Neutral Citation [2015] IEHC 276

THE HIGH COURT

[2005 No. 1749P]

BETWEEN

ORLA McCORMACK

PLAINTIFF

AND

JOHN McCORMACK

DEFENDANT

Note of Ex Tempore Ruling of Mr. Justice David Keane delivered on the 28th April 2015

Introduction

1. This is the Court's *ex tempore* ruling on the plaintiff's application that I recuse myself from the trial of the present action on the ground of bias.

2. The trial commenced on the 21st April 2015, on which date the case was opened and the plaintiff, having been sworn in as a witness, commenced her evidence in chief. The Court was obliged to deal with the conclusion of another trial on the 22nd April and the plaintiff's evidence in chief resumed on the 23rd April. An exchange occurred between Counsel for the plaintiff and the Court at the conclusion of that day's hearing, which gave rise to the application at hand on the morning of the 24th April. The Court is now ruling on that application at the first practicable opportunity, which is today.

Background

3. In order to put the application and the present ruling in context, it is necessary to briefly describe the nature and history of the proceedings and certain aspects of the trial so far.

4. The parties are husband and wife, although it appears to be common case that they have been effectively separated since 2003.

5. On the 19th May 2005, a plenary summons issued on behalf of the plaintiff. In it, and in the statement of claim subsequently delivered on the 28th June 2005, the plaintiff claims for rescission of an agreement that she entered into with the defendant on the 2nd December 2004. Under the central terms of that agreement the plaintiff agreed to relinquish her share in a nursing home business operated by the parties in exchange for a payment of €350,000. The plaintiff alleges that the said agreement was procured by misrepresentation or the application of undue influence or duress, or some combination of those factors, or that it amounts to an unconscionable bargain. A defence and counterclaim was delivered on the 2nd August 2005, admitting the agreement, denying that it was procured inequitably and denying, in particular, that the plaintiff was not in receipt of independent legal advice in relation to it. The plaintiff joined issue with that defence by reply and defence to counterclaim delivered on the 24th July 2014.

6. The defendant in these proceedings initiated separate family law proceedings against the plaintiff by Circuit Family Court Civil Bill issued on the 24th November 2004, in which he seeks a decree of judicial separation and various ancillary reliefs. The plaintiff delivered a defence and counterclaim in those proceedings on the 14th December 2005 in which she also seeks a decree of judicial separation, together with various ancillary reliefs, notable amongst which is the necessary property adjustment order to resolve the issues with regard to the respective interest of the parties in the nursing home business. Those proceedings have not yet been brought on for trial.

7. When the Court was apprised of the existence and nature of those family law proceedings during the opening of the plaintiff's case, I enquired whether the parties had given consideration to the possibility of seeking to resolve all of the issues between them in that forum, bearing in mind the obligation imposed on any court that is dealing with proceedings covered by section 16 of the Family Law Act 1995 to "endeavour to ensure that such provision is made for each spouse concerned and for any dependent member of the family concerned as is adequate and reasonable having regard to all the circumstances of the case." In response, I was told that the parties had developed a tacit understanding that the present equitable claim should be determined first, notwithstanding that this must entail the additional court time and legal costs associated with the resolution of two sets of proceedings rather than one. Accordingly, I permitted the trial to proceed, although not without at least some misgivings in light of the emerging trend towards more active case management, whereby the interests of the efficient administration of justice and of access to justice generally, might well require the Court, in an appropriate case, to overrule the consensus of the parties on a procedural issue.

8. Later in the course of the opening of the plaintiff's case, certain *inter partes* correspondence was read out in which criticisms were made on behalf of the plaintiff concerning the position of the defendant in respect of the maintenance of the parties' three children. At that point I intervened again, explicitly stating that I was addressing both parties in expressing a concern that they were unable or unwilling to consider seeking the resolution of the disputes between them within the rubric of the family law proceedings. In doing so, I made the parties aware that the Court's specific concern stemmed from the absence in proceedings in chancery of any provision protecting the privacy interests of family members (including children) equivalent to that permitted under s. 45(1) of the Courts (Supplemental Provisions) Act 1961 and provided for by s. 38(6) of the Family Law Act 1995 and s. 34 of the Family Law Reform Act 1989, whereby proceedings covered by those provisions are heard otherwise in public. Moreover, under s. 40 of the Civil Liability and Courts Act 2004, as amended, *bona fide* representatives of the press who attend such proceedings are subject to certain reporting restrictions and possible exclusion from the hearing. In response, Counsel for the plaintiff informed me that, while it was acknowledged that public policy issues may be in play, it is significant that the youngest of the parties' three children attained the age of majority last year. Somewhat reassured by that information, I permitted the trial to proceed, although it is by no means clear to me that the privacy interests protected by the legislation I have just cited are solely and exclusively those of the minor children of the parties.

9. Two further occurrences during the trial so far need to be described at this point in the present ruling in order to place the application now before the Court in sharper focus.

10. The first of those occurrences arose in the context of an objection made by Counsel for the defendant to a question asked of the plaintiff by her Counsel on the afternoon of the 23rd April. I will return to exchanges between Counsel and the Court in the context of that objection later in this ruling. For present purposes, suffice it to note that, in the course of his submission in response to that objection, Counsel for the plaintiff stated:

> "The simple fact of the case is that it is not possible to conclude that the bank has a concern that is not driven by, or that is independent of, the plaintiff's mother-in-law's manipulation of the situation. This is all immensely cunningly planned. The Court has to be prepared to see through what is a very, very clever scheme devised by a lady of immense commercial acumen and unbridled ruthlessness."

11. I come now to the intervention that has precipitated the present application, while fully acknowledging that the application ranges much further and wider than an objection to that intervention alone. Very close to 4 o'clock on the afternoon of the 23rd April, the plaintiff, who was still in the course of her examination-in-chief, stated in evidence as follows:

> "I just want to say, your honour, you were concerned about the children knowing anything about John and myself and how we felt about things. They were never ever involved, I never ever let them know there was anything wrong. I never cried at home. Everything continued as normal as possible. And that's … I was determined that that would be the way forward for them…."

12. The following exchange then occurred:

> "The Court: "I think you misunderstand me, Mrs McCormack."
>
> The Witness: "Sorry"
>
> The Court: "I wasn't saying anything about having any particular concern about the manner in which the children may have been brought up or the manner in which the children may or may not have been exposed to whatever unhappy marital differences there were between you and Mr McCormack. I was expressing a concern, and frankly it is a concern I still feel, about the fact that matters are now being agitated in open court, not in family law proceedings where the parties can reasonably expect the protection of what is known as the in camera rule where what is said cannot be reported – but all of those matters are now being ventilated, to the extent they are being ventilated, in this Court upon which the media are entirely free to report, when it is suggested, for example, about a mother-in-law, and it is your perfect entitlement to make whatever case you wish, that this is a ruthless woman and somebody who will be exposed in these proceedings as a ruthless woman. That is all being done in this Court.
>
> Counsel "Those were my words, Judge."
>
> The Court "Yes."
>
> Counsel "And I take the gravest possible exception to that intervention. I take absolute exception to the interference with my role as a Counsel in presenting an extremely difficult case by your Lordship threatening, in open terms, to penalise my client for something I have said."
>
> The Court: "[Counsel], do you want to reflect on the suggestion that I have penalised your client for something that you have said?
>
> …
>
> Do you want to reflect on the suggestion that I have threatened anybody in any way, shape or form in these proceedings?"
>
> Counsel: "Perhaps I will retract that. I cannot stand over that."
>
> The Court: "I have expressed a concern, [Counsel]."
>
> Counsel: "It has gone a little bit further than that, Judge and I would be very concerned about the trend of your comments in this case. Perhaps we might leave it there until the morning.
>
> The Court: "That seems to me to be a very good idea. We will take the matter up at 11 o'clock in the morning."

The Application

13. At the resumption of the trial on Friday, the 24th April, Counsel for the plaintiff brought the present application that the trial should be halted on the basis that the Court should recuse itself.

14. Counsel for the plaintiff explained that the application is brought under three heads. Before setting out those arguments, Counsel prefaced his submission with the following statement:

> "This is a case which, as I explained, has a family aspect and a commercial aspect, there are hybrid or composite aspects to the case.
>
> The Court expressed certain concerns about that on Tuesday and we have bent over backwards to address those concerns to the point where the plaintiff in her evidence in chief is plainly inhibited in giving her evidence."

15. The foregoing statement is one of grave concern to the Court. Counsel for the plaintiff uses the plural "we", in suggesting that the plaintiff's side have bent over backwards to address the concerns expressed by the Court. Counsel appears to believe that whatever this response has been (and that is not clearly stated), it has had the effect of inhibiting the plaintiff in the giving of her evidence in this Court. It is important to make clear, as I believe the transcript will, that nothing in the concerns expressed by the Court required, or requires, the plaintiff to be in any way inhibited in the giving of her evidence. The Court requested both parties to give consideration to the possibility of resolving all of the issues between them, equitable and otherwise, in the family courts. The

parties have made clear that they do not propose to do so. Since then, the Court has been at pains to emphasise, as I believe the exchange just noted confirms, that it is the perfect entitlement of each of the parties to make whatever case he or she may wish, subject only to the rules of evidence. I wish to emphasise that the Court has expressed no concern of any kind that would warrant the parties, any witness or Counsel in this case being anything other than completely forthright, and it is disturbing that Counsel should suggest that any party properly advised could have been permitted to believe otherwise.

The first argument

16. I turn now to the first of three arguments made by Counsel in support of the plaintiff's application. According to my note, Counsel submitted (in pertinent part) as follows:

> "I want to state, because I want the transcript to show clearly that the Court directly imputed responsibility to the plaintiff for my remark in a way that went further than the legal fiction under which a party is responsible for the observation of her Counsel. The remarks of the Court were physically directed at the plaintiff…. The Court has now sanctimoniously objected to my referring to the plaintiff's mother-in-law as ruthless…. I thought we had addressed the Court's concerns but evidently we had not. Those concerns returned yesterday afternoon in the form of an attack on the plaintiff's case…. In those circumstances, how dare this Court object two thirds of the way through the plaintiff's evidence to my characterisation of [the plaintiff's mother-in-law] in whatever way I as plaintiff's counsel see fit to do so in the light of my instructions. And how, having done so, could the Court possibly propose to continue hearing the case."

17. I have considered that submission carefully and I have come to the following conclusions in relation to it. In the first place, I am satisfied that the narrow doctrine whereby a client may in certain circumstances be held to bear responsibility for the conduct of, or statements made, by his or her lawyer has no application to the circumstances of the present case. That is because the doctrine is solely directed towards those situations in which a client has no practical knowledge or control over a step taken, or statement made, by his or her lawyer as his or her legal representative. So, for example, the doctrine may (or may not) come into play where a legal representative makes a statement on a client's behalf that is alleged to be defamatory (or otherwise tortious); where a legal representative settles an action on a client's behalf with ostensible but, allegedly, without actual authority to do so; or where a legal representative purports to waive legal privilege on behalf of a client who contends he or she did not authorise that waiver, but hardly otherwise. In other words, the doctrine only comes into play where there is some actual or potential disagreement between lawyer and client concerning the extent of the lawyer's authority to make a particular statement on a client's behalf.

18. There is no suggestion of any such situation in this case. Counsel for the plaintiff is adamant that he has his client's unequivocal authority to make the statements, and to put forward the case, that he has made on her behalf. This has been Counsel's position both in opening the case and in the submissions he has made in responding to objections that have been made to certain questions he has put to the plaintiff as his own witness. There has been no suggestion, nor is there any suggestion now, that the plaintiff wishes to demur in any way from any such statement of her case.

19. Indeed, in making the present argument, Counsel expanded on that case by stating:

> "The defendant in this case is a cipher, he is a pallid emanation of his mother."

Whether the foregoing statement gives rise to any separate issue regarding the appropriate application of Order 15, rule 13 of the Rules of the Superior Courts is not one that I propose to address for the purposes of the present ruling. Accordingly, for the time being at least, I propose merely to note without comment the submission made by Counsel for the plaintiff that the rights and interests of the person concerned can be appropriately respected by the defendant making that person available for cross-examination on behalf of the plaintiff.

20. Moreover, paragraph 5.2 of the Code of Conduct of the Bar of Ireland states:

> "Barristers when conducting a case must not assert their personal opinion of the facts or the law. Barristers must not act as the mere spokesperson for the client or the instructing solicitor and must exercise the independent judgment called for during the case, and where practicable after appropriate consideration of the client's and the instructing solicitor's desires."

21. I have no reason to believe that Counsel for the plaintiff has not complied with this rule and I must assume, therefore, that, having exercised any independent judgment necessary, and having had due regard to his client's and his instructing solicitor's desires, he is putting forward the plaintiff's case and not expressing his own personal opinion when he asserts as a matter of fact that the plaintiff's mother-in-law is a person of unbridled ruthlessness and that the defendant is a mere cipher, or pallid emanation, of his mother.

22. In the premises just described, I do not accept that, in correcting an evident misimpression on the part of the plaintiff about the real nature of the Court's concern about a particular aspect of the proceedings, it was in any way improper, much less indicative of bias, for the Court to refer to the case that the plaintiff is making and from which, no doubt quite properly, neither she nor her Counsel now resiles. Therefore, I must reject as untenable the submission that, in attributing to the plaintiff the case that the plaintiff is in fact making, the Court is instead wrongly applying a legal fiction that may sometimes apply in other circumstances, whereby Counsel's statements are attributed to his client whether or not they were authorised by that client.

23. The second conclusion that I have reached on the plaintiff's first argument is that it is simply wrong as a matter of fact to suggest that the Court's intervention as quoted above amounted to, or was capable of being construed as, either "a sanctimonious objection to the plaintiff's case that her mother-in-law is an utterly ruthless woman" or "an attack on the plaintiff's case". I cannot reconcile either of those submissions with the words actually used by the Court and, in particular, with the words "it is your perfect entitlement to make whatever case you wish."

24. The third conclusion that I have reached on the plaintiff's argument is that, while it is perfectly proper – indeed, admirable – for Counsel to raise trenchant argument or objection where Counsel believes it is warranted, it is deeply regrettable that Counsel for the plaintiff should resort to *ad hominem* invective in accusing the Court of sanctimony, an allegation the truth or baselessness of which it is for others to judge, but which adds nothing to the present legal argument. After all, paragraph 5.1 of the Bar Council Code of Conduct states that "[b]arristers must maintain due respect and courtesy towards the Court before which they are appearing."

25. In summary, I must reject the first argument advanced on behalf of the plaintiff that the Court should recuse itself because, in correcting an evident misunderstanding on the part of the plaintiff about the nature of the Court's legitimate concerns, the Court was instead sanctimoniously objecting to the case being advanced on behalf of the plaintiff or mounting an attack on the plaintiff's case. I am satisfied that no reasonable person in the circumstances could have an apprehension that the Court had acted in the manner

alleged or that, in consequence, the plaintiff cannot have a fair hearing from this Court as an impartial judge.

The second argument

26. I turn now to the second argument advanced on behalf of the plaintiff in support of the present application. It can be very simply put. It is that the Court has made statements, put questions and, indeed, adopted a general demeanour in the course of the evidence that are intended to convey that it disbelieves the plaintiff's testimony. Expanding on his reference to the Court's demeanour, Counsel for the plaintiff complains specifically "the Court has pointedly stopped listening; the Court consults its mobile phone, it has more or less stopped paying attention over long stretches of the plaintiff's evidence." I will return to those particular assertions later in this ruling.

27. Specifically, Counsel submits that the Court has intervened in the evidence "at least twice" to pose questions of the plaintiff, in the course of her evidence in chief, that are intended to convey that she is not telling the truth. Rather unhelpfully, Counsel has not specifically identified either of the two instances to which he is referring. Nevertheless, Counsel submits that those interventions were intended to convey to him, to his opponent and to all of the lawyers in court that, prior to the conclusion of the plaintiff's evidence in chief, the Court has resolved the entire action against the plaintiff's interest in that the Court's "mind has snapped shut and rather loudly at that."

28. Counsel elaborates on this submission in the following terms:

> "That is, of course, expressed by way of a time honoured code, which is supposed to be understood by Counsel and it is unmistakeable and I want to say this to the Court: The day there is one language spoken in Court between lawyers and another between the people of Ireland is over. The Court should not expect Counsel to ignore that; to carry on; to submit meekly to proceeding with the case."

29. I will pause here only briefly to express mild bemusement at an application in which Counsel accuses the Court of sanctimonious behaviour before purporting to castigate the Court in the terms I have just described. But that observation should not be taken for one moment to suggest that I do not treat the application as one of the utmost gravity.

30. I wish to state clearly, simply and categorically that I have not attempted, nor would I ever attempt, to communicate with the lawyers, the parties or anyone else, whether in code or otherwise concerning the prejudgment of any issue, much less of the action, in this case, or in any other case, nor have I attempted, nor would I ever attempt, to communicate with the lawyers, the parties or anyone else in code or otherwise concerning any pre-determined conclusion regarding the truthfulness or credibility of any witness.

31. Furthermore, if any such "time-honoured code" exists, I wish to make it absolutely clear that I am a stranger to it. In that context, one might have expected Counsel to specifically identify the particular questions of which he complains and to explain to the Court the code that is being used and how and by reference to what principle the relevant message can be "decoded."

32. Counsel for the plaintiff relies on two propositions in support of his argument. The first is that, in Counsel's words "the *animus* of the Court has not escaped my client who has instructed me to make this application." I will assume that Counsel is using the word *animus* by reference to the subsidiary meaning "motivating spirit or feeling", rather than by reference to its principal meaning "display of animosity." I will further assume that Counsel is not deliberately seeking to rely on any ambiguity there may be in that regard.

33. In response to that particular proposition, Counsel for the defendant responds that he vehemently disagrees that there is any basis for the present application; that he fails to see how the Court's interventions were in any way indicative of any pre-determination of any issue; and that neither he, his instructing solicitor nor his client were aware of any message communicated by the Court in code.

34. The second proposition upon which Counsel for the plaintiff relies to lend weight to his argument is that he is absolutely satisfied that the application should succeed by reference to his own lengthy experience in practice. In my brief tenure on the bench, I have noticed that it is surprisingly frequently the lot of less experienced judges to be presented with arguments that, instead of resting on any identified legal authority, are based instead on the suggestion that appropriate deference is due to the greater experience of the Counsel who is making them.

35. No legal authority of any kind has been cited in the course of the present application. It is to the relevant legal principles (and to what seems to me to be some helpful and persuasive legal authority) that I now propose to turn.

An excursus on the law

36. It is one of several remarkable features of the present application that, although Counsel for the plaintiff did not expressly address the conceptual basis upon which it is being pursued, the assertions that he makes on behalf of his client appear to amount to an allegation of subjective bias; that is, it might be considered that he claims to have evidence, in the form of the transcript when produced, his own observations and his knowledge of what he describes as "a time honoured code" whereby he contends he can establish the actual state of mind of the court is one of accomplished pre-judgment bias towards his client. As he did not address the point, I do not know whether Counsel puts his case so high. But for the avoidance of doubt, I should say that I harbour no pre-judgment bias or bias of any kind towards the plaintiff; that I am satisfied (in circumstances that will be further elaborated upon later) that the transcript when produced will reflect that fact; and that I have paid careful attention to the plaintiff's evidence (a proposition to which I shall also later return).

37. The most authoritative modern statement of the test for bias is that set out by Denham J. in *Bula Ltd. (No. 6)* [2000] 4 I.R. 412 (at 441) in the following terms:

> "[I]t 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."

38. In so far as subjective (or actual) bias, as well as objective bias, may be in play, the most apposite authority of which I am aware is the decision of the Supreme Court in *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159. In that case, Keane J. summarised the position as follows (at 187):

> "Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the

litigant of the important right to which we have referred and violates one of the most fundamental principles underlining the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing real danger of bias without requiring them to show that such bias actually exists…."

39. In the same case, Barron J. addressed the issue of bias in the following terms at 221):

> "Insofar as bias may be found to exist or have existed, it will always predate the actual decision or contemplated decision. Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing and in that way alert a party to the possibility of bias and so enable such party to establish facts which show that the attitude adopted by the decision maker in the course of the hearing was one which might have been expected having regard to those facts. The essence of bias then is the perception – the strength of the perception not being relevant for the purpose of this definition – once all the facts are known that the particular decision maker never could give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude. Obviously, if it is perceived that it may influence a decision yet to be given, it must exist at that stage."

40. Later in his judgment, having considered at some length the decision of Mahon J. in the New Zealand case of *Anderton v. Auckland City Council* [1978] 1 N.Z.L.R. 657, Barron J. concluded as follows (at 225):

> "In so far as Mahon J. was of the opinion that the manner in which proceedings are conducted might in itself create a reasonable suspicion of bias, I must respectfully disagree. Without evidence of the connection to which he refers there cannot be evidence from which bias can be perceived. In *In re Watson; Ex p. Armstrong* and the other two cases there was clear evidence of the connection. There may be many reasons for the manner in which proceedings may be conducted. To suggest that the cause must be bias is speculative. There is a duty upon decision-makers to carry out the process leading to the decision in a particular way. Not to do so may make the process unfair or otherwise invalidate it, but that is not bias."

41. In his further concurring judgment in the same case, Murphy J, cited with evident approval the views of Bingham L.C.J. in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd*. [2000] 2 W.L.R. 870 as follows (at p. 243):

> "Having then identified a number of circumstances which would give rise to a suspicion of bias the Lord Chief Justice went on to exclude the following:-
>
> > "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…."

42. Later in his judgment, returning to the appeal then at hand, Murphy J. stated (at p. 245):

> "Furthermore no authority was cited in support of the proposition that bias could be inferred from a series of adverse findings in a particular case. Indeed some American authorities – which are of course based on a different jurisprudence – would suggest that such a procedure lacks validity. In *National Labour Relations Board v. Pittsburgh S.S. Co*. (1949) 337 U.S. 656, a hearing officer found the witnesses for the company untrustworthy and those for the union involved reliable. The N.L.R.B. adopted the finding of the examiner and the Court of Appeal upheld the conclusion that this fact alone showed undue bias. The Court of Appeal said:-
>
> "It is enough to say that the unvarying repudiation of the witnesses for the petitioner because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary."
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> That decision was reversed by the Supreme Court (337 U.S. at 659) which expressed its judgment in terms, with which I would agree, as follows:-
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> "…total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.""

43. The following particularly helpful summary of the relevant principles of the law of the United States, which strongly commends itself to me as of obvious potential relevance to the application now at hand, can be found in Flamm, *Judicial Disqualification, Recusal and Disqualification of Judges*, 2nd ed., (Berkeley, California), 2007 (at pp. 124-5):

> "In circumstances that are apt to shake the confidence of a litigant in an impartial adjudication, a judge should not be reluctant to step away from a case. But because some people see goblins behind every tree, there is a significant difference between a lawyer's or client's perception of bias and the appearance of bias generally. For this reason and because some counsel are willing to use every available weapon in their arsenal to achieve their goals, it has been recognized that an approach to disqualification that would require a judge to base his or her decision as to whether a reasonable observer would question her impartiality on a litigant's or attorney's subjective view would likely result in a system that is tantamount to peremptory disqualification.
>
> It has generally been agreed, therefore, that neither a partisan litigant nor her attorney provides an appropriate frame of reference for determining whether a judge's impartiality can reasonably be questioned, and that is so regardless of how strongly the litigant's or his counsel's views on this score may be held. Thus, in the absence of a statute that requires the court to consider the allegations of bias from the point of view of the litigant, the subjective belief or fear of a party or his counsel that a judge may be biased is ordinarily not deemed to be legally sufficient to support a well-founded disqualification motion."

The second argument - conclusions
44. Having carefully considered the submissions and the law as I perceive it to be (no authority having been opened to the Court), I have come to the following conclusions on the plaintiff's second argument:

> (a) That, as a matter of fact, the plaintiff's assertions that the Court has made comments, asked questions and adopted a demeanour designed to communicate to the lawyers (but not to other persons) in a secret code that it has pre-judged the action against the plaintiff are an offensive nonsense and are wrong.
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> (b) The test for bias is whether a reasonable person in the circumstances would have a reasonable apprehension that the plaintiff would not have a fair hearing from an impartial judge on the issues.
>
> (c) Neither the subjective views of the Court, nor those of the parties or their Counsel form part of the test. It would be entirely wrong for the Court to base its decision in respect of the application of the appropriate test on the subjective view of a litigant or a litigant's legal representative as that would likely result in a system that is tantamount to peremptory disqualification.
>
> (d) There is legal authority binding on this Court to the effect both that bias of the type now alleged does not come into existence in the course of a hearing and that the manner in which proceedings are conducted cannot in itself create a reasonable suspicion of bias.
>
> (e) There is persuasive English and U.S. authority, that has received the evident approval of the Supreme Court, to the effect that neither adverse comment by the Court upon a witness or party nor a finding by the Court that the evidence of a witness or a party is unreliable is sufficient to sustain a finding of bias or, without more, to found a sustainable objection on the ground of bias. A *fortiori*, the suggestion that such adverse comment or adverse finding has been made and then communicated in code to the lawyers in the case, though not the parties, cannot sustain such an objection or finding.

45. For the reasons I have just set out I must reject the second argument advanced on behalf of the plaintiff that the Court should recuse itself because it has made statements, put questions and, indeed, adopted a general demeanour in the course of the evidence that are intended to convey that it disbelieves the plaintiff's testimony. I am satisfied that no reasonable person in the circumstances could have an apprehension that the Court had acted in the manner alleged or that, in consequence, the plaintiff cannot have a fair hearing from this Court as an impartial judge. I am further satisfied that the case law binding on me firmly establishes that, even if it could be established that the Court had made adverse comment upon, or an adverse finding in relation to, the plaintiff's evidence (and it has not), the plaintiff's remedy would lie in establishing some fundamental unfairness in that regard on appeal. It does not lie in recusal on the ground of bias.

The third argument
46. The third argument advanced on behalf of the plaintiff appears to me to invoke what is asserted to be a specific instance of the more general bias alleged in the plaintiff's second argument. I am grateful for that, as a more specific charge admits of a more focussed rebuttal. My note of Counsel's argument is as follows:

> "Yesterday, the Court expressed open scepticism about the merits of my case. That was done with reference to the letter of the 20th July 2004 from Mark Hutch of Doody Crowley to the parties in relation to the indebtedness of the nursing home business at its start up. This exercise was taken up by the Court in an extremely pointed way. The Court went too close in my submission to expressing a concluded view that the plaintiff could not go behind the debts or seriously expect that the Court would do so. This, I expect, is a difficult area. Most legal practioners would expect a judge to express what is on his or her mind and those sort of exchanges between a judge and counsel play a central role in the business of litigation; in how we work through cases. But there is a line, it's a subtle line but one we all know is there. And your lordship's interventions yesterday on the issue of my case being able to go behind the debt - and there is no dispute but that there were debts - is going to the merits of the plaintiff's case and, in my submission, it crossed that line. It was not an exercise in intellectual enquiry, it was not a teasing out of a point – it was a flagging of the Court's position for myself and Mr Connaughton. In my submission, it is objectionable, it is unacceptable either in itself or taken in conjunction with the other two heads I have outlined."

47. The first thing to note about the interaction to which Counsel is here referring is that it was not an intervention (or exercise taken up) by the Court at all. It was an exchange that took place in the context of an objection by Counsel for the defendant to a question put to the plaintiff by Counsel for the plaintiff during the plaintiff's examination in chief.

48. According to my – no doubt, imperfect - note, that objection arose in the following circumstances. Counsel for the plaintiff was taking the plaintiff broadly chronologically through her evidence in respect of a booklet of documentation comprising the plaintiff's discovery. When, in the course of that exercise, he reached the letter to which he refers, he opened a considerable portion of it to the witness. The author of the letter, Mr Hutch, was at the material time the accountant to the business. The letter speaks for itself in referring to a meeting concerning various financial over-runs, decisions that had been made in relation to various outstanding creditors, and conclusions that had been reached in respect of a shortfall in projected income, resulting in a financial deficit. The plaintiff's mother-in-law is not identified in the letter as one of the creditors about whom any decision had been made, although it appears to be common case that she was then pressing for repayment of a substantial sum of money that had been used to pay off the bridging finance that the parties had obtained to purchase the nursing home property. The last two pages of that three page letter address the available courses of action that Mr Hutch states he had identified at the previous meeting to which he refers. One of the three options enumerated by Mr Hutch - the others being to sell the property or to take in one of the defendant's brothers as a business partner - was: "Discuss matters with [the plaintiff's mother in law]."

49. Having put a number of questions to the plaintiff concerning the terms of that letter, Counsel for the plaintiff asked the plaintiff the following question: "So what was the root problem as you saw it?", to which the plaintiff replied; "to repay [my mother in law] her money back." Counsel for the defendant then rose to object to the question. While, as I understood it, that objection was initially and mistakenly framed on the basis that the question was an impermissible leading one, Counsel for the defendant corrected himself to suggest that no foundation had been laid for it, stating that it was "not a sequitur to anything."

50. In seeking to rule on that objection, the Court noted that Counsel had been referring the witness to the letter already described and that the problem as disclosed in it appeared to be the current financial liabilities and income shortfall of the business and that, insofar as it was suggested that the root cause of those problems was the plaintiff's mother in law: "I don't follow but in any event I will hear…." At which point, Counsel for the plaintiff interjected, "How do you mean, you don't follow?"

51. Counsel for the plaintiff then submitted that the plaintiff's case would be that this "was an entirely manipulated situation, and that he was sorry that the Court had difficulty in conceptualising that."

52. Counsel for the plaintiff then said: "This is a very serious aspect of my case and I am troubled that the Court is expressing scepticism about it." The Court replied to that submission: "I am not professing any scepticism [Counsel] and I'd like to make that clear. I am simply looking at the statements in the letter"

53. Counsel for the plaintiff continued: "The Court appears to be struggling to accept my case that this is a wholly manipulated situation." The Court then enquired (by way of example): "You are saying, for example, that the defendant has manipulated a situation where there are creditors of the business in the amount of €89,000?" To which Counsel for the plaintiff responded: "The defendant and his mother. This is a situation in which on my case the plaintiff was shamelessly manipulated. It is an absolutely naked manipulation of the plaintiff."

54. The Court replied that it broadly understood that to be the plaintiff's case but that it was looking at the particular correspondence to which the question appeared to relate.

55. Counsel for the plaintiff then volunteered the following submission (to part of which reference has already been made):

> "The simple fact of the case is that it is not possible to conclude that the bank has a concern that is not driven by, or that is independent of, the plaintiff's mother in law's manipulation of the situation. This is all immensely cunningly planned. The Court has to be prepared to see through what is a very, very clever scheme devised by a lady of immense commercial acumen and unbridled ruthlessness."

56. The Court responded: "If it is appropriate to look behind the fact of the indebtedness of the business, then, of course, I hope that I will do so when the time comes if that is appropriate, but I didn't understand the question to be 'what is behind all of this indebtedness?', I understood the question to be 'what was the cause of all of these difficulties?'

57. Moments later, it seemed to the Court that the fog began to clear when Counsel for the plaintiff added:

> "I was asking an opinion question. What was her opinion. I have to ask that of the plaintiff who may be inhibited by the constant hearsay objections which have rendered the tale not very much different but needlessly circuitous."

58. Perhaps in light of those comments, Counsel for the defendant did not press his objection further, the Court was not required to make any ruling and the examination-in-chief of the plaintiff resumed.

59. With the greatest respect to Counsel for the plaintiff, it seems to me tolerably clear that both Counsel for the defendant and the Court understood, I would suggest not unreasonably, that in opening the letter just described before asking the plaintiff to identify the root problem as she saw it, Counsel for the plaintiff was asking the plaintiff to identify the root problem *amongst the problems identified in the letter*. Of course, Counsel for the plaintiff appears to have since clarified that he was asking the plaintiff more generally her opinion concerning the root problem *quite apart from the problems identified in the letter*. Based on the Court's original understanding (and, I suspect, that of Counsel for the defendant), the Court was enquiring how it could be suggested that the plaintiff's mother-in-law was responsible for the liabilities incurred by the business or the shortfall in its anticipated income as identified in the letter, which proposition Counsel for the defendant had suggested was a *non-sequitur* and which the Court was struggling to follow.

60. In my experience, such miscommunications are not uncommon and are generally rectified sooner or later. The unusual feature of this case is that the embers of the relevant misunderstanding, which appeared to have been extinguished as quickly as the first flames began to flicker, have now reignited into a conflagration of untenable complaints on the part of the plaintiff.

61. This escalation began with the suggestion that, rather than failing to follow how the specific liabilities and cash flow problems of the business identified in Mr Hutch's letter could be laid at the door of the plaintiff's mother-in-law, the Court was instead failing to conceptualise the plaintiff's allegation that her mother-in-law was orchestrating the alleged unlawful conduct which is the subject of these proceedings. That is, of course, fundamentally wrong. The two things are quite different. And whatever may be the legal or evidentiary obstacles that have prompted Counsel for the plaintiff to repeatedly volunteer that he is making a difficult case, the plaintiff's allegations against the defendant and her mother-in-law are not, I would venture to suggest, difficult to conceptualise.

62. The escalation continued with the assertion that, by implication, the Court was expressing scepticism about the plaintiff's case, despite the Court's express denial that that was so.

63. The heat, rather than light, was ratcheted up a further notch when, in support of the present application it was submitted that the Court had come too close to expressing a concluded view that the plaintiff could not go behind the debts or seriously expect that the Court would do so. I do not understand the plaintiff's case to be that the Court should go behind the legitimate debts that the parties incurred to builders, suppliers and sundry professional persons in the construction and commencement of the nursing home business. Those creditors are not parties to the present proceedings. I have at all times understood, and still understand, the plaintiff's case to be that the Court should rescind the contract she entered into with the defendant, whereby she relinquished her interest in the nursing home business in exchange for a payment of €350,000, on the basis that the said agreement was procured by misrepresentation or the exercise of undue influence, or both, and constituted an unconscionable bargain, which unlawful conduct was orchestrated by the plaintiff's mother-in-law.

64. And finally, it is now suggested that, in the guise of dealing with the relevant objection raised by Counsel for the defendant as well as in myriad other more nebulous ways, the Court was in fact engaging in a subtle and recondite exercise, whereby it was communcating with Counsel, through a time-honoured code, that it had pre-judged the entire action against the plaintiff.

65. I have not the slightest hesitation in rejecting those submissions in their entirety.

66. There are two further matters that the Court is anxious to address before concluding its ruling. The first is this. As I have already stated in reciting my note of Counsel's third argument, Counsel for the plaintiff did acknowledge that most legal practioners would expect a judge to express what is on his or her mind and that sort of exchange between a judge and counsel plays a central role in the business of litigation; in how the courts work through cases. In relation to such interventions by the Court, Counsel pointed out that there must necessarily be a line that must not be crossed. I wish to state that, to the foregoing extent, I entirely agree with that statement of principle.

67. However, I would like to express disagreement with Counsel's assertion that the line is a subtle one. I believe it is distinct. I believe that there are sometimes cases where a Court may have come close to that distinct line. In those cases, the issue is whether the line has been crossed, not whether the line itself is subtle or distinct. I do not believe that the present case comes anywhere close to that line.

68. I note again that no authority was opened to the Court in support of the present application. However, I am aware of many cases that stand as navigation points to help practitioners and judges chart where the line is to be found. The briefest consideration of decisions such as that in *R. (Donoghue) v Cork County JJ* [1910] I.R. 271 or *Dineen v Delap* [1994] 2 I.R. 228 would have served to demonstrate how far distant the line is from the place where we now find ourselves.

69. In the former case, Lord O'Brien L.C.J. stated (at 276):

> "In *The King (De Vesci) v. Justices of Queen's Co.* [1908] 2 I.R. 285 (at 294), I expressed myself as follows:-'By "bias" I understand a real likelihood of an operative prejudice, whether conscious or unconscious.' There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias." I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds – was reasonably generated – but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

70. The decisions I have referred to each involved a finding that a judge or magistrate demonstrated bias in the conduct of a summary criminal trial and plainly delineate the terrain onto which no judge should venture. I believe that any reasonable consideration of those cases serves to illustrate how far away from that terrain the circumstances of the present case are.

71. Although Counsel for the plaintiff did not open any authority whatsoever, it did at times appear, particularly in relation to Counsel's second objection or argument, that the complaints being made concerning the conduct of the Court, whereby the Court was accused, for example, of "weighing in against the plaintiff with increasing emphasis on the side of the defendant", amounted to an invocation of that train of English jurisprudence that deals with interventions by the trial judge that have been found to amount to reversible error in criminal jury trials. Those cases are usefully summarised in *Archbold 2015* at paragraphs 7-80 to 7-82. Leaving aside the fact that I do not accept at all that the Court "weighed in on the side of the defendant against the plaintiff", there are two observations I wish to make in that regard. The first is that this is not a criminal jury trial in which the judge must be extremely careful not to trespass on the role of the jury as the trier of fact, whether by usurping its function or, more pertinently here, by consciously or unconsciously seeking to influence it in its decision. Second, even if one were to ignore the last observation and to attempt instead to directly equate the present proceedings with such a trial, I believe that it would quickly become clear by reference to the contents of the jurisprudence to which I have referred that the circumstances of the present case do not remotely approach the type or level of intervention that has been found to be impermissible in criminal jury trials.

72. The final matter that I want to address is the suggestion by Counsel, to which I have already referred, that bias on the part of the Court in this case can be established or inferred from the Court's non-verbal demeanour or passive conduct. There are a number of difficulties with this proposition. The first is that it appears to circumvent the dictum of Keane J. in *Orange* that the law does not countenance the questioning of a judge about extraneous influences affecting his mind, by arrogating to a party, Counsel or, perhaps even, an expert, the ability to read the Court's mind through close observation of its passive conduct or demeanour.

73. The second is that it can result in the unedifying spectacle, as has occurred in the present case, of Counsel abjuring reliance upon appropriate legal authority and admissible evidence, to engage instead in just such an exercise in purporting to decode messages through mere observation of the Court.

74. If only for the sake of completeness and for the avoidance of any doubt, I must add that I absolutely reject the assertion that, in the manner in which I took notes, in the circumstances in which I briefly consulted my mobile phone (upon which I maintain my court diary and through which I receive communications from my judicial assistant), or in the manner in which I have listened to the evidence, that I have in any way attempted to convey either pre-judgment or deliberate inattention. As I believe the limited interventions that I have made so far in the proceedings demonstrate, I am quite satisfied that I have followed the evidence in this case closely from its commencement to date.

75. As a final aside, I hope I may be forgiven a wan joke in observing that the only authority I have been able to uncover that even weakly supports the plaintiff's position is the decision of the English Court of Appeal in *Baigent and another v. The Random House Group Ltd* [2007] EWCA Civ 247 (at paragraph 3 in the judgment of Lloyd LJ), which I must concede establishes that there is at least one judge in these islands who is disposed to communicate in code.

Conclusion

76. For the reasons I have stated, I am satisfied that none of the three objections on foot of which the Court has been requested to recuse itself in this case has any merit. Having rejected each of the three objections put forward on its merits, it follows that I must reject also the argument that what those arguments lack in individual quality they may make up for in quantity.

77. I therefore refuse this application.