AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2023:000102

[2025] IESC 6

O'Donnell C.J.
Charleton J.
O'Malley J.
Collins J.
Donnelly J.

Between/

PATRICK KELLY

Appellant/Plaintiff

-and-

UNIVERSITY COLLEGE DUBLIN, NATIONAL UNIVERSITY OF IRELAND DUBLIN

Respondent/Defendant

-and-

THE LAW SOCIETY OF IRELAND, AND THE GENERAL COUNCIL OF THE BAR OF IRELAND

Amici Curiae

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 12th day of February, 2025.

1. A hearing and decision before an impartial tribunal is not simply the personal entitlement of the parties. It is a basic, perhaps the basic, requirement of the administration of justice guaranteed to citizens by Article 34 of the Constitution, and by Article 6 of the European Convention on Human Rights ("ECHR"). It is also a long-established feature of the common law, and indeed any developed legal system. So fundamental is it that where impartiality is questioned, it is not sufficient to demonstrate that the actual hearing and outcome of any case was fair whether on the balance of probabilities or to some higher standard. Justice holds itself to a much higher standard.

2. The administration of justice in a civilised society requires acceptance of the outcome even where an individual might disagree with the result and a party might find it extremely burdensome. Acceptance of an outcome rests on public confidence. That public confidence in the system of the administration of justice would not be achieved if judges were only disqualified from hearings if a party could prove on the balance of probabilities that a judge was actually biased in favour of one or other party (what is described in the case law as "subjective bias" or "active bias"). It would not be acceptable that there could remain reasonable doubt on the part of the parties, or members of the public, as to the impartiality of the decision maker. Instead, the law in Ireland, and most countries, has developed a test of what is called "objective bias." That requires disqualification where a reasonable and informed onlooker would have a reasonable apprehension that a judge or tribunal would be biased towards or

against a party because of some identified factor, or, perhaps more precisely still where the reasonable and informed onlooker would have a reasonable apprehension that the judge would not be able to give the matter an impartial hearing and decision by reference only to the facts and law.

3. The law has recognised a list of factors which may give rise to a reasonable apprehension of bias. These include where a judge may have an interest direct or indirect in the case, has made a prior public commitment to the position of one or other party relating to the merits of the action, where the judge has connections with the party or with a witness whose credibility is at issue, or perhaps with a lawyer or lawyers representing the party, or where the judge has extraneous information or knowledge of some kind not acquired from the evidence in the case.

4. Irish law has developed a test for so-called objective bias by reference to a standard of reasonable apprehension and thus created a *cordon sanitaire* which extends far beyond the core area of actual bias proved or suspected. The justification for this policy is to ensure that public confidence in the system of administration of justice is maintained. The test for disqualification is sensitive and may be triggered by matters which are some distance from any actual bias or predisposition. Most of the difficulty in the law on disqualification comes from the attempt to delineate that outer protective boundary, at some distance removed from any question of actual bias. This is one such case.

5. In those cases where judges have been held to be disqualified, there is little if any likelihood that any decision would be or was actuated by a predisposition or bias towards one or other party. Instead, it might be said that an objective

bystander could simply not have the high degree of assurance the law requires that the decision will not be, or that a decision given has not been, affected by considerations which are extraneous to the disposition of the case by reference to the facts, evidence, law and submissions alone.

6. But even that outer protective boundary has, and must have, defined limits. For a variety of considerations, it cannot be correct to simply accede to any objection however flimsy to avoid controversy. First, the basic rule is that a judge should sit unless disqualified. That was well articulated by Sir Anthony Mason, in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352:-

> "*Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour*."[1]

7. In the leading case of *Bula Ltd. and others v Tara Mines Ltd. and others (No. 6)* [2000] 4 I.R. 412 ("*Bula v Tara (No.6)*"), 449 Denham J. stated, "*A judge has a duty to sit and hear a case*." Much the same was said by the same judge, by then Chief Justice, in *Goode Concrete v CRH plc and others* [2015] IESC 70,

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[1] See also Lester, 'Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure' (2001) 24 *Advocates' Quarterly* 326, 327-328: "*A judge [...] must not be stampeded into surrendering his jurisdiction. Just as there is a duty not to sit where disqualified, so there is an equally strong correlative duty to sit where not disqualified. It is an abdication of the judicial function and encouragement to procedural abuse […] It is imperative that a judge not accede too readily to an application for recuse, for to do so allows litigants effectively to influence the choice of the judge in their own case. The decision to step down and recuse oneself must be made sparingly and in the most clear and exceptional circumstances*."

[2015] 3 I.R. 493 ("*Goode Concrete*"), 518, citing with approval the leading Australian case of *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 ("*Ebner*"). In that case Gleeson C.J. put it very simply at paragraph 19 of the judgment: judges do not choose their cases.

8. Second, and correspondingly, too-ready accession to objections to a judge runs counter to an important value of the system that parties should not be entitled to select their judge, even negatively. Parties do not choose their judge.

9. Third, the raising of allegations, particularly after the fact, is not costless. Instead, it imposes substantial costs, particularly on the successful party who sees a decision challenged on matters entirely outside their control and faces the prospect of further hearings and or appeals, both in terms of a challenge to the decision and any rehearing that might be ordered. Fair procedures should protect those parties' rights also.[2] Bias challenges also impose costs on the legal system more generally in terms of delay and diversion of resources that would otherwise be applied to the cases of other litigants. It is important therefore that the test of disqualification and its application in any case should go so far as is necessary to ensure the maintenance of public confidence, but not further, since that deprives the successful party of the judgment to which they are entitled without any corresponding benefit in increasing public confidence. Indeed, the too-ready use of the term bias and the possibility of a consequent implication and perception that a judge disqualified has been guilty of serious wrongdoing

[2] A similar point is made by McGuinness J. in *Bula v Tara (No.6)*, at page 509, "*It should, however, be remembered that this is a case* inter partes *and that the right to fair procedures does not belong solely to the applicants. The respondents, too, have a right to fair procedures. In particular, in the case of the Tara respondents (both corporate and individual) the right to finality may be very much a part of the right to fair procedures.*"

even in cases very far removed from any real lack of impartiality, may undermine confidence rather than support it.

10. It is a difficult task to chart the outer boundaries of the test of objective bias. It is an inherently difficult task since it involves not merely the ascertainment of a state of mind (difficult in itself), but the identification of a possibility that there may be a sufficient and reasonable apprehension that that state of mind exists even if it does not exist in fact. It is also the case that since the test is dependent on the assessment of the reasonable observer, developing views on what is appropriate or permissible may mean that what was acceptable in the past, even if endorsed by judicial decision, may no longer be acceptable. A key component in charting that outer boundary is that it must be connected logically to the core issue of bias. There must be a cogent and rational link between the issue raised and its capacity to influence the decision to be made; it is not to be determined by some precautionary consideration that it might have been better not to sit, or some wise after-the-fact assessment that a problem might have been avoided by not sitting. The legal test must remain connected to the question of bias, and a judge is only disqualified where a reasonable person would have a reasonable apprehension of bias, or that the decision in the case would be influenced by factors other than an assessment of the evidence and the law. It will be necessary to return to this test in more detail later.

The Issue in This Case

11. The precise issue raised in this case is one which has arisen in a number of countries but has not yet been considered directly by any court in Ireland. The Irish legal system is a common law system with a bifurcated legal profession in

which cases are often argued by specialist advocates instructed by solicitors. For its part, the solicitors' profession in Ireland is now organised in such a way that there are a number of large firms composed of 100 or more lawyers organised into separate departments with separate areas of expertise. Ireland is also a common law country with a comparatively small judiciary and, indeed, the smallest number of judges per capita in Europe. Judges in Ireland have traditionally been drawn from the ranks of practising lawyers, normally with decades of experience in practice.[3] Is such a judge disqualified from hearing a case when one party is represented by a firm where a close relative of the judge works in that firm but has no involvement in, or connection to, the case itself? In addressing the question, it will be necessary to consider and distinguish a number of different issues: the difference between a recusal in advance and a disqualification after a hearing; the relevance of guidelines for the conduct of judges to disqualification for bias; and the significance of disclosure or non-disclosure of facts by the judge.

Facts

12. The issue in this case is relatively net: the decision in the High Court on appeal from the Circuit Court on an interlocutory motion in respect of the production of documents was made by Mr. Justice Meenan. A son of the Judge is a senior associate solicitor employed in the Capital Markets division of Arthur Cox LLP, the firm which is now on record for UCD in these proceedings. The Judge's son did not appear in court or instruct counsel, he was not involved in any of the

[3] Section 63 of the Judicial Appointments Commission Act 2023 inserts a new section 45A into the Courts (Supplemental Provisions) Act 1961 permitting the appointment of academic lawyers as judges, and it requires that such lawyers have practised as a barrister or solicitor for a minimum period of four years (s.45A(1) (c)). It is likely that such appointees will also have had extensive interaction with the profession.

correspondence in this case and did not appear to have been involved in any other way in the proceedings. Did this connection mean however that the judge was disqualified from hearing the case?

13. That issue falls to be resolved by application of a long-established test in Irish law,[4] set out and articulated definitively in *Bula v Tara (No.6)* by Denham J. at p. 439: *"[T]here is well settled Irish law that the test is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair trial of the issues"*. Later, at p. 449-450, she described as 'helpful' the following passage from the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) S.A. 147 ("*President of the Republic of South Africa v SARU*"):-

> "*... the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed*

[4] Denham J. cited *O'Neill v Beaumont Hospital Board* [1990] ILRM 419 at p.435, *Dublin Wellwoman Centre v Ireland* [1995] ILRM 408 at p.421, *Bane and Ors. v Garda Representative Association* [1997] 2 I.R. 449 and *Carroll v Law Society* [2000] ILRM 161.

> *that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial*."

14. In this case that means determining whether a reasonable and informed observer would have a reasonable apprehension that the Judge would be inclined to favour UCD because of his son's employment at a firm of solicitors on record for UCD, or perhaps put at its highest, that the hearing or decision could be influenced or affected by the fact of the judge's son's employment in that firm. As such it might appear a net issue of law, capable of being resolved by legal argument relying on first principles. However, it did not prove possible to isolate the legal issue in this way, and it is accordingly necessary to set out in some detail the background to this case and the procedural progress of the case.

Background

15. In 2001, over 23 years ago, Mr. Kelly (who I will refer to hereafter as "the Appellant") applied for admission to the Master's of Social Science (Social Work) – Higher Diploma in Applied Social Studies for the academic years 2002-2004 at University College Dublin. Approximately 50 places were available. The Appellant was interviewed and was informed that his application was unsuccessful but that he would be placed on a waiting list. It appears that

87 women and six men applied for the course, and 47 women and three men were successful. University College Dublin contends that the Appellant was subsequently offered a place from the waiting list – see *Kelly v Director of the Equality Tribunal* [2008] IEHC 112 (para. 8). Nothing turns on this issue for the purposes of this appeal. It does appear however that the Appellant was subsequently admitted to a similar course in Trinity College Dublin (*Kelly v Director of the Equality Tribunal* [2008] IEHC 112 (Unreported, High Court, Gilligan J., 11 April 2008)).

16. In 2002 the Appellant commenced proceedings against UCD under the Equal Status Act 2000 ("the Act of 2000") contending that he had been discriminated against on grounds of gender. The Equality Tribunal dismissed his complaint. The Appellant appealed that decision to the Circuit Court as permitted under the Act of 2000. Prior to the hearing of that appeal, the Appellant sought inspection of all the retained applications – that is those made by students who were successful in being admitted to the course – and any documents included with the applications and copies of all scoring sheets. The application came before Judge Linnane in the Circuit Court and the Appellant made an application that she recuse herself (*Patrick Kelly v National University of Ireland, Dublin and The Director of the Equality Authority* [2012] IEHC 169 (Unreported, High Court, Hedigan J., 9 May 2012)). The grounds for the application for recusal are not recorded in the judgment. The matter was then transferred to the President of the Circuit Court who refused the application.

17. The Appellant then appealed that decision to the High Court. He also brought an application to the High Court seeking a reference to the European Court of

Justice, having regard to the fact that the Equal Status Act, 2000 is regarded as implementing the requirements of Directive 76/207/EEC as amended by Directive 2002/73/EC on the principle of equal treatment for men and women. The Appellant also contended that Directive 97/80/EC on the burden of proof was relevant. McKechnie J. considered that a reference might be necessary but that the application was premature since no decision had been made on the application for inspection of documents: it was possible that inspection would be granted in which case no reference would be necessary (*Kelly v The National University of Ireland, also known as University College Dublin and The Director of the Equality Tribunal* [2008] IEHC 464 (Unreported, High Court, McKechnie J., 14 March 2008)).

18. In due course, McKechnie J. indicated that he would propose to refuse the motion on grounds that information contained in the application forms was confidential and personally sensitive. Accordingly, pursuant to McKechnie J.'s earlier judgment of 14 March 2008, a potential issue arose as to the interpretation and application of the Act in light of the Directive. However, the Appellant sought to set aside the decision of McKechnie J. on the grounds, *inter alia*, that it was obtained by fraud and there had, he alleged, been perjury on the part of UCD. That application was refused (*Patrick Kelly v The National University of Ireland and The Director of the Equality Tribunal* [2009] IEHC 484 (Unreported, High Court, McKechnie J., 5 May 2009)).

19. In 2010 McKechnie J. made a reference to what was by then the Court of Justice of the European Union ("CJEU"). The reference sought guidance from the CJEU as to whether a person who contended they had been discriminated

against in accessing a vocational training course was entitled to information held by the course provider as to the qualifications and applications of other applicants. The CJEU responded that an applicant was not entitled to such information pursuant to the Directive but it was for the national court to ascertain if the refusal would risk compromising the objective pursued by Directive 97/80/EC on the burden of proof (Case C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)* [2011] ECR I-06813, ECLI:EU:C:2011:506).

20. There was an entirely separate series of applications in which the High Court (McKechnie J.) ultimately directed the Appellant to remove matters he had posted on the internet relating to the case and the High Court Judge.

21. Subsequently, the High Court was required to consider the case in light of the CJEU ruling. The Appellant requested that McKechnie J. recuse himself. The matter was transferred to Hedigan J. without it appears any formal determination of that application. The Appellant also brought a number of interlocutory injunctions including one seeking to attach and commit journalists because of the manner in which the case had been reported. That application was refused by Hedigan J. (P*atrick Kelly v National University and The Director of the Equality Tribunal* [2012] IEHC 145 (Unreported, High Court, 30 March 2012)).

22. In a subsequent ruling, Hedigan J. applied the CJEU ruling and refused the application for inspection of documents. The Appellant applied to Hedigan J. to recuse himself. That application was refused. Hedigan J. considered making an Isaac Wunder order restraining the Appellant from further applications without leave of the High Court, but accepted an undertaking from him that he would

not make further interlocutory applications in the proceedings in the Circuit Court against UCD, its employees or its solicitors (*Patrick Kelly v National University of Ireland, Dublin v The Director of the Equality Authority* [2012] IEHC 169 (Unreported, High Court, 9 May 2012)).

23. The substantive appeal of the Appellant case pursuant to s. 28 of the Equal Status Act, 2000 commenced on 23 October 2012. However, the Appellant alleged bias on the part of the Circuit Court judge and the proceedings were adjourned to permit an application to Hedigan J. to stay the proceedings and to prohibit further proceedings without the consent of the High Court. Such an order was made by Hedigan J. but on appeal was set aside by the Court of Appeal (*Patrick Kelly v National University of Ireland Dublin aka University College Dublin (UCD) and The Director of The Equality Tribunal* [2017] IECA 161 (Unreported, Court of Appeal, Finlay Geoghegan J.; Peart and Hogan JJ., 26 May 2017)).

24. In addition to all these proceedings the Appellant also made a complaint to the Equality Tribunal in relation to his treatment in Trinity College Dublin ("TCD") which he contended had been affected by his complaints against UCD. He also sought to challenge the decision of the Board of Visitors in respect of his complaint because he contended that a member of the Board was disqualified on grounds of bias because of her previous role in the University. The case was also appealed and ultimately came before this Court, where the Appellant also applied to have a member of the Court recuse herself on the grounds that she was a graduate and/or associated with TCD. That application was dismissed (*Patrick Kelly v The Visitors of the College of the Holy and Undivided Trinity*

of Queen Elizabeth near Dublin [2007] IESC 61 (Unreported, Supreme Court, Fennelly J.; Macken and Finnegan JJ., 14 December 2007)).

25. The Appellant also brought an application under the Freedom of Information Acts, 1997 to 2003 seeking to obtain the documentation held by UCD pursuant to that statutory procedure. The application was dismissed *in limine* by the Freedom of Information Commissioner, and that decision was in turn challenged by the Appellant. That claim was dismissed by the High Court (*Patrick Kelly v The Information Commissioner* [2014] IEHC 479 (Unreported, High Court, O'Malley J., 7 October 2014)), and on appeal by the Court of Appeal ([2015] IECA 270 (Unreported, Court of Appeal, Ryan P., Kelly and Hogan JJ., 30 November 2015)), and by this Court ([2017] IESC 64 (Unreported, Supreme Court, McKechnie J.; O'Donnell, Clarke, Laffoy and Dunne JJ. concurring, 1 June 2017)).

26. In late 2017 the Appellant returned to the issue of documentation in the context of the as yet unresolved Circuit Court proceedings. During the course of the initial application before McKechnie J., UCD had, by way of compromise, offered to provide redacted copies of the documents. That offer was rejected by the Appellant and, as set out above, his application was ultimately dismissed.

27. In 2017 an application was made by the Appellant in the Circuit Court seeking an order under Rule 6(6) of order 57A of the Circuit Court Rules directing the defendant to deliver copies of "redacted" documents, referred to in the appeal in which he alleged UCD had "confirm[ed] on an open basis" its "willingness to provide". It should be observed that it is not clear, at least to me, whether UCD had offered to redact documents and provide them if there was agreement,

or whether there were in existence redacted documents, although the former seems more likely.

28. For reasons which are not apparent, the application did not come before the Circuit Court until 2022. It was heard by Judge John O'Connor, who delivered a written judgment on 1 July 2022 dismissing the application. In it he explains that McKechnie J. had indicated in his provisional ruling that he would dismiss the application to inspect documents on the grounds that the information contained was personal in nature and related to abuse and other personal events witnessed by the applicants. Those events related to circumstances of personal or family sexual abuse, drug abuse, or other such situations. McKechnie J. had held that even the removal of the names of the proposed candidates would not protect the confidentiality of the people in question. Judge O'Connor accordingly considered that the application was an attempt to relitigate an issue already decided comprehensively by the High Court. However, Judge O'Connor also concluded that even if he was incorrect in this interpretation of the decision in the High Court, he was entirely satisfied, having heard the application and considered the relevant affidavits and submissions, that furnishing the documentation even with redaction would be improper. The probative value of these documents was in his view far outweighed by their prejudicial nature due to the personal and sensitive information contained within the applications.

29. That decision was appealed to the High Court and heard by Meenan J. on 22 June 2023. It is this hearing which gives rise to the present appeal. At the conclusion of the hearing and during closing submissions the Appellant contended that it was clear that the Judge had already made up his mind "*from*

[his] comments and his behaviour" and he concluded his submission "*I am deadly serious, I ask that you recuse yourself on the grounds of objective and subjective bias*." The judge refused the application, observing that it had been made literally in the last sentence of the submissions. The judge held that the suggestion of bias was misplaced, and a judge was perfectly entitled to question a party on an application, its background, and the authorities on which they relied. That did not amount to bias. The judge then addressed the appeal proper and dismissed the appeal, upholding the decision of Judge O'Connor.

30. The matter was then adjourned and came before the High Court on 21 July 2023 for final orders in respect of costs. On that occasion the Appellant again asked the Judge to recuse himself, this time on the grounds that he had made a complaint against the Judge under the provisions of s. 51 of the Judicial Council Act, 2019, ("the 2019 Act") (a complaint which it appears had been made after the hearing of 22 June). That application was made at a time when the only decision which remained to be made related to the cost of an appeal in respect of which the Appellant had been wholly unsuccessful. The judge refused that application also.

31. The Appellant then made an application for leave to appeal directly to the Supreme Court by way of leapfrog appeal pursuant to Article 34.5.4° of the Constitution. This he did by an application dated 16 August 2023. He raised a ground that the High Court had infringed European law by failing to ascertain whether the refusal of the documents would risk compromising the objective pursuant to Directive 97/80/EC citing in this respect the terms of the judgment

in his own case: Case C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)* [2011] ECR I-06813.

32. The remaining grounds raised the issue of bias. In the application, the Appellant did not rely on the fact that a complaint had been made to the Judicial Conduct Committee but did refer in general to "*remarks made by the Judge during the hearing*" although he did not specify what remarks were alleged to constitute bias. However, in addition, he raised two fresh matters which he contended amount to bias. The first was the claim that the judge's son was a solicitor in the firm representing the respondent which is the central issue in this appeal. On the 13th of September the Appellant had emailed the firm seeking the name of the person who, as he put it, was responsible for the decision not to disclose to him the fact that the judge's son was a solicitor in the firm, which he contended amounted to fraud or dishonesty under the Legal Services Regulation Act 2013 which he said he wished to make the subject of a complaint to the Law Society. The firm had replied on the 21st of September that no solicitor had made a decision not to disclose the fact: the judge's son had no past or present involvement in the litigation and his employment was irrelevant. The second ground advanced concerned an assertion that the Judge had an association with the defendant, UCD. The Appellant highlighted the fact that the judge was a graduate holding a BCL degree, a BA and a Diploma in European Law, all obtained between 1980 and 1983, had spoken at conferences organised by UCD and that two of his children were solicitors and also graduates of UCD. These grounds were made for the first time in the application for leave to appeal, on the basis that they were matters of which he had become aware between the July hearing and the application on 16 August.

33. The Respondent replied by Respondent's Notice. The Appellant then sought permission to respond to the Respondent's submission, which was granted. In that response, he made reference to guideline 4.4 of the Guidelines on Judicial Conduct and Ethics adopted by the Judicial Council in February 2022 ("the Judicial Conduct Guidelines") and which came into force in October of that year. Clause 4.4 under the heading "*Propriety*" provides that a judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case. This document also expanded on his complaint, contending now that three children of the judge were graduates of UCD and that this fact should have disqualified him from hearing the appeal.

34. By a Determination on 22 February 2024 [2024] IESCDET 24 this Court (O'Donnell C.J., Woulfe and Donnelly J.J.) refused leave to appeal to the Appellant on the ground relating to alleged failure to apply EU law. The panel also refused leave on the claim of subjective bias as well as objective bias by reference to the Judge's connection to UCD and/or non-disclosure of the same matter. The Determination pointed out that UCD was the largest university in the State, and at the relevant time when the judge attended it was one of very few law schools operating in the State. There was no suggestion of any connection between the Judge and the department in issue or with any of the persons involved in the case. The fact that he was a graduate of the university and had spoken at conferences did not give rise to any real or reasonable apprehension of bias and, *a fortiori*, the fact that his children attended the same university could not do so. The panel was satisfied that whether individually or

cumulatively the connections alleged between the Judge and the university did not satisfy the threshold and accordingly leave was refused on those grounds.

35. However, the Court considered that the question of the connection to a solicitor in the firm representing the respondent did give rise to an issue of law of general public importance that did not appear to have been the subject of any decided case in this jurisdiction even though it is by no means unknown for judges to be related to members of the legal profession. Therefore, the Court granted leave on the following issue only:-

> "*Does the fact that a close relative of a judge is employed as a solicitor in the firm of solicitors representing a party meet the well-established test for objective bias*?"

The Court also invited the parties to address the law by reference to three issues:

> 1. The law on objective bias as referred to in case law having regard to the adoption of the Guidelines for the Judiciary on Conduct and Ethics under the Judicial Council Act 2019.
>
> 2. Whether the status of the relative in the firm, the size of the firm or the nature of the litigation is relevant to the application of the test?
>
> 3. The relevance, if any, of the decision in *Kenny v Trinity College Dublin* [2008] 2 IR 40.

36. The Determination also directed that the Law Society should be notified of the appeal and given the opportunity to appear and make submissions. Subsequently, the same facility was extended to the Bar of Ireland. In each case,

the Appellant sought and was granted permission to deliver submissions in response to the separate submissions made by the respective *amici curiae*.

37. In his replying submissions to the Law Society, the Appellant sought to raise yet further matters in relation to the Judge's connection to UCD, namely, positions held in the University by the Judge's father, uncle and two of his aunts. It was not suggested that any of the individuals are currently employed in any position in UCD or had been engaged by UCD at the time of the Appellant's application, had any involvement with the facts of the case, or even the Department involved (Social Science). It was plain that these matters were not within the limited leave granted by this court. Instead, they related to a ground upon which leave had been expressly refused. The Appellant then brought an application in case management to extend the grounds of appeal pursuant to paragraph 19 of the Supreme Court Practice Direction SC19. Having heard the argument, I delivered a ruling on the 24 June 2024 refusing the Appellant's application to extend the grounds of appeal to include these matters.

38. Subsequently and shortly before the hearing of the appeal, the Appellant brought a fresh application for leave to appeal from the decision of Meenan J on 22 June 2023, relying on the matters set out above in respect of the Judge's father, uncle and aunts' connection to UCD as constituting objective bias. The hearing date was close, and if leave was granted, it would be necessary to extend the argument in the appeal, so I directed that the application would be heard immediately after the hearing of the appeal and before any consideration of the arguments raised, and be considered by a panel composed of three judges who had sat in the appeal, so that it could be heard by a panel familiar with all the

facts of the case and the potential relevance of any of these matters. Also, that if the panel decided to grant leave it would be possible to fix a further hearing date in close proximity to the time of the hearing of the appeal and avoid further delays. In the event, this Court refused leave to appeal on these points ([2024] IESCDET 86 (Charleton, O'Malley and Collins JJ., 12 July 2024).

The Necessity for Evidence

39. The issue of bias by reference to the employment of the Judge's son was something raised for the first time after the hearing and the judgment had been delivered. It followed that there was no evidence given in, or material before the High Court in this regard. This raised the practical problem that strictly speaking, in order to make his legal argument, the Appellant needed either to prove certain facts or secure admission or agreement in relation to those facts. In case management it was suggested to the Appellant that since his argument was that the mere fact that the Judge's son was employed in the firm on record from the respondent was enough to disqualify him, then that fact could be easily agreed. It was directed that the parties exchange documents as to matters on which they were prepared to agree or sought agreement. However, it was not possible to secure any agreement in this respect. The Appellant maintained that the Respondent was obliged to give evidence on this matter and furthermore insisted that he had a right to cross-examine any witness giving evidence. He relied on the fact that the European Court of Human Rights ("ECtHR") had decided, in *Nicholas v Cyprus* Application No. 63246/10, 9 January 2018 ("*Nicholas*"), that in a case where a claim of bias was made by reference to a family relationship with the judge, the question depended on all of the circumstances of the case such as the organisation of the firm, the position of

the judge's relative in the firm, the financial importance of the case and more. Accordingly, the Appellant contended that he had an entitlement to explore in evidence all matters of possible relevance within the knowledge of UCD, or more precisely, its solicitors. Since the question of any such entitlement was itself intertwined with the core issue in this case, it was necessary to hear evidence in this Court.

40. In *Goode Concrete*, MacMenamin J. had observed at paragraph 5 of his judgment, page 553-554 of the reports, that it was desirable that any claim of bias made after a hearing by reference to matters relating to a judge and which had not been in evidence in the hearing, should be brought at first instance in the High Court to allow evidence to be given if necessary, and findings of fact to be made which would permit an appellate court to perform its function in due course, in reviewing findings of fact and determinations of law. In other countries, such as Canada,[5] it has been suggested that where issues are raised relating to a judge, they should prepare a memorandum but should not be subject to cross-examination. The adequacy of the memorandum and the matters contained therein could then be reviewed by an appellate court. Neither of these courses was suggested in this case. It is apparent that there are potential objections and difficulties whatever course is taken. In this case, the parties accepted that evidence should be given in this Court, and an affidavit was sworn by a partner in the firm of Arthur Cox, and a replying affidavit sworn by the

[5] See, Lester Fn. 1 above. This is also the course followed in South Africa in *President of the Republic of South Africa v SARU*, and in an Australian case relied on by the Appellant, *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 A.L.R. 753, and is what occurred in *Bula v Tara (No.6)* at p.458 when Barrington J. wrote to the Chief State Solicitor setting out his involvement as counsel.

Appellant. The Appellant then sought to cross-examine the partner on her affidavit.

The Evidence Given in This Case

41. Louise O'Byrne is a partner in Arthur Cox in the employment division (I will refer to her hereafter as "the partner"). Arthur Cox had taken on the representation of UCD in 2012. In her affidavit she explained that she was one of three solicitors who had any direct involvement with the case, and she named the other two solicitors involved. She stated that Arthur Cox was one of the largest law firms in the State, had 84 partners, a total of 334 solicitors (including partners) and 140 trainees. In total there were 801 employees in the firm. The firm was organised by departments. The principal departments were corporate, litigation, corporate recovery and insolvency, banking, asset management and investment funds, financial regulation, capital markets, aviation, real estate, technology and innovation, environmental and planning, company governance and compliance, tax, infrastructure construction and utilities, employment, competition and regulated markets, pensions and pro bono.

42. The current litigation was only one of hundreds of cases in which Arthur Cox was involved. In financial terms it represented a very small fraction of the firm's work and income having regard to the firm's size, the variety of the firm's work, and indeed its sources of work.

43. The Judge's son joined the firm as a senior associate in 2018. He worked in the capital markets department and had always worked there. He had worked in the Dublin office until September 2023 when he had been seconded to the London office until March 2024. He did not practice in contentious litigation. He had no

involvement in the proceedings at any stage. He was an employee and not a partner and had no proprietary interest in the firm.

44. The Appellant then cross-examined the partner. In her evidence in answer to the Appellant's questions, the partner estimated that the fees paid to the firm in respect of the case represented 0.01 per cent of the firm's income. University College Dublin was not itself aware of the fact that the judge's son worked in the firm. The partner did not consider that was relevant because he had had no hand, act or part in the proceedings, had no involvement with her, or her department, and worked in an entirely different department. In relation to the structure of the firm, a very small number of associates progressed to partner level. That was a competitive process conducted by the management committee of the firm. She did not know if it was widely known that the solicitor in question was the son of a senior judge, although she did not think it was a secret. She herself did not know him. She did not know how he was seen within the firm and was not interested in that. When his name came up in these proceedings, she made enquiries as to whether he was an associate in the firm and where he was working but had made no other enquiries about him.

45. In addition to these matters the Appellant sought to explore a wide range of other matters such as: the total amount of fees Arthur Cox had been paid by UCD in respect of the litigation, the details of any notice sent by Arthur Cox to UCD under s. 150 of the Legal Services Regulation Act, 2015, and any agreement or updated agreement with UCD delivered pursuant to s. 151 of the same Act. He questioned the partner on the drafting of her affidavit and the identity of the solicitors involved in his case. He also questioned her about the

earnings of partners, the differentiation between partners' income, and the relativity between the income of partners and associates within the firm. He asked about the judge's son's prospects of becoming a partner, and whether the witness knew anything about how ambitious a person the judge's son might be.

46. It should be observed that most if not all of the matters explored in detail in this evidence, particularly the internal organisation of the firm and the financial significance of the case to it were not matters which would have been known to the Judge concerned.[6] Accordingly, they were not matters which could be disclosed by him even if he had considered disclosure desirable, or if it was determined to be necessary. Second, the matters relate to the business and careers of individuals who do not hold judicial office and involves consideration of what would otherwise be the private affairs of both the Judge's son, and the firm in which he is employed. Third, the enquiries necessarily involved one party questioning an opposing lawyer about the relationship between her firm and the client against whom the litigation was being brought while that litigation was ongoing. The Appellant maintained that all of this was necessitated by the terms of the decision of the European Court of Human Rights in *Nicholas*, and, that if this was considered undesirable – and it is clear that this would be a matter of real concern if this was to become a necessary part of any recusal claim brought in respect of a judge – then the solution was to adopt the simple bright-

[6] The judge might be expected to know that the firm in question was one of the largest in Ireland, and that his son was not involved in the employment or litigation departments of that firm. Since lawyers have their own ethical obligations (and practical interests in avoiding hearings that could be nullities) he could reasonably have expected that if his son had any involvement in the case that would be brought to his attention. See the observations of Denham J. in *Bula v Tara (No.6)* at p.441 "*it is prudent for parties to bring to the attention of the court any relevant matters*".

line rule he argued for, that employment in any capacity in a firm on record for a party of a relative of a judge should disqualify that judge.

47. The experience of hearing evidence in this matter makes it clear in my view that it is not a practice that should be followed or permitted. The question of whether a judge is disqualified by bias or not is not an issue between the parties, or the subject of dispute to be resolved by *inter partes* hearing. It is not a matter for the parties, but rather for the judge. If the parties were agreed, it would not follow that a judge should recuse himself or herself. Conversely, even if the parties were agreed that the judge was not disqualified, a judge could nevertheless so conclude and recuse himself or herself. No curial order is made by the court. The only outcome of an application is that a judge continues to sit or recuses himself or herself. The immunity from suit of a judicial officer means that it would be inappropriate for a judge to give evidence and/or be subject to cross-examination. Accordingly, if it is necessary to establish any facts if an issue is raised or adverted to by a judge, then the judge should provide a statement of the matters of which he or she is aware. If the matter is raised after a hearing by way of appeal, then such a statement should be provided to the appellate court if requested. It would be for an appellate court to consider whether, on the facts as disclosed, the test for disqualification had been met.[7]

[7] It seems to be accepted in Canada, for example, that it is inappropriate to have an evidential hearing: see Lester Fn. 1 above at 344 "*it is unthinkable that the judge should give sworn evidence and be cross-examined*". See also Bryden and Hughes, 'Legal Principles Governing the Disqualification of Judges' (2014) *Social Sciences Research Network*, 86. "*It is certainly the case that the common practice when a party raises an issue concerning disqualification on the basis of a judge's financial holdings or personal relationships is for the judge to issue a statement disclosing his or her understanding of the true state of affairs. Such a statement is not made by way of affidavit and the judge is not, of course, subject to questioning in relation to it*." As set out at Note 4 above this appears to be the course followed in South Africa, Australia and in Ireland in *Bula v Tara (No. 6).*

Discussion

48. The argument in this case ranged over a very wide field and made reference to a considerable number of authorities and materials from different jurisdictions. It is helpful therefore to distinguish at the outset between a number of different situations.

49. It is not uncommon for judges who may have concerns about sitting in a case in which they apprehend there might be an allegation of bias to discuss the matter with the President of their Court or with other colleagues, and where another judge is free to sit without difficulty or inconvenience, to arrange for that to occur. These arrangements are driven by pragmatism and prudence, and a desire to avoid the distraction and delay involved in dealing with an allegation of bias, even if unfounded. (This situation is one of precautionary avoidance/recusal).

50. In other cases, a formal application may be made by a party to the litigation seeking to have the judge recuse themselves in advance from hearing the case (recusal in advance). Again, if that application is made in advance of the hearing and sufficient notice is given, the practical threshold applied may be quite low and lower than the law can be said to strictly require: while the legal test is the objective view of a reasonable informed observer, and not the subjective concerns of an individual litigant, all things being equal, it is desirable that the parties themselves should have no cause for complaint even if objectively unjustified and/or unreasonable in the circumstances. Consequently, judges may recuse themselves without coming to any concluded judgment on whether or not they are disqualified from hearing the case as a matter of law.

51. Informal transfer and recusal in these cases does not establish the circumstance in which a judge is disqualified by law from hearing a case. Where, however, a case has been heard and determined, and the outcome challenged on the grounds of bias alleged against the trial judge, the consequences are much more serious. If the objection is made and sustained, it will necessitate a hearing (and possibly an appeal), and if the objection is upheld, it will result in the setting aside of the original decision with the requirement of a rehearing. This imposes delay and costs upon the parties, without fault on their part. This test is not met by some wise after-the-event consideration that it might have been preferable not to sit. The conclusion that a decision is tainted by bias, objective or subjective, is one which has the effect that an otherwise binding decision is a nullity. Such a conclusion can only be arrived at if the legal test for disqualification for bias is demonstrably met. It is important not to allow the distinctions between these situations to become blurred, and that considerations which may simply be pragmatic or precautionary should not be permitted to become mandatory.

52. While the impartiality of the judiciary is a universal value, the principle must be applied in the context of the particular legal system at issue and the manner in which it is organised. There are common law systems which have substantial contingency fees and in which it can be said that lawyers have a more direct economic interest in the outcome of the case. There are other common law systems where the legal profession is fused, and where advocates engaged in the presentation of a case to judges are members of and sometimes partners in a single unified firm. There are important distinctions between the role and training of both lawyers and judges in civil law and common law systems. In particular, in the context of this case, in the adversarial common law system

which applies in Ireland, where the legal profession is organised in two branches, it is apparent that a barrister, if engaged, will play a much more prominent role in the presentation of the case in court than the solicitor on record. While considerable work has been done by international bodies to attempt to delineate principles of conduct which might be of general application, a court faced with a claim that a judge was disqualified and a judgment should be set aside, should be cautious about generalisations drawn from quite different circumstances and systems.

The Significance of Judicial Conduct Guidelines

53. A relatively recent feature of the law in this area, and more generally, is the emergence of codes of conduct for judges, although codes of conduct for lawyers have a longer history. In this case, the Court invited the parties to address the meaning and effect of the Guidelines on Judicial Conduct and Ethics recently adopted by the Irish Judiciary pursuant to s. 7(2)(d)(i) of the Judicial Council Act, 2019 ("The Judicial Conduct Guidelines"). Such conduct guidelines shall include, as per s.43(3)(d), "*guidance as to the matters a judge should consider when deciding whether he or she should recuse himself or herself from presiding over legal proceedings.*" As the terms of the Guidelines explicitly acknowledge, they are drawn in large part from the terms of the Bangalore Principles of Judicial Conduct adopted by the United Nations Human Rights Commission in 2003 ("the Bangalore Principles"). Those principles, and the Irish Guidelines, address certain circumstances in which a judge should recuse themselves. The Appellant has made an express reference to clause 4.4 of the Code of Conduct which is paraphrased at paragraph 33 above and provides:-

> "*A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case*."

This clause is contained in the section under Principle 4, "*Propriety*", which states that, "*Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.*" The specific guidance on recusal required by s.43(3)(d) is to be found under principle 2 "*Impartiality"* which states as follows:-

> *"2.5 A judge shall recuse himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where*
>
> *2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;*
>
> *2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or*
>
> *2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy.*
>
> *…"*[8]

[8] A 'judge's family' for the purposes of the Guidelines is defined to include "spouse, civil partner, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household". "Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

54. The Guidelines also state that the decision of a judge to recuse themselves should take account of the fact that it is the duty of a judge to sit and hear cases and the decision on the reasonableness of any apprehension that a judge would not bring an impartial mind to bear on the proceedings must be assessed in the light of the declaration a judge makes under the Constitution in taking up office and their ability to fulfil that declaration by reason of their training and experience – "*It must be assumed that they can clear their mind of irrelevant personal beliefs*" (principle 2.6.2). It is also provided that objective bias may be established by showing that the judge has acted in such a manner as to give rise to a reasonable apprehension that he or she will decide the case without proper consideration of the evidence and submissions. This is a close paraphrase of the language in *Bula v Tara (No.6*).

55. The principles set out in the Guidelines, and documents such as the Bangalore Principles, help identify acceptable and unacceptable behaviour by judges. However, in considering the content of guidelines in the context of a contention that a judge may be disqualified from hearing a case, it is necessary to focus on the difference between guidelines, even those on recusal, and the law on bias itself. First, the interpretation of the Judicial Conduct Guidelines is a matter in the first place for the Judicial Conduct Committee established under section 43 of the 2019 Act. Second, the Guidelines do not themselves determine conduct or, as the case may be, misconduct. That is a matter for the Judicial Conduct Committee applying the statutory test set out in the Act in section 2, namely, conduct constituting a departure from acknowledged standards of judicial conduct, such standards to have regard to the Guidelines adopted, *and* which brings the administration of justice into disrepute. As both the Guidelines and

the Act make clear, therefore, breach of the Guidelines does not *per se* amount to misconduct. Third, a determination that there has been misconduct whether by reference to the Guidelines or not, has certain consequences defined by the statute involving reprimand as contemplated by section 76 (3)(a). A finding of misconduct does not in itself have any impact on the decision made by that judge and does not affect its finality or binding character. Finally, it is in the nature of Guidelines for future conduct that they may adopt clear rules so that judges, litigants, and members of the public can have a clear understanding of what is accepted or expected in advance, and can adjust their behaviour accordingly. Whether a judge is actually disqualified by bias, objective or subjective, with the effect that the decision made by them is to be treated as a nullity, is a distinct matter, and would not of itself follow from a consideration that there had been a breach of the Guidelines even in respect of recusal, although given the overlap in both language and subject matter the Guidelines are a helpful source, particularly in considering the approach of a reasonable and informed observer.

56. Finally, there is no table of forbidden relationships which will always disqualify whatever the circumstances of the case. In particular, until now, it has been clear that a relationship, whether familial or of friendship, between a lawyer and a judge, would not disqualify a judge from hearing a case in which that lawyer was participating, although the same relationship with a party might well do so. A party in such circumstances has a much more direct interest in the outcome of the case and may be more significantly affected by the decision than any of the professional representatives. As it was put by Denham J. in *Bula v Tara (No.*

6), a lawyer does not become espoused to a client's cause.[9] Similarly, familiarity with a witness might not disqualify a judge, but may do so if that witness's credibility is an issue, particularly where their reputation might suffer from an adverse finding. These distinctions both reflect the difference in roles between a lawyer presenting a case, a witness, and a party, and highlight the necessity to address any question of disqualification by reference to the precise facts concerned.

57. In any case, where bias is alleged, it is not sufficient to attempt to reason by analogy or to invoke examples from other jurisdictions without context. In each case, it is necessary to apply the legal test and focus precisely on the circumstances alleged to require disqualification. In that regard, it is important to recognise that the application of the apprehension of bias test involves a two-stage process. First, identification of what is said might lead the judge to decide a case other than on the legal and factual merits, (in this case the parental relationship) and second, the articulation of a cogent, rational and logical connection between that matter and the feared deviation from the course of deciding the case on its merits.[10]

A Rule of Automatic Disqualification?

58. The Appellant's first contention was that there should be an absolute rule that the mere fact of employment in a legal capacity[11] in a law firm representing a

[9] See also the observations to similar effect in *President of the Republic of South Africa v SARU* at paragraph 79 in respect of the former relationship of client and lawyer between the President and Chief Justice.

[10] This two-stage approach was articulated in *Ebner*, paragraph 8, "[The application of the apprehension of bias principle] requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."

[11] He specifically included paralegals, legal executives and trainees.

party of a close relative of the judge,[12] was in itself sufficient to disqualify the judge, irrespective of the degree of connection or lack of it between that individual and the case, or the size and organisation of the firm, or the role played by the firm's lawyers in the litigation. The Appellant acknowledged that this was not the law as it was understood in Ireland to date or indeed as it stood at the time of the hearing before the judge. However, he argued that it was a necessary and logical position which should be established by the decision of this Court in this case. In that regard, he relied heavily on the development of the practice in Cyprus, itself in response to one of the principal cases in the jurisprudence of the European Court of Human Rights in this area.

59. In *Nicholas v Cyprus*, the Third Section of the European Court of Human Rights found that Article 6.1 of the Convention had been violated in circumstances where an applicant had brought a wrongful dismissal claim against Cyprus Airways Limited, had failed at first instance and had appealed to the Supreme Court where a panel of three judges had unanimously dismissed the appeal.

60. The defendant in the case was represented by the managing partner of a law firm. Subsequently the applicant in the proceedings discovered that the daughter of the judge was married to the son of the managing partner and that both the judge's daughter and son-in-law worked in the firm. The applicant did not know

[12] He adopted the definition of 'close relative' in the Housing (Local Authority Tenancy Warnings) Regulations 2015 S.I. 122/2015 "(a) a spouse, civil partner, co-habitant, lineal ancestor or descendant, step-son, step-daughter, sibling, half-sibling, step-sibling, son-in-law, daughter-in-law, brother-in-law, sister-in-law or first cousin, or (b) by consanguinity or affinity, an aunt, uncle, nephew or niece..." There is no logical or functional connection between the 2015 Regulations and the question of recusal. The definition is different from both the definition used in the Cypriot Supreme Court, and the definition set out in the Judicial Conduct Guidelines drawing on the Bangalore Principles and set out at paragraph 53 above. Since this case involved a paternal relationship, it was within any definition, and it is not necessary to explore the outer limits of the term 'close relative', other than to observe that it is obvious that even though there is a degree of convergence on the definition contained in the Guidelines, there are different definitions in some jurisdictions and in Ireland in different statutory contexts.

if either the daughter or son-in-law had worked on the case or had a financial interest in the outcome. The applicant relied on both matters, that is, the relationship between the judge and the managing partner lawyer as fathers-in-law, and the fact of employment of the judge's daughter and son in law in the firm representing the defendant.

61. The Supreme Court of Cyprus had a code of judicial practice, applicable it appears only to the Supreme Court, which was first adopted in 1988 and amended from time to time thereafter. The provisions relating to family relationships with lawyers had been changed from time to time. At one time, it had precluded a judge from sitting in a case in which a party was represented by a close relative of the judge, or by a lawyer who was a partner or employer of one of his or her close relatives. However, that stipulation in relation to partners or employers of a close relative was removed, and at the time of the hearing before the Supreme Court, the rule provided simply that a judge should not sit in a case in which a lawyer *appearing* before him or her was a close relative of his or hers. A close relative was defined quite widely as a parent, spouse, children, child, children's spouses, siblings, siblings' children and siblings' spouses, but the rule of practice did not apply where a court appearance concerned minor matters. Subsequent to the hearing in question, and before the decision of the European Court of Human Rights, the code was further amended to include in addition to close relatives, as defined, lawyers with whom a judge had a spiritual relationship, the relationship of father-in-law and son-in-law, and the relationship between fathers-in-law. Clearly, if this version of the Code had been applicable at the time of the hearing, it would have precluded the judge from sitting in the case by reason of the fact that there was a relationship

between him and the lawyer, of fathers-in-law of each other's child. It was argued by the applicant that this latter position was also required by Article 6, because in Cypriot society as a whole, a person's "*in-laws were considered members of that person's extended family and traditionally very close bonds existed between two merged families.*"

62. The ECtHR observed that impartiality denoted the absence of bias or prejudice and could be tested in a number of ways. First by a subjective test, as to whether a judge held any personal bias or prejudice. A second test was objective and involved ascertaining whether the tribunal in its composition or otherwise offered "*sufficient guarantees to exclude any legitimate doubt in respect of its impartiality*" (para. 49). The structure of the test, and its terms, has an obvious resonance with the law of bias as adopted and applied in Ireland and other common law countries.

63. The objective test involved a decision in each individual case as to whether the relationships in question were of such a nature and degree as to indicate a lack of impartiality (para. 53). The court had to confine itself so far as possible "*to an examination of the concrete case before it*" (para. 59). Noting that the judicial code had been amended, the Court considered that the relationship between the judge and the managing partner through the marriage of their children was sufficient to justify the doubt as to impartiality.

64. In respect of the contention relating to the fact that the judge's daughter and son-in-law were working in the company, the Court found (para. 62) that where a judge had a blood tie with an employee of the law firm, "*this does not in and of itself disqualify the judge*", citing *Ramljak v Croatia* Application No. 5856/13

(para. 29). The Court continued that "*an automatic disqualification … as was provided in the judicial code prior to the applicant's case, is not necessarily required*" (para. 62, emphasis added). However, in an important passage in the judgment the Court continued:-

> "*It is, however, a situation or affiliation that could give rise to misgivings as to the judge's impartiality. Whether such misgivings are objectively justified would very much depend upon the circumstances of the specific case, and a number of factors should be taken into account in this regard. These should include,* inter alia, *whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) on the part of the relative*."

The appellant's reliance on this passage, it should be noted, was what led in part to the evidence heard by this Court in respect of such matters. However, the Court's statement that automatic disqualification is not required is of course directly contrary to this limb of the Appellant's case.

65. At paragraph 64 of its judgment, the ECtHR discussed the importance of disclosure, observing that when a situation arises which can give rise to a suggestion or appearance of bias, "*that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important*

procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality." It will be necessary to refer in greater detail to this passage in due course when considering the relevance of disclosure.

66. The Court concluded that the relationship between the judge and the lawyer as respective fathers-in-law was sufficient to objectively justify the applicant's fears as to the judge's impartiality (para. 60). However, the Court also held that the relationship of the judge with his daughter and son-in-law had not been disclosed, and that therefore, the applicant did not know whether they had actually been involved in the case or had a financial interest connected to the outcome (para. 65). Accordingly, an appearance of partiality was created and the applicant's doubts regarding the impartiality of the judge in this regard were also objectively justified and accordingly there had been a violation of Article 6.1 of the Convention. (It is perhaps implicit that had the relationship been known or disclosed and it was established that the judge's daughter and son-in-law had not been involved in the case and had no financial interest connected to the outcome, the judge would not have been disqualified).

67. It is manifest that in its own terms the *Nicholas* judgment, while important, does not support the bright-line rule contended for by the Appellant. On the contrary, it contemplates an assessment by reference to the particular facts of the case. However, the Appellant relied heavily on subsequent amendments to a Judicial Practice Direction of the Supreme Court of Cyprus which had been reported to the Council of Europe as demonstrating the compliance by Cyprus with the decision in *Nicholas*. He submitted a copy of a submission made to the Council

of Europe dated 15 June 2018 in which a further amendment to the code was set out providing for disclosure of an employment connection whether as employer, or employee or partner or "professional relationship" between a lawyer appearing in a case and a member of the judge's family. This however only provided for disclosure and not disqualification and was apparently considered sufficient to establish compliance with the ECtHR judgment.

68. Subsequently, however, that rule was further amended in January and February 2019 having regard, it appears, to the experience to date. In particular, it does not appear that the amendment was considered to be required in order to comply with the ECHR. The new rule did not provide merely for disclosure but rather for disqualification where a party was represented by a lawyer who was the employer or employee or partner of a lawyer member of the family or where a party was represented by a lawyer working under the "same professional roof" as a lawyer member of the judge's family. However, even this rule adopted by the Supreme Court of Cyprus was not the bright-line rule contended for by the Appellant. There were exceptions when the matter was a minor matter, or a procedural matter and importantly did not apply when the Supreme Court was sitting as a plenary court, meaning a full bench composed of at least seven members. Furthermore, the Direction was expressly stated to be of prospective effect only.

69. The Appellant argued that these qualifications contained in the Cypriot Practice Direction were unjustified. He also argued that the prohibited relationship should extend beyond lawyers and to anyone involved in any legal-type work within a firm and would therefore extend to include paralegals and trainees. The

Appellant argued that a similar bright-line rule shorn of the limitations he criticised in the Cypriot rule, and with the extension he suggested, should be the test for recusal, which this Court should now adopt.

70. I would have no hesitation in rejecting the argument that Irish law requires such a rule.

71. It is apparent that not only is a bright-line rule of disqualification not supported by either the existing Irish jurisprudence or the case law of the European Court of Human Rights, it instead runs directly counter to it. This is so for at least two reasons. First, the decision of this Court in *Goode Concrete* followed the Australian approach in *Ebner* in rejecting a rule of automatic disqualification in cases of share ownership for alleged interest and holding that the same approach should be taken to all challenges on the grounds of bias, that is, the reasonable apprehension of the informed observer. Second, as will be seen, that is the test which has been applied in Ireland and elsewhere to cases of alleged disqualifying relationships, familial or professional or other, and whether with parties, witnesses or lawyers.

72. As will be discussed in a little detail later in this judgment, the only Irish case law in which a relationship between a judge and a lawyer has been discussed considers that such a relationship does not disqualify at all and does not support a bright-line rule of disqualification. The Cypriot Supreme Court Practice Direction upon which the Appellant places emphasis, was manifestly not adopted because it was considered to be *required* by law, or in that case the decision of the ECtHR in *Nicholas*. It was instead expressed to be a rule adopted on grounds of practicality or convenience in the particular circumstances of the

Cypriot judicial legal system, and then only in the Supreme Court. There is no good reason to consider that the same consideration should apply in Ireland. More fundamentally, whatever argument there may be for adopting a bright-line rule for future conduct driven by considerations of practicality or clarity, there is no justification for adopting the same provision as a matter of law, applying retrospectively to past events and setting aside judgments and decisions made at a time when no such rule was in existence, and where, *ex hypothesi*, a reasonable observer would not have had a reasonable apprehension of bias.

73. In this regard, the only apparent advantage of such a blanket rule of disqualification – that it provides certainty and predictability for the future – is somewhat illusory. There is some uncertainty as to the definition of close relative. Even if there was an agreed definition in this respect, there would inevitably be arguments that the disqualification should not be limited to family ties but should extend to friends. The Appellant himself would not accept some of the qualifications in the Cypriot rule, in respect of procedural or minor matters, and the very significant disapplication when the Court sat as a plenary court, and would extend disqualification on the grounds of relationship beyond that of lawyers, and to include anyone "*involved in legal work*" and extending therefore to trainees and paralegals within a firm. Any certainty and predictability provided by such a broad ranging rule of automatic disqualification would, it seems to me, be purchased at a very high price in terms of disqualification of otherwise competent and qualified judges capable of hearing and determining a case without giving rise to any reasonable apprehension of actual bias on the part of an observer informed of the facts and circumstances of the case. It would also and, not irrelevantly, impose

considerable burdens and inconvenience on law firms, on clients who may be forced to seek representation elsewhere, and upon anyone unfortunate enough to be related to a sitting judge within a wide degree of relationships and who has sought to pursue a legal career. Furthermore, such a rule would impose a uniformity of disqualification which would equate quite different relationships: the relationship and consequent expectation of possible bias which might arise from a spousal relationship between a judge and a lawyer is manifestly quite different from that between a judge and the spouse of a niece or nephew, but both relationships would require automatic disqualification if the rule were as proposed by the Appellant.

74. In this regard, it is noteworthy that it was not possible to point to any other jurisdiction which had adopted such a rule. Indeed, the codes of conduct in jurisdictions to which references were made in submissions were consistent with the approach set out in paragraph 62 of *Nicholas* providing for possible refusal only by reference to the particular facts of each case.

Guidelines on Judicial Conduct

75. Of most importance in this regard are the terms of the Guidelines adopted by the Judicial Council in Ireland. Paragraph 4.4 thereof has already been quoted:-

> *"A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case."*

As already noted, this is not expressed to be a guide to ensuring impartiality, but rather a matter of propriety. Even taken at its height it would not appear to support the argument for the bright-line rule excluding a judge from hearing a

case where a relative was a member of a firm on record but had no involvement in the case. The reference to *representing* a litigant most clearly addresses the situation of a judge's relative appearing in the case whether as counsel or solicitor. Disqualification is linked to the fact of representation. Self-evidently, this means the lawyer or lawyers involved in the case. The fact that law firms in Ireland can range very considerably in size, and that it is commonplace for lawyers to be employed in firms such as Arthur Cox organised in departments by reference to specialities, is a well-known part of the background against which the Guidelines were adopted. Had it been intended to adopt a rule that it was improper for a judge to sit in a case where a party was represented by a lawyer in a firm which also employed a relative of that judge then it would have so provided expressly. The reference to being "associated in any manner with the case" cannot reasonably be interpreted as capturing this well-known situation by more general language. Instead, it seems clearly directed to circumstances in which a close family member of a judge may be a witness or may be another professional advisor involved in the case. Even assuming that the Guide can be taken to represent the law on disqualification for bias therefore, and for reasons already addressed that is not the case, clause 4.4 does not assist the Appellant's argument. Taken separately neither part of this provision can be said to support the argument for a bright-line rule of disqualification in this case, and when they are read together as one, it must be that the position is put beyond doubt. The fundamental connecting factor involved in any obligation of a judge not to sit in a case is the involvement of a family member *in the case in question*.

76. It is telling that a similar approach is taken in a number of comparable jurisdictions. These were helpfully surveyed in the submissions made by the

Law Society. Thus, the United Kingdom Supreme Court Guide to Judicial Conduct (2019) states (para. 3.11):

> *"Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:*
>
> *…*
>
> *(ii) the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case*." [13]

77. The UK Courts and Tribunals Judiciary Guide to Judicial Conduct (July 2023) takes a similar approach (at p. 22-23) and usefully distinguishes between the situation in which a close family relative is a party, and the case where they are a lawyer, and in the latter case distinguishes between the position of an advocate appearing in the case, and an employee of a firm:

> *"Guidelines which are likely to be applicable despite the absence of hard and fast rules are:*
>
> *• Judicial office holders should not sit on a case in which they have a close family relationship with a party or the spouse or domestic partner of a party.*

[13] Relative is not defined here, but family is for the purposes of providing that a judge will not sit in a case where a member of his or her family has a significant financial interest in the outcome. Family is defined there as "spouse, domestic partner or other person in a close personal relationship with the Justice; son, son-in-law, daughter, daughter-in-law; and anyone else who is a companion or employee living in the Justice's household."

…

• The fact that a relative of the judicial office holder is a partner in, or employee of, a firm of solicitors engaged in a case before the individual judicial office holder does not necessarily require disqualification. It is a matter of considering all the circumstances, including the extent of the involvement in the case of the person in question.

… …

• Judicial office holders should not sit on cases in which a member of their family (as defined at page 15 above)[14] *appears as an advocate"* (emphasis added).

78. The Australasian Institute of Judicial Administration Guide to Judicial Conduct (3rd edition, December 2023) states (at para. 3.3.4):

"Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering

[14] "*A judge's family should be regarded as including the following: Spouses/ civil partners - this extends to any person with whom the judge has a continuing relationship, whether or not one in which the two parties live together as spouses or civil partners. Close Relative - i.e. the judge's father, mother, son, daughter, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law or step-child; or persons who have any of those relationships with a partner. This includes relatives by adoption.*"

all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.

…

There may be a justifiable exception:

…

• Where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case."[15] (emphasis added)

79. The Bangalore Principles of Judicial Conduct are of particular significance in this regard, because they are expressed to be of general application, and were expressly relied upon in the adoption of the conduct guidelines for the Irish Judiciary. Paragraph 4.4 of those principles is in identical terms to paragraph 4.4 of the Irish Code of Conduct. The terms of that principle were considered in the 2007 Commentary on the Bangalore Principles of Judicial Conduct issued by the United Nations Office on Drugs and Crime ("Commentary on the Bangalore Principles") and at paragraph 129 it is stated:

[15] First degree is defined as parent, child, sibling, spouse, domestic partner or other person with whom an intimate relationship exists or has existed. Second degree is defined as grandparent, grandchild, "in-laws" of the first degree, aunts, uncles, nephews, nieces.

> *"Members of a law firm normally share profits or expenses in some manner and are motivated to acquire clients, in part, through the successful conclusion of their cases. However, the fact that a lawyer in a proceeding is affiliated with a law firm with which a member of the judge's family is affiliated may not, in and of itself, require the judge's recusal. Under appropriate circumstances, the fact that the judge's impartiality may reasonably be questioned or that the relative is known by the judge to have an interest in the law firm that could be substantially affected by the outcome of the proceeding will require the judge's recusal. In addition, factors that a judge may consider in a case by case analysis include, but are not limited to, the following:*
>
> …
>
> *(d) The extent of the relative's financial, professional or other interests in the matter."*[16]

80. Finally, the Canadian Judicial Council Ethical Principles for Judges adopted in 2021 states (at para. 5.C.8, entitled 'Personal Relationships'):

> *"Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member. Generally speaking, it would not be problematic for a judge to sit on a case involving a lawyer from a firm*

[16] The definition of family is the same as that in the Guidelines on Judicial Conduct set out in footnote 8 above.

> *in which the close friend or family member is a member or employee, provided that the friend or family member has not been involved in the matter. However, there may be circumstances where it would be inappropriate for a judge to hear such a case. For example, where the law firm is very small (such that there is a greater risk of the perception of lack of impartiality) or where the law firm stands to gain or lose significantly by the outcome, such that the judge's decision would result in a monetary or reputational gain or loss to the close family member or friend or former colleague [17]"* (emphasis added).

81. It is noteworthy that codes of conduct also apply to professional lawyers. The only reference to this area in the codes of conduct applicable to the Irish legal profession is that contained in the code of conduct for barristers, promulgated by the Bar of Ireland. That provides that a barrister should not habitually practice in any court where their parent, spouse or near blood relative is a presiding judge.[18]

82. The respondent also referred to a decision of the Court of Appeal for British Columbia delivered by McEachern's C.J., *GWL Properties v WR Grace & Co. of Canada Limited* (1992) 21 BCAC 167 ("*GWL Properties*") in which the then applicable code of conduct for the Bar of England and Wales was referred to and which was in similar terms. It provided that "*no barrister should habitually practice in any court in which his father or near relative is the judge but there is no objection to a barrister practising in a court where his father or near*

[17] It does not appear that the term is defined.
[18] Paragraph 5.30 provides that where a barrister appears before a Court of which their parent, spouse or near blood relative is the Judge or one of the Judges, appropriate steps should be taken to ensure that such fact is made known to the opposing party.

relative is one of several judges. [...] *It is not considered improper for a barrister to appear before his father or near relative in the High Court, Court of Appeal, or in the House of Lords*". McEachern C.J. noted that in British Columbia it had not been the practice for the offspring of judges to appear before their parents, but that rule had never been extended to include relatives such as appeared in the particular case, where the judge's brother was the managing partner of the firm representing the plaintiff. He observed that many judges would be disqualified from hearing many cases to the detriment of the bar and the public if the rule contended for were to be applied with the strictness which the application contemplated.

83. The Appellant appeared to accept that the strong tide of authority lay against his argument but contended that the Court should, through the law on bias, adopt a new rule of conduct, for reasons of both practicality and, as he saw it, principle. However, this approach misunderstands the role of the Court both in relation to the code of conduct and the law relating to bias. It appears that the Cypriot Supreme Court can itself adopt Practice Directions for members of that court. In Ireland, amendments to the Guidelines on Judicial Conduct must be proposed by the Judicial Conduct Committee, and adopted by the Judicial Council, constituted by every judge in Ireland, in formal meeting. As already observed, the function of such code of conduct is to provide guidance for judges for their future behaviour and to inform, but not determine, any question of misconduct which may give rise to sanctions under the Act.

84. The function of the law relating to bias is quite distinct. Again, the Appellant suggests that it is open to this Court to adopt a new rule in that regard. However,

as was pointed out by Fennelly J. at paragraph 34 of his judgment in *O'Ceallaigh v An Bord Altranais* [2011] IESC 50:

> *"The principles to be applied by our courts in adjudicating on allegations of objective bias have been well-established for a number of years and, in particular, by two decisions of this Court delivered within two months of each other in the year 2000. There is an inevitable tendency on the part of counsel to suggest that each new decision on a particular or novel set of facts constitutes a development in the law. There are many individual instances of decisions on particular facts. Here, it seems to me that our courts have merely been concerned to apply very well known criteria."*

85. The distinction between adopting a new rule, and the application of an old rule to a novel set of circumstances, may not appear critical in many cases. Here however, it is of some significance. Once it is acknowledged, as it must be, that the absolute rule contended for by the Appellant is driven by considerations of at best, asserted convenience and practicality, and extends beyond those cases where a reasonable and fair minded objective observer in possession of all the facts would reasonably apprehend that a decision maker would not be fair and impartial, then it becomes apparent that the rule contended for would not be the application of the existing law to a novel set of circumstances. Rather, it would mean the departure from a fundamental principle of Irish law, which has been repeatedly affirmed by this Court in the same terms for well over a quarter of a century, and which was said to flow from fundamental concepts of both impartiality, and the necessity to ensure that justice was seen to be done. There

is, in my view, simply no basis for acceding to the application to set aside the decision in this case on the basis of adopting or now promulgating the absolute rule contended for by the Appellant.

Whether Having Regard to All the Circumstances of This Case, the Judge was Disqualified

86. The next argument advanced was that even if the Court did not adopt a bright-line rule of disqualification, and it was a matter for assessment on the facts of this case, then it was apparent that having regard to at least some of the jurisprudence, most notably the decisions of the ECtHR, it was possible that family connections between a lawyer and a judge could disqualify, and that, if so, this was such a case.

87. Considerations of the law and its application to this case casts a further light on the logic of the principal argument advanced by the Appellant. The high point of the law to date as indeed touched on by some of the materials already considered, is that a family relationship with a lawyer having some connection, direct or indirect, with a case *may* in some circumstances mean that a judge should not hear the case, at least as a matter of conduct, or propriety. However, once it is accepted that there is a spectrum at one end of which all the factors identified in paragraph 62 of the judgment in *Nicholas v Cyprus* point towards disqualification, and at the other end where those factors mean that a judge is not disqualified, and that it is for the court to locate the particular case on that spectrum, it must be obvious, that on any rational view, this case must lie almost at the furthest point on the spectrum, at which the relationship cannot disqualify. The law firm is very large; it is organised into departments with different

specialities; the issue in the case was what in another case would be a routine application for production of documents; the case of itself was not of particular significance either in financial or reputational terms to the firm (and the particular application even less so); the application was argued by professional counsel instructed by solicitors in the employment department of the firm; the judge's son was not a partner in the firm; he had no connection whatsoever with the case; the firm itself did not operate on a contingency fee; there was nothing unusual in the issue or the ruling made; there was no conceivable circumstance in which the judge's son's financial affairs, career or reputation could be said to be enhanced by the outcome of the application. The only circumstance in which it could be plausibly said that a judge was disqualified in this case, therefore, was if indeed there was an absolute rule of disqualification in any case where a judge's relative was employed in a firm on record in proceedings, which perhaps explains why the applicant placed such emphasis on the argument.

88. This should be enough to dispose of this aspect of the case. However, since the law in Ireland is unclear on the general question of familial relationships, particularly in light of the provisions of the code of judicial conduct, and since the matter was so strongly pressed and elaborately argued, and since resolution of the issue involves some further consideration of the principles underpinning the rule against bias, it is necessary to consider the matter in further detail.

Kenny v TCD

89. The decision in *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40, to which the parties' attention was drawn by the terms of the Court's determination in this case, is one case of familial relationship being held to

disqualify. In that case, one of the judges on the Supreme Court panel was a brother of the principal in a firm of architects, an employee of which was a central witness in the case, albeit an application on affidavit with no oral evidence. On a motion to set aside the judgment, the Supreme Court held that the judge in question was disqualified from hearing the case and set aside the judgment. As such, the case may be said to establish a new high point in the jurisprudence: the brother was not himself a witness and the firm was not a party. However, in my view, *Kenny* must be understood in the light of the very particular facts of the case, where serious allegations were being made against the firm of architects which, if established, could be said to be very damaging to the firm's reputation. In that sense the case must be analysed as one in which the firm was in effect a, indeed the, party to the proceedings, and in any event had a particularly significant interest in the outcome, which proceedings raised serious issues as to its integrity and probity. This is how the case was analysed at paragraph 34 of Hedigan J.'s judgment in *O'Ceallaigh v An Bord Altranais* [2009] IEHC 470. We were not invited to reconsider the decision in this case, and I would reserve for another day the question of whether it was correctly decided. In my view the decision represents the outermost limits of the law on disqualification for bias and cannot be treated as a springboard for further expansion of the law.

90. There is no doubt that a close family relationship such as between siblings, spouses, parents and children, indeed a close relationship of any kind, between a judge and a party, or between a judge and a witness whose credibility is in issue in a case, would normally disqualify a judge and indeed most judges would recuse themselves voluntarily from such a case. The issue in *Kenny* really

resolved itself into whether, in the particular circumstances, the case could be properly analysed as one in which there was a familial relationship between the judge and a witness, or more plausibly, whether the judge's brother through his firm could be said to be in effect, if not a party, then certainly someone with an interest in the outcome of that case.

91. However, even taken at its highest, *Kenny* does not support the Appellant's case. It has always been recognised that it is not the relationship *per se* that disqualifies: it is the relationship having regard to the role played by the individual in the proceedings before the judge. The manner in which an individual is affected as a party who is either successful or unsuccessful in the litigation is obviously much more direct and intense than the impact on the professional advocate or representative. It is rare for a lawyer's financial affairs to be directly at issue in proceedings, and their reputation and integrity is not normally at stake. It is also commonplace in a system in which the judiciary is drawn from a cohort of lawyers who have practised from often upwards of 20 years that a judge will have had a professional relationship with lawyers from either branch of the profession, and sometimes ties of friendship. These connections have never been thought to disqualify a judge from hearing a case in which a former colleague appears; on the other hand, the same judge would normally recuse themselves from hearing a case in which a former colleague with whom they had a close professional relationship was a party.

92. Until recently, as exemplified by the code of conduct of the Bar of Ireland, and the equivalent rules in the UK, it was considered that the fact that the function of professional advocates was to present a case and that the function of a judge

was to adjudicate on the issues of fact and law alone, meant that it was not regarded as objectionable that a barrister should practice in a court in which a parent was the judge or one of a panel of judges. Indeed, there have been a number of examples of this in Ireland and a number of other common law jurisdictions.

O'Reilly v Cassidy

93. In *O'Reilly v Cassidy* [1995] 1 ILRM 311 ("*O'Reilly v Cassidy*"), the applicant was the holder of an intoxicating liquor licence where the gardaí had objected to the renewal of the licence. Those objections were dismissed in the District Court and the gardaí appealed to the Circuit Court where the application was heard by the first named respondent. Counsel instructed on behalf of the gardaí was the daughter of the judge. No objection on this ground was made initially, but as the case proceeded it became more fractious, and the issue of the relationship between the judge and counsel was raised, an adjournment was refused, and counsel for the applicant left the court. In the event the objections were upheld by the Circuit Court judge and renewal of the licence was refused. The applicant then sought judicial review, relying *inter alia* on the fact that counsel for the gardaí objectors was the daughter of the judge.

94. Flood J. quashed the decision of the respondent, holding that an adjournment ought to have been granted to allow inspection of documents. A second ground alleged relied upon the relationship between counsel for the objectors and the judge. In that respect Flood J. observed that an allegation of subjective bias had been abandoned, and that the only issue was one of objective bias. The argument on behalf of the applicant was that the simple fact of the parental relationship

between the judge and counsel was itself sufficient to give rise to a possibility of reasonable doubt considering that bias could follow. Flood J. considered that stated in what he described as this "bold and rigid fashion", he would reject it. To accept it would be to derogate the oath made and subscribed to by every judge on appointment pursuant to Article 34.6.1° of the Constitution. Nevertheless, he considered, that in the circumstances prevailing during the hearing, the complaint by the applicant's counsel, as to the relationship between counsel and judge, became so inextricably entangled with other contentious factors in the case that there was a real possibility that the end product could give rise to a fear in a reasonable person that the outcome of the proceedings could be affected in an indeterminate way by the relationship between the judge and counsel. Accordingly, he quashed the order of the respondent on that ground also.

95. *O'Reilly v Cassidy* is often cited for the proposition that a parental relationship between judge and counsel is not itself sufficient to disqualify the judge. However, it may be noted that it is implicit in the decision of the High Court in that case that the relationship of parent/child was a *factor* which, taken together with other matters, could result in disqualification.

96. The matter was also addressed in a more recent High Court case: *Allied Irish Banks plc v McQuaid* [2022] IEHC 224. In that case, a claim was made of objective bias in circumstances where the solicitor and counsel for the plaintiff in the proceedings had previously acted for the wife of the judge in separate proceedings. McDonald J. considered the distinction between the relationship of a judge and a professional lawyer appearing in a case, and a judge and a party.

He also made certain observations, at paragraph 28, on the historical practice within the Irish Courts:

> *"In my view, a relationship between a judge and a party to proceedings is in a different category to a relationship between a judge and a lawyer in proceedings before that judge. It must be kept in mind in this context that a judge, in hearing a case, has to decide the issues as between the parties to the proceedings. While, in many cases, the parties will be represented by lawyers, the decision to be made by the judge is one that has real life consequences for the parties, not the lawyers. It is the parties who have to live with the decision for the future; the lawyers are simply providing a professional service. Inevitably, in the course of their practice, lawyers will win some cases and lose others. While the lawyers will be expected to use their legal skills to the best of their ability, their capacity to influence the outcome is always limited by the legal merits of their clients' case. As one case is concluded, the lawyers move on to the next case. In some of their cases, lawyers may be very familiar with the trial judge; in others they may have no prior experience at all of the judge. Everything will depend on the happenstance as to who is available to hear the next case. The reasonable objective person at the heart of the* Bula *test is taken to be aware of these everyday facts. Against that backdrop, it is not difficult to see that a previous professional relationship between a judge and a lawyer appearing in that judge's court is unlikely to give the reasonable person cause for concern that the judge might be influenced by the existence of the relationship."*

97. McDonald J. observed that judges are concerned with the merits of the cases made by the parties and not with who the lawyers might be. While the quality of advocacy may be important to the ultimate result, the identity or personality of the lawyer does not of itself influence the result. McDonald J. went on to instance a number of well-known reported cases where close relations of a judge had appeared as advocates in a case, and where there was no suggestion of a predisposition on behalf of the judge to his or her relations.[19]

98. The observations of McDonald J. on these cases are correct as a matter of historical fact. Both in this jurisdiction and in neighbouring jurisdictions there have been a number of occasions when, as a matter of history, particular counsel on behalf of a party had a direct relationship before a judge who may have been sitting in a case, either alone or as part of a panel in an appellate court.

99. Nevertheless, it is clear that what is expected in this regard has changed over time. This is apparent not least from the provisions of paragraph 4.4 of the Guidelines, but also from the fact that those guidelines are in turn identical to the Bangalore Principles adopted in 2002. It is a notable feature of this case that both the respondent to the case, and counsel on behalf of the Bar of Ireland expressly stated that the blanket statement in *O'Reilly v Cassidy*, that the relationship of parent and child could not in itself disqualify a judge, could no longer be regarded as good law and should not be endorsed by this Court. It appeared that counsel on behalf of the Law Society took the same position. In other words, the position set out at paragraph 4.4 of the Guidelines and adopted

[19] It may be noted that this was also the historical practice in England and Wales and in South Africa. See *President of the Republic of South Africa v SARU* at paragraph 84: "*We would also mention that it has been accepted practice in our Courts for many decades that close family members appear before each other and it has never before been suggested that it was inappropriate.*"

by the judiciary as a guide to conduct in respect of propriety was also broadly accepted by the parties as representing the law on recusal/disqualification and has been the practice in this Court for many years now.

100. The starting point for argument in this case is therefore that the law has developed in this regard, and reached the point where a judge will be disqualified from hearing a case in which a direct and close family relation (spouse, sibling or child) represents a party in court whether as advocate or instructing solicitor. If this is correct, and I consider it to be so, then a number of questions arise as to why the law should have developed in this regard, and whether it should develop further. Should it develop either by reference to the nature of the relationship involved (such as to include more remote family relationships), or the degree of involvement of the lawyer (or lack of it) with the case, (such as to disqualify a judge where a close family relation as defined above was working in a firm which represented a party) or a combination of these factors? If so, would this case be captured by the rule, so that it should be held that a judge was disqualified from hearing this case by reason of his connection with his son and the fact of his son's employment with the firm on record in the case? While it is possible to answer this question simply by reference to cases decided in this and other jurisdictions and the terms of codes of conduct adopted here and elsewhere, it is in my view, helpful to attempt to identify the relevant principles underpinning the law and which may explain both its development, and its limits.

101. The law in relation to disqualification on grounds of objective bias, which had generated sometimes anguished discussion in both the case law and academic

literature, has tended to focus on the manner in which the objective bystander's view in the case is to be assessed. At one point, there was a lively debate as to the formulation of the test in England and Wales by reference to a real danger that a decision would be affected by bias: see e.g. *R v Gough* [1993] AC 646 and there was a difference of opinion between a number of common law countries in this regard. However, it has always been the case in Ireland and was confirmed in the decision in *Bula v Tara (No.6)*, that the test applied is that of a reasonable apprehension of bias. The critical term, "apprehension", is somewhat opaque and there have from time to time been subtle variations to the manner in which this has been expressed with perhaps the most liberal formulation – in the sense of being one of the most easily satisfied – being that of whether a reasonable bystander *might* apprehend that there was a *risk* the judge might not be fair and impartial.

102. The devising of legal tests and their application in particular circumstances, particularly as to the degree of confidence a court or fact finder should have in any circumstance, is a familiar aspect of legal reasoning. All lawyers are familiar with the standard required in criminal cases (beyond reasonable doubt), often contrasted with that in civil cases (the balance of probabilities); the particular test to be satisfied in a standard injunction (a real issue to be tried), and the elevated standard required in cases in which a mandatory injunction is sought (a strong case). In addition to these standards, lawyers are familiar with the requirement of a *prima facie* case, being facts established which if accepted and not contradicted would entitle the party to succeed, and the different standards which may be required to obtain leave to seek judicial review (from an arguable case, to a strong arguable case on substantial grounds).

103. These tests are different because their functions are different, and the tests are, or at least should be, aligned with the policy objective sought to be achieved by that area of law. Thus, proof beyond reasonable doubt in criminal cases necessarily means the acquittal of persons whose guilt a fact finder might be satisfied on a balance of probabilities, indeed to a reasonably high degree. That matches the criminal law's underlying principle that it is preferable that guilty people should go free rather than one innocent person be convicted, and that public confidence in the criminal justice system requires that convictions are justified by this standard. The test of reasonable apprehension of bias has been variously stated as being satisfied only on balance of probability standard, or conversely where there *might be* bias. In my view, in the field of judicial disqualification, the test reflects the underlying policy of the law that justice must be done and seen to be done. This objective is achieved if a reasonable and informed observer would be satisfied that in all the circumstances the judge or adjudicator was impartial and addressed the matter solely by reference to its merits. This means that if the objective bystander has a reasonable doubt as to the impartiality of the judge, then the test is met.

104. The judgment of McGuinness J. in *Bula v Tara (No.6)* is helpful in this regard. At p.509 of the reports, she said:-

> "*If the test of reasonable apprehension by a reasonable person […] is to be applied, I consider that it requires a strict interpretation. The apprehension must be reasonable and realistic; over scrupulous, fanciful or fantastic apprehension or a vague worry is not sufficient. While this is not of course, a criminal trial, there is, I think, some parallel*

with the standard explanation of a "reasonable doubt" contained in the judge's charge to the jury – a fanciful, exaggerated or over scrupulous doubt is not enough."

105. However, it is a mistake, in my view, to focus only on this aspect of the test and what is meant by apprehension (all the more so if it is expressed in terms of *apprehension* of *risk* that something *might* occur). The entire test has been carefully developed over time to strike the balance required by the law. It may be helpful to conceive of it as having three different parts or components. First, the approach must be that of the reasonable and informed observer. This is a standard which ensures that the unrealistic or overly subjective fears of litigants, particularly those who have lost a case, and are perhaps naturally predisposed to attributing such a loss to extraneous factors, does not set the standard. This aspect of the test therefore imposes a necessary degree of objectivity and rigour. The second limb is the level of belief or apprehension just discussed, and is formulated as a standard of reasonable apprehension (rather than proof on the balance of probabilities) consistent with the high value placed on ensuring that there is demonstrable impartiality, which would maintain public confidence in the entire system. However, the third limb of the test is also important. That is what must be established to this standard of reasonable apprehension. That is actual bias.

106. Actual bias in fact, is the antithesis of the proper performance of the judicial function. It refers to when a judge is likely to or has in fact decided a case by reference to factors extraneous to its merits, factual or legal. This is not something which should be readily assumed. On the contrary, there is a heavy

onus on a party to demonstrate that this has occurred or will occur. Objective bias for its part is the apprehension of a reasonable (and informed) observer of actual bias. The difficulty of this test, and what it involves in reality, should not be discounted by concentrating solely on an apprehension of a risk of bias, still less of an apprehension of a risk that there might be bias. The test is an objective one, but it is, and should be, difficult to satisfy.[20] It must be applied strictly and rigorously.

107. An important consideration in this regard is what was referred to as the judicial oath and, more correctly, the declaration made by a judge under Article 34.6.1° of the Constitution. Over 100 years ago, the Courts of Justice Act, 1924 established a new and independent courts system in Ireland and s. 99 thereof sets out the terms of the declaration which is to be made by the Chief Justice on appointment, and by each newly appointed judge in the presence of the Chief Justice or the most/next senior available judge, and which must be made in open court. The terms of s. 99 were incorporated into the Constitution itself in 1937 by (at that stage) Article 34.6.1°, which provides that every judge appointed shall make the declaration that they will perform the task and execute their office "*without fear or favour, affection or ill will towards any man, and that [they] will uphold the Constitution and the laws*". This declaration is so fundamental to the judicial function that it must be made before a judge can enter upon their duties, and if not made for any reason within ten days of their appointment, then

[20] As was said by Cory J. in the Supreme Court of Canada in *R v S (R.D.)* [1997] 3 SCR 484 at paragraph 117, "*Courts have rightly recognized that there is a presumption that judges will carry out their oath of office […] This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high".*

the appointment of the judge made by the President on the advice of the Government simply lapses.

108. The terms of the declaration are instructive. They are an adaptation of declarations and oaths made across the common law world,[21] and indeed in civil law jurisdictions. The terms do not mean that the only candidates who may be appointed to judicial office are those who can say that they have no views, fears, likes, affections, or antipathies. Instead, the terms of the declaration in Article 34.6.1° are a recognition that judges are people first and foremost, capable of fear, favour, affection, and ill will, but who acknowledge that they are obliged to consciously put all these matters aside when adjudicating in a case, and not permit them to form part of their decision.

109. While this is a demanding standard, it is not necessarily difficult to achieve in most cases: the negative obligation to administer justice without fear or favour is achieved by the positive performance of the function of doing justice solely by reference to the facts and law in each case. The performance of that positive obligation necessarily excludes extraneous considerations.

110. The application of the test for disqualification for bias can be seen as an equation containing the three components identified at paragraph 105 above, that is (1) the view of the reasonable and informed bystander who has (2) a reasonable apprehension of (3) bias. There is room for argument in some cases as to

[21] Blackstone, Commentaries on the Laws of England III at p.361 said "*The law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea".* See also McGuinness J in *Bula v Tara (No. 6)* at p. 2511 citing with approval *Dovade Pty Ltd v Westpac Banking Group* [1999] NSWCA 113 "*This public oath is not a talisman against error, but it forms the constant backdrop to the way in which each judge functions on and off the bench*".

whether any of the three components has been established in any case, and to some extent the differing decisions can be understood as examples of differences of opinion as to the what is required to establish an apprehension in a particular case but it is important that each of the components is given its correct weight, and in particular, that the test of bias when measured by the standard of apprehension is not further depreciated, since otherwise the balance sought by the test would not be achieved.

111. A related aspect of this matter is that unless proper weight is given to the strictness of the test, and to the declaration made by a judge on appointment, and the value it upholds, and its centrality to the judicial function and every judge's conception of their role, then there is a real possibility that judgments and decisions would be set aside where there could be no real or sensible belief that the judge involved would be actuated by prejudice. Far from achieving the objective of reinforcing public confidence in the administration of justice by demonstrating the extremely high standard demanded of judges, to readily set aside decisions on flimsy grounds would have the opposite effect.

112. It is simply wrong, in my view, to approach this case on the basis that judges are people of intense convictions, unable, or perhaps unwilling, to control their prejudices, and who see their role as an opportunity to settle old scores in some cases, and reward their friends, associates and families in others, and who are only prevented from doing so, if at all, by a combination of appellate courts, international tribunals, and the vigilance of litigants.

113. It is necessary in every case to state the nature of the bias alleged in order to consider whether a reasonable observer would have a reasonable apprehension

that it could, or did, operate on the decision of the judge. The two stage test set out by Gleeson C.J. at paragraph 8 of the leading Australian case of *Ebner*,[22] of requiring the identification of the factor which might lead a judge to decide a case other than on its factual and legal merits, and second, the articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits and referred to at paragraph 57 above, is instructive in this regard. In *Bula v Tara (No 6)* both Denham J.[23] and McGuinness J.[24] referred to the necessity to establish a "*cogent and rational link*". It is easy to identify the matter that is said to have led the judge in this case to decide the issue other than by reference to the factual and legal merits, that is the relationship between father/judge and lawyer/son. However, any attempt to articulate the logical connection between that matter and the feared deviation from the course of deciding the case on its merits reveals how implausible and unreasonable any apprehension of bias would be.

114. In this case, it involves the proposition that a judge of the High Court would decide a motion for production of documents on appeal from the Circuit Court in favour of one party, upholding in that regard the decision of the Circuit Court judge, not upon the merits of the application but rather because, it is asserted, he might wish to promote his son's career in the capital markets division of the major law firm acting for the defendant. This necessitates the further proposition that the firm in question would be able to recognise that their client had been

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[22] A decision approved by this Court in *Goode Concrete*.

[23] At p.446: "*The circumstances must be cogent and rational so as to give rise to a reasonable apprehension...*"

[24] At p.510: "*This requirement of a 'cogent and rational link' between the judge's past associations and the capacity of those associations 'to influence the decision to be made' seems to me to fulfil the requirement that the applicants' apprehension should be both reasonable and realistic and I respectfully adopt it as a correct analysis...*"

successful in the discovery motion in whole or in part because of the judge's bias, and would be prepared in turn to give credit to the judge's son in this regard. This in turn would seem to involve a wholesale acquiescence, or worse, by at least those members of the firm in a position to make the connection between the outcome in this case and to make decisions in respect of the son's career in a system of institutionalised judicial nepotism. It also perhaps implies an acceptance of such a system more generally, which on this hypothesis would mean that while such a firm could be expected to be generally happy with the fact that they had some form of advantage and an expectation of favourable decisions in even trivial cases, before one judge, they would necessarily face an equal and opposite disadvantage in the cases of any other judge of the Superior Courts, who happened to be related to other lawyers in other firms. The argument also necessarily implies that the judge in question would routinely derogate from the judicial declaration discussed at paragraph 107 above.

115. A component in the argument is that there is something inherently suspect in the fact that a judge would have a relative who was also a lawyer, whether a solicitor or barrister. This is, indeed, how the Appellant put it in his submissions:-

> "*I mean it's – it's a relatively small country, there is so much of that going on, and they don't want that to come out, they don't want that to be disclosed, they don't want anything – any action to have to result from these relationships, because then that might make having a judge's son in your firm maybe not a good idea, whereas up to now it might have been thought to be a very good idea, you know. So there are all kinds of*

implications arising and things – a situation that is actually a fairly rotten situation, but that they don't wish to change, they wish it to remain exactly as it is. It's – the potential for corruption is massive."

116. There is no doubt that if you start from the proposition that the fact that a judge may have relatives, whether children or siblings or spouses, in the legal profession, is itself a rotten situation, and one giving rise to potential for corruption, and that judges are generally willing to indulge their fears, favours and affections, or are at least incapable of restraining them, it becomes possible to argue that there could be an apprehension of bias in a case such as this. I do not believe that this type of reasoning can or should be treated as reasonable or should be accepted.

117. There is in my view nothing improper, rotten, or corrupt, in the fact that members of the family of lawyers who become judges might themselves become lawyers. It is a natural human tendency that some children will tend to follow in the footsteps of their parents. That is not unique to the law, or indeed other professions, it is found in trades, industry, sport and the arts to take only some examples. The fact that people attend courses together, or later work with, or work in the same area, means that a not insignificant percentage of them meet and form relationships with others in the same field and some of their children may follow a similar route. There are, it is said, only six degrees of separation between any two people and it is easy therefore to look for some links and connections particularly in a small jurisdiction. The fact that a judge may have relatives who are lawyers is not of itself suspect, still less presumptively corrupt. The necessary theory on which the challenge in this case is based depends on

assumptions about the behaviour of judges, law firms, and the relationship between judges and their family which is, in my judgment, simply not reasonable, and accordingly the contention that in this case, a reasonable observer would have an apprehension that the judge in this case would be biased in favour of UCD, is itself unreasonable and cannot therefore be accepted.

International Authorities on Familial Links

118. While this precise issue – the employment in a firm, a member or employee of which is appearing before a judge, of a close relative of the judge who is however not involved in any way in the case – has not arisen before in Ireland, it has been raised in a number of other jurisdictions and, so far as the papers before the Court can show, has always been resolved by a finding that such connection does not require the disqualification of the judge from hearing the case in question.

119. The most comprehensive discussion of the precise issue is to be found, in my view, in the concurring judgment of Wakeling J.A. in the Court of Appeal of Alberta in *Lay v Lay* (2019) ABCA 21.[25] That case concerned a claim in respect of a share transaction which was dismissed by a case management judge in the High Court of Alberta, on a limitation point. The plaintiffs appealed and also argued that the judge ought to have recused himself because the judge's daughter was employed by the firm representing the successful defendant. The appellant in that case also relied on the fact that the trial judge had not disclosed the fact of the employment of his daughter prior to or at the hearing.

[25] It should be noted that in Canada an applicant is required to establish an apprehension of bias on the balance of probabilities.

120. Two features of the case might be noted which make it a particularly useful point of comparison to the present case. Alberta is a common law system which has fused legal professions, and therefore the advocate presenting the case was employed in the same office as the judge's daughter. Second, the judge's daughter had received an offer of employment during the currency of the case. These features make the case, if anything, a stronger one than the present.

121. Wakeling J.A. also cited, with approval, the approach of the Supreme Court of South Africa, in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) S.A. 147 and the passage which had been cited with approval by Denham J. in *Bula v Tara (No. 6):*

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel.*"

122. Wakeling J.A. then considered Canadian, Australian, New Zealand and U.S. authority to the effect that courts should not adopt an overly broad rule of disqualification as that would allow litigants to influence the choice of judge, referring at footnote 28 to the Commentary on the Bangalore Principles on judicial conduct: "*frequent recusals may give [litigants] the impression they can*

pick and choose which judge will decide their case and this would be undesirable". [26]

123. In applying the test to the case before him, the judge observed that the firm in question had more than 240 lawyers, the judge's daughter had played no part in the case, the case itself would have negligible impact on the firm's income, and the judge would have no reason to think that a decision in favour of the respondent could advance his daughter's career. At footnote 21 of the judgment Wakeling J.A. cites eight different cases in Canada and the U.S. in which a challenge had been raised to a judge hearing a case on the basis that a close relative was employed in the firm appearing before him but had no connection with the case. In each case, the court decided that this fact did not disqualify the judge. The parties' extensive researches in this case, which in the case of the Appellant has involved the reference to authorities from a number of jurisdictions, has not produced any case in which a judge has been held to be disqualified where a close relative merely worked in another department of a firm representing a party, and had no involvement in the case.

124. Two cases referred to in this regard perhaps deserve particular attention. In *GWL Properties*, the Chief Justice of British Columbia held that a judge was not disqualified from hearing a case in which a party was represented by a firm in which the judge's brother was a partner. Similarly, in *Makowsky v Doe and Ors*

[26] He cited a previous decision in *Bizon v Bizon* [2014] 7 WWR 713, 743-44 in which he had said "*a community must not be oblivious to the dangers associated with … modest disqualifying standards which may only marginally reduce the risk an adjudicator is partial but considerably increase the risk legitimate interests associated with the administration of justice will be compromised … A modest bias rule … creates an undesirable prospect of complicated and time-consuming recusal motions that introduce delay and uncertainty into the process and distorts judicial workloads*".

[2007] BCSC 1231, Goepel J. refused an application that he should disqualify himself on the basis that his son was a recent employee of a firm which was acting on behalf of one of the parties. Goepel J. also addressed the question of any duty of disclosure, followed the Ethical Principles for Judges in Canada and had concluded that no reasonable, fair minded and informed person considering the matter would have a reasonable suspicion of a lack of impartiality. That was his decision based on his understanding of the precedents and past practice of the court, and accordingly he considered it was not necessary to disclose the fact of his son's employment. In any event, that did not change the underlying analysis, which was whether given the judge's presumed impartiality, an informed reasonable and right-minded person would conclude that the failure to disclose would give rise to an apprehension of bias - and it did not. If anything, the considerations addressed in those cases, and in *Lay v Lay*, should apply with even greater force in the current situation given that the judge's close relative is at one further remove from the physical presentation of the case in court by counsel instructed by the firm, which normally would be the focus of consideration by any reasonable observer of the case.

125. Wakeling J.A. in *Lay v Lay* did, however, express the view that a reasonable apprehension of bias would arise where a member of a judge's close family appeared in court or worked on the litigation file. The link between the advocate and the adjudicator would, he considered, give rise to a legitimate fear sufficient to require the recusal of the judge.

126. I agree with this conclusion which is itself consistent with the broad terms of clause 4.4 of the Guidelines of Judicial Conduct to which reference has already

been made, and the submissions in this case by the respondent and those made on behalf of the Bar of Ireland and the Law Society, but since this would be a new step in the application of the jurisprudence in Ireland it may be helpful to analyse exactly why this should be so, and accordingly what the limits of the principle are.

127. In my view, the concentration on apprehension, and the idea that a judge would favour a party in deciding a case because of a relationship with a lawyer, formulates the issue in a way which does not facilitate its proper resolution. It is, in my view, preferable to express the principle in the words of the Constitutional Court of South Africa cited above as being whether or not an objective and informed person would, on the correct facts, reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submission of counsel, and I would add, by those matters alone. A judge with a close relationship, particularly to a sibling, spouse, or child, has in addition to the evidence and submissions in the case, a universe of information, knowledge and intuition about the advocate which it may be impossible to separate out and exclude. It is this principle which means, for example, that it may be inappropriate for a judge to hear a case involving someone who has been a former client of theirs in a number of matters. (See e.g. *Keegan v Kilraine* [2011] IEHC 516, [2011] 3 IR 813.) That is because, if an issue of credibility arises, it may be difficult or impossible for a judge to separate out his or her views formed on that issue, because of repeated exposure to the client, and just as importantly, it may be difficult for a reasonable onlooker to believe that the judge can do so successfully. Similar considerations apply, in

my view, where the judge has lived closely with the person, whether a spouse, sibling or parent, even when that person is acting merely as an advocate in the case. It is not merely that a judge would tend to favour the advocate's side of the case so much as that judge may simply know too much about the lawyer, their approach, and attitudes to give the case the dispassionate assessment of fact and law required, and an advocate in such a situation might know too much (and be perceived to know too much) about the judge and their views, so that it might appear that the scales of justice are not balanced. The effort to exclude all of this knowledge may itself distort the approach of the case. It may also be that an onlooker would think that if a relationship is so close there is the possibility that something might be said in even casual or innocent conversation that could affect, even subconsciously, the approach of either the advocate or the judge. Even if everyone is scrupulous in avoiding any hint of impropriety, the factor may loom so large in the case that the hearing cannot be said to be one which an objective onlooker would be confident would be conducted by reference to the facts and law alone.

128. As clause 4.4 of the Guidelines of Judicial Conduct recognises, the issue of impartiality is related to the question of propriety, and the public perception of the role of the court and what is proper. What is acceptable to the public may change over time, as indeed the Australian guidelines recognise. It is irrelevant whether the standard of behaviour of the past can now be considered to be unduly complacent, or whether current social attitudes are unnecessarily censorious: the fact is in my judgment, it is less likely that the public will take matters such as this on trust and increasingly difficult to ask them to do so. On the other hand, recusal in such circumstances may enhance public confidence

more generally as illustrating a scrupulous standard. The fact that the Bangalore Principles maintain the same standard – that a judge should not participate in a case in which a close relative appears as an advocate – is itself an indicator of changing attitudes to concepts of judicial propriety, which in turn feeds into the assessment of the reasonable onlooker. Even allowing for the significant difference between the role of the professional advocate and a party to a case, as explained by McDonald J. in *Allied Irish Banks v McQuaid* [2022] IEHC 224, the fact remains that a losing party may, even unreasonably, be inclined to attribute the outcome to some connection between the judge and the advocate, and that a reasonable onlooker today may not be able to entirely discount that contention, with consequent damage to the general confidence for the administration of justice.

129. It follows in my judgment, that the law should now state clearly that a judge should recuse themself from a case in which a close relative appears for the party as an advocate, and that principle should extend to the situation where a close relative is or has been involved in the preparation and/or presentation of the litigation. A close relative in my view is someone whom a judge would have that degree of familiarity created by living with them in a close family unit over an extended period, since it is that very knowledge which would be difficult to exclude from any consideration: accordingly, that should be a direct relationship of parent, child, sibling or spouse or partner or equivalent relationship.

130. It should be noted, however, that this definition of disqualifying relationship would be slightly narrower than the relationships set out at clause 4.4 of the Judicial Conduct Guidelines where, as a matter of propriety a judge should not

sit. In principle, it is not essential that the classes should align perfectly. The consequences in each case are markedly different and it is arguable that where the law identifies a class of relationship which automatically excludes a judge and leads to the setting aside of a decision (irrespective of the nature of the actual relationship and the degree of interaction or lack of between the judge and relative) the law should track closely the relationships which could give rise to the type of risk identified above, and go no further. It is obvious that the further the relationship from the judge, the less likely that any assumption of an inability to give a truly dispassionate hearing by reason only of the relationship holds true. In such a case, it might be argued that the parties should be left to argue that the relationship was in fact so close as to disqualify the judge. However, the existence of the Guidelines and the fact that they follow the Bangalore Principles is a factor to which weight must be given. The fact that in any given case a judge had sat or was prepared to sit, notwithstanding the provisions of the Guidelines, might itself give rise to, or add to, an apprehension of bias. In those circumstances I am persuaded that even if many reasonable observers might not have any apprehension of bias in such cases, the objective of clarity and consistency should lead to the conclusion that a judge is disqualified from sitting in any case in which a close family relative as defined in clause 4.4[27] of the Guidelines acts as an advocate for a party or is a solicitor engaged in the case.

131. However, this case does not fall into the category of cases where a close family member of a judge represents a party before the judge. On the contrary, for the

[27] Close relative is defined in the Guidelines as "spouse, civil partner, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household". See Footnote 8 above.

reasons already set out it represents a situation which should not give rise to any obligation of recusal or disqualification.

Disclosure

132. The final issue in this case concerns the Appellant's claim that the fact that the trial judge did not mention that his son worked in the law firm was in itself a ground for setting aside the judgment. It is preferable to state the matter in this neutral way, rather than use the language of disclosure, non-disclosure or even concealment, since such language may imply that it is a matter which ought to have been mentioned but was not.

133. I recognise that this was an argument on which the Appellant placed particular reliance and one which he contended was in itself sufficient for him to succeed without going further to consider the question of objective bias. However, I consider that the argument has to be addressed in sequence and after the Court has determined the question of whether the relationship itself is disqualifying. If it was, disclosure or non-disclosure would be irrelevant or at least superfluous: the judgment would still require to be set aside. The question of disclosure as a separate argument can therefore only be properly isolated, and addressed, where it has been established that the fact or relationship which was not mentioned is one which in itself does not amount to objective bias, and would not require that the judgment be set aside, which is the case here.

134. The Appellant relied on a decision of a court of first instance of Merkel J. in the Federal Court of Australia, in *Aussie Airlines Pty Limited v Australia Airlines Pty Ltd* (1996) 135 ALR 753 ("*Aussie Airlines*").[28] The judge in that case had

[28] It might be noted that in this case Merkel J. followed the practice of providing the parties with a statement of his relationship to the counsel in question.

raised of his own motion the question of his relationship—personal, professional and financial—with leading counsel who had been retained in the case. Once this issue was raised by the judge, the opposing party applied to him to disqualify himself.

135. The statement provided to the parties explained that Merkel J. and counsel had been members of the same chambers for a considerable period of twelve to thirteen years. They together with four others held a 1/6th interest in the property in which the chambers were located but which the judge was in the process of transferring. They also held shared interest in a number of property investments and the judge and counsel had a close friendship involving being signatories in each other's accounts, and directors on each other's family trust companies, until the point at which the judge had been appointed to the bench.

136. Merkel J. refused to disqualify himself. He considered that the test for disqualification was one of appearance and required a cogent and rational link between the association and its capacity to influence the decision maker. Absent such a rational link the argument was not advanced by accumulating aspects of an association each of which did not in itself constitute the requisite link. He also held that the issue was not whether the informed observer might conclude whether or not it would be better for another judge to hear the case, but rather, was whether the judge sitting might not bring an impartial or unprejudiced mind to the case.

137. Merkel J. did refer to a "duty of disclosure." He identified three reasons supporting such a duty. First, it could not be expected that parties might be or should be aware of any matters alleged to disqualify a judge. Secondly, the failure to disclose in itself could, together with other facts, give rise to an

apprehension of bias in the sense that non-disclosure might give rise to additional suspicion and disclosure might allay it. Third, disclosure also served the purpose that justice was being seen to be done.

138. The Appellant relies on this language in the judgment of Merkel J. to suggest that there is or should be a general rule of an independent and separate duty to disclose the association here, even if it, in itself, did not and could not give rise to an apprehension of bias so that non-disclosure should by itself result in the judgment being set aside. The case however is not authority for this proposition. The case itself was not a case where there had been non-disclosure. Instead, it was one of positive, voluntary disclosure. Consequently, it was clearly a case which was not decided on a proposition that there was a general duty of disclosure, on which a litigant may rely after the fact, to set aside a judgment made, even where a matter either itself, or in conjunction with the non-disclosure, did not give rise to an apprehension on the part of a reasonable bystander that the judge would not bring an impartial mind to bear on the case.

139. Furthermore, and in so much as *Aussie Airlines* discusses a duty in general terms, it is a duty to disclose facts "*that **might** found or warrant a bona fide application for disqualification*" (emphasis original). It is apparent that this is a judgment which must be made by the judge concerned,[29] since he or she will be the only person in possession of all the information. But that illustrates how difficult the standard would be if it became a basis for mandatory disqualification rather than a matter of prudence or propriety: it would be entirely dependent upon the judge's own internal sense that an issue while

[29] This is also apparent from the Commentary on the Bangalore Principles, discussion at paragraph 146 below.

unjustified, *might* nevertheless found an application. But if the judge's internal compass is perfectly aligned with the law, they may not identify any such unjustified ground for a possible recusal, precisely because they might have no sense that the association or connection or issue might affect their impartiality, and unless that can be said, there could be no basis for any disqualification application.

140. In the event, the matter was discussed authoritatively in a subsequent case of the Australian High Court, to which reference has already been made: *Ebner v Official Trustee in Bankruptcy*. Gleeson C.J., McHugh, Gummow and Hayne JJ. held that there was an important distinction between considerations of prudence and the requirements of law. It is worth setting out the passage in full, as it is in my view an admirable statement of the law:

> *"69. As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying. It is common, and proper, practice for a judge who owns shares in a company which is involved in a case in which the judge is sitting to inform the parties of that fact and to give them an opportunity to raise an objection should they wish to be heard. In most cases, the outcome is that no objection is raised and, by reason of waiver, any potential problem disappears. One reason for the practice is that it gives the parties an opportunity to bring to the attention of the judge some aspect of the case, or of its possible consequences, not known to, or fully appreciated by, the judge.*

70. It is, however, neither useful nor necessary to describe this practice in terms of rights and duties. At most, any "duty" to disclose would be a duty of imperfect obligation. A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias [(Aussie Airlines v Australian Airlines [1996] FCA 1308; (1996) 65 FCR 215 at 221 per Merkel J; Gascor v Ellicott [1997] 1 VR 332 at 361 per Ormiston JA)]. A failure to disclose has no other legal significance. In particular it does not, of itself, give a litigant any right to have the judge desist from further hearing the matter or to have the ultimate decision in the matter set aside for want of procedural fairness.

71. To describe the practice of making disclosure as a matter of right or duty may distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established. That question will be litigated on appeal from the substantive decision in the matter or in proceedings for prohibition, certiorari or similar relief. Whatever the process which the person alleging reasonable apprehension of bias may adopt, there will, in those proceedings, be a full opportunity to make whatever case for disqualification of the judge the moving party can. Inquiring whether the moving party was denied some opportunity to make submissions on the question of disqualification to the judge in question is irrelevant. The question of disqualification can and will be litigated fully in the appeal or application for prerogative or like relief and no separate question of denial of procedural fairness could arise. The point can be illustrated by

what happened in [Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd [1999] 2 VR 573]. The fact that the judge did not disclose his shareholding gives no different or additional right to the present appellants. All that they were denied by the fact that there was no disclosure was an opportunity to put an argument which we consider must fail.

72. Disclosure of association may raise more difficult questions than are presented by the straightforward case of ownership of shares in a corporation. It is impossible to identify all of the kinds of association which might be thought to reveal a serious possibility of being potentially disqualifying. As we have said earlier, the application of the apprehension of bias principle requires identification of what it is said might lead a judge to decide a case other than on its legal and factual merits, and the articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits."

141. It should also be observed that in *Bula v Tara (No.6)*, McGuinness J. dealt with the contention that Barrington J. ought to have disclosed his prior dealings with the State parties in respect of the ore body in issue. She rejected this argument, quoting with approval the following observation in *Dovade Pty Ltd v Westpac Banking Group* [1999] N.S.W.C.A. 113 to similar effect:-

"*Statements are to be found in judgments and writings to the effect that it would be good practice for judges who may be concerned that some matter or association could possibly give rise to an apprehension of bias*

ought in those circumstances to disclose the matter or association. Obviously this may be prudent. And, like judicial courtesy, it may serve the interests of justice in that it removes unnecessary obstacles and difficulties. However, it is a different matter to elevate a cautious or even good practice into a legal principle that the failure to disclose in such circumstances is itself a ground for setting aside a judgment. The party that succeeded in litigation has interests too".

142. I agree. Disclosure may be commendable and may serve in some cases to enhance confidence, allay suspicion, or lead to a waiver, but lack of disclosure cannot *in itself* be a separate ground for setting aside a judgment where the matter which is not mentioned or disclosed does not itself give rise to objective bias. If there was a separate test of disclosure of non-disqualifying matters, it would significantly enlarge the grounds for disqualification and the consequent setting aside of judgments and would lead to the illogicality that an association or fact which in itself did not directly disqualify, would do so indirectly on the basis of non-disclosure of the non-disqualifying factor.

143. Disclosure *may be* relevant as a factor in the overall test of objective bias. It may allay suspicion on the one hand where otherwise an objective bystander might be led to a conclusion of unobjective bias, and conversely, non-disclosure relating to a fact may itself be a matter that tips the balance towards a finding of objective bias. This was said by Denham J. in *Bula* at p.460: "*If links are established subsequently the lack of knowledge or disclosure may be one of the factors, the weight of which will depend on the circumstances, leading to a reasonable apprehension of bias.*" However, as was observed in *Ebner*, seeking

to address this matter as a separate and self-standing ground of disqualification or invalidity is incorrect, and distracts attention from the fundamental question which is whether the reasonable apprehension of bias test is established. Fennelly J. made the same point in the Supreme Court judgment in *O'Ceallaigh* at paragraph 57:

> *"There are, in any event, several difficulties with the argument, including an element of circularity. Whether a complaint of objective bias is present depends on the application of the 'reasonable observer' test. It does not depend on whether the particular association has or has not been disclosed. If a matter does not amount to objective bias, it does not become so by reason of not having been disclosed. No authority has been produced in support of the argument that failure to disclose a matter, which otherwise does not amount to a ground of objective bias, can amount to evidence of such bias".*

144. In this case, the fact of the relationship, together with the fact that it was not mentioned by the judge, does not satisfy the test of objective bias. There is nothing to suggest that the relationship between the judge and his son in this case, where his son had no involvement in the case, was one which might give rise to a plausible challenge on the grounds of objective bias. Indeed, as we have seen, both the case law and practice in Ireland was not only to a contrary effect but went further and suggested that historically such a relationship between parent and child would not disqualify even in the case of a judge and the advocate presenting the case in court. Accordingly, the fact that the judge did

not mention the relationship does not, give rise to a reasonable apprehension of bias or amount to a basis for setting aside his decision.

145. It is also noteworthy, in this regard, that this is the precise conclusion come to by the Court of Appeal in Alberta, in *Lay v Lay*, already discussed. Wakeling J.A. took the view that a judge should disclose on record to the parties information that *might* cause a reasonable bystander to conclude that the judge may not be impartial but concluded that in the instant case, the case management judge was not obliged to disclose to the parties the fact that the respondents law firm had recently employed the judge's daughter in circumstances where she did not appear before him as an advocate, and had no involvement in the file. At paragraph 93, Wakeling J.A. stated that if a judge concludes that disclosure is not obligatory, he or she should not do so, citing *Taylor v Lawrence* [2002] EWCA Civ 90 [2002] 2 All E.R. 353, 370 ("*Judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair minded and informed observer as raising a possibility of bias*"), and observed, correctly in my view, that unwarranted disclosure can be harmful. It might also be noted that this is also the approach taken by Goepel J. in *Makowsky v Doe* - because he, correctly, did not consider the connection one which might disqualify, he did not disclose it. That did not give rise to a separate ground of challenge.

146. A final consideration in this regard, is that the Judicial Conduct Guidelines adopted under the Judicial Council Act do not contain any general guidance on disclosure, still less a particular obligation in the circumstances of this case or

comparable circumstances. The closest to any such suggestion is in the Commentary to the Bangalore Principles which state, at page 69:-

> "***When a judge should make disclosure***
>
> *80. A judge should make disclosure on the record and invite submissions from the parties in two situations. First, if the judge has any doubt about whether there are arguable grounds for disqualification. Second, if an unexpected issue arises shortly before or during a proceeding."*

Thus, it is in the first place a matter for the judge in question. It is instructive the Guidelines do not themselves contain any guidance on disclosure even as a matter of propriety. As such, it is not possible to conclude that the judge in this case was obliged to make such disclosure, whether as a matter of propriety or law, and still less, that the fact that he did not do so, should be a separate and self-standing ground of disqualification and the setting aside of a judgment in favour of an innocent party.

147. In some cases where the fact is discrete and plainly identifiable, disclosure may have beneficial consequences as already discussed, but disclosure is not a panacea. As Gleeson C.J. observed in *Ebner* however, it can be extremely difficult to know what associations might usefully be disclosed, and furthermore, the extent of disclosure necessary. It is certainly likely that if some disclosure is made, it may subsequently be contended that more detailed or extensive disclosure ought to have been made and once again, that, the failure to do so is, in itself, a sufficient ground to set aside the judgment.

148. There is a real risk of hindsight bias in this regard. The question of whether a matter should have been disclosed cannot properly be addressed in isolation. Any disclosure must be made in advance and tested by everything known at the time. If the consequence is to be the nullification or the invalidity of any judgment or decision made, a judge should know precisely what his or her obligation is. By the same token, the successful party should not be at risk of the setting aside of a judgment, perhaps properly obtained, on grounds that are ill-defined and difficult to apply in advance. This case provides an illustration. If it is to be said that the judge ought to have been aware of, and then disclosed, the tenuous connection of his son to the issues in controversy, ought he also to have disclosed the fact that he was a graduate of the defendant, as the Appellant also contended? If so, would that disclosure have been sufficient, or would it have been said to have been inadequate by reference to some one or more of the additional matters subsequently relied on in this case, and if so, would that be a separate and distinct ground for the invalidity of the judgment, notwithstanding the fact that none of these matters on their own or cumulatively have been considered sufficient to raise an arguable case of objective bias?

European Convention on Human Rights

149. The Appellant also argued that the fact that the relationship between the Judge and his son had not been mentioned was itself a breach of the European Convention on Human Rights, relying in this regard on paragraph 64 of the decision in *Nicholas* set out above.

150. The European Convention on Human Rights is an international convention to which Ireland is a contracting party. As such, it operates at the level of

international law: Ireland has agreed to guarantee to persons within its jurisdiction the rights guaranteed by the Convention and accepts in that regard the jurisdiction of the European Court of Human Rights ("ECtHR"). Ireland is a dualist jurisdiction and so the Convention is part of Irish law through domestic legislation in the shape of the European Convention on Human Rights Act, 2003 ("2003 Act"). The 2003 Act requires public bodies to act in such a way as to ensure Ireland is not in breach of its obligations under the Convention. Courts are obliged to interpret the law where possible to ensure compliance and have power to declare legislation incompatible with the Convention and Ireland's obligations, and to award damages. This structure, which retains and respects the international character of the Convention, means that it is always necessary to understand exactly how the Convention is being invoked in any particular case. Here, it would appear that the Appellant relies on s. 2 of the 2003 Act which provides that in interpreting or applying a statutory provision or a rule of law, the Court shall, so far as possible, and subject to the rules in relation to interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. In doing so, the Act also requires the Court to take judicial notice of the jurisprudence of the European Court of Human Rights.

151. The relationship of the national courts to the ECtHR is not a hierarchical one in which decisions are immediately binding: instead, it is a relationship of respectful dialogue in ensuring the proper application of the Convention and the guaranteeing to persons within the jurisdiction of each contracting State of the rights guaranteed under the Convention. In fact, as already seen, the analysis in

the jurisprudence of the ECtHR in the context of the 2003 Act provides a helpful framework of analysis in the resolution of this case.

152. The facts of *Nicholas* have already been set out but may be recalled for this aspect of the case. It will be recollected that two separate claims were made: first, a claim of bias in respect of the relationship between the judge and the advocate by reason of the marriage between their children and a second relating to the employment in the advocate's firm of the judge's daughter and her husband. In respect of the first issue, the court considered (para. 60) that the tie between the judge and the advocate was itself sufficient to objectively justify the applicant's fears, observing moreover that the practice in Cyprus had been amended to stipulate that a relationship of such a nature would be a ground for withdrawal of a judge from the hearing of the case.

153. The decision in relation to the second issue was more nuanced. The Court did not find that the relationship itself gave rise to objective fears sufficient to require disqualification. However, at paragraph 64 of the judgment the Court had regard to the non-disclosure of the relationship during the trial. It said, "*given the importance of appearances, however, when such a situation (which can give rise to a suggestion or appearance of bias) arises, that situation should be disclosed at the outset of the proceedings, and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality"*. At paragraph 65, the Court went on to consider the information that was available,

observing that since there had been no disclosure, the applicant did not know whether the judge's daughter and son-in-law had "*actually been involved in the case*" and whether they had a financial interest connected to its outcome, and concluded that an appearance of partiality was thus created. Accordingly, the applicant's claim on this ground succeeded as well.

154. The Appellant, understandably, relied on the statement at paragraph 64 that disclosure should be made at the outset, and that it is an important procedural safeguard. However, *Nicholas* cannot be considered to be an authority for the proposition that a non-disclosure of any relationship is itself a ground of disqualification even if the relationship would itself not disqualify. On the contrary, the Court had regard to all the facts involved before coming to its conclusion. In particular, it considered that the fact that there had not been disclosure meant that the applicant did not know whether the judge's son or daughter had been involved in the case, or whether they had a financial interest in the outcome, and therefore there was an appearance of partiality.

155. I consider that this decision is consistent with the common law authority outlined above. In *Nicholas,* non-disclosure is treated in a functional way: the lack of information led to a justifiable doubt about the nature of the relationship between the judge and his daughter and son-in-law, and the case.

156. However, that conclusion cannot be translated to this case. I have already held that the mere fact of the relationship in this context cannot have given rise to an objectively justified or reasonable apprehension of a lack of impartiality, and that as a matter of Irish law and practice, while there are rules to withdrawal and recusal, there is no obligation to disclose a relationship such as this.

Furthermore, the fact that it was not disclosed did not give rise to any of the doubts which arose in *Nicholas*. Instead, all the facts in this case were the subject of scrutiny and challenge by the Appellant. This Court is accordingly in a position to know with certainty whether the judge's son was involved in any way in the case (he was not) and whether he had a financial interest in its outcome (he did not). There was an abundance of detail about the organisation of the firm, the position of the judge's son in it, his lack of connection to the case or anybody involved in the case. In those circumstances there could not be any reasonable doubt or suspicion, and accordingly, it follows that there could be no justification for recusal or disqualification.

157. In *Koulias v Cyprus* Application No. 48781/12, 26 August 2020 ("*Koulias*"), the ECtHR had to consider a complaint arising out of a case in 2012. There the applicant discovered after a hearing that a new lawyer appointed to represent his opponent was the founding partner of the firm for which the son of the presiding judge on the Supreme Court bench worked. The ECtHR referred to the subsequent amendments to the practice direction of the Supreme Court of Cyprus[30] which, if they had been applicable at the time, would have required the withdrawal of the judge in question. The Court (paras. 61-64) followed the analysis and language in *Nicholas* and held that a relationship with consanguinity could give rise to misgivings, but whether they would be objectively justified would very much depend on the circumstances of the specific case and the factors identified in *Nicholas* i.e. whether the judge's relative was involved in the case in question, the position of the judge's relative

[30] As set out at paragraph 68, the 2019 version of the rule precluded a judge from sitting on a case where they had a family relationship to a lawyer working "under the same professional roof" as the lawyer at hearing in the case.

in the firm, the size of the firm, its internal organisational structure and the financial importance of the case for the law firm and any possible financial interest or potential benefit. Again, it was held that the relationship should have been disclosed at the outset of the proceedings, and quoting *Nicholas,* that this was an important procedural safeguard which is necessary to provide adequate guarantees in respect of both subjective and objective impartiality. Non-disclosure led to a lack of knowledge of the extent of involvement, if any. That the applicants did not know whether the judge's son had actually been involved in the case, or whether he had a financial interest connected to the outcome, meant that an appearance of partiality was created. It is apparent that the decision in *Koulias* is an application of the decision in *Nicholas* and does not advance the jurisprudence. The case does illustrate the fact that, as in *Nicholas,* the issue is to be addressed on the particular facts of each case.

158. As repeatedly stated in the jurisprudence of the ECtHR on Article 6, the fundamental test is the fairness of the hearing in all the circumstances of the case. This is an assessment which must be made in the particular factual and legal circumstances of each case. Accordingly, I do not consider that the language of *Nicholas* (para. 64) should be taken to mean that the jurisprudence of the ECtHR requires that there is a separate and self-standing test of disclosure of a family relationship which, if not complied with, requires that a judgment made must be quashed, even where the relative has no involvement in the case. Indeed, if the case law was to be interpreted in this way, it would raise a significant question as to the interpretation of the Convention by the Court and its relationship with the Contracting States. The European Court of Human Rights would have regard to the manner in which the case is assessed at national

level. Furthermore, where it is invited to establish a new principle, it often has regard to the consensus among contracting States. It has not been suggested in this case that there is any such consensus, and as set out above, the case law already discussed does not support such an approach. In my view the decisions in *Nicholas* and *Koulias* do not require the Irish Courts to interpret the law relating to bias in such a way as to hold that a failure to make disclosure of a family relationship such as that involved in this case can, in and of itself, give rise to a disqualification of the judge concerned.

159. Instead, I consider that the correct approach under the Convention is to consider the entire matter and consider whether any disclosure or non-disclosure together with any other factor such as the nature of the relationship involved and/or connection to the case, gives rise to a reasonable apprehension of a lack of impartiality. That involves an assessment of all of the facts of the case. In this case, the facts have been investigated in detail and in a manner which has no precedent in the Irish case law. The result of that exercise is to demonstrate beyond doubt that the relationship between the judge's son and the case being heard by the judge is as remote and tangential as is possible, and extends no further than the fact that he is an employee in a firm, a separate department of which firm is representing the respondent. It is apparent from the case law of the ECtHR, consistent with that of the common law jurisdictions surveyed in this case, that if this is the extent of the connection between the judge and the lawyers appearing before him, that is not sufficient to give rise to any obligation of recusal and does not invalidate any decision taken by the judge.

160. The Court was also referred to the decision of *Ramljak v Croatia* Application No. 5856/13, 13 November 2017 ("*Ramljak*"). In that case, a party was represented by the principals in a firm where the son of a judge was employed as a legal trainee. His employment was temporary and subject to possible extension in respect of which he depended on his two superiors who were the two principal lawyers in the office and who represented one of the parties in the case. At paragraph 37 the court concluded that the judge's son "*must have had close working ties with [the law firm's] only two principal lawyers, both of whom represented the applicant's opponent*". It also observed that the power of attorney given by the plaintiff to the law office automatically included him. In the particular circumstances, the Court held that the applicant's fears were objectively justified. This case turned on the degree of involvement of the judge's son in the small firm representing a party before the lawyer's father and found that there were close working ties. The court observed that "*automatic disqualification of all judges at national level who have blood ties with the employees of legal offices representing the parties in given proceedings is not always called for*" (para. 29). The facts of the present case fall into that category rather than the situation in *Ramljak* where there were close working ties between the judge's son and the lawyers actually representing the party.

161. Finally, the Court was referred to the case of *Svilengaćanin and Ors v Serbia* Application No. 50104/10, 12 January 2021. That case concerned meetings between the Supreme Court and one of the parties to the proceedings, a government ministry, to discuss the procedural matters relating to a large series of cases concerning the calculation of military salaries and pensions which were overburdening the court and military systems. The court observed, at paragraph

61, that "*It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality*" and, at paragraph 63, that "*The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor*". At paragraph 66 the Court stated that "*the decisive factor is whether there are ascertainable facts which may raise doubts as to the court's impartiality from the point of view of an external observer*" and concluded that in this case the facts were not such as to cast doubt on the objective impartiality of the Supreme Court in ruling on the applicants' appeals. Here there are rules regulating recusal, an appellate process, and no ascertainable facts which raised doubts as to the court's impartiality from the point of view of the long-suffering external objective observer.

Conclusion

162. It is possible to set out the general principles applicable to judicial disqualification as follows (cross referred to the paragraphs of the judgment):

(i) Judicial Conduct Guidelines do not determine the test for disqualification as a matter of law, but are relevant in the assessment of a reasonable and informed observer (para. 55);

(ii) Other than a case in which a judge is or is deemed to be a party (and even then the rule of necessity might require a judge to sit, e.g. when the Judicial Council, of which every judge is required by statute to be a member, is a party), there is no absolute rule of disqualification of a judge from hearing any case, and there are not separate categories of cases to which different principles apply (para. 56);

(iii) The same test is applicable in every case: whether a reasonable observer would have a reasonable apprehension of bias (para. 71);

(iv) There are three components to this test which must be assessed together (para. 105):

(a) the reasonable and informed observer;

(b) who has a reasonable apprehension;

(c) of bias.

(v) The reasonable observer imports an objective standard (paras. 2-4);

(vi) The apprehension necessary is akin to the standard of reasonable doubt: and must be reasoned and cogent (para. 102-104);

(vii) Objective bias is best understood as a reasonable apprehension that the case will not receive a fair and impartial hearing (paras. 105-106);

(viii) The assessment of an apprehension of bias must give full weight to the declaration made by a judge under Article 34.6.1° and that such impartiality is central to the role which a judge accepts and holds themselves to (paras. 107-108);

(ix) It is necessary to show a rational, cogent and logical connection between a factor identified and the apprehension that the case will not receive a fair and impartial hearing (para. 113);

(x) While the standard is one of reasonable apprehension, and is, and is intended to be, less than proof on the balance of probabilities, the matter

apprehended is by definition both unusual and exceptional. Therefore, the test is a strict one, which must be rigorously applied, and is not easily satisfied. Too low a standard will damage, rather than promote, public confidence (para. 111);

(xi) Disclosure, or non-disclosure, is not itself a separate test: it may be a component in the overall analysis of the test of whether a reasonable observer would have reasonable apprehension that the case will not receive a fair and impartial hearing (paras. 139-148, 155).

In the specific context of the case of a connection between a judge and a lawyer, the forgoing principles may be applied as follows:

(xii) There is no absolute rule that a judge is disqualified from hearing a case in which a relative, even a close relative, is connected to a firm, which represents a party (para. 85);

(xiii) A judge is disqualified from hearing a case in which a close relative actually represents a party whether as a solicitor or barrister in respect of the case. This is consistent with the provisions of the Judicial Conduct Guidelines (paras. 99-100);

(xiv) Close relative for these purposes is as defined in the Judicial Conduct Guidelines and Bangalore Principles to include “spouse, civil partner, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge’s household”. “Judge’s spouse” includes a domestic partner

of the judge or any other person of either sex in a close personal relationship with the judge. (paras. 129-130);

(xv) Where a close relative of a judge is employed in a firm acting for a party, the question of disqualification may depend upon the particular facts of the case, the involvement of the relative, whether they have a direct and significant financial interest in the outcome (which in the context of practice of law in Ireland would be unusual), the degree of involvement with the lawyers actually engaged in the case, and the size of the firm (paras. 64, 73-74, 156);

(xvi) In the situation where a close relative of a judge is employed in a large firm, organised in separate departments, and where that firm represents a party, but the close relative has no involvement with the case and no financial interest in its outcome, a judge is not disqualified from hearing such a case. This too is consistent with the Judicial Conduct Guidelines (paras. 87, 131);

(xvii) Disclosure of such a relationship in such circumstances is not required, and non-disclosure does not mean that a judge is disqualified from hearing the case (paras. 144, 156);

(xviii) Where this or any similar issue arises, or a judge is in doubt as to whether they should recuse themselves – or where the issue is subsequently raised after the fact, or by way of appeal – a judge may provide a short account or statement in relation to the matter, and the judge's knowledge of it. This is not an issue *inter partes* in the litigation, an evidential hearing is not appropriate, and a judge cannot be required to give

> evidence. The statement, and any assessment of it, becomes a matter to be considered by that court or any appellate or reviewing court in determining the question of whether a judge ought to recuse themselves, or was disqualified from hearing a case (para. 47).

163. These principles may be applied to this case. Here, it has been established beyond any doubt, and beyond any standard required by the law, that the judge's son in this case had no involvement in or connection to the case, or interest financial or otherwise in its outcome. Accordingly, the judge was not disqualified from hearing the case, and the appeal must be dismissed.