THE COURT OF APPEAL

CIVIL

[2019 No. 491]
[2020 No. 174]
[2020 No. 175]

Birmingham P. **Neutral Citation No: [2022] IECA 180**

Barniville P.

Edwards J.

BETWEEN

ULSTER BANK DAC, PAUL MCCANN AND PATRICK DILLON

PLAINTIFFS/RESPONDENTS

AND

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS/APPELLANTS

JUDGMENT of the Court delivered on the 28th day of July 2022 by Birmingham P.

1. On 6th April 2022, this Court (Murray, Collins, Pilkington JJ.) delivered a judgment in an appeal brought by the appellants against certain decisions of the High Court (*Ulster Banks & Ors v. McDonagh & Ors* [2022] IECA 87). That judgment was a joint judgment of Murray J and Collins J, with which Pilkington J concurred. The defendants have now moved to set aside the judgment and have sought related reliefs. They do so in circumstances where they claim that it has come to their attention, subsequent to delivery of the decision on the appeal, that a member of the Court, while practising as a barrister, had acted on behalf of the plaintiffs.

Background to the Motion

2. Before turning to address the issues raised in this application, it is appropriate to give some context to the motion now before the Court.

3. In the High Court proceedings, Ulster Bank DAC ("the Bank") had sought to recover judgment against the defendants in the sum of €22,090,302.64 on foot of a liability said to have arisen from a loan advanced by the Bank to the defendants in July 2007. The second and third plaintiffs were appointed as receivers by the Bank on foot of security documentation executed as a term of a loan agreement. In the High Court proceedings, the receivers sought orders that they were validly appointed as joint receivers over the secured assets.

4. A point of significance in the High Court proceedings is the fact that on 13th March 2013, the Bank and the defendants had entered into an agreement which was referred to throughout the proceedings as "the Compromise Agreement". The agreement arose in the context of the collapse of the property market that had occurred, combined with delays in obtaining planning permission for the development of a data centre on lands at Kilpedder, County Wicklow, and the failure of the defendants to that point to comply with repayment obligations. It should be appreciated that the loan was designed to part-fund the acquisition by the defendants of what was stated to be an 80-acre site at Kilpedder.

5. In broad terms, the net effect of the Compromise Agreement was that the liability of the defendants to the Bank, which at that time stood in the order of €25,000,000, was to be written-off in return for payment by the defendants of approximately €5,000,000. In circumstances described in some detail in the judgments of the High Court and of this Court, the Bank took the view that the defendants had been in breach of the Compromise Agreement, and that as a result, the Bank was entitled to treat the agreement as at an end, and to pursue the defendants in respect of the debts alleged to be due.

6. On 1st October 2014, the Bank appointed the second and third named plaintiffs as joint receivers over the lands in Kilpedder.

7. In July 2018, proceedings were instituted by the Bank and came on for hearing before Twomey J. on 3rd December 2019. The case was at hearing for a total of 21 days in the High Court and resulted in the delivery of two judgments. The first and principal judgment, delivered on 6th April 2020 ([2020] IEHC 185), explained that there were two broad issues in the case. The first issue was whether the defendants had been in breach of the Compromise Agreement and what consequences would flow from that if so, and the second issue related to the defendants' contention that the effect of the provisions of s. 17(2) of the Civil Liability Act 1961 was that the Bank – by reason of what was characterised as a compromise with a concurrent wrongdoer – was precluded from claiming against the defendants in respect of debts owed by them. What might be described as the "Civil Liability Act issue" arose in circumstances where, on 26th June 2013, the Bank had instituted proceedings against CBRE, alleging negligence on their part in the preparation of a valuation report in respect of the Kilpedder lands. On 22nd January 2016, the proceedings between the Bank and CBRE were settled, the Bank settling its action for a sum of €5,350,000. The second judgment, delivered by the High Court on 23rd June 2020 ([2020] IEHC 311), dealt with the issues that arose from the arguments that had been addressed in relation to the Civil Liability Act 1961.

8. Subsequent to delivery of the judgments in the High Court, the first named defendant sought liberty to issue a motion seeking various orders, including: (i) an order setting aside the declaration that he had breached the Compromise Agreement, (ii) an order "voiding the entire effects of the Compromise Agreement", (iii) an order setting aside the judgment granted to the Bank "for want of particulars", and (iv) an order "permitting a review of the judgment".

9. Unsurprisingly, the Bank objected to the attempts to reopen the judgment and the question of whether there should be liberty to issue such a motion was debated in the High Court on 16th July 2020. The High Court judge took the view that there was no basis for revisiting the Court's judgment.

10. From the decisions of the High Court, an appeal was brought to this Court. The appeal was listed for hearing over two days: 16th and 17th February 2021. It may be noted that while the first named defendant appeared as a litigant in person before the High Court, all three defendants were represented before this Court. The second and third named defendants were represented by Ms. Avril Gallagher, solicitor, instructing Mr. Louis McEntagart SC and Mr. James McGowan BL (now a senior counsel). The first named defendant was represented by Mr. Geoffrey Nwadike, solicitor, and Ms. Tara Jawad-Sallar BL.

11. It may also be noted that the dates for the hearing had been allocated back in October 2020. On the evening of 11th February 2021, a Mr. William Murphy sought to lodge with the Court of Appeal Office a motion on behalf of the first named defendant seeking to adduce new evidence and to amend the reliefs sought in the Notice of Appeal. It was explained by Mr. Nwadike that Mr. Murphy, who had sought to lodge the motion, was a legal executive who "works in [his] office". In the course of an affidavit, Mr. Nwadike averred that he had been instructed in the matter on the evening of Friday 3rd February 2021, and that following acceptance of instructions, he had conducted "research" and ascertained that the second named plaintiff had had past commercial relationships with CBRE. It was therefore said that the second named plaintiff was "compromised" in the receivership. This Court concluded that the motion should be refused. Accordingly, the new "evidence" was not admitted, and the first named defendant was not permitted to amend his Notice of Appeal.

12. The appeal hearing proceeded, and judgment was reserved. Judgment was delivered on 6th April 2022. By any standards, it is an extremely detailed and comprehensive judgment,

running to 127 pages, and deals meticulously with each of the issues that had been raised in the course of the appeal.

13. The next matter of significance occurred on 19th April 2022. On that occasion, the defendants wrote to the solicitors for the Bank. The letter begins by referring to an intention to have the judgment set aside immediately for reasons set out in the letter. There is reference to the refusal of the motion to admit evidence in relation to connections between the receivers and CBRE, and the letter states that under the circumstances of refusal, they have carried out an extensive investigation. It goes on to say that the investigation was premised upon the protection from due process that was afforded to the clients of the solicitors by the Court of Appeal, adding that it was not difficult to find an explanation, and that the result of the investigation reveals extraordinary, and moreover, very sad circumstances. It is stated that ethics were disregarded, and any semblance of candour was viewed in the same vein. The observation is then made that that comment is not restricted to the Court, but it also applies to others. The letter then goes on to allege that the Bank provided certain aspects of the writers' data in relation to the Kilpedder property to the receivers who were partners in Grant Thornton, and that Grant Thornton then released data to unauthorised recipients. The complaint was made that at no stage were the writers informed of the release of private and confidential information. It then contends that full awareness of the breach was known to the clients, but also, crucially, known to Collins J. In strident terms, the letter states:

> "It beggars belief in the year 2022, a situation could exist in a democratic country where a sitting judge would compromise himself and the judicial system through a failure to declare his association and representation of Patrick Dillon and Paul McCann who had breached our data protection rights as Partners in Grant Thornton."

14. Amoss Solicitors responded by letter dated 21st April 2022. The letter comments:

"As regards the contents of the letter sent by your client we have taken instructions from Grant Thornton and can confirm that your client is incorrect as regards the allegations made. While it is accepted that a data breach took place in 2015, we can confirm that no personal data belonging to your client was disclosed as part of the breach. The breach in question related to data subjects linked to a separate financial institution. Please also find attached a letter issued by our client yesterday to your client, confirming the position.

Accordingly, the serious allegations made by your client relating to the conduct of Mr. Justice Collins are baseless, vexatious and without merit and should be immediately withdrawn."

15. The defendants now seem to accept that the Grant Thornton data breach did not in fact involve any of their data.

16. In exchanges with members of the Court during the hearing of the present motion, it was indicated that the defendants had apologised for misstating the position, though it was also indicated that the apology was a somewhat qualified one, in that the defendants were only apologetic if it was in fact the case that their data had not been part of the unauthorised disclosure. One can only express disappointment that allegations of such seriousness, couched in intemperate terms, could have been advanced without, it seems, any effort being made to establish their veracity. At this point, what is of significance is that, for the purpose of this application, it is not being suggested that Collins J., when he was a barrister, had acted in relation to any unauthorised disclosure of data relating to the defendants.

17. There followed a Notice of Motion dated 6th May 2022 seeking the following reliefs:

"(1) An Order setting aside the decision of this Honourable Court of Appeal as was handed down on the 6th of April 2022 in the above entitled proceedings.

(2) In the alternative, a full review of the decision of this Honourable Court of Appeal as was handed down on the 6th of April 2022 in the above entitled proceedings with the addition of the Attorney General in the capacity of a Notice Party to the said review.

(3) An Order of referral to the Supreme Court.

(4) Further or any order of the Court.

(5) Costs."

18. In the course of the oral presentation, the reliefs sought were reformulated somewhat, and the application was reframed as one to set aside the judgment on the basis of the perception of bias, or in the alternative, the Court was asked to review the decision affirming the judgment of the High Court, or as a further alternative, which was offered to the Court under relief (4) in the Notice of Motion, the Court was asked to send the matter to the Court of Justice of the European Union ("CJEU") on a case stated basis as a referral for an Opinion of the Advocate General. It was said that the reason for the referral was motivated by the lack of guidance for the judiciary within the European Union.

19. The Notice of Motion was grounded on an affidavit of the first named defendant. At paragraph 10, the affidavit states that since delivery of the decision, the defendants have discovered that a member of the hearing panel had acted as senior counsel for the receivers. Exhibited was a newspaper cutting from 18th May 2017, which consisted of a report on a court case before Gilligan J. relating to an unauthorised disclosure by Grant Thornton. The newspaper article quotes Maurice Collins SC for Grant Thornton as telling Gilligan J. that Ms. Scanlon (the party who was the recipient of the unauthorised disclosure) had not complied with the court order and had retained confidential data. Counsel was quoted as saying that a demand for €1,000,000, which it was said had been made by Ms. Scanlon, amounted to "a form of extortion against Grant Thornton". The affidavit takes issue with the

letter sent by Amoss Solicitors on behalf of the Bank and the reference to the fact that the letter emanating from the defendants had been "baseless and scurrilous". The deponent says that the letter from the solicitor was "offensive and not researched" and the solicitor was asked to retract the statement. It is said that the solicitor's statement was incorrect because a "member of the panel had acted for Ulster Bank in a matter involving a large amount of finance[,] running into hundreds of millions of euros". A further newspaper cutting is exhibited. This newspaper article appears to be from the online edition of The Irish Times of 10th March 2014. The article is a court report and refers to the fact that three brothers, members of the Cosgrave Property Group, were claiming more than €250,000,000 damages from the Bank over the alleged mis-selling of financial derivative instruments or swaps. The court report refers to the fact that Maurice Collins SC, representing the Bank, had argued that the claims were unsustainable, and had contended that nine of the disputed instruments were entered into more than six years ago, meaning that the legal time period during which they could be challenged had elapsed.

20. It may be noted that the grounding affidavit is somewhat different in tone to the previously referred correspondence. Indeed, at paragraph 15, it is stated that "for the avoidance of doubt", the deponent wishes to say that "the reliefs sought…do not in any way undermine the integrity of the member of the panel." The deponent acknowledges that "had the member not presided at the appeal[,] the decision may well have been the same." He says that justice may have been done through the decision of the Court, but that due to the position of the member of the hearing panel having acted for all three plaintiffs, "it cannot be said that justice was manifestly seen to be done in the circumstances." He says that "there exists[,] in the eyes of any reasonable person[,] the possibility of bias in this decision-making process."

21. The application before the Court is therefore quite a straightforward one. It is contended that the judgment of the Court of Appeal should be set aside, or the matter dealt

with by way of one of the alternative reliefs previously outlined, because one member of the Court who sat on the appeal had, as a barrister, acted on an occasion for the Bank in 2014 and for Grant Thornton in 2017.

The Issue on Appeal

22. Cases which raise issues relating to objective bias are not uncommon before the courts, and the law in this area might fairly be described as well settled. What is clear from all the authorities is that each case turns on its own facts, and all the surrounding factual context and circumstances fall to be considered when assessing an allegation of objective bias. Another matter not in controversy is that where the decision being impugned is that of a multi-member tribunal, it is sufficient to invalidate a decision for it to be established that objective bias applied in the case of any one member. At the heart of the jurisprudence in this area is the fundamental principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done (see the observations to that effect of Lord Hewart CJ. in *Rex v. Sussex Justices, Ex Parte* McCarthy [1924] 1 KB 256, a case referred to by the third named defendant in the course of his submissions).

23. It has long been accepted that the leading authority in this jurisdiction is the case of *Bula Ltd. v. Tara Mines (No. 6)* [2000] 4 IR 412. As it happens, the factual background to that case is not too far removed from the issues that the defendants raise in this case. In the *Bula* case, the Supreme Court dismissed an application, brought on appeal from the High Court, to set aside its decision on the grounds of objective bias by reason of the fact that two members of the Court who sat on the appeal had worked, while in practice at the Bar, for Tara Mines and for the Minister for Energy. Two judgments were delivered on the application, one by Denham J. (as she then was) and one by McGuinness J.

24. Denham J. referred to the fact that it was "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". In the course of her judgment, Denham J. referred to two aspects which have considerable relevance in the context of the present case. She dealt in some detail with the particular role played by a barrister as a member of an independent referral Bar, referring specifically to the cab rank rule. Denham J. said that the test takes account of the fact that the reasonable person would have a reasonable knowledge of a barrister's work, and that accordingly, to sustain a case of objective bias against a judge, it would be necessary to show more than simply that the judge, while practising as a barrister, had acted for one of the parties in the case. She commented (at page 445 onwards):

> "… the mere fact that a judge when a practising 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 adviser and client…
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> […]
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> 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.
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> […]
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> … It also illustrates the clear principle that a judge is not disqualified simply because he or she has acted for a party previously…
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> […]

> … In order for a judge to be disqualified from hearing a case, in addition to the relationship of client/counsel, there must exist a factor which would give rise to a reasonable apprehension of bias in the mind of a reasonable person. Such a link must be cogent and rational. Such a link could be if the counsel had advised on the issues to be determined. However, in this case the advice and advocacy given was not in relation to the issues on the appeal."

25. Denham J. endorsed the approach of the Australian courts in a number of cases. In *Re Polites: Ex Parte Hoyts Corporation PTY Ltd.* (1991) 173 CLR 78, the Court had commented that the links between a judge's previous work as a barrister and the issues in the case had to be "cogent and rational". In *Aussie Airlines PTY Ltd. v Australian Airlines PTY Ltd*. (1996) 135 ALR 753, the trial judge had commented that "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". Denham J. also referred to the declaration made by every judge on his or her appointment before taking up duty. In that regard, she commented:

> "On occasion it is inappropriate for a judge to adjudicate in a case. This will depend on the circumstances. A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar, which operates in Ireland, such a link is not a connection sufficient to disqualify. It requires special additional circumstances to disqualify a judge from adjudicating on a case. Thus, a long, recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge

as counsel had previously given legal services to a party on issues alive in the case to be heard by the court."

26. The judgment delivered by McGuinness J. in the same case addressed the importance of judicial declaration, often incorrectly referred to as the judicial oath, the nature of the independent Bar, and in that case, the time factor involved. If there is to be any basis for distinguishing and not applying the *Bula* case, it is that the timetable between acting for the parties and sitting on the appeal is much shorter in the present case. Notwithstanding that possible ground of distinction, it seems to me that the *Bula* case is clearly and directly in point in a way that none of the cases to which counsel or the McDonaghs referred are.

27. The first case to which Mr. Maurice McDonagh referred was the case of *Good Concrete v. CRH plc & Ors* [2015] 3 IR 493. As is well known, that decision relates to a case where it was suggested that a judge had a pecuniary interest. This arose in circumstances where, when the case was being admitted to the Commercial List, the presiding judge told the parties that he had "a vague feeling" that his pension fund held a very small number of shares in CRH. However, some days later, unbeknownst to the judge, his pension advisers bought additional shares in the first respondent. In contrast, in the present case, there is no suggestion whatever of any pecuniary interest. Mr. Maurice McDonagh then referred to the case of *Kenny v. Trinity College Dublin* [2008] 2 IR 40**.** In that case, the plaintiff, who had seen his claim dismissed in the Supreme Court on foot of a contention that his proceedings were frivolous, vexatious and an abuse of process, raised an issue about the fact that one of the judges of the Supreme Court who had heard the application to dismiss the plaintiff's claim was a brother of an architect in the firm of architects which was responsible for the design and execution of the development the subject matter of the proceedings. While the factual background is quite different, what is significant is that the Supreme Court was of the view,

when asked to adjudicate on whether one of its own judgments was tainted by objective bias, that it should err on the side of caution.

28. Another case referred to by Mr. Maurice McDonagh was *Re Pinochet* [1999] 1 All ER 577. Again, the factual background was far removed from the present case. As is well known, Senator Pinochet was a former Head of State of Chile. It was alleged that during his period as Head of State, various crimes against humanity had taken place for which he was knowingly responsible. When he was in England for medical treatment, the judicial authorities in Spain issued international warrants for his arrest, giving rise to extradition proceedings before the British courts. The principal point at issue in those proceedings was whether, as a past Head of State, he was entitled to immunity. The matter came before a committee of the House of Lords, but before the hearing of the appeal, there was an interlocutory application which saw Amnesty International, as well as other human rights bodies and individuals, petitioning for leave to appeal. A petition was successful. Thereafter, Amnesty International participated actively in the appeal before the House of Lords. Subsequent to the hearing of the appeal, issues arose relating to connections between Amnesty International and one member of the Appeals Committee, Lord Hoffman, along with his wife, Lady Hoffman. The case is of interest in the context of the present case, but arguably is to be distinguished on the basis that what was involved there were indications of a philosophical or ideological link by a member of the Court with one of the parties in a case that was highly controversial and contentious.

29. The final case referred to by Mr. Maurice McDonagh was the case of *Hanif & Khan v. The United Kingdom* (2012) 55 EHRR 16, a decision of the European Court of Human Rights. Similar to the other cases relied on by the defendants, the factual background in *Khan* bears no resemblance to the facts of the case before this Court. In the *Khan* case, the appellants had been charged with conspiracy to supply heroin. At an early point in the trial, a

particular police officer gave evidence. Arising from this, one of the jurors sent a note to the judge indicating that he (the juror) was a serving police officer and that he knew the police witness, though he had not worked with him for two years. The defence made an application to the judge to discharge the juror in question. That application was rejected at trial. However, the ECHR was of the view that leaving aside the question of whether the presence of a police officer on a jury could ever be compatible with Article 6, jury directions and judicial warnings were insufficient to guard against a risk that the juror in question may, albeit subconsciously, favour the evidence of the police officer witness in circumstances where there was an important conflict regarding police evidence in the case and where the police officer witness giving evidence was personally acquainted with the police officer juror. We will content ourselves to saying that in a situation where there was conflict about the police evidence, and where the jury had as one of its members a police officer who subsequently acted as foreman of the jury, a reasonable observer would certainly be expected to have concerns.

30. The question of a case stated to the CJEU was not elaborated upon during the course of the oral hearing. The issue is canvassed despite the fact that the Notice of Appeal responds to the question as to whether the Court of Appeal is being asked to make a reference to the CJEU with an unequivocal no. Following his brother, Mr. Brian McDonagh drew the Court's attention to the fact that in another case heard recently by McDonald J., the judge had enquired as to whether the parties wished him to recuse himself on the basis of a relationship that he had with a partner/director of a company involved in litigation with the McDonaghs. Mr. Brian McDonagh asserted that McDonald J. had gone on to explain to the McDonaghs that he was a lecturer in Trinity College and that perhaps he had given a lecture or a number of lectures to a barrister who is apparently a director of the company involved in those proceedings. When it was his turn to respond, Mr. Rossa Fanning SC on behalf of the

respondents indicated that the reference to those High Court proceedings was inaccurate, that the position had not been stated correctly by Mr. Brian McDonagh, and that there was no question of any concern on McDonald J.'s part regarding the delivery of lectures; rather, the judge had indicated that at one point, the barrister in question had been his pupil or devil. In the course of his submissions, Mr. Fanning contended that he was on stronger ground than had been the position in *Bula v. Tara*, in that while it is the case that the temporal factor here was not as long, the work done by Mr. Barrington and Mr. Keane (as they then were) related in a sense to the controversy before the Court, in that it related to the geographic location and ore body in issue.

31. Counsel also referred to the case of *Curran v. Finn* [2001] IEHC 5. In that case, an issue had been raised about the fact that the trial judge, O'Neill J., while in practice at the Bar, had acted for the plaintiff in the well-known Superwood litigation in which the Royal and Sun Insurance Company had been a party. Counsel drew attention to the fact that O'Neill J. had refused the application for recusal. In rejecting the application, the judge made the point that if insurers could object to a judge in a position such as his hearing a case on the basis of an alleged apprehension of bias, it would mean that insurance companies could pick and choose the judges they wanted to hear cases. That case was appealed to the Supreme Court, but the point in issue on appeal was not whether O'Neill J. should have recused himself or not, but whether what remained in controversy could be dealt with only by O'Neill J. or whether any judge of the High Court could deal with it. However, he drew attention to the observations of the Chief Justice who referred to the fact that a specious ground of objection was being properly discontinued and abandoned by the defendants.

Decision

32. The question that arises is really quite a narrow one. Would a reasonable observer, by which it must be meant a reasonable observer with a reasonable knowledge of the Irish legal system, apprehend that Collins J. would have been unable to bring an open mind to bear, but rather would have been unconsciously biased towards the position of the plaintiffs because of having acted for either or both of them? In my view, the question only has to be posed in those terms for the answer to be apparent. It is the nature of the independent referral Bar that, in general, barristers do not have ongoing relationships with particular clients. Barristers practising on the civil side, and particularly in the commercial courts, as Mr. Maurice Collins did, with distinction for many years, will invariably find themselves acting for and against institutional clients. It might be helpful to pose the question whether there was anything to prevent Mr. Collins from accepting instructions to appear against the Bank following the 2014 litigation, and to appear against Grant Thornton following the 2017 application. Emphatically, the answer has to be that there was not. Similar situations apply across other areas of the Court. On the criminal side, as Denham J. pointed out in *Bula v. Tara,* barristers often find themselves appearing for the Director of Public Prosecutions to prosecute one week, and on the defence side of the court in another case the following week. The personal injuries division of the courts sees barristers sometimes appearing for plaintiffs, in effect appearing against insurance companies, and then later appearing for the insurance company. On the planning side, counsel sometimes find themselves appearing for developers and sometimes for objectors. One could give any number of examples.

33. There is a further consideration in the case of an appellate court. When a panel is being assembled, it will generally be thought desirable that at least some members of the panel, if not all, would have a particular background in the area of law involved. If an appeal is expected to raise issues of banking law, it would be desirable that at least some, if not all, of the members of the panel hearing the case would have a background in that area, whether

as practitioners and/or trial judges. Those who appear in the appellate courts are fully aware that is the position. Those appearing in the criminal courts realise, and indeed expect, that some or all of the judges will have a background in criminal law, and similar considerations apply to other divisions. Similarly, practitioners about to undertake an appeal from the commercial court will have hope and expectation that the panel assigned to the case will be comprised wholly or in part of people with considerable professional background and expertise in the area. Indeed, it seems to us that the notional, reasonable observer at the back of the Court would also be cognisant of this.

34. In the circumstances, the notion that those familiar with the work of the courts would see anything unusual or disturbing about the fact that a member of the Court had in the past, as a barrister, appeared for or against a party is unlikely. When the party is an institutional litigant, it is to be expected that it might have frequent business before the Court. In the course of his submissions, Mr. Fanning SC stated that with the benefit of hindsight, a counsel of perfection might have seen Mr. Collins draw his prior involvement to the attention of the parties. I would agree with him only to a point. In general, I do not see any need to do that when the prior litigation had no connection whatsoever with the dispute now coming before the Court. However, the background to the present litigation was a somewhat fraught one. Reference has already been made to the attempt to reopen matters after delivery of judgment in the High Court and the attempt to introduce new evidence and expand the grounds of appeal shortly before the appeal hearing. Forewarned by that, a judge might have been wise in mentioning the prior involvement. However, had the judge done so and had the response been a request for recusal, it would have been a request that should properly have been refused. Quite simply, there was no rational basis upon which Collins J. should have recused himself had such an application been made. If such an application had been made and

acceded to, it would only have given rise to attempts at forum shopping for litigants who were willing to do so, seeking to pick their own judges and to put other judges off-side.
In summary, the application to set aside the judgment is without merit and borders on, if not already, being unstateable. The application is accordingly refused.

35. I would like to address one final matter. On 8th July 2022, Mr. Brian McDonagh sent a letter referring to the fact that when lodging papers, he had suggested that perhaps I may have appeared many years ago in a case where a man called John Woods sued a company called Rink Air Conditioning Ltd. in which he was a director and majority shareholder. He says that he has had a note from his solicitor at the time and she cannot recollect the case as it was more than twelve years ago. However, he felt it necessary to bring to the attention of the Court. I have no idea what the purpose of that communication was. It is not clear from the letter whether the suggestion is that I appeared for Mr. Woods or for Rink Air Conditioning Ltd. I have no knowledge of the case whatsoever. As an absolute minimum, the case must go back more than fifteen years since I have been a judge for that length of time. While I cannot be 100% certain of this, I think if I had any involvement in such a case, it must have predated my taking Silk in 1999 since I did little if any private law litigation, other than personal injuries litigation, subsequent to taking Silk. Indeed, that was a situation that was developing in the years before I took Silk, so if I had any involvement, the case must go back a number of years. I mention this only for the sake of completeness.