

**THE HIGH COURT**

**COMMERCIAL**

[2022] IEHC 307

[Record No. 2016/1920S]

**BETWEEN**

**ALLIED IRISH BANKS, PLC (AND BY ORDER DATED 17<sup>th</sup>**

**SEPTEMBER 2018) EVERYDAY FINANCE DAC**

**PLAINTIFFS**

**AND**

**SEAMUS MCQUAID**

**AND BY ORDER DATED 30<sup>TH</sup> MAY, 2017**

**BEN GILROY AND CHARLES MCGUINNESS**

**AND BY ORDER DATED 1<sup>ST</sup> JUNE, 2018**

**SUSAN MCQUAID, PAUL MCQUAID AND GRÁINNE MCQUAID**

**AND BY ORDER DATED 16<sup>TH</sup>, JULY, 2018**

**SONIA MCQUAID AND CONOR MCQUAID**

**DEFENDANTS**

**RULING on costs of Mr. Justice Denis McDonald delivered electronically on**

**24<sup>th</sup> May 2022**

1. On 8<sup>th</sup> April 2022, I gave judgment electronically in respect of the notice of motion brought by the second named defendant, Mr. Ben Gilroy, in which he sought orders setting aside all previous orders made in these proceedings and, in particular,

the orders made by Mr. Justice McGovern. Mr. Gilroy's application was made on the basis that the orders in question were vitiated by bias on the part of McGovern J. In making that application, Mr. Gilroy relied both on alleged objective bias on the part of the judge and also alleged actual bias. The allegation of objective bias was made on the basis that, unknown to Mr. Gilroy, the solicitor and counsel for the plaintiff in these proceedings had previously acted for the wife of McGovern J. in High Court proceedings (record number 2008/6237P) relating to a dissolution of a family partnership in which Ms. McGovern was involved. Mr Gilroy contended that this "*relationship*" gave rise to a substantial conflict of interest on the part of the judge which, in turn, gave rise to a reasonable apprehension of bias on his part.

2. In my judgment delivered electronically in April, I examined the law in relation to objective bias and I came to the conclusion that Mr. Gilroy had failed to establish any circumstances which would give rise to a reasonable apprehension of bias.

3. I also rejected the allegations of actual bias made by Mr. Gilroy against the judge. Mr. Gilroy made a number of specific allegations in support of this element of his case. Having examined these allegations, I came to the conclusion that they were entirely baseless and improper. Some of them had previously been struck out as scandalous by order of Haughton J. In para. 49 of my judgement, I expressed the view that it is clear that the only conceivable basis on which Mr. Gilroy chose to ventilate such serious but groundless allegations was to embarrass and cause offence. In those circumstances, in exercise of the powers available under O. 40, r. 16, I struck out as scandalous a number of paragraphs of Mr. Gilroy's affidavit sworn on 29<sup>th</sup> March 2021 and his supplemental affidavit sworn on 9<sup>th</sup> June 2021.

4. I made an order dismissing Mr Gilroy's application to set aside the orders previously made in these proceedings. I dealt with the question of costs in para. 51 of my judgment. In that paragraph, I directed that, if any party wished to make an application for costs, any such application was required to be submitted electronically to the Registrar not later than 4<sup>th</sup> May 2022 and copied to the opposing party. I also directed that the opposing party would have a period of fourteen days thereafter to respond by email addressed to the Registrar, following which I would issue an electronic ruling setting out my decision on costs.

5. Subsequently, on 29<sup>th</sup> April 2022, the Registrar received an email from the solicitors acting on behalf of the plaintiffs enclosing a submission in which the plaintiffs made a case not only that costs should be awarded in their favour but that the court should exercise its discretion to award costs on a solicitor and client scale. No responding submissions were delivered on behalf of Mr. Gilroy's.

6. I now give my ruling on costs. The general rule on costs is set out in s. 169(1) of the Legal Services Regulation Act 2015. Section 169(1) makes clear that the overriding principle in relation to the award of costs is that a party who is successful in proceedings is entitled to an award of costs against a party who is not successful in those proceedings. In other words, costs should follow the "event". The court is given power under the subsection to otherwise order but only in particular circumstances, none of which is relevant here. Furthermore, s. 169(2) requires that reasons should be given by a court where it does "*otherwise order*".

7. In light of the provision of s. 169(1) of the 2015 Act, it is clear that the plaintiffs must be entitled to an order against Mr. Gilroy in respect of the costs of the motion brought by him such costs to be adjudicated in default of agreement. In the ordinary way, such costs would be adjudicated on a "*party and party*" basis. However,

as noted above, the plaintiffs in this case apply for costs to be awarded on a solicitor and client basis pursuant to O. 99, r. 10(3). In making that application they draw attention to the finding made by me that the allegations relied upon by Mr. Gilroy in support of his allegation of actual bias on the part of the judge were baseless and were maintained solely to embarrass and cause offence. They refer to the judgment of Barniville J. in *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13. In that case, Barniville J. held that, before a court could exercise its discretion to award costs on a solicitor and client basis, there had to be good reason to do so. Barniville J. indicated that it might be appropriate for the court to exercise its discretion to award such costs where it wished to mark its disapproval of or displeasure at the conduct of the party against whom the order for costs is to be made. Such conduct could include, for example, an abuse of process by the party in commencing or maintaining proceedings for an improper purpose or ulterior motive or a failure to exercise caution in commencing proceedings or making very serious allegations without ensuring that clear evidence exists supporting a prima facie case in relation to such claims. In considering whether the conduct of a party is such that the court should exercise its discretion to make such an order, the court should clearly identify the particular conduct which is said to afford the basis for the exercise of discretion in that way and should carefully examine and consider any explanation offered by the party for the conduct in question. Barniville J. also indicated that the court should carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the opposing party, whether in terms of delay or costs or any other form of prejudice to that party.

**8.** No explanation has been offered by Mr. Gilroy for his conduct in ventilating the baseless allegations canvassed in his affidavits. Those allegations were of a highly

improper nature. Had those allegations been the sole basis on which his application had been advanced, I would have no hesitation in awarding costs on a solicitor and client basis against him. In my view, all of the factors identified by Barniville J. in *Trafalgar* would point in that direction. However, I must also bear in mind that the baseless allegations were not the sole focus of the application made by Mr. Gilroy. He also relied on objective bias which he said arose from the previous lawyer/client relationship that existed between the judge's wife and the lawyers for the plaintiff. That is the issue which occupied most of the hearing. It is also the issue which took up most of my judgment. It was an issue that required careful consideration of the pre-existing case law. In addition, it could not be said that the allegations of actual bias (baseless and improper though they were) caused additional cost or delay to the plaintiff. Only one affidavit was delivered on behalf of the plaintiff. The vast majority of that affidavit was concerned with the history of the proceedings. Only five of the twenty-seven paragraphs in the affidavit addressed the allegations in issue. In these circumstances, I have come to the conclusion that, notwithstanding my view of the approach taken by Mr. Gilroy in putting such baseless allegations before the court, it would be going too far to exercise my discretion to award solicitor and client costs on this occasion. Accordingly, the appropriate order to be made in respect of costs is an order directing Mr. Gilroy to pay to the plaintiffs their party and party costs of the motion dated 29<sup>th</sup> March 2021, such costs to be adjudicated in default of agreement.