Neutral Citation: [2014] IEHC 554

THE HIGH COURT

[2013 No. 418 MCA]

BETWEEN

MICHAEL TULLY

APPELLANT

AND

THE PRIVATE RESIDENTIAL TENANCIES BOARD

AND

MYRTLE ROBERTS

RESPONDENTS

JUDGMENT of Mr. Justice Keane delivered on the 6th November 2014

Introduction

1. This is an appeal on a point of law pursuant to the terms of s. 123(3) of the Residential Tenancies Board Act 2004 ("the Act"). The decision appealed is a determination of a Tenancy Tribunal ("the Tribunal"), embodied in a determination order of the Private Residential Tenancies Board ("the Board") made on the 18th October 2013.

Background

2. The decision of the Tribunal was made in the following circumstances. On the 25th March 2013, the appellant, as tenant, submitted an application for dispute resolution to the respondent Board, identifying the second named respondent as his landlord ("the landlord"), in respect of certain premises at Butterfly Hill, Newcastle, County Wicklow, where both the appellant and the landlord reside.

3. At the request of the appellant and in accordance with the Act, the matter was referred in the first instance to an adjudicator. After a hearing on the 18th July 2013, the adjudicator concluded that the Board has no jurisdiction to consider the appellant's application.

4. In accordance with his entitlement to do so under s. 100 of the Act, the appellant submitted an appeal against that decision to the Tribunal on the 21st August 2013. The Tribunal heard the appeal on the 3rd October 2014, at which hearing the appellant was represented by a solicitor. The Tribunal made its determination on the 6th October 2014, holding:

> "The PRTB have (sic) no jurisdiction to hear the Appellant Tenant's application in respect of the Dwelling at Butterfly Hill, Newcastle, County Wicklow."

That is the decision, embodied in the determination of the Board made on the 18th October 2014, against which the appellant now appeals to this Court.

The jurisdiction on appeal

5. Section 123 of the Act states in relevant part:

> "(3) Any of the parties concerned may appeal to the High Court, within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law.
>
> (4) The determination of the High Court on such an appeal in relation to the point of law concerned shall be final and conclusive."

The point of law raised

6. In mounting the present appeal, the appellant, who is a litigant in person for the purpose of these proceedings, relied initially on a notice of motion, dated the 19th December 2013, in which the relief sought was "an order appealing the whole of the determination of [the Board] given on the 18th October 2013." That application was grounded on an affidavit sworn by the appellant on an unspecified date in December 2013, enumerating eight separate errors of law that he was then alleging had been made by the Tribunal in its determination of his case. In the same affidavit, the appellant also averred to various facts that he obviously considers would, if accepted, support his contention that the Board does have jurisdiction to entertain his application. The report of the Tribunal is exhibited to the appellant's affidavit.

7. However, in what the appellant has termed a "supplementary" notice of motion dated the 14th February 2014, grounded upon a supplemental affidavit that the appellant swore on the 12th February 2014, he now identifies the point (or points) of law that he wishes to raise on appeal in the following terms:

> "The Private Residential Tenancies Board Tribunal misinterpreted section 3(2)(g) of the Residential Tenancies Act 2004, and
>
> The Tribunal and Chairman employed unfair procedures during the hearing of the matter between [the appellant] and [the landlord]."

8. It may be that, in now identifying the points of law he wishes to raise in the manner just described, the appellant is, or has become, aware of the requirements of Order 84 C, rule 2(3), of the Rules of the Superior Courts whereby, in an appeal on a point of law, the motion must "state concisely the point of law on which the appeal is made." Certainly, there would have been an obvious difficulty in attempting to deal with the appeal on the basis of the original notice of motion. Indeed, the statement of opposition, delivered on the 27th February 2014 by the Board, pleads, amongst other things, that the appellant has failed to comply with the provision of the rules just cited. Perhaps by reference to the terms of the "supplemental" notice of motion that the appellant now seeks to rely upon, I did not understand the Board to press that point in argument on this appeal. However, it does seem to me to follow that the only points of law properly before the Court in accordance with the Rules are those identified in the appellant's "supplemental" notice of motion, dated the 14th February 2014

9. In its statement of opposition, the Board joins issue with the appellant in respect of each of the two points of law that he now identifies (and, perhaps for the avoidance of doubt, also in respect of the eight separate legal issues averred to in the appellant's original grounding affidavit). That statement of opposition is grounded on an affidavit of Dervla Quinn, sworn on the 21st February 2014. Ms Quinn was the Chairperson of the Tribunal the determination of which is under appeal. Ms Quinn has exhibited the following documents: the appellant's original application form for dispute resolution; the adjudicator's report on that application; the appellant's appeal form to the Tribunal from that decision; and a copy of the transcript of the hearing of that appeal before the Tribunal on the 3rd October 2013.

10. While a memorandum of appearance has been entered on her behalf, the landlord has taken only a limited part in this appeal.

The determination under appeal

11. From the terms of the Tribunal's report and from the evidence before this Court, a number of background facts emerge that I do not understand to be in dispute between the parties. The landlord, a widow, owns the property at Butterfly Hill and resides in it. The landlord operates a bed and breakfast business there and offers rented accommodation in the property also. The appellant became a tenant in the property about 9 years prior to the Board's determination. The appellant now occupies a different bedroom and kitchen area than that which he originally moved into. The appellant pays a weekly rent of €90 and has paid a deposit of €80.

12. Section 3(1) of the Act provides that it applies "to every dwelling, the subject of a tenancy." By way of derogation from that provision, s. 3(2)(g) of the Act states as follows (in relevant part):

> "(2) … this Act does not apply to any of the following dwellings—
>
> …
>
> (g) a dwelling within which the landlord also resides"

13. Under s. 4(1) of the Act, for the purpose of s. 3(2)(g) of the Act, "dwelling" is defined to mean (in relevant part) "…a property let for rent or valuable consideration as a self-contained residential unit and includes any part of a building used as a dwelling."

14. The only guidance provided by the Act in respect of the meaning of the term "self-contained residential unit" is that set out in s. 2(1) whereby it is defined to include "the form of accommodation commonly known as 'bedsit' accommodation."

15. In the penultimate section of its report, headed "Findings and Reasons", the Tribunal found as follows:

> "Having considered all of the documentation before it, and having considered the evidence presented to it by the Parties, the Tribunal's findings and reasons thereof, are set out hereunder.
>
> Finding: The agreement between the Landlord and the Tenant is not for the rent of a self contained unit within the meaning of the Act. The Landlord although accessing the Dwelling through a separate entrance had full access to and use of the entire of the Dwelling excluding only the Tenant's bedroom. Section 3(2)(g) of the Act states that the Act does not apply to a dwelling within which the landlord also resides.
>
> Reasons
>
> The tenant had access to and the use of a kitchen and dining area but this use was not exclusive and was shared by the other tenant and in particular by the Landlord who carried out the cleaning of all areas herself excluding only the Tenant's bedroom. The Landlord made use of the dining room for her B&B business and the sitting room for carrying out her work. The Tenant had a key to his bedroom which was personal to him but all other areas of the Dwelling are shared with the Landlord, another tenant and guests of the B&B business. The Tribunal notes that the Dwelling is a large building and separate entrances are used by the Landlord and the Tenant but notwithstanding this the Landlord does have access to and in fact used all areas of the Dwelling excluding only the Tenant's bedroom.
>
> The decision of the Tribunal in Zang and Holohan TR168/2011, although informative on the question of what constitutes a self-contained unit, concerns a letting where the landlord was not ordinarily resident in the Dwelling. In this matter the Tribunal is satisfied that the Landlord is in fact also resident in the Dwelling which brings the matter outside of the jurisdiction of the PRTB pursuant to section 3(2)(g)."

The basis of appeal

16. In the case of *Ashford Castle v. SIPTU* [2007] 4 I.R. 70, the High Court had to consider the nature and scope of its jurisdiction in an appeal on a point of law from an expert tribunal. Clarke J. began his conspectus of the authorities in that regard by citing the following passage from the judgment of Hamilton C.J. in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34 (at pp. 37-8):

> "…the courts should be slow to interfere with the decision of an expert administrative tribunal. Where conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by appeal or judicial review."

17. Later in his judgment in the same case, Clarke J. quoted with approval the following passage from the judgment of Gilligan J. in *Electricity Supply Board v Minister for Social Community and Family Affairs* [2006] IEHC 59, (Unreported, High Court, 21st February 2006)(at p. 30):

> "I take the view that the approach of this court to an appeal on a point of law is that findings of primary fact are not to be set aside by this court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this court has to be mindful that its own view of the decision arrived at is irrelevant. The court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the appeals officer to arrive at the inferences drawn and, adopting a reasonable and coherent view, to arrive at her ultimate decision."

18. Clarke J. went on to acknowledge the many other decisions to a similar effect - *e.g. Faulkner v. Minister for Industry and Commerce* (Unreported, High Court, Murphy J., 25th June 1993) and *Brides v. Minister for Agriculture* [1998] 4 I.R. 250. As Clarke J. noted, these cases form part of a strong line of authority going all the way back to the decision of the Supreme Court in *Mara v. Hummingbird Ltd* [1982] I.L.R.M. 421. That appeal arose from a case stated by the Income Tax Appeal Commissioners to the High Court, whereby the Commissioners determined that the profit derived from the sale of a property by a development and investment company was liable to capital gains tax as the realisation of an investment rather than to income tax as a sale undertaken as an adventure in the nature of trade. Speaking for the Supreme Court in a celebrated passage, Kenny J. stated (at p. 426 of the report):

> "A case stated consists in part of findings on questions of primary fact, *e.g*. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inference which he made from the primary facts were ones that no reasonable commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of trade nearly always depends on the importance which the judge or commissioner attaches to some facts. He will have evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law."

19. These principles were helpfully restated by the High Court (*per* McKechnie J.) in *John Deely v. The Information Commissioner* [2001] 3 I.R. 439 in the following terms (at p. 452):

> "There is no doubt but that when a court is considering only a point of law, whether by way of restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn form such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
>
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that is also a ground for setting aside the resulting decision: see for example *Mara v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421, *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June 1999)."

20. In considering this aspect of the law, it remains only to note that, in *Canty v. Private Residential Tenancies Board* [2007] IEHC 243, (Unreported, High Court, 8th August 2007), which in common with the present case was an appeal by way of case stated under s. 123(3) of the Act, Laffoy J. expressly identified the apposite principles as those set out in *Mara v. Hummingbird Ltd* and *Henry Denny & Sons (Ireland) Ltd v. Minster for Social Welfare*. I respectfully agree with that conclusion.

The appropriate evidence to consider

21. Having established the nature and scope of the present appeal, it will at once be evident that it is no part of the function or role of this Court in that regard to purport to consider afresh the jurisdictional issue that was determined at first and second instance by the adjudicator and the Tribunal respectively. That is because it is impossible to reconcile such an approach with the application of the principles identified in the preceding section of this judgment. Simply expressed, albeit in legal parlance, this is not an appeal *de novo*; it is a restricted appeal on a point of law.

22. That observation leads, in turn, to a consideration of the question whether it is appropriate to receive any further or additional evidence on that jurisdictional issue in the context of the present appeal. The question arises because the appellant deposes to the merits of that issue at some considerable length in both the first affidavit and, more particularly, the second affidavit that he swore for the purpose of the present appeal. While many of the relevant averments might more properly be characterised as argument than evidence (and would, of course, be innappropriate as such), at least some of them are plainly intended to be the latter. One averment in particular, in the appellant's second affidavit, states that "the Appellant Deponent hopes to be able to procure an accurate plan of the premises from Wicklow County Council Planning Department in the near future and begs leave to submit it when he can." The appellant did indeed produce such a plan to the Court in the course of the hearing.

23. In the case of *Ashford Castle Ltd v. SIPTU* to which I have already referred, one of the issues that Clarke J. had to address was an attempt by the appellant in that case to exhibit a chart or table that it was claimed was derived from materials that had had been before the Labour Court when it had made the decision then under appeal on a point of law. The appellant in that case wished to argue that the exhibit concerned helped to demonstrate that there was no evidence to support a particular component of the Labour Court's decision. Clarke J. recorded that, in the course of the hearing of the appeal before the High Court, it became apparent that the relevant chart or table contained significantly misleading information that did not, in fact, accurately reflect the material that had been before the Labour Court.

24. In commenting on that aspect of the appeal, Clarke J. stated (at p. 90 of the report):

> "59 The exercise also shows the extreme danger of permitting any materials other than those which were before the statutory body in question to be introduced at an appeal. Indeed it provides a strong argument for a return to the procedure advocated by Finlay C.J. in *Bates v. Model Bakery Ltd* [1993] 1 I.R. 359 which sought to confine the evidence to an affidavit which exhibited only the materials which were before the body in question and the determination of that body and excluded any additional matter. It does not appear to me to be appropriate for affidavits filed either in support of or against appeals of this type to include any additional materials whether by way of argument or background."

25. In *Model Bakery Ltd*, Finlay C.J. had expressed the view (at pp. 364-5 of the report), though perhaps *obiter*, that the special summons in that case (brought under s. 39 of the Minimum Notice and Terms of Employment Act 1973), equivalent to the notice of motion in the present appeal, should simply have stated the decision being appealed against, the question of law which it was suggested was in error, and the grounds of the appeal, and that it should be supported only by an affidavit or affidavits exhibiting the determination appealed against, including any findings of fact or recital of evidence made by the relevant tribunal, and, in effect, identifying the parties and the grounds on which the aggrieved party was seeking a determination of a question of law.

26. I share the view expressed by Clarke J. that it is not appropriate for affidavits filed either in support of or against appeals of this type to include any new or additional materials, whether by way of argument or background, and I do not propose to consider any such material for the purpose of the present appeal.

The first point of law raised

27. Having established the appropriate legal framework within which the present appeal must be considered, I turn now to deal with the first point of law that the appellant has raised. The appellant contends that the Tribunal misinterpreted s. 3(2)(g) of the Act.

28. Insofar as I can ascertain, this argument derives from, or is inextricably bound up with, the assertion that the Tribunal either misinterpreted or misapplied its own earlier decision in the case of *Zhang v. Holohan* (17th January 2012, Reference No. TR168/2011/DR92/2011). In that case, the parties were in agreement concerning the following essential facts: the property at issue was a two-bedroom apartment; the tenant had exclusive occupation of one bedroom and non-exclusive occupation of the common areas (in that she shared them with the other tenant); and that the only period during which the landlord had occupied the premises was for a period of three nights after the parties fell into dispute.

29. While the landlord in that case gave evidence that the apartment had previously been his home and while it was agreed that the landlord had resided in the apartment for one period of three nights after the parties fell into dispute, the Tribunal noted that the landlord did not press the argument that the apartment comprised a dwelling within which the landlord was also residing, thereby taking the dwelling outside the scope of the Act by operation of s. 3(2)(g). Nevertheless, in light of the landlord's claim that all of his possessions were in the apartment, the Tribunal did go on to briefly address that point. In doing so, it recorded its finding, as a matter of fact, that the landlord stayed in the dwelling for only three nights during the 16 month duration of the tenancy at issue. By reference to that finding, the Tribunal expressly rejected the landlord's claim that he also resided in the dwelling and that, in consequence, the tenant's claim fell outside the scope of the Act.

30. The primary jurisdictional issue considered by the Tribunal in *Zhang v Holahan* was the landlord's argument that the property concerned fell outside the scope of the Act because it was not a "dwelling", as that term is defined under s. 4(1) of the Act, on the basis that it was not "a self-contained residential unit".

31. In its decision in *Zhang v. Holohan*, the Tribunal held itself bound to give the term "self-contained residential unit" its ordinary and colloquial meaning, on the authority of the decision of the Supreme Court in *Inspector of Taxes v Kiernan* [1981] IR 117. In doing so, it concluded:

> "It is the view of the Tribunal that the ordinary meaning of "*self-contained*" as regards a *unit* means – "*containing within itself all parts necessary for completeness*" or put another way "*something which is complete on its own and doesn't need anything else*" or "*constituting a complete and independent unit of itself*."
>
> Consequently, a "*self-contained*" residential unit must mean a unit which enables the person residing there to have all the essentials for living *i.e.* for sleeping, washing, cooking, toiletry and relaxing."

32. Returning to the decision now under appeal, the Tribunal's conclusion on the arguments that were raised on the appellant's behalf concerning the relevance and application of the decision in *Zhang v. Holahan* were that, although the Tribunal considered that case to be informative on the question of what constitutes a self-contained residential unit, it was nevertheless a case that included a clear finding that the landlord was not residing in the dwelling at issue there.

33. Insofar as it may be argued that a consideration of the extent to which the appellant's accommodation comprises a "self-contained residential unit" is a necessary element in considering the wider question of whether the landlord resides in that accommodation with the appellant, it is important to note that the facts of the present case (as found by the Tribunal) were quite different from the facts found or agreed in *Zhang v. Holohan*. At paragraph 15 of this judgment, I have already set out the Tribunals findings of fact in this case, and at paragraphs 28 and 29 I have described the much more straightforward facts that were agreed between the parties or found by the Tribunal in *Zhang v. Holohan*.

34. Even if I were persuaded that I should take a different view of the facts than the one reached by the Tribunal in this case (and I am not so persuaded), it is clear, by reference to the principles already considered, that it would be entirely wrong to do so.

35. That is because, as Gilligan J. put it in *ESB v. Minister for Social Community and Family Affairs*, *supra*, the Court's own view of the decision arrived at is irrelevant. The court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Tribunal to arrive at any inferences drawn and,

adopting a reasonable and coherent view, to arrive at its ultimate decision. I am satisfied that there was a basis in evidence for the Tribunal's primary findings of fact; that it was open to the Tribunal to draw an inference from those facts that the notice party was residing within the same dwelling as the appellant for the purpose of s. 3(2)(g) of the Act; and that it was open to the Tribunal, adopting a reasonable and coherent view, to arrive at its ultimate decision that it did not have jurisdiction under the Act to consider the appellant's appeal.

36. Finally on this point, it is necessary to add that I have been unable to identify any error of law in the approach adopted by the Tribunal in this case. More particularly, I am satisfied that the Tribunal did not err in law in its interpretation (or application) of the provisions of s. 3(2)(g) of the Act.

The second point

37. The second point of law relied upon by the appellant is his contention that the Tribunal and its Chairperson employed unfair procedures during the hearing of his case. Specifically, the appellant alleges that the Chairperson acted in breach of s. 170(1)(c) of the Act and in breach of the principle "*nemo iudex in causa sua*" (that is, the principle that no one should be a judge in her own cause or, as it often described, the principle against bias).

38. Section 170(1)(c) of the Act requires various persons associated with the Board, including Tribunal members, to take no part in the consideration of a matter if the person concerned has a pecuniary interest or other beneficial interest in, or material to, that matter. Accordingly, it would appear that the appellant is asserting that the Chairperson of the Tribunal that heard his appeal had a pecuniary interest or other beneficial interest in, or material to, that appeal, such that she should have recused herself from hearing it.

39. The basis for this assertion, in so far as there is one, is set out in a single paragraph of the appellant's first affidavit, in which he avers:

> "The Tribunal Chairman Dervla Quinn is a member of the local community, and her address is… less than one and a half miles from Butterfly Hill where the Appellant Deponent resides, less than a mile from [an equestrian establishment owned by the landlord's sister in law A], and in fact Dervla Quinn could be almost her next door neighbour, and less than five hundred yards from [the landlord's sister in law B and her sons]. The Appellant Deponent has met the Tribunal Chairman at least once, if not more times in connection with her equestrian pursuits, prior to the Tribunal Hearing. The Chairman should have refrained from taking part in considering these matters under Section 170(1)(c) of the Act."

40. At paragraph 19 of the affidavit that she swore on the 21st February 2014, Ms. Quinn responded to those averments in the following terms:

> "…I say that I have never met [the landlord], have no recollection of ever meeting [the landlord's deceased husband] or the Appellant, am unaware of the location of the rented dwelling and I was not aware that a neighbour of mine is a sister in law of the [landlord] until I had sight of the Grounding Affidavit of the Appellant."

41. By reference to the evidence just described, I conclude that the appellant has failed to identify, much less establish, any pecuniary interest or other beneficial interest in, or material to, his appeal on the part of the Chairperson that would require her to take no part in the consideration of the matter. Accordingly, I am satisfied that the appellant has failed to establish any breach of s. 170(1)(c) of the Act on the part of the Tribunal or its Chairperson.

42. As regards, the appellant's allegation of bias on the part of the Chairperson and, by extension, the Tribunal in the consideration of his appeal, I must apply the accepted test in that regard, being that set out by the Supreme Court in *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412. It is whether the relevant facts would give rise to a reasonable apprehension of bias in a reasonable person. I am quite satisfied that neither the fact that the Chairperson lives in the same locality as the parties, nor the fact that a sister in law of one of the parties is a neighbour of the Chairperson, nor the fact that the Chairperson has an interest in equestrian pursuits in common with any relation of any of the parties, nor the fact that the Chairperson has previously encountered any of the parties (if that has occurred) is sufficient to give rise to a reasonable apprehension of bias in a reasonable person, whether those facts are considered individually or in combination. I conclude, therefore, that the appellant's argument must fail on this point also.

43. For the sake of completeness I should add that it is evident from the transcript of the hearing before the Tribunal that no issue of bias (or breach of s. 170(1)(c) of the Act) was raised on the appellant's behalf by the solicitor who represented the appellant at that hearing. Were it necessary to do so, I would also be disposed to find that the appellant is not entitled to raise the issue of bias for the purpose of the present appeal, in circumstances where he failed to raise it before the Tribunal and there is no suggestion that the facts upon which he now seeks to rely (such as they are) were not within his knowledge at that time. That finding is based upon the doctrine of waiver, the rationale behind which was explained in the following way by Henchy J. in *Corrigan v. Irish Land Commission* [1977] I.R. 317 (at 326):

> "The rule that a litigant will be estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways"

44. Finally, in circumstances where it is unnecessary to do so, I express no view on the submission made on behalf of the Tribunal that the statutory procedure under s. 123(3) of the Act whereby a decision of the Tribunal can be appealed to this Court on a point of law is not the appropriate mechanism by which to seek to quash any such decision on grounds of bias.

Conclusion

45. For the reasons set out above, this appeal on a point of law must fail.