

THE HIGH COURT

[2007 No. 7939 P]

BETWEEN

KEVIN TRACEY

PLAINTIFFS

V.

THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM, IRELAND, THE ATTORNEY GENERAL, THE COMMISSIONER OF AN GARDA SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE DUBLIN METROPOLITAN DISTRICT COURT, THE COURTS SERVICE, AND KEITH BANNON

DEFENDANTS

[2007 No. 8488 P]

BETWEEN

KEVIN TRACEY

PLAINTIFF

V.

THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM, IRELAND, THE ATTORNEY GENERAL, THE COMMISSIONER OF AN GARDA SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE DUBLIN METROPOLITAN DISTRICT COURT, THE COURTS SERVICE, AND DAVID REYNOLDS

DEFENDANTS

[2008 No.1840 P]

KEVIN TRACEY AND KAREN TRACEY

PLAINTIFFS

V.

IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM, THE COMMISSIONER OF AN GARDA SIOCHANA, THE GARDA COMPLAINTS BOARD, ANTHONY DUGGAN, MALACHY DUGGAN, MARTIN GRIFFIN, LIAM MULGREW, DECLAN MURRAY, EDWARD FINUCANE, DEIRDRE RYAN, FELIM MCKENNA, PAUL FANNING, KEVIN GROGAN, THE DIRECTOR OF PUBLIC PROSECUTIONS, CLAIRE LOFTUS, RONAN O'NEILL, DECLAN KEATING, THE COURTS SERVICE, FRIEDA MCELHINNEY, CORMAC DUNNE, YVONNE BAMBURY, MARY MCKEOWN, OLIVER DOYLE AND BRIDGET O'DOWDA

DEFENDANTS

[2008 No. 11092 P]

KEVIN TRACEY AND KAREN TRACEY

PLAINTIFFS

V.

IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM, THE COMMISSIONER OF AN GARDA SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE DUBLIN METROPOLITAN DISTRICT COURT, THE COURTS SERVICE, EDWARD FINUCANE, KEVIN GROGAN, DAVID REYNOLDS, PADRAIG O'MEARA, RONAN COFFEY, JASON COURAGE AND MICHAEL FITZPATRICK

DEFENDANTS

[2008 No. 11094 P]

KEVIN TRACEY AND KAREN TRACEY

PLAINTIFFS

V.

IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM, THE COMMISSIONER OF AN GARDA SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE COURTS SERVICE, JOHN MOLLOY, FRIEDA MCELHINNEY, HAZEL BELL, KEITH LAMBE, EDWARD FINUCANE, KEVIN GROGAN, DAVID REYNOLDS, DEIRDRE RYAN AND RONAN COFFEY

DEFENDANTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 25th day of October, 2019

1. This is the court's judgment on an application by way of notice of motion dated the 28th November 2019 by the plaintiff seeking the recusal of this judge from the case management of these proceedings, in full compliance with the criteria of natural justice (*nemo iudex in causa sua* – no judge shall be a judge in his own cause) as endorsed by the former Chief Justice, Ms. Susan Denham, in *Dellway Investments v. NAMA* (2011) IESC 14. The plaintiff also sought an order to stay all further case management in these cases until after the hearing of this motion. He also sought further and other relief and costs.
2. The notice of motion was grounded on a grounding affidavit sworn by the plaintiff.
3. Although the application was that of the plaintiff, he did not take part in the proceedings on the basis that he felt that another judge should consider whether or not this judge should recuse himself from the case management of these cases.
4. The position of the plaintiff is clearly wrong as it is a matter in the first instance for the judge who is dealing with the issues to decide whether or not he should recuse himself from the case.

History of the proceedings

5. The first of the proceedings was commenced by the issuing of a plenary summons by the plaintiffs on the 20th December 2006. The proceedings were not served until the following year. There are two sets of defendants to the principal proceedings, the Courts Service, who are represented by A&L Goodbody Solicitors for most of the cases, and the relevant State respondents who are represented by the Chief State Solicitors Office.
6. The principal proceedings progressed in an orderly fashion with the delivery of a statement of claim on the 31st May 2007, the raising of particulars and replies thereto, and the filing of defences, such that a notice of trial was filed by the plaintiffs on the 27th of August 2008. It is clear that the plaintiffs had progressed the case with reasonable expedition up to that point.
7. There were further procedural issues arising from discovery which resulted in voluntary discovery being part agreed on behalf of the State representatives by letter dated the 21st September 2009. The response of the State respondents of that date related to a request seeking voluntary discovery which had been made by the plaintiffs on the 6th January 2009. This was in relation to a case which has been disposed of bearing record number (2006/6470 P). By early 2010 there were a total of seven sets of proceedings in being in which Mr. Tracey either alone or in one guise or another was the principal moving party and elements of the State were the sole, or in some cases, the main defendants. In early 2010 the State respondents brought a motion seeking case management of all of those cases together. The principal proceedings was one of the cases brought under case management on that basis. One of the cases in question was struck out by order of Charleton J. on the 29th June 2010. The remainder of the cases continued to be the

subject matter of case management to the adjournment from time to time of the case management applications.

8. The principal nature of the proceedings are that the plaintiffs were subject to a particular conspiracy and collusion of malicious prosecution and abuse of legal process including false summonses, false prosecutors, false fines, false indorsement of licence, forced breaking and entering and assaults by members of An Garda Síochána in executing false warrants of arrests for false imprisonment and the plaintiff's constitutionally inviolable home and incarceration at Mountjoy Prison.
9. The application for case management was initially returnable for the 15th March 2010 before Kearns P. It was subsequently adjourned from time to time to the 26th July, the 5th October, the 14th December 2010, and finally to the 4th March 2011.
10. In February 2011, a motion to strike out these proceedings for want of prosecution was brought on behalf of the Courts Service. The State respondents and other relevant State parties also sought to have each of the relevant proceedings struck out for want of prosecution. These applications were initially returnable on the 18th February 2011 and were adjourned to the case management date that then stood adjourned to the 4th March 2011 so they could be heard in conjunction with case management.
11. What transpired was then contained in a judgment of Kearns P. which he delivered on the 4th March 2011 in the following terms: -

"At the start of the Michaelmas term in 2010 it was intimated to me by a person attending court on Mr. Tracey's behalf that he was ill and had been hospitalised first in Connolly Hospital, first in Connolly Hospital and after in Beaumont Hospital up to the time of his discharge on the 20th August 2010. The only evidence adduced to support ongoing requests for an adjournment was a four line medical report from a general practitioner dated the 2nd September 2010. At that time, I put Mr. Tracey's litigation back for a period of time to enable him to obtain a specialist opinion and in doing so made it absolutely clear to his representative in court that, having regard to the long interval of time since the matters complained of occurred, the Court would require such detailed expert evidence, failing which the proceedings which were to be before the court in early November would be dismissed. I impressed this fact upon Mr. Tracey's representatives in the strongest possible terms".

12. Kearns P. also stated: -

"In the instant case Mr. Tracey was represented by a different McKenzie friend when the matter came before me on the 4th March. On that date various defendants had sought to dismiss the plaintiff's claim for want of prosecution".

On the 4th March, Mr. Tracey's representative, Mr. Justin Morahan, produced letters which in the opinion of Kearns P. failed to explain why the plaintiff was unable to attend upon his

legal business or even to swear an affidavit in response to those replied upon by the various defendants. Kearns P. then made orders dismissing the six sets of proceedings.

13. The matter came before the Supreme Court by way of an appeal against that order and judgment was given in *Tracey v McDowell* [2016] IESC 44 by Clarke J. on behalf of the Supreme Court which were concurred upon by the other two judges on the Supreme Court, MacMenamin J. and Charleton J. on the 26th July 2016.
14. On hearing of the case by the Supreme Court, Mr. Tracey, who presented the case on behalf of himself and his wife in person, suggested that both MacMenamin J. and Charleton J. should recuse themselves by virtue of what was to be argued to be a reasonable apprehension of bias against Mr. Tracey, said to be derived from a judgment delivered in a previous case.
15. The suggestion made in the recusal application was that the judgment displayed bias against Mr. Tracey by virtue of the fact that, it was said, only selective quotations from his statement of claim were included.
16. Clarke J. said: -

"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". (This Court's emphasis).

Clarke J. continued at para. 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".

17. Having heard the arguments in relation to the medical reports, Clarke J. continued at para. 7.4: -

"I am, therefore, satisfied that, in all the circumstances, the trial judge was entitled to conclude that there had been a failure on the part of Mr. Tracey to comply with the previous directions of the court concerning the filing of an appropriate medical report. The reports furnished fell short of that which was required.

7.5 *But the question remains as to whether a dismissal of each of the relevant proceedings was a proportionate response, in all the circumstances, to that failure...*

- 7.6 *In summary, therefore, it seems to me that the trial judge was entitled to conclude that there had been inordinate and inexcusable delay, in the particular sense relevant to the facts of this appeal, by virtue of the persistent failure of the Traceys to present adequate medical reports to the Court so as to enable the Court to make an appropriate decision as to whether, and if so for how long, to put these proceedings on hold.*
- 7.7 *However, the question remains as to whether a dismissal of each of the relevant proceedings, rather than some lesser measure, was within the range of proportionate responses which it was open to the Court to take in all the circumstances of the case...*
- 7.9 *Nonetheless, in my view, in the light of the fact that the Traceys had progressed the relevant proceedings in a timely fashion up to that point and had at least provided some additional medical information, a dismissal of the proceedings was a disproportionate sanction to impose for the undoubted procedural failure present”.*
18. Clarke J. then concluded that the trial judge was in error in dismissing the relevant proceedings and the appeal must be allowed. In his concluding remarks, he said: -
- “8.2 *I would, however, draw attention to the fact that, for a variety of reasons not all of which are the Traceys’ fault, each of the relevant proceedings have now been in being for quite some time. It is, therefore, incumbent on all concerned to ensure that all of the proceedings can come on for trial in the earliest possible timeframe. (This Court’s emphasis)*
- 8.3 *In those circumstances I would propose that this Court give a direction that each of the matters be listed, at the earliest convenient date available, before the President of the High Court or a judge nominated by the President for the purposes of further case management. It should, in that context, be emphasised that, while the dismissal of the relevant proceedings may be seen as disproportionate in all the circumstances then prevailing, nonetheless there was a material procedural failure on the part of the Traceys. It follows that any further procedural failures, provided that they be of substance and could not be regarded as minor or trivial, could legitimately lead a judge conducting further case management of these proceedings to the conclusion that such further procedural failure, when taken in conjunction with the procedural failure which is the subject of this judgment, rendered the failures concerned sufficiently persistent to warrant dismissal. It is of the utmost importance, in that context, that it be understood that any directions given by a case management judge in the future should be strictly complied with”.*
19. In October 2016, the President of the High Court, Kelly P., requested this Judge to case manage the series of cases which had been sent back to the High Court for case management by the Supreme Court. There were six cases for civil jury trial when the High Court took over the matter in October 2016.

20. At least three cases were awaiting decisions of the Supreme Court. Under those circumstances the first case the court concentrated on was 2006 6407 P.
21. This Judge had no knowledge of the proceedings brought by Mr. Tracey and had no knowledge of Mr. Tracey when asked to case manage the proceedings. This Court is aware that Mr. Tracey has a number of cases which have been in the Supreme Court not relating to these matters, because Mr. Tracey has indicated this to the court.
22. The individual cases:
 - (i) 2006/6407 P: On the 31st July 2017, this Court determined that discovery had been completed and that the case should be ready for trial at the next jury sittings which was beginning in October 2017. The court is aware that this case was eventually dismissed before a jury presided over by Barton J.
 - (ii) 2007/7939 P: On the 8th June 2018, following on the plaintiff's notice of motion dated the 12th July 2017 for discovery coming in for hearing before the court on the 23rd March 2018. There had been some delays caused to this Court not being able to deal expeditiously with these matters:
 - (a) Due to the attendance of Mr. Tracey at the Supreme Court on other issues which the court accepted was reasonable; and
 - (b) The court notes that having made an order of discovery the affidavit on behalf of the State defendants had been delayed for no obvious reason.
23. This Court ruled on the 19th June 2019 that the case should be transferred to the plenary list of the jury list on the 20th June 2019. The court notes that:

"In respect of inspecting any discovered material, the court invited the plaintiff to make an arrangement with the solicitors acting for the Courts Service and acting for the State defendants, to view this material. The plaintiff did not do so. This and all other matters came before the court on the 20th May 2019. The court dealt with other matters which again were matters for which a jury trial is sought".
24. In relation to case (2007/7939 P) Mr. Compton, BL on behalf of the Courts Service said that no contact had been made but that he had been served with an affidavit of Kevin Tracey which was in effect an application for this judge to recuse himself. Mr. Tracey, in an affidavit sworn on the 13th May 2019 claimed the following in relation to the Courts Service: -
 - (a) *"They had been guilty of backdating an order to block an appeal.*
 - (b) *They had produced false documents.*
 - (c) *They had committed perjury in the full eyes of the court without any accountability.*
 - (d) *They had fabricated judgments.*

- (e) *They had written orders/judgments for the court”.*
25. He said that due to the blatant perversion of the course of justice by the trial court in one plenary action in July 2018, the plaintiffs are requesting that this case and other plenary actions which when complete, be brought before the President of the High Court for further scrutiny of that trial.
- 27 Mr. Compton, BL set out his client’s understanding of what had happened as follows:-
- “(i) *On the 5th September 2018, the sworn affidavit of discovery of Kevin Fidgeon was served on the plaintiff, but the plaintiff still maintains in his affidavit of the 13th May 2019 that this discovery was not received despite, having acknowledged in open court on the 22nd March 2019 that he had in fact received this affidavit of discovery.*
- (ii) *On the 5th October 2018, the court directed the plaintiff to write to A&L Goodbody setting out his issues with the discovery made in advance of the next mentioned date the 7th of December 2018 and he said the plaintiff had failed to comply with this directive.*
- (iii) *On the 7th December 2018 the court again directed the plaintiff to write to A&L Goodbody setting out his issues with the discovery made in advance of the next mentioned date and the response was that the plaintiff had failed to comply with this direction.*
- (iv) *On the 25th January 2019, the court heard the plaintiff’s submissions in respect of the slip rule application made and perfected the order. A&L Goodbody confirmed to the court that they had not received any correspondence from the plaintiff in relation to the purported issues with discovery. The court adjourned the matter to the 1st March 2019 and indicated that the matter would be sent for jury trial on this date if no progress was made between the 25th January 2019 and no correspondence was received from the plaintiff in this regard. On the 1st March the plaintiff was unable to attend as he suffered a family bereavement and the matters were accordingly adjourned to the 22nd March. The court adjourned the matter on the 22nd March until the 5th April and directed the plaintiff to set out his issues with the discovery made in advance of the 3rd April 2019. The plaintiff failed to comply with this direction.*
- (v) *On the 4th April 2019, the plaintiff emailed A&L Goodbody, setting out what discovery was not received in compliance with the order for discovery dated the 8th June 2018”.*
- 28 Counsel for the Courts Service noted that an email dated the 5th April 2019 from the plaintiff to his instructing solicitors had not in fact set out any issues with the discovery made but it merely expressed the plaintiff’s dissatisfaction. The court had directed the plaintiff to write to A&L Goodbody within seven days on the 12th April 2019 and to agree

a date to attend A&L Goodbody's offices and inspect the discovery documentation. The plaintiff failed to comply with this direction.

- 29 The court notes at para. 5.8 of the judgment of Clarke J. on 26th July 2016 in *Tracey v. McDowell & Ors* [2016] IESC 44 in which he stated: -

" . . . a significant or persistent failure to comply with express court orders or directions might justify dismissal as a proportionate consequence of major procedural non-compliance".

In these circumstances, the court put this matter in for the jury action call over list for the 20th June 2019.

- 30 The next case is (2007/1840 P). These proceedings were issued on the 15th November 2007, and on the 22nd December 2007, the plaintiff issued a statement of claim. On the 21st February 2008, the plaintiff sought an order of judgment against the sixth and seventh named defendants (the Courts Service and the Dublin Metropolitan District Court). The motion on behalf of the plaintiff came before McKechnie J. on the 31st March 2008, and it was ordered that the plaintiff reply to the notice of particulars delivered by the sixth and seventh named defendants to the plaintiff dated the 18th January 2008, within four weeks from the date of perfection of the order and the sixth and seventh named defendants had three weeks from the date of receipt of said replies to particulars from the delivery of a defence.
- 31 On the 25th April 2008, Mr. Tracey served replies to notice of particulars and on the 16th June 2008, the defence of the sixth and seventh named defendants were delivered by Messrs A&L Goodbody on behalf of the Courts Service and the Dublin Metropolitan District Court. On the 14th October 2008, the sixth and seventh named defendants sought by way of notice of motion: -
- (i) An order pursuant to O. 19, r. 28 dismissing the plaintiff's claim as against the sixth and seventh named defendants on the basis that same was frivolous and vexatious.
 - (ii) An order pursuant to O. 19, r. 27 striking out the plaintiff's pleadings as against the sixth and seventh named defendants on the basis that they disclosed no reasonable cause of action against the defendants.
 - (iii) An order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim as against the sixth and seventh named defendants on the basis that same are frivolous or vexatious or bound to fail.
 - (iv) This motion came before Hedigan J. on the 26th January 2009 and he ordered the plaintiff's claim as against the sixth and seventh named defendants be dismissed pursuant to O. 19, r. 28 on the basis that same was frivolous and vexatious.
 - (v) On the 11th February 2009 the plaintiff served a notice of appeal arising from the judgment of Hedigan J. dated the 26th July 2009.

32 As previously recited at that time there were six High Court cases including 2007 8488 P, which were then dismissed by the President of the High Court, Kearns P., on the 4h March 2011. The Supreme Court allowed the appeal of Mr. Tracey against the order of Kearns P. on the 26th July 2016.

33 It is clear that the application of the sixth and seventh named defendants which had been successful and which was the subject matter of the judgment of Hedigan J. dated the 26th January 2009 was not considered by the Supreme Court in those proceedings. Mr. Tracey's appeal against the order of Hedigan J. came before the Supreme Court in *Tracey v MJE&LR & Ors* [2018] IESC 45 and on the 31st July 2018 the judgment of the court was given by MacMenamin J., and in his judgment he said: -

"The following issues fall to be determined in this appeal. First, whether Mr. Tracey was wrongly denied a right to cross-examine a deponent, Margaret O'Neill, who swore a grounding affidavit in the High Court on behalf of the Courts Service, and next, whether any claim is sustainable in law against the sixth named defendant, the 'Dublin Metropolitan District Court'".

The Supreme Court upheld the judgment of the High Court in relation to the sixth named defendant, the Dublin Metropolitan District Court. At para. 24 of his judgment, he said: -

"There is, however, the allegation as to the alleged conduct on the part of a District Court clerk. This claim was not fully particularised, either in the statement of claim, or in the reply to particulars. For a cause of action such as misfeasance in public office to be sustainable, a plaintiff would have to allege that conduct by a public servant was motivated by malice or ill-will or knowing illegality. There is no such specific plea in these proceedings. Nonetheless, the allegation, as it stands, subsists as part of the claim. Furthermore, the order relied on was included in the evidence and appears to show that a clerk certified the order was a true copy of the original. It does not appear that the signature complained of goes to the validity of the order, or even on Mr Tracey's case is in any way wrongful - he asserts that the order was indeed in that form, i.e. signed by the judge in question, Judge Fitzpatrick, but contends this was unlawful. All this is without adverting to terms of the District Court Rules on signature of orders already referred to. However, these matters were not considered or addressed on the appeal before this Court and there remains, at minimum, a prima facie allegation pleaded against one of the employees of the Courts Service. Can the Courts Service then avail of Order 19, Rule 28 to strike out? I am not persuaded that this can be done under this Order and Rule. In expressing this view, I do not preclude the possibility that an application might be made to the High Court to strike out the proceedings against the Courts Service, but this time based upon the inherent jurisdiction of that court. In such an application, different legal criteria would arise. These are described in the case law". (This Court's emphasis)

34 He further stated: -

"A new application to strike out the claim against the Courts Service, relying on the different and distinct basis of inherent jurisdiction of the Court, would not be res judicata by reason of the prior application or this judgment".

Such an application was made by the Courts Service, and on the 22nd March 2019, in Tracey v MJE&LR [2019] IEHC 183 this Court held at para. 64: -

"Having regard to the jurisprudence and in particular the comments of McCracken J. in the Supreme Court in Fay and Tegral Pipes Ltd. [2005] IESC 34, the court will strike out the proceedings herein as against the seventh named defendant pursuant to the inherent jurisdiction of this Court. The court is satisfied that the proceedings herein against the seventh named defendant are bound to fail

35 This Court has not been notified of any appeal lodged: -

(i) Against this judgment dated the 22nd March 2019 in which the court indicated it was satisfied that the proceedings against the seventh named defendant were bound to fail.

(ii) The court been aware of any appeal against the ruling of this Court on the 19th June 2019 in relation to the case of 2019 7939 P in which this Court sent this case to the list of dates in respect of the ruling of the court.

(iii) The court does note that before this order, the plaintiff had sought to have this judge recuse himself from the case.

36 The next two cases are (2008/11092 P) and (2008/11094 P).

37 The Court has given a judgement on the application for discovery made by the plaintiffs in these cases. One of the issues which the court had to deal with was the issue as to whether or not in these two proceedings the Courts Service was represented by the Chief State Solicitor's Office. The court does not see any reason why the Chief State Solicitor's Office should not represent the Courts Service in relation to these matters. The fact that a private firm of solicitors were engaged by the Courts Service in other proceedings has no relevance to the decision by the Courts service to be represented by the Chief State Solicitor. Again, there has been no application to appeal the decisions in these cases to the Court of Appeal.

38 An application in the proceedings (2008/11092 P) were made by way of an application by the plaintiffs for judgment in default of defence and Herbert J. ruled that the motion as against the Courts Service be struck out but that the sixth named defendant pay to the plaintiff the costs of the motion and ordered to be taxed in default of agreement. Again in respect of (2008/11092 P), by way of notice of motion dated the 17th May 2010 and returnable for the 18th October 2010, the plaintiff sought an order for judgment against the first to fifth and seventh to thirteenth defendants (apart from the Courts Service) for judgment in default of defence. It appears that this case was adjourned initially to the 7th December 2011, subsequently to the 9th May 2011, then to the 10th October 2011. On

the 10th November 2011, O'Neill J. struck out the notice of motion for non – appearance by the plaintiff.

39 By affidavit sworn on the 1st February 2018, the plaintiff sought discovery of documents in relation to (2008/11092 P) and (2008/11094 P). Having heard the plaintiff and counsel on behalf of the defendants, all of whom were represented by the Chief State Solicitor, the court made orders of discovery on the 5th April 2019 and directed that an order be drawn up in due course in respect of the judgment of this Court. The plaintiff complained that the Chief State Solicitor's office represented the Courts Service in one case and represented by A&L Goodbody in another. The court however did not see any reason why the Chief State Solicitor's office should not represent the Courts Service in relation to these matters. The court notes that no order has been drawn up, and the court will deal with this matter in October 2019.

40 The next case is (2008/1840 P). This was the subject of an appeal from the order of Lavan J. on the 22nd March 2010 and the judgment of the Supreme Court was given on the 7th February 2018 by Finlay Geoghegan J. The order of Lavan J. made on the 22nd February 2010 ruled that a notice of motion issued by the plaintiffs for judgment in default of defence against the defendants on the 14th December 2009 be struck out. The plaintiff appealed this order by notice of appeal dated the 20th March 2010 and Finlay Geoghegan J. notes: -

"The matter appears to have lain dormant for a number of years until recently reactivated at the instigation of the court". (This Court's emphasis)

Finlay Geoghegan J. stated at para 3: -

"The motion for judgment in default of defence held and determined by Lavan J. on the 22nd February 2010 was the second motion for judgment in default of defence issued by the plaintiff in these proceedings. In those circumstances the plaintiffs contend that the High Court judge was in error in striking out the motion as the submission was bound by the terms of O. 27, r. 8(1) of the Rules of the Superior Courts then applicable to grant judgment in favour of plaintiffs against the defendant".

She continued at para. 10: -

- "10. It is common case that the plaintiffs' proceedings are not an action referred to in the proceeding rules of O. 27 and hence r. 8 applies. The plaintiff's claim is a claim for unliquidated damages in tort and hence r. 9 also applies."*
- 11. Rules 8 and 9 concerned with the provision of a defendant fails to deliver a defence. As appears from r. 8 if a defendant being bound to deliver a defence does not do so within the time allowed, then the plaintiff may 'subject to the provisions of r. 9' set down the action on motion for judgment.*

13. *I have concluded that the jurisdiction given the court in O. 27, r. 8(1) on a second application for judgment in default of defence to grant judgment in favour of a plaintiff is only where the defendant at the date of the hearing of the motion, has not delivered their response.*
17. *The provisions of r. 9 evince a clear intention that the primary purpose of rules. 8 and 9 of O. 27 are to secure the delivery of a defence, and it is only where a defendant notwithstanding the steps taken by a plaintiff and the effective permission to deliver late a defence still fails to deliver a defence by the time of the hearing of the second motion for judgment that the Court is given jurisdiction under O. 27 r. 8 to grant judgment on the statement of claim in favour of the plaintiff against the defaulting defendant.*
20. *Accordingly, I have concluded that Lavan J. correctly exercised the High Court jurisdiction on a hearing of the second motion for judgment in default of defence on the 22nd February 2010, the State defendants having delivered the defence, by striking out the plaintiffs' motion and awarding costs of the motion to the plaintiffs. I would dismiss the appeal".*

The Complaints of the Plaintiff

- 41 The plaintiff swore an affidavit on the 28th June 2019, grounding the application to support his motion to have this judge recuse himself from all case management of this case and the four other High Court cases. They are (2007/7939 P), (2007/8488 P), (2008/11092 P) and (2008/11094 P).
- 42 He states that on the 18th February 2019 he requested this judge to recuse himself from the case management in five plenary actions claiming damages from wrongful prosecution/conviction following the Supreme Court decision in *Tracey v McDowell* [2016] IESC 44 on the 26th July 2016, to return the cases to the High Court for case management. He states that the case management commenced in October 2016, and following the continued unacceptable conduct of the court on the 18th February 2019 he made a verbal application for this judge to recuse himself. In response this judge informed the plaintiff to make a formal court application and to bring this application before the court for hearing. He also indicated that this judge should be aware that in hearing any such application to recuse oneself, one cannot hear it oneself under the law of natural justice which is enshrined in the Constitution. The principle of natural justice (*nemo iudex in causa sua*) must be strictly complied with. He said that this principle was endorsed by Denham J. (as she then was) in *Dellway Investments v. NAMA*. [2011] IESC 14. He stated that on the 5th April 2019, his affidavit of the 14th March 2019 was not addressed by the court. It was not in the possession of this judge. This application shows the conduct of the court, its partiality and bias against him.
- 43 In this affidavit he first of all refers to counsel for the Courts Service, indicating that the order of the 8th June 2018 did not reflect the judgment and asked to make a slip rule application to amend the order of Eagar J. He said there was no court motion for the amendment, but his objection was ignored. He stated that on the 7th December 2018 he

objected to the slip rule application to the case as proposed by the Courts Service legal team in the discovery application inquired by him from the Courts Service. He said he was treated unfairly and not permitted to present his case but instead when he started to speak he was asked by the court to sit down. He said that on the 25th January 2019, the application by counsel for the Courts Service to apply the slip rule was again addressed. The court confirmed that the slip rule was in his favour and expanded the documentation that will be supplied to him. However, he said he was not given any explanation or evidence of this when he requested same. On the 25th January 2019 it was confirmed that the order applying the slip rule application was brought back to three months earlier on the 8th October 2018, three days after the court hearing on the 5th October 2018 which had put this matter in for mention on the 7th December 2018 (when the court had supposedly perfected the order three days later). He said that this was an unfair procedure and on the 25th January 2019 he was left outside the time to appeal. He said that on the 25th January 2019 he had not received the sworn discovery affidavit from the State at the Courts Service. Due to the delay the State were to have the sworn affidavit within three weeks and finally to have it served on him on the 1st March 2019. He stated that on the 25th January 2019 a peremptory order was made by Eagar J. for the State to file and serve the affidavit by the 1st March 2019. He said that at the time of swearing of this affidavit he still had not received the affidavits of discovery. He said that on the 25th June 2019 when inspection was raised by him, the court stated that this issue will be dealt with later.

- 44 He then dealt with the case of (2007/8488 P). He said that it was during the hearing of the application by the Courts Service to strike out the case that he made a verbal application for the court to recuse itself on the following grounds: -
- (i) On the 18th February 2019 apart from the fact that this is a third attempt to strike out the Court Service as defendants, a book of papers and the book of authorities were handed to him by counsel for the Courts Service just five minutes before the hearing. The court was advised of this and did not grant him an adjournment or allow him time to consider the papers or the case law or to file a response or submissions in same. He felt that this was an unfair procedure and to any ordinary observer would create a perception of bias. He also said that the court was asked a direct question by him if it was fair for counsel for the Courts Service to *"regurgitate the same matters that were heard ad nauseam in the Supreme Court"*. The court failed to reply. He stated the court is not impartial in matters pertaining to the Courts Service as it has members on the board of the Courts Service. Should the Courts Service be now removed as a defendant, the court may suffer further delay due to a further appeal to the Supreme Court.
 - (ii) In relation to case (2008/1840 P), he said that on the 5th October 2018 there was no clarification or reason given to the court with regard to the State requirement to procure the High Court DAR of proceedings before Charleton J. on the 4th June 2010. He stated that the DAR was operating on that date and that the record is there, although the state could not acquire the DAR for the 4th June 2010. He said

that on the 25th January 2019 counsel for the State requested that he provide a revised statement of claim regarding the assaults and false imprisonment by the 8th April 2019 against the remaining defendants in proceedings before Charleton J. on the 4th June 2010. The court requested the plaintiffs to do this. He said the Supreme Court and counsel is aware that a claim may be entered regarding the judgment of Charleton J. The court and counsel should be aware that a recent Supreme Court judgment may necessitate further time for a delivery of the revised statement of claim.

- 45 In relation to (2008/11092 P), he said his discovery motion was filed on the 23rd March 2018, but that did not happen and remains to be heard. However, on the 27th July 2018, he received from the State barrister a document suggesting a discovery order on the part of the State and Courts Service. He did not receive any explanation why the State was representing the Courts Service in this case. He said the offer of discovery by the State falls short of the discovery sought on his motion/affidavit of the 22nd February 2018. There are questions arising from the document which included an undated Defence received on the 27th July 2018, (eight years after the delivery of the statement of claim). The discovery of a document of the 27th July 2018 avoids issues as outlined in his affidavit of the 21st February 2018. He said that on the 25th January 2019 when inspection was raised by the plaintiffs, the court stated again "*this will be dealt with later*".
- 46 Similarly, in relation to (2008/11094 P), he stated that in relation to the general conduct of case management: -
- (a) The procedure had been very unfair considering that he and the litigants in person are against heavily resourced opposition of State and Courts Services who have procrastinated throughout.
 - (b) At the outset, opposition legitimate claims were acknowledged by the Supreme Court and the court commended that these cases be settled by us to do so, or dealt with individually and constructively.
 - (c) In the event that the cases proceed to trial, it is the court's responsibility that we are treated fairly with particularly judicial forbearance as litigants in person, as can be seen by a few examples in the affidavit, he does not believe he is being treated fairly.
- 47 In relation to (2007/7939 P), he stated that his wife had sought to make arrangements with the State Solicitor and the solicitor for the Courts Service for inspection of documents with the prior experience that they and their legal representatives have a history of distorting documents and engaging in impropriety. On several occasions including the 28th May 2019, his wife sought information from the solicitors for the Courts Service regarding the scheduled inspection on the 18th June 2019 of documents in paper and electronic format. Professionals had been engaged to perform this task. This letter was ignored by the solicitors, which proved our point. An audacious and ludicrous letter

asking us to withdraw a threat was sent to us and proves a further point. He stated that Eagar J. had clearly stated unfair procedure and had shown bias against him when in fact as a lay litigant he should be shown extrajudicial forbearance. He quoted from *DPP v. Ramachandran* [1999] CCA 63. He states that the Supreme Court case of *O'Driscoll and Hurley v. the Health Service*, Dunne J. referred to the Bangalore principles of judicial conduct in 2002 in relation to the recusal due to judicial impartiality and to quote the Bangalore principles, Dunne J. stated: -

" . . . they encapsulate at an international level norms of universal application in relation to such issues as bias, the reasonable observer and the question of recusal".

The response of the Courts Service

- 48 Lisa Scott swore an affidavit dated the 30th July 2018 in response to the application by the plaintiff for this judge to recuse himself. She refers to Mr. Tracey's affidavit sworn on the 28th June 2019 grounding the notice of motion issued on the 28th June 2018 and served on the solicitors for the Courts Service on the 23rd of July 2018 seeking the recusal of this judge from the case management of various High Court cases involving Mr. Tracey and also seeks a stay on these cases. She states that in relation to paras. 3 and 4 of Mr. Tracey's affidavit, she is advised that at all times Mr. Tracey was advised by the court that if he wished to bring any application seeking the recusal of Eagar J. he should do so by issuing a formal notice of motion and she said that on the 18th February 2019, Eagar J. indicated that he would hear Mr. Tracey's recusal application and in the interests of expediency, Mr. Tracey was directed to bring a formal notice of motion before the 15th March 2019. Due to a family bereavement Mr. Tracey was unable to attend court on that date and the hearing was adjourned until the 22nd March 2019. She states that on the 22nd March 2019 Mr. Tracey failed to bring any such application before the court and in fact did not issue a motion in this regard until the 28th June 2019.
- 49 She said that there was no basis whatsoever to say that the court had misconducted any aspect of the case management of the various courts involved with Mr. Tracey before it. She said that Mr. Tracey's affidavit of 14th March 2019 was not served on the Courts Service or its solicitors in advance of the sitting of the court before Eagar J. on the 5th April 2019. Further, the Courts Service had still not been served with a copy of this affidavit. She says that the affidavit of Mr. Tracey sworn on the 13th May 2019 and served on the solicitors for the Courts Service on the 16th May 2019 seeking the recusal of Eagar J. although it was not sworn in support of any formal motion was opened and considered by Eagar J. at the sitting before the court on the 18th May 2019. She states that at no time in the almost eleven months since the Courts Service made discovery in this matter has Mr. Tracey identified with any specificity his purported issues with the discovery made by the Courts Service and has instead merely described it as "*totally unsatisfactory*".
- 50 She says that the slip rule application order referred to by Mr. Tracey was pursued to clarify the discovery granted to Mr. Tracey. He was afforded ample opportunity to raise objections at several stages however he never raised a particular objection in respect to

this order. In relation to Mr. Tracey's request for inspection he was afforded the opportunity to attend the offices of the solicitors for the Courts Service to inspect the discovery documentation listed in the first schedule to the Courts Service's affidavit of discovery and failed repeatedly to avail of this opportunity. He was also sent several copies of this documentation at various stages. For this reason, the matter was set out for trial by Eagar J. on the 17th May 2019, and Eagar J. issued his formal written ruling in this regard on the 19th June 2018. She also refers in particular to the letter from the solicitors for the Courts Service to Mr. Tracey dated the 16th May 2016 which outlines the ample opportunities for inspection or discovery afforded to Mr. Tracey since the Courts Service made discovery on the 5th September 2018 which he failed to properly pursue. She further advised that there was no evidence whatsoever to suggest that Eagar J. ignored Mr. Tracey's request for inspection, rather, Eagar J. made his ruling on the 17th May in circumstances where Mr. Tracey was attempting to delay matters by avoiding the inspection facilitation offered to him.

- 51 With regard to para. 8, she said there was no basis whatsoever in any of the allegations made at sub-paras. A to P.
- 52 She advised that at all times Eagar J. conducted the case management of these cases properly and appropriately. Mr. Tracey has at all times sought to delay matters by raising spurious arguments and allegations against all parties including the Courts Service itself and she states that he has in fact been shown additional judicial forbearance by Eagar J. She says that it is simply outrageous and wholly incorrect to suggest that the Courts Service or any of its legal representatives have engaged in any impropriety. As outlined in the letter from A&L Goodbody to Mr. Tracey dated the 16th May 2019, Mr. Tracey was afforded ample opportunity to inspect the discovery made by the Courts Service prior to Eagar J.'s ruling on the 17th May 2019. Following the delivery of this ruling, Mr. Tracey via correspondence issued by his wife, engaged in aggressive behaviour by threatening to attend at the Courts Services offices notwithstanding the fact that the matter had been dealt with by the court and sent on for trial in the jury list.

The reply of the State defendants

- 53 In the affidavit of Niall O'Shea sworn on the 29th August 2019, Mr. O'Shea says that he is the solicitor in the Chief State Solicitor's office acting for the State defendants in these proceedings. He says initially that the plaintiff had not adduced any basis upon which this judge should recuse himself from the case management of proceedings involving Kevin Tracey. He says that in his affidavit the plaintiff avers that Eagar J. cannot hear the application himself. He says that as a matter of law this is wholly misconceived and the application for a judge to recuse himself or herself is invariably made to that judge and he notes that the plaintiff has previously made a number of applications to judges of the High Court to recuse themselves in proceedings involving him. He said the plaintiff raises issues regarding affidavits he filed. He says that while the plaintiff filed affidavits they did not ground any application. A notice of motion was not issued until the 28th June 2019. Moreover, it is unclear as to how the plaintiff can seek to raise any issue with regard to

discovery and inspection in circumstances where the plaintiff never issued any motion for further and better discovery or for inspection as required by the Rules.

- 54 He said the plaintiff only issued the motion herein on the 28th June 2019 and was not served on the Chief State Solicitor's office until the 23rd July 2019, notwithstanding a direction by Eagar J. on the 5th July 2019 that the motion be served within one week of the 5th July 2019 in circumstances in which the motion was to be heard on the 29th July 2019.
- 55 Insofar as the plaintiffs make assertions of conduct which he alleges merit recusal, he said that the assertions made are wholly misconceived. They provide no basis whatsoever for recusal and contain consistently false and deliberately misleading allegations. He stated that the court handed down a comprehensive ruling dated the 19th June 2019.
- 56 He said it is apparent that this judge has acted appropriately and fairly throughout in dealing with the management of these proceedings. No reasonable person could comprehend that Eagar J. showed any bias or partiality whatsoever in case managing these proceedings. He said that for avoidance of any doubt, the plaintiff has not properly adduced any evidence of partiality or bias on the part of the court in managing these proceedings.

The Jurisprudence

- 57 The jurisprudence in respect of the recusal of a judge has been the subject matter of many decisions of the Superior Courts.
- 58 On the 30th March 2007, the Supreme Court delivered judgment in a case of *O'Callaghan & Ors v. Judge Alan Mahon & Ors* [2007] IESC 17. These were judicial proceedings in which the applicants appealed to the court from the judgment and order of Smyth J. delivered on the 10th October 2006 refusing the applicants the reliefs they sought. In giving judgment, Denham J. (as she then was) stated at para. 3: -

"In spite of the fact that these are judicial review proceedings, a significant feature of this case is the very high level of factual detail in the pleadings and in the submissions, as to the proceedings before the Tribunal. To address fully the issues submitted by the applicants I consider that it is necessary to refer in some detail to the allegations".

- 59 She recited the 40 grounds of appeal and identified the issues of appeal in that matter as follows: -

"There were two fundamental issues raised on this appeal, as they were in the High Court, being: (i) allegations of unfair procedures and inequality of treatment, and (ii) bias."

At para. 14 she stated the test to be applied: -

"Thus, expressly referring to this line of case law, the test to be applied in determining whether there is objective bias is whether a reasonable person, with full knowledge of the circumstances, would consider that there are external factors which would cause the decision maker to make a particular decision, or would inhibit him from making a decision impartially, as would give rise to a reasonable apprehension of bias".

60 Denham J. stated later in para. 23: -

"The applicants now claim bias by the Tribunal against them. Absolute bias is not alleged. What is alleged is objective bias - the apprehension of bias. The law as to this concept has been established clearly, and set out earlier in this judgment. The test to be applied is whether a reasonable person, who had knowledge of all the relevant circumstances, would have a reasonable apprehension of bias. It is an objective test".

She further said in relation to that case: -

"There has been extensive evidence as to certain actions of the Tribunal. The question is whether there is a basis, external to the decisions of the Tribunal, from which a reasonable person would have a reasonable apprehension of bias, of prejudgment, by the Tribunal. Whether, from the documents now given to the applicants, a reasonable person would have a reasonable apprehension that the Tribunal had prejudged the credibility of Mr. Tom Gilmartin, favourably, and that of Mr. Owen O'Callaghan unfavourably. I am satisfied that a reasonable person would not have such an apprehension".

61 In *Goode Concrete v. CRH Plc* [2015] IESC 70 judgment was given by the Supreme Court on 31st July 2015 by the then Chief Justice Denham C.J. She identified at para. 4 as follows: -

"The single ground of appeal upon which the appellant was given leave to appeal was that that the learned trial judge erred in law in hearing and determining these applications in circumstances where there was or could have been a perception of bias on his part due to his holding of interests in the shares of Crh Plc, which interests had not been disclosed and were unknown to the appellant".

The High Court judge had shareholding in CRH plc and that holding was valued at €135,835. At para. 44, Denham C.J. dealt with recusal: -

*"There is a well-established tradition of recusal, amongst the judiciary, where a judge recuses him or herself from hearing a case. This may be made by the judge independent of any application, or after an application that he or she recuse themselves. However, a balance has to be struck and a prudent practice adopted. As Keane C.J. said in *Rooney v. Minister for Agriculture and Food* [2001] 2 I.L.R.M. 37 at pp. 40 to 41.*

'Where one or other party does invite a judge to disqualify himself, the established and prudent practice has been for the judge concerned to disqualify himself if he has any reservations about the matter. On the other hand, a judge cannot permit a scrupulous approach by him to be used to permit parties to engage in forum shopping under the guise of challenging the partiality of the court.

The need to ensure the appearance, as well as the reality, of impartiality must be reconciled with the proper functioning of the judicial system. The dilemma to which these conflicting demands give rise might be resolved in cases of difficulty by the judge concerned referring the issue — perhaps on the basis of a memorandum prepared by him or her — to the senior available judge of the court of which he is a member. Such a course would be acceptable in cases of particular difficulty but I do not believe that this procedure should develop into common practice. The disclosure of possible grounds for concern and the sensible reaction of the parties, advised by their lawyers, has usually been sufficient to dispose of any such difficulty and I do not doubt this will continue to be the case”.

62 At para. 46, Denham C.J. referred to *Bula Ltd. v. Tara Mines* (No. 6) 4 IR 412: -

“... '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 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: *President of the Republic of South Africa v. South African Rugby Football Union* 1999 (4) S.A. 147 at para. 48: —*

'...the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial.'”

63 Denham C.J. continued: -

"The tradition of recusal in the Irish Courts is reflected in the Bangalore Principles of Judicial Conduct 2002, at paragraph 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".

64 At para. 53, Denham C.J. said: -

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

54. The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts.

55. The test to be applied when considering issues of perceived bias is important in protecting the administration of justice, and necessary to preserve public confidence in the judiciary. Thus, the issue is not simply a matter as between parties, but it is an issue for consideration in relation to the manifest impartial administration of justice in the State, and the confidence which the people rest in the judiciary".

65 In the case of *Commissioner of an Garda Siochaná & Ors v. Penfield Enterprises Limited & Ors* [2016] IECA 141, Irvine J. gave judgement on the 11th May 2016. At para. 34 of her judgement, Irvine J. stated:-

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

35. *However, there are circumstances in which a judge has a duty to step aside from a pending or impending hearing so as to permit another judge determine some matter in contest between the parties. This is because not only must justice be done it must be seen to be done. One such circumstance is where a party to litigation can establish that the judge scheduled to hear their case or application has demonstrated objective bias.*
37. *There is no doubting the fact that the onus of proof of establishing objective bias rests on the party who asks the judge to recuse themselves. This issue was addressed by the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union [1999] (4) S.A. 147* at para. 48 where the court stated as follows:-*

'The correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant.'

- 66 In *O'Callaghan v. Mahon & Ors. (No. 2)* IEHC 265. At para. 80 of his judgment, (Fennelly J) also helpfully summarised the principles relevant to a recusal application where the applicant relied upon prejudgment: -

'The principles to be applied to the determination of this appeal are thus, well established: -

- (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”.

67 The most recent judgment delivered by the Supreme Court was that of Dunne J. in *O’Driscoll (a minor suing by his mother and next friend Breda O’Driscoll) and Michael Hurley v. the Health Service Executive* [2016] IESC 32. This was the judgment of Dunne J. who sat with Denham C.J. (as she then was) O’Donnell J., MacMenamin J. Charleton J. and O’Malley J. It is useful to summarise the facts of the case in that the appellant was admitted to St. Luke’s Hospital in Kilkenny and underwent surgery on that date. During the course of the surgery an injury was occasioned to the appellant’s bladder which caused it to leak urine into his abdomen. The appellant brought proceedings suing by his mother and next friend in respect of the damage suffered as a result of the injury to his bladder and the consequences of that injury. Following a hearing before the High Court (O’Neill J.) the appellant was awarded a sum of €50,000 by way of general damages in respect of personal injuries sustained by him as a result of the clinical negligence of the surgeon attached to Kilkenny Regional Hospital. The hearing before the High Court was confined to an assessment of the damages as to the question of negligence was not an issue. The appellant appealed that decision to the Court of Appeal on a number of grounds but essentially the complaint was that the award of the damages were inadequate. The matter came in for hearing in the Court of Appeal on the 14th May 2015, the composition of the court being the President, Irvine J. and Hogan J. Judgment was reserved and a judgment was delivered by Irvine J. on 8th July 2015 dismissing the appeal. The application to the Supreme Court was granted on the issue of a preliminary application made by the applicant to the Court of Appeal that Irvine J. should have recused herself on the grounds of objective bias.

68 It was contended that as a result of the participation at the said conference by the judge there was a real possibility of unconscious bias on the part of the judge. Under the heading “*The applicable law*” at p. 5 of her judgment, Dunne J. stated: -

“The parties were not in dispute as to the relevant case law in this area. Both parties identified the decision of this Court in Goode Concrete v. CRH plc & Ors. [2015] 2 ILRM 289, as the authority in which the appropriate test was most recently elucidated. In her judgment in that case Denham C.J. (Clarke J., MacMenamin J. and Denham C.J. concurring) described the reasonable person test relating to the issue of bias”.

Submissions by the Parties

69 Mr. Tracey took the view that he was not taking part in the proceedings on the basis that the judge who is being asked to be recused should pass this case on to be determined by another judge.

70 Mr. Jackson B.L. on behalf of the State defendants made the following argument:

Applications for judges to recuse themselves are invariably heard by the judge subject to the recusal application. He said that Mr. Tracey was aware of this as he had made this type of application in numerous instances in the past.

Furthermore it is clear that if a judge was to pass on the case to be determined by another judge that would amount to some sort of regulatory hearing as opposed to anything else. The judge was being asked to recuse themselves is the best judge to hear the application as they would be familiar with the relevant facts.

- 71 Mr. Jackson quoted from the *Commissioner of An Garda Síochána and Ors. v. Penfield Enterprises Limited & Ors.* [2016] IECA 141 and the judgment given by Ms. Justice Irvine he quoted:

"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."

- 72 Mr. Jackson also quoted from the case of the *President of the Republic of South Africa v. South African Rugby Football Union* [1999] (4) S.A. 147 which says:

"the correct approach to this application for recusal of members of this Court is objective and the onus of establishing it rests upon the applicant".

- 73 Mr. Jackson said the test is objective but must be established by the applicant. The applicant did not participate in the application it is difficult to see how he could succeed.

- 74 He further referred to the test as enunciated in the Supreme Court by Denham C.J. in *Good Concrete v. CRH Plc* [2015] IESC 70.

"The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

- 75 Mr. Jackson also quoted from Fennelly J. in *O'Callaghan v. Mahon* [2007] IESC 17. These imply in circumstances where the alleged bias and impartiality involves some sort of prejudgment he submitted. He quoted as follows:

"The principles to be applied to the determination of this appeal are thus, well established:

- (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;*
- (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 which show prejudice, hostility or dislike towards one party or his witnesses."*

76 Mr. Jackson submitted the following:

- i. It is not a concern for the court as to how Mr. Tracey's perceives the court's behaviour but how a reasonable man perceives the court's behaviour.
- ii. In relation to principle (c) of Fennelly J's judgement above, Mr. Jackson stated that it was clear that Mr. Tracey was referring to procedural decisions of the court that he is not happy with. Those are matters in which he had another remedy in respect of and in some circumstances where he clearly refused to take up those remedies, for example bringing motions. It is not permissible to come to court and say the court is bias in circumstances where the applicant could have brought motions or in other instances appeals in respect of decisions of the court. That doesn't satisfy the test.

77 Mr. Jackson said that Mr. Tracey's grievances outlined in para. 8 (a) to (p) in his affidavit does not in any way demonstrate bias or partiality which would you justify his application succeeding. In relation to the issues at (a) to (p) the substantial allegation at (g) Mr. Tracey's says "*he ignored non-compliance with the pre-emptory orders against the defendants*". He stated that having looked through it, the only possible order could be an order that discovery be made by the 1st March and an affidavit of discovery is sent and subsequently sworn and filed by the 5th March. On that ground he submitted tht this could not ground an application for bias. He next quoted from Mr. Tracey's affidavit where Mr. Tracey stated "*he ignored the necessary requirement of inspection repeatedly requested in his court*". Mr. Jackson said that Mr. Tracey knows that if he wants to bring an application for inspection he must ultimately issue a motion but choose not to time and again.

78 Mr. Jackson quoted from Mr. Tracey's affidavit "*he accepts untruths regarding the procurement of the DAR for 2010. Mr. Jackson submitted that this was just false and misleading and an untruthful allegation*".

- 79 Mr. Jackson quoted from Mr. Tracey "*he confirmed there was no DAR in existence until June, 2010*". That is correct because there was no DAR in existence when the judgment of Charleton J. which he is referring to.
- 80 Mr. Jackson quoted from Mr. Tracey's affidavit stating that "he permitted the State's Solicitors to represent the Courts Service in two of the actions without adequate explanation. Mr. Jackson said that this was a matter for the State Solicitor as to who he represent. That is not a matter for the court.
- 81 He further quoted from Mr. Tracey's affidavit "*he allowed inordinate procrastination of our cases*". Mr Jackson responds to this by stating that there has in fact been extensive delay on the part of Mr. Tracey in a number of these cases. He pointed to the case bearing record number (2008/1840 P) stating that the parties had been waiting for many months for a new statement of claim to be submitted by Mr. Tracey but it had not been put forward.
- 82 Mr. Jackson quoted from Mr. Tracey "*he put the case into a jury list knowing that the issues in the case were unresolved*". Mr. Jackson submitted that the court made a correct and clear ruling in that regard and he submitted that the application should be refused. Mr. Compton B.L. on behalf of the Courts Service adopted the legal principles and factual assertions and submissions made by Mr. Jackson. His submissions related to cases (2007/7939 P) and (2008/8488 P).
- 83 He stated that the decision in *Penfield* ruled that substantial reasons need to be induced in order to succeed in an application such as this. The reasons relied upon by Mr. Tracey particularly against the Courts Service can't be described as substantial reason. His objections can be characterised in three matters.
1. The slip rule, Mr. Compton said the court would remember that this was done entirely for the benefit of Mr. Tracey. The order was originally incorrect and restricted discovery to be made although Mr. Tracey on occasion did object to this he could not recall any specific basis for alleging prejudice.
 2. Mr. Compton referred to objections to Mr. Tracey's contention of objection in relation to inspection and said the court had comprehensively dealt with this in its decision of the 19th June, 2019. The court sets out in that decision numerous occasions in which Mr. Tracey was allowed to raise objections to the discovery by the Courts Service never went beyond saying he was unsatisfied. No time over the course of nine months did Mr. Tracey set out precisely any particular objection. He also failed to take up an offer to attend the Courts Service Offices to inspect the documents. All of that was relatively academic because Mr. Tracey was furnished with copies of the documents as well as in the affidavit of discovery. There is no prejudice he was given numerous opportunities to bring a motion and didn't do so as he didn't embark in the process of identifying the problems of discovery made on behalf of the Courts Service.

3. Mr. Compton referred to his objection late in the Courts Service that there are members of the Courts Service that are also members of the judiciary. He submitted that this could not be entertained as a valid or substantial reason.

84 He submitted that this application can be described as a dissatisfaction on behalf of Mr. Tracey in respect of the determinations of the court and he referred to *Penfield* at para. 47 which endorsed his para. 80 from *O'Callaghan*:

“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”.

Observations

85 This judge was asked by the President of the High Court to case manage the six cases where the plaintiffs were Kevin Tracey and Karen Tracey and the defendants were State defendants and the Courts Service.

86 The court is approaching this application in the light of the principles laid down by Fennelly J. in *O'Callaghan No. 2*.

- a. The apprehension of Mr. Tracey is not relevant.
- b. 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. The court is satisfied that there is nothing external to the process which the court is case managing.

87 The court notes that Clarke J. in the Supreme Court in its decision dated 26th July 2016 concluded his judgment at 8.3 in these terms: -

"8.3 In those circumstances I would propose that this Court give a direction that each of the matters be listed, at the earliest convenient date available, before the President of the High Court or a judge nominated by the President for the purposes of further case management. It should, in that context, be emphasised that, while the dismissal of the relevant proceedings may be seen as disproportionate in all the circumstances then prevailing, nonetheless there was a material procedural failure on the part of the Traceys. It follows that any further procedural failures, provided that they be of substance and could not be regarded as minor or trivial, could legitimately lead a judge conducting further case management of these proceedings to the conclusion that such further procedural failure, when taken in conjunction with the procedural failure which is the subject of this judgment, rendered the failures concerned sufficiently persistent to warrant dismissal. It is of the utmost importance, in that context, that it be understood that any directions given by a case management judge in the future should be strictly complied with".

88 The court also notes the judgment of MacMenamin J. dated the 31st July 2018. In his concluding observations at para 25: -

"This appeal took up a day of court time. Mr. Tracey was given latitude to make his submission. He chose to cite very many legal authorities in his written submissions. As a consequence, in light of Mr. Tracey's status as a litigant in person, the defendants' solicitors were requested to prepare what transpired to be three large folders of authorities, containing no less than 54 legal texts and judgments, including provisions of the Constitution, and the European Convention on Human Rights. This comes at a cost. In fact, the legal principles applicable in this area are very well established. It was unnecessary to refer to the legal authorities in the appeal. There may come a point when, even well-resourced opposing parties, cannot reasonably be asked or required to assist personal litigants in preparation of a case. Compliance with the rules, with practice directions, and with time tables, are duties which fall on all parties to legal proceedings, whether or not they are legally represented. After due warning, a fundamental absence of compliance with the rules, and practice directions, or consistent dilatoriness, and failure to progress a case for years, may, in itself, be a basis for orders staying proceedings, on whatever terms are just".

At para. 27 he stated: -

"Finally, one cannot ignore the fact that the complaints in these proceedings refer to matters said to have occurred now some 12 years ago. The High Court judgment under appeal was delivered some 8 years ago. This appeal only came on for hearing as a result of initiatives from the office of the Supreme Court, calling upon the plaintiff, as appellant, to indicate whether or not the appeal was proceeding. Delay very frequently defeats justice. I do not say it will here, but that is the hazard of long drawn-out proceedings. I would dismiss the appeal with regard to the sixth named defendant, but allow the appeal with regard to the seventh named defendant".

- 89 This judge had no knowledge of these proceedings before undertaking the case management of same. The judge had no knowledge of Mr. and Mrs. Tracey or of the proceedings that they had initiated. The judge was very aware at all times of Mr. Tracey being a lay litigant and gave him time to prepare his cases and to allow him to pursue other cases including those which were in the Supreme Court, where judgments were given by MacMenamin and Finlay Geoghegan JJ.
- 90 As a result of those cases in the Supreme Court, the court dealt initially with (2006/6407 P). On the 31st July 2017, the courts was of the view that all relevant documentation had been discovered by the defendants in the matter and the court indicated that the motion seeking further and better particulars of discovery has now been completed. The case was ready for trial and was subsequently transferred to the next jury listing.
- 91 The court then concentrated on the case (2007/7939 P) and gave a judgment and an order in respect of discovery of matters. There was a substantial delay in the delivery of the State defendants' affidavit of discovery but no such delay by the Courts Service. The

court is aware of many judgments of the Superior Courts in relation to giving time to enable discovery to be made.

92 Mr. Tracey was unsatisfied by the affidavits of discovery. However, he did not seek further and better discovery. However, Mr Tracey indicated that he was unsatisfied.

93 The court initially suggested that he accept the documents that had been discovered and then directed him to write to the solicitors for both defendant parties to arrange a date to inspect the documents. He did not do so, although in his affidavit he suggests that his wife may have been in contact. In the affidavit of Kevin Fidgeon, on behalf of the Courts Service, a number of copy documents were provided.

94 The court sent (2007/7939 P) to the jury list on the 20th July 2019 and this Court made a ruling on the 19th July 2019 setting out the history of events noting that Mr. Tracey had set out what he believed to be dishonest actions of the Courts Service as follows: -

- (a) They had been found guilty of backdating an order to block an appeal.
- (b) They had produced false documents.
- (c) They committed perjury in the full eyes of the court without any accountability.
- (d) They had fabricated documents.
- (e) They had written orders/judgments for the court.

None of these complaints were backed up by any facts or evidence.

95 The court found that the plaintiff had failed to address with any level of specificity his purported issues with the discovery made by the Courts Service, merely describing it "*totally unsatisfactory*".

96 Mr. Tracey also complained that on the date when the court had the proceedings against the Courts Service struck out pursuant to the inherent jurisdiction of the court, on the grounds that the proceedings were frivolous and vexatious or bound to fail. Papers that were put before the court on that date was the notice of motion and grounding affidavit which had been served on Mr. Tracey. The other matters were his plenary summons, the statement of claim, the notice for particulars, the order of McKechnie J. dated the 31st March 2018, and other documents in relation to those proceedings. The submissions that were put before the court were the Supreme Court submissions on behalf of the plaintiff of the 24th March 2015, prepared by the plaintiff, the Supreme Court submissions on behalf of the sixth and seventh named defendants dated the 20th May 2015 which he would have had, the replying submissions on behalf of the plaintiff dated the 23rd March 2016, which he prepared and the judgment of MacMenamin J. The court was satisfied that Mr. Tracey had all the materials which he needed to prepare for the application which was made well in advance by the Courts Service.

- 97 The court also notes that there is a complaint by Mr. Tracey that he was out of time in terms of making an appeal against that judgment. No application has ever been made to this Court to extend the time for making an appeal and this Court would have granted him time within which to make an appeal against the court's judgment.
- 98 This Court and this judge will not be hearing any of the jury actions in relation to these cases, and the court is satisfied that in the words of Dunne J. in *O'Driscoll & Ors v. Hurley & Ors.*, that: -
- "It seems to me that invitations to judges to recuse themselves have become more commonplace. There is a growing tendency which involves litigants involved in a multiplicity of actions in cases making such applications in circumstances which could be only described as forum shopping".*
- 99 The court is satisfied that the plaintiffs in this case are indeed guilty of forum shopping, particularly in the circumstance where Mr Tracey had not sought to appeal any of the decisions of this court.
- 100 For the above reasons, this judge is satisfied that he should not recuse himself of the case management of these cases.
- 101 This court has not as yet considered the issues raised by Clarke C.J. in relation to dismissing the proceedings on the basis of further procedural failures, provided they be of substance. They could not be regarded as minor or trivial, but would legitimately lead a judge conducting further case management of these proceedings to the conclusion that such further procedural failure, when taken in conjunction with the procedural failure which is the subject of this judgement, rendered the failures concerned sufficiently persistent to warrant dismissal.
- 102 The court had determined that it had not yet reached that stage. But the court proposes to deal with the other matters which are before the case management which are (2007/8488 P), (2008/1840 P), (2007/11092) and, (2007/11094 P).
- 103 Finally, this Court proposes to deal with the other matters which are before the case management court, which are (2007/8488 P), (2008/1840 P), and (2007/11092 P) and (2007/11094 P), to prepare these cases for being sent to the jury list.
- 104 Unless this Court receives direction from the Court of Appeal or the Supreme Court, the court shall continue to case manage these proceedings.