UNAPPROVED
No Redaction Needed

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 324

Record No.: 2019/101

Edwards J.
Donnelly J.
Haughton J.

BETWEEN/

ANTHONY J. FITZPATRICK

APPELLANT

-and-

PAUL M. BEHAN (IN HIS CAPACITY OF TAXING MASTER OF THE HIGH COURT)

RESPONDENT

-and-

MYLES KIRBY

NOTICE PARTY

JUDGMENT of Ms. Justice Donnelly delivered on the 24th day of November, 2020

Introduction

1. This is an appeal against a decision of O'Regan J. [2018] IEHC 764 in which she refused to grant the appellant orders of *certiorari* by way of an application for judicial review of three certificates of taxation of costs granted by the respondent Taxing Master ("the Taxing Master"). Two central issues arise in this appeal. The first arises from a claim by the appellant that the Taxing Master failed to grant him an adjournment of the hearing of the costs appeal. The second issue is whether the Taxing Master was objectively biased because of perceived ongoing links with the firm of cost accountants acting for the notice party. Objective bias is not a claim that a decision maker was actually biased. It is a claim that a reasonable and fair-

minded objective observer in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial.

2. The proceedings in which the orders for costs arose followed the presentation of a winding-up petition by the Revenue Commissioners in relation to Elm Star Frames Limited ("the company"). The company nominated the appellant to be its voluntary liquidator and he was so confirmed at a creditor's meeting. The appellant opposed the winding-up petition and after a three day hearing, the High Court appointed Myles Kirby ("the notice party") as the official liquidator.

3. It is unnecessary to set out in detail the earlier history of those proceedings except to note that they resulted in three separate orders for costs being made in favour of the notice party against the appellant personally. When those costs were not discharged, following the issue of three separate summonses on the 16th May, 2018, the matter was heard by the Taxing Master on the 12th July, 2018 and subsequently three certificates of costs issued on the 2nd August, 2018.

Background

4. The issue surrounding the refusal to grant an adjournment is a separate and distinct issue to the ground raised by the appellant of objective bias. Both issues however, as submitted by the appellant, give rise to a breach of fair procedures. An unusual feature of the case is that the Taxing Master, despite claiming quasi- judicial immunity, entered a statement of opposition in the High Court. He engaged in this opposition on a limited basis; primarily related to claims centred on his relationship to the costs accountants who represented the notice party. The Taxing Master himself did not swear an affidavit, but his personal tax agent swore an affidavit on his behalf concerning his (previous) financial relationship with the firm. A Principal Officer in the Department of Justice also swore an affidavit on his behalf. I will give further details of these matters below.

The Taxation Hearing

5. The appellant received three covering letters dated the 16th May, 2018 from Behan & Associates enclosing three Summonses to Tax. Mr. Conlon, the legal cost accountant for the notice party, was listed as one of the seven partners of Behan & Associates on the covering letter. The summonses had "Paul M Behan Taxing Master" stamped on them. The appellant did not raise any concern about a possible connection between the Taxing Master and the cost accountants at this stage.

6. Following receipt of the summons to the taxation hearing, the appellant's solicitor entered into correspondence with the notice party's cost accountant and his solicitor. In the initial letter, he sought an adjournment on the basis that the appellant required an adjournment in order to retain and instruct his own cost drawer. The letter also stated that the entire High Court decision including the costs order in favour of the notice party, was under appeal and was due to be heard in 2019. A subsequent email claimed that the appeal had the effect of staying the personal order of costs against the applicant.

7. In his letter of reply, the cost accountant for the notice party refused to consent to any adjournment of the taxation. The cost accountant stated that a period of eight weeks in advance of the taxation date was more than enough time to instruct a legal cost accountant. A follow-up letter from the cost accountant again indicated that any attempt to adjourn would be strongly resisted.

8. By email dated the 14th June, 2018, the solicitor for the appellant again referred to the issue of liability of costs arising when the Supreme Court reached its determination. He indicated that the Court of Appeal had stayed the personal costs order against the appellant. The solicitor stated that the appellant had instructed him that he would nominate a cost drawer if and when the matter arises. In response to that letter, the solicitors for the notice party pointed out, correctly, that the order of the Court of Appeal referred to an entirely separate costs issue

between the appellant and the revenue. It was again robustly stated that they would oppose any application to adjourn the matter of taxation.

9. From the foregoing, it can be seen that there was no substance in the request to stay based upon an outstanding appeal. The appeal referred to by the appellant did not concern the costs orders at issue and furthermore, there was no stay on the orders for costs. This was not an issue that was pursued in the judicial review hearing.

10. In his statement grounding the application for judicial review, the appellant claimed that his solicitor and counsel attended the hearing for the purposes of seeking an adjournment "on the ground inter-alia that the appellant was not in a position to instruct Cost Accountant to act for him". The grounding statement stated that counsel made various submissions including placing reliance on fair procedures and also advised the Taxing Master that the appellant had been in hospital for some time since being furnished with the bill of costs by the notice party. It is then alleged that the Taxing Master refused the adjournment and did not give adequate reasons for same. At that point, counsel and solicitor for the appellant left the hearing.

11. The appellant's solicitor's affidavit also stated that his counsel outlined that the appellant was in hospital for some of the time since the bills of costs were received. The solicitor also referred to having previously sought the adjournment of the taxation hearing and exhibited certain of the correspondence referred to above. He did not exhibit his own email to the cost accountants as referred to above. No medical report was produced to the Taxing Master nor was one produced at any latter stage.

12. In keeping with his limited participation in the proceedings, the affidavits filed on behalf of the Taxing Master did not address the decision making at the taxation hearing.

13. The notice party swore an affidavit in the proceedings, but this was only sworn for the purpose of responding to the application for a stay. His cost accountant who was present representing him at the hearing did not swear an affidavit. The fact that the affidavit was placed

before us (by the appellant in his booklet of pleadings) when it had not been considered by the trial judge was an unfortunate aspect of these proceedings. No great objection was taken to the Court considering the affidavit, but I consider that it has limited relevance. The notice party who was not present at the hearing makes a hearsay averment that the appellant relied upon two issues in seeking the adjournment: a) the hospitalisation and b) the stay on the costs order. The notice party also stated that the adjournment was opposed by his cost accountant, Mr. Conlon, who opened the correspondence of the 26th June, 2018. The notice party averred that the Taxing Master declined to grant an adjournment and advised that he would proceed with the matter after it had dealt with some other matters. The notice party also referred to information provided to him by Mr. Conlon to the effect that Mr. Conlon had received a telephone call during the recess in proceedings, from a Mr. Michael Ryan, the cost accountant who subsequently prepared a report for the appellant in the present proceedings. The notice party indicates that Mr. Conlon was told by Mr. Ryan that he had been approached to act that morning but was not in a position to attend. The notice party indicates that the hearing then proceeded in the absence of the appellant and his solicitor. The notice party in his affidavit referred to details of other appointments as liquidator by the appellant but for the purpose of the matters dealt with in this judgment it is not necessary to adjudicate on that issue.

14. From the information provided by the appellant in his affidavit, it appears that at no stage did he place before the Taxing Master any evidence as to his illness or hospitalisation. That is evidence on which this Court may make a decision concerning the refusal to grant an adjournment.

The Claim of Objective Bias

15. Subsequent to the hearing, the appellant claimed that the Taxing Master had not disclosed the fact that he "owned" the business name "Behan & Associates" and this had deprived the appellant of a chance to object to the Taxing Master hearing the claim. The

appellant claimed that he had suffered losses as a result of this, namely damage when his name appeared in Stubbs Gazette on registration of the judgment on foot of the taxation process and wrote to the appellant's professional body.

16. In his verifying affidavit, the appellant averred that, following receipt of the three certificates of taxation on the 2nd August, 2018, he was "surprised at the high level of costs awarded to the Notice Party by the Respondent" and was "concerned that the cost accountant appeared to be from a firm with the same name as the Respondent." The appellant instructed a legal costs accountant who prepared a report which concluded that the "sums allowed with regard to the three instructions fee in my professional opinion are high for the work carried out by the various solicitors involved."

17. The appellant, who averred he was very familiar with Company Registration Office and business name searches conducted a search and made relevant inquiries into the ownership of the business name of "Behan & Associates". It was at this point that the appellant discovered that while Behan & Associates LCC Ltd. is a limited company, the business name under which it trades, *i.e.* Behan & Associates, is registered to the Taxing Master. It is on this basis, the appellant sought to judicially review the decision of the Taxing Master on the grounds of objective bias due to an alleged pecuniary interest that the Taxing Master held in the business name and his previous working relationship with the firm and in particular, Mr. Conlon. In order to give context to this ground of appeal, it is necessary to briefly outline the Taxing Master's relationship with Behan & Associates.

18. In 1989, the Taxing Master, a legal cost accountant at the time, founded Behan & Associates as a sole trader. The business was incorporated in 1997. There were two companies associated with Behan & Associates and these were incorporated under the Companies Acts; the first being "Behan & Associates Legal Costs Accountants Limited (hereinafter, Behan & Associates LCA") and Behan & Associates Legal Costs Consultants Limited (hereinafter,

"Behan & Associates LCC"). By this stage, the Taxing Master and three other people, were shareholders in the company. Behan & Associates LCA is a non-trading subsidiary of Behan & Associates LCC and has not been trading since 2001.

19. In October 2002, the name "Behan & Associates" was registered by the Taxing Master as a presenter under the Registration of Business Names Act, 1963. Mr. Magill, from the firm Crowe Ireland, who were the Taxing Master's personal tax agents, swore an affidavit on behalf of the Taxing Master. Mr. Magill's firm advised the Taxing Master on the full divestment of the Taxing Master from any legal and beneficial interests in Behan & Associates LCC. According to his affidavit, at the time of the registration of the business name, the Taxing Master had ceased to trade personally except through Behan & Associates LCC. The business name was registered to the business address of that company and not that of the Taxing Master. The trading company utilised the business name of "Behan & Associates" on both its letterhead and its website and continues to do so.

20. In 2008, the Taxing Master retired from Behan & Associates LCC. The Taxing Master was a Director in both of these companies, but terminated his role as Director of both companies on the 1st May, 2011. The Taxing Master had divested himself of all shares in Behan & Associates LCC by the 16th November, 2010 and in Behan & Associates LCA by the 1st May, 2014. The legal interest the Taxing Master had in the companies' premises under a co-ownership agreement and leased to Behan & Associates LCC, was disposed by him in December, 2017. Mr. Conlon, the cost accountant for the notice party, has been a Director for Behan & Associates LCC since December 2005.

The Judicial Review Grounds

21. The trial judge records that leave was granted to the appellant to maintain the within judicial review proceedings in respect of the certificates of the 2nd August, 2018 on the basis that:

1. "Behan and Associates" was the name used by the accountant for the notice party and this name is registered to the name of the Taxing Master. Accordingly, it is argued there is ongoing goodwill in favour of the Taxing Master associated with the name and his "ownership" of the name could be encashed thereby giving rise to a perception that the respondent has a direct or indirect interest in that accountancy business;

2. The Taxing Master ought not to have determined the taxation on 12th July, 2018 as it offends the *nemo judex in sua causa* principle and lacked basic fairness of procedure;

3. The Taxing Master unreasonably exercised his discretion not to accede to the appellant's application for an adjournment and therefore the appellant did not have an opportunity to instruct cost accountants;

4. Insofar as the refusal of the application for the adjournment is concerned no adequate reasons were furnished and to the objective observer such observer would believe that the adjournment was refused to facilitate an early taxation and higher reward and faster fee collection making a net gain directly or indirectly to the respondent.

5. No comparators were open to the Taxing Master while the applicant's solicitor and counsel were present accordingly the Taxing Master's methodology was not in compliance with O. 99 principles of natural and constitutional justice and fairness;

6. That the appellant would have requested the Taxing Master to recuse himself on grounds of objective or perceived bias or unfairness if the Taxing Master has disclosed that he had a former professional relationship with the notice party's cost accountant and was currently the owner of the business name used by such accountant's firm.

The High Court Judgment

22. In the course of her judgment, O'Regan J. outlined that the application for the adjournment was made on the basis that the appellant had been in hospital for some of the time since the bill of costs had been received. At para. 9 she noted a number of matters that no detail or medical report was furnished to the Taxing Master, no such report had been proffered at any time up to the date of the application, opposing arguments were made, no precise date has been given as to when the appellant's cost accountant had been instructed, there was no answer as to the identity of the cost accountant when asked and the appellant's arguments *"appear[ed] to be premised on an entitlement to secure an adjournment"* if he was in hospital at some point and without otherwise indicating how there was a difficulty in appointing a tax accountant.

23. At para. 10, O'Regan J. held that in the circumstances, the appellant had not disclosed an error of law by the Taxing Master in refusing the adjournment sought.

24. The judgment records that the Taxing Master only took part in the hearing as a result of submissions made by the appellant to the High Court. The trial judge noted that there was a discrepancy between the first and second set of submissions by the appellant as to whether or not he accepted that the Taxing Master had limited immunity as applied to judges. The trial judge held however that no plea of *mala fides* or impropriety had been made against the Taxing Master in the pleadings.

25. The trial judge noted that the Taxing Master's statement of opposition and submissions were also somewhat contradictory. The Taxing Master had indicated that he was only taking part because of the allegation of *mala fides* and impropriety against him but in written submissions argued there was no such allegation against him, arguing that bias does not equate to either *mala fides* or impropriety. The statement of opposition stated that bias was being addressed by the respondent. The appellant argued in oral submissions that by taking part in

the proceedings without any allegation of impropriety or *mala fides* the Taxing Master had lost any immunity he might have had.

26. O'Regan J. went on to hold that the case law demonstrates that the Taxing Master, who has specialist expertise with the function of decision making on a conflict, is entitled to the limited immunity available to judges, that is, limited immunity when they do not partake in proceedings and the possibility of impropriety or *mala fides* has not been made out.

27. The trial judge referred to the tests for objective bias as set out in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 and in *Goode Concrete v. CRH* [2015] 3 I.R. 493. She specifically cited the judgment of Denham C.J. where she indicated that where the adjudicator has a proprietary or some other definite personal interest in the outcome there is a presumption of bias without further proof.

28. At para. 36 of her judgment, O'Regan J. held:

> "*In the instant circumstances the reasonable observer would know:*
>
> 1. *The respondent and Mr. Paul Conlon worked together for a period of ten years which terminated in 2008 when the respondent retired.*
> 2. *As and from the 16th November, 2010 the respondent disposed of his shares in one of the two companies associated with Mr. Paul Conlon and thereafter was not a director or had any involvement with same.*
> 3. *By the 1st May, 2014 the respondent did not retain any shares or have any involvement in either company – at that time his holding in trust ceased.*
> 4. *The respondent disposed of his interest in the property from which the notice party Tax Accountants operated in December 2017.*
> 5. *The respondent was appointed as Taxing Master on 24th April 2017.*

6. *There is no proprietary interest in the name of Behan and Associates vested in the respondent and indeed from 2008 the respondent was obliged to ensure that his registration was removed from the register.*
7. *In his adjudication a Taxing Master would in ordinary course be dealing with and hearing submissions from tax accountants.*
8. *The respondent had no interest in the outcome of the decision.*
9. *In dealing with the relevant costs there was no allegation arising against anyone – the hearing was limited to measuring costs due.*
10. *Friendship and associations will inevitably arise between cost accountants.*
11. *A multiplicity of different and unconnected persons can and often do hold identical or confusingly similar business name registrations."*

29. Having so found as above, O'Regan J. held:

"I am satisfied that a reasonable observer who is not unduly sensitive would not form the view that the respondent had difficulty in maintaining complete objectivity and impartiality or that the circumstances cast doubt on the integrity of the respondent in or about the discharge of his functions. Nor would the reasonable observer be apprehensive that the applicant would not have had a fair hearing from an impartial judge on the issues (had the applicant attended for the full hearing)."

The Issues in this Appeal

30. In his submissions, the appellant relies upon the following grounds:

a) That the refusal to grant the appellant an adjournment of the hearing of the taxation appeal and the failure to give reasons was a breach of fair procedures (although the failure to give reasons was not mentioned in the notice of appeal), and,

b) that there was a further breach of fair procedures on the basis of:

(i) Objective bias on the part of the respondent in hearing the appeal in circumstances where "Behan and Associates" was the name used by the accountant for the notice party and this name is registered to the name of the respondent. Accordingly, it is argued there is ongoing goodwill in favour of the respondent associated with the name and his ownership of the name could be encashed thereby giving rise to a perception that the respondent has a direct or indirect interest in that accountancy business; the respondent had previously been involved in Behan & Associates and had worked with the cost accountant for the Notice Party; the respondent had until December 2017 an interest in the property leased to the cost accountants.

(ii) The respondent ought not to have determined the taxation on the 12th July, 2018 as it offends the *nemo judex in sua causa* principle and lacked basic fairness of procedure;

c) That no award as to costs of the notice party as against the appellant should have been ordered.

31. The notice party contests the appeal but also cross-appeals. This cross-appeal is against the decision to limit the costs of the notice party as against the appellant to 50% of the costs of the first day of hearing.

32. The Taxing Master also contested the appeal on the grounds that the trial judge did not err in law or in fact in her decision. He did so on the basis that the notice party was the *legitimus contradictor* in respect of any ground of appeal that did not refer to either *mala fides* or alleged impropriety. He claimed that as Taxing Master he is a quasi-judicial officer who enjoys immunity from suit in all actions arising from the exercise of his judicial function.

33. On the basis of the foregoing, the following issues arise or potentially arise for determination in this appeal:

a) Was the refusal of the adjournment a breach of fair procedures because of:

i) the appellant's circumstances

ii) the failure to give reasons

b) Was there a breach of fair procedures because of objective bias on the part of the Taxing Master?

c) Does the Taxing Master enjoy a limited immunity from suit?

d) Was the notice party entitled to all, some or any costs of the High Court hearing?

Breach of Fair Procedures: The refusal to grant an adjournment

34. The appellant submitted that the refusal to grant the adjournment breached his right to fair procedures. The appellant submitted that there was a breach of fair procedures as he had no cost accountant's report, this was the first time the matter was in the list and because no adequate reasons for the refusal of the adjournment were given.

35. The appellant relied upon a variety of case law to support the contention that in a hearing such as this, fair procedures requires adequate time to prepare the case (*Flanagan v. UCD* [1988] I.R. 724). He particularly relied on *Law Society of Ireland v. Coleman* [2018] IESC 80 in which, he submitted, the Supreme Court upheld that applicant's appeal "where he had been refused an adjournment in analogous circumstances".

36. Paragraph 43 of the appellant's written submissions appears to be an innuendo that the refusal by the Taxing Master to give the adjournment was a deliberate ploy to ensure that the review would proceed before him. In reply to a question at the hearing of this appeal, counsel for the appellant confirmed that there was no claim made in relation to actual bias but that the failure to grant the adjournment was a matter that a reasonable observer would be entitled to consider in the context of the issue of objective bias.

37. None of the affidavits recount the words spoken by the Taxing Master in reaching his decision on the adjournment application. It is unsatisfactory that neither the notice party nor

the appellant chose to put before the High Court an admissible and complete version of what transpired before the Taxing Master. The primary responsibility for that must lie with the appellant however. He has taken these proceedings. He must place all relevant material before the Court when seeking relief by way of judicial review.

38. The necessity to place all relevant material before the Court is particularly important when it concerns a claim that there has been a failure to give adequate reasons. As the Supreme Court held in *Connelly v. An Bord Pleanála* [2018] 2 I.L.R.M. 453 in a claim concerning the adequacy of reasons, context is everything. Thus, the full nature and extent of the application made, together with the opposition, if any, to that application must be placed before the Court. Similarly, as complete a picture as possible must be given as to what was said in the ruling on the application for an adjournment

39. Furthermore, although the claim of inadequacy of reasons formed part of the grounds upon which leave was granted and there is a reference to it in the High Court judgment, it is not addressed in the judgment. That would support the view that this was a ground not pursued with any vigour in the court below. This is further fuelled by the fact that the only ground relating to the adjournment did not deal with the adequacy of reasons. That ground as set out in the notice of appeal is as follows:

> "The learned High Court judge erred in fact by failing to take adequate cognisance of the failure of the Respondent to grant an adjournment to the appellant on 12th of July 2018 to facilitate his instructions of a cost Accountant. The respondent was informed that the appellant had been unwell and in hospital in the months prior to 12th July 2018. That date was the first time the matter was before the respondent and the Respondent ought to have used his discretion to accede to the Appellant's request for an adjournment in all circumstances."

40. Notwithstanding the above, in his written submissions the appellant urged the Court to find that there had been a failure to give adequate reasons in refusing to grant the adjournment. In oral submissions, there was less reliance on the failure to give adequate reasons for the refusal to adjourn per se. The appellant attempted to tie the failure to give reasons to the absence of a request by the Taxing Master for a medical report. In the absence of a reference to a medical report by the Taxing Master it could not be said to be a reason for the adjournment.

41. I reject the appellant's claim of a breach of fair procedures based upon inadequacy of reasons as that is not a ground of appeal before this Court. Even if it were such a ground, I would also reject it because due to the failure of the appellant to place before the High Court a complete picture of the grounds on which the application was made, the grounds on which it was opposed and the contents of the decision refusing the relief, no case had been made out by him that there was a failure to give "adequate reasons".

42. Finally, and in light of the above perhaps unnecessarily, I would observe that the requirement to give reasons varies depending on the context. As McKechnie J. noted in *The Law Society v. Coleman* (at para 101) -

> *"It is worthwhile to point out however, that Fennelly J. [*in *Mallak v. Minister for Justice [2012] 3 IR* 297*] was careful in his decision not to create a formal rule, one which would oblige all decision-makers to give reasons in every situation. He stated that the underlying objective would be the attainment of fairness in the process. On occasions, provided that the process was fair, open and the affected person had been given a chance to respond, then the reasons for the decision may be obvious. Unless so however, the basis of any such decision must be set out, so that the reasons therefore are both apparent and manifest."*

In the present case, the fact that one leg of the claim for an adjournment was completely incorrect (the alleged stay on the order) and the second leg was based upon a previously

unmentioned hospital stay without any medical report whatsoever, extensive reasoning could not be expected of a decision maker.

43. The appellant submits that *The Law Society of Ireland v. Coleman* is an analogous case. In my view, the factual situation in *The Law Society of Ireland v. Coleman* was far removed from the present facts. In *Coleman*, the Supreme Court overturned the decision of the High Court confirming orders of the Solicitors' Disciplinary tribunal on the basis that the solicitor should have been granted an adjournment. Mr. Coleman, although a solicitor, was representing himself when he applied for the adjournment in order to instruct solicitor and counsel. According to the evidence of Mr. Coleman, he was only served with the motion papers on the Friday evening before the motion was heard on the Monday, and although that time frame was disputed by the Law Society, there was no doubt that on any view of the evidence the notice period was quite short. Those proceedings concerned the right of Mr. Coleman to carry on his profession as a solicitor and also involved a restitution award made against him of many multiples of the amount of the certificate of taxation granted in the present case. Although Mr. Coleman clearly had notice of the general claims being made against him (as decided by the Disciplinary Tribunal), it is noteworthy that Mr. Coleman had no earlier notice that the restitution order in the sum of €320,000 would be made against him until he received Notice papers.

44. At one point in his written submissions, the appellant claims that he sought the adjournment to instruct solicitor and counsel. That is not averred to on affidavit, but, in any event, it is difficult to see how such a claim could be made where the same solicitor and counsel acted for the appellant throughout the course of these proceedings. Indeed, his solicitor had acted for him during the entire eight-week period leading up to the taxation hearing.

45. The appellant placed great emphasis on the fact that this was the first date listed for the hearing of this application. In so far as he makes this point, there is no support for such a

standalone proposition in any of the authorities. This was the hearing date, there is no right to an adjournment simply because it is the first date it was listed.

46. The onus is on the appellant to establish that the High Court judge erred in refusing relief based upon the refusal to grant the adjournment. I am satisfied that the appellant has not established any such error. The High Court judge ruled that the Taxing Master had not erred in law in refusing to grant the adjournment. The appellant had no absolute right to an adjournment. It was a matter for him to establish an entitlement to an adjournment based upon the facts of the case. No entitlement to an adjournment has been established in circumstances where the appellant made no prior claim of an inability to instruct a cost accountant based upon hospitalisation and on the day made such a claim in the absence not only of any medical report but of any detail whatsoever about the nature or the extent of such hospitalisation. He was represented by solicitor and counsel who, it appears, made no effort even to explain the inability to obtain such a report or such detail to the Taxing Master. If such explanation had been given, it may then have been appropriate to flesh out the details of the hospitalisation in subsequent judicial review proceedings. In the present case, there was a complete absence of any attempt to explain the difficulties either at the time of the application or subsequently.

47. Finally, the evidence in the correspondence displays an engagement by the appellant with his solicitor prior to the Taxation hearing. I refer to the appellant's solicitor's email to the notice party's cost accountant wherein he explicitly refers to the instructions from his client with regard to issues concerning the cost accountant and why no steps were being taken. It is clear therefore that at least at some stage during the eight-week period prior to the hearing, the appellant was capable of instructing a cost accountant but had not done so for a reason that turned out to be entirely incorrect. Put simply, there is no basis on which this Court could or should overturn the finding of the High Court judge to dismiss this part of the appellant's claim.

48. In so far as the appellant relies upon objective bias and that the failure to adjourn was demonstrative of such bias, I consider that bound up with the issue of objective bias which I will now address.

Breach of Fair Procedures: Claim of Objective Bias

Delay on the Part of the Appellant in raising the issue of Bias

49. The notice party submitted that it was relevant that the appellant only raised the issue of bias after the order was handed down by the Taxing Master. In relation to the failure on the part of the Taxing Master to disclose his previous working relationship with Mr. Conlon, the notice party contends that the appellant was in fact on notice of the commonality of names between Behan & Associates and the name of the Taxing Master when correspondence from Behan & Associates was sent to the appellant on the 16th May, 2018 and not only when the appellant received the Certificates of Taxation on the 2nd August, 2018 as alleged.

50. The notice party relied upon the following passage from Hogan & Morgan, Administrative Law in Ireland, 5th Edition:

> "14.95 The right to object to a breach of the nemo iudex principle may be held to have been waived by the applicant, provided that he or she had (or are deemed to have) full knowledge of the facts, and yet failed to protest. The rule has been stated as follows:
>
> *'[W]here a decision is challenged on the grounds of bias in the tribunal of which gave it, [the] Court will not interfere where it appears that the fact or suspicion of bias was present to the mind of the challenging party at the hearing before the tribunal, and the point as to bias or suspected bias was not made by or on his behalf at the hearing by the tribunal'*
>
> The common-sensical policy underlying this rule is presumably that an applicant may not wait to see whether a decision goes in his or her favour and then, if it does not do so, turn around and complain that the decision-maker was biased."

In *Corrigan v. Irish Land Commission* [1997] I.R. 317 Henchy J. stated that 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."* Where information was publicly available, a person may be estopped from raising a complaint as to bias. It is important, for the due administration of justice, that any objection of bias is to be made at the earliest possible opportunity.

51. The appellant submitted that this albeit tardy raising of bias was not a tactic sought by the appellant. The appellant relied upon the decision in *Goode Concrete v. CRH* cited above. In that case, the trial judge alerted the parties to a vague recollection of some shares in the defendant company and no objection was taken. On further enquiry after judgment, the losing party on further enquiry made a complaint of objective bias on the grounds of a much greater financial interest in the company. Unbeknownst to the trial judge, his pension advisers had bought additional shares in the defendant company shortly after the case had been listed before him. The Supreme Court overturned the findings of the High Court on the grounds of objective bias *i.e.* that there was an appearance of bias.

52. The appellant submitted that the Taxing Master did not raise with the parties, the fact that:-

(a) He had a previous working relationship with Mr. Conlon, the legal costs accountant for the notice party; and

(b) He was the registered owner of the name "Behan & Associates".

53. The appellant in the present case was an accountant who even on his own account was a liquidator with more than a passing involvement in litigation. He had received on the 16th May, 2018 a letter from Behan & Associates enclosing the Bill of Costs and the Summons to Tax. It is very clear on the summons that "Paul M Behan Taxing Master" is stamped on the

document. There was an immediate name connection. Moreover, at all material times the appellant was represented by solicitor and counsel and there is no affidavit from either of these saying that they had no knowledge of any link. Indeed, it would be difficult to imagine that such lack of knowledge could exist in any solicitor engaging in litigation given the small number of Taxing Masters and the small gene pool of cost accountants.

I consider therefore that the appellant must be deemed to have known of at least the potential for a link between the Taxing Master and Behan & Associates. His own affidavit points to a search of the website of Behan & Associates in which the link is clarified. The appellant was on notice therefore of the alleged connection between the firm of Behan & Associates and the Taxing Master based upon the previous connection of the Taxing Master with the firm. Therefore, if he wanted to take objection, he could and should have given instructions to his counsel to raise such objection on the grounds of objective bias at the taxation hearing on the 12th July, 2018. If that was the only matter arising, *i.e.* the mere fact of a previous connection between the Taxing Master and the notice party's cost accountant arising from being in business together, I would have no hesitation in saying that the appellant had waived his right to raise this issue.

54. The registration of the business name however raises a somewhat more difficult issue. The appellant in seeking to impugn aspects of Mr. Magill's evidence points himself to the fact that the Registration of the Business Name is a matter of public record. On the one hand, following the appellant's logic, he could have taken steps to review the association the Taxing Master had to the business name as that information is available freely to the public. Further, he avers that he is "very familiar with CRO Searches to enquire into the status of companies and the ownership of business names etc." Therefore, it could hardly be the case that the appellant could have been delayed from raising the issue of bias at the earliest possible

opportunity due to the lack of facilities or information available to him to carry out any relevant checks.

55. The Supreme Court in *Goode Concrete v. CRH* affirmed that there was no automatic disqualification principle where a judge had a pecuniary or other personal interest in the outcome of the proceedings but that "a reasonable person" test applied on the issue of objective bias. The responsibility is on the decision maker to make the necessary enquiries as to his interests in certain holdings. As stated by Denham C.J. in *Goode Concrete v. CRH* "*[i]t is the responsibility of a judge to make the necessary inquiries into his holdings of shares in a company which is in litigation before him, and to inform the parties, so that an informed assessment may be made as to whether he or she should recuse himself or herself. It is not a burden of inquiry to be borne by the parties."*

56. In *Goode Concrete v. CRH*, Denham C.J. held at p.521 that it was not simply a matter between the parties, but an issue for consideration in relation to the manifest impartial administration of justice in the State and the confidence which people rest in the judiciary. The Supreme Court held that in that case there had not been sufficient disclosure to allow for any consideration of a waiver. In conclusion, Denham C.J. stated that she would not address the manner in which the information concerning the trial judge's shareholding came before the Court, as the fundamental issues were so important, being the administration of justice and the allegation of objective bias.

57. In the present case, this Court was asked to adjudicate on the issue of whether the Taxing Master was entitled to judicial immunity; the appellant submitting that he was not. Although Gannon J. in *Magauran v. Dargan* [1983] I.L.R.M. 7 had held that the Taxing Master was not presiding over a Court or exercising a judicial function, he also held that *"[t]he Taxing Master's function may be described as ancillary to the judicial process only in the sense of being supplementary to it but not as forming an essential part of it. He provides a service of a*

very limited nature which may be directed by the Court or availed of or not at the choice of solicitors and their clients."

58. In my view the Taxing Master's role is so closely linked, not least in the perception of the public, with the judicial process, that the protection of the administration of justice requires that a court asked to consider whether there is objective bias on the basis of a pecuniary interest must reach a decision that there has been a waiver in only the most clear of situations and even then, the court must consider the overall public interest. In those circumstances, I am satisfied that in this case, the matter is such a fundamental one of a claim of pecuniary interest in the outcome that the Court must proceed to consider the claim despite any delay.

The Taxing Master's Previous Working Relationship

59. If the issue of objective bias had been raised purely on the ground of the previous business relationship between the Taxing Master and Mr. Conlon, it may well have been rejected on the ground of waiver. As the appellant's case appears to be bound up with a claim of continued financial links between them it is necessary to consider it for the purpose for adjudicating on the issue of whether there is a breach of fair procedures on the basis of objective bias. I am doing so on the basis that the appellant submits that these are issues that an objective observer would reasonably apprehend that there is a risk that the decision maker will not be fair and impartial. As has been demonstrated in the case law referred to below, there is a difference between a previous business link between a decision maker and those who may appear in front of them (*e.g.* judges and barristers) and an ongoing link between the decision maker and the parties (or those appearing before him or her) from which the decision maker might benefit.

60. The appellant relies on *Kenny v. Trinity College Dublin*, cited above. The facts in that case were that one of the judges who heard the appeal was a sibling of an architect in the firm of architects who had been responsible for the design and execution of the development the

subject matter of the proceedings. There was an allegation against that firm (but not the sibling who had not been involved in the development) by the plaintiff that the firm had participated in the concealment of material from the High Court at the application for leave. The Supreme Court, in upholding *Orange Communications Ltd. v. Director of Telecoms (No.2)* [2000] 4 I.R. 259 which quoted the English decision of *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] 1 Q.B. 451:-

> *"a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case."*

Fennelly J went on to state that:-

> *"objective bias does not necessarily require that the relationship of which complaint is made between the adjudicator and a party in the case. A witness will suffice. The question is whether a reasonable observer might have a reasonable apprehension that a judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? Applying the most favourable interpretation of the facts from the appellant's point of view, and bearing in mind that the Court should be especially careful where it is considering one of its own judgments, I believe that the test of objective bias should be held, in all the circumstances, to be satisfied."*

The appellant accepts that the relationship between the judge and the firm in *Kenny v. Trinity College Dublin* was a personal relationship as opposed to a business relationship in this case.

61. Counsel on behalf of the Taxing Master sought to distinguish *Kenny v. Trinity College Dublin*. Counsel submitted that *Kenny v. Trinity College Dublin* was a very specific case, in which the Court was particularly careful due to the fact that it was reviewing one of its own decisions. The case was not one about a connection *simpliciter*. In *Kenny v. Trinity College Dublin*, the substance of the allegations put forward by the plaintiff was that the first defendant engaged in deliberate misleading of the High Court with the result that the court made an incorrect decision. The affidavits exchanged in the High Court in *Kenny v. Trinity College Dublin* show that the plaintiff alleged that the firm of architects were implicated in this action by the first defendant. Therefore, there was a specific allegation made against the architects in *Kenny v. Trinity College Dublin* and therefore a specific connection in that case.

62. The test in this jurisdiction on how a reasonable apprehension of bias is assessed, is that of the reasonable observer. In *Orange Communications Ltd. v. Director of Telecoms (No.2)*, Keane C.J. held that there is "*no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension of suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."*

63. Shortly after the *Orange Communications* decision, the Supreme Court examined in more detail the appropriate test *i.e.* real danger of bias or reasonable apprehension of bias. In *Bula Ltd v. Tara Mines Ltd. (No.6)* [2000] 4 I.R. 412. The Supreme Court strongly opted for the test of reasonable apprehension of bias which the trial judge applied in this case. In *Bula Ltd. v. Tara Mines Ltd. (No. 6)*, the appellants alleged that two members of the Bench in the Supreme Court had links with the respondents which were of such a character as to give rise to a perception of bias. One judge, as senior counsel, had acted for the fifteenth respondent in

two sets of proceedings relating to the Tara respondents in one case and the applicants in another. He had also advised on legislative reform in the area of mineral mining. That senior counsel had also acted against the Tara respondents in a case and prepared two sets of advices for the first respondent. The other judge, as senior counsel, previously advised the first respondent. He undertook to appear for the first respondent in an anticipated hearing but did not do so due to his appointment as judge of the High Court. In dismissing the appeal, the Supreme Court outlined the manner in which the Bar conducted itself in terms of its independence in representing clients. There was no affiliation with the cause of a client no matter how controversial. The reasonable observer would know that barristers acted independently.

64. The High Court case of *Keegan v. Kilrane* [2011] 3 I.R. 813 is perhaps even more instructive. The applicant in that case brought judicial review of the decision made by the first respondent on the grounds *inter alia* that the first respondent proceeded to hear, convict and sentence the applicant despite having been requested to recuse himself from the case on the basis that he had, prior to his appointment as a judge, practised as a solicitor and acted for the applicant in previous proceedings. The applicant argued that the prior connection between himself and the District Court judge was such as to cause a reasonable, objective and informed observer to apprehend, on reasonable grounds, that the District Court judge could not bring an impartial mind to bear on the matter. The High Court condemned the conduct of the applicant in bringing the proceedings at a late stage, albeit within the permitted time limit to bring an application for judicial review. Birmingham J. stated that the *"application was made so late in the day was (sic) not a 'genuine one', in the sense that it was not meritorious and it was merely the latest ploy in a series of attempts to postpone the evil day when the case came on for hearing."* This view was taken by the trial judge as the applicant failed to raise any issue of bias when the trial date was being fixed and instead did so when the application to adjourn

the matter was unsuccessful. Birmingham J. reluctantly held however, that the overriding consideration is that a fair, reasonable and objective observer in possession of the facts should have confidence in the fact that the applicant was being tried by a judge who was capable of bringing an open mind to bear. At para. 24, Birmingham J. went on to state: -

> *"In my view, such an observer might well believe that it would be very difficult for the judge to put out of his mind the prior information that had come to him in his unique role as a defence lawyer, and in these circumstances, while believing the applicant was in large measure, the author of his own misfortune, view the proceedings with a significant degree of disquiet. Accordingly it seems to me that confidence in the administration of justice is enhanced by the quashing of the challenged orders and that is what I propose to do."*

65. It is very much apparent why the High Court judge found for the applicant in that case. In his previous capacity as a solicitor for the applicant, there had been quite a number of occasions where the judge had represented the client on criminal charges where alcohol was a factor (as was alleged in the present case), the judge would have been privy to confidential information as part of the privilege enjoyed by the solicitor-client relationship and would have had an even more extensive knowledge of his client than the prosecuting Garda, opposing lawyers or other judges. The nature of that relationship, particularly in light of its extensive and repeated nature gave rise to a reasonable apprehension of bias and confidence in the administration of justice required the quashing of the challenged orders.

66. On the other hand, in *Bula Ltd. v. Tara Mines (No.6)* the Court held that:-

> *"Having formally conceded that, in order to establish 'objective bias' on the part of either Mr. Justice Barrington or Mr. Justice Keane, they need to establish <u>something more than the mere fact that, as Counsel, they had acted for the Tara Defendants and/or the State Defendants</u>, the applicants effectively seek to resile from*

this concession by suggesting that the fact that, as Counsel, they were engaged by the Defendants, means that they have made common cause with their clients in a manner different to the normal relationship of Counsel and client." (Emphasis added)

It is also worth pointing out that in *Orange Communications* the Supreme Court appeared satisfied that merely pointing to previous links or associations (including employment) was not sufficient to establish objective bias. That is not to say that the approach of the various judges in that case was to say that listing certain categories of connections as being either acceptable or not acceptable was the appropriate manner in which to approach the issue. In applying the test of whether there is a reasonable apprehension of bias, the various judgments indicate that each case is dependent on the facts.

67. As stated in *O'Ceallaigh v. An Bord Altranais and Ors*. [2011] IESC 50, there must be a real and not a mere hypothetical or speculative link between the association under consideration and the apprehension of lack of impartiality being alleged. In a situation where the allegation of bias is made due to the connection on the part of an advocate with the judge or quasi-judicial officer, the Supreme Court has held in *Talbot v. Hermitage Golf Club and Ors.* [2009] IESC 26 wherein Denham C.J. held:-

"His submissions and assertions do not establish a basis for intervention, nor do they establish objective bias. Attendance at the same schools by judges and lawyers does not establish objective bias. Having a spouse, who many years before was a member of a law firm which is a respondent in a case, does not establish objective bias by a judge. Having advised persons as clients previously does not prove objective bias. […]

The appellant sought to rely on Kenny v. Trinity College Dublin & Anor [2007] I.E.S.C. 4. I would distinguish the facts of this case from Kenny. That case related to the issue of the perception of bias, applying the objective test, arising out of a family

connection between the judge who delivered the judgment and a member of a firm of architects retained as an expert witness. No such issue arises here. This case is more similar to Bula Ltd v. Tara Mines Ltd (No.6) [2000] 4 I.R. 412. That case 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 before 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. Similarly, a solicitor does not espouse his client's ambitions. There must be additional factors establishing a cogent and rational link and its capacity to influence."

68. From the foregoing, the case law establishes that there is no automatic bar on judges hearing cases involving advocates from the previous firms in which they were employed (or partners). They may hear cases involving clients for whom they previously acted, subject to the facts establishing a real apprehension of bias based upon extensive knowledge of that client. Judges may even hear cases in which they acted against one of the parties in other litigation. The appellant has not satisfied this Court that the prior business relationship of itself, would establish reasonable bias. In the present case, the costs accountant was appearing essentially as an advocate in the proceedings. The mere fact of the previous business relationship does not give rise to a reasonable apprehension of bias. It therefore follows that in so far as the appellant advances this part of his application on the basis of a mere business relationship between Mr. Conlon and the Taxing Master giving rise to an apprehension of bias, this ground of appeal must fail.

The Registration of the Business Name and Interest in Property

Whether the Taxing Master's registration of the business name amounts to a pecuniary interest, an interest he should have revealed and which should have resulted in his recusal is the central

issue in this case. It is important to state that the appellant's case is made on the basis that the Taxing Master owned the business name. The distinction, if any, between "ownership" of a business name and "registration" of a business name is an important consideration in assessing whether there is in fact a pecuniary interest in the business name. Another relevant issue in terms of the claim of pecuniary interest is that the Taxing Master had, until December 2017, an interest in the property leased to the cost accountants and that this, coupled with the business name, aroused a reasonable apprehension of objective bias on the part of the Taxing Master. Prior to embarking on that issue, it is necessary to consider an evidential point raised by the appellant.

Failure on the Part of the Taxing Master to Swear an Affidavit

69. The appellant took issue with the fact that the Taxing Master did not swear an affidavit in the judicial review proceedings. The recent judgment of this Court in *Harrison v. Charleton* [2020] IECA 168 discussed the position of judges and quasi-judicial officers swearing an affidavit in proceedings. Noonan J., delivering judgment, relied on *inter alia* the Supreme Court case of *Walsh v. Minister for Justice and Equality and Anor.* [2019] IESC 15, where O'Donnell J. stated:-

> *"[I]t is difficult to envisage a circumstance in which it would be necessary, and therefore appropriate, to require the original judge to give evidence. The judge is not the complainant or injured party: the essence of the offence is interference with the administration of justice. It is generally inconsistent with the obligation of the judge to be a dispassionate adjudicator for that person to become a participant in litigation relating to what occurred in a courtroom. For this reason, it is, for example, generally recognised as undesirable that a judge should swear an affidavit in judicial review proceedings, or indeed be made a party thereto".*

Noonan J. went on to say in *Harrison v. Charleton* that:-

> "*Order 84 of the RSC in fact expressly prohibits the naming of a judge as a party to judicial review proceedings challenging the decision of that judge save where male fides is alleged. As the cases above show, I am satisfied that it would have been quite inappropriate for the respondent to swear an affidavit in this case.*"

70. In the appeal, counsel on behalf of the appellant took a nuanced approach to the issue of the affidavit. There was not so much a contention that a Taxing Master was not a quasi-judicial figure or that in general an affidavit should not be sworn by him or her. Indeed in the light of the criticism of McCarthy J. levelled at the Taxing Master who did swear such an affidavit in *State (Gallagher Shatter) v. De Valera* [1986] I.L.R.M. 3 at p. 9, it is difficult to see how that argument could be sustained. Instead, the appellant sought to submit that as this involved an issue outside the decision making itself but concerned an issue of fact, *i.e.* the knowledge of the Taxing Master of his registration of the business name, it was a matter that the High Court judge should have taken into account. Counsel submitted that Mr. Magill was not able to give such evidence.

71. In my view, the Taxing Master was correct not to file an affidavit in keeping with the approach in the case law. It is important that in a case of an alleged pecuniary interest that the factual situation is placed before the Court. That can be done in a number of ways, including by utilising tax/accounting consultants familiar with the factual position. The appellant submitted that the High Court should not have taken into account the evidence of the Taxing Master's knowledge or lack thereof of the fact of registration as only he could know that. Even if that is a correct proposition, I consider that this aspect was not central to her findings and I refer to those findings set out at para. 28 above. I repeat, what is central is whether there was a pecuniary interest arising out of the respondent's registration of the business name and any retained proprietary interest.

The assessment of objective bias

72. The parties agree that the applicable test for objective bias where the interest is pecuniary in nature, is the Supreme Court case of *Goode Concrete v. CRH.* The appellant submits that the circumstances surrounding that case are analogous to the present case as he submits that the registration of a business name is pecuniary in nature.

73. Under *Goode Concrete v. CRH*, in order to establish objective bias on the basis of pecuniary interest, the decision maker must have an interest in the outcome of the case in which he or she is presiding over. Denham C.J. held at p. 522 that:-

> *"However, in exceptional circumstances, where the interest declared is 'trivial', 'insubstantial', or that not to hear the case would be 'absurd', a judge may proceed to hear a case. In such an approach it is not necessary to take a further step to establish that the outcome of the decision to be made by the judge would have an impact on the price of the shares, or assets, which the judge owns, or which his family own."*

In *Orange Communications Ltd. v. Director of Telecoms (No.2)* the Court held that:-

> *"A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding, competition, or other matter on which he is adjudicating"* (Emphasis added).

Denham C.J. in *Goode Concrete v. CRH* referred to the Bangalore Principles of Judicial Conduct, 2002 which provide:-

> *"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*
>
> *[…]*

2.5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;". (Emphasis added)

74. The issue therefore, is the application of *Goode Concrete v. CRH* to the facts of this case. Does the registration of a business name by the Taxing Master amount to a pecuniary or economic interest so as to invoke a reasonable apprehension of a reasonable person who is in possession of all the facts, that the respondent was objectively biased? The appellant submits that it does. In doing so, the appellant submits that the registration of a business name is a proprietary right and therefore, the trial judge erred in law in holding that no proprietary right exists. The appellant submits that the respondent has a direct or indirect pecuniary interest in Behan & Associates in having registered the business name of the company.

75. The Taxing Master argues however that this case is dissimilar to *Goode Concrete v. CRH*. In Ireland, the governing legislation mandating the requirement to register a business name is the Registration of Business Names Act, 1963 (hereinafter, "the Act of 1963"). The Taxing Master argues that this Act imposes an obligation on persons carrying on businesses using a business name other than their given surname to be registered in accordance with the Act. The Taxing Master submits that the purpose of the Act is not to give rights or protections to the person or entity using the business name but rather, the purpose is for transparency so that people dealing with the business or service can identify the person who is behind it. The Taxing Master relies on s. 14 of the Act which provides that:-

> "(1) The Minister may refuse to permit the registration under this Act of any name which in his opinion is undesirable […]
>
> (2) Where registration of a business name is refused under this section any person or, in the case of a firm, every partner in the firm, carrying on business under that name in such circumstances as to require registration under this Act, shall be liable on summary conviction to a fine not exceeding £100.

> (3) The registration of a business name under this Act shall not be construed as authorising the use of that name if apart from such registration the use thereof could be prohibited."

Therefore, the Taxing Master submits, even if one registers a business name, its use can still be prohibited if it offends against another law.

76. The appellant contends however, that the pecuniary value, if not direct, is indirect in so far as a business name establishes goodwill in the name, thereby giving the business name worth. It is submitted by the appellant that the respondent could in fact benefit when and if the business is sold or a franchise licence agreement is put in place and states that there is a perception that the Taxing Master's name and the company are the same entity and the Taxing Master may have either indirectly or directly, an interest in the business *viz* Behan & Associates LCC. The appellant points to the fact that the name used by the registered company, Behan & Associates LCC is registered to the Taxing Master at the same address as a business owner in the Companies Registration Office. The appellant argues that this is further bolstered by the fact that it is the business name and not the limited liability reference that is used on the company's letterhead. As the person whose business name is linked to the firm, a firm in which the very entity who is representing the notice party is employed, the Taxing Master refusing to grant an adjournment in favour of the notice party and ultimately finding in favour of the notice party in the substantive taxation appeal, leads to the perception of objective bias.

77. While there are conflicting submissions as to whether the Taxing Master's continued registration of his name to the firm was due to inadvertence or with actual knowledge, I consider this is not relevant for the purposes of discerning whether such registration raises a reasonable apprehension of objective bias. At a fundamental level, what the Court is being asked to decide, is whether the continued registration of a business name falls within the tests

for objective bias. In coming to a decision on this issue, the Court must decide if there was in fact a pecuniary or economic interest.

78. Section 3 of the Act of 1963 prescribes who must register the "business name", meaning the name or style under which any business is carried on. Section 3, in so far as it is relevant provides that:-

"(1) Subject to the provisions of this Act –

a) every firm having a place of business in the State and carrying on business under a business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners which are bodies corporate without any addition other than the true Christian names of individual partners or initials of such Christian names;

b) every individual having a place of business in the State and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof;

c) every individual or firm having a place of business in the State, who, or a member of which, has either before or after the passing of this Act changed his name, except in the case of a woman in consequence of marriage;

d) every body corporate having a place of business in the State and carrying on business under a business name which does not consist of its corporate name without any addition;

e) without prejudice to the generality of the foregoing, every person having a place of business in the State and carrying on the business of publishing a newspaper,

shall be registered in the manner directed by this Act."

79. The Taxing Master is registered as trading under the business name, "Behan & Associates". The registration of this name does not generate a proprietary interest in the name *simpliciter*. The trial judge referred to Clark, Smith & Hall, *Intellectual Property Law in Ireland* (4th Ed., Bloomsbury Professional, 2016) which provides as follows:-

> *"Under the Registration of Business Names Act 1963, the registration of a business name is a legal requirement imposed upon a person who uses a name which is different from his own individual or corporate name or, in the case of a firm, the names of all partners. The purpose of such a registration is that the public can carry out a search in the Register of Business Names and ascertain who is behind a particular business name at a particular address. The registration of a business name does not confer any proprietary rights in the name. Section 14(3) specifically states that the registration shall not be construed as authorising the use of that name if, apart from such registration, the use thereof could be prohibited. The Registrar of Business Names has no power to refuse a registration based on what is already on the Business Names Register, only on the basis that registration of the business name is undesirable in the opinion of the Minister for Jobs, Enterprise and Innovation. A multiplicity of different and unconnected persons can, and often do, hold identical or confusingly similar business name registrations."*(Emphasis added)

80. Allied to the above is the fact that s. 12 of the Act of 1963 mandates and requires that somebody who ceases to be involved with a business name or ceases to carry on business must notify the registrar. It is a summary offence not to do so. It is clear therefore, that the Taxing Master, on the basis of his registration of the business name in and of itself does not and could not confer any proprietary right upon him.

81. The appellant must fail in his appeal. Undoubtedly, and I do not think the appellant has ever attempted to assert the contrary, the Taxing Master was not trading in Behan &

Associates at the time of the taxation hearing. In those circumstances, his name should not have continued to be registered. That this is the legal position is a relevant fact which the Court must assume would be known to the reasonable observer. His legal responsibilities in that regard were sufficiently serious as to amount to a summary offence if he failed to comply with this requirement. It is not a matter for this Court to assess whether there is a defence of inadvertence to this apparently regulatory offence. The importance of the construction of the Act is that there is simply no proprietary interest in the business name.

82. Counsel for the appellant, in the course of the hearing, referenced a situation where a judge was registered as the business owner of a large company and submitted that it could not be seriously suggested that this is not something that would have an impact. He submitted that there was no reason in law or fact to minimise the "concept of owning the very title of the entity which is now acting on behalf of the party suing or presenting the taxation in those circumstances." The inherent flaw in that argument is obvious. Such a person does not <u>own</u> the title of the entity. That is what Clark *et al* state in the passage from *Intellectual Property Law in Ireland* quoted above. That this view is correct is apparent from a perusal of the Act. The trial judge correctly identified the legal position. As there is no ownership or proprietary interest in the registered name, the person who is wrongly registered despite not trading in that name, has no pecuniary or economic interest in the name. A person who is not trading under the name might make an attempt to assert otherwise in a claim by or against a big entity but a reasonable person would know that the legal and factual position is that the registered owner would not, by virtue of such registration alone, have entitlement to pecuniary or economic relief or damages in such a claim. I therefore reject this appeal in so far as it is based upon the registration of the Taxing Master as trading under the business name of Behan & Associates.

83. The appellant still relies upon the claim of pecuniary interest in Behan & Associates by virtue of the link with the premises from which the firm operated. The appellant makes the

point that the Taxing Master used to refrain from hearing taxation matters where the legal costs accountants involved in the case were Behan & Associates. In the affidavit of Ms. Duffy, the Principal Officer in the Courts Policy Division, states that "the [Taxing Master] confirmed to the Courts Service and the Department of Justice and Equality herein that he had divested himself of all interest, legal and beneficial, in Behan & Associates save as identified below." She goes on to say that "prior to his appointment, the [Taxing Master] expressly drew the attention of the Courts Service and the Department of Justice and Equality to his legal interest in a property which was let to Behan &Associates Legal Costs Consultants Limited. The [Taxing Master] indicated he would accept appointment on the basis that he would not conduct taxation of any bills of costs in the preparation of taxation of which that firm would have an involvement."

84. The appellant in his written submissions states that it is unclear why the Taxing Master conducted the Taxation hearing at issue when arrangements were in place to avoid hearing matters from the firm with which he had a recent association. This must be rejected. The affidavit of Ms. Duffy refers specifically to the interest the Taxing Master had in the property that was leased to the firm. From the affidavit of Mr. Magill, following lengthy negotiations, the Taxing Master finally divested himself of that interest in December 2017. Mr. Magill was qualified to give that evidence as the personal taxation agent of the Taxing Master. Therefore, this interest was divested before the present matter came on for hearing. This removed any interest the Taxing Master could have in the outcome of proceedings concerning Behan & Associates.

85. I consider that it cannot be sustained that the Taxing Master has an interest in the outcome of the taxation hearing. The Taxing Master does not "gain" or "lose" anything if he finds for the notice party or for the appellant. The Taxing Master was not a shareholder in Behan & Associates LCC or LCA at the time of the appellant's taxation hearing, having

divested himself of the shares in both companies by the 1st May, 2014. Secondly, the fact that the Taxing Master previously had an interest in the property bears no relevance to the claim of objective bias. His interest was disposed of before the appellant's matter came before him for determination. Further, a pecuniary or economic interest cannot be derived from the registration of the business name on two grounds: the first being that the registration of a business name does not confer any proprietary rights, and the second being that it is a summary offence to retain a business name in the entity you have ceased trading in. Therefore, the Taxing Master could not profit from his continuing registration. The onus is on the appellant to establish that there was objective bias. This onus has not been discharged on this ground for the reasons outlined above. The trial judge correctly held that there was no propriety interest in the name "Behan & Associates" at the time of the hearing and that he had no interest in the outcome of the decision. This point of appeal can be dismissed.

86. I would like to address the appellant's reference to the refusal of the application for an adjournment as indicative of objective bias. Having reviewed the principles to be applied in cases of objective bias in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 Denham J. stated at para. 80 *inter alia*, that:-

> *"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;"*

The law has been clearly stated. There is no basis upon which the appellant could succeed on the grounds that the refusal to grant him an adjournment was indicative of objective bias. The appellant has not asserted subjective bias which could arise from something said or done in the course of proceedings. If there has been a breach of rights because of a failure to grant an adjournment, the law provides for an effective remedy. In this case, as demonstrated above, there was no beach of rights in the refusal to grant the adjournment.

87. In so far as the appellant's claim is based upon a breach of fair procedures on the basis of objective bias, this point of appeal is dismissed.

Does the Taxing Master Enjoy Limited Immunity from Suit?

88. Whether the Taxing Master enjoys the limited immunity available to him as a quasi-judicial figure only arises in relation to whether an order for costs can be made against him. Since I have found that there was no objective bias on the part of the Taxing Master in this case, this issue falls away.

The Cross-Appeal: The Award of Costs in the High Court Hearing

89. The notice party cross-appeals the decision of the trial judge to award only 50% of the costs of the first day of the hearing to the notice party. The appellant submits that the notice party was not entitled to any costs. Since the parties have not set out the trial judge's reasoning in making that costs order, I consider that neither party has demonstrated any grounds for interfering with that order. In so far as the appellant submitted that the notice party had limited participation in the appeal, a notice party who is the *legitimus contradictor* in a judicial review is generally entitled to costs actually incurred in the successful opposition to the application. It is not necessary to express any further view on the extent of costs in light of the absence of information before us as to the reasoning of the trial judge on the issue of costs.

Conclusion

90. For the reasons set out in the judgment, the trial judge was correct in her finding that that the appellant was not entitled to an order of *certiorari* on the basis of a) the refusal to grant him an adjournment of the taxation hearing or b) that the Taxing Master was not objectively biased. I therefore dismiss this appeal.

91. As the Taxing Master and the notice party have been entirely successful in this appeal, my provisional view is that they are both entitled to their costs in this Court. If the appellant wishes to contend for an alternative form of order, he will have liberty to apply to the Court of

Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

92. As this judgment is being delivered electronically, Edwards J. and Haughton J. have indicated their agreement with it.