Neutral Citation: [2015] IEHC 247

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2014/ 328 JR]

BETWEEN/

ALLIED IRISH BANKS PLC

-and-

AIB MORTGAGE BANK

APPLICANTS

-and-

EDMUND HONOHAN

RESPONDENT

-and-

ANGELA FARRELL

NOTICE PARTY

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 17th day of April 2015

Introduction

1. The respondent to this application is the Master of the High Court. The case concerns the manner in which he dealt with a special summons issued by the applicant banks. The notice party is the defendant in those proceedings. She is a former solicitor, now bankrupt, but who was still in practice as a solicitor when the applicants initiated their action against her.

2. The proceedings sought enforcement of certain undertakings given by the notice party in her capacity as solicitor. As they were initiated by special summons, the matter came before the respondent in the first instance rather than being entered directly into the court list. It remained in the list over a period of months and was dealt with by the respondent on several separate occasions. On the 14th May, 2014, the respondent announced that he was going to refer the papers in the case to the Director of Public Prosecutions because of what he considered to be perjury in one or more of the affidavits sworn by bank officials.

3. The applicants sought leave to seek judicial review of this decision. They claimed that the respondent, firstly, had taken it upon himself to enquire into the merits of the case when his function was purely administrative; secondly, had decided to send the papers in the case to the Director of Public Prosecutions for investigation into what he pronounced, wrongly and irrationally, to be perjury on the part of a bank witness; and, thirdly, had refused to draw up an order either confirming that decision (so that it could be appealed) or reflecting his refusal to draw up such an order (which could also be appealed).

4. After leave to seek judicial review had been granted, the respondent requested the applicants to withdraw the special summons proceedings (which were still before him). After they had refused to do so he struck out the summons. The applicants then obtained leave to amend the judicial review application in order to seek additional reliefs relevant to that decision.

5. The applicants say that in dealing with the matter as he did the respondent acted without jurisdiction and in an irrational and biased fashion.

6. The respondent takes the position that in deciding to send the papers to the Director of Public Prosecutions he was acting as a private citizen and is in that context not amenable to judicial review. It is also pleaded that the public has a right to expect every public official to report suspected crime, and that the applicants are attempting to prevent him from reporting a serious crime.

7. The respondent

> *"invites the Judge hearing this Judicial Review application to dismiss the application and instead refer the Plaintiff banks' Affidavits to the Director of Public Prosecutions."*

8. He says that there is "incontestable *prima facie* evidence of perjury" and argues on this basis that it is inevitable that the matter must be referred to the DPP. The case is, he says, therefore moot.

9. It is claimed that the special summons proceedings against the notice party are in fact an attempt by the applicants to gain unjust enrichment, and that they should be refused relief in the judicial review, on the basis of the maxim *ex turpi causa non oritur actio*, because they are seeking to avoid the consequences of perjury.

10. It is denied that there is any evidence of bias, and it is pleaded that the applicants waived any right to object at the relevant hearing. It is further pleaded that the respondent at all times afforded fair procedures to the applicants.

11. The *locus standi* of the applicants is challenged on two grounds. Firstly, it is said, in effect, that the banks have no right to take this application because they have no special interest in their employees' "personal concerns". Secondly, there is an express plea that the applicants should lose their standing because the allegation of bias is a malicious abuse of the court's processes.

"The bank is seeking to engineer a general defamation of the Master, under cover of absolute privilege, leaving the Master with no remedy in defamation."

12. In relation to the striking out of the summons, the respondent says that he was entitled to do so because, despite several adjournments to facilitate correction of the banks' position, the case was not ready for hearing.

The evidence
13. The facts of the case as set out in the applicants' affidavits are not in dispute and the respondent has not filed an affidavit. The notice party, who supports the position of the respondent, did not appear in the matter before the respondent until the 23rd July, 2014, and has not contradicted any averment made on behalf of the applicants as to what happened on that occasion.

14. Since the respondent stands over his view that there was evidence of perjury, and claims that this judicial review application is an effort by the applicants to cover up that evidence, the case will be laid out in considerable detail.

Background facts – the special summons against the Notice Party
15. The applicants had issued a special summons against the notice party, in which the reliefs claimed were an order that she comply with undertakings that she had given in her capacity as a solicitor, acting for customers of the banks in relation to loans relating to certain properties, and/or compensation for loss suffered by them as a result of her failure to comply with those undertakings.

16. Allied Irish Banks plc was the first named plaintiff on the summons and AIB Mortgage Bank the second. The loans in question, totalling in excess of €3 million, were all made to members of the same family. (Since it is accepted that the borrowers have not defaulted on the loans, they were not joined as parties in either the special summons proceedings or before this court and there is no need to identify them in this judgment.)

17. The schedule to the summons listed eight undertakings, given by the notice party to the plaintiffs on dates between February, 1999 and March 2009, covering some twenty properties. As the schedule is relevant to at least some of the difficulties that subsequently arose, it is here set out in full.

> 1. Solicitor's undertaking dated 25 May 2005 in favour of the First Named Plaintiff pertaining to Apartment Nos. 8, 23, 31, 55, 56, 39 and 194 Bracken Hill, Simonsbridge, Sandyford, Dublin 18.
>
> 2. Solicitor's undertaking dated 9 April 2002 in favour of the First Named Plaintiff pertaining to Apartment Nos. 2, 3, 4, 5, 6, 7, 8 & 9, Bow Bridge, Bow Lane West, Dublin 8.
>
> 3. Solicitor's undertaking dated 23 March 2009 in favour of the Second Named Plaintiff pertaining to Apartment 71, Bow Bridge, Kilmainham, Dublin 8.
>
> 4. Solicitor's undertaking dated 6 October 2003 in favour of the Second Named Plaintiff pertaining to Apartment 10, New Row Place, Dublin 8.
>
> 5. Solicitor's undertaking dated 16 November 2005 in favour of the First Named Plaintiff pertaining to Apartment 31, Bracken Hill, Sandyford, Dublin 18.
>
> 6. Solicitor's undertaking dated 13 January 2009 in favour of the Second Named Plaintiff, pertaining to 5 Seamount, Stillorgan Road, Mount Merrion, County Dublin.
>
> 7. Solicitor's undertaking 4 February 1999 in favour of the Second Named Plaintiff pertaining to Apartment No. 2 Seamount, Mount Merrion, Dublin 4.
>
> 8. Solicitor's undertaking dated 13 March 2009 in favour of the Second Named Plaintiff pertaining to 7 La Rochelle, Christchurch, Dublin 8.

18. It is agreed that in each case the notice party undertook:

> i) that the borrowers would acquire good and marketable title to the properties;
>
> ii) that the bank's standard form of all sums mortgage/charge had been or would be executed by the borrowers;
>
> iii) as soon as practicable, to stamp and register the mortgage/charge to ensure that the bank would obtain a valid first legal mortgage/charge on the property;
>
> iv) to lodge with the bank a certified copy of the folio showing the bank's charge duly registered; and
>
> v) to lodge with the bank the solicitor's report and certificate of title.

19. It is important to appreciate that such undertakings are a common and perhaps essential feature of residential mortgages in this country, obviating the need for the lender to have its own solicitor. Compliance with an undertaking given by a solicitor is a serious professional obligation. Where there is failure to fulfil that obligation, the lender is entitled to invoke the High Court's inherent supervisory jurisdiction over solicitors and ask for an order to compel compliance. If performance of the undertaking is no longer possible, the solicitor may, if it is appropriate, be ordered to compensate the lender for any loss incurred.

20. The banks' grounding affidavits in the case were sworn by Lynn Hogan, (on behalf of Allied Irish Banks PLC, the first named plaintiff) and Jim O'Keeffe (on behalf of AIB Mortgage Bank, the second named plaintiff).

21. Ms. Hogan, whose address was given in the affidavit as being that of the registered office of Allied Irish Banks plc at Bankcentre in Ballsbridge, averred that she was employed as a bank official in that bank's Financial Services Group.

22. Ms. Hogan set out the undertakings given by the notice party to Allied Irish Banks plc as follows:

> 1. Undertaking dated March 2009 relating to 7 La Rochelle, Christchurch, Dublin 8;

2. Undertaking dated 9 April 2002 relating to apartments 2,3,4,5,6,7,8 and 9 Bow Bridge, Kilmainham, Dublin 8;

3. Undertaking dated 23 March 2009 relating to Apt 71 Bow Bridge, Kilmainham, Dublin 8;

4. Undertaking related to 11 Apartments at 23/24 Middle Gardiner Street, Dublin 1;

5. Undertaking dated 25 May 2005 relating to Apartments 8, 23, 55, 56, 39 and 194 Bracken Hill, Simmonsridge, Sandyford, Dublin 18;

6. Undertaking dated 6 October relating to New Row Place, Dublin 8;

7. Undertaking dated 16 November 2005 relating to Apt 31 Bracken Hill, Sandyford, Dublin 18.

23. Ms. Hogan averred that the notice party had been requested on various dates to comply with the undertakings and had failed, refused or neglected to do so in respect of Nos. 1, 2, 3, 5, 6 and 7 in this list. She said that as a consequence

> *"the Bank is not in a position to enforce the security in respect of the loans referred to above and by reason of the failure on the part of the Defendant to comply with her undertakings the Bank has thereby incurred significant loss, damage and expense."*

24. On behalf of AIB Mortgage Bank, Mr. O'Keeffe referred to five undertakings given by the notice party as follows:

1. Undertaking dated 23 March 2009 relating to Apartment 71 Bow Bridge, Kilmainham, Dublin 8;

2. Undertaking dated 6 October 2005 relating to 10 New Row Place, Dublin 8;

3. Undertaking dated March 2009 relating to 7 La Rochelle, Christchurch, Dublin 8;

4. Undertaking dated 13 January 1999 relating to 5 Seamount, Stillorgan Road; and

5. Undertaking dated 4 February 1999 relating to 2 Seamount, Stillorgan Road.

25. Mr. O'Keeffe averred that despite requests on various dates the notice party had failed, refused or neglected to comply with the undertakings. He made the same claim as Ms. Hogan that in consequence the bank was not in a position to enforce its security and had thereby suffered significant loss, damage and expense.

The proceedings before the respondent

26. The special summons was issued on the 12th December, 2013. A special summons is, under the Rules of the Superior Courts, processed through the Master's Court to ensure that the papers in the case are in order before transferring the matter to the Court List to be dealt with by a judge. This summons was given a return date of the 23rd January, 2014, before the respondent. No appearance had been entered to the summons and counsel on behalf of the applicants applied to have the matter transferred to the court list.

27. It appears that the respondent raised a query as to the entitlement of the two banks to bring their claims against the notice party in one set of proceedings. The matter was adjourned for two weeks to deal with this issue.

28. On the second hearing date, counsel submitted that the requirements of O. 15, r. 1 of the Rules were fulfilled having regard to the relationship between the plaintiffs, the relationship between the borrowers and the capacity in which the notice party acted in each transaction. Counsel again applied for the matter to be transferred. The respondent permitted the application to proceed.

29. When counsel opened the papers to him, it became apparent to the respondent that Ms. Hogan, who had sworn the affidavit for Allied Irish Banks plc, had included in her affidavit the undertaking relating to 7 La Rochelle. As the schedule to the summons, and indeed the document itself, makes clear, this undertaking was in fact in favour of AIB Mortgage Bank and it also appeared in Mr. O'Keeffe's affidavit. The respondent stated that Ms. Hogan had been "untruthful" in exhibiting that undertaking. Counsel acknowledged that it should not have been included in Ms. Hogan's list but contested the accusation of untruthfulness and said that it was most likely the result of inadvertence.

30. The respondent then queried whether there was any evidence as to the nature of the alleged non-compliance with the undertakings. Counsel acknowledged that there was no specific averment but relied on the averment that there had not been compliance. The respondent stated that it was a matter that went to the truthfulness of the affidavit.

31. The respondent pointed out that some of the undertakings post-dated the advancement of certain of the monies and could not therefore be said to have been relied upon in making the relevant loans. Counsel accepted that it might have been a mistake to refer to these undertakings in the affidavit but referred the respondent to the special summons in order to clarify the fact that those undertakings were not the subject of the reliefs sought. The respondent said that it went to the truthfulness of the affidavit. He adjourned the matter to allow corrective affidavits to be filed.

32. On the next occasion supplemental affidavits from Ms. Hogan and Mr. O'Keeffe had been filed. Ms. Hogan confirmed that two of the undertakings referred to in her grounding affidavit – relating to 7 La Rochelle and also 71 Bow Bridge – were in favour of AIB Mortgage Bank and not Allied Irish Banks plc. She said that the undertakings to Allied Irish Banks plc which remained outstanding were

- The undertaking of the 25thMay, 2005, relating to 8, 23, 31, 55, 56, 39 and 194 Bracken Hill.

- A separate undertaking relating to 31 Bracken Hill, dated the 16th November, 2005.

- The undertaking dated the 9th April, 2002, relating to 2, 3, 4, 5, 6, 7, 8 and 9 Bow Bridge. Ms. Hogan stated that this undertaking had been satisfied in relation to Nos. 8 and 9 but was outstanding in so far as it related to the other six apartments.

33. Mr. O'Keeffe averred that each of the five undertakings referred to in his grounding affidavit remained outstanding. He said that in each case,

> *"the Defendant herein has failed to furnish a solicitor's report and certificate of title (in the Lender's standard form) duly completed along with the documentation required to accompany said solicitors report and certificate of title to include but not limited to the Second Named Plaintiff's Mortgage/Charge and the Title Deeds relating to the secured property."*

34. Mr O'Keeffe concluded that

> *"As the undertakings remain outstanding, the Second Named Plaintiff's security in each case remains outstanding."*

35. The respondent was not satisfied with the evidence in relation to non-compliance and adjourned the matter again.

36. Prior to the next hearing date Ms. Hogan swore a third affidavit. She averred that in the case of each of the three undertakings in favour of Allied Irish Banks plc

> *"the Defendant has failed to furnish a solicitor's report and certificate of title (in the Lender's standard form) duly completed along with the documentation required to accompany said solicitors report and certificate of title to include but not limited to the First Named Plaintiff's Mortgage/Charge and the Title Deeds relating to the secured property."*

37. Like Mr. O'Keeffe, Ms. Hogan stated that as the undertakings remained outstanding, the bank's security in each case remained outstanding.

38. The matter next came before the respondent on the 14th May, 2014. On this occasion the respondent queried what was meant by the phrase "*documentation required to accompany said solicitor's report and certificate of title".* Counsel said that he was unsure but that the absence of the specified documents was sufficient to establish a breach of undertaking.

39. The respondent then took issue with the averment that, because the undertakings were outstanding, the security was outstanding. He said that there was no evidence that the security had not been put in place and that the averment that the security was outstanding was untruthful. Counsel submitted that this was a legal question, upon which the respondent had no jurisdiction to adjudicate. Counsel sought the transfer of the matter to the Court list.

40. The respondent then stated that he would be sending the papers in the proceedings to the Director of Public Prosecutions. Counsel repeated the submission that the issue was a legal rather than factual one, but said that if the respondent required, he would take instructions on filing a corrective affidavit. The respondent stated that any explanation would have to be given to the Gardaí.

41. The matter was then adjourned to the 18th June, 2014.

42. The applicants wished to appeal this decision but, on requesting a copy of the order, found that the record referred only to the adjournment. Counsel was therefore instructed to mention the matter in the respondent's list on the 16th May, 2014, to request that an order be drawn up so that it could be appealed. The respondent refused to do this, and further refused to make an order reflecting his refusal, on the basis that he was taking this course as a private citizen.

43. On the 5th June, 2014, the applicants sought and were granted leave to apply for judicial review. They were also granted an interim order restraining the respondent from acting on foot of his purported decision to refer the papers to the Director of Public Prosecutions.

44. The requisite notice of motion was issued on the 6th June, 2014, and a statement of opposition was filed on behalf of the respondent on the 17th June, 2014.

45. The special summons came back into the respondent's list on the 18th June, 2014. Counsel for the banks once more applied to have it transferred to the Court list.

46. The respondent referred to the fact that the High Court had granted an interim injunction against him. Counsel submitted that the order did not affect his capacity to transfer the proceedings. The respondent adjourned the matter to the 23rd July, 2014.

47. On the 23rd July, 2014, the notice party, who had been informed in writing of each adjourned date, was present for the first time. She stated that she wished to file an affidavit. She informed the court that she had been adjudicated bankrupt. Counsel for the applicants indicated that there was no objection to her filing an affidavit in court.

48. The affidavit in question is very short, but indicates that the notice party wished to raise issues about the propriety of the service of the special summons, the history of the loan offers to her clients, contact between herself and the banks, and the date on the special summons.

49. It is averred by Mr. Emmett Martin, who was attending counsel, that counsel then applied to have the matter transferred.

> *"Before letting the application proceed, however, the Respondent indicated to Counsel that upon the advice of his lawyers, he was formally requesting that the Special Summons Proceedings be withdrawn."*

50. Counsel responded that he had no instructions to withdraw and that he intended to proceed. The respondent then asked whether the proceedings were now moot having regard to the bankruptcy of the notice party and the fact that she was no longer a solicitor. Counsel responded that while this might affect her ability to comply with the undertakings, there was also the issue of compensation. Although she was bankrupt she might have insurance cover in place to deal with such claims.

51. The respondent then said that the proceedings were nothing other than "*an insurance claim*", and an attempt by the banks to reclaim the full value of the monies lent from an insurance company. Counsel did not accept that characterisation and said that it was possible that the banks could simply procure the services of another solicitor to complete the undertakings, thereby rendering any claim for compensation "*very modest*".

52. Counsel then commenced opening the affidavits, beginning with the grounding affidavit of Ms. Hogan. The respondent queried whether this affidavit was admissible, having regard to the fact that it did not give the deponent's place of abode.

53. The respondent asked what the purpose of Ms. Hogan's second affidavit was. On being told that it was to correct the inaccuracy in the first affidavit as to the number of undertakings outstanding, the respondent noted that it was not described as a "corrective

affidavit". He asked whether, since the inaccurate evidence had not been formally withdrawn, there was *prima facie* evidence of perjury. He said that it would have been better if the deponent had apologised for her mistake.

54. The respondent then pointed to the averment in Ms. Hogan's second affidavit that the undertaking had been satisfied in relation to Nos. 8 and 9 Bow Bridge, and queried whether this amounted to *prima facie* evidence of perjury, since one or other of the first and second affidavits must be incorrect.

55. Counsel submitted that any inaccuracies in the record had been corrected in the supplemental affidavits and accordingly no question of perjury arose. The respondent replied that the inaccuracies had not been corrected to the extent that the perjury had been discharged.

56. When the third affidavit of Ms. Hogan was opened the respondent remarked that the bank had done a "180 degree turn" in that it had originally sought relief in respect of six undertakings but now sought relief in respect of three. Counsel again referred him to the special summons for the list of undertakings sought to be enforced. The respondent said that the confusion had arisen because of the fact that the two banks had brought their claims in the same proceedings and again queried the legal basis for this.

57. The respondent went on to say that the bank was pursuing an insurance claim and had been forced into a "180 degree turn". He said that he was being asked to turn a blind eye to perjury but would be referring the papers to the DPP as soon as the injunction against him was lifted.

58. The respondent then queried again the averment that the banks' security was outstanding, in the absence of evidence that the mortgages had not been registered. Counsel said that in any event it would be impossible for the bank to realise any security without the original deeds of mortgage. The respondent disagreed and referred to a High Court judgment to the effect that the bank would be able to get a well-charging order in those circumstances. He said that the averment was as to fact, since the deponent did not say that she had received legal advice that the security was outstanding. Counsel submitted that it was a legal assertion, the correctness of which was a matter for adjudication by a judge.

59. The respondent said that the applicants had "gone after" the notice party as soon as they heard that she was "on the slide". Ms. Hogan had sworn an untruth in the hopes of getting it "under the radar". He asked why the borrowers had not been joined to the proceedings and was told that they were not in default. The respondent then said that the applicants had failed to mitigate their loss and were seeking to be unjustly enriched.

60. Turning to the affidavits of Mr. O'Keeffe, the respondent raised a similar issue as to the deponent's place of abode and commented that the place of abode becomes very important where perjury is concerned. He referred to the fact that Mr. O'Keeffe had set out the state of the loans as of the 9th October, 2013, and said that this represented an attempt by the bank to quantify its insurance claim.

61. Counsel submitted that it was improper to impugn the integrity of the deponents in this way. According to Mr. Martin,

> *"The respondent replied that the deponents had impugned their own reputation by their actions and that their names were already in the public domain. He further stated that he was entitled to speculate as to the true purpose of the Special Summons Proceeding and that the allegations of perjury would have to be adjudicated upon by a District Judge."*

62. The respondent stated that that if he transferred the proceedings "downstairs" (i.e. to the Court list) there would be nobody to challenge the banks' version of events and that the evidence before the judge would be compromised by perjury.

63. The notice party then addressed the respondent on a number of issues not relevant to the matter before this Court.

64. The respondent then gave his decision.

> *"He stated that there was an unsatisfactory sequence of affidavits and that it was his duty, not necessarily as Master of the High Court, to bring same to the attention of the authorities. He stated that he was 'going to be very nice to the Bank and offer them an easy way out' [or, according to Mr. Martin's original note, "a massive favour"]. He then stated that the summons would be struck out."*

65. On the 5th September, 2014, after a contested hearing, the applicants were granted liberty to amend their statement of grounds in order to apply for reliefs in relation to this decision. They now seek an order of *mandamus*, if necessary, directing the respondent to make an order reflecting his decision to refer papers to the DPP; *certiorari* to quash that decision; an order of *certiorari* quashing the decision to strike out the special summons; an order of *mandamus*, if necessary, compelling the transfer of the special summons for hearing before a judge of the High Court; and declarations to the effect that the respondent has no jurisdiction in matters of this sort to go beyond the provisions of O.38 r.6 and inquire into the substantive content of affidavits filed in the proceedings.

Evidence in the judicial review proceedings

66. The above account of events is taken from the affidavits of Mr. Brian O'Neill, the applicants' solicitor, and Mr. Emmett Martin, who attended counsel.

67. In addition, Ms. Hogan has sworn two affidavits. In the first she rejects any accusations of untruthfulness. While there were certain inaccuracies in her affidavits in the special summons proceedings, she believes that the material facts to which she deposed were true and accurate. She says that the respondent's decision to refer the papers to the DPP has caused her significant alarm, distress, anxiety and upset and is a matter of enormous concern to her and to her employer.

68. In the second, sworn in response to the statement of opposition, Ms. Hogan deals with the matter of the outstanding undertakings and the effect of non-compliance. However, since the effect of this is to introduce new evidence of a substantive nature, relating to the merits of the special summons, I do not think it appropriate to consider it here.

69. The notice party swore an affidavit in the judicial review proceedings on the 2nd July, 2014 (after the decision to refer the papers to the DPP but before the strike-out). In effect, she blames the borrowers and the banks for her inability to comply with the undertaking. Since this is not of relevance to the issues between the applicants and the respondent in these proceedings, I do not propose to set out her contentions.

70. The respondent has not filed an affidavit.

Order 38 of the Rules of the Superior Courts
71. Order 38 provides that every special summons is to be returnable before the Master. In a case where he has jurisdiction, he may decide the matter himself but has the option of putting it into the court list for hearing.

72. Rule 6 provides as follows:

> *In all cases in which he shall not have jurisdiction, and in all such other cases which he shall decide to put in the court list for hearing, the Master shall transfer the summons, when in order for hearing, to the court list for hearing on the first opportunity.*

Submissions

The applicants' case
73. The applicants submit, in reliance on *The State (Richard F. Gallagher, Shatter & Co.) v de Valera* (unrep., Costello J. 9th December, 1983) and *Elwyn Cottons Limited v The Master of the High Court* [1989] I.R. 14, that the Master of the High Court is an officer attached to the Court and is amenable to judicial review. They accept that under the Rules his decisions could as an alternative be appealed but say that in this case judicial review is appropriate because of the nature of the case they wish to make requires detailed consideration of the actions of the respondent, and largely concerns the legal question as to the extent of the respondent's jurisdiction. In any event, it was not possible to appeal the decision to refer the papers to the DPP since the respondent had refused to have an order drawn up on that issue.

74. They submit that the respondent enjoys only the jurisdiction conferred upon him by statute and by the Rules. The special summons in question was not one in relation to which he had any substantive jurisdiction, in that it did not involve him either a) acting under O. 63, r. 2 and assessing damages or taking an account, or b) acting under O. 63, r. 3 and trying an issue of fact with the consent of the parties. It therefore came into the category, covered by O. 38 r. 6, of a special summons where he did not have jurisdiction. His role under that rule was to put the matter in the court list when it was in order for hearing.

75. In this regard reliance is placed on the decision of Hogan J. in *ACC Bank plc v. Heffernan* [2013] IEHC 557, where the phrase "in order for hearing" was said to mean

> " *nothing more than that the case is administratively ready for hearing so that, for example, all appropriate affidavits have been sworn and filed."*

76. It is submitted that this does not involve a decision as to whether the case is properly constituted. Still less does it involve an examination of the veracity of witnesses, the merits of a case or the determination of the issues raised in the proceedings – that is the role of a judge.

77. The applicants do not accept the respondent's statement that in referring the matter to the DPP he would be acting in his capacity as a private citizen. They argue that he is not a private citizen when sitting as Master, but is exercising a public law function ancillary to and in support of the administration of justice. He would not otherwise have access to the papers in the case.

78. It is submitted that even if the respondent had had jurisdiction to refer the papers, the decision was on the facts of the case manifestly irrational in that there was no basis on which a reasonable decision-maker could have made a finding of perjury against Ms. Hogan.

79. The assertion by the respondent that the applicants were using the special summons procedure in an attempt to recover the full amount of the original loans from the notice party or her insurers is described as "manifestly incorrect and baseless", where the primary relief sought was compliance with the undertakings. Compensation was sought as an alternative, and it was never suggested that compensation should be in a sum equivalent to the loans.

80. In relation to the striking-out of the summons, reliance is placed on the High Court decisions of Laffoy J. in *ACC Bank v. Tobin* [2012] IEHC 348; Hogan J. in ACC Bank v. Heffernan (referred to above) and Kearns P. in *Bank of Ireland v. Dunne & Cawley* [2013] IEHC 484 for the proposition that the Master has no power to strike out a special summons.

81. It is contended that the decision to strike out, even if the respondent had power to do so, was tainted by objective bias, having regard to the comments made by him in the course of the hearing of the 23rd July, 2014 and in the light of the history of the case. It is accepted that, on the authorities, bias cannot be inferred from the making of the decision in itself, or the claimed perversity of the decision, but must be shown to arise from something external. The conduct of the decision-maker at the hearing will not normally suffice for a finding of bias but is relevant where the issue is one of pre-judgment of the sort identified by Clarke J. in *P. v. Judge McDonagh* [2009] IEHC 316, which

> *"can only happen at a hearing and arises from the adjudicator creating…an impression that a rush to judgment has occurred…"*

82. The applicants say that this is what occurred in this case.

The respondent's submissions
83. The respondent says that the reliefs sought are not, as a matter of law, available to the applicants and that in any event judicial review should not be granted where an appeal would have been more appropriate. He contends that he had jurisdiction to strike out the summons, and continues to maintain that Ms. Hogan's affidavit was tainted by perjury.

84. Looking at the reliefs sought against him, it is argued that *mandamus* cannot lie where a respondent had expressed an intention to take a particular course of action that he was not legally obliged to take (i.e. refer a matter to the DPP). In any event, it could not lie where he was acting as a private citizen rather than in exercise of a public function. It also contended that the respondent has no power to direct his registrar to draw up an order.

85. It is submitted that to seek *mandamus* in this respect conflicts with the application for *certiorari*. In any event it is said that *certiorari* does not lie because the respondent had only expressed an intention, had not taken a final decision, and was acting as a private citizen.

86. The applications for declaratory relief are described as an attempt to determine rules of civil procedure by means of a High Court judgment. It is suggested that if any proceedings were appropriate for such a result, it would be plenary proceedings involving the State as a party. This is said to be because of the far-reaching consequences for civil procedure and the requirement for this court to adopt a position on the nature and function of the Master generally, including his jurisdiction.

87. It is said that if the court does adopt such a position, it will open the door to judicial reviews and determinations on the Rules and on the scope of each and every one of the Master's functions. It is pointed out that this respondent has not been judicially reviewed since taking up office, and that no holder of the office has ever been judicially reviewed in respect of a function conferred on him by the Rules. If, however, it was thought that judicial review was permissible, there would be a considerable burden placed on the High Court because

> *"representatives, of whatever seniority, who felt they were hard done by or disrespected in the hurly burly of the Master's Court would seek judicial review. The availability would place an additional layer of cost on parties and on the State."*

88. The respondent accepts that it was not open to the applicants to appeal a decision by him to refer the matter to the DPP, in the absence of any order having been made. It is submitted that the decision to refer was the choice of the respondent as private citizen and could not as such be judicially reviewed. In any event it was not a decision involving an adjudication with legal consequences.

89. It is submitted that the applicants should not be permitted to seek the discretionary relief of judicial review in relation to the strike out, when a full right of appeal was available. There would have been no loss in terms of "opportunity, time or money" if they had appealed that order and made the claim in the appeal that the court should give them judgment on the summons.

90. However, it is also argued that the Master is not amenable to judicial review in the exercise of his functions under the Rules. This is said to be because under the Rules he is exercising part of the jurisdiction of the High Court, and the High Court is not judicially reviewable. In this respect the respondent refers to the judgment of Geoghegan J. in *Taylor v. Clonmel Healthcare* [2004] 1 I.R. 169. He says that the applicants' special summons constituted an invocation of the inherent jurisdiction of the High Court and that in these circumstances the role of the Master is "closely associated" with the role of a judge.

91. The cases relied upon by the applicants are said to be distinguishable and in any event not binding on this court. The Gallagher, Shatter case concerned the Taxing Master, whose functions are said to be very different from those of the Master in that the latter

> *"has an obligation to do justice in the light of precedent and general principles and, in certain cases, to prefigure what a judge would do.*
>
> *The role involves analysis and potentially prejudicial orders, including discovery 'where necessary'. The assessment of necessity involves adjudication. The Master must make assessments based on jurisdiction.*
>
> *The Master must apply European Union law, and has obligations thereunder and under the Irish Human Rights Act."*

92. *Elwyn Cottons* is distinguished on the basis that it concerned a particular jurisdiction conferred on the Master under an EU regulation, rather than a function under the Rules, so that the appeal mechanism under the Rules was not available.

93. The comments of Laffoy J in *ACC v Tobin* are described as obiter, in circumstances where the judge was dealing with an appeal in a contested case where the respondent had dismissed the proceedings rather than striking out.

94. On the jurisdictional issue, it is submitted that the applicants are attempting to narrow the role and function of the Master, and to codify the office through decisions in judicial review cases.

95. It is contended that the Master has "jurisdiction and function in controlling the proceedings in front of him", and that this includes "raising an issue on papers which appear to state falsity". In this case, he saw something that was *prima facie* perjury and that was capable of giving rise to serious injustice.

96. The statutory provisions dealing with the office of the Master – specifically, the Court Officers Act, 1926, s. 15 of the Courts of Justice Act, 1953, the Courts (Supplemental Provisions) Act, 1961 (including the relevant provisions of the Eighth Schedule), the Courts and Court Officers Act, 1995, and O. 63 of the Rules are referred to. It is noted that neither the Rules nor any statutory provision purport to give an exhaustive description of the Master's functions and jurisdiction.

97. With particular reference to the special summons procedure and to O. 38 r. 6, it is submitted that it is for the respondent to determine whether or not the papers in the case are "in order for hearing". If he considers that they are not, because (for example) there is no evidence, or there are irreconcilable versions of affidavits, or the proceedings are an abuse of process, strike out must be an option.

98. It is the view of the respondent that the judges of the High Court will assume that papers in a case have been checked by him and are in order, and may therefore not be inclined, in a busy list, to scrutinise them further.

99. Turning to the papers in the special summons proceedings, it is submitted that they presented serious deficiencies and, in the respondent's view, untruths. These issues are addressed in order to counter the applicants' claims that the respondent acted in excess of jurisdiction, behaved irrationally and demonstrated bias. It is also submitted that the alleged deficiencies are relevant to the exercise of the Court's discretion to refuse relief by way of judicial review.

100. It is said that

> *"Allied Irish Bank appears to have repeatedly attempted to ram through this office of the High Court papers which were*
>
> *a. in breach of the RSC*
>
> *b. contained an untrue picture of the facts*
>
> *c. in uncontested proceedings*

d. where it sought handsome relief, presumably executable against insurers."

101. The respondent refers specifically to the conflict between the averments in Ms. Hogan's first affidavit as to the number of relevant undertakings provided to Allied Irish Banks plc, and the undertakings actually exhibited and listed in the schedule.

102. It is submitted that Ms. Hogan's averment that the notice party had failed to meet the obligations set out in the undertakings implied that each of the undertakings remained outstanding in its entirety, and therefore that the notice party had failed to take each of the five steps referred to in paragraph 18 above in respect of each undertaking. After the supplemental affidavits had been filed, that remained the position in respect of the three undertakings then said to be in issue. Ms. Hogan had sworn that in relation to these, the security remained outstanding.

103. The respondent submits that this averment was incorrect, insofar as mortgages had been executed in respect of two out of three of the properties, the subject of undertakings to this bank. He further submits that this must have been known to Ms. Hogan. Accordingly, her statement that there was security outstanding was a knowingly false statement of fact.

104. Detailed submissions have been made to the court as to the meaning of "security" in this context. It is said that the absence of title documents, or the solicitor's certificate, may make it more difficult for a lender to enforce its security, or make the land less valuable, but does not mean that the security is "outstanding". A party is described as having "security" once they have an interest in the property.

105. Criticism is made of Ms. Hogan for not including in her affidavit the fact that the borrowers were up to date. This is described as "the elephant in the room", because the impression given to the respondent was that the defendant would be liable for the full amount of the borrowings.

106. However, it is submitted on behalf of the respondent that he did not make a finding of perjury. Rather, he made comments "directed to referring the matter to the investigative body". He afforded repeated opportunities for correction of the papers and struck the case out when the correction was not made.

107. Referring to the argument made by the applicants that what the respondent did was irrational and in the teeth of the evidence, the following submission is made:

> *"The Master contends that he is not, as Master, obliged to disregard false testimony as an irrelevant consideration but must consider the injustice of a later uncontested trial on this evidence and the unjust enrichment of the plaintiff; and he also contends that, one way or the other, in the alternative to acting qua Master, he is entitled as a citizen to refer suspected crime to the proper authorities.*
>
> *The Master's comments in this case were relevant and justifiable. If anything, they are indicative of a professional taking his task and responsibility and workload seriously. The very taking of this judicial review operates as an attempt to chill that ardour."*

108. Dealing with the matter of the strike out, the respondent is critical of the applicants' submissions on the phrase "in order for hearing", and says that to focus exclusively on that phrase can lead to

> *"an inaccurate simplification and emaciation of the Master's nature and function if it is construed, as the applicants would have it, as a reduction of function and responsibility to the administrative shuffling of papers….*
>
> *…the stipulation that the matter be transferred when "ready for hearing" must be assessed by reference to a combination of jurisdictional fact and operative discretion.*
>
> *The Master must take into account a number of matters, including whether or not due process has been followed, or whether the Rules have been complied with…*
>
> *…The corollary of the condition of readiness for hearing is that papers, which are not ready, must not be transferred. Order 38 Rule 6 only makes sense if the Master is empowered to refuse a transfer and, in consequence, strike out the Summons. The entitlement to strike out is ancillary to the decision to refuse to transfer. There is no point in requiring the Master to check the papers if he has no available sanction for rule non-compliance.*
>
> *In exercising his discretion in regard to Rule non-compliance, the Master must have regard, not merely to the Rules, but also to the overarching interests of justice including, of course, Article 6 of the European Convention, and, in consequence of Section 3(1) of the European Convention on Human Rights Act, 2003 the Master must perform his functions in a manner compatible with the State's obligations under the Convention."*

109. It is submitted that the papers in the special summons case were not in order for hearing for the following reasons:

> a) There was a breach of the principle laid down in *Plunkett v Houlihan* [2004] IEHC 357 that plaintiffs cannot join similar claims in a single action where the only common factor is the identity of the defendant.
>
> b) The claim for compensation was not suitable for disposal by special summons, since the lenders' losses were not capable of summary assessment on affidavit. Even if they were capable of being so assessed, summary assessment would be inappropriate where the defendant is a bankrupt and cannot defend the case personally.
>
> c) There was a conflict between the affidavits as to the undertakings.
>
> d) The affidavits did not state the place of abode of the deponents.
>
> e) It was deposed by Ms. Hogan that monies had been lent in reliance on six undertakings when in fact three of the six post-dated the advance and were in any event in favour of the second named plaintiff.
>
> f) The affidavits contained an untrue averment to the effect that the security was outstanding. The consequent assertion that the plaintiffs had suffered loss was also untrue.

g) The affidavit of Mr. O'Keeffe referred to five undertakings but exhibited only three. The claim in respect of the other two was therefore bound to fail unless leave was given to amend the summons.

110. It is accepted that not all of these points were raised by the respondent before the matter was struck out but the court is urged to take them into consideration in the context of the allegation of bias.

111. In relation to the claim of bias, it is noted that no complaint of bias was made before the strike out, and it is submitted that the applicants cannot therefore rely on the comments made at earlier hearings.

112. It is said that the respondent's comments on the day of the final hearing should be seen against the background of the fact that he had already been publicly criticised.

113. The request to the applicants to withdraw the special summons is explained as being the giving of an opportunity to the banks to withdraw without embarrassment, rather than as evidence of bias. Withdrawal of the summons would have entailed withdrawal of the affidavits considered to be perjured, with the result that there would have been no referral to the DPP. The respondent's view was that the case was "holed irremediably under the waterline" and that if it went forward it was bound to fail.

114. It is suggested that

> *"It may be that the lawyers for the banks have become accustomed to their paperwork being waved through preferentially, without scrutiny, almost as if the presumption 'omnia rite esse acta' applies generally to all banks' paperwork. There is no preferential treatment for the banks (and there is no bias in not being accorded preferential treatment). The reverse, rather: it obliges the Court to examine banks' paperwork with greater care, especially if there is no appearance by the defendant".*

115. It is contended that an objective observer would recognise as frustration, or even "provocative overstatement", rather than prejudgment or bias,

> *" the Master's reaction to the wilful refusal of the applicants' lawyers to acknowledge even at that late stage, that the case was improperly prepared."*

116. It is submitted that the respondent was not exercising power for personal advantage and there was no question of material gain to him.

The notice party's submissions
117. The notice party has made an application to dismiss these proceedings. Her submissions are concerned to some extent with the merits of the banks' proceedings against her, which are not of any relevance to the judicial review application. I do not propose to summarise her arguments in this respect. However, it may be noted that she considers that the case made on behalf of the respondent involves allegations that

> *"constitutionally appointed members of the Judiciary in Ireland are playing fast and loose with civil procedure to indulge Lending Institutions".*

118. I do not think that the respondent wishes to be understood as making that accusation.

119. The notice party also refers to s. 19 of the Criminal Justice Act, 2011, which provides in relevant part that it is an offence if a person, who has information which he or she knows or believes might be of material assistance in (for the purposes of this case) securing the apprehension, prosecution or conviction of any other person for a relevant offence, fails without reasonable excuse to disclose that information as soon as it is practicable to do so to the Gardaí.

Relevant statutory provisions
120. Section 5(2) of the Court Officers Act 1926 provides as follows:-

> *"In addition to the general superintendence and control aforesaid the Master of the High Court shall also have and exercise such powers and authorities and perform and fulfil such duties and functions as shall be from time to time conferred on or assigned to him by statute or rule of court, and in particular (unless and until otherwise provided by statute or rule of court) shall have and perform all such other powers, authorities, duties and functions as are or become vested in him by virtue of any other provision of this Act"*

121. Section 14(3) of the Courts (Supplemental Provisions) Act 1961 provides as follows:-

> *"Rules of court may, in relation to proceedings and matters (not being criminal proceedings or matters relating to the liberty of the person) in the High Court and Supreme Court, authorise the Master of the High Court and other principal officers, within the meaning of the Court Officers Acts 1926 to 1951, to exercise functions, powers and jurisdiction in uncontested cases and to take accounts, conduct inquiries and make orders of an interlocutory nature."*

122. Paragraph 4(2) of the 8th Schedule of the Act sets out the powers and functions of the Master:-

> *"The Master of the High Court shall have and exercise such powers and authorities and perform such duties and functions as are from time to time conferred on or assigned to him by statute or rule of court, and in particular (unless and until otherwise provided by statute or rules of court) shall have and perform all such other powers, authorities, duties and functions as are vested in him by virtue of subsection (3) of section 31 of the Act of 1926."*

123. Section 24 of the Court and Court Officers Act 1995 provides as follows:-

> *"The Master of the High Court is hereby authorised by law to exercise limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution."*

124. Section 25 of the Court and Court Officers Act 1995 provides as follows:-

> *"(1) Subject to subsection (2) of this section and section 26 of this Act, the Master of the High Court may, in all such*

applications made ex parte or by motion on notice whether interlocutory or otherwise and in all such application for judgment by consent or in default of appearance or defence as may from time to time be allocated for hearing by the Master of the High Court by the President of the High Court, exercise all the functions, powers and jurisdiction which a judge of the High Court exercises from time to time.

[…]

(3) All the functions, powers and jurisdiction exercised by the Master of the High Court immediately before the passing of this Act by virtue of any statute or rule of court may continue to be exercised by the Master of the High Court save in so far as the same are inconsistent with the exceptions mentioned in subsection (2) of this section

(4) The Master of the High Court may exercise such further or other functions and powers in relation to matters arising before the trial of an action as may from time to time be conferred on the Master of the High Court by rules of court.

(5) All orders of the Master of the High Court shall be subject to appeal to the High Court.

(6) Rules of court may be made by the Superior Courts Rules Committee, with the concurrence of the Minister in relation to any function, power or jurisdiction conferred on the Master of the High Court under this section."

Relevant authorities
Amenability of the Master to judicial review

125. In *State (Richard F. Gallagher, Shatter and Company) v. De Valera* (unrep., Costello J., 9th Dec., 1983), the applicant solicitors sought orders of *certiorari* in respect of certain rulings made by the Taxing Master. One of the issues in the case was whether *certiorari* was available. It was contended on behalf of the Taxing Master that he should be regarded as a "delegate" of the High Court and that, just as the High Court could not make an order of *certiorari* against itself it could not make an order against its own delegate. Costello J. rejected this argument. He held that the office of Taxing Master was, by virtue of the 8th Schedule to the Courts (Supplemental Provisions) Act, 1961, one of a number of offices "attached to" the High Court, the Supreme Court and the President of the High Court. Reference was made to the judgment of Gannon J. in *Magauran v Dargan* (1981) I.M.L.R. 7, where the nature of the office was described as follows:

"The Taxing Master's functions may be described as ancillary to the judicial process only in the sense of being supplementary to it but forming an essential part of it."

126. In *Elwyn (Cottons) Ltd. v. The Master of The High Court* [1989] I.R. 14, the Master had declined to make a particular order under the provisions of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 and the new rules of court made thereunder, on the basis that he believed that he did not have jurisdiction to make the order. The applicants had lodged an appeal but were unsuccessful, as Carroll J. held that the Rules did not make provision for an appeal in the circumstances. The applicants then applied for an order of *mandamus* directing the Master to make the order sought.

127. O'Hanlon J. noted the fact that there was no case, in the long history of the office of Master, in which an order of *mandamus* had been made.

"This might suggest that it has never been considered appropriate, or perhaps even within the jurisdiction of the High Court, to make such an order against an officer who may be regarded as an arm of the High Court itself, but it appears to me that the more likely explanation lies in the fact that there was no need to involve the procedure by way of mandamus when the alternative and simpler and more expeditious procedure by way of appeal under O. 63, r. 9, was always available."

128. O'Hanlon J. referred to the judgment of Costello J. already cited, and noted that the office of Master of the High Court was "attached" to the High Court by virtue of the same legislative provisions as those dealt with in that judgment. It was therefore clear that an order could be made against the Master in the same way as the Taxing Master. On the basis that an appeal could not be taken under the measures in question, the order sought was granted.

The "jurisdiction" or powers of the Master

129. In *Taylor v Clonmel Healthcare Ltd*. [2004] 1 I.R. 169 Geoghegan J. dealt with the Master's jurisdiction in the following terms:-

"Although with reference to the Master, the word 'jurisdiction' is included in the index of the Rules of the Superior Courts 1986, it is not included in the body of the rules and is, in my opinion, a misnomer. The Master has the powers and duties conferred upon him by the Rules of the Superior Courts 1986. The powers of the Rules making Committee in this regard in turn derive from the Courts (Supplemental Provisions) Act 1961 and by cross-reference the Courts and Court Officers Act 1926. But, as I would see it, it is not a conferring of jurisdiction on the Master. It is rather limited powers given to the Master to exercise the jurisdiction conferred on the High Court. The rules of court simply regulate the jurisdiction already conferred. The rules do not themselves confer a jurisdiction. Under the definition of 'court' in the Rules of the Superior Courts 1986, the Master is included when exercising his powers under the rules."

130. *Kennedy v. Killeen Corrugated Products Limited* [2007] 2 I.R. 561 was an appeal from an order made by the Master that a plaintiff's solicitor should pay personally the costs of an unsuccessful motion before him. The power to make such an order was contended to come from a combination of O. 63, r. 6, which gives discretion to the Master to award costs in matters before him, and O. 99 r. 7, which provides that "the Court" may make an order of costs against a solicitor where costs have been "improperly or without any reasonable cause incurred". Order 125 of the Rules provides *inter alia* that "the Court" means either, as the context requires, the High Court or a judge or judges thereof, and includes the Master where he has jurisdiction.

131. Finnegan P. held that power to award costs against a solicitor had its origin in the inherent jurisdiction of the High Court over solicitors, and is exercisable where there has been improper conduct by a solicitor in the course of proceedings. On the facts of the case, he was satisfied that the conduct of the solicitor in question was not improper. He went on to consider whether, in any event, the Master had the power to make such an order and concluded, having reviewed the statutory provisions in relation to his office, that he did not. The Master's powers in relation to costs were encompassed in O. 63, r. 6.

132. Finnegan P. noted that an allegation of improper conduct by a solicitor could give rise to complex issues, requiring a determination as to whether the solicitor whose conduct was in question had been guilty of professional misconduct or negligence sufficient to amount to misconduct or gross negligence.

> *"Leaving aside any issue arising under Article 37 of the Constitution, jurisdiction could only be conferred upon the Master by statute, by rules of court or by an allocation by the President of the High Court. There is no statute nor is there a rule nor is there such an allocation."*

133. In *ACC Bank v. Tobin* [2012] IEHC 348, the plaintiff bank had claimed that the defendant, a solicitor, was in breach of an undertaking given by him as solicitor. The proceedings were taken by way of special summons. After a replying affidavit was filed, the Master struck out the summons, with costs to the defendant, apparently on the basis that the papers were not "in order". Allowing the appeal, Laffoy J. referred to the provisions of O. 38 and said that the Master had no jurisdiction to dismiss the proceedings.

134. In *ACC Bank plc v. Heffernan* [2013] IEHC 557, Hogan J. dealt with the question of whether the Master was entitled to strike out summary summons proceedings on the basis that the action should have been commenced by plenary summons. The facts were that the plaintiff had issued a summary summons seeking judgment for a liquidated sum. A motion for liberty to enter final judgment was responded to by affidavits on behalf of the defendants, contesting liability. The plaintiff then applied to the Master to transfer the matter into the High Court on the basis that it was contested. Instead, the Master acceded to an application by the defendants to strike out the proceedings, on the ground that the plaintiff must have been aware when the proceedings had commenced and that the defendants had a substantive defence.

135. Order 37, r. 6 provides that

> *"In contested cases, the Master shall transfer the case, when in order for hearing by the Court, to the Court list for hearing on the first opportunity; and for this purpose, the Master may extend the time for the filing of affidavits and adjourn the case before himself as he shall think fit. The Master may also, on consent, adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons…"*

136. Hogan J. held that, accordingly, the Master had no jurisdiction to enter final judgment in contested cases.

> *"His task in such cases is rather to transfer the matter to the High Court for hearing when the case is "in order" for hearing by the Court. The reference to "in order for hearing" means nothing more than that the case is administratively ready for hearing so that, for example, all appropriate affidavits have been sworn and filed. This phrase does not give the Master a jurisdiction to strike out contested cases on the ground that the pleadings are in some way irregular or that the proceedings ought to have been commenced by plenary action rather than by way of summary summons: see here by analogy the comments of Laffoy J. to like effect in ACC Bank v. Tobin [2012] IEHC 348."*

137. Hogan J. noted that it had been established as early as 1927 that the Master had no jurisdiction to determine contested cases (referring to *Grace v. Molloy* [1927] I.R. 405). Considering the meaning of the difference between a "contested case" and an "uncontested case", he said that an uncontested case was one where the defendant offered no opposition to the application over and above the entry of an appearance. Where, as in that case, the defendants opposed the application for liberty to enter final judgment by filing affidavits disputing the plaintiff's claim, the case fell into the category of a contested case.

> *"In those circumstances, as the comments of O'Byrne J. in Grace make clear, the Master's task is simply either to transfer the case into the High Court for adjudication once satisfied that the papers are in order and the matter is ready for determination or, should the parties so consent, adjourn the case for plenary hearing."*

138. It is important to note that the learned judge continued as follows:

> *"Specifically, the Master has no function to resolve a conflict of fact or to make an assessment of the likely strength of the case made by either the plaintiff or the defendant or to determine that the case ought to have been commenced by plenary summons."*

139. Four days after the decision of Hogan J. in *ACC Bank v. Heffernan*, Kearns P. delivered judgment in the case of *Bank of Ireland v. Dunne and Cawley* [2013] IEHC 484. There, the plaintiff bank had applied to the respondent for liberty to enter final judgment on foot of a summary summons. The grounding affidavit contained an averment that the defendants had no *bona fide* defence to the proceedings and that the appearance had been entered for the purposes of delay. The defendants then swore affidavits claiming to have a full defence, which would require a plenary hearing. The respondent dismissed the plaintiff's summons and awarded costs of the proceedings against it, apparently for similar reasons as in *ACC v. Heffernan.*

140. On the appeal, the only issue was whether the Master had jurisdiction to dismiss the proceedings rather than being compelled to put the matter into the court list. The court had before it the written decision of the Master in the *Heffernan* case, in which the Master had stated *inter alia* that the phrase "in order" must mean "in accordance with the Rules and the law". He had taken the view in that case that if the plaintiff was incorrect in averring that the defendant had no defence, the summons was bad in law and not "in order".

141. Kearns P. referred to the provisions of O.37, rule 4 of which permits the Master to deal summarily with an uncontested motion for judgment. In that type of action, he may give liberty to enter judgment, or he may dismiss the action "and generally may make such order for the determination of the action as may seem just". He also set out Rule 6 and went on:

> *"These rules are clear and unambiguous. The Master's jurisdiction to dismiss an action arises only in uncontested cases. This is not an uncontested case.*
>
> *The Master has no discretion in a contested case. Where a case is contested, the Master is obliged by rules of court to transfer the case to the court list for hearing at the first opportunity…Further, where a case is contested and there is some inadequacy as to form, the Rules do not confer on the Master a jurisdiction to dismiss the proceedings out of hand – his jurisdiction, clearly spelt out in the Rules (Order 37, Rule 6) permits him only to go so far as to decline to transfer the case to the court list until those deficiencies are rectified and the matter thereby becomes 'in order'…*
>
> *The power to dismiss a contested case is clearly reserved to the High Court …*

No part of Order 37 confers jurisdiction on the Master in a contested case to analyse affidavits filed in reply by a defendant to retrospectively impugn or invalidate a grounding affidavit sworn in support of a claim for a liquidated sum so as to permit or effect a finding that it is or might be in conflict with the stated requirements of Order 37."

Bias

142. *A.P. v. Judge McDonagh* [2009] IEHC 316 concerned divorce proceedings in the Circuit Court. After the case had opened and the wife's evidence had been heard, the parties reached agreement on the terms of a settlement. The matter then came before the judge for ruling on the settlement. It was not in dispute that, under the relevant statutory provisions, the judge had an obligation to ensure that the settlement made "proper provision" for the wife. The complaint in the judicial review proceedings arose primarily from the fact that the judge said that he wanted to see a specified lump sum payment, and indicated that if the husband was not prepared to pay that figure he would make an order that it be paid. The husband (who had not yet given evidence) then applied unsuccessfully for the case to be transferred to another judge. In the judicial review, it was argued on behalf of the husband that the judge's conduct gave rise to an apprehension of objective bias.

143. In his judgment, Clarke J. analysed the jurisprudence on bias, with particular reference to the decisions of the Supreme Court in *Bula Ltd. V. Tara Mines Ltd (No.6)* [2000] 4 I.R. 412, *O'Neill v Beaumont Hospital Board* [1990] I.L.R.M. 419 and *Orange Ltd. V. Director of Telecoms (No.2)* [2000] 4 I.R. 159. He noted that the test is whether there is a reasonable apprehension of bias, citing the following passage from the judgment of Geoghegan J. in *Orange*:

"Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken (O'Reilly v. Cassidy [1995] 1 I.L.R.M. 306) or the judge having been involved in a different capacity in matters which were contentious (Dublin Well Woman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408), or where there was evidence of prejudgment by a person adjudicating (O'Neill v Beaumont Hospital Board [1990] I.L.R.M. 419)."

144. Clarke J. also referred to the view of Barron J. in *Orange* to the effect that where bias may be found to exist or to have existed, it will always predate the actual decision or contemplated decision. Barron J. had said:

"Bias does not come into existence during the course of a hearing. It may become apparent in the course of a hearing and in that way alert a party to the possibility of bias and so enable such party to establish facts which show that the attitude adopted by the decision maker in the course of the hearing was one which might have been expected having regard to those facts. The essence of bias then is the perception – the strength of that perception not being relevant for the purpose of this definition – once all the facts are known, that the particular decision maker could never give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude. Obviously, if it is perceived that it may influence a decision yet to be given, it must exist at that stage…a belief or perception that a decision might have been different is at the heart of bias because if the decision would always have been the same, it cannot have been influenced by bias or any other cause."

145. Noting also that Barron J. had held that the principles of bias were too wide to be conclusively defined, Clarke J. said that "bias can take a number of forms".

"What I am concerned with in this case is pre-judgment. To the extent that pre-judgment can be properly regarded as a form of bias, it seems to me that it is, nonetheless, in a different category. Most cases of bias involve an allegation that by reason of some factor external to the adjudicative process, the adjudicator might be perceived to be biased in favour of one party or the other. Thus there may be a relationship or connection between the adjudicator and one of the parties, or some common interest between the adjudicator and such party. Likewise, it might be suggested that the adjudicator did not come to the hearing with an impartial mind, whether because of a connection of the type which I have described or reason of some animus which the adjudicator might bear towards one of the parties, or in relation to the issue which the adjudicator was being called on to determine.

However, it seems to me that there is another form of pre-judgment which arises where the adjudicator indicates that the adjudicator has reached a conclusion on a question in controversy between the parties, at a time prior to it being proper for such adjudicator to reach such a decision (indeed it might well be more accurate to describe such a situation as premature judgment rather than pre-judgment). It can hardly be said that a reasonable and objective and well-informed person would be any the less concerned that a party to proceedings was not going to get a fair adjudication if, at an early stage of the hearing, comments were made by the adjudicator which made it clear that the adjudicator had reached a decision on some important point in the case at a time when no reasonable adjudicator could have, while complying with the principles of natural justice, reached such a conclusion….

…It does not seem to me that the comments of Barron J. in Orange can be taken to prevent a finding of a form of pre-judgment (or premature judgment) to which I have referred (that is to say a pre-judgment stemming from an appearance being given of the adjudicator having made a decision at a time when further evidence or argument on the issue concerned remained to be presented) simply because such contention arises out of what happens at, rather than prior to, the hearing concerned."

Discussion and conclusion

146. It is not disputed that the respondent may be amenable to judicial review in at least some circumstances, although in general it will be more appropriate to appeal. In my view the applicants were entitled to seek judicial review in this instance.

147. They initially obtained leave to apply in circumstances where the respondent had refused to have an order drawn up reflecting his decision to refer the papers to the DPP, thus denying them an opportunity to appeal. The respondent's position was, and is, that in making that decision he was acting as a private citizen. That is not, in my view, a tenable proposition. He was sitting in his official capacity, as an officer attached to the court, and he had access to and control over the court file by virtue of that capacity. The physical act of sending papers to the DPP would involve an assertion of a right to take or copy the papers that no private citizen could have.

148. When the respondent struck out the summons, it would in theory have been possible to appeal that order. However, the circumstances of the decision to strike out were so intimately connected with the earlier decision that it cannot be said that it was not appropriate to seek and obtain leave to have it dealt with in the same judicial review proceedings.

149. The next issue, then, is whether the respondent was lawfully entitled to refer the matter to the prosecution authorities.

150. Some time was devoted at the hearing to a submission by the applicants that only a judge has power to take such a step, other persons being restricted to making a complaint to An Garda Síochána. There does not appear to be any authority dealing with this practice, and it does not in my view rest on the basis of any particular concept of judicial status. It appears, in reality, to be merely something that some judges have on occasion found to be an appropriate course of action where it has been determined, after consideration of the evidence in a case, that a potential criminal offence has been disclosed. I would prefer not to embark upon a consideration of the basis for such a practice, because I am satisfied that in any event it could not be seen to be part of the functions being exercised by the respondent in this case.

151. The notice party claims that the respondent was obliged to refer the matter by virtue of the provisions of s. 19 of the Criminal justice Act, 2011. However, that provision itself makes it clear that the offence is only committed if the person concerned "fails without reasonable excuse" to inform the Gardaí.

152. Civil litigation involves, generally speaking, disputes between parties. There are of course some cases where the only dispute is as to legal consequences of a particular, agreed, state of affairs, or where there is no dispute but a court order is required for a particular purpose. However, most of the time, litigation involves parties making allegations of misconduct, of varying degrees, against other parties. The allegations may in turn be responded to with counter-allegations. These allegations will, prior to being heard in court, have been put in writing, and the papers will be seen by any official whose task it is to deal with the court files. If every official were to feel entitled to form a view on reading the papers that one of the parties was lying, and were to therefore refer the matter to the criminal prosecution authorities rather than fulfil his or her function of assisting in bringing the matter into the civil courts, the consequences would be extraordinary. This is not just a question of "inconvenience", as counsel for the respondent suggested when the court put this scenario to him. It would amount to a fundamental undermining of the constitutionally-mandated process for the resolution of civil disputes. I do not consider that s.19 of the Act of 2011 can apply in this context. If it does, the provision relating to "reasonable excuse" must apply.

153. This is not, it must be emphasised, a question of expecting public officials to turn a blind eye to evidence of criminality. The point here is that the role of officials attached to the courts is (apart from minor matters where they have been given decision-making powers of a limited nature) to assist in bringing disputes into the forum where they belong. That forum is a court, presided over by a judge who administers justice in public, in accordance with the Constitution. The suggestion inherent in the respondent's submissions, to the effect that the judges are too busy to consider the papers in a case properly, and will permit injustice to be done as a result, is one that is not proper for a court official to make and certainly not one that a court can accept.

154. As a separate consideration, there is the question of whether the respondent could rationally have reached the conclusion that the affidavits were perjured.

155. The crime of perjury involves a sworn statement that the maker knows to be false. Since the offence requires proof of the mental element, a judge or jury would have to examine the surrounding circumstances in order to come to a decision as to whether a statement, demonstrated to have been in fact false, was made in the knowledge that it was false. In this case, the respondent's suspicions of perjury appear to have centred on, firstly, the inclusion in Ms. Hogan's list of undertakings that were in fact made to the co-plaintiff bank rather than to her own employer; and secondly, the assertion by her (and indeed by Mr. O'Keeffe) that, because the notice party had not complied with her undertaking, the "security was outstanding".

156. With regard to the first of these averments, it is abundantly clear that there was nothing to be gained for either Ms. Hogan or the bank that employed her by including in her affidavit undertakings that did not apply to that bank. Given that the relief sought was, primarily, enforcement of the undertakings set out in the special summons, there was no prospect of any benefit to her employer either. In the context of this case, an undertaking can only be fulfilled once, and only in the interest of the party to whom it is given. Even if the issue ultimately came down to compensation, there could be no question of both banks being compensated in respect of the same undertaking. Any relief to be granted could only be by reference to the reliefs sought in the special summons. There is, in my view, absolutely nothing to indicate a deliberate intention to swear to a falsehood.

157. The deponent may well be accused of sloppiness, which is an all-too frequent phenomenon in these matters, but that is a very far cry from a finding that there is an "incontestable *prima facie* case of perjury".

158. The other ground argued for the accusation of perjury seems to be in relation to the assertion that the security was outstanding. For the purposes of this case it is not necessary to embark upon an analysis of the law relating to the meaning of the term "security". Firstly, this is clearly an assertion of law and it is irrelevant, in this context, that the deponent did not state that she had received legal advice in making the assertion. Secondly, it is clear from the authorities that it is no part of the respondent's functions under the Rules to reach his own conclusions as to the merits of the contents of affidavits grounding a special summons that he has no jurisdiction to deal with. That is a matter for the court, into whose list he is supposed to transfer the case.

159. On this issue, I find that the respondent acted irrationally.

160. I therefore conclude that the respondent had no power, and no entitlement, to deal with the court file in the manner proposed by him.

161. The next issue is whether the respondent had the power to strike out the summons.

162. Having regard to the authorities cited above, certain propositions relevant to this case seem to be beyond dispute. The first is that the respondent only has powers where such are given to him by statute, the Rules, or (in some circumstances) allocation by the President of the High Court. The second, arising from the first, is that he has no power to take a step which amounts to a determination of the rights and liabilities of parties save where he has jurisdiction to do so. The third is that he has no function in assessing the veracity or accuracy of affidavits in cases where he does not have jurisdiction. The fourth is that he has no power to strike out a special summons.

163. The submissions made on behalf of the respondent on this issue depend on the court distinguishing or refusing to follow the various High Court judgments referred to. There is no basis upon which I could properly take either course of action.

164. I do not think it necessarily correct to characterise the observations of Laffoy J. in *ACC Bank v. Tobin* as *obiter*, given that the appeal before her was primarily an appeal against an order striking out the summons. The fact that she also determined the substantive matter does not alter that. In any event, her reasoning was followed by Hogan J. in *Heffernan*.

165. The fact that the relief sought in the special summons involves an invocation of the inherent jurisdiction of the High Court in my view weakens rather than strengthens the respondent's position. The supervisory jurisdiction over solicitors inheres in the High Court. It is clear from *Killeen* that no part of that jurisdiction has been allocated to the respondent.

166. The submission that it is part of the role of the respondent to, in some way, "prefigure" the function of a judge, and that he is entitled to strike out proceedings that are "bound to fail", is one that I have to admit I have difficulty in understanding. If it means that he believes that he has the same powers as a judge to dismiss proceedings that are bound to fail, the submission is mistaken.

167. The contention that, because the authorities relied upon by the applicants are decisions of the High Court, this court can decline to follow them is misconceived. Having regard to the principles set out in *Irish Trust Bank v Central Bank (1976 -7) I.L.R.M. 50, In Re Worldport Ireland Limited* [2005] IEHC 189 and *Kadri v Governor of Wheatfield Prison* [2012] IESC 27, I am bound by them unless persuaded that they are wrong on one of the grounds set out in those judgments. As it happens, I completely agree with the authorities and do not propose to differ from them.

168. References to the European Convention on Human Rights and the European Convention on Human Rights Act, 2003 do not assist. The Convention requires the State to ensure that litigants can have a fair and impartial hearing by an independent tribunal "established by law". The "tribunals" in this State are the courts, and the relevant law of the State, in so far as this case is concerned, is to be found in the applicable legislation and the Rules.

169. The Act of 2003 requires organs of the State to carry out their functions in a manner compatible with the State's obligations under the Convention. This, if it applies to the respondent, certainly requires him to act fairly towards parties when carrying out his functions. His functions are determined by the applicable law. Neither the Convention nor the Act can conceivably be thought to confer on court officials a power that they did not already have, such that they could be entitled to determine the rights and liabilities of parties.

170. Finally, there is the issue of bias.

171. Having considered the authorities, I do not think that this case falls into the category of "pre-judgment" or "premature judgment" identified by Clarke J. It could not properly be said that there was a rush to judgment, or that the respondent's decision was made before he had heard all that he should have heard.

172. However, I think that what occurred on the 23rd July, 2014, is a matter for real concern. Adopting the test of the reasonable onlooker, the sequence of events was that the respondent announced that his legal advisers had advised him to formally request the withdrawal of the special summons. (It may be noted that it would be a surprising thing for any public official to do this in a public forum. It is particularly surprising for the request to be made by a senior court official sitting to transact court business.) A reasonably informed onlooker would know that the effect of a withdrawal of the summons would have been to render the judicial review moot. Counsel representing the applicants refused to withdraw the summons. The respondent subsequently struck it out.

173. In my view, a reasonable onlooker might well have apprehended from this that the respondent had been advised prior to the hearing that the judicial review proceedings would become moot if the summons was withdrawn; that it was therefore in his interest that the special summons not proceed, and that his decision to strike out the summons was not uninfluenced by that consideration.

174. This is a matter of objective, rather than proven, bias and is in itself sufficient grounds for quashing the decision. I bear in mind that in *Kenny v. Trinity College* [2008] 2 I.R. 40, the Supreme Court reviewed one of its own judgments to adjudicate on a question of objective bias arising from a familial relationship between a member of that Court and a party in the litigation. The judgment of the Court makes it clear that because it was reviewing its own judgment on this basis, it was particularly necessary to take the interpretation more favourable to the person challenging the decision. I consider that this is an appropriate approach in a case involving a senior court official.

Reliefs

175. The respondent appears to have misunderstood the reason why the applicants have sought an order of *mandamus* to direct him to draw up an order, and also an order of *certiorari* to quash that order when drawn up. I understand this to be because of the traditional rule that the order to be quashed must be presented to the court having power to quash it, and that, if the decision-maker had not drawn up an order, *mandamus* would lie for that purpose.

176. In the circumstances of this case, I do not believe that it is necessary to go through that particular procedure and I propose therefore to grant a declaration that the respondent has no power to copy or otherwise take possession of the court file in the case for the purpose of sending it to the Director of Public Prosecutions.

177. I will also make an order of *certiorari* quashing the order made by the respondent striking out the special summons proceedings.

178. It is unlikely that any further order will be required.