APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/206

Costello J.
Binchy J.
Allen J.

Neutral Citation Number [2023] IECA 6

BETWEEN

MICHAEL LEAHY

APPELLANT

AND

A CIRCUIT COURT JUDGE

RESPONDENT

AND

TIPPO INTERNATIONAL LIMITED

AND

ANDERSON & GALLAGHER SOLICITORS

NOTICE PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 18th day of January, 2023

Introduction

1. This is an appeal by Mr. Michael Leahy, who represents himself, against a judgment and order of the High Court (Hyland J.) by which Mr. Leahy was refused leave to apply for an order of *certiorari* by way of judicial review of an order made by His Honour Judge Quinn on 14th July, 2020.

2. Mr. Leahy made an *ex parte* application to the High Court on 14th September, 2020 and by order of Meenan J. dated 19th October, 2020 was directed to make his application for leave on notice to the judge and the notice parties. Mr. Leahy's *ex parte* application was grounded on an affidavit sworn on 14th September, 2020 and a statements of grounds dated the same day. The order of Meenan J. allowed Mr. Leahy seven days within which to issue a motion returnable for 17th November, 2020. He did not issue and serve his motion in time but the time was extended by further orders of Meenan J. made on 23rd November, 2020 and 14th December, 2020 and the motion was eventually issued on 22nd December, 2020, returnable for 26th January, 2021.

Background facts

3. On 28th September, 2018 in proceedings entitled Record No. 2010/EJ003, The Circuit Court, South Eastern Circuit, County of Waterford, Between: Michael Doyle, Plaintiff and Michael Leahy Trading as Ideal Kitchens, Defendant, Mr. Doyle recovered judgment against Mr. Leahy in the sum of €29,796.00 and costs.

4. In the course of that action Mr. Leahy produced to the Circuit Court an agreement dated 4th September, 2018 which had been made between the first notice party, Tippo International Limited *("Tippo")* and Mr. Leahy by which Tippo had agreed to pay to Mr.

Leahy a total sum of €550,000 by way of an initial instalment of €100,000 to be paid on 8th October, 2018, eight consecutive monthly instalments of €50,000 on the 8th day of each month commencing on 8th November, 2018 and a final instalment of €40,000 to take into account a contribution to the costs of a mediation in the course of which the agreement had been reached. The settlement agreement between Tippo and Mr. Leahy was made in full and final settlement of all claims howsoever arising but referred in particular to High Court proceedings Record No. 2014/1623S which Mr. Leahy had brought against Tippo, which, by the terms of the settlement agreement, Mr. Leahy agreed to discontinue.

5. On 6th November, 2018, in the action in which Mr. Doyle was the plaintiff, an order was made by His Honour Judge O'Donoghue sitting at Kilkenny, on the *ex parte* application of Mr. Doyle, directing the payment into court of the sum of €29,796.00 for the amount of the judgment which Mr. Doyle had recovered and a sum of €20,000 in respect of costs, pending the outcome of Mr. Leahy's appeal against the order of 28th September, 2018. The order was made *"In respect of any monies which [Mr. Leahy] will recover in an action entitled The High Court, Michael Leahy v. Tippo International Limited Record No. 2014/1623S".* The order provided for service on Anderson & Gallagher, solicitors for Tippo, but not, expressly, for service on Mr. Leahy. However, on the following day, 7th November, 2018, Anderson & Gallagher wrote to Mr. Leahy to say that Tippo would comply with the order and pay the balance of €204.00 of the instalment of €50,000.00 which would become due on 8th November, 2018 into his account.

6. On 28th March, 2019 Mr. Leahy's appeal to the High Court against the judgment and order of 28th September, 2018 in favour of Mr. Doyle was dismissed, with costs. Mr Leahy did not appeal the order of His Honour Judge O'Donoghue of 6th November, 2018, which remains in effect.

7. On 30th May, 2019 Mr. Doyle applied to the Circuit Court (Her Honour Judge Doyle) sitting in Dungarvan and obtained an interim order freezing the remaining payments due from Tippo to Mr. Leahy. That order provided that notice of the making of the order should be given to Tippo and Tippo's solicitors, Anderson & Gallagher, and gave liberty to Mr. Doyle to issue and serve a motion returnable for 4th June, 2019. Such a motion was duly issued and appears to have been adjourned from time to time with the interim freezing order continued.

8. By my reckoning, the effect of the order of 30th May, 2019 was to freeze the payment of the two last instalments payable on foot of the settlement agreement which became due on 8th June, 2019 and 8th July, 2019, amounting together to €90,000. According to a letter written by Mr. Doyle's solicitors on 26th June, 2019, there was then €90,000 *"still due"* to Mr. Doyle. It is not evident what, if any, account was taken of the money paid into court. All the appearances are that the €49,796 which was paid into court by Tippo on 26th November, 2019 remains in court.

The action by Mr. Leahy against Tippo and Anderson & Gallagher

9. By ordinary civil bill issued on 5th March, 2020 Mr. Leahy commenced proceedings against Tippo and Anderson & Gallagher claiming a declaration that Tippo did not have the authority to *"redirect"* the payment of €49,796.00 due to Mr. Leahy on 8th October, 2018; an order directing the Kilkenny Circuit Court Office to release the funds said to have been wrongfully paid by Tippo on 21st October, 2018 *"under pretence to"* the order of 6th October, 2018; and damages for loss.

10. The indorsement of claim refers to an order of 6th October, 2018 and a payment into court on 21st October, 2018 but both dates were obviously mistaken. The order of Judge O'Donoghue for the payment of monies into court was made on 6th November, 2018, not 6th

October, 2018. The first payment of €100,000 on foot of the settlement agreement which fell due on 8th October, 2018 was paid to Mr. Leahy and the monies paid into court – which were paid in on 26th November, 2018 – were deducted from the instalment of €50,000 which fell due on 8th November, 2018. However, nothing turns on the precise dates.

11. The premise of Mr. Leahy's claim was that he had not recovered any monies in his 2014 action against Tippo and that the order of 6th November, 2018 had not authorised Tippo to pay into court monies which were due to Mr. Leahy on foot of the settlement agreement of 4th September, 2018. The case made by Mr. Leahy was that *"it was reasonable to say"* that Tippo knew or ought to have known that the order of 6th November, 2018 did not authorise it to *"redirect €49,769.00 due to [Mr. Leahy] to court for the benefit of [Mr. Doyle]"* and that *"it was reasonable to say"* that Anderson & Gallagher had been negligent in advising Tippo to do so.

12. By notice of motion dated 15th June, 2020 and returnable for 8th July, 2020 Anderson & Gallagher applied to the Circuit Court at Kilkenny for an order dismissing the action against them on the grounds that it failed to disclose a cause of action. That motion was grounded on an affidavit of Mr. Noel Gallagher, solicitor, sworn on 12th June, 2020. Mr. Gallagher identified the basis of Mr. Leahy's claim as being an attempt to distinguish between monies paid on foot of the proceedings which he had brought against Tippo and the monies payable on foot of the mediated settlement. That distinction, he suggested, was without foundation and Tippo, he suggested, had had no option but to pay the monies into court as directed by the order of 6th November, 2018. Mr. Gallagher suggested that if Mr. Leahy had had a problem with the order he could have appealed it but had not. As to the action against Anderson & Gallagher, Mr. Gallagher suggested that there was no contractual nexus between Mr. Leahy and the solicitors and that the solicitors owed Mr. Leahy no duty of care.

13. Mr. Gallagher exhibited a copy letter which had been sent to Mr. Leahy on 26th March, 2020 inviting him to discontinue the action and a copy of Mr. Leahy's reply. The reply is dated 26th March, 2018 but this is clearly a mistake. Mr. Gallagher's letter, having set out the defendants' stall, indicated that if the proceedings were not discontinued a defence would be delivered. Mr. Leahy, in his reply, contested what Mr. Gallagher had said and gave his consent to the late delivery of a defence within ten days.

14. On 23rd June, 2020 a separate motion was issued on behalf of Tippo seeking to have the action against it dismissed as disclosing no reasonable cause of action and/or on the grounds that it was frivolous and vexatious. That motion, which was also made returnable for 8th July, 2020 at Kilkenny, was grounded on an affidavit of Mr. Patrick Martin, a director of Tippo. Mr. Martin set out the background to Mr. Leahy's claim which he identified as being, in a nutshell, that Tippo had wrongfully paid monies into court and that Anderson & Gallagher had been negligent in advising it to do so. Mr. Martin suggested that if Mr. Leahy was dissatisfied with the order of 6th November, 2018 the appropriate course of action was an appeal and he characterised the new action as a frivolous and vexatious attempt to circumvent that order. He suggested that Mr. Leahy's argument that there was a distinction to be drawn between monies paid on foot of his High Court proceedings against Tippo and monies paid on foot of the settlement agreement was without merit. Mr. Martin suggested that Tippo had simply complied with a Circuit Court order and that Mr. Leahy could have no cause of action against it.

15. On 29th June, 2020 Mr. Leahy issued a motion by which he sought judgment in default of defence and an order directing the payment out of the sum of €49,769. That motion was also initially returnable for 8th July, 2020. He had, in the meantime, formally consented to the late delivery of the defences as required by O. 27 of the Circuit Court Rules.

16. In circumstances to which I will come, all three motions – the defendants' respective motions to dismiss and Mr. Leahy's motion for judgment – were listed for hearing together on 14th July, 2020 before His Honour Judge Quinn. The judge acceded to the defendants' motions to dismiss and refused Mr. Leahy's motion for judgment. He allowed the defendants the costs of their motions and made no order as to the costs of the motion for judgment.

Mr. Leahy's application for leave

17. The affidavit of Mr. Leahy grounding his motion for leave to apply for judicial review shows that Anderson & Gallagher's motion was sent to him by e-mail on 15th June, 2020 and was followed by Tippo's motion. He does not say precisely when he received Tippo's motion but inferentially it was before he issued his motion for judgment on 29th June, 2020 which was returnable for the same day.

18. The motion list for 8th July, 2020 was a County Registrar's list. On 2nd July, 2020 Mr. Leahy was notified by Tippo's solicitors by e-mail, as a matter of courtesy and with a view to forestalling any unnecessary journey, that Tippo's motion was not one which could be dealt with by the County Registrar and that application would be made to transfer it to the judge's list. Mr. Leahy does not say so in the body of his affidavit but Tippo's solicitors' e-mail of 2nd July, 2020 – which is among Mr. Leahy's exhibits – shows that he was also told that in their view the motion for judgment should travel with the motions to dismiss and that they intended to apply for a listing in one of the days in the week commencing 14th July, 2020 when the court would be dealing with civil business.

19. What precisely happened on 8th July, 2020 in the County Registrar's list and how the three motions came to be listed for hearing is unclear but the three motions appeared in the judge's list for 14th July, 2020 and – as Mr. Leahy had been told by the solicitors for Tippo

that they would – the defendants asked that they be heard together. Mr. Leahy, in his grounding affidavit, has deposed that he reminded the judge that the judge had previously said that *"with no defence filed no motion could be heard other than a motion in default of defence"* and that *"With no clear four days' notice of the hearing to file a replying affidavit the plaintiff asked for adjournments."* It is not clear from Mr. Leahy's affidavit whether he said so at the time but the basis on which he sought the judicial review was that if he had had four clear days' notice of the hearing he would have filed an affidavit exhibiting the settlement agreement of 4th September, 2018 and contesting the averment of Mr. Gallagher that the identification in the settlement agreement of Tippo as the applicant and Mr. Leahy as the respondent had been a mistake.

20. The grounds on which Mr. Leahy sought leave were:-

(i) That the hearing on 14th July, 2020 was premature and unfair as he had not had four clear days' notice of the hearing to allow him to file a replying affidavit;

(ii) That the hearing was premature and unexpected having regard to a ruling by the judge on 21st May, 2020 on a previous application by Mr. Leahy – apparently an *ex parte* application for payment out of the money in court – that he would not entertain such an application but that Mr. Leahy should bring a motion for judgment; and

(iii) That the judge refused to adjourn the defendant's motions;

(iv) That the judge *"errored as of order 27(2) on (within) his jurisdiction he was limited on hearing the plaintiff's application"* to give judgment or leave to the defendants to defend the whole or part of the claim.

21. Mr. Leahy's motion for leave to apply for a judicial review was heard by the High Court (Hyland J.) on 5th July, 2021.

22. In the meantime, a cross-motion had been brought by the Chief State Solicitor on behalf of the Circuit Court judge to require Mr. Leahy to reconstitute his motion so that it complied with the requirements of O. 84, r. 22(2A) of the Rules of the Superior Courts by removing the Circuit Court judge as the named respondent and substituting the notice parties as the *legitimus contradictor*. The gravamen of that application was that absent any claim of *mala fides* or other personal impropriety in the conduct of the proceedings such as would deprive the judge of immunity from suit, the Circuit Court judge ought not to have been named as a respondent or notice party or served with the proceedings. That cross-motion had been preceded by a long letter to Mr. Leahy explaining the requirement of the rule and referring him to the relevant jurisprudence. In response to the cross-motion, Mr. Leahy swore a further affidavit in which – by reference to definitions of *mala fides* and bias which he looked up on the internet – he suggested that *"how [he] felt treated by the judge"* amounted to *"bad faith"* and *"inclination and prejudice"*

23. The High Court judge, without demur, decided to deal with the application for leave first.

The High Court judgment

24. In an *ex tempore* judgment delivered on 6th July, 2021 Hyland J. began by summarising Mr. Leahy's pleadings. She noted that there was no allegation of *mala fides* or bias in the notice of motion, the statement of grounds or in the grounding affidavit but that in a request for voluntary discovery Mr. Leahy had asserted that the Circuit Court judge was biased in that he had been unfair to him. The High Court judge rejected an application by Mr. Leahy to include a claim of bias in his leave application on the ground that an applicant

cannot add any new relief or grounds at the leave stage and had not sought to amend his statement of grounds or to put any new material before the court.

25. The High Court judge noted that Mr. Leahy wished to challenge the decision of the Circuit Court judge of 14th July, 2020 on the motions of Anderson & Gallagher dated 15th June, 2020 and of Tippo of 29th June, 2020, both of which he accepted he had received.

26. The judge noted that while it was unclear precisely how the defendants' motions to dismiss had come to be listed together with Mr. Leahy's motion for judgment on 14th July, 2020, Tippo's solicitors' e-mail of 2nd July, 2020 had indicated that they would apply for the motion to dismiss to be listed in the week of 14th July, 2020 and that it was appropriate that the motions should travel together, and Mr. Leahy had not objected to that course of action.

27. The High Court judge identified two essential grounds in Mr. Leahy's statement of grounds; first, that he had not had four clear days' notice of the hearing to allow him to file a replying affidavit, and secondly, that although the Circuit Court judge had told Mr. Leahy on 21st May, 2020 that no decision could be made on the application which he then made unless a motion for judgment in default of defence was brought, the judge nevertheless heard and determined the defendants' motions. In what the High Court judge characterised as a linked argument, Mr. Leahy sought to make the case that the only options open to the Circuit Court judge on his motion for judgment were to grant judgment or to extend the time for delivery of the defences.

28. The High Court judge dealt first with the argument that the Circuit Court judge ought not to have dealt with the motions to dismiss in the absence of defences. This, she said, was based on a misunderstanding of the function of a motion to strike out for failure to disclose a cause of action. The High Court judge thought that Mr. Leahy may have misunderstood what Judge Quinn may have said on 21st May, 2020 – on what appeared from Mr. Leahy's affidavit to have been an application for payment out of the money in court – but found that

he was perfectly entitled to adjudicate on the defendants' motions from a jurisdictional point of view. She found that Mr. Leahy had not identified any arguable grounds in relation to that issue.

29. As to the refusal of Judge Quinn to adjourn the defendants' motions, the High Court judge carefully examined the facts. First, Mr. Leahy accepted that he had been served with the defendants' motions returnable for 8th July, 2020. Accordingly, he was in a position to file whatever affidavit he wished and exhibit any document he considered to be relevant. Secondly, on Mr. Leahy's case he had previously – albeit in the context of a different application – exhibited the documents he contended that he wished to exhibit. Mr. Leahy, she said, had not identified any impediment to exhibiting the documents and had not explained why he had not filed a replying affidavit prior to 14th July, 2020, or, indeed before the initial return date of 8th July, 2020.

30. As to Mr. Leahy's complaint that he had been surprised by the listing of the defendants' motions on 14th July, 2020, the High Court judge noted that he had been clearly warned – or advised – by the e-mail of 2nd July, 2020 of Tippo's solicitors' intentions and had not objected to it. She found that Mr. Leahy, once he had secured a hearing date for his motion for judgment, should have been aware that it was likely that the other motions would be listed on the same day and that if he had any concern about that should have made it known. It was, said the High Court judge, Mr. Leahy's own action in persuading the Circuit Court judge to list his motion that brought about the hearing date for all of the motions.

31. As to the manner in which the motion for judgment had been disposed of, the High Court judge held that the Circuit Court had an inherent jurisdiction to regulate its own procedures and was not confined to O. 27 of the Circuit Court Rules. In circumstances in which the Circuit Court judge had decided to dismiss the action, it would have been a nonsense to direct the defendants to deliver a defence.

32. The judge concluded that Mr. Leahy had not identified any arguable ground and refused the application for leave.

33. As to the cross-motion, the judge said that there was no claim of *mala fides* or other personal misconduct such as would have justified the naming of the Circuit Court judge but that in circumstances in which she had concluded that Mr. Leahy had not identified any arguable ground, it was not necessary to deal with the respondent's motion.

The appeal

34. On 9th August, 2021 Mr. Leahy filed a notice of appeal against the judgment and order of Hyland J. The notice of appeal indicated that Mr. Leahy sought leave from this court for judicial review of the decision of 14th July, 2020 and an order striking out the respondent's motion of 19th March, 2021 – which the High Court judge had not dealt with – but all that was set out under the heading *"Grounds of appeal"* was that *"The judge erred in her understanding of events"*.

35. On 18th January, 2022, in purported compliance with a direction given in the directions list, Mr. Leahy filed a six page, 45 paragraph document entitled *"ADDITIONAL PARTICULARS"* which introduced itself as *"a shortened and softened cut-back version of my first draft as the matter of bias in the courts is for me a concerning matter of which exercises me of not just bias but extreme bias I have suffered at times in the courts as a lay litigant."*

36. Mr. Leahy's complaint of bias is misguided as well as mistaken. The fact of the matter is that the notice of appeal disclosed no arguable ground of appeal and Mr. Leahy, as a litigant in person, was afforded the opportunity to mend his hand. Litigants are entitled to represent themselves but if they do so they are expected – in the same way as represented

litigants – to abide by the rules and procedures of whatever court they are in. The Court of Appeal Rules require – as the printed form notice of appeal spells out – that an appellant should first of all set out the grounds of appeal concisely and then identify the legal principles related to each ground, the specific provisions of the Constitution or legislation relied on, and the issues of law before the court appealed from to the extent that they are relevant to the issues on the appeal. The rules apply to all litigants.

37. In his additional particulars, Mr. Leahy endeavoured to explain at some length the circumstances in which his application for judicial review had named *"Circuit Court Judge"* as the respondent and how and when the papers had been served on the Chief State Solicitor. Very soon after the papers were served on the Chief State Solicitor, objection was taken on behalf of the Circuit Court judge in correspondence that absent any suggestion of *mala fides* or misconduct he ought not to have been named or served and that objection was pressed by the cross-motion to remove the Circuit Court judge from the proceedings. The substance of Mr. Leahy's position on this issue is that he was caught between the requirements of O. 84, r. 22(2A) and the order of the High Court made on 19th October, 2020 which directed service of his motion on the respondent as well as the notice parties. In his additional particulars, Mr. Leahy first of all makes the case that he never wanted to join or serve the judge but goes on to try to argue that the objection that he had not made any suggestion of *mala fides* or misconduct opened the door to him to do so.

38. Insofar as Mr. Leahy contends that he was caught between the requirements of O. 84, r. 22(2A) and the directions of the High Court as to service, he has a point, up to a point. In *M. v. M.* [2019] IECA 124, this court (Irvine J., Whelan and Kennedy JJ. concurring) held that the appellant in that case had been correct not to join the Circuit Court judge, anonymously or otherwise, but ought to have served a copy of the proceedings on the registrar of the Circuit Court, as required by O. 84, r. 22(2A)(c). In this case, Mr. Leahy

having named the Circuit Court judge anonymously as the respondent was directed by the High Court to serve the respondent and the notice parties. As I understand Mr. Leahy's submission he did not, at the time he issued his motion, wish to name the Circuit Court judge – whether by name or anonymously – but was directed to do so by the Central Office of the High Court and he did not wish to serve the judge but was directed by the High Court judge to do so. However, Mr. Leahy was quite wrong to perceive the objection that he had not alleged *mala fides* as an invitation or opportunity to do so. In the event, as the High Court judge correctly said, Mr. Leahy did not seek to amend his grounds or to put any further information before the High Court and, as the High Court judge correctly found, he was not entitled to advance any argument based on bias.

39. The conclusion of this court in *M. v. M* was that the appellant's judicial review application was not improperly constituted by reason of the fact that the Circuit Court judge had not been named as a respondent. I mention for completeness that in another case, *Brady v. Revenue Commissioners* [2021] IECA 8, this court (Edwards J., Haughton and Pilkington JJ. concurring) expressed a contrary view, finding that while O. 84, r. 22(2A) precluded the appellant from identifying the Circuit Court judge whose order was impugned by name, the judicial review application ought to have named the Circuit Court judge for the county as respondent. The judgment of Edwards J. in *Brady* shows that the point as to the constitution of the proceedings was first raised by the court of its own motion at the oral hearing but as I will explain, it is unnecessary for the purposes of this case to resolve the conflict between *M. v. M.* and *Brady*.

40. When I say that as to the constitution and service of the proceedings Mr. Leahy has a point up to a point, the point is that the High Court order of 19th October, 2020 directing service on the respondent does not sit altogether easily with the requirements of O. 84, r. 22(2A). The judgment in *Brady* was handed down on 18th January, 2021 – which was after

Mr. Leahy had issued his motion seeking leave – and appears not to have been published on the Courts Service website until 30th June, 2021 – which was very shortly before Mr. Leahy's motion and the cross-motion were listed for hearing. However, the manner in which the proceedings were constituted had nothing to do with the judgment and order under appeal.

41. Hyland J., as I have said, did not deal with the cross-motion as to the constitution of the proceedings but dealt with the application for leave as it was presented by Mr. Leahy.

42. Mr. Leahy contends that:-

1. The High Court judge erred in her conclusion that the Circuit Court judge was entitled to hear and determine the defendants' motions before they had delivered their defences;
2. The High Court judge ought to have dealt with the respondent's cross-motion before dealing with the application for leave;
3. The High Court judge erred in refusing to allow Mr. Leahy to advance a case based on bias;

43. Strikingly absent from the additional particulars is any criticism of the manner in which the High Court judge dealt with Mr. Leahy's argument that the Circuit Court judge's refusal to adjourn the defendants' motions was an arguable ground for a judicial review.

44. Mr. Leahy's additional particulars also suggested that the defendants' motions to dismiss his action on the grounds that it was frivolous and vexatious ought to have been preceded by correspondence – which on his own evidence it had been.

45. Mr. Leahy's additional particulars also suggest that there was an earlier listing of the respondent's motion at which the judge took the view that the respondent's motion could not be heard in circumstances in which no decision had been made on the leave application. However, the public record of the progress of the proceedings shows that Mr. Leahy's application for leave and the respondent's cross-motion were both listed for hearing before

Hyland J. on 5th July, 2021 – and that there was no previous listing for hearing – and that on 6th July, 2021 an order was made on Mr. Leahy's application but no order was made on the respondent's motion.

46. On 2nd September, 2021 a respondent's notice was filed on behalf of the Circuit Court judge by which the respondent limited his participation in the appeal to a submission that he had been improperly joined. In an amended respondent's notice filed on 3rd February, 2022 the respondent objected to the inclusion – presumably in Mr. Leahy's additional particulars – of grounds that dealt with allegations of bias and/or impropriety. That objection was expressed to be made *"In so far as the appellant has sought to include [such] grounds"* but did not identify what those grounds were said to have been.

47. Mr. Leahy's written submissions were in the main a repeat of what he had set out in his additional particulars although he added a gratuitous and scurrilous attack on the judges who had dealt with Mr. Doyle's action against him. He also added a reference to *"the surprising hearing of the defendants motion"* for which he was not prepared and the refusal by Judge Quinn of his adjournment application.

48. Written submissions were filed on behalf of the respondent limited to arguing that the respondent had been improperly joined and objecting to the inclusion in Mr. Leahy's additional particulars of allegations of bias which had not been included in his statement of grounds. That submission correctly references O. 84, r. 22(2A) and the relevant jurisprudence but not the conundrum identified by Mr. Leahy that he had been directed by the High Court to serve the respondent. The respondent's participation in the appeal – as it was in the High Court – was limited to the constitution of the judicial review application. Mr. Paul Gallagher B.L., for the respondent, drew attention to the relevant authorities and offered his assistance if required but agreed that the High Court judge had decided Mr. Leahy's application on its substance – or lack of substance – rather than the form.

49. Written submissions were also filed on behalf of Anderson & Gallagher, which were adopted by Tippo, which chronicled the 2014 action by Mr. Leahy against Tippo, the mediated settlement agreement, Mr. Doyle's action against Mr. Leahy, the order of 6th November, 2018, the payment into court, the freezing order of 30th May, 2019 and the continuation of that order, Mr. Leahy's 2020 action against Tippo and Anderson & Gallagher and the disposition of that action by the order of 14th July, 2020. Reference was also made to a notice of appeal dated 23rd July, 2020 which Mr. Leahy *"... appears to have issued but this does not appear to have progressed."* At the oral hearing of the appeal Mr. Leahy confirmed that he had stamped and served a notice of appeal to the High Court from the order on 14th July, 2020 but had been unable to file it in time because of COVID-19 restrictions. However, he went on to explain that he decided on reflection not to pursue an appeal but to apply for judicial review instead. Mr. Leahy volunteered that he was alive to the possibility of applying for an extension of time within which to file a notice of appeal – which on his account of events would surely have been granted for the asking – but decided not to.

50. The substance of the notice parties' submission is that the High Court judge was correct in her analysis of the case which Mr. Leahy sought to make and was correct in her conclusion that he had identified no arguable ground for judicial review. The notice parties' written submission suggested that the allegation of bias in this case appears to be based on the manner in which the Circuit Court judge dealt with the case, which, as a matter of law, is not a basis on which bias can be shown. Reference was made to *O'Callaghan v. Mahon* [2008] 2 I.R. 514. The submission was that Mr. Leahy had failed to show any evidence of bias on the part of the Circuit Court judge and had no ground for claiming bias.

Discussion and decision

51. This is an appeal by Mr. Leahy against a judgment and order of the High Court. As the appellant, Mr. Leahy bears the onus of identifying an error of law or fact on the part of the High Court judge such as would warrant the intervention of the Court of Appeal.

52. Mr. Leahy tells a long and from his point of view sorry story but the task of the High Court was not and the task of this court is not to attempt to unravel all that has gone before.

53. I do not doubt that Mr. Leahy has a sense of grievance. Notwithstanding the encouragement of the court to focus on his appeal against the refusal by the High Court of leave to apply for judicial review of the Circuit Court order of 14th July, 2020, Mr. Leahy devoted most of his oral presentation to his dispute with Mr. Doyle and his settlement agreement with Tippo. Mr. Leahy's dispute with Mr. Doyle has been finally determined in accordance with law. Mr. Leahy is indebted to Mr. Doyle in the sum of €29,796 and is liable to pay Mr. Doyle's costs of the Circuit Court action and Mr. Leahy's unsuccessful appeal. I do not know why those costs have not yet been taxed and ascertained. I should have thought that with even a modicum of cooperation on Mr. Leahy's part they should have been taxed or agreed before now but that is a matter between Mr. Leahy and Mr. Doyle. At the time of the order of 6th November, 2018, Mr. Doyle's costs of his successful Circuit Court action, which by all accounts had taken three days at trial, were estimated at €25,000. The order for payment into court was in respect of the full amount of the decree and a sum of €20,000 in respect of the costs. There is no indication in the material now before this court as to how long Mr. Leahy's appeal was at hearing or of the amount of the estimated costs of that appeal. If the combined effect of the order of 6th November, 2018 and the freezing order first made on 30th May, 2019 has been to tie up a total of €139,796 to meet a liability for €29,796 and two sets of costs, that is a matter between Mr. Leahy and Mr. Doyle.

54. However, on Mr. Leahy's judicial review application the High Court was not concerned with the rights and wrongs of anything other than the order of His Honour Judge

Quinn of 14th July, 2020 and even then, not with whether the decision made by the Circuit Court judge was correct but whether Mr. Leahy had made out an arguable case that the order was not made within jurisdiction. In his oral argument, Mr. Leahy argued that the High Court judge had looked at his application with tunnel vision. The fact of the matter is that the High Court judge was not concerned with what Mr. Leahy described as the hornets' nest of his dispute with Mr. Doyle but examined, analysed and decided Mr. Leahy's application for leave to apply by way of judicial review. It was not tunnel vision but focus on the application before the court.

55. I have taken some time to set out the background to Mr. Leahy's action against Tippo and Anderson & Gallagher to show how the impugned order of 14th July, 2020 came to be made. If Mr. Leahy thought that the decision was wrong – and I am sure that he did and does – the challenge he sought to mount against it by his application for leave to apply for a judicial review was not that it was wrong but that it had been made without jurisdiction and in excess of jurisdiction. He deliberately decided not to pursue an appeal on the merits and he cannot pursue any arguments to that effect by way of judicial review in these proceedings.

56. As to the suggestion in Mr. Leahy's additional particulars that the High Court judge erred in refusing to allow him to advance a case based on bias, I am satisfied that the judge was perfectly correct. An allegation of bias against a judge is a serious charge. It is a legal concept which must be grounded in fact. It is not something that can be properly introduced by a wild and bald allegation. I agree with the submission made on behalf of the notice parties that Mr. Leahy has failed to show any evidence of bias on the part of the Circuit Court judge and had no ground for claiming bias. I agree also that the apprehensions of the affected party – in this case, by reference to the affidavit filed in response to the respondent's motion how Mr. Leahy may have *"felt"* – are not relevant: See *O'Callaghan v. Mahon* [2008] 2 I.R. 524, at page 672. But that it not quite the basis on which the High Court judge refused to

entertain any such claim. The fact is – and Mr. Leahy accepts that it is so – that there was no reference whatsoever in Mr. Leahy's statement of grounds or in his grounding affidavit to bias. He was not entitled to try to introduce it by the back door in a request for voluntary discovery, *a fortiori* on the hoof in the course of moving his leave application. The High Court judge did not refuse leave on the basis that Mr. Leahy had not made out any arguable ground of bias but rather refused to entertain an argument which was no part of the application for leave. I am satisfied that that was the correct approach.

57. The business before the Circuit Court on 14th July, 2020 comprised two motions, one each by Tippo and Anderson & Gallagher, to dismiss Mr. Leahy's action on the ground that the indorsement of claim on the civil bill disclosed no cause of action and that the claim was frivolous and vexatious and bound to fail, and Mr. Leahy's combined motion against both defendants for judgment in default of defence. There was no question that the motions had not been properly served in accordance with the Circuit Court Rules.

58. It was no part of Mr. Leahy's case that the Circuit Court judge did not in principle have jurisdiction to hear and determine the defendants' motions, rather his argument was that the jurisdiction had been displaced or postponed by the motion for judgment in default and that the judge was required by law to first decide whether to grant judgment to Mr. Leahy or extend the time for delivery of the defendants' defences. That argument, as the High Court judge correctly found, was based on a misunderstanding of the Circuit Court Rules – specifically O. 27 – and the separate jurisdiction of the Circuit Court to deal with the defendants' motions to dismiss the action *in limine*. The High Court judge was correct to conclude that the Circuit Court acted within jurisdiction in deciding the defendants' motions to dismiss the proceedings without first requiring the defendants to deliver defences as contended by Mr. Leahy. That being so, he had no basis to seek judicial review on this ground.

59. As the High Court judge correctly observed, it was evident from para. 13 of Mr. Leahy's grounding affidavit that what was said to have been said by the Circuit Court judge on 21st May, 2020 was said in the context of an application by Mr. Leahy for payment out of the monies in court and of no assistance to his argument in these proceedings. While Mr. Leahy referred at para. 13 of his grounding affidavit to the DAR, he did not exhibit and does not appear to have applied for a transcript of the hearing on 21st May, 2020. In principle, if Mr. Leahy wished to rely on anything said by the Circuit Court judge on 21st May, 2020 it was incumbent on him to prove precisely what was said, which would have been shown by a transcript of the DAR. According to para. 13 of Mr. Leahy's affidavit, what the Circuit Court judge is said to have said is that he could not deal with the question of the return of the money paid into court by Tippo or any motion at all where defences had not been filed unless on a motion for judgment in default of defence.

60. Assuming that this account is a full and correct statement or summary of what was said – which I am bound to say I am inclined to doubt – the judge was clearly addressing the procedure by which Mr. Leahy might correctly apply to have the money paid out. When I say that I am inclined to doubt Mr. Leahy's evidence of what was said on 21st May, 2020, I am not, for the avoidance of doubt, to be understood as doubting his veracity but rather his understanding. After all, the money which was paid into court was paid in on foot of – or purportedly on foot of – an order which had been obtained by Mr. Doyle to satisfy or secure the judgment which he, Mr. Doyle, had obtained and Mr. Doyle would have had an interest in whether the money was to be paid back. Moreover, Mr. Leahy's recollection in the course of his oral submission was that the judge had told him that *"I cannot bring any motion before the court other than a motion for judgment [in default of defence]."* A direction as to what motions further or other motions might be brought by Mr. Leahy is quite different to a direction restricting the defendants as to what motions they might bring.

61. The third ground on which Mr. Leahy sought to challenge the order of 14th July, 2020 was the refusal of his adjournment applications. Plainly the Circuit Court judge had jurisdiction in principle to allow or refuse an adjournment. The issue before the High Court was whether Mr. Leahy had an arguable case that the refusal of Mr. Leahy's adjournment application was so capricious or unreasonable that the order ought to be set aside. As I have said, there was no complaint in Mr. Leahy's additional particulars in relation to the High Court judge's analysis of this element of his application and the reference in Mr. Leahy's written submissions to the refusal of the adjournment merely characterised the hearing of 14th July, 2020 as a *"surprising hearing of the defendants motion the applicant had not yet delivered his replying affidavit"*.

62. I do not believe that Mr. Leahy has properly identified any alleged error in the High Court judge's analysis and reasoning which would constitute a ground of appeal but in any event, I am satisfied that the High Court judge was correct in her analysis and conclusion on this issue. It was the fact, as the High Court judge found, that the defendants' motions had been served in abundant time to have allowed for the filing of any replying affidavit which Mr. Leahy wished to file. Mr. Leahy had not offered any explanation as to why he had not filed any replying affidavit and had not identified any impediment to his having done so. It was clear, as the High Court judge said, from the fact that Mr. Leahy had previously exhibited the mediated settlement agreement that he could readily have done so. I also agree with the High Court judge that Mr. Leahy – if he was – ought not to have been surprised that the defendants' motions were listed together with his motion for judgment. He had been on notice since 2nd July, 2020 that it was Tippo's intention to have its motion listed together with Mr. Leahys's motion for judgment and if – as I agree with the High Court judge – Mr. Leahy was surprised that Tippo's motion was listed for hearing on the same date as his, he ought not to have been. The fact – on which Mr. Leahy sought to place some emphasis – that Anderson

& Gallagher did not make their intentions known in the same way that Tippo had, is neither here nor there. The proposition that Mr. Leahy was entitled to have four clear days' notice of a hearing date before he could have been expected to file his replying affidavit is utterly inconsistent with sensible list management. The requirement under the rules is to have four clear days' notice before a motion is heard. This was amply met in this case as he himself acknowledged receipt of the motions returnable for 8th July, 2020 by e-mails on 15th and 29th June, 2020 respectively.

63. As to the complaint in Mr. Leahy's additional particulars that the High Court judge ought to have dealt with the respondent's cross-motion before dealing with his leave application, this was a matter which was clearly in the discretion of the judge. The respondent's motion did not, as Mr. Leahy variously put it, open a door for him or conjure a wagon onto which he might have jumped. In the course of his oral presentation, as he had in his written submission, Mr. Leahy acknowledged that there had been no mention of bias in what he referred to as his initial application, that is, in his application for leave. The Chief State Solicitor, on behalf of the respondent did not, as Mr. Leahy argued, introduce the question of bias but pointed out that Mr. Leahy had made no suggestion of bias. The respondent was not obliged to move the cross-motion and did not object to the High Court judge's suggestion that she would deal with the leave application first. In any event, anything which Mr. Leahy might have said or sought to say in response to the cross-motion could not have affected the basis on which he had sought leave, and the basis on which his leave application was correctly decided. It is also notable that this ground of appeal is inconsistent with his complaint that the direction of the High Court judge that he serve the respondent with the notice of motion meant that he faced the respondent's motion and but for this he believes that he would have succeeded in his application for judicial review. In fact, because the High Court dealt first with his application for leave to seek judicial review he was not

confronted with this perceived unfairness, but he cannot now claim simultaneously that the High Court erred in failing to address the motion first.

Conclusion

64. I am satisfied that Mr. Leahy has failed to identify any error in the judgement of the High Court and that his appeal must be dismissed.

65. The notice parties as *legitimus contradictor* having been entirely successful on the appeal are presumptively entitled to their costs. The respondent did not apply for costs in the High Court and I presume that there will be no application for the costs of his limited participation in the appeal. If Mr. Leahy wished to contend for any other costs order, I would afford him the facility of filing brief written submissions (not exceeding 1,000 words) within fourteen days, in which event the notice parties will have fourteen days within which to file a response, similarly so limited. The costs of any argument as to the appropriate costs order will follow the outcome of any dispute.

66. For completeness I reject out of hand the allegation that litigants in person are seen in low esteem or that counsel are held in higher esteem or that lay litigants' arguments are treated any differently to the arguments of counsel. Mr. Leahy's appeal fails not because he is a litigant in person but because there is nothing in it.

67. As this judgment is being delivered electronically Costello and Binchy JJ. have authorised me to say that they agree with it.