

THE HIGH COURT

Record No. 2013/624 JR

Between:

MUIRIS O'DONOGHUE

Applicant

and

SOUTH KERRY DEVELOPMENT PARTNERSHIP LIMITED

Respondent

and

DEPARTMENT FOR THE ENVIRONMENT, COMMUNITY
AND LOCAL GOVERNMENT

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2015.

Part 1

Overview

1. Geokaun Mountain and the Fogher Cliffs in County Kerry are true John Hinde material. Beautiful in themselves, they offer panoramic views back across Valentia Island and out towards the grey-blue expanse of the wide Atlantic Ocean. The mountain and cliffs, and the land and ocean views that they afford, have been identified by Fáilte Ireland as one of fifty scenic 'secrets' of Ireland – though one suspects that, with the publication of this judgment, the secret is out, at least among the legal community.

2. Mr O'Donoghue, a farmer from Feighmane West, together with his wife, has spent the last few years developing the mountain and cliffs as a farm tourism project. It has been a considerable success: in recent years, the O'Donoghues have had about 20,000 visitors per annum. As one would expect, husband and wife seek continuously to enhance the visitor experience. They have erected a shelter and ticket station, built an initial 1,500metre looped path, and done landscaping and other works.

3. Back in August 2013, when the statement required to ground his application for judicial review was sworn, Mr O'Donoghue estimated that he and his wife had to that time invested about €182k of their own money in the project, to which can be added a further €71k of funding that was paid to them under an Ireland-EU rural development scheme known as the LEADER programme. It is a largely unsuccessful application for further LEADER funding in respect of certain drainage and tarring works which has led to the present proceedings.

Part 2

Government Cutbacks

4. In early-2013, the Department of the Environment advised the circa. 50 local development companies' with responsibility for, *inter alia*, the nationwide distribution of LEADER funds – of which South Kerry Development Partnership Limited (SKDP) is one – that the funds available for the LEADER scheme would be reduced from €400m in that year to €370m. At the same time, the Department ordered an embargo on payments under the scheme, pending the completion of an audit into the scheme's operation.

5. Notably, the just-mentioned embargo did not stop applications for LEADER funding from being assessed; it merely meant that no payments could be made. There was good reason why assessments would be continued despite the embargo. The general understanding was that when the embargo came to be lifted, payments out would likely be required to be done within a relatively tight timeframe. If assessments had not continued throughout the duration of the embargo, projects that would otherwise have been eligible for funding would likely have missed out on funding because there would not have been the time to assess them before the narrow window of opportunity closed.

Part 3

SKDP's Assessment and Approval Process

6. The disbursement of millions of euro of Government and EU funding is naturally subject to a comprehensive set of rules. The court has been referred, in this regard, to an Operational Procedures Manual (the 'Procedures') and lengthy Operating Rules (the 'Rules') drawn up under the auspices of, *inter alia*, the Department of Community, Rural and Gaelteacht Affairs. In accordance with the said Rules and Procedures, SKDP administers applications for LEADER funding in the following way:

(1) Applications are first evaluated by SKDP's Evaluation Committee. Its role is to evaluate projects and make recommendations concerning the funding of same to SKDP's board of directors.

Members of the Committee tend to be drawn from relevant sectoral bodies such as the County Enterprise Board, Forbairt and Fáilte Ireland, that are possessed of expertise in the types of developments with which the LEADER programme is concerned.

Under Rule 5(4) of the Rules:

"The role of the Evaluation Committee is to make recommendations to the Board [of SKDP] who then make the final decision on projects".

(2) All applications recommended by the Evaluation Committee go to the board of directors for final sanction. Rule 5(2) of the Rules states, inter alia, as follows:

"The Board...is the decision-making authority in relation to all Programme related activities....All Board decisions shall be made in conformity with...[inter alia] EU regulations, National legislation [etc.]....Any decisions at variance with the recommendations of the Evaluation Committee and the reasons for doing so shall be clearly documented in the Board Minutes".

7. In short, the Evaluation Committee and the SKDP board of directors appear to have a relationship similar to that which exists, for example, between a credit committee and the board of directors in a bank. The credit committee, typically comprising credit and other experts, may recommend that a large loan be approved but this recommendation can always meet with a contrary and overriding view at board-level, as can happen also when Evaluation Committee recommendations go to the SKDP board, its being, as mentioned above, *"the decision-making authority in relation to all Programme related activities"*.

8. Prior to 4th June, 2013, it appears from the evidence before the court that the SKDP typically operated a 'first recommended, first funded' approach to its dealings, so that approved projects were funded in a chronological sequence, each up to the full amount approved by the board, until the entirety of the available funds were expended. This system obviously worked an unfairness to those projects that were worthwhile ventures but came later in the chronological sequence; however, some sort of system had to be devised upon and likely any system that seeks to be generally fair will invariably run the risk of some individual unfairness: such is life.

9. Some attempt was made during the proceedings to read a requirement for such a chronological approach into Rule 8.1 of the Rules which, insofar as relevant in this regard, provides:

"A decision on an application must not be postponed indefinitely or delayed, having regard to the possibility of funds becoming exhausted or the ending of the Programme."

10. All the court sees in the last-mentioned obligation is a requirement that a local development company, here SKDP, should not act sluggishly in its despatch of applications for the reasons stated, and nothing more.

Part 4

The Processing of Applications in 2013

A. February to May 2013

11. At meetings of February, March and May 2013, SKDP's Evaluation Committee assessed a total of 119 applications. One of these applications was later withdrawn. All of the applications so assessed were recommended to the board of directors for approval.

12. In late-May 2013, SKDP was advised by the Department for the Environment, etc. that the above-mentioned embargo was being lifted. In a letter of 29th May, it relayed this information to all applicants, noting, inter alia, that *"[SKDP] has suffered a 20% budget cut on its original allocation. The result is that SKDP will not have sufficient grant aid for all projects evaluated to date in 2013"*.

13. The precise cash difficulties presenting were not advised in the letter. However, SKDP was in fact facing a situation where roughly €4.1m of funding had been recommended by the Evaluation Committee and only €1.5m of funding was available to SKDP to disburse.

14. While one might perhaps wonder at the efficacy of a vetting system that sees so many projects recommended for funding when there is comparatively little funding available, it should have been clear to anyone who received the letter of 29th May, and it would certainly have been clear to anyone senior within SKDP, that a problem was 'bubbling up' through SKDP that would have to be resolved.

B. The Board Meeting of 4th June, 2013.

15. At its meeting of 4th June, 2013, SKDP's board of directors resolved to approve certain criteria that it would apply when judging Evaluation Committee recommendations, presumably so that the fairest disbursement of funding would ensue. The board minutes record as follows:

"As the amount of grant aid sought...[by] project applicants far exceeded the project grant funding available the following criteria...[were] agreed in prioritising/not prioritising projects for the available grant aid –

- Whether the promoter had received grant funding previously under the current [LEADER]...Programme and the funding currently sought is for a project that represents an expansion, enhancement or continuation of this previously funded grant aided activity. These projects would not be prioritised for funding. Priority would be given to promoters who had not received...[LEADER] grant aid under the current programme or where the activity for which funding was currently sought represented new project activity.

- Geography – Extent to which an area had not benefitted from grant aid under the current... [LEADER] programme.

- Enterprise Projects – Priority would be given to new enterprises looking to start up.

- Feasibility studies would not be prioritised for funding. Analysis & Development projects would be given greater priority than feasibility studies.

- Job creation potential – Projects with the greatest job potential would be prioritised for funding.

- Festivals – Priority would be given to festivals seeking RDP grant support for the first time, 50% of total project costs would be awarded to festivals seeking RDP grant aid support for the second time and 25% of the total project costs

would be awarded to festivals seeking RDP grant aid support for the third time.

- Projects that require planning and that had not been applied as at the date of the board meeting would not be funded due to the revised Dept. time frame – which requires all commitments to be made by 31st August...”.

16. Mr O'Donoghue queries whether the SKDP board was legally empowered to formulate the above-mentioned prioritisation criteria. This is an issue to which the court returns later below. Suffice it to note for now that there is nothing in the Rules to indicate that the board cannot so proceed. Having adopted the above-quoted criteria, the board then went on to apply them, certain board members absented themselves when an application in which they had an interest presented. The application of the agreed-upon criteria led the board of directors to approve or gave preliminary approval to 71 applications for funding, reject two applications, decline to give approval to 26 projects for the time being, and defer 18 projects to the next board meeting, of which Mr O'Donoghue's application was one.

C. A Possible Conflict of Interest Presenting?

17. Mr O'Donoghue asserts that some of the SKDP board members who agreed the above-quoted criteria ought to have absented themselves from the board meeting when the proposal to adopt them was discussed and voted upon. This is because Mr O'Donoghue perceives those members to have had a conflict of interest presenting, in that some of the criteria, he claims, stood to favour funding applications in which those board members had an interest and which came before the board later in the meeting – at which point, the court notes (and this is testament, surely, to the honesty of the board members in question) successive members absented themselves from whatever portion of the meeting considered their particular applications, leaving the remaining members to vote on the projects. So, avers, Mr O'Donoghue:

"I say and believe that while it is standard practice that a warning be given by the Company Secretary to Board members 'to absent themselves from the meeting when the projects they had declared an interest in came up from deliberation'...that there is no indication that those members of the Board, with an interest in the forty six Applications upon which they were to decide to impose criteria, absented themselves, either in respect of the change of procedures to impose 'criteria' or the formulation of the criteria themselves."

18. This is the extent of Mr O'Donoghue's evidence in this regard. He does not contend that any director in fact benefitted from the prioritisation criteria adopted. He merely contends that matters could have been better structured optically, and perhaps they could, but that is the extent of matters. If the court does a 'sniff test' as to whether there was some unfairness presenting in the criteria adopted – and that is all it can do given the absence of substantive evidence – nothing 'smells'. The SKDP board members agreed no criteria that are so specific and/or strange that they would lead an objective observer to suspect that those criteria had been crafted with some ulterior objective in mind. In truth, they are precisely the kind of prioritisation criteria that one might reasonably expect to have been adopted in the financial circumstances presenting. Perhaps it would have been better if certain board members had stated that the prioritisation criteria being considered might impact on their project applications, if they did fall to be impacted – and apart from Mr O'Donoghue's say-so, there is no evidence to indicate that this was so. But taking Mr O'Donoghue's case at its very height in this regard, his concern is that criteria which appear objectively rational, and are not proven to have unfairly favoured anybody, are entirely objectionable because they were approved by board members via a process which might perhaps have been better structured optically. This is not a line of objection that the court finds persuasive.

D. The Board Meeting of 25th June, 2013.

19. On 25th June, 2013, the SKDP board of directors held a further meeting. At that meeting, a project that had received preliminary approval at the previous meeting had that approval withdrawn in light of planning law issues that had become apparent. The 18 projects that had not been allocated funding at the previous meeting were then re-visited, the criteria resolved upon at the previous board meeting again being applied once again. Of those 18 projects, ten were approved, several for less than the amount sought. Mr O'Donoghue's application suffered the greatest reduction, from the almost €200k sought to a comparatively paltry €20k. Of the remaining eight projects, six were not approved and two were deferred to a later meeting.

Part 5

Mr O'Donoghue's Application

A. Overview.

20. Some of the detail of what happened to Mr O'Donoghue's application has already been touched upon above. However, it is useful to consider certain aspects of the process in greater detail before proceeding further. This seems best done by way of the summary chronology that follows.

B. Chronology.

21. **8th March, 2013:** Mr O'Donoghue makes formal application for LEADER funding of just under €200k. This is accompanied by a business plan and a technical engineering study.

22. **29th March, 2013:** Mr O'Donoghue's application is recommended for approval by the Evaluation Committee.

23. **29th May, 2013:** Letter issues to Mr O'Donoghue indicating that his project will go to a meeting of the SKDP board in the coming weeks. This letter advises, inter alia, that SKDP:

"...has suffered a 20% budget cut on its original application. The result is that SKDP will not have sufficient grant aid for all projects evaluated to date in 2013."

Mr O'Donoghue is, perhaps surprisingly, not disheartened by this letter. His experience is that SKDP typically operates on a 'first recommended, first funded' basis. As the first recommendations issued in February 2013, he considers that he should be near the top of the list and so that he will get the funding for his now-recommended project.

24. **4th June, 2013:** Board meeting takes place. The new prioritisation criteria are adopted by the board. Applying these criteria, the board defers consideration of Mr O'Donoghue's application to its next meeting. Mr O'Donoghue learns of this 'through the grapevine' and is aggrieved.

25. **6th June, 2013:** Mr O'Donoghue meets an SKDP director at a business event and asks why his application was rejected on the 6th. He is advised that this information is correct.

Mr O'Donoghue places a telephone call with another director concerning his application. There appears to have been a somewhat heated exchange of views.

There was some suggestion at the hearing of the present application that in engaging with SKDP directors so, Mr O'Donoghue was engaged in some form of canvassing of support for his application. Given, however, that Mr O'Donoghue by this time believed – mistakenly – that his application had been rejected, it is difficult to see how he could, or why he would, have been canvassing support for an already failed application. In truth, he seems merely to have been trying to understand why his application had not been approved for the full amount sought. There can be few people who, similarly placed, would not seek to do the same.

26. **17th June, 2013:** Notwithstanding that there has not yet been any formal communication from SKDP, Mr O'Donoghue's solicitors issue a letter threatening judicial review of the meeting of 4th June unless, inter alia, all decisions taken at that meeting are vacated and matters dealt with on a 'first recommended, first funded' basis. It was suggested at the hearing that by going down the legal route so quickly, Mr O'Donoghue was seeking to 'strong-arm' SKDP into doing what he wanted. The court sees nothing more in the letter than an attempt by Mr O'Donoghue to protect his commercial interests vigorously and see that what he perceived to be due process was respected – and when it comes to matters of due process, one would perhaps instinctively engage the services of a solicitor.

27. **25th June, 2013:** SKDP's solicitors issue a letter of reply indicating that no board decision has yet been taken as regards Mr O'Donoghue's application and taking issue with certain points made in the letter of the 17th. The letter also refers to the availability of an appeal process provided for in the Rules (considered later below). Much was made of this at the hearing: what was the point of an appeal, it was asked, if the thrust of the letter was (and it was) that no board decision had yet been made? Undoubtedly the letter was not as clear as it might have been. However, the court sees in it nothing more than a sensible effort to remind Mr O'Donoghue that an appeal process was available if he thought himself to have a complaint and that there was no need to be rushing off to the High Court – and indeed, there was not. As no decision had been made, it must or should have been obvious to Mr O'Donoghue that he could have no complaint at all regarding same.

28. **1st July, 2013:** A further letter must have issued from Mr O'Donoghue's solicitors after the letter of the 25th issued from SKDP. This is apparent from the fact that on 1st July, SKDP's solicitors issued another letter (a) taking issue with some assertions in that interim letter (unseen by the court) and (b) advising, inter alia, that Mr O'Donoghue had by this time been allocated partial funding and that he would be advised of this by SKDP in due course.

29. **2nd July, 2013:** SKDP issues a letter to Mr O'Donoghue advising that he has been allocated funding of €20k and advising of the appeal process available to him – so whom he should contact and how and what supporting information he might wish to provide – if he is disappointed by the decision. Mention was made at the hearing of the present application that the letter only referred to an appeal being made to the chairperson of the SKDP and did not mention that there was an onward appeal to an independent third party. However, Mr O'Donoghue knew from the letter that he could bring an appeal and how such an appeal should be brought. The fact that there was an onward appeal process from this initial appeal does not seem to the court to be detail that it was necessary to provide in this letter. The court returns later below to the issue of whether Mr O'Donoghue's failure to invoke the appeal process ought to incline the court to decline him now the discretionary reliefs that he seeks of it.

30. **17th July, 2013:** A more detailed letter issues to Mr O'Donoghue concerning the funding.

31. **2nd August, 2013:** Ex parte application for leave to seek judicial review made and granted.

The court must admit to a degree of surprise that barely a month after being advised formally of the, doubtless disappointing, news that he had received much lower funding than he had sought, Mr O'Donoghue had approved the commencement of judicial review proceedings, without any attempt to engage in a 'free-of-charge' appeal process that would not have prejudiced his position, would have been hugely cheaper than coming to the High Court, and was invoked successfully by other disappointed applicants for funding. The doors of the courts are open to all and judges are here to serve; however, in an age when the cost of civil litigation appears so often to cross the threshold of absurdity, those not possessed of abundant means should think carefully before coming to the High Court with such apparent alacrity. Matters ought not to be so but, for now, matters are so, and would-be litigants ought therefore to tread very cautiously if they are not to expose themselves to often exorbitant and potentially ruinous levels of costs. Whether Mr O'Donoghue's failure to invoke the appeals process should discline the court to grant the reliefs now sought is considered later below.

Part 6

SKDP's Appeal Process

A. Overview.

32. The Rules establish an appeals process for disappointed applicants for LEADER funding. It suffices to recite the key elements of the appeals process to demonstrate how comprehensive and well thought-out it is. There is no suggestion that the appeals process is tinsel to conceal the tawdry: it works, and that it works is evidenced by the fact that some other people who were disappointed by the response to their applications by SKDP for LEADER funding around the same time as Mr O'Donoghue brought successful appeals.

B. The Appeals Process.

33. In summary, the appeals process works as follows:

1. An applicant may seek a review of the decision from the local action group (or 'LAG', here SKDP) in the first instance.

2. The LAG should advise the applicant, in writing, within two months of the request for review, of the outcome of that review.

3. Where the applicant is dissatisfied with the outcome of the LAG review, s/he may, within a one-month timeframe, appeal that decision to a regional inspector (a Department official).

4. The regional inspector will notify the appellant of the outcome of the appeal. This notification will outline the reasons for the decision of the regional inspector. This decision is the final decision of the Department.

34. Rule 23.4.1 provides, inter alia, as follows:

"The Regional Inspector will only review the decision of the LAG in respect of:

the process and procedures followed by the LAG in coming to the original decision and in performing the review,

and

the LAGs interpretation of the relevant national/EU regulatory requirements."

[Emphasis in original].

35. In practice, the appeal to SKDP goes to its chairperson in the first instance. Even allowing for the prescribed scope of the regional inspector's onward review of matters, it is difficult to see what is so objectionable or inadequate about the appeal process that Mr O'Donoghue did not avail of it. Mr O'Donoghue's complaints in this regard appear to be that:

(1) he was advised by SKDP of the appeal process at a time when he could not have availed of it.

It is true that this happened. However, it is also true that Mr O'Donoghue was also clearly and properly advised by SKDP of the appeal process at a time when he had been formally advised of the board's decision as regards his funding application, and so when he could have availed of the appeal process – as others did, some or all of them successfully so. It seems a curious basis for avoiding an appeal process that one has been over-advised of its existence.

(2) a fair appeal does not cure an unfair first decision.

The court does not understand this contention. Curing an unfair first decision is precisely what a fair appeal does. That is one of the reasons that appeals processes exist.

(3) it was difficult to identify the decision made and the basis for same.

The only reason for any confusion on Mr O'Donoghue's part as to what decision he ought to challenge, and why, arises because he was given misleading insider information (or had a misunderstanding of such true information as was given to him) from within SKDP. Had Mr O'Donoghue but awaited the formal response to his funding application that issued from SKDP, it is absolutely clear what decision he needed to appeal against and why. Clearly the decision in issue was the decision to grant him reduced funding and, just as clearly, the objection to same derived from the fact that based on past experience, Mr O'Donoghue considered himself entitled to full funding. He might perhaps have thrown some of his 'insider information' into the mix by way of information to back up his appeal, or as a basis for grounds of appeal. However, what he cannot do is rely on any confusion he had as a result of 'insider information' as a separate ground of complaint. He did not have to listen to or rely upon that 'insider information'. That he did so, and appears to have gotten confused as a result having done so, is a matter for him, not SKDP.

(4) it is questionable that the decision of the board of 4th June, 2013, to defer its decision yielded a decision that fell to be appealed.

As mentioned above, the decision in issue clearly was and is the decision to grant Mr O'Donoghue reduced funding. This is so obvious that the court must admit to being unconvinced that Mr O'Donoghue, who has long had the benefit of legal advice concerning the matters in issue in this application, could have been in any doubt in this regard, certainly after consulting with his legal advisors.

Part 7

Reliefs Sought

36. Mr O'Donoghue comes to court seeking the following principal reliefs:

(i) an order of *certiorari* quashing the decisions taken by the board of directors of SKDP at meetings of 4th and 25th of June, 2013, including but not exclusively the decisions:

(a) not to decide upon, or consider the applications approved by the Evaluation Committee, in chronological order;

(b) to refuse to consider individual applications approved by the Evaluation Committee in chronological order;

(c) to disregard the chronological order of applications approved by the Evaluation Committee and instead to consider all applications simultaneously, without having regard to chronological, or any rational or reasonable method of assessment;

(d) to remove from the consideration of the SKDP board, applications which had been approved by the Evaluation Committee, but made by applicants who had previously received funding;

(e) to take into account irrelevant and impermissible considerations, namely whether a particular applicant had previously received funding;

(f) to adopt a method of consideration of applications (approved by the Evaluation Committee) which disregarded and dis-applied their own procedures, namely the failure to consider each application on its merits in accordance with the order in which it appeared relative to other applications, and

(g) to grant Mr O'Donoghue the sum of €20,000;

(ii) a declaration that SKDP in carrying out its duties and obligations, is not entitled to:

(a) disregard the chronological order of receipt of applications, by the Evaluation Committee;

(b) remove from the consideration of the board, applicants who had previously received funding, and

(c) fail to decide on each and every application in turn and in chronological order of receipt;

(iii) an order directing SKDP to convene a meeting of the SKDP board to re-consider applications for funding and/or award of grants, already approved by the Evaluation Committee, in accordance with the Rules and also natural and constitutional justice;

(iv) a declaration that in disregarding or abandoning consideration of applications approved by the Evaluation Committee in order of receipt and/or removing from consideration applicants who had previously obtained funding, SKDP acted ultra vires, contrary to its powers and in breach of natural and constitutional justice; and

(v) a declaration that in purporting to disregard or abandon consideration of applications approved by the Evaluation Committee in order and/or applicants who had obtained funding previously, that SKDP had failed to treat all applicants fairly and in accordance with natural and constitutional justice and fair procedures; and

(vi) certain ancillary reliefs are also sought.

Part 8

The Duty of Utmost Good Faith

37. It is well-settled law that when a party comes to court seeking *ex parte* relief, that party is subject to a duty of utmost good faith to disclose all material facts. So, for example, Hogan and Morgan in *Administrative Law in Ireland* (4th edition, 2010) state as follows, at 866:

"All applications for judicial review require the utmost good faith and full disclosure of all material facts on the part of the applicant.290

....290 As Fennelly J. said in Gordon v. Director of Public Prosecutions [2002] 2 I.R. 369 at 375: 'On any application made ex parte the utmost good faith must be observed and the applicant is under a duty to make a full and fair disclosure of all the relevant facts of which he knows and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient or candid disclosures, the ex parte order may be set aside on that very ground.'"

38. The practical rationale for the imposition of this duty is obvious: a judge is being asked to make an order based on what s/he is being advised by one party and, if injustice is to be avoided, must be able to rely upon what the applicant party advises. And so the applicant is subject to a duty to present the applicable facts, 'warts and all'.

39. SKDP objects that when Mr O'Donoghue made his *ex parte* application for leave to seek judicial review, two 'warts' went unmentioned: (1) he did not advise how he came across the information as to what happened at the board meeting of 4th June, 2013; and (2) he did not disclose his purported efforts to canvass the board members.

40. As to (2), the court has concluded above that Mr O'Donoghue did not engage in canvassing, so this ground of objection fails.

41. As to (1), the only way that Mr O'Donoghue could have found out what happened at the meeting of 4th June is that one or more of the attendees at that meeting must have told him. Generally the fact that one man listens while another man speaks offers no basis for censure. Had Mr O'Donoghue paid for the information, had he induced another by force to tell him what happened, had he 'bugged' the SKDP board-room – and none of these, nor any like circumstances, present – these are facts that would have to be revealed to the judge of whom leave was sought, and might well have impacted on the decision whether or not to grant leave. But a failure to disclose that a man merely listened as he might, when another man spoke as he ought not, is no failure, at least on the facts as known to this Court.

Part 9

Non-Invocation of Appeal Process

42. As was mentioned above, Mr O'Donoghue was repeatedly apprised of his entitlement to appeal the partial rejection of his application and declined to do so, in truth for no good reason other than that he preferred to come to court. In this regard, the court has again been referred to Hogan and Morgan, op. cit., at 885 et seq., with the following observations of the learned authors seeming to the court to be the most pertinent:

"The existence of an alternative remedy does not of itself debar an application for judicial review. The question is essentially one for the discretion of the court and regard will be had to the adequacy of the alternate remedy and to all the circumstances of the case. Where the issues in question are principally issues of fact or law not fundamentally going to the jurisdiction and which can be dealt with on appeal, then the courts will invariably insist that the appellate remedy be availed of...."

In State (Abenglen Properties Ltd.) v. Dublin Corporation[[1984] I.R. 381] the Supreme Court had appeared to lean in favour of the 'exhaustion of remedies' requirement....

However, the more rigid approach taken in *Abenglen* and subsequent cases has now been more or less abandoned. In more recent times the courts have treated both the existence of an alternative appeal and even the actual exercise of the remedy as simply one factor to be considered in the exercise of the court's discretion. The modern approach was eloquently summarised thus by Barron J. in *McGoldrick v. An Bord Pleanála*[[1997] 1 I.R. 497]:

"The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

43. Systemic reasons also present: the need to avoid every earthly dispute coming before the courts; the need to avoid the absurdly high costs of civil litigation that now so often present being used as a means of coercing settlements that have more to do with fear of expense than the amicable and equitable resolution of disputes to the satisfaction of all; and what might be called the 'need for speed', i.e. the need for the swiftest possible resolution of disputes, if only so that all involved can get on with their lives instead of being constantly involved in protracted court proceedings; life is too short for long years of eminently avoidable litigation.

44. Counsel for Mr O'Donoghue has referred the court, *inter alia*, to the decision of the Supreme Court in *Stefan v. Minister for Justice* [2001] 4 I.R. 203. That was a case in which Mr Stefan, a Romanian gentleman who had claimed refugee status in Ireland, came to court seeking an order of *certiorari* in respect of a decision of the Minister for Justice, instead of availing of an appeal process available in the context of refugee applications. The Supreme Court held, *inter alia*, that the appeal procedure was not an appropriate or adequate alternative remedy so as to withhold *certiorari*. By contrast, a meaningful and suitable route of appeal was available to Mr O'Donoghue; he simply elected not to go down that route.

45. In a nutshell, Mr O'Donoghue's complaint is that the board of SKDP could not rightly have, and ought not to have, adopted the prioritisation criteria that it resolved to approve at its meeting of 4th June, 2013, and that had it proceeded on the 'first recommended, first funded' basis to the approval of applications, he would have got the €200k that he sought. There is nothing so complex in this line of complaint that it could not have been addressed by way of the appellate process. To the suggestion, if it is suggested, that the relief available by that process is more apparent than real, the fact that other applicants similarly positioned to Mr O'Donoghue were successful in their appeals gives the lie to any such suggestion. Common-sense and case-law suggest that Mr O'Donoghue ought to have proceeded by way of the appeal system of which he was duly apprised – and inexplicably ignored. That is a factor which would disincline the court to grant Mr O'Donoghue the discretionary reliefs that he now seeks, were the court to conclude that there was any basis for granting any of those reliefs, but in fact it has arrived at the entirely opposite conclusion.

Part 10

The Adoption of the Prioritisation Criteria

A. Objections to Adoption of the Prioritisation Criteria.

46. It seems to the court that five key objections are raised by Mr O'Donoghue as regards the adoption of the prioritisation criteria:

1. The criteria by which applications fall to be measured had already been applied by the Evaluation Committee in accordance with the Procedures and Rules.

Court Response: The board of SKDP is not bound by the actions of the Evaluation Committee in this regard.

2. The Procedures and Rules cannot be departed from.

Court Response: Rule 11.3 of the Rules provides that "LAGS must consider the following in determining the eligibility of a project"; it does not provide that additional criteria cannot be considered. Moreover, the Rules themselves provide in the Introduction that "The Operating Rules are subject to compliance with EU and National requirements". There is nothing contrary in the Procedures. The said EU requirements include Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (O.J. L277, 21.10.2005, p.1) which, *inter alia*, makes the following provision in respect of LEADER funding, in Arts. 61 and 62: "The Leader approach shall comprise at least the following elements...(c) bottom-up approach with a decision-making power for local action groups [here SKRD] concerning the elaboration and implementation of local development strategies" (Art. 61), and "The local action groups shall choose the projects to be financed under the strategy." The 'top down' style of governance advocated for by Mr O'Donoghue seems entirely inconsistent with the 'bottom up' approach so clearly provided for in this directly effective European legislation. Moreover, it does not appear to the court that in agreeing or applying the additional criteria settled upon at the meeting of 4th June, 2013, SKDP departed from any of the Procedures or Rules.

3. The criteria adopted by the board of SKDP on 4th June, 2013, diverge from the Procedures and Rules.

Court Response: See the response to 2.

4. It is procedurally unfair to change the criteria by which an application is assessed after the application has been submitted and during the assessment process.

Court Response: In principle, this might seem unassailable as an absolute proposition. In practice, a more nuanced response is required. The Evaluation Committee recommended that Mr O'Donoghue's application be approved, but the mere fact that the application had been recommended was not the end of matters. It had yet to be approved by the board and there was no guarantee that such approval would be forthcoming. When the matter went before the board, it had regard to the Evaluation Committee's recommendation and also to the rational and reasonable prioritisation criteria that it had adopted (and was thereafter entitled to apply) in an entirely proper attempt to secure greater fairness to all in the context of the straitened financial circumstances presenting – the effects of which circumstances SKDP had been

careful to communicate to Mr O'Donoghue in its letter of 29th May, 2013, during the period between the issuance of the Evaluation Committee's recommendation and the board meeting of 4th June, 2013. Viewed in this light, the allegation of unfairness made, though it might appeal in principle, seems rather to dissipate in practice.

Counsel for Mr O'Donoghue referred the court in this regard to, *inter alia*, the decision of the Supreme Court in *Latchford and Sons Ltd. v. Minister for Industry and Commerce* [1950] I.R. 33. In that case, funds had been provided by the Oireachtas to meet the payment of certain subsidies, the conditions for the payment of those subsidies had been established by the Minister, and the Minister then purported to exercise a discretion to refuse payment of the subsidy to the plaintiff, notwithstanding that it had satisfied these conditions. The Supreme Court held that the Minister enjoyed no such discretion. Giving judgment for the court, Murnaghan J. observed as follows, at 42:

"After having made and published the conditions on which payment of subsidy would be made, the Minister can alter these conditions from time to time or withdraw them: but, until altered or withdrawn, the conditions apply, and persons who have complied with the published conditions are entitled to claim that they have qualified for payment of subsidy."

Counsel for Mr O'Donoghue contended that a similar situation presents here. However, at least one singular difference is immediately apparent between that case and this: in *Latchford*, there was no question but that the funding was there to be distributed. Here, there were €4.1m-worth of approved projects and but €1.5m of available funding: some means had to be found of resolving fairly the shortfall presenting, and by 4th June, 2013, the board of directors, having not yet met as a board to consider the Evaluation Committee recommendations, and as a preliminary measure, agreed what it considered a rational and reasonable set of criteria to be applied, given the cut in funding presenting. Those criteria may not have served Mr O'Donoghue's interests best, but the board was tasked with doing fairness to all, and sought to do so.

5. Mr O'Donoghue had a legitimate expectation that his application would be assessed fairly and in accordance with agreed criteria.

Court Response: The court turns to the issue of legitimate expectation below.

B. Did Previous Practice Create Some Legitimate Expectation?

47. Among the grounds upon which relief is sought in this application is the following:

"(iii) [Mr O'Donoghue], pursuant to the...Rules...and having a legitimate expectation that...[SKDP] would observe the...Rules...and natural and Constitutional Justice, applied for and was approved, by the Evaluation Committee of [SKDP]...for funding or grant, on foot of an Application dated the 8th day of March, 2013 [was unlawfully deprived of this legitimate expectation]".

48. The case-law and commentary on legitimate expectation is extensive. The court turns to consider the various cases in which it has been referred in this regard.

i. Gutrani v. Minister for Justice

[1993] 2 I.R. 427

49. In *Gutrani*, which is not, *sensu stricto*, a case of legitimate expectation, the Minister for Justice was held to certain assurances that had been given by the Minister to the Office of the UNHCR as to how applications for asylum and refugee status would be conducted. This was found not to be by reference to any legitimate expectation arising, but because this was the procedure which the Minister had represented that he would follow. Per McCarthy J., in the Supreme Court, at 435:

"The Minister does not contest that he is obliged to consider the application within the framework of the letter of the 13th December, 1985. Having established such a scheme, however informally so, he would appear to be bound to apply it to appropriate cases, and his decision would be subject to judicial review. It does not appear to me to depend upon any principle of legitimate or reasonable expectation; it is, simply, the procedure which the Minister has undertaken to enforce."

50. In the present case, by contrast, no express assurances were offered by SKDP as to how Mr O'Donoghue's application would be treated in the straitened circumstances presenting. His application went through the usual process: it was considered by the Evaluation Committee and then went to the SKDP board which had due regard to the Evaluation Committee's recommendation; however, the board was also entitled to, and did, have regard to other criteria, including such prioritisation criteria as it had adopted in a bid to address the financial predicament presenting, thanks to the financial scale of the recommended projects arising and the amount of LEADER funds available. Again, however, even if the court is wrong in the foregoing, it considers that this is a case in which in any event, as happened in the Curran case (considered later below) public interest considerations trump any legitimate expectation that may have presented as regards Mr O'Donoghue.

ii. Glencar Exploration plc v. Mayo County Council (No. 2)

[2002] 1 I.R. 84

51. Still a leading decision of the Supreme Court in the area of legitimate expectation, *Glencar Exploration* came to court seeking damages for, *inter alia*, breach of legitimate expectations, after the High Court had declared the inclusion of a mining ban in the Council's development plan to be *ultra vires* the Council and hence void. This application for damages was unsuccessful in both the High Court and the Supreme Court. The following remarks of Fennelly J. are especially pertinent to the present application:

"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be

addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

52. It is well to pause and remind oneself what is in issue in these proceedings. SKDP's Evaluation Committee did as it was required to do, SKDP's board did as it was entitled to do, and the sole representation that the court can see to arise – if representation it is (and the court does not see that it is) – is the note in SKDP's letter of 29th May, 2013, to Mr O'Donoghue that SKDP *"has suffered a 20% budget cut on its original application...[and] will not have sufficient grant aid for all projects evaluated to date in 2013."*

53. Turning then, to Fennelly J.'s observations, what is their effect in the context of the present application? First, the court does not see that SKDP made any statement or adopted any position amounting to a promise or representation, express or implied as to how it would act in respect of an identifiable area of its activity. Second, the only possible representation that the court can identify (and which it does not in fact consider to be a representation) is the above-quoted text from the letter of 29th May – and that representation would have the effect that Mr O'Donoghue ought to have expected a reduced grant. Third, the court does not see that there is any representation which favours the line of argument advanced by Mr O'Donoghue and from which it would be unjust to allow SKDP to resile.

54. Even if this Court were wrong in all of the just-mentioned conclusions (and it does not consider that it is), it notes the observation of Fennelly J. that the propositions he had identified *"are qualified by considerations of the public interest"*, an observation that finds echo in the later judgments of the High Court in *Curran and McCarthy* (considered later below) that the general public interest can trump a private legitimate expectation. Here, in the court's view, the public interest in the generally fair disbursement of radically limited public monies trumps any (if any) legitimate expectation that Mr O'Donoghue might have had (and, for the reasons stated in this judgment, the court does not consider that he did have any such legitimate expectation) that the LEADER monies would otherwise be distributed.

iii. Power and Ors v. Minister for Social and Family Affairs

[2007] 1 I.R. 543

55. In this case the applicants were the beneficiaries of a back-to-education social welfare scheme. The information booklet that accompanied the scheme indicated that payments would continue during all academic holidays. Part-way through one academic year, the Minister unilaterally altered the terms of the scheme to end payments during academic holidays. In the High Court, MacMenamin J. granted a declaration that the decision to implement these changes was contrary to the first applicant's legitimate expectation – though acknowledging, at 556, that in cases of legitimate expectation:

"[I]t is clear that the court must ultimately carry out a balancing exercise between the interest to the applicant and the public interest in the unfettered exercise of the decision maker's discretion."

56. And, it might be added, it is eminently possible that instances may present – as happened in *Curran and McCarthy* (considered below) – in which public interest may defeat private interest.

57. Another aspect of *Power* that is perhaps worth noting is that it was a case involving an express representation set out in the scheme booklet. Here, there was no such guaranteed payment. The process was that Mr O'Donoghue's application would be considered by the Evaluation Committee, then go to the SKDP board. The board was required to have due regard to the Evaluation Committee's recommendation; however, the board was also entitled to, and did, have regard to other criteria, including such prioritisation criteria as it had adopted in a bid to address the particular financial predicament presenting in 2013. And, even if there was some legitimate expectation presenting, one is still left with the possibility – and, in this Court's view, the actuality, that this is a case in which the general public interest defeats such private legitimate expectation 'à la' *Curran and McCarthy*, for example.

iv. Curran v. Minister for Education and Science

[2009] 4 I.R. 300

58. *Curran* is an especially interesting case in the context of the present application because it affords an example of where public interest considerations trumped legitimate expectation, notwithstanding, interestingly, that it was a case involving an express representation. There the Minister for Education had issued a circular in 2007 inviting applications from post-primary schoolteachers seeking early retirement, in the first instance in the 2007-2008 school year, but indicating that the scheme would operate again in 2008-2009. Then, in November 2008, as a result of the collapse of the national economy, the scheme was withdrawn. As a result, the applicants were denied the opportunity of submitting applications in respect of 2008-2009. They came to court claiming that they had a legitimate expectation that the scheme would be available to them and that they had acted significantly to their detriment in reliance on this expectation. Their claim was unsuccessful, Dunne J. observing, inter alia, as follows, at 316 et seq:

"[36] There is no doubt that it is open to the executive to change their policies. Fennelly J. in Glencar...recognised that the doctrine of legitimate expectation could be qualified by public interest considerations....This particular qualification of the doctrine was endorsed by MacMenamin J. in Power...."

[39] I am satisfied that declining economic circumstances were such that the overriding public interest in taking the decision to suspend the scheme must outweigh any legitimate expectation the applicants had to pursue their applications under the scheme."

59. These are observations that, mutatis mutandis, apply with equal rigour in the context of the case now presenting.

v. McCarthy v. The Minister for Education and Skills

60. This was a judicial review application that followed the collapse of the national economy in and after 2008 and was concerned with the decision of the Minister for Education to restrict the provision of certain student grants. When considering the third part of the *Glencar* test, Hedigan J. noted as follows, at para. 6.5:

"The question arises as to whether or not the applicants could reasonably have expected a regular practice to continue. The applicants must have been aware of the worsening economic situation....The alteration in the [grant arrangements] ...the subject matter of this challenge had been signalled in the 2010 Budget."

61. Likewise, Mr O'Donoghue cannot but have been aware of the financial predicament presenting for SKDP in 2013. Moreover, although he may have thought that the financial bind in which SKDP found itself would not impact on his application for funding, it was clearly flagged in the letter of 29th May, 2013, from SKDP to Mr O'Donoghue that SKDP *"has suffered a 20% budget cut on its original application....[and] will not have sufficient grant aid for all projects evaluated to date in 2013."* This is not a million miles removed from the flagging in the 2010 Budget of the welfare restrictions at issue in *McCarthy* – save that Mr O'Donoghue was the recipient of written correspondence that issued directly to him.

62. Continuing in *McCarthy*, Hedigan J. observes as follows, at paras. 6.6–6.7:

"Even if I were satisfied that the applicants had demonstrated that they had a legitimate expectation that would not be the end of the matter. Even an expectation legitimately held may be qualified by considerations of the public interest. [Reference is made in this regard by Hedigan J. to the decision in Curran]...."

It is clear that an unsustainable gap has emerged in recent years between the State's income and its expenditure. The expenditure reduction measures introduced over the course of the past four years must be weighed against a very challenging economic background. Whilst the applicants have suggested that the respondent acted unfairly, it seems to me that given the obvious requirement for reduction in public expenditure there was a clear public policy basis for the respondent's actions...."

I [am not] satisfied that the applicants had a legitimate expectation that the non-adjacent rate of student support grant, would continue in respect of each of them. Even had the applicants such an expectation, overwhelming considerations of the public interest would outweigh it in light of the dire financial circumstances facing this country at the time the decision was made. These findings are dispositive of this case..."

63. The only caveat that this Court would respectfully add to the foregoing is that one does not require a once (or perhaps twice) in a century economic 'crash' to arrive a situation where a legitimate expectation can be 'trumped' or qualified by the public interest. The 'crash' of 2008 and the economic recession that followed were part of the factual matrix of *McCarthy* and likely also here also. But even were this not so, it is simply not possible to pay €4.1m of requested funding from €1.5m of (significantly reduced) funding. In such a situation, to borrow an Americanism, 'something's gotta give', and here the previous way of allocating funding gave way to the prioritisation criteria that the board adopted, was entitled to adopt, to which it was entitled to have regard, and in the adoption and application of which it was not, inter alia, in breach of any of the Procedures or Rules.

vi. Lett & Co. Ltd. v. Wexford Borough Council

[2012] 2 I.R. 198

64. In *Lett*, the plaintiff mussel farming entity brought proceedings in which it sought damages arising from a breach of its legitimate expectation that it would receive compensation due to adverse consequences arising for it from an upgrade of Wexford's sewage facilities. This legitimate expectation flowed from previous express agreements between the Minister for Communications, Marine and Natural Resources and Wexford Borough Council which had the effect, per Clarke J. in the High Court, at 208, that *"it was always clear to the mussel fishermen (including the plaintiff) that a scheme of compensation was to be put in place for loss of income arising out of the impact of the waste water treatment plant"*.

65. In the present case, the court would but note again that no express assurances were offered by SKDP as to how Mr O'Donoghue's application would fare. His application went through the usual process: it was considered by the Evaluation Committee and then went to the SKDP board which had due regard to the Evaluation Committee's recommendation; however, the board was also entitled to, and did, have regard to other criteria, including such prioritisation criteria as it had adopted in a bid to address the financial predicament presenting. And again, even if the court is wrong in all of this, it considers that this is a case in which in any event, as happened in *Curran* (considered below) and as anticipated by Fennelly J. in *Glencar*, public interest considerations would trump any legitimate expectation that might have presented as regards Mr O'Donoghue.

66. Some reliance is placed by Mr O'Donoghue on the following observations of O'Donnell J., giving judgment for the Supreme Court, in *Lett*, at 254:

"[I]t seems to me that in principle, at least, and indeed by analogy with the position in estoppel in private law, that the issue for the court is that once a legitimate expectation or estoppel has been identified, it is necessary to make good the equity so found, and that in such circumstances again in principle, the court can make an order, whether characterised as damages or in restitution, in order to make good the breach identified."

67. In the present case, again without pushing the analogy too far, where could an estoppel arise? The Evaluation Committee did what it was required to do. The board did what it was entitled to do. And if there was any extra-procedural representation by SKDP, it was contained in the letter of 29th May, stating that SKDP *"has suffered a 20% budget cut on its original application....[and] will not have sufficient grant aid for all projects evaluated to date in 2013."* The only expectation that the court can conceivably see as possibly arising – and it does not acknowledge that it does arise – is that funding applications had previously been processed on a 'first recommended, first funded' basis. But this seems to have been an arrangement that was known privately to Mr O'Donoghue, thanks to his previous involvement with SKDP, not one that was ever represented by SKDP as the arrangement that it would unfailingly apply – and certainly not one that, confronted with the straitened circumstances which presented in 2013, the board was bound unyieldingly to apply. As the judgment of the High Court in *Curran* makes clear, and there is nothing in the Supreme Court's decision in

Let to suggest that it departed from this view, as anticipated in *Glencar*, a general public interest can defeat a private legitimate expectation. What greater public interest could there be than to see funds distributed with the greatest possible fairness to all, in the face of fresh financial constraints arising from cutbacks that were implemented, it seems, as part of the continuing legacy of the then lately-deceased and still generally un-lamented 'Celtic Tiger'?

vii. Nurendale Limited t/a Panda Waste Services v. Dublin City Council

[2013] 3 I.R. 417

68. Four Dublin councils (Dublin City, Dún Laoghaire-Rathdown, Fingal, and South County Dublin) varied the Waste Management Plan for the Dublin Region 2005 to 2010, with the effect that all rights to collect waste from single dwelling households in the Dublin area would be vested in a single operator who, at the choice of the councils, would be either the local authority or, following a public tendering process, a nominated private operator. Nurendale, a private waste collection operator active in the Dublin areas, claimed, inter alia, that this variation breached its legitimate expectation, arising from its waste collection permit, that it would be allowed to provide household waste collection in services in the Dublin area. Rejecting this line of contention, McKechnie J. observed as follows, at 506:

"It is clear from the case law that the grant of a licence does not in itself give rise to a legitimate expectation. There must be some representation which is relied upon by a party to their detriment, which is reasonable and which would not fetter the exercise of a statutory power...."

In the current case, it would seem that the applicant seeks to rely on the WCP [waste collection permit] and its assertions that it is permitted to collect household waste from the stated council areas. There is a requirement under [statute]...that such permits be reviewed on a regular basis, and no representations apart from the WCP were made to the applicant to the effect that he was entitled to collect household waste; quite the contrary, it is clear that very soon after the entry of the applicant into the market the respondents made their position in relation to that entry quite clear: they were against it, they had never anticipated it, and they wished it to stop. In those circumstances I cannot see how the applicant could have had any expectation that the respondents would allow him to continue to collect household waste, or that they were acquiescing to it. Any reliance placed on the WCP as a source of rights in these circumstances it did so at its own risk. The applicant is therefore responsible for any loss it may have suffered as a result of such reliance. I therefore find that it had no legitimate expectations in this regard."

69. Where is the representation on which Mr O'Donoghue purports to rely? SKDP's Evaluation Committee did as it was required to do. SKDP's board did as it was entitled to do – and never represented that it would not, or gave some representation that had the effect it could not, do as it did. If anything, SKDP's letter of 29th May, 2013 – which clearly identified the stark financial position confronting SKDP – ought to have engendered an expectation of disappointment on the part of Mr O'Donoghue and it is perhaps surprising that it did not. But again, even if the court is wrong in all of this, if some legitimate expectation did arise that was later disappointed, it has been clear since at least the time of the decision in *Curran* (and anticipated in *Glencar*) that public interest considerations can trump a private individual's legitimate expectation.

Part 11

Objective Bias

70. In the *ex parte* application for leave to apply for judicial review, mention is made of SKDP having acted "*in breach of natural and Constitutional justice*". In the order granting leave to seek judicial review similar mention is made. No great detail is provided. However, in essence the breach identified is that by proceeding as it did at the meeting of 4th June, 2013, SKDP's board acted in breach of natural justice and constitutional fair procedures.

71. This last-mentioned ground of objection is rather vague – indeed it could reasonably be contended that it is "*an assertion in general terms*" of the type that O.84, r.20(3) of the Rules of the Superior Courts 1986 (as amended) seeks to guard against. In any event, relying on the foregoing, it was contended that the actions of the SKDP board on 14th June, 2013 and the next succeeding board meeting was guilty of objective bias and that this was the breach of natural and constitutional bias presenting.

72. The difficulty presenting for Mr O'Donoghue in this regard is that the court does not consider that a vague reference to "*breach of natural and Constitutional justice*" is a proper basis on which to construct a line of argument as to objective bias. Fairness of procedures, to borrow a colloquialism 'cuts both ways': it is something to which all parties to any proceedings are entitled. So when judicial review is sought of the actions of some emanation of the State, that emanation is entitled to sufficient specificity in the criticisms made as will enable it to construct a properly informed and, for the court's benefit, informative response.

73. In *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 a case included among the bundle of authorities handed to the court in the course of the present application, McGuinness J. touched upon the multi-sided dimension of fairness of procedures when she observed as follows, at 509:

"It should...be remembered that this is a case inter partes and that the right to fair procedures does not belong solely to the applicants. The respondents, too, have a right to fair procedures."

74. In this case the issue of objective bias – a most serious allegation to make, and not one that should ever be made lightly – was sought to be constructed on the most generic of wording in the leave application and the ensuing order. In truth, a fair reading of the text of the pleadings suggests that the breach of natural justice and fair procedures contemplated therein is linked to Mr O'Donoghue's purported legitimate expectation going disappointed, not to any issue of objective bias.

75. All of the above being so, the court declines to consider the issue of objective bias raised. However, it would note, by reference to the facts as described, the evidence before it and the analysis undertaken in this judgment, that it does not see any issues of natural justice or fair procedures otherwise to present – nor does it even see a convincing basis for contending that they present.

Part 12

Conclusions

76. For the reasons outlined above:

(1) the court does not consider that SKDP in adopting the prioritisation criteria that it did at its meeting of 4th June, 2013, and in applying those criteria thereafter, acted in breach of the Procedures and/or the Rules and/or any applicable law or legal principle. More particularly the court does not consider any breach of natural justice or fair procedures to present.

(2) the court does not consider that Mr O'Donoghue stood rightly possessed of any legitimate expectation that SKDP, and in particular the board thereof, would or should have acted otherwise than it did when considering the application for LEADER funding that has led to the within judicial review application. In passing, the court cannot but note that it was, at best, unwise for Mr O'Donoghue to believe after receiving the letter of 29th May, 2013, notifying him of SKDP's straitened circumstances that this would not have consequences for his application.

(3) even if the court is wrong and Mr O'Donoghue did stand possessed of some legitimate expectation as to how SKDP would proceed with his application, the court in any event considers, by reference to such cases as *Glencar, Curran and McCarthy*, that this is a case in which public interest considerations trump any legitimate expectation that may have presented. The particular public interest presenting was the public interest in the optimal distribution of public funds, in a manner that was fairest to all members of the public, whether as individuals or via collective groupings of whatever nature, who applied for funding, following significant government cutbacks in the scale of funding available.

(4) the court does not consider that any reason presents why Mr O'Donoghue could not, and every reason presents why Mr O'Donoghue should, have invoked the effective appellate process of which he was duly apprised by SKDP in the formal documentation that issued after his application was partly declined. The court does not accept as credible any suggestion that Mr O'Donoghue was confused, and continued despite the benefit of professional legal advice to be confused, as to what he might appeal and why. Common-sense and case-law suggest that Mr O'Donoghue ought to have proceeded by way of the appeal system of which he was duly apprised, and inexplicably ignored. This factor would have disinclined the court to grant Mr O'Donoghue the discretionary reliefs that he now seeks, even had the court considered that any of those reliefs had fallen to be granted.

77. The court has every sympathy for the position in which Mr O'Donoghue found himself in 2013. He expected that his application for LEADER funding would be successful and was greatly disappointed when it was not. It was a blow to his expectations, and this judgment may come as a further blow, which is to be regretted. However, for the reasons stated above, the court is coerced by law to decline to grant any of the reliefs that Mr O'Donoghue has sought in the present application.