

THE HIGH COURT

COMMERCIAL

[2022] IEHC 224

[Record No. 2016/1920S]

BETWEEN

ALLIED IRISH BANKS, PLC (AND BY ORDER DATED 17th

SEPTEMBER 2018) EVERYDAY FINANCE DAC

PLAINTIFFS

AND

SEAMUS MCQUAID

AND BY ORDER DATED 30TH MAY, 2017

BEN GILROY AND CHARLES MCGUINNESS

AND BY ORDER DATED 1ST JUNE, 2018

SUSAN MCQUAID, PAUL MCQUAID AND GRÁINNE MCQUAID

AND BY ORDER DATED 16TH, JULY, 2018

SONIA MCQUAID AND CONOR MCQUAID

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 8th April 2022

1. By a notice of motion dated 29th March, 2021, the second named defendant, Mr. Ben Gilroy, has sought orders setting aside all previous orders made in these proceedings and, in particular, the orders made by Mr. Justice McGovern. Mr. Gilroy has brought this application on the basis that the orders in question are vitiated by bias

(either actual or objective) on the part of McGovern J. In making this application, Mr. Gilroy stated in para. 3 of his grounding affidavit that it had recently come to his attention that, at the time the previous orders were made in these proceedings, McGovern J and the solicitor and counsel acting for the plaintiff in the proceedings had failed to disclose a “*relationship*” which Mr. Gilroy contends gives rise to an apprehension of bias on the part of the judge. Mr. Gilroy complains that, unknown to him, the solicitor and counsel for the plaintiff in these proceedings namely Ms. Claire Callanan and Mr. Lyndon MacCann S.C. had previously acted for the wife of McGovern J. in High Court proceedings (record number 2008 No. 6237P) relating to a dissolution of a family partnership in which Ms. McGovern was involved (which I will refer to as “*the 2008 proceedings*”). Mr. Gilroy contends that this “*relationship*” gave rise to a “*substantial conflict of interest*” on the part of the judge which, in turn, gives rise to a reasonable apprehension of bias on his part. Mr. Gilroy also goes further and alleges actual bias on the part of McGovern J. For example, in para. 23 of his replying affidavit sworn on 9th June 2021 he alleges that McGovern J was “*totally biased*” in favour of counsel and the solicitor for the first named plaintiff “*so much so that I believe they were successful in every application they brought*”.

2. Ordinarily, the High Court would have no power to set aside orders previously made by it. The remedy for a party who is dissatisfied with an order made by the High Court is to appeal. However, in cases where an allegation of bias is made against a judge of the court, there is authority for the proposition that the court, if satisfied that a case of bias has been made out, can set aside an order previously made by it. This is precisely the course that was taken by the Supreme Court in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40. It was also the course taken by the Court of Appeal of England & Wales in *Taylor v. Lawrence* [2003] Q.B. 528 at p. 547. However, in this

case, there is a procedural impediment in Mr. Gilroy's path. Haughton J. has made an order restraining Mr. Gilroy from issuing any motions in these proceedings against the plaintiff save with the prior permission of the judge for the time being in charge of the Commercial Court list. This order was made by Haughton J. on 10th September 2018 following a comprehensive judgment given by him on the same day in which he described, in considerable detail, all of the previous orders and judgments made in these proceedings involving Mr. Gilroy. He also explained the reasons why he had come to the conclusion that an order should be made restraining Mr. Gilroy in this way.

3. At the hearing of Mr. Gilroy's application on 30th June 2021 counsel for the plaintiff drew attention to the order made by Haughton J. and to the fact that, as of that date, Mr. Gilroy, had not sought leave from the judge in charge of the Commercial Court list to bring the present application. In response, Mr. Gilroy submitted that he did not need leave to bring this application in circumstances where, according to him, he was not making any application as against the plaintiff. On the contrary, he contended that his application was directed at McGovern J. and the solicitor and counsel acting for the plaintiff. With due respect to Mr. Gilroy, I do not believe that this submission is correct. Were I to set aside any of the orders previously made in these proceedings, this could well affect the position of the plaintiff in the proceedings. The plaintiff would lose the benefit of the orders previously made. For that reason, it seems to me that the application falls within the ambit of the restraining order made by Haughton J. That said, if Mr. Gilroy has a proper basis for his case that the previous orders made by McGovern J are vitiated by objective bias or actual bias, I believe that leave would have to be given to him to pursue the present application. Furthermore, I was designated by the judge then in charge of the Commercial Court to

hear Mr. Gilroy's application. In the intervening period since the application was heard, I have been designated as the judge in charge of the Commercial Court list. Given these circumstances and given the way in which the matter was very fully argued at the hearing in June 2021, I believe that I should proceed to decide the substantive application.

4. A further preliminary issue arises in relation to Mr. Gilroy's objection to the way in which an officer of the plaintiff has sworn an affidavit in response to his own grounding affidavit. Mr. Gilroy has objected to this affidavit on the basis that it constitutes hearsay insofar as it purports to recount the role played by the plaintiff's solicitor and lead counsel in the proceedings previously taken by Ms. McGovern, the wife of McGovern J. Mr. Gilroy contends that the relevant affidavits would have to be sworn by the solicitor and counsel concerned or by McGovern J. himself. I have concluded that this objection is misplaced. The reality is that Mr. Gilroy himself has no direct evidence of the role played by the solicitor and counsel concerned in the previous proceedings taken by Ms. McGovern and other members of her family. Any evidence he has given in relation to their role is plainly hearsay. If he is to succeed in making a case based on the involvement of the solicitor and counsel in those proceedings, he must, of necessity, rely on the admissions made by the plaintiff in the affidavit sworn on its behalf by Mr. Ian Smith. In this context, it is important to keep in mind that Mr. Gilroy bears the burden of proof on this application. As Denham J. (as she then was) observed in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 at p. 552 "... *there is no doubt that the burden rests on the applicants to prove their case on the balance of probabilities. They carry the onus of proof.*" The same point was made by Murphy J. in *Orange v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 at p. 241 in the

context of the need to prove the existence of a factor said to give rise to a reasonable apprehension of bias.

5. In his affidavit, Mr. Smith provides the following information confirming the role played by solicitor and counsel in those proceedings in paras. 24 to 26 as follows:-

“24. I am advised by Ms. Callanan that there was, indeed, a much publicised piece of litigation between members of the children of the late Circuit Judge Ryan. One of the Plaintiffs in those proceedings was the wife of Mr. Justice McGovern. Mr. MacCann SC and another Senior Counsel acted in those proceedings until shortly after they were settled. Thereafter, Mr. MacCann had no further involvement. The proceedings had been settled long before Mr. Gilroy was joined as a defendant to these proceedings.

25. The instructing solicitors in the Ryan proceedings were Cusack McTiernan. When Mr. McTiernan of that firm joined Beauchamps, the filed [sic] moved with him to Beauchamps. Ms. Callanan advises me that she had no involvement in relation to that file until after Mr. McTiernan had left Beauchamps and some final matters had to be tied up.

26. I say and believe that no conflict arose from Mr. Justice McGovern by virtue of Mr. MacCann having previously acted for a group of plaintiffs who included Mr. Justice McGovern’s wife. Nor did any conflict arise by virtue of the firm of Beauchamps subsequently coming on record for those plaintiffs”.

6. In this context, the judgments of White J. delivered at a late point in the 2008 proceedings are instructive. It appears from the judgments of White J. in *Ryan & McGovern v. Ryan & Larkin* [2014] I.E.H.C. 675 delivered on 21st February 2014 and [2014] I.E.H.C. 684 delivered on 18th November 2014 that, by that year, the

proceedings (record no. 2008 no. 6237P) involving Ms. McGovern were substantially concluded. It appears from these judgments that what was then in issue were the fees of a receiver appointed by the court to manage the partnership assets of the plaintiffs and the defendants. If the receiver was seeking payment of fees, it seems probable that the proceedings must, by then, have been substantially complete. In his judgment delivered in February 2014, White J explained that all of the property of the partnership had, by that stage, been sold. He also records in para. 22 of his judgment that the partnership proceedings were compromised by a settlement agreement of 26th January 2010. In the same paragraph, he explains that a dispute arose between the plaintiffs and the first defendant in those proceedings about the implementation of the settlement agreement but that matter was determined by the court on 24th July 2013. This provides significant corroboration for the averment made by Mr. Smith that the proceedings involving Ms. McGovern were settled “*long before Mr. Gilroy was joined as a defendant to these proceedings*”.

7. The last preliminary matter that arises is the highly derogatory language used by Mr. Gilroy in his affidavits concerning McGovern J. It was submitted to me by counsel for the plaintiff that it is scandalous and that it is further evidence of criminal contempt on the part of Mr. Gilroy. In this context, it should be noted that, as explained in detail in the judgment of Haughton J. in September 2018, Mr. Gilroy has twice before in these proceedings been found guilty of criminal contempt. He was first held to be in criminal contempt of court in the judgment of Mc Govern J. delivered on 25th June 2017. A second finding of criminal contempt was made against him by McGovern J. in an *ex tempore* judgment delivered on 21st February 2018.

8. While I am deeply troubled by the tone and content of many of the averments made by Mr. Gilroy (which I believe to be expressed in wholly improper terms) I do

not believe that it would be appropriate, on this occasion, to embark upon a hearing as to whether Mr. Gilroy has opened himself up to a further finding of criminal contempt. In adopting this approach, I am conscious that Mr. Gilroy strongly believes that he has suffered a very significant injustice. Furthermore, if it be the case that a decision of the High Court could be said to be vitiated by bias (whether actual or objective) it seems to me that the decision would have to be set aside. Accordingly, I believe that it is appropriate that I should proceed to consider Mr. Gilroy's application on the merits. That said, if I come to the conclusion that Mr. Gilroy's allegations are groundless, then it may be appropriate to strike out some of the averments made by him as scandalous within the meaning of O. 40, r. 16. I will address that issue at a later point in this judgment. It should also be noted in this context that, in his affidavits, Mr. Gilroy has, in substance, repeated certain averments made in an affidavit sworn by him on 25th June 2018 which were previously struck out as scandalous by order of Haughton J. made under O. 40, r. 12 (which is in identical terms to what is now O. 40, r. 16).

Judicial impartiality

9. In his affidavit, Mr. Gilroy questions the impartiality of McGovern J. in the manner in which he conducted earlier hearings leading to the orders made against Mr. Gilroy. Judicial impartiality is, of course, a key requirement in the administration of justice. As Denham C.J. observed in *Goode Concrete v. CRH plc* [2015] 3 I.R. 493 at p. 524:

“68. ... no one should be a judge in his own cause. It is ... a fundamental building block of the principle that justice should not only be done but should be seen to be done.

69. *In analysing this issue of alleged perceived bias, it is a matter not only for the parties, or the trial judge, but there is the fundamental concern for the manifest impartial administration of justice, and the confidence which the People rest in the judiciary. Judicial impartiality is the fundamental principle upon which the administration of justice proceeds, upon which rests confidence in the judiciary, and upon which rests the rule of law.*”

10. This principle explains why bias (whether actual or objective in nature) will disqualify a judge from adjudicating on a dispute. Thus, a judge cannot have a pecuniary interest in the outcome of the proceedings (such as shares in a company which is party to the proceedings). If the judge has such an interest, there is, as the decision of the Supreme Court in *Goode* at p. 519 demonstrates, a positive obligation on the judge to disqualify himself or herself.

11. The case law also shows that, if the judge has a personal relationship with one of the parties or with a witness, this will also call the judge’s impartiality into question and the judge should recuse himself or herself. However, as discussed in more detail below, the case law also shows that, in general, a previous professional relationship between a judge (when still in practice as a lawyer) and a party or a witness will not raise a question in relation a judge’s impartiality unless the relationship touches upon an issue relevant to the case to be heard by that judge.

12. As McGuinness J. explained in *Bula Ltd. v. Tara Mines (No. 6)* [2000] 4 I.R. 412 at pp 508-509, the right of a party to a decision by an impartial judge forms part of the right to fair procedures guaranteed by the Constitution. However, she added at p. 509 that, in proceedings between parties, the right to fair procedures does not vest in one party alone. A respondent who is faced with a challenge to an earlier decision alleged to be vitiated by bias is also entitled to fair procedures. McGuinness J.

stressed that, from the respondent’s perspective, “*the right to finality may be very much a part of the right to fair procedures.*” For that reason, it is unsurprising that, as mentioned in para. 4 above, the onus of proof lies on the person seeking to challenge a previous decision on the grounds of bias. For similar reasons, McGuinness J. explained at p. 509 that an apprehension of bias must be “*reasonable and realistic*” and not “*over scrupulous, fanciful or fantastic ...*”.

13. The need to keep all parties’ interests in mind is also evident from the judgment of Dunne J. in *O’Driscoll (a minor) v. Hurley* [2016] IESC 32 where she said at pp. 26-27, in the context of a recusal application:

“The administration of justice would grind to a halt if judges regularly recused themselves by responding in an over scrupulous way to an invitation to recuse. It is important to bear in mind that the test involved is an objective one and that the onus of establishing the grounds for recusal rests upon the applicant.

... A small number of litigants ... end up in inviting judges to recuse themselves, presumably as the litigant concerned forms the conclusion that their litigation is unlikely to be successful before a particular judge ... litigants need to remember that not all litigation is winnable. ... Judges need to be careful in considering such applications and to bear in mind the rights of all the litigants in proceedings before the court.”

14. As noted above, Mr. Gilroy alleges two forms of bias in this case. In the first place, he relies on objective bias arising from the “*relationship*” described above. In addition, he makes the case that the judge was subjectively biased against him. In this judgment, I first examine the case made on objective bias. Having done so, I next turn to the allegation of actual bias. Finally, I address the issue as to whether there is a

basis on which I should exercise the power of the court to strike out scandalous material from Mr. Gilroy's affidavits.

The case made by Mr. Gilroy in relation to objective bias

15. Insofar as objective bias is concerned, the relevant test to be applied was explained in the following terms by Keane C.J. in *Orange Ltd v. Director of Telecoms (No. 2)* at p. 186:-

“While the test for determining whether a decision must be set aside on the ground of objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is, in the light of the two authorities to which I have referred, [Dublin Wellwoman Centre Ltd v. Ireland [1995] 1 I.L.R.M. 408 and Radio Limerick One Ltd. v. Independent Radio and Television [1997] 2 I.R. 291] no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias.”

16. The wholly objective nature of that test has been reiterated on a number of occasions. The issue is not to be determined by reference to the subjective view of the party alleging bias on the part of the judge. Instead, it is to be determined by reference to the view which a reasonable person would form as to the whether the circumstances give rise to a reasonable apprehension of bias. Thus, for example, in *Bula Ltd v. Tara Mines Ltd (No. 6)* Denham J. (as she then was) said at p. 441:

“... it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an

impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person.”

17. In *Bula*, the Supreme Court came to the conclusion that a prior relationship of legal advisor and client did not generally disqualify a judge from hearing a case where the judge had formerly provided legal advice or legal representation to a party in relation to an issue or subject which has no connection with the subject matter of the proceedings in question. In her judgment in that case, Denham J. approved the following passage from the judgment of the High Court of Australia in *Re: Polites* (1991) 173 C.L.R. 78 at pp. 87-88 where it was said:

“A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature

of his or her relationship with the client, the ambit of the advice given and the issues falling for determination.”

18. Denham J. said that she was satisfied that this extract represents a correct analysis of the legal position. She also emphasised that, before the reasonable apprehension of bias can be said to arise from a previous relationship of legal advisor and client, there must be something more than the mere fact of a previous association. In this context, she expressly approved the following passage from the judgment of Merkel J. in *Aussie Airlines Pty Ltd v. Australian Airlines Pty Ltd and Ors.* (1996) 135 ALR 753 where he said:

“55. In my view, as with the cases considering personal, family and financial interests the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular, they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In the absence of such a link it is difficult to see how the test for disqualification as stated in Livesey can be satisfied.”

19. Having drawn attention to the approach taken in the Australian cases outlined above, Denham J. then continued at p. 446:

“If a judge has acted for or against a person previously as a legal adviser or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant.”

20. At p. 510, McGuinness J. also stressed the need for a challenger to establish a “*cogent and rational*” link between a judge’s past associations and the capacity of those associations to influence the decision of the judge. McGuinness J. characterised this principle as fulfilling “*the requirement that the ... apprehension should be both reasonable and realistic*”.

21. In *Bula*, the relationship in issue was between two members of the Supreme Court and two of the defendants in the proceedings. The judges in question (who had participated in the dismissal of the appeal brought by the plaintiff) had, prior to their appointment to the bench, provided professional services as barristers to two of the defendants. Against that backdrop, the plaintiff sought to overturn the decision on its appeal on the grounds of objective bias. Its challenge was very carefully considered but rejected by a differently constituted Supreme Court. It was held by the Supreme Court that, in circumstances where the services provided did not touch on any issue in the *Bula* case, the previous professional relationships did not give rise to a reasonable apprehension of bias. While the decision was concerned with a previous relationship between a former barrister and a party, the same principle applies where the relevant relationship was between a former solicitor (who has since become a judge) and a former client (who is now a party to proceedings before that judge). This was made

clear by Denham J. (as she then was) in *Talbot v. Hermitage Golf Club* [2009] IESC 26 at p. 7 where she said:

“This case is ... similar to Bula Ltd v. Tara Mines Ltd ... That case held that the test was whether an ordinary reasonable member of the public would have a reasonable apprehension that an appellant would not have a fair hearing before an impartial judge. It was pointed out that barristers were independent and did not become espoused to a litigant's ambitions in providing the litigant with legal services. The reasonable person would be aware of that. Similarly, a solicitor does not espouse his client's ambitions. There must be additional factors establishing a cogent and rational link and its capacity to influence.”

22. In contrast, it is clear that, if there is a personal or familial relationship between a judge and a party to proceedings or between a judge and a witness in proceedings, that is a matter which is likely to give rise to a reasonable apprehension of bias. A well-known example is to be found in the decision of the Supreme Court in *Kenny v. Trinity College Dublin* where the plaintiff complained that the defendant had deliberately misled the High Court and that a firm of architects had participated in the concealment of material from the High Court. A family connection between the judge and a member of the firm of architects (who were retained as an expert witness in the case) was considered to be sufficient to give rise to a perception of bias.

23. The decision of the Court of Appeal in *Fitzpatrick v. Behan* [2020] IECA 324 addresses a similar issue in the context of a business relationship. In that case, the applicant complained that, in the course of assessing the amount of costs that the applicant should be required to pay on foot of an order for costs against him, the respondent, the Taxing Master of the High Court, had not disclosed that he owned the business name “*Behan & Associates*” which was the name of the firm who had acted

against the applicant in a taxation of costs before the Taxing Master. At that taxation, the opposing party had been represented by Mr. Paul Conlon, a director of Behan & Associates. Several years previously, Mr. Conlon had also been a director of that company at a time when the respondent, prior to his appointment as Taxing Master, was still on its board.

24. In the *Fitzpatrick* case, the applicant was dissatisfied with the decision made by the Taxing Master on the taxation of costs. He sought to judicially review the decision of the Taxing Master on the grounds of objective bias due to an alleged pecuniary interest that the Taxing Master held in the business name of Behan & Associates and also on the basis of his previous working relationship with the firm and in particular with Mr. Conlon. The judicial review application failed in the High Court and the applicant appealed to the Court of Appeal. The appeal was dismissed. Much of the judgment is concerned with the allegation that the Taxing Master had a pecuniary interest in the name Behan & Associates. That element of the judgment is not relevant for present purposes. However, the judgment also addresses the relationship between the Taxing Master and Mr. Conlon. In para. 67 of the judgment of the Court, Donnelly J. made clear that there must be a real and not a hypothetical or speculative link between the association or relationship under consideration and the apprehension of bias alleged. She referred, in this context, to the decision of the Supreme Court in *Talbot v. Hermitage Golf Club* (previously cited in para. 21 above) where Denham C.J. said at p. 6:

“His submissions ... do not establish objective bias. Attendance at the same schools by judges and lawyers does not establish objective bias. Having a spouse, who many years before was a member of a law firm which is a respondent in a case, does not establish objective bias by a judge. Having

advised persons as clients previously does not prove objective bias. The decision of a court on its merits, with which a litigant does not agree, does not establish objective bias.”

25. Having referred to the decision of the Supreme Court in that case and having also referred to the decisions of the Supreme Court in *Orange Communications* and *Bula*, Donnelly J. continued as follows in para. 68:

“From the foregoing, the case law establishes that there is no automatic bar on judges hearing cases involving advocates from the previous firms in which they were employed (or partners). They may hear cases involving clients for whom they previously acted, subject to the facts establishing a real apprehension of bias based upon extensive knowledge of that client. Judges may even hear cases in which they acted against one of the parties in other litigation. The appellant has not satisfied this Court that the prior business relationship of itself, would establish reasonable bias. In the present case, the costs accountant was appearing essentially as an advocate in the proceedings. The mere fact of the previous business relationship does not give rise to a reasonable apprehension of bias. It therefore follows that insofar as the appellant advances this part of his application on the basis of a mere business relationship between Mr. Conlon and the Taxing Master giving rise to an apprehension of bias, this ground of appeal must fail.”

26. Bearing the case law discussed above in mind, I can see no plausible basis to suggest that a reasonable apprehension of bias could be said to arise from the fact that a solicitor and barrister appearing for a party in court proceedings had previously acted for the spouse of the judge hearing those proceedings. As the decisions of the Supreme Court and Court of Appeal make clear, a previous professional relationship

between the judge and one of the parties is not, of itself, sufficient to give rise to a reasonable apprehension of bias. The reason was explained in very simple and straightforward terms by Denham J. in *Talbot v. Hermitage Golf Club* in the passage quoted in para. 20 above. In providing services to a client, a lawyer does not espouse the ambitions of a client. An obvious example is the criminal defence lawyer. Such lawyers will deploy their skill to the best of their ability in seeking to defend their clients. But no reasonable person would say that such lawyers are in any way condoning the activities of their clients even where the clients are ultimately convicted. The same applies in civil cases. In acting for a client in civil proceedings, a lawyer is providing a professional service but that does not make the lawyer the *alter ego* of the client. On the contrary, the lawyer may have no personal sympathy whatever for the client's position. In the context of a professional relationship between lawyer and client, the lawyer's personal view is irrelevant. That is why, in *Bula*, both Denham and McGuinness J.J. stressed that something other than the existence of a professional relationship must be shown before any apprehension of bias could be said to be either reasonable or realistic. A person seeking to question the impartiality of the judge must go further and show that some specific aspect of that relationship has the capacity to influence the decision of the judge. That requirement will only be satisfied where there is a cogent and rational basis to believe that the particular circumstances of the relationship are such as to lead a reasonable person to be concerned that the decision of the judge might be influenced by it. The decision in *Bula* illustrates that this requirement would be satisfied, for example, if the judge in the course of services previously provided to a party had provided advice in relation to a live issue in the proceedings over which the judge is to preside.

27. I appreciate that, in the case law discussed above, it was the judge who had previously acted as lawyer for a party to the proceedings. In the present case, the complaint made by Mr. Gilroy is that the solicitor and barrister instructed by the plaintiff had previously acted for the wife of the judge. In a sense, this is the reverse of the situation that was addressed in *Bula*. Nonetheless, at minimum, the rationale underlying the approach taken in *Bula* and similar cases must apply equally here. If a relationship of lawyer and client does not give rise to a reasonable apprehension of bias on the part of a judge who previously occupied the role of lawyer in that relationship, it logically follows that, at the very least, the same must be true where the judge (or the spouse of the judge) had previously been the client of the lawyer in that relationship. In neither case can it be said, to paraphrase Denham J. in the *Hermitage Golf Club* case, that such a relationship implies that the one has espoused the ambitions of the other.

28. If anything, the fact that a lawyer appearing before a judge has previously acted as a lawyer for that judge (or the spouse of that judge) is even less likely to give rise to concern than the circumstances discussed in *Bula*. The judgments in that case were concerned with a previous relationship between a judge and one of the parties to the proceedings. In my view, a relationship between a judge and a party to proceedings is in a different category to a relationship between a judge and a lawyer in proceedings before that judge. It must be kept in mind in this context that a judge, in hearing a case, has to decide the issues as between the parties to the proceedings. While, in many cases, the parties will be represented by lawyers, the decision to be made by the judge is one that has real life consequences for the parties, not the lawyers. It is the parties who have to live with the decision for the future; the lawyers are simply providing a professional service. Inevitably, in the course of their practice,

lawyers will win some cases and lose others. While the lawyers will be expected to use their legal skills to the best of their ability, their capacity to influence the outcome is always limited by the legal merits of their clients' case. As one case is concluded, the lawyers move on to the next case. In some of their cases, lawyers may be very familiar with the trial judge; in others they may have no prior experience at all of the judge. Everything will depend on the happenstance as to who is available to hear the next case. The reasonable objective person at the heart of the *Bula* test is taken to be aware of these everyday facts. Against that backdrop, it is not difficult to see that a previous professional relationship between a judge and a lawyer appearing in that judge's court is unlikely to give the reasonable person cause for concern that the judge might be influenced by the existence of the relationship. There is something of a parallel with the circumstances of *Fitzpatrick v. Behan* albeit that, there, the professionals involved were legal costs accountants rather than lawyers.

29. In contrast, if a judge has previously had a professional or other relationship with one of the parties, that has greater potential to raise the antennae of the reasonable person. As noted above, the judge's decision is bound, one way or the other, to have significant consequences for the parties in question. Moreover, in cases where the judge previously acted as legal representative for a party or has provided legal advice to the party, the judge may have learned details of the party's *modus operandi* and, very likely, the judge will have received payment for the professional services involved. Yet, even in those cases, the Supreme Court decisions show that the mere fact of such a previous relationship will not give rise to a reasonable apprehension of bias. There must be something more before any apprehension of bias can be said to be reasonable.

30. It should be noted that, in para. 10 of his supplemental affidavit sworn on 9th June 2021, Mr. Gilroy seeks to suggest that the retainer of Ms. Callanan by Ms. McGovern cannot properly be characterised as a previous relationship. He says that it extended up to December 2016 which was after these proceedings had commenced. Mr. Gilroy contends that Ms. Callanan was responsible for filing an affidavit in the 2008 proceedings in July 2015 and that affidavits were filed in those proceedings up to December 2016. As noted earlier, the substantive claims made in the 2008 proceedings were resolved several years before 2016. It is therefore inherently unlikely that there was anything significant in controversy in 2016 in the 2008 proceedings involving Ms. McGovern. Moreover, it is clear from the judgment of Haughton J. delivered on 10th September 2018 that the orders affecting Mr. Gilroy in these proceedings were all made after 2016. In this regard, Haughton J. has explained in his judgment that it was he rather than McGovern J. who dealt with the application against the first named defendant, Mr. McQuaid, for summary judgment in February 2017 when it appears that Mr. Gilroy (who was not then a party to these proceedings) acted as “*McKenzie friend*” for Mr. McQuaid. Mr. Gilroy did not become a party to these proceedings until the order of 30th May 2017 made by McGovern J. In my view, it can only be from that point onwards that Mr. Gilroy can purport to raise any issue in relation to McGovern J. There is no evidence to suggest that, at that point, anything remained to be done in the 2008 proceedings. Thus, there was no ongoing professional relationship between the solicitor and counsel concerned and the judge’s wife at the time McGovern J. made the first order affecting Mr. Gilroy.

31. Furthermore, I do not believe that the position would be any different even if the lawyer/client relationship had been ongoing at that time. In my view, a reasonable objective observer would know that a professional relationship of this kind with a

relation of a judge does not mean that the judge will be predisposed to favour the lawyer in question. That would lead to an almost absurd situation where the lawyer concerned could not appear before that judge for the duration of the lawyer's retainer by the relation in question. Such a proposition is neither reasonable nor realistic. In hearing and determining proceedings that come before them, judges are concerned with the merits of the cases made by the parties before them. They are not concerned with who the lawyers might be. The lawyers are appearing in a purely representative capacity. While the quality of advocacy of an individual lawyer may sometimes be important to the ultimate result, the identity or personality of the lawyers who act in proceedings is of no significance and does not, of itself, influence the result.

32. For example, there have been a number of reported cases where relations of a judge have appeared as lawyers before that judge and it was not contended that such a scenario would suggest a predisposition on behalf of the judge towards his or her relation. On a very quick scan of the Irish reports, one can readily identify several well-known cases where a close relation of a Supreme Court judge acted as advocate in an appeal before a court which included that judge. These include *Caudron v. Air Zaire* [1985] I.R. 716 (where a brother-in-law of the judge acted for the successful appellant and a daughter of the same judge acted for a notice party), *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151 (where a daughter of the judge acted for the unsuccessful appellant), *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425 (where a daughter of the judge acted for the successful respondent) and *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450 (where the daughter of the judge acted for the successful appellant).

33. On any relevant scale, the examples cited in para. 32 above are much further along that scale than the circumstances that fall for consideration here. All that arose

here was that the lawyers acting for the plaintiff had previously acted for the judge's wife. In my view, it is clear that such a relationship would not give rise to a reasonable apprehension of bias on the part of the judge. The approach taken in *Taylor v. Lawrence* [2003] Q.B. 528 is of some assistance in this context. While the approach taken in England & Wales in relation to objective bias is not identical to that taken in this jurisdiction, the decision is helpful in that it addresses a somewhat similar complaint to that made by Mr. Gilroy here. In those proceedings, the solicitors for the claimants also acted for the trial judge and his wife in relation to their wills. The firm in question had drafted the wills and, during the currency of the trial in 1999, they provided further professional assistance to the judge and his wife in drafting codicils to those wills. On the evening before judgment was given, the judge and his wife attended the offices of the solicitors for the purpose of executing the codicils. During the trial, the judge had informed the parties that the firm had acted for him and his wife in drafting their wills but he did not disclose that they were about to execute codicils and that the firm was still acting on their behalf. The latter information only emerged after judgment had been given in the claimants' favour. In their appeal to the Court of Appeal of England & Wales, the defendants relied on objective bias. That was rejected by the court in a judgment delivered in January 2001 ([2001] EWCA Civ 119). In his judgment, Peter Gibson L.J. said at para. 22 that: "*the fair minded and informed observer would recognise that every judge lives in the community and that, in his private life, he may need to use the services of service providers, including solicitors. That observer would also appreciate that solicitors, by the very nature of their work, have many clients the affairs of each of whom must be kept separate from those of another client. The use by a judge of the services of a firm of solicitors for his personal purposes, such as for drafting his will, would not, I think, give rise to any*

expectation, or even any suspicion, in the fair-minded and informed observer that the judge, in his judicial capacity, would, by reason of that connection over his will, be untrue to his judicial oath and favour another client of those solicitors.” The reference in the last sentence to *“another client of those solicitors”* is important. It underlines the basic fact that, in determining the substantive issues in court proceedings, the judge is doing so as between the parties; the identities of the lawyers are not relevant to that determination.

34. In the same case, Chadwick L.J said at para. 33: *“In my view, no fair-minded observer would reach the conclusion that a judge would so far ... disregard the obligations imposed by his judicial oath as to allow himself, consciously or unconsciously, to be influenced by the fact that one of the parties before him was represented by solicitors with whom he was himself dealing on a wholly unrelated matter.”* Chadwick L.J. went on to observe that it is a matter of everyday experience that judges are acquainted in one capacity or another with lawyers who appear before them but that does not give rise to a reasonable apprehension of bias. The key point is that, in deciding cases, judges are not deciding in favour of or against the lawyers involved in the proceedings. The decision instead is directed at the parties and the court’s focus is on the merits – or otherwise – of the cases made by the respective parties.

35. Some time after the judgments of Peter Gibson and Chadwick L.J.J. were delivered in January 2001, the defendants learned that the solicitors who acted for the judge and his wife had never charged a fee for their services in preparing the codicils which were executed on the evening before the trial judge gave judgment. The defendants contended that this was very significant new information which had previously been concealed from them and they sought to renew their appeal on the

grounds that this plainly gave rise to a reasonable apprehension of bias. Their appeal was heard by a differently constituted court comprising five very senior members of the judiciary of England & Wales. The court rejected the application. The judgment (reported at [2003] Q.B. 528) was given by Lord Woolf C.J. In his judgment, Lord Woolf expressly endorsed what was previously said in the judgments delivered in January 2001. In para. 73 of his judgment, he said: *“We regard it as unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party in litigation with whom he has no relationship merely because that party happens to be represented by a firm of solicitors who are acting for the judge in a purely personal matter in connection with a will. ...”*. Lord Woolf continued in para. 74 to note that, while it was a mistake for the trial judge to have made only partial disclosure of the facts to the parties at the time of the trial, the judge was not, in fact, required to have made any disclosure to them in respect of *“his personal relations with the solicitors”*. Lord Woolf added that the judge’s conduct in only partially disclosing the facts had fuelled the defendants’ suspicions but that *“regrettably the Lawrences’ response ... has been a wholly disproportionate suspicion. They are not in a position to be objective, as they cannot accept that a court could decide this unfortunate litigation against them unless there was bias.”*

36. In light of the approach taken in the case law, Mr. Gilroy plainly cannot succeed in the present application solely on the basis of the fact that Mr. MacCann and Ms. Callanan had previously acted for Ms. McGovern in the 2008 proceedings. Something more would be required before it could be said that any apprehension of bias is reasonable. In this context, Mr. Gilroy, in his affidavits has made a number of allegations about the conduct of the hearings before the court. While these allegations appear to be deployed primarily with a view to supporting Mr. Gilroy’s case of actual

bias, I should also examine them in the context of his case based on objective bias. It is necessary to consider whether any of these matters could be said to supply the necessary additional ingredient to give rise to a reasonable apprehension of bias.

37. In the first place, Mr. Gilroy complains that the judge did not disclose his wife's retainer of Ms. Callanan and Mr. MacCann in the 2008 proceedings. In light of the approach taken in the case law discussed above, I am of the view that there was no necessity for the judge to disclose that fact. Next, Mr. Gilroy contends, in para. 9 of his grounding affidavit, that he knew in his heart that there was "*favouritism towards Ms. Callanan*" and he says that Mr. MacCann and Ms. Callanan were successful in every application they made including the *ex parte* applications to which Mr. Gilroy objects most strongly. In my view, that allegation proves nothing. Mr. Gilroy's allegation appears to proceed on the basis that all of the decisions made by the judge were wrong. I appreciate that he clearly holds such a view but his subjective view does not prove that the decisions made were wrong or ought not to have been made. The only orders of the judge which Mr. Gilroy sought to contest on appeal are the order of 30th May 2017 joining him as a party to the proceedings and the order of 6th October 2017 requiring him to perform 80 hours community service following the finding of contempt made against him in the judgment of 25th July 2017. Those attempted appeals were unsuccessful in circumstances where they were brought outside the prescribed time and the Court of Appeal refused to extend the time for appeal. Mr. Gilroy did not appeal the balance of the orders. There is accordingly no basis on which I can proceed to treat any of the orders made in these proceedings as wrong.

38. Moreover, the fact that one side has won every application in proceedings is not indicative of bias and does not provide the additional ingredient necessary to

establish a reasonable apprehension of bias. This was made very clear by the Supreme Court in the *Orange* case. In his judgment in that case at p. 245, Murphy J. approved the statement of Rutledge J. in the United States Supreme Court in *National Labour Relations Board v. Pittsburgh S.S. Co.* (1949) U.S. 656 that: “... *total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.*”. In his judgment in the same case, Geoghegan J., at p. 251 observed that: “*It seems clear from the case law in Ireland and England that an allegation of bias must be made on foot of circumstances outside the actual decisions made in the case itself. I would accept that in a situation where there was an arguable case of bias based on traditional proofs the added factor of cumulative wrong decisions all one way might be tantamount to corroboration of alleged bias and be a relevant factor in that restricted sense in the proving of bias. But of itself and by itself it can never be evidence of bias.*” Later in his judgment, Geoghegan J. referred extensively to the judgment of Lord Bingham in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] 2 W.L.R. 870 and, at p. 254, he noted that in every instance of bias identified by Lord Bingham in that case, there was some “*outside fact*” (i.e. a fact extraneous to the conduct of the hearing) which gave rise to a reasonable apprehension of bias. On the same page, Geoghegan J. added: “*There is not the slightest suggestion that bias could ever be established as a consequence simply of the decisions of the judge.*”

Accordingly, it is clear that, to the extent that it might be said that all of the decisions made by McGovern J. were adverse to Mr. Gilroy, that does not provide the additional ingredient necessary to establish a reasonable apprehension of bias.

39. In his supplemental affidavit sworn on 9th June 2021, Mr. Gilroy also says that the tone of McGovern J. towards him was “*always hostile and was absolutely bias and the constant criminal accusations that we were attempting to put assets beyond*

reach of a creditor was ridiculous without foundation and simply a lie.” As explained above, Mr. Gilroy was twice the subject of findings of criminal contempt made against him. Those findings are final and conclusive. Mr. Gilroy cannot therefore make a case before the court on this application that the findings made were without foundation. Unless Mr. Gilroy can succeed in his case on bias, he is bound by those findings; as am I. The findings made are very serious. It is unnecessary to repeat them all here. An example will suffice. In his judgment of 21st February 2018, McGovern J. found that Mr. Gilroy had sent correspondence to Ms. Callanan which was threatening by its nature and was calculated to interfere with or prejudice the due administration of justice. McGovern J. also found that correspondence of a threatening nature was sent by Mr. Gilroy to the chief executive officer of the first named plaintiff both at his home address and at his office. In those circumstances and against a backdrop of two findings of criminal contempt, it would not be surprising if the tone used by a judge was unsympathetic or may have been such that it appeared to Mr. Gilroy’s ears to be hostile. The findings made were of a very grave nature and the fact that it was necessary to address the issue of contempt on more than one occasion is also very relevant. That said, the allegation that a hostile tone was adopted is put forward in such general terms in the affidavits before the court that I cannot accept that any sufficient case has been made out to establish that the tone used by the judge was, in fact, hostile or inappropriate. An example is purportedly supplied in para. 18 of the affidavit but all it suggests is that the judge took a different view of a matter than that taken by Mr. Gilroy. The taking of a different view by the court cannot be equated, without more, to hostility.

40. A similar issue arises in relation to para. 22 of the supplemental affidavit. There, it is alleged that the judge showed Mr. Gilroy “*plenty of ill will*” which is

tantamount to suggesting that the judge was in breach of the declaration made by him under Article 34.6 of the Constitution. Indeed, an express allegation to that effect is made in para. 13 of his grounding affidavit sworn on 29th March, 2021. This is an entirely baseless allegation which is nowhere justified in either of the affidavits made by Mr. Gilroy. As previously noted, Mr. Gilroy's affidavits show that he continues to harbour a strong sense of grievance arising from the findings of criminal contempt made against him and the fact that he was ultimately imprisoned as a consequence. However, there is no evidence to show that the orders made against him were, in any way, prompted by ill will. On the contrary, the basis for the orders made against Mr. Gilroy was carefully and comprehensively set out in the judgments given by the judge.

41. The same conclusion applies in relation to the equally baseless allegations that the judge "*used every weapon at the state's disposal against me and to destroy me*" and that the judge "*had convened a star chamber*" and that the judge "*became a judge in his own cause*". These allegations are made without any identified or sustainable basis. They clearly represent the subjective view of Mr. Gilroy but that falls far short of substantiating the allegations made.

42. It is entirely improper that allegations of the kind described in paras. 40 to 41 above should be ventilated without any evidence to substantiate them. It is unsurprising in the circumstances that counsel for the plaintiffs suggested at the hearing of the present application that Mr. Gilroy had opened himself up to a further charge of criminal contempt. It is very clear that Mr. Gilroy believes that the orders made against him were made without justification but it is clear from the judgments given by McGovern J. that it was Mr. Gilroy's own conduct that led to the making of the orders against him first in respect of criminal contempt. The justification for the

making of those orders is clearly set out in the judgments. Where a litigant believes that an order of the High Court has been wrongly made, the appropriate remedy is to appeal within the prescribed time. Regrettably, Mr. Gilroy did not take that course.

43. In paras. 32 and 33 of his supplemental affidavit, Mr. Gilroy repeats, in substance, an averment that has previously been struck out by Haughton J. as scandalous in his judgment of 10th September 2018. In para. 53 of that judgment, Haughton J. noted that he had struck out parts of paras. 16 and 17 of Mr. Gilroy's affidavit sworn on 25th June 2018. In those paragraphs, Mr. Gilroy had alleged, among other things, that Ms. Callanan had prompted a witness in the course of cross-examination by Mr. Gilroy and that Mr. MacCann had done nothing to stop her. Haughton J. further noted in para. 53 of his judgment that this allegation was a repetition of previous allegations to the same effect and he highlighted that McGovern J. had found that this had not happened. It is therefore particularly surprising that Mr. Gilroy should see fit to ventilate the same allegation yet again in paras. 32 and 33 of his supplemental affidavit. In light of the judgment of Haughton J., he is plainly not entitled to do so. In para. 32, Mr. Gilroy also contends that, in the course of his cross-examination of Mr. Butler, the deponent of an affidavit sworn on behalf of the first named plaintiff, the judge "*kept interrupting me and helping Mr. Butler when I had cornered him in relation to his affidavit.*" That is also a matter which was addressed by Haughton J. in his judgment of 10th September 2018. In para. 34 of that judgment, Haughton J. noted that McGovern J. considered that much of Mr. Gilroy's questioning of Mr. Butler was irrelevant. In presiding over a hearing, a judge is perfectly entitled to curtail cross-examination if the judge considers the questions to be irrelevant. Order 36, r. 37 recognises this. The rule expressly provides that a judge may disallow questions put in cross-examination which appear to the judge to be vexatious and not

relevant. Thus, the curtailment of cross-examination to exclude irrelevant questions is not indicative of bias.

44. The remaining allegation that requires consideration in this context is that made in paras. 26 and 27 of Mr. Gilroy's supplemental affidavit to the effect that the judge "*got revenue after me and he made a complaint to the DPP in relation to my application for legal aid ...*" In para. 27, he contends that this was done "*with absolutely no proof whatsoever*". That contention is manifestly incorrect. In fact, the basis on which transcripts of three hearings were sent to the Revenue Commissioners and the Director of Public Prosecutions is clear on the face of the order made by McGovern J. on 6th October 2017. Immediately before the curial part of the order on the final page, the following is stated: "*And THE COURT expressing concerns that it was on the 21st day of July 2017 when considering the application on behalf of the second named defendant for free legal aid informed that he had no means but that the said Community Service Assessment Report states that he is in full-time employment*". The curial part of the order then directs that the transcripts of the hearings of 21st and 25th July 2017 and the transcript of the hearing on 6th October 2017 should be forwarded to the Revenue Commissioners and the Director. It is accordingly clear that there was an inconsistency in the information provided by Mr. Gilroy to the court, on the one hand, and to the Community Service authorities, on the other. In light of that inconsistency, it was open to the judge to take those steps to allow the matter to be fully investigated. In circumstances where there was a rational basis for the order made, the taking of these steps by the judge could not be said to be suggestive of bias.

45. In light of the conclusions reached in paras. 37 to 44 above in relation to the individual allegations made by Mr. Gilroy, there is plainly no additional factor in play in this case which, in combination with the previous retainer of Ms. Callanan and Mr.

MacCann, might prompt a reasonable person to apprehend bias on the part of the judge. Accordingly, it is clear that Mr. Gilroy's application, in so far as it is based on objective bias, must be dismissed.

Actual bias

46. Equally, his claim based on actual bias must also fail. In substance, the allegations discussed in paras. 37 to 44 above form the basis of the case made by him as to the alleged existence of actual bias on the part of the judge. Having regard to the findings which I have already made in relation to those allegations, it is clear that there is no sustainable basis for his case based on actual bias. It is unnecessary to repeat my analysis of those allegations. They are all without foundation.

47. It should also be noted in the context of actual bias that a further entirely groundless and wholly improper allegation is made in para. 4 of Mr. Gilroy's grounding affidavit to the effect that the judge, counsel and solicitor must have conspired together "*to get the original plaintiff in this case whatever they desired and at whatever cost*". No basis whatever has been advanced to support such an extraordinarily serious allegation. This inflammatory allegation is not only wholly unsubstantiated but it again illustrates why counsel for the plaintiffs raised the spectre of criminal contempt at the hearing of this motion. In all of the circumstances, it is clear that the application, in so far as it is based on allegations of actual bias, must be dismissed. There is no evidence to support it.

Scandalous material in Mr. Gilroy's affidavits

48. In circumstances where I have concluded that the very serious allegations made by Mr. Gilroy in his affidavits are baseless, it is next necessary to consider whether I should invoke my power under O. 40, r. 16 to strike out some of Mr. Gilroy's averments as scandalous. Order 40, r. 16 is in identical terms to O.40, r. 12

applied by Haughton J. in his judgment of 10th September 2018. The rule states that the court may order to be struck out from any affidavit, any matter which is scandalous. In *Dublin City Council v. Marble and Granite Tiles Ltd.* [2009] IEHC 455, Laffoy J. explained that material in an affidavit which is calculated to cause embarrassment or offence will be regarded as scandalous within the meaning of the rule.

49. In paras. 37 to 44 above, I have discussed in some detail the allegations made by Mr. Gilroy. Not only are the allegations very serious but, for the reasons already explained, they are baseless. I regret to say that, in my view, it is clear that the only conceivable basis on which Mr. Gilroy chose to ventilate such serious but groundless allegations was to embarrass and cause offence. The allegations serve no other purpose. In those circumstances, I will, in exercise of the powers available under O. 40, r. 16, strike out as scandalous paras. 4, 9, 12, 13 and 14 of Mr. Gilroy's affidavit sworn on 29th March 2021 and paras. 3, 4, 22, 23, 24, 25, 27, 28, 31, 32, 33 and 34 together with the last sentence of para. 7 and the first sentence of para. 20 of his supplemental affidavit sworn on 9th June 2021.

Conclusion

50. I will accordingly make an order dismissing Mr. Gilroy's application pursuant to his notice of motion dated 29th March, 2021. I will also make an order in the terms of the last sentence of para. 49 above.

51. In so far as costs are concerned, I will direct that, if there is an application to be made by any party for the costs of the application, it must be submitted not later than 4th May, 2022 by email addressed to the registrar (and copied to the opposing party) in the form of a short written submission not longer than 1,500 words; the opposing party will have a period of 14 days thereafter to respond by email addressed

to the registrar (and copied to the party applying for costs) again in the form of a short written submission no longer than 1,500 words, following which I will issue an electronic ruling setting out my decision on costs.