THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2022/67

Whelan J.
Binchy J.
Allen J.

Neutral Citation Number [2023] IECA 186

IN THE MATTER OF EMPLOYMENT EQUALITY ACT, 1998
AND IN THE MATTER OF THE EQUALITY ACT, 2004
AND IN THE MATTER OF THE WORKPLACE RELATIONS ACT, 2015

BETWEEN/

OLUMIDE SMITH

APPELLANT

- AND –

CISCO SYSTEMS INTERNETWORKING (IRELAND) LIMITED

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 21st day of July 2023

Introduction

1. The above-entitled appeal from the judgment, [2020] IEHC 714 and order of Mr. Justice Meenan, perfected on the 17th February, 2022 was listed for hearing before this court on the 16th March, 2023. Before the commencement of the hearing the appellant raised a preliminary issue seeking the recusal of two members of the panel assigned to hear the appeal. This judgment is directed towards the appellant's said recusal application.

Background

2. The appellant is self-represented. He was dismissed from his employment with the respondent in or about July 2013. Thereafter he pursued a complaint and claim before the

Adjudication Officer pursuant to the provisions of the relevant employment equality legislation asserting against his former employer discrimination on grounds of race. By determination dated 18th February, 2016 the Adjudication Officer found that the respondent had not discriminated against the appellant on grounds of race in relation to, *inter alia*, promotion, pay and dismissal. Several of his complaints based on alleged discrimination on the grounds of race were determined to be out of time and rejected for that reason. The appellant appealed the said determination to the Labour Court.

3. The appellant contended before the Labour Court, *inter alia*, that it ought to extend time to enable him to pursue complaints which had been excluded as out of time for the various reasons he advanced. The appellant contended in his submissions and arguments before the Labour Court that he had been subjected to discriminatory treatment, victimisation and had been dismissed discriminatorily on the grounds of race. He submitted detailed arguments, contending that in the context of the statutory provisions the "*cognisable period*" should be determined in the context of "*a continuum*" of discriminatory events which, he argued, culminated in his dismissal in July 2013. The determination of the Labour Court was delivered on the 26th April, 2018. It upheld the decision of the Adjudication Officer. It concluded that the appellant had not been discriminated against on grounds of race.

4. The appellant brought an appeal to the High Court pursuant to statute. Such an appeal is statutorily circumscribed by virtue of s. 90(1) of the Employment Equality Act, 1998, as amended. Either party is entitled to appeal to the High Court *"on a point of law"*. Meenan J. in the High Court dismissed the appellant's appeal and made an order for costs against him.

5. As regards proceedings to which it applies, s. 46 of the Workplace Relations Act, 2015 provides for an appeal to the High Court on a point of law but excludes any further appeal beyond that.

6. However, the within proceedings were instituted prior to the coming into operation of the Workplace Relations Act, 2015, as amended. In light of relevant jurisprudence, including *A.B. v Minister for Justice* [2002] 1 I.R. 296, *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 I.R. 509 and the decision of this court in *Irish Prison Service v Cunningham and the Labour Court* [2021] IECA 19 – in which Collins J. confirmed that a party in the position of the appellant has an entitlement *as a matter of right* to pursue a further appeal to this court against a determination of the High Court on a point of law pursuant to s. 90(1) of the Employment Equality Act, 1988 – the appellant is entitled to pursue this statutory appeal. There is no dispute between the parties with regard to the appellant's further right of appeal to this court from the judgment of Meenan J.

The preliminary issue - Recusal

Grounds advanced in support of recusal application

7. The appellant objects to Binchy and Allen JJ. sitting on the panel of this court to hear, consider and adjudicate upon his appeal. Simply put, his objections distil down to a few distinct issues: -

(1) Both judges had heard and determined either a previous appeal or application brought by Mr. Smith. In the case of Mr. Justice Binchy he was a member of the panel who heard and determined an appeal in proceedings *Smith v The Office of the Ombudsman & Ors.* wherein judgment of the court was delivered on the 27th April, 2022, [2022] IECA 99. By its order made on the 15th June, 2022 the court had dismissed the appellant's appeal and affirmed the order of the High Court. (*The Judge Binchy Ground*)

(2) Separately, and within these proceedings, subsequent to the determination of the High Court and judgment of Meenan J. which is under appeal to this court [2020] IEHC 714, the appellant issued a notice of motion on the 20th April,

2022 seeking an order from this court extending the time for service and lodgement of a notice of appeal against an order made by Mr. Justice Noonan in the High Court over three years previously on the 23rd January, 2019. That application for an extension of time was heard and determined by a panel of this court on the 17th October, 2022 which included both Mr. Justice Binchy and Mr. Justice Allen. Mr. Justice Allen gave judgment [2022] IECA 238 - with which the other members of the panel concurred – refusing the appellant's application to extend time within which to bring an appeal. (*The Judge Allen Ground)*

(3) Mr. Smith asserts that by his making a complaint against the judges to the Judicial Council, that step *per se* warrants automatic recusal of both judges from hearing any case to which he is a party. (*The subsisting complaint ground)*

(4) The email issue – Mr. Smith asserts that his emails were blocked by Courts Service by reason of the alleged conduct of a judge of the Circuit Court and that this factor supports his application. *(The email ground)*

Arguments and submissions of appellant in support of recusal

8. The appellant's arguments had a number of features. He strenuously disagreed with the two adverse judgments and orders (above) made or concurred in by both judges. Each is considered separately. He objected on the basis that arising from his dissatisfaction with the adverse judgments and orders made in his appeals aforementioned he had made formal complaints to the Judicial Council against both judges for their failure to find in his favour, asserting discrimination, victimisation on the basis of race and/or ethnic origin. Finally, he relied on an incident that occurred in 2020 in the course of Circuit Court proceedings wherein he recalled that his email address had been blocked by Courts Service. He ascribed this

event to alleged conduct of a judge of the Circuit Court. It is proposed to consider each of the said aspects in turn.

The email ground

9. Looking at the last issue first, the email incident is said to have occurred in 2020. The appellant recounted that a named judge of the Circuit Court had requested that incoming emails (understood to emanate from the appellant) be blocked. This, the appellant informed the court, had the result that his emails were blocked not alone from receipt by the Circuit Court judge in question but from all Courts Service emails. He informed the court that the issue of his emails being blocked in 2020 was the subject matter of complaints to another forum. It is noteworthy that the instant appeal was filed on the 16th March, 2022, a couple of years subsequent to the alleged incident pertaining to Mr. Smith's emails. This court has no knowledge or awareness of the matters alleged beyond what was asserted by the appellant in respect of same. In fairness, the appellant did not suggest that either judge had any nexus or involvement with or awareness of the blocking of emails alleged. Mr. Smith suggested that the email incident illustrated a possibility of judicial inclination to be negatively disposed towards him where that judge had previously found against him in a substantive matter.

The grounds concerning previous judgments and decisions of Binchy and Allen JJ.

10. The appellant confirmed that he was not asserting actual bias. He was requested to identify specifically and clearly in respect of the judges whose recusals he sought all grounds he was relying upon in support of his contentions that they ought not to sit and adjudicate on this appeal on the grounds of apprehended bias. He advanced arguments at a high and generalised level and asserted that the issues he was raising in respect of the previous adverse judgments and orders included lack of fair procedures and effective access to justice, lack of

access to an effective remedy, bias and partiality, including discriminatory treatment on the basis of racial or ethnic characteristics.

11. With regard to the prior decisions adverse to the appellant, he suggested that in substance the outcome or decisions in question – being adverse to him – were as such an abuse of his equal treatment and equality rights and human rights. In substance he contended that the unfavourable decisions rendered or concurred in by the two judges in his unsuccessful applications/ appeals constituted evidence *per se* of racial and ethnic bias against him. It is apparent from his submissions that the applicant is wholly convinced of the correctness of his position in both applications/appeals and is satisfied that where a judge "*did not find in my favour*", that fact is evidence without more that the judge is racially biased and has thereby exhibited conduct which gives rise to an apprehension of bias warranting their recusal.

Judgment of the Court *Smith v The Office of the Ombudsman & Ors.* [2022] IECA 99

12. Mr. Justice Binchy was a member of the panel which heard and determined this matter, being an appeal against two decisions of the High Court. He recalled the appeal hearing that had taken place on or about the 8th February, 2022. Mr. Smith identified nothing that was said or done in the course of the hearing of the said appeals to support any of his assertions of bias, partiality, discriminatory treatment on the basis of race or ethnicity, want of fair procedures or otherwise. Neither did he identify anything contained within the said judgment – a judgment of the court – delivered on the 27th April, 2022 as being supportive of his contentions. The appellant was invited on a number of occasions to clarify with precision any conduct he alleged had been engaged in by Mr. Justice Binchy in the course of the said hearing that supported his allegations. He asserted that he had presented evidence before the court in support of his contentions that the Office of the Ombudsman had applied different rules to comparable situations and also recalled other arguments that he had

advanced in the course of that hearing wherein he had sought a reversal of orders and two judgments of Mr. Justice Simons previously delivered in the High Court on the 11th February, 2020 and the 5th May, 2021.

13. His key complaint, repeated frequently, was that the facts, arguments and submissions and evidence which he had put before the Court of Appeal on the 8th February, 2022 did not find favour with the court and that his appeal had been dismissed. He was invited to identify any aspects of the hearing or judgment which had been reserved and delivered on the 27th April, 2022 which supported his contentions – beyond the key issue that the court had failed to find in his favour. His position was that in substance, by dismissing his appeal and affirming the High Court orders, the Court of Appeal panel, of which Mr. Justice Binchy was a member, acted in breach of the principle of equal treatment on the grounds of race and ethnicity. He repeatedly contended there had been errors of fact and errors of law in the [2022] IECA 99 judgment and a misapplication of relevant rules to comparable circumstances and that the judgment thereby amounted to a breach of his right to equal treatment. In essence he contends that the failure of the Court of Appeal to find in his favour constitutes evidence *per se* of racial bias and discrimination warranting the judge's recusal. Although he raised the issue of fraud in the course of his submissions, Mr. Smith clarified that fraud was not alleged against either judge nor was it a basis for either application.

Application for leave to appeal pursuant to Article 34.5.3 of the Constitution.

14. It does however appear that on the 7th July, 2022 Mr. Smith made an application to the Supreme Court for leave to appeal against the said judgment [2022] IECA 99 and orders. The Supreme Court in its Determination dated the 13th September, 2022 [2022] IESCDET 107 refused his application for leave to appeal from the Court of Appeal decision. Given the gravity of the allegations underpinning the recusal application it is necessary to consider this

Determination in some detail. The Supreme Court (MacMenamin J., O'Malley J. and Hogan J.) in its Determination made, *inter alia*, the following observations: -

> *"**The Court of Appeal***
>
> 13. *On appeal to the Court of Appeal, the applicant made a general claim that the High Court had treated him with bias, partiality and unfairness on the ground of racial or ethnic origin. He argued that the judge should have found that the Circuit Court judge erred in failing to find primary facts upon which reasonable inferences could be drawn. While accepting that it was for him to raise a prima facie case, he submitted that the 2018 letters constituted the necessary evidence and that inferences should have been drawn from them.*
>
> *14. The Court agreed with the analysis of the High Court. It held that, in principle, a decision might in and of itself constitute prima facie evidence of discrimination. However, this was not such a case. There was no reason to believe that the Ombudsman's decision would have been any different in the case of a person of a different ethnicity. Ultimately, the Court considered that the claim of discrimination was based on mere assertion and could not succeed. All of the authorities made it clear that a complainant must adduce some evidence to establish primary facts which prima facie gave rise to an inference of discrimination. The applicant had failed to adduce any evidence at all."*

15. The Supreme Court in determining to refuse the appellant's application for leave to appeal against the judgment and order in question (which order was perfected on the 22nd June, 2022) noted: -

> *"... The applicant alleges that the decision of the Court of Appeal violated his rights under various stated provisions of the Constitution of Ireland, the Universal Declaration of Human Rights, the European Convention on Human Rights and the*

Charter of Fundamental Rights of the European Union. He complains that the judgment has failed to identify the precise legal identity of the Ombudsman, and thereby breached his rights to equal treatment on racial grounds. He alleges that the Court manufactured and distorted facts, and that it failed to apply the relevant legal authorities. He claims that it did so because his papers made it clear that he had made complaints against a number of judges as well as the Legal Aid Board."

16. In its Determination refusing the applicant leave to appeal to the Supreme Court, the panel observed: -

*"**Decision***

17. In the view of this Court, both the Court of Appeal and the High Court were correct in concluding that the applicant had not adduced sufficient evidence to bring out a prima facie case of discrimination. It may be, as the Court of Appeal said, that there could be a case in which an inference of discrimination could be drawn from the mere fact of an adverse decision. However, this was not such a case and there was nothing in the evidence to suggest that the handling of the applicant's complaint by the respondent would have been different had the applicant been a person of a different race or ethnic origin. That is the essence of racial discrimination.

18. Given that the applicant's claim has now been considered by the Workplace Relations Commission, the Circuit Court, the High Court and the Court of Appeal, this Court does not consider that a further appeal is necessary in the interests of justice.

19. In the circumstances the application does not meet the constitutional criteria and accordingly the Court refuses leave to appeal."

17. The appellant did not identify any further or other fact, matter or thing, statement or omission, or act on the part of Mr. Justice Binchy in the context of the hearing or judgment

in the said matter, [2022] IECA 99, or otherwise, in support of his contention which in substance was that the judgment and order *per se* warranted his recusal from hearing this appeal.

18. Separately, the appellant identified a second occasion when Mr. Justice Binchy was a member of a panel which had reached a determination adverse to him, namely *Smith v Cisco Systems Internetworking (Ireland) Limited* [2022] IECA 238. Although the latter judgment was delivered by Mr. Justice Allen, Mr. Justice Binchy had expressed his concurrence and agreement with the judgment and the consequential order refusing Mr. Smith's application to extend time for the service and lodgement of a notice of appeal. This is conveniently considered in the context of the objections directed towards Mr. Justice Allen.

Judgment and order of Mr. Justice Allen [2022] IECA 238

19. Mr. Justice Allen delivered an *ex tempore* judgment [2022] IECA 238 on the 17th October, 2022 wherein he refused to extend time for the service and lodgement of a notice of appeal against an order previously made in the High Court on the 23rd January, 2019. The motion had issued over three years and three months subsequent to the making of the order in question by Noonan J. – a very lengthy delay in the context of the jurisprudence. The judgment is succinct and factual, noting relevant jurisprudence in regard to extension of time applications including *Eire Continental Trading Co. v Clonmel Foods Limited* [1955] I.R. 170, the important more recent Supreme Court decision *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] 2 I.R. 441 and other decisions. Allen J. concluded, having reviewed the transcript of the High Court hearing before Noonan J. of January 2019 (para. 30): -

> *"... it is not even arguable that the High Court judge was wrong in the view he took of the discovery motion*."

20. Allen J. concluded that the application ought to be refused. Collins and Binchy JJ. agreed. The order was perfected on the 19th October, 2022. It is very clear from the

submissions made by Mr. Smith in the course of his recusal application concerning Mr. Justice Allen that he takes issue with the judgment and strongly disagrees with the refusal of his application for an order to extend time to enable him to serve and lodge an appeal against the High Court order made on the 23rd January, 2019. He asserts that the panel was biased in arriving at its decision to refuse the orders he sought. He is very strongly aggrieved with the order of Mr. Justice Noonan in the first instance though he did not appeal against same within time. Mr. Smith made clear in his oral submissions to this court that he equates the adverse outcome of his application for an extension of time within which to appeal as constituting in and of itself evidence of bias, discrimination, and victimisation on the basis, *inter alia*, of race and ethnicity. He did not identify anything as having transpired in the course of the hearing as giving rise to any complaint, nor did he identify any statement or words within the judgment itself as specifically supporting his complaint, save and except the adverse determination and consequential order made refusing his application. He did point out that the order for costs made against him has been stayed pending the determination of the substantive appeal which was, as stated above, fixed for hearing for the 16th March, 2023.

No appeal against judgment [2022] IECA 238

21. Although the order was perfected on the 19th October, 2022 and therein provided a stay in respect of the order for costs made against Mr. Smith pending the determination of the substantive appeal by the Court of Appeal, he never sought leave to appeal against the order which was perfected on the 19th October, 2022. The time has long since expired pursuant to the rules for the bringing of an application seeking the necessary leave of the Supreme Court pursuant to Art. 34.5.3 of Bunreacht na hÉireann, 1937. Mr. Smith never sought such leave at any time. He informed the court that he did not bring any application to the Supreme Court for leave to appeal against the orders in question with which he was

unhappy, citing costs as a factor in his decision. The appellant indicated that he had limited means.

22. When invited to outline any further specific matter which he was relying upon in support of his application that the two judges should recuse themselves, he indicated that he had a concern that there could to be a repetition by any member of the panel committing, what he described as *"an error of fact or an error of law"* or doing something that might undermine due process or any step that might undermine the application of due care and due diligence. This appears to stem from the fact that notwithstanding that the Supreme Court refused his application for leave to appeal in respect of judgment [2022] IECA 99, finding that he had not met the threshold to warrant leave being granted, and further that he never sought leave to bring an appeal against the judgment and order in [2022] IECA 238, he is certain that his failure in both cases to have the court find in his favour demonstrates not alone error but racial discrimination. Underpinning his application for recusal was the ongoing motif that he didn't wish to have a judge who had previously made a decision adverse to him, hear or determine his appeal in this instance.

Ground of pending Complaints to professional body/bodies in lieu of an appeal

23. Mr. Smith suggested that since complaints to a professional body could be submitted online by way of an electronic form, this avenue offered him a more convenient option or alternative to pursue his grievances regarding any judgment/order with which he disagreed rather than having to make an application to the Supreme Court for leave to bring an appeal pursuant to Art. 34.5.3 of the Constitution. He emphasised that he was on Jobseeker's payment. This aspect is considered below.

24. This limb of his objection centred on the fact that arising from the above adverse decisions and judgments characterised by Mr. Smith in each case as *"failure to find in my favour"*, he has submitted a complaint online against each judge to the Judicial Council

which said complaints had not been dealt with to a conclusion. It is very clear that the appellant has a burning sense of grievance at the adverse decisions and judgments and what he sees as the failure of the Court of Appeal in each case to deliver the *"correct"* decision. He is clearly very invested in and close to the litigation which, as against Cisco, has been in being in one form or another for almost ten years.

25. The appellant raised the obligation of confidentiality in connection with complaints which I take to be referring to the obligations in Rule 28 of the complaints procedure:

> *"28.1 Unless otherwise provided within the 2019 Act, the particulars of complaints made, or investigations conducted by the Registrar, the Complaints Review Committee, the Panel of Inquiry or the Judicial Conduct Committee, as the case may be, shall be confidential.*

26. As was explained to the appellant in the course of the oral hearing, beyond noting the existence of such complaints, this court cannot engage with the substance or content of any such complaint . Such complaints are dealt with in accordance with the Judicial Council Act, 2019, as amended, Part 5 by virtue of the procedures of the Judicial Conduct Committee and the processes provided thereunder. The facts embodied in a complaint can, of course, be the basis of a recusal application on a stand alone basis. He suggests that the very existence of a complaint may warrant recusal.

27. The net question for determination is whether the lodging of a complaint against a judge who is assigned to hear a case in and of itself constitutes in all cases a valid basis entitling a party to insist on the recusal of the judge concerned.

28. A recusal application on the basis of apprehended bias must demonstrate a *reasonable suspicion or the reasonable apprehension* of bias and is to be decided by the courts. Issues of alleged judicial misconduct fall to be decided by the wholly independent Judicial Council. These are wholly separate processes. The underlying factual matrices arising in both

processes may overlap to a greater or lesser extent. It is for the objector in a recusal application to put before the court all grounds, evidence and facts relevant to and supporting the claim such that a reasonable and objective person appraised of all relevant facts would have a reasonable apprehension of lack of impartiality such that the objector would not have a fair trial. Each application turns on its own facts. I conclude below for the reasons outlined that the making of a complaint to the Judicial Council cannot *per se* offer an automatic ground to secure the recusal of a judge on the basis of apprehended bias. Such a blanket approach would risk offering a pathway to a resourceful litigant to dislodge a judge assigned to hear a case in order to achieve a perceived litigation advantage and as such would be contrary to the public interest. These issues will now be considered in turn.

The law

General

29. As the appellant made clear during the course of his application, what he contends for is that he has a reasonable apprehension of bias rather than asserting actual bias against either judge. The onus of demonstrating apprehended bias lies upon the individual who alleges its existence. In each case, whether a reasonable apprehension of bias has been made out is dependent entirely on the facts of the case. It is an objective test. As was observed by MacMenamin J. in *Goode Concrete v CRH Plc.* [2015] IESC 70, [2015] 3 I.R. 493 at 553: -

"Applications of this type should not be lightly made without clear grounds."

Racism is a heinous wrong and a great social evil. Allegations of apprehension of bias on the grounds of racial discrimination are of the greatest gravity. As has been repeatedly observed in the authorities, the burden rests on the individual seeking a recusal to adduce evidence to rebut the presumption of impartiality.

30. The late Grant Hammond in his textbook *Judicial Recusal: Principles, Process and Problems* (Bloomsbury Publishing, 2009) emphasised that an independent judiciary is an

essential requirement if the rule of law is to be upheld and maintained. Courts must be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Thus, a judge who has any financial or personal interest in a case is automatically disqualified. Recusal may be appropriate also where a judge has had an involvement with one of the parties in the past. This is not based on an evaluation that the judge might not hear and determine a case uninfluenced by such factors, rather it is imperative to maintain society's trust and confidence in the administration of justice. In any case where there is an appearance of bias, as that concept is properly understood, the judge should recuse him or herself from hearing the matter.

Correct approach by an objector seeking recusal

31. Given the seriousness of such an application, it is regrettable that the application was only moved on the morning of the appeal hearing. It was not disputed by Mr. Smith that he had given no notice of the intended application to the respondent, whose legal representatives were wholly unaware in advance of the proposed application or the grounds for same. Generally, such applications ought not be kept up the objector's sleeve until the very last moment. For instance, if there is any merit in the objection, some degree of notice facilitates assigning another judge or judges to deal with the matter and ensures the efficient management of limited court resources.

Presumption of Judicial Impartiality

32. There is a strong presumption of impartiality applicable to judges. It is referenced in texts such as Blackstone, *Commentaries on the laws of England, Book 3* (Oxford: Clarendon, 1788) at 361. He observes: -

"The law will not suppose a possibility of bias in a judge who is already sworn to administer impartial justice and whose authority greatly depends on that presumption and idea."

The Constitutional Declaration

33. Pursuant to Art. 34.6.1 of Bunreacht na hÉireann, the solemn constitutional declaration entered upon by every judge in taking office provides as follows: -

"*… I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute [my] office without fear or favour, affection or ill will towards any man, and that I will uphold the Constitution and the law."*

34. The Constitution at Art. 35.2 reiterates the obligations and responsibilities of each judge providing, as it does: -

"*All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."*

The Bangalore Principles

35. The judicial obligation to administer impartial justice is universal as is recognised by the United Nations Judicial Group on Strengthening Judicial Integrity, a body comprised of senior judges from disparate and varying jurisdictions which agreed a series of precepts and principles pertaining to judicial conduct at the Hague in November 2002 which were subsequently endorsed at the 59th session of the United Nations Human Rights Commission at Geneva in April 2003 and which have come to be known as the Bangalore Principles.

36. The fundamental core principles encompass judicial independence, impartiality, integrity, equality, propriety, competence and diligence. They adumbrate with clarity the constituent elements of judicial integrity.

37. The preamble to the Bangalore Principles makes clear that same are designed to "*…provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.*"

38. In the context of impartiality, a principle engaged where an apprehension of bias is asserted, it will be recalled that the Bangalore Principles provide: -

> "*Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made."*
>
> *"2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice."*

39. In the context of an allegation of apprehended bias, notable provisions include: -

> *"*2.5 *A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where –*
>
> *(a) the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;"* – This principle is reflected in Clause 2.5.1 of the Judicial Council Guidelines.
>
> *"5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.*"

Guidelines for the Irish judiciary on conduct and ethics

40. Guidelines were adopted by the Judicial Council pursuant to the Judicial Council Act, 2019 as amended, in 2022. In his foreword to same dated the 4th February, 2022 the Chief Justice observed: -

> "*The guidelines are not a code. They seek to promote high standards of behaviour. It will be for the Judicial Conduct Committee to decide in the light of the Irish experience and the facts of any case whether any departure or deviation from the guidelines is of such a nature as to amount to judicial misconduct. The Judicial Conduct Committee also has a function in providing advice and suggesting amendments to the guidelines, and it is to be anticipated that the guidelines and our understanding of them and the broader obligations of judicial conduct will develop over the coming years."*

The 2022 Guidelines as adopted by the Judicial Council – some relevant aspects

> 2.5 *"A judge shall recuse himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:*
>
> > *2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings…"*

Obligation to consider a recusal application rests with judge concerned in the first instance

> *"2.6 A judge who is requested by a party to recuse himself or herself, or who apprehends that there may be grounds for recusal, other than those grounds set out above, shall consider such issue dispassionately and without undue sensitivity. The*

proviso that recusal is not required if no other tribunal can be constituted or because of urgent circumstances continues to apply. While it is not possible to list all the criteria that might apply, the judge should, in particular, bear in mind the following guidance:

2.6.1 It is a duty of a judge to sit and hear cases.

2.6.2 A judge should recuse himself or herself if a reasonably objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. The reasonableness of such an apprehension must be assessed in the light of the constitutional declaration made by judges on taking up office, and their ability to fulfil that declaration by reason of their training and expertise. It must be assumed that they can clear their minds of irrelevant personal beliefs.

2.6.3 If a request for recusal is grounded upon an assertion of objective bias, the judge should remember that such a ground does not imply personal criticism but is concerned with the perception of partiality in the eyes of a reasonably objective and informed observer.

2.6.4 Objective bias is not to be inferred merely from the fact that a judge has made interim or interlocutory orders in the proceedings, or has presided over a trial that did not come to a final verdict, or may have made legal errors in that process.

2.6.5 Objective bias may be established by showing that the judge has acted in such a manner as to give rise to a reasonable apprehension that he or she will decide the case without proper consideration of the evidence and submissions."

Each application turns on its own facts

41. Every recusal application falls to be decided on the facts and circumstances of the individual case. Acceding to such an application without a valid basis for same being established is not in the public interest. It results in a greater cost, excessive and undue delays and additional expenses. Whereas fanciful or tenuous objections must be disregarded, the threshold is not an especially high one in this jurisdiction. It is not necessary to show a likelihood or real danger of bias but rather a "*reasonable apprehension*" when the salient facts are viewed from the perspective of the fair-minded and reasonable objective observer.

The duty of a judge to hear and determine cases or appeals to which they have been assigned

42. In cases in which recusal is sought based on apprehended bias where no suggestion is made that the judge has any personal or pecuniary interest in litigation outcome or material nexus with a case, party or witness, a judge ought not lightly or automatically accede to a request for recusal merely on the basis of such a request having been made by one of the parties to the proceedings in the first instance. Rule 2.6.1 of the 2022 Guidelines, above, makes that clear. Judges do not get to pick and choose the cases or appeals they try but rather are assigned by the Court President.

43. Judges ought generally to be reluctant to recuse themselves given the need to proceed with court business, avoid delays and make expeditious determinations, unless there are good reasons identified for acceding to a recusal application. For instance, in the Court of Appeal there is a limited number of judges. Acceding to requests for recusal on demand or for unsound reasons could quickly eliminate a substantial number of judges, potentially resulting in an appellant succeeding in hand picking a panel whose members may be assessed or perceived to be more sympathetic to the litigant's position in the appeal. Such strategic applications are to be discouraged because they are calculated to undermine the

administration of justice, facilitate forum shopping and ought not to be acceded to, save where a valid basis is established.

Reasonable apprehension of bias

Outline of the Irish position on recusal

44. The *locus classicus* in this jurisdiction for the formulation of the test for establishing a reasonable apprehension of bias in support of the recusal of a judge or adjudicator was adumbrated by Denham J. (as she then was) in *Bula Limited v Tara Mines Limited (No. 6)* [2000] 4 I.R. 412 at p. 441. That approach was substantially echoed by Keane C.J. in *Orange Limited v Director of Telecoms (No. 2)* [2000] I.R. 159.

45. The test was succinctly expressed in the judgment of Denham J. in *Bula (No. 6)* at page 441: -

> *"However, there is no need to go further than this jurisdiction where 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 issue. 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".*

Keane C. J. also articulated the test in substantially similar terms *Orange* at p. 186 thus:-

> *"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 [Irish] authorities to which I have referred, 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."

The Irish authorities considered by Keane C.J. had included *Dublin Wellwoman Centre v Ireland* [1995] 1 ILRM 408 and *Radio One Limerick v Independent Radio and Television Commission* [1997] 2 I.R. 291. *Bula (No. 6)* and *Orange* remain the key authorities in this jurisdiction in the correct approach to be adopted where an apprehension of bias is asserted. They are considered in greater detail below.

Historic origin of the test for reasonable apprehension of bias by a decision maker

46. It is clear that the approach adopted by Denham J. in *Bula (No. 6)* was informed by the jurisprudence pertaining to recusal in South Africa and in particular the decision *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) S.A. 147. As the South African judgment made clear, in ascertaining whether a reasonable apprehension of bias is to be inferred same cannot be done in a vacuum and must necessarily involve a contextual interpretation of the facts. The South African court emphasised at p. 695 that the exercise is a purely objective inquiry and does not require the satisfaction of any subjective elements. The perspective from which the assessment is made is the vantage point of a reasonable observer and the inferences drawn from the evidence must be reasonable.

47. Such approach is founded on the essential maxim *"nemo debet esse judex in propria sua causa"* recited as an established principle by Coke in the *Earl of Derby's Case (*1613) 12 Co. Rep.114. That decision appears in turn to have reflected the observations of Coke in the earlier decision *Dr Bonham's Case* (1609) 77 E.R. 646 where he reached his conclusions by the application of the principle *"nemo judex in causa sua potest"* – no one should be a judge in their own cause.

48. The modern exposition as to the approach to be adopted where recusal is sought on the grounds of apprehended bias is to be found in the dissenting judgment of de Grandpré J.

in the Canadian decision *Committee for Justice and Liberty v National Energy Board* [1978] 1 S.C.R. 369. At p. 394 of his judgment he observed: -

> "*… The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question in obtaining thereon the required information. In the words of the Court of Appeal, the test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [...] whether consciously or unconsciously, would not decide fairly."*

He further observed at p. 395: –

> "*The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'".*

49. That formulation of the test for apprehended bias was expressly approved and adopted by the Canadian Supreme Court in *R.D.S. v Her Majesty the Queen & Ors.* [1997] 3 S.C.R. 484 where L'Heureux-Dubé and McLachlin JJ., in their joint judgment, reiterating the correctness of the de Grandpré formulation, observed at para. 31: -

> "*The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and Liberty v National Energy Board [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades*."

The court further observed: –

> "*Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision makers, by virtue of their positions, have nonetheless been granted*

considerable deference by appellate courts enquiring into the apprehension of bias. This is because judges 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': United States v Morgan 313 US 409 (1941) …"

50. Having considered the presumption of judicial impartiality they observed: -

"*33. Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias… 'a reasonable apprehension that the judge might not act in an entirely impartial manner is grounds for disqualification' Blanchette v CIS Limited [1973] S.C.R. 833 at pp. 842 – 43*."

L'Heureux-Dubé and McLachlin JJ. described the *"reasonable person"* as follows –

"36. The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail … the person postulated is not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case.

37. It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging …"

Concerning judges in, *inter alia*, multiracial and multicultural society such as Canada or Nova Scotia the court observed: -

"38. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. …. The reasonable person does not expect the judges will function as neutral

ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

39. "It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative functions. As David M. Paciocco and Lee Stuesser write in their book The Law of Evidence (1996) at p. 277:

> *'In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact.'"*

51. Their joint judgment emphasised that the reasonable person is an informed and right minded member of the community who would support the fundamental principles of equality provided under Canadian law, including the Canadian Charter of Rights and Freedoms, and would be aware of the history of discrimination faced by disadvantaged groups in Canadian society. Thus, the reasonable person, contemplated by the test;

"48. … is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualised understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.

49. Before concluding that there exists the reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question has improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary.

There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality."

The reasonable person is informed

52. Corey J. in his concurring judgment in *R.D.S.* observed (at para. 111) concerning the de Grandpré J. test outlined above: -

"It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. ... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold') ... To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community." (emphasis added)

Corey J. further emphasised at paras. 113 and 114:-

"113 … that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. ... Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114. The onus of demonstrating bias lies with the person who is alleging its existence … Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case."

Cogent evidence

53. Corey J. further observed at para. 117: -

"Courts have rightly recognised that there is a presumption that judges will carry out their oath of office … This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite the high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. … The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial."

A useful analysis and review of the Canadian jurisprudence is to be found in *Wewaykum Indian Band v Canada* [2003] 2 S.C.R. 259.

Apprehension of bias on the grounds of race

54. It is clear from the authorities, including *R.D.S.* in the context of race, that where an apprehension of bias is asserted and advanced by an objector to secure the recusal of a judge assigned to try a case or hear an appeal, it must be a reasonable one and based on an objective assessment, one which could reasonably be held by a reasonable and right minded person applying themselves to the question and appraised of the requisite information in relation to the issue. This hypothetical person as might be situate at the back of the court considering the alleged bias must be a reasonable person and the apprehension of bias itself must also be reasonably held in the context of all the evidence and in the circumstances of the case. The individual is taken to be an informed person with knowledge of all the material circumstances which includes the traditions of integrity, impartiality and the obligations of

judges in general and have regard to the fact that impartiality is an obligation and a duty of judges which each judge by solemn declaration undertakes to uphold. It is clear that a mere suspicion of bias, whether on the race ground or otherwise, will not suffice.

Objective test – reasonable apprehension

55. McGuinness J. in the course of her judgment in *Bula Limited v Tara Mines Limited (No. 6)* [2000] 4 I.R. noted that: -

> *"... the general approach has been to use the 'reasonable apprehension' test. This has roots in Lord Hewart C.J.'s much quoted dictum in R. v Sussex Justices ex parte McCarthy, [1924] 1 K.B. 256 '... that justice should not only be done but manifestly and undoubtedly be seen to be done.'. In some of the earlier English cases other phrases such as 'real likelihood' are used rather than 'reasonable apprehension'. But the concept is similar."*

McGuinness J. also cited with approval *Metropolitan Properties Limited v Lannon* [1969] 1 Q.B. 577 at p. 59 where Lord Denning M.R. had stated:-

> *"... in considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the Chairman of the Tribunal, or whoever it might be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand..."*

56. In *Bula (No. 6)* the issue was whether legal professional links which existed in the past between two of the respondents to the appeal and two members of the judiciary sitting in the Supreme Court in itself gave rise to a *"reasonable apprehension"* of bias.

Apprehension of bias not to be based on mere suspicion

57. The Supreme Court in *Bula (No. 6)* noted that the question of an apprehension of bias had been considered in a number of Irish decisions including *Dublin and County Broadcasting Limited v IRTC* (Unreported, High Court, 12th May, 1989) where Murphy J. had observed: -

> *"... it does seem to me the question of bias must be decided on the basis of what a right minded person would think of the real likelihood of prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill-informed and did not seek to direct his mind to the facts. ... If it is shown that there is on the facts circumstances which would lead a right minded person to conclude that there was a real likelihood of bias this would be sufficient to invalidate the proceedings of the Tribunal."*

Prejudgment, prior involvement, personal attitudes and beliefs

58. In *Dublin Wellwoman Centre v Ireland* [1995] 1 ILRM 408 the Supreme Court held that Carroll J. was disqualified from hearing the case assigned to her in the High Court as she had previously served as Chairperson of The Second Commission on the Status of Women, when considered together with the contents of a letter which she had written in that capacity. Denham J. observed: -

> *"In the general sense 'bias' is an emotive word. It is defined in the Oxford English Dictionary as: an inclination, leaning, tendency, bent, a preponderating disposition or propensity, predisposition, predilection, prejudice. It is also a technical legal term and as such has been defined by the courts in many cases. The concept of bias developed through cases considering material interests. It also arose in cases on prejudgment, prior involvement and personal attitudes and beliefs."*

59. In *Radio Limerick One (CJ) Ltd v Independent Radio & Television Commission* [1997] IESC 3, [1997] 2 I.R. 291, Keane C.J., having considered the decision of Lord Hewart L.C.J. in *R. v Sussex Justices, Ex Parte McCarthy* [1924] 1 K.B. 256 and cited same with approval, observed that the basis for a valid application for recusal on the grounds of apprehended bias may take a variety of forms.

> *"The decision maker may have a financial or proprietary interest in the outcome of the litigation. ...He or she may have on some other occasions so prejudged the matters in dispute as to be incapable of reaching a detached decision or, at all events a decision which reasonable people would regard as free from even the suspicion of bias."*

Approach of Denham J. in *Bula (No. 6)* still prevails

60. As stated above, the applicable test in this jurisdiction in evaluating whether a claim of apprehended bias has been made out continues to be that articulated succinctly in its essential elements by Denham J. in *Bula (No. 6)* at p. 441; *"... whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issue."* That objective test has been reiterated by the Supreme Court on numerous subsequent occasions including *Maguire v Ardagh & Ors.* [2002] 1 I.R. 385 at p. 694.

61. In *O'Driscoll v Hurley & Anor.* [2016] IESC 32 Dunne J. reiterated the *Bula No. 6* test, noting that Denham J. had *"... reviewed the well settled law applicable in this jurisdiction to the test to be applied by a court when considering the issue of objective bias."* The *Bula* decision was considered by Dunne J. as one *"... which may regarded as the fons et origo of the test in Irish law"*.

62. Dunne J. cited with approval the decision of Denham C.J. in *Goode Concrete* where Denham C.J. once more reiterated the essential indicia of the test for apprehended or perceived bias: -

> *"…whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."*

Dunne J. further cited with approval para. 55 of the judgment of Denham C.J. in *Goode Concrete*: -

> *"The test to be applied when considering issues of perceived bias is important in protecting the administration of justice, and necessary to preserve public confidence in the judiciary. Thus, the issue is not simply a matter as between parties, but it is an issue for consideration in relation to the manifest impartial administration of justice in the State, and the confidence which the people rest in the judiciary."*

63. Dunne J.'s comprehensive review of the Irish jurisprudence on objective bias continued in her judgment in *Kelly v The Minister for Agriculture* [2021] IESC 23 which included a consideration of the decision of the Supreme Court in *Reid v. I.D.A.* [2015] 4 I.R. 494, where the judgment of the Court was delivered by McKechnie J. At para. 74 of his judgment, McKechnie J. set out the test for objective bias in the following terms:-

> *"The test for this class of objection is now well established: in short, it is the reasonable suspicion or the reasonable apprehension test. Whilst the latter description has been preferred in Bula Limited v. Tara Mines Limited (No.6) [2000] 4 I.R. 412, both terms continue to be used interchangeably. No longer is there any real suggestion that the once alternative approach, namely a real likelihood of bias,*

should be considered. The test now to be applied is centrally rooted on the necessity of establishing and maintain the confidence of the public in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of what happened. Therefore, as has been said on numerous occasions, what the parties, the witnesses or even us judges think, is not decisive. It is what the reasonable person's view is, albeit a person well informed of the essential background and particular circumstances of the individual case."

64. That approach was also endorsed by O'Donnell J. (as he then was) in *Kelly v The Minister for Agriculture & Ors.* where at para. 6 he observed: -

"…The relevant legal issue is the question of objective bias, which, in turn, must be viewed from the perspective of the well-known resident of the province of administrative law: the reasonable bystander apprised of all relevant facts."

Elsewhere, at para. 13, he observed:-

"… Bias must be extraneous to the correctness of the decision sought to be impugned. But this reasoning does not, in my view, go the distance of contending that bias must also be extraneous to the process leading to the decision."

McKechnie's clear exposition that the Irish approach based on the *"reasonable apprehension"* test is not interchangeable with the approach in some English authorities based on *"the real likelihood of bias"* is helpful, since in truth they are materially different thresholds - *"likelihood"* or *"danger"*, as formulated in *R. v Gough* [1993] A.C. 646 (*per* Lord Goff) connotes a statistically significant probability whilst, by contrast *"reasonable apprehension"* locates the exercise in the domain of ensuring that justice is not merely done but in each cases is seen to be done from the perspective of the lay observer who is

reasonable, fair-minded, and fully informed, thereby striking a more resilient and equitable balance.

65. The above jurisprudence is outlined to illustrate that the test for recusal established in the key authorities in this jurisdiction such as *Bula (No. 6)* and is located within the context of international jurisprudence and the principles adumbrated by the European Court of Human Rights as developed and refined over time. The test is to be applied by the court to determine whether there is a reasonable apprehension of bias warranting acceding to an application on the part of a litigant or objector for a recusal.

Objective Test

66. The fact that Mr. Smith personally does not wish for the two judges to be involved in hearing this appeal cannot of itself be a valid ground for seeking a recusal. As succinctly stated by Davis L.J. in *Shaw v Kovac & Anor* [2017] EWCA Civ. 1028, [2017] 1 W.L.R. 4773, noting that the objector:-

> *"... personally would not wish to have sitting on this appeal two judges who have previously been involved in decisions adverse to her cannot of itself procure a recusal. The law is clear. The test is objective. The outcome cannot be determined by the subjective views or wishes of the objecting party. .... But any inclination to defer to the individual sensibilities of individual parties cannot of itself justify, let alone require, a judge to recuse himself or herself."*

This view echoed the earlier English Court of Appeal decision in *Dobbs v Triodos Bank NV v Dobbs* [2005] EWCA 468 where Chadwick L.J. observed:-

> *" 7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. .... A litigant who*

does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally. Mr Dobbs' appeal could never be heard."

Prior adverse decision by judge against objector as grounds for recusal – the Irish position

67. Leaving aside the issue of alleged racial discrimination for the moment which requires, given its extreme gravity, to be the subject of a separate consideration, it is clear from the jurisprudence outlined above that the mere fact that a judge previously heard a case involving a party who seeks that judge's recusal and found against that applicant – or indeed found in favour of the other party to litigation – does not in and of itself constitute a valid ground to seek recusal on the basis of apprehended bias.

68. Clarke J. (as he then was) in *Tracey & Anor. v McDowell & Ors.* [2016] IESC 44 observed: -

"It does have to be recorded that there is an increasing tendency of litigants to allege bias arising largely out of the fact that a judge or judges who have previously heard a case involving the litigant concerned and found in favour of the litigant's opponent. Sometimes […] the argument is little more than a rehash of the original case coupled with the contention that the judge must have been biased to have found against the relevant party. Such an application for recusal is unstateable."

69. The issue of an application for recusal of a member of this court on the basis that the judge had heard an unrelated action in which the applicant seeking recusal was a party and had made a decision adverse to the applicant was the subject of consideration in *In the matter of Decobake Limited (In Liquidation)* [2022] IECA 31 and in particular paras. 28 – 34.

70. Murray J. noted at para. 30 that no basis had been suggested on which it could be concluded that the prior hearing had been conducted unfairly by the judge. He observed: -

"It is incumbent on a person contending that a judge should have recused himself or herself as a result of bias to establish that 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…"

He cited with approval the Supreme Court decision in *Bula (No. 6).*

71. He further observed: -

"The fact that a judge has heard either other proceedings involving the objecting litigant, or other applications in the same proceedings, is not in itself a basis on which a claim of bias can be sustained having regard to the objective requirement of the test."

72. He reiterated, as had been previously emphasised by the Supreme Court, that apprehensions on the part of the objecting party or applicant are not relevant. He cited

O'Malley J. in *Murphy v DPP* [2021] IESC 75 at para. 60 where she observed of the actual affected party who seeks recusal: -

> *"... That party is, obviously, not to be equated with a fair minded and neutral observer."*

Murray J. observed (para. 30): -

> "*Instead, it is necessary for the objecting party to identify some aspect of the conduct or disposition of those proceedings that would cause a reasonable and fair-minded observer to conclude that the judge would not fairly and impartially determine the second suit*."

Citing *Tracey & Anor. v McDowell & Ors.*, Murray J. further observed (para. 34): -

> *"Judges have a duty to hear cases assigned to them, and parties who seek to disqualify a judge from doing so must adduce a clear basis on which a reasonable observer could be said to reasonably apprehend bias."*

73. As is clear from the jurisprudence, including Murray J. in *Decobake,* previous adverse outcomes *per se* in litigation before a judge who has been assigned to hear a case or appeal are not a valid ground to support the recusal applications. In *Otkritie International Investment Management Limited v Urumov* [2014] EWCA Civ. 1315, Longmore L.J. observed:-

> *"13. There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a*

> *real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive*."

Longmore L.J. cited with approval the decision in *Arab Monetary Fund v Hashim (No. 8)* (1993) 5 Admin LR 348, noting that Bingham M.R. had stated at p. 355:-

> *"In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party had shown greater judgment, determination and knowledge of the rules than its opponent."*

74. Applying the above authorities to the within application, it is clear that the primary basis of the appellant's complaints against the two judges distils down to this: that in all the circumstances, in light of the prior decision of Mr. Justice Allen [2022] IECA 238, the concurrence of Mr. Justice Binchy with the said decision and order, and the judgment of the court delivered in other unconnected proceedings [2022] IECA 99 on the 27th April, 2022 in respect of which Mr. Justice Binchy was a member of the panel, both of which were adverse to him, Mr. Smith is entitled to secure their recusal and exclude them from the panel hearing this appeal by reason of the perceived errors of fact and errors of law and other errors perceived by him in respect of the said decisions and consequential orders.

75. The test is not the subjective view of Mr. Smith nor of the members of the court but rather, in light of the jurisprudence outlined above, the reasonable apprehension test based on whether a fair minded and informed observer would consider that there was evidence identified by Mr. Smith that the said decisions - or either of them - were reached on the basis of bias (potentially including racial bias) such as could give rise to a reasonable

apprehension that Mr. Smith would not receive a fair hearing in respect of his appeal were they - or either of them - to remain members of the court panel.

76. The appellant identifies nothing either said or done by either judge in either of the appeal hearings relied upon or the judgments delivered as offering evidence in support of his application that they now be required to recuse themselves. He relies instead on the failure of his appeal and application to meet with success and the adverse judgments as the primary basis underpinning his applications. Ours is an adversarial legal system. In almost every application one party will be less successful than the other - if not entirely unsuccessful.

The allegation of racial discrimination

77. Central to the appellant's application seeking the recusal of two members of the panel assigned to hear this appeal is his assertion that based on the two prior decisions of this court involving outcomes adverse to him, he has a valid apprehension that neither judge will adjudicate impartially on the substantive appeal and that this will occur on the basis of racial discrimination and/or ethnic bias.

78. The core value of judicial impartiality necessarily imports a presumption of colour blindness and the obligation that each individual be treated equally without regard to race, ethnic origin or nationality. Given the strict obligation of judicial impartiality and the gravity and egregiousness that is necessarily imported into the determination of a case on the basis of racial or ethnic bias, it is clearly of great importance that before such an allegation is raised the applicant identifies cogently and with great particularity all of the evidence relied upon in support of a recusal on the basis of racial bias.

79. Racism and discrimination or any bias or victimisation on the basis of ethnicity is a most serious matter in this jurisdiction. A wide variety of legislation has been passed to address various aspects of this grave wrong and to protect individuals from the inevitable

harm and injury racial bias and discrimination inflicts. Measures include the Equal Status Acts, 2000 - 2018, the Employment Equality Act, 1998 and relevant regulations, sundry EU Council Directives governing equal treatment, in addition to the establishment of the Irish Human Rights and Equality Commission pursuant to the 2014 Act. It is generally acknowledged that the scope of protection within our domestic laws is significantly wider than what is required by European law. That is rightly so. Our legislation has developed the ground of race beyond colour or ethnicity and has regard to nationality and for instance Irish law recognises xenophobia *per se* as unlawful discrimination.

80. An allegation of racial bias is a most serious matter. Flamm in *Judicial Disqualification: Recusal and Disqualification of Judges* (2nd Edn., Banks & Jordan, 2007) at para. 3.8 observes that racial bias is considered to be *"particularly anathema"*. He observes that a charge of bias based on gender, race or sexual orientation is a *"very serious charge"* which must be supported by *"evidence that tends to show its validity – not simply by speculation that cannot be traced to facts in the record."*

81. The approach of the English Court of Appeal to the issue is illustrated in *Bennett v Southwark BC* [2002] EWCA Civ. 223 in which the members of an employment tribunal decided that they could not continue to hear a case on race discrimination where they themselves had been accused by counsel on behalf of the claimant of racism. The Tribunal, having earlier refused an application for an adjournment, then discharged itself and put the matter back to be heard by a freshly constituted Tribunal. Ultimately the issue of whether the decision of the Tribunal to recuse itself was correct or not, along with sundry other issues, came to be determined by the English Court of Appeal. The judgment was delivered by Lord Justice Sedley.

Sedley L.J. observed that an allegation that a Tribunal was not treating an application fairly was a serious assertion, particularly where the substance of the case itself concerned race discrimination. At para. 19 of his judgment he observed that:-

> *"Courts and Tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation."*

82. Bearing in mind the strong presumption of a judge's objectivity and impartiality coupled with the extreme seriousness of the allegations of racism and discrimination, there is a high burden on an applicant who seeks a recusal particularly on an issue of such gravity as racial bias and discrimination on ethnic grounds to demonstrate a valid basis for such an assertion so as to satisfy the test, namely that a reasonable objective and fair-minded independent observer informed of all the relevant facts would consider that there was a reasonable apprehension that the applicant would not obtain a fair hearing and determination of his appeal by reason of racial bias or discrimination.

83. A Canadian example of a case where racial discrimination was alleged to ground a recusal application is *Beard Winter LLP v Shekhdar* [2016] ONCA 493 which concerned a motion for an extension of time to bring an application for leave to appeal from the Divisional Court. The moving party contended that the presiding judge should not sit to hear the motion. The reason identified was that the presiding judge had sat on two prior panels involving the objector. It was alleged that the reasoning in the prior decisions dismissing the appeal was incorrect and could only be explained by *"racism, corruption and/or criminal case fixing"*.

84. Doherty J.A. in the course of his judgment in the Ontario Court of Appeal observed at para. 11: -

"… a reasonably objective observer would give no weight to the claims of partiality advanced by the moving party in his 61- page document. The challenged decisions were made by a unanimous three-judge panel. To my knowledge, none were appealed. The moving party is certainly entitled to his own opinion about the adequacy of the reasons and the correctness of those decisions. However, the personal opinion of the losing litigant as to the quality and correctness of the court's decision counts for little when assessing a partiality claim. It is understandable that losing litigants sometimes firmly believe that the court got it all wrong. To jump from that conclusion to allegations of racism and corruption is irresponsible and irrational."

Pattern of repeated allegations of racism

85. The court went on to consider a fact pattern which emerged in that case indicating that the moving party had made previous allegations of racial bias, racism and the like against other judges in other proceedings: -

"13. *A reasonable observer, in considering the allegations made by the moving party, would also take into account that this moving party has made similar allegations of serious misconduct against a great many people involved in the judicial process, including many judges. The moving party offers no evidence that any of the matters of the many allegations he has made have ever been made out to the satisfaction of anyone other than himself.*

14. There is no air of reality to the moving party's allegations of bias."

It is noteworthy, and considered more fully below, that the appellant in this case has unsuccessfully pursued allegations of bias and racial discrimination on a number of other occasions.

The European Convention on Human Rights – Article 6(1)

86. In the context of s. 2(1) of the European Convention on Human Rights Act, 2003 regard is to be had to the Convention in interpreting and applying any statutory provision or rule of law. In this instance of primary relevance is Art. 6(1) of the said Convention. The key principle governing Art. 6(1) is the guarantee of fairness in the determination of criminal charges or civil rights and obligations. A central aspect of fairness is ensuring the appearance of the fair administration of justice by the independence and impartiality of the decision maker. The European Court of Human Rights has made clear however that the objector's standpoint is not decisive and any misgivings or concerns asserted must be objectively justified: *Kraska v Switzerland* (1994) 18 EHRR 188. The court has in several of its judgments emphasised the necessity to dispense with even the appearance of bias. For example, as stated in *Fey v Austria* (1993) 16 EHRR 387 at para. 30:-

> *"30. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified."*

<u>Application of the above principles and authorities in the instant case</u>

The email ground

87. As regards the email issue, the appellant submitted a copy of an email said to have been received by him on the 19th June, 2020 from a Registrar in the High Court indicating

that an enquiry was being carried out as to why the appellant's emails were not being received by Courts Service. The judge said to be involved in the matter is not connected with the Court of Appeal. No nexus of any kind was identified between the incident and the judges concerned in this application save that the appellant suggested that he had run an unsuccessful case before the Circuit Court judge and speculated that having had a previous unsuccessful application before any judge might predispose that judge to rule against him if he appeared in that court again. This approach grounded upon unsupported suspicion, conjecture and surmise falls foul of the authorities and signally fails to address the fundamental obligation of the objector in such an application to identify some aspect of the previous conduct of the judges that would cause a reasonable and fair-minded observer to conclude that there was a reasonable basis for an apprehension that the judge would not fairly and impartially determine the later case as outlined by Denham J. in *Bula (No. 6)*, Keane C.J. in *Orange* or Murray J. in *Decobake*.

88. The fair-minded reasonable observer having objectively considered the material facts surrounding the apparent blocking of the appellant's email two years ago - in reaching a conclusion as to whether there was any valid basis for a reasonable apprehension that either judge would not give the appellant a fair hearing and determination in the substantive appeal would take into account and have regard to, *inter alia*, the following salient facts: -

(a) There is no cogent evidence or even a shred of evidence to suggestion that either Judge Binchy or Judge Allen had any nexus with this email. Neither is it suggested that they are in any way involved or even aware of the claim that the appellant's email account was blocked or that he was impeded in 2020 from sending emails to Courts Service.

(b) Merely because of a prior allegation that a judge in a different court may have been instrumental in taking steps to restrict or delimit the receipt of emails

from the appellant could not be logically probative of apprehended bias towards the appellant by Judges Binchy or Allen.

The assertion that the 2020 email incident supports the recusal application is wholly unsustainable and no fair-minded or informed observer would consider that there was any possibility of bias by either judge in hearing or determining the appeal on the basis of the contents of the email document bearing date 19th June, 2020 with an earlier email dated the 28th May, 2020 or any relevant or incidental matter. No nexus, however tenuous, was identified between the judges the subject matter of the recusal application and the said email. Accordingly, that contention is unsustainable.

Prior decisions of the two judges

89. The aforementioned fair-minded reasonable observer would further take into account:-

(a) In respect of the appeal which led to judgment on the 27th April, 2022, [2022] IECA 99 when Mr. Justice Binchy was a member of the 3-judge panel which rendered the unanimous judgment of the court, that Mr. Smith has identified nothing, pointed to no matter, fact or statement in the course of the hearing, or within the said judgment which in and of itself could be said to support a contention that the said judge ought to be required to recuse himself from hearing the within appeal on the basis of apparent or apprehended bias.

(b) The appellant solely take issue with the conclusions reached in the judgment and the ensuing order dismissing his appeal.

(c) That on the 13th September, 2022 the Supreme Court determined to refused the appellant leave to appeal from the said judgment and orders.

(d) With regard to the appeal resulting in judgment delivered on the 17th October, 2022, [2022] IECA 238 which said judgment was an *ex tempore* judgment of Mr. Justice Allen and where Mr. Justice Binchy was a member of the 3-judge panel and expressly

concurred with the said judgment, save and except the outcome and determination in the said application by Mr. Smith for an order extending time to enable him to serve and lodge a notice of appeal against an order of the High Court made on the 23rd January, 2019 was refused, the appellant did not identify any facts or matter which would impugn the impartiality of either judge in respect of same.

(e) The sole grievance in each case is that the court failed to find in his favour.

(f) The fair-minded objective observer would understand that it is irrational or at least illogical to infer or assert that an unsuccessful litigant is entitled to automatically infer that their claim or appeal was unsuccessful solely by reason of judicial bias.

(g) They would also know that an adverse outcome in a previous appeal or application could never *per se* justify advancing a very serious allegation of racial bias or discrimination.

Application of the objective test

90. The objective, reasonable observer would not be unduly sensitive or suspicious and would be apprised of all the relevant facts and thereby would advert and have regard to the following salient matters with regard to the complaints against both judges:-

a. The administration of justice operates generally by means of an adversarial process. Thus, at the conclusion of an appeal one side is perceived to have *"won"* or at the least to have had a greater degree of success than the other.

b. Judges in the Court of Appeal hear and determine appeals and applications based on the relevant standard of review considered to be applicable and the evidence adduced, the grounds of appeal pursued, the arguments advanced by both sides, and the application of the law and legal principles to the established facts and any identified errors.

c. When a litigant or appellant is unsuccessful same is not *per se* evidence that can support an assertion of apprehended bias or lack of impartiality on the part of the judge or judges deciding a matter.

d. Errors of fact or errors of law or the misapplication of the law to the facts by a judge or a court may give rise to valid grounds of appeal or offer good grounds to seek that a judgment be revisit or for seeking leave to appeal to the Supreme Court pursuant to Article 34.5.3 but such errors or mistakes are not evidence *per se* of apparent bias or want of impartiality on the part of the judge or the court. Where such occur, the appropriate step is to make the appropriate application in accordance with normal practice and procedure or seek leave of the Supreme Court to appeal. In the instant case, in respect of the judgment [2022] IECA 99 and orders that followed from the appeal hearing on the 8th February, 2022 and which is the subject matter of a complaint against Mr. Justice Binchy, the Supreme Court considered Mr. Smith's detailed application for leave to appeal and in the process of reaching its determination carried out a review of all the assertions advanced by Mr. Smith in support of his leave application Those allegations included, *inter alia,* that the judgment and order in question had breached his right to equal treatment on racial grounds. The Determination (set out above) notes that it was alleged by Mr. Smith that the Court of Appeal had manufactured and distorted facts and that it had failed to apply relevant legal authorities. He also had advanced arguments to the Supreme Court that the Court of Appeal had reached a decision adverse to his appeal *"because his papers made it clear that he had made complaints against a number of judges as well as the Legal Aid Board"*.

e. The reasonable objective observer would also know and understand that the Supreme Court in its Determination which refused Mr. Smith leave to appeal entirely agreed with the Court of Appeal and the judgment and orders which had determined that *"there was no reason to believe that the Ombudsman's decision would have been any different in the case of a person of different ethnicity."* They would also note the substance of the decision embodied within the Supreme Court's Determination which reiterated and endorsed the essential finding of the Court of Appeal judgment in question which stated: -

> *"... There was nothing in the evidence to suggest that the handling of the applicant's complaint by the respondent would have been different had the applicant been a person of a different race or ethnic origin. That is the essence of racial discrimination."*

Thus the objective reasonable observer would have no valid or reasonable apprehension of any bias as would warrant recusal of Judge Binchy on any ground - including but not limited to grounds of race, ethnicity or discrimination arising from or in respect of the judgment [2022] IECA 99.

f. In the case of the judgment of the 17th October, 2022 delivered *ex tempore* by Mr. Justice Allen [2022] IECA 238, and concurred in by the other court members which included Mr. Justice Binchy, the objective reasonable observer would note, being apprised of all relevant facts, that Mr. Smith did not seek leave to appeal to the Supreme Court in respective of the said judgment.

g. They would understand that Mr. Smith was clearly aware of his right to seek leave to appeal against a judgment or order of this court. The reasonable and objective observer would be astute to assess that the fact that no application

for leave to appeal at all was brought in respect of the *ex tempore* judgment and ensuing order of the 17th October, 2022 [2022] IECA 238 was suggestive of an evaluation having been carried out by Mr. Smith, who is highly experienced in litigation and ably self-represents, that he had no maintainable grounds to support an application to the Supreme Court seeking leave to appeal.

h. Such an individual would be astute and understand that Mr. Smith had at least implied at the hearing of his recusal application that he considered the option of making a complaint of judicial misconduct against a judge to the Judicial Council operated as an alternative more convenient and cheaper option than seeking leave to appeal in his pursuit to seek a reversal of the decision and order of the 17th October, 2022, [2022] IECA 238.

i. Such an independent observer – being fair-minded and impartial – would also know and understand that submitting a complaint of professional misconduct to the Judicial Council is not an appropriate alternative to seeking leave to appeal to the Supreme Court when a litigant seeks to reverse any material aspect of a judgment or order of the Court of Appeal. They would also know that an outside body such as the Judicial Council has no power to reverse, alter or vary the terms of judgments or orders of the Court of Appeal. They would know that the complaints procedure under the Judicial Council Act or any other analogous statutory process is not an alternative to an application to the Supreme Court seeking leave to appeal and it does not entitle any independent body to interfere in any way with orders of any court.

j. The independent observer would also note that the assertions of apparent bias and lack of impartiality against both judges as well as assertions of

discrimination on racial grounds in reaching previous determinations adverse to the appellant were only made after the judgments in question were delivered in each case. Arising from the above facts, the reasonable and objective independent observer would be reasonably satisfied that the complaints directed against both judges were actuated solely by the fact that the judgments and decisions in question were adverse to the appellant's claim and based on no other factor.

k. As regards the allegation of bias on the basis of racial or ethnic discrimination, the objective reasonable observer would note the gravity of that allegation but also the core fact which emerges from the evidence that, in respect of both judges, the only basis coherently identified in support of that application is that the judges in question were members of the Court of Appeal panel when judgments and orders unfavourable to the appellant and with which he strongly disagrees were delivered. There is nothing identified to suggest that the outcomes in each case would be any different were the appellant of a different racial or ethnic origin.

   The objective reasonable observer would be satisfied in light of the submissions and arguments advanced by the appellant that he harbours no doubt as to the merits of the applications and as to the merits of his position in the appeals in question and has both convinced and persuaded himself that the only basis on which his appeals failed was because of the apparent bias, including apparent racial bias of the judges against him.

l. The objective reasonable observer would know too that in this regard Mr. Smith's allegations follow a pattern and that in other cases, unconnected with

this substantive appeal, he has made the grave allegation of racial bias against decision makers who have made determinations adverse to Mr. Smith.

The ground of racial bias

91. Leaving to one side all assertions of discrimination and racial and ethnic bias arising in the within substantive appeal against the respondent Cisco, it is noteworthy that the appellant has unsuccessfully pursued allegations of bias and racial discrimination on a number of occasions including in proceedings:-

i. *Olumide Smith v Copeland* [2020] IEHC 42
ii. *Olumide Smith v The Office of the Ombudsman, Adam Kearney Bernard Traynor and Peter Tyndall* [2022] IECA 99
iii. *Olumide Smith v Iquate* [2017] IESCDET 109

92. Beyond a bare assertion based on the outcomes of appeals and ensuing judgments and orders in question the appellant has not advanced one scintilla of evidence to support the serious allegation of bias on the basis of race or ethnicity against either judge. Bare assertions do not suffice where apparent bias or potential lack of partiality is asserted. The appellant has identified nothing said or done by either judge as would support such a contention.

Ground of subsisting complaints made to professional bodies/independent bodies

93. Great care must be exercised in achieving a balance between ensuring that any legitimate risk or concern identified by a litigant is engaged with and fully addressed on the one hand and avoiding judicial forum shopping or facilitating interference with the composition of a panel independently assigned to hear an appeal on the other. A stratagem whereby a litigant, perhaps close in time to a hearing, submits an online complaint against a judge who may be perceived to be unsupportive or unsympathetic to the litigant's position is to be discouraged. It is essential that the administration of justice operates resiliently and

it thereby follows that the mere submitting of a complaint to, for instance, the Judicial Conduct Committee, cannot in and of itself necessarily require that the judge the subject matter of such a complaint must recuse himself or herself in respect of all matters or appeals pertaining to that litigant pending the conclusion of the complaints process.

94. Sedley L.J.'s observations in *Bennett v. Southwark BC* outlined above bear repetition - particularly where, as here, the substance of the appeal itself concerned alleged race discrimination. At para. 19 he observed that courts and tribunals do need to have:-

> *"… broad backs, especially in a time where some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for an adjournment cannot."*

95. Acquiescing too readily in a recusal application without proper assessment of its merits would potentially undermine the proper administration of justice since it is axiomatic that litigants do not get to choose the judge or judges who try their cases – just as judges cannot choose the cases they are assigned to adjudicate upon. Automatic recusal in such circumstances would represent an efficient means of circumventing the rigorous process governing recusals in general. There is no obligation on an appellant to disclose the existence of a professional complaint in the context of a recusal application. There is however a fundamental obligation on such a litigant to identify in a recusal application each and every fact, matter and thing substantively asserted in respect of the judge in question in support of the application.

96. Thus, each recusal application turns on its own facts and the weight to be attached to the existence of a complaint - the determination of which is the responsibility of an independent tribunal or body - will be a factor to be weighed in each case where it arises having due regard to the context, the overall issues and elements supporting the application. It is for the objector to put before the court the material facts to support the recusal

application - irrespective of whether some or all of same form part of a professional complaint. While a subsisting complaint of judicial misconduct against a judge may be a relevant factor in assessing a recusal application, it cannot be determinative in any case *ex ante*. It is a fundamental requirement that a party seeking recusal identifies with particularity all factors and matters which he purports to rely upon in moving the application in open court. That some part, all or no aspect overlaps with the contents of a complaint put before the Judicial Conduct Committee is not material. It is not necessary to disclose to the court that some or any aspects grounding the objection are also being deployed in support of a complaint submitted to the Committee. The obligation of confidentiality in Rule 28 governing the complaints procedure does not impede the right and obligation on an individual litigant seeking recusal to identify the specific relevant grounds sub-tending the recusal application without reference to the making of the complaint itself. It is only in a case where the objector seeks to rely on a complaint to the Judicial Conduct Committee in the first place that its existence falls to be disclosed.

97. In the instant case, having carefully considered the submissions and arguments of the appellant, one fundamental issue of concern in connection with the complaint made to the Judicial Conduct Committee is the characterisation by Mr. Smith in his submissions to the court of the complaints mechanism itself as an alternative litigation strategy in lieu of pursuing the process of making an application to the Supreme Court seeking leave to appeal against a judgment or order of this court. One can fully understand the attractions of such an approach for Mr. Smith. He advised the court that financially it is more attractive than having to incur any expenses in connection with lodging an application for leave to appeal. He can apparently pursue the process of a complaint online, without cost.

98. However he identified no provision or measure within the Judicial Council Act, 2019 tending to suggest that the statutory complaints procedure provided therein could ever

operate as a valid alternative to pursuing the process of an appeal where the fundamental basis of the complaint is that the judge in question fell into error in regard to the facts, erred in respect of the law and/or misapplied the law to the facts and thereby erroneously reached a conclusion adverse to the complainant and where, overlaid on both scenarios asserted in the instant case against Binchy and Allen JJ., is the contention or bare assertion that the decision in question or judgment impugned was made or determined in a manner adverse to the appellant on the basis of racial or ethnic bias.

99. In light of Mr. Smith's observations it would appear, in the context of the recusal applications against both judges, that in this instance the complaints against the judges submitted to the Judicial Conduct Committee amount to an expression of his intense and sincere disagreement with the unappealed judgment of Allen J. in [2022] IECA 238 as concurred in by Binchy J. and the judgment of the Court in [2022] IECA 99 where Binchy J. was a member of the 3-judge panel and in respect of which the Supreme Court subsequently determined to refuse leave to appeal [2022] IESCDET 107. As such the existence of these complaints do not provide a valid basis for the recusals sought in this instance.

Conclusion

100. I am satisfied that a fair minded and informed observer being a reasonable person, perhaps seated at the back of the court, considering objectively all of the arguments and contentions advanced by Mr. Smith would not share his view either that the outcome of the two previous appeals or the fact that he had submitted complaints to the Judicial Conduct Committee could give rise to any reasonable apprehension on the part of a right minded person that either Mr. Justice Binchy or Mr. Justice Allen would decide the substantive appeal in this case otherwise than impartially. Further, the events surrounding the email incident were not shown to be in any way connected with either judge. The subsisting

complaints processes being pursued by Mr. Smith against both judges on the evidence adduced do not warrant recusal of either. The various bald assertions of bias are all untenable. From an objective perspective, nothing has been advanced by Mr. Smith to cast doubt on the impartiality of either judge. This application accordingly and for all the reasons cited above falls to be refused.

Other issues

101. The substantive appeal now needs to proceed. I would propose that the matter goes into the next list to enable the list judge to fix an early date for hearing the appeal.

Costs

102. With regard to the issue of costs, in my preliminary view costs follow the event. In light of Order 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act, 2015, as amended, the respondent is entitled to the costs of the failed recusal application – same to be ascertained in default of agreement. If Mr. Smith contends for a different order regarding costs, written submissions - no longer than 2,000 words - to be filed within 21 days of the date of delivery of this judgment with a replying submission of equivalent maximum length to be filed within a further 21 days from the date of receipt by Cisco of Mr. Smith's submission.

103. Binchy and Allen JJ. concur with the above judgment.