

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2019/392J.R.]**

**BETWEEN**

**PATRICK MCKILLEN**

**APPLICANT**

**AND**

**DAVID TYNAN**

**(IN HIS CAPACITY AS ASSESSOR APPOINTED BY THE MINISTER FOR FINANCE  
PURSUANT TO SECTION 22 OF THE ANGLO IRISH BANK ACT 2009)**

**RESPONDENT**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 24th day of January, 2020.**

1. In 2009, the Oireachtas enacted the Anglo Irish Bank Corporation Act ("The Act"). At the time this legislation came into force, the Plaintiff (Mr. McKillen) owned some 101,000 shares in Anglo Irish Bank Plc. As of the last publicly quoted price before the suspension of trading in shares in Anglo Irish Bank, the value of Mr. McKillen's shareholding was approximately €22,000.00.
2. Section 5 of the Act provided that all shares in Anglo Irish Bank were transferred to the Minister for Finance on the commencement of the legislation. Mr. McKillen's shares were so transferred.
3. Section 22 of the Act required the Minister to appoint an Assessor to determine the amount of compensation (if any) payable to former shareholders in respect of the transferred shares and the associated rights extinguished by such transfer.
4. The Defendant (Mr. Tynan) was appointed by the Minister for Finance on the 16th of November 2018 to act as Assessor in accordance with the provisions of the Act. On the 7th of February 2019 the Minister made Regulations under the Act setting out the procedure to be followed by Mr. Tynan in carrying out his role as Assessor.
5. In these proceedings, no challenge is made by Mr. McKillen to the constitutionality of the Act, no challenge is made by Mr. McKillen to the validity of the Regulations made under the Act, no assertion is made that Mr. Tynan has (in terms) acted in breach of the provisions of the Act and no assertion is made that Mr. Tynan has acted in breach of the Regulations.
6. Instead, three issues are raised by Mr. McKillen. The first two of these are "*interlinked*", to use the language of Counsel for Mr. McKillen in opening the application.
7. The interlinked challenges are described by Mr. McKillen's Counsel as follows:-
  1. Notwithstanding the statutory entitlement of Mr. McKillen to make a submission to the Assessor, "*the way in which his requests were dealt with by the Respondent effectively made it practically impossible for him to exercise that right.*" (Transcript: day one, page six.).

2. The second ground of challenge, stated to be associated with the first, was described at page seven of the transcript of day one as follows:-

“The second this is how that impacts upon what is ultimately a constitutional right on the part of Mr. McKillen and that is the right to ensure that when the shares are being valued that they are done in a way that complies with his constitutional rights. That is effectively the ballpark within which we are arguing about the first two decisions.”

As the case was argued, and in accordance with the issue paper directed by me and agreed between the parties, these first two issues have not so much remained interlinked as have fused into one. The essential question posed in this first strand of attack against the way in which Mr. Tynan has conducted himself is whether or not Mr. McKillen had established that the information sought by him from Mr. Tynan is information which Mr. Tynan is legally obliged to provide to Mr. McKillen, in order to enable Mr. McKillen to make meaningful submissions to the Assessor.

3. There is then a separate freestanding issue of prejudgment; in this regard, it is alleged that Mr. Tynan has expressed (in his Affidavit of the 6th of September 2019) a predetermination on the question of the solvency level of Anglo Irish Bank as of the 15th of January 2009 (the date specified as the relevant date in the Act).
8. In order to decide these challenges to the conduct of Mr. Tynan, it is essential to set out the legislation, and the correspondence leading to this judicial review application.
9. Subsections 22(1) and 22(2) of the Act provide that:-
  - “(1) The Minister shall, as soon as he or she considers it appropriate in the circumstances, appoint a person (referred to in this Act as the “Assessor”) to determine, in accordance with this Act, the fair and reasonable aggregate value of the transferred shares and the extinguished rights and the consequent amount of compensation, if any, payable to persons in respect of those shares and those rights.
  - (2) In deciding whether it is an appropriate time to appoint the Assessor, the Minister shall have regard to the public interest.”
10. It will become immediately apparent that the appointment of the Assessor is not a matter for Mr. Tynan, except in as much as he agrees to take on that role. Notwithstanding this, the timing of the appointment of Mr. Tynan has been a matter of adverse comment by Mr. Bernard Somers and Dr. Constantine Gurdgiev (the two persons giving expert evidence on behalf of Mr. McKillen in these proceedings). These criticisms of the timing of the Minister’s appointment of Mr. Tynan are irrelevant to any real issues in this action, but the fact that they are made is significant in assessing the quality of the evidence offered to this Court by Mr. Somers and Mr. Gurdgiev.
11. Section 22 (7) provides as follows:-

“(7) In the performance of his or her functions under this Act, the Assessor-

- (a) is independent,
- (b) shall act as an expert only, and
- (c) shall act as expeditiously as possible consistent with fairness.”

12. The obligation on the Assessor to act “*as expeditiously as possible consistent with fairness*” is of some relevance in considering Mr. Tynan’s decision not to provide the information sought by Mr. McKillen.
13. Section 24 of the Act defines the persons who may make submissions to the Assessor “*in respect of the aggregate value of the transferred shares and extinguished rights [...]*”. Mr. McKillen certainly qualifies under that section as somebody entitled to make such submissions.
14. Section 25 of the Act provides as follows:-

“25. (1) The Assessor shall determine the fair and reasonable aggregate value of the transferred shares of each class and the extinguished rights as at 15 January 2009 for the purposes of the payment of fair and reasonable compensation for the acquisition of those shares and the extinction of those rights.

- (2) The Assessor shall determine the value referred to in subsection (1) -
  - (a) on the basis of the true financial state of Anglo Irish Bank on 15 January 2009, taking into account the underlying market values of Anglo Irish Bank’s assets and the extent of its actual, contingent and prospective liabilities at that date,
  - (b) having regard to the rights attaching to each class of transferred shares, and
  - (c) assuming that no financial assistance, investment or guarantee (other than the guarantee already provided under the Credit Institutions (Financial Support) Act 2008 ) would in future be provided to or made in Anglo Irish Bank, directly or indirectly, by the State.
- (3) In determining the value referred to in subsection (1), the Assessor shall have reference to -
  - (a) the quoted price of its shares at the close of business on 15 January 2009, and the movements in that price during such period as the Assessor considers appropriate,
  - (b) any relevant information about the business of Anglo Irish Bank as of 15 January 2009, whether publicly available or not,
  - (c) whether Anglo Irish Bank was, on 15 January 2009, unable or likely to become unable to continue as a going concern in the short, medium or long term, or that there was a material risk of its not being able to do so,
  - (d) the viability of its business model,
  - (e) its capital and solvency levels on 15 January 2009,

- (f) its liquidity,
  - (g) the terms of the Credit Institutions (Financial Support) Scheme 2008 (S.I. No. 411 of 2008),
  - (h) any access that Anglo Irish Bank had or would be likely to have had to funding from the central banks of the euro area, including the Central Bank and the European Central Bank,
  - (i) any relevant evidence that the Assessor obtains in the performance of his or her functions,
  - (j) any submissions made to the Assessor, and
  - (k) any other relevant matter.
- (4) The Assessor shall make the determination required by subsection (1) on the basis of the information and evidence available to him or her at the time he or she carries out his or her function.
- (5) A conclusion drawn or finding made by the Assessor in making the determination required by subsection (1) does not amount to a finding of fact for any purpose other than the purposes of this Act.
- (6) Nothing in this Act prevents the Assessor from determining that the amount of fair and reasonable compensation to be paid in relation to the transferred shares or the extinguished rights is nil.
- (7) Whenever the Minister so requests, the Assessor shall report to the Minister as to his or her progress in making the determination required by this section.”
15. There appears to be a broad consensus between the parties that the Assessor has a high level of discretion in determining the compensation sum in accordance with section 25 of the Act. It is also clear that there are certain matters which the Assessor is obliged to consider in making his decision. Notwithstanding the characterisation of section 25(6) by the witnesses for Mr. McKillen, I find nothing surprising about the decision of the Oireachtas to put beyond doubt the fact that the Assessor may return a compensation value of nil. The subsection certainly does not have the sinister connotation argued for by Mr. Somers and Dr. Gurdgiev.
16. Section 26 deals with the circulation of the Assessor’s draft report for comment. Section 26(1) provides as follows:-
- “26. - (1) Before making a report to the Minister under section 27, the Assessor shall send a draft of his or her report to -
- (a) each person who made a submission to the Assessor, and
  - (b) any other person, or each person in any class of persons, that the Minister specifies in writing,
- inviting the person to make written submissions concerning the draft report and specifying a reasonable period in which to do so.

- (2) The Assessor may omit from the draft report any evidence or material if including that evidence or material would disclose commercially sensitive information or would otherwise be contrary to the public interest.
  - (3) Before submitting the report to the Minister under section 27 , the Assessor shall consider any submissions made in accordance with the Assessor’s invitation under subsection (1) and shall revise the report as appropriate.
  - (4) A person to whom the Assessor sends a copy of a draft report under subsection (1) commits an offence if he or she discloses the report or its contents or any part of the report or its contents to any person other than for the purpose of obtaining professional advice.
  - (5) A person to whom a draft report of the Assessor is disclosed (whether under subsection (4) for the purposes of obtaining professional advice or otherwise) commits an offence if he or she discloses the report or its contents or any part of the report or its contents to any other person other than for the purpose of obtaining professional advice.”
17. There are two things of significance in connection with this section generally and this subsection in particular.
  18. Looked at in a general sense, the Oireachtas has required the Assessor to come to provisional conclusions about the level of compensation to be paid to former shareholders of Anglo Irish Bank. In coming to such provisional conclusions, it would be expected that the Assessor would come to a view about each and every one of the factors which the Oireachtas has required him to consider, in accordance with section 25 of the Act. While section 26 did not refer to “*provisional conclusions*”, it is inherent in the provisions of that section that the conclusions must be provisional as opposed to final given that the Assessor is required to invite from qualifying persons written submissions on the draft report; the only purpose in doing so must be that these submissions could have the effect of influencing and shaping the final report of the Assessor.
  19. The specific importance of the subsection – section 26(1) – is that it requires the Assessor to invite submissions from persons who have already made submissions to him. The Oireachtas has decided that persons in the position of Mr. McKillen are entitled to make not one but two submissions should they choose to do so. The first submission is made in advance of the preparation of the draft report. The second submission is made having received the draft report. These are two separate entitlements, and I think it inconsistent with the legislation to run one into the other. Counsel for Mr. Tynan has suggested that the current application is premature, in that Mr. McKillen has “*a second bite of the cherry*”. However, Mr. McKillen is entitled to two bites of the cherry under the legislation on foot of which Mr. Tynan has been appointed assessor. If Mr. McKillen has been wrongly deprived of his ability to make a meaningful submission before the draft report is circulated, I do not think that that is adequately met by an argument that he can always

make a meaningful submission after he has received the draft report. That is not the way in which the Act was formulated by the Oireachtas to operate.

20. Finally, it is worth noting that section 27 provides for the Assessor to provide his final report to the Minister having determined "*in accordance with this Act*" the value of the transferred shares and extinguished rights. It has been submitted by Mr. McKillen that there is provision in section 27(6) permitting commercially sensitive information to be omitted by the Minister when the report is published. This suggests, it is submitted, that the Act contemplates that confidential information may be considered by the Assessor in performing his duties. I accept that submission.
21. Equally, it is submitted on behalf of Mr. McKillen that section 25(3)(b) suggests that information which is not publicly available either must or may be considered by the Assessor. Again, I accept that the Act contemplates the possibility that information (other than publicly available information) would be considered by the Assessor in the performance of his duties.
22. The Regulations made under the Act are the Anglo Irish Banks Corporation Act, 2009 (section 36) Regulations 2019. I do not need to describe those Regulations in detail, other than to say that they provide in a high level of detail for the solicitation of submissions by the Assessor and the making of submissions to the Assessor, both in respect of the initial submissions and the submissions concerning the draft report. Again, I think it clear that both the Act and the Regulations stipulate that persons in the position of Mr. McKillen have an entitlement to make not one but two sets of submissions to the Assessor.
23. I now intend to set out the correspondence which led to the current application.
24. In compliance with the legislation, Mr. Tynan invited submissions from qualifying parties by correspondence dated 26th of February 2019, and by notices placed in newspapers of the 28th of February 2019. Persons were invited to make submissions no later than the 29th of March 2019.
25. On the 22nd of March 2019 Mr. McKillen (through his solicitors, Eames Solicitors) sought an extension of time to make submissions to Mr. Tynan.
26. In that letter, Eames Solicitors stated the following:-

"Please find enclosed a signed interim submission from Mr. McKillen which provides all of the above information and states that he wishes to consult with a valuation expert in relation to the value of his shareholding and needs extra time. Please also find enclosed evidence of Mr. McKillen's shareholdings from Anglo Irish Bank, Private Banking.

In this regard, we would note as follows:

1. Regulation 3(1) of the Anglo Irish Bank Corporation Act 2009 (Section 36) Regulations 2019 (the "Regulations") states that you shall give notice to

former shareholders seeking submissions in relation to the valuation of their shares or other rights by, inter alia, advertising in two national newspapers in Ireland. These advertisements issued on 28 February 2019 and our client first learned of the advertisement on 20 March 2019 as he had been travelling internationally in the period prior to that.

2. Pursuant to Regulation 3(2) of the Regulations, the said notice shall stipulate the latest date for receipt of submissions. In the notice of 28 February, the date set was 29 March 2019.
3. Regulation 5(1) of the Regulations stipulates that an eligible person (including a former shareholder) may make a submission by not later than the specified date. However, Regulation 5(2) of the Regulations notes as follows:

*'The period specified in paragraph (1) may, on one or more occasions, at the request in writing of an eligible person or otherwise at the discretion of the Assessor, be extended by the Assessor for such further period as the Assessor considers necessary and appropriate.'*

We hereby inform you that the period allowed by you to permit our client to:

- find and identify a valuation expert to estimate the value of the shares at the date of nationalisation;
- agree to terms of engagement with that expert;
- provide that expert with all of the data necessary for the purposes of making an assessment;
- await the expert's work and valuation; and
- incorporate that valuation into a written submission,

is grossly insufficient and does not leave our client anything near enough time to make the kind of submission that he would wish to make.

As such, we hereby formally demand that you remedy this unsatisfactory situation by exercising your discretion pursuant to Regulation 5(2) of the Regulations by not less than six weeks so that our client can adequately prepare his submission and consult an expert. As the date of 29 March 2019 is rapidly approaching, it is a matter of enormous urgency that you respond with dispatch and confirm that you are extending the deadline as our client requests.

If we do not receive such a confirmation by close of business on Monday, 25 March 2019, our client will have no choice but to seek to judicially review you and we reserve the right to do so without further notice. The contents of this letter will be relied upon in any costs application."

27. By an email of the 25th of March 2019, within the period stipulated by Mr. McKillen's solicitors for a response, Mr. Tynan granted Mr. McKillen an extension until the 30th of April 2019 to make his submissions.

28. On the 25th of April 2019 Mr. McKillen sought an extension of potentially indefinite duration. In doing so, Mr. McKillen set out certain information which he stated was required for the purpose of his submission. The letter of the 25th of April 2019 set out the approach which would be taken by Mr. McKillen and his advisors in preparing the submission, and the information sought by Mr. McKillen in that regard. It is impossible adequately to summarise these requests and I therefore set them out in full.

29. Under the heading "*Balance sheet valuation*" Mr. McKillen stated the following:-

"Discussions between me, my legal advisers, Dr. Gurdgiev and Mr. Somers have identified the paramount importance, for the purposes of valuing the Shareholding, of valuing the Anglo balance sheet as at nationalisation date. This is naturally a less than straightforward exercise which involves:

- a) valuing the assets on the Anglo balance sheet (the "Asset Base") on a mark-to-market basis as at 15 January 2019;
- b) identifying a model which could reliably approximate the maximum speed at which a liquidator could have disposed of and/or worked the Asset Base;
- c) identifying a model which could reliably approximate the duration and operation of a strategy for disposing of and/or working out the Asset Base in such a manner as to optimise the realised value thereof;
- d) establishing, based on industry best practice, the most likely manner in which a liquidator appointed to wind the bank up in early 2009 would have been chosen to realise the Asset Base, bearing in mind a), ,b) and c) above;
- e) estimating the likely realisation value of the Asset Base, bearing in mind the likely manner in which a liquidator would have chosen to realise them (the "Realisation Proceeds");
- f) subtracting from the Realisation Proceeds the monies (inclusive of principal and interest amounts) which Anglo/the liquidator would have had to remit to creditors (the "Anglo Debts"); and
- g) establishing, bearing in mind the quantum of the Realisation Proceeds and the amount of and repayment schedule for the Anglo Debts, the likely net return to shareholders on a hypothetical normal liquidation, if any (the "Net Return").

I am advised that only when the Net Return is valued will I be capable of valuing the Shareholding, bearing in mind the valuation metrics set out at section 25 of the 2009 Act. This requires a valuation of:

- a) the Realisation Proceeds; and
- b) the Anglo Debts.

The calculation of the Realisation Proceeds will require us to obtain the following information for the purposes of establishing a comparative benchmark from which an estimate can be calculated or so to say reverse engineered, namely:

- a) an inventory of the assets sold by Anglo/the liquidator since nationalisation;



- b) the return obtained on those assets and the average haircut suffered by the bank on same;
- c) an inventory of the assets still held by Anglo/the liquidator; and
- d) a valuation on those assets.

Meanwhile, the calculation of the Anglo Debt requires (again, for comparative/benchmarking purposes):

- a) the total principal sums owned by Anglo;
- b) a calculation of average rates of interest payable;
- c) a calculation of average tenor and maturity of Anglo debts;
- d) a calculation of average default interest rates that would alternatively have been repayable on acceleration;
- e) an estimate of the likely future crystallised amount of contingent liabilities; and
- f) full details of the costs to date of the liquidation of Anglo (liquidator's fees, legals etc.).

Only after the above data items are analysed can we even prepare an appropriate set of models for valuing the Net Proceeds. Moreover, it has been indicated to me that even the preparation of the relevant information requests for the purposes of obtaining the above items itself constitutes an entire analytical workstream. For the purposes of completing this workstream, the experts will require:

- a) a thorough summary of distressed forms'/banks' valuation methodologies – i.e. a road map for data requests.
- b) a pivoting/tilting of these methodologies towards extreme distress risk of the kind that Anglo experienced at the time (we do not have comparatives for that, so these will have to be established from the ground up); and
- c) an application of the uncertainty and ambiguity in the early 2009 financial environment to a) and b) in line with the core valuation dimensions of section 25 of the 2009 Act.

Only when this workstream is completed, information requests are made on foot thereof, the information requested in provided and those items are processed and fashioned into reasonable valuation models can we calculate Net Proceeds and submit a realistic value for the Shareholding. It is currently impossible to estimate how long this process will take and when I will be able to produce a comprehensive submission. Moreover, Dr. Gurdgiev has indicated that even delivering on the first workstream (i.e. establishing the data requests that we will need to make) will take us well beyond the current extended deadline of 30 April 2019.

I am advised that the completion of this first workstream alone will require an extension of time until 31 May 2019 at the earliest and possibly beyond.”

30. It is striking that even the very significant amount of information sought in this correspondence was (self-evidently) not the only information that would be required

under this heading. It is clear from Mr. McKillen's letter that he was requesting from Mr. Tynan not just the specific items listed in this portion of this letter but was also making it plain that information requests would be made on foot of what Mr. McKillen described as "*this work stream*", once the work stream was completed.

31. Secondly, having set out both the provisions of section 25 (2) and section 25 (3) of the Act, and also described the reaction of Dr. Gurdgiev and Mr. Somers to the website set up by Mr. Tynan, further information was requested, as follows:-

"In this regard, it has been noted that:

- a) For the purposes of (a) above, the Assessor has not nominated an appropriate period of time during which the quoted price of Anglo shares shall be taken into account;
- b) For the purposes of (b) above, the Assessor has not made available any of the information in relation to Anglo's business model to which it intends to have recourse;
- c) For the purposes of (c) above, the Irish Bank Resolution Corporation Act 2013 made no reference to the bank being insolvent or unable to continue as a going concern and the Assessor has made no information available which would indicate:
  - i. what consideration he is going to give to this fact and the manner in which it will affect his assessment of whether or not Anglo would or would not have been able to continue as a going concern on or after 15 January 2009; or
  - ii. how he proposes to assess Anglo's ability to continue as a going concern more generally;
- d) for the purposes of (d) above, the period of reckoning for the purposes of assessing the viability of Anglo's business model has not been provided by the Assessor, nor has he given any indication as to whether subsequent changes in business model such as the merger of Irish Nationwide Building Society with Anglo will be taken into account in so doing; and
- e) for the purposes of (f) above, the Assessor has not given any indication of the date(s) or time period(s) which will be taken into account for the purposes of assessing Anglo's liquidity position;

At a minimum, the Assessor must provide full details of the above matters in order to allow me and the experts I have engaged to make an informed submission. However, in addition to the above, the experts will need to have access to an exhaustive list of items of information that the Assessor will take into account in reaching his valuation and (to the extent to which the same are not publicly available) access to all documentation evidencing same.

As such, I hereby request that the Assessor outline all of the information to which he intends to have recourse, such documentation as is necessary to evidence that

information and full clarity in relation to each of the specific information deficits outlined above.

Until we have received clarity from the Assessor as to when he will be able to comply with above information requests, I am advised that I will require an extension of indefinite duration. Once the Assessor has complied with this request, I (in conjunction with the experts) will be able to make a more informed assessment as to how long it will take to make a comprehensive submission."

32. No detailed evidence has been provided to me as to the scale of the information sought, possibly because Mr. McKillen had flagged the inevitability of a further request for information in due course. However, at paragraph 44 of his first Affidavit Mr. Tynan does provide some insight into what might be involved in meeting this request for information. The paragraph reads:-

"Finally, while the interpretation of the 2009 Act and the 2019 Regulations is a matter for this Honourable Court, if Mr. McKillen is correct and an Assessor, such as your deponent, was obliged to provide the vast amount of information sought, potentially in this case to 21,000 shareholders, on a potentially unlimited timeframe, in my view it would make the legislation unworkable."

33. No issue is taken with this description by Mr. Tynan, notwithstanding the fact that both Dr. Gurdgiev and Mr. Somers subsequently filed Affidavits in these proceedings.
34. Indeed, in his subsequent Affidavit Dr. Gurdgiev addresses what might be involved not in the original request for information but in "*a representative sample of such information*". Paragraph 16(d) of Dr. Gurdgiev's second Affidavit says this:-

"Crucially, because of the vast size of the bank as an undertaking, even a representative sample would have to be extremely voluminous [...]"

35. The Court can safely proceed on the basis, established in the evidence, that meeting Mr. McKillen's requests would involve the provision of a vast amount of information over an undefined period of time, which in the view of the Assessor would make the legislation unworkable.
36. While Mr. Tynan, in his first Affidavit, refers to this information being provided potentially to 21,000 shareholders it is undisputed that the only shareholder who has made such a request for information is Mr. McKillen.
37. By letter of the 7th of May 2019, Mr. Tynan responded to Mr. McKillen's letter of the 25th of April. He refused to grant an extension of time to the 31st of May 2019. Mr. Tynan also refused the request for what he described as "*a significant volume of information*". Having set out the provisions of the Act, including the provision to act as expeditiously as possible consistent with fairness, Mr. Tynan said this:-

“You will also note that section 26(1) of the 2009 Act provides that, before making a report to the Minister, I am required to send a draft of my report to each person who makes a submission to me, inviting such persons to make written submissions concerning the draft report. Before submitting my report to the Minister, I am required to consider any such further submissions made to me following this invitation, and am required to revise my report as appropriate.

My draft report will set out the matters I have taken into account in carrying out my functions under section 25, thus enabling affected persons to make submissions on all of these matters at that stage. You will appreciate that it is not appropriate for me to set out these matters at this stage of carrying out my functions as I have not yet reached a view on these issues yet.

However, any submissions on the draft report will be considered when I am preparing my final report.

Having regard to the foregoing, it would be unduly disruptive to my ability to carry out my duty as Assessor to grant you an indefinite extension of time within which submissions could be made by you. In addition, as you will have a further opportunity to make submissions after receipt of my draft report, I do not believe it is necessary to provide you with the voluminous information requested by you at this time.

I will send you the draft report once it becomes available. In the meantime, should you have any other comments, please could you provide them by 17th May 2019.”

38. Mr. McKillen’s solicitors responded two days later, invited Mr. Tynan to reconsider his position, and asking him to confirm by the 13th of May 2019 that he would comply with the information requests contained in the letter of the 25th of April and would extend the period within which submissions were to be made by Mr. McKillen to not earlier than the 31st of May.
39. By letter of the 13th of May 2019 Mr. Tynan refused these requests.
40. In doing so, Mr. Tynan said the following:-

“It was open to your client to make whatever submissions he wished in relation to the fair and reasonable aggregate value of his transferred shares, based on the information available to him either personally or generally available in the public domain. However, under the Act, it is not a requirement that I provide your client with the information requested in his letter dated 25 April, nor provide an extension of time in which to consider and reply to such information.

In relation to the provision of information, it is worth noting that some of the information requested by your client is not relevant to the determination I must make. You will note that, under Section 25 (3) (b), in determining the fair and reasonable aggregate value of the transferred shares and extinguished rights, I

shall have reference to any relevant information about the business of the Bank as of 15 January 2009, whether publicly available or not. A number of items requested by your client relate to the subsequent liquidation of Irish Bank Resolution Corporation (as the Bank was renamed). I do not have this information in my possession and have not requested the same as these events post-date 15 January 2009.

Other information requested by your client is confidential information relating to the Bank and others, which I do not propose to disclose. You will note that, when circulating my draft report under Section 26 (2) of the Act, I am entitled to omit from the draft report any evidence or material if including the same would disclose commercially sensitive information or would otherwise be contrary to the public interest.

Further, a person who receives a copy of my draft report commits an offence (Section 26 (5)) if he or she discloses the report or its contents to any person other than for the purpose of obtaining professional advice. No such protection attaches to any information disclosed by me at this stage of my carrying out my functions.”

41. On the 16th of May 2019, Eames Solicitors joined issue with the most recent statement of position on the part of Mr. Tynan. A compromise was suggested by that firm on behalf of Mr. McKillen as follows:-

“On the basis of the above, we put to you an entirely reasonable compromise as between our existing requests and your counterproposal(such as it is), namely that:

- a) You provide us with each of the clarifications sought at 1-4 above including, in particular, the information sought in 4 above (confidentiality of documents);
- b) Our client agrees to hold off on making any further submissions or information requests pending the receipt of your draft report;
- c) On receipt of your draft report, our client commits that he will promptly indicate:
  - i. Whether he assents to its contents; and
  - ii. If not, the timeframe in which he will be able to provide submissions;
- d) You commit to provide our client with:
  - i. Such information and documentation (subject to the appropriate confidentiality safeguards) as he needs for the purposes of producing a meaningful submission; and
  - ii. Such extensions of time pursuant to Regulation 8(2) as are necessary to allow him to do so; and
- e) your office, our client and his experts cooperate to prepare an indicative timetable for the preparation of submissions such that your office has

reasonable comfort that the valuation process will be complete by an acceptable date.

If you commit to the above, we will have some comfort that your office is seriously committed to engaging with our client and other shareholders in generating a reasonable bona fide valuation for the shares. However, if you do not do so, we will have no choice but to infer that the valuation process is little more than a box-ticking exercise designed to go through the motions of shareholder consultation.

We therefore call upon you, by not later than close of business on Wednesday 22 May 2019, to confirm to us that you agree to our compromise proposals and, in the absence of such confirmation, we reserve the right to commence judicial review proceedings without further notice.”

42. This proposal was not acceptable to Mr. Tynan, and on the 24th of May 2019 he rejected the compromise suggested by the solicitors for Mr. McKillen. In doing so, Mr. Tynan said the following:-

“Without prejudice to the above, I note the following in relation to the points raised in your letter (adopting the numbering used in your letter):

1. It was open to your client to make whatever submissions he saw fit to me in respect of the aggregate value of the transferred shares, on the basis of whatever information was available to him. However, that does not correspond to an obligation upon me to provide your client the information requested by him. The process I am required to carry out would be unworkable if I had an obligation to provide information, upon request, to any individual former shareholder of Anglo Irish Bank (of which there are approximately 21,000) to enable him or her make submissions to me pursuant to Section 24(1). There is, in my view, no basis upon which such an obligation could be inferred or reasonably assumed to exist. Further, it would be a potentially endless iterative process, dependent upon whatever further information a former shareholder considered was necessary to make his or her submissions [sic], with a result that an unreasonable delay would be caused to the carrying out of my functions. The request for information at this stage is particularly unnecessary given that, as already indicated, your client will be informed of all relevant material upon which my decision will be based when he is provided with my draft report.
2. I am satisfied that the rights of your client have been respected in the processes adopted by me to date when carrying out my functions under the 2009 Act and the Regulations. In particular, when your client sought an extension of time on 22 March, I gave consideration to this request, to which I then acceded and afforded him an extension until 30 April 2019. On receipt of your client’s submission dated 7 May 2019, I then gave him a further opportunity to make submissions to 17 May 2019. The two submissions delivered by or on behalf of your client have been received by me and I will

give them all due consideration in exercise of my functions. I cannot discern any prejudice to your client in the processes adopted by me thus far.

3. You will note that section 25(1) of the 2009 Act requires me to determine the fair and reasonable aggregate value of the transferred shares and extinguished rights as at 15 January 2009. I am required to determine this value on the basis of the matters set out in Section 25(2) and to have reference to the matters set out in Section 25(3). My draft report will set out a summary of the evidence upon which I relied in making my determination and it will be open to your client to make submissions on that evidence at that time. As apparent from the 2009 Act, the majority of the criteria to which I am directed to have regard in Section 25(3) are specifically date set at 15 January 2009. On any reasonable analysis, the valuation date of 15 January 2009 required by Section 25(2)(a) renders evidence of factual matters which post-date 15 January 2009 of limited, if any, relevance to my determination. However, I will carefully consider any submission made to me which relies upon information that relates to events which occurred post 15 January 2009.
4. The 2009 Act does not provide for me to enter into confidentiality agreements with any person in relation to the disclosure of confidential information to him or her and it would not be appropriate for me to do so. The existence or absence of a confidentiality agreement would, in any event, not determine my attitude to the provision or otherwise of the information your client is seeking. The draft report, as referred to above, will set out a summary of the evidence upon which I relied in making my determination and it will be open to your client to make submissions on that evidence at that time.

I trust that the above addresses your client's concerns."

43. The final piece of correspondence, in advance of the issuing of the proceedings, is a letter from Eames Solicitors of the 27th of May 2019. Having noted that Mr. Tynan would not provide Mr. McKillen with *any* information *whatsoever* and that Mr. McKillen must confine himself to using information that was in his possession or in the public domain, the letter went on to say this:-

"Moreover, it is very clear from the terms of your most recent letter that there is a major difference of principle between you and our client which cannot and will not be remedied by waiting for your interim report and the opportunity to make further submissions at that stage. In this regard, it is:

- a) inconceivable that our client's experts will be able to assist him in producing meaningful submissions without (at a bare minimum) receiving the information that has already been requested, whether or no they have had the benefit of reading your interim report; and

- b) entirely clear from the terms of your most recent correspondence that you will not entertain our information requests at any stage in the future, whether before or after the publication of your interim report.”
44. In the light of the submissions made to me, it is important to note that Eames Solicitors have stated, in very trenchant terms, that Mr. McKillen’s experts required all of the information that had been requested up to that point in time, that this was “*a bare minimum*” of what was needed, and that without this Dr. Gurdgiev and Mr. Somers would not be able to assist Mr. McKillen “*in producing meaningful submissions*” to the Assessor.
45. A central issue in this application, therefore, is whether or not Mr. McKillen has satisfied me that all of the information sought by Mr. McKillen or on his behalf in the correspondence which I have described is material which is necessary to allow Mr. McKillen to make a meaningful submission to Mr. Tynan.
46. The onus is on Mr. McKillen to satisfy me of this proposition. In doing so, he has chosen to rely exclusively upon the evidence of Dr. Gurdgiev and Mr. Somers. Indeed, at the very commencement of his opening of the application, Counsel for Mr. McKillen (Transcript: day one, page six.) anchored this part of the case in “*what the expert evidence is*”.
47. Appropriately the parties have agreed that the first question to be determined in the issue paper that they have provided to the Court is one relating to the expert evidence. That issue paper describes the issues as follows:-
1. The status and weight to be attached to the evidence of Mr. Somers and Dr. Gurdgiev.
  2. Does the Applicant have sufficient interest to make this application for the relief sought? Is the Respondent permitted to raise the issue?
  3. With regard to the decisions of the 7th, 13th and 24th of May 2019 (“the Decisions”):-
    - a) Were the Decisions to refuse to provide the requested information (or any information) unreasonable (within the meaning of the judgments of the Supreme Court) in Meadows).
    - b) Were the Decisions to refuse the Applicant’s request for an extension of time unreasonable?
  4. In stating that IBRC would have been severely insolvent, did the Respondent make a premature judgment (within the meaning of the judgments of the Supreme Court in O’Callaghan and the High Court – Clarke J. in AP)?
- The first and third of these issues can be taken together.
48. While it was submitted to me by Counsel for Mr. Tynan (Transcript: day two, page 69.) that on this topic “*there is obviously plenty of law on independent expert evidence*” only one authority was opened to me by either side during the course of the oral submissions.



No further authority was referred to in the written submissions. This is despite the fact that this issue took on increasing importance as the hearing proceeded.

49. I believe that this absence of submissions on the law relating to expert evidence is because the rules in respect of such evidence are well settled.
50. *O'Leary v. Mercy University Hospital* [2019] IESC 48, which is the judgment to which I was referred in argument, encapsulates most of the relevant principles and these were not subject to any dispute by Counsel for Mr. McKillen in his reply.
51. Before I consider the judgment of Mr. Justice McMenamin in *O'Leary*, which in large measure deals with the terms on which experts are engaged and the conduct of an expert in assisting the Court, a more fundamental proposition should be addressed. That proposition is whether or not either Dr. Gurdgiev or Mr. Somers in fact qualify to give expert evidence in this case.
52. The position is comprehensively set out in McGrath On Evidence (2nd Ed., 2014) at paragraph 6.36 and 6.37 as follows:-

"A witness who gives evidence as an expert must have sufficient expertise in relation to the matter upon which he or she is to give evidence to be considered an expert and the burden of establishing this rests on the party calling the witness. Such expertise may be acquired by reason of experience, training or knowledge. In *Galvin v. Murray* [2001] 2 ILRM 234 at 239, Murray J. stated that, in general terms, "an expert may be defined as a person whose qualifications or expertise give an added authority to opinions or statements given or made by him within the area of his expertise". No formal qualifications are necessary if the judge is satisfied that the witness has the requisite expertise. Thus, in *McFadden v. Murdock* (1967) 1 ICLR 211 at 217, a shopkeeper was allowed to testify as to the amount of wastage that it was reasonable to expect in the course of a grocery business. Provided that an expert is appropriately qualified, the admissibility of his or her evidence does not depend on the court's view as to how expert the person is, that is a matter that goes to weight.

The special knowledge and experience of the expert must be demonstrated to the court as a threshold requirement before he or she gives evidence. [...]"
53. The balance of paragraph 6.37 addresses proof by an expert of his expertise, qualifications and experience.
54. As was accepted by Counsel for Mr. McKillen (Transcript: day two, page 132 and following.) both Mr. Somers and Dr. Gurdgiev are giving evidence about what information is required for the purpose of the valuation of the shares in Anglo Irish Bank.
55. Neither Dr. Gurdgiev or Mr. Somers state that they ever valued a shareholding in any company, let alone a bank. They attest to no qualifications which would suggest that they have the capacity to advise on the valuation of the shareholding in Anglo Irish Bank. They

have authored no papers relating to the valuation of a shareholding in any form of company let alone a financial institution. During the course of their evidence they refer to no guideline, academic work, or practical paper relating to the valuation of a shareholding in a bank. At its height, their evidence suggests what these individuals believe should be made available to Mr. McKillen, but they do not even begin to suggest why they as individuals are qualified to provide this evidence.

56. Even when there is a reference in the evidence of these two gentlemen to the valuation of a bank (as Dr. Gurdgiev refers to OneWest Bank in California) there is no press report, academic paper, or regulatory filing supporting what the witness says about this specific example.
57. I will shortly look at the evidence of Mr. Somers and Dr. Gurdgiev in order to consider the following:-
- i) Has Mr. McKillen discharged the burden of establishing that either witness has sufficient expertise in relation to the valuation of Anglo Irish shares so that the Court might consider either witness an expert for the purpose of these proceedings?, and;
  - ii) Has either witness provided evidence to the Court that complies with the requirements of expert evidence to be found in the judgment of Mr. Justice McMenamin in *O'Leary*?
58. Before I do so, I will set out the legal principles which apply to this issue.
59. Paragraphs 25 and 26 of *O'Leary* are particularly helpful in setting out the recognised and desirable requirements placed on expert witnesses as to the nature and form of the evidence which they provide to the Court. The principles set out by Cresswell J. in the case of "*The Ikarian Reefer*" [1993] 2 Lloyds Reports 68 are quoted with apparent approval by Mr. Justice McMenamin, and I believe represent the law in this jurisdiction. These principles are:-
- "(1) The evidence of such witnesses should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation;
  - (2) Such witnesses should provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates;
  - (3) Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion;
  - (4) Expert witnesses should make it clear when a particular question or issue is outside their expertise;

- (5) If such witnesses consider that insufficient data is available, they should say so, and indicate that the opinion is provisional only; and
  - (6) If the witness is not sure that their report contains the truth, the whole truth and nothing but the truth, without some qualification, they should state that qualification in their report. If an expert witness changes his views on a material matter such change of views should be communicated (through lawyers) should the other side without delay and when appropriate to the court;
  - (7) Where expert evidence refers to photographs, plans, calculations analyses, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of reports."
60. Of these, I would particularly emphasise principle (1), principle (2) and principle (4). For reasons which will shortly become plain, I do not believe that either of Mr. McKillen's expert witnesses have complied in full with these principles.
61. Finally, both the need for expertise and the need for independence is pithily summarised by O'Donnell J. in *Emerald Meats Limited v. The Minister for Agriculture, Ireland & The Attorney General* [2012] IESC 48, at paragraph 28, in the following terms:-
- "In theory, expert witnesses owe a duty to the Court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Courts determination."
62. It is plain from the authorities to which I have referred that Mr. McKillen must establish that Dr. Gurdgiev or Mr. Somers have the necessary expertise, and that they have acted in a way that is suitably independent in giving evidence to the Court.
63. I will firstly deal with the Affidavit of Mr. Somers sworn on the 23rd of July 2019.
64. At paragraph 2, Mr. Somers says the following:-
- "I make this Affidavit in my capacity as an expert witness engaged by the Applicant in the herein proceedings for the purposes of assisting him in the valuation of his divested shareholding in Anglo Irish Bank Corporation plc ("Anglo") and for the purposes of supporting his claim for the reliefs sought in the Notice of Motion and the Statement of Grounds."
65. Strikingly, Mr. Somers does not describe the area in which he claims expertise. In the subsequent paragraph he says that he has extensive experience as a company director and business consultant, has been a director of AIB and of the Central Bank of Ireland, holds board position (in unnamed companies) and acts as principle to his own consultancy firm. Presumably, if Mr. Somers had any experience or qualification in the valuation of banks he would have said so at that point in time. Merely being a director of a bank (for

periods which are not defined, at times which are unknown) does not provide that qualification or expertise.

66. Secondly, an Affidavit sworn "*for the purposes of supporting*" a claim is not a good start in terms of independence. At paragraph six Mr. Somers says:-

"My approach to the valuation exercise has been to analyse the statutory framework and establish a valuation model based on the application of the statutorily prescribed valuation principles to the exercise of assessing compensation."

67. At paragraph 18, Mr. Somers expresses a view about section 55 of the Act (to the effect that it is "*rather opaque* [...]").

68. Under the heading "*The Information Available*" Mr. Somers makes the following observations at paragraphs 26 and 27 of his Affidavit:-

"My first observation in relation to the conduct of this process is that it took until about November 2018 for the government to appoint the Respondent as Assessor in spite of the fact that the nationalisation occurred nearly ten years previously. Moreover, the tenth anniversary of Anglo's nationalisation had come and gone by the time the Assessor had been furnished with the powers necessary to perform his function pursuant to the Anglo Regulations. Leaving the divested shareholders of Anglo in limbo for a whole decade when a matter so germane to the defence and vindication of their property rights is at stake demonstrates a casual attitude to the Anglo shareholders – many of whom have doubtless experienced financial hardship over the last decade.

It is notable, that when the UK government nationalised Northern Rock in February 2008, it appointed an assessor within less than a year. This may not be of direct relevance to the work of the Assessor – and absolutely none of the foregoing criticisms should be imputed to him, as he had no control over whether and when he would be appointed – but I do believe that it is an ominous indicator of the State's overall intention as regards its shareholders."

69. This section of the Affidavit is, as Mr. Somers concedes, of no relevance to the issue in the proceedings. In this, Mr. Somers appears to act as an advocate for Mr. McKillen, in suggesting some murky and malign intent on the part of the State as against Mr. McKillen and the other shareholders.

70. Having referred to Mr. Tynan's website and certain provisions of the Act, Mr. Somers offers the following evidence at paragraphs 35 and 36:-

"It must be assumed that the information provided on the Respondent's website follows a formal decision taken by him to the effect that he would not take into account (and the submissions made to him by shareholders could ignore) the 'extent of its actual, contingent and prospective liabilities'.

The Applicant has been advised that this approach on the part of the Respondent is unlawful as it ignores a key element of that which he is mandated by section 25 to consider. This is more properly a matter for legal argument at the hearing of the application.”

71. While Mr. Somers ultimately accepts – correctly – that the approach of Mr. Tynan is a matter for legal argument rather than for his own evidence, Mr. Somers only reaches that conclusion after he has assumed that Mr. Tynan has taken a formal decision not to take into account matters which Mr. Tynan is under a statutory obligation to consider. At its most benign this is advocacy on behalf of Mr. McKillen. At its worst, it constitutes a grievous attack on Mr. Tynan’s professional integrity. It is of some significance that when Mr. Tynan, at paragraph 38 of his first Affidavit, addressed this specific criticism by Mr. Somers and stated clearly that the assumption made by Mr. Somers at paragraph 35 of the first Somers Affidavit was “incorrect” no effort was made to cross examine Mr. Tynan or put to him that Mr. Somers “assumption” was in fact justified.

72. At paragraph 42 of his Affidavit Mr. Somers says the following:-

“Moreover, the Anglo Act lacks definition in its words and phrases and the Assessor has provided no guidance on his interpretation of the Act or of his approach to valuation. This places a shareholder wishing to make representations to the Assessor at significant disadvantage. It is difficult to avoid the conclusion that the instructions to the Assessor in the Anglo Act and the matters to which he is referred are biased in favour of a low valuation. This raises a question as to its compatibility with constitutional rights. Although that issue may be for another forum, the manner in which the Respondent has approached the issue thus far appears to have exacerbated this problem. This is in stark contrast to the mandatory instructions issued by Revenue, on behalf of the State on the valuation of companies.”

73. The mandatory instructions issued by Revenue are not described in detail by Mr. Somers, nor are any such instructions exhibited to his Affidavit. More troublingly, Mr. Somers now purports to be in a position to give evidence about “*the instructions to the Assessor in the Anglo Act [...]*”, to form a view that the legislation is “biased” in the manner he suggests, and to express an opinion about the compatibility of the legislation with the constitutional rights of Mr. McKillen. Mr. Somers offers no basis whatsoever to establish a qualification or an expertise enabling him to give that evidence.

74. Paragraph 45 of Mr. Somers Affidavit raises similar concerns about the way in which he has overreached himself in giving evidence about matters of law. It is difficult to see why this paragraph is included in the evidence of Mr. Somers unless to make a case of some sort on behalf of Mr. McKillen. That paragraph reads as follows:-

“My (and the Applicant’s) legal advice is that the wording of section 25 has been designed with enough flexibility and ambiguity to ensure that it could plausibly (if not persuasively) be argued that the legislative framework might not be unconstitutional since the locus of constitutional controversy has moved from the

legislation itself to the Assessor to whom the Minister has delegated the function of implementing the legislation. In effect, therefore, the Assessor has the peculiar knowledge of the valuation process which alone can determine whether this flawed legislative framework is implemented in a manner which is capable of vindicating the shareholders' constitutional rights."

75. The advancing of a case on behalf of Mr. McKillen is also evident at paragraph 51 of Mr. Somers Affidavit, where he describes the position taken by Mr. Tynan as "*beyond comprehension*". Again, while it is not a critical point in itself, this use of denigratory language by Mr. Somers is more consistent with an address by a particularly acerbic Counsel that with the moderate and precise language one would expect from a witness with true expertise, in the course of assisting the Court.
76. A similar point can be made about paragraph 54 of the first Affidavit of Mr. Somers where he addresses the proposition that Mr. Tynan has suggested to Mr. McKillen that information that postdates the 15th of January 2009 is irrelevant to the valuation of Anglo's assets and liabilities. About this position, Mr. Somers says the following:-
- "I can only hope that this extraordinary comment does not reflect what the Respondent actually thinks."
77. Again, the denigration of Mr. Tynan's position is regrettable, though not decisive in my assessment of the evidence of Mr. Somers. The hint of dishonesty on the part of Mr. Tynan does Mr. Somers little credit, and is consistent with Mr. Somers building a case for Mr. McKillen rather than anything else.
78. Finally, and importantly, paragraph 55 of Mr. Somers first Affidavit reads as follows:-
- "Accordingly, I believe that the process as currently constituted is irredeemably flawed from the perspective of allowing shareholders to make comprehensive and meaningful submissions in relation to the valuation of their divested shares and believe that this Honourable Court grant the Applicant the reliefs sought herein."
79. As was highlighted by Counsel for Mr. Tynan, this paragraph is in every respect identical to the concluding paragraph of Dr. Gurdgiev's first Affidavit, sworn nine days after the Affidavit of Mr. Somers. Notwithstanding that gap in time, Dr. Gurdgiev does not acknowledge the coincidence in the use of language.
80. The principles set out in *The Ikarian Reefer* include the requirement that evidence should be seen to be independent and uninfluenced in form by the exigencies of litigation. The use by two independent witnesses of the same concluding paragraph in their evidence is not consistent with the compliance with that principle.
81. I now wish to consider the first Affidavit of Dr. Gurdgiev. While paragraph two of Dr. Gurdgiev's Affidavit is not identical to paragraph two of Mr. Somers first Affidavit, it is materially similar. Like Dr. Somers, Dr. Gurdgiev says that he is giving this evidence "*in my capacity as an expert witness*" engaged by Mr. McKillen. The reason for the evidence

is described by both deponents as being *"for the purposes of supporting his claim for the reliefs sought in the Notice of Motion and the Statement of Grounds."*

82. Dr. Gurdgiev is an economist who says that in the twenty years prior to his Affidavit he has *"amassed considerable experience as a professional economist, academic, and company director"*.
83. Dr. Gurdgiev holds a chair in finance, and holds non-executive directorships with two charities, and is an independent consultant in finance and economics.
84. In terms of their expertise, therefore, there is no evidence that either Dr. Gurdgiev or Mr. Somers have actually valued the shareholding in any commercial entity, as was accepted by Counsel for Mr. McKillen (Transcript, day two, page 134).
85. For the sake of completeness, I should also refer to paragraph 4(c) of Dr. Gurdgiev's second Affidavit, where he describes himself as "an economist and expert in public policy". This does not carry the matter of his relevant expertise any further.
86. At paragraph eight of his first Affidavit, Dr. Gurdgiev states the following:-

*"It seems to me that the Respondent appears to want to move with haste in carrying out the exercise with which he has been entrusted. This is in stark contrast to the timing of his appointment, which took place in excess of ten years after the enactment of the legislation providing for it. It is in this context that I do not understand the determination of the valuation exercise carried out in this way."*
87. Dr. Gurdgiev does not refer to the obligation of expedition placed on Mr. Tynan by the Act.
88. At paragraph 9, Dr. Gurdgiev describes the "obvious political concerns" which existed in January 2009 and which (he contends) influenced the form the legislation took.
89. At paragraphs eleven and twelve of his first Affidavit, Dr. Gurdgiev describes the politically unpalatable possibilities that the special legislation was designed to prevent. Dr. Gurdgiev does not explain the relevance of these matters, how he has the expertise to opine on these matters, or provide any documentation supporting his views about these matters.
90. At paragraph nineteen, having set out section 25(2) of the Act, Dr. Gurdgiev says:-

*"Speaking as someone with no background in law or statutory interpretation but with many years of experience in looking at how the government of Ireland habitually does its business, I find it difficult not to infer an intention in the above wording to ensure that the share price as at nationalisation date or immediately prior to the public announcement of nationalisation, should be ignored and that the shares valued at zero."*

91. Again, I do not see how this falls within Dr. Gurdgiev's expertise, and I believe it constitutes an attempt by him to advance Mr. McKillen's case. It is also of marginal (if any) relevance to the proceedings.
92. At paragraph 21, Dr. Gurdgiev describes the purpose of his evidence. He says that his analysis is relating to "*the methodological view on the valuation of assets*".
93. From paragraph 35 to paragraph 43 inclusive Dr. Gurdgiev sets out how his valuation will proceed, and what is required in order to allow Mr. McKillen to make "*the type of submission contemplated by the Act*".
94. This description of Dr. Gurdgiev's approach to valuation and the documentation required for the purpose of Mr. McKillen's submission is echoed in the letter of the 25th of April 2019 in which Mr. McKillen set out his requirements from Mr. Tynan. This section of the Affidavit is somewhat fuller than the portion of the letter of the 25th of April, but in material terms the requirements are the same. The portion of the Affidavit is somewhat longer than the analogous section of the letter because the Affidavit contains a commentary by Dr. Gurdgiev which is absent from the correspondence. As part of that commentary, and in considering the position taken by Mr. Tynan that no information would be provided to Mr. McKillen, Dr. Gurdgiev includes this section at paragraph 41:-

"This is unconscionable, given that the Respondent is, ultimately, being tasked with providing estimates as to the residual post-liquidation value of the shares. Such a refusal to directly engage in the provision of material information will, in my opinion, lead to a widespread mistrust of the process of valuations, triggering significant legal actions from the remaining shareholders challenging these valuations."

95. This represents a now familiar pattern of the use of emotive language in advancing Mr. McKillen's case and the giving of evidence which goes beyond the scope of any stated expertise on the part of Dr. Gurdgiev; he certainly has not made out any basis upon which he can give expert evidence that the position taken by Mr. Tynan will lead to the triggering of significant legal actions from the remaining shareholders challenging these valuations. As I have already observed, no other shareholder has even sought the information required by Mr. McKillen, let alone threatened to litigate in that regard. However, the point is not whether or not Dr. Gurdgiev is right but rather his willingness on the part of Mr. McKillen to offer such evidence.
96. At paragraphs 44 and 45 Dr. Gurdgiev gives his concluding evidence (apart from paragraph 46 which, as I have noted, is in identical form to the last paragraph of the Affidavit of Mr. Somers).

"The Respondent has refused to provide the Applicant with the extension of time which he needs to complete his submissions and has indicated that he will not, as a matter of principle, be providing any information at all – even going so far as to say that the Applicant should be confined to material that is in the public domain (in



other words, nothing terribly useful and nothing approaching what might realistically or reasonably be needed, or what is customarily expected by the investors in a normal course of markets operations).

This strongly suggests to me that the submission process being run by the Assessor is a somewhat hollow exercise designed to generate a predetermined valuation of zero which are materially independent from the real valuations that could or can be obtained in the markets.”

97. The tone and content of this portion of the Affidavit is redolent of the peroration of a speech by Counsel rather than the considered evidence of an expert who wishes to assist the Court in its deliberations.
98. The matter is not carried further by the subsequent Affidavits of Dr. Gurdgiev and Mr. Somers, though I will look at other aspects of the evidence when I consider the allegation of pre-judgment by Mr. Tynan.
99. I find that Mr. McKillen has not discharged the burden which he carries to establish that either Mr. Somers or Dr. Gurdgiev have the experience, training or knowledge to act as an expert witness with regard to the valuation of the shareholding in Anglo Irish Bank. If I am wrong on this, the nature and quality of the evidence that has been given by these two individuals has no weight given their patent desire to advance a case made by Mr. McKillen; as each witness has stated, the purpose of their evidence is to support Mr. McKillen's claim.
100. In the light of this finding, I further find that there is no evidence before the Court to establish that the information sought by Mr. McKillen is necessary in order to allow him to make a meaningful submission to the Assessor. I can certainly contemplate circumstances where information sought by a party seeking to make a submission of some type was so obviously relevant or necessary that expert evidence is not required in order to establish that it should be provided in order to enable the person wishing to make the submission to make a meaningful submission. However, this is not the case here as the information sought (in its totality) is not self-evidently needed in order to allow a meaningful submission to be made. However, more importantly, as I have already indicated the case made on behalf of Mr. McKillen through his Counsel is that the Court knows that this information is required because the experts say it is. That whole basis for this part of Mr. McKillen's case falls away in the event I find that the witnesses are not in fact experts or that (even if they are) they have fallen foul of the rules governing the provision of expert evidence to the Court.
101. In the absence of any reason for the Court to find that the information sought by Mr. McKillen was necessary to enable him to make a meaningful submission to Mr. Tynan, then the decision to refuse to provide the requested information cannot be unreasonable within the meaning of the judgments of the Supreme Court in *Meadows*. The paragraph in *Meadows* put forward by Counsel for Mr. McKillen as stating the relevant rule which I should apply was paragraph 449 of the judgment of Mr. Justice Fennelly in *Meadows v.*

*Minister for Justice, Equality & Law Reform* [2010] 2 IR 701. That paragraph reads as follows:-

“I prefer to explain the proposition laid down in the *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, ‘substantive’ to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence.”

102. It cannot properly be said that the decision of Mr. Tynan to refuse to provide the information sought by Mr. McKillen was “*unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense*”. I say this for the following three reasons:-

i) As I have said, it has not been established to the satisfaction of the Court that any of this material was needed in order to make a meaningful submission. In that regard, it is worth noting that having opened paragraph 449 to me (Transcript: day one, page 187.). Counsel for Mr. McKillen then accepted the burden of showing that the decision not to provide the information was unreasonable “in that context”. Counsel then went on to say:-

“[...] that is why the Affidavits of the experts are provided. Because if no Affidavit on the part of the experts were provided you would undoubtedly have been met with an argument to the effect that : how can you say it is irrational or unreasonable?” (Transcript: day one, page 188.).

ii) The nature of the request contained in the letter of the 25th of April 2019 was to seek a deferral for an indefinite period, agreement to which without good reason would certainly have been inconsistent with the statutory obligation of expedition placed on Mr. Tynan in the performance of his role as Assessor; and

iii) The scale of the information sought, as already recorded in this judgment, was very significant.

103. It should be noted that Mr. McKillen never retreated from the scale of the information sought in his letter of the 25th of April 2019; precisely that information was sought again in the letter of the 9th of May 2019. While a more nuanced approach was taken in the final substantive item of correspondence (the letter of the 16th of May 2019 from Eames Solicitors) that correspondence nonetheless required a commitment by Mr. Tynan to provide Mr. McKillen with:-
- i) Such information and documentation (subject to the appropriate confidentiality safeguards) as he needs for the purpose of producing a meaningful submission; and
  - ii) Such extension of time pursuant to regulation 8(2) as are necessary to allow to him to do so.
104. The subsequent Affidavit of Dr. Gurdgiev (in particular) makes it plain that the advice being provided to Mr. McKillen by his experts was that he still required the panoply of documentation and information sought in the letter of the 25th of April 2019. In addition, subsequent to the circulation of the draft report by Mr. Tynan (on the 15th day of October 2019) there was no revision or refinement of the documentation sought by Mr. McKillen in his letter of the 25th of April.
105. As I have decided that the decision to refuse to provide the requested information was not unreasonable, it follows that the decision to refuse the request for an extension of time was not unreasonable given that the only purpose suggested by or on behalf of Mr. McKillen for any of the extensions of time (apart from the first one) was in order to obtain and digest the information sought. The refusal to provide the information was not unreasonable. It was therefore not unreasonable to refuse to extend the time when the only purpose for the extension was the provision of information which Mr. Tynan has said he would not provide.
106. For similar reasons, I find that the refusal to provide this information does not breach the requirements of proportionality as set out in *Meadows*. Mr. McKillen has failed to establish any adverse impact on, or prejudice to, his rights arising from the challenged decisions of Mr. Tynan.

#### **Issue Two**

107. In the light of my decision on issue one and issue three I do not need to address issue two.

#### **Issue Four – Prejudgment**

108. I will now set out the facts giving rise to the allegation that Mr. Tynan made a premature judgment by stating on oath that IBRC “*would have been severely insolvent*” without the injection of State funds. The prejudgment is stated by Mr. McKillen to be in an important one, as one of the requirements of the Act is that the Assessor shall have reference to the capital insolvency levels of Anglo Irish Bank on the 15th of January 2009 in determining the value of the transferred shares in the bank – section 25 (3) (e) of the Act, already quoted.

109. At paragraph 43 of his first Affidavit, Mr. Somers states the following:-

“However, it is interesting to note that when Anglo (by then known as IBRC) was placed in liquidation under the 2013 Act, it was not on the basis of insolvency.”

110. Mr. Somers then goes on to quote from a statement made by Alan Dukes to the Joint Committee of Inquiry into the banking crisis. Mr. Dukes is described as “*the former chairman of Anglo / IBRC*”.

111. At paragraph 44 Mr. Somers says:-

“It goes without saying that the above does not necessarily imply that Anglo was solvent (on a balance sheet or cash flow basis) in January 2009. However, it does make clear that it is unsafe and unsound to approach the valuation exercise *a priori* assumption it was not.”

112. At paragraph 31 of his first Affidavit, Dr. Gurdgiev says:-

“More to the point however, the subsequent liquidation of Anglo (now known as IBRC) is reported in the media to have been a solvent one. Of course, this is not to say that a liquidation process commenced in 2009 and without the buffer of government support and assistance would have been solvent also. However, this fact alone gives rise to a question of principle.”

113. Paragraphs 32 and 33 of Dr. Gurdgiev’s Affidavit suggests that, “*even if the assets of Anglo are worth less than the liabilities on a mark to market basis*” the disposal of those assets by a liquidator during a relatively lengthy period may have led to “*a positive return*”. Indeed, this evidence of Dr. Gurdgiev is summarised by the statement (at paragraph 33 of his Affidavit) to the effect that “*broadly speaking, the longer the process the better the ultimate return*”. He then cites the example of *Merchant Banking Limited*, an institution which collapsed in 1982 but was not dissolved until 2010. The suggestion made by Dr. Gurdgiev in this portion of his Affidavit is therefore not to contest the possibility that Anglo was insolvent in January 2009 (in the sense that liabilities exceeded assets) but rather to postulate a lengthy liquidation process which would have resulted in a return (presumably to shareholders) as the value of secured assets would have risen in the years between January 2009 and the date of the appointment of Mr. Tynan.

114. In response to these averments by Mr. Somers and Dr. Gurdgiev, Mr. Tynan replied in his first Affidavit (at paragraph 37) as follows:-

“Both Mr. Somers and Mr. Gurdgiev refer to the “*solvent liquidation of IBRC (formerly Anglo Irish Bank)*”. The fact that the liquidation is likely to be a solvent liquidation is in the public domain as the Special Liquidators appointed in respect of IBRC publish regular progress reports on the liquidation, setting out the cash received and payments made and covering other matters such as the cost of the liquidation, including the liquidator’s fees. However, when referring to the solvent liquidation, Mr. Somers and Mr. Gurdgiev make no reference to the €29.3 bn of

funding that the State provided to the Bank or the €5.4 bn of funding that the State provided to Irish Nationwide Building Society. Had the State not provided these funds, IBRC would have been severely insolvent.”

115. It is this last sentence which Mr. McKillen alleges constitutes a premature judgment in that it decides an issue which Mr. Tynan is obliged to consider.
116. Counsel for Mr. Tynan have described this allegation of prejudgment as being “*opportunistic*”. I do not agree that this is so. The averment by Mr. Tynan is one made in a considered and solemn context, and Mr. McKillen is quite entitled to make the case that he does.
117. Dr. Gurdgiev’s response to this averment by Mr. Tynan is interesting. At paragraph thirteen of his second Affidavit, Dr. Gurdgiev accepts that at the relevant time Anglo would have been “*severely insolvent*” by reference to its cash flow position. With regard to the proposition that Anglo was “*severely insolvent*” by reference to its net assets position, Dr. Gurdgiev comments as follows:-
- “[...] it suggests that Mr. Tynan has already, in advance of even having prepared or published his interim report, reached the conclusion that the bank’s assets were clearly worth less than its liabilities – meaning that he has already made a determination that Anglo’s shares were worth nothing. In addition to providing a frame for the present case analysis, it also opens up the wider question as to the legitimacy of repayments made to the unsecured creditors who are traditionally tiered just above shareholders in seniority.”
118. Dr. Gurdgiev’s Affidavit appears to me to concede the possibility that it was open to Mr. Tynan to reach the conclusion that the banks assets were clearly worth less than its liabilities “*having prepared or published his interim report*”. Regardless of whether or not I am correct in this assessment of Dr. Gurdgiev’s evidence, I believe that it must have been open to Mr. Tynan to reach a conclusion at the time of his interim report as to the solvency position of Anglo Irish Bank on the 15th of January 2009. That is one of the matters he was required by the Act to consider. For the draft report to be meaningful, Mr. Tynan would have had to be able to consider this issue and form a view on it. For the reasons I have given earlier, that view might well have been a conditional or provisional one (and must have been subject to possibly being changed as a result of the second wave of submissions which could have been made to him) but such a finding could have been reached.
119. At paragraph five of his second Affidavit, Mr. Somers addresses what is stated by Mr. Tynan at paragraphs 37 and 43 of the latter’s first Affidavit. Mr. Somers says:-
- “Specifically, Mr. Tynan has indicated through the language that he has used that he regards Anglo as having been balance sheet insolvent as of the date of its nationalisation. If this is so, then Mr. Tynan already appears to have determined the shares as being of no value and the contents of his report and consequent

recommendations to the Minister have been pre-determined in advance. I very much hope that this is not the case but the implications of his Affidavit are, in my view, inescapable.”

120. The capital insolvency and solvency levels of Anglo Irish Bank as of the 15th of January 2009 is just one of the matters to be considered by the Assessor in determining the value of the shareholding. I can see it may be an important factor. However, it is but one of eight factors which are expressly to be considered by the Assessor, along with three other more open textured classes of material to be considered – extending to “*any other relevant matter*” at section 25 (3) (k).
121. It is also significant that, as I have already outlined, Dr. Gurdgiev considered that the ultimate outcome of a lengthy insolvency process could lead to a value being placed on the shareholding notwithstanding the fact that Anglo Irish Bank might have been insolvent (using either the cash flow or net assets test) as of the 15th of January 2009.
122. In his second Affidavit, Mr. Tynan addressed the comments of Mr. Somers and Dr. Gurdgiev in connection with the relevant portions of the first Affidavit sworn by Mr. Tynan. This is done at paragraphs nine – eleven inclusive of his second Affidavit:-

“The fact of the above-mentioned funding by the State in the Bank and Irish Nationwide Building Society during 2009 and 2010 is public knowledge and has been disclosed at various times, including in the audited financial statements of the Bank. I beg to refer to a copy of the relevant extract from the audited financial statements contained at Tab 1 of the Booklet of Exhibits.

The funding made by the State allowed both entities to write down their loan books to amounts that approximated net realisable value and still maintain the necessary levels of regulatory capital. In the circumstances, if the State had not made the specified investments, the balance sheets of the two entities would have been negative and therefore, they would have been severely insolvent. This position was made clear in the letter from your Deponent’s solicitors dated 10 October 2019, delivered in response to the Applicant’s suggestion that he wished to amend the Statement of Grounds. In the circumstances, in my view the issue should not be a controversial one. I beg to refer to a copy of the said letter, contained at Tab 2 of the Booklet of Exhibits.

In any event, as previously clarified in the correspondence, the task which your Deponent was appointed to undertake is a different one, namely to determine the fair and reasonable aggregate value of the transferred shares of each class and the extinguished rights as at 15 January 2009, for the purposes of the payment of fair and reasonable compensation for the acquisition of those shares and the extinction of those rights. In order to reach a determination, I must have reference to a number of matters set out in Section 25(3) of the 2009 Act, including the capital and solvency levels of the Bank on 15 January 2009.”

123. In addition, Mr. Tynan says the following at paragraph fourteen of his second Affidavit:-

“Two points arise in connection with the issue of the Draft Report. Firstly, the work in relation to the preparation of the Draft Report was largely complete at the time I swore My Verifying Affidavit, on 6 September 2019. In accordance with my statutory obligations, work had been underway since my appointment on 16th November 2018. Secondly, it is open to the Applicant, and other relevant parties, to make Further Submissions. In the event that the Applicant or any other relevant party considers that my determination of the fair and reasonable aggregate value of the Transferred Shares and extinguished rights has not been carried out in accordance with the factors identified in Section 25 of the 2009 Act, then it is open to them to deliver Further Submissions. I confirm that all Further Submissions will be taken into account by your Deponent.

In the circumstances, I say and believe that the averment made at paragraph 37 of My Verifying Affidavit, to which the Applicant takes issue, is factually correct. In the event that I am wrong in that regard, pursuant to the statutory regime, it is open to the Applicant, or indeed any other relevant party, to provide Further Submissions in respect of the Draft Report. I also do not believe it is reasonable for the Applicant to criticise me for explaining, in an Affidavit sworn in response to Affidavits tendered in support of Judicial Review proceedings that he elected to commence against me, my opinion in relation to matters on which I am obliged to a view.”

124. Contrary to the speculation of Dr. Gurdgiev, therefore, Mr. Tynan’s statement at the end of paragraph 37 of his first Affidavit was in fact made having broadly prepared the draft report (described by Dr. Gurdgiev as an “*interim report*”). Secondly, Mr. Tynan had been working on assessing the value of the Anglo Irish shareholding since November 2018, a period of over nine months.
125. These averments of Mr. Tynan have not been the subject of any meaningful challenge; they are subject to some comments by Mr. McKillen
126. In his second Affidavit, which deals mainly with this evidence of Mr. Tynan, Mr. McKillen states that Mr. Tynan’s evidence is “*nonsensical*” (paragraph six of McKillen 2), “*classically glib and indiscreet*” (paragraph ten of McKillen 2), and preposterous (paragraph thirteen of McKillen 2). At paragraph twelve of his Affidavit, Mr. McKillen suggests that both the evidence of Mr. Tynan in his second Affidavit and the submission made by Counsel on the application to amend the Statements of Grounds constituted “*an ex post facto rationale drawn up for the purposes of retrospectively plugging a metaphorical hole*”.
127. I do not think it is open to me, on the evidence in any of the Affidavits filed on behalf of Mr. McKillen, to find that Mr. Tynan’s evidence of this prejudgment issue is either mistaken or untrue. Had an application been brought to cross examine Mr. Tynan on these portions of his Affidavits I would have seriously considered permitting this.

128. On the evidence before me, therefore, I accept that Mr. Tynan had been working on his task as Assessor since his appointment in November 2018, that one of the things he considered was the question of the solvency of Anglo Irish Bank on the relevant day, and that his averment at paragraph 37 of his first Affidavit represented the opinion that he had then formed which was to the effect that Anglo Irish Bank was insolvent at that point in time. I find that a view to that effect is one that Mr. Tynan would have been quite entitled to include in his draft report, and had the impugned portion of Mr. Tynan's first Affidavit been included in the draft report this could not have given rise to any legitimate concern or complaint on the part of Mr. McKillen as findings of this sort are exactly what the Oireachtas contemplated in requiring a draft report to be prepared and circulated. I also have no reason to disbelieve Mr. Tynan when he swears (at paragraph fourteen of his second Affidavit) that all Further Submissions will be taken into account by him including – as Mr. Tynan makes plain at paragraph fifteen of his second Affidavit – submissions in respect of the relevant part of paragraph 37 of Tynan 1.
129. Counsel for both parties agree that the test to be applied in respect of the allegation of prejudgment is to be found at paragraph 551 in O'Callaghan v. Mahon [2008] 2 IR 514 at 672. The paragraph is from the majority judgment of Mr. Justice Fennelly. This provides as follows:-
- "The principles to be applied to the determination of this appeal are thus, well established:-
- (a) Objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;
  - (b) The apprehensions of the actual affected party are not relevant;
  - (c) Objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;
  - (d) Objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses."
130. Particular emphasis was placed by Counsel for Mr. McKillen on the first limb of principle (d) of this paragraph.
131. I think this part of Mr. McKillen's case completely overlooks the fact that Mr. Tynan was obliged by the Act to provide a draft report which would necessarily involve conclusions. I do not think that the reasonable and fair minded objective observer, who is not unduly sensitive, but who was in possession of the relevant facts, would reasonably apprehend that (in this context) the impugned averment of Mr. Tynan meant that he had effectively decided the value of the shareholding. I think that such an observer would see the impugned averment for what it was, namely the provision of information that neither Mr.



Somers nor Dr. Gurdgiev had taken into account in their Affidavits. This information was the undisputed fact that there had been an injection of €29.3 billion into Anglo Irish Bank (and €5.4 billion into INBS). The objective observer would also understand that Mr. Tynan had, on the figures, expressed the view that Anglo Irish Bank was “*severely insolvent*” if one takes these State funds into account. The objective observer would also have understood that any position identified by Mr. Tynan (resulting from his work as Assessor) would in respect of insolvency be reflected in his draft report and would be subject to submissions by Mr. McKillen and any other interested party after that draft report had been circulated.

132. I do not therefore believe that objective bias is established in accordance with the principles set out at paragraph 551 of the judgment in *O’Callaghan*. For the reasons I have described, I do not think that the objective observer as defined in that portion of the judgment would apprehend that the decision maker would not be fair or impartial. On the contrary, the decision maker was diligently considering the effect that the injection of State funds had on the balance sheet of Anglo Irish Bank as described by Mr. Somers and Dr. Gurdgiev.
133. Even if it was confined to the principle described at (d) of paragraph 551 of *O’Callaghan*, and leaving aside the likelihood that that principle is simply an example of the overriding principle described at (a), I do not think that the correction that Mr. Tynan proposed to the accounts contained in the first Affidavits of Mr. Somers and Dr. Gurdgiev involve Mr. Tynan “*effectively deciding the value of the shareholding*”. The linked example of objective bias contained at (d), which I understand Counsel for Mr. McKillen does not seek to rely upon, are nonetheless instructive. Far from showing prejudice, hostility or dislike towards Mr. McKillen or his witnesses Mr. Tynan has accurately and correctly pointed out that those witnesses have not taken into account enormous payments made to support Anglo Irish Bank and Irish Nationwide Building Society.
134. There was also reliance on the judgment of Mr. Justice Clarke in *AP*, and the issue paper agreed between the parties suggest that I decide whether or not Mr. Tynan made a premature judgment within the meaning of the decision in *AP*.
135. At paragraph 7.4 of his judgment, Clarke J. raises the concern that an objective and reasonable and well informed person would have in the event comments were made which made it clear that an adjudicator “*had reached a decision on some important point in the case at a time when no reasonable adjudicator could have, while complying with the principles of natural justice, reached such a conclusion*”.
136. At paragraph 7.6, Mr. Justice Clarke says:-

“The form or prejudgment which I have sought to analyse can only happen at a hearing and arises from the adjudicator creating, in the minds of reasonable and informed people, an impression that a premature rush to judgment has occurred. Such a rush to judgment does not necessarily depend on the adjudicator having a particular animus towards one of the parties concerned, but rather stems from the

fact that a reasonable apprehension has been created that the adjudicator has not considered all appropriate matters before reaching what appears to be a final view on the issue.”

137. Mr. Justice Clarke goes on to say (at paragraph 7.7) that *“it is not necessary to establish that [the prejudgment] predated the adjudicative process.”*
138. I do not think that the impugned averment of Mr. Tynan qualifies as the form of prejudgment against which Mr. Justice Clarke is warning. For all the reasons which I have set out in respect of the test in *O’Callaghan*, I do not think that a reasonable and objective and well informed person would have come to the view that the Assessor had made a decision on an important point in the process of valuation of the Anglo Irish shares *“when no reasonable adjudicator could have, while complying with the principles of natural justice, reached such a conclusion”*. I do not want to repeat all of the factors that I have already indicated apply, but I would (at the risk of inordinate repetition) again indicate the statutory obligation on Mr. Tynan to prepare a draft report and the context of (and basis for) the final sentence of paragraph 37 of this first Affidavit.
139. It is also worth observing that Mr. Tynan had, in compliance with his obligations under the statutory regime, invited submissions from Mr. McKillen. As Mr. McKillen has not satisfied me that the extensive information he sought was in fact required in order to allow him to make submissions to Mr. Tynan, it follows that all fair procedures have been provided to Mr. McKillen in accordance with the statutory regime in advance of Mr. Tynan’s evidence about the solvency of Anglo Irish Bank.

### **Summary of Conclusions**

140. In summary my conclusions are as follows:-

1. Mr. McKillen has not satisfied me that either Mr. Somers or Dr. Gurdgiev qualify as experts in the field of valuation of the shareholding in Anglo Irish Bank.
2. Even if Mr. Somers or Dr. Gurdgiev qualify as experts in this field, I find that the content and tone of their evidence to be such as to render the evidence of no real value.
3. Mr. McKillen relies exclusively on the evidence of Dr. Gurdgiev and Mr. Somers to make out the proposition that he needs the requested information in order to be able to make a meaningful submission to Mr. Tynan. As the evidence of neither Dr. Gurdgiev or Mr. Somers is capable of supporting that proposition, I find that Mr. McKillen has not discharged the burden on him of establishing that the information sought in his letter of the 25th of April 2019 is information which (in whole or in part) is required by him to make a meaningful submission to the Assessor.
4. For that reason, and given the other factors identified in this judgment (notably the statutory obligation of expedition on Mr. Tynan, the indefinite nature of the time it will take to assemble the information, the uncontradicted evidence of Mr. Tynan that the provision of the information sought would make the process unworkable,

the likely scale of the information currently sought and the unknown dimensions of the further information which is likely to be sought) I find that Mr. McKillen has not discharged the onus on him of showing that the decision of Mr. Tynan not to provide the information was “*unreasonable*” within the meaning of the judgments in *Meadows*.

5. Given that Mr. McKillen has failed to establish that the refusal by Mr. Tynan of the requests for information was unreasonable, it follows that the decision to refuse an extension of time was not unreasonable as the sole purpose of the application for the extension of time was the provision of information to which Mr. McKillen has not established he was legally entitled.
6. As the only information sought by Mr. McKillen was the full panoply of information described in the letter of the 25th of April 2019, the question of whether or not Mr. Tynan should have agreed to provide other, lesser tranches of information does not arise. Even if it did, no case has been made out on the evidence that any particular tranche of information is required in order to enable him to make meaningful submissions.
7. In the light of my decisions on issue one and issue three, the questions raised in issue two do not arise.
8. On the question of prejudgment, or premature judgment, Mr. McKillen has not succeeded in making out a case of objective bias on the part of Mr. Tynan in accordance with the judgment of Mr. Justice Fennelly in *O’Callaghan*. Mr. McKillen has also failed to make out a case of premature judgment on the part of Mr. Tynan within the meaning of the decision of Clarke J. (as he then was) in *AP*.
9. Having decided in this manner the issues which the parties agree I have to address, I therefore refuse all reliefs as sought by Mr. McKillen in this judicial review in its amended form.