THE SUPREME COURT

[Appeal No: 116/2016]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

Between/

Student Transport Scheme Limited

Applicant/Appellant

and

The Minister for Education and Skills

Respondent

and

Bus Éireann

Notice Party/Respondent

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 14th June, 2021

1. Introduction

1.1 The application with which this judgment is concerned arises from a motion brought by the applicant/appellant ("Student Transport"), seeking, in effect, to reopen an application for leave to appeal to this Court, which application was refused on October 10th, 2016. For the reasons set out in a determination of that date (see, *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2016] IESCDET 123), this Court declined to grant leave to Student Transport to appeal from a judgment of the Court of Appeal in these proceedings (see, *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2016] IECA 152). As that determination amounted to a final decision of this Court, it follows, and is accepted by the parties, that the jurisdiction to set aside that final decision of this Court and allow the matter to be reconsidered, arises only under what has come to be known as the *Greendale* jurisprudence (see, *Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514).

1.2 The respondent ("the Minister") and the notice party/respondent ("Bus Éireann") both accept that there is a jurisdiction, arising in what are said to be very limited circumstances, to reopen a matter which has been the subject of a final decision of this Court. For its part, Student Transport also accepts that the threshold which must be met in order to persuade the Court to exercise that jurisdiction is a high one. While the case law to date in respect of the *Greendale* jurisprudence has been concerned with circumstances where it is sought to set aside a final order of this Court which arose as a result of the full hearing of an appeal, is accepted in principle by the parties that the jurisprudence arising in that context applies equally to an application, such as this, in which it is sought to set aside a determination of this Court to refuse leave to appeal. However, Student Transport does suggest that the application of that

jurisprudence may differ somewhat when applied in the context of an attempt to reopen an unsuccessful application for leave to appeal.

1.3 In those circumstances it is, perhaps, appropriate to set out in brief terms the relevant jurisprudence.

2. The *Greendale* Jurisprudence

2.1 The decision of this Court in *Greendale* established that there are rare and exceptional circumstances in which this Court may exercise its jurisdiction to set aside a final order or decision. The circumstances relied on by an applicant, seeking to invoke the jurisdiction of this Court in that regard, must show that it is necessary that a final order be set aside on the basis that it should in reality be regarded as a nullity.

2.2 In her judgment in *Greendale*, Denham J. held that this Court has a jurisdiction and a duty to protect constitutional rights, so that the powers of the Court should be as ample as required to protect such rights. On this basis, she held that this Court has the power to overturn a final order where an applicant successfully establishes that allowing the order in question to remain in place would infringe on their constitutional rights. Some of the language used in the judgment might, if read out of context, suggest a relatively low threshold for there could be a number of circumstances where it might be contended that constitutional rights might be engaged. However, Denham J. expressly stated that this jurisdiction to set aside a final order should be exercised only in very exceptional circumstances and she emphasised that there is a heavy burden on an applicant who seeks to establish that such circumstances are present.

2.3 The circumstances in which this Court may exercise its jurisdiction to set aside a final order are summarised by Denham J. at p. 544 of the report as follows:-

> "The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights".

2.4 The jurisdiction of this Court to revisit a final order exists as an exception to the provisions of what was Article 34.4.6° of the Constitution (now Article 34.5.6°, following the enactment of the Thirty-third Amendment to the Constitution), which provides that:-

> "6° The decision of the Supreme Court shall in all cases be final and conclusive."

In her judgment in *Greendale*, Denham J. referred to the importance of finality in respect of judgments and remarked that this Court's jurisdiction to overturn final orders should, therefore, be exercised sparingly. Having regard to the importance of the principle of finality, Denham J. justified the heavy burden resting on any applicant who seeks to have a final judgment set aside on the following basis (see p.539 of the report):-

> "If an applicant seeks to have the court exercise its jurisdiction to protect constitutional rights there is also a very heavy onus of proof. The court has to balance the application against the jurisprudence, of the common law and the Constitution, of the finality of an order. Whilst the Supreme Court is guardian

> of constitutional rights, it must also protect the administration of justice which includes the concept of finality in litigation".

2.5 The exceptionality of the jurisdiction has been emphasised in subsequent cases where the dicta of Denham J. in *Greendale* were adopted and developed by this Court. In *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, McGuinness J. reiterated the approach taken in *Greendale* and expressly agreed with the analysis of Denham J. in regard to the jurisdiction of this Court to set aside a final order in limited circumstances pertaining to the protection of constitutional rights. McGuinness J. also drew attention to the fact that the jurisdiction established in *Greendale* exists as an exception to the principle of finality found in what was then Article 34.4.6°, and that it is, therefore, a jurisdiction which arises only in specific and limited circumstances. At para. 286 of the report in *Bula*, McGuinness J. stated:-

> "[286] … In summary, whilst very great weight must be given to the principle of finality and to the provisions of Article 34.4.6°, this court has a jurisdiction to review and if necessary to set aside what appears to have been a final order in circumstances where the court's duty to protect constitutional rights or natural justice arises. Such circumstances can only be to a high degree exceptional, and a very heavy onus lies on the Applicants to establish that such exceptional circumstances exist".

2.6 The jurisdiction established in *Greendale* was once again restated in *L.P. v. M.P.* [2002] 1 I.R. 219, in which Murray J. stated as follows at p. 229 of the report:-

> "The judgments of this Court in *Greendale* and *Bula* establish that a final order may be rescinded or varied where a party discharges the burden of establishing that there are exceptional circumstances showing that such a remedy is necessitated by the interests of constitutional justice."

2.7 Murray J. went on, also at p. 229, to somewhat qualify the scope of the jurisdiction established in *Greendale*, holding that this Court was only permitted to

exercise the jurisdiction in question in circumstances where the applicant seeking to have a final order set aside has clearly established "a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties". While deliberately refraining from considering further criteria necessary for the *Greendale* jurisdiction to be invoked, Murray J. made the following observations at p. 230, outlining the exceptional nature of the circumstances giving rise to the jurisdiction:-

> "… [S]uch exceptional circumstances could not include rulings made in final instance by a court concerning such matters as the admissibility in evidence even if they have implications for the manner in which a party was allowed to present its case. Rulings on questions of law and procedure are a matter for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality in courts of last instance. Otherwise, I confine myself to saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice."

2.8 The *Greendale* jurisdiction was next considered in a significant way in *DPP v. McKevitt* [2009] IESC 29, in which Murray C.J. reiterated the rare and unusual circumstances which must be present for this Court to permissibly vary or rescind a final order. At paras. 20 and 21 of his judgment, Murray C.J. identified two factors to be addressed when considering whether this Court has jurisdiction to consider re-opening one of its previous decisions:-

> "[20] …Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant.

> [21] Accordingly, insofar as this Court has *potential* jurisdiction, in the exceptional circumstances referred to in the case-law, to review one of its earlier decisions, an applicant must show cogent and substantive grounds which are objectively sufficient to enable the Court to enter on an exercise, by way of a hearing of an application on the merits, of that wholly exceptional jurisdiction. (For example, a mere assertion of subjective bias on the part of the Court by a dissatisfied litigant could not be a ground on which the Court could have jurisdiction to hear and determine an application)".

2.9 More recently, in *Murphy v. Gilligan* [2017] IESC 3, Dunne J. remarked that, in any consideration of whether a judgment or order of the Supreme Court can be set aside, the starting point must be Article 34.5.6° of the Constitution (formerly Article 34.4.6°). Having considered the decisions of this Court in *Greendale* and *Bula*, Dunne J. reiterated, at para. 124 of her judgment, that the *Greendale* jurisdiction is an exception to the principle of finality and that it must, therefore, be exercised only in limited circumstances:-

> "[124] Two things are clear. One is that great weight must be given to the finality of judgments. It goes without saying that parties to litigation are entitled to know that a final decision made by a court on a particular point cannot be re-opened by a party dissatisfied with the outcome of that final order. Nevertheless, it is also clear that in exceptional circumstances involving an issue of constitutional justice, the matter may be re-opened."

2.10 Dunne J. also restated the exceptional nature of this Court's jurisdiction in this regard and the high burden which lies on applicants seeking to rely on the judgment in *Greendale*. At para. 138 of her judgment she observed that,

"the *Greendale* jurisprudence does not exist to allow a party to re-argue an issue already determined".

2.11 The exceptional nature of the jurisdiction of this Court to revisit a final decision, and the circumstances in which it is appropriate for this jurisdiction to be exercised, were recently considered by MacMenamin J. at para. 112 of his judgment in *Bates v. Minister for Agriculture, Fisheries & Food* [2019] IESC 35, in which he stated as follows:-

> "[112] … This Court (in *Greendale*) made clear that, in an appropriate case, it would exercise this exceptional jurisdiction, but only in circumstances where failure to do so would conflict with the guarantee of fair procedures enshrined in the Constitution. The Court made clear it will not take the highly exceptional step of setting aside, rescinding, or varying a final order made by the court, unless there has been a clear breach of the principles of natural justice, to which the applicant has not acquiesced, and such that failure to take steps to remedy such a breach would, in the eyes of right-minded citizens, damage the authority of the court".

2.12 It is also important to note the detailed analysis of the jurisprudence carried out by O'Donnell J. in his judgment in *Nash v. Director of Public Prosecutions* [2017] IESC 51.

2.13 There is, therefore, a clear and consistent line of authority on this topic. A high weight has to be attached to the principle of finality. The reason behind this is clear. Where proceedings have reached an end, the parties are entitled to expect that they will not have to continue to litigate the issues which have been finally determined. However, there may be exceptional circumstances where a failure to reopen may itself amount to 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, such that the decision sought to be reopened can properly be considered to be a nullity and not merely arguably in error. Where such a situation

arises through no fault of the party concerned, then it follows that the limited jurisdiction to reopen the case can be exercised.

2.14 It is next necessary to set out the procedure followed in this case in order to establish the background to the issues which the Court has to determine.

3. Procedural History

3.1 Under Practice Direction SC17, a party wishing to issue a motion seeking to invoke the *Greendale* jurisprudence is required to file the papers and materials sought to be relied on. Thereafter, those papers are considered either by a single judge or by a panel of judges for the purposes of determining whether there is a sufficient basis disclosed that might potentially justify the Court in exercising the rare and exceptional jurisdiction identified in the case law, to which reference has been made.

3.2 The specific procedure for issuing a motion to vary or rescind a final judgment or order made by this Court is outlined in paras. 1-8 of Practice Direction SC17 as follows:-

> "1. An intending applicant must lodge in the Office of the Registrar of the Court (in this practice direction "the Office") -
>
> (a) a copy of the notice of motion sought to be issued in the proceedings,
>
> (b) an affidavit, duly sworn, verifying any facts sought to be relied on in support of the intended application and
>
> (c) any exhibits referred to in that affidavit.
>
> 2. The papers referred to in paragraph 1 shall be considered by -
>
> (a) a single judge of the Court or

(b) a panel of three judges of the Court

as the Chief Justice or, in the absence of the Chief Justice or where the Chief Justice has determined that it would not be appropriate that he or she give a direction in the matter, the senior ordinary judge of the Court for the time being available directs.

3. The judge or, as the case may be, panel of judges referred to in paragraph 2 shall determine on the papers referred to in paragraph 1, and on any papers in reply furnished in accordance with paragraph 4, whether or not, having regard to the principles referred to in the relevant case-law including the case-law referred to in the recitals to this practice direction, the application intended to be made is one in respect of which a hearing on the merits is justified.

4. The judge or panel of judges referred to in paragraph 2 may, in his or her or its absolute discretion, direct that the papers referred to in paragraph 1 be served on any party to the original proceedings and on any other person for the purpose of affording that party or person an opportunity to furnish to the Court, a reply in writing, supported where appropriate by replying affidavit, to the allegations of the intending applicant.

5. The papers in reply referred to in paragraph 4 shall be lodged at the Office within such time from the date of service of the intending applicant's papers as the judge or panel of judges referred to in paragraph 2 shall direct.

6. If satisfied in accordance with paragraph 3 that the application intended to be made is one in respect of which a hearing on the merits is justified, the judge or, as the case may be, panel of judges referred to in paragraph 2 shall give leave to the intending applicant to issue a motion on notice for a specified initial return date, in which event notification of such leave and of that return date shall be given by the Registrar to the intending applicant in writing or by e-mail.

7. On the initial return date of the motion the Court shall give such directions as it considers appropriate for the hearing of the motion.

8. If not satisfied in accordance with paragraph 3 that the application intended to be made is one in respect of which a hearing on the merits is justified, the judge or, as the case may be, panel of judges referred to in paragraph 2 shall refuse leave to make the application, in which event the intending applicant shall be notified of such refusal by the Registrar in writing or by e-mail."

3.3 The reasoning behind that procedure stems from the fact that a party, who has been successful in an appeal to this Court (whether that party has the benefit of a favourable order giving an award or relief or whether that party has successfully defended proceedings and persuaded the Court to make no adverse order against it) has a derived right, as an aspect of the principle of the finality of judgments of this Court, to be spared from having to deal with the case further. That right is not absolute for, if it were, then the *Greendale* jurisdiction could not exist. However, that derived right to finality must be given due recognition by ensuring that parties are not exposed to having to deal again with a matter which appeared to have been finally determined, save in circumstances where there truly is a credible basis on which the *Greendale* jurisdiction might be exercised.

3.4 In any event, Student Transport filed the required affidavit (of November 30, 2020), sworn by Mr. Brian Lynch on Student Transport's behalf, ("the grounding affidavit"), the required copy of their notice of motion along with the exhibits referred to in the grounding affidavit. Having considered the content of those materials, it was determined that it was appropriate to allow the motion to be issued. Both the Minister and Bus Éireann have filed replying affidavits.

3.5 It should also be mentioned that, in the course of case management, an issue arose between the parties as to whether Student Transport might be entitled to discovery of certain documents. For the reasons set out in a judgment (see, *Student Transport Scheme Ltd. v. The Minister for Education and Skills & Bus Éireann* [2021] IESC 22) delivered on March 29, 2020, the Court refused that application. As noted in that judgment, the motion was required, therefore, to proceed on the basis of the materials already filed. As such, the basis on which Student Transport seeks to invoke the *Greendale* jurisprudence, and the basis on which the Minister and Bus Éireann resist that application, are set out in the respective affidavits filed by the parties and the documents exhibited to those affidavits. Thus, the issues which this Court has to decide arise from that documentation and from the written and oral submissions subsequently made. In that context, it is appropriate to turn to those materials.

4. <u>The Arguments</u>

4.1 The proceedings underlying Student Transport's present SC17 application arise from a challenge to the alleged failure of the Minister to run a competition for the award of what is said to be a reviewable public service contract, under the requirements of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I No. 329 of 2006). At the core of the underlying proceedings is the Student Transport Scheme ("the Scheme"), an arrangement by which Bus Éireann, acting as agents for the Minister, provides school transport for children nationwide at both primary and post-primary level, as well as for children with special needs. In October 2011, Student Transport brought judicial review proceedings in the High Court, claiming that the Scheme amounted to a public contract which the Minister

should have put out to tender. Student Transport's claim was dismissed by the High Court and on appeal by the Court of Appeal. This Court later issued a determination refusing to grant Student Transport leave to appeal, which determination Student Transport now seeks to have set aside by this Court exercising its jurisdiction established in the *Greendale* jurisprudence.

4.2 The grounding affidavit relies heavily on two separate pieces of documentation, the first being a Report by the Comptroller and Auditor General in 2017 ("the ICAG Report") and the second being two letters received by the Irish State from the European Union Commission in 2019 ("the Commission correspondence"). Student Transport submits that the conclusions reached in these documents would have resulted in the reversal of the orders made by the High Court and the Court of Appeal in the underlying judicial review proceedings, which, in the view of Mr. Lynch, now amount to a "wasted trial".

4.3 First, in respect of the ICAG Report, Mr. Lynch suggests that this Report exposes inconsistencies in the evidence and submissions advanced by the Minister in the High Court, particularly in relation to the Minister's submissions and evidence on the profitability of the Scheme for Bus Éireann. Mr. Lynch states that, in the High Court, counsel for both the Minister and for Bus Éireann had submitted that payments made to Bus Éireann for the operation of the Scheme were granted on a cost recovery basis, and that Bus Éireann did not seek to profit from the Scheme. Mr. Lynch suggests that this was accepted as true and factual by all parties at the time of the High Court proceedings. However, Mr. Lynch avers that the ICAG Report, which was published some six years after the proceedings in the High Court, reveals that Bus Éireann had in fact made a net surplus from the provision of school transport

services under the Scheme, which surplus was recorded as profit by Bus Éireann in its statutory financial statements. Mr. Lynch therefore asserts that Bus Éireann misled the High Court by claiming not to have profited from the Scheme.

4.4 In further reliance on the ICAG Report, Mr. Lynch claims that the Minister was unaware of the fact that the net surplus paid to Bus Éireann had been defined as profit, and that the Minister failed to make any verification checks on how Bus Éireann spent the surplus which it had received. In Mr. Lynch's view, these failures are demonstrative of a negligent lack of oversight of the financial affairs of Bus Éireann on the part of the Minister. Mr. Lynch suggests that this negligence indirectly led to incorrect information on the profitability of the Scheme being submitted in the proceedings before the High Court and the Court of Appeal. Additionally, Mr. Lynch asserts that the information contained in the ICAG Report contradicts the Minister's submission that it controlled Bus Éireann like an in-house department.

4.5 In the grounding affidavit, Mr. Lynch also states that, in his view, the inconsistencies and contradictions between the findings of the ICAG Report and the evidence adduced by the Minister and Bus Éireann in the High Court are such that all of the evidence adduced in that Court is liable to be discredited. Mr. Lynch states that the ICAG Report contradicts findings of fact made by the Courts below and that, as a result, those findings should be regarded as unsafe. Furthermore, Mr. Lynch claims that the Minister and Bus Éireann, having, in his view, negligently supplied incorrect information to the Courts below, breached an implied undertaking of good disclosure to the Court.

4.6 Mr. Lynch suggests that, in light of the Courts below having allegedly reached their findings on the basis of inconsistent and incorrect evidence, the circumstances of

this case are appropriate for this Court to exercise its jurisdiction set out in the *Greendale* jurisprudence, which would enable this Court to set aside its previous determination refusing to grant Student Transport leave to appeal in 2016. Relying on the judgment of MacMenamin J. in *Bates*, Mr Lynch suggests that a failure to remedy the "injustice" suffered by Student Transport, "would, in the eyes of right-minded citizens, damage the authority of the court". This, he argues, meets the burden of proof required for the granting of a *Greendale* type order.

4.7 The Commission correspondence, on which Mr. Lynch also places significant reliance in the grounding affidavit, consists of two letters sent from the European Union Commission ("the Commission") to the Irish State, which are dated respectively March 29, 2019 and July 12, 2019. The context for these letters was a complaint originally lodged by Student Transport with the Commission in 2013. The complaint was lodged, and ultimately resolved in 2019, through the EU Pilot Procedure, which is a mechanism for informal dialogue between the Commission and Member states on issues relating to potential non-compliance with EU law. The EU Pilot Procedure is used before a formal infringement procedure is instigated. Student Transport complained that the way school transport was managed in Ireland was incompatible with EU public procurement law. In particular, Student Transport complained that the requirements set out by the Court of Justice of the European Union ("the CJEU") in *Teckal Srl v. Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (Case C-107/98) (ECLI:EU:C:1999:562) for the application of the "in-house exemption" had not been met, contrary to the decision of the High Court in this case. Where a case satisfies the in-house exemption in accordance with the test in *Teckal*, the implication is that the contract in question falls outside the scope of EU procurement law. It is submitted by Student Transport that

the High Court was incorrect to reach the conclusion that the Scheme benefited from this exemption.

4.8 Mr. Lynch suggests that the outcome of Student Transport's complaint was a decision by the Commission (in the form of the Commission correspondence) to the effect that the decisions of the High Court and the Court of Appeal in the underlying proceedings represented an infringement of European Union procurement law. For their part, the Minister and Bus Éireann dispute that any "infringement" was found. Mr. Lynch also suggests that, on foot of the Commission correspondence, Ireland agreed to implement actions under a new regulations procedure to bring the infringement to an end. Mr. Lynch suggests that the decision of the Commission further demonstrates that there is a need to vary and vacate the orders made by the High Court and the Court of the Appeal by virtue of a *Greendale* type order, so as to correct the errors made by those Courts and to restore justice between the parties.

4.9 In their replying affidavits (sworn by Ms. Shirley Kearney and Mr. Colm Costello respectively), the Minister and Bus Éireann disputed many of the claims made on behalf of Student Transport by Mr. Lynch in the grounding affidavit and also submitted that Student Transport had not meet the high threshold necessary to obtain a *Greendale*-type order. Mr. Costello objected to the nature and tone of the grounding affidavit, which he claimed went beyond merely stating the facts of the case and instead strayed into legal argument and submissions, many of which were, in his view, based on unfounded allegations. In particular, Mr. Costello objected to the claims made by Mr Lynch to the effect that Bus Éireann had misled the Courts below, and that there had been "inconsistencies or falsehoods" in the evidence adduced by Bus Éireann to those Courts.

4.10 Both Mr. Costello and Ms. Kearney dispute the suggestion made by Mr Lynch to the effect that the ICAG Report and the Commission correspondence could or would have resulted in the reversal of the orders of the High Court and the Court of Appeal. As such, in both replying affidavits, it is claimed that Student Transport's SC17 application, even taken at its height, does not provide a sufficient basis on which to overturn the judgment of the Court of Appeal, or to set aside the determination made by this Court in 2016. Therefore, Mr. Costello and Ms. Kearney indicate that they do not believe that Student Transport has discharged the high burden of proof required to invoke the *Greendale* jurisprudence.

4.11 In respect of the ICAG Report, and specifically in relation to the arguments made by Mr Lynch on the profitability of the Scheme for Bus Éireann, Mr. Costello suggests that the Report does not, in fact, make any finding that Bus Éireann profited from the Scheme. Mr. Costello asserts that the Scheme is administered by Bus Éireann on a costs recovery basis and that any surplus which arose from the Scheme was held in reserve and used specifically for school transport expenditure, subject to approval from the Department of Education. Mr. Costello suggests that this reserve, the balance of which he says was repaid to the Department in full in 2018, is what the ICAG Report refers to as "profit". On this basis, Mr. Costello avers that Mr. Lynch has improperly mischaracterised the findings of the ICAG Report and that, this being so, the Report does not advance Student Transport's SC17 application. Mr. Costello also denies that there was any inaccuracy in the statements made by Counsel for Bus Éireann to the effect that Bus Éireann did not profit from the Scheme.

4.12 It is further averred by Mr. Costello that the findings of the ICAG Report actually support the conclusions reached by the Court of Appeal insofar as it is said

that the Report reflects that Court's conclusion that the profitability of the Scheme was not determinative of the pecuniary interest requirement under EU law. Mr. Costello suggests that, this being so, the ICAG Report cannot be used as grounds for bringing an appeal against the decision of the Court of Appeal, much less for setting aside the determination of this Court refusing to grant leave.

4.13 For her part, Ms. Kearney avers on behalf of the Minister that the issue of profitability was not part of the substantive case advanced by Student Transport in the High Court and the Court of Appeal. On this basis, she suggests that raising the issue now amounts to an impermissible attempt by Student Transport to run a different case to that previously advanced. Furthermore, while noting that such issues are more properly dealt with in submissions, Ms. Kearney also suggests that the findings of the ICAG Report support some of the conclusions reached by the Courts below insofar as that report found that the Scheme was based on unchanged arrangements, that Student Transport was given documentation that had been provided in discovery and that many school transport routes were tendered out to private operators in compliance with procurement guidelines. On this basis, she suggests that the findings of the ICAG Report provide no basis for reopening those proceedings.

4.14 Both Mr. Costello and Ms. Kearney suggest that, in any case, the ICAG Report is irrelevant to the present proceedings as it does not concern what they contend is the only period relevant for review, which is a six-month period in 2011. It is said that the ICAG Report does not make any express findings in relation to this period and that its scope is limited to a single payment made in 2015, meaning, in the views of Mr. Costello and Ms. Kearny, that it can have no bearing on either the findings of the Courts below, or the determination made by this Court in 2016.

4.15 Second, in respect of the Commission correspondence, Mr. Costello suggests that it is a mischaracterisation of this correspondence to suggest that the Commission found an infringement against Ireland. Rather, Mr. Costello suggests that the conclusions reached in the correspondence are highly qualified and unclear and that the Commission refers only to an "*alleged* incompatibility" with European Union public procurement legislation.

4.16 Mr. Costello acknowledges that, in its letter dated March 29th, 2019, the Commission stated that the alleged contract in the present case did not formally satisfy the test for the *Teckal* in-house exemption, as the Department of Education was not involved in the decision making structures of Bus Éireann. However, Mr. Costello suggests that the Commission's use of the term "*formally* satisfied" indicates that the *Teckal* exemption may well have been satisfied in substance and that Ireland had agreed to make the formal legal changes necessary to reflect the reality. Mr. Costello further suggests that, while the Commission correspondence indicates that the Scheme does not meet the necessary criteria to fall within the in-house exemption from the operation of European Union procurement law, the *Teckal* exemption is predicated on the existence of a contract, which is an issue that was disputed by the parties in the present proceedings. Mr. Costello states that the Commission does not appear to have considered whether any contract actually existed in the context of the present proceedings.

4.17 For her part, Ms. Kearney suggests that there was no concession made by the Minister in the Commission correspondence in respect of any of the conclusions reached by the Courts below, nor the conclusions reached by this Court in its determination in 2016. In addition, Ms. Kearney suggests that, in the Commission

correspondence, the Commission indicated that it supports the continued existence of the Scheme insofar as it serves the public policy goals of promoting universal education up to and including secondary level and in facilitating equal access to educational opportunities.

4.18 It may be of some relevance in the context of those arguments to refer briefly to the basis on which the High Court rejected Student Transport's original claim and, perhaps more importantly, the basis on which the Court of Appeal rejected Student Transport's appeal to that Court. Obviously the application for leave to appeal to this Court was brought in the context of the decision of the Court of Appeal and, indeed, the issues which were before that court for determination.

5. The Original Judgments

5.1 In the High Court, McGovern J. dismissed Student Transport's claim on four grounds, which led him to conclude that the Scheme did not amount to a public contract within the meaning Council Directive 2004/18/EC, which regulates the coordination procedures for the award of public works contracts, public supply contracts and public service contracts ("the 2004 Directive"). As such, McGovern J. found that the Minister could not be said to have infringed EU procurement law by not putting the Scheme out to tender.

5.2 The first ground on which McGovern J. found against Student Transport was that, in his view, no relevant contract actually existed, as Student Transport had failed to establish that the Scheme involved a pecuniary interest, which is required by Article 1(2)(a) of the 2004 Directive in order to establish the existence of a public contract. McGovern J. held that the fact that Bus Éireann had received funding from the Minister in the course of administering the Scheme did not in itself determine that

the Scheme involved a pecuniary interest, nor did it establish the existence of a public contract. In that context the trial judge accepted that the Scheme was operated solely on a costs recovery basis. McGovern J. had particular regard to the fact that the funding provided to Bus Éireann for administering the Scheme had been reduced annually since 2008 at the direction of the Minister. In his view, this indicated that there was no pecuniary interest in the operation of the Scheme such that was capable of satisfying the requirements of Article (1)(2)(a) of the 2004 Directive.

5.3 Second, the High Court dismissed Student Transport's claim on the basis that the Scheme amounted to an administrative arrangement between the Minister and Bus Éireann and did not include any terms that might normally be associated with a commercial contract. McGovern J. determined that the Scheme was unilateral in nature, as evidence provided to the Court by the Minister established to his satisfaction that Bus Éireann was required to administer the Scheme as the Minister's agent and to comply with all of the Minister's directions and policy. Furthermore, McGovern J. accepted that Bus Éireann's functions within the Scheme could be varied at any time by the Department of Education and that the Minister could amend the funding provided to the Scheme without the need to consult Bus Éireann. On this basis also, McGovern J. concluded that the Scheme did not amount to a public contract within the meaning of the 2004 Directive.

5.4 In response to an argument made by Student Transport to the effect that material changes had been made to the Scheme such that they constituted the creation of a new contract, McGovern J. concluded that there was no cogent evidence to support a case that parties had renegotiated the essential terms of the Scheme. Moreover, he held that, even if the Scheme did amount to a public contract and that

contract had been materially amended, neither of which propositions were accepted by McGovern J., the Scheme would be exempt from the application of EU procurement law under the in-house exemption set out by the CJEU in *Teckal* due to the extent of the cooperation between the Minister and Bus Éireann.

5.5 The third ground on which the High Court rejected Student Transport's claim was that, under Regulation 7 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010), the claim was time-barred as Student Transport had failed to bring proceedings within six months of the conclusion of what it alleged was the relevant contract. It was in the context of that ground that the issue of whether any contract had changed arose. I will make some observations on this aspect of the case later in this judgment.

5.6 Finally, High Court found against Student Transport on the basis that it did not have standing to bring the proceedings. McGovern J. held that Student Transport had failed to demonstrate that it was eligible to bring the claim as it had provided insufficient evidence to the Court in relation to its capacity to carry out the Scheme. In this regard, McGovern J. also took into consideration that the fact that Student Transport is a shelf company which was only founded a short time before the initiation of the proceedings.

5.7 On appeal, the Court of Appeal also found against Student Transport and dismissed its appeal in full, although its reasoning was different to that in the High Court. Importantly, Hogan J. (speaking for the Court), overturned one of the grounds on which the High Court had found against Student Transport, being that the Scheme failed to satisfy the pecuniary interest requirement in the 2004 Directive. Hogan J. found that the question of whether Bus Éireann administered the scheme on a costs

recovery basis had become irrelevant by the time proceedings reached the Court of Appeal due to developments in the jurisprudence of the CJEU, which had occurred shortly after the High Court judgment. In its decision in *Azienda Sanitaria Locale di Lecce, Università del Salento v. Ordine degli Ingegneri della Provinci di Lecce* (Case C159/11) (ECLI:EU:C:2012:817), the CJEU found that the term "pecuniary interest" should be interpreted broadly, stating at para. 29 of the judgment:-

> "[29]…a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed services."

On this basis, Hogan J. concluded that the fact that the Scheme provided for Bus Éireann's remuneration solely on a cost recovery basis did not preclude the existence of a pecuniary interest within the meaning of the 2004 Directive. For this reason, Hogan J. held that the findings of the High Court in relation to the pecuniary interest requirement could no longer be supported.

5.8 However, Hogan J. found that, despite the Minister and Bus Éireann no longer being able to rely on the pecuniary interest requirement as a defence, Student Transport's claim nonetheless failed on the bases that there was no contract concluded in writing between the Minister and Bus Éireann and that the Scheme was of indefinite duration, both of which meant that the Scheme fell outside the scope of the 2004 Directive.

5.9 Article 1(2)(a) of the 2004 Directive defines a public contract as being "concluded in writing". That same Directive defines the words "written" or "in writing" as meaning "any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means". Hogan J. held that the term

"concluded in writing" is clear evidence that the European Union legislator sought to ensure that the contracting parties intended to create mutually binding legal relations in a formal and enforceable fashion.

5.10 In the case on appeal, Hogan J. observed that the original agreement made between the Minister and Bus Éireann in 1967 (from which the Scheme derives) did not recite in writing any key terms that would have been normal features of a contractual agreement, such as terms relating to the nature of the contractual obligations assumed by the parties, the duration of the contract or the remuneration payable under the contract. In this regard, he found that the original agreement giving rise to the Scheme consisted simply of an administrative instruction from the Minister for Education, which was later supplemented by a more formal agreement in 1975 setting out the price for the services, the nature of the vehicles to be used and the schools covered by the scheme. On this basis, Hogan J. was convinced by the Minister's argument to the effect that the Scheme is really an administrative scheme between two statutory bodies which, while providing for some form of financial contribution, lacks the indicia of a normal contract. Hogan J. observed that this line of argument was supported by the total lack of documentation describing the scheme or formally stating the nature of the obligations that arise from it. As such, Hogan J. determined that the Scheme did not meet the definition of a public contract within the meaning of Article 1(2)(a) of the 2004 Directive. In light of the fact that Student Transport's claim rested on the argument that there was a written concluded contract between the Minister and Bus Éireann, Hogan J. held that it logically followed from the conclusion that there was no such contract that Student Transport's claim must fail.

5.11 Furthermore, Hogan J. concluded that, even if a written contract had been found to exist between the Minister and Bus Éireann, Student Transport's claim should nonetheless be dismissed as the Scheme is of indefinite duration, and therefore falls outside the regime of the European Union public procurement regime. In *Pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund)* (Case C-454/06) (ECLI:EU:C:2008:351), the CJEU held that contracts of indefinite duration are exempt from the EU procurement law. Applying the analysis of the CJEU in *Pressetext* to this case, Hogan J. concluded that it could be said that the Scheme was a contract of indefinite duration, which had not been subject to any material amendments. On this basis, Hogan J. held that, even if the Scheme had amounted to a contract concluded in writing (which, as stated, Hogan J. found it did not), it was nonetheless a contract of indefinite duration which came within the *Pressetext* exception. Accordingly, Hogan J. found that the Scheme would fall outside the scope of the 2004 Directive and that Student Transport's claim must fail on this basis.

5.12 I have felt it appropriate to set out in some detail the basis of the decisions of both the High Court and the Court of Appeal for it is, of course, against the decision of the Court of Appeal, upholding in substance the decision of the High Court albeit on slightly different grounds, that leave to appeal was sought and refused. The context of the application for leave was, therefore, rooted in the process which ended with the rejection of Student Transport's appeal to the Court of Appeal.

5.13 Given that there was some suggestion in the oral argument that the application of the *Greendale* jurisprudence to a determination of this Court refusing leave to appeal might be somewhat different to its application in the context of a decision by this Court after a full appeal, it is appropriate next to turn to that question.

6. ***Greendale*** **and Applications for Leave**

6.1 The starting point has to be to identify the constitutional status of an application for leave to appeal. As has been noted by this Court on many occasions, the new constitutional architecture which has been in place since the adoption of the 33rd Amendment to the Constitution is such that this Court only has jurisdiction to deal with those appeals which meet the constitutional threshold. As Article 34.5 puts it, this Court has appellate jurisdiction "if the Supreme Court is satisfied that" the threshold is met. Likewise, similar language is used in Art. 34.5.4, dealing with so-called leapfrog appeals where the constitutional threshold is described as a precondition for the Court being satisfied that the circumstances are such than a direct appeal to this Court is warranted.

6.2 It follows that a decision by this Court to refuse leave to appeal amounts to a decision that the constitutional threshold has not been met (or, in the case of a leapfrog appeal, possibly that there are not exceptional circumstances justifying a direct appeal). It follows, in turn, that the consequence of a refusal of leave to appeal by this Court will normally mean that the relevant proceedings, or any relevant aspect of them, can be taken to be at an end, save in the limited circumstances where this Court may refuse leapfrog leave in a non-certificate case so that an appeal can still progress to the Court of Appeal in the ordinary way.

6.3 In those circumstances, it seems to me that it is appropriate to describe a determination of this Court refusing leave to appeal as being a final decision of this Court. Subject only to the circumstances in which an appeal might still progress to the Court of Appeal, the proceedings, or any aspect of them which was the subject of the application for leave, are at an end and will rest with whatever final decision had

been made by the relevant lower court. I cannot see that there is any difference between the principle of finality as applied in such a case as opposed to in any other case where there has been a full consideration by this Court of the issues on the merits. Likewise, the derived right of a party who has benefited from the relevant decision of a lower court to be spared from having to continue with litigation (or a relevant aspect of litigation) which has come to an end, is equally clearly engaged by a determination of this Court refusing leave to its opponent to appeal.

6.4 I would also make two further observations. First, it is important to say that, even in the context of a refusal of leapfrog leave, the decision of this Court to decline such leave is in itself a final decision. It cannot be revisited, save in the same manner as would apply in respect of any other *Greendale* application. It is, of course, the fact that the proceedings generally may not thereby be at an end but that does not affect the finality of the determination of this Court to refuse leapfrog leave. Second, it is important to note that the obligation to ensure finality, save for the limited and exceptional jurisdiction exercised in accordance with *Greendale*, obliges the Court to refuse to allow a matter to be reopened unless the threshold is met. The fact that a party, who might benefit by invoking the derived right of finality which a successful party in this Court enjoys, does not assert that right, does not in any way diminish the obligation of the Court to enforce the finality which the Constitution requires.

6.5 In those circumstances, I cannot see that there is any difference in principle between the application of the *Greendale* jurisprudence to a determination of this Court refusing leave to appeal, on the one hand, and an order of this Court arising from the substantive hearing of an appeal, on the other.

6.6 That being said, there can, of course, be practical ways in which the same general principle impacts on different types of situations. In that context it must be recalled that the underlying principle behind the *Greendale* jurisprudence is that there may be wholly exceptional cases where it can properly be said that there has been such a significant departure from what the Constitution requires that a final decision of this Court must be treated as a nullity so as to enable the strong constitutional mandate, in respect of the finality of decisions of this Court, to be bypassed. It follows that the overall question which must be asked is as to whether the determination of this Court refusing leave must be treated as a nullity in that sense. The focus of the analysis must, in turn, therefore, be on the application for leave process. What was there about that process that might be said to render the determination, which was the result of the process concerned, as being properly regarded as a nullity?

6.7 In reality, the entire focus of the case made by Student Transport on this application concerned what happened, or perhaps more accurately, what is said not to have happened, in the proceedings when they were before both the High Court and the Court of Appeal. Little or nothing was said directly about the leave to appeal process. It must, therefore, be implied that the case which Student Transport wishes to make is that the leave to appeal process was in some way tainted by that which had gone before. I do not consider that such an argument is consistent with the constitutional value of finality and the proper respect for the derived right of a party who is entitled to treat proceedings as being at an end.

6.8 It must be recalled that the mere fact that it might be said that new evidence has emerged or that it can be shown that a final decision of this Court was incorrect,

does not, of itself, justify the reopening of proceedings. Indeed, in the context of a potential European Union law aspect to this application, it is worth noting the judgment of the CJEU in *Impresa Pizzarotti v. Comune di Bari* (Case C-213/13) (EU:C:2014:2067) where the following is said at para. 58:-

> "[58] … [A]ttention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question."

6.9 Thus it is clear that where, in accordance with national law, a matter is considered to be *res judicata*, the fundamental principles of the law of the European Union do not require such a matter to be reopened by the national court concerned, even if it is clear that European Union law was misapplied or wrongly interpreted in the case in question. Very similar principles apply in the law of this jurisdiction.

6.10 On the basis of that analysis, it seems to me that it is necessary for a party, who wishes to have a determination refusing leave to appeal to this Court set aside, to establish that there was something about the leave to appeal process itself which gives rise to the sort of constitutional issues identified in the jurisprudence which would justify setting aside the determination refusing leave to appeal.

6.11 It was already pointed out, in the earlier judgment of this Court on the question of discovery in the context of this application, that the proper method to seek to reopen a final decision which is said to have been procured by fraud is to commence plenary proceedings in the High Court seeking appropriate orders in that regard. Counsel for Student Transport did not go so far as to assert that a case in fraud was

being made. Rather, counsel sought to place reliance on the principle that state authorities should conduct litigation in an open manner "with all the cards face upwards on the table" (see, *R. v. Lancashire County Council Ex. Parte Huddleston* [1986] 2 All E.R. 941).

6.12 This principle has been recognised and followed by the Irish courts on numerous occasions. For example, in my judgment in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, I observed as follows at para. 6.9:-

> "[6.9] … Indeed, a court can, and in many cases should, punish a party in costs for unnecessarily and unreasonably declining to agree evidence in circumstances where there was no real basis for contesting the testimony concerned. This will be particularly so in public law proceedings where a public authority is a party. As was noted by Lord Donaldson M.R. in *R. v. Lancashire County Council Ex p. Huddleston* [1986] 2 All E.R. 941, such parties should conduct public law litigation 'with all cards face upwards on the table'."

More recently, this Court has accepted the principle that public authorities should be transparent in litigation in its decisions in, amongst other cases, *Quinn Insurance Limited (Under Administration) v. Pricewaterhousecoopers* [2021] IESC 15, *Protégé International Group & anor v. Irish Distillers Ltd.* [2021] IESC 16 and *Kelly v. Minister for Agriculture* [2021] IESC 23. Indeed, this Court had, independently of the *Huddleston* jurisprudence, adopted a similar approach in *O'Neill v. Governor of Castlerea Prison* [2004] I.R. 298 (see the observation of Keane C.J. at para. 49).

6.13 It follows that it cannot be doubted that such a principle has been recognised. It has not, however, been as yet established that a breach of that principle can be used to set aside a final order of the courts and, in particular, of this Court. No cases were cited as authority for such a proposition. Indeed, even if such a possibility exists, it would be necessary to define with some clarity the threshold of breach of the principle

which would need to be established in order to justify reopening a matter which had apparently come to finality. In any event, I can see no reason for taking a different approach to any such jurisdiction, should it be held to exist, than applies to a case in which it is sought to set aside a judgment on the grounds that it was procured by fraud.

6.14 The reason why it is appropriate that proceedings seeking to set aside due to fraud should be brought by plenary proceedings is that any such allegation requires to be fully considered by a court of first instance with the ability to hear and have tested evidence relevant to the serious allegation involved. I should again make clear that I should not be taken to indicate that a jurisdiction exists which permits a party to seek to set aside a final judgment on the grounds of a breach by a state authority of its obligation of conducting litigation in an open and transparent way. However, I am of the view that the very same considerations, concerning the need to consider and test detailed evidence, as apply in the context of fraud, would necessarily apply in respect of the exercise of any similar jurisdiction to reopen proceedings which might be held to exist in the context of an allegation that the State had failed properly to conduct its side of litigation. I would thus hold that, even if such a jurisdiction exists, it can only be pursued by plenary proceedings in the High Court.

6.15 Having made those observations in respect of the jurisdiction to apply the *Greendale* jurisprudence in relation to a determination refusing leave to appeal, it is next necessary to consider the application of those principles to the facts of this case.

7. Application to the Facts of this Case

7.1 As noted briefly earlier, the central focus of the case made on behalf of Student Transport was to suggest that misleading information was placed before the

High Court and the Court of Appeal on behalf of both the Minister and of Bus Éireann. On that basis, it is said that the decisions of those courts were affected by that misleading information. It must also be noted that both the Minister and Bus Éireann strongly resist those allegations.

7.2 However, as already noted, the focus of an application to set aside a final order of this Court must be on the process before this Court which, it is said, is such as makes it appropriate to treat the final decision of the Court as being a nullity.

7.3 In essence, as already noted, the case made on behalf of Student Transport was that the Minister had failed, in the proceedings generally, to conduct the litigation in the transparent manner which, in light of *Huddleston*, state authorities are obliged to act. It cannot be doubted but that the *Huddleston* jurisprudence can be deployed within proceedings brought against a state authority to require that authority to act in a transparent manner in the proceedings concerned. A court may, for example, give directions requiring compliance with the obligation of transparency. A court might also criticise a state authority for any demonstrated lack of transparency and take whatever action might be considered appropriate, for example in relation to costs, to mark that criticism.

7.4 However, as already noted, it is by no means clear that a breach of the requirement of transparency identified in *Huddleston* can be deployed to set aside a judgment of the Court in proceedings which have been finalised. It does not seem to me to be appropriate to reach a final conclusion on such issues in the context of a *Greendale* motion such as this. I would merely express the view that there must at least be a significant doubt as to whether any such jurisdiction does exist. However, for the purposes of the analysis in this case, it seems to me to be appropriate to

consider what the situation would be should such a jurisdiction exist. If the existence of such a jurisdiction (and, indeed, its parameters should it exist) would not make any difference to the result of this application, then that would provide further reason for not giving a definitive view on the matter in this judgment.

7.5 Of course, where it is said that the way in which the proceedings generally were conducted amount in some material way to fraud, then the proper process, for the reasons already analysed, is to seek to have the final decision set aside on that basis. Likewise, I am of the view that, if there be a jurisdiction to set aside a final judgment of this Court on the grounds of a sufficiently egregious failure on the part of the State or one of its agencies to conduct the proceedings in a transparent and open manner, then a similar procedure should be followed. Such general accusations do not, in my view, provide a basis for seeking to reopen a refused application for leave to appeal where the only consequence would be that an appeal would have to be conducted in circumstances where it would be highly unlikely that this Court would be able to reach any definitive assessment as to whether the underlying allegations made were true or not.

7.6 In those circumstances, the only possible order which this Court might make would be to remit the matter back to the High Court to consider whether an allegation such as fraud, or if it be a permissible basis for reopening proceedings, state failure to conduct proceedings in a transparent fashion, were made out. However, a party is entitled, in any event, to bring fresh proceedings (subject, in the case of an allegation of lack of transparency, to satisfying the Court that the relevant jurisdiction exists) on precisely those bases. There would then be no point in the appeal in the first place unless it could be said that the result of the appeal would get the party concerned to a

position where they would be able to run their case afresh in the High Court without having to establish fraud or, if the relevant jurisdiction exists, failure to conduct proceedings in a transparent way. However, there is no basis in fairness why a party should be entitled to do that without having first established the necessary underlying condition which would enable proceedings to be re-litigated. For the reasons already analysed, it would be impossible for this Court to reach a conclusion in that regard so that remitting the matter back for a full fresh hearing would be fundamentally unfair as it would bypass the necessary conclusion to such a fresh hearing being that fraud or, possibly, lack of transparency, had been established.

7.7 In that context, it must be noted that no specific allegation was made by Student Transport which suggested that the way in which the process, by which leave to appeal was refused by this Court was conducted, was in any way flawed. Rather the contention was that the proceedings as a whole were flawed by what is contended to have been a material lack of transparency on the part of the respondents.

7.8 It follows that, even if it might be possible to establish a jurisdiction to set aside proceedings on the ground that a state authority conducted proceedings with a lack of transparency, and I reiterate that I am far from determining that such a jurisdiction exists, a contention in that regard could not provide a basis for reopening an appeal to this Court but could only be pursued, if at all, through plenary proceedings. In that context and in light of the fact that no material contention was put forward to suggest an egregious flaw in the leave to appeal process itself, I would on those grounds alone dismiss this application. However, given that a number of serious accusations have been made on behalf of Student Transport, it does seem to

me appropriate to add some additional comments concerning some of the issues which were debated at the hearing of this application.

7.9 A central feature of the dispute concerns the question of whether the arrangements (to use a neutral term) between the Minister and Bus Éireann were solely on a cost recovery basis or whether there was some element of profit or surplus available to Bus Éireann. However, as was pointed out by Hogan J. in the Court of Appeal, the question of whether or not there was a profit or surplus element in the arrangements had ceased to be of any relevance by the time the case came to that Court because of the judgment of the CJEU in *Azienda*, which was delivered after the judgment of the High Court but before the case came to the Court of Appeal. As a result of *Azienda*, it was no longer open to the Minister to argue that the arrangements with Bus Éireann were not subject to EU public procurement law on one of the grounds on which the Minister had succeeded in the High Court, being the contention that there was no profit or surplus involved. It was clear by that time that arrangements which otherwise qualified as being subject to EU public procurement law, were not necessarily removed from the ambit of the requirements of that law simply because there was no surplus or profit involved.

7.10 The application for leave to this Court was concerned with a contention that issues of general public importance arose out of the decision of the Court of Appeal. However, that decision of the Court of Appeal ultimately found in favour of Student Transport on the pecuniary interest question precisely because of the intervening decision of the CJEU in *Azienda*. It follows that there would have been no possibility for an appeal being pursued to this Court by Student Transport on the ground that the

Court of Appeal was incorrect in that regard, for the Court of Appeal had found in favour of Student Transport on the point in question.

7.11 In those circumstances, I find it impossible to see how any issues concerning pecuniary interest could have been relevant to the decision of this Court to refuse leave to appeal, for all such issues had been disposed of in favour of Student Transport at the level of the Court of Appeal.

7.12 It is, therefore, necessary to concentrate on those issues on which the Minister succeeded before the Court of Appeal, for they were the only bases on which any possible leave to appeal to this Court might have been granted. One such issue concerned the time limits within which public procurement cases such this must be commenced.

7.13 In oral argument, counsel for Student Transport placed reliance on what was said to be additional information which has emerged in the context of the ICAG Report and the Commission correspondence, from which it is said that it might have been argued, had the relevant information been available, that a new arrangement was entered into between the parties as a result of discussions or arrangements which led to reductions in the amounts paid to Bus Éireann under the scheme. In that context, it must be noted that there is a six month limitation period within which proceedings of the type with which the Court is now concerned must be commenced. It followed that it was necessary for Student Transport to establish that events occurred within the six month period prior to the commencement of these proceedings, which involved the Minister entering into arrangements in breach of EU public procurement law. If there had been, in substance, a new or materially amended contract concluded within the relevant six month period then it might well not be the case that a single contract of

indefinite duration was in place. It is clear from the judgment of the CJEU in *Pressetext* that a potential change in arrangements may give rise to an obligation, where the other necessary conditions are met, to put a matter out to tender under public procurement requirements. However, it is also made clear that this is so only where that change in the arrangements operates to the financial benefit of the party contracting with the public authority concerned. Insofar as any new information might be argued to have become available, that information only goes to suggest that Bus Éireann was paid less than would have been the case had the strict operation of the methods for calculating its payments under existing arrangements continued in force. It is again very difficult to see how these matters could avail Student Transport.

7.14 As has been mentioned on a number of occasions in the course of this judgment, it is not permissible for Student Transport to seek to reopen an appeal to this Court (in circumstances where leave to appeal was refused) on the basis of general contentions concerning the proceedings as a whole. To the extent that any remedy may exist in respect of such allegations, then plenary proceedings are the appropriate course of action to adopt. If there had been an appeal to this Court from the decision of the Court of Appeal in these proceedings, then any such appeal would have been required to have been based on grounds suggesting that the Court of Appeal was incorrect in some material conclusion which it reached to the extent either that the judgment of the Court of Appeal should be reversed or that some aspect of the case be remitted back.

7.15 The bases on which Student Transport lost these proceedings in the High Court consisted of four independent grounds, any one of which would have been

sufficient, if correct, to lead to a dismissal of the case. As already noted, one of those grounds disappeared on appeal and was, in substance, found in favour of Student Transport. However, it was not only necessary for Student Transport to succeed on one ground but rather, for its appeal to succeed, all of the separate and independent bases on which it lost its case before the High Court would need to have been reversed. Like considerations would have applied in respect of any appeal to this Court. I do not consider that any material has been put forward on behalf of Student Transport to suggest that the Court of Appeal was wrong in the conclusions which it reached which in turn led to the dismissal of the appeal. Once any one of the bases on which the High Court held in favour of the Minister was upheld, then the appeal would necessarily have been dismissed. I cannot, therefore, see any basis on which any of the new material could be said to have raised issues sufficient to lead to the conclusion that the Court of Appeal was wrong in its ultimate decision to dismiss the appeal before it on the basis of the case then made.

7.16 In so saying, I would again emphasise that it would fall short of the threshold necessary to allow for a reopening as a result of a successful *Greendale* motion, to merely establish that the Court of Appeal was in error. However, I am not even satisfied that a lower threshold of error has been shown to arguably exist in the sense of an error which would have been sufficient to lead to a different result. This analysis re-emphasises the fact that what is truly sought on behalf of Student Transport on this application is the opportunity to rerun a different case from that which failed before. For the reasons already analysed, I am not satisfied that such a course of action is permissible.

7.17 The principle of finality applies even where there may be a basis for suggesting that a judgment of this Court was wrong. Where new evidence emerges after a final decision of this Court (as opposed to before a final decision of this Court when an application to admit new evidence can be moved) then that, too, is insufficient, in and of itself, to justify reopening. In light of those factors there is, in my view, no legitimate basis for giving Student Transport the opportunity to now run a different case in the High Court to the one which failed before. If Student Transport has any entitlement arising from the allegations which it makes, then same can only be pursued by fresh plenary proceedings in the High Court.

7.18 If Student Transport can persuade the High Court that there is a jurisdiction to set aside final orders on the basis of a breach of the obligation on state parties to conduct litigation in a transparent manner and if Student Transport can establish, to whatever standard may be considered necessary, a breach on the facts of this case, then it is possible that the case could be reopened subject to whatever terms the High Court might consider just. As indicated earlier, I am not to be taken as indicating that any such jurisdiction exists. However, on the hypothesis that such a jurisdiction may be found to exist, the proper place to make such an argument is in fresh proceedings before the High Court where the merits or otherwise of any factual contentions can be fully explored and determined on the basis of tested evidence. To suggest that Student Transport should be able to get to that position on the basis of an appeal to this Court which could not give rise to a detailed consideration of the merits or otherwise of the factual contentions, would be to allow an easy backdoor to reopening proceedings which would, in my view, be in fundamental breach of the principle of finality.

7.19 In those circumstances, I would refuse the application of Student Transport.

8. Conclusions

8.1 For the reasons set out in this judgment, I am satisfied that the principles established in the *Greendale* jurisprudence apply equally to an attempt to set aside a determination of this Court refusing leave to appeal. In the context of any such application, and in accordance with the relevant jurisprudence, a party seeking a *Greendale* order must establish to the very high threshold identified in the case law that 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.

8.2 I have also concluded that general accusations concerning the way in which the proceedings were conducted before lower courts do not give rise to the proper exercise of the *Greendale* jurisdiction in respect of a final order, judgment or determination of this Court. To the extent that any aspect of the manner in which proceedings were conducted before lower courts may give rise to an entitlement to have the result of proceedings set aside, then the proper course of action to adopt is to bring plenary proceedings in that regard. That is clearly so in the case of an attempt to set aside proceedings on the grounds of fraud. If there is a jurisdiction to set aside proceedings on the grounds of the failure of a state authority to conduct those proceedings in a transparent manner (and I make clear in the course of the judgment that I am not to be taken as indicating that such a jurisdiction exists), then an attempt to invoke that jurisdiction must also be pursued, for the reasons set out in this judgment, by plenary proceedings.

8.3 I also indicate that I am not satisfied that any basis has been put forward for suggesting that there was any fundamental flaw in the process leading to the determination refusing leave to appeal in this case. Insofar as any realistic case is made on behalf of Student Transport, it concerns allegations relating to the manner in which the proceedings were conducted before lower courts. To the extent that any such allegations might, conceivably, give rise to an entitlement to reopen these proceedings generally, then same can only be pursued in plenary proceedings and not by an appeal to this Court. Such an appeal to this Court would, for the reasons set out earlier, not be an appropriate way in which to determine whether the very limited circumstances in which the principle of finality can be overcome have been established.

8.4 On that basis I have concluded that the application should be refused. However, I make some additional observations on aspects of the case as argued by Student Transport.