Neutral Citation No: [2021] NICA 8 *Judgment: approved by the Court for handing down (subject to editorial corrections and in draft until further direction)**	**Ref: McC11383** **ICOS No: 15/098217/02/A02** **Delivered: 28/01/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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SURESH DEMAN

Plaintiff/Appellant

-and-

SUNDAY NEWSPAPERS LIMITED, JOHN CASSIDY AND RICHARD SULLIVAN

Defendants/Respondents

_____

Before: McCloskey LJ and Maguire LJ

_____

Representation

Plaintiff: unrepresented, in person
Defendants: Mr Richard Coghlin QC (instructed by Carson McDowell Solicitors**)**

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] By Writ of Summons issued on 20 October 2015, accompanied by a Statement of Claim, the Plaintiff initiated proceedings against the Defendants claiming (*inter alia*) damages for alleged defamation arising out of an article published in The Sunday World ("*the newspaper*") on 25 November 2007 which described an alleged physical attack by the Plaintiff on a lawyer in the precincts of a tribunal courtroom in Belfast. In sequence, the next relevant document is one entitled "Certificate of No Defence", signed by the Plaintiff and dated 20 November 2015, purporting to certify that the Defendants had failed to enter an appearance and/or serve a defence within the period prescribed by the Rules of the Court of Judicature of Northern Ireland

("*the RCJ*"). On 08 December 2015, the Plaintiff entered judgment in default of defence. This was followed by a summons dated 22 January 2016 whereby the Plaintiff applied to have damages assessed.

[2] By notice of motion dated 01 March 2016, the Defendants applied to the court for an order pursuant to Order 13, Rule 8 RCJ and Order 19, Rule 9 RCJ setting aside the default judgment. On 10 November 2016, the Queen's Bench Master ordered that the default judgment be set aside. The Plaintiff's appeal against this order was dismissed by order of the High Court filed on 13 November 2019. By this stage, the judge concerned, Horner J, had also delivered a written judgment dated 21 October 2019. This helpfully illuminates that the appeal hearing before him was conducted on 03 October 2019 and, further, he pronounced his decision orally on the same date. The written judgment was generated by an application to Horner J which, in substance, sought leave to appeal to the Court of Appeal. Observing *inter alia* that the grounds of appeal "*… might be considered to be both insulting and abusive*" – at [12] – the judge refused leave to appeal.

[3] By "Notice of Appeal" dated "21 November October 2019" (*sic*), filed on 05 February 2020, the Plaintiff challenges the order of Horner J before this court. The grounds of appeal are, *verbatim*:

> (i) "*Appearance of bias, perversity, religious and racial bias*".
>
> (ii) "*Having ruled that it was a rehearing, Mr Justice Horner reinforced Master Bell's decision of January 2016 was an error of law*".
>
> *(iii)* "*Mr Justice should recuse himself as he couldn't remain unbiased in deciding application for cost*".
>
> *(iv)* "*Justice Horner erred in awarding the cost*".

Each of these grounds is accompanied by detailed particulars.

[4] On 06 July 2020, there was an *inter-partes* listing before the Lord Chief Justice (LCJ). This was conducted through the medium of a remote hearing. The context was the LCJ's exercise of reviewing all cases in the Court of Appeal system and listing as much as business as possible, having regard to the delays caused in the wake of the pandemic outbreak some four months previously. The ensuing order records that the Plaintiff in person and counsel representing the Defendants were heard by the court. The operative part of the order is:

> "***The court directs*** *that –*
>
> *1. The appellant shall serve a skeleton argument on or before 14 October 2020.*

2. *The respondents shall serve and file a skeleton argument on or before 21 October 2020.*

3. *The appeal shall be listed for hearing on 02 November 2020.*"

[5] In an electronic communication dated 21 October 2020, the Plaintiff repeated a familiar allegation of "*institutionalised Roman Catholic bias and racism in Northern Ireland*". In the same communication, he stated:

> "*Finally, as you are well aware, Dr Deman's medical condition as he is recuperating from cancer and he also diabetic recently has been having Covid-19 symptoms and has to self-isolate for 14 days. We are sure you would not want him to prepare for hearing and attend on 2nd November under those circumstances … In the foregoing background hopefully you will give your consent for a short adjournment.*"
>
> [*sic*]

In the same communication, the Plaintiff confirmed that he had received from the Defendants' solicitors an index to an appeal hearing bundle and a transcript of one of the hearings before Horner J. He also repeated previously made objections to the LCJ having any involvement in the determination of his appeal. On the same date, the Defendants' solicitors replied:

> "*We neither consent nor object to your application for an adjournment …*"

[6] On 22 October 2020, the Plaintiff lodged a formal application for an adjournment. On 30 October 2020, the Plaintiff provided a written submission in support of his application for an adjournment of the substantive appeal. The central complaint expressed herein was the lateness of the provision by the Defendants' solicitors of a transcript of the 06 July listing before the LCJ. The second issue raised in this application was that of the Defendants' "*neither consent nor object*" stance coupled with the parties' agreement that this is not an urgent case. Thirdly, the following passage is noted:

> "*As to Dr Deman's Covid-19 symptoms, no further query has been raised as we have adequately explained in our number emails, his self-isolation as per NIHS guidelines given his extreme vulnerability to diabetic condition and ongoing recuperation from cancer surgery for which he is being monitored for five years before remission could be given.*"

[7] On (Friday) 31 October 2020, it became clear to the judicial panel (McCloskey LJ and Maguire J) that there had been evident default on the part of the Defendants (the Respondents before this court) in complying with Practice Direction 06/2011 as amended and the "Covid" Practice Direction 01/2020. A judicial direction was hastily composed. The weekend having intervened this was not transmitted to the Defendants' solicitors until the morning of (Monday) 02 November 2020. In addition, the court was in receipt of a written application by the Plaintiff to adjourn the hearing based on personal incapacity.

[8] At the listing on 02 November 2020, the Plaintiff neither appeared nor was represented. The Defendants were represented by senior counsel, Mr Richard Coghlin QC. Following exchanges between the court and Mr Coghlin the court determined to accede to the Plaintiff's application for an adjournment. A comprehensive case management order was pronounced orally by the presiding judge. This order was drawn up by the court office on the same date and approved by the panel of judges. It is reproduced in **Appendix 1** to this judgment. In short, by its order the court devised a detailed timetable encompassing all necessary procedural and case management steps to ensure that the rescheduled hearing date of 18 December 2020 would be achieved.

[9] By his electronic communication dated 09 November 2020, the Plaintiff confirmed that he had received the order of this court dated 02 November 2020. This communication signalled the beginning of what might be described as a discrete subplot based on the Plaintiff's contention that the aforementioned order was made by an "*… illegally constituted panel which should have had three Court of Appeal judges*". From this date, the Plaintiff has adopted the persistent stance of seeking to have said order set aside. In other communications around this time, the Plaintiff also raised the issue of the panel consisting of "*Roman Catholic judges*". This became a further discrete theme of the proliferation of electronic communications generated by the Plaintiff during November/December 2020. This is illustrated by his electronic communication of 23 November 2020 to the court alleging:

> "*… a nexus between the Roman Catholic defendants, the Roman Catholic panel of judges appointed by a Roman Catholic LCJ and the Roman Catholic staff.*"

Within these communications, there emerged a second aspiration on behalf of the Plaintiff, namely, to secure recusal of the judicial panel.

[10] By an electronic communication dated 12 November 2020, the Defendants' solicitors informed the court that an exercise directed to achieving consensual resolution *inter-partes* had "*… culminated in the execution by both parties of an agreement embodied in the draft Tomlin Order attached to the email*". The communication further drew attention to the terms of the attachment which *inter alia* required the withdrawal of the appeal and a stay of the proceedings "*… by an order made at a*

hearing at which the Appellant/Plaintiff is present in person or by video link". To this end, a listing before the court was requested.

[11] The abundance of electronic communications before the court include the following from the Plaintiff to the Defendants' solicitor dated 11 November 2020 (the previous day):

> "*Further to your without prejudice settlement please note we believe that on 02 November 2020 the direction had been given by illegally constituted panel which should have had there court of appeal judges. We have asked the court to set aside the directions and also adjournment due to Dr Deman's unavailability and failure to address his summons fully.Therefore without prejudice to adjournment and reconsideration Dr Deman has agreed to sign the agreement though reluctantly.*"
>
> [Verbatim.]

[12] The document signed by the Plaintiff is entitled "Confidential Schedule" (reproduced in part in **Appendix 4**). It comprises seven clauses. By clause 1, the parties agree on a certain course without admission of liability within 28 days of the date of signing the agreement by the parties or their representatives, in full and final settlement of the Plaintiff's claim and "*subject to the terms below and upon condition that the Plaintiff/Appellant shall comply with the obligations upon him in these terms …*" By clauses 2 and 3, the issue of legal costs is regulated. By clause 4, the appeal is to be withdrawn by consent "*at a hearing at which the plaintiff/appellant is present in person or by video link*". Clause 6 makes provision for confidentiality and clause 7 specifies liberty to apply.

[13] The document linked to the "Confidential Schedule" and also exchanged between the parties at the same time is entitled "Tomlin Order", the operative content whereof is this:

> "*And the parties having agreed to the terms set out in the attached Confidential Schedule …*
>
> ***By consent it is ordered that –***
>
> 1. *All further proceedings in this action shall be stayed except for the purpose of carrying the terms of the agreement into effect.*
>
> 2. *And for that purpose the parties have liberty to apply ….*
>
> 3. *The scheduled terms are to be placed in a sealed envelope on the court file with an endorsement that it is not to be*

> *inspected without the permission of the Master or judge."*

[14] The preliminary assessment of the court at that stage was that the parties had made a legally binding agreement which would come into operation upon the issuing of a final order by the court. It goes without saying that the court would be the sole arbiter of the content of such order. To this end on 19 November 2020, the court issued the following direction:

> *"The court has directed that Carson McDowell sols file and serve [1] a revised draft Tomlin Order, to include provision for the court [a] approving amendment of the Writ and all appropriate consequential amendments and [b] issuing any further necessary authorisation or dispensation and [2] a draft amended Writ and any further pleading etc, by 16.00 on 28/11/20."*

This was the stimulus for the second draft Tomlin Order which was transmitted to the court by electronic communication dated 20 November 2020. Attached to this communication were:

(i) A draft amended Writ of Summons rectifying the issue of the correct description of the Defendants (which arose out of the misdescription in the Plaintiff's original Writ and subsequent formal court documents); *ditto* the accompanying Statement of Claim.

(ii) A revised draft Tomlin Order which contained, in its operative clauses, two further provisions namely (a) the grant of leave to the Plaintiff to amend the Writ and Statement of Claim (i.e. the title of both) in the terms of the accompanying drafts and (b) the ordering of the stay upon the court issuing the aforementioned leave.

The terms of the attached "Confidential Schedule" replicate *verbatim* the document signed by the Plaintiff on 11 November 2020.

[15] The Defendants' solicitors having responded to the further court directions in the manner noted immediately above, the court determined to convene a further *inter-partes* hearing which it scheduled for 02 December 2020, on notice to all parties. The Defendants were, once again, represented by solicitor and counsel. The Plaintiff did not appear and was unrepresented. On the eve of the hearing, the Plaintiff transmitted a document intimating a hospital appointment on this date. The court, having delayed until almost 11am, proceeded to conduct a limited hearing. Following the hearing, the court directed the preparation of a transcript. This is attached to this judgment at **Appendix 2**. In short, the outcome of the hearing was:

(i) A dismissal of the Plaintiff's request that the order of the court dated 02 November 2020 be set aside.

(ii) A dismissal of the Plaintiff's request that the judicial panel recuse itself.

(iii) The timetabling of any further application to be made to the court on behalf of the Defendants.

(iv) A further listing before the court to be held on 14 December 2020.

(v) Subject to (iv) the maintenance of the earlier arranged listing scheduled for 18 December 2020.

[16] On 11 December 2020, the transcript of the hearing conducted on 02 December 2020 was finalised. On the directions of the judicial panel, this was forwarded to all parties. The scheduled listing on 14 December 2020 duly proceeded. On this occasion, the Plaintiff was in attendance accompanied by one other person. The Defendants were represented by solicitor and counsel. During the intervening period, the Defendants had filed and served an application for an order staying proceedings. The essence of this application is expressed in the final paragraph of the grounding affidavit sworn by their solicitor:

> "*The* [Defendants] *seek an order staying the action on the basis of the settlement of the action comprised in the counter-signed Confidential Schedule dated 11 November 2020.*"

The court had also received written applications filed and served by the Plaintiff which, reflecting the two themes highlighted above, pursued the setting aside of the court's order of 02 November 2020 and recusal of the judicial panel.

[17] The court received brief submissions from Mr Coghlin, who had provided a skeleton argument the previous week. The Plaintiff, when invited to do so, addressed the court at some length. At the conclusion of the hearing, the court stated that it would reserve its consideration of the applications made and arguments advanced, that a decision would be provided within days if feasible and, finally, that the parties would be informed as soon as possible whether the court considered it necessary to maintain the listing previously scheduled for 18 December 2020.

[18] On 16 December 2020, the parties were informed, on the direction of the court, that the listing scheduled for 18 December 2020 would not be proceeding. It is convenient to interpose the observation that this listing had been determined by the order of the court dated 02 November 2020 as the rescheduled substantive hearing of the Plaintiff's appeal against the abovementioned order of the High Court. The parties were simultaneously informed that the listing on 18 December would be

maintained solely for the purpose of promulgating its reserved decisions. On 16 December, the court also received the Plaintiff's further submissions [**Appendix 3**].

[19] As the transcript of 02 December 2020 (**Appendix 2**) demonstrates, the court was particularly concerned to explore the question of whether the Plaintiff's act of executing the "Confidential Schedule" on 12 November 2020 might have been vitiated by a lack of consent which, of course, is the fundamental element of any legally binding agreement (or contract). This remained an issue of particular interest to the court thereafter.

[20] The court's assessment of the issue of consent is as follows:

(i) There is no indication of a lack of consent or any other legally vitiating factor in either the abundance of written materials placed before the court or the Plaintiff's applications or his witness statements or his oral submissions.

(ii) The court harbours no reservations whatsoever about the Plaintiff's electronic communication of 11 November 2020 whereby he purported to "*… agree to sign the agreement though reluctantly*". This professed reluctance, considered in the context of all the evidence, does not begin to establish any want of consent.

(iii) Elaborating on the foregoing, this "*reluctance*" was based on two factors (only), namely the immediately preceding contentions about the judicial panel being "*illegally constituted*" and "*also adjournment due to Dr Deman's unavailability*". There is nowhere to be found even the slightest hint of a want of consent.

(iv) The linkage which the Plaintiff has sought to forge between his execution of the settlement agreement and the aforementioned matters does not withstand logical or coherent analysis: it is both illogical and incoherent.

(v) In his further electronic communication of 24 November 2020, the Plaintiff used the language of "*… the orders that have been agreed between the parties*", without the slightest hint of a want of consent. He stated further that "*… in view of hobnobbing between the court and the Respondents' solicitors Dr Deman is reconsidering his position about the agreement as he thinks this is too low a price to sacrifice his conscience*". No comment is necessary. Notably, no purported retreat from the agreement signed by him was signalled.

Our Conclusions

[21] Our conclusions are the following:

(i) On the authority of *Smallman v Smallman* [1971] 3 All ER 717, which has consistently been applied in this jurisdiction, a legally binding agreement containing all essential terms was made between the parties on 12 November 2020. Fundamentally, there was an offer of compromise by the Defendants which the Plaintiff accepted and the requirement of consent was manifestly satisfied.

(ii) The subsequent steps and measures relating to the finalisation of the corresponding court order endorsing and attaching said agreement did not affect the legality and enforceability of the agreement in any way. They belonged exclusively to the realm of technical court procedure and administration. They were divorced entirely from the relationship and engagement between the parties and the fruits thereof, namely their bargain.

(iii) Equally the Plaintiff's "applications" to the court to set aside its order of 02 November 2020 and for recusal have no bearing whatsoever on the foregoing. They are properly described as an illogical, misconceived, unmeritorious and incoherent diversion. The same analysis applies to the Plaintiff's repeated requests/demands for a transcript of the listing on 02 November 2020. No good reason for the court ordering this was ever demonstrated. Furthermore, the Plaintiff made no attempt to procure a transcript via the court protocol and proffered no explanation for this failure.

(iv) We refuse the Plaintiff's "applications" on two grounds. First, being pure duplicates of the applications which the court refused on 02 December 2020, they constitute a misuse of the process of the court. Second, and in any event, they are manifestly devoid of merit on the grounds and for the reasons elaborated in this judgment and in the transcript at **Appendix 2**.

(v) The court grants the Defendants' application for a stay order.

[22] The stay order will be in the terms of the revised Tomlin Order noted above. For the avoidance of any doubt and the convenience of the parties, this Order in its entirety, with the accompanying "Confidential Schedule" in edited form, is attached at **Appendix 4** of this judgment. Given that the parties' agreement (in the "Confidential Schedule") has a self-contained provision for costs in comprehensive terms, nothing further on the part of the court is required in this respect.

This judgment was initially promulgated by the court at a remote video listing on prior notice to both parties, on 18 December 2020.

ADDENDUM

[23] As appears from the footnotes in Appendix 4 (draft Tomlin order), while this judgement was promulgated on 18 December 2020 it was not complete and was, in consequence, in draft form. The footnotes in Appendix 4 explain why this was so. As these indicate, each party was given the opportunity to make further submissions on the contents of the final order of the court. In summary, the Plaintiff objected to the inclusion in the court's final order of any of the provisions of the confidential schedule. The Defendant raised no objection. We consider that the Plaintiff's further submission raises no sustainable objection and fails to engage with either the legal principles in play or the reasoning of the court. Accordingly, the draft order in Appendix 4 is affirmed.

[24] In furtherance of the principle of open justice and taking into account that the Plaintiff is an unrepresented litigant this judgment, in final form, was promulgated at an *inter-partes* remote listing of the court on 28 January 2021.

APPENDIX 1: Order dated 02 November 2020

HM COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Monday the 2nd day of November 2020

THE RIGHT HONOURABLE LORD JUSTICE MCCLOSKEY

THE HONOURABLE MR JUSTICE MAGUIRE

Between

SURESH DEMAN

Plaintiff/Appellant

and

SUNDAY NEWSPAPERS LIMITED

JOHN CASSIDY

RICHARD SULLIVAN

Defendants/Respondents

UPON this appeal being in the list this day for the hearing of the substantive appeal and for the hearing of the Plaintiff/Appellant's application for an adjournment,

AND UPON READING the documents recorded on the Court file as having been read,

AND UPON hearing Counsel on behalf of the Defendants/Respondents;

AND UPON there being no appearance on behalf of the Plaintiff/Appellant;

THE COURT ORDERS that:

1. the Appellant's application for an adjournment is granted;
2. the costs of today's hearing shall be reserved;
3. the hearing of the substantive appeal shall be listed on Friday 18 December 2020 at 10.15am, time allocation two hours evenly divided;
4. Both parties shall address in writing, by 13 November 2020, the option of adjudication of the appeal on the papers;
5. the solicitor for the defendants/respondents shall prepare a draft case management directions order, addressing all preparatory steps and measures necessary to ensure that the listing of this appeal can be completed without further delay or interruption, and serve same on the Appellant and the Court by 4.00pm on 4 November 2020;
6. the backstop date for dealing with and completing all further/outstanding pre-relisting steps and measures shall be 23 November 2020;
7. the Appellant shall serve his reply to the draft case management directions order on the Court and the solicitor for the Defendants/Respondents by 4.
8. the Respondents' solicitors will rectify the court's hearing bundles by 13 November 2020.
9. the Court will issue the formal case management directions order immediately thereafter.

Ian McWilliams

Proper Officer

Time Occupied: 2 November 2020 1 hour

APPENDIX 2: Transcript of 02 December 2020

ICOS NO 15/98217/02/A02

THE ROYAL COURTS OF JUSTICE OF NORTHERN IRELAND

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SUNDAY WORLD & OTHERS

PROCEEDINGS

HEARD BEFORE

THE RIGHT HONOURABLE LORD JUSTICE MCCLOSKEY & THE HONOURABLE MR JUSTICE MAGUIRE

ON

2nd December 2020

APPEARANCES

DOCTOR DEMAN did not appear and was not represented

MR RICHARD COGHLIN QC appeared on behalf of the Respondent

LORD JUSTICE MCCLOSKEY: If you can hear me, Mr Coghlin, if you could take note that we cannot hear you. Are you muted?

MR COGHLIN: My Lord, I am going to repeat what I just said because I was muted, thank you. I appear for the Respondents, my Lords.

LORD JUSTICE MCCLOSKEY: Is the other person in remote attendance the solicitor representing you, sorry, instructing you?

MR COGHLIN: Yes, Ms O'Kane is also on the line and she is my instructing solicitor from Carson McDowall.

LORD JUSTICE MCCLOSKEY: From your perspective and that of Ms O'Kane, is there any reason to expect any kind of attendance or participation by Dr Deman this morning?

MR COGHLIN: We do not think Dr Deman is going to appear. We understand he has sent some evidence of an appointment at an ophthalmology unit at a hospital in London yesterday and he also has his application for the setting aside of the directions of the 2nd of November and he takes issue with the make-up of the Panel as I think your Lordship knows.

LORD JUSTICE MCCLOSKEY: So, from your side's perspective, Mr Coghlin, Dr Deman has extant two applications before the court. One is to set aside the order and directions we made on the 2nd of November. The second is that this constitution of the court recuse itself.

MR COGHLIN: Yes, that is our understanding, my Lord. We gleaned that from the material that was sent to us, although we are not always confident that the same material is sent to us as is sent to the court office, but that is our understanding of the position.

LORD JUSTICE MCCLOSKEY: Fine. That, therefore, brings us to the question of possible conclusion of these proceedings. In very brief compass, the case was scheduled to be heard in this court on the 2nd of November. It did not proceed on that date. This court made an order of the same date. The essence of that order was to accede to the Appellant's application for an adjournment. That order also relisted the case for hearing on the 18th of December.

One of the requirements of the order was that the solicitor for the Defendant Respondent would prepare a draft case management order for the consideration of this court.

In the period which followed, there was one standout development, namely that the Respondent's solicitors brought to the attention of this court by an electronic communication dated the 12th of November 2020, what I will describe in shorthand as the proposed resolution of the entirety of the Appellant's claim. I quote from the email:

"In parallel to the process of preparing for the hearing of the appeal, the parties have been exploring whether a resolution of the dispute can be achieved that would be mutually satisfactory and result in a saving of court time and other resources. This process has culminated in the execution by both parties of an agreement embodied in the draft Tomlin order attached to the email."

The communication continues:

"The court will note from paragraph 4 of the terms in the agreement in the schedule to the draft order requires as conditions precedent the withdrawal of the instant appeal and a stay of the actions against all three Defendant Respondents by an order made at a hearing at which the Appellant/Plaintiff is present in person or by video link. We respectfully request that the court consider the attached draft order and if content, list the matter for a review at which the Appellant/Plaintiff could be present for the purpose of making the order as set out in the draft. We remain at the court's disposal should a retrial application be required."

That communication triggered a further discrete process on the part of the court, namely, consideration of the terms of the communication itself and the draft *Tomlin* order attached. At the same time, the court was also, on another separate but clearly related track, giving consideration to a draft case management order provided by the

Respondent's solicitors in compliance with the order of this court of the 2nd of November.

This court determined not to invest time or resources in the draft case management order, given the terms of the last mentioned communication from the Respondent's solicitors. To that end, this court directed its attention in particular to the terms of the proposed *Tomlin* order and identified certain deficiencies which were the subject of a specific case management direction.

This gave rise to a response from the Respondent's solicitors attaching a revised draft *Tomlin* order. That communication was addressed to the court on the 20th of November. In that communication, it was stated inter alia:

"We note that the court has requested that Carson McDowall file a revised draft Tomlin order to include provision for the court approving amendment of the writ and all appropriate consequential amendments, issuing any further necessary authorisation or dispensation and a draft amended writ and any other further pleading and so forth by four o'clock on the 28th of November 2020."

That communication continues:

"We now enclose a draft amended Tomlin order with schedules in which the terms in the confidential order remain the same as the terms signed and submitted to the court on the 12th of November, but in which the order as was cited include orders giving leave to amend the written summons in the draft sub-schedule 2 – that is the writ – and schedule 3, the statement of claim. The draft amendments have been facilitated by Carson McDowall to consist only of the change in the first named Defendant and title to Sunday Newspapers Limited from Sunday World."

The communication continues:

"The draft amended Tomlin order also provides for the court to approve the amendments once effected and to issue further necessary authorisations or dispensations before staying the actions on the agreed terms.

If the court is minded to make orders in the terms of the draft amended Tomlin order, we respectfully invite the court to list the matter for a review at a date convenient to the court and to Dr Deman. … We shall copy this letter and draft amended Tomlin order to Dr Deman for his information and so that he can understand and approve the amendments of the draft Tomlin order and why they have been submitted and so that he can approve the draft amendments to his witness summons and statement of claim. We remain at the disposal of the court if further clarification is required."

Pausing, from the court's perspective and subject to any correction to be provided by Mr Coghlin, representing the Respondent, it is the court's understanding that prior to the exchange of communications between the court and the Respondent's solicitor, to which I have just referred, Dr Deman had signed and executed the first version of the draft *Tomlin* order.

From this court's perspective, by his actions, Dr Deman was willingly and knowingly participating in the acts required to bring these proceedings to final termination by consensual resolution.

That brings us to a question on the part of the court. Having regard to one of the features of these proceedings, namely a veritable proliferation, indeed a bombardment, of emails to the court from Dr Deman, we have the following question. What reaction, if any, has Dr Deman made to the amended version of the draft *Tomlin* order which was generated in response to this court's directions? Mr Coghlin?

MR COGHLIN: My Lord, there has been, as I understand it, no specific reference to the amendments. There has instead been a confirmation of his position that the

agreement he signed was subject to his application for the setting aside of the directions made on the 2nd of November and the discharge of the judicial panel.

That seems to be his strong position, that the agreement he signed was subject to those applications and that the Respondents should not have sent the signed agreement to the court before a decision had been made on foot of those applications, so there has been no dissent as to the amendments to the draft order or to the amendments to the pleadings that I can see, but there has been an affirmation of his position with respect to the order of events which should take place, which in his submission is that there should be a decision as to his application for the setting aside of the directions and the decision as to his application for the recusal of the Panel before any decision is made or any orders are made on foot of the signed agreement. That is the position he has expressed right up to today's hearing.

LORD JUSTICE MCCLOSKEY: Now, Mr Coghlin, has any issue been raised about the authenticity or voluntariness of his signature on the draft *Tomlin* order of the 11th of November 2020?

MR COGHLIN: My Lord, no. The covering email by which he returned that document, if I may, I will read the text of that into the record.

LORD JUSTICE MCCLOSKEY: Yes.

MR COGHLIN: This comes from the email address that has been used throughout these proceedings, but as your Lordships know, it is often signed on behalf of Dr Deman and not by him, himself.

LORD JUSTICE MCCLOSKEY: Yes. Just give us the time and the date of the communication, please.

MR COGHLIN: This was on the 11th of November 2020 and it was timed at 15.48 and it has '*without prejudice*' in the subject line because it is a product of the continuing discussions between the parties. Dr Deman has sent some of that material to the court already, but what it says is:

"*Dear Ms O'Kane, further to your without prejudice settlement, please note that we believe that on the 2nd of November 2020, the direction was given,..*"

and I paraphrase because there are some spelling issues,

"*… was given by an illegally constituted Panel which should there have had three Court of Appeal judges. We have asked the court to set aside the directions and also adjournment due to Dr Deman's unavailability and failure to address this summons fully. Therefore, a without prejudice to adjournment and reconsideration, Dr Deman has agreed to sign the agreement though reluctantly*."

That email had attached to it the executed terms which had been the product of the course of negotiations that had ensued before that date.

LORD JUSTICE MCCLOSKEY: Mr Coghlin, would you just repeat the content beginning with the words, "*Without prejudice …*"?

MR COGHLIN: "*Without prejudice to adjournment and reconsideration, Dr Deman has agreed to sign the agreement, though reluctantly.*"

LORD JUSTICE MCCLOSKEY: Without prejudice to adjournment and reconsideration?

MR COGHLIN: Yes, my Lord.

LORD JUSTICE MCCLOSKEY: Fine. Well, then, we will just register this point, the direction that that particular email be sent to the court this morning, please. I do not say categorically that we do not have it, but I have already made reference to the email blizzard which these proceedings have generated. Now, is it the case, therefore, Mr Coghlin, that Dr Deman has signed the first draft of the *Tomlin* order but has not signed the amended draft?

MR COGHLIN: That is correct, my Lord.

LORD JUSTICE MCCLOSKEY: Is it your submission that the amended draft *Tomlin* order is, in substance, identical to the first draft with the exception of some purely procedural and mechanical aspects?

MR COGHLIN: That is correct, my Lord. The confidential schedule which contains the agreement between the parties is identical between both drafts.

LORD JUSTICE MCCLOSKEY: But the confidential schedule is not a freestanding agreement. The *Tomlin* order provisions and the confidential schedule combined constitute a composite agreement, is that not the correct analysis?

MR COGHLIN: I think, my Lord, we would say that the confidential schedule contains the agreement and the orders recited in the preamble to the confidential schedule provide the mechanism by which that agreement is to be worked into effect.

LORD JUSTICE MCCLOSKEY: I think this has probably become the issue, Mr Coghlin, and I am not requiring you to deal with it *ad-hoc* just at this moment, but what we really need to examine is whether Dr Deman has executed a completed final agreement by his signature to a document which has two main components, namely, an order of this court and a confidential schedule to that order. What needs to be considered is whether the schedule can, as a matter of law, be viewed as detached from the draft order and that, it seems to us, is an issue which must be grasped by the court in our consideration of whether we should proceed to make a final order either in the terms of the amended draft *Tomlin* order with schedule, or with such final refinements as the court considers appropriate.

MR COGHLIN: My Lord, may I make a suggestion as to how that might be, how that hearing might be developed, how that issue might be developed?

LORD JUSTICE MCCLOSKEY: Yes, please.

MR COGHLIN: The Respondents are concerned to maintain the element of consent that has been present during the development of these terms and, to that end, one way of exposing all of the arguments might be for the Respondents to apply for a stay, bringing into evidence these issues and accompanying that application with a short skeleton argument setting out what the legal position is from their perspectives.

Dr Deman could then have an opportunity to respond to that so that when it came before this court again, there would be a full ventilation of the issues as to the status of the agreement and as to the significance of any of the email traffic that surrounded the completion of that agreement.

The court would then have a full understanding of the position. Dr Deman would then have a full understanding of the Respondent's position, which we are concerned that prior to this hearing, had only been developed in a piecemeal fashion and he would have an opportunity to consent or otherwise.

LORD JUSTICE MCCLOSKEY: Mr Coghlin, what timescale would you propose for making the application which you have just canvassed?

MR COGHLIN: I think we could do it as quickly as the court requires. I am not sure about Dr Deman's availability, but we could do it just as quickly as the court requires and it would deal with three aspects. It would deal with the legal status of the agreement, but Dr Deman we anticipate will say that the agreement was conditional or subject to his application to set aside the orders of the 2nd of November and that issue would probably need to be tackled as part of that process too.

LORD JUSTICE MCCLOSKEY: Fine. We will take each matter in turn. First of all, would it be feasible for you to file your proposed application by close of business next Monday, the 7th of December?

MR COGHLIN: It would, my Lord.

LORD JUSTICE MCCLOSKEY: Second, this court is in a position now to adjudicate on Dr Deman's two applications, namely (1) to set aside the order of this court made on the 2nd of November 2020 and (2) that this Panel recuse itself. We could determine those applications this morning. We are satisfied that to do so in the doctor's absence would entail no prejudice whatsoever to him, given that we have his contentions and assertions - and it is a mixture of contentions and assertions - comprehensively in writing.

What I would like to flag up is this. There is a question of sequencing which we do not entirely grasp, but which may be clearer to you in light of the verbal application that you have mooted. If this court were to determine those two applications this morning, would that have any impact on the procedural proposal you have just made?

MR COGHLIN: I do not think so, my Lord. I do not think it would. I cannot speak for Dr Deman's view of that, but we do not think it would.
LORD JUSTICE MCCLOSKEY: On one view, it would be positively beneficial because it would, so to speak, clear the decks.
MR COGHLIN: Yes, my Lord.
LORD JUSTICE MCCLOSKEY: Thank you. We will just confer for a minute if you do not mind. Anything further from you, Mr Coghlin?
MR COGHLIN: No, my Lord, thank you.

RULING

LORD JUSTICE MCCLOSKEY: This court is fully equipped to determine the two applications of the Appellant, Dr Deman, which are before it. One is an application to set aside our order of the 2nd of November. The second is an application that this constitution of the court recuse itself.

As regards the first application, the Appellant was fully on notice of the hearing. He chose not to attend either in person or by a representative or by remote means. The order which this court made was an order entirely favourable to the Appellant on that occasion. The central feature of our order was a provision acceding to his application that the substantive hearing of the appeal, scheduled to proceed on that date, should be adjourned. We granted that relief to the Appellant. The order is in all respects regular, both procedurally and substantively. There is no basis whatsoever for setting it aside in whole or in part and we therefore refuse that application.

The second application by the Appellant is for an order that this panel recuse itself. The first observation to make is this panel was not at any stage and still is not engaged in any substantive adjudication of the merits of the Appellant's claim against the Respondent or the merits of his appeal against the order of the High Court under challenge. In the events which have occurred, this panel of judges has

been solely concerned with case management issues. That is the first ground upon which the recusal application must be rejected.

The second is that the application is entirely without merit in any event. No basis for the recusal of this panel has been demonstrated either by reference to the identities of the judicial members of the panel or by reference to the legality of the composition of the court. In accordance with the provisions of the Judicature Act, this court has been lawfully and regularly constituted at all times by a panel of two judges. Accordingly, that application is also refused.

That brings us to the business of today. The purpose of today's listing was to allow the court to consider the proprietary of making a final order, a so-called *Tomlin* order, the context being the signature and execution of a draft order by the Appellant and the court's subsequent intervention of a purely procedural nature which has given rise to the existence of a second draft *Tomlin* order in amended form.

The stand out feature of the second draft is that it does not bear Dr Deman's signature. Insofar as his willingness to execute that agreement is linked to this court's determination of the two applications which I have just dealt with, that issue is no longer a live one and, accordingly, it will be open to Dr Deman, the Appellant in these proceedings, to execute the draft amended agreement. From the court's perspective, there is absolutely no reason why he should decline to do so because the substance of the agreement, the terms conferring a benefit upon him and dealing with related issues, is fundamentally unchanged in every respect. All that has altered is the introduction of certain purely procedural mechanisms which this court considered necessary to ensure that it made an order that was regular in all respects. Accordingly, as far as the court is concerned, there is no reason whatsoever why the Appellant should not execute the draft amended order.

In the event that the Appellant's unwillingness to do so persists, the alternative course of action will be to accede to the Respondent's proposal that they bring a further application before the court for such relief as they consider appropriate. We add in parenthesis that it has been indicated that they will seek a stay of proceedings on certain terms and to allow for that course, the court orders today that that application be filed and served electronically by 4pm on the 7th of December.

The court further maintains the listing of the hearing of the appeal for the 18th of December and we hereby direct a further interim case management listing at ten o'clock on the 14th of December. If it is possible for the court to make a final order on that date we shall do so.

If it becomes necessary for the court to issue any further procedural directions in the interim, we shall do so.

Finally, we reserve today's costs and there shall be liberty to apply. Anything arising, Mr Coghlin?

MR COGHLIN: My Lord, if I could mention one thing which is that Dr Deman has said he is going to be out of the country on the 18th of December. I do that so the court has a complete picture, but I am not suggesting any alternation of the directions given at present.

LORD JUSTICE MCCLOSKEY: I recall that he said he would be out of the country from the 18th for a period of something like three or four weeks.

MR COGHLIN: I think that is correct, my Lord. I do not have the email in front of me that sets that out, but the court is aware that he has said that he has some issues.

LORD JUSTICE MCCLOSKEY: That is fine. We will take that as it comes because he is out of the country as of today. The country is Northern Ireland, the jurisdiction is Northern Ireland. He has been out of the country at all material times and we do not at present see any distinction between being out of this jurisdiction in country X and being out of this jurisdiction in country Y. That too will go into the record this morning and thank you for reminding us of it, Mr Coghlin, but our view is it is quite

immaterial since as on all previous occasions, it will be open to the Appellant to attend by electronic means or to attend by a representative who is participating either remotely himself or in person.

MR COGHLIN: Thank you, my Lord.

LORD JUSTICE MCCLOSKEY: Thank you very much.

APPENDIX 3: Plaintiff's Submissions 14/12/20

SUBMISSIONS ON POINTS OF LAW

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I. FACTUAL BACKGROUND:

1. The Appellant's claim is of defamation against the above three defendants who appeared to be the defendants of Roman Catholic persuasion. Incidentally, the defendants, court's staff and he members of the judiciary thus far involved at various stages of the judicial process also appears to be of the same religious and racial persuasion. Although there is no bar in hang case hard by any religious or racial persuasion it calls in question the professional and fairness of the judicial process if all the decisions appear to go in favour of one party that is the defendants in present appeal.

Factual Matrix

2. Appellant has set out the factual matrix in his witness statements and in chronology of emails attached to his Summons previously sent no 1st November and today in support of Summons. It is a matter of fact as outlined in witness statements & emails chronology there are outstanding complaints against LCJ Sir Declan Morgan who appointed the panel of Court of Appeal Judges consisted of LJ McCloskey and Justice Maguire.

3. It was shocking that in spite of unresolved complaints the same panel of judges decided to continue with the appeal and gave oppressive directions while the appellant was under Isolation due to the Covid -19 and had a Hospital appointment for Glaucoma on 2nd Dec 2020. Ms O'Kane, a solicitor for the above named defendants was always found on the Court of Appeal's driving seat as she was the first to inform the appellant her version of what had transpired at the hearing on 2nd Nov and 2nd Dec 2020, but nothing substantial officially from the Court of Appeal was communicated in spite of repeated requests to do so that could be seen from the email chronology.

4. Appellant is entitled know the tribunal prior to the hearing or on listing names of his adjudicators who were going to adjudicate on his appeal but Mr McWilliams failed to disclose the names and the same tribunal kept on giving oppressive directions in spite of medical evidence and an application for its recusal.

5. Although the onus is on the LCJ Sir Declan Morgan to ensure that, "the justice is not only done, but must be seems to be done", he chose to appoint a Roman Catholic Tribunal in breach of the NI Judicature Rules. However, it was not so surprise about the choice of LCJ for LJ McCloskey who has been at the centre of a great deal of controversy in Northern Ireland and was a subject of attack by DUP in 2013 for his religious and political bias was not an "ill-informed" interference in the process of law but it was an accurate characterisation of his tained mindset which has reflected in my appeal.

6. In view of outlined application of 11th & 13th November 2020 for recusal and unresolved complaints to Judicial Complaint Officer it was sufficient for them to step down as the merit of the complaints is irrelevant as they can't be the Judge in their own cause. Dr Deman has at least 13 recusals to his credit so far on applications made either by his counsel, John Davies QC or by himself and most recent application is outstanding for the recusal of LJ Sir Declan Morgan since 6th August 2020.

7. Previously Mr Justice Maguire was subject to recusal in 2017 but he recused only after giving oppressive directions. Appellant relied upon a EAT decision in his earlier decision we refer to EAT decision below:

BREEZE BENTON SOLICITORS (A PARTNERSHIP) V WEDDELL: EAT 13 MAY 2004.

> In the above decision, a mere reference to a complaint to Lord Chancellor at the tribunal was considered good enough to recuse himself. A stubborn tribunal refused to recuse himself but the EAT overturned his decision. Since then there are many other cases supporting this approach, but the test adopted by the House of Lords in *Porter v McGill* is "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Still is the key.

8. At the last moment on 11th December 2020, Mr McWilliams had sent a transcript of hearing held on 2nd December which is quite revealing and shocking as LJ McCloskey has made no reference to appellant's Summons backed by his witness statement and skeleton arguments sent to Mr McWilliams on 22nd & 30th October & 1st November 2020 and his detailed grounds for recusal sent on 11th & 13th November 2020 along with email chronology.

9. In the absence of above evidence & submissions, the Court of Appeal made its decision to adjourn the hearing on 2nd November because of the Defendants' solicitor had consented for an adjournment due to Covid-19 symptoms without any reference to defendants failure to comply with LCJs directions of 6th July 2002 as outlined in Summons and Witness statement. Since the Defendants'

solicitor had consented well in advance on 23rd October 2002 the hearing should have been adjourned to save the costs.

10. However, LJ MCCLOSKEY refers to 2nd of November imposed hearing stating, "... it did not proceed on that date and the court made an order of the same date. The essence of that order was to accede to the Appellant's application for an adjournment. That order also relisted the case for hearing on the 18th of December". However, there is no reference to appellant's Summons, email chronology, and skeleton arguments sent to court on 22nd & 30th October 2020 & failure of the defendants to comply with 6th July directions of LCJ Sir Declan Morgan which outlined number of other outstanding matters.

11. Hence, it favoured the defendants not the appellant by bailing them out from their failures to comply with the directions. Hence, combined with this and above and the evidence of Hospital appointment on 2nd December, LJ McCloskey chose to arrive at erroneous, perverse and biased conclusions although he knew why appellant could not attend, see quote from the transcript below:

> "He chose not to attend either in person or by a representative or by remote means. The order which this court made was an order entirely favourable to the Appellant on that occasion".

12. Since the Court of Appeal completely relied upon what the Defendants' Counsel narrated from an email combined with the tenor of his comments on appellant's emails show further appearance of bias of this tribunal and of Court Staff, Mr McWilliams who failed to put before the Court the above summons, witness statement and email chronology. For the record appellant would quote from the transcript of 2nd December 2020 hearing as to LJ McCloskey's mindset:-

> "Lord Justice McCloskey: Having regard to one of the features of these proceedings, namely a veritable proliferation, indeed a bombardment, of emails to the court from Dr Deman, we have the following question"
>
> And
>
> "Lord Justice McCloskey: Fine. Well, then, we will just register this point, the direction that that particular email be sent to the court this morning, please. I do not say categorically that we do not have it, but I have already made reference to the email blizzard which these proceedings have generated"

13. Defendants' counsel, Mr Coghlin clearly identified two issues which he had to deal at the 2nd December Review Hearing, as set out in the transcript follows:-

> "MR COGHLIN: We do not think Dr Deman is going to appear. (1) we understand he has sent some evidence of an appointment at an ophthalmology unit at a hospital in London yesterday and (2) he also has his application for the setting aside of the directions of the 2nd of November and (3) he takes issue with the make-up of the panel as I think your Lordship knows".

14. In spite of the above facts, LJ McCloskey consciously omitted issue No (1) related to evidence of an appointment at an ophthalmology unit at a hospital in London (on 2nd December at 9:00am letter was sent on 1st December 2020) which could be seen by his reframing the issues as follows:

> "LORD JUSTICE MCCLOSKEY: So, from your side's perspective, Mr Coghlin, Dr Deman has extant two applications before the court. ONE IS TO SET ASIDE THE ORDER AND DIRECTIONS WE MADE ON THE 2ND OF NOVEMBER. THE SECOND IS THAT THIS CONSTITUTION OF THE COURT RECUSE ITSELF.

MR COGHLIN, rather than correcting him for the omission of medical evidence just confirmed by saying, "Coghlin: Yes, that is our understanding, My Lord". This not only shows highest form of contumelious disregard for judicial conscience but also overt Roman Catholic racial bias.

15. As to the second issue related to the recusal it is unequally clear that LJ McCloskey would not let appellant's email application of 11th & 13 November and also email of 13th November to LCJ Sir Declan Morgan as to the illegality of the constituted tribunal led by LJ McCloskey which was registered as a Judicial Complaint. Law on bias jurisprudence is quiet clear that while an outstanding complaint, the tribunal should recuse itself. I will refer to Case Laws separately in my skeleton arguments.

16. In fact, the transcript of 2nd of December confirms neither LJ McCloskey nor Mr. Coghlin had before them appellant's above emails.

> "MR COGHLIN: I think that is correct, my Lord. I DO NOT HAVE THE EMAIL IN FRONT OF ME THAT SETS THAT OUT, but the court is aware that he has said that he has some issues".

If LJ McCloskey had before appellants' emails of 11th & 13th November outlining extensive reasons for recusal it would have appeared in the transcript, but there is none.

17. As to signing of the Tomlin "Agreement", it was unequally clear from the attached email of 11th November 2020 that it was a conditional agreement which Mr. Coghlin described as, "As to the significance of any of the email traffic that surrounded the completion of that agreement". The email traffic emphasises that how upset appellant was with the defendants' solicitor action to clandestinely send "Without Prejudice" agreement to the Court which had taken precedence over appellant's application of 11th of November 2020 for the recusal of the tribunal. Had the defendants' legal team and the Court was serious about any meaningful agreement it should have adjourn the hearing and negotiate a just and fair agreement without distress and stressful directions while appellant was recovering from the Covid-19. Therefore, LJ McCloskey's assertion on 2nd December that, "Still is not engaged in any substantive adjudication of the merits of the appellant's claim against the Respondent or the merits of his appeal against the order of the High Court under challenge", was irrelevant as he was putting the Appellant under distress by setting very oppressive directions at the same time bailing out the defendants from their failures.

18. From the forgoing conduct of LJ McCloskey it could be seen by backward induction in retrospect how the Review Hearing on 2nd November 2020 was conducted as appellant pointed out at the Review hearing on 14th December 2020. LJ McCloskey was reading very fast and from the tonal quality of his voice he appeared furious. Therefore, appellant found it difficult to figure out what he was saying. In fact, the Review Hearing held on 14th December was worst than any Du-Bay Hearing in the Military Courts as he was not receptive to anything appellant would say and without let him complete his comments on the transcript of 2nd December 2020 he adjourn by saying decision reserved to 18th December 2020. Hence, a decision adverse to appellant is a foregone conclusion.

LAW JURISPRUDENCE ON BIAS:

19. Bias is a breach of rules of natural justice. In an impartial and fair court there is no room even for apparent bias. Hence, Bias is a freestanding point of appeal and amounts to an error of law in that it is a breach of the rules of natural justice and contravenes Article 6 ECHR. Application is generally made for appearance of bias, the conduct and demeanour of the Judge.

20. It is no longer sufficient to just say that justice has been done or will be done; "justice must be seen to be done". The overriding objectives require the Tribunal, above all, to deal with cases "justly" and "fairly". The overriding objectives are widely regarded as implementing the intentions of Article 6 of Schedule 1 of the Human Rights Act 1998, which ensures RIGHT TO A FAIR TRIAL and states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest or morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

21. Previously, the Court of Appeal had given further guidance in *Locabail (UK) Ltd v Bayfield Properties Ltd (2000) IRLR 96*, and In re Medicaments and Related Classes of Goods (No.2) (2001) 1 WLR 700. There can be actual bias or apparent bias. As far as the former is concerned where the allegation is that the judge or member of the judicial panel has some interest in the outcome of the application, the question is whether the outcome of the case could realistically affect the judge's mind. Any doubt should be resolved in favour of disqualification. Where the allegation is that the interest is derived from the interest of a spouse, partner, or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself. In the latter situation, apparent bias, the test is whether a fair-minded and impartial observer would conclude that there was "a real possibility, or a real danger, the two being the same, that the tribunal was biased". (Per Lord Hope in Magill).

22. Since the promulgation of earlier authorities of law Human Right Act 1998 has come in existence in 2000. The House of Lords in *Porter v Magill* [2002] 2 A.C. 357 incorporated the spirit of HRA in the decision and formulated the test on whether a court or tribunal decision could be said to be influenced by either actual or apparent bias. Pill LJ cited above case in *Lodwick v London Borough of Southwark* [2004] EWCA Civ 306 CA at para 18 in determining bias is:

> "Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased".

23. Since then House of Lords promulgated its decision in *Lawal v Northern Spirit Limited* [2003] UKHL 35. The House of Lords offered further assistance in the speech of Lord Steyn. From the passage Mr. Davies, QC submitted the following principles emerge:

    (i) the hypothetical fair-minded observer will adopt a balanced approach. He will be neither complacent nor unduly sensitive or suspicious;

    (ii) the observer will consider whether there is a real possibility of subconscious as well as conscious bias;

    (iii) the requirement that the observer "would" conclude that there was a real possibility of bias does not mean that it is necessary to show that the observer would "necessarily" take such a view. It is enough if it is "likely" that he would take such a view. In substance the "would" provision is to be satisfied on the usual balance of probabilities test.

24. It is, of course, not that there was bias (conscious, unconscious or subconscious); it is merely that there is "a real possibility" of such bias. Properly so understood the threshold is not very high (as, it is submitted, appears from actual decision of the House of Lords in Lawal). The reason is combination of increased public scepticism and the "indispensable requirement of public confidence in the administration of justice"- see Lawal at paragraph 22. Lord Steyn also cautioned about the existence of collegiate culture in the judicial system.

25. In *Breeze Benton solicitor v Waddell* [2004], an Employment Judge rejected the application in this way according to its extended reasons:

    1. The award of costs to the applicants (in the previous case) related to "relatively modest amounts of money".
    2. Mr Reilly (the respondent) had done nothing to pursue his complaint to the Lord Chancellor's Department.
    3. The matter had not been raised at an earlier interlocutory stage so that the allocation of the case might "avoid the appointment of this Chairman".
    4. The matter was raised for the first time on the first morning of the hearing.
    5. The Judge was not sitting alone on the previous occasion but was a member of a tribunal constituted by three individuals and it

was open to the two members on this occasion to dissent from the Judge's view, which was a "reasonable safeguard".

26. The tribunal had applied the fair-minded observer test above from Magill (supra), as did the EAT in the instant case. However, the EAT came to a different conclusion. The EAT reviewed all the authorities and then summarised the effect as amounting to the following propositions:

1. that the test properly applied requires the tribunal to recuse itself if there is a real possibility of bias. If such a risk is found the tribunal is not entitled to balance against that risk considerations of prejudice to the other party resulting from delay;
2. that if in any case there is a real ground for doubt, that doubt should be resolved in favour of recusal;
3. that it is no answer to a recusal application to say that the chairman was only one of three members with an equal vote, given the important position of the legally qualified and presiding member of a tribunal of three members; and
4. unless he admits to the possibility of bias, the claim of the person asked to recuse himself that he will not be or is not partial is of no weight because of "the insidious nature" of bias.

27. Applying these principles to the facts, the Appellant concluded (at para.46) that the Judge ought to have recused himself for the following reasons:

"(a) There was no suggestion and no finding by the Tribunal that Mr Reilly's application subsequently for the Chairman to recuse himself was a tactical ploy on his part. On the contrary, the Tribunal accepted for the purposes of the application that Mr Reilly's fear was genuinely held.

(b) Mr Reilly's claims were to some extent corroborated by the complaint he had made subsequently to the Lord Chancellor's Department and, indirectly, to the Regional Chairman. We note that the Chairman himself has made no reference to the remarks in his statement responding to Mr Reilly's affidavit.

(c) Due to the insidious nature of bias, little weight could be attached by the Tribunal members to the Chairman's non-acceptance of Mr Reilly's allegations and to his statement that he was not and would not be partial.

(d) The mere fact that the Chairman felt it necessary to state expressly at para.19 of the reasons that he rejected Mr Reilly's allegations indicated the level of the dispute between the Chairman and Mr Reilly and rendered it inappropriate, in our judgment, that he should sit on the case."

28. In *Deman v Association of University Teachers, Mr D. Triesman, Mr B Everett, Dr. G. Talbot, Dr J. DeGroot* [2005], HHJ McMullen QC recused himself stating that it was not appropriate for a judge of the EAT, subject to an unresolved complaint to the Lord Chancellor by Dr Deman to handle that party's case. Breeze Benton applied. HHJ McMullen gave the following reasoning

a. On 17 September 2005 a letter was sent by Council for Ethnic Minority to the Registrar, copied to the Lord Chancellor. It is not on the record, because the Claimant is represented by solicitors. It indicated that an oral hearing listed before me should not take place because, in a recent direction, I had disposed of a number of appeals, which the Claimant sought to make.

b. In response, a letter was written on behalf of the Registrar indicating that the case would be constituted in front of me and an application would have to be made as a matter of urgency. On 26 September 2005, a letter was written by Council for Ethnic Minority to the President, and copied to the Lord Chancellor.

c. The letter, which extends for two pages, rehearses a complaint previously made against the President himself. The letter goes on to indicate that a complaint has been made to the Lord Chancellor about me, alleging unprofessional conduct and racial bias and hostility against Mr Deman. The principal basis is the finding against him in a number of matters pending before the EAT and in respect of an allegation that I accused him of picketing the EAT.

d. The solicitors on the record representing the Claimant, Hudgell & Partners, having been provided by the EAT with those two letters, written by Council for Ethnic Minority, made an application that it would be inappropriate for me to hear the application today. At that stage, the solicitors made clear that they were making no comment on any of the matters set out in the letters from Council for Ethnic Minority. On the basis of that, a letter was sent indicating that the Deputy Registrar had refused the application but it could be raised as a preliminary point at today's hearing, as it has been.

e. Mr Davies, in one short submission, indicates without any comment upon the substance of the complaints to the Lord Chancellor, that while such a complaint is before the Lord Chancellor, I should not hear any application on behalf of the Claimant. He relies on Porter v Magill [2002] 2 AC 357 and Lawal v Northern Spirit Ltd [2003] IRLR 538.

f. I also drew his attention to the judgment of Cox J in Breeze Benton Solicitors v Weddell UKEAT/0873/03. In that case, she considered whether a Chairman of Employment Tribunals should have recused himself in the light of, amongst other things, a complaint made to the Lord Chancellor about his conduct which was still pending. Her conclusion was that it was inappropriate for a number of reasons for the Chairman to have continued to hear the case and he should have recused himself. One of the matters, as found in paragraph 47 of her judgment was this.

"Secondly, the very fact that Mr Reilly had complained about the Chairman's conduct made it inappropriate that the Chairman should sit. The significance of the complaint lay in the fact that it had been made and that the Chairman knew that he had complained and was aware of the specific allegations made about his conduct."

"I have been made aware today of the complaint, which is sought to be made against me. I understand that the complaint was made some time ago but while the Court of Appeal was seized of the matter, steps were no longer being taken. The Court of Appeal (para 1 above) refused leave to Mr Deman to appeal against my judgment and refusal to review it, dismissed his allegation of bias as totally without merit and imposed the civil restraint order. According to the letter, the complaint to the Lord Chancellor will now be re-activated; and so, I am in the same position as the Chairman in the Breeze Benton case.

g. It seems to me that given the very long procedural history of this case, if there is a possibility that the matter can be handled by another judge, it ought to be taken rather than any distraction is introduced into the merits of Mr Deman's case by consideration of whether or not he is having a fair hearing. Because of the civil restraint order, if I were to direct that no further action be taken on this case at this Rule 3 hearing, I could not handle any application for leave to appeal and it would be the end of the road for Mr Deman's claim. This case is at a very early stage and the only loser by vacating today proceedings, as Mr Davies points out, is Dr Deman himself, who will wait yet longer for a determination of the claims made originally 10 years ago.

h. I have paid careful attention to those three authorities, which deal with apparent not actual bias. Mr Davies has stressed that he does not make his submission upon the allegations of actual bias set out by Council for Ethnic Minority. It is by reference to the test for apparent bias:

"… whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." (*Porter v. Magill* [2002] 2 AC 359, paragraph 103, per Lord Hope of Craighead)

i. It seems to me that no harm will be done by my standing aside from this case. The Claimant feels that justice may not be done but equally, it could be said, I suppose, by the Respondent that with a complaint by Mr Deman to the Lord Chancellor hanging over me, I might seek to demonstrate my fairness by finding in his favour when I would otherwise not. For both those reasons, therefore, it seems to me that Mr Davies' application should be accepted. I acknowledge that I have had no help because this is a hearing where no respondent appears under the rules, nor have I had the assistance of an advocate of the Court. I make up my own mind, guided by those authorities and the brief submission made by Mr Davies.

j. I will now pass this case to the President to decide which judge should hear it. I note that a complaint has been made against Judge Clark and Judge Pugsley and Mr Davies tells me he would make the same application. So I will order this case to be heard before a judge, which is not any of us. Mr Davies expressly volunteered, despite the terms of the letter from Council for Ethnic Minority, that no objection is taken to the President dealing further with Dr Deman's matters, including this Rule 3(10) hearing.

29. The Lady Smith in *Chris Project v Lara Hutt* [2006] EAT adopted the same approach and remitted the case to a freshly constituted tribunal in respect that they were satisfied that the Chairman's comments were such as to give the impression that there was a real possibility of pre-judgment.

30. Recently, the Court of Appeal in *Ansar v Lloyd TSB & others* [2006] EWCA Civ 1462 has confirmed above approach although Ansar complaint was related to a CMD. In the case, complaint of bias was not upheld since Judge was only dealing with the Case Management Decision as opposed to more serious matters involving determination of civil rights at a full merit hearing.

31. Before the court can answer that question it must examine all the surrounding circumstances, and that must include any explanation proffered by the impugned judge, even where there is a conflict. The court is not at liberty to call witnesses for evidence and cross-examination to resolve any potential factual conflicts, but equally the existence of such conflicts is yet another issue to factor into any assessment of the question: whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, or rather would the same fair-minded observer, having considered the facts, and notwithstanding the explanation advanced, still consider there was a real danger of bias.

32. On the question of the essential requirements of waiver, the court indicated that the litigant must act freely, and in full knowledge of the facts relevant to the decision whether to waive or not. The Court of Appeal went on to offer this advice to judges faced with the dilemma of when to recuse themselves on the basis of potential bias:

> 1. If there is any real as opposed to fanciful chance of objection being taken by a fair-minded observer, the first step is to ascertain whether or not another judge is available to hear the case. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.
>
> 2. Some time should be taken to prepare whatever explanation is to be given to the parties.
>
> 3. It is vital that the judge's explanation is either mechanically recorded or carefully noted so that there is no controversy about what was or was not said.
>
> 4. #A full explanation must be given to the parties, detailing exactly what matters are within the judge's knowledge which gives rise to a possible conflict of interest and explaining why the problem had only arisen so late in the day. The parties should also be told whether it would be possible to assign the case to another judge.
>
> 5. The options open to the parties should be explained in detail. These options are to consent to the judge hearing the case, with the consequence that thereafter they will lose the right to object after the event. The other option is an application to the judge to recuse himself. In that situation the parties must be told that it is their right to object, it will not be taken amiss if the right is exercised, and that the judge will then rule on that submission.

They must be told what the consequences will then be, whether the case will proceed if the judge declines to stand down, or if the judge does step down and there is no other court available, when the case will be heard.

6. The parties are to be given time to reflect, and if there are sources of available advice, for example from the CAB, they are to be directed to that source.

33. In fact, LCJ himself also reiterated above principles in his decision in https://www.bailii.org/cgin/format.cgi?doc=/nie/cases/NICA/2014/30.html&query=(Deman). Hence, the Appellant/Claimant avers that a fair-minded observer, having considered the facts outlined above, would have concluded that there is a real possibility that the CA consisted of LJ McCloskey and Justice Maguire who sat mute throughout the hearing was appointed by LCJ who himself has not yet ruled on another application since August 2020, would appear bias or was biased and their further involvement at a any stages of appeals or hearings will be unsafe and would delay the judicial process as "justice delayed is justice denied." The operation of bias would have been acute in cases where a Judge was expected set the tone & directions of the claim and exercise his discretion judiciously. I/We therefore on behalf of Dr Deman invite the tribunal to recuse himself and set aside its previously given directions.

Dr S Deman Appellant **14 December 2020**
BSc, MA (India), MA, DBA (US), MPhil (UK), PhD (Japan)

APPENDIX 4: Tomlin Order

2015/98217

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

SURESH DEMAN

Appellant

-and-

SUNDAY NEWSPAPERS LIMITED

First Named Respondent

-and-

JOHN CASSIDY

Second Named Respondent

-and-

RICHARD SULLIVAN

Third Named Respondent

TOMLIN ORDER

UPON THE appeal of the Appellant coming on for review before Her Majesty's Court of Appeal in Northern Ireland:

AND UPON HEARING the Appellant in person and Counsel for the Respondents

AND the Parties having agreed to the terms set out in the attached Confidential Schedule

BY CONSENT IT IS ORDERED that

1. The Plaintiff shall have leave to amend its writ in terms of the draft amended writ of summons at Schedule 2 to this Order;

2. The Plaintiff shall have leave to amend its statement of claim in terms of the draft amended statement of claim at Schedule 3 to this Order;

3. Upon the Court approving the amendment of the Writ and all appropriate consequential amendments, and issuing any further necessary authorisation or dispensation, all further proceedings in this action be stayed except for the purpose of carrying the terms of the agreement into effect;

4. AND for that purpose the Parties have permission to apply.

IT IS DIRECTED that

5. The scheduled terms are to be placed in a sealed envelope on the court file with an indorsement that it is not to be inspected without the permission of the master or judge.

SCHEDULE 1

CONFIDENTIAL SCHEDULE

IT IS HEREBY AGREED by and between the parties hereto, as witnessed by their signatures or those of their respective representatives, that the above-entitled action is settled on the following terms:

1. Subject to the terms below, and upon condition that the Plaintiff/Appellant shall comply with the obligations upon him in these terms, the First Named Defendant/Respondent ……[1] in full and final settlement of:

    a. The Plaintiff/Appellant's claims contained in writ number 2015/98217 and all of the Plaintiff/Appellant's claims arising from or relating to the publication by the First Named Defendant/Respondent of an article on 25th November 2007 entitled "*suing fan quizzed on head butt"* or arising from or relating to the publication of any other article or information published by the First Named Defendant/Respondent prior to the date of this agreement.

[1] This part of the document has been omitted by the court on the ground of confidentiality between the parties.

b. Any and all claims, complaints or actions in any jurisdiction, whether at common law, in contract or in tort, under statute, statutory instrument or Regulation, or pursuant to European law which the Plaintiff/Appellant has or may have up to the date of this agreement against the Defendants/Respondents, or each of them, or any employee, servant or agent of the Defendants/Respondents or each of them;

2. ……. [2]

3. …… [3]

4. This agreement shall be worked into effect by, and is subject to, the following steps being taken as conditions precedent:

   a. The title of the First Named Defendant/Respondent in these proceedings shall be corrected to Sunday Newspapers Limited. Each of the parties shall consent to such amendment.

   b. The instant appeal shall be withdrawn by consent with no order as to costs and the action stayed against all 3 Defendants/Respondents upon the terms set out in this agreement, with no order as to costs, at a hearing at which the Plaintiff/Appellant is present in person or by video link.

   c. No other costs order obtained in these proceedings shall be enforced by any of the parties to this agreement.

5. This agreement is made without admission or adjudication of liability.

6. This agreement and its terms and the fact that it has been made are private and confidential. None of the parties shall disclose the terms of this agreement, or the fact that it has been made, save in so far as it may be necessary to disclose the same in compliance with the requirements of regulation, law or order of a court of competent jurisdiction.[4]

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[2] See footnotes above and below

[3] See footnotes above and below

[4] The court hereby orders publication of those parts of the Confidential Schedule reproduced in this Appendix as [1] this is necessary in order to understand and give full consequential effect to the decision and final Order of the Court, [2] there has already been express or oblique reference to this information in open court and open documents, [3] this information is not truly confidential as a matter of law, [4] there is no public interest requiring its suppression, [5] the public interest promoted by the principle of open justice prevails and [6] the truly confidential parts of the document have NOT been reproduced. Any further submission to the court

7. The parties have liberty to apply to enforce the terms of this Agreement.

Dated ……. November 2020

Signed……

Dr. Suresh Deman[5]

Signed……

For and on behalf of the Defendants/Respondents.

about this issue shall be lodged electronically by 16.00, 30/12/20: two A4 pages maximum, minimum font size 12. In the interim there shall be no publication of this judgment beyond the parties and their legal representatives.

[5] The first version of this document bore the Plaintiff's actual signature and was returned by him to the Defendants' solicitors.