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THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 289

Appeal No 2020/004

Donnelly J.

Collins J.

Binchy J.

BETWEEN

EUGENIE HOUSTON

Plaintiff/Appellant

AND

WENDY DOYLE

PRACTISING UNDER THE STYLE OF WENDY DOYLE SOLICITOR

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 22 October 2020

BACKGROUND

1. The Plaintiff appeals two orders made by the High Court (Reynolds J) on 3 December 2019. The first of those orders has a number of elements. First, the Judge refused the Plaintiff's application to recuse herself from hearing the motions before the Court. Second, the Judge acceded to the Defendant's application to dismiss the Plaintiff's

claim on the ground that it was an abuse of process. Third, the Judge directed the Plaintiff to pay the costs of the motion and the action and refused a stay on that order. Finally, the Judge ordered that the Plaintiff be "*restrained from instituting any further proceedings in the High Court without the prior leave of President of the High Court*." By the second order, the Judge struck out a motion brought by the Plaintiff to change the title to the proceedings and join a further six defendants, those proposed defendants being partners in a firm of solicitors, Tully Rinckey, in which the Defendant had been a partner for a time. The Judge also made an order for costs in favour of the firm, measuring those costs in the sum of €1,200 plus VAT. Again, the Plaintiff's application for a stay on that order for costs was refused.

2. Before addressing the Plaintiff's appeal further, it is necessary to look at the Plaintiff's claim against the Defendant and the background to it.

3. Ms Houston, the Plaintiff, is a practising barrister. The Defendant, Ms Doyle, is a practising solicitor. These proceedings have their roots in previous proceedings brought by Ms Houston against Ms Doyle. In 2014 Ms Houston issued High Court Proceedings (Record Number 2014/3904P) in which she sought damages for defamation from Ms Doyle. Those proceedings were settled before hearing on 14 February 2017 and an order was made by the High Court (MacEochaidh J) by consent on that date which (*inter alia*) provided for the payment by Ms Houston of Ms Doyle's costs. The costs payable on foot of that order, as well as two orders for costs that had made in the course of those proceedings on 27 February 2015 and 12 October 2015, were subsequently taxed by the Taxing Master in a total amount of €58,888.89 and a

Certificate of Taxation in that amount issued on 14 July 2017. None of the costs orders just referred to were appealed (and as already noted the order of 14 February 2017, which accounted for much the largest part of the total costs allowed, was made by consent). Furthermore, while it was open to the Plaintiff to carry in objections to the amount of costs allowed by the Taxing Master, she did not do so.

4. Separately, in June 2015 Ms Houston brought District Court proceedings against Ms Doyle, and another party, apparently for the recovery of fees allegedly payable to her. That claim was dismissed by the District Court in April 2017 and the court made an order for costs in favour of Ms Doyle. The costs recoverable on the District Court scale totalled €4,700. The District Court order was not appealed by Ms Houston.

5. Ms Doyle subsequently applied to the Property Registration Authority to have judgment mortgages registered against property owned by Ms Houston in Naas, Co. Kildare and in the period between June and August 2017 four judgment mortgages – one in respect of each of the orders for costs already referred to – were registered on the relevant Land Registry Folio.

6. The proceedings giving rise to this appeal were commenced by Ms Houston on 20 July 2017. The Indorsement of Claim gives little insight into the claim being made, the following being the reliefs claimed:

> *"1* ***Ex debito justitiae,*** *Order(s) in favour of the Plaintiff in the matter of Eugenie Houston v Wendy Doyle, High Court Record Number 2014/3904P*

> *2. Declaratory and other relief in respect of the taxation of costs in the matter of Eugenie Houston v Wendy Doyle, High Court Record Number 2014/3904P*
>
> *3. Declaratory and other relief in the matter of Eugenie Houston v GD Gendist and Wendy Doyle, District Court record number 3965/15."* (emphasis in the original)

7. Prior to any further step being taken in these proceedings (including, it seems, their service on Ms Doyle), Ms Doyle brought well-charging proceedings [Record No 2017 377Sp]. Those proceedings ("*the Well-charging proceedings*") issued in September 2017 and, after an unsuccessful application by Ms Houston to have them struck out as being frivolous and vexatious, came on for hearing before Allen J in the High Court in March 2019.

8. By then, Ms Houston had delivered a statement of claim in these proceedings [2017/6661P]. Paragraph 3 of that document characterises the action as one "*seeking relief in respect of costs*". The same paragraph pleads that Ms Houston "*asserts that orders used by the Defendant to obtain judgment mortgages on the Plaintiff's home are void or in the alternative are voidable. Void orders do not exist as a matter of law and therefore cannot be appealed or judicially-reviewed*." The Statement of Claim is entirely silent as to the basis on which Ms Houston asserts that the costs orders are *"void or … voidable*". Paragraph 6 of the Statement of Claim refers to further High Court actions that had been instituted by Ms Houston, namely *Houston v O' Neill &*

others [2014/10610P] and *Houston v Geoghegan & others* [2018/785P]. "*Within those proceedings*", it is pleaded, "*the Plaintiff has claimed inter alia that those defendants interfered with the right of the Plaintiff to sue Wendy Doyle, the Defendant herein, and is seeking as special damages any and all costs associated with dealing with Wendy Doyle in these proceedings. At the conclusion of the within proceedings, should there be any financial liability at all towards the Plaintiff herein, then any such amount would form part of the special damages claim by the Defendant against [the defendants in those other proceedings]*." It will be necessary to refer to those other proceedings (to which I shall refer as "*the Bar Council proceedings*") further below. Paragraph 8 of the Statement of Claim seeks to have the four judgment mortgages registered against the Plaintiff's property set aside, as well as "*declarations that the purported 'orders' underpinning them are void*". An order setting aside the judgment mortgages is then sought in addition to the reliefs included in the Indorsement of Claim.

9. Returning to the Well-charging proceedings, at the conclusion of the hearing on 27 March 2019, and notwithstanding the objections of Ms Houston, Allen J made the orders sought by Ms Doyle (including an order for sale in default of payment).

10. One of those objections was to the effect that the Court had no jurisdiction to hear Ms Doyle's claim in circumstances where Ms Houston's proceedings (the proceedings now before this Court on appeal) had issued first and (so it was said) encompassed the same issues. Allen J characterised Ms Houston's proceedings as an attempt to launch a collateral attack on costs orders made by the High Court and District Court which had not been appealed and which were final and conclusive, and he was satisfied that

those proceedings did not have the effect of ousting the jurisdiction of the Court to determine the Well-charging proceedings. It was also argued that Ms Doyle had no entitlement to enforce the costs orders because (so it was said) those orders were made in her favour *qua* solicitor, and she was now suing in a personal capacity. The correct plaintiff, it was said, was the firm of solicitors that Ms Doyle had subsequently joined/merged with. That argument was rejected by the High Court on the basis that the orders in question had been made in favour of Ms Doyle personally, given that she had been sued personally and the fact that she was a member of a particular firm of solicitors at the time of the hearing was irrelevant. Various points were made about the costs orders and the certificate of taxation all of which Allen J rejected.

11. Allen J placed a stay on the order for sale only in the event of appeal, pending the first directions hearing before this Court. Having lodged an appeal, Ms Houston then applied for a stay on the entirety of Allen J's order and on 11 October 2019 a stay in those terms was ordered by consent in circumstances where the Court was in a position to give an early hearing date for the appeal of 5 February 2020.

12. Meanwhile, Ms Doyle took the view that, in light of the judgment and order of Allen J, the issues which Ms Houston was seeking to agitate in her action [2017/6661P] were *res judicata* and that, in the circumstances, it would be an abuse of process for Ms Houston to continue that action. Ms Doyle's solicitors therefore wrote to Ms Houston calling on her to discontinue, failing which a motion to dismiss would be brought.

13. Ms Houston did not discontinue the action and on 24 April 2019 Ms Doyle issued a

motion applying for an order pursuant to the High Court's inherent jurisdiction dismissing (or, alternatively, staying or striking out) the claim "*on the basis that it is an abuse of the process of the Court, that it discloses no bona fide or stateable cause of action as against the Defendants, that it is frivolous and vexatious and that it is bound to fail*." I shall refer to this motion as the "*application to dismiss*." The application to dismiss was grounded on an affidavit of Ms Doyle sworn on 24 April 2019 which exhibited the papers in the Well-charging proceedings, referred to the judgment of Allen J and made the core point that the issues in Ms Houston's action were the same as the issues she had agitated – unsuccessfully – by way of defence to the Well-charging proceedings. Ms Houston delivered a replying affidavit in July 2019 in which she disputed the entitlement of Ms Doyle to bring the motion (on the basis that the "*matters arising in these proceedings are a matter for Tully Rinckey and not for Wendy Doyle alone in any capacity*") and asserted that the High Court did not have jurisdiction to hear the motion in circumstances where the judgment and order of Allen J which was the basis for the motion were under appeal to this Court. The affidavit did not engage with or dispute Ms Doyle's contention that the issues in Ms Houston's proceedings were the same as the issues that had been raised by her in defence of the Well-charging proceedings. Instead, its primary focus was on whether Ms Doyle had described herself as a practising solicitor at a time when she was not (an issue which has also been the subject of a complaint made by Ms Houston to the Law Society). In particular, Ms Houston asserted that Ms Doyle had been "*masquerading*" as a solicitor as of 27 March 2019 and on that basis – so it was said – the orders made by Allen J on that date were "*worthless*." That far-fetched contention did not feature in the submissions made by Ms Houston to this Court.

14. It appears that on 25 July 2019 Ms Houston made an *ex parte* application to join additional defendants to her claim. Having considered the papers, Reynolds J declined to make the order sought and instead directed Ms Houston to issue and serve a motion. Though this order was not appealed by Ms Houston, she nonetheless criticised the Judge's approach to what she characterised as a "*simple procedural matter*". Such criticism is, in my opinion, misplaced. The Judge was entitled to direct the bringing of a formal joinder application in the circumstances here and was also entitled to direct that the application be served on the proposed additional defendants as well as on Ms Doyle.

15. In any event, in October 2019 Ms Houston issued a motion seeking the joinder as defendants of six individuals who were stated to be partners in the firm of Tully Rinckey. The motion also sought to change the name/description of Ms Doyle from Wendy Doyle Solicitor to Wendy Doyle practising as Tully Rinckey Solicitors. I shall refer to this motion as the "*joinder application*". The proposed additional defendants were notice parties to the application which was grounded on an affidavit of Ms Houston sworn on 21 October 2019. The affidavit explains that, whereas Ms Doyle was a sole practitioner at the time of the commencement of the proceedings in July 2017, her practice had been "*subsumed and incorporated into Tully Rinckey*" in July 2018. Although (according to Ms Houston) Ms Doyle had ceased to be a partner in Tully Rinckey in early 2019, "*any standing originally attached to Wendy Doyle practising under the style of Wendy Doyle travelled with her into Tully Rinckey when she became a partner in Tully Rinckey and remained with Tully Rinckey when her partnership with Tully Rinckey terminated*." On that asserted basis, Ms Houston

averred, the partners of Tully Rinckey, including Ms Doyle, "*are now the correct defendants*." Ms Doyle swore an affidavit in response in which she professed herself to be at a "*complete loss*" to see a basis on which the partners of Tully Rinckey should be joined and characterised their proposed joinder as a further abuse of process on Ms Houston's part.

16. Both applications came before the Judge on 14 November 2019 for mention and were adjourned for hearing to 3 December 2019. The Judge also gave liberty to Ms Houston to serve any proposed draft Amended Statement of Claim within 7 days and permitted Tully Rinckey to file an affidavit in reply within a further 7 days. Ms Houston says that the Judge indicated on 14 November that her joinder application would be heard before Ms Doyle's application to dismiss and complains that, when the motions were heard, the Judge in fact directed that the application to dismiss be heard first. I will address that complaint in due course.

17. Ms Houston did not serve a draft Amended Statement of Claim within 7 days. Notwithstanding that failure, an affidavit was sworn (on 27 November 2019) by a Tully Rinckey partner, Mr Conor Robinson. Mr Robinson said of the existing Statement of Claim that it made "*no identifiable allegation against [Tully Rinckey]. As a matter of pleadings, no claim is disclosed and the claim raised in the Motion against [Tully Rinckey] is therefore bad as a matter of law*."

18. Ms Houston served a draft Amended Statement of Claim on 2 December 2019. In addition to the inclusion of the proposed additional defendants, it included some

amendments to the body of the statement of claim (though no leave to amend had been sought by Ms Houston). The most material amendments were to paragraph 7 (previously paragraph 6). It was now pleaded that Ms Doyle, and her solicitor Mr Brennan, had been subpoenaed to bring "*the relevant files*" to the hearing of the Bar Council proceedings but, so it was said, they "*refused to produce the files*." Reference was also made to the fact that an appeal by Ms Houston had been allocated a hearing date in this Court of 29 April 2020.[1] A further amendment (new paragraph 8(B)) stated that the Plaintiff would give evidence *viva voce* and would for that purpose rely on a long list of "*documents*", including a large number of digital audio recording (DAR) audios and transcripts. There were amendments to the reliefs sought also. In addition to seeking to set aside the four judgment mortgages to which I have already referred above, the draft sought to set aside "*the additional judgment mortgages which are not attached but will be delivered and orders vacating the burdens*". A further amendment sought to have Ms Doyle "*and/or her successor*" pay to the Plaintiff the costs of High Court proceedings 2014/3904P (the defamation proceedings in which an order for the payment of Ms Doyle's costs by the Plaintiff had been made by consent), on the basis that the Plaintiff had "*won*" that action.

19. Both applications – Ms Doyle's application to dismiss and Ms Houston's joinder application – then came on for hearing in the High Court on 3 December 2019. As of that date, the Order made by the High Court (Allen J) in the Well-charging proceedings [Record No 2017 377Sp] had been stayed by this Court and Ms Houston's appeal was

[1] Ms Houston's claim having been dismissed by the High Court (Twomey J) on 18 July 2019: [2019] IEHC 601.

listed for hearing on 5 February 2020.

THE HEARING IN THE HIGH COURT

20. The Court was provided with the DAR transcript of the hearing on 3 December 2019 (in passing, I would note that this was the only transcript included in the papers to the Court –reference was made in submissions to other hearings but no transcript of any such hearing was provided to us). I have carefully reviewed that transcript. Insofar as Ms Houston appeared to suggest that the transcript may have been "*tampered with*", no basis for that suggestion was identified by her and there is no reason to regard it as other than an accurate record of what occurred on that date (everyone with any experience of litigation is aware that transcripts inevitably contain a certain level of inaccuracy in terms of mis-transcribed words, typographical errors and the like).

21. Shortly after the hearing commenced, Ms Houston submitted to Reynolds J that she should recuse herself from hearing the applications on the grounds of actual bias. The Judge indicated that she did not know what bias was being alleged and asked Ms Houston to explain the basis for her submission. In response, Ms Houston referred to a ground in her notice of appeal in the Well-charging proceedings in which she complained that a High Court Practice Direction – HC 75, which relates to certificates of readiness in non-jury and chancery actions – had not been complied with. That complaint, Ms Houston explained, amounted to a criticism of Reynolds J because she (Reynolds J) was in charge of the Chancery list. Ms Houston then proceeded to

complain about various aspects of the procedural history of the Well-charging proceedings, including the fairness of the hearing before Allen J. As a matter of fact, it appears that Reynolds J did not have any involvement in the Well-charging proceedings.

22. Ms Houston next referred to the fact that the Judge was a bencher of the King's Inns and made reference to the fact that, some years earlier, the King's Inns had intervened in an application made by Ms Houston in proceedings before Gilligan J in the High Court, suggesting that such intervention had been on the instructions of the benchers, including the Judge. In response, the Judge indicated that she knew nothing of any such application or intervention. I should explain here that I represented the King's Inns as counsel when, at the invitation of Gilligan J, it made submissions to him regarding an application that had been made in a case being heard by him for Ms Houston to be permitted to come on record for one of the parties as a "*direct-access*" counsel. On behalf of the King's Inns, I made submissions on the issue of whether it was permissible for a barrister to appear in contentious litigation without being instructed by a solicitor. The issue was one of principle rather than one relating to Ms Houston's qualifications or person. Before this Court, Ms Houston referred to my involvement and suggested that I might be embarrassed by the "*innuendo*" that the benchers of the King's Inns had not known or and/or authorised the intervention before Gilligan J. No such innuendo arises in my view and it is quite fanciful to suggest that the submissions made by the King's Inns in response to the High Court's invitation were, or were required to be, approved by every bencher.

23. The final matter identified by Ms Houston as providing a basis for the allegation of actual bias was the fact that, following an application made by her to the Judge in July 2019, she had made a complaint to the Chief Justice and the Attorney General about the Judge's conduct. The application appears to have been that made *ex parte* by Ms Houston to join additional defendants on 25 July. Ms Houston explained that her complaint (which was not produced to the Judge or provided to this Court on appeal) did not name the Judge. In response, the Judge stated that she had never treated Ms Houston unfairly and was unaware of any complaint that may have been made by her.

24. On the basis that the matters raised by Ms Houston were matters that she knew nothing about, the Judge declined to recuse herself. Counsel for Ms Doyle then moved the application to dismiss. In essence, he contended that the proceedings were an improper collateral attack on the judgment mortgages, and the underlying costs orders, on grounds that had already been rejected by Allen J in the Well-charging proceedings. As regards the plea in paragraph 6 of the Statement of Claim (paragraph 7 of the draft Amended Statement of Claim), Counsel relied on the fact that Ms Houston's claim against the Bar Council had failed.

25. In response, Ms Houston acknowledged that the Statement of Claim was not "*in the shape that it needs to be*." The costs order made in the defamation proceedings in 2017 was, she said, made under duress. She had "*won*" in the defamation proceedings and she should have gotten her costs. She had not appealed the costs order or sought to have it set aside because the Court of Appeal was "*closed to me*". Later in her submissions Ms Houston asserted that, because she was a barrister, she had "*no rights*".

She made reference to a practice direction issued by the Chief Justice which, it was suggested, had a bearing on the issue of the taxation of the 2017 costs order and which would enable her to apply to the Supreme Court to re-open its decision in *Sheehan v Corr* (which concerns the taxation of party and party costs under Order 99). The District Court Order was "*completely false*" and there was "*no valid judgment of the District Court*." However, she then appeared to suggest that this was also a matter for the Chief Justice to deal with. Finally, Ms Houston suggested that the Court did not have jurisdiction to deal with the application to dismiss in circumstances where there were related matters pending before this Court.

26. I should note that in the course of her submissions Ms Houston sought to refer to what she referred to as the "*more detailed statement of claim*", but the Judge indicated that the application to dismiss was being heard first and that it should be determined by reference to the existing statement of claim.

THE HIGH COURT RULING

27. The High Court gave an *ex tempore* ruling. The Judge expressed some difficulty in identifying what the indorsement of claim and statement of claim referred to, observing that there was scant information in those documents and in the affidavit that had been sworn by Ms Houston. As far as the reliefs relating to the defamation proceedings were concerned, the Judge noted that the costs order had been made some 2½ years previously and that no application had been made to have it set aside. Whatever other avenue might be open to Ms Houston to have the issue of costs looked at again, the Judge was satisfied that she did not have any stateable case to make in these proceedings. The position in respect of the District Court was similar, in that the order for costs made by that Court could have been appealed but no appeal had been brought by Ms Houston. The proceedings were a collateral attack on the costs orders and the Court was satisfied that the matters complained of by Ms Houston did not "*give rise to any new cause of action where effectively what is sought to be determined again by this Court are issues that have already been dealt with by other courts, not just of this jurisdiction, but it would appear of other jurisdictions*." In these circumstances, the Judge concluded, the proceedings were an abuse of process, disclosed no reasonable cause of action, were bound to fail and ought to be dismissed.

28. The Court then addressed the joinder application. In the Judge's view, it followed from her ruling on the application to dismiss that the joinder application had to be refused. The Judge expressed concern, however, at the prospect that Ms Houston would simply

proceed to issue new proceedings against the intended additional defendants. So as to ensure that the Court's decision would not be undermined, and that matters which were *res judicata* would not be litigated further, the Judge stated that:

> *".. save and except for any appeals that are outstanding, I'm going to place an Isaac Wunder order as against Ms Houston and prevent her from bringing any further High Court proceedings without leave of the court. Not just as against Ms Doyle or indeed the proposed co-defendants in these proceedings, but as against any other parties, as I have grave concerns about the costs that have already been incurred in these proceedings."*

The Judge later clarified that the order would be that Ms Houston would be restrained from instituting further proceedings without the prior leave of the President of the High Court.

29. The Judge proceeded to make the costs orders already referred to. She did not make an order for costs in favour of Ms Doyle in respect of the joinder application. She was asked by Ms Houston to stay the costs orders. Counsel for Ms Doyle opposed that application and the Judge refused to direct a stay on the basis that to do so would undermine the effect of the orders she had made, which were intended to bring the proceedings to a halt once and for all.

THE APPEAL

Preliminary Observations

30. I will not set out *seriatim* the submissions made by the parties. Instead, I will address the issues raised by the appeal and, in that context, I will identify and consider the submissions that have been made so far as relevant, with particular reference to the submissions made by Ms Houston as appellant.

31. Before doing so, there are a number of matters which it appears important to record. In the first place, the only evidence before the Court on this appeal are the affidavits sworn in the two applications. A great many matters were agitated by Ms Houston in her notice of appeal and in her written and oral submissions to this Court which have no basis in the evidence before the Court. As a practising barrister, Ms Houston is well aware that submissions made by a party, or by counsel on behalf of a party, do not constitute evidence.

32. By way of example, the Court was told by Ms Houston of correspondence and other dealings which she says she has had with a number of third parties, including the Chief Justice, the Attorney General and the President of the High Court. Reference was also made to complaints apparently made by Ms Houston to the European Commission. No evidence of any of these matters is before the Court and, in my opinion, it follows that the Court must disregard all that it has heard from Ms Houston about these matters.

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33. Ms Houston has also severely criticised various third parties in her submissions, including a number of judges of the High Court. There is no evidence before the Court that could on any view justify any of these criticisms. Ms Houston has also made statements relating to the capacity, character and conduct of the Judge that lack any evidential foundation in the material before the Court. It would be quite unfair to those parties, none of whom are represented in this appeal, to give further circulation to what Ms Houston has said about them and I do not propose to do so.

34. Finally, at the outset of the appeal hearing Ms Houston referenced the fact that the members of the Court were all judicial benchers of the King's Inns. While making it clear that she was not seeking anyone's recusal, she asserted that, as benchers, the members of the Court were biased against her. A similar issue was raised by Ms Houston in her appeal from the judgment and order of Allen J in the Well-charging proceedings and is addressed in paragraph 34 of the judgment of Costello J, with which Haughton J and I agreed: [2020] IECA 86. For the avoidance of doubt, I reject any suggestion that the fact that I and the other members of the Court are benchers of the King's Inns gives rise to any bias, or any reasonable perception of bias, against Ms Houston.

Recusal/Bias

35. I have set out in some detail above the basis which Ms Houston articulated in the High Court as to why Reynolds J was biased and ought to recuse herself. As I have noted, the objection taken by Ms Houston was one of *actual* bias. That was clearly stated by

Ms Houston on two separate occasions in the course of her submissions in the High Court. On appeal, Ms Houston maintains the allegation of *actual* bias but also seeks to make a case of *objective* bias. No such case was made in the High Court.

36. In *Goode Concrete v CRH plc* [2015] IESC 70, [2015] 3 IR 493, Hardiman J observed that *"[a]ctual bias means what it says*."[2] An allegation of actual bias on the part of a judge is, self-evidently, a very serious allegation to make. For it to be established, "*it would be necessary actually to prove that the judge ... was deliberately setting out ... to hold against a particular party irrespective of the evidence*": per Geoghegan J in *Orange Limited v Director of Telecoms (No 2)* [2000] 4 IR 159, at 252.

37. In my opinion, Ms Houston has not put any material before the Court capable of justifying any suggestion of actual bias on the part of the Judge.

38. The first ground articulated by Ms Houston in support of her application that the Judge should recuse herself – the fact that Ms Houston had complained of non-compliance with Practice Direction HC 75 in the Well-charging proceedings and that this amounted to a criticism of Reynolds J as the judge in charge of the Chancery list – is, in my view, utterly specious. It is clear that the Judge had had no involvement in the management of the Well-charging proceedings. Even if she had had an involvement, and even if it was the case that there had been some failure to comply with HC 75, that could not conceivably justify an allegation of actual bias on the part of the Judge. In the event,

[2] At paragraph 91.

this Court rejected all Ms Houston's complaints as to the fairness of the proceedings in the High Court: [2020] IECA 86, at para 52 and following. But even if any of those complaints was found to have any merit, it would not give rise to any inference of bias. Bias – actual or objective – is not demonstrated merely by establishing error: *Orange Limited v Director of Telecoms (No 2)* [2000] 4 IR 159; *O' Callaghan v Mahon* [2007] IESC 17, [2008] 2 IR 514

39. The suggestion that the fact that the Judge is a bencher of the King's Inns is an indicator of bias is, in my opinion, equally without foundation. The conclusion simply does not follow from the premise. That position is not altered by the fact of King's Inns' intervention in the proceedings before Gilligan J in the High Court. Even if the Judge had been aware of that matter – and she made it clear that she was not – it is simply not capable of giving rise to any inference of bias or animus on her part against Ms Houston.

40. That leaves the complaint said to have been made to the Chief Justice. As already noted, no evidence of that complaint was put before this Court. The Judge made it clear that she was not aware of any such complaint. Even if the Judge had been aware of a prior complaint made by Ms Houston, the fact that such a complaint had been made would not provide evidence of actual bias (though it might be relevant in the context of considering an allegation of objective bias, if such an allegation had been made). As to the alleged conduct prompting whatever complaint Ms Houston may have made, no evidence whatever of any wrongful or improper conduct on the part of the Judge has been put before this Court.

41. In these circumstances, the suggestion that the Judge was actually biased against Ms Houston must be rejected.

42. As already noted, that decision was made in the face of an allegation of actual bias. That was the only bias case made to the Judge. It is quite unfair for Ms Houston to seek to make a different case on appeal. But even if objective bias had been relied on by Ms Houston, I do not consider that any of the matters identified by her would (or should) have led the Judge to conclude that the test for recusal on grounds of objective bias had been met: see in this context my judgment in *Permanent TSB Group Holdings plc v Skoczylas* [2020] IECA 1 and the authorities referred to in that judgment.

43. Before leaving this issue, I should address the complaints made by Ms Houston about the hearing on 3 December. According to her, the Judge had previously indicated that the joinder application would be dealt with before the application to dismiss and she complains about the fact that this sequence was reversed when the motions came to be heard on 3 December. Even if it is the case that the Judge had previously indicated an intention to hear the joinder application first, she was fully entitled to take a different view on 3 December and I can readily understand why the Judge considered that it made sense to hear the application to dismiss first (quite apart from the fact that it was first in time). As regards the hearing more generally, it is evident from the transcript that the Judge pressed Ms Houston to explain the basis for the allegation of actual bias. The Judge was perfectly entitled to do so. She could not properly adjudicate on the recusal application without knowing the basis for it. If Ms Houston was surprised to

be questioned in that way, she had no right to be. The Judge also pressed Ms Houston to explain the nature and basis of the claim she sought to make against Ms Doyle. Again, she was perfectly entitled to do so, given the uninformative terms of the pleadings and the affidavits that Ms Houston had sworn. In my opinion, there is no basis for any suggestion that the hearing in the High Court was unfair.

The Dismissal of the Proceedings

44. As noted above, the principal basis on which the application to dismiss was brought was that the issues sought to be litigated by Ms Houston had already been adjudicated by the High Court – adverse to Ms Houston – in the Well-charging proceedings.

45. As of 3 December 2019, Ms Houston's appeal from the decision of the High Court had not yet been heard by this Court. That appeal has since been heard and determined and, for the reasons set out in the judgment of Costello J delivered on 7 April 2020 (with which Haughton J and I agreed) the appeal was unsuccessful on all issues: [2020] IECA 86.[3]

46. As a matter of fundamental principle, Ms Houston cannot seek to re-litigate matters which have been determined in the Well-charging proceedings. Her defence in those proceedings was characterised by Costello J as "*in truth, a collateral attack on the costs orders*", adding that:

[3] Ms Houston has indicated an intention to seek leave to appeal this Court's decision to the Supreme Court.

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> *"But, she has raised no basis to question the validity of the costs orders. I reiterate that none of them have been appealed. They are therefore valid final orders binding on all courts. She has advanced no basis upon which it would be open to the court to set aside or vacate any of the costs orders."*[4]

47. In these proceedings, Ms Houston seeks to attack the self-same costs orders, for the purpose of attacking the self-same judgment mortgages as were at issue in the Well-charging proceedings, with the ultimate purpose of attacking the orders which were made by the High Court, and affirmed by this Court on appeal, in those proceedings. In seeking to maintain these proceedings in circumstances where the Well-charging proceedings have been finally determined – subject only to the possibility of a further appeal to the Supreme Court – it is quite evident that Ms Houston is seeking to negate the outcome of those proceedings and to undo the orders made in them. As a matter of fundamental principle, that is impermissible.

48. That the proceedings brought by Ms Houston seek to agitate the same matters as were agitated by her in the Well-charging proceedings is not, as I understand it, in any significant dispute. In fact, one of the arguments made by Ms Houston in the Well-charging proceedings was that the High Court lacked jurisdiction to hear those proceedings precisely *because* the issues in those proceedings were, as far as Ms Houston was concerned, already encompassed within her claim against Ms Doyle.

[4] At para 57.

49. Before the High Court and again in her submissions on appeal, Ms Houston sought to suggest that the order for costs that had been made in the defamation proceedings on 14 February 2017 was made under "*duress*". Having carefully reviewed the transcript of the High Court hearing and listened carefully to Ms Houston's submissions on appeal, it is not at all apparent to me what is said to be the "*duress*" of which she complains or how, on her case, her consent to an order for costs against her might be said to be ineffective. Her complaint appeared to amount to a suggestion (for which there is no evidence whatever) that her defamation claim was "*forced on*" by the judge in charge of the jury list but how that might have led Ms Houston to agree to pay the costs of an action she claims to have "*won*" is entirely unclear.

50. In any event, no plea of "*duress*" is made either in the Statement of Claim or the draft Amended Statement of Claim nor is there any reference whatever to any alleged "*duress*" in any of the affidavits that have been sworn by Ms Houston in the application to dismiss or the joinder application. In fact – and strikingly – neither the pleadings (including the draft Amended Statement of Claim) nor Ms Houston's affidavits make any reference to the circumstances in which the order of 14 February 2017 was made.

51. Ms Houston brought the Court to the decision of Court of Appeal of England and Wales in *Spicer v Tuli* [2012] EWCA Civ 845 which, she submitted, illustrated that a "*friendly settlement*" might subsequently be reviewed and reopened. No doubt, that is so, in certain circumstances at least. However, the decision in *Spicer* does not assist Ms Houston. The claimants (receivers appointed in relation to a flat) had issued

proceedings for possession. The defendants were in occupation of the flat. The defendants claimed to have the benefit of a tenancy. The receivers suspected that the tenancy was not genuine but needed time to investigate. In these circumstances, the parties had agreed that the possession proceedings would be *withdrawn*. However, the agreed order provided that the proceedings be *dismissed*. The receivers brought further proceedings for possession, challenging the existence and/or *bona fides* of any tenancy. The occupiers pleaded that the dismissal of the earlier possession proceedings gave rise to a cause of action estoppel and/or that the bringing of further proceedings was an abuse of process. It is evident from the judgment of Lewison LJ that all of the evidence pointed to the conclusion that a "*technical error*" had been made in the form of the order, that the receivers had never intended to abandon their entitlement to seek possession of the flat and this was known by the occupiers and their solicitors. That being so, it is unsurprising that the receivers were permitted to proceed with their claim.

52. As I have already observed, and in clear contrast to the position in *Spicer*, Ms Houston's pleadings and affidavits are entirely silent on the circumstances in which the costs order of 17 August 2017 was made.

53. No basis for attacking the earlier orders for costs made by the High Court in the defamation proceedings is disclosed in the pleadings or affidavits and those orders were not addressed in Ms Houston's submissions. As regards the District Court order, Ms Houston in her oral submissions suggested that the order amounted to some form of double recovery by Ms Doyle. I was, however, unable to understand the point being made. In any event, no such issue is canvassed in the pleadings or affidavits. All of

these orders could have been appealed but were not. The District Court could have been judicially reviewed. The suggestion in the Statement of Claim that the orders could not be appealed or reviewed because they were void or voidable is entirely without merit or force whatsoever, as is the suggestion made in submission that the appeal courts were "*not open*" to Ms Houston.

54. The Judge concluded that these proceedings amounted to a collateral attack on the costs orders. That conclusion was inevitable, in my view. They are also a collateral attack on the judgment mortgages registered against Ms Houston's property in Co. Kildare and on the orders made in the Well-charging proceedings. Insofar as the pleadings disclose any grounds for Ms Houston's challenge to the orders and the judgment mortgages, those grounds appear to be the same as those on which she unsuccessfully defended the Well-charging proceedings against her. While "*duress*" does not appear to have been argued in the Well-charging proceedings, at least in explicit or identifiable terms, it does not at all follow that Ms Houston could properly rely on a duress claim in these proceedings, having regard to the principle in *Henderson v Henderson* (1843) 3 Har 100. That principle would appear to apply with more than usual force in the circumstances here. In any event, no claim of duress is in fact made in these proceedings nor is there a scintilla of evidence to support any such claim before the Court.

55. This leaves for consideration the plea in paragraph 6 of the Statement of Claim (in amended form, paragraph 7 of the draft Amended Statement of Claim). These paragraphs are not easy to understand but, as I read it, paragraph 6 does not in fact

advance any claim against Ms Doyle in these proceedings. Rather, it refers to an element of the special damages claim which Ms Houston intended to advance in the Bar Council proceedings (to which Ms Doyle was/is not a party). Paragraph 7 of the draft Amended Statement of Claim does state that Ms Doyle and her solicitor were subpoenaed to bring "*the relevant files*" to the hearing of the Bar Council but refused to do so but that appears to me a piece of narrative rather than a plea of any actionable wrong. No relief appears to be sought by reference to paragraph 7, no loss or damage is pleaded by reference to it and no argument was made by Ms Houston to the effect that Ms Doyle's alleged refusal to comply with a *subpoena* might give rise to some private law cause of action against her. There was no evidence before the Court of what occurred before Twomey J but when asked whether she had raised the alleged non-compliance with the judge, Ms Houston indicated that she had but that Twomey J had failed to take any action. If the judge did not consider that any action was warranted, it is impossible to see how any claim could properly be made in these proceedings arising from the same circumstances.

56. I have already noted that Ms Houston had not sought leave to amend the Statement of Claim – her motion sought only to change the name/description of Ms Doyle and to add the additional defendants from Tully Rinckey. However, it is well-established that a statement of claim should not be dismissed in the exercise of the courts' inherent jurisdiction if it "*admits of an amendment which might so to speak, save it and the action founded on it*": per McCarthy J in *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425, at 428. It follows, in my view, that the Judge ought to have looked at the draft Amended Statement of Claim in considering whether Ms Houston's proceedings should be

dismissed. However, nothing in the draft Amended Statement of Claim would have altered that position. For reasons I will explain shortly, the proposed joinder of the additional defendants was entirely misconceived, and no close analysis of the joinder motion was required to reach that conclusion. I have already considered the proposed amendments to paragraph 6 (paragraph 7 in the draft). None of the other amendments were capable of having any bearing on the issue of whether the claim should be dismissed. The draft did seek relief in respect of additional judgment mortgages. However, those judgment mortgages were unidentified, the draft Amended Statement of Claim disclosed no basis for seeking to have them set aside and there was no evidence about any such judgment mortgages.

57. It follows from the discussion above that, in my view, the Judge was correct to conclude that the proceedings were an abuse of process and that Ms Houston's appeal from the Judge's order that the proceedings be dismissed must fail.

The Joinder Application

58. Having decided that the proceedings should be dismissed, the Judge was entitled to take the view that it followed that the joinder application had to be refused.

59. Even if there had never been an application to dismiss the proceedings, or if the joinder application had been heard in advance of that application, it would inevitably have been refused. At the time that the joinder application issued, Ms Houston was not a partner in Tully Rinckey. More importantly, the costs orders which Ms Houston sought

to challenge were made in favour of Ms Doyle personally and the judgment mortgages were registered in her name. As Allen J had explained in his judgment in the Well-charging proceedings, "*the fact that Ms. Doyle was a member of a particular firm of solicitors at any time is irrelevant on the face of the orders*." Tully Rinckey had no involvement whatever in the issues between Ms Doyle and Ms Houston. Even on the premise that Ms Houston had an entitlement to challenge the costs orders and/or the judgment mortgages, the correct defendant in any such challenge clearly was Ms Doyle (and Ms Doyle only). Ms Houston must have been aware that she had no cause of action or claim against Tully Rinckey and her affidavit grounding the joinder application did not identify any plausible basis for that application. Whatever may have been Ms Houston's motivation in seeking the joinder of Tully Rinckey, the fact is that the application was devoid of any legal or factual foundation.

The Isaac Wunder Order

60. Ms Houston was very critical of the *Isaac Wunder* order made by the Judge. In her written submissions she characterises such an order as a "*statutory instrument from another country*" which, she submits, "*is unconstitutional simpliciter in Ireland*." Those submissions also refer to the decision of this Court in *Kearney v Bank of Scotland* [2020] IECA 92, in which Whelan J gave a judgment with which Baker J and I agreed. In her oral submissions, Ms Houston stated that the order had made her an "*unperson*" and emphasised the fact that it had been made without any notice to her. That, she submitted, amounted to "*a fundamental denial of constitutional justice*". In that context, she placed significant reliance on a further decision of this Court, *Sfar v*

Minister for Agriculture [2020] IECA 206, as well as a decision of the High Court (Gearty J) *SL v ML* [2020] IEHC 203.

61. In response, Counsel for Ms Doyle observed that the order had not been made on her application. While Ms Doyle accepted that the Judge had jurisdiction to make the order and did not "*demur*" from it, Counsel did not otherwise seek to engage with Ms Houston's submissions on this aspect of her appeal.

62. I addressed the *Issac Wunder* jurisdiction in my concurring judgment in *Irish Aviation Authority v Monks* [2019] IECA 309 and it is also discussed in detail in *Kearney v Bank of Scotland plc*.

63. The authorities clearly establish that the Superior Courts have jurisdiction to make such an order in an appropriate case: see for instance *Riordan v Ireland (No 4)* [2001] 3 IR 365, per Keane CJ at 370. Ms Houston's submission that such orders are *"unconstitutional simpliciter*" must therefore be rejected.

64. Courts are, rightly, reluctant to make such orders and the circumstances in which it is appropriate to do so will be "*very rare*"[5], given the important constitutional value attaching to the right of access to the courts. But that right is not absolute and other rights and interests are also engaged in this context, including the right of citizens "*to be protected from unnecessary harassment and expense*."[6] Apart from the stress of

[5] *O' Malley v Irish Nationwide Building Society* (Unreported, High Court, 21 January 1994), at page 10.

[6] *Riordan v An Taoiseach (No 4)*, at 370.

being sued, defendants may incur significant cost in defending themselves against even unmeritorious claims. As Keane CJ stated in *Riordan v Ireland (No 4)*, courts would be failing in their duty if they allowed their processes "*to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation*."[7] As I observed in *Irish Aviation Authority v Monks*, in addition to the *private* rights of persons to be protected from vexatious claims, there is an important *public* interest in avoiding limited court resources being taken up in dealing with such claims. Finality of litigation is another important *public* interest in this context.

65. However, the jurisdiction is one to be exercised cautiously and only in clear cases. Apart from the specific restrictions that an *Issac Wunder* order may impose in terms of access to the courts, as Whelan J observed in *Kearney v Bank of Scotland plc* (at para 132(xi)), such an order potentially stigmatises a litigant by branding them as "*vexatious*". No order should be made unless the relevant court is satisfied that, in its absence, further litigation is likely to follow that would clearly be an abuse of process. Where an order is made, it is important that it should be framed as narrowly as possible, consistent with effectively achieving its purpose.

66. Before an *Isaac Wunder* order is made, the subject of the intended order must be given an opportunity to be heard. In *Sfar*, the appellant was on notice of the application and had made submissions. Subsequently, however, the High Court judge had, without affording any further hearing to the appellant, decided to make an order in terms which,

[7] Also at page 370.

in this Court's view, were materially wider than the form of order sought by the defendants. This Court characterised the making of such an order in such circumstances as "*a fundamental denial of constitutional justice*". The Court held that the judge was wrong to widen the scope of the order so without hearing both parties and, if necessary, listing the matter for further hearing for that purpose.[8]

67. It follows from *Sfar* that, in principle, it will be a breach of constitutional justice to make an *Isaac Wunder* order without affording the affected person a right to be heard in relation to the proposed order.

68. Here, there was no such hearing. Ms Doyle's application to dismiss did not seek any form of *Isaac Wunder* order and the first reference to such an order was in the course of the Judge's ruling. One can understand the concern that the Judge evidently had about the possibility of Ms Houston pursuing proceedings against Tully Rinckey and, indeed, her more general concern that there should be no re-litigation of issues which she had held to be *res judicata*. But the order made by the Judge – which restrains Ms Houston from instituting *any* further High Court proceedings whatsoever, regardless of the nature of the claim or the identity of the intended defendant(s), without the prior leave of the President – appears to go well beyond what might be considered necessary or proportionate to address those understandable concerns. Such a blanket restriction on access to the courts would appear to require very particular and compelling

[8] In *IAA v Monks* the relevant *Isaac Wunder* order was also made in terms that were wider than the terms sought (the order encompassed litigation concerning additional parcels of land) but this Court was of the view that, in the particular circumstances, no injustice had been done to the appellant.

justification. In any event, no order – however broad or narrow its scope – ought to have been made without first giving Ms Houston an opportunity to be heard.

69. Typically, *Isaac Wunder* orders are made on the application of a party, normally by way of motion. In such circumstances, the person against whom the order is sought will be on notice of the order being sought and the stated basis for it and will have an opportunity to provide evidence and/or make submissions in rebuttal. However, there may be circumstances where, absent any such application, a court considers that it may be appropriate to make such an order. As already explained, the rights and interests which the jurisdiction seeks to protect extend beyond the private rights of the parties and, in my opinion, the power (and duty) of a court effectively to protect its processes from abuse would be significantly undermined if the exercise of that power were in all circumstances to be contingent upon the court being invited to act. Furthermore, on a practical level, a court may have greater knowledge of the litigation history of a party appearing before it than the other parties have. Having said that, it appears to me that courts should tread very cautiously in this context, lest their fundamental role as impartial decision-makers be blurred and the court is perceived, however unfairly, as having "*entered into the ring*". It seems to me that the circumstances in which it may be necessary or appropriate for a court to consider making any form of *Isaac Wunder* of its own motion are likely to be rare indeed. Where such circumstances appear to arise, that context makes it particularly important that the party that would be affected by any such order is given an adequate opportunity to be heard before any decision is made.

Approved

70. In the circumstances here, Ms Houston did not have an opportunity to be heard either as to the making of an order at all or the breadth of the order. It follows, in my view, that the *Isaac Wunder* order made by the Judge must be set aside. No question of remittal arises, given that no application for any form of *Isaac Wunder* order was made by Ms Doyle. No suggestion was made on Ms Doyle's behalf that the Court should consider substituting any different form of order on its own motion and I do not consider that it would be appropriate to do so in the circumstances here. In my opinion, the appropriate order to be made is one setting aside the order made in the High Court, without more.

71. However, I would add that, as she is a barrister, Ms Houston is or ought to be well aware that she is not entitled to relitigate the issues which have been determined in the Well-charging proceedings and which she has sought to agitate again in these proceedings. Any attempt to do so – whether by way of further proceedings against Ms Doyle and/or action against Tully Rinckey – would be an abuse of process and would clearly expose Ms Houston to a serious risk of an *Isaac Wunder* order being made against her in the future.

Costs

72. No arguments were advanced by Ms Houston as to why the Judge was wrong to make the costs orders that she did. Ms Doyle's application to dismiss was successful and, that being so, the costs of the application, and of the action, followed the event. As regards the costs order made in favour of Tully Rinckey on the joinder application, that

order was clearly one which the Judge was entitled to make and Ms Houston has not identified any basis on which this Court could properly interfere with it.

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DISPOSITION OF THE APPEAL

73. For the reasons set out above, I would:

- Dismiss Ms Houston's appeal from the Judge's refusal to recuse herself.
- Dismiss Ms Houston's appeal from the order dismissing the proceedings.
- Allow Ms Houston's appeal from the *Isaac Wunder* order and set aside that order.
- Dismiss Ms Houston's appeal from the order striking out the joinder application.
- Affirm the orders for costs made by the Judge.

74. I would therefore affirm both of the orders the subject of this appeal, subject to setting aside the *Isaac Wunder* order.

75. As regards the costs of the appeal, the parties should be given an opportunity to make submissions as to the appropriate order to be made. Each of the parties will have 14 days from the date of this judgment to make a brief written submission (not to exceed 1,000 words). The Court may then decide the issue of costs without further hearing or

may decide to hold a short hearing, in which case the parties will be notified.

In circumstances where this judgment is being delivered electronically, Donnelly J and Binchy J have indicated their agreement with it.