THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2020/275
High Court Record No. 2019/717 JR
Neutral Citation Number [2021] IECA 186

APPROVED
NO REDACTION NEEDED

Whelan J.
Murray J.
Pilkington J.

BETWEEN

JOHN O'CONNELL

APPLICANT/APPELLANT

- AND –

THE TAXING MASTER (PAUL BEHAN)

- AND -

THE COURTS SERVICE

- AND -

THE MINISTER FOR JUSTICE, LAW AND EQUALITY; THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Murray dated the 1st day of July 2021

This appeal

1. The applicant claims that the High Court ([2020] IEHC 437) erred in refusing his application for leave to seek judicial review of a ruling of the first respondent of 12 July 2019. That ruling was made in the course of the taxation of costs in proceedings brought by the applicant against *inter alia* the Building and Allied Trades Union ('BATU'). The effect of the impugned decision was to refuse the applicant's application that the first respondent recuse himself from further involvement in that taxation.

2. The applicant applied for leave to seek an order of *certiorari* quashing this decision (Relief (a)), an order prohibiting the first named respondent from further partaking in the taxation (Relief (b)), declaratory orders to the effect that Order 99 Rules 38(1), (2) and (3) of the Rules of the Superior Courts were *ultra vires* and void and in breach of the applicant's rights under the Constitution and the European Convention on Human Rights (Reliefs (c) and (d)), together with damages (Relief (e)). He based his claim for this relief upon the contention that the first named respondent failed to give reasons or to make his notes, the Digital Audio Recording or other information or evidence available to the applicant, that he ought to have recused himself because of various conflicts of interest of which, it is said, he ought to have advised the applicant, and that the provisions of Order 99 in question breached provisions of the Constitution and European Convention on Human Rights.

3. The High Court refused leave on three grounds:

(i) That the applicant had failed to establish a good arguable case that the provisions of Order 99 in question were contrary to the Constitution or European Convention on Human Rights.

(ii) That as a result of the applicant's failure to join BATU as a party to these proceedings, his application was improperly constituted, and that he had failed to establish that he had an arguable case that he was entitled to the remaining relief claimed by him in the absence of BATU.

(iii) In the alternative, that the court would exercise its discretion to refuse leave to the applicant (a) because he had failed to join a necessary party to the intended action, (b) taking account of the fact that he did not put before the court the impugned decision and documents subsequent to that decision and (c) that having failed to put those documents before the court, the applicant made submissions to the court that were not consistent with them and which incorrectly characterised the attitude of BATU to the proceedings.

The pleadings

4. The statement grounding the application for judicial review records the grounds upon which the relief is sought in five paragraphs also identified as (a) to (e). These (a) assert the invalidity of the impugned provisions of Order 99 on the grounds that (it is claimed) they require the applicant to follow a process of appeal to the same Taxing Master prior to making an appeal to the High Court and (b) posit that these provisions are contrary to the right to fair procedures, an unfair or unjust impediment to the applicant's access to the High Court contrary

to Articles 38 and 40.3 of the Constitution, a breach of the right to a fair hearing by an impartial court pursuant to Article 6 of the European Convention on Human Rights and an unreasonable restriction of his right to an effective remedy conflicting with Article 13 of the Convention.

5. Rolled in to the remaining three paragraphs (c) to (e) are a number of allegations directed to the order of *certiorari* sought quashing the impugned decision of the first respondent. They encompass three headings of complaint – a failure to give reasons, a failure to grant access to the applicant to certain information, and bias. Broken down, the factual allegations underlying this appear six-fold:

(i) The applicant '*was not afforded reasons'* and/or '*a sufficient explanation'* by the first respondent.

(ii) He was not '*allowed a Copy to view or examine the Evidence/Master's Notes/DARR* [sic].'

(iii) The first respondent failed or refused '*to use previous Taxing Masters procedures when referring to disputes making the DAR immediately available to clarify matters'*.

(iv) The first respondent failed to put the applicant on notice '*that his family including himself carried out services of Taxing Accounting for the Defendants over decades'*.

(v) The first respondent failed to inform the applicant '*that the 2 Tax Cost Accountants for the Defendants at the Hearing were fellow directors of the firm Behan's Cost Accountants'*.

(vi) An objective observer would believe that what are described as '*the adjournment/delays/decisions in Taxing the Bill of Costs was to facilitate the family's Tax Cost Accountancy long running Client to put a stay on the Taxing Process'*.

The evidence

6. The evidence before the High Court comprised the affidavit verifying the statement of grounds and a variety of documents. None of the documents were formally exhibited in the affidavit, although many of them were referred to in it. No objection appears to have been taken to this before the High Court, and I will proceed, accordingly, as if these documents had in fact been exhibited and duly attested to.

7. It appears from the grounding affidavit that the applicant had been represented by two firms of solicitors at earlier stages of his case against BATU but that the action itself – and subsequent appeals – were presented by the applicant himself. The proceedings had a lengthy and procedurally complex history, being initiated in 2002. Following a hearing in the High Court ([2014] IEHC 360), and appeal to this Court ([2016] IECA 338) they concluded in a decision of O'Connor J. of 21 June 2018 whereby the first defendant (BATU) was ordered to pay damages to the applicant of €15,000 together with certain costs. The Order of that date addressed those costs as follows:

'*IT IS ORDERED that the first named Defendant do pay to the Plaintiff three days of the costs and expenses of the hearing on the 4th 5th 6th 18th 19th and 20th days of February 2014 the 27th day of March 2014 and the 16th day of May 2014 to be taxed in default of agreement*

AND IT IS ORDERED that the first named Defendant do pay to the Plaintiff the costs and expenses of the entire assessment hearing (on the 11th and 12th days of April 2018 and this day) to be taxed in default of agreement.'

8. The taxation of the costs, expenses and outlay of the applicant pursuant to this Order came before the first respondent on December 4 2018. The affidavit records that BATU then applied that '*the matter be struck out'*, the reason being '*that the Applicant had an Appeal in the Court of Appeal'*. This was a reference to the fact that the applicant had appealed the order he was seeking to have taxed (that appeal has since been heard by this Court and judgment reserved). The applicant says that the first respondent said that '*he was being unfair to the Defendants'* (seemingly in proceeding with the taxation when the appeal was pending). The applicant avers that the first respondent interpreted the costs order as meaning that the applicant was entitled only to the costs and expenses for attendance on a certain number of days of the hearing while the applicant disputed this and '*questioned the Master about the Legal Costs and Expenses for the preparation work and Costs Bill of the two previous solicitors that were on record in this case'*.

9. The applicant explains that the matter was then adjourned on the basis that the applicant would return to the High Court to clarify whether the order for costs allowed a Bill of Costs from (as it is described in the affidavit) '*Mr. John O'Connell two previous solicitors who were*

on record' and to '*Clarify if the Order allowed Mr. John O'Connell Costs, Expenses and Outlays, including Preparation Work that was carried out since previously Solicitors came Off Record'*. An application was then brought before O'Connor J. on the same day. The applicant says in his affidavit that, at one point, O'Connor J. confirmed that the previous solicitors were entitled to their costs, whereupon the applicant indicated that it was '*an application'* (by which I understand him to mean a date for making the application) that he was seeking. The applicant says that O'Connor J. '*stopped … and arranged a date and directed Mr. John O'Connell, as the Taxing Master directed also, to put the other side on notice of the date'*.

10. Included in the book of documents is an e-mail from the applicant to the office of the Taxing Master dated 12 December, in which he stated as follows:

> '*I can confirm that Justice O'Connor will hear the interpretation of the last 2 lines of his order that Master Behan interprets that the meaning of it is that the defendants do pay the Plaintiff the Number of days of the Costs and Expenses only for attending (attendance) of the Hearing. If the Master wishes to attend the hearing to clarify his decision or explain it would be of great assistance as I believe that the Judge may prevent me addressing the Court on the Taxing Master behalf. The hearing will take place tomorrow December 13 at 10.30'*

11. The first respondent's office responded saying that Taxing Masters did not attend Court. The applicant replied questioning whether this was a rule or choice of the Master. The matter then duly proceeded before O'Connor J. on 13 December. The affidavit does not state whether BATU was represented at that hearing (the submissions made by BATU to the Taxing Master on 1 March 2019 would suggest that it was not). The affidavit summarises the decision of O'Connor J. as follows:

'*he cannot comment or clarify the issues regarding the Costs in his own Order as he does not have the Jurisdiction as the Application Issues are for the Taxing Master and he was not going to change wording of the Order or amend the wording of the order to clarify that the Defendants do pay the Plaintiff the number of days of the Costs and Expenses* <u>Only</u> *for attending (attendance) of the Hearing.'*

12. As recorded in the applicant's affidavit and as revealed by the documents furnished with it, matters thereafter unfolded as follows:

(i) On 14 December 2018 the applicant wrote to the Taxing Master's office requesting that another Taxing Master tax the bill of costs '*for reasons of Prejudice etc.'* The e-mail records three specific objections in this regard – the fact that the first respondent stated that the plaintiff was being unfair to the defendant, the fact that the first respondent interpreted the Order of O'Connor J. '*restricting the plaintiffs Costs and Expenses'*, and the fact that the first respondent had '*objected to terminology of a phrase I used (For the sake of pig iron) was not to be used in his court'*. A request was made that another Taxing Master hear the matter as the first respondent had shown '*an alarming degree of prejudice'* and that the hearing before him '*would not result in a fair hearing'*.

(ii) A hearing was then fixed for February 1 2019. At that hearing the first respondent decided that the application for recusal would proceed by way of submissions. The applicant says that the applicant repeated his '*grave concerns of what had taken place and the comments and decisions he had made on December 4 2018.'* The

applicant says that the first respondent '*denied making these comments and decisions and the contents of my letter/email date* [sic] *December 14 2018.'*

(iii) The applicant duly delivered a submission in accordance with this direction. The document identifies five '*Events'* on the basis of which the recusal of the first respondent was sought. These were, in summary, as follows:

1. The applicant referred to the hearing on December 4, submitting that BATU had used the fact of the applicant's appeal against the Order of O'Connor J. as the basis for delaying the taxation, that the first respondent had interpreted the Order and decided that the costs and expenses to be paid by BATU were limited to a certain number of days of the hearing, that he had taken a personal view in the matter deciding that the applicant was being unfair and that on February 1 the first respondent denied making these statements. The applicant complains that in the course of hearings before other Taxing Masters those Masters neither formed any opinion about the costs orders, nor accused the applicant of being unfair towards the respondents.

2. The second event is referenced to the application before O'Connor J. on December 4 and to certain communications around this. In that connection the applicant also refers to the denial by the first respondent on February 1 that he made '*any interpretation/decision'*. He says – having regard to the e-mails exchanged in connection with the hearing before O'Connor J. - that the first respondent had ample opportunity to refute the claim by the applicant that he had rendered an interpretation and decision as to the scope of the

Order. He re-iterates the statement by the first respondent that the applicant was being unfair to BATU and says that it is clear that a suspicion of bias has been established.

3. While the third '*Event'* is the hearing before O'Connor J. on December 13, the applicant also refers in this regard to events around the hearing before the first respondent on February 1. The applicant repeated his objection to the first respondent's comments about the terminology the applicant had used at the hearing on December 4, claimed that he has formed a firm opinion as to the interpretation of the Order, claimed that that the first respondent had been misled by BATU, and asserted that because the first respondent does not accept the applicant's account of what he said on December 4 there is a conflict of interest and breach of natural justice. He also observes (i) that he learnt from the cost accountant representing BATU immediately after the hearing on February 1 that the first respondent was previously the owner/director of the company representing BATU, (ii) that the first respondent has moved away from his expertise of taxing costs to a *'complex and vast'* area of law and (iii) that he should not adjudicate upon his own decision.

4. The next heading arises from the applicant's e-mail of December 14 and is, I infer, a reiteration of the complaint made in that communication.

5. Finally, the applicant says that at the hearing on February 1 the first respondent denied the contents of his e-mail of December 14 as false and said

that he had never stated that the applicant was unfair to BATU and had not made and interpreted or made a decision regarding the Order of O'Connor J.

(iv) BATU delivered its replying submissions on March 6 and a hearing date on the recusal application was fixed for May 2 2019. On March 27, the applicant was advised by the Taxing Master's Office (seemingly in response to an enquiry from him) that the submissions of both parties on the issue of bias was set down for hearing on that date. However, the applicant determined not to attend that hearing. He notified '*the Respondents'* of this by letter dated April 19. He explains his reason for this stance as follows:

> '*he felt that the Taxing Master had already ruled on the matter on February 1st 2019 denying what he stated/decided on the previous Hearing of December 4th 2018 and he should review the DARR* [sic.] *and for those reasons the Applicant could not see a reason for his attendance.'*

(v) The applicant then avers that what he describes as *'new information'* was on July 1 submitted by him '*by way of supplementary submissions'*. The *'submissions'* are described in the applicant's grounding affidavit as follows:

> '*It included the Fact that the Taxing Master and his family Business had a serious Conflict of Interest with the Defendants which existed over many years which the Applicant was never put on Notice or the Defendants failed to put the Taxing Master on Notice.'*

(vi) This Court was advised at the hearing of this appeal that these submissions comprised an e-mail of July 1. That e-mail was not before the High Court and indeed it was not included in the papers furnished to this Court. It was sent to the Court following the hearing, reference to the document having been noted by the Court at the hearing. Seemingly attached to the e-mail were various documents purporting to show that in 2004 Paul Behan and Associates were representing BATU, as well as documents to like effect from 2013. These documents were not furnished to this Court. The e-mail asserts that the costs in the matter are to be '*adjudicated by Partner in the family run business of Behan and Associates'*. It claims that there was a business relationship between the first respondent and what is described as '*his family run business'* and that this relationship was '*ongoing'.* He says that it was incumbent on the first respondent to advise the applicant of those interests. He says of the e-mail of 1 July '*No Reply Was furnished'*

(vii) On July 12 the first respondent issued his ruling. In a post script to the ruling he says that he had no regard in issuing the ruling to the e-mail from the applicant of July 1 as BATU had no opportunity to address him in respect of that e-mail. He notes that this 'submission' of July 1 appears to have been sent in response to an e-mail and letter dated 24th June 2019 advising the parties that a ruling would be delivered on 12th July.

(viii) The applicant has included in his book of documents a letter from the Taxing Master's Office dated 19 July 2019 explaining that '*[t]he procedure for lodging Objections/Appeal is regulated by Order 99 Rule 38 of the Superior Court Rules'* and enclosing a copy of those provisions. On July 24 the applicant applied to review that decision in accordance with Order 99 Rule 38 RSC, thereafter (on

October 10) swearing the affidavit grounding this application for judicial review. The hearing date of November 25 previously assigned for the taxation was vacated, and that taxation was adjourned generally pending completion of these proceedings.

The ruling of July 12

13. The applicant did not furnish the impugned decision to the High Court before or during the hearing of the application, it being submitted to the trial Judge at his request following the hearing. It comprises an extremely detailed 27 page ruling which engages at some length with the facts and applicable authorities. It contains, over the course of ten pages, an extensive account of what transpired before the first respondent on December 4. The first respondent prefaces this record as follows:

> '*I have extracted from my notebook and I have checked it against the DAR recording system, a broad outline of the entirety of the submissions made on that day. I do not confess that they are completely verbatim but they are as reasonably accurate as can be.'*

14. The decision contains a comprehensive response to each of the five claims advanced by the applicant as grounding his contention that the first respondent ought to have recused himself (claims 1 to 5 as summarised by me earlier). As to claim 1, the taxing master says that the matter was not adjourned because of BATU's objection to him proceeding having regard to the appeal against the Order of O'Connor J., but to assist the applicant, essentially to allow him to think about matters and, if he thought it appropriate to do so, to bring the matter back before

the Court. He says that he formed the view that the Order for costs would be likely construed in a narrow manner but that it was not done with any element of pre-determination. In relation to claim 2, he says that the applicant in complaining of the failure of the first respondent to appear before O'Connor J., misunderstands his role, and that his function is that of decision maker not the protagonist. In relation to claim 3 he describes the observation in relation to '*pig iron'* as a passing comment (and indeed – as I explain later - that is how it appears in the first respondent's summary of the evidence).

15. He says the following of the assertion made in the applicant's submission of bias arising from the first respondent's involvement with Behan and Associates:

> '*Insofar as there is made a claim for objective bias on the basis of a past prior professional association between Mr. Conlon and myself I believe that this past association is neither recent nor ongoing nor relates to the matters in issue herein. Mr. Conlon and Ms. Fagan, it is true, are members of a firm of legal costs accountants, Behan and Associates. I have not had any connection with this firm in terms of ownership since 2008 and contact since 2011. I was appointed Taxing Master in April 2017.'*

16. Having referred to the decisions in *Bula v. Tara (No. 6)* [2000] 4 IR 412*, O'Ceallagh v. An Bord Altranais & anor* [2009] IEHC 470 and [2011] IESC 50, *Nasheur v. National University of Ireland Galway* [2018] IECA 79 and *Fitzpatrick v. Taxing Master Behan* [2018] IEHC 764, he continued :

> '*The reasonable observer, a person identified and established in the test deduced from the authorities above, is expected to understand the nature of the role of Counsel, Judges, Legal Costs Accountants and Taxing Masters, their ability to exercise their professional*

judgment impartially, notwithstanding prior professional relationships and the fact that a prior relationship of that nature does not necessarily equate with an interest in the outcome ...

...the Courts will require a cogent and realistic link between the nature of that prior relationship and the nature of the issues to be determined in the decision making process in which the objection is made.'

17. Claims 4 and 5 are treated briefly: they appear, in general, to me to be reiterations of the complaints made in relation to the other grounds. The ruling makes clear that the first respondent adopts the position that there has been no adjudication of any kind on the substantive issues in the taxation. As I have noted earlier, the post script to the decision explains that and why the allegations contained in the e-mail of July 1 had not been addressed by the first respondent in his ruling. There had, therefore, been no determination reached by the first respondent in respect of the matters referred to in that communication.

These proceedings

18. The proceedings came before the High Court on October 10 by way of the applicant's *ex parte* application for leave to seek judicial review. On that date the court directed that the application be made on notice to the intended respondents, and the application was adjourned for mention to October 24. On October 16 the applicant wrote to '*Ireland and the Attorney General'* at Government Buildings enclosing the Statement Grounding the Application for

judicial review and the affidavit verifying that Statement. A similar letter was sent on the same date to the office of the Taxing Master. In those letters he said :

> '*I am now directed by Mr. Justice Meenan to put you on Notice to attend High Court Judicial Review mention date for October 24th 2019.'*

19. The High Court judge records in his judgment that on October 24 the respondents submitted (as the trial Judge puts it) '*that the proceedings were fundamentally flawed in that the counterparty to the taxation process (BATU) was not joined as a party to the intended judicial review.'* The *inter partes* application for leave to seek judicial review was then listed for hearing on February 10.

20. On October 30, the applicant wrote to BATU's solicitor, Arthur McLean, advising that firm that the application for leave was set down for February 10. It is not apparent whether the pleadings were enclosed with that letter. On December 17 the Chief State Solicitor wrote to the applicant on behalf of the Taxing Master and the Courts Service. That letter, which was largely directed to the contention that the first and second named respondents should be removed from the proceedings and/or to the demand that no costs orders would be sought against those parties, urged the applicant to reconstitute the proceedings by removing those parties from the action. It made it clear that neither of those respondents proposed to intervene in the substantive proceedings. However, it also made it clear that the proper *legitimus contradictor* to the action was the defendant in the original action (BATU and related parties). It said:

'*In the absence of allegations of mala fides and or impropriety on behalf of the Taxing Master or Court Service, the legitimus contradictor should be the parties in the underlying taxation i.e. some or all of the defendants in the originating proceedings.'*

21. On February 3, the applicant wrote again to Arthur McLean enclosing his letter of October 30 and noting that this had not been replied to. On February 5, BATU's solicitor sent an e-mail to the applicant acknowledging the letter of February 3 and stating:

'*I note that you will be moving your application seeking leave to bring Judicial Review Proceedings this Monday the 10th February.*

Given that our client, BATU, is not a party to the proceedings it has no part to play. We may however attend for the purposes of a watching brief.'

22. The applicant replied to this by letter dated February 6, saying the following:

'*... you and your client have been aware of this application for some time and joining as a notice party has been an option which has been declined. You wish to only take part as confirmed for the purpose of a watching brief. I will pass on your decision to the court in question.'*

23. The matter came for hearing on February 10. The trial Judge's judgment records that at the hearing on that date the applicant told him that he did not amend his proceedings to include BATU as a party because he did not follow the submission made by the respondents on October 24, in part because he could not hear what was being said in court on the adjourned date. The

Judge said that this did not explain why the applicant did not apply to join BATU either in response to the correspondence from the Chief State Solicitors Office or in response to the submissions made at the hearing of the matter.

The challenge to the vires of O. 99 Rule 38(1), (2), and (3).

24. As I have noted, the first ground on which the trial Judge refused leave related to the specific challenge to the provisions of Order 99 Rules 38(1), (2) and (3) of the Rules of the Superior Courts. Those provisions as they were in force at the time of the events giving rise to these proceedings provided for what they termed a '*Review of Taxation'*. This enabled a party who was dissatisfied with the allowance or disallowance by the Taxing Master of the whole or part of any items to carry in his objections in writing to the allowance and thereupon apply to the Taxing Master to review the taxation in respect of same.

25. The essential objection raised by the applicant depends on his understanding (which he appears to suggest arises from communications he has had with the first respondent's office) that before he can proceed to the High Court to appeal the first respondent's refusal to recuse himself, he must initially apply to the first respondent for a review of taxation. His objection is that given that he is claiming that the first respondent is disqualified by reason of bias from ruling on the taxation, he should not have to re-apply to him to ask him to review his own decision on the recusal application.

26. The reference to an appeal to the High Court arises from Order 99 Rule 38(3) and, indeed, that provision requires an application to the Taxing Master for a review of his decision before such an appeal can be brought. However, the entire procedure (review by the Taxing Master followed by appeal to the High Court) only arises where there has been an allowance or

disallowance of items in the bill of costs in the first place. The Rules, insofar as relevant and as in force at the relevant times, are as follows (emphasis added):

> '*(1) Any party **who is dissatisfied with the allowance or disallowance** by the Taxing Master ... may, before the certificate is signed, but not later than 14 days **after the completion of the adjudication** by the allowance or disallowance of the entire of the items in the bill of costs deliver ... and carry in before the Taxing Master his objections in writing to such allowance or disallowance ....*
>
> *(2) Upon such application **the Taxing Master shall reconsider and review his taxation** upon such objections ... and, if so required by any party, he shall state in writing the grounds and reasons of his decision thereon ...*
>
> *(3) Any party who is **dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof**, may within 21 days from the date of the determination of the hearing of the objections ... apply to the court for an order to review the taxation ..*

27. It is apparent from the ruling of the first respondent which it is sought to quash in these proceedings that, in fact, no decision as to any allowance or disallowance has been made by the first respondent. By the impugned decision, the first respondent has rejected the allegation of bias, and decided to refuse the application of the applicant that he recuse himself from taxing the applicant's costs. In terms of the taxation, this is the only decision that has been made by the first respondent. As the first respondent makes clear in the concluding part of his ruling of July 12, the taxation is presently at a point where there is before him (a) an application by

BATU to adjourn the taxation pending the outcome of the applicant's appeal to this Court of the order of O'Connor J. the subject of the taxation and (b) the issue of whether the terms of that order are sufficiently broad so as to cover all of the items claimed by the applicant. Neither of these have been adjudicated upon, neither party has actually made any submissions as to any item claimed within the bill of costs and all that has happened in the substantive taxation is that it was adjourned (as the first respondent put the matter in his ruling) '*to allow [the applicant] to think about matters and, if he felt it necessary, to refer the matter back to Court'*.

28. That being so, the question of invoking Order 99 Rule 38(1), (2) or (3) simply does not arise. There has been no '*allowance or disallowance'* on foot of which the applicant must, or indeed can, request a review, and until such time as there has been such a review there can be no appeal to this Court pursuant to Order 99 Rule 38(3). The applicant having raised the issue of bias before the first respondent and the first respondent having ruled upon it, he is entitled in principle to seek judicial review of that decision (as he has done) (see *State (Gallagher Shatter and Co.) v. de Valera* [1986] ILRM 3). The authorities make it clear that one circumstance in which an applicant might not be precluded from seeking judicial review by the existence of the alternative remedy afforded by the facility for review of taxation and appeal to this Court is where there is an alleged breach of fair procedures and constitutional justice during the initial stages of the taxation (see *DMPT v. Taxing Master Moran and ors.* [2015] IESC 36, [2015] 3 IR 224). A credible claim of bias would in ordinary course meet that test and, indeed, in *Fitzpatrick v. Behan* [2018] IEHC 764 a claim of bias against the Taxing Master was agitated by way of judicial review, rather than appeal. I note in passing that in the proceedings giving rise to that decision the opposing party in the underlying taxation was identified as a notice party. The decision is specifically referred to by the first respondent in his ruling of July 12 (see para. 49), and was – as I explain shortly – upheld by this Court ([2020] IECA 324).

29. In *DMPT v. Taxing Master Moran and ors.* the Supreme Court rejected a claim that these provisions breached constitutional justice or rights to fair procedures and access to the Courts protected by Articles 34 and 40.3 of the Constitution and by Article 6 and 13 of the European Convention on Human Rights. In a detailed analysis of the provisions Laffoy J. (with whom Murray, Hardiman, O'Donnell and Dunne JJ. agreed) found the essential constitutional and Convention complaint advanced by the applicant in that case – that the provisions envisaged a review by the statutory decision maker of his or her own decision – to be ill founded. Taxation of costs, she explained, was a *sui generis* procedure and the role of the Taxing Master at the review stage was not a second stage of the taxation, but part and parcel of the taxation itself. The dissatisfied person was obtaining, she found, a '*second bite of the cherry'* and there was no objective reason to believe that the Taxing Master would be naturally predisposed to support his original decision.

30. An applicant faces a formidable challenge in applying for leave to seek judicial review of an administrative decision on a ground that has been clearly, authoritatively and recently rejected by the Supreme Court by which, of course, both the High Court and this Court are bound. A claim is not '*arguable'* for the purposes of an application for leave to seek judicial review if it is in the teeth of established law (*PF v. Director of Public Prosecutions* [2016] IECA 304, [2017] 2 IR 136 at para. 40). At the very least, an applicant in these circumstances would have to adduce cogent grounds on which it could be said either that his case is so different in nature from that considered in the earlier decision that it could be distinguished and/or that the Supreme Court had erred in, and that it was arguable that it could be prevailed to overturn, its earlier decision (and see *McD v. DPP* [2016] IEHC 210 at para. 40 *per* Humphreys J.).

31. The applicant contends that the decision in *DMPT* is distinguishable from his case because there the issue was not one of recusal on the grounds of bias. In point of fact, one of the issues in that case was also an argument rooted in natural and constitutional justice (an absence of reasons at the conclusion of the initial stage of the taxation). More fundamentally, however, Order 99 Rule 38 does not in fact require the applicant – or at least does not require him on the facts of this case – to return to the Taxing Master where there is a complaint of bias at a point where there has been no allowance or disallowance. The only credible basis on which the applicant can complain of these provisions – that in the course of the taxation he may have to apply to the first respondent to review a decision of his own where he has ruled on allowances – has been conclusively determined by the Supreme Court. It follows that the applicant's application for leave to seek those reliefs (c) and (d) in his Statement of Grounds pertaining to the alleged invalidity of Order 99 Rule 38(1), (2) and (3) was properly refused.

Affected parties and the constitution of judicial review proceedings

32. The issue of whether the trial Judge was correct to refuse leave to seek judicial review because the applicant had failed to join BATU as a necessary and proper party to the proceedings presents a distinct question. In this regard, having regard to the applicant's reliance upon the decisions in *Brehony v. Longford Westmeath Farmers Mart Limited* [2019] IECA 60 and *Antekcki v. Motor Insurers Bureau of Ireland and ors.* [2021] IEHC 15, it is necessary to emphasise that, unlike those proceedings (which involved reviews of taxation pursuant to Order 99 Rule 38(3)) this is a judicial review proceeding governed by Order 84. The fact (emphasised by the applicant) that the Taxing Master was not joined in the proceedings giving rise to those decisions was irrelevant, because the Rules do not envisage that he will be

a party to the proceedings – Order 99 Rule 38(3) simply provides for such an appeal to be brought by motion on notice to the other party to the taxation (Order 99 Rule 38(4)). Similarly, judicial review is a distinct process from the statutory appeal in issue in *O'Connell v. Financial Services and Pensions Ombudsman* [2020] IEHC 559 (to which the applicant also referred).

33. In that regard it is necessary to recall that it is common for applicants when applying for leave to seek judicial review to name in in the title to the proceedings one or more parties having a clear interest in the matter, designating them as '*Notice Parties'.* This is, specifically, the usual practice where a challenge is brought to a decision of an administrative tribunal in a proceeding between the applicant and a third party. In that situation, the third party invariably has a particular interest in the outcome of the litigation and will often be the true *legitimus contradictor*. Indeed, it sometimes happens that where such a party has not been so identified in the proceedings, the judge hearing the application for leave will direct that a party having a clear interest in the matter be so '*joined'*. In *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39, at p. 78 Finlay CJ said:

> '*If application is made for liberty to issue proceedings for judicial review and the claim includes one for certiorari to quash the decision of a court or of an administrative decision-making authority* ***the applicant must seek to add as a party any person whose rights would be affected by the avoidance of the decision impugned****.'*
>
> (Emphasis added)

34. In *Dowling v. Minister for Finance* [2013] IESC 58 at paras. 37 and 38 Fennelly J. quoted this statement describing it as '*perhaps obiter'* but in any event adding the proviso that the

word '*directly'* should appear before '*affected*' in this passage. He proceeded (at para. 52) to explain the position where judicial review proceedings were commenced which affected the interests of a third party, as follows :

> '*... any person or body which is 'directly affected' should be joined. To begin with, any such person or body should be served with the proceedings. If this has not been done, an order joining him, her or it should be made. Finlay CJ expressed the matter briefly and clearly in his judgment in* <u>*O'Keefe v. An Bord Pleanala*</u>'.

35. Neither the decisions in *O'Keefe v. An Bord Pleanala* or *Dowling* were cited by, or it seems to, the trial Judge and they did not feature in argument in this appeal – although counsel for the second to fifth named respondents did allude to the rule they suggest when he referred to a '*common law'* requirement to '*join'* a notice party. To understand the origin and incidents of any such obligation – and the consequences of a failure to comply with it - it is necessary to look carefully at Order 84.

36. In normal course, the application for leave to seek judicial review is made *ex parte.* The judge receiving the application hears submissions from one side alone. He or she does so on foot of a Notice in Form No. 13 in Appendix T to the Rules naming the Applicant and Respondent or Respondent(s) (see Order 84 R.20(b)). The respondents in an application for Judicial Review are the persons against whom the relief sought is claimed, save that where the application relates to proceedings in or before a court, the judge shall not be named in the title unless the relief is grounded on an allegation of *mala fides* or other form of personal misconduct by the judge such as would deprive him or her of immunity from suit (O84 R. 22(2A). In that situation - uniquely – the other party to the proceedings leading to the impugned decision must

be joined as a *respondent*. There is no requirement expressed in the Rules at this point that any other party be named in the application.

37. Obviously, where the application for leave to seek judicial review is thus made *ex parte* the position of other persons having an interest in the proceedings only arises if that application is granted. The Rules accordingly provide that upon the grant of leave, the notice of motion (together with the statement of grounds and verifying affidavit – O.84 R. 23(1)) must be served on '*all persons directly affected'* (O.84 R. 22(2)). This is such an important requirement – having regard to the need to ensure that judicial review proceedings are not heard in the absence of parties who might be affected by the outcome of the case – that the applicant is required to swear an affidavit giving the names and addresses of, and the places and dates of service upon, all parties who have been served with the notice of motion, the court being given the power to adjourn the hearing of the proceedings where it is of the opinion that persons who ought to have been served have not been (O.84 R.22(6) and (9) respectively). Strictly speaking, any person duly served with notice of proceedings is a party, even if not named on the record thereof (O.125 R.1), but it is common for persons who have been served in accordance with O.84 R. 23(1) to attend in court before the hearing and ask to be given the right to submit evidence or make legal argument in the matter, in which event they will be often joined as '*Notice Parties'* and named in the proceedings as such. A power to enable a proper party who wishes to be heard to be heard is conferred by O.84 R.27(1). That power is not limited to those who have been served with the proceedings.

38. In practice, as I have noted, much of this detail is rendered irrelevant and the process envisaged by the Rules short circuited by the naming at the outset in the title to the proceedings (either by the applicant, or at the direction of the judge granting leave) of persons having a

clear and critical interest in the application as '*Notice Parties'*, the grant of leave in the action as so entitled, and the service upon those parties of the proceedings. In that situation, the party so named is absolved of any obligation to apply to be joined or heard, although of course their joinder at the *ex parte* stage does not obligate them to participate in the proceedings.

39. The position is different when, as happened here, the Court directs that the application for leave to seek judicial review be heard on notice. This is enabled by O.84 R.24. Under this provision where the Court decides that such an application shall be heard on notice, it may '*give such directions as it thinks fit as to the service of notice of the application for leave … on the intended respondent* ***and on any other person***' (emphasis added). Clearly, a failure by a party to comply with such a direction would entitle the court in an appropriate case, to refuse leave at the *inter partes* hearing. It would be entitled to do this on the related bases that the applicant had failed to comply with a direction of the court and/or that the application was, in consequence of that failure, proceeding without a necessary *legitimus contradictor*. However, it was accepted by counsel for the second to fifth respondents that no order requiring service on BATU was made in this case.

40. This leads to the following conclusion. Apart from the very particular circumstance provided for in Order 84 R. 22(2A) (and, of course, apart from the effect of any statutory provisions applicable to specific categories of judicial review) the provisions of Order 84 envisage that the means by which all necessary parties are made aware of judicial review proceedings affecting their interests is though service of the proceedings following the grant of leave. However - whether the comments of Finlay CJ in *O'Keefe* to which I have referred earlier are viewed as a binding legal obligation, or as simply recording good practice - an applicant seeking leave for judicial review of a decision of an administrative tribunal arising from an *inter partes* proceeding should at the time of seeking leave normally name the other

party to the underlying proceeding as a notice party to the action. Where the applicant has not done this, the judge granting leave has the power to require the party thus directly affected by the proceeding to be named and joined as a notice party.

41. Where an application for leave is directed to be heard on notice, the Rules envisage a power on the part of the judge to direct the service of the proceedings on any specific party. If the applicant has approached the application for leave correctly, parties directly affected by the proceedings should be named as notice parties and, where this has happened, the judge directing that the application for leave be made on notice may wish to direct that some or all of those parties be served with and afforded the right to attend at the hearing of the leave application. Where (as happened here) the applicant has not constituted the proceedings in this way, the court still has the power to direct service on other parties or indeed the power to direct that other parties be named as notice parties to the action. It is, of course, in no sense required to do so.

The exercise by the trial Judge of his discretion to refuse relief

(a) Principles and findings of the High Court

42. Where an applicant for leave to seek judicial review has not joined the affected party to the application and the court has not at the time of the fixing of an *inter partes* leave application made an order to that effect, the consequence depends on the circumstances. In this case, the default of the applicant is in my view best viewed as one – critically important – part of a sequence of procedural failures on the part of the applicant which, when viewed together, more than justified the trial Judge's decision on the facts of this case to refuse, in his discretion, to grant the relief claimed.

43. Clearly, while judicial review is a discretionary remedy the court is not at large in withholding such relief where the legal basis for it has otherwise been established. The discretionary factors by reference to which judicial review has been refused have tended to fall into three broad groups – grounds relating to the action or inaction of the claimant (such as a failure to exhaust an alternative remedy, delay, *laches*, waiver, acquiescence or misconduct in connection with the proceedings), grounds relating to the impact a remedy will have on others (such as where the grant of relief would represent an unwarranted interference with the settled rights or expectations of third parties) and grounds relating to the practical value of the remedy (such as mootness or futility) (see *Independent Newspapers (Ireland) Ltd. and ors v. IA* [2020] IECA 19 at para. 78). Most of the decisions addressing the discretion of the court in refusing relief are concerned with discretionary bars to relief after a final hearing. Nonetheless, as the judgment of the High Court Judge in this case makes clear, the court also has a discretion to refuse to grant leave to seek judicial review. The fact of that discretion has been repeatedly stated (see *De Roiste v. Minister for Defence* [2001] 1 IR 190 at 204 per Denham J.). Here, the trial judge relied in this regard upon the judgment of Finlay C.J. in *G. v. DPP* [1994] 1 IR 374 who observed (at p. 378):

> '*the court has a general jurisdiction, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also whether the applicant has shown good faith in the making of an ex parte application'*

44. In applying this statement, the Judge said (at paras. 22 and 23 of his judgment) :

'*If I am wrong in finding that these proposed proceedings fall foul of the express principles set out above, I would exercise my discretion to refuse leave as Mr. O'Connell has failed to join a necessary party to this intended action; he was expressly warned of this objection to the grant of leave and was given every opportunity to name BATU as a notice party. No good reason is given for his decision not to do so. In those circumstances, I would not grant leave to seek judicial review where those proceedings are incompletely constituted.*

In exercising my discretion against Mr. O'Connell I would also take into account the fact that he did not put before the Court the Decision and the documents subsequent to the Decision; these were clearly relevant and important documents for the purpose of deciding whether leave should be granted. Not only were they not included in the evidence of Mr. O'Connell but (as I have already indicated at paragraph 15 of this judgment) Mr. O'Connell made a submission which was not consistent with the documentation which he decided not to include in his application for leave. In addition, Mr. O'Connell/s description of the attitude of BATU to these proceedings was not accurate; this inaccuracy was only discovered when the letter of the 5th of February 2020 was actually provided to the court.'

(b) BATU

45. If the applicant was not under a legal obligation to '*join'* BATU, and if it is further accepted that he did not hear the submission made by counsel for the State at the first adjourned hearing that the proceedings were fundamentally flawed because of the failure to take that step, he could have been under no illusion when he received the correspondence from the Chief State

Solicitor dated December 19 that (a) neither the Taxing Master nor the Courts Service were proposing to intervene in the proceedings, (b) the other named respondents to the case (the Minister for Justice Equality, Ireland and the Attorney General) were concerned solely with those grounds relating to the *vires* of O. 99 R. 38(1), (2) and (3), (c) that the applicant was being advised that the *legitimus contradictor* should be the other parties in the underlying taxation matter, that is some or all of the defendants in the originating proceedings and (d) that in the absence of those parties there would be no party to put the opposing case on the remainder of the application in what the Court was clearly concerned should be an *inter partes* application for judicial review. By February 5 the applicant knew that BATU was adopting the position (correctly or not) that insofar as it was not a party it had no part to play, and by the time of the hearing itself the applicant was clearly aware that the point was being strenuously advanced that in the absence of BATU he could not obtain leave.

46. In those circumstances I believe that the High Court Judge was well justified in deprecating the failure of the applicant to actively take steps to formally involve BATU in the proceedings. Of course, it must be stressed, the joinder of BATU would not have put it under any obligation to participate in the *inter partes* hearing. However, it would have ensured that its representatives were fully aware of the precise case being made by the applicant, that they would have had the opportunity to present their case without further application or, even if they did not, that they could have sought to at the very least ensure that the Court had before it all relevant material. Most importantly, it would have allowed the trial Judge to adjudicate on the application for leave having regard to either (a) the submissions of BATU if it chose to participate in the hearing or (b) the fact that BATU, although duly served with the proceedings and identified as a notice party, had chosen not to take part in them. As it was, BATU was not

merely not joined to the action, there is also nothing in the evidence before the Court to suggest that it was even provided with the pleadings in the judicial review proceedings.

47. Before leaving this, I should make clear that I have fully taken account of the factor, stressed by the applicant in his submission, that BATU's solicitor was present in Court at the time of the hearing before the High Court, and of his contention that BATU made no attempt to be joined to the proceedings. Both contentions, I think, miss the point. Because BATU had not been formally joined to the proceedings or (it would appear) been served with the papers, the consequence was that for the Court to hear the application with the benefit of a *legitimus contradictor* would have required it to formally join that party and proceed to adjourn the matter to allow that party to determine if it would take part in the proceedings and, if it did, to hear them. The Court should not have been put in that position, and it was upon the applicant that the onus fell to ensure this did not occur. As it happens, and as the trial Judge noted, even during the hearing when this deficiency was drawn to his attention, the applicant failed to request any such joinder.

(c) The failure to produce the decision of the Taxing Master

48. The trial Judge described the failure of the applicant to put the decision sought to be challenged before the court as an '*unusual feature of the application'.* This was an understatement. It described an omission that had particular consequences for this application. Because BATU had not been joined and in the light of the fact that counsel for the third, fourth and fifth named respondents were not representing either the Taxing Master or the Courts Service, the applicant's application for leave was advanced solely on the basis of his pleadings and the documents submitted by him to the Court. Thus, the hearing proceeded without the

decision being before the Court *and* in the absence of any party other than the applicant that was actually involved in those proceedings. It was in those circumstances that the trial Judge (as his judgment records) made a direction that the ruling of the first respondent be made available to him, and it was provided to him after the application had concluded.

49. This was thus a significant omission. The decision which the applicant sought to quash was central to the entire application, and obviously so. Not merely is it very difficult to see how the applicant could have made the complaints he did without producing the decision he sought to impugn and relating those complaints to the reasons of the first respondent (and see Order 84 Rule 27(2)), but (as I explain shortly) the decision itself casts (at the very least) very significant doubt over each and every one of the grounds advanced by the applicant in the course of his pleading. On any version it is a document that was centrally relevant to the issue of whether the applicant had an arguable case for obtaining the relief sought in the proceedings. Consideration of the first respondent's decision discloses significant issues around whether the applicant's complaints properly disclosed a claim at all and thus by failing to present and address the ruling the applicant breached one of the fundamental requirements imposed on a party making an application for leave to seek judicial review to put all relevant material before the Court. Clearly, the trial Judge was correct when he said that he was, in exercising his discretion against the grant of leave, taking into account '*the fact that he did not put before the Court the decision and the documents subsequent to the Decision, these were clearly relevant and important documents for the purpose of deciding whether leave should be granted'* (at para. 23).

(d) The documents subsequent to the decision and inaccurate description of BATU's position.

50. The reference by the trial Judge to the '*documents subsequent to the decision'* which had not been produced by the applicant was to '*objections/appeal'* issued by the applicant on July 24 and served on BATU's solicitors. The trial Judge adopted the view that this showed that the applicant fully understood that BATU was the proper *legitimus contradictor* in the dispute which, the Judge felt, demonstrated that the position adopted by the applicant before the High Court that the issue as to recusal was between the applicant and the first respondent was not accurate. The Judge's comments in relation to the position of BATU arose from the fact that while the applicant had said that BATU had indicated that it did not wish to take part in the proceedings, in fact the correspondence from its solicitors disclosed that it had actually said that because it was not a party to the proceedings, it had no part to play.

Conclusions on the issue of discretion

51. As I have explained, it is clear that the High Court has an over-riding discretion to refuse relief by way of judicial review. It is also clear that that discretion may be exercised against the grant of such relief having regard to the conduct of the applicant, and – obviously – this extends to the conduct of the application itself. In reviewing the exercise of that discretion, this court must afford considerable deference to the judgment of the court of first instance, intervening only where it is satisfied that the judge has either erred in principle or, if correct in the principles he has applied, that he or she has (as it was put by Clarke C.J. in *Waterford Credit Union v. J&E Davy* [2020] IESC 9, [2020] 2 ILRM 334 at para. 6.3) strayed outside the range of judgment calls which were open to the first instance court.

52. Had the applicant been represented in the course of these proceedings, there can be no doubt not merely that the decision to refuse relief in these circumstances would have been

within the permissible scope of the High Court Judge's discretion, but that it would have been most surprising had he exercised that discretion in any other way. The applicant failed to properly constitute his case in accordance with the requirements I have identified. Even if that is to be excused, in the three and a half month period between the fixing of the date and the hearing, the applicant was clearly and unequivocally advised in writing that the proper *legitimus contradictor* was BATU. He failed to act on that advice and even when presented with that deficiency in the clearest of terms at the hearing on February 10, did not make any attempt to rectify it. Then, he proceeded to move his application without presenting the court with the decision he was seeking to impugn, let alone to address the formidable obstacles to his obtaining relief which, as I shortly explain, it obviously presented.

53. In these circumstances in itself the failure to provide the Court with the actual decision would have amounted to a breach of the obligation imposed on parties seeking judicial review to put all relevant material before the Court. When combined with the fact that there was no informed *legitimus contradictor* at the hearing this resulted in a situation in which the Court was not presented with a complete picture of the case, and this undermined fundamentally the objective of the judge in listing an *inter partes* hearing in the first place. While the circumstances in which the conduct of an applicant of an application for leave to seek judicial review are such as to result in the refusal of the relief on discretionary grounds will be exceptional, the court is entitled to require parties presenting such applications to properly constitute their proceedings and afford the court with an evidential basis on which it can reliably adjudicate upon the application before it. The Court is fully entitled to refuse relief where a party fails to comply with this basic obligation. Noting the applicant's reliance on the decision in *Hosford v. Ireland and ors.* [2021] IEHC 133 in which Simons J. identified the factors to be brought to bear on the exercise by the court of its discretion to excuse non-

compliance with the Rules, the instant case (as indeed with *Hosford* itself) involved fundamental failures, and there is no basis on which it can be said that the Court was required to overlook them. Critically, having regard to the impact of the decision on the underlying merits of the applicant's case as I explain it shortly, I can see no ground on which it can be said that the trial Judge erred in exercising his discretion as he did.

54. That being so, the only basis on which this Court could conclude that the trial Judge strayed outside the permissible scope of his discretion in refusing relief for the reasons he did is if the fact that the applicant represented himself converts an order that would have been clearly justified had the applicant been represented before the court, into an impermissible exercise by the trial Judge of his discretion.

The applicant as a personal litigant

55. The applicant placed a great deal of emphasis throughout his submission on the contention that the trial judge paid insufficient regard to the fact that he was not represented, referring to various authorities in which the courts have indicated that lay litigants will be afforded latitude and assistance in negotiating frequently complex rules of pleading and procedure. It is, of course, a fact that many persons who represent themselves in litigation have no choice but to do so, and it is clear that the most general requirements of fairness require that some accommodation be extended to those who self-represent to reflect their lack of expertise and the disadvantage they may face in negotiating legal action, particularly against represented parties. Thus, the case law presents many examples in which rules of precision in pleading or in the formulation or presentation of legal arguments have been relaxed, or in which the consequences that might otherwise attach to failure to adhere to time limits or other procedural rules have been abated in the case of self-represented parties.

56. However, this is subject to two important qualifications - the unrepresented party should not obtain a positive advantage over their opponent by reason of their lack of legal representation, and the court must not allow an indulgence of the unrepresented to occlude its obligation to all litigants to ensure the efficient administration of its resources (see, in particular, *ACC v. Kelly* [2011] IEHC 7 at paras. 5 to 7). In this case, putting to one side the not unimportant consideration that the applicant in these proceedings was not a novice to the preparation and presentation of legal proceedings, the court was put in a situation in which the various defaults of the applicant to which I have referred left it with only two options.

57. One was to adjourn a hearing which had been specifically fixed some months beforehand and in which the second to fifth named respondents had appeared through counsel so as to allow the applicant to (a) join BATU as a party, (b) serve it with the proceedings, (c) fix a further date for the hearing in the presence of BATU, (d) furnish the Court with a copy of the taxing master's ruling, (e) receive submissions and/or further evidence from the applicant on that ruling. Noting that no application was made even at the trial for any such adjournment or orders, the other was to adopt the course followed by the trial Judge and to refuse the application because the applicant could, and should, have ensured that these matters were all attended to before the allocated hearing date.

58. I do not believe that the applicant's status as a lay litigant either required the trial judge to adopt the former course or precluded him from reaching the latter conclusion, and I am unaware of any authority that would suggest it did. To do so would not only have afforded the applicant the very advantage as a self-represented litigant that is decried by the case law thereby prejudicing the respondents accordingly, but it would have also excused the applicant for occasioning a wholly avoidable loss of court time. It is to be remembered (a) that the applicant

was specifically advised in writing of the fact that BATU was a necessary *legitimus contradictor* to his application, (b) that his failure to exhibit the taxing master's decision meant that the court was being requested to grant leave wholly unaware not merely of what precisely had been decided by the taxing master, but of what the taxing master's own position was on significant aspects of the case against him, and (c) that a consideration of that decision discloses (at the very least) significant issues around whether the applicant enjoyed an arguable case at all on any of the grounds sought to be agitated by him.

59. In explaining these omissions, the applicant says in his notice of appeal that the reason the first respondent's decision was not before the court was that he understood he was making an *ex parte* application for leave and did not require the evidence '*at this stage'*. As I have explained earlier, this was mistaken : an applicant for leave to seek judicial review must put before the court the evidential basis for his claim. In fact he consistently refers to the proceedings as being at the '*ex parte'* stage, when it was clear that the Court had directed that the named respondents be put on notice of the application. He further submits that not having mounted a judicial review before, he could not have known that it was necessary to join BATU '*without past experience or instructions of some sort from the Courts'*. It is emphatically *not* the function of the Courts to provide '*instructions'* to litigants as to how they should constitute or proceed with their litigation.

Merits

60. The trial Judge identified as the second basis for his decision in respect of grounds (c) to (e), that the applicant had failed to establish that he had an arguable case that he was entitled to the remaining relief claimed by him '*in the absence of BATU'*. Whether or not the presence

of that party at the hearing of the application for leave application affected the merits of the applicant's case, if I am mistaken in my view that this Court should not interfere with the decision of the trial Judge to refuse leave on the discretionary grounds identified by him, I would not hesitate to hold that leave in respect of these grounds ought to have been refused on the basis that the applicant had failed to establish an arguable case. Obviously, it is a matter for the applicant to lay before the court evidence of the facts on the basis of which he claims he is entitled to obtain leave, and equally obviously the determination of whether the applicant has established arguable grounds must be based upon the facts as so asserted (see *G. v. DPP* at page 378).

61. Grounds (c) and (d) complain of an inadequacy of reasons and assert a failure to allow the applicant to view the notes or DAR. The decision of July 12 shows the objection insofar as based upon inadequacy of reasons to be without any conceivable foundation – the decision is detailed and comprehensive. Insofar as these grounds are actually directed (a) to a claim that the reasons for not providing the DAR were inadequate (as the applicant suggested at the hearing of this appeal) and (b) insofar as it is contended that the first respondent was required *sua sponte* to make his notes and the DAR available before referring to either in his ruling, the applicant's case is patently misconceived.

62. First, nowhere in the Statement of Grounds or verifying affidavit is it averred that the applicant applied for the production of the DAR and I can find no such request in the papers : his e-mail of 19th April merely suggests that the first respondent review the DAR (which the first respondent's ruling records him as having done). Second, a court is of course required to have recourse to its own record of proceedings in adjudicating upon them, and in so doing does not assume any obligation to make that record available to the parties. Third, I can find in the Statement of Grounds and Affidavit no clear statement of what precise aspect of the record of

the hearings contained in the first respondent's ruling is actually wrong, let alone why this is so. This is unsurprising given that the decision was not produced by the applicant, and is referred to in the verifying affidavit in only the most general of terms.

63. The ruling of July 12 is also critically relevant to the claim of bias set forth in ground (e). In the absence of some explanation of the applicant's response to the decision, a court that was aware of the terms of the first respondent's decision could not be satisfied that the applicant had made out the essential basis for his claim of bias. That claim, it will recalled, had two components. The first was that the actions of the first respondent at the hearing on December 4 in positing an interpretation of the Order of O'Connor J., in suggesting that the applicant had been unfair in proceeding to taxation while appealing the order, and in referring to the applicant's use of the term '*pig iron'*, were indicative of bias, and that his denial of having made the statement regarding unfairness at the hearing on February 1 afforded further evidence of this. Even viewed in the abstract, I cannot see how any of these allegations could conceivably sustain a claim of bias: the Taxing Master is quite entitled to express his provisional interpretation of the Order, if he feels that a party is not conducting themselves fairly he is entitled to say so and the reference to '*pig iron'* as a ground of bias is – to put it at its mildest - difficult to understand. There is no conceivable basis on which comments of this kind as part of the to-and-fro of an oral hearing could form the basis of a claim of bias.

64. The ruling itself puts this beyond doubt. The first respondent's record of the hearing on December 4 made it quite clear that the view he was expressing of the Order was provisional ('*on its face*', '*I am not making any pre-determination of the issue', 'I am just putting you on notice of what I think is the effect of the Order'*). That ruling records him as *asking* whether it would be fair to proceed with the taxation in the light of the appeal ('*would that be fair to the Other Side ?'*). The reference to '*pig iron'* as recorded in the decision is simply this:

'*Pig Iron is not a term of art we use around here very often'*.

65. Of course, it was at all times open to the applicant to say that this was not a correct record of what happened and to aver accordingly. However, as I have explained, he never actually addressed the record set forth in the decision at all.

66. The second aspect of the bias claim relates to the first respondent's prior association with BATU's cost accountants. The decision discloses that the taxing master asserts that he has had no connection with Behans in terms of ownership since 2008 or contact since 2011. It was incumbent on the applicant to provide some basis on which the court could, at the leave stage, conclude that this was not so and that instead the position was, as the applicant asserted in his Statement of Grounds, that the first respondent was a '*fellow director'* of the firm. The applicant was on notice of the decision of the High Court in *Fitzpatrick v. Taxing Master Behan* (it is referred to in the first respondent's decision at para. 49), in which the claim of similar associations was held by the High Court not to ground a claim of bias on the part of the first respondent. That decision was upheld by this Court ([2020] IECA 324) where Donnelly J. said (at para. 68) :

> *'there is no automatic bar on judges hearing cases involving advocates from the previous firms in which they were employed (or partners). They may hear cases involving clients for whom they previously acted, subject to the facts establishing a real apprehension of bias based upon extensive knowledge of that client. Judges may even hear cases in which they acted against one of the parties in other litigation. The appellant has not satisfied this Court that the prior business relationship of itself, would establish reasonable bias. In the present case, the costs accountant was appearing*

essentially as an advocate in the proceedings. The mere fact of the previous business relationship does not give rise to a reasonable apprehension of bias. It therefore follows that in so far as the appellant advances this part of his application on the basis of a mere business relationship between Mr. Conlon and the Taxing Master giving rise to an apprehension of bias, this ground of appeal must fail.

67. Neither the High Court nor Court of Appeal decision in *Fitzpatrick v. Behan* were referred to in this appeal although, as I have noted, the applicant was on notice of the former. In any event, and even if these decisions are ignored for the purposes of this application, the critical point is that the applicant, not having referred to the first respondent's decision, did not address how on the basis of the factual position as explained there, his former association with Behan and Associates created any apprehension of bias. This is not affected, I should state, by the contents of the e-mail of July 1. This was not addressed in the impugned decision, BATU did not have the opportunity to address it, it was not before the High Court, it was not properly before this Court, and it cannot be understood without reference to the documents referred to in it (which were not furnished to the Court).

Conclusion

68. I have thus concluded (a) that the trial Judge was correct in law in determining that the applicant had not disclosed any arguable case to ground his claim that Order 99 Rule 38(1), (2) and (3) of the Rules of the Superior Courts are contrary to the Constitution or the European Convention on Human Rights (b) that this Court should not interfere with the exercise by the High Court Judge of his discretion to refuse to grant the applicant leave to seek judicial review on the remaining grounds sought by him and (c) that even if a basis has been made out for interfering with that discretion, the applicant has not surmounted the threshold required to

obtain leave to seek judicial review on those remaining grounds. For those reasons this appeal should be dismissed.

69. It is my provisional view that, the appeal having been dismissed, the costs of the second to fifth named respondents should be borne by the applicant. If the applicant disagrees with this proposal he should advise the Court of Appeal office within seven days of the date of this judgment, and within a further ten days of that he should deliver written submissions of no more than 1,500 words outlining the costs order for which he contends, and explaining the basis on which he seeks it.

70. Whelan J. and Pilkington J. are in agreement with this judgment and the order I propose.