



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 359

Court of Appeal Record No. 2019/495

High Court Record Numbers: 2007/7939P

Approved

No Redactions Needed

**Costello J.
Murray J.
Pilkington J.**

BETWEEN:

KEVIN TRACEY

PLAINTIFF / APPELLANT

- AND -

**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
IRELAND, THE ATTORNEY GENERAL,
THE COMMISSIONER OF AN GARDA SIOCHÁNA
AND THE DIRECTOR OF PUBLIC PROSECUTIONS
AND THE COURTS SERVICE
AND KEITH LAMBE**

DEFENDANTS / RESPONDENTS

JUDGMENT of Ms. Justice Pilkington delivered on the 21st day of December 2020

1. In a judgment delivered on 25 October 2019 Eagar J. refused an application by the plaintiff to recuse himself, in respect of this and four other proceedings.

2. In a further judgment on 4 November 2019 Eagar J. made orders awarding the costs of the recusal application to the defendants and also gave further directions as to the ongoing case management of the litigation.
3. The plaintiff is a litigant in person, albeit one with considerable experience of litigation and court procedures. His Notice of Appeal is unusual in that it explicitly seeks to appeal only the order of Eagar J. of 4 November 2019. There is no appeal from the order of 25 October 2019.
4. The defendants urged the court to only consider the later order. The appellant's wide-ranging submissions dealt with both the substantive application and the costs order and indeed, if anything, focused more upon the judgment of 25 October 2019 than the subsequent costs order. In addition it is difficult, if not impossible, to consider an appeal in respect of an order for costs other than by reference to the application itself. In those circumstances this court has considered both judgments.
5. As has been pointed out by the Supreme Court in its judgment, *Tracey & anor. v. McDowell & ors.* [2016] IESC 44, within this litigation instigated by Mr. Tracey, by 2010, in one guise or another, there were some seven sets of proceedings where the plaintiff was the principal moving party and elements of the State were defendants. Within this appeal, the sixth named defendant (the Courts Service) is separately represented, with all other defendants instructing the Chief State Solicitor's Office. The State defendants point out, within their submissions, that Mr. Tracey has initiated twelve plenary actions against State defendants, in addition to other proceedings.
6. In essence these proceedings deal with various claims by the plaintiff arising out of an incident at Áras Uí Dhálaigh in July 2006 and a subsequent prosecution in connection with the same incident. Eagar J. noted in his judgment that the plaintiff claims, amongst other matters, to have been subject to a particular conspiracy, collusion and malicious prosecution,

an abuse of legal process including false summonses, false prosecutions, false fines, false indorsement of licence and false warrant of arrests for false imprisonment.

7. The background to this aspect of the matter begins on 4 March 2011 when, by order of the then President of the High Court (Kearns J.), six named proceedings (including this one) were struck out. Mr. Tracey is the plaintiff in all cases, in some with his wife as co-plaintiff. It is noteworthy that one of the terms of the order of 4 March is a refusal ‘that this court would recuse itself’. The dismissal of all proceedings (but not it appears that part of the order refusing recusal) was then appealed. That appeal was allowed by the Supreme Court (referenced above) and the order of the trial judge dismissing the proceedings was discharged.

8. Clarke J. (as he then was) delivered the judgment of the court on 26 July 2016 and described Mr. Tracey as an experienced litigant before the court. In the course of his judgment he dealt with the application by Mr. Tracey that his fellow judges, MacMenamin and Charleton JJ., recuse themselves on the basis of what Mr. Tracey contended was a reasonable apprehension of bias against him. Both judges had been involved in a previous case concerning Mr. Tracey, *Tracey t/a Engineering Design & Management v. Burton & ors.* [2016] IESC 16, the judgment of the court in that case was delivered by MacMenamin J. (with which Charleton J. and Denham C.J. agreed)..

9. In considering the recusal application Clarke J. noted;

“4.3 It does have to be recorded that there is an increasing tendency of litigants to allege bias arising largely out of the fact that a judge or judges had previously heard a case involving the litigant concerned and found in favour of the litigant's opponent. Sometimes, although in fairness to Mr. Tracey this is not such a case, the argument is little more than a rehash of the original case coupled with the contention that the judge

must have been biased to have found against the relevant party. Such an application for recusal is unstateable.”

10. Having analysed the judgment which Mr. Tracey contended disclosed bias, Clarke J. continued:

“4.7 I have engaged in that somewhat detailed analysis of the judgment for the purposes of demonstrating that the allegation of bias was entirely misconceived. It failed to address the central finding of the Court which was to the effect that, in the absence of a clear statement that a claim in defamation was being made, a case cannot be treated as a defamation case by implication....

4.8 For those reasons I strongly supported the view of the Court that the claim of an appearance of bias and thus the suggestion of recusal was entirely misconceived and should be rejected.”

11. Within the same judgment, Clarke J. directed that, amongst other matters, the litigation be listed before the President of the High Court, or a person nominated by him, for the purposes of ongoing case management. Eagar J. was the person nominated by the then President (Kelly P.) and has been dealing with the case management of all proceedings since then. In respect of the other two proceedings; one had been previously struck out by Charleton J. on 29 June 2010 and another, was transferred by Eagar J. in July 2017 for a trial by jury. It was thereafter the subject of a jury trial before Coffey J. and then Barton J. in which the plaintiff’s action was unsuccessful. Thus five actions now remain.

12. By order on 8 June 2018 (perfected on 5 July 2018) Eagar J. made an order in these proceedings in respect of Mr. Tracey’s application for discovery against all defendants. The order runs to some six pages setting out the specific categories of documents contained within his order.

13. In the course of an application before Eagar J. on the 18 February 2019 the plaintiff initially requested that the judge recuse himself. He was informed, correctly, that this required a formal application.

14. On 19 June 2019 Eagar J. issued what he described as a 'ruling'. It directs the transfer of these plenary proceedings to a jury list for 20 June 2019. Within this ruling Eagar J. also set out and dealt with the background of ongoing issues advanced by Mr. Tracey in respect of the discovery furnished by both defendants (Mr. Tracey also accuses them of dishonesty in that regard) and his complaints with regard to appropriate inspection facilities. These issues are dealt with in some detail by Eagar J. He also considers Mr. Tracey's renewed submission that he recuse himself.

15. In the ruling of Eagar J. he stated:

"15... This and all the other matters came before the court on the 20th May 2019. The court dealt with some other matters which again were matters for which a jury trial is sought. In relation to the case numbers 2007/7939P, Mr. Compton BL on behalf of the Courts Service, said that no contact had been made but he had been served with an affidavit of Kevin Tracey which in effect was an application for this Judge to recuse himself.

16. This Judge, however, had already indicated to Mr. Tracey that if he wanted to consider the issue of my recusing myself he would have to serve by way of notice of motion an affidavit so that the Courts Service and the State bodies would be in position to respond either by way of affidavit or by way of legal argument. Mr. Tracey then proceeded to read from an affidavit which was in effect an application for this Court to recuse itself. The court insisted that a notice of motion should be filed in this regard... Mr. Tracey mentioned the issue of discovery, stating that it had not been

received by him and that the issue of discovery is not satisfactory. Mr. Tracey said it was not acceptable that the Court ignores this fact”.

16. The ruling continued:

“20. The plaintiff failed to address with any level of specificity his purported issues with this discovery made by the Courts Service, merely describing it as totally unsatisfactory. He had indicated on the 5th April 2019 to the court that he had emailed A&L Goodbody setting out his issues with the discovery. Counsel for the Courts Service noted that this email had not in fact set out any issues with the discovery made but it merely expressed the plaintiff's dissatisfaction with same. The court directed the plaintiff to write to A&L Goodbody within seven days on the 12th April 2019 and agree a date to attend A&L Goodbody's offices and inspect the discovery documentation.

21. The plaintiff failed to comply with this direction. A letter was not received within seven days as directed and to date no letter seeking to arrange inspection has been received by the solicitor for the Courts Service.

22. The letter notes that the plaintiff did however swear an affidavit on the 13th May 2019 which was received by the Courts Service on the 15th May 2019 which again fails to adequately specify the plaintiff's issues with this discovery made by the court.

23. The letter continued that these proceedings have now been delayed for a period of nine months due to Mr. Tracey's consistent failure to comply with judicial direction as matters stand.

.....

25. Mr. Tracey said he wanted an expert to come and inspect the issues relating to CCTV which he said the court had already directed discovery. He then referred to the dishonest actions of the Courts Service. There was also reference to a suggestion by Mr. Tracey that Charleton J.'s judgment in a case had been written by Mr. Jackson

BL, counsel for the State defendants. This is quite a scandalous statement to have made and the court is satisfied that Mr. Tracey had an opportunity to inspect the documents but had not sought to do so and the court is not going to put the matter back for any further time but is going to list it for jury action call over list for the 20th June 2019. Mr. Tracey objected to this but the court is satisfied to do so.

26. This Court is of the view that Mr. Tracey did not want any of these matters to go before a jury in regard to what happened to the previous case as referred by a jury but was seeking to have issues raised which might lead him to be in a position to appeal the matters in the Court of Appeal and the Supreme Court.”

17. The ruling accepted that there had been certain delays by the State defendants during the discovery process. The court further noted Mr. Tracey’s dissatisfaction with the affidavits of discovery but also observed no further steps had been taken by him in respect of any interlocutory application(s) regarding discovery or other issues that he had raised. Certain difficulties in inspecting the discovered documents were also considered. However, having taken all matters into account, the court was satisfied that the matter could proceed and be transferred to the jury list.

18. I have set out the terms of this ruling in some detail as it deals with a number of issues of which the plaintiff now complains in this appeal and within his recusal application before the High Court. It also deals with his repeated submissions, in the absence of a formal application, that Eagar J. recuse himself.

19. Thereafter by Notice of Motion dated 28 June 2019 the appellant sought the recusal of Eagar J. from the above entitled proceedings and four other High Court cases “in full compliance with the criteria of nature justice (*nemo iudex in causa sua* - no Judge will be a Judge in his own cause) as endorsed by former Chief Justice Mrs. Susan Denham J. in *Dellway Investments v. NAMA*”.

20. Within the grounding affidavit, Mr. Tracey averred that Eagar J. “*should be aware that in hearing any such application to recuse himself he cannot hear it himself under the law of natural justice which is enshrined in the Constitution*”. He thereafter makes a number of points with regard to the discovery process and lists from sub. para. (a) to sub. para. (p) examples of judicial conduct which he claims merit recusal. These include allegations of bias, unfair procedure, being prevented from presenting his case on 7 December 2018, ignoring a blatant absence of discovery and inspection, accepting untruths, placing a case into the jury list in the knowledge that issues remained unresolved and failing to act with fairness and impartiality.

21. The State defendants and the Courts Service both filed replying affidavits dealing with the issues in detail and stated their position that there were no grounds for recusal. The affidavits also point out that Eagar J. is better positioned to case manage this litigation having regard to his extensive knowledge of the various sets of proceedings before the court.

22. At the hearing of his recusal application on 7 October 2019, the plaintiff attended but chose not to make any submissions before the court. This is confirmed within the judgment of Eagar J. and by the appellant before this court. His reasons for doing so relate to his contention that a judge, against whom a recusal application is made, cannot adjudicate upon it. Notwithstanding that the plaintiff made no oral submissions, it is clear that the court had regard to his grounding affidavit.

23. Eagar J. delivered a comprehensive judgment on 25 October 2019, *Tracey v. Minister for Justice, Equality and Law Reform* [2019] IEHC 950. He dismissed the application to recuse himself and ordered that the application stand further adjourned in relation to the question of costs and for the ongoing case management of this matter and four other actions. At the time he assumed responsibility for case management, he noted there were six cases for civil jury trial, with at least three then awaiting decisions of the Supreme Court. In *Tracey*

v. Minister for Justice, Equality and Law Reform [2018] IESC 45, Mr. Tracey's appeal from the order of Hedigan J. was determined by the Supreme Court. Arising from the terms of that judgment, an application was then heard by Eagar J. in the High Court, [2019] IEHC 183, in which the proceedings against the Courts Service were struck out pursuant to the inherent jurisdiction of the court. Eagar J. noted at para. 35(iii) of his judgment of 25 October 2019, that prior to his order in that case, the plaintiff sought his recusal.

24. Eagar J. set out in significant detail the various interlocutory applications and judgments in respect of all proceedings, which are extensive. It is clear that his knowledge of the procedural aspects of these proceedings is comprehensive.

25. The allegations and contentions of the plaintiff are also set out and considered by the learned trial judge, particularly his complaints with regard to the attitude of all defendants to dealing with the discovery aspect of this present case. Eagar J. also pointed out that no application for further or better discovery has been made, nor any appeal from the court's order in respect of discovery. On more than one occasion he pointed to the plaintiff's lack of specificity in respect of his precise difficulties regarding discovery.

26. The learned trial judge was at pains to point out that, prior to this litigation, he had no knowledge of Mr. Tracey or his litigation and pursuant to the order of the President of the High Court he has case managed what is undoubtedly long running and procedurally complex litigation and stated he will continue to do so, subject to any court order. He also properly noted that the events giving rise to this litigation occurred many years ago and the need that all matters proceed to trial at the earliest opportunity.

27. On 4 November 2019 the court held a further hearing to determine the question of costs. The transcript of the application before Eagar J. discloses that the plaintiff appeared and made oral submissions in respect of the matter generally and as to why costs should not be awarded against him. At the conclusion of the hearing the court awarded the costs of the

application to the defendants, with an order that those costs be taxed or ascertained in default of agreement and also giving certain directions with regard to the ongoing case management of the litigation. As set out above this is the only order against which the plaintiff now seeks to appeal.

Appeal

28. In his eight grounds of appeal the appellant re-iterates throughout that he has been denied fair procedures, together with the principles of natural justice (invoking the Latin maxims *audi alteram partem* and *nemo iudex in causa sua* throughout), together with his contention that there has been a denial of his constitutional rights pursuant to Article 40 of the Constitution and Article 6.1 of the European Convention on Human Rights (ECHR).

29. As set out above, the appellant only invokes the judgment of 4 November 2019. He states that, in summary, on that date the court;

- (a) On this and on preceding dates did not act fairly towards him
- (b) Ignored the rules and procedures concerning recusal and acted in a grossly unfair manner in ordering costs against him
- (c) In imposing such a burden upon him that was not in accordance with the rules of natural justice.
- (d) Should have ensured that Eagar J. did not act as a judge in his own cause
- (e) In ignoring the high standards of natural justice, the professional standing of the plaintiff was placed in jeopardy
- (f) Ignored the Bangalore principles of judicial conduct
- (g) Did not afford the plaintiff due process

(h) Denied the appellant equality of arms and procedural equality; his simple application for recusal resulted in an abuse of process which did not afford a fair balance to the plaintiff .

30. In his written and oral submissions before the court the appellant contends that Eagar J. had permitted what he described as procrastination and postponements of proceedings at the instigation of the defendants in particular in respect of his applications for discovery. He also re-iterated his view that Eagar J. should have acceded to his oral application that he recuse himself and following his accepting the judge’s request that he make a formal application, should not have adjudicated the issue himself.

31. For their part, both defendants set out the factual position in some detail and aside from the State defendants’ concession of some delay in the furnishing of discovery, reject all allegations in so far as they relate to them and ask that the recusal application be denied.

Recusal

32. The legal principles with regard to the test to be applied where the issue of recusal arises are well-established.

33. As Eagar J. sets out in his judgment, these principles are set out in *O’Callaghan & ors. v. Judge Alan Mahon & ors.* [2007] IESC 17, (*‘O’Callaghan’*), *Goode Concrete v. C.R.H. plc.* [2015] IESC 70, (*‘Goode’*) and *Commissioner of An Garda Siochána & ors. v. Penfield Enterprises Limited & ors.* [2016] IECA 141, (*‘Penfield’*).

34. Eagar J. quoted Fennelly J. in *O’Callaghan*, who described the principles to be applied in a case in which the allegation is of objective bias as well-established, stating as follows:-

“(a). objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision

maker will not be fair and impartial;

(b) the apprehensions of the actual affected party are not relevant; (this Court's emphasis).

(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;

(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or show prejudice, hostility or dislike towards one party or his witnesses”

35. The appellant does not appear to take issue with these well-established principles but rather to the fact that a recusal application was dealt with by Eagar J. who is the judge against whom the accusation of bias is made.

36. In considering the issue of potential judicial bias in *Bula Ltd. v. Tara Mines Ltd.* (No. 6) [2000] 4 IR 412 (*'Bula'*) Denham J. (as she then was) stated:-

“106... it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person”.

37. The court continued:-

“141. A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case.

The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes that the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective. This has been analysed by the Constitutional Court of South Africa... ”

38. The appellant invoked the Bangalore principles, which the Supreme Court considered in *Goode* where Denham C.J. put the position as follows:

“47. The tradition of recusal in the Irish Courts is reflected in the Bangalore Principles of Judicial Conduct 2002, at para. 2.5:-

’A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:-

2.5.1. The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice ”

39. Later in the same judgment the court confirmed:

“53. While the Bangalore Principles and Commentary go into some detail as to the principles underlining the exercise of recusal, the test is that of a reasonable

observer. The jurisprudence of this jurisdiction, the reasonable, objective and informed person, is fundamentally consistent with the approach in the Bangalore Principles.”

40. The Supreme Court has, on more than one occasion, noted the importance of the Judicial Oath taken by all judges, in terms of considering any motion for recusal; a point highlighted by Dunne J. in *O’Driscoll v. Hurley and Health Service Executive* [2016] IESC 32. In *Penfield Irvine J.* (as she then was) stated the position as follows;

“34. The starting point for the court’s consideration on this appeal is the right and indeed the duty of judges to hear and determine all such cases or legal issues as may come before them for adjudication, unless there are substantial reasons why they should not do so. It is relevant in this regards that judges, at the time of their appointment, make a declaration pursuant to Article 34.6.1 of the constitution to administer justice ‘without fear or favour’

35. However, there are circumstances in which a judge has a duty to step aside from a pending or impending hearing so as to permit another judge determine some matter in contest between the parties.....One such circumstances is where a party to litigation can establish that the judge scheduled to hear their case has demonstrate objective bias...

.....

37. There is no doubting the fact that the onus of proof of establishing objective bias rests with the party who asks the judge to recuse themselves”.

41. Within his Notice of Motion before Eagar J. and this appeal, the appellant relies upon the Supreme Court decision of *Dellway Investments Ltd. v. NAMA* [2011] IESC 14. That

judgment of the court addressed the issue of fair procedures in the joinder of a party claiming a significant and direct interest in the outcome of that litigation, in which the Supreme Court, Denham J. (as she then was) stated;

“89....The decision in this case is based on a fundamental constitutional principle. When an order could affect the rights of a person in that it might restrict his existing right to trade or his right to enjoy some benefits contracted for, such a possible result is sufficient to require that the procedure which can lead to that result must conform to the principles of constitutional justice, which includes the right to be heard”.

42. The applicability of that case to the facts of this case is not immediately apparent; the occasion when the plaintiff did not make any submissions is where he has chosen not to do so, specifically in respect of his own recusal application. To the extent that he invokes a broader principle that he is entitled to fair procedures, it is clear that he takes serious issue with regard to Eagar J.’s rulings or determinations in respect of discovery and inspection of certain documentation. He appears particularly aggrieved that this particular matter has been transferred to the jury list to be allocated a date for a jury trial in circumstances where he contends that aspects of these specific issues remain unresolved. That appears more an assertion that the court has not found in his favour rather than a failure to afford him fair procedures. As was pointed out by Clarke J. the plaintiff is an experienced litigant before these courts; and, as Eagar J. pointed out in his judgment there are possible interlocutory applications open to this plaintiff if he is dissatisfied with these issues. Rather than utilise these, the appellant seeks Eagar J.’s recusal. The difficulty is in seeking to identify the objective bias of which he complains. It is clear from the ruling, judgment and the transcript of the hearing on 4 November 2019 that this appellant has been afforded fair procedures throughout.

Order of 4 November - Costs

43. The applicable provision at the time of the application before Eagar J. was RSC O. 99, r. 1(3) which set out the general rule that costs should follow the event. The judgment of Clarke J. (as he then was) in *Veolia Water Plc. v. Fingal County Council* [2007] 2 IR 81 confirms the general application of this rule and moreover that it should only be departed from in special or unusual circumstances. The burden is upon the party (in this instance the appellant) asserting that costs should not follow the event.

44. It is clear from the transcript of the costs hearing before Eagar J. on 4 November 2019 that the learned trial judge dealt with the issue at length and the plaintiff was given every opportunity to set out why in his view costs should not be awarded against him. It should be noted that disagreeing with the determination of the trial judge does not constitute either a special or an unusual circumstance – a point made by Clarke J. at paragraph 4.3 within the Supreme Court judgment concerning Mr. Tracey cited above.

45. An appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle or failed to attach a weight to the appropriate factors relevant to a particular decision (see *Godsil v. Ireland* [2015] 4 IR 535). In this case there has been no such error in principle or a failure to properly weigh all of the relevant factors, including any exercise of his discretion.

46. Murray J. in *Heffernan v. Hibernian College Unlimited* [2020] IECA 121 in dealing with an appeal of an order for costs that pre-dated SI 584/2019 stated:

“30. *It is also clear that the exercise by the High Court of its discretion in calibrating these various considerations should not be lightly upset by an appellate court: as the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders ‘it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were*

open to the first instance court' (Waterford Credit Union v. J&E Davy [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs (see Delaney and McGrath "Civil Procedure" 4th Ed. (Dublin, 2018) at paras. 24.777 – 24.285). However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relevant to the particular decision in hand (Godsil v. Ireland [2015] IESC 103; [2015] 4 IR 535 at para. 69)."

47. In respect of the costs application a separate date of 4 November 2019 was allocated and the transcript discloses that the plaintiff was given every opportunity to identify any special circumstances which would justify the departure from the normal rule of costs following the event. No reason was provided that satisfied the court that the usual rule should not apply. Nor has the appellant demonstrated on appeal that any special circumstance applies, nor any error making it necessary or even appropriate to interfere with the decision of Eagar J. in respect of costs.

Observations and Conclusion

48. In his Notice of Appeal the appellant states that the order that will be sought from this court is:

“To set aside the order of 04 November 2019 inclusive of costs and to have the recusal application dealt with in accordance with natural justice, natural law and the rights to Constitutional justice guaranteed under the Constitution. To recuse the court dealing with the case management principally due to demonstrated bias, abuse of process, errors of law, pre-judgment, lack of fair procedure, lack of equality of arms, lack of fair balance and lack of impartiality. Regardless of the appellant’s status as a

litigant in person, to allow the existence of due course of law and fair procedure in accordance with the Bangalore Principles, the Constitution and the European Convention on Human Rights (enshrined in Irish law in 2003)”.

49. In invoking his constitutional rights, his entitlements pursuant to the ECHR and the other matters of which this appellant complains, he bears the onus of proof. It is for him to clearly outline why Eagar J., who has been case managing this litigation for some four years, has shown objective bias such as to merit his recusal. His rulings and judgment show he has an excellent mastery of the procedural aspects of this case. The matters forming the basis of these proceedings occurred a considerable time ago and any recusal would doubtless delay matters further. Of course, if a finding of objective bias was found based upon the tests set out by the Supreme Court, this would supersede any possible issue of delay to this litigation.

50. The papers have been considered in detail. Any fair reading of them shows that the basis of this recusal application appears to be rooted in the appellant’s objection to the decisions of the court with regard to various interlocutory orders that have arisen in the case management of this litigation, rather than to any criteria of objective bias that Eagar J. has demonstrated. Within his submissions to this court he again re-iterated and relied upon the correspondence and documentation in this case concerning discovery and inspection of documentation. At times his submissions were more akin to an appeal in respect of these specific matters, than to a recusal application. This is not the first occasion that the appellant has sought the recusal of judges dealing with this litigation.

51. The Supreme Court is clear that a judge, mindful of his or her judicial oath and duties and responsibilities and within that role is entitled to hear an application for that judge’s recusal. The case law is replete with such examples. Eagar J. was fully entitled for the reasons clearly and comprehensively outlined by him in his judgment and the judgments that

he in turn cited within it. He was also in a position to bring to bear his extensive experience in dealing with the case management of this litigation since October 2016.

52. Eagar J. in his comprehensive judgment of 25 October 2019 and in a previous extensive written ruling forwarding this matter to trial by jury, dealt comprehensively with all of the issues raised within the substantive application(s) and also in respect of an application for his recusal. In his submissions before this court, the appellant's submissions were very much directed towards his disagreement with the court's adjudication of issues concerning discovery, inspection and consequently having this matter deemed ready to transfer for the purposes of seeking a jury trial.

53. In my view no case for objective bias has been made out by this appellant; the ruling and subsequent judgments of Eagar J. disclose that he has considered all of the proceedings in considering how their case management might proceed. The appellant, whilst eloquently outlining the difficulties of a lay litigant in dealing with litigation, nevertheless advanced no grounds of objective bias in respect of Eagar J. In respect of this action, Eagar J. himself has pointed out that discovery might have been advanced with greater expedition. Thereafter, having carefully assessed all of the issues, he determined this matter was now ready to be transferred to await a jury trial. The appellant disagrees and that of course is his prerogative. Disagreement with the view taken by the learned trial judge does not, of itself, constitute objective bias.

54. With regard to the specific grounds of appeal the judgment of Eagar J. dealt comprehensively with the application by this appellant to recuse himself. The Latin maxims of *audi alteram partem* and indeed *nemo iudex in causa sua* have no relevance in respect of this application. The plaintiff chose not to participate in the hearing and accordingly chose not to exercise his right to be heard. When he has chosen to do so, his applications have been properly considered by the court. The Supreme Court is clear, in the decisions cited above,

that a judge is entitled to deal with an application seeking his recusal as Eagar J. has done in this case.

55. There is nothing within those established principles of Irish law that are in any way inconsistent with the Bangalore principles of judicial conduct referred to by the appellant. As set out by the Supreme Court in *Goode* and cited above; the test to be applied in respect of objective bias in an application for recusal as that of a reasonable, objective and informed person, is fundamentally consistent with these principles. That test was considered and applied throughout by Eagar J.

56. The appellant also sought the recusal of Eagar J., on the basis of his rights pursuant to Art. 40 of the Irish Constitution and Art. 6 of the European Convention on Human Rights have been denied. No basis has been established for either contention and they are rejected.

57. The well-established principles with regard to any recusal application were all properly considered by Eagar J. Within these proceedings this appellant requested, at least twice in the course of submissions to the court, on separate occasions, that the judge recuse himself. Thereafter he brought his formal application before the court. His complaint that he should not be obliged to do so is unfounded; seeking a judge's recusal cannot form part of an oral submission, not properly on notice to the court or the other parties. It is a serious issue and requires a formal application. Within his ruling and judgment Eagar J. rehearsed the history of this litigation and the current status of each proceeding. He also dealt in detail with the various issues raised by this appellant, regarding his dissatisfaction with the defendants' discovery and his inability to properly inspect it. Eagar J. dealt with and properly adjudicated all of these matters in some detail. The judge took the view that this matter was now ready to be transferred into the jury list to await a date for a jury trial. That must be seen against the background of his extensive experience of dealing with this litigation.

58. Eagar J. comprehensively dealt with all of the matters raised by this appellant both within his recusal application and the costs application, consequent upon his judgment of 25 October 2019. In the view of this court he correctly considered and applied the appropriate authorities. To re-iterate Clarke J. in respect of the quotation at para. 9 above, where a recusal argument becomes little more than a rehash of the original case made, in essence on the basis that the bias of the trial judge is evident by his disagreement with the orders sought by the litigant, then such an application for recusal is unstateable. That is the position in respect of the appellant's appeal.

59. For these reasons I would dismiss this appeal.

60. The preliminary view of the court is that the costs should follow the event and that the respondents are entitled to the costs of the appeal to be adjudicated in default of agreement. If the appellant wishes to contend that the proposed order as to costs should not be made, within 21 days of delivery of this judgment he must request the office of the Court of Appeal to fix a date to hear short submissions from all parties on the costs when the costs will be determined by the court.

61. As this judgment is being delivered electronically, Costello and Murray JJ. have indicated their agreement with it.