THE HIGH COURT

[2016 No. 716 J.R.]

BETWEEN

VOLKSWAGEN GROUP IRELAND LIMITED AND VOLKSWAGEN AG

APPLICANTS

AND

EITHNE HIGGINS

RESPONDENT

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 5th day of December, 2017

Nature of the Case
1. This is an application for judicial review on behalf of the applicants arising out of the conduct of civil proceedings by a District Court Judge. The civil proceedings involve a claim by the respondent, Ms. Higgins, for damages for breach of contract in connection with her purchase of a car which is affected by a C02 or NOx emission issue. Issues relating to the jurisdiction of the District Court in a civil claim for breach of contact, and the proper procedures for determining this issue, arise for consideration. Complaint is also made that there was a breach of fair procedures on the part of the District Judge and/or that she acted in excess of jurisdiction. An unusual feature of the case is that it had not concluded in the District Court at the time leave was granted for the within judicial review; the case before the District Court was technically still at the pre-trial discovery stage, although, as will be discussed, this had evolved into a hearing of an unusual kind.

2. The reliefs sought by the applicants include (1) prohibition of the trial; (2) a declaration that the Castlebar District Court has no jurisdiction to hear the case; (3) (in the alternative) a declaration that the case proceed only before a judge other than the judge who previously dealt with the case; (4) (in the alternative), a declaration that the jurisdictional issue be heard in advance of any other aspect of the case; (5) if necessary, *certiorari* of any decision made on the 7th May 2016, 6th September 2016 or otherwise 'determining that the Castlebar District Court has jurisdiction in respect of the respondent's case'; (6) a declaration that the hearing has not been conducted in accordance with fair procedures and/or in due course of law and /or the judge's conduct of the proceedings exceeded or caused her to act in access of jurisdiction; (7) *certiorari* in respect of a number of rulings; and (8) prohibition with regard to the making of further orders relating to discovery.

Jurisdiction of the District Court in contract cases
3. The relevant provisions, for present purposes, concerning the jurisdiction of the District Court in contract cases are as follows. S79 of the Courts of Justice Act, 1924 provides that the jurisdiction in civil cases shall be exercised by a Judge assigned to the District "wherein the defendant or one of the defendants ordinarily resides or carries on any profession, business or occupation". S.53 of the Courts of Justice Act, 1936 provides that any civil proceedings founded on contract within the jurisdiction of the District Court may be brought, heard and determined at the election of the plaintiff before the Judge for the time being assigned to the district wherein the contract is alleged to have been made.

Relevant District Court Rules
4. Order 40 of the Rules of the District Court provides that a civil proceeding must be commenced by the filing for issue and service of a claim notice, and that the claim notice must be filed and issued by the clerk for the court area (a) in which the respondent or one of them ordinarily resides or carries on any profession, business or occupation, or at the election of the claimant, (b) in proceedings founded on contract in which the contract is alleged to have been made.

5. Order 44, inserted by SI17/2014, provides in r. 1(1) that the Order, unless otherwise provided for by the Rules, applies to any interlocutory or other application in civil proceedings, and in rule 1(2) that nothing in the Order limits the power of the Court to make any interlocutory order or give a direction without the issue of a notice of motion in an appropriate case.

6. Order 49A(1) provides that the court may, at any time and from time to time, of its own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of civil proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

7. Order 50 deals with affidavits in civil proceedings. Order 50 rule 18 provides that (1) The Court may direct the deponent to any affidavit to attend at the trial or hearing at which the affidavit is to be used, where it considers the deponent's attendance necessary in the interests of justice; (2) Unless the Court has ordered otherwise, a party may, by written notice served on the party relying on the affidavit concerned at least seven days before the trial or hearing, require the deponent to any affidavit to attend at the trial or hearing at which the affidavit is to be used, for the purpose of being cross-examined and (3) In any case mentioned in sub-rule (1) or sub-rule (2) in which the deponent does not attend at the trial or hearing, the affidavit may not be used, unless the Court orders otherwise.

Relevant chronology
8. On the 3rd November, 2014, the respondent Ms. Higgins purchased a second-hand Seat vehicle from Rochford Motors (Ballyhaunis) Ltd. Some ten months later, on the 22nd September, 2015, the second named applicant publicly disclosed irregularities concerning a particular software used in certain vehicle engines. In October, 2015, the first applicant notified Ms. Higgins that her vehicle was affected by software built into the vehicle which causes "discrepancies in the values for oxides of nitrogen (NOx) during dynometer runs." On the 16th November, 2015, a letter was issued threatening legal proceedings from solicitors on behalf of Ms. Higgins, O'Dwyer Solicitors.

The issue of the respondent's Claim Notice
9. On the 18th November, 2015, two days later, District Court proceedings were issued on her behalf by Claim Notice in Castlebar District Court. The Claim Notice pleaded that by contract at Ballyhaunis, Co. Mayo, the claimant purchased a motor car from "the a [sic] Dealer authorised by the First Named Respondent to sell his motor cars and as distributed from the First Named Respondent and manufactured by the Second Named Respondent". Paragraph 7 of the Claim Notice pleaded that "the contract the subject matter of these proceedings was entered into between the claimant and the respondents in Ballyhaunis, Co. Mayo within the District Court of Castlebar, District Court Area No. 3". It may be noted that the grounding affidavit sworn by Mr. Steven McDonnell on behalf of the applicants in the present proceedings avers that the company Rochford Motors (Ballyhaunis) Limited was not an agent for the

applicants. As regards the substance of the claim, it was pleaded in the Claim Notice that dishonest representations had been made with regard to the vehicle's technical specifications, emissions, fuel efficiency and performance.

10. On the 29th February, 2016, an appearance and defence were delivered. The defence raised a preliminary objection as to jurisdiction. It was pleaded that the respondent failed to disclose jurisdiction in the District Court area of Castlebar, as her assertion that the contract between her and the applicants was entered into in the District Court area was incorrect. It was pleaded that no such contract exists, that the defendants were strangers to the contract for Ms. Higgin's vehicle, which was entered into with an authorised third party dealer, that each of the defendants' registered offices were in Dublin and Germany respectively and that no facts were pleaded by the respondent which permit the identification of the Castlebar District area as the appropriate jurisdiction.

11. On the 1st April, 2016, a request for voluntary discovery was made on behalf of Ms. Higgins and on the 22nd April, 2016, there was a response refusing this discovery request. It was refused, *inter alia*, on the ground that the document sought related to CO2 emissions when the defect in the car related to NOx emissions. On the 12th May, 2016, a discovery motion issued, which was returnable for the 27th May. On the 25th May, 2016, two days before the return date for the discovery motion, solicitors on behalf of the applicants, A&L Goodbody Solicitors (hereinafter "ALG") wrote a letter to solicitor on behalf of the respondent, Mr. O'Dwyer, proposing case management of these proceedings and other proceedings. The letter noted that there were 11 identical proceedings ongoing in six District Court areas against the applicants, all issued by the respondent's solicitor and that these proceedings were identical in all respects save for individual client details. It noted that the defences and appearances lodged by the respondents in relation to eight of proceedings were identical, and that the respondent's solicitor had issued identical requests for discovery in seven of the proceedings and four identical applications for discovery. Ten other letters before action had been sent to respondents in respect of other clients of the respondent's firm of solicitors. In light of the related, and in some instances identical, matters in the different proceedings, the applicants proposed case management of the proceedings by a District Court judge or by the President of the District Court in order to avoid unnecessary costs and time to both the parties and court resources.

12. There then followed, between the 27th May, 2016 and the 6th September, 2016, a series of court hearings in the District Court and a considerable degree of correspondence between the solicitors for the parties between those hearings. It is necessary in order to deal with the issues in this case to refer in some detail to what transpired at the court hearings. The Court has the assistance of a number of transcripts in this regard.

The hearing on the 27th May, 2016

13. The 27th May, 2016 was the return date for the discovery motion which had issued on behalf of Ms. Higgins. This was the first court hearing in relation to the case. Before the discovery motion was dealt with, counsel on behalf of the applicants, Mr. Fogarty, addressed the Court. He said that while there was no formal application before the court, he wished to flag that they would like to suggest that the matter be case managed. He suggested "an approach being made to the President of the District Court in Dublin with a view to perhaps appointing a judge in conjunction with the various district colleagues to deal with these cases in their totality". He indicated that the present case was one of a number of cases which had been issued on behalf of various plaintiffs by the same solicitor over a number of districts. He referred to the proposal made in their letter of the 25th May, 2016. Returning to the issue of an application to the President of the District Court, suggested that it might be sensible to adjourn the case to see whether this course was one which could actually work. In the course of exchanges between the Judge and counsel, the Judge replied that there was no provision within the Rules for such an application to be made to the President, and said that each judge sitting in his or her district outside the Dublin Metropolitan District had complete autonomy and responsibility for the administration of his and her court and the running of cases and the management of those cases. Therefore, the President would not have a role to play outside the parameters of the management of the courts in Dublin Metropolitan District or the allocation of moveable District judges. In the course of these exchanges the Judge showed a degree of irritation with counsel for what she perceived as his lack of familiarity with District Court procedures, as well as the his lack of knowledge of the gender of the President of the District Court.

14. A second matter raised by counsel for the applicants on this date was that, he said, the motion for discovery had been issued on the erroneous premise that the problem with the vehicle was that it was a CO2-affected vehicle when in fact it was a vehicle suffering from a NOx emission problem. He indicated that his client was of the view that the respondent would have to amend the pleadings in order to reflect this. For brevity, I will refer in this judgment to this particular issue i.e. whether the problem affecting the car purchased by Ms. Higgins related to CO2 or NOx emissions, as "the CO2/NOx issue". It may be noted that counsel's submission on this point was effectively to the advantage of Ms. Higgins, insofar as the applicants were pointing out a potential flaw in her pleadings which she might need to amend.

15. Thirdly, counsel on behalf of the applicants went on to refer to an objection that was being made by the defendants to jurisdiction on the basis that there was no contract within the jurisdiction of this District Court which related to the particular parties being sued. He indicated that they were hoping to reach an accommodation with Ms. Higgins regarding jurisdiction, because there certainly was jurisdiction in Dublin on the basis that the defendant was incorporated there. He indicated that they had written to the solicitor on behalf of the respondent and were awaiting a response, but that if the reaction were negative, the applicants would then have to make a formal application to the court regarding jurisdiction, upon which the court would have to rule. He indicated that it was in that context that they had raised the issue of case management, and that it seemed an appropriate course to look at the reality of the situation and if multiple courts across the country were going to be hearing the same matters, it might be more sensible to use the court resources in a way that allowed the court to build up the expertise and avoiding the necessity for a formal challenge to what they believed was an erroneous assertion of jurisdiction.

16. Thus, three points of a legal nature were made, one of which was an application which, as counsel soon learned, could not be progressed; the second of which was actually beneficial to Ms. Higgins; and the third of which was the flagging of a perfectly valid legal issue, namely the issue of the court's jurisdiction. I am at a loss, therefore, to understand the tone of the response from the solicitor on behalf of Ms. Higgins at this stage. The opening salvo of his reply was that what was "really going on here is that there is a desperate attempt on the part of the [applicants] to have these cases not heard". It is difficult to understand why this comment was made when the applicants were merely seeking a transfer to another Judge/District, rather than some kind of dismissal of the proceedings. He went on to recite the history of the resignation of a chief executive officer of the second applicant and the acceptance by the company that wrong had been done. He referred to the letter which had been issued to his client, and referred to correspondence between himself and the applicants. He went on to say that this was a "desperate attempt on the part of the respondents first of all without any practical knowledge of the way the District Court runs to have all of the cases taken out and moved to Dublin." He referred to the correspondence from ALG and, *inter alia*, said that he had many clients from around the country and "they are entitled to have their dispute dealt with in their local District Court". He made numerous criticisms of points made in the correspondence which I do not propose to deal with here. In my view, the tone of this response was unnecessarily combative and aggressive, given the three discrete legal issues that had been raised on behalf of the applicants. Further, he was incorrect insofar as he was asserting that litigants have a right to have their cases dealt with in the District Court locality to where they live; the jurisdiction in contract cases is based on where the relevant contract was made or where the defendant has its place of business.

Further, the question of jurisdiction is a discrete technical, legal point which any litigant may raise irrespective of the merits of the case itself. The public admission of wrongdoing by VW had nothing at all to do with this issue. This tone was maintained by Mr. O'Dwyer throughout subsequent hearings.

17. Importantly for present purposes, however, I note that the Judge then asked what he said with regard to the "third item" raised, namely the issue of jurisdiction. Mr. O'Dwyer said that it was a matter for evidence: that as the applicant had raised it in their defence it was a matter for evidence, that the pleadings were not yet closed, and that notice of trial had not been served. On this point, as I will explain further below, I believe that Mr. O'Dwyer was correct.

18. When the Judge asked him about the CO2/NOx emissions point made by counsel, Mr. O'Dwyer replied that he was "hamstrung" because of the fact that he did not yet have discovery. He again referred to the fact that his pleadings were not yet closed and said that if he could net down the issues after discovery, he would then have to "fine-tune" his pleading before closing them, because he was "in the dark". Thus, from the earliest stage, the approach of Mr. O'Dwyer was to link the discovery application with trying to establish the precise case he needed to make on behalf of his client. This is simply not appropriate; it is well-established that the discovery process should not be used to work out a plaintiff's case but rather to gather documents to support a case already pleaded. Other mechanisms, such as interrogatories, may be used to gather different types of information, but discovery is a particular procedure with a particular and limited purpose. As Murray J. stated in *Framus Ltd. v CRH plc* [2004] 2 I.R 20 at para. 64:

> *"the sole purpose of discovery of documents is to enable the party seeking it to advance an existing case or to defeat the case of the other party and is not to enable the party seeking discovery to search for or to set-up a case."*

McCracken J. also set out the parameters of discovery in *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001):-

> "1. The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.
>
> 2. Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that O. 31, r. 12 of the Superior Court Rules specifically relates to discovery of documents 'relating to any matter in question therein'.
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> 3. It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties' documentation is not permitted under the rules."

19. The Judge, having heard again from counsel on behalf of the applicants, ruled as follows:

> "The first issue is the question of what your instructing solicitor chose to call case management and the involvement of the President. And I repeat it may be your lack of familiarity, Mr. Fogarty, and indeed the same lack of familiarity of your instructing solicitor with the District Court, which has led you to suggest what your instructing solicitor did so suggest. I repeat the autonomy of each District judge outside the DMD is a fact. Therefore, you may take it I will proceed to deal with this case. That is the first issue. The second issue is the question or whether or not as you say, Mr. Fogarty, Mr. O'Dwyer's claim is incorrectly based in that it seems to be based on CO2 emission defect, if I might put it in that rather general way, and opposed to the NOx. That however, in my view can be considered and I hope resolved when I am hearing the application for the order for discovery. If there is enough evidence produced by you in response, I can direct the discovery to be discrete, to be explicit and to refer to certain items. Therefore, the matter can proceed and will proceed. Now, do you want me to deal with it today?"

Having heard submissions, the Judge then fixed the 7th June, 2016 as the date for the hearing of the application for discovery. Again, it is also clear that from an early stage, the Judge as well as the solicitor for Ms. Higgins mistakenly appeared to view the discovery application as a vehicle which would assist in establishing the precise case that would or should be made on behalf of Ms. Higgins. Notably, the Judge did not say anything at all about the jurisdictional pointed raised by counsel for the defendants subsequent to Mr. O'Dwyer having said that it would require the hearing of evidence in the future.

20. In summary, as matters stood at the conclusion of the hearing on the 27th May 2016, the Judge had rejected the application relating to case management/requesting the President of the District Court to allocate a specific judge to all of the cases: she had fixed a date in relation to the application for discovery: and while the issue of jurisdiction had been flagged on behalf of the applicants, she *had* not ruled upon it. It is important to note the latter point because she would later assert that she had ruled on the jurisdiction point on the 27th May, 2016.

The hearing on the 7th June, 2016

21. On the 7th June, 2016, the case came before the District Judge again. It was indicated to the court by Mr. O'Dwyer that he had written to ALG on the 29th May, seeking consent to the amending of the pleadings in order to address the issue (CO2/NOx) referred to on the last occasion. He had not received consent and therefore he had served a motion. There was then some discussion as to whether adequate notice had been given to ALG, and whether the amended pleadings had been available to the solicitors on behalf of the applicants such that they could reasonably have consented. The judge intervened at one point to say that it was unusual for such a "degree of animus to be present" between the parties, that she did not know the origin of it but she would like it noted and would wish it to stop immediately. She then indicated that she was allowing the motion to amend the pleadings. I would observe in passing that I agree with the Judge's comments in relation to animosity between lawyers.

22. Mr. O'Dwyer then presented his motion for discovery. In the course of this application, there was some discussion between counsel for the applicants and the judge of the CO2/NOx issue. In the course of this, the Judge indicated, *inter alia*, that, having read the papers, she herself thought that expert evidence was required on the issue, and also that she was considering making an interim discovery order. Mr. Fogarty indicated certain difficulties in relation to taking instructions at short notice but said that, while he was not in a position to consent, the court had "succinctly identified the core issues" and if that core issue was made subject to an order, he would have to conform to it, but he was conscious "of the future instructions". There were further discussions and time was given to see if the parties could agree matters between themselves, but this proved fruitless.

23. The Judge then said that she would make an interim order that "all documentary, technical, expert original evidence indicating

which if either or both issues, i.e. relating to nitroxide and CO2 emissions affect the claimant's car to be produced to the applicant". She suggested a timeframe of six weeks for the swearing of the affidavit of discovery. Mr. Fogarty indicated that they wished to clarify who might be an appropriate deponent. It was accepted that the deponent should be someone with a technical or scientific background. He suggested that they might in due course write to Mr. O'Dwyer with details of a proposed deponent, and subject to there being no objection to this, they would then notify the court of the deponent's name. The matter was then adjourned to the 6th September.

24. In summary, on this court date, an interim order for discovery was made, and it had been agreed that a person in the nature of a technical expert would swear the affidavit of discovery. There had been little or objection by counsel on behalf of the applicants as to the course of action proposed by the District Judge. The issue of the jurisdiction of the District Court was not raised at all during this hearing, and no motion relating to this issue had issued since the last occasion on which the case was before the court. The six-week period fixed for discovery was due to expire on the 19th July, 2016.

The hearing on the 5th July, 2016

25. The Judge had granted liberty to re-enter the case before her if any matter arose. On the 5th July, 2016, the solicitor on behalf of the respondent called for the proceedings to be mentioned. The transcript of the hearing indicates that he did so because he had an issue relating to the suitability of the deponent. There were various exchanges in court as to when certain correspondence had been sent and whether and when it had arrived. Counsel for the applicant told the court that there had been "obviously a very serious breakdown in communication". Again, there was a degree of acrimony between the parties and the judge intervened at one point to ask whether she had to make a direction as to how two very long-established solicitor's offices had to communicate with each other. Mr. O'Dwyer described the situation as being one of "David versus Goliath".

The hearing on the 22nd July, 2016

26. It appears that the defendants' affidavit of discovery, sworn by one Steven McDonnell, was sworn one day late. It also appears that Mr. O'Dwyer, not having received the affidavit on the 19th July, listed the case for mention before the District Court for the 22nd July. At this hearing, counsel for the applicants explained that the one-day delay in the finalising of the affidavit of discovery had arisen. Apparently the delay was caused by a difficulty in sourcing a notary public while the intended deponent was on holiday in Ibiza. In passing, I observe that a day's delay in the swearing of an affidavit is a matter of very little significance, but it was referred to repeatedly by Mr. O'Dwyer on various occasions, apparently to show that the applicants were contemptuous of the court.

27. In the course of various exchanges on this date, the following points are of note. First, the Court invoked Order 49A of the District Court Rules in order to case-manage the case. Secondly, Mr. O'Dwyer informed the court that he would need an opportunity to reply to the affidavit of discovery and might need to call witnesses and also sought an opportunity to cross-examine the deponent. Thirdly, the Judge indicated that Mr. McDonnell, the deponent, should attend for cross-examination on the 6th September. Although counsel for the applicants said that it was highly exceptional for cross-examination to take place in relation to an application for discovery, the Judge did make it clear she was going to allow cross examination. She also indicated that if Mr. O'Dwyer "is calling expert evidence in that regard that will be dealt with on that date". Mr. O'Dwyer indicated that if experts were to be called by his client, he would notify the applicants of their identify and furnish the reports to the applicants on or before the 1st September.

28. It is true that no order for the cross-examination of the deponent appears to have been formally drawn up, but it is apparent from the transcript that the applicants could not have been under any impression at the conclusion of the hearing other than that there would be oral evidence on the 6th September, including the cross-examination of the deponent and possibly also expert evidence on behalf of Ms. Higgins. I will have comments to make later about the appropriateness of the procedure itself, but I do not think there can be any doubt, having read this transcript, that the applicants knew at this stage what was being proposed was an oral hearing and something much more than "housekeeping", as counsel would later assert.

The Motion relating to Jurisdiction is issued on behalf of the applicants

29. On the 15th August, 2016, Mr. O'Dwyer notified ALG of his intention to list proceedings before Judge Devins on the 1st September. On the 24th August, 2015, the applicants issued a formal motion challenging the jurisdiction of the Castlebar District Court, returnable for the 1st September, 2016. Events then proceeded on the 1st September, 2016, an important date in the chronology of hearings before the District Court, as follows.

The hearing on the 1st September, 2016

30. Matters did not get off to a good start. When the matter was first called, the legal team on behalf of the applicants was not present. I was most surprised to see that the matter nonetheless proceeded in their absence, with Mr. O'Dwyer making submissions and orders being made, without the matter being put to second call or allowed to stand in the list in the first instance. Mr. O'Dwyer explained he had filed the affidavits he intended to rely on and outlined the three witnesses he intended to call to rebut the applicant's evidence, with an estimated time it would take for the witnesses to give their testimony. He also told the Court he intended to add a further affidavit in the form of a report from the Nobel-Prize winning economist Dr. Joseph Stiglitz. He gave an undertaking to the Court to deliver his replying documents to the applicant's solicitors that day. The Judge queried the absence of the applicant's legal team twice, first by asking Mr. O'Dwyer, who told the Judge that he had put the applicants on notice that the matter was in for mention, and secondly by asking the registrar if he had been notified of the applicant's absence.

31. Subsequently, the legal team for the applicants arrived. Mr. Fogarty told the court that there had been an accident on the M50 which had delayed them coming down and apologised for their lateness. Again, I note, with some dismay, that a comment was made by Mr. O'Dwyer questioning the truthfulness of the explanation offered, indicating the level of animosity he appeared to have towards the legal team travelling for the applicants. In any event, the Judge explained to counsel for the applicant that Mr. O'Dwyer had simply indicated that his replies had been filed and that he was undertaking to deliver them, and that she had done no more than indicate that the motion for discovery would proceed on the 6th September. There then followed quite a lengthy series of exchanges, the most important points from which I will now endeavour to summarise.

32. First, as regards the proposed hearing on the 6th September, Mr. Fogarty said that his understanding was that it was "essentially for mention" and that there was no question of hearing evidence. Mr. O'Dwyer indicated that said that he had asked the court under O. 49 that the deponent, Mr. O'Donnell, would be called as a witness and that the court had "granted that order". He then went on to deal with his three replying affidavits. He said that there was now a flurry of activity on the part of the respondents at a very late hour to try and prevent the court from hearing the discovery application on the 6th of September. Mr. Fogarty disagreed with Mr. O'Dwyer as to what happened on the 22nd July, and said that the court had not made an order directing the attendance of the deponent, Mr. O'Donnell, but merely suggested that he be present in court. He submitted that it was an extraordinary procedure if there were oral evidence in the manner suggested, which would amount, effectively, to a trial of the issue in the case.

33. Secondly, as regards the jurisdiction issue, in respect of which there was a motion with this date as the return date, Mr. Fogarty

submitted that this issue should logically be dealt with first in time. Mr. O'Dwyer applied for an adjournment of this motion in order that he might file a replying affidavit. In opposing the application for an adjournment, Mr. Fogarty referred to the issue of jurisdiction having been dealt with in other District Courts in a particular way and he spoke of Mr. O'Dwyer's involvement in those cases and submitted that Mr. O'Dwyer did not need time to prepare for the motion. At one point, the Judge said that this was the first time Mr. Fogarty had mentioned jurisdiction, but then corrected herself and said it was the second time any mention had been made of jurisdiction, the first mention of it having been in May. The Judge then said that she had "made a ruling, which was a ruling and that was it". Mr. Fogarty said there was no application before the court at that time, and the judge replied "but this is now, but you did argue it". Mr. Fogarty insisted that there was no application before the court in May and therefore the issue of jurisdiction had not been dealt with. The Judge said that she had indicated a certain attitude at that stage, and that she had a note and a DAR print-off, so she knew exactly what was said. Mr. Fogarty said that this was not the first such application and that the substance of it was already well known to Mr. O'Dwyer. The judge asked whether he meant "not the first such application in this court". Mr. Fogarty replied "no, it's the first time this application has been before the court". The Judge disagreed with him and said that she had gone through her note of the first day. Mr. Fogarty reiterated his submission that it was not before the court on the first day because there was no motion at that stage. The judge said that it, i.e. the application in relation to jurisdiction, did not have to be in a format other than an oral format, a proposition with which Mr. Fogarty disagreed. The Judge asked whether he would consent to an adjournment of the jurisdiction motion. In substance, Mr. Fogarty objected to an adjournment on the basis that Mr. O'Dwyer had been given the full 7 days notice and that he had previously dealt with the same issue in other district courts. He accepted that his clients "perhaps little but slow off the mark" with regard to the jurisdiction motion, but said that from the very outset there had been an issue of jurisdiction that had never been withdrawn. Until there was a motion before the court, it could not be ruled on. Mr. Fogarty did, however, concede that while he was opposing an application for an adjournment, the court did have such jurisdiction to adjourn "as part of its commitment to fairness to the party". The Judge then decided to adjourn the motion relating to jurisdiction and said that she would mention to the matter again at 4pm and decide on an appropriate date and time for the adjourned motion.

34. When the Judge came to rule, after 4pm, she referred to O.44 and said that it provided that nothing therein limited the power of the District Court to make any interlocutory order or give a direction without the issue of a notice of motion. She said that it appeared to her that procedure and protocol had been observed. She said that the case was unusual in that it had stemmed from the public pronouncements of Volkswagen. She said that in an effort to establish details of the action relating to this particular claimant, she had heard an application of discovery and ruled on it in specific discrete terms. She said that the affidavit of discovery and scheduled documents were received, lodged with the court and served on the claimant. The claimant had then referred in open court to replies to the said affidavit, which would be filed in turn before the 1st of September and served on the respondent. She said that the date of 6th September had been identified as far back as the 7th of June as the date on which the interim discovery "substantively would be considered". She said that it seemed to her the only way to verify and "establish the issue, if any, effecting the claimant's car was by way of oral hearing involving the cross examination, if necessary of the relevant deponent in relation to discovered material and documents." She referred to previous dates and said that it would seem clear that the 6th September was clearly noted as "the date for the preliminary hearing. She thought that if the court were to ascertain the real question that issued between the parties, it was incumbent on her and in accordance with Order 49A to direct that the matter proceed on the 6th September in order to "isolate and establish the true issue or issues in this case". She then went on to say that she believed that Mr. Fogarty had more or less agreed that the issue of jurisdiction might be adjourned. There was then an exchange between them in which Mr. Fogarty was indicating his view that the jurisdictional matter should be dealt with first because it might not be necessary to deal with any other matters if he were successful, and the Judge was saying that he had already agreed that the discovery matter was separate from the jurisdiction. She said "I am taking it that I am dealing with the discovery first". There were then further exchanges between the parties, following which Mr. Fogarty sought to clarify the scope of the hearing in relation to discovery. He wished to clarify whether the cross examination was in relation to "a potential trial of an issue within the case" or "an issue in relation to the adequacy of discovery". The judge replied that she thought she had indicated in her preliminary interim judgment, which she had just given, that "the discovery is an effort to establish the case". Mr. Fogarty said that he would have to take his client's instructions because their understanding was different.

The hearing on the 6th September, 2016

35. On the 6th September, 2016, the hearing commenced with a discussion about the costs of a stenographer. Mr. Fogarty then informed the court that the deponent, Mr. McDonnell, who had sworn the affidavit of discovery, was not present in court, and that the reason for that was that his clients had taken legal advice and were satisfied that the court had no jurisdiction, and that the court had showed an "apparent determination to conflate substantive and procedural issues in the interim without regard to the fundamental question as to the court's lack of jurisdiction". There were certain interventions by the Judge, first, inquiring as to who precisely had given this legal advice, and then inquiring what document Mr. Fogarty was reading from and requiring that the document be furnished to Mr. O'Dwyer. Mr. Fogarty then indicated that his instructions were that if the court insisted on proceeding with the oral hearing before dealing with the jurisdictional issue, the legal team were to absent themselves from court and proceed by way of judicial review. He complained of the lack of clarity as to the purpose for which the evidence was being taken, particularly from the three witnesses being called by Mr. O'Dwyer. I should say, however, that he made clear that the objection was not merely to the three witnesses, but also to the cross-examination of the deponent, who had not, in any event, attended court.

36. Mr. O'Dwyer, in reply, engaged in a general criticism of the attitude of the applicants' behaviour, made criticism of their attitude to the Irish courts, referred to their "endless resources", and alleged there had been an attempt by the applicants to bully the court, referring to the court being "threatened" with judicial review. In terms of the legal issue now before this Court, I note that he referred to the discovery order made on the 6th June as "an order that the court wanted to establish if there was a prima facie case to be made by the claimant or not", because if there was no prima facie case "that is the end of the case". He described a situation where a "global international company" was causing "unruliness" and "chaos" and that they were trying to "pull the wool" over the Judge's eyes.

37. Mr. Fogarty replied and then the Judge spoke. She referred to the 27th May, 2016 and the application in relation to the President of the District Court. She referred to the jurisdictional issue raised on that day and said:

> "...That initial issue, I considered. And on the basis of my belief that when a car is bought from a person in the motor trade, that person in the motor trade is an agent for the type of car bought. In this case it was a SEAT. That trader, in my view, was an agent for VW. Therefore, the contract, in my view, was correctly entered into. And towards the conclusion of that first day of hearing, I noted for DAR and wrote: 'I accept jurisdiction and the motion will proceed'. That's the first point I want to stress".

As regards the motion for discovery, she referred to previous dates on which it was mentioned, and read out her notes of what she had said on the 1st September. She concluded by saying:

> "In a nutshell, the question of jurisdiction is *res judicata*. It was not appealed in any other court. Neither was any of my

subsequent directions or orders. The only way the claimant in this case can actually find out what issue, if any, affects her car is by way of discovery today. Since Volkswagen has chosen not to have the deponent of discovery in court, I now intend to proceed by hearing the witnesses on behalf of the claimant in relation to the affidavit of discovery."

38. The applicants' legal team withdrew at this point. The court proceeded to hear evidence from three witnesses in their absence. The first witness was an American attorney who had dealt with litigation, including discovery, involving VW in the United States and he was questioned by Mr. O'Dwyer about the adequacy of discovery made in the Higgins case as against what had been done in the United States. At one point, Judge Devins intervened to ask whether he had a view as to "the contrast in attitudes of VW in the Untied States and in the humble District Court in the West of Ireland". The second witness, who had scientific expertise enabling him to deal with car emissions from a technical point of view, was then called. When the third witness, an economist, was called, and before he gave his own evidence, a report of another person (the Nobel-prize-winning economist, Joseph Stiglitz) was "appended" to the witness' report and read into the record; as was an affidavit of Ms. Higgins, the plaintiff, which was also "appended to his report". The witness then gave his own evidence, which was in relation to the quantification of Ms. Higgins' loss. At the conclusion of the hearing, the Judge asked Mr. O'Dwyer if she was "to infer that you will be making an application for further and better discovery", to which she received an affirmative reply. She adjourned the matter to the next day. There are many things I could say about this hearing, but I will confine myself to saying that it was extremely lacking in focus and procedurally irregular.

39. On the 7th September, 2016, the Court heard from Mr. O'Dwyer. Many criticisms were made both by him and by the judge of the behaviour of the applicants' legal team on the previous day. The Judge made a finding that the discovery order was not complied with and said that the next step was to make an order for further and better particulars. She requested Mr. O'Dwyer to prepare a draft application which she would then consider. It may be noted that, on this date, she said: "The question of the jurisdiction was raised as far as back as May, I ruled on it, and no challenge ensued between then and the 1st September when it was raised."

40. On the 15th September, 2016, the applicants obtained leave to bring the within judicial review proceedings.

Time limits for judicial review
41. The respondent had pleaded that the application for judicial review was out of time insofar as the challenge was based on any alleged ruling of the District Judge dated the 27th May, 2016. The written submissions also dealt with this matter. However, at the oral hearing, it was conceded on behalf of the respondent that the District Judge had not made any ruling on jurisdiction on the 27th May, 2016, and therefore that the time-limit issue was no longer relevant, having regard to the transcript of the hearing on the 27th May, this was a sensible concession. The Judge had made no ruling on the jurisdiction issue on that date.

Whether the Applicants are precluded from raising an issue of jurisdiction because of a failure to enter a conditional appearance
42. It was pleaded in the Statement of Opposition that the applicants could not now dispute the jurisdiction of the District Court, having entered an unqualified appearance to the Claim Notice. I am not persuaded by this argument, having regard to the fact that O.42, r.(1) of the Rules of the District Court (as amended by S.I. 17/2014) provides for an appearance and defence at the same time, and that in this case, the applicants raised a defence based on jurisdiction in their defence at that time. In my view, they made it immediately clear that they would be raising this issue by way of defence.

Whether the Applicants are precluded from raising an issue of jurisdiction because they consented or acquiesced in the District Court assuming jurisdiction
43. It was also pleaded in the Statement of Opposition that the applicants could not now dispute the jurisdiction of the District Court, having taken numerous steps in the proceedings, including the making of discovery.

44. Even if parties could confer jurisdiction on the District Court by consent or acquiescence, upon which I reach no conclusion and which seems to me to be subject to doubt, it does not seem to me that the conduct of the applicants in the present case could in any event amount to such consent or acquiescence. The jurisdiction issue was raised in the defence from the outset, and it was mentioned to the court on the 27th May, 2016, the first occasion upon which the matter came before the court, as described earlier. It is surprising that the step of issuing a motion in respect of the jurisdictional issue was not issued on behalf of the applicants very soon thereafter. It is also unfortunate, because it might well have prevented the case from taking the unusual turns it did ultimately take if such a motion had issued in early course and the applicants had sought to insist from the outset that the jurisdictional issue be dealt with before any discovery motion proceeded. However, I am not prepared to go so far as to find that the conduct of the applicants was such as to consent or acquiesce to jurisdiction in the District Court.

Whether this Court should rule on the issue of the jurisdiction of the District Court
45. The precise relief sought at No. 2 of the Applicant's Statement of Grounds is a declaration by way of judicial review that the Castlebar District Court has no jurisdiction to hear the respondent's case, in that the claim as pleaded fails to properly disclose jurisdiction.

46. Although numerous authorities were cited to the Court in respect of the statutory foundations of the jurisdiction of the District Court, it seems to me that there was in this case no real dispute about the fundamental principles relating to jurisdiction but rather a dispute as to how and when a District Court should decide the issue of jurisdiction, including whether evidence should be taken on the issue when a jurisdictional point is raised or whether a case should be struck out if there is a failure to show jurisdiction on the pleadings, as well as how the High Court should deal with the matter in judicial review proceedings.

47. My view is that, where an issue as to jurisdiction is raised by a party in District Court proceedings, the District Court must satisfy itself, having regard to the pleadings and by hearing evidence if necessary, whether it has jurisdiction in accordance with the tests as set out in legislation. In turn, it seems to me that the High Court in judicial review proceedings should only engage with an issue of the jurisdiction of the District Court where a determination on jurisdiction has been made by the District Court itself and it is suggested that it is irrational/unreasonable within the judicial review meaning of those terms.

48. It was argued on behalf of the applicants that the claimant in a District Court proceeding cannot confer jurisdiction on the court simply by making baseless assertions of jurisdiction in the pleadings. I agree with that proposition only to this extent; once an issue as to jurisdiction is raised before the District Court, the court should investigate, with reference to evidence if necessary (and it may not always be necessary), whether the statutory conditions for jurisdiction are met, and if no evidence is adduced to support the asserted jurisdiction, then the court cannot have jurisdiction simply because jurisdiction was asserted in the pleadings. It is not the pleading document that "confers" jurisdiction; it is the situation as established by the evidence upon investigation by the court that matters. As regards the role of the High Court, the hearing and evaluation of the evidence relating to jurisdiction is a matter, in the first instance, for the District Court. The High Court has a limited role in reviewing the court's conclusion in accordance with the normal judicial review tests. Thus, the question of whether there is a baseless assertion of jurisdiction or not is in the first instance a

matter for the District Court itself. This approach seems to me to be in accordance with what was stated by Clarke J. (as he then was) in Payne v. Brophy [2006] 1 I.R. 560, albeit that he made his remarks in the context of a defect in a criminal summons, when he said:

> "…where an issue as to the validity of a summons is raised by or on behalf of a defendant in any proceedings before the District court it is incumbent upon the District Judge concerned to enter into an inquiry for the purposes of ascertaining the following matters:-
>
> 1. whether the defects complained of are such as go to the jurisdiction of the court or are merely technical or procedural in nature;
>
> 2. where it is possible that the defects complained of may be sufficiently fundamental to go to the jurisdiction of the court then it will be necessary, in accordance with *Duff v. Mangan* [1994] 1 I.L.R.M. 91, to hear evidence to enable the District Judge to ascertain whether the court has jurisdiction;

3. if, having heard such evidence as may be necessary, the District Judge concerned is satisfied that the court has jurisdiction then it will be necessary for the court to consider whether any measures (such as an adjournment) may be necessary to render the proceedings fair in the light of any technical defects identified."

49. There is a limited role for the High Court in deciding whether a conclusion reached by a District Court is sustainable, in accordance with the normal judicial review tests. Usually, it is not difficult to determine whether a District Court has reached a conclusion as to its own jurisdiction to hear a matter. The present case is unusual in that, because of the manner in which matters developed on successive dates before the District Court, the District Judge misremembered what had happened on the first date. The question of jurisdiction had been "flagged" by counsel on behalf of the applicants, but they made it clear that they would not pursue a formal application in this regard unless it proved necessary. She then heard a submission from Mr. O'Dwyer, solicitor for Mr. Higgins, who, correctly in my view, said that the court would need, in due course, to hear evidence on the issue of jurisdiction. The Judge then said nothing further in relation to the matter. By not ruling on the matter on this date, the Judge effectively postponed ruling on jurisdiction. On the 6th September, the Judge described herself as having already decided the issue of jurisdiction on the 27th May, 2016 (which she had not) and described the matter as *res judicata*. However, on the 1st September, she had fixed a hearing date for the motion on jurisdiction for the 16th September. It is difficult to reconcile these positions with each other; if she had already ruled on the matter, there was no need for her to hear the motion. I suspect the root of the confusion was that two different issues had been raised on the 27th May: (1) the issue of jurisdiction, on which she did not rule; and (2) the issue of transferring to another judge/asking the President to allocate all the VW cases to one judge, on which she did rule (rejecting the application).

50. On balance, I am of the view that since she was proposing to hear the motion on jurisdiction, and presumably evidence in relation to it, on the 16th September, the best interpretation is that she had not yet determined the issue of jurisdiction, notwithstanding what she said on the 6th September. In those circumstances, it seems to me that it would not be appropriate for this Court to rule on jurisdiction in advance of the District Court having had an opportunity to do so.

51. Counsel for the applicants invited me to look at the evidence as set out in the affidavit on behalf of the applicants regarding jurisdiction, and said that the absence of response on this issue in the respondent's affidavit indicated that there was no response that could validly be made and that it would be futile to return the matter to the District Court in light of what must be an inevitable conclusion that the District Court in Castlebar lacked jurisdiction to hear this case. I am not persuaded by this argument. It may well be that the reason for a lack of response in the respondent's affidavit was because it was considered inappropriate to offer evidence on an issue to be decided by the District Court; but in any event, it is seems to me that this Court should not overstep the mark in judicial review proceedings and that the appropriate location for such evidence to be heard is the District Court, and that this Court should not pre-empt its conclusions in that regard.

Whether the District Judge's comments on the Jurisdiction Issue preclude her from continuing to deal with the case on grounds of objective bias

52. The essence of the case for the applicants on the objective bias ground is that the District Judge, in making statements to the effect that she had already ruled on the issue of jurisdiction and that it was *res judicata*, had thereby made comments that would reach the threshold of objective bias such that, if she were to be invited to rule on the issue in the future, a reasonable bystander would consider that she had pre-judged the issue of jurisdiction.

53. The applicants rely, *inter alia*, upon *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M 419, in which the only bias alleged was pre-judgment. The Supreme Court held that the chairman of the board in his comments in a "very definite fashion" the exercise of a judgment on the merits of relevant contested questions of fact. Finlay CJ, delivering the judgment of the Supreme Court, also said that the statements of two other Board members "could be construed as having committed themselves to a firm judgment on the actual facts", and that while they were more ambiguous, the position was "sufficiently doubtful to make it reasonable for a person in the position of the plaintiff to fear that these persons would not be able, no matter what their honesty is, to give him a fair trial by reason of pre-judgment". Reliance was also placed *upon Commissioner of An Garda Siochana v. Penfield Enterprises Ltd*. [2016] IECA 141, in which the Court of Appeal held that a High Court judge should have recused himself from hearing a contempt application in respect of an article by Phoenix magazine relating to the Ian Bailey civil litigation, when he had previously remarked that an earlier article on the same subject was "reckless" and "irresponsible". Irvine J, delivering the judgment of the court, said that a "reasonable and fair-minded objective observer, who was not unduly sensitive but who was in possession of all the relevant facts, might reasonably apprehend that there was a risk that the High Court judge might not afford the appellants a fair and impartial hearing on the contempt motion" and also said that there was authority for the proposition that the court, in applying the test, should "take the interpretation more favourable to the plaintiff where there is ambiguity".

54. Counsel on behalf of the respondent submitted that this was not a case where it was suggested that the judge had, in advance of the hearing(s), brought any prejudgment into the courtroom, but rather that what had happened was that she had simply made an error, a simple mistake of recollection as to what she had and had not ruled on the 27th May, 2016, which was understandable in light of the various matters that had been dealt with by her on that date, and in the context of how the issue arose on the 1st September, 2016. It was submitted that a professional judge would be well able to address her mind to the issue properly, hear evidence, receive submissions, and decide the matter impartially. It was also submitted that, since counsel on behalf of the applicants had not pointed out to the Judge that she was mistaken in her recollection, they could not now come to this Court complaining of her error as constituting objective bias.

55. I am very conscious that the decision-maker in this case is a professional District Judge, and also that the issue of jurisdiction is a technical one, rather than, for example, an issue such as one as to the credibility of the witness. Nonetheless, it seems to me that

the comments made by Judge Devins on the 6th September, 2016 unfortunately have created a situation where it would not be unreasonable for a person in the position of the applicants, or any bystander to the events, to have a concern as to her ability to completely detach herself from what she had believed was her previous ruling. I emphasise that I have no doubt that if Judge Devins were in fact allowed to decide the issue of jurisdiction in the future, she would do so in an entirely professional and impartial manner. However, the test of objective bias has more to do with the appearance of things rather than their substance, and it seems to me that, unfortunately, a line has been crossed, albeit through error, which would render it preferable that judge other than Judge Devins would rule on the issue of jurisdiction.

56. Counsel on behalf of the respondent relied upon *Balaz v. Kennedy and DPP* [2009] IEHC 110, for the principle that a party, who is fully apprised of all the facts necessary to mount an objection on the grounds of objective bias of the relevant judge, is not permitted to keep such a challenge in reserve, in case the result of trial is not in his favour. It was argued that the applicants in the present case had failed to apply to the District Judge to recuse herself from the case once she had made her comments to the effect that she had previously ruled, in a manner adverse to the applicants, on the issue of jurisdiction, and that they could not therefore be heard to complain in these proceedings that the comments showed objective bias. While I agree of course that there are cases in which a party may be said to have waived his or her entitlement to raise a point of objective bias, I am of the view that the present case is not such a case. This was not a straightforward situation where a case proceeded to a hearing after an event had taken place giving rise to the ground for concern as to objective bias and the party failing to raise it on the basis of taking his chances on the merits instead. Here, the Judge had been involved in the case over a series of hearings and, despite counsel for the applicants seeking to insist that she could not have ruled in the manner she was now saying she had, was emphatic that she had done so and that she would now proceed to the other aspect of the case (the cross-examination of the deponent in relation to discovery, and the hearing of oral evidence from the three witnesses being called on behalf of Ms. Higgins). I do not think there is any practical reality to the suggestion that she would, if requested, have recused herself from the proceedings at that point, particularly with the witnesses from abroad ready to give oral evidence. Further, given the way matters proceeded in this particular case, I do not think that this could fairly be characterised as a situation where the applicants kept a point 'in their back pocket', as it were, and deliberately chose not to deploy it before the decision-maker in order to see if the outcome would be in their favour on the merits. They did not, in fact, await the outcome but chose to leave instead. Counsel for the respondent laid emphasis on the fact that a 'walk-out' must have been envisaged by the applicants in any event, as they had arrived in court without the deponent Mr. McDonnell, and he submitted that the objective bias point must therefore be regarded as a mere afterthought, contrived for the purpose of these judicial review proceedings. I would interpret the significance of a planned departure differently. It may be that it had been decided that if the Judge refused to hear the jurisdiction motion first in time, there would be no further participation in the District Court proceedings and that judicial review proceedings would be initiated on this basis. I do not think that the existence of this conditional plan to terminate participation in the proceedings detracts from the raising of an additional objective bias point, if it has merits in its own right, nor do I think that it adds weight to the argument that the applicants should have requested the Judge to recuse herself.

Whether there was a breach of fair procedures

57. The applicants complain that there was a breach of fair procedures on a number of grounds. These related essentially to the conduct of an oral hearing under the guise of a discovery hearing but which was in reality some kind of trial of a preliminary issue or depositions. The also complained of the lack of notice in relation to this and that there was a lack of clarity as to the relief being sought in this process. The case is unusual insofar as it is not suggested, as is frequently the complaint in judicial review proceedings, that the Judge did not give the applicants a fair opportunity to be heard, or deal with their submissions fairly. Nor could that realistically be suggested. Apart from what looked like some irritation on her part at times, especially at the first hearing, at what she perceived as the lack of familiarity of the applicants' legal team with the District Court procedures, she afforded all parties very opportunity to make their submissions on every occasion upon which they were before her. The real gravamen of the complaint is something quite different; namely, that what started out as an interim discovery order morphed into something quite different and unclear; and that it was proceeded with before the jurisdiction issue had been properly determined,

58. I have some difficulty accepting that the applicants may properly complain about some of these matters before this Court when, having regard to the transcripts, there was a degree of acquiescence in the manner in which the case proceeded. For example, I am not persuaded that the applicants were taken by surprise and learned for the first time, on the 1st September, that the hearing on the 6th September would involve the hearing of oral evidence from (a) the deponent; and (b) possibly expert witnesses on behalf of Ms. Higgins. The issue of oral evidence from their own deponent had been flagged at the hearing of 22nd July, 2016, on which date Mr. O'Dwyer had also indicated that he might wish to call witnesses of his own. He also followed this up with the delivery of expert reports/statements, although to be fair to the applicants, the extent of what was proposed by Mr. O'Dwyer may not have become clear until the 1st September, the date on which the substantial witness statements and exhibits/reports were furnished to the applicants.

Certainly, what ultimately had evolved by the 6th September, 2016 from the original interim order of the 7th June, 2016 was a most unorthodox procedure. What was proposed was that the deponent of an affidavit of discovery was to be cross-examined not, as might usually be the case, (even allowing for the fact that cross-examination on affidavits of discovery is in itself exceptional) on the adequacy of discovery, but rather as to matters relating to the subject-matter of the cause of action itself. Further, witnesses were to be called "in reply" and these were, as described above, a United States attorney to talk about discovery made in the courts of another jurisdiction, a scientist to talk about the emissions, and an economist to talk about loss. This was, to put it mildly, a substantial departure from the normal procedures in respect of discovery. Leaving aside questions of formal notices and motions, and even allowing for a degree of informality and flexibility in the District Court, the case had entirely lost its procedural moorings. Something which had started out as a discovery application had developed into a mini-trial of the issues, with the ostensible purpose of "assisting" Ms. Higgins clarify what complaint she should properly be making in her proceedings. This inquisitorial-type hearing bears little resemblance to the adversarial procedures of the Irish legal system. The evolution of the "discovery" motion into a mini-trial had taken place incrementally, and in the course of oral hearings which were marked by a considerable degree of acrimony and confusion, and in those circumstances I would not be overly critical of the applicants for failing to object more clearly and in a more timely manner. They would not have had a clear idea of the evidence Ms. Higgins proposed to call until they received the "replying" material from Mr. O'Dwyer on the 1st September, after the hearing on that date. It was made clear that the applicants' position was that their jurisdiction motion should be ruled on first. It is difficult to understand why the Judge would not agree to sequence matters so that the jurisdiction motion would be heard ahead of the proposed "discovery" hearing, for the obvious reason that if the applicants were successful in their jurisdictional argument, the case would not proceed any further in that District Court. Accordingly, while I am of the view that the applicants did know that oral evidence was envisaged and not mere "housekeeping" on the 6th September, I am not persuaded that what the applicants agreed to amounted to acquiescence in the unusual procedure that did actually commence on the 6th September. I have briefly described the hearing which took place on that date and it amounted, in my view, to an extraordinary procedure.

59. In those circumstances and for those reasons in addition to the "objective bias" point, it would seem to me that I should remit the matter to the District Court and direct that the remainder of any proceedings in the District Court should be heard by a judge other

than Judge Devins; that whoever deals with this case should deal with the question of jurisdiction in the first instance, as the question of jurisdiction should logically be dealt with prior to matters such as discovery; and that, if the case survives in the District Court after any such ruling, the same judge should continue with the case but ensure that it stays within the normal confines of the pre-trial and trial procedures as set out in the Rules and in the authorities. It seems to me that the order for further and better discovery on the 7th of September should also be quashed.

60. Finally, by way of comment I would add that any defendant in an Irish court should be entitled to raise an issue of jurisdiction and have it dealt without having to engage with submissions as to the merits of the case against him; that it makes logical sense to deal with a jurisdictional issue before proceeding to other matters, particularly if the other matters are likely to be complex and time-consuming; that it is inappropriate in responding to discrete legal applications to make wide-ranging allegations about the applicant's behaviour generally or in other courts; and that a litigant is perfectly entitled to take a view that judicial review proceedings may need to be initiated without being accused of bullying and threatening the decision-maker. Sadly, a reading of the transcripts suggests that a certain level of hostility towards the applicants and their legal team, perceived as Goliath flanked by his expensive Dublin lawyers, appears to have contaminated the atmosphere of the District Court proceedings to date and led to proceedings which were not in accordance with fair procedures.