THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 168
Record Number: 2019/447
High Court Record Number: 2018/939JR

Noonan J.
Faherty J.
Power J.

BETWEEN/

KEITH HARRISON

PLAINTIFF/APPELLANT

-AND-

PETER CHARLETON

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 22nd day of June, 2020

1. This appeal is brought from the judgment and order of the High Court (Donnelly J.) of the 23rd August, 2019 and is primarily concerned with the issue of objective bias.

Background Facts

2. The applicant is a member of An Garda Síochána having completed his training in 2001. Thereafter he was stationed in Malahide and County Westmeath before being transferred at his own request to Buncrana in Donegal on the 11th March, 2011. The appellant requested the transfer as he wished to pursue a personal relationship with Ms. Marisa Simms who lived in Donegal. The appellant and Ms. Simms had previously had a relationship when both were in college in Galway some years earlier. In the interim, Ms. Simms married and had a family. The appellant also married and was subsequently divorced. Ms. Simms is the sister of Martin McDermott. On the 14th December, 2009, Martin McDermott unlawfully drove a motor vehicle at high speed while escaping lawful apprehension by gardaí and collided with a garda patrol car being driven by Garda Gary McLoughlin, a popular young garda stationed in Buncrana. Garda McLoughlin was killed in the impact and another garda seriously injured.

3. At the time of the appellant's transfer to Buncrana, Martin McDermott was awaiting trial on a charge of motor manslaughter, an offence of which he was subsequently convicted.

At that time, the appellant's superiors were unaware of his relationship with the sister of the accused person. When this became known, it became the source of considerable bad feeling between the appellant and his colleagues in Buncrana. As a result, the appellant was transferred to Donegal Town Garda Station on the 2nd June, 2011, against his wishes. At this time, the Donegal Division was under the command of Chief Superintendent Terry McGinn ("C.S. McGinn").

4. From June, 2012, the appellant and Ms. Simms began living together as domestic partners. On the 28th September, 2013, an argument took place between the appellant and Ms. Simms. On the 6th October, 2013, Ms. Simms attended at Letterkenny Garda Station and made a lengthy statement detailing a number of complaints against the appellant. Arising from this statement, on the 8th October, 2013, C.S. McGinn convened a meeting of senior garda management to consider the matter and determine what steps were to be taken in consequence of the statement by Ms. Simms.

5. The argument between the appellant and Ms. Simms referred to in the statement took place in the presence of Ms. Simms' children and the question of a referral to the HSE was discussed at the meeting. Such a referral was in fact made by one of the senior officers in attendance at the meeting, Superintendent McGovern, subsequently on the 10th October, 2013. The matter was also referred to the Garda Síochána Ombudsman Commission but it was ultimately not pursued by GSOC for reasons not relevant to the issues herein. Ms. Simms later withdrew her statement. Subsequently, a member of the Child and Family Agency (Tusla), attended at Ms. Simms' home on the 19th February, 2014 by agreement and interviewed the children. No issues were identified during this visit and accordingly the Tusla files were closed.

6. On the 17th February, 2017, the Oireachtas established the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act, 2014 and certain other matters, ("The Disclosures Tribunal"), and appointed the respondent sole member. The tribunal's terms of reference were primarily concerned with investigating allegations involving two garda "whistle-blowers", Sergeant Maurice McCabe and Superintendent David Taylor. The appellant, also a garda whistle-blower, was the sole subject of one of the terms and concerned in a second. These terms were as follows: -

> "(N) To investigate contact between members of An Garda Síochána and Tusla in relation to Garda Keith Harrison.
>
> (O) To investigate any pattern of the creation, distribution and use by Tusla of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and of the use knowingly by members of An Garda Síochána of these files to discredit members who had made such allegations."

7. The second interim report of the Disclosures Tribunal was published on the 30th November, 2017 and was described as "a report relating to Garda Keith Harrison". This report was highly critical of the appellant and Ms. Simms and rejected all of their

allegations. Although the tribunal's second interim report was concerned with the appellant, he featured again in the tribunal's third interim report published on the 11th October, 2018 and again was the subject of significant criticism. On the same date, the appellant says that he became aware for the first time of two newspaper articles published in the Irish Times on the 30th and 31st March, 2006. These articles referred to a report of proceedings before the Tribunal of Inquiry into complaints concerning some Gardaí of the Donegal Division, ("the Morris Tribunal"), in which the respondent appeared as senior counsel on behalf of the tribunal. The reports concerned a statement made by the respondent at the Morris Tribunal concerning C.S. McGinn which the appellant, in these proceedings, claims give rise to the appearance of bias on the part of the respondent in dealing with the appellant at the Disclosures Tribunal.

Chief Superintendent Terry McGinn

8. The Morris Tribunal was established in March 2002. This tribunal was tasked with investigating the conduct of certain members of An Garda Síochána in the Donegal Division. The respondent, at that time a member of the Inner Bar, was one of the legal team representing the tribunal. Superintendent Terry McGinn (as she then was) was appointed to act as liaison officer between An Garda Síochána and the tribunal. She carried out that function for a period of some three and a half years until August 2005 when she was promoted to the rank of Chief Superintendent and appointed to head up the Donegal Division. A new garda liaison officer was then appointed to replace her and take over her functions at the Morris Tribunal.

9. At the sitting of the Morris Tribunal on the 30th March, 2006, in what is subsequently referred to as "the clarification statement", the respondent addressed the tribunal as follows: -

> "Mr. Charleton: I wonder if possible could I say something first. By reason of the way I get to work, which is usually on foot, I don't normally hear the very excellent programme, Morning Ireland. But, however, a tape of it was drawn to my attention this morning, particularly concerning Chief Superintendent Terry McGinn, who was, Sir, the garda liaison officer to the tribunal and fulfilled that post with distinction for some three years prior to being promoted to Chief Superintendent and given the responsibility of running the Donegal Division.
>
> Sir, it may be an error, I do not know, but apparently during the course of a reconstruction of the evidence of Detective Garda John Dooley, as examined by myself, some substantial portions of the transcript were read out. Whereas I appreciate, Sir, that it is necessary of course that these matters be truncated and that a transcript edit has to end somewhere as well as beginning somewhere, the manner in which it ended concerning Chief Superintendent McGinn was particularly unfortunate, and it seems to me, on listening to the tape, that a deeply unpleasant situation has been created, perhaps inadvertently, by the makers of that programme. In a section of the recreated transcript dealing with the manner in which the witness, Detective Garda John Dooley, came about to a position whereby he was determined to tell the truth, he first of all spoke about the support he

received from Chief Superintendent John Manley and then, having been asked as to why, given that he had made a number of false statements in his role as a member of An Garda Síochána, did he not go to someone in authority, he mentioned that he had indeed gone to then Superintendent Terry McGinn.

Sir, If I can read out the portion of the transcript where the edit ends and indicate why it seems to me that a deeply unfortunate and unpleasant impression has been created, I think, Sir, you will realise why that is so. A question was asked as follows:

> 'Q. Would that be typical of Chief Superintendent Manley and his attitude to things?
> A. Oh it would, yes. I told my own Superintendent as well with the details of what was involved.
> Q. Who would that be?
> A. That was Superintendent McGinn, she is now Chief Superintendent McGinn.
> Q. Yes, that's Terry McGinn?
> A. Yes.
> Q. Who would be the tribunal's liaison officer from the past?
> A. Yes. I had a story to tell her but I didn't tell the details to her. I didn't think she wanted to hear it. I was so upset at the time.'

That is the point at which the edited transcript ended, creating the impression therefore that perhaps Chief Superintendent McGinn had no interest either in the truth or in assisting in any way with the tribunal's business on behalf of the Garda Commissioner in uncovering the truth. But in fact the transcript went on and gave a totally different impression, so that the edit was, as I say, deeply unfortunate. If I can read on, sir, for the next half a page. It continues as follows:

> Q. Can I ask you this: on the basis of friendship you received some support from Chief Superintendent Manley?
> A. Yes.
> Q. From Superintendent, later Chief Superintendent McGinn, did you receive appropriate support?
> A. Very much so.
> Q. Because that's an important matter vis á vis the tribunal looking into this matter?
> A. Very much so.
> Q. Would you tell the tribunal about that then?
> A. Chief Superintendent McGinn visited me regularly in hospital and she told me I was doing the right thing to be honest and to tell the truth. And I never actually told her because Mr. Tansey told me not to tell anybody what was in my statement. I never actually told her the details of my statement nor did she ask me. She got me a back (*sic*) to hospital a few times from Irvinestown

to Dublin. She contacted me regularly by phone and she's extremely supportive. Yes, absolutely.

Q. Has there been someone assigned, apart from Chief Superintendent McGinn, who is clearly a very busy woman, has there been someone assigned by her to offer you necessary support?

A. The Garda Welfare Officer Garda Brendan Flynn. He is excellent also.'

Sir, I end the matter there, normally I wouldn't bother you with a matter such as this, save for the fact that I think [all of us] who have worked at the tribunal have great respect for the assistance that Chief Superintendent McGinn has given and it would indeed be unfair to her, given that she has done her best to assist the tribunal in terms of uncovering the truth, that an attitude be left abroad whereby the people listening to the programme might feel that she simply wasn't interested in Detective Garda Dooley when he came to her and attempted to tell the truth, because in fact the opposite is, on the basis of the transcript, the case.

Chairman: Yes, Mr. Charleton, thank you very much for bringing that to my attention and indeed the attention of the wider public. There is no doubt that if the broadcast terminated at the point that you indicate, it might well convey an entirely wrong impression of what the evidence actually was. I confirm that the evidence did go on to identify how supportive Chief Superintendent McGinn was to Garda Dooley. Hopefully, though obviously we have no control over these things, hopefully the record might well be corrected and set right, because it would be quite wrong if anybody should be left with the idea that Chief Superintendent McGinn was not extremely helpful to the tribunal in the carrying out of its work. Thank you very much."

10. C.S. McGinn was a witness at the Disclosures Tribunal to whom she provided a detailed statement. Her oral evidence to the tribunal commenced on the 6th October, 2017 and she was cross-examined for a number of days by counsel for the appellant. During the course of that cross-examination on the 9th October, 2017, the following exchange took place:

"Q. Now, you mentioned on Friday that you – your first direct involvement with Donegal, in fact, was with the Morris Tribunal?

A. Yes, that's correct.

Q. You were that the liaison – and, in fact, I think you were praised in the Morris Tribunal Report for your cooperation with the tribunal, isn't that correct?

A. Yes, that's correct.

Q. I think, therefore, in terms of that, I take it that you liaised with the tribunal directly in respect of any evidential matters that needed to be sorted out through Garda Headquarters, is that correct?

A. My purpose was as tribunal liaison officer, which I was appointed by the Garda Commissioner at the time because I had no involvement in Donegal prior to that, and I was a newly-promoted Superintendent that had been assigned to the Division and my role was to facilitate, you know, not the evidence but the queries from the tribunal to Garda Headquarters and to follow up on any inquiries that were outstanding in terms of notifying people that they should be in attendance because they hadn't got the correspondence or following up etc. That was my role.

Q. That required very close cooperation with the tribunal on your part?

A. I was completely independently (*sic*) to the tribunal.

Q. I appreciate you were independent.

A. My role was just as a liaison to the flow of information between the two organisations – the tribunal and An Garda Síochána."

Correspondence prior to proceedings

11. Following upon these matters coming to the attention of the appellant, his solicitors wrote on the 19th October, 2018 to the respondent saying: -

"As the tribunal is aware the actions of Chief Superintendent Terry McGinn were central to the issues before the tribunal in respect of Module (N) and the steps taken by An Garda Síochána. Further, as you are aware, insofar as the tribunal was presented with a summary of relevant events from the perspective of An Garda Síochána this summary was formulated in a statement to the tribunal from Chief Superintendent Terry McGinn. You will be aware that at the time we took issue on our client's behalf regarding the approach being taken and the apparent attitude of the tribunal to our client.

Hearings in respect of our client's Module(s) commenced on day 19 of the tribunal (18th September, 2017). On day 33 (6th October, 2017), Chief Superintendent McGinn commenced evidence and revealed that she had acted as garda liaison to the Morris Tribunal from 2002 to 2005. Her precise evidence was:

> '*I was assigned by the Garda Commissioner at that time, because I was new into the Division, to be the liaison officer to the Morris Tribunal.*"

She was then questioned by counsel for the tribunal as follows: "*So you have particular experience of the way tribunals work*". Chief Superintendent McGinn's response was "*I have*". There was no further questioning or explanation by counsel for the tribunal of the nature and extent of Chief Superintendent McGinn's involvement with the Morris Tribunal or in relation to her interaction with the chairman or legal team in that tribunal.

Over the course of the weekend of the 7th and 8th of October, 2017, a reading of the Morris Tribunal Report revealed to us that Chief Superintendent McGinn had been praised by the chairman of that tribunal for her assistance to the tribunal."

12. The letter went on to quote the exchange above referred to and continued: -

> "On the assertion of complete independence from the tribunal, the questioning relating to the closeness of the working relationship was not pursued further. You will no doubt appreciate Sir, that those of us who have not worked on a tribunal legal team could have no knowledge of the nature or extent of interaction between members of a tribunal legal team and a 'garda liaison'.
>
> We have reviewed the transcripts and there is no further discussion of the nature of Chief Superintendent McGinn's involvement with the Morris Tribunal and its legal teams. There is discussion on occasion of the knowledge which she ought to have had in relation to the outcome of the report from the Morris Tribunal but nothing dealing with her interaction with the Morris Tribunal.
>
> In the second interim report, which is unrelenting in its criticism of our client, the following is stated of and about Chief Superintendent McGinn. She is described as '*a determined officer who took decisions*". It is said that "*her attitude is admirable*". The report states "*there is not the slightest evidence that she is capable of even contemplating any malicious action against any one of her subordinates*". There is an extended paragraph about her kindness and compassion to our client and reference to the cross-examination of her on our client's behalf as "*unkind*". The report refers to her "*distinguished career*". She is described as a "*witness of truth*". Her testimony is described as "*eloquent*". There is no mention of Chief Superintendent McGinn's role as garda liaison to the Morris Tribunal albeit that the report of that tribunal is frequently mentioned.
>
> There is no mention of Chief Superintendent McGinn's previous role as Garda Liaison in the third interim report though lavish praise is again heaped on the management of the Donegal Division.
>
> This Sir is therefore where matters stood as of Thursday last the 11th of October 2018. We had no knowledge of the extent of the interaction between the Morris Tribunal legal team and then Superintendent Terry McGinn. When questioned about same she simply asserted her "*independence*". You will, of course, appreciate that such questions are relevant in view of the fact that you Sir were a member of the counsel team to the Morris Tribunal.
>
> By coincidence on the same day as the publication of the third interim report the following newspaper article from 2006 was brought to our attention."

13. The letter goes on to quote the two newspaper articles from the Irish Times on the 30th and 31st March, 2006 dealing with the clarification statement to the Morris Tribunal. The letter continued: -

> "Sir, what is clear from these articles is that then Superintendent Terry McGinn had worked closely with the tribunal and that you Sir felt it appropriate to correct a

broadcast on the radio as it might have given an "*unfair*" impression of her. You also expressed a view as to the assistance that she had given to the tribunal and a further view as to her interest in the truth. Moreover, it is clear that the application was not to correct the record before that tribunal but simply to correct a misleading impression of proceedings that had been given by "Morning Ireland".

At the time of these events, Superintendent Terry McGinn was no longer garda liaison to the tribunal. She would have had ample recourse to have the record corrected directly through RTE or before the tribunal by counsel acting on behalf of An Garda Síochána. This is not what occurred and from what did, in fact, occur it would appear that you, as counsel for the tribunal felt it was your role to defend her integrity before the nation.

In the circumstances, it would appear to us that there was a prior involvement between the chairman of this tribunal and Chief Superintendent McGinn, which ought to have been disclosed. No attempt was made to disclose it in counsel's opening statement, during the course of the hearing of the evidence or in any of the interim reports. This prior involvement (and indeed the failure to disclose it) gives rise to a risk of bias, either actual or apparent, real or objective, and at the very least our client, and indeed the Government and the Oireachtas, ought to have been advised of it prior to embarking on the hearings. Had our client knowledge of the prior involvement and of its nature our client would immediately have called upon you to recuse yourself from any further dealings in relation to our client's modules.

It would appear to us that in all the circumstances, the only appropriate steps are:

(a) For you to formally withdraw in its entirety your second interim report;
(b) To withdraw and remove all references to our client and his module from your third interim report;
(c) To remove any online or other publication of same;
(d) To recuse yourself from any further dealings in relation to our client (either in relation to costs or otherwise), and;
(e) To formally acknowledge the circumstances giving rise to those steps.

We, of course, remain open to any alternatives which you might propose in relation to remedying this unfortunate situation and await your reply within ten days of the date hereof.

In default of any adequate resolution, our client reserves the right to apply to the courts without further notice and rely on this letter, if necessary, in respect of any costs of such an application."

14. This letter was replied to by Ms. Elizabeth Mullen, the solicitor to the Disclosures Tribunal, on the 22nd October, 2018. She wrote: -

"I have drawn the attention of the chairman of the tribunal to your letter dated 19 October 2018. The tribunal chairman has asked me to reply. Despite the fact that the letter is written to the chairman personally, it is presumed that it is based on instructions and that ethically you feel able to promote what is alleged in it. A few brief comments are required in reply.

Prior to and during the tribunal it was generally known and indeed a matter of public record quite often referenced in testimony and in submissions, that the chairman was lead counsel to the Morris Tribunal from 2002 until his appointment to the High Court in 2006. As such, he had professional interactions with counsel, solicitors, witnesses and liaison officers from any agencies represented at the tribunal. As pointed out in the evidence of Chief Superintendent McGinn before this tribunal, she had acted as liaison officer and her role was thus in relation to the flow of information between the tribunal and An Garda Síochána and was independent from the tribunal.

All the above facts were generally known, but more particularly known to you, your counsel and your client. Indeed her role as liaison officer to the Morris Tribunal was explored by your counsel when Chief Superintendent McGinn was giving evidence to this tribunal. It therefore appears that the sole basis on which you allege bias against the chairman arises out of an application he made as lead counsel to correct an erroneous report of the proceedings at the Morris Tribunal that had caused disquiet as to its accuracy. The chairman, as a matter of fact, has no recollection of this application.

Such applications are common and indeed have been made and acceded to during the currency of this tribunal. Is counsel moving the application or indeed the chairman to be accused of bias in favour of a witness or party who has justifiably had an issue with media reports or some other inaccuracy and has had the true position ventilated and corrected in public?

In the circumstances, your proposal that the tribunal take the steps outlined in your letter is absurd and repugnant to the tribunal's duty to the Oireachtas and the people of Ireland."

The Proceedings

15. On the 12th November, 2018, the High Court granted leave to the appellant to commence judicial review proceedings seeking various orders of the kind alluded to in the above correspondence including orders of *certiorari* quashing the findings in the second interim report in its entirety, and the third interim report insofar as it related to the appellant, together with ancillary reliefs. In his statement of grounds, the appellant pleads that the protected disclosure made by him, which was the subject matter of investigation by the Disclosures Tribunal, identified Chief Superintendent McGinn as a key witness and made various allegations against her which questioned her *bona fides* and motivation in relation to the steps she directed be taken concerning the appellant.

16. The statement of grounds alleges that the links between the respondent and C.S. McGinn ought to have been disclosed and were such that the respondent was not sufficiently impartial or independent to fairly assess the issues between C.S. McGinn and the appellant. It is alleged that the determination of these issues required a determination of the truth or accuracy of the evidence of C.S. McGinn. The grounds allege that the facts pleaded give rise to a presumption of bias and that a reasonable person would apprehend that the respondent was biased and not impartial or independent. The appellant specifically pleaded at para. 41.11 of the statement of grounds that he did not know and could not properly make an allegation of bias until evidence of "previous dealings" came to his attention on the 11th October, 2018.

17. The statement of grounds was supported by a verifying affidavit of the appellant. In it, he avers that neither he nor his legal team had any understanding of what the role of "garda liaison to the Morris Tribunal" involved. Although he was aware that the respondent had been lead counsel to the Morris Tribunal, he had no knowledge that C.S. McGinn was the garda liaison officer to that tribunal. He only became aware of that when she gave evidence to the Disclosures Tribunal in October 2017. He says he was upset to learn of the respondent's pre-existing interactions and view of C.S. McGinn. He says that the actions of the respondent during the Morris Tribunal gives rise to bias or the apprehension or perception of bias. He says he has no faith in the independence or impartiality of the respondent in carrying out his functions as sole member of the Disclosures Tribunal affecting the appellant.

18. In his statement of opposition, the respondent pleads that the proceedings are misconceived as the matters alleged in the statement of grounds could not possibly meet the test for actual or apparent bias. He denies that he "took it upon himself" to remedy the wrong "which he felt had been done to Chief Superintendent McGinn". In fact it was the solicitor for the Commissioner of An Garda Síochána who contacted the tribunal's legal team and the tape of the broadcast was listened to by counsel for the tribunal and counsel for the Garda Commissioner after which the respondent agreed to consult with the chairman to clarify the matter on the record. The respondent pleads that he was not acting to protect the good name of C.S. McGinn of his own motion but rather in his professional capacity as senior counsel to the Morris Tribunal and pursuant to the approval of the tribunal chairman. The respondent pleads further that he was not in a position to disclose the clarification of the 30th March, 2006 in circumstances where he did not even remember it. It is pleaded that the appellant was at all times aware that the respondent acted as senior counsel to the Morris Tribunal and that C.S. McGinn acted as garda liaison at that tribunal. Despite that, the appellant did not raise any concerns and accordingly acquiesced in the respondent dealing with the matter or alternatively is estopped from challenging the findings.

The Affidavits filed on behalf of the Respondent

19. The statement of opposition is verified by a formal affidavit of Peter Kavanagh, registrar to the Disclosures Tribunal. A further affidavit was sworn by Philip Barnes, Assistant Principal (acting) in the Department of Justice and Equality. Mr. Barnes is currently the

office manager of the Protected Disclosures Tribunal and previously held the same position at the Morris Tribunal. He held that position at the Morris Tribunal from the 26th August, 2002 until it concluded. He detailed the functions and responsibilities that the role entailed in both tribunals and avers that he is very familiar with the day to day running of tribunals and the roles occupied by individuals working there. He attended most hearings in respect of both tribunals.

20. He avers that he makes the affidavit from facts within his own knowledge and where otherwise appears to the best of his knowledge, information and belief. He makes the affidavit on behalf of the respondent and with his knowledge and consent. Given the matter as referred to in the statement of grounds, he sets out in detail the nature of the association between the respondent and C.S. McGinn at the Morris Tribunal. At its commencement, Judge Morris requested the Garda Commissioner to appoint a garda liaison officer to the tribunal who had no involvement with the Donegal Division for the purpose of acting as a conduit for the exchange of information, to assist with requests from the tribunal for documentation, exhibits, inspection facilities and coordination with garda witnesses and routine enquiries.

21. Mr. Barnes avers that any request for assistance from the tribunal would be made by the solicitor to the tribunal to the solicitor for the Garda Commissioner who would pass it on to the liaison officer. If any issue arose, this was raised either through the solicitors or on a counsel to counsel basis. C.S. McGinn attended at the tribunal hearings on a regular basis to ensure requests made by the tribunal of An Garda Síochána were attended to promptly and to assist both the tribunal and garda legal teams in locating material that was required. Consequently, there was a professional interaction between Superintendent McGinn and the solicitors at the tribunal and to a very much lesser extent counsel to the tribunal. There was simply no cause for any regular interaction between counsel for the tribunal and the garda liaison officer. At para. 12 of his affidavit, Mr. Barnes avers: -

> "I say and believe that the respondent and Superintendent McGinn rarely spoke to one another and if they ever did, the interaction between them was brief and professional. No personal relationship existed between the parties and the relationship between them is best described as nothing more than a passing professional acquaintance."

22. Mr. Barnes goes on to deal with how the clarification statement arose and the involvement of Garda John Dooley, whom he describes as a significant witness to the Morris Tribunal. Garda Dooley had witnessed mistreatment of a suspect in garda custody. He refers further in that regard to the affidavit of Mary Cummins, the solicitor for the Garda Commissioner at the Morris Tribunal. He notes that the solicitor to the Disclosures Tribunal had already advised the appellant's solicitor in correspondence that the respondent had no recollection of the application on the 30th March, 2006 which he says is unsurprising, given that it happened over twelve years ago, occurred in a professional

context and took place in the same manner as many other professional exchanges during the Morris Tribunal.

23. With regard to the respondent's application to the tribunal on the 30th March, 2006, Mr. Barnes avers that before any such application was made, the practice was that it would always be drawn to the attention of the chairman who would then give permission, or not, for it to be mentioned to him in the public forum. The practice was for two lawyers to consult with him at all times. Consequently, he avers at para. 14: -

> "Accordingly, when Mr. Charleton mentioned the matter of the broadcast to the tribunal chairman publicly on the 30th March, 2006, I believe he did so entirely in his professional role as counsel to the tribunal and with the prior knowledge and consent of the chairman and at least one other member of the tribunal legal team counsel and, most probably, all of them."

24. He points out that the application for the correction came from the Garda Commissioner, not the tribunal legal team, and corrections of this nature were not unusual and were made in the interests of fairness and people's entitlement to their good name and not on the basis of partisanship or any association between anybody.

25. Mr. Barnes describes the physical layout of the premises where the Morris Tribunal was located in Belfield Office Park in Dublin. The tribunal was located in a large office block in this business park with the tribunal hearing room and main reception areas on the ground floor. The first floor was occupied by tribunal administrative staff, the second, third and fourth floors by other bodies and the fifth floor by the tribunal legal team, registrar and chairman. Access to the second and fifth floor was available only to those who worked there.

26. Other persons and groups occupied different offices on the ground floor of the building including the garda liaison, tribunal witnesses, stenographers, media personnel and other legal teams. Mr. Barnes notes that the first report of the Morris Tribunal was published in July of 2004 containing an acknowledgment of the assistance provided by Superintendent McGinn to the Tribunal at p. 24 chap. 1: -

> "The tribunal directly sought the assistance of the Commissioner of An Garda Síochána, the Department of Justice and a number of foreign police services. The tribunal is happy to report that it received cooperation from all of these bodies. In particular, the Garda Commissioner appointed Superintendent Terry McGinn to liaise with the tribunal and to assist in the furnishing of all relevant documents and information which might be of assistance to the tribunal in pursuing its enquiries. Everything which the tribunal asked for through Superintendent McGinn was furnished promptly. Every enquiry that was made by the tribunal resulted in proper efforts being made, both within Garda Headquarters and in relevant Garda divisions, to uncover relevant information, insofar as that was possible."

27. The final affidavit sworn on behalf of the respondent is that of Mary Cummins, Deputy Assistant Chief State Solicitor in the Office of the Chief State Solicitor. Ms. Cummins avers that she acted as solicitor for the Commissioner of An Garda Síochána at the Morris Tribunal. She notes that counsel for the tribunal comprised Peter Charleton SC, Paul McDermott SC and Anthony Barr BL. She recalls the Morning Ireland programme that had been broadcast on the 30th March, 2006 and in particular the reconstruction of a portion of the evidence given on the previous day by Garda John Dooley. Shortly after the programme was broadcast, she was contacted by the Garda Commissioner's office and instructed to raise the matter with the tribunal.

28. The Commissioner was concerned about the impression created by the broadcast to the effect that "Chief Superintendent McGinn had no interest in either the truth or assisting in any way with the tribunal's business on behalf of the Garda Commissioner". The Commissioner required the matter clarified on the record at the earliest possible opportunity, as to fail to do so could leave the public under the misapprehension that An Garda Síochána and Chief Superintendent McGinn were not interested in uncovering the truth, the subject of the terms of reference of the Morris Tribunal.

29. She says that Garda Dooley had witnessed garda mistreatment of a female suspect and had informed a superior officer about it. C.S. McGinn was Garda Dooley's Chief Superintendent at the time and was supporting Garda Dooley in his decision to become a whistle-blower. He gave evidence to the tribunal on the 28th and 29th March, 2006 in which he emphasised the kindness shown to him on a personal level by C.S. McGinn and that she had no role in processing his evidence to the tribunal. C.S. McGinn was not a witness to the Morris Tribunal and had no involvement in the matters under investigation.

30. Ms. Cummins states that the Garda Commissioner arranged for a tape of the programme to be delivered to her at her offices in the Clonskeagh office block and she instructed her counsel to approach the tribunal's counsel to raise the concerns of the Commissioner. Counsel for the tribunal and counsel for the Commissioner listened to the tape following which counsel for the tribunal agreed to clarify the matter on the record of the tribunal. This resulted in the clarification already referred to. Ms. Cummins observes that clarifications on the record were not unusual throughout the currency of the Morris Tribunal.

31. These affidavits sworn on behalf of the respondent were replied to in a further affidavit of the appellant. In this, the appellant states that the fact that there has been no averment as to the true nature and extent of interaction between the respondent and C.S. McGinn working in close proximity over the course of three years, it is entirely reasonable to form an apprehension of bias on the part of the respondent. He says it is clear from all the facts that the respondent worked alongside or in conjunction with C.S. McGinn for at least three years, that he had formed an opinion of her as to her honesty and integrity and to her various qualities and he found himself able to publicly express that opinion of her even after she ceased working with the Morris Tribunal.

32. He complains of the fact that no person capable of averring to the facts contained in the statement of opposition has sworn an affidavit. He again refers to the fact that he had no knowledge of the function that C.S. McGinn carried out at the Morris Tribunal or what the function of a garda liaison was. He says that it is apparent that the respondent had almost daily contact and involvement with C.S. McGinn until her promotion in 2005. He repeats his previous averment that the respondent ought to have disclosed all of his interactions with C.S. McGinn and had he done so, the appellant would have applied for him to recuse himself. He complains about the means of knowledge of both Ms. Cummins and Mr. Barnes. He says that Mr. Barnes' affidavit is mostly hearsay and mostly inadmissible.

Judgment of the High Court

33. At the outset, the trial judge noted that although the letter before action and the statement of grounds appeared to include a claim of actual bias, the case was advanced before the High Court on the sole basis of objective bias. The judge set out the relevant background facts as I have noted them above. She also canvassed the pleadings and affidavits, noting the appellant's complaint that the respondent did not swear an affidavit, which was contentious. The judge went on to deal with the submissions of the parties which appear in large measure to have been similar to those arising during the hearing of this appeal and are considered further below. In her analysis and determination, the trial judge held that the test for objective bias posited by Denham J. in *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 IR 412 was the relevant test to apply to the facts of this case. Although that case concerned bias on the part of a judge, it was equally applicable in circumstances where, as here, a judge was performing a quasi-judicial role. The test was applied to a tribunal of inquiry in *O'Callaghan v. Mahon* [2008] 2 IR 514.

34. The trial judge considered that some relevance should be attached to the fact that the respondent is a judge and on appointment had made a declaration to administer justice fairly. With regard to the respondent swearing an affidavit, the trial judge was of the view that this was inappropriate in the light of a number of authorities to which she referred. She rejected the appellant's criticisms of the affidavits sworn on behalf of the respondent. She found that the criticism of the respondent in failing to make disclosure by swearing an affidavit was misplaced in circumstances where that disclosure was contained in the statement of opposition verified by the registrar of the Disclosures Tribunal.

35. The judge then turned to deal with the issue of objective bias. She found it surprising that the applicant made the claim at all, given that C.S. McGinn's involvement in the Morris Tribunal was clear from at least the commencement of her evidence before the Disclosures Tribunal. If her role as garda liaison officer was truly a cause for concern, the judge observed that it was entirely unclear why the appellant waited so long to make the claim. In other areas, the appellant had no difficulty in making very detailed complaints about any perceived unfairness to him.

36. She inferred that these facts did not raise in the appellant an apprehension of bias. Importantly, she held that it was abundantly clear that a reasonable person apprised of

the facts would not have a reasonable apprehension of bias. Contrary to what was asserted by the appellant, Superintendent McGinn and the respondent did not work together and alongside each other for a period of thirty months and this suggestion was entirely misplaced. The court said (at para. 117): -

> "It is also important to identify what her role was not. Her role was not that of a witness. Her role was not that of a client of the respondent. Her role was not that of a party to the proceedings in which the respondent was acting. Her role was not akin to being an employee of a client of the respondent. It is also of relevance that the contact at the Morris Tribunal had been over twelve years prior to the present tribunal the subject matter of these proceedings."

37. The court was of the view that there was no basis for doubting the position as set out in the statement of opposition duly verified by the registrar to the Disclosures Tribunal. The suggestion that the respondent interrupted the proceedings of the Morris Tribunal without prior notice to the chairman was not credible. She said that the height of any positive impression was that the respondent was stating, in his capacity as lead counsel to the Morris Tribunal, that C.S. McGinn had done her best to assist the tribunal in terms of uncovering the truth and that it was not correct to say that she was not interested when a named garda came to her and attempted to tell the truth because "on the basis of the transcript" the opposite was in fact the case. This statement had to be viewed in the context of the role of C.S. McGinn at the Morris Tribunal which was very specific.

38. The respondent did not state that her evidence had been truthful or that she was a truthful person in general. Her *bona fides* was not the subject of the statement. The clarification had arisen in a very particular context where the public may have been left under a misapprehension that a particular senior garda had essentially discouraged a garda from telling the truth. The clarification or correction was one in terms of the image or impression that had been left on the public of An Garda Síochána itself. It was unsurprising that the respondent did not recall the clarification given that it had taken place more than eleven years previously.

39. She placed emphasis on the nature of the role of senior counsel and their interactions with clients, witnesses and professional persons such as members of An Garda Síochána. The working relationship here was not any closer than the barrister/client relationships at issue in *Bula* which were held not to give rise to apparent bias. On the contrary, the relationship was of a more minimal degree. There was no clear or cogent link between the association and the capacity to influence the decision. Taking all these matters into account, the trial judge was of the view that no reasonable person could have a reasonable apprehension of bias as regards the fairness of the respondent dealing with any issue that would require an assessment of the truth of C.S. McGinn's evidence before him. She was satisfied that the appellant's claim of objective bias must be rejected.

40. Having made that finding, the trial judge said that it was, strictly speaking, unnecessary to go further and examine whether the prior relationship could have any relevance as to whether the appellant had received a fair hearing. She nonetheless went on to consider

the facts as they arose in the context of C.S. McGinn's involvement in the complaints made by Ms. Simms concerning the appellant. She said it was for the appellant to show that the assessment of C.S. McGinn's evidence was relevant to the fair issue to be tried and he had failed to do so. In this respect, the trial judge said (at para. 136): -

> "[The appellant] has not demonstrated even an arguable case, that Chief Superintendent McGinn was acting in any way improperly by directing another member of An Garda Síochána to take a statement when she had a report made to her of an argument between the applicant and his partner. Furthermore, he has not in any way made an argument to this court that this direction influenced in any way that could even remotely be seen as improper, the actual manner of the taking of the statement by the member of An Garda Síochána. Furthermore, he has not placed before this court, any material, that would give rise to an arguable belief that faced with the statements before her, that Chief Superintendent McGinn's convening of a meeting to discuss steps including referral to the HSE/Tusla (and the subsequent referral by another member) was in any way improper, irrational, unreasonable, wrong in law, biased, discriminatory or unfair.
>
> 137. All that the applicant has done is himself put forward bald assertions that Chief Superintendent McGinn was a key witness or somehow central or at least of importance to the issues before the Disclosures Tribunal. He has not however truly put the court in a position to make any such determination."

41. In summarising this aspect of the appellant's claim, the judge said (at para. 138): -

> "In short, the applicant has failed to demonstrate that in relation to the fair issue to be tried, Chief Superintendent McGinn's evidence, and in particular the evaluation of her evidence by the respondent, that he would not receive a fair hearing of the issue, namely the contacts between the members of An Garda Síochána and the HSE/Tusla in relation to him. In his replying submissions the applicant laid great emphasis on the stake that Chief Superintendent McGinn had in the outcome of the Disclosures Tribunal as head of the Donegal Division and that it was not simply her evaluation as a witness that was at issue. In my view any such stake, if there be one merely arising from her position as head, is so tangential to the real issue before the Disclosures Tribunal that it can be dismissed out of hand."

42. The trial judge expressed her final conclusion in the following terms (at para. 140): -

> "In the present case, a comment made by a respondent in a highly particular situation eleven years previously when he was acting as senior counsel to a different tribunal, to the effect that a Chief Superintendent had done her best to assist that tribunal in finding the truth in her capacity as a liaison officer, has been elevated by the applicant as a ground for claiming objective bias, but this does not bear rational scrutiny. No reasonable person with knowledge of all relevant facts could have a reasonable apprehension that as regards the matters that were

investigated in the second interim and third interim reports of the Disclosures Tribunal that this applicant did not have a fair hearing."

43. The court accordingly rejected the application for judicial review.

Grounds of Appeal

44. The first ground of appeal relates to what are said to be a number of errors of fact made by the trial judge. These include the finding that C.S. McGinn was not directly involved in the reports concerning the applicant and his partner. The involvement of C.S. McGinn in the subject matter of the appellant's protected disclosures inquired into by the Disclosures Tribunal was a matter of some controversy between the parties, both in the High Court and again in this court. It was contended on behalf of the respondent that there was in fact no issue involving C.S. McGinn which required any determination by him of the veracity of her evidence. In written replying submissions by the appellant to the respondent's replying submissions in the High Court, the following appeared: -

> "The second interim report accepts that Chief Superintendent McGinn convened the meeting whereby it was determined what steps if any should be taken arising from that statement. Amongst those steps was the referral to HSE/Tusla the express subject of Module (N)."

45. This statement was disputed by counsel for the respondent, in particular because it was contrary to the chronology appended to the second interim report of the Disclosures Tribunal and as a result, the trial judge directed the parties to agree a note as to where in the second interim report the issue was dealt with. To obviate the necessity for this, the parties instead agreed a form of wording contained in an "Agreed Note" signed by leading counsel for both parties in the following terms: -

> "(1) a meeting of senior officers took place on 8th October, 2013 in Chief Superintendent McGinn's office at Letterkenny Garda Station;
>
> (2) the meeting was convened by Chief Superintendent McGinn in order to determine what steps were to be taken in consequence of the statement which had been made by Marisa Simms, the applicant's partner. The following were present at that meeting, Chief Superintendent McGinn, Superintendent McGovern, Superintendent Finan, Inspector Sheridan, Detective Inspector O'Donnell and Garda Campbell;
>
> (3) the question of a referral to the HSE was discussed as part of the meeting;
>
> (4) a HSE referral was made by Superintendent McGovern on 10th October, 2013."

46. The grounds of appeal complain that the trial judge failed to have regard to this agreed note in her judgment. Other alleged factual errors raised in the Notice of Appeal are that the failure on the part of the respondent to swear an affidavit fell within the "usual convention" that members of the judiciary do not swear affidavits. Again, complaint is made that the trial judge relied on the affidavit of Mr. Barnes which was said to be

hearsay, that the appellant had made bald assertions concerning C.S. McGinn's role and that the unchallenged averments of the applicant were not evidence. The finding that C.S. McGinn's evidence did not require to be tested by the respondent is also said to be an error of fact.

47. Alleged errors of law are also relied upon including, again, the admission of what is said to be hearsay evidence by the trial judge. Complaint is also made of the finding that the respondent's alleged failure to disclose relevant connections could not give rise to an apprehension of bias. It is further pleaded that the trial judge fell into error in holding that the appellant was obliged to prove that C.S. McGinn would have benefitted from any bias and further failing to properly apply the legal test for objective bias.

48. In addition to alleged errors of fact and law made by the trial judge, a number of separate grounds of appeal are raised. These include what is said to be an error in principle by the trial judge inferring that the appellant's failure to launch proceedings after he first learned of C.S. McGinn's involvement in the Morris Tribunal infers that those facts did not raise an apprehension of bias on the part of the appellant or a reasonable person. This is said to be contrary to the position of the Superior Courts that bias must not be raised on mere conjecture. The trial judge was unfair to criticise the appellant for not cross-examining Mr. Barnes as to his means of knowledge when this was the subject of legal submissions. Different standards were applied to the admissibility and evidence of the parties. The trial judge further erred in failing "from a common sense perspective" to consider that C.S. McGinn had "a stake in matters" to be considered by the respondent at the Disclosures Tribunal. The trial judge was in error in holding that because the respondent is a judge, that in some way eliminates the potential for the reasonable person apprehending bias on his part and unreasonably emphasised the nature and effect of the judicial oath.

The Arguments

49. I think it is fair to say that the arguments advanced by both sides on the hearing of this appeal were broadly similar to those advanced in the High Court. The appellant lays emphasis on the role of C.S. McGinn before the Disclosures Tribunal and the fact that she had a stake in the outcome. The appellant submits that her actions fell to be considered by the respondent. Alternatively, it is argued that even if C.S. McGinn had no personal stake, her evidence and conduct fell to be evaluated by the respondent. Various extracts of the respondent's reports are referred to which deal with C.S. McGinn.

50. Having regard to Order 40 rule 4 of the Rules of the Superior Courts, the appellant submits that none of the deponents on behalf of the respondent can give any evidence of the nature of the engagement between the respondent and C.S. McGinn at the Morris Tribunal or of the view which he has said to have formed of her at that tribunal. Further, it is said that the extent to which he retained that view is not the subject of any admissible evidence. There was a duty of candour on the respondent to disclose these prior links to C.S. McGinn and reliance is placed on *R. (Huddleston) v. Lancashire County Council* [1986] 2 All ER 941 and *Murtagh v. Kilraine* [2017] IEHC 384. *Huddleston* was approved by the Supreme Court in *RAS Medical Limited v. Royal College of Surgeons in Ireland* [2019] IESC 4.

51. The appellant contends that in view of the evidential deficit (as it is described by him), the court should infer that the case made by the appellant is correct, namely, that the respondent and C.S. McGinn worked alongside each other for a protracted period of time, that he formed a strong opinion of her as reflected in the clarification statement, that that opinion had not changed and gave rise to an apprehension of bias. The appellant relies on a number of the leading cases on bias including *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 IR 412, *Goode Concrete v. CRH Plc and Ors.* [2015] IESC 70 and *O'Callaghan v. Mahon* [2008] 2 IR 514. Reliance is also placed on *Keegan v. District Judge Kilraine* [2011] IEHC 56 and *Kenny v. Trinity College* [2007] IESC 42.

52. On the issue of acquiescence or waiver, the appellant accepts that he was aware that the respondent was counsel to the Morris Tribunal and also that he became aware during her evidence to the Disclosures Tribunal that C.S. McGinn was the garda liaison to the Morris Tribunal. However, he says that he had no knowledge of what this meant or implied. This only became evident when he discovered the newspaper articles much later. An ordinary member of the public could not be expected to understand what a garda liaison to the tribunal meant. Consequently there could be no acquiescence where the full facts were not known.

53. The decision of the Supreme Court in *Shatter v. Guerin* [2019] IESC 9 makes clear that an allegation in bias ought not be made without a sufficient factual basis. Accordingly, the trial judge was wrong to have regard to the fact that the appellant did not bring an action in bias once he knew of C.S. McGinn's involvement in the Morris Tribunal. Reliance is placed on the judgment of the Court of Appeal of England and Wales in *Jones v. DAS Legal Expenses* [2003] EWCA Civ. 1071. In any event, the appellant submits that it was not for him to establish the nature of the relationship between the respondent and C.S. McGinn at the Morris Tribunal but rather a matter for the respondent to have disclosed that before investigating matters concerning the appellant.

54. Importantly, the appellant submits that what gives rise to the apprehension of bias is not the making of the application before the Morris Tribunal on 30 March 2006 *per se*, but rather that the reasonable apprehension arises from the words used by the respondent in making the application, together with the prior relationship disclosed by those words. Although therefore, the appellant in his written submissions appears to say that the allegation of bias in this case stems from the words used by the respondent in the clarification statement coupled with the prior relationship, in the conclusion to his written submissions he appears to suggest that C.S. McGinn's role as garda liaison is sufficient in itself to raise a reasonable apprehension of bias, a point considered further below.

55. The respondent in his replying submissions contends that the appellant's case does not withstand any cogent analysis. It is based on the assertion of a close relationship which did not exist and criticism of the respondent for failing to disclose a non-existent relationship. There was no evidence before the High Court of any form of a day to day working relationship let alone any relationship that could give rise to objective bias. As regards an alleged duty of candour, the respondent held no information that required to

be disclosed because there were no circumstances that could give rise to a reasonable apprehension of bias and in any event, the clarification statement had been forgotten by the respondent so could not be disclosed.

56. The respondent relies on broadly the same authorities as referred to by the appellant with particular emphasis on *Bula*, *O'Ceallaigh v. An Bord Altranais* [2009] IEHC 470 and *O'Reilly v. The Commissioner of An Garda Síochána* [2018] IECA 34. The respondent submits that the conclusion of the High Court was correct that no reasonable person in possession of the facts relating to the connection between C.S. McGinn and the respondent would have had a reasonable apprehension of bias. No cogent or rational links of the kind discussed in Bula arose in this case.

57. The respondent further submits that no issue of bias could arise in circumstances where there was no direct allegation against C.S. McGinn which related to the Disclosures Tribunal's terms of reference. Her evidence did not fall to be evaluated. The respondent cannot have been obliged to disclose a connection which in itself was insufficient to establish objective bias. The burden of proof rests upon the appellant and the respondent cannot be required to disprove something that in any event does not arise, i.e. a relationship capable of giving rise to a perception of bias.

58. With regard to the criticism of the respondent for not swearing an affidavit, reference is made to a number of authorities which emphasise the undesirability of judges swearing affidavits in relation to proceedings which have come before them.

59. With regard to waiver/acquiescence, it is contended on behalf of the respondent that it is settled law that where a decision is challenged on the grounds of bias on the part of the decision maker, the court will not interfere where it appears that the fact or suspicion of bias was present in the mind of the challenging party at the hearing before the tribunal but the point was not taken at the time. Further, the delay in raising it of some thirteen months further disentitles the appellant to relief.

Objective Bias

60. As already noted, both parties place significant reliance on the judgment of the Supreme Court in *Bula Limited and Ors. v. Tara Mines Limited and Ors.* (No. 6) [2000] 4 IR 412. The applicants appealed to the Supreme Court against the judgment and order of the High Court. The appeal was heard and dismissed by a panel of the court comprising Hamilton C.J., Barrington and Keane J.J. The applicants subsequently applied to have the judgment of the Supreme Court set aside on the grounds of objective bias on the part of two members of the court, Barrington J. and Keane J. They alleged that both judges had had prior links with the respondents which gave rise to a perception of bias.

61. As a member of the Bar, Barrington J. had acted for the fifteenth respondent, the Minister for Energy, in two pieces of litigation, one of which involved the Tara respondents and the other the applicants. Prior to his appointment to the bench, Keane J. had advised Tara Mines Limited in a planning matter and was instructed to appear on Tara's behalf in an oral hearing before An Bord Pleanála. In the event, he did not do so as he was appointed

to the High Court in the interim. These facts were alleged by the applicants to give rise to objective bias.

62. The Supreme Court delivered two judgments by Denham and McGuinness J.J. Denham J. set out the facts in some detail, noting that the litigation that had involved Barrington J. occurred some twenty years prior to the hearing complained of by the applicants. A similar time period applied to the involvement of Keane J. The applicants did not allege actual bias on the part of the two judges but relied solely on objective bias. Having analysed a number of authorities, Denham J. said (at p. 439): -

> "Thus, there is well settled Irish law that the test is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair trial of the issues."

63. She elaborated further on this (at p. 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 issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person."

64. On the issue of a judge hearing a case involving a party for whom he had acted as a barrister she said (at p. 445): -

> "Indeed, it was quite rightly accepted by the applicant that the mere fact that a judge when a practicing barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal advisor and client."

65. She referred to a quotation from the Australian case of *Re. Polites* (1991) 173 CLR 78 and said (at p. 445): -

> "I am satisfied that this is a correct analysis of the situation and the approach to be taken in analysing the issue. The links must be cogent and rational. I agree with the analysis of Merkel J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* [1996] 135 ALR 753 where he stated: -
>
> > '55. In my view, as with the cases considering personal, family and financial interests, the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more

than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In the absence of such a link it is difficult to see how the test for disqualification as stated in *Livesey* can be satisfied.'

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

66. Denham J. cited with approval the following passage from the judgment of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union 1999* (4) SA 147 at para. 48: -

> "… The correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, 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, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or previous positions. They must take into account the fact that they have a duty to sit on any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not and will not be impartial."

67. In a concurring judgment, McGuinness J. observed (at p. 510): -

> "This requirement of a 'cogent and rational link' between the judge's past associations and the capacity of those associations 'to influence the decision to be made' seems to me to fulfil the requirement that the applicants' apprehension should be both reasonable and realistic and I respectfully adopt it as a correct analysis test in the present case."

68. The Supreme Court again applied the test posited in *Bula* in *Kenny v. Trinity College Dublin* [2007] IESC 42 where Fennelly J. said (at para. 20): -

> "The hypothetical reasonable person is an independent observer, who is not oversensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias."

69. As these cases show, mere professional contact, even those involving a lawyer/client relationship are in themselves and without more, insufficient to raise an apprehension of bias. The threshold for recusal was considered by this court in *O'Reilly v. Garda Commissioner* [2018] IECA 34 where Irvine J., giving the sole judgment with which the other members of the court agreed, said (at para. 26): -

> "While individual judges, may choose to disclose any connections they may have with potential witnesses or parties they are not obliged to do so unless they consider that the reasonable, objective and informed person would, on being made aware of the relevant facts would reasonably apprehend that the judge would not be minded to adjudicate upon the case in a fair and impartial manner. That is the threshold at which a judge must recuse himself or herself from hearing the proceedings before them. However casual relationships, such as here suggested by Ms. O'Reilly even if there was evidence in support would not reach this threshold. For example, in *Talbot v. Hermitage Golf Club* [2009] IESC 26, Denham J. held that the test of objective bias was not satisfied by the attendance at the same school of judges and lawyers in the case before her."

70. In *O'Callaghan v. Mahon* [2008] 2 IR 514, Fennelly J. held that the principles of objective bias as I have outlined them above apply in the same way to a tribunal of inquiry as to a court of law. The test was again reiterated by Denham C.J. in *Goode Concrete v. CRH Plc.* [2015] 3 IR 493.

71. It is also important to note that in considering whether an apprehension of bias might arise, a relevant factor to be considered is the lapse of time between the event that is said to give rise to the bias and the impugned hearing. This was recognised by Denham J. in *Bula* where she said (at pp. 460-461): -

> "The time factor is an important element in this case, it has two aspects. First, Mr. Donal Barrington SC and Mr. Ronan Keane SC acted for the parties over twenty years ago. The lapse of time since the work done is an important factor distancing judges from a link."

72. So too is the public declaration required by the Constitution of every judge on assuming office to execute that office without fear or favour, affection or ill-will towards any man. That is also a fact of which the reasonable person is deemed to be apprised and as *The President of South Africa* case shows, must weigh in the assessment of the reasonableness of the apprehension. Although the respondent was not acting as a judge at the material time, the tradition and practice of appointing current and former judges as appropriate persons to head up tribunals and commissions of inquiry into issues of public concern springs from the public confidence reposed in judges to act fairly and justly in the

discharge of their duties. It is a tacit acknowledgement that notions of fairness are hard wired into the DNA of every judge.

The Appellant's Case

73. Before considering how these principles are to be applied in this case, it is important to understand precisely how the bias is said to arise. The appellant has variously alleged that C.S. McGinn's role as garda liaison to the Morris Tribunal and/or the clarification statement give rise to an apprehension of bias. The appellant appears to allege that the mere fact of C.S. McGinn's role as garda liaison is in itself sufficient to give rise to an apprehension of bias and although he knew that fact at the latest by October 2017 when she gave evidence, he did not understand what it meant until he discovered the clarification statement some thirteen months later. The appellant relies on this fact to explain why he waited thirteen months to take action.

74. As the trial judge observed, the reason for this delay is not properly explained by the appellant. The High Court noted that the appellant was extremely vigilant in correspondence with the tribunal to complain immediately and at length about any perceived hint of unfairness to him. He relies on *Shatter v. Guerin* as authority for the proposition that care must be taken in raising allegations of bias which should not lightly be made. Mere suspicion is not enough, it is said. The implication therefore, appears to be that although the appellant was suspicious in October 2017, he did not have enough to go on until November 2018.

75. It was only on this latter date, apparently as a result of internet searches carried out by the appellant's legal team, that the clarification statement came to light. When asked in this court what prompted this, counsel for the appellant indicated that it was the lavish praise heaped upon C.S. McGinn in the Disclosure Tribunal's third interim report. This is somewhat difficult to comprehend because the appellant's own letter before action of the 19th October, 2018, as noted above, devotes a full paragraph to identifying the laudatory comments about C.S. McGinn in the second interim report. The same letter notes that over the weekend of the 7th and 8th of October, 2017, a reading of the Morris Tribunal Report revealed that C.S. McGinn had been praised by the chairman for her assistance to that tribunal.

76. If, as now appears to be suggested, there was as of October 2017 a suspicion of bias arising from the appellant learning that C.S. McGinn was garda liaison to the Morris Tribunal, but one that was insufficient to take action, it is very surprising that during the three day cross-examination of C.S. McGinn by counsel for the appellant, the precise nature of her role was not explored in forensic detail. This is sought to be explained by the suggestion that counsel could not go further than he did because his instructions did not justify doing so.

77. I find that explanation difficult to accept. Among the matters the appellant says give rise to an apprehension of bias in the context of C.S. McGinn's role are the facts that, by way

of example, she had an office in the same building as the tribunal and both she and the respondent attended the tribunal on a daily basis. To suggest that the appellant could not have found this out by simply asking C.S. McGinn "Where was your office?" and "How often did you attend?" or even "What did you do?" is scarcely credible. The question also arises of why, if the appellant had a suspicion of bias in October, 2017 as a result of learning of C.S. McGinn's role, the internet trawl was not undertaken until a year later. The information was there to be discovered at any time.

78. The foregoing admits of only two possibilities. Either C.S. McGinn's role as garda liaison to the Morris Tribunal did not raise an apprehension of bias on the part of the appellant, as the trial judge inferred, or alternatively it did but the appellant decided not to act on it at that time, a point to which I will return.

79. It has to be said that the appellant's submissions are somewhat unclear as to how precisely the apparent bias arises. In paragraph 52 of the his written submissions, he sets out a number of matters related to C.S. McGinn's role as liaison which he submits ought to have been disclosed by the respondent. These include the matters I have already referenced above, namely that C.S. McGinn and the respondent had offices in the same building, had worked on a continuous basis at the Morris Tribunal for a period of thirty months and attended almost all the public hearings of that tribunal over that period. If these matters ought to have been disclosed, then the appellant is clearly suggesting that they point to objective bias in themselves. However, in the next paragraph 53, the appellant appears to say that it is the words of the clarification that give rise to bias: -

> "53. The opposition papers state that the respondent had no recollection of the application regarding the 'Morning Ireland' broadcast. They do not state, nor indeed are any of the deponents qualified to state, that the respondent had not formed a positive opinion of Chief Superintendent McGinn and her interest in the truth, such as was expressed by him before the Morris Tribunal. It is that opinion, arising as it did over the course of a working relationship, which gives rise to the apprehension of potential bias and the opposition papers make no effort to resile from that opinion. In other words, the appellant does not contend that the making of the application before the Morris Tribunal gave rise to bias but rather that the words used and the prior relationship disclosed by those words give rise to that reasonable apprehension."

80. One might be forgiven therefore for thinking that the emphasis is on the words used in the clarification statement and those words coupled with the prior relationship give rise to the reasonable apprehension. It follows that the prior "relationship", without more, does not. That however appears to be again contradicted in the conclusion to the appellant's written submissions at paragraph 58 where he says: -

> "In this case the relevant facts are that the respondent and Chief Superintendent McGinn worked together and alongside each other for a period of thirty months. Her task was to assist him and the Morris Tribunal legal team in any request that they

had of the Garda Commissioner or Garda witnesses and to assist them in locating relevant documentation. It is submitted that these facts alone would give a reasonable man cause for apprehension of the potential for bias however the matter does not rest there.

59. In this case the apprehension of bias is furthered, hyphened and cemented by reason of a clearly and publicly stated opinion of Chief Superintendent McGinn which was expressed by the respondent." (My emphasis).

81. There is thus a singular lack of clarity in the appellant's case. At paragraph 53, the objective bias is identified as the words in conjunction with the prior relationship disclosed by the words. Paragraph 58 however says that the role of liaison alone gives rise to bias but separately and additionally, the clarification statement also.

The Evidence before the High Court

82. The primary evidence of C.S. McGinn's role at the Morris Tribunal is to be found in her own testimony to the Disclosures Tribunal quoted above. This showed that she was assigned by the Garda Commissioner to be liaison officer to the Morris Tribunal and that was her first involvement with Donegal. She was praised in the Morris Tribunal Report for her cooperation with the tribunal. Her role was to facilitate, not the evidence, but the queries from the tribunal to Garda Headquarters, to follow up outstanding enquiries and to notify Garda witnesses to be in attendance at the tribunal. Her role was completely independent of the tribunal.

83. She acted as a liaison to the flow of information between the tribunal and An Garda Síochána. She was not asked to give any further detail as I have already explained. Her day to day activities and interactions with the tribunal are further explained in the affidavit of Philip Barnes to which I have already referred. Objection is taken by the appellant to the content of this affidavit as being hearsay and not in compliance with O. 40, r. 4 of the RSC.

84. As his affidavit discloses, Mr. Barnes was office manager to the Morris Tribunal from its inception and attended most hearings of the tribunal. As a result, he is very familiar with the roles occupied by the individuals who both worked with the tribunal and worked with parties involved with the tribunal, how these roles were discharged and the interaction between the various parties. Mr. Barnes thus observed the interaction of these parties over an eight year period and in the case of the respondent and C.S. McGinn, for some two and a half years from the commencement of the tribunal until her promotion in August 2005. The following facts emerge from Mr. Barnes' affidavit –

(1) Mr. Justice Morris requested the Garda Commissioner to appoint a garda liaison officer who had no involvement with the Donegal Division for the purpose of acting as a conduit for the exchange of information, to assist with requests from the tribunal for documentation, exhibits, inspection facilities and coordination with garda witnesses and routine enquiries.

(2) Any request for assistance from the tribunal would be made by the tribunal solicitor to the solicitor for the Garda Commissioner. The Garda Commissioner, if satisfied to do so, would pass the request to the liaison officer for action.

(3) C.S McGinn attended at the hearings on a regular basis for the purposes of ensuring that all requests made by the tribunal were attended to promptly and the tribunal and Garda Commissioner legal teams were assisted in locating material where necessary. She also updated the Commissioner on developments at the tribunal.

(4) There was professional interaction between C.S. McGinn and those solicitors and to a very much lesser extent counsel to the tribunal including the respondent. The vast majority of her interactions with lawyers for the tribunal were conducted through solicitors and occasionally counsel. There was no cause for regular interaction between counsel for the tribunal and the garda liaison officer.

(5) C.S. McGinn and the respondent rarely spoke to one another. There was no personal relationship and such relationship as existed was nothing more than a passing professional acquaintance.

(6) Arising from the matters referred to in Ms. Cummins' affidavit, Mr. Barnes describes the normal practice that where any clarification application was made, it was drawn to the attention of the chairman in advance. Two of the legal team would consult with him for that purpose.

(7) When the respondent mentioned the broadcast to the tribunal on the 30th March, 2006, he did so in his professional role as counsel to the tribunal with the prior knowledge and consent of the chairman and probably all of the legal team.

(8) He describes in detail the layout of the office building occupied by the tribunal and all associated persons and parties.

(9) The first report of the Morris Tribunal was published in July 2004 and the second in 2005. All tribunal reports are generally available to the public online.

(10) In this case the work of the tribunal spanning eight years was exclusively concerned with policing in Donegal, the Division in which the appellant was stationed for a number of years up to and including the currency of the Disclosures Tribunal.

(11) Mr. Barnes supplies a direct quote from the first report of the Morris Tribunal which expressly acknowledges the contribution of C.S. McGinn and which I have quoted above.

85. In my view, it is difficult to conceive that Mr. Barnes would not have had direct knowledge of all of these matters given the extent and duration of his involvement with the Morris Tribunal and his undoubted experience of observing these matters first hand. I therefore,

cannot accept the proposition that his evidence is inadmissible hearsay or not in compliance with the RSC. It is relevant to note that the appellant did not seek to cross-examine Mr. Barnes on any of these averments when undoubtedly, he could have done so.

86. The appellant's answer to this is that there was no need for cross-examination in circumstances where legal objection was taken, after the event, to the content of the affidavit. However, the appellant could not have known in advance that his objection would prove successful, as indeed it did not, and he therefore declined the opportunity to cross-examine Mr. Barnes at his peril. The appellant having failed to do so, the trial judge was perfectly entitled to rely on the evidence in the affidavit of Mr. Barnes.

87. In this regard, the observations of Clarke C.J. in *RAS Medical v RCSI* [2019] IESC 4 are apposite (at para. 7.2): -

> "Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question."

88. Criticism is also made of the affidavit of Ms. Cummins on similar grounds and the same considerations apply. She explains how the clarification statement arose and what gave rise to it. It was the Garda Commissioner, not the respondent, who raised the matter. The Commissioner was concerned about the impression created by the RTE broadcast for obvious reasons. The Morris Tribunal was tasked with investigating very serious allegations of misconduct against gardaí operating in the Donegal Division. The tribunal's investigation was very high profile and long lasting. Its importance to An Garda Síochána could not be overstated from many perspectives, not least the public's perception of, and confidence in, the force.

89. It could not be doubted that the RTE broadcast created a strongly negative impression of An Garda Síochána in general and C.S. McGinn in particular. Such impression was of course entirely misleading and wrong. It takes little imagination to envisage the reaction to this broadcast in Garda Headquarters and the pressing and immediate need for that impression to be as publicly corrected as it was publicly aired. The suggestion that the respondent, in making the clarification statement, was expressing purely personal opinions or somehow going on a frolic of his own would be surprising enough if made by a lay person, but coming from lawyers, is quite extraordinary.

90. Quite apart from the evidence of Mr. Barnes, the trial judge was entirely correct in drawing the inference from all the facts, including in particular the content of the clarification statement itself, that this statement could not have been made without the prior approval and express instructions of the chairman of the tribunal. When lawyers, be they barristers or solicitors, speak in court or in a professional capacity in any forum where they are instructed in such capacity, they do so on behalf of those who instruct them.

91. The clarification statement made was formal in nature and made at the behest of the party affected by it, not C.S. McGinn personally, but the Commissioner of An Garda Síochána for the benefit of that entire body. It is manifest from all the circumstances that the statement was made on behalf of the tribunal with the express imprimatur of the chairman, who himself endorsed it in similar terms as soon as it was made and indeed within the pages of the report later published. Further, it is clear that the respondent was not expressing views arrived at from personal experience of, or interaction with, C. S. McGinn at the tribunal but an opinion formed "on the basis of the transcript".

92. I cannot see how any reasonable person, apprised of these facts, which must be assumed, could entertain a reasonable apprehension of bias on the part of the respondent arising from the clarification statement. I agree with the views of the trial judge in this respect. I have come to the same view concerning the so-called "relationship" between C.S. McGinn and the respondent at the Morris Tribunal. The appellant has said repeatedly in correspondence, pleadings and submissions that the respondent and C.S. McGinn worked side by side at the tribunal on a daily basis for a period of some thirty months.

93. There is simply no evidence of such a relationship. The evidence is to the contrary. C.S. McGinn was not a party whose conduct was being investigated by the Morris Tribunal. She was not a witness before that tribunal. She was not a client or former client of the respondent. Indeed, she was not a client of any lawyer attending before the tribunal. The evidence shows that she was independent of the tribunal and by extension its legal team. Her function, without diminishing it in any way, was purely clerical and administrative in nature, albeit important.

94. She was one of a large number of people who attended the Morris Tribunal on a regular basis, possibly even daily, and these included barristers, solicitors, parties before the tribunal, witnesses, tribunal staff, stenographers, media reporters, interested members of the public and perhaps many others as well. The fact that C.S. McGinn was regularly, perhaps even daily, present in the same hearing room or building as the respondent cannot in any rational sense be construed as a "relationship". Such interaction as the evidence establishes between C.S. McGinn and the respondent must be viewed as falling far short of the professional relationship that exists between a barrister and his or her client.

95. Yet precisely that relationship was found insufficient of itself to give rise to a reasonable apprehension of bias in *Bula*. Something more than that is required amounting to a cogent or rational link between the association and its capacity to influence the decision.

The facts here do not approach that standard. The passage of time is also a significant factor here. The clarification statement was made on the 30th March, 2006, some seven or eight months after C.S. McGinn had been replaced. Indeed, it is not known if she was even present when the statement was made.

96. The Disclosures Tribunal was established on the 17th February, 2007, and C.S. McGinn's evidence commenced on the 6th October, 2017, some eleven and a half years after the clarification statement. Given the passage of time and the relatively routine nature of the clarification as it emerges from the evidence, it is quite unsurprising that the respondent would have no recollection of it. When one factors in all these matters, I am left in no doubt that the reasonable observer would not entertain a reasonable apprehension of bias from these facts.

Duty of Candour

97. The appellant placed repeated emphasis on the submission that the matters giving rise to the apprehension of bias, C.S. McGinn's role at the Morris Tribunal and the clarification statement, were matters that ought to have been disclosed by the respondent in advance of dealing with the modules which concerned the appellant. It was not a matter for the appellant to unearth these facts. Reliance was placed by the appellant on the *dicta* of Lord Donaldson M.R. in *R. v. Lancashire County Council Ex p. Huddleston* [1986] 2 All ER 941 who said that public authorities should conduct public law litigation "with all cards face upwards on the table", an observation with which Clarke C.J. agreed in *RAS Medical Limited*. In this regard, the appellant appeared to suggest that the onus was on the respondent to make appropriate disclosure in the absence of which he was entitled to succeed.

98. The contention that the onus of proof should be reversed in this way was rightly rejected by the trial judge and is not the import of *Huddleston*. That case was concerned with a public body giving adequate reasons for a particular decision where the court was of the view that there was a duty on the public body to disclose all relevant information relating to the taking of that decision when challenged. As observed by Barrett J. in *Murtagh v. Kilraine* [2017] IEHC 384, (at para. 25): -

> "(6) The notion that it is not for a public body to make out an applicant's case for him is only partially correct. It is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the public body's hands. (*Huddleston*)."

99. It is a commonplace occurrence for judges to be confronted with potential conflicts in cases. These may be personal conflicts in the sense of a party or a witness being a relative or a personal friend of the judge. Instinctively, little difficulty arises in such cases. Professional relationships are probably more common and frequently less straightforward. It would of course be absurd to suggest that every judge carries an obligation to disclose every professional contact in his or her career that might conceivably be relevant to a

particular case before him or her. A judge has a duty to sit and hear cases and, as has been pointed out more than once, an over scrupulous approach runs the risk of systemic paralysis. This is particularly the case in small jurisdictions such as this where in legal and other professional circles, "everybody knows everybody".

100. Even having acted for a party is not of itself a bar, as *Bula* shows, although in many cases a judge may feel more comfortable about drawing such fact, if remembered, to the attention of the parties. Of course, long professional associations with a particular client may call for disclosure but even then, such disclosure may not result in recusal. Judges, for example, who may have such past associations with institutional clients such as insurance companies would generally not find it necessary to recuse themselves from hearing cases where that insurer indemnifies one of the parties. It might be otherwise if the insurer were directly a party.

101. There is of course a broad spectrum of such relationships which may require consideration and disclosure by a judge in any particular case. At the end of the day, it is a matter for the judge him or herself to decide whether a relationship, once recalled, is one that should be disclosed. It is probably fair to say that most judges would tend to err on the side of caution in this regard. However, as noted by Irvine J. in *O'Reilly v. Garda Commissioner* above, a judge is only obliged to disclose the connection if the judge considers that a reasonable, objective and informed person would apprehend that the judge might not decide the case fairly. There are of course a vast range of professional interactions that would not approach that threshold and I am satisfied that this is one of them.

102. As regards disclosing the clarification statement, the respondent's position is that he has no recollection of it and of course it follows that one cannot be expected to disclose something of which one is unaware. The whole point about objective bias is the potential for something to act on the mind of the decision maker which might rob the decision of perceived impartiality. Something long forgotten cannot possess that quality. However, even if it had not been forgotten, I remain of the view that it does not come within the ambit of matters requiring disclosure as I have explained. In *Locabail Limited v. Bayfield Properties* [2000] 1 All ER 65, Lord Bingham C.J. noted (at para. 25): -

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness or found the evidence of a party or witness to be unreliable would not without more found a sustainable objection… every application must be decided on the facts and circumstances of the individual case."

103. The same perforce must apply to a favourable comment.

Should the respondent have sworn an affidavit?

104. Criticism was levelled, somewhat indirectly, at the respondent by virtue of the fact that he did not swear an affidavit verifying the statement of opposition or setting out details of the so-called relationship with C.S. McGinn and the circumstances surrounding the

making of the clarification statement. The trial judge felt that this was an attempt to expose the respondent to cross-examination and undoubtedly there was a risk of that. The respondent's position is clearly set out in a letter written at his direction by the solicitor to the Disclosures Tribunal in response to the letter before action from the appellant's solicitors. It is also set out in the statement of opposition which is verified by an affidavit of the registrar to the Disclosures Tribunal.

105. The trial judge noted that the facts as set out in these documents were not the subject matter of significant dispute by the appellant. The appellant however insisted that the only person who could give admissible evidence on many of the central issues is the respondent. Although counsel for the appellant in the High Court indicated that there was no suggestion of cross-examination, the trial judge pointed out that if that was so, it was difficult to see why the respondent's position as set out in the documents could not be accepted.

106. The undesirability of judges swearing affidavits has been adverted to by the Supreme Court on a number of occasions. Thus, in *the State (Sharkey) v. McCardle* (unreported Supreme Court, 4th June, 1981) Henchy J. said: -

> "The court has pointed out on a number of occasions that it is undesirable in a case such as this for a person exercising judicial functions to rely on an affidavit made by himself. Such an affidavit leaves him open to the risk of being cross-examined by the dissatisfied litigant. It would be more judicious if the affidavit was made by the court clerk or registrar, and it should contain an averment that it is made from information within the deponent's own knowledge and/or from information supplied by a named person."

107. In *O'Connor v. His Honour Judge James Carroll* [1999] 2 IR 160, the Supreme Court approved the *dicta* of the High Court (Barron J.) noted at p. 166 of the report: -

> "It would be inappropriate for any judge to swear an affidavit in any such proceedings [in which the decision of the judge is being impugned] as that would leave him open to cross-examination in relation to the judicial process. That would be contrary to the public interest."

108. More recently, in *Walsh v. Minister for Justice and Equality and Anor.* [2019] IESC 15, O'Donnell J., with whom the majority of the Supreme Court agreed, observed (at para. 34): -

> "… It is difficult to envisage a circumstance in which it would be necessary, and therefore appropriate, to require the original judge to give evidence. The judge is not the complainant or injured party: the essence of the offence is interference with the administration of justice. It is generally inconsistent with the obligation of the judge to be a dispassionate adjudicator for that person to become a participant in litigation relating to what occurred in a courtroom. For this reason, it is, for

example, generally recognised as undesirable that a judge should swear an affidavit in judicial review proceedings, or indeed be made a party thereto…"

109. Order 84 of the RSC in fact expressly prohibits the naming of a judge as a party to judicial review proceedings challenging the decision of that judge save where *male fides* is alleged. As the cases above show, I am satisfied that it would have been quite inappropriate for the respondent to swear an affidavit in this case. Although not sitting as a judge in respect of the matters under challenge in these proceedings, the respondent was, as noted by the trial judge, sitting in a quasi-judicial capacity and precisely the same public policy considerations apply. If a decision maker acting judicially is to be open to cross-examination by the disappointed litigant against whom he or she has decided a case, it opens up the prospect of such decision maker being required to justify or explain his or her decision beyond what the decision itself contains, a process which would undermine judicial independence and indeed the rule of law itself. It would be inimical to the administration of justice and contrary to the public interest.

Waiver

110. The doctrine of waiver is somewhat interchangeably also referred to as acquiescence and estoppel. It arises in these proceedings in the following way. As I have already noted, there is a significant degree of ambiguity in the appellant's case with regard to whether C.S. McGinn's role at the Morris Tribunal is said, in and of itself, to give rise to a reasonable apprehension of bias. At some points the appellant appears to say that it does and at others, that it does not without the addition of the clarification statement. The trial judge, while not dealing expressly with the waiver issue, inferred that the core facts known by the appellant from October 2017 when C.S. McGinn gave her evidence did not give rise to an apprehension of bias in the appellant.

111. If one proceeds on the assumption that it did, or ought to have done, then the issue of waiver arises as the appellant permitted the Disclosures Tribunal to continue without objection despite this knowledge. I have already explained why I do not accept the appellant's explanation that he could not have raised the point at the time. If his suspicions were aroused, it is difficult to account for the failure of his legal team to explore the issue fully with C.S. McGinn. The fact that they did so at all must suggest that there was a concern, otherwise the questions about C.S. McGinn's role in the Morris Tribunal were entirely irrelevant.

112. It must therefore be assumed that this issue was present in the mind of the appellant and his legal team from the outset. It is no answer to say that the appellant, himself a garda, did not understand what was meant by a garda liaison. If he did not understand, it was incumbent on him to find out and he had the means to do so. The very fact that it arose at all put him on enquiry. Indeed, the very reason advanced in submissions for the appellant being put on enquiry after the third interim report, namely that C.S. McGinn was praised, was also present in the second report and therefore presumably, should equally have put the appellant on enquiry then, if not indeed significantly earlier. The rule is explained with typical clarity in the judgment of Henchy J. in *Corrigan v. Irish Land Commission* [1977] IR 317 when he observed (at p. 324): -

> "I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, he expressly or by implication acquiesces at the time in that member's taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had."

113. The judge continued (at p. 326): -

> "It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, by reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

114. If, therefore, it is the appellant's case that the fact alone of C.S. McGinn's role at the Morris Tribunal gives rise to an apprehension of bias, then in my judgment the appellant has waived his right to complain of it. I note in passing that he would also appear to have been well outside the three month period limited by O. 84 of the RSC for seeking judicial review but in fairness to the appellant, the respondent has not pleaded that and the appellant had as one of his grounds sought an extension of time if necessary. Therefore, I do not make any finding on this account.

C.S. McGinn's involvement in the Disclosures Tribunal

115. Perhaps the issue which gave rise to the most controversy between the parties at the hearing of this appeal was whether or not C.S. McGinn's involvement in the events giving rise to modules (N) and (O) of the Disclosures Tribunal required the respondent to evaluate the veracity of her evidence. Counsel for the respondent argued that C.S. McGinn's evidence was, as a matter of fact, not in dispute and not in conflict with the evidence of either the appellant or any other witness before the Disclosures Tribunal. The relevance of this submission was that if in truth C.S. McGinn's evidence did not fall to be evaluated by the respondent, then the issue of objective bias became entirely irrelevant since even if it could be said to have existed, it had no material bearing on the tribunal's investigation. Accordingly it was argued that the appellant's claim failed in *limine*.

116. Counsel for the appellant, on the other hand, contested this submission vigorously and submitted that it was clear from his client's protected disclosure that he was strongly challenging the *bona fides* of C.S. McGinn in pursuing the course of action she did insofar as it concerned him. It was therefore said that irrespective of any evidential conflicts, she had a clear stake in the proceedings before the tribunal or, to use the colloquial expression, "skin in the game".

117. As I have noted in the summary of the trial judge's findings above, she reached the conclusion that the appellant's claim of objective bias was not well founded, which finding

would, without more, have disposed of the matter. However, she went on to consider the issue now under discussion and made certain findings, albeit recognising that it was strictly speaking unnecessary for her to do so. I agree with that observation and as the findings I have already made in this judgment clearly dispose of this appeal, I do not believe it necessary or useful to consider this issue further.

Conclusion

118. For the reasons already explained, I am satisfied that the appellant has not established a case of objective bias in these proceedings and the trial judge was correct in rejecting his claim. I would accordingly dismiss this appeal.

119. As costs follow the event in the normal way, my provisional view is that the costs of the appeal should be awarded to the respondent. If the appellant wishes to contend for an alternative order, he will have liberty to deliver a written submission not exceeding 2000 words within 14 days and the respondent will have 14 days to reply. In default, an order in the proposed terms will be made.

120. As this judgment is being delivered remotely, Faherty and Power JJ. have indicated that they are in agreement with it.