

**The High Court**

**[Record No.] 2023/2459 P**

**[2024] IEHC 320**

**Edel Campbell**

**Plaintiff**

**-V-**

**Gemma O'Doherty**

**Trading as "The Irish Light"**

**Defendant**

**Judgment of Mr. Justice Dignam delivered on the 16<sup>th</sup> day of May 2024.**

1. This is my decision on the defendant's application for me to recuse myself from dealing with the plaintiff's application to have the defendant committed for contempt of court for alleged non-compliance with an interlocutory injunction which I granted on the 23<sup>rd</sup> June 2023.
2. The defendant raises two bases for her application:
  - (i) that I previously represented the former Commissioner of An Garda Síochána, Mr. Martin Callinan; and
  - (ii) that, in her words, I take issue or have a problem with her historical research on German history and therefore am not objective.
3. The defendant did not expressly say whether she was alleging actual bias or objective bias. It seems to me from the substance of what she said that she is alleging objective bias in relation to the first of these and may be alleging actual bias in relation to the second. However, in order to be fair to her, as she did not specify which she was

alleging I have approached both on the basis that she is alleging objective bias as this requires her to meet a lower test.

4. The immediate background to this application is as follows.

5. I granted interlocutory injunctions against the defendant on the application of the plaintiff on the 23<sup>rd</sup> June 2023. The defendant did not attend the hearing despite being served. These injunctions included an Order restraining the defendant from harassing or intimidating or communicating by any means whatsoever with the plaintiff or her immediate family. At the hearing of this motion for committal, Senior Counsel for the plaintiff made clear that it is this injunction that is most relevant.

6. I had no further involvement in the matter until the plaintiff's application for committal came before me on Wednesday, the 10<sup>th</sup> April 2024. It seems that the plaintiff issued a motion for attachment and committal on the 27<sup>th</sup> November 2023. The motion for attachment was dealt with by Sanfey J, as the judge in charge of the Chancery list, and he made an Order for Attachment on the 21<sup>st</sup> February 2024.

7. An Garda Síochána executed that Order at the defendant's home on the morning of the 10<sup>th</sup> April 2024 and she was brought before the Court to explain why she should not be committed to prison. The matter was assigned to me on that day because the case that had previously been assigned to me was resolved between the parties that morning. After hearing some submissions from both sides I adjourned the matter when the defendant told me, for the first time, that she did not have any papers or files with her and that she did not have a solicitor (and seemed to indicate that she wished to instruct one) and that she had not eaten since that morning.

8. I adjourned it to the Friday (the 12<sup>th</sup> April) and made clear that it might well be the case that the defendant, or her solicitor, if she instructed one, might be looking for further time at that stage and that I would consider same.

9. When the matter came before me on the Friday, the defendant continued to represent herself and did not look for time. She made a number of submissions including that I should recuse myself on the grounds set out above.

10. In relation to the first ground, i.e., that I previously represented Mr. Callinan as a barrister, the defendant said, inter alia, that "*I was not aware of the fact that you Judge had represented Martin Callinan when you were a barrister...I was not aware and I*

*should have been made aware of the fact that you were an agent of Martin Callinan and you cannot hear this case objectively."*

11. I was surprised that the defendant stated that she was not aware that I had represented Mr. Callinan because I had had an opportunity to read the papers before dealing with the matter on the Wednesday morning, including transcripts of online discussions which were exhibited to the grounding papers, and had seen that there are at least two direct and express references by the defendant in those transcripts to me having represented Mr. Callinan (26<sup>th</sup> June 2023, one at time stamp 00:23:38.890 and another at 01:04:48.210) so the defendant clearly knew that I had represented him. When I told the defendant that I was surprised to hear her say that she was not aware of my having acted for Mr. Callinan because she referred to it in the online discussions, she then agreed that what she meant was that it had not occurred to her on the Wednesday. She explained this by reference to what she described as the circumstances of that day: that she was "kidnapped" at her home (I take this to mean on foot of the Order of Sanfey J), was highly traumatised and had no possessions or notes with her.

12. The transcripts of the online discussions which are exhibited to the grounding papers also show that the defendant was fully aware that I had referred to German history when determining the interlocutory injunction application. These include the transcript of the 23<sup>rd</sup> June 2023 (the day the injunction was granted) (time stamp 01:16:48:670, and the 26<sup>th</sup> June 2023 time stamp 00:21:51:850 and 00:25:16.730). The defendant has not appealed or applied to discharge the injunction.

13. However, in my view, rather than determining the defendant's application on the basis of whether she has waived her entitlement to object or is estopped from objecting to me dealing with the case, it would be preferable for all concerned for me to determine the substance of her recusal application and I therefore propose to do so.

14. I was not referred to any authorities by the parties. Either side could have applied for time to deal with this application but did not do so. However, the principles relating to objective bias are well-established and well-known.

15. The onus of proof of establishing bias rests on the party who asks the judge to recuse themselves (per Irvine J at paragraph 37 of her judgment in *Commissioner of An Garda Síochána v Penfield Enterprises Ltd [2016] IECA 141*).

16. The test for objective bias is very well-established. It is whether a reasonable person who has knowledge of all of the facts would have a reasonable apprehension that the party would not have a fair hearing from an impartial judge on the issue. This is put in slightly different formulations in various cases but that is the core of the test (see, for example, *Bula v Tara (No.6)* [2000] 4 IR 412, *Goode Concrete v CRH Plc* [2015] 3 IR 493, *O'Callaghan v Mahon* [2008] 2 IR 514, *Nurendale Ltd t/a Panda Waste Services v Dublin City Council* [2013] 3 IR 417, *Ryanair Ltd v Terravision London Finance Ltd* [2011] 3 IR 192, *Nasheuer v National University of Ireland Galway* [2018] IECA 79, *Commissioner of An Garda Síochána & Ors v Penfield Enterprises Limited* [2016] IECA 141, *Burke v Workplace Relations Commission* [2023] IEHC 225).

17. Of central importance to whether a reasonable person would have a reasonable apprehension of bias on the part of a judge is that the reasonable person will be taken to know that (a) it is the duty of judges to hear and determine all cases and (b) they make a declaration under Article 34.6.1 of the Constitution. Denham J said in *Bula Ltd v Tara Mines Ltd (No. 6)* that "[A] judge works on the basis of his or her legal training and the declaration made on being appointed a judge. The declaration is in the terms, as set out in Article 34.5.1 of the Constitution of Ireland, 1937." Irvine J said in *Commissioner of An Garda Síochána v Penfield Enterprises Ltd* [2016] IECA 141 that:

"34. The starting point for the court's consideration on this appeal is the right and indeed the duty of judges to hear and determine all such cases or legal issues as may come before them for adjudication, unless there are substantial reasons why they should not do so. It is relevant in this regard that judges, at the time of their appointment, make a declaration pursuant to Article 34.6.1 of the Constitution to administer justice "without fear or favour". They have made a public declaration to uphold the Constitution and the law. This necessarily includes a solemn promise to uphold the impartial administration of justice and to provide, for all who come before them, a fair and just hearing."

18. However, there are circumstances in which judges must recuse themselves. Irvine J went on to say:

"35. However, there are circumstances in which a judge has a duty to step aside from a pending or impending hearing so as to permit another judge determine some matter in contest between the parties. This is because not only must justice be done it must be seen to be done. One such circumstance is where a party to litigation can establish

*that the judge scheduled to hear their case or application has demonstrated objective bias."*

19. The first basis for the defendant's application is that I, as a barrister, represented the former Commissioner of An Garda Síochána in the Disclosures Tribunal. The defendant puts her position thus: *"I was not aware of the fact Judge that you represented Martin Callinan when you were a barrister. Now Martin Callinan, as you know, the disgraced former Garda Commissioner, had me removed from my job of twenty years in the Irish Independent as Chief Features Writer because I exposed the fact that he was unlawfully speeding on our roads and abusing the road safety laws and at the time I was working closely with Maurice McCabe. An apology was read out to me by the President of the High Court in these courts relating to defamation against me by INM and unlawful dismissal and personal injury and I was not aware and I should have been made aware of the fact that you were an agent of Martin Callinan and you cannot possibly hear this case objectively."*

20. I have previously dealt with the suggestion that the defendant was not aware that I had represented Mr. Callinan.

21. The reasonable person is a person armed with all the facts. They will therefore be taken as knowing that I did indeed represent Mr. Callinan in the Disclosures Tribunal. I represented the Commissioner of An Garda Síochána, who originally was Commissioner O'Sullivan, and all serving and retired members of An Garda Síochána who wished to be represented by the lawyers acting for the Commissioner in the Disclosures Tribunal. I did so as a member of a team of seven counsel. Mr. Callinan, the former Commissioner, was one of the persons represented. The defendant gave evidence against Mr. Callinan to the Tribunal. The defendant was cross-examined on behalf of Mr. Callinan by a member of the legal team.

22. The starting point for an application for recusal on the grounds of bias based on a judge having previously represented a person when in practice as a barrister is that it is not a ground for recusal. This, and the rationale for same, was considered in detail by Denham J in *Bula Ltd v Tara Mines Ltd (No. 6)*. She said, under the heading "An independent bar" commencing on page 442, inter alia:

*"Many of the submissions both written and oral made on behalf of the applicants indicated a misunderstanding of the place of the independent bar and barristers in the State..."*

*A barrister in his or her work is an independent sole practitioner. He or she is a legal advisor and advocate. The professional services rendered by the barrister do not establish an affiliation to the client or a sharing of kindred cases and objectives, as submitted on behalf of the applicants. The work is as a professional to give legal advice and or to be an advocate. The work does not espouse him or her to the litigant's cause, no matter how controversial, emotional or hostile the litigation; nor does he or she espouse the ambitions of the litigant, as submitted by the applicants.*

*The work done by barristers is of the nature of a professional service. By advising or advocating for a client a barrister does not become "associated" with the client's cause. Barristers operate what is colloquially called "the cab rank" principle. Having completed a case they move on to the next client – who may have been on an opposing side in the previous case...*

*The barrister is a source of legal advices and services and is approached, not by clients, by solicitors for professional expertise. In giving that legal expertise barristers do not become "associated" or establish "a prior special relationship" with a client..."*

23. Denham J indorsed the principles stated by Merkel J in in paragraph 83 of his judgment in *Aussie Airlines Ptv. Ltd. V. Australian Airlines Ptv. Ltd. and Ors. (1996) 135 ALR 753* and went on to say at page 445:

*"In Ireland the test is objective. The test is the view of the reasonable person who would have a reasonable knowledge of a barrister's work and so the link or links alleged need to be more than simply that the judge as barrister had acted for one of the parties in action.*

*Indeed, it was quite rightly accepted by the applicants that the mere fact that a judge when a practising barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal advisor and client. In *Re Polites; Ex parte Hoyts Corporation Pty. Ltd. (1991) 173 C.L.R. 78* at pp. 87 and 88 it was held that a prior relationship of legal adviser and client does not generally disqualify the former adviser on becoming a member of a court from sitting in proceedings. The High Court of Australia, Brennan J., Gaudron J. and McHugh J. held:*

*"A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party...Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination."*

*I am satisfied that this is a correct analysis of the situation and the approach to be taken in analysing the issue. The links must be cogent and rational. I agree with the analysis of Merkel J. In Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd. (1996) 135 A.L.R 753 where he stated:*

*"55. In my view, as with the cases considering personal, family and financial interests the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In the absence of such a link it is difficult to see how the test for disqualification as stated in Livesey can be satisfied."*

*If a judge has acted for or against a person previously as a legal adviser or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant."*

24. Denham J went on to say at page 446:

*"On occasion it is inappropriate for a judge to adjudicate in a case. This will depend on the circumstances. A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar, which operates in Ireland, such a link is not a connection sufficient to disqualify. It requires special*

*additional circumstances to disqualify a judge from adjudicating on a case. Thus, a long, recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court."*

25. It is worth pausing to note that these cases were focused on the situation where a judge had previously represented one of the parties who were now before him or her. This case is even more removed from that situation.

26. Thus, the mere fact that a judge represented a person when in practice as a barrister is not sufficient. Something more is required. Denham J used phrases such as that there "*must be an additional factor or factors*" or "*special additional circumstances*". Merkel J said "*something more than the mere fact of association is required.*" What amounts to "*something more*" or "*an additional factor*" will depend on the facts of each case. What is required, however, is that there must be a cogent and rational link between it and the alleged bias. As Denham J put it, the additional circumstance(s) must "*be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case*" (*Bula*, page 446). Merkel J said "*Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case.*" In *Ó Ceallaigh v An Bord Altranais [2011] IESC 50*, Fennelly J, referring to Denham J's judgment in *Bula v Tara Mines*, said at paragraph 39, "*She made, at page 445, in particular, the important point, emphasised by the trial judge in this case, that, in assessing objective bias, the "links must be cogent and rational," i.e., there must be a real and not a mere hypothetical or a speculative link between the association under consideration and the apprehension of lack of impartiality being alleged.*" He also said at paragraph 41 "*This need for a cogent and rational link between the claimed bias and the feared departure of the adjudicator from the standard of impartiality, has been emphasised in two subsequent cases in the High Court of Australia...*"

27. As hinted at in some of the passages quoted above, some circumstances which might amount to "*something more*" are if there has been a long, recent and



varied connection between the judge (former barrister) and the party, or where an issue in the previous proceedings is a live issue in the current proceedings, or where the previous proceedings involved a detailed attack on a party's credibility. This is not intended to be exhaustive.

28. The defendant does not expressly rely on any of these. Her application was solely based on the fact that I represented Mr. Callinan when dealing with her allegations against him.

29. The mere fact that I represented Mr. Callinan as a barrister is not sufficient. There must be something more. The defendant did not point to anything more. Nonetheless, I have considered whether there might be some additional factor constituting a cogent and rational link between my representation of Mr. Callinan and the alleged apprehension that the defendant would not get a fair hearing on this application.

30. My association was limited to representing Mr. Callinan in the Tribunal and was therefore not a long, recent and varied connection.

31. I have also had an opportunity to review the terms of reference for the Disclosures Tribunal and to review the transcripts of the defendant's evidence to the Tribunal including the cross-examination of the defendant on behalf of Mr. Callinan to see if there are any live issues common to this application and the Tribunal. I am satisfied that there is no cogent or rational link between those matters and my representation of Mr. Callinan in relation to them and the questions to be determined in this application. While the defendant was cross-examined in the Tribunal about a number of areas, including her journalistic practice or methods, her motivation, and her credibility, the only issue which has to be determined on this application is whether the defendant has breached the Order of the 23<sup>rd</sup> June 2023 and, in particular, whether the alleged facts (which essentially comprise alleged statements by the defendant during the course of online discussions) constitute harassment of the plaintiff.

32. It is important to note that those facts have not been denied by the defendant and therefore the Court does not even have to determine whether those facts are correct. The consideration of whether those statements constitute a breach of the Order potentially gives rise to complex questions concerning, for example, the existence, definition and parameters of harassment in civil law, and possibly its

interaction with free speech or a free press but they do not relate to the issues arising in the Tribunal. The defendant also raises the point that the application (and indeed the injunction) is unlawful because they are in breach of the rule against maintenance and champerty. Again, this does not relate to any of the issues in the Disclosures Tribunal. I am satisfied therefore that there is no cogent and rational link between the representation of Mr. Callinan in the Tribunal and the matters which were put to the defendant in the Tribunal on his behalf and the matters to be decided in this application.

33. Essentially the basis for the defendant's application is that because she gave evidence against Mr. Callinan, he has an animus against her, and therefore the reasonable person would have a reasonable apprehension that I have an animus against her because I was one of a number of barristers who represented Mr. Callinan. As discussed in detail by Denham J, the reasonable person knows that a barrister as a member of an independent bar is not associated with a client's views or position.

34. In my view, the facts that a reasonable person must be taken as knowing are, in summary:

- (i) A judge is required on appointment to make a declaration under Article 34.6.1 of the Constitution to execute their office "*without fear or favour, affection or ill-will towards any man*";
- (ii) A judge is under a duty to hear and adjudicate on cases save where it is necessary to recuse themselves;
- (iii) I, as part of a team of counsel, represented the Commissioner of An Garda Síochána and all serving and former members of An Garda Síochána who wished to be represented by the lawyers for the Commissioner. Over the course of the Tribunal the number of members represented ran to several dozen. Mr Callinan was just one of those individuals represented;
- (iv) Mr. Callinan was central to a number of the modules of the Tribunal;
- (v) The defendant made allegations and gave evidence against Mr. Callinan and was therefore cross-examined on behalf of Mr.

Callinan;

- (vi) A Tribunal of Inquiry is different to more common types of proceedings such as litigation;
- (vii) Barristers are independent and in their professional work do not become associated with their clients in any way other than as legal advisor and advocate unless there are some additional circumstances over and above the fact of providing those professional services;
- (viii) There are no such additional circumstances in this case. In particular there is no cogent and rational link between the issues which were considered in the Tribunal and in respect of which I represented Mr. Callinan and the issues which have to be determined in this application.

35. In my view, when all of those facts are weighed up, the defendant has not discharged the onus of showing that a reasonable person, armed with all of those correct facts, would have a reasonable apprehension that she would not get a fair hearing on the basis that I, as a barrister, represented Mr. Callinan.

36. The defendant also says that I should recuse myself because when determining the application for an interlocutory injunction I took issue with her research on German history.

37. Her submission was that I should recuse myself:

*"Not only on the grounds that you worked for Martin Callinan who had me unlawfully dismissed from my job but also you take issue with my historical research on German history. You, for some reason, brought into this case, which is to do with the death of a young adult in Cavan, you brought German history into it. Now I cannot see where the history of Germany in the Second World War comes into the case of Diego Gilson and his death. So I don't know why you raised those issues. You've got a problem with my research on the Second World War and that says to me that you are not objective and I'm asking that you recuse yourself."*

38. As discussed above, the test for objective bias *"...is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is possessed of all of the relevant facts."* Thus, whether or not something says to the defendant that I am not objective is irrelevant (see *O'Callaghan v Mahon [2007] IESC 17* and *Ryanair v Limited v Terravision London Finance Limited, paragraph 35 and 39*).

39. As the defendant alleges bias on the basis of what I said in my ruling on the interlocutory injunction application, I think it is necessary to quote from the relevant part of that ruling (see paragraph 41 of Irvine J's judgment in *Commissioner of An Garda Síochána v Penfield Enterprises Limited & ors [2016] IECA 141*). As the plaintiff was seeking interlocutory injunctive relief, I had to engage with the question of what threshold test had to be satisfied by the plaintiff: the traditional 'fair issue to be tried' test for prohibitory injunctions or the higher 'strong case' used for mandatory injunctions. As some of the relief was mandatory in nature I applied the test for mandatory interlocutory relief, i.e., the higher test. I held:

*"I am satisfied that a strong case has been made that the defendant's conduct amounts to what is commonly called harassment. I do not propose to go through all of the social media posts and online lecture transcripts or discussion forum transcripts but I am satisfied that there is a strong case that the repetition of comments to the effect that the plaintiff is a bad mother, ignored her son's text messages the night he took his life, was a liar, involved in criminality, that her son was involved in criminality, and that he died because of the Covid measures, sorry the Covid vaccine, particularly in the context of some of the other topics covered in those online lectures or discussions, including the denial of the holocaust and anti-semitic comments, amounts to harassment..."*

*So by reference to these – section 10 [of the Non-Fatal Offences Against the Person Act and Dowson v Chief Constable of Northumberland Police], I am satisfied that the matters which I have referred contained in the social media posts and online discussion transcripts particularly in the overall context of those materials gives rise to a strong case that the defendant's conduct amounts to harassment and therefore gives rise to a strong case that the plaintiff may be able to attach liability to the defendant for that conduct."*

40. Fennelly J held in *O'Callaghan v Mahon [2007] IESC 17* that *"objective bias may not be inferred from legal or other errors made within the decision-making*

*process; it is necessary to show the existence of something external to the process*". He did go on in the next point to say that statements by the decision-maker which show prejudice, hostility or dislike towards one party or their witnesses may, if applied to the case at issue, establish objective bias but it is clear from the phrase *"if applied to the case at issue"* that he was referring to statements external to the case or process.

41. Of course, there is clear logic to the principle that objective bias may not be inferred from legal or other errors made within the decision-making process and that the fact(s) relied upon to infer objective bias must be external to that process. Errors are matters for appeal. It is the function of a judge to make decisions and that carries with it a risk that they will err. There is no basis for saying that the mere fact of a judge performing their constitutional function gives rise to objective bias. Furthermore, it would mean that a judge who incorrectly decided a matter, such as an interlocutory application, could not, merely by virtue of having made such an error, determine any subsequent matter in that case. That is not the law.

42. However, this principle can not be stated in absolute terms. There may be something done by a judge in the course of the same proceedings which may lead to a finding of objective bias. That is clear from the judgment of Irvine J in *Commissioner of An Garda Síochána v Penfield*, where she said, *"[I]n considering whether comments or actions on the part of a judge ought to be classified as bias, objectively assessed, it is clearly relevant to consider whether those words or actions might suggest that the judge has in some way prejudged some issue he is due to decide."* Indeed, even Fennelly J in *O'Callaghan v O'Mahon* allowed of the possibility that statements or conduct of a judge in the proceedings themselves (rather than external to them) may lead to a conclusion of objective bias. At paragraph 77 of his judgment he said that *"Of course, a judge may so behave that he steps outside his judicial role. If he does, it will be obvious. In my view, that is what is required, something quite outside the bounds of proper judicial behaviour to establish objective bias, based on judicial statements."*

43. Of course, it is important to note that *O'Callaghan* was referring to statements made by a judge during the course of the hearing rather than in the judgment or ruling, as in this case. There is a fundamental difference between the two situations. Nonetheless, it is clear from these passages, that the principle that the claim of bias must be based on something external is not absolute. However, there must be something significantly different from and beyond mere error. It is

not possible or appropriate to draw up an exhaustive list of what is required because it will depend on the facts of each case but some guidance is offered by the passages quoted above.

44. The defendant's basis for seeking recusal is that German history or, more particularly, what she describes as her research into German history, has absolutely nothing to do with the case (which she describes as being about the death of a young man), that I have a problem with her research into something which has nothing to do with the case, and therefore I can not be objective. Strictly for the purpose of this discussion I accept that if a judge has regard to something which is entirely irrelevant or which no judge reasonably could have regard to may be a basis for a finding of objective basis.

45. In my view, the defendant's application is unsustainable because it is based on an incorrect premise; namely that the matters which I had regard to were wholly irrelevant to the issues which I had to decide in the injunction application. Firstly, one of the arguments that was made on behalf of the plaintiff, and therefore which had to be determined by me, was that the Court had to assess what was being said about the plaintiff and her family along with how it was said, how often it was said and what it was said with. Secondly, it cannot be suggested that what is discussed on either side of the statements which are alleged to constitute harassment are irrelevant to the determination of whether they might constitute harassment and they certainly can not be so entirely irrelevant as to be evidence of bias. Words and conduct take meaning from their context and surrounding words. In my view the question of whether the plaintiff had established a fair issue or a strong case (the latter being the higher test and the one that I applied) that the statements about the plaintiff, her son and her family amount to harassment on the one hand or legitimate comment or investigative reporting on the other must, as was submitted on behalf of the plaintiff, be assessed by reference to the terms of the statements themselves and the context in which they were uttered. Thus, in my view, the other topics covered on the same occasions as the statements complained of are relevant and must be considered in assessing whether those statements might amount to harassment.

46. Indeed, it must be recalled that, on the evidence to date, it was the defendant who chose to discuss these various topics in the same forum or at the same time. In some instances the themes were interwoven or leading one to the other such as, for example, a discussion on the 26<sup>th</sup> May 2023 bearing a time stamp

of 00:41:20.330 and 00:42:54.310. The initial reference to the plaintiff's son by the defendant/The Irish Light was in the context of an article about what the defendant describes as unexplained deaths of young persons. In these excerpts the defendant is recorded as discussing how persons do not want questions being asked about such deaths, including that of the plaintiff's son, and comparing this to what she describes as "*the holocaust hoax*" and how questions are not allowed "*about the holohoax because we will offend the Jews*" and goes on to describe it as "*the exact same playbook because it comes out of the Jewish Communist playbook.*" In other instances, different themes are less interwoven but follow in relatively quick time sequence.

47. I am satisfied therefore that, as was submitted by the plaintiff, the other topics which were discussed during these sessions, including the question of the holocaust and anti-semitism, are directly relevant to the question which I had to determine in the interlocutory injunction. However, even if I am wrong on this, that is a matter for an appeal rather than a basis for recusal. Even if I was wrong to take account of these surrounding words and context, they are not so entirely irrelevant as to give rise to a reasonable apprehension on the part of a reasonable person that the defendant would not get a fair hearing on the claimed basis that I stepped outside the bounds of proper judicial behaviour in having regard to them.

48. I am also satisfied that my conclusions were not expressed in extreme or unbalanced terms or that the manner in which I dealt with them stepped outside the bounds of proper judicial behaviour and that they were firmly grounded in the evidence.

49. Thus, I am satisfied that the defendant has not established that my consideration of the other themes discussed in the online discussion forum in determining the legal issue which I had to determine or the terms or manner in which I did so gives any basis upon which I should recuse myself from discharging my constitutional duty.

50. The height of the defendant's case on this point is that I had regard to an irrelevant matter in reaching my conclusion. That is an appeal point. What is striking is that the defendant, despite discussing my reference to these historical matters online after I granted the injunction, did not appeal my decision and has not sought to have the injunction discharged.

51. I am therefore satisfied that the defendant has not established the legal standard for recusal on either of the grounds, either taken together or separately.

52. However, notwithstanding that the case on bias must fail, it seems to me that I should consider the approach adopted by Kelly P in *Ryanair Ltd v Terravision London Finance Ltd* [2011] 3 IR 192.

53. In that case, he considered *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (page 480) and *Drury v British Broadcasting Corporation* [2007] EWCA Civ. 605. In *Drury*, the Court of Appeal rejected an argument that the trial judge should recuse himself but nonetheless substituted a judge for the judge originally assigned. In doing so, the Court of Appeal referred to *Locabail (UK) Ltd v Bayfield Properties Ltd* where, it noted, the court “made it plain that, if there was any room for doubt as to which was the right course to adopt, doubt should be resolved in favour of recusal. Also if another judge can be found so that the case can proceed immediately, without increased cost or inconvenience to the parties, it seems to me that the court can properly and should arrange that substitution, so as to avoid any question of dissatisfaction or future complaint.”

54. In *Ryanair*, Kelly P concluded that if he continued to deal with the case before him, his decision to not recuse himself would be appealed and this would cause a significant delay which would be unjust to the other party and in those circumstances he should follow the course adopted in *Drury v British Broadcasting Corporation* and arrange for another judge to deal with the matter where that could be done without increased cost or inconvenience. He said:

*“The interests of justice, the rights of the defendant and the attainment of the objectives of the Commercial Court will not be well served by any further delays.*

...

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



55. The motion before the Court is a motion for committal for alleged serious breaches of a Court Order. That in itself is a very grave matter. Compliance with Court Orders is a fundamental tenet of any democratic system based on the rule of law. It must therefore be determined as expeditiously as possible consistent with the rights of the parties. In addition, it is alleged that these alleged breaches are causing great distress to the plaintiff. These allegations may or may not be made out but the interests of justice and the rights of the parties require the application to be determined expeditiously. It should not be allowed to be held up by an appeal on the subject of whether or not I should recuse myself, if that can be avoided.

56. If the matter had had to proceed on the last day and another judge was not available, my constitutional duty to hear and determine cases and the defendant's failure to meet the legal standard for recusal would have required me to proceed. However, for unrelated reasons (the plaintiff's application to obtain a copy of the DAR of Sanfey J's ruling on the attachment application and for filing further affidavits) the application was adjourned. This has allowed a period to ascertain whether another judge will be available to deal with the case and, in circumstances where there should be one available to take up the matter in my place, I think I should adopt the course adopted by Kelly P and allow a judicial colleague to deal with the matter. As discussed above, the alternative would be for me to indicate that I will continue to hear the case. It is very likely that this would involve an appeal on the recusal point and this would hold up the determination of a motion which is of a type which should be heard and determined with expedition and would lead to additional costs. Neither eventuality would be in the interests of justice.

57. I have had regard to the point made in some of the authorities that, as the judge who granted the interlocutory injunction, I would be best placed to determine the issues on this application. This is an important consideration (see *Commissioner of An Garda Síochána v Penfield*). However, I do not believe that, when weighed against these other considerations, that is a reason not to ask another judge to deal with the matter.

58. I am of the view that the defendant has not met the legal test for bias and recusal but as another judge can be available on the adjourned date without causing any delay or additional costs I will ask Sanfey J, who is responsible for managing the Chancery list, to assign the matter to a different judge.

59. In conclusion, I think it necessary to deal briefly with two additional matters. Firstly, the defendant submitted that the hearing could not proceed lawfully because not every single person who was in attendance could get into the courtroom. There was indeed a large number of people in Court sitting and standing, and some people in the corridor outside the courtroom. It was not necessary to rule on this point because, having made this submission, the defendant then proceeded to make her other submissions, i.e. on the recusal point and on the second matter, the question of maintenance and champerty. Secondly, there was an inconsistency in the defendant's position in relation to this latter point. Having moved her application for me to recuse myself, she then went on to make submissions and was critical of the Court for not determining the maintenance point by discharging the injunction and refusing the plaintiff's application for committal. The recusal application having been made I, of course, could not determine any substantive matter one way or the other and made it clear that I was not doing so. I consider it necessary to mention this matter because in some of her comments the defendant seemed to take the position that I had, by not holding against the plaintiff on the maintenance point, in some way made a decision in respect of the point. That point remains to be determined.