issue of conflict of interest, nor was there any suggestion by Mr. Skoczylas that there was bias, objective or otherwise, or that we should recuse ourselves.

Further, in deciding the substance of the appeal, the decision was that the Appellants did not have locus standi, and it was for that reason, and none other, that the Court did not go on to consider the merits of the dispute.

In relation to the ruling on 13 December 2022, it will be recalled that the Appellants invited the Court to review or set aside its decision under the Nash or Greendale jurisdiction. We decided that the fact that our ruling on Day 1 of the appeal hearing the Attorney General continued to represent the Notice Party was not such an exceptional circumstance with constitutional significance such as to warrant this Court embarking on a review or to set aside its own judgment. The very high threshold for such a review had not been met. We were not asked to recuse ourselves on the basis of objective bias and that was not a determination of that issue.

Accordingly, it cannot be said that the ruling on Day 1 or the substantive judgment or the ruling of the Court on 13 December 2022 were occasions when an allegation of objective bias on the part of the panel was made or was determined.

We cannot emphasise too much, as Judge Binchy did most eloquently in the course of argument today, that we have not predetermined the recusal application. While we appreciate that the Appellants subjectively take a different view, those are not legitimate fears that have a grounding in objective fact such as was demonstrated to be the case in Mironov. We are, therefore, satisfied that this panel should now hear the recusal application.

MR. JUSTICE BINCHY: I have listened carefully to the ruling just delivered by Judge Haughton. I am in agreement with it, I have nothing to add.

MS. JUSTICE PILKINGTON: I also have listened carefully to the ruling of Judge Haughton. I also agree with it and have nothing further to add.

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