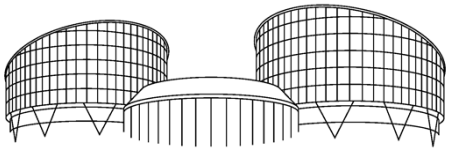

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PASQUINI v. SAN MARINO

(Application no. 50956/16)

JUDGMENT

STRASBOURG

2 May 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pasquini v. San Marino,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski,
Gilberto Felici, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 19 March 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 50956/16) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Enrico Maria Pasquini ("the applicant"), on 16 August 2016.

2. The applicant was represented by Mr A. Pagliano, a lawyer practising in Naples. The Government of San Marino ("the Government") were represented by their Agent, Mr L. Daniele.

3. The applicant alleged, under Article 6 § 1 of the Convention, that the composition of the Court for Trusts had been irregular and not prescribed by law. He further complained that the fact that he had had to pay substantial legal costs in order to apply to that court, on the basis of criteria not specified by law and the refusal of leave to appeal in itself had amounted to a violation of his right of access to a court. He also complained that the Judge of Civil Appeals had not been impartial in refusing him leave to appeal, given his previous expression of opinion on the same facts in a connected case.

4. On 19 June 2017 notice of the application was given to the Government.

5. The Italian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1948 and lives in San Marino.

A. Background to the case

7. The applicant owned the entire share capital (and at the material time was also the director) of S.M.I., a fiduciary company operating in San Marino. Company S.M.I. is currently in compulsory liquidation.

8. On an unspecified date an individual, B., conferred a mandate to Z. for the latter to open a fiduciary account (*conto fiduciario*) with company S.M.I. in his own name but on behalf of the former. Thus, on 2 March 1988 Z. signed a fiduciary management mandate (*mandato di amministrazione fiduciaria*) with company S.M.I. on behalf of B.

9. As part of the mandate, company S.M.I. opened fiduciary account no. 381-AF07701 in order to carry out some financial operations concerning securities listed on the Italian Stock Exchange.

10. By a contract of 20 March 1990, signed in the context of the above-mentioned fiduciary mandate (on behalf of B.), company S.M.I. and another company, K., purchased from company P.A. some shares of its subsidiary company, A.N. As part of the price for these shares, companies S.M.I. and K: (i) waived a previous debt owed to them by an owner of company P.A., and (ii) undertook to reimburse a debt of 11,000,000,000 Italian liras (LIT) that company P.A. owed an Italian bank, S. (in particular, company S.M.I. undertook to reimburse LIT 9,900,000,000 and company K. LIT 1,100,000,000).

11. Eventually B. complained that company S.M.I. had not returned to him part of the proceeds (LIT 9,035,264,332) obtained from the purchase (see paragraph 10 above) and subsequent sale, a few months later, of the shares of company A.N. Nor had company S.M.I. recorded that sum in the statement related to the fiduciary account. B. had become aware of the breach of contract during previous criminal proceedings (ongoing for other reasons, in Milan) in which company S.M.I. had submitted statements concerning the above-mentioned fiduciary account.

B. Civil proceedings no. 300/2001

1. First-instance

12. On 4 October 2001 B. filed a civil complaint against Z. and company S.M.I., represented by its legal representative and director (the applicant), in order to obtain from them, *in solidum*, the payment of LIT 9,035,264,332.

13. By an interlocutory judgment of 4 June 2007 the first-instance judge (*Commissario della Legge*) found that not all the financial operations carried out by company S.M.I. on behalf of B. in execution of the fiduciary mandate had been correctly recorded in the financial statement. The judge applied the rules governing contracts of mandate as established by the domestic case-law and practice, relying, in particular, on the duty of the agent (*mandatario* – in this case, company S.M.I.) to give evidence of the operations carried out in execution of a mandate in order to demonstrate that it had fulfilled its reporting obligation (*obbligo di rendiconto*). According to the judge, the only evidence that company S.M.I. had submitted for that purpose had been the above-mentioned financial statement. However, B. had demonstrated that the statement was incomplete and therefore unreliable. Thus, company S.M.I. had failed to discharge its burden of proof to show that it had returned to B. the sums obtained from the transfer of company A.N.'s shares.

14. Given the unreliability of the statement, the judge, applying the domestic practice concerning the assessment of documentary evidence, took into consideration only the parts of the statement which constituted evidence against the party which had drafted the document, that is to say, only the credit entries (the sums of money company S.M.I. admitted to having been received by B.) but not the debit entries reported therein (indicating what sums S.M.I. had claimed to have used in execution of the fiduciary mandate). Thus, the judge considered all the credit entries (amounting to LIT 34,962,635,382) and deducted from them the sums which B. acknowledged having received and those which company S.M.I had used on his instructions (amounting to LIT 25,927,371,050) as also admitted by him. This left an outstanding debt of LIT 9,035,264,332 (approximately 4,662,778.93 euros (EUR)) which company S.M.I. owed B.

15. However, according to the judge, this was the result of presumptions being made, and B. had not entirely discharged the relevant burden of proof. Thus, to compensate for the partial lack of evidence and allow B. to entirely discharge his burden of proof, the judge in the same aforementioned interlocutory judgment summoned B. so that he could take a "supplementary oath" (*giuramento suppletorio* – an oath of a party on his or her own behalf as confirmation of otherwise inadmissible or inconclusive evidence – for more details, see Relevant domestic law, paragraph 68 below). The wording of the "supplementary oath", as set by the judge, was as follows:

> "I swear and declare that I did not authorise any other withdrawals [of money] as reported in financial statement no. 381-AF0770l apart from the ones that I have acknowledged and that [were] indicated in my counsel's submission of 24 April 2003. Thus, company S.M.I. must return to me LIT 9,028,398,950."

16. Consequently, the proceedings continued solely for the purposes of the taking of the "supplementary oath".

17. In the same interlocutory judgment the judge also found that Z. had been a mere agent of B. and removed him from the case.

18. On 30 June 2008, B. took the above-mentioned "supplementary oath" as set out by the judge.

19. No first-instance judgment on the merits was ever issued.

2. Appeal against the interlocutory judgment

20. On 12 December 2008 company S.M.I. appealed against the interlocutory judgment of 4 June 2007. B. cross-appealed and requested, *inter alia*, that the interlocutory judgment of 4 June 2007 be declared final and that company S.M.I.'s requests be rejected.

21. By a judgment of 9 June 2011, filed with the registry on 30 June 2011, and served on the applicant on 20 July 2011, the Judge of Administrative Appeals, in his capacity as Judge of Civil Appeals (*Giudice Amministrativo d'Appello in veste di Giudice delle Appellazioni Civili*), dismissed the appeal. The judge confirmed that company S.M.I. had a remaining debt to B. of LIT 9,028,398,950 (EUR 4,662,778.93), and ordered it to pay him that sum of money together with default interest and currency revaluation.

22. The judge specified that the judgment (against which S.M.I. had lodged this appeal) had to be considered a "partial interlocutory judgment" (*interlocutoria mista*) falling into the category of judgments which examined the merits in part [and thus could be appealed against, as opposed to a "mere interlocutory judgment" (*interlocutoria mera*) which did not examine the merits and therefore could not be appealed against]. It could not be regarded as a "mere interlocutory judgment" since the first-instance judge, finding that B. had partially proven his statements, had partly examined the case on the merits. Thus, the judgment had become final after B. had taken the "supplementary oath", and was amenable to appeal.

3. Third-instance

23. On 6 July 2011 company S.M.I. attempted to further appeal against the judgment of 30 June 2011, before the Third-Instance Judge (*Terza Istanza*). By a judgment of 6 April 2012 the complaint was declared inadmissible on the grounds that the only role of a Third-Instance Judge was to decide which one of two non-concordant judgments had to be upheld. That prerequisite did not exist in the case at hand, since both the first and second-instance judgments had been concordant on the merits.

C. Joined criminal investigations nos. 312/RNR/2011 and 198/RNR/2012 (for "false oath" and slander)

24. On an unspecified date the applicant (in his own name) filed a criminal complaint against B. under Article 359 of the Criminal Code, accusing him of swearing a false oath. He claimed that, by the statements made under oath on 30 June 2008, B. had committed perjury. A criminal investigation was subsequently initiated.

25. In turn B. filed a complaint against the applicant, accusing him of slander. The investigating judge (*Commissario della Legge Inquirente*) joined the two investigations.

26. By a decision of 11 May 2015 the investigating judge closed the proceedings since in his opinion there was no evidence that B. had committed perjury. The judge considered that since the expert's report showed that it was not possible to conclude who had made the payment to bank S., there was no evidence to show the non-existence of the debt to B. and consequently the falsity of the statements which he had made under oath.

27. On an unspecified date the applicant lodged a complaint with the Judge of Criminal Appeals requesting that the investigation be reopened.

28. By a decision of 31 July 2015, Judge L.F., a Judge of Civil Appeals in his capacity as Judge of Criminal Appeals (*Giudice delle Appellazioni Civili in veste di Giudice delle Appellazioni Penali*) dismissed the complaint and upheld the decision to close the case. In the opinion of the judge it was implausible that a reopening of the investigation could lead to the discovery of new documents able to demonstrate the origin of the funds used to pay off the debt to bank S. The expert had already analysed all the documents available, which had been found not only in the headquarters of company S.M.I., but also in the archives of the court in Milan (where other proceedings were ongoing). He had not found any records of such a payment. Moreover, the payment dated back to 1990. Furthermore, the dispute at hand had arisen because company S.M.I. and B. had decided, by mutual consent and on purpose, not to record all the operations carried out in execution of the fiduciary mandate.

D. The institution of proceedings no. 2/2014 (before the Court for Trusts)

1. First-instance

29. Meanwhile, on 30 October 2014 the applicant (in his own name) had lodged an application with the first-instance civil judge to have civil proceedings no. 300/2001 reopened (*istanza di riassunzione del giudizio*).

30. Within that application, the applicant submitted a "jactitation suit" (*azione di iattanza /di accertamento negativo*) (see paragraph 42 and 74

below), requesting the judge to declare that the supplementary oath sworn by B. had been false. The applicant argued that after the taking of the "supplementary oath" new evidence had come into his possession. According to him, B. had not provided company S.M.I. with the necessary funds to carry out the purchase of company A.N.'s shares. Thus, the statement that B. had not authorised any other money withdrawals (except for the ones he had expressly acknowledged) had been false since he had at least authorised company S.M.I. to pay off the debt of LIT 9,900,000,000 owed to bank S., in execution of the obligations arising from the contract for the purchase of company A.N.'s shares. That debt had been paid off by company S.M.I. with the proceeds deriving from the sale of the shares of company A.N., since no other funds had been provided by B. for that purpose, and therefore the sum of LIT 9,900,000,000 had to be subtracted from the amount of the alleged debt claimed by B.

31. By a decision of 12 November 2014 the Chief Justice (*Magistrato Dirigente*), relying on the domestic law on the competence of the courts (see paragraph 61 below), referred the case to the Court for Trusts and Fiduciary Relationships (*Corte per il Trusts ed i Rapporti Fiduciari* - hereinafter "the Court for Trusts"). The latter had been instituted by Constitutional Law no. 1 of 26 January 2012 and had competence to hear all cases concerning trusts and fiduciary relationships (see paragraph 56 below).

32. Thus, proceedings no. 2/2014 were instituted before the Court for Trusts.

33. By a decision of 3 December 2014, pursuant to the relevant law (see paragraph 57 below), the President of the Court for Trusts (hereinafter "the President") referred the case to a panel composed of two judges (Judge G. and the President himself). By the same decision, the President calculated the amount of legal fees. To this end, he relied on the "Rules on Court Fees and Judicial Remunerations", which he had issued himself the day before (2 December 2014). He considered that the claim had an "undetermined value", however, the applicant had requested to establish the non-existence of a debt of EUR 4,662,778.93. Therefore, on the basis of the latter value and the applicable rules, the President calculated the amount of court fees as being EUR 6,000 and the variable part of the judge's remuneration (*la parte variabile del compenso spettante al giudice*) as being EUR 23,000 (EUR 20,000 – in accordance with the relevant table – increased by 15%, given that the case had been referred to two judges) as well as EUR 500 in reimbursement of judicial expenses. The President ordered the applicant to pay (i) the court fees *in toto* and (ii) half of the required payments (for a total amount of EUR 17,750) at least seven days before the date of the first hearing, failing which the claim would be barred (see paragraph 57 below).

34. Although he was regularly notified of the reopening of the proceedings, B. did not respond.

35. In the course of the proceedings, the court ordered some expert reports to be drawn up. The final liquidation balance sheet of company P.A. was also added to the case file, amongst other things. The applicant submitted a consultant's report aimed at showing that company S.M.I.'s debt to B. did not exist. That report was also added to the case file.

36. At a hearing of 26 May 2015 the court questioned the applicant and heard Z. (a witness called by the applicant).

37. On 10 June 2015 the applicant filed written submissions as requested by the court.

38. On 30 June 2015 the court, having considered the applicant's submissions incomplete, heard the applicant again.

39. On 14 July 2015 the applicant submitted further written submissions.

40. By a judgment filed with the registry on 18 September 2015 the court partly acceded to the applicant's complaint.

41. The court considered that the applicant had an interest in bringing proceedings, given the position which he had held in company S.M.I. (see paragraph 7 above). Notwithstanding the fact that the applicant, in his own name, had not been a party in the "original" civil proceedings (brought by B. against company S.M.I.) the outcome of those proceedings (the fact that company S.M.I. had been ordered to pay a substantial sum of money to B.) could have been detrimental to his personal property and reputation both because he would have been liable to pay the sums found to be due, but also because those sums would have been due as a result of his mismanagement.

42. The court accepted the applicant's characterisation of the action lodged against B. as a "jactitation suit" aimed at establishing the falsity of the statements that B. had made under oath in the course of the civil proceedings. Addressing the applicant's claim (that he had brought to the court's attention new evidence which had come into his possession after the taking of the "supplementary oath", or written evidence which he could not submit before, on the basis of which he had initiated the "jactitation suit"), the court found that the applicant had not submitted any such new evidence. Thus, according to the court, the applicant's action should have been rejected on procedural grounds, without the merits of the case being dealt with. Nevertheless, in the court's view, the fact that the parties of the case before it (the applicant and B., the latter *in absentia*) were different from the original parties in the "ordinary" civil proceedings (company S.M.I. and B.), allowed the court to consider the "jactitation suit" procedurally admissible, even in the absence of new evidence (that is to say, in the absence of the prerequisites for the admissibility of a "jactitation suit" as established by the domestic case-law, see paragraph 68 below). The court justified its decision not to follow the above-mentioned precedent on the basis that the final judgment in the "ordinary" civil proceedings had to be considered "*res inter alios acta*" (a thing involving and affecting different parties).

43. As to the merits, the court declared false only the first part of the "supplementary oath" (in which B. had declared that he had authorised only the operations he had explicitly acknowledged in the list submitted by his lawyer on 24 April 2003 and not the further money withdrawals which had been recorded in bank statement no. 381-AF0770l – see paragraph 15 above). However, the court held that what he had said under the second part of the "supplementary oath" (relating to the final amount due) had been true. It dismissed the applicant's request to reduce the amount of the debt and confirmed that company S.M.I. had to pay B. the same sum of money.

44. According to the court, the wording of the "supplementary oath" did not imply that the second part had to be seen as a consequence of the first part, despite the use of the word "thus" (*per cui*). It was therefore preferable to separate the two parts, since operations could have existed which may not have had any effect on the amount of the final balance.

45. In connection with the first part, the court noted that the authorisation of the mandator (in this case, B.) to use the proceeds obtained from a certain financial operation in order to pay off an obligation arising from the same operation (as had happened in the case at hand) had to be considered implicit in a contract of mandate. This was a "natural effect" of the contract. It followed that the first part of the "supplementary oath" (in which B. had stated that the only operations which had been authorised were those listed by B.'s legal representative) had not been exact and the applicant was thus right on that point and the first part of the "supplementary oath" had to be considered false.

46. In any case, having examined all the evidence, in the court's view, the declaration of falsity of the first part of the statement made by B. under oath did not necessarily impact upon the quantification of the debt since (i) all the parties to the contract of 20 March 1990 had acted under the instructions of the same mastermind (B.), (ii) company P.A. (the seller of the shares of company A.N., from which company S.M.I. had taken over the debt owed to bank S. – see paragraph 10 above) belonged to company S.M.I., and (iii) bank S. had not even been notified of the taking over of the debt. Thus, there was no risk that company S.M.I. had to actually pay the debt. In addition, the applicant had not given evidence of any payments made by company S.M.I. enabling a reduction in the amount which it owed B.

47. By the same judgment the court also calculated the total amount of litigation fees to be EUR 29,500 (which included the estimate provided previously) and approved the fees requested by the lawyers (EUR 37,887).

2. Refusal of leave to appeal

48. On 2 October 2015, relying on section 11 (2) of Delegate Decree no. 128 of 30 September 2013 (see paragraph 57 below), the applicant (in

his own name) applied to the President of the Court for Trusts for leave to appeal part of the judgment of 18 September 2015.

49. The applicant claimed, *inter alia*, that the splitting of the wording of the "supplementary oath" into two parts, and the finding of falsity of the first part and not the second, had been illogical and erroneous. According to the applicant, his "jactitation suit" had aimed at ascertaining the existence of actual damage arising from the falsity of the "supplementary oath" and such damage had arisen from the second part of the "supplementary oath" (the one in which B. had claimed the return of a quantified sum) and not the first part. Furthermore, the two parts of the "supplementary oath" had to be considered strictly connected. Thus, the finding that the first part of the "supplementary oath" had been false should have also automatically led to a declaration of falsity of the second part since between them a logical causal link (*nesso logico di causalita)* existed. In addition, the decision to split the "supplementary oath" into two parts had not been reasoned and, in the applicant's view, he needed not bring any proof of the non-existence of the debt, it being an automatic result of the falsity of the statement given on oath.

50. On 19 October 2015 the President dismissed the application for leave to appeal on the grounds that: (i) most of the applicant's grounds of appeal concerned the merits of the case (which, under the relevant law, cannot constitute a ground of appeal against judgments of the Court for Trusts, see paragraph 57 below), (ii) in the first-instance proceedings before the Court for Trusts, the applicant had not given evidence of any payments made by company S.M.I. able to reduce the amount which it owed B. In this connection, the judge stated that the applicant did not seem to realise that the Court for Trusts had given fully detailed reasoning as to its decision to consider the second part of the "supplementary oath" as true, far more than had ever been done in the various phases of the proceedings before the [ordinary] courts. Thus, the court had correctly concluded that the second part of the "supplementary oath" had been true and that the amount of the debt had to remain the same.

51. The judge added that had he granted leave to appeal, it would have certainly been unsuccessful, which showed the quality of the applicant's defence in the case at hand. Moreover, according to the judge, leave to appeal also had to be refused because the applicant had not set out any reasons as to why the court had been wrong in its reasoning justifying its decision to split the "supplementary oath" into two parts.

3. Complaint concerning the refusal of leave to appeal

52. On 3 November 2015 the applicant lodged a complaint with the Judge of Civil Appeals concerning the refusal of leave to appeal, relying on Section 11 (3) of Delegate Decree no. 128 of 30 September 2013 (see

paragraph 57 below). He essentially reiterated the same requests which he had already submitted earlier.

53. By a decision of 11 February 2016, Judge L.F., in his capacity as Judge of Civil Appeals, dismissed the complaint and upheld the decision not to grant leave to appeal. The decision was served on the applicant's legal counsel by email on 16 February 2016.

54. In the opinion of the judge, the complaint did not contain any issues of law. In particular, whether it had been legitimate for the Court for Trusts to split the "supplementary oath" into two parts was not a point of law (that is to say concerning the interpretation or application of a law or legal principle) and actually concerned the interpretation of the wording of the "supplementary oath" by the Court for Trusts, which had to be considered a complaint on the merits.

55. The judge observed that, on the one hand, the court had considered that the first part of the "supplementary oath" had been false on the basis of the rules governing contracts of mandate and in the light of the evidence of the operations carried out by company S.M.I. On the other hand, the second part of the "supplementary oath" had been held to be true on the basis of the fact that no evidence had demonstrated that company S.M.I. had made any relevant payments in B.'s name (namely the reimbursement of the debt). Thus, the decision to split the "supplementary oath" into two parts had been a consequence of the court's finding that the two parts were not logically connected.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Court for Trusts and Fiduciary Relationships (*Corte per il Trust ed i Rapporti Fiduciari*)

56. Section 1 of Law no. 1 of 26 January 2012 reads, in so far as relevant, as follows:

Section 1

> "In the context of the ordinary jurisdiction, the Court for Trusts and Fiduciary Relationships is instituted. The court has competence to hear all cases concerning legal relationships arising from entrustment or confidence, such as trusts, fiduciary agreements, *fideicommissum* ... and similar legal instruments regulated by any legal system ..."

57. Delegate Decree no. 128 of 30 September 2013, concerning the procedure before the Court for Trusts, reads, in so far as relevant, as follows:

Section 2 (Application)

"... (2) To avoid a claim being barred (*improcedibilita*), an application shall be filed with the registry together with evidence of the payment of:

(a) judicial tax,

(b) court fees (*diritti di cancelleria*) in the amount periodically determined by the President and, in general, also calculated on the basis of the value of the claim. ..."

Section 4 (Beginning of the proceedings)

"(1) The President shall decide, by a final decision not amenable to appeal:

(a) whether the case has to be referred to a single judge, panel (*collegio*) (of which he also decides the members and the President), or the full court (*piena corte*),

(b) [the amount of] the variable part of the remuneration payable to the single judge or panel,

(c) [the amount of] legal fees (which may vary depending on the complexity of the case and/or its value and in conformity with the general criteria) that the applicant shall pay within seven days, to avoid the claim being barred, ... the total amount of remuneration and expenses payable to the judge[s]. This sum shall be determined by the President, applying a variable increase between 10 and 20% to the cost incurred by the State for the remuneration of judges and the expenses payable to them, as well as for court fees. (*applicando una maggiorazione, nella percentuale variabile dal 10% al 20%, sugli oneri sostenuti dall'Erario per i compensi ed i rimborsi spese in favore dei Giudici nonché per le spese di cancelleria*) ..."

Section 10 (Decision)

"(1) If a case is to be decided by a panel:

...

(b) the court shall adopt its decisions by a majority. ..."

Section 11 (Appeal)

"(1) Appeals shall only concern issues of law without any prejudice to the factual findings made by the court, as long as [leave to] appeal has been previously granted in accordance with the following paragraphs:

(2) The unsuccessful party may, within fifteen days of the filing of the judgment with the registry, request leave to appeal from the President. The President, by a reasoned decision, shall only grant leave to appeal if the case raises uncertainty in respect of the legal issues determined or if such issues are of general importance.

(3) If leave is refused, the applicant may, within fourteen days of the refusal of the President, lodge a complaint with the Judge of Civil Appeals requesting leave to appeal.

(4) Appeals:

(a) are lodged before a Judge of Appeal within fourteen days of leave to appeal [being granted];

...

(5) Within fourteen days of the submission of the pleas (*motivi*) the Judge of Appeal shall request the opinion of an expert (*consilium sapientis*), selecting the expert in the register provided pursuant to section 7(4) of Law no. 1 of 26 January 2012. The Judge of Appeal shall select one expert if the first-instance proceedings were decided by a single judge, or a panel composed of three experts if they were decided by a panel or the full court.

(6) The Judge of Appeal shall be bound by the principles of law given by the expert (*si attiene ai principi di diritto enunciati dal sapiente*). The subsequent use of extraordinary remedies shall be precluded. ..."

58. In a sitting of 4 June 2014, Parliament (*Consiglio Grande e Generale*) appointed the President and six members of the Court for Trusts and Fiduciary Relationships for a mandate of five years.

59. By a Decree of 2 December 2014, entitled "Rules on Court Fees and Judicial Remuneration" (*Decreto sui Diritti di Cancelleria e il Compenso del Giudice*), the President of the Court for Trusts, having regard to the domestic law concerning proceedings before that court, established specific criteria to determine the amount of legal fees and remuneration payable to judges in proceedings before the Court for Trusts.

60. On 10 September 2015 the President of the Court for Trusts, "having taken note of the fact that it was opportune to enhance some procedural aspects [of the former Rules]" amended some parts slightly.

B. Law no. 145 of 30 October 2003

61. Section 6 of Law no. 145 of 30 October 2003 attributes power to the Chief Justice to organise and distribute the workload of the courts. It reads, in so far as relevant, as follows:

Section 6

"... (2) The Chief Justice shall have the power to organise and distribute the judicial workload in accordance with pre-established criteria, as well as the duty to supervise (without interfering with the free decision-making of each judge) and to coordinate and manage the judicial office, with the exception of merely administrative functions.

(3) The Chief Justice shall attribute the workload to first-instance civil judges, first-instance administrative judges and trainee judges in accordance with their professional competencies, experience and academic background (*titoli*). He shall also establish criteria for the purpose of distributing the workload between judges of appeal, with their agreement.

(4) The Judicial Council (*Consiglio Giudiziario*) shall approve the criteria drawn up by the Chief Justice for the workload distribution, during its next [available] session.

(5) First-instance judges [mentioned above] shall fulfil on time the duties of their office and adapt to the orders given by the Chief Justice, save for any incompatibilities provided for by law – any other possible function may be undertaken only in accordance with the needs of the office and upon authorisation of the Judicial Council in its ordinary session.

(6) The Chief Justice shall submit to Parliament (*Consiglio Grande e Generale*), through the Secretary of State for Justice, an annual report concerning the state of justice, including details of the work carried out by magistrates and judges at every level."

C. Incompatibility, abstention and withdrawal of judges

62. Section 1 of Law no. 145 of 30 October 2003, following amendments in 2011 reads, in so far as relevant, as follows:

"The courts shall be divided into the following sections, civil, criminal, administrative and protection of minors and family. First-instance judges shall be assigned to each section by the Chief Justice.

Judges of each specialised section shall have full competence and therefore may be substituted in the exercise of [their] functions and competence.

Appeal judges may replace each other in the event of impediment or incompatibility.

Substitutions shall be decided in accordance with predetermined criteria, established by the Judicial Council, in respect of the principle of the tribunal established by law ..."

63. Point 2 of Part VI of the regulations on the distribution of work amongst single judges and their substitutions, entitled "General Regulations for Magistrates of Single Judge Tribunals", approved by the Judicial Council, and dated November 2003, provides as follows:

"Incompatibility arises when a judge has already dealt with a case concerning the same facts, during which he or she has in some way expressed his or her opinion - and therefore the reason for abstention will already have existed when the case was assigned. Thus, it is a duty (*onere*) of the magistrate in case of incompatibility, and a legal obligation under section 10 of Law no. 45/2003 in the case of abstention, for the magistrate to speedily withdraw from the case. The deadlines for abstention are the same as applicable for withdrawals ... but there are no deadlines for the purposes of incompatibility, which depends on the powers of the Chief Justice to assign the case to another judge in the relevant field. For the correct functioning of the system, a judge who considers that he or she has reason to declare his incompatibility should, no later than five days after the case has been assigned to him, write a letter giving reasons to the Chief Justice. On the expiry of this time-limit, the judge must proceed by means of abstention as provided for by law. In the event that abstention is upheld or incompatibility recognised, a new judge competent in the relevant field must be assigned, in accordance with the criteria set out in the list of competencies."

64. Section 10 of Qualified Law no. 145 of 30 October 2003, as modified by Section 9 of Qualified Law no. 2 of 16 September 2011, concerning abstention and withdrawal, in so far as relevant, reads as follows:

"A judge or magistrate must abstain when serious reasons exist, due to personal interests in the proceedings, existing relationships of family, marriage, cohabitation *more uxorio*, friendship, hostility, existing business or working relationships, between the judge himself or one of his close relatives and one of the parties or their lawyers in

civil or administrative proceedings, or the accused person, the victim of the crime or their lawyers, in criminal proceedings.

The judge must likewise abstain himself if he gave advice and opinions, or, prior to the proceedings and in the exercise of his functions he or she illegitimately expressed his opinion on the facts object of the proceedings.

In all such cases, if the judge does not abstain of his own motion, the parties may request his withdrawal.

The judge could also abstain himself where it would be appropriate if circumstances exist which would compromise his impartiality and free judgment.

A request for the withdrawal of the judge competent to decide a request for withdrawal shall not be admitted.

In criminal proceedings a request for the withdrawal of the Attorney General (*Procuratore del Fisco*) shall not be admitted.

The procedures regarding the abstention and withdrawal of judges shall be established by an ordinary law on the matter.

Any judge who fails to comply with his duty of abstention, despite the existence of clear and objective reasons specified by the present Section..., shall be sanctioned with the measures provided for by a dedicated law."

65. In judgment no. 6 of 16 November 2015 by the Third-Instance Judge, in criminal proceedings no. 154/RNR/2015, that court considered that the statements made by judges in judgments or decisions could not be considered illegitimate expressions of opinion (mentioned in section 10(2) of Qualified Law no. 145 of 30 October 2003, see paragraph 64 above), the latter constituting one's opinions expressed in the exercise of his duties.

66. By a decision of 19 September 2015, in separate civil proceedings no. 1/2015 (to which the applicant was a party), the Judge of Civil Appeals (Judge L.F.) rejected a "request for abstention" which the applicant had filed on the grounds that Judge L.F. had already sat as a judge in different civil and criminal proceedings concerning the same parties (the applicant and B.). The judge specified that none of the grounds for abstention under section 10 of Law no. 145 of 2003 existed in that case. In particular, he had not given advice or opinions, nor had he illegitimately expressed his opinion on the facts which were the subject of the proceedings. He excluded that he had made any statements concerning those facts in his previous decisions and judgments (in different proceedings concerning the applicant), but even assuming that he had done so, that would have happened while he had been exercising his legitimate jurisdictional functions, thus it could not have been considered an illegitimate expression of opinion. The judge also considered that not even the ground for facultative abstention under section 10(4) (that is to say, abstention for "reasons of appropriateness") was applicable to the applicant's case.

67. Section 2 of Law no. 139 of 16 September 2011, in so far as relevant, reads as follows:

"Any judge who is affected by one of the grounds of mandatory abstention under section 10 of Qualified Law no.145 of 30 October 2003, as modified by section 9 of Qualified Law No. 2 of 16 September 2011, shall declare so and request the competent judge to exempt him from the proceedings in which incompatibility has occurred.

The request, once it has been served on the parties, shall be transmitted to the competent judge, together with the documents of the proceedings. The evidence shall be mentioned and attached to the request.

The decision shall be filed with the registry together with the case file of the proceedings and shall be served on the parties and to the judge on the merits of the main proceedings.

The same disposition shall apply also in cases of non-mandatory abstention.

A request for withdrawal (*istanza di ricusazione*) may be submitted in every phase of the proceedings.

The request for withdrawal shall be added to the case file and indicate in detail the grounds for withdrawal as specified by law, and the related evidence substantiating the challenge.

Once the judge hearing the main proceedings receives the request, he shall inform the Chief Justice and request the registry to transmit it to the competent judge, together with a copy of the case file. If the request is submitted in the pleading stage of the criminal proceedings, the judge shall carry out the tasks set out for such hearing but desist from delivering the judgment.

The request for withdrawal shall be submitted by a lawyer practicing in San Marino...

If following a request for withdrawal, the judge chooses to abstain, the provisions related to abstention shall apply and the withdrawal proceedings are extinguished.

Once the withdrawal request is received by the competent judge he shall, within the next three days, assign to the parties and the judge who has been challenged a period of ten days for submitting evidence and submissions which shall be at the disposal of the parties and the judge, who may make copies thereof. If there is a request to hear witnesses, the competent judge shall set a hearing. On expiry of the [ten day] period and once evidence has been collected, a further period of ten days shall be provided for the concluding submissions.

Once the latter period expires, the case file shall be held for the decision, which shall be filed with the registry within thirty days.

The judgment shall be filed with the registry together with the case file and shall be served automatically on the parties and the judge.

The judgment which accedes to the withdrawal request shall also order which specific acts of the proceedings must be renewed in the light of the decision.

In the judgment rejecting a request the party who made the request may be ordered to pay a sum of money from EUR 1,000 to 10,000, as legal costs, without prejudice to any available civil or criminal actions ..."

D. "Supplementary oath"

68. A "supplementary oath" is a sworn oath that confirms a statement of fact. A party may be requested to take such an oath by the judge, who draws up wording to that effect. The "supplementary oath" can be requested by means of an interlocutory discretionary decision of the judge in order to decide the case if the facts were not fully established at the probative stage. According to domestic case-law and legal literature, a "supplementary oath" is only admissible in the case of a partial lack of evidence (*semiplena probatio*) and should preferably be requested from the party who partially gave evidence of his or her statement in the course of the proceedings. The factual findings which derive from statements made under oath cannot be examined any further by the judge. Thus, the sworn statement of facts creates an unrebuttable presumption of truth (legal proof). According to the domestic practice, the only admissible ways to contrast the factual findings arising from statements made under oath are: (i) a declaration of falsity in criminal proceedings for perjury ("false oath" - Article 359 of the Criminal Code), and (ii) the submission of new evidence concerning facts of which the party had knowledge after the taking of the oath or written evidence which would have been impossible to submit earlier ("jactitation suit" - *azione di iattanza*).

69. In a final judgment of 8 April 1924 (published in *Giurisprudenza Sammarinese*, 1924, p.7) the Judge of Civil Appeals stated that "when a testimony has not given indisputable results, a "supplementary oath" can be requested. When doubts exist as to the plaintiff's submissions, it is more appropriate to request the oath from the defendant."

70. In a judgment of 16 June 1928 (*Giurisprudenza Sammarinese*, 1928, p.13) the first-instance judge stated that: *Jus commune* (*diritto commune*), on the basis of [Justinian's] Law no. 31 (ff. *de jurejurando* - *Digesto*, book no. 22, title no. 2) and [Justinian's] Law no. 3 (*Cod. De rebus cred. Et jurejurando* - *Digesto*, book no. 4, title no. 1) provides that: (i) a judge has the possibility (but not an obligation) to request a "supplementary oath" of his own motion in "doubtful" cases and in cases showing an "*inopia probationum*", that is to say in cases in which evidence is insufficient or partial; (ii) such an oath may be requested either from the plaintiff ("supplementary oath") or from the defendant (negative oath), although, in an equally non-conclusive context, the latter [party] shall be preferred."

71. In a judgment of 16 February 1935 (*Giurisprudenza Sammarinese*, 1935-36, p. 33) the first-instance judge stated that "a supplementary oath can be requested only when the plaintiff's claim is supported by a *semiplena probatio* [a partial lack of evidence] or by valid presumptions."

72. In a final judgment of 12 March 1962 (*Giurisprudenza Sammarinese*, 1965, No. 1, p. 1) the Judge of Civil Appeals stated that "a supplementary oath is admissible under *jus commune* and the local judicial

customary law. It shall be requested in order to supplement evidence (*supplementum probationis*) from the party who has given partial evidence [of his or her statements], provided that such evidence is not partially rebutted by contrary evidence. The aim [of a "supplementary oath"] is to verify circumstances which are not fully established or to complete and corroborate sure evidentiary elements which have been already collected by a judge."

73. In other relevant case-law it was stated that "only a judge can request a supplementary oath" (judgment of the first-instance judge of 12 June 1925, *Giurisprudenza Sammarinese*, 1925, p.18), "it shall be requested from the party who has given partial evidence" (judgment of 8 August 1929 of the Judge of Civil Appeals, *Giurisprudenza Sammarinese*, 1929, p. 5) and "[it shall be requested] from the party who has already given partial evidence of his claim" (judgment of 19 July 1954 of the Judge of Civil Appeals, *Giurisprudenza Sammarinese*, 1963, No. 1, p. 42).

E. "Jactitation suit" ("*azione di iattanza*" or "*azione di accertamento negativo*")

74. According to the domestic case-law and legal literature a "jactitation suit" is a civil action afforded to an alleged victim of slander. The aim of the action is to obtain a declaration of falsity of statements made by the counterparty and "the cessation of the slander". The interest in bringing proceedings exists if the alleged false statements of the defendant have damaged the reputation (*buon nome*), status, rights or patrimony of the plaintiff. In the course of the civil proceedings the defendant has to demonstrate that his statements were true. If this burden of proof is not satisfied the judge declares the statements false (see the judgment of the *Commissario della Legge* of 4 June 1966, *Giurisprudenza Sammarinese*, 1964-1969, p. 316, in relation to the alleged falsity of a "supplementary oath" and the judgment of the *Commissario della Legge* of 25 August 1962, *Giurisprudenza Sammarinese*, 1965, p. 196; see also *G. Chiovenda*, *Azioni e sentenze di mero accertamento*, *Rivista di diritto processuale*, p. 33 *et seq.*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

75. The applicant raised multiple complaints under Article 6 § 1. The relevant Article reads, in so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations... everyone is entitled to a fair...hearing...by an independent and impartial tribunal established by law."

A. Civil proceedings before the Civil Court

1. The parties' submissions

76. The applicant complained that the requirement to take a "supplementary oath" had amounted to a breach of his right to a fair trial.

77. The Government observed that the parties had been granted an equal opportunity to present their case and the related evidence to the first-instance court and that none of them had been provided with the opportunity to unilaterally influence the decision.

2. The Court's assessment

78. The Court considers at the outset that it must examine if the complaint complies with the six month rule. In this connection, the Court points out that it is not open to it to set aside the application of the six-month rule solely because the respondent Government in question have not made a preliminary objection to that effect, since the said criterion, reflecting as it does the wish of the Contracting Parties to prevent past events being called into question after an indefinite lapse of time, serves the interests not only of respondent Governments, but also of legal certainty as a value in itself. It marks out the temporal limits of the supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *Blečić v. Croatia* [GC], no. 59532/00, § 68, ECHR 2006-III; *Peňaranda Soto v. Malta*, no. 16680/14, § 43, 19 December 2017, and the case-law cited therein). Lastly, it ensures that, in so far as possible, matters are examined while they are still fresh, before the passage of time makes it difficult to ascertain the pertinent facts and renders a fair examination of the question at issue almost impossible (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 74, 5 July 2016).

79. In assessing whether an applicant has complied with Article 35 § 1, it is important to bear in mind that the requirements contained in that Article concerning the exhaustion of domestic remedies and the six-month period are closely interrelated (ibid., § 75). The Court has consistently rejected applications in which the applicants have submitted their complaints within six months of the decisions rejecting their requests to have the proceedings reopened on the grounds that such decisions could not be considered "final decisions" for the purpose of Article 35 § 1 of the Convention. However, the Court has also accepted that situations in which a request to reopen the proceedings is successful and actually results in a reopening may be an exception to this rule (see *Sapeyan v. Armenia*, no. 35738/03, § 23, 13 January 2009, and the cases cited therein).

80. Turning to the circumstances of the present case, the Court notes that the "supplementary oath" was requested by means of a partial interlocutory

judgment of 4 June 2007 in the course of the first-instance proceedings before the "ordinary" civil court (see paragraph 15 above). The applicant appealed against that judgment on 12 December 2008 and the appeal was dismissed by a judgment of 9 June 2011, which was served on the applicant on 20 July 2011 (see paragraphs 20 and 21 above). Given the findings made by the Third-Instance Judge, the appeal judgment became final and, *inter alia*, confirmed the amount which company S.M.I. owed B.

81. The Court further notes that the applicant subsequently tried to rebut the evidence obtained by means of the "supplementary oath", attempting both avenues provided for that purpose by domestic law, namely by means of a criminal complaint against B. for "false oath" (which were closed on 11 May 2015, see paragraphs 24 and 26 above) and through a "jactitation suit" before the Court for Trusts (see paragraph 29 above).

82. While it is evident that the decision to close the applicant's criminal complaint was not successful and therefore cannot be considered to be the final decision in respect of the proceedings complained of, it is necessary to determine whether the decision of the Court for Trusts, taken on the basis of the applicant's lodging of a "jactitation suit", restarted the running of the six-month period connected to the civil proceedings complained about.

83. In this connection the Court notes that, as appears from the facts (see paragraph 29 above), the applicant was of the view that the proceedings he had instituted before the Court for Trusts had constituted a "reopening" of the original civil proceedings, brought against S.M.I, before the ordinary civil court. However, the Court considers that the proceedings before the Court for Trusts were instead a different and autonomous civil action, which had to determine a different main issue i.e., whether B. had lied under oath, and then consequently, whether the sums, which S.M.I. had been ordered to pay in the civil proceedings, be diminished or set-off. Moreover, while the proceedings before the Court for Trusts concerned the same set of facts, they had been brought by a different party (the applicant in his own name instead of company S.M.I.). Most importantly, even had it been considered as a "reopening", which is not the case, the Court notes that, while the applicant had been successful in part, the final outcome of the proceedings before the Court for Trusts had no impact on the impugned decision in the ordinary civil proceedings and did not lead to a reopening of those proceedings (see, *mutatis mutandis* and *a contrario*, *Dicle and Sadak v. Turkey*, no. 48621/07, § 55, 16 June 2015), nor did they consist of a review of that decision (see, *a contrario*, *Sapeyan*, cited above, § 24). Thus, in any event, the decision in the "jactitation suit" brought by the applicant before the Court for Trusts cannot be considered an exception to the rule mentioned in paragraph 79 above. It follows that the starting point for the running of the six-month rule is the final judgment of the Court of Appeal of 9 June 2011 which was filed with the registry on 30 June 2011 and served on the applicant on 20 July 2011 (see paragraph 21 above).

84. Given that the complaint was only lodged on 16 August 2016, the Court finds that it was lodged more than six months after the relevant starting point.

85. It follows that this part of the application has been lodged out of time and must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Civil proceedings before the Court for Trusts

1. *Applicability of Article 6 to the proceedings before the Court for Trusts and subsequent appeals*

86. The Court observes that the Government have not raised any objection *ratione materiae*. However, it notes that competence *ratione materiae* is a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see, by implication, *Tănase v. Moldova* [GC], no. 7/08, § 131, ECHR 2010 and *mutatis mutandis*, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, 5 July 2016).

(a) General principles

87. The Court has reiterated time and again that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 42, ECHR 2015, and *Denisov v. Ukraine* [GC], no. 76639/11, § 44, 25 September 2018).

88. While Article 6 § 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants (see *Bochan*, cited above, § 50).

89. Further, the Court notes that the prevailing approach in its case-law is that Article 6 § 1 is applicable also to leave-to-appeal proceedings and that the manner of its application depends on the special features of the proceedings involved, account being taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or

cassation court therein (see *Hansen v. Norway*, no. 15319/09, § 55, 2 October 2014, and the case-law cited therein).

(b) The Court's assessment

90. The Court notes that it has already held at paragraph 83 above that the "jactitation suit" was not a "reopening procedure" and that it was an autonomous civil action. That action was aimed at establishing the falsity of the statements that B. had made under oath in the course of the prior civil proceedings and, subsequently, whether the amount (debt) which S.M.I. had been ordered to pay (see paragraph 30 above) was to be diminished or set-off. The Court for Trusts ultimately dismissed the applicant's request to reduce the amount of the debt and confirmed that company S.M.I. had to pay B. the same sum of money (see paragraph 43 above).

91. In view of the above, the Court considers that there is no obstacle to the application of Article 6 to the proceedings before the Court for Trusts which cannot be considered extra-ordinary proceedings. Further, the Court observes that part of the decision of the Court for Trusts consisted in determining whether the sums which S.M.I. had been ordered to pay had to be diminished or set-off. That court had further found that the applicant, who was the owner of the entire share capital, had an interest in bringing those proceedings for multiple reasons (see paragraph 41 above). Thus, the Court considers that the Court for Trusts was also called on to decide on the applicant's rights of a patrimonial nature, as well as on matters related to his civil rights such as the right to a "good reputation".

92. It follows that Article 6 in its civil limb is applicable to the proceedings before the Court for Trusts, including the subsequent appeals.

2. Alleged violation of the applicant's right to a tribunal established by law

93. The applicant complained that the first-instance Court for Trusts hearing his case could not be a tribunal established by law since it had not been appointed in accordance with the domestic law.

(a) Admissibility

94. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) The parties' submissions

(α) The applicant

95. Relying on *Biagioli v. San Marino* ((dec.), no. 8162/13, § 71, ECHR 8 July 2014) and *Savino and Others v. Italy* (nos. 17214/05 and 2 others, § 94, 28 April 2009) the applicant submitted that a tribunal had to be established by law, so that the latter did not depend on the discretion of the executive or the judicial authorities. The same applied to the modalities of the composition of a court, which also had to be prescribed by law (as the Court had reiterated in *Piersack v. Belgium*, 1 October 1982, § 33, Series A no. 53 and *Buscarini and Others v. San Marino*, (dec.), no. 24645/94, 4 May 2000).

96. Invoking Article 6 § 1 of the Convention, the applicant submitted that the composition of the Court for Trusts which had decided his case had not been prescribed by law. Primarily section 10 of Delegate Decree no. 128 of 30 September 2013 required decisions to be taken by a majority, while the panel in his case had been composed of two judges. In the applicant's view, a two-judge panel had to be considered "ontologically incapable" of taking its decisions by a majority; in reality it could only take its decisions by unanimity.

97. Secondly, section 4 of the same law provided that in the event that the President decided to refer the case to a panel, he also had to select the "members" and the President thereof (thus at least three people in total). However, in his case, the President of the court had appointed himself president of the panel and had chosen just one further member. Furthermore, the applicant noted that section 4 of Delegate Decree no. 128 gave too much discretion to the President with respect to the choice of composition of the court in a given case and did not contain any guidelines as to which of the different formations of the court (single judge, panel or full court) were appropriate in a specified case. Thus, that decision was left to the complete discretion of the President. Moreover, under the above-mentioned provision, the President did not have to provide reasons to justify his choice and the decision was not amenable to appeal before a judicial body.

(β) The Government

98. In the Government's view, the composition of the Court for Trusts had been prescribed by law, since a deciding panel was one of the possible formations of that court, as provided for by the Relevant domestic law (see paragraph 57 above).

99. As to the alleged incompatibility of a panel of two judges with the majority rule in decision-making, under domestic law, the Government

pointed out that the purpose of the latter principle was to eliminate uncertainty concerning decision-making modalities. Had it not been specified by law, one could have assumed that unanimity was necessary or that decisions could be adopted in the light of different criteria. Considering the purpose of the majority rule, the Government noted that the decision in question had been adopted by the majority of the deciding panel, which, in the case at hand had equated to unanimity. Indeed, panels composed of two judges were nothing new at international level, for example, the Divisional Courts and the British courts of appeal, were normally composed of two judges.

(ii) The Court's assessment

(α) General principles

100. The Court reiterates that, according to its case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament". Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation (see *Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, § 24, 20 July 2006).

101. The Court further reiterates that, as it has previously held, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it (ibid., § 25) and the composition of the bench in each case (see *Richert v. Poland*, no. 54809/07, § 43, 25 October 2011, and *Ezgeta v. Croatia*, no. 40562/12, § 38, 7 September 2017).

102. The Court also reiterates that, in principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1. The Court may therefore examine whether the domestic law has been complied with in this regard. However, having regard to the general principle that it is, in the first place, for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law (see *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 61, 5 October 2010)

103. Lastly, the Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests,

accessibility of the place of hearings for the parties and so forth, which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to assign a case to a particular judge or court, the Court must be satisfied that the reassignment concerned was compatible with Article 6 § 1, and, in particular, with the requirements of objective independence and impartiality (see *Sutyagin v. Russia*, no. 30024/02, § 187, 3 May 2011 and the case-law cited therein).

(β) Application to the present case

104. Turning to the present case, the Court will first determine by reference to the facts complained of in the instant case whether there has been a flagrant violation of domestic law.

105. To that end, the Court notes that, pursuant to section 4 (1a) of the relevant law (see paragraph 57 above), at the beginning of the proceedings the President of the Court for Trusts had to decide, by a decision – not amenable to appeal – whether the case had to be referred to a single judge, to a panel (of which he also had to decide the members and the President), or to the full court (plenary). Moreover, pursuant to section 10 (1b) of the same law, if a case had to be decided by a panel, decisions had to be taken by a majority.

106. In the instant case the President decided to refer the case to a panel made up of two persons (himself and another judge) and appointed himself president of the panel (see paragraph 33 above).

107. Firstly, the Court notes that the domestic law does not explicitly prohibit a two-judge formation. The wording of the above-mentioned section 4 (1a): "he also decides the members and the President" (see paragraph 57 above), does not necessarily imply that a panel always has to be made up of at least three members. In this connection, the Court notes that besides being the president of the panel, the latter was also a member. It is conceivable that only after choosing the members of the panel would the President of the Court for Trusts choose its president, thus, the use of the term "members" in the plural (which also caters for the possibility of having a number of other members), does not in itself exclude a two-judge formation. Moreover, the Court notes that the above-mentioned provision did not oblige the President to provide any reasons for his decision on the composition of the panel, whereas it unambiguously provided that the decision was not amenable to appeal. The Court considers that this in itself does not contravene the Convention. Indeed, the instant case does not refer to a reassignment of judges once proceedings had already started, which may require reasons for such changes and the possibility for applicants to comment (compare *Bochan v. Ukraine*, no. 7577/02, § 71, 3 May 2007 and *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 78, Series A no. 146). The present case concerns the first assignment of a judge to the

case in question. Bearing in mind that the applicant's complaint does not concern the impartiality or independence of the assigned judges at that stage of the proceedings, and that the decision was taken within the limits of domestic law, the Court does not find that in determining the composition in the present case the situation was one where the margin of appreciation enjoyed by the domestic authorities in such matters was exceeded.

108. As to the alleged contrast with section 10 (1b), the Court reiterates that it must as far as possible confine itself to examining the issues raised by the case before it (see *Ahmed v. the United Kingdom*, no. 59727/13, § 72, 2 March 2017). While in certain circumstances, a judge formation incapable of reaching a majority may result in a problem of access to a court, in the event that this led to a failure to take a decision (see *Marini v. Albania*, no. 3738/02, §§ 118-22, 18 December 2007), in the circumstances of the present case, the fact that it was decided unanimously, does not impinge on the majority rule, and does not lead to an incompatibility with domestic law.

109. Thus, the Court is satisfied that there was no flagrant violation of domestic law.

110. Having determined that there has been no flagrant violation of any provision of domestic law in relation to the formation of the Court for Trusts, the Court must determine whether the objective of the safeguard enshrined in the concept of "established by law" has been achieved. As transpires from the general principles set out in paragraphs 100-102 above, the designation of a judge must be independent of the executive and cannot be solely dependent on the discretion of the judicial authorities (see, *mutatis mutandis*, *Biagioli*, cited above, § 79).

111. In the present case, the applicant raised no concerns about the independence of the President of the Court for Trusts and it has not even been claimed that there was any interference on the part of the executive. Moreover, the Court notes that the actions of the President were limited in scope, given that they only concerned the choice of formation of the court (from three different kinds of formations potentially provided for by law) and the members of the bench (from a list of judges, expert in the specific field of trusts and fiduciary relationships, also provided for by law, see paragraph 58 above), and that those actions had to be in accordance with the general legal framework, including the specific rules concerning the formation of the Court for Trusts (see paragraph 57 above).

112. As to the fact that the law did not specify any criteria in order to guide the choice between the three different formations of that court (single judge, panel or full court), the Court considers that, in the silence of the law and given that the three types of formations differed only in terms of the number of judges (see paragraph 57 above), it is sufficiently evident that the main criterion behind the choice was the complexity of a given case. It follows that, in the present case, the Court does not find it established that

there was any arbitrariness on the part of the President of the Court for Trusts (compare *Biagioli*, cited above, § 80).

113. In consequence, the court which heard the applicant's case must be considered a tribunal established by law, in the sense of the Convention and there has therefore been no violation of Article 6 of the Convention in that respect.

3. Alleged lack of impartiality of the President of the Court for Trusts deciding on leave to appeal

114. The applicant complained that the President of the Court for Trusts had been a member of the panel which had decided his "jactitation suit" at first-instance and had also decided whether or not to allow him to appeal against that judgment. For that reason he could not be considered impartial, as required by Article 6 of the Convention.

The Government's objection of non-exhaustion of domestic remedies

(i) The parties' submissions

115. The Government explained that under the relevant law (see paragraph 64 above) a request for the withdrawal of a judge was the ordinary domestic remedy in cases of alleged partiality of a judge. The applicant had not made use of that remedy which, in their opinion, had to be considered effective.

116. According to the applicant, the domestic system did not provide for an effective remedy in the event that a judge who had already dealt with the facts of a case was called to assess those same facts in different proceedings. Relying on the domestic law on abstention/withdrawal (see paragraph 64 above), the applicant pointed out that the specific situation causing incompatibility in the present case was not encompassed in any of the grounds for compulsory abstention specified by law. The applicant submitted a judgment of the Court of Appeal (in a different case concerning him and B., see paragraph 66 above), noting that the court had stated that the fact that the same judge had already expressed his opinion on facts which were the subject of different proceedings was not an illegitimate expression of opinion and therefore was not covered by section 10 (2) of the law on abstention/withdrawal.

(ii) The Court's assessment

(α) General principles

117. The Court reiterates that the rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an

indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

118. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (ibid., § 71).

119. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (ibid., § 74).

120. The Court has, however, also frequently pointed out the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism. It would, for example, be unduly formalistic to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust (ibid., § 76).

(β) Application to the present case

121. In the light of the above-mentioned principles, the Court notes that the applicant did not raise the issue of the alleged impartiality of the President of the Court for Trusts before the competent domestic authority, namely the Judge for Extraordinary Remedies, by means of a "request for withdrawal" in accordance with the procedure provided for in section 2 of Law no. 139 of 16 September 2011 (see paragraph 67 above).

122. In this connection, the Court notes that, from the outset, the applicant was perfectly aware of the fact that the decision on leave to appeal would have been delivered by the President of the Court for Trusts, as clearly provided for in section 11 of the relevant law (see paragraph 57 above). Given that the formation of the court when deciding on leave to appeal was fixed (since such decisions were always referred to the President), the applicant could have made an ordinary "request for withdrawal" of the President together with his request for leave to appeal.

123. As to the issue of whether the specific reason of the alleged impartiality of the President of the Court for Trusts was encompassed in any of the grounds for compulsory abstention/withdrawal specified by law, the Court notes that the Government did not contest the applicant's claim that he could not rely on section 10 (2). However, the Court considers that the applicant could have applied to the competent judge, relying on section 10 (1) of the relevant law (see paragraph 64 above), arguing that the fact that the President had sat on the bench which had delivered the first-instance judgment had determined an "interest in the proceedings' on

the part of President. The applicant has not argued that relying on this ground would have had no prospects of success. Nor has he submitted any reason as to why he could not pursue such an avenue. Thus, the Court considers that, in the particular circumstances of the present case, the applicant should have at least tried this avenue and given the domestic authorities an opportunity to put matters right through their own legal system (see, *mutatis mutandis*, *Di Giovanni v. Italy*, no. 51160/06, § 46, 9 July 2013 and *Bacciocchi v. San Marino*, (dec.), no. 23327/16, 4 December 2018).

124. It follows that this complaint must be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

4. Alleged lack of impartiality of the Judge of Civil Appeals upholding the refusal of leave to appeal

125. The applicant complained that the Judge of Civil Appeals who had heard his complaint concerning the refusal of leave to appeal had not been impartial, since he had previously taken a decision on the same facts in another set of proceedings.

(a) Admissibility

(i) The Government's objection of non-exhaustion of domestic remedies

126. According to the Government the applicant had not exhausted the effective domestic remedies provided for by law (see paragraph 115 above).

127. The applicant reiterated the arguments already set out in paragraph 116 above.

128. The Court notes that the situation of this complaint is different to the previous one for various reasons. Primarily, it observes that the ground for challenging the partiality of the judge in the previous complaint refers to the fact that the same judge decided both the first-instance decision and the refusal of leave to appeal against that decision, while the complaint at issue here is the fact that the same judge who decided his complaint concerning the refusal of leave to appeal had also expressed an opinion on the same facts, albeit in a different set of proceedings (for "false oath" and slander). However, the Court does not need to determine whether in the circumstances of the present complaint a request for withdrawal under any of the relevant subsections would have had any prospects of success, as it considers that in any event in the situation at hand the applicant would not have had a practical opportunity to lodge such a request for the following reasons.

129. Section 11 (3) of Delegate Decree no. 128 of 30 September 2013 (see paragraph 57 above) provides that if leave to appeal is refused by the President of the Court for Trusts, the unsuccessful party can lodge a complaint with the Judge of Civil Appeals, requesting once again leave to

appeal. The procedure before the Judge of Civil Appeals does not provide for any oral hearings and the judgment of that judge is delivered without any further act of procedure.

130. In the present case, the applicant lodged his complaint concerning the decision refusing him leave to appeal on 3 November 2015. The relevant judgment was filed with the registry on 11 February 2016 and was served on him on 16 February 2016 (see paragraphs 52 and 53 above). No acts of procedure under notification occurred during that time.

131. In the light of the above, and in the absence of a fixed formation of the court of appeal, the Court considers that the applicant could not have known in advance that the Judge of Civil Appeals to whom his case had been assigned was Judge L.F., the same judge who had already dealt with the issue of the "supplementary oath" in the criminal proceedings for "false oath" in his capacity as Judge of Criminal Appeals (see paragraph 28 above). The applicant only became aware of that fact when the judgment upholding the President's refusal of leave to appeal was served on him, that is to say when it was too late to lodge a "request for withdrawal".

132. It follows that, unlike in the above-mentioned situation (see paragraph 121 above), in this respect, the applicant, having no knowledge of who the judge would have been, did not have the possibility to lodge a "request for withdrawal" of Judge L.F. prior to the delivery of the judgment and could not reasonably have been expected to take any different course of action.

133. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection is therefore dismissed.

(ii) Conclusion

134. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) The parties' submissions

(α) The applicant

135. In the applicant's opinion, Judge L.F., in his capacity as Judge of Civil Appeals, had not been impartial, given that he had expressed his opinion twice on the same facts. In particular, the first time was in his capacity as Judge of Criminal Appeals, in the criminal case for "false oath", where he had taken the decision to close the investigation on the basis that, in his opinion, evidence confirming the payment of the debt to B. did not

exist, thus B.'s testimony could not be considered false. The second time had been in his capacity as Judge of Civil Appeals, where he had upheld the refusal of leave to appeal. On the latter occasion he had also found that whether it had been legitimate for the Court for Trusts to split the "supplementary oath" into two parts was not a point of law and concerned the interpretation given to the "supplementary oath" by the Court for Trusts. Moreover, according to the applicant, on the latter occasion Judge L.F. had stated that the evidence collected in the proceedings before the Court for Trusts had led him to exclude that company S.M.I. had paid a substantial part of the debt owed to B. The applicant pointed out that on both occasions, Judge L.F. had acted as a single judge and had dismissed his claims. In the applicant's opinion a close link existed between the issues dealt with by Judge L.F. in the two different sets of proceedings, thus his doubts concerning his impartiality were justified. He relied on *Indra v. Slovakia* (no. 46845/99, § 53, 1 February 2005).

(β) The Government

136. According to the Government, there had not been any violation of Article 6 in terms of a lack of impartiality of Judge L.F. They noted that the issues on which the judge had ruled on the two occasions had been totally different. The first time, Judge L.F., in his capacity as Judge of Criminal Appeals, had confirmed the investigating judge's decision to close the criminal proceedings for slander and "false oath", having established that a reopening of the investigation would not have been useful for the collection of new evidence, since the useful methods of investigation had already been exhausted. The Government acknowledged that in that decision Judge L.F. had therefore assessed the material facts of the case.

137. However, in the impugned proceedings Judge L.F., in his capacity as Judge of Civil Appeals, had just upheld the refusal of leave to appeal decided by the President of the Court for Trusts. Thus he had merely assessed whether the case raised uncertainty in respect of the legal issues determined or if those issues were of general importance. Therefore, with this second judgment, Judge L.F. had made only abstract legal considerations, without examining the material facts of the case.

138. In the light of the different subjects of assessment carried out by Judge L.F. on the two above-mentioned occasions, the Government considered that the applicant's approach (that impartiality had arisen from the fact that in both cases the same judge had dismissed his claims) was not in line with the approach of this Court, since a lack of impartiality could not be inferred solely from the content of the decisions adopted against the applicant. They relied on *Bracci v. Italy* (no. 36822/02, 13 October 2005).

(ii) The Court's assessment

(α) General principles

139. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and that its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 145, 6 November 2018; *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009, with further references; and *Denisov*, cited above, § 61).

140. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test), but may also go to the issue of his or her personal conviction (subjective test). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Ramos Nunes de Carvalho e Sá*, § 146; *Denisov*, § 62; and *Micallef*, § 95; all cited above).

141. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ramos Nunes de Carvalho e Sá*, § 147, and *Micallef*, § 96, both cited above).

142. In itself, the objective test is functional in nature: for instance, the exercise of different functions within the judicial process by the same person (see *Piersack*, cited above), or hierarchical or other links with another actor in the proceedings (see cases regarding the dual role of a judge, for example, *Wettstein v. Switzerland*, no. 33958/96, § 47, ECHR 2000-XII and *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005, representing the applicant's opponents and subsequently judging in a single set of proceedings and overlapping proceedings respectively), give rise to

objectively justified misgivings as to the impartiality of the tribunal, which thus fail to meet the Convention standard under the objective test (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII). It must therefore be decided in each individual case whether the connection in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, 10 June 1996, § 38, *Reports of Judgments and Decisions* 1996-III).

143. In this connection, even appearances may be of certain importance or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Denisov*, cited above, § 63). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Micallef*, cited above, § 98).

144. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (ibid., § 99).

(β) Application to the present case

145. The Court notes that Judge L.F. exercised the function of Judge of Criminal Appeals in the criminal investigation for "false oath" and in this capacity he decided to uphold the investigating judge's decision to close the case, in the light of the absence of evidence as to the alleged perjury of B. under oath (see paragraph 28 above). Subsequently, in his capacity as Judge of Civil Appeals, Judge L.F. decided to uphold the decision of the President of the Court for Trusts to refuse the applicant leave to appeal (see paragraph 53 above) on the basis that the applicant's appeal did not raise any issues of law – the case did not raise uncertainty in respect of the legal issues determined, nor were such issues of general importance (see paragraph 54 above). Hence, Judge L.F. exercised the function of judge in two different sets of proceedings, where the complainant was the same person, and which related to the same facts (the alleged falsity of the statements made by B. under oath) (compare *Indra*, cited above, § 53).

146. As regards the subjective test, it has not been shown or argued that Judge L.F. when ruling on the admissibility of the applicant's complaint

held or expressed any personal convictions which would cast doubt on his subjective impartiality.

147. As regards the objective test, the Court reiterates that the requirements of a fair hearing as guaranteed by Article 6 § 1 of the Convention do not automatically prevent the same judge from successively performing different functions within the framework of the same case (see *Warsicka v. Poland*, no. 2065/03, § 40, 16 January 2007 and, *a contrario*, *San Leonard Band Club v. Malta*, no. 77562/01, §§ 63-64, ECHR 2004-IX).

148. The Court, reiterates that it is not prima facie incompatible with the requirements of Article 6 § 1 if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined. The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge (see *Warsicka*, cited above, § 40).

149. In this connection, the Court is of the view that the same considerations apply in the case at hand where the same judge did not perform different functions in various stages of the same civil proceedings but rather participated in different, albeit factually connected, criminal and civil proceedings. The Court notes that the applicant requested the Judge of Civil Appeals to review whether the decision of the President of the Court for Trusts to refuse him leave to appeal had been compliant with the grounds specified by law for the admissibility of appeals (see paragraph 52 above). Accordingly, the Judge of Civil Appeals examined the decision of the President on the admissibility of the applicant's appeal and, like the President, concluded that the applicant had failed to show the existence of any of the grounds for granting leave to appeal clearly specified by law (namely that the appeal raised issues of law, that the case raised uncertainty in respect of the judicial issues determined, or that such issues were of general importance, see paragraph 57 above). At no point did the judge at that stage assess the evidence itself, its weight, credibility or otherwise.

150. The Court therefore considers that the specific question for determination by Judge L.F. when reviewing, in his capacity as Judge of Civil Appeals, the decision of the President of the Court for Trusts to refuse the applicant leave to appeal, was not the same as the question which Judge L.F. had determined in his capacity as Judge of Criminal Appeals (namely whether to reopen the investigation into whether B. had made a false oath). Also, in the Court's view, the scope of the examination as to

whether or not to grant leave to appeal against the decision of the Court for Trusts, did not amount to an assessment of the merits of the appeal (see, *mutatis mutandis*, *R.M.B. v. the United Kingdom*, (dec.), no. 37120/97, ECHR 16 January 2007, and *Central Mediterranean Development Corporation Limited v. Malta (no. 2)*, no. 18544/08, §§ 35-36, 22 November 2011), which, had leave been granted, would have been determined in line with the opinion of a different judicial body, namely a panel of experts (see paragraph 57 above) (see, *mutatis mutandis*, *Warsicka*, cited above, § 44). While it is true that the judge expressed his opinion as to the approach taken by the Court for Trusts for assessing the "supplementary oath" (see paragraph 55 above), that consideration, which went beyond the scope of the review requested from him, can nevertheless be considered to be one not affecting the actual merits of the case decided in the criminal proceedings, namely the truth or not of the statement made under oath. Thus, there was no substantive link between both sets of proceedings (see *Warsicka*, cited above, § 45) nor can it be considered an issue intrinsically linked to the original proceedings (see *Central Mediterranean Development Corporation Limited (no. 2)*, cited above, § 35) nor a reconsideration of the previous decision in the criminal proceedings (compare and contrast *Indra*, cited above, § 53).

151. It follows that there was no relevant link between the substantive issues determined by Judge L.F.'s decision in the criminal proceedings and the review of the President's decision to refuse leave to appeal in the civil proceedings which would cast doubt on the impartiality of Judge L.F.

152. Thus, having regard to the circumstances of the case, the Court is of the view that it cannot be said that the applicant's fears as to the impartiality of the Judge of Civil Appeals when reviewing the admissibility of his appeal at second instance were objectively justified.

153. It follows that there has been no violation of the invoked provision.

5. Alleged violation of the applicant's right to access to court in connection with the refusal of leave to appeal

(a) The parties' submissions

(i) The applicant

154. The applicant complained that the leave to appeal procedure in itself had constituted a refusal of his right to a court. He considered that the existence of a filter (*filtro*) on the admissibility of appeals, which, furthermore, was substantially entrusted to the same judicial authority who had delivered the impugned judgment, was an undue restriction of his right to a court, which was not justified on the grounds of an overriding public interest.

(ii) The Government

155. In the Government's opinion, the need to seek leave to appeal from the President of the Court for Trusts had not violated the applicant's right to a court. They explained that its purpose was to ensure that only those appeals deserving to be heard were selected, to ensure an efficient allocation of judicial resources. Moreover, it had to be noted that often appeal proceedings ended up being *de facto* second proceedings, which were not justified since they were not instituted immediately after the gathering of evidence. They pointed out that, in this connection, the domestic law was definitely in line with the legislation in force in other European and non-European countries, such as the United Kingdom, Finland, Sweden, the United States of America and Canada. In particular, under the law applicable in the United Kingdom, in order to lodge an appeal before the civil division of the Court of Appeal against decisions of local or higher courts, prior permission of the judge was necessary. Moreover, the judge was not obliged to grant such leave, the latter being granted only when strong reasons existed as to why the appeal should be heard or when the judge considered that the appellant had a real chance of success. Relying on the case *Dobrić v. Serbia* (nos. 2611/07 and 15276/07, 21 June 2011) the Government considered that leave to appeal a judgment of the Court for Trusts had the legitimate aim of providing for a simplified procedure to deal with appeals without a reasonable chance of success and to rationally allocate judicial resources.

(b) The Court's assessment

(i) General principles

156. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Lupeni Greek Catholic Parish*

and Others v. Romania [GC], no. 76943/11, § 89, 29 November 2016, and *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018).

157. The Court has ruled that in some cases, in particular where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on the individual's access to a "court" or "tribunal" (*Kreuz v. Poland*, no. 28249/95, § 54, ECHR 2001-VI). The Court has also accepted that there can be cases where the prospective litigant must obtain prior authorisation before being allowed to proceed with his claim (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 59, Series A no. 93).

(ii) Application to the present case

158. The Court reiterates that conditions for the admissibility of appeals on points of law or of appeals to a superior appeal court – such as a supreme court – may be more rigorous than those for ordinary appeals (see *Zubac*, cited above, § 82). It should in addition be noted that, in this as in other domains, the Contracting States have a greater latitude in relation to cases concerning "civil rights and obligations" than to criminal cases (see *Valchev and Others v. Bulgaria*, (dec.), no. 47450/11 and 2 other applications, § 84 *in fine*, 21 January 2014).

159. The Court notes that, pursuant to section 11 (1 and 2) of Delegate Decree no. 128 of 30 September 2013 (see paragraph 57 above), the domestic courts refused the applicant leave to appeal, given that in his appeal he had not raised any issues of law. That fact was established by the President of the Court for Trusts (see paragraphs 50 and 51 above) and confirmed by the Judge of Civil Appeals (see paragraphs 53 and 54 above) in, moreover, fully reasoned decisions. The Court reiterates that, according to its settled case-law, the fact that an appeal lies only when it is certified by a court that the decision appealed against involved a point of law does not, as such, amount to an unjustified denial of right of access to a court (see, *mutatis mutandis*, *R.M.B. v. the United Kingdom*, (dec.)., cited above). In the present case, the Court is satisfied that the limitation on the admissibility of appeals on points of law in civil cases before the Court for Trusts pursues a legitimate aim, namely the effective and speedy administration of justice. The Court further accepts that the manner in which that limitation is set out in section 11 (1 and 2) of Delegate Decree no. 128 of 30 September 2013 is within the State's margin of appreciation (see, *mutatis mutandis*, *Valchev and Others*, cited above, § 87). Finally, bearing in mind that the applicant had been able to request a criminal investigation which in fact ensued, as well as the fact that the applicant's claim had already been examined by the first-instance Court for Trusts, having full jurisdiction, three years after the end of the original proceedings giving rise to the applicant's complaint, the

Court cannot find that the restriction was disproportionate or that it impaired the very essence of the applicant's right to a court.

160. It follows that the complaint is inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

6. Alleged violation of the applicant's right to access to a court in connection with legal costs incurred before the Court for Trusts

(a) The parties' submissions

(i) The applicant

161. The applicant submitted that he had been made to pay legal costs not established by law, which in his view had constituted a violation of his right to a court. In this connection, the applicant noted that the President had only adopted criteria for calculating the legal costs of proceedings before the Court for Trusts in a decree of 10 September 2015, when the proceedings concerning him had already begun. He alleged that in his case the President of the Court for Trusts had established the amount of costs payable without referring to any pre-set criteria and relying uniquely on his discretion. Thus, when the applicant had applied to the Court for Trusts he could not anticipate the costs of the proceedings in the absence of any previous judicial or legislative provisions on that point.

(ii) The Government

162. According to the Government, the legislation concerning legal costs and expenses before the Court for Trusts had been absolutely accessible, precise and foreseeable. As to accessibility, the Government noted that Delegate Decree no. 128 of 30 September 2013 (see paragraph 57 above) had been circulated in line with the ordinary procedure for the publication of laws, which required not only the posting of the legislative texts in the Government building but also their publication in the Official Gazette (*Bollettino Ufficiale*) and on Parliament's website, the latter being permanently accessible to anyone. The predictability of such a general provision had been further ensured through the adoption of the Rules of 2 February 2014 by the President of the Court for Trusts. Both those rules and subsequent rules adopted by the President of the Court for Trusts on 10 September 2015 had been published on the website of the court, in a section specifically devoted to legislation and regulatory measures. Therefore, all the relevant law and regulations had been constantly accessible and (i) had provided for precise criteria concerning the calculation of legal costs before the Court for Trusts; (ii) had linked the amount of such costs with the value of a given claim and the costs normally paid by the State for the remuneration and expenses of judges, as well as court fees; and (iii) had required that part of the legal costs be paid in

advance. In the light of the content of that legislation, the Government considered that the applicant had been perfectly able to foresee the economic burden of the proceedings before the Court for Trusts, thus, according to the Government, the relevant legal basis, from a qualitative point of view, had also been predictable. Moreover, the costs payable had been proportionate to the high value of the claim (approximately EUR 4,662,778.93).

(b) The Court's assessment

163. Having regard to the above-mentioned statement of principles arising from its case-law (see paragraph 156 above), the Court reiterates that it has never ruled out the possibility that the interests of the fair administration of justice may justify imposing a financial restriction on an individual's access to a court (see *Kreuz*, cited above, § 59).

164. The Court accordingly reiterates that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Article 6 § 1 of the Convention. It further reiterates, however, that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access and had "a ... hearing by [a] tribunal" (ibid., § 60).

165. The Court notes that the applicant's complaint concerns the fees he was made to pay at first-instance. He primarily complained that the rule applied to him had been unforeseeable, in particular the fact that the President had established the amount of costs payable without referring to any pre-set criteria and relying uniquely on his discretion. In this connection, the Court notes that section 2 (2b) of Delegate Decree no. 128 of 30 September 2013 (see paragraph 57 above) provides that to avoid the claim being barred, an application must be filed with the registry together with evidence of payment of court fees in the amount periodically determined by the President and, in general, also calculated on the basis of the value of the claim. In addition, section 4 (1b and c) of the same law (see paragraph 57 above) provide that, at the beginning of the proceedings, the President decides, by a final decision not amenable to appeal, the amount of the variable part of the remuneration of the single judge or panel and the amount of legal fees (which can vary depending on the complexity of the case and/or its value). Moreover, pursuant to that same provision, the applicant must pay, within seven days, to avoid the claim being barred, a part thereof, which is calculated in relation to the total amount of remuneration and expenses payable to the judges. Such a sum is determined by the President applying a variable increase between 10 and 20% to the

cost incurred by the State for the remuneration and expenses payable to judges, as well as court fees.

166. The Court further notes that, contrary to what was alleged by the applicant (who complained about the President's reliance on the "Rules" issued on 10 September 2015, see paragraph 60 above) in his decision of 3 December 2014 containing the calculation of legal costs and expenses (see paragraph 33 above) the President relied on the "Rules" issued by him on 2 December 2014 (see paragraph 59 above). Indeed, these rules had not been issued prior to the applicant lodging his claim. Thus, the President, in calculating the legal costs and expenses in the specific case of the applicant, relied on a detailed series of criteria which he had established himself the day before in his (administrative) capacity as President of the Court for Trusts. In this connection, however, the Court considers that such criteria were perfectly in line with the above-mentioned sections 2 (2b) and 4 (1b and c) of Delegate Decree no. 128 of 30 September 2013, which, as stated above, constituted the more general legal basis of the President's request to the applicant to pay, in advance, legal costs and expenses. There is no doubt that the latter general basis was foreseeable at the time the applicant lodged his claim.

167. The Court must next determine whether, in the particular circumstances of the present case, the fees actually charged constituted a restriction that impaired the very essence of the applicant's right of access to a court (ibid., § 61). Admittedly, the sum required in advance (EUR 17,750) as well as the total amount of litigation fees (EUR 29,500), were substantial, and the time-limit for providing the sum required in advance (at least seven days before the first hearing) was relatively short. However, there is nothing to suggest that the figure was unreasonable in connection with the high value of the claim (almost EUR 5,000,000) or the applicant's financial resources. Indeed, the applicant did not claim that he had been unable to pay the costs.

168. In view of the above circumstances it cannot be said that the amount of litigation fees in the instant case impaired the very essence of the applicant's right of access to a court or were disproportionate for the purposes of Article 6.

169. It follows that there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

170. The applicant complained under Article 1 of Protocol No. 1 that the deprivation of his property had been disproportionate and not adequately reasoned.

171. For the same reasons as those set out earlier (see paragraphs 78 to 85 above), the Court considers that the final decision concerning the

deprivation of the applicant's property is that of 9 June 2011, which was filed with the registry on 30 June 2011 and served on the applicant on 20 July 2011. It follows that this part of the application has been lodged out of time and must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaints under Article 6 § 1 in connection with the tribunal established by law requirement, the impartiality of Judge L.F. and the access to court requirement in the light of costs, admissible;

2. *Declares*, unanimously, the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention in connection with the tribunal established by law requirement in relation to the Court for Trusts;

4. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention in connection with the requirement of impartiality on the part of Judge L.F.;

5. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention in connection with the applicant's complaint of access to court.

Done in English, and notified in writing on 2 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Linos-Alexandre Sicilianos President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Wojtyczek, Eicke and Ilievski is annexed to this judgment.

L.A.S.
A.C.

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES WOJTYCZEK, EICKE AND ILIEVSKI

Introduction

1. Unfortunately, for the reasons set out below, we are unable to agree with the conclusion of the majority set out in paragraph 1 of the operative part of the judgment that the applicant's complaints under Article 6 § 1 of the Convention in relation to the tribunal established by law requirement, the impartiality of Judge L.F. and the access to court requirement in the light of the costs are admissible. The majority having, however, decided that these aspects of the applicant's complaint are admissible, we agree that there has been no violation of Article 6 § 1 in the present case.

Piercing the corporate veil

2. At the heart of the present case are various proceedings before the courts of San Marino arising out of (a) a contract in the form of a fiduciary management mandate concluded on 2 March 1988 between a private individual, B. (acting through his agent Z.), and a fiduciary company, S.M.I. It appears that the purpose of that contract was for S.M.I. to carry out fiduciary operations concerning securities listed on the Italian Stock Exchange. These operations appear to have included the purchase of (further) shares by means of separate contracts concluded by S.M.I. acting for and on behalf of B.

3. It was in connection with one of these share purchase contracts concluded by S.M.I. on 20 March 1990 for and on behalf of B., that B. brought civil proceedings against S.M.I. for (so it appears) breach of fiduciary duty, seeking damages of LIT 9,035,264,332 (civil proceedings no. 300/2001). As the judgment records, in these proceedings, S.M.I. was "represented by its legal representative and director (the applicant)" (§ 12).

4. However, in so far as the present complaint relates to those civil proceedings (no. 300/2001), our first difficulty arises from the fact that the applicant before this Court is not the company S.M.I. but rather the applicant is Mr Enrico Maria Pasquini, who is described in the judgment as having "owned the entire share capital" of S.M.I. (§ 7) as well as having been, at the relevant time, "its legal representative and director" (§ 11).

5. While the majority concluded (and we agree) that the complaint in relation to these civil proceedings has been lodged outside the period of six months from the date on which the final decision was taken as required by Article 35 § 1 of the Convention, it would have been preferable to reject this complaint for want of "victim" status under Article 34 of the Convention. After all, not only is the question of the required "victim" status a

necessarily prior question going to the Court's jurisdiction *ratione personae* but, in the circumstances of this case, the absence of "victim" status in relation to the civil proceedings, for the reasons set out below, also informs the admissibility of his complaints in relation to the proceedings before the Court of Trusts.

6. The majority does not address this issue directly but appears to have assumed that, in the circumstances of this case, it was appropriate for the Court to "pierce the corporate veil" and to treat the applicant, Mr Pasquini, as if he had been a party to the proceedings before the Civil Court and/or that those proceedings were capable of determining his civil rights and obligations rather than those of the separate legal person, S.M.I.

7. We profoundly disagree with such an approach.

8. As the Court has consistently made clear that:

> "... the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators. The Supreme Courts of certain member States of the Council of Europe have taken the same line. This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice (*Barcelona Traction, Light and Power Company Limited*, judgment of 5 February 1970, Reports of judgments, advisory opinions and orders 1970, pp. 39 and 41, paras. 56-58 and 66)." (*Agrotexim and Others v. Greece*, 24 October 1995, § 66, Series A no. 330‑A; see also *Hubert Ankarcrona v. Sweden*, (dec.), no. 35178/97, 27 June 2000 and *Gubiyev v. Russia*, no. 29309/03, § 53, 19 July 2011)

9. While the Court has accepted in the past for the purposes of victim status that the "exceptional circumstances" envisaged in *Agrotexim* may exist when a sole owner and shareholder brings an application complaining of acts directly affecting the company (*Hubert Ankarcrona v. Sweden*), the Court, in *Agrotexim* itself, explained the need for caution thus:

> "... It is a perfectly normal occurrence in the life of a limited company for there to be differences of opinion among its shareholders or between its shareholders and its board of directors as to the reality of an infringement of the right to the peaceful enjoyment of the company's possessions or concerning the most appropriate way of reacting to such an infringement. Such differences of opinion may, however, be more serious where the company is in the process of liquidation because the realisation of its assets and the discharging of its liabilities are intended primarily to meet the claims of the creditors of a company whose survival is rendered impossible by its financial situation, and only as a secondary aim to satisfy the claims of the shareholders, among whom any remaining assets are divided up." (§ 65)

10. As § 7 of the judgment makes clear, this latter scenario appears to describe the very circumstances of this case. After all, the company S.M.I. is there described as being "currently in compulsory liquidation" and no information is provided at all as to the existence and/or (potentially competing) interests and/or claims of (potential) creditors (whether other customers of its fiduciary services or other companies with which it had

concluded share purchase or other agreements such as that underlying the civil proceedings in issue in the present case).

11. Furthermore, there is, here, no reason why S.M.I. could not, itself, have brought these proceedings before the Court, either through its organs or through its liquidators.

12. Consequently and absent clear evidence that (a) there are no (potentially) conflicting claims or interests arising out of the situation of the company in question and (b) there are the required "exceptional circumstances", it seems to us wholly inappropriate for this Court to "pierce the corporate veil" and to accept that Mr Pasquini should be treated as a "victim" of the alleged violation of Article 6 § 1 in relation to the proceedings brought against S.M.I. (In so far as this approach appears potentially at odds with the recent Committee decision in *Le Bridge Corporation LTD S.R.L. v the Republic of Moldova*, no. 48027/10, 27 March 2018, we would urge caution in treating that decision as reflecting "well established case law" beyond the specific facts of that case.)

Determination of "his" civil rights and obligations

13. The remainder of the applicant's complaints declared admissible by the majority concern proceedings before the Court for Trusts in which the applicant, this time applying in his own name sought "to have civil proceedings no. 300/2001 reopened" (§ 29).

14. It is telling, and this is not affected by the conclusions of the majority in § 83, that the applicant characterised these proceedings as a "reopening" of the said civil proceedings brought against S.M.I. Whether this is the appropriate label or whether the proceedings are better described as different and autonomous proceedings concerning the question whether B. had lied on the proceedings brought against S.M.I., a "different party" (as the majority suggests in § 83), their very nature is crucial in determining whether they are, in fact, capable of determining the applicant's (as compared to S.M.I.'s) civil rights and obligations.

15. In light of the distinct (legal) personalities of the applicant and the company S.M.I., it is not clear to us that they could have been so determinative and that therefore, in relation to this applicant, Article 6 § 1 had any application. The summary of the basis on which the domestic courts accepted the "jactation suit" (see § 42) also provides no real indication of any basis on which it would be appropriate for this Court to assume that the dispute before the Court for Trusts would be "determinative" of the applicant's "civil rights" so as to engage Article 6 § 1. Any indirect consequences of the proceedings before the Court of Trusts on the applicant's pecuniary position would not, in our view, be sufficient to engage Article 6 § 1; this is even more so where, in light of the fact that S.M.I. is in "compulsory liquidation", any pecuniary/proprietary interest

this applicant may have in relation to S.M.I. may well have to be assessed in the context of and in competition with any pecuniary claim or interest of any possible creditors. Finally, we can also not see how these proceedings could have been determinative of his "civil right" to a "good reputation" sufficiently to engage Article 6 § 1. After all, as the majority suggest in § 83, the primary purpose of these proceedings was to establish whether B. (not the applicant) had lied under oath in the civil proceedings brought against S.M.I. It is not clear to us how even a conclusion that B. had lied in the context of his "supplementary oath" would have been directly and necessarily "determinative" of the applicant's "good reputation".

Exhaustion of domestic remedies

16. Finally, it appears to us that his complaint about the Court for Trusts not being established by law raises an obvious and very real question as to whether the applicant has exhausted the available domestic remedies, as required by Article 35 § 1 of the Convention. After all, there is no evidence at all that the applicant ever raised this point either before the Court for Trusts itself or on appeal.

17. By failing to raise this issue before the domestic courts, the applicant has therefore completely denied the domestic courts the opportunity to consider and/or rectify the alleged Convention breach. While we are, of course, aware that the respondent Government has not expressly raised any objection to the present application on the basis of exhaustion of domestic remedies, it seems to us that, in particular in this "age of subsidiarity" (see, for example, the Copenhagen Declaration of 13 April 2018, in particular at paragraph 10), it would be inappropriate to consider the merits of a complaint in circumstances such as the present, where it is obvious on the face of the application that the applicant has failed to exhaust domestic remedies (see, *mutatis mutandis*, *Laidin v. France* (no. 1), no. 43191/98, 8 January 2002). After all, just like the six-months requirement (*Blečić v. Croatia* [GC], no. 59532/00, § 68, ECHR 2006‑III), the exhaustion requirement on its face goes to the very jurisdiction of the Court (as compared to the "mere" admissibility of the complaint) and:

> "... the two rules contained in Article 26 [now Article 35 § 1] are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation; and whereas the term 'final decision', therefore, in Article 26 refers exclusively to the final decision concerned in the exhaustion of domestic remedies according to the generally recognised rules of international law, so that the six months period is operative only in this context; whereas furthermore, the preparatory work of the Convention, in particular the report prepared in June 1950, by the Conference of Senior Officials, confirms this interpretation." (Commission Decision in *De Becker v. Belgium*, no. 214/56, 9 June 1958, Yearbook 2, p. 214 at p. 242.)