Neutral Citation Number: [2011] IEHC 244

THE HIGH COURT

COMMERCIAL

2010 208 S

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

TERRAVISION LONDON FINANCE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 30th day of June, 2011

This Action

On 18th January, 2010, the plaintiff (Ryanair) began this action by the issue of a summary summons. It sought to recover €1,809,758.16 from the defendant (Terravision). By the time the statement of claim was delivered less than four months later, Ryanair's claim had been increased to €8,407,614.71 less a sum of STG£986,849.90.

In the meantime, I made orders in favour of Ryanair admitting the proceedings to the Commercial List and, *inter alia*, fixed a date for the hearing of an application for summary judgment against Terravision. When Ryanair received Terravision's replying affidavit, it became apparent to it that it had no prospect of obtaining summary judgment and so, on Ryanair's application, I vacated the summary judgment hearing date, adjourned the action for plenary hearing and directed an exchange of pleadings. Terravision sought costs in respect of that aborted hearing but I declined to award them against Ryanair and made them costs in the cause.

Having received the statement of claim of 4th May, 2010, with the much increased claim, Terravision sought leave to bring a motion to strike out that pleading in whole or in part. In accordance with the normal case management of litigation, I gave leave to bring such a motion returnable for hearing at the end of June 2010.

On 5th July, 2010, Ryanair issued the motion which is the subject of this judgment.

The motion seeks that I should discharge myself from:-

> "hearing and determining the defendant's application to have all or part of Ryanair's statement of claim set aside or struck out which is pending before the courts; and
>
> hearing and determining any further applications and/or the substantive hearing in these proceedings."

The basis for the application is also stated on the notice of motion, it is "that there is a reasonable apprehension of bias due to his conduct, and/or his beliefs expressed, towards Ryanair in other proceedings".

It is immediately apparent that no allegation of actual bias is made. Indeed, counsel on behalf of Ryanair made that very clear from the outset of the hearing. What is relied on is what is called objective bias. That is a concept quite different to actual bias and I will consider it in some detail later in this judgment.

Secondly, it is clear from the terms of the notice of motion that the matters relied upon to support this claim do not arise from anything that has occurred in the present litigation.

The principal basis for the application arises from a sentence at the conclusion of a reserved judgment which I delivered in the case of Ryanair Limited v. Commissioner for Aviation Regulation [2010] IEHC 220, (the judicial review proceedings) where I said:-

> "Having had to consider Ryanair's untruths to the Court, its untruths about the Court and its untruths about the Minister, one has to conclude that the truth and Ryanair are uncomfortable bedfellows."

The Judicial Review Proceedings

My judgment in the judicial review proceedings was delivered on 4th June, 2010.

The case involved an application by Ryanair for leave to apply for judicial review against a determination of the Commission for Aviation Regulation. That determination set maximum levels of airport charges at Dublin Airport for the years 2010 – 2014.

It is not necessary to rehearse in detail the matter which I already considered in my judgment in that case, save to record the following.

In the course of hearing this motion, Ryanair's counsel expressly accepted that I was correct in my earlier judgment that Ryanair had, indeed, been untruthful to the court, had been untruthful about the court and had been untruthful about the Minister. A number of these untruths were contained in communications made by the Chief Executive of Ryanair (Mr. O'Leary). Others were contained in affidavits sworn on behalf of Ryanair but in circumstances where the deponents had not been informed of the true position which Mr.

O'Leary knew but failed to tell them. The affidavits sworn by them misled the court and misled the other parties to the litigation.

All of this having been accepted by Ryanair, in the course of discussion with counsel I asked the following question concerning the conclusion which I expressed at the end of my judgment in the judicial review proceedings and to which exception is now taken.

> "**Question:** What is wrong with that conclusion when you accept that Ryanair told untruths to the court, told untruths about the court and told untruths about the Minister?
>
> **Answer:** Because that reference is to Ryanair and all its employees and this Court had evidence before it and formed the view that informs that decision on the evidence of Mr. O'Leary, the individual who wrote the letter, who apologised to the court. If the court had said at that point in time that Mr. O'Leary was the individual and it had formed a view on (sic) in relation to the credibility of or otherwise of that witness, that is one thing but what the court did, in my respectful submission, was to globalise that to the entirety of an organisation where there is (sic) 8,000 employees, 7,999 who are not involved in that particular correspondence and that letter that the court rightly identifies is the basis for the decision was a letter written and sent by Mr. O'Leary.
>
> **Question:** Well, could any reasonable person conclude in the context of this judgment that when that comment was made that it affects every Ryanair employee, pilot, airhostess, ground handler whatever it might. Could any reasonable person so conclude when one reads the judgment in context, quite apart from isolating one clause in one sentence.
>
> **Answer:** Whether I can form that view or this Court forms that view is not the appropriate approach."

Ryanair does not complain that the comment was not justified. Indeed it would be difficult to so complain given the serious untruths involved. Rather the complaint is that by referring to Ryanair I was, to use counsel's expression, "globalising" my conclusion to cover "the entirety of an organisation where there is (*sic*) 8,000 employees".

From counsel's response, which I have set out in full above, it appears that I if I had commented that one had to conclude that the truth and Mr. O'Leary were uncomfortable bedfellows, this application would not have resulted. In order to be sure that that was indeed what counsel was submitting I put precisely that question to him. Here is the question and his answer.

> "**Question:** So if, instead of saying "Ryanair", I had said at the end of the judgment that Mr. O'Leary and the truth are uncomfortable bed fellows, there would not be this application, is that what you are saying?
>
> **Answer**: That is a reasonable question and one I would wish not to have to answer, because it is not one that I had to trouble myself with. And avoiding the question, I know, the only matter I had to address my mind to was what was actually said by the court.
>
> Because to date, to get to this point in time, and I do not want to get – Ryanair at no stage prior to this, and there have been many cases in which Ryanair has been involved, has it ever brought an application prior to this before for your Lordship not to hear the matter. And your Lordship has heard many cases. And I was at pains, both in the submission and the opening, to indicate to the court that the view furnished to Ryanair was the fact that a judge has in the past held one way or another relative to that particular entity is not a grounds of itself to base any application for a recusal.
>
> And it is only and simply because of the issue that has subsequently arose (sic) in relation to the reference to Ryanair as the party which the court identified as being the issue in relation to the truth, not, as I say, Mr. O'Leary."

That response appears to confirm that had I made my comments concerning Mr. O'Leary and not Ryanair, this application would not have been brought.

Despite the fact that it was Mr. O'Leary who was personally responsible for the untruths in question (a fact which is obvious on a fair reading of my judgment in the judicial review proceedings) the comment to which exception is taken did not name him.

The reason why I did not personalise the comment in question to Mr. O'Leary was because on each occasion of his untruthfulness he was acting in his capacity as the Chief Executive of Ryanair. He acted at all times on behalf of Ryanair and in that company's name.

For all I know Mr. O'Leary may be a man of complete probity when dealing with his personal affairs. Perhaps he would not dream of uttering an untruth when dealing with such matters. I simply do not know because I decide cases on evidence and there was no evidence as to his personal affairs on his approach to them. In such circumstances I do not believe that it would have been appropriate or fair to make the comment in the form which Ryanair finds unobjectionable.

Objective Bias

Much judicial ink has been expended both in this jurisdiction and abroad in discussing the concept of objective bias and the test to be applied when such an allegation is made.

It is not necessary for me to range over the many authorities which were cited to me in the course of argument since a number of the more recent decisions set out in clear and unequivocal terms what constitutes objective bias and the test to be applied in deciding whether such an allegation is made out.

In *O'Callaghan v. Mahon* [2008] 2 I.R. 514, Fennelly J. synopsised the principles involved at p. 672. He said as follows:-

> "(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;
>
> (b) the apprehensions of the actual affected party are not relevant;
>
> (c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;
>
> (d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses."

This is the test which Ryanair must meet if it is to be successful on this application.

The judgment of Fennelly J. is peppered with references to authorities from Ireland and the common law world. The conclusions which he reached are not peculiar to this jurisdiction but apply in many common law countries.

An equally comprehensive review of the authorities was conducted by the Court of Appeal in England in the case of *Locabail UK Ltd v. Bayfield Properties Ltd* [2002] W.L.R. 870. The test formulated by that court does not differ from that stipulated by Fennelly J. in his judgment in *O'Callaghan's* case with which the majority of the Supreme Court agreed and which is binding on this Court.

I find observations in the judgment of Fennelly J. in *O'Callaghan* and the Court of Appeal in *Locabail* of assistance to me in the task which I have to undertake of objectively examining the application which is made by Ryanair.

In *Locabail* the Court of Appeal said as follows:-

> "If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. We find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* [1994] 4 S.A. 147, 177, even though these observations were directed to the reasonable suspicion test:
>
> > 'it follows from the foregoing that 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 predisposition. They must take into account the fact that they have a duty to sit in 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 or will not be impartial.'
>
> 22. We also find great persuasive force in three extracts from Australian authorities. Mason J., sitting in the High Court of Australia said in *In Re JRL, ex-parte CJL* [1986] 161 C.L.R. 342, 352:
>
> > 'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'
>
> 23. In *In Re Ebnor* [1999] 161 A.L.R. 557, 568 para. 37, the Federal Court asked:
>
> > 'Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?'
>
> 24. In the *Clenae* case [1999] V.S.C.A. 35, Callaway J.A. observed, at para. 89E:
>
> > 'As a general rule, it is the duty of a judicial officer to hear and determine the case as allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'"

Having set the general scene by reference to those quotations, I will now turn to consider the evidence which Ryanair has adduced in support of this application. I will then analyse it by reference to the authorities already cited and to a number of others which assist in reaching a determination on this matter.

The Evidence
Two affidavits were sworn in support of this application. The first is that of Mr. O'Leary and the second that of Mr. Michael Cawley who is the Chief Operating Officer and Deputy Chief Executive of Ryanair.

In Mr. O'Leary's affidavit, he sets out the background to the present action. He says that Ryanair is claiming in excess of €7m from Terravision for, *inter alia*, breach of contract. Terravision operates a coach business. Ryanair claims that it entered into a marketing contract with Terravision whereby Ryanair agreed to market Terravision's coach services from certain airports, on Ryanair's flights and on its website. He avers that from an affidavit sworn by Mr. Petroni on behalf of Terravision, he believes that two defences will be raised at the trial. These are a claim that Ryanair has sued the wrong party and secondly, a dispute as to Ryanair's interpretation of the contract. He goes on to say that there are factual as well as legal issues between the parties and that Ryanair employees will have to give evidence at the trial.

Mr. O'Leary will not be a witness at the trial. However, he says that Mr. Cawley and other members of Ryanair's commercial department will be called. They will have to give evidence, he says, on both issues at the trial. He goes on to say that the adjudication of these matters will determine the case and that it will have very serious financial repercussions for the parties.

He then says as follows:-

> "In this context, Ryanair has an apprehension of bias on the part of Mr. Justice Kelly if he were to determine these proceedings and indeed any disputes that involve Ryanair."

Two issues arise from this. First, that sentence could be read as amounting to an allegation of actual bias but I will not so read it in

the light of what was said in court by counsel, what is contained in the written submissions and the other documents all of which assert objective bias and nothing else.

Second, the affidavit continues in like vein throughout and expresses Ryanair's apprehensions concerning my continued involvement with this litigation. In that regard it entirely misunderstands the legal position. As is clear from the passage which I have quoted from the judgment of Fennelly J. in *O'Callaghan,* "the apprehensions of the actual affected party are not relevant". It is not what Ryanair apprehends that is relevant but what a reasonable fair minded objective observer would think.

Mr. O'Leary then quotes from my judgment in the judicial review proceedings. The part which he quotes is as follows:-

> "In view of the conclusion which I have reached, it is not necessary for me to reach a decision on whether the conduct of Ryanair is of a type that would warrant a refusal of leave as a matter of discretion.
>
> It has to be recorded, however, that the factual misstatements in affidavits put before the Court on its behalf misled the Court in a material way. Its chief executive in his letter of 25th February, 2010, to the Minister seriously misrepresented the position of the court. A later letter from Mr. Komorek of 12th March, 2010 was to like effect. These are grave matters and fall far below the standards that the Court is entitled to expect.
>
> Earlier in this judgment, I set out the exchanges between Ryanair and the Minister and identified various misrepresentations of the Minister's position which occurred. Whilst that is not perhaps of direct relevance, I was invited to regard it as part of the alleged 'ingrained culture of disrespect for process', including the court process, which appears to prevail in Ryanair.
>
> Having had to consider Ryanair's untruths to the Court, its untruths about the Court and its untruths about the Minister, one has to conclude that the truth and Ryanair are uncomfortable bedfellows."

Mr. O'Leary then says that he has been advised that I struck out Ryanair's application for judicial review and awarded costs against it without affording Ryanair an opportunity to make any submissions regarding costs. That is indeed correct. There is nothing unusual in that where a court wishes to record its disapproval of misconduct of the type in question by awarding costs. It should be borne in mind that the misconduct in the case was both gross and admitted and indeed apologised for once it was found out. But it had, *inter alia*, misled the court and the other parties to the litigation. Thus costs had to follow and there was no point in time being wasted on spurious submissions.

The affidavit continues:-

> "It is clear from the portion of his judgment set out above that Mr. Justice Kelly has expressed a conclusion and/or belief that Ryanair does not tell the truth, or at the very least is uncomfortable with the truth. It is not confined to particular persons within Ryanair. It is not confined to the particular issues that arose in the case the subject matter of the judgment in question. It is an unqualified statement that on the basis of what Mr. Justice Kelly heard in those proceedings, he believes that Ryanair is not disposed to telling the truth.
>
> Having made such a statement, Ryanair has an apprehension of bias and is naturally apprehensive that any version of events advanced by anyone within its organisation, whether by way of a simple interlocutory application or when seeking substantive relief, will be influenced by Mr. Justice Kelly's conclusion and/or belief that Ryanair and the truth are 'uncomfortable bedfellows'.
>
> For this reason, Ryanair is apprehensive that the defendant's evidence, where it conflicts with the evidence of Ryanair, will be preferred. Obviously that it something that may occur in any case. However, Ryanair has, given what has been indicated to date, an apprehension of bias. In circumstances where the success of these proceedings is dependent upon the parties advancing their different accounts, there is an apprehension on the part of Ryanair that its version of the facts will not be accepted or favoured by Mr. Justice Kelly."

This passage exemplifies again the mistaken understanding of the legal position to which I have already alluded i.e. it is not Ryanair's apprehensions that matter or are relevant. The test is objective. Whilst Ryanair may complain, it is the hypothetical objective observer that matters (per Fennelly J. in *O'Callaghan* at p. 666)

The affidavit then departs from the judgment in the judicial review proceedings and goes back to what occurred in court in March 2010 when Mr. O'Leary gave oral evidence to explain the misleading affidavits sworn by Ryanair. He cites a passage from the transcript and seeks to rely upon that for a conclusion which he then states at para. 10 of his affidavit. The particular passage arose in circumstances where counsel had asked Mr. O'Leary if he had considered issuing a clarifying press release apologising to the Minister for Transport once Mr. O'Leary received the Minister's letter of 3rd March with a view to making it clear to the public that the Minister had in fact set up an appeal panel. Mr. O'Leary replied in the negative. I asked him why he had not done so. This was the response:-

> "A. Because the press release, your Honour, simply calls on the Minister to appoint the Appeals Panel.
>
> Q. 122. Mr. Justice Kelly: Which he had already done?
>
> A. With respect, we were not aware that he had already done when we issued that.
>
> Q. 123 Mr. Justice Kelly: I know, you've told me that. When you did become aware, you didn't think it right to put the matter right and say the Minister has now done it?
>
> A. I'm not sure, why we would issue – if we issue a press release calling on the Minister to do something, why would we issue a press release subsequently saying thank you to the Minister for doing it?
>
> Q. Mr. Justice Kelly: You might have regarded it as being fair to people, having represented as you did here, in such offensive terms, that when you became aware of the fact that when you actually issued this press release two days beforehand, the Minister had actually set up the panel. You might have thought it right to say well in fact the Minister had done so but you didn't?

A. I disagree with your interpretation.

Q. You are entitled to disagree with my interpretation if you wish.

A. I think what is offensive here is that I have customers who will be paying 40% higher airport charges.

Q. Mr. Justice Kelly: You needn't make a political speech, Mr. O'Leary. You are here now to deal with a very serious matter, and a serious matter for you personally, I want to warn you."

Having cited a portion of the passage which I have set out, Mr. O'Leary swears that:-

> "Ryanair is concerned that sworn evidence given by it under oath in these proceedings will be dismissed in similar terms as a 'political speech' rather than a genuine explanation of Ryanair's position in these proceedings."

Quite apart from the offensive nature of this averment, it once again demonstrates Mr. O'Leary's failure to understand the legal position.

The next paragraph in his affidavit cites from transcripts of different hearings in the judicial review proceedings dated 24th March, 26th March, 15th April, 4th June and 10th June, respectively. However, having exhibited these transcripts, nothing specific is identified in them in support of this application.

The affidavit then ranges over other proceedings in which Ryanair was involved and which were entered into the Commercial List.

The first involved Cork Airport Authority and a number of other entities who sued Ryanair. The case was entered into the Commercial List despite the opposition of Ryanair. Mr. O'Leary combs through a twenty-five page transcript of that hearing and takes issue with some factual matters which were dealt with in the course of my ruling.

The second set of proceedings involved a claim by Dublin Airport Authority against Ryanair. There is no transcript of this hearing, but reliance is placed on a solicitor's attendance of a hearing which took place in October 2008 in which it is alleged that I made criticism of Ryanair's utilisation of the court as part of a publicity campaign being conducted by it on the topic of airport fees. I have little recollection of this matter, but even a perusal of the solicitor's attendance makes it clear that part of the submission that was made to me on the part of the applicants on that occasion was that Ryanair was indeed engaging in a deliberate campaign in seeking to avoid entry into the Commercial List by a number of devices.

Issue was taken with the costs order which I made against Ryanair in that case when it unsuccessfully objected to a transfer to the Commercial List. On the preceding Friday, its solicitors had written in unequivocal terms that it would consent to such transfer, but on Monday, a different stance was taken.

It is of no little significance that despite the fact that these complaints are made now, no appeal was taken from any of the orders in question.

Finally, he refers to an application which was made seeking that I should recuse myself from hearing the case brought by Cork Airport Authority against Ryanair. Counsel sought to have me deal with that in a completely informal manner without any affidavit evidence being placed before the court. I declined to deal with it on that basis. I required a motion and grounding affidavit to be brought in the normal fashion. Having considered the contents of the affidavit, I decided to recuse myself. I did not do so by reference to the complaints made by Ryanair which arose principally from my observation in the judgment in the judicial review proceedings. Rather, I did so because to hear the matter in full would have delayed those proceedings unnecessarily, and so the party who had successfully sought the transfer of the case to the Commercial List (not Ryanair) would be deprived of its benefits by the delay that would have been involved in hearing the application in full.

Again, the transcript has been combed by Mr. O'Leary and extracts taken from it, but it is all done in the context of Ryanair's alleged apprehensions.

It is right that I should point out that both in the course of the written submissions and in the oral hearing, little, if any weight, was attached to the material in Mr. O'Leary's affidavit concerning anything other than my observation in the judgment in the judicial review proceedings. Indeed, counsel appeared to distance himself from any reliance upon any such matters where, in the course of his answer, which I have already reproduced in full, he said that he, "was at pains, both in the submission and the opening, to indicate to the court that the view furnished to Ryanair was the fact that a judge had in the past held one way or another relative to that particular entity, is not a grounds of itself to base any application for a recusal". In this he is undoubtedly correct having regard to the case law on the topic.

Mr. Cawley's affidavit is much shorter than Mr. O'Leary's. It largely repeats what he had to say concerning the issues in the present case. It reproduces the passage to which offence is taken from my judgment of 4th June, 2010. He then goes on to allege that my conclusion was not confined to particular persons within Ryanair, nor was it confined to the particular issues that arose in the case the subject matter of the judgment. He contends that the comment is an unqualified statement and, that on the basis of what I had heard in those proceedings, I believe that Ryanair is not disposed to telling the truth. Having made such a statement, he says, Ryanair is apprehensive that any version of events, as advanced by anyone within its organisation, would be influenced by the conclusion that Ryanair and the truth are uncomfortable bedfellows.

Discussion

In examining the evidence put before the court, the yardstick which I must use is that of a reasonable and fair-minded objective observer. That observer is not to be unduly sensitive. He is to be in possession of all the relevant facts. He is to exclude the apprehensions of the actual party. If such an objective observer, behaving in a reasonable and fair-minded fashion, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial, then a recusal should occur.

Before considering in detail the application of those norms to the evidence adduced here, it is, I think, useful to quote one further passage from the Court of Appeal's decision in *Locabail*. This is a passage which was cited with approval by Clarke J. in *A.P. v. H.*H. Judge McDonagh [2009] IEHC 316:

> "Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however,

> conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family;…
>
> . . .
>
> by contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were at issue to be decided by the judge, he had, in a previous case, rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if, on any question at issue in the proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. 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. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

As is clear from the passage which I have quoted from the judgment of Fennelly J. in *O'Callaghan's* case, a reasonable and fair-minded objective observer would be in possession of all the relevant facts. Thus, he would have acquainted himself with the entire of the judgment of 4th June, 2010. He would realise from the terms of that judgment that the untruthfulness dealt with in it was admitted, albeit only after it was found out. He would realise that it was of a most serious variety. He would realise that part of it involved an allegation being made to a Government Minister that the court had been critical of him, when, in fact, no such thing had occurred. He would realise that misleading affidavits were placed before the court on two occasions. He would realise that the comment in respect of which complaint is made was made in that context. He would know that a judge is entitled to comment adversely on the misconduct of a party to litigation, particularly when that misconduct is intimately connected to the administration of justice.

The objective observer would also know that judges, when they take up office, make the solemn declaration prescribed under Article 34.5 of the Constitution that they will execute the office of judge without fear or favour, affection or ill will, and will uphold the Constitution and the laws. The observer would know that this is taken very seriously by judges. He would also know that judges can disabuse their minds of any irrelevant personal beliefs or predispositions.

He would also bear in mind that whilst justice must be done and be seen to be done, a judge should not too readily accede to suggestions of appearance of bias and thus not discharge the duty to try cases.

In the light of all of this, would the objective observer conclude that the comment made is one which could give rise to a reasonable apprehension of bias?

The only way that he might so conclude would be by accepting the construction which is sought to be placed on the comment and interpreting it as counsel sought to do as, namely, a criticism of all 7,999 Ryanair employees mentioned by him. Could any reasonable, fair-minded, objective observer, who is not unduly sensitive but who is in possession of all of the relevant facts, so conclude? I do not believe so. He would regard such a construction as far fetched.

To give the comment the construction which is sought to be placed upon it by Ryanair is to ignore the factual matrix against which the comment was made, the issues in question and to artificially extend it in a way that is wholly unreasonable. The comment was not intended in the way that Ryanair now asserts nor could any reasonable person so interpret it.

The comment would not be regarded by an objective observer as indicating any reasonable likelihood of bias against Ryanair or its employees generally who might be witnesses in this action.

I do not accept that a case of objective bias has been made out.

I attach as little weight to the other matters relied upon by Mr. O'Leary in his affidavit as counsel appearing on behalf of Ryanair gave to it in the course of the submissions both written and oral. Neither those matters alone nor combined with the principal area of complaint, in my opinion, make out a case for objective bias. Some of the complaints are absurd, for example the allegation that because I enjoined Mr. O'Leary from making a political speech in the witness box that there is a reasonable apprehension that sworn evidence of fact would be similarly regarded as political posturing. The case on objective bias fails.

Other Considerations
Two further elements of argument fall to be dealt with. Both arise from observations which are contained in *Locabail* and a subsequent decision of the Court of Appeal in *Drury v. British Broadcasting Corporation* [2007] EWCA 605.

The first proposition is one with which I have no difficulty whatsoever. It is that, as was stated in *Locabail*, that if there is "real ground for doubt, that doubt should be resolved in favour of recusal". If the objective observer would have a real ground for doubt, then the recusal should be granted, even in circumstances where the case for recusal does not meet the necessary standard of proof.

In the present case, it might be argued that the objective observer could conceivably have a doubt if it were the case that Mr. O'Leary would be giving evidence in this case. In the light of the quotation from Smyth L.J., which follows in the next paragraph, I do not believe this would be a good argument. But any possible doubt disappears since Mr. O'Leary will not be a witness.

The second aspect of the matter arises, in particular, from the observations in *Drury*. There, Smyth L.J., having referred to *Locabail*, said:

> "From the guidance given in that case, it is clear that the mere fact that a judge has been critical of a party on a previous occasion does not found a later objection to the judge sitting on another matter involving the same party. However, all such applications have to be considered within their factual context and it is possible that trenchant criticism of a party by a particular judge might give rise to a perception of a risk bias in another case.

. . .

> It is my view that no impartial observer with knowledge of all the relevant facts, would think that any adverse view that Wilson L.J. might have formed of Mr. Drury in the past could cause him to be biased in respect of this appeal. I think it would be entirely appropriate for us to reject the application.
>
> However, in *Locabail*, the court made it plain that, if there were any room for doubt as to which was the right course to adopt, the doubt should be resolved in favour of recusal. Also, if another judge can be found so that the case can proceed immediately, without increased cost or inconvenience to the parties, it seems to me that the court can properly and should arrange that substitution, so as to avoid any question of dissatisfaction or future complaint."

Thus, in *Drury,* the Court of Appeal, although it rejected the application to recuse on the merits and had no doubt in that regard nonetheless substituted a judge for the judge originally assigned.

In the present case, I have to bear in mind that this piece of litigation was entered into the Commercial List, which has as its objective, the fair and expeditious resolution of commercial disputes. The case has been subjected to delay as a result of Ryanair's application. As it was Ryanair which successfully applied to have the case transferred to this List, it can hardly have any legitimate complaint concerning any delay which its own unsuccessful motion has brought about. However, I have to have regard to the rights of the defendant as well.

The defendant has not been responsible for any such delay. It is anxious to have its case heard including the motion to strike out Ryanair's statement of claim. As I have already observed, the quantum of the claim increased from €1.8m to €8.4m (less Stg. £986,000) within a period of four months. Such a large claim against any company, whether well founded or not, is something that can create problems for it. It may have to be provided for in its accounts and may even lead to a qualification of such accounts. It is, in principle, undesirable that a claim of that size should be allowed to remain undecided for an unnecessary length of time particularly in the Commercial List.

If I continue to deal with this litigation, I have little doubt but that Ryanair will appeal this decision to the Supreme Court thus delaying the hearing of this action for a period in excess of three further years. Even if such an appeal were to be entered in that court's priority list, a delay of least a year will be encountered. The interests of justice and in particular the rights of the defendant will not be well served by such delays.

In these circumstances, I am of the opinion that I ought to follow the course adopted by the Court of Appeal in *Drury's* case. Such a course can be adopted without increased cost or inconvenience. The interests of justice, the rights of the defendant and the attainment of the objectives of the Commercial Court will not be well served by any further delays.

In these circumstances, I propose to have a colleague deal with this litigation. I do so, solely to ensure that no further delays are encountered, thus vindicating the entitlement of the defendant to have its motion and the action against it adjudicated upon speedily and to ensure that the objectives of the Commercial Court can be achieved. It is for these reasons and these reasons alone that I propose taking the course which I have outlined.