THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023/305
High Court Record Number: 2022/535JR
Neutral Citation Number [2024] IECA 105

Birmingham P.

Costello J.

Noonan J.

BETWEEN/

AMMI BURKE

APPELLANT

-AND-

AN ADJUDICATION OFFICER
AND THE WORKPLACE RELATIONS COMMISSION

RESPONDENTS

-AND-

ARTHUR COX LLP

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 30th day of April, 2024

1. The within appeal is brought by the appellant from three separate judgments of the High Court (Bolger J.) given in judicial review proceedings against the respondents. The

High Court ultimately dismissed the appellant's claim in, to say the least, unusual circumstances.

2. Before dealing with the substantive appeals herein, it is necessary to say something about the manner in which the oral hearing of this appeal proceeded. At the commencement of the hearing, the Court raised an issue with the parties concerning whether certain evidence on affidavit that post-dated the hearing in the High Court should be admitted before this Court. Counsel for the second respondent made brief submissions in support of his application to have the evidence admitted. Thereafter, the appellant, who represented herself, was invited by the Court to respond to counsel's submissions on this issue.

3. Instead, the appellant indicated that she had an application to the Court to have the President recuse himself from hearing the appeal. This was grounded on an affidavit of the appellant which was then made available to the Court and the parties. No prior notice of this application was given to the Court or the other parties, despite the fact that the composition of the Court was published some four weeks in advance of the hearing. There were two subsequent sittings of the Directions Judge at which this application could have been moved or at least notice of it given. When the appellant was asked why she had delayed until the morning of the appeal to make the application, she responded that she had been reflecting on the matter for some time and that the composition of the court was published during school holidays.

4. The Court accordingly indicated that it would rise to read and consider the relevant affidavit before ruling on the matter. Having done so, the Court resumed the hearing and refused the appellant's recusal application for the reasons explained in court. The appellant was then invited to proceed with her appeal. She however declined to do so and commenced reagitating the recusal application which had just been decided by the Court. She was

repeatedly warned that if she declined to proceed with her appeal, the Court would have no option but to rise and deal with the appeal on the papers. In order to give the appellant an opportunity to reflect on this, the Court again rose for a short period. When the Court resumed, the appellant again declined to proceed with her appeal and once more, attempted to reagitate her recusal application, already decided. On the basis that the appellant therefore refused to accept the ruling of the Court on the recusal application and declined to proceed with her appeal, the Court concluded the oral hearing and rose.

5. This judgment is accordingly written on the basis of the books of appeal before this Court.

Background

6. The appellant was employed by the notice party as a solicitor and was dismissed from her employment. Arising out of that dismissal, she brought proceedings before an adjudication officer of the second respondent claiming unfair dismissal. The first hearing of the appellant's application was in effect abandoned as a result of the judgment of the Supreme Court in *Zalewski* v *Adjudication Officer & Ors* [2021] IESC 24 and a subsequent hearing was convened before a different adjudication officer. That hearing ran for several days until, on the final day, as a result of persistent and continuous interruption by the appellant and her mother who attended at the hearing, the adjudication officer found it impossible to continue the hearing and he ultimately dismissed the application as a result.

7. In consequence of that dismissal, the appellant brought the within judicial review proceedings. The appellant's *ex parte* application for leave to seek judicial review was coincidentally heard by Bolger J. who granted leave on all grounds. Although it is unnecessary to describe in detail the grounds, in essence the appellant sought to have the decision of the adjudication officer quashed on the ground that he had approached the

hearing on the basis that it was an adversarial rather than inquisitorial process, which the appellant claimed was incorrect as a matter of law, and that he had failed to summon certain witnesses that the appellant had sought to have summoned or to direct the production of certain emails sought by the appellant. The appellant further claimed that the adjudication officer had no jurisdiction to dismiss the claim in the manner in which he had done so. The judicial review proceedings came on for hearing before Bolger J. on the 2nd May, 2023, the matter having been listed for three days. The applicant represented herself and the second respondent and notice party were represented by counsel and solicitors.

8. On the first day of the hearing, the 2nd May, 2023, the appellant made an application to the trial judge to recuse herself from hearing the case. The application took a full day. The judge considered the matter overnight and delivered a detailed written judgment with commendable speed the next morning, the 3rd May, 2023 in which she refused the application ("the recusal judgment"). What followed is described in detail in the subsequent judgment of the High Court dismissing the proceedings ("the substantive judgment") which was delivered on the 26th June, 2023, following the dismissal of the claim on the 4th May, 2023.

9. As appears from the substantive judgment, after the court refused the recusal application, the judge attempted to commence hearing the application for judicial review, but the appellant proceeded to challenge the recusal judgment and reagitate the same points repeatedly. Although the hearing eventually got underway, the appellant began to embark on a course of conduct best described as confrontational. When the judge sought to ask any question of the appellant, even as innocuous as what she was reading from, the appellant objected to this as an *"interruption"*.

10. The appellant proceeded to make serious allegations against the other parties which the judge found to be inappropriate, particularly in circumstances where the appellant, although a litigant in person, was a qualified solicitor and officer of the court. As noted by the judge, the appellant repeatedly spoke over the judge leading to her having to rise on a number of occasions but there was, as described by the judge, a pattern of refusing to accept the court's decisions and rulings throughout the hearing.

11. On the third day of the hearing, the 4th May, 2023, shortly before lunch, counsel for the second respondent made reference in the course of her submissions to the judgment of the Supreme Court in *Walsh v Minister for Justice Equality and Law Reform* [2019] IESC 15, [2020] 1 I.R. 488. A copy of this judgment was not contained in the agreed book of authorities, because of a High Court practice direction limiting the number of authorities in books of authorities, although extracts from it were cited in the decision of the first respondent and in the submissions of the second respondent and notice parties.

12. When the proceedings resumed after lunch, the appellant sought to move an application under the slip rule and the judge inquired if it was being made on consent. When the appellant confirmed that it was not, the judge indicated that the appellant would have to bring the application by way of motion grounded on affidavit. The appellant would not accept this ruling and continued to attempt to loudly move her application to the extent that the judge was compelled to ask counsel to speak over the appellant. Counsel continued with her submissions referring again to the *Walsh* judgment.

13. As the appellant had complained that she did not have access to a printer, the judge over the luncheon adjournment arranged to have copies printed off and distributed to the parties on the resumption after lunch, having expressed the view that she considered the case to be important and wished the appellant to have a full copy available to her. The appellant

immediately took objection to this course of action, apparently on the basis that she formed the view that the judge was somehow attempting to favour the other parties by producing a judgment not contained in the book of agreed authorities which the appellant considered was unfavourable to her.

14. From that point on, the hearing, as with the earlier hearing before the adjudication officer, descended into chaos. The appellant began shouting her repeated objections over the other parties and the judge. The judge repeatedly rose to give the appellant an opportunity to regain her composure, but at each attempt to resume the hearing, the appellant continued to loudly object and made clear that she did not accept the legitimacy of the court's actions. This ultimately led to an application by counsel for the second respondent and the notice party to dismiss the claim on the grounds of abuse of process. After several warnings had been given to the appellant that she risked having her claim dismissed if she did not desist, the judge acceded to that application and indicated that she would give her reasons subsequently, which she did in the substantive judgment.

15. On the 21st July, 2023, the High Court convened a hearing on costs. On that date, it emerged that a copy of the stenographer's transcript of the earlier hearing, obtained at the behest of the respondent and the notice party, had been made available to the trial judge and the other parties, but not the appellant. It would appear that the transcript had been sent by the stenography service to the judge without any specific instruction in that regard. According to the notice party, it was not made available to the appellant because following an earlier exchange, she declined to share the cost of the transcript. As a result, the judge adjourned the hearing to the 11th October, 2023 with a direction that the transcripts be furnished to the appellant.

16. This in turn became contentious on the resumed hearing on the 11th October as the appellant objected to the fact that the transcripts had been furnished to the court without her knowledge or consent. During the course of the costs hearing, an application was made by the second respondent and the notice party for orders for costs in their favour on a legal practitioner and client basis pursuant to O. 99, r. 10(3) of the RSC. In a written judgment subsequently delivered on the 16th October, 2023, the judge acceded to that application.

The recusal appeal

17. In the recusal judgment, the judge identified four grounds upon which the appellant relied in support of her claim that there was a reasonable apprehension of bias (objective bias) on the part of the judge:

(i) An academic article written by a judge when a practicing barrister, in which she expressed views that the appellant considered disclosed pre-judgment of one of the issues raised by in the proceedings by the appellant;

(ii) An alleged *"close relationship"* with senior counsel for the notice party when both the judge and counsel had been founding members of a specialist Bar Association;

(iii) Views expressed by the judge at the leave stage that the case was not of public interest; and

(iv) That the judge was named as a potential mediator by the notice party in August 2020 in the dispute with the appellant.

18. The judge first considered the test for objective bias and referred to a number of well-known authorities as well as the relevant Judicial Council Guidelines incorporating the Bangalore principles of judicial conduct.

19. The judge then turned to a consideration of each of the individual grounds of objection in the following manner:

(i) Prior to her appointment to the High Court in 2022, the judge was one of the leading employment law practitioners at the Irish Bar. In 2015, she wrote an article expressing concern about aspects of the then proposed Workplace Relations Commission Bill and in particular the fact that it did not allow for cross-examination of witnesses on oath. The judge described the proceedings as essentially adversarial in nature. As the appellant claims as one of her grounds in these judicial review proceedings that the first respondent was wrong to characterise the proceedings as adversarial when they are in fact inquisitorial, she concludes from this that the judge had predetermined the issue and in that regard relies on the judgment of the Court of Appeal of England and Wales in *Locabail (UK) Limited v Bayfield Properties Limited* [2000] Q.B. 451. The judge noted that her views on cross-examination were subsequently vindicated by the judgment of the Supreme Court in *Zalewski*. The judge concluded that the *Locabail* decision did not support the claim of the appellant and there was no basis for the suggestion that a reasonable person with knowledge of all the relevant facts would entertain an apprehension of bias by virtue of the judge having predetermined one of the issues in the case.

(ii) As noted by the judge, the appellant alleged that she had a close relationship with counsel for the notice party based on the fact that the judge, when a barrister, and counsel for the notice party were founding members of the Employment Bar Association and shared the platform as speakers at the Association's annual conferences. The judge also chaired one of the Association's conferences in 2022 in her judicial capacity. In commenting on this ground of objection, the judge noted the Judicial Council Guidelines and the judgment of the Supreme Court in *O'Driscoll v Hurley and HSE* [2016] IESC 32, which suggest that participation in legal conferences by judges is not merely acceptable, but to be positively encouraged. The judge accordingly considered that her involvement in the Association both as barrister and judge was a normal part of each occupation. She also derived support for this view from the judgment of the Court of Appeal in *O'Doherty and Waters v The Minister for Health and Ors.* [2021] IECA 59.

(iii) During the course of the leave application heard by the trial judge, the appellant applied to amend her statement of grounds to seek declaratory relief equating to what the judge considered was a request for an advisory opinion and, although the judge granted leave on all original grounds, she refused the amendment application in the course of which she observed that the case was not a public interest case. The judge noted that while she refused this application, and this in itself was not a ground for recusal in accordance with well settled authority, she did point out to the applicant that she remained entitled to explore the interpretation of the legislation in support of her other grounds of claim. Of note in the context of this appeal, the appellant contended that where the judge makes a statement that the appellant

considered to be wrong, or *"a false statement"*, as she described it, the appellant remained entitled to challenge that decision continuously throughout the course of the proceedings. This in the judge's view demonstrated an extraordinary lack of understanding of court procedure and the status of a court decision by the appellant, herself a solicitor, which the judge considered would not be shared by a reasonable objective bystander informed of the relevant facts.

(iv) It emerged during the course of the appellant's submissions to the High Court that the notice party had nominated the judge as one of three potential mediators to mediate the dispute between the appellant and the notice party. The appellant appears to have assumed that this fact alone meant that there must have been a prior conversation between the judge, then a barrister, and the notice party which resulted in her nomination as a potential mediator. The judge confirmed that this was not the case and had the appellant taken the trouble to enquire from the notice party, this could have been confirmed. She was of the view that it was unacceptable for the appellant to make this allegation without first verifying that it was correct.

Accordingly on the basis of each of these objections, the judge was satisfied that the appellant did not establish any ground upon which she should recuse herself from the hearing.

20. In her notice of appeal herein, there are nine grounds in total, one only of which relates to the recusal judgment, and it is to the effect that the judge erred in failing to recuse herself and in failing to include her *"specific previously expressed statement as issue on the subject matter of these proceedings"* in her judgment. What this statement is remains unexplained

by the appellant and this ground of appeal does not appear to engage in any way with the judgment itself or how it is alleged to be erroneous. In her written submissions, the appellant suggests that the statement at issue is that contained in the 2015 article. She further reagitates the complaint about the judge not accepting that hers is a public interest claim. As regards the other two original grounds of complaint, namely the alleged *"close relationship"* with counsel for the notice party and the inclusion of the judge's name as a mediator, these are not referred to in the appellant's written submissions.

Objective bias

21. There is no real dispute between the parties as to the legal principles to be applied. The test was clearly expressed by Denham J. (as she then was) in *Bula Limited v Tara Mines (No. 6)* [2000] 4 I.R. 412:

> *"The test to be applied is whether a reasonable person, who had knowledge of all the relevant circumstances, would have a reasonable apprehension of bias. It is an objective test."*

22. It is well settled that the reasonable person concerned would have regard to the fact that a judge is bound by the constitutional declaration contained in Art. 34.6.1 of the Constitution to which he or she is required to subscribe on assuming office. In *D.D. v Gibbons* [2006] 3 I.R. 17, the High Court (Quirke J.) observed (at para. 44):

> *"There is no reason why an objective, informed person should doubt the commitment of a judicial office holder to honour his or her oath of office and to perform judicial functions in a fair, independent and impartial manner."*

23. Judges cannot be overly sensitive to recusal applications as their first duty is to sit and hear cases. As Dunne J. observed, speaking for the Supreme Court in *O'Driscoll (a minor) v Hurley* [2016] IESC 32 (at pp. 8):

> *"After all, the first duty of the judges to sit and hear cases. The administration of justice would grind to a halt if judges regularly recused themselves by responding in an over scrupulous way to an invitation to recuse. It is important to bear in mind that the test involved is an objective test and that the onus of establishing the grounds for recusal rest upon the applicant."*

24. This is reflected in the 2022 Judicial Council Guidelines which state:

> *"2.6.1 It is the duty of a judge to sit and hear cases.*
>
> *2.6.2 A judge should recuse himself or herself if a reasonably 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. The reasonableness of such an apprehension must be assessed in the light of the Constitutional declaration made by judges on 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."*

25. In her judgment in *Bula*, Denham J. cited with approval a passage from the judgment of the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union* [1999] (4) SA 147 at para. 48:

> *"… 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 that they can disabuse their minds of any irrelevant personal beliefs or previous positions …"*

26. In the recusal judgment, the judge drew attention to nine factual matters that she considered a reasonable and objective observer would be deemed to be aware of and understand, one of which is the distinction between a barrister's comment in an academic journal versus the judicial function to make a decision based on the law and precedent. The appellant in this case places reliance on a view expressed by the judge in such a journal some eight years earlier when commenting upon proposed draft legislation. It would perhaps be surprising if after a lengthy period of time practicing law, lawyers who subsequently become judges might not at some time in the past have expressed opinions or views on matters of academic legal interest.

27. But whatever the judge's views may have been at some time in the past, every judge has a constitutional obligation to fairly and impartially consider the case before them in the light of the arguments advanced at that time. It must be remembered that the appellant's claim before the judge was not that the judge's view of the appellant's argument about the nature of the proceedings being inquisitorial would, or might be, coloured by the views expressed many years earlier, but rather that the judge had already decided the issue in advance. It seems to me that that proposition is entirely untenable and unsupported by any evidence. It merely goes to show, as the judge commented, that the appellant labours under

an entirely erroneous understanding of the function and duty of a judge appointed under the Constitution. The judge concluded that a reasonable objective and informed bystander would not share that misunderstanding and I agree entirely with her view.

28. On the issue of the judge's comment about the appellant's claim not being a public interest case, the context in which the comment was made must be remembered. The appellant had already been granted leave to seek judicial review on all of the grounds in her statement of grounds but she subsequently sought leave to amend her grounds to include a claim which, in the view of the judge, amounted to seeking an advisory opinion from the court in the sense of not being necessary to determine any of the issues raised. The appellant sought to justify seeking this relief on the basis that there was a public interest involved which elicited the comment from the judge now complained of.

29. It is often thought by litigants in person that in the course of debate with the parties, a judge may not express any comment which might suggest that he or she has a view of the matter before judgment is pronounced. That however is to fundamentally misunderstand the nature of the interactions that take place on a routine basis between judges and the parties before them. Judges often express tentative views about various aspects of cases or arguments advanced by parties which may concern them or require elucidation. This is not intended as an indication of pre-judgment but rather to assist the parties in relation to matters in respect of which the court may require further argument or persuasion. Indeed, it is a regular occurrence for judges to raise issues with parties which the parties themselves may not have either considered or directly addressed up to that point in time but which the judge considers are relevant. This is entirely appropriate and legitimate.

30. Parties are sometimes heard to complain of judges who say nothing during the course of a hearing or give no hint of what direction of thought they may be following as parties

may feel that this deprives them of the opportunity to directly confront an issue that may be troubling the judge. Interactions between the bench and lawyers and parties are therefore an essential component of the judicial process which litigants in person can sometimes misconstrue as some form of pre-judgment. In saying that however, it should not be forgotten that the appellant in this case, whilst a litigant in person, is a practicing solicitor.

31. As the authorities show, the onus is on the appellant to establish objective bias and I am satisfied that she has failed by a wide margin to demonstrate anything that might be so regarded or any error in the approach of the trial judge to this application.

The substantive appeal

32. It is not possible to define exhaustively the categories of abuse of process, nor, perhaps should a court attempt to do so. Some examples are:

(i) Bringing claims that are frivolous and vexatious and/or bound to fail;

(ii) Attempting to re-litigate issues determined in earlier proceedings;

(iii) Attempting to litigate issues that could have been, but were not, brought forward in earlier proceedings;

(iv) Pursuing litigation for an improper purpose, such as the oppression of a party;

(v) Conducting litigation in an improper manner;

(vi) Pursuing proceedings that can confer no benefit on the claimant;

(vii) Failing and refusing to comply with orders and directions of the court, particularly where this occurs on a repeated basis;

(viii) Refusing to accept decisions and rulings of the court by seeking to challenge and reopen matters, otherwise than in accordance with a lawful appeal or other legitimate manner of challenge;

(ix) Making serious allegations against parties without any proper basis for doing so;

(x) Moving the court *ex parte* without making full disclosure of material facts;

(xi) Conducting proceedings in a manner designed to prevent the court from performing its function of adjudicating fairly and impartially on the dispute;

(xii) Disrupting proceedings in court so as to prevent the court carrying on its business.

33. The right of access to the court is not absolute and brings with it certain obligations. Parties who are not prepared to assume those obligations may find themselves forfeiting that right of access. Those who participate in any rules based process must comply with the rules that exist to guarantee the fairness of the process. The court process is available to those who seek the resolution of genuine disputes. It is not available as a platform to enable parties to ventilate complaints or express views, opinions and beliefs beyond the immediate dispute and those who seek to do so abuse that process.

34. The integrity of the court process requires the court to guard and relieve against abuse where it occurs. The court's inherent jurisdiction entitles it to protect against abuse by making such order as the justice of the case requires. That includes, in rare and exceptional instances, a power to strike out and/or dismiss a claim - see for example *Tracey v Burton* [2016] IESC 16 and *W.L. Construction Limited v Chawke* [2016] IEHC 539.

35. In *Walsh v Minister for Justice* [2019] IESC 15, O'Donnell J. (as he then was), in a passage cited by the trial judge, observed (at [6]):

> *"…it is central to a court's capacity to administer justice that it should be capable of maintaining order. This in turn allows competing claims - sometimes highly charged, and always of importance to the participants - to be ventilated, fairly and dispassionately considered, and adjudicated upon. As was said long ago, of all the places where law and order must be maintained, the first place is in the courtrooms themselves. The administration of justice demands on parties that they trust this system and accept its outcomes. Parties are required to accept the decision of the court on the case itself and on intermediate issues, even when they strongly disagree."*

36. In a further passage relevant to the present appeal, O'Donnell J. said (at [7]):

> *"The disruption of proceedings, the refusal to accept court rulings, and an insistence on continuing to speak when a matter has been determined by the judge, should not be mischaracterised as speaking truth to power, or merely challenging authority. A judge siting in a crowded courtroom has little power other than respect for the law itself. The refusal to accept rulings and decisions, the constant interruption of court proceedings, and the making of offensive interjections and comments is at best rude and inconsiderate to all other court users who are obliged to accept the necessity for calm in court proceedings, but more often amounts to simple bullying. When carried out in a concerted manner, it is, and is often intended to be, menacing and intimidatory. These are serious concerns which should not be ignored or likely dismissed. Disruption of proceedings attacks the very essence of a fair hearing which it is the court's obligation to provide, and every litigant's right to obtain."*

37. I have carefully considered the transcript of these proceedings, in particular of the 4th May, 2023, and have had the opportunity of listening to the Digital Audio Recording for that sitting of the court. What occurred on that day in court may not be unique, but is certainly beyond my experience. The appellant's conduct can only be described as utterly appalling and egregious. For any litigant to behave in this way is absolutely unacceptable.

38. However, when one factors into the equation that this conduct did not occur in the heat of battle, as it were, but rather was part of a continuous and calculated pattern of behaviour, not just on this occasion before the High Court, but over many days before the respondents and again before this Court, it becomes all the more serious. One must add to this that the appellant, as a practicing solicitor, professes to take her duties as an officer of the court very seriously and yet repeatedly indulges in the most contemptuous conduct when before the court in a deliberate and premeditated manner.

39. The appellant's conduct here was calculated to preclude the other parties from vindicating their right to a fair hearing. By that conduct, the appellant sought to prevent the respondent and the notice party from making submissions and the judge from hearing them. This is the very antithesis of the due administration of justice and an affront to the rule of law. The appellant suggests, rather extraordinarily it must be said, that the court, in lieu of dismissing her claim, ought to have adjourned the matter and excluded her from the court, without the appellant ever once accepting that there was anything wrongful or untoward in her behaviour.

40. The appellant appears to assume that this would somehow have placed the court in a better position to resolve the dispute if it could exclude the appellant herself from the process, she having made it plain by her conduct that she was not going to participate in the proceedings in any way that might assist the court rather than obstruct it. The case was

approached at all times by the appellant on the basis that the court was obliged to find in her favour and should not be permitted to hear or entertain any argument from the other parties with which she did not agree. In other words, the appellant was never willing to participate in the court process, except on terms to be decided by her. This of course is not participation at all but a conscious and deliberate attempt to subvert the due administration of justice. A party acting in such a manner in my view forfeits their right to ask the court to pronounce on the issues they seek to agitate.

41. I agree entirely with the views expressed by the trial judge at para. 23 of the substantive judgment:

> *"23. The constitutionally protected rights of the respondent and the notice party to a fair hearing before this court gives rise to a duty on the part of all court users, including litigants, to respect those rights and not to interfere with them. In practical terms that means that court users must stay quiet during proceedings so that others can be heard, and they must accept decisions made during a hearing. Whether decisions are substantive or more minor, once a decision has been made it must be accepted and the hearing must be allowed to move on, subject to any challenge that may be legitimately made at that point in the proceedings. A decision may or may not be acceptable to a litigant and, even where it is not acceptable to them, and subject to their right to challenge the decision, they may (depending on the circumstances) have to wait until the hearing has been finalised before they can invoke any appeal or challenge allowed to them. Their options to challenge the decision do not include a right to challenge the decision maker after the decision has been made and/or to harangue the decision maker to revisit their decision."*

42. What appears to have provoked the appellant's outburst and subsequent conduct was something as innocent as the judge circulating the parties with hard copies of the *Walsh* judgment, repeatedly referred to in submissions, not just before the High Court, but at the hearing before the first respondent and cited *in extenso* in his decision. The judge clearly took this step in ease of the plaintiff, who claimed not to have access to a printer, because the judge considered, correctly in my view, that this decision was of central importance to the issues she had to decide and she wished the appellant to have available to her a full copy of the decision. For the appellant to characterise this innocuous and benign act by the judge as an attempt to enter the arena and favour the other parties is totally and utterly absurd.

43. Indeed, the appellant goes further in entering the realms of the unreal in submitting that the judge's suggestion, and it was no more than that, to counsel that, in order to try and placate the appellant, she would take back the case, was defied by counsel who thereby became in breach of the judge's order.

44. This appears to underpin the submission that the judge was wrong to dismiss the claim on the application of parties who were in defiance of her order. This, I am sorry to say, is pure nonsense. There was no order nor any defiance by counsel. It seems to me that the judge was at that stage coming to her wits' end in trying to maintain some semblance of order over the proceedings and considered fleetingly whether taking back the cases might pacify and appease the appellant. That was clearly a vain hope, as transpired.

45. It is true to say that the judge could have considered a range of options to control the abuse which was unfolding before her and that was a matter for her discretion, to be exercised in a proportionate manner. A judge must be afforded a wide margin of discretion to control his or her own court in the face of abusive conduct. The alternatives suggested by the appellant appear to me to be somewhat farfetched. There was absolutely no prospect

that an adjournment was going to achieve anything in the light of the persistent and continuing pattern of behaviour of the appellant to which I have already alluded. Nor can I see any basis upon which it could reasonably be said that the judge ought to have continued with the proceedings by excluding the appellant when she, as the claimant, had manifestly brought about the collapse of the claim herself. I cannot see how it can be said that the court had somehow a continuing obligation to determine the litigation on the merits in circumstances where the party bringing that litigation was actively pursuing the objective of preventing a fair hearing from taking place.

46. While the dismissal of a claim is, as I have said, undoubtedly a remedy of last resort, this appears to me to be precisely the type of rare and exceptional circumstance which justified the judge in exercising her undoubted discretion in the manner in which she did.

The costs appeal

47. The costs hearing took place on the 21st July, 2023. As mentioned previously, the notice party and second respondent had arranged for a stenographer to attend court throughout the proceedings and the transcript was shared by prior agreement. The appellant had previously declined to participate in the arrangement. As is commonly the case, the stenography service provided transcripts to the relevant parties but also to the court. This is regularly done as a matter of routine although, as in the present case, it had neither been specifically requested by the parties or the court.

48. When the hearing commenced, the judge became aware for the first time that the appellant had not had access to a copy of the transcript. Accordingly, the judge directed that it be furnished to the appellant and she adjourned the costs hearing to the 11th October, 2023 to allow that to take place and the appellant to consider the transcript. While all this was done self-evidently to assist the appellant, she chooses to characterise it as a breach of natural

and constitutional justice by the judge being provided with a copy of the transcript without the knowledge or consent of the appellant. This is, yet again, another preposterous and nonsensical proposition advanced by the appellant.

49. The court does not require the permission of a party to consult a transcript of the proceedings and is entitled to, and does in fact on a frequent basis, direct that a transcript be made available to the court even where it is not available to the parties. The judge is entitled to consult the Digital Audio Recording of proceedings at any stage, a facility not available to parties to litigation, and may do so by either listening to the recording or seeking a typed transcript. This may be done by the court for various reasons, including the review of evidence or submissions made in the course of a hearing that the judge may not have had the opportunity to note fully. For example, in the present case, it would have been a virtual impossibility for the judge to take a meaningful note of the proceedings while at the same time trying to maintain some semblance of control over the chaotic scenes in court brought about by the appellant's conduct.

50. However, even if it could plausibly be argued that there was some unfairness to the appellant as a result of her not having a copy of the transcript, that was remedied by the judge adjourning the case and directing it be made available to her. The proposition that this offends in some way the constitutional rights of the appellant is wholly unstatable. The appellant's submissions concerning equality of arms in this regard are *nihil ad rem*.

51. The second respondent and notice party applied to the judge for their costs on a legal practitioner and client basis. As pointed out by the judge in the costs judgment, O. 99, r. 10(3) provides for the making of such an order in an appropriate case. The appellant opposed the application on the basis that in instituting the proceedings, she had rendered a public

service and further, the conduct of opposing counsel should be taken into account in refusing the costs order sought.

52. The judge stated, correctly in my view, that the jurisdiction to award costs on a legal practitioner and client basis is an unusual one and is generally limited to circumstances where the court considers it necessary to indicate its disapproval of the conduct of the party against whom the order is sought. The judge referred to a number of authorities which support this proposition, and in fairness to the appellant, she does not appear to dispute these. In reaching her conclusion, the judge said that responsibility for the chaos that occurred in court on the 4th May, 2023 rested solely with the appellant and that conduct was an abuse of process, designed to collapse the hearing before opposing submissions could be heard in full.

53. The judge further indicated that she was not satisfied that the appellant had rendered a public service in instituting the proceedings or that the recusal application was a *bona fide* and responsible one. She noted the appellant's submission that the furnishing of transcripts to the court without her permission was a relevant matter to be considered in the allocation of costs but that no authority was advanced to support this contention.

54. The judge also noted that during the second costs hearing, the appellant repeatedly accused opposing counsel of lying and misleading the court, allegations devoid of any merit but which the appellant and members of her family present in court chose to loudly repeat after the judge had made a finding that these allegations were unfounded.

55. The judge was ultimately forced to terminate the costs hearing, again as a result of the behaviour of the appellant and members of her family and to decide the issue based on written submissions, as indeed this Court has been compelled to do. It again represents a consistent, deliberate and persistent course of conduct by the appellant that has been manifest from the outset of these proceedings.

56. The judge concluded that the court could and should mark its disapproval of how the appellant chose to conduct herself during the course of the proceedings and accordingly made the order for costs on a legal practitioner and client basis. She expressly excluded from that order the costs of the adjourned costs application on the 11th October, 2023 and any costs relating to the engagement of the stenographer or preparation of transcripts.

57. In her notice of appeal, the appellant re-agitates her complaint that the judge erred contrary to natural and constitutional justice in entering into a private arrangement with the notice party and the second respondent concerning the private stenographer's transcript. I have already dealt with this. She further complains that the judge made incorrect statements in her judgment without identifying what the statements are or how they are said to be incorrect and finally that the judge erred in awarding costs on a legal practitioner and client basis, without advancing any particular ground in that respect.

58. The appellant re-agitates these points in her written submissions quoting from various authorities concerning equality of arms. It is impossible to fathom what point is being made by the appellant in this regard in circumstances where the proceedings were expressly adjourned so that she could be provided with a copy of the transcript and further, the judge did not make any order against the appellant in relation to the costs of the subsequent adjourned hearing.

59. This Court has said on many occasions that discretionary costs orders made by the High Court will not lightly be interfered with save where it can be shown that the judge exercised his or her discretion in a manner that was outside the range of options reasonably available to the High Court, even if this Court might have reached a different conclusion if exercising its own discretion *de novo*. It is normally the case that the trial judge is much better placed than an appellate court to determine the appropriateness of a costs order and

that is particularly true of the present case where the conduct directly witnessed by the judge over a number of days led to the making of the order under appeal.

60. I am therefore satisfied that the appellant has advanced no basis upon which this Court would be justified in interfering with the discretion of the High Court on the question of costs.

Conclusion

61. For all the reasons I have explained, I would dismiss this appeal in its entirety. With regard to the costs of the appeal, my provisional view is that the second respondent and notice party, having been entirely successful, are entitled to their costs. If the appellant wishes to contend for an alternative order, she will have liberty to deliver written submissions not exceeding 1,000 words within 14 days of the date of this judgment and the second respondent and notice party will have the same period to respond likewise. In default of such submissions being received, an order in the terms proposed will be made.

62. As this judgment is delivered electronically, Birmingham P. and Costello J. have authorised me to record their agreement with it.