THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 337

Appeal No. 2019/17

Baker J.
Costello J.
Power J.

BETWEEN/

DEFENDER LIMITED

PLAINTIFF/APPELLANT

- AND–

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT/RESPONDENT

- AND–

RELIANCE MANAGEMENT (BVI) LIMITED, RELIANCE INTERNATIONAL RESEARCH LLC, FIMAN LIMITED AND DAVID WHITEHEAD

THIRD PARTIES

JUDGMENT of Ms. Justice Costello delivered on the 16th day of December, 2019

Introduction

1. This appeal arises out of the notorious fraud perpetuated by Bernard L. Madoff in what has been described as the world's largest ponzi scheme. The appellant is an investment fund. It entered into a Custodian Agreement on 3 May 2007 with HSBC International Trust Services (Ireland) Limited ("HSBC") whereby the appellant appointed HSBC as its custodian for cash and other assets delivered to it. HSBC entered into a sub-custody agreement dated 4 May 2007 with Bernard L. Madoff Investment Securities, LLC ("BLMIS"), a company set up and owned by Mr. Madoff. The appellant invested over USD$500 million with BLMIS pursuant to the terms of the custody agreement which led to significant losses as it turned out that Mr. Madoff had in fact created a huge ponzi scheme. The appellant claims that HSBC was negligent and in breach of contract in its role as custodian under the custodian agreement.

2. On 12 December 2008 the assets of BLMIS and Mr. Madoff were frozen after Mr. Madoff was arrested by the FBI on 11 December 2008. Mr. Irving H. Picard was appointed the Trustee in Bankruptcy of BLMIS by the United States District Court for the Southern District of New York. The trustee administering the bankruptcy estate has engaged in claw-back litigation to recover assets to the insolvent funds. Based on his success up to October 2018, the appellant expects to recover 75% of the $540 million invested with BLMIS by the conclusion of the bankruptcy. On 16 April 2015, the US Bankruptcy Court approved a settlement agreement between the trustee, the plaintiff and other parties entered into on 23 March 2015 pursuant to which the trustee granted the plaintiff an allowed claim of $522,840,000 in the BLMIS bankruptcy. The trustee agreed to pay the plaintiff $161,317,906.40, which represented 48.545% of the allowed claim, plus a $500,000 advance provided to all claimants, less the plaintiff's settlement payment of

$93,000,000. The trustee agreed to, and has paid, further distributions on the allowed claim subsequently, thereby reducing the losses sustained by the plaintiff.

3. The case had been the subject of considerable case management before a number of judges before coming on for trial in October 2018. It was listed for an estimated five months. The appellant opened the case over a period of two and a half days and HSBC replied. After the opening submissions the Court decided that it was appropriate to hear a preliminary legal issue arising from the defence of HSBC relying on s.17(2) of the Civil Liability Act 1961 ("CLA"). The Court heard arguments from the parties on the CLA issue and delivered its judgment on 4 December 2018. The trial judge held that, for the purposes of the preliminary issue, the appellant and BLMIS were concurrent wrongdoers pursuant to s.11 of the CLA, that the settlement agreement entered into on 23 March 2015 between the trustee and the appellant amounted to an accord for the purposes of the CLA, that the law of New York had no application to determining the effect of the settlement agreement nor respective contributions, and that, as a concurrent wrongdoer, the appellant's total claim against HSBC is reduced by 100% pursuant to s.17(2) of the CLA.

4. The appellant notified the Attorney General that it intended to appeal the decision but, if it was unsuccessful in its appeal, it intended to bring a constitutional challenge to the applicable provisions of the CLA. This meant that the proceedings would have to come back before the High Court, either on the basis that the appellant succeeded on its appeal and the proceedings as currently constituted would resume, or to determine the appellant's constitutional challenge to the provisions of CLA.

5. The matter was listed again before the trial judge on 11 December 2018. Counsel for the appellant indicated that it was the intention of the appellant to appeal the decision on the CLA and, secondly, that it wanted to bring a motion later in the week requesting the trial judge to recuse himself from further involvement in the case if and when the case came back to the High Court following the appeal. The application arose out of certain passages in his judgment of 4 December 2018 which, it was said, indicated an antipathy towards the claim that amounted to objective bias. The passages of the judgment were paragraphs 15-22 as follows:-

> *"15. Professional negligence and breach of contract actions regularly appear before the High Court and they do not last any more than a few days or weeks at most. Yet, this case is listed to last for some five months of court time, although it appears that even this exceptionally long period of time may be an under-estimate, since during the opening of the case, submissions were made to the effect that it could last several days in excess of the 80 court days originally fixed.*
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> *16. In Fyffes v. D.C.C. plc [2007] IESC 36 at para. 7, in a case that went on for a similar length of time (88 days) and also involved a considerable amount of money, Fennelly J. remarked that:*

'It is difficult to escape the expression that the length of the trial was the product of the large amounts of money at stake and the depth of the respective corporate pockets rather than of the complexity of the issues.'

17. *In this case, the depth of the pockets is perhaps best illustrated by the fact that one set of legal submissions before the Court has a total of seven barristers - four senior counsel and three junior counsel - listed as the co-authors of those submissions. It is not surprising that, with this level of legal expertise, the legal arguments on all sides of the dispute are so comprehensive, which may go some way to explaining why so much time is required to deal with the issues raised by the parties.*

18. *However, as was the case in Fyffes, it is difficult for this Court to escape the impression (based on the first week of the case in which all the parties outlined their claims and defences), that five months of court time is being sought, not because this dispute could not be resolved in a much shorter time and without five months of evidence, but rather because of the sums of money at stake and the fact that the parties can afford to pay their own lawyers and therefore use up valuable court resources to resolve what is, essentially, a private dispute. It is difficult to avoid the conclusion that while 'ordinary' litigants have to wait years to have their cases or appeals heard (e.g. if an appeal is sought today in the Court of Appeal it will be listed for hearing in 2021), on the other hand wealthy litigants can monopolise court time and thus further delay hearings for other litigants, simply because they can afford to do so.*

A limit on amount of court time to which parties are entitled?

19. *Five months is an inordinate amount of time for the determination of any dispute and it seems likely to this Court that if the same issues regarding alleged negligence and breach of contract concerned an investment of €1 million, rather than $141 million, the parties would not be seeking five months of court time to determine the issues in dispute, which suggests that it is not the complexity of the legal issues which causes the long trial, but the amount of money that the parties are prepared to spend disputing those legal issues.*

20. *While an appeal court is very different from a trial court, nonetheless it is instructive to note that in the US Supreme Court, lawyers, no matter how deep the pockets of their clients, have just 30 minutes to present their case. One cannot help but wonder whether it would assist in reducing the considerable amount of money which it costs to litigate in Ireland, as well as reducing the strain on court resources in this country, if some limits were placed on the amount of court time to which litigants are entitled in order to resolve their disputes, so that a team of lawyers do not come up with every conceivable argument that might be in their favour, but rather just the strongest points in their favour. In this way, justice is achieved for wealthy litigants, but not to the detriment of other litigants who do not have justice denied by having justice delayed.*

21. Due to the high cost of litigation in Ireland, Kelly P. has noted that the Irish courts are currently the preserve of the very rich (who can afford to use up five months of court time to resolve a private dispute) or the very poor (who can endlessly litigate with no legal representation without consequence, as orders for costs against them, if they lose, are effectively meaningless). Speaking extra-judicially in an interview published in the Bar Review Vol. 23 No. 1 at p. 11, he stated:

> *'Under the current system, as they say, the only people who can litigate in the High Court are paupers or millionaires!'*

22. We may well have reached the point where the ongoing Review of the Administration of Civil Justice may consider whether there are good policy reasons for the imposition of a limit on court time to make litigation more affordable, since as noted by the Chairman of that Review Group, also Kelly P., in relation to the work of the Group:

> *'An assessment might indicate that* ***a case should take no more than X number of days****, and the costs will not be allowed to exceed Y,' (Irish Independent 16th February, 2018).* (emphasis added)

However, this is clearly not a matter for this Court to decide."

6. The trial judge indicated that the appellant could bring a motion to that effect returnable for 19 December 2018.

7. On 13 December 2018, in his chambers and without hearing any submissions from either of the parties, the trial judge decided that he would *"not now"* hear the motion. He explained his reasons in a brief ruling on 17 December 2018. On 17 December he said that the essence of the appellant's application was that, at some future date, the High Court will have to deal with a further hearing in the case, irrespective of the result of the appeal. This is likely to be two or more years in the future in his estimation. Whatever occurred, the appellant's application was that, in relation to the resumption of the hearing of the case before the High Court, which could be years from now, the trial judge should decide on 19 December 2018 whether he should recuse himself from hearing that case if and when it comes back before him. He was of the view that dealing with this future and contingent issue of his recusal in these circumstances was not the most efficient use of court resources when there were current and urgent issues to be dealt with in the High Court. He said that he would hear the application if and when the matter was due to come back before him, whether that was in many months, or many years, into the future.

8. At the end of the ruling, counsel for the appellant said:-

> *"I infer that this is a refusal to deal with the motion and I would like you to record that because I will appeal that decision if that is your decision."*

9. The trial judge confirmed that it was a refusal to deal with the matter at the moment. He confirmed that he had not reviewed the material submitted in support of the motion when

he decided on 13 December 2018 to notify the parties on 17 December 2018 of his decision not to proceed with the motion on 19 December 2018.

10. On 19 December 2018 the court sat to deal with consequential matters arising out of the decision on the CLA preliminary issue, the question of a constitutional challenge to the CLA and costs. At the end of the hearing, counsel for the appellant said he wanted to revisit the matter of the recusal application. He asked, in view of the fact that it appeared that no other matter was listed in the legal diary before the trial judge, whether in the circumstances he could open the recusal application. Counsel urged that if the recusal application was heard by the trial judge after the appeal in respect of the CLA judgment was determined, and it was then necessary to appeal the judgment in relation to the recusal application, that this could add a further two years' delay to the resumption of the trial, whether on the merits of the original application or the constitutional challenge to the CLA. He also reassured the trial judge that the motion could be dealt with by allowing the applicant and the respondent approximately one hour each. In relation to the two lever arch files presented to the court, he reassured the judge that most of the material had already been seen by him in the context of preparing for and in the opening of the trial. He emphasised that the only new material in the two folders was an eight-page affidavit, a one and a half-page list of points, a document which he called *"the boiled down Irish authorities"* on recusal running to seven pages and a quote from a speech given by the Chief Justice. The trial judge said that he was not in a position to hear the motion that day but that, *"I will consider what you have said and I have this matter in for mention on [21 December 2018] at 11 o'clock, so I will consider it before then."*

11. On 21 December 2018, the trial judge sat to rule in relation to procedural matters arising out of the judgment on the CLA and the question of the costs of the substantive hearing. He prepared a written judgment in relation to the recusal motion. He stated:-

> *"11. Having considered the matter, and in particular because my judgement of 4th December is, in any event, subject to an appeal which could take some time, I decided on Thursday 13th December that I was not going to hear the motion but was instead going to adjourn the matter generally with liberty to apply. ...*
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> *14. On Wednesday 19th December, counsel for Defender asked me to revisit my decision of the 17th December and hear the recusal application rather than adjourning it. He indicated that he was concerned that after the case comes back before me, say in two years' time (assuming of course that I am the judge it comes back before), that if at that stage I refuse to recuse myself, this would lead to an appeal of that decision by Defender, which could lead to further delay in this matter being heard. On this occasion, he also sought to clarify that while the recusal application to be heard might take longer than the one hour he had indicated on 11th December, he felt that it would take two hours, after discussing the matter with counsel for HSBC.*
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> *15. This Court undertook to consider these submissions and to give its final decision on Friday 21st December.*

16. While these submissions by counsel for Defender were helpful and were gratefully received by the Court, the determinative issue in the Court's decision regarding the adjournment of the recusal hearing remains the most appropriate use of court resources and, in particular, this Court's reluctance to use up scarce judicial resources today deciding whether it should hear a case which might or might not come back to it in two years' time. However, it is important to give the background and the detailed reasons for this decision. …

27. Thus, the essence of Defender's application which was due to be heard before this Court on Wednesday 19th December is that, at some future date after the appeal of the 4th December judgment has been decided, the High Court will have to deal with a further hearing in this case, irrespective of the result of the appeal. Thus, Defender wished this Court to deal with an application on Wednesday 19th December, or at a date shortly thereafter (but not to adjourn the matter generally), whereby I would decide that, if and when the matter comes back before the High Court, I would not be the judge dealing with it.

28. The date when these proceedings return to the High Court is likely to be two or more years in the future, unless the parties get an expedited appeal in the Court of Appeal or a leap frog appeal to the Supreme Court, in which case it is still likely to be many months into the future.

29. On the other hand, if the Court of Appeal's decision is itself appealed to the Supreme Court, and the Supreme Court agrees to hear that appeal, there could be a delay beyond two years, before the matter is back before the High Court.

30. Equally, of course, and this is a relevant point when considering the efficient use of court resources, it is possible that for other reasons, e.g. if the matter settled, the proceedings might not come back before the High Court at all. …

32. If, for any of the foregoing logistical or other reasons, the proceedings in this dispute do not come back before me, it would have been a complete waste of court time for this Court to spend 3-5 days in deciding whether I should recuse myself from a case, that ends up not even coming back before me. …

34. In summary, it is clear to this Court that the proposed recusal hearing involves this Court making a decision on a contingent and future issue. It is contingent since the case may not even come before this Court again and it is future since the next High Court hearing in this case could be years away. It is this Court's view that spending 3-5 days this week or early next term on a recusal application for a contingent and future hearing is not the most efficient use of court resources when there are clear and present issues to be dealt with in the High Court at this very moment. …

37. While I will not be hearing Defender's application for recusal this week or in the short term, I wish to emphasise that I am adjourning this matter generally with liberty to apply. Accordingly, if for whatever reason Defender feels that

circumstances have changed at any time in the future, such that it believes it is justified in seeking an immediate hearing on my recusal from the case at that stage, I will then of course consider those circumstances and whether I should hear the application for my recusal at that stage.

38. In this regard, this Court is not oblivious to the wishes of Defender not to have any delay to the hearing of the substantive matter/constitutional issue, caused by an appeal of a refusal by me to recuse myself. In making this decision, I have taken account of those concerns and in making any decision in the future on the timing of any such future recusal hearing, I will also take account of those concerns. In particular regard would be had to whether, the appeal of any such failure by me to recuse myself (assuming of course that this is decision [sic] which is taken by me in the future), could lead to a significant deal in the resumption of the substantive matter/constitutional issue.

39. However, the desire of Defender to have a judge, who might possibly hear this action in two years' time, to recuse himself, or refuse to recuse himself, now (so as to enable Defender appeal that decision in advance of the return of the matter to the High Court) is but one of the issues that must be weighed in the balance when this Court is reaching its decision on whether to adjourn a hearing. As is clear from this judgment, another issue to be taken into account is the most efficient use of court resources and in particular ensuring that judicial time is not expended in vain."

12. He explained his estimation of the amount of judicial time required to deal with the motion as follows:-

"46. To reach its final decision, this Court will have to:

- *review the supporting material prior to the application,*
- *allocate a minimum of a half day but perhaps more,*
- *review any other material and written legal submissions made during the hearing,*
- *possibly research the law on recusal, depending on the complexity of the arguments and legal material supplied by the parties,*
- *draft and finalise a written judgment on this important issue - in this regard it is often the case that the writing of a judgment takes a multiple of the amount of hearing time, and*
- *deal with costs and any other consequential orders arising from the judgment and if necessary draft and finalise a written judgment on same.*

So, while hearing the application might take less than a day, it seems likely that perhaps three days and up to five days of judicial time could be involved in this process."

13. It was necessary to adjourn the proceedings which were listed for mention on 16 January 2019 for further submissions in relation to the forms of orders to be made. At the end of the discussion counsel for the appellant applied for an early hearing of the application on the basis of the appellant's rights under Article 6 of the European Convention on Human Rights and he sought liberty to file a short supplemental affidavit dealing with this point and matters which had transpired since the grounding affidavit had been sworn. Counsel submitted *"…the decision on the recusal application we say should be made now or as soon as convenient to allow that part of the litigation, should it arise, keep pace with the substantive appeal and that the failure to hear it promptly would entail or could entail a further entirely avoidable delay to the commencement of the trial which already is long removed from the events in dispute and from the date of commencement."*

14. Counsel indicated that the application could be heard in two and a half hours, well within a day. The trial judge asked whether the further affidavit was to deal with the decision he had already made and whether it was not more appropriate for an appeal as he was functus officio. Counsel replied that he was not *functus officio* as he had given the appellant liberty to apply when he refused to hear the motion. The trial judge said that he would consider the submission that had been made and consider it further. The matter was put in for mention on 22 January 2019.

15. On 22 January the trial judge delivered a further written judgment on the application. He confirmed his decision of 17 December 2018 to adjourn the recusal motion generally with liberty to apply. He said:-

"59. It should be emphasised that I am not refusing to hear the recusal motion, but rather, in the interests of the efficient use of court resources and judicial time, I am refusing to hear the recusal motion now.

60. This is because if this case comes back to me in the future (which could, in any case, be up to four years['] time from now), it would have been a complete waste of court resources for me to spend judicial time deciding if I should recuse myself from a case which I was never going to hear."

16. He went on to state that:-

"64. If and when it is very likely, or certain, that I will be the judge to hear the proceedings between the parties in this case, then in this Court's view that is a more appropriate time for consideration to be given to whether a date should be set for the hearing of the recusal motion."

He elaborated as follows:-

"39. While I will not be hearing Defender's application for recusal now or in the short term, I wish to emphasise that I am adjourning this matter generally with liberty to apply. Accordingly, if for whatever reason Defender feels that circumstances have changed at any time in the future, such that it believes it is justified in seeking an immediate hearing on my recusal from the case at that stage, I will then of course consider those circumstances and whether I should hear the application for my recusal at that stage.

40. In this regard, this Court is not oblivious to the wishes of Defender not to have any delay to the hearing of the substantive matter/constitutional issue, caused by an appeal of a refusal by me to recuse myself. In making this decision, I have taken account of those concerns but have given precedence to the hearing of other applications and the preparation of judgments for clear and present matters involving other litigants, over the contingent and future concerns of Defender. In making any decision in the future on the timing of any such future recusal hearing, I will also take account of those concerns of Defender. In particular, regard would be had to whether the appeal of any such failure by me to recuse myself (assuming of course that this is a decision which is taken by me in the future) could lead to a significant delay in the resumption of the substantive matter/constitutional issue.

41. However, the desire of Defender to have a judge, who might possibly hear this action in two or four years' time, to recuse himself, or refuse to recuse himself, now (so as to enable Defender appeal that decision in advance of the return of the matter to the High Court), is but one of the issues that must be weighed in the balance when this Court is reaching its decision on whether to adjourn a hearing. As is clear from this judgment, another issue to be taken into account is the most efficient use of court resources and in particular ensuring that judicial time is not expended in vain. ...

50. This does not mean that this Court is not alive to the interests and desire of Defender to have their litigation heard promptly, rather this Court gives precedence to using court time on issues that definitely need to be decided over matters that may not ever need to be decided. In this regard, this Court would also note the comments of Irvine J. in Rice v. Muddiman [2018] IECA 402 at para. 31 regarding the discretion that is granted to High Court judges regarding the management of its scarce resources:

> *'I am first of all satisfied that the High Court judge was entitled to exercise his discretion in the manner in which he did when he refused Mr. Rice's adjournment application. There was nothing unjust or unfair in his decision having regard to the prevailing circumstances. Mr. Rice needs to understand that an appellate court will only set aside what was, in this case, effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice. (See, for example, the decision of Budd J. in Vella v. Morelli [1968] I.R. 11 and that of*

Lynch J. in Martin v. Moy Contractors Ltd [1999] IESC 26). A significant margin of appreciation must be afforded to a High Court judge, particularly the judge charged with the administration of the Personal Injuries List and the management of the Court's own scarce resources, as to how he or she may decide to exercise their discretion when faced with an application to adjourn an action on the date it is listed for hearing.'

51. It should be added that it is the case that the interests and desire of Defender to have their litigation heard promptly is something that can be considered by me during the course of the next one to four years depending on the progress of the appeal, if and when it is certain, or very likely, that the case will be assigned to me. If there was, at that stage, to be a refusal to recuse (which of course is by no means certain), then in appealing that decision Defender could ask the Court of Appeal or the Supreme Court to take those interests of Defender into account in considering an expedited appeal of a refusal to recuse, so that the substantive litigation is not delayed unduly. …

55. Having been granted a second opportunity (on 19th December, 2018) to argue that I should not adjourn the recusal motion, in essence therefore Defender was seeking a third opportunity (on 16th January, 2019) to make the same case, albeit with different arguments and sought to do so on the grounds that this Court had given Defender liberty to apply when giving judgment on the 17th December. Counsel no doubt had clear instructions from Defender to make a second attempt to overturn the adjournment of the recusal motion when this Court was functus officio as it had been for the first attempt. However, it must be acknowledged that counsel for Defender did concede that in pursuing those instructions he was testing judicial patience.

56. As part of this application on the 16th January, Defender sought liberty to file a supplemental affidavit regarding the adjournment of the recusal motion by this Court on the 17th December. Counsel for Defender argued that it needed to file the affidavit as it wanted these additional arguments on the record for the purposes of its appeal of the adjournment of the recusal motion. However, it is this Court's view that the purpose of the liberty to apply, which this Court had granted to Defender, was not to enable Defender to file arguments that it had not raised at the initial hearing regarding the adjournment of the recusal motion on the 17th December. For this reason, therefore, and also because this Court is functus officio regarding the adjournment of the recusal motion, it refused liberty to file the supplemental affidavit. Since it is functus officio, this Court also decided that it should not consider any of the oral submissions made by Defender on the 16th January. If Defender wishes to argue that this Court was wrong to adjourn the recusal motion, it is this Court's view that it should do so by way of appeal."

The appeal

17. The appellant appealed the decisions of the trial judge in relation to the recusal application. It said that the trial judge had erred in law on the grounds that:-

(1) the order of 21 December 2018 and the decisions of 16 January 2019 and 22 January 2019 are tantamount to a refusal by the trial judge to hear the recusal motion;

(2) he had failed to deal with and hear the recusal motion in a manner consistent with the appellant's right to a fair trial within a reasonable time, and the appellant's constitutional right to appeal;

(3) he adjourned the recusal motion without reading the papers grounding the application and without hearing any submissions from the appellant and/or on the basis that the application would take three/five days of judicial time; and

(4) he failed to recuse himself from any further hearing of the proceedings as a reasonable person in possession of all the relevant facts in all the circumstances of the case would have a reasonable apprehension that the appellant would not obtain a fair trial having regard to the contents of the judgment delivered by the trial judge on 4 December 2018, [2018] IEHC 706, and the subsequent comments of the trial judge on 17, 19 and 21 December 2018 and 16 and 22 January 2019.

18. The appellant submitted that there were three issues arising on the appeal:-

(a) the orders made by the trial judge on 21 December, 2018 and his decisions on 16 and 22 January 2019 are tantamount to a refusal to hear the recusal application;

(b) the trial judge failed to deal with the recusal application in a manner consistent with the appellant's right to a fair hearing within a reasonable time and the constitutional right to appeal; and

(c) the trial judge erred in fact and in law in failing to recuse himself from any further hearing of the within proceedings as a reasonable person in possession of all the relevant facts would have a reasonable apprehension that the appellant would not obtain a fair trial.

Tantamount to a refusal to hear the application?

19. The order of 21 December 2018 adjourns the motion that the trial judge recuse himself from any further hearing of the proceedings generally with liberty to apply. The decisions on 16 and 22 January 2019 were not drawn as orders of the court. The transcript of the hearings records that on 13 December 2018 the trial judge decided that he would not hear the motion listed for 19 December and that on 17 December he informed the parties that he was refusing to deal with it at that moment. The extracts from his written judgments of 21 December 2018 and 22 January 2019, quoted above, make it clear to my mind that he was not refusing to hear the application; he was refusing to hear it in December 2018, or shortly thereafter. He made it clear that he was aware of the fact that the appellant did not want him to adjourn the motion generally with liberty to re-enter, he understood the reasons why it wished him to decide the motion at that time and he understood the concerns about a possible future delay in the further progress of the proceedings once the appeal against his decision on the CLA was concluded. He

emphasised that if the appellant believed that circumstances have changed *"at any time in the future"*, which in the judgment of the appellant would justify reconsidering the application at that time, he would then consider those circumstances and whether he should hear the application at that stage. In my opinion, this fact is critical. If he had not made clear that the appellant could apply to re-enter the application in light of future changes in circumstances, and that he would consider any such application at that time in the light of any such change of circumstances, the decisions to adjourn the motion would amount to a refusal to hear the motion at all and, therefore, be tantamount to a refusal of the relief sought, and might arguably be a denial of justice. But that is not what he did. The appellant may renew the application pursuant to the liberty to apply at any time that the appellant deems appropriate in light of the trial judge's judgments.

20. The appellant relied upon the decision of the Supreme Court in *SPUC v. Grogan* [1989] I.R. 753 as support for the proposition that to defer reaching a decision on an application for an interlocutory injunction pending a ruling by the Court of Justice of the European Communities on a preliminary reference constituted a refusal to grant an interlocutory injunction. In that case, the plaintiffs had sought an interlocutory injunction restraining the defendants from printing, publishing and distributing information calculated to inform persons of the identity and location of, and the method of communication with, clinics where abortions were performed. An interim injunction was granted on 3 October 1989; the plaintiffs sought to continue the injunction and also an order for attachment and committal of some of the defendants for failing to comply with the interim order. The defendants claimed to be entitled to publish and distribute the information under certain provisions of European Law and argued that they should not be restrained from so doing. The High Court referred the issue, under Article 177 of the Treaty of Rome, to the Court of Justice of the European Communities. The High Court made no formal order in relation to the application for an interlocutory injunction pending a ruling of the Court of Justice. The net effect of the failure to make any order on the motion was that there was no order restraining the defendants from engaging in the complained of acts, pending the outcome of the reference to the Court of Justice. The plaintiffs appealed to the Supreme Court. Finlay C.J. held:-

> *"The application before the High Court was for an interlocutory injunction, that is, for an injunction lasting only until the trial and determination of the action. The purpose of an interlocutory injunction is, of course, to maintain a particular situation, without alteration, from the time when the order is made until the court can adjudicate on all the issues involved between the parties. To defer or postpone reaching a decision on such an application for a period which certainly equals and probably exceeds the time necessary to bring the action to hearing is, in my view, to decline or refuse to make an interlocutory injunction."*

On that basis the Supreme Court held that the failure of the High Court to make a decision on the application for an interlocutory injunction amounted to a decision within the meaning of the Constitution, which was appealable to the Supreme Court. The Court emphasised that, irrespective of the form of the order or the absence of formal words

from the High Court order, it could not oust the appellate jurisdiction of the Supreme Court on a determination of a High Court judge which affects one of the parties involved and has all the characteristics of a decision.

21. The appellant argues by analogy that the decisions of the trial judge in these proceedings have all the characteristics of decisions and amount to a determination which affects one of the parties involved, and is thus appealable to this court. It further submits that the decisions are tantamount to declining, or refusing, to hear the application.

22. In my opinion, the facts of this case are clearly distinguishable from those in *SPUC v. Grogan*. In SPUC, the effect of the refusal to determine the application for an interlocutory injunction was to leave unrestrained the actions of the defendants which the plaintiffs had specifically sought to restrain. On the other hand, in these proceedings, the failure of the trial judge to deal, in December 2018 or shortly thereafter, with the application that he recuse himself from further hearing of the proceedings, has no immediate impact on any of the parties. This is different to the situation in *SPUC* where the failure of the trial judge to deal with the motion had an immediate adverse effect upon the moving parties. In the present case, the application could still be made at a later stage and before the trial judge resumed a hearing, if that was to occur. There was no urgency in the sense that if the order was not made it would be too late to remedy the situation. For this reason, I am not persuaded that this authority is of assistance.

23. The argument in this case, that the adjournment of the motion amounts to a refusal of the relief sought, depends upon three assumptions: that the case will come back to the trial judge, that he will refuse to recuse himself from further hearing of the proceedings and, that therefore the resumption of the trial will be delayed pending the outcome of an appeal against that refusal to recuse himself.

24. The trial judge retains seisin of the case. Thus, it is likely that in the first instance the case will return to the trial judge upon the conclusion of the appeal. However, it is not inevitable that this will occur, for the reasons he explained, and it may be that the judge in charge of the commercial list may be obliged for reasons of the management of the list to assign the case to a different judge or, if the case is to proceed as a constitutional challenge, it may not be heard in the commercial list of the High Court at all. If the matter comes back to the trial judge for hearing (as opposed to further case management) it is of course possible that the trial judge may refuse to recuse himself, in which case the appellant will appeal that decision. However, the third assumption underlying this appeal is mistaken in my view and this undermines considerably the basis for the appeal before this court against the decisions of December 2018 and January 2019.

25. The appellant's appeal of the judgment of the trial judge on the preliminary issue will not be heard and determined for many months, if not longer. Until the appeal has been finally determined, there can be no question of the proceedings resuming in the High Court. Furthermore, it is not as if the proceedings can resume immediately once the appeal has been determined. If the appellant is successful in its appeal, time will have to be found in

the court diary to relist a trial which was previously listed for hearing for five months. For the purposes of this judgment, I shall presume that it will be relisted for the same, or similar, duration. I note that the parties, who are represented by experienced counsel, remain of the view that their original estimate of the duration of the case is unchanged. Inevitably, there will be some element of postponement of the resumption of the trial even after the appeal has been concluded, possibly of many months.

26. In the alternative, if the appellant is unsuccessful in its appeal then there will have to be further exchanges of pleadings and determinations on how the case is to proceed in respect of the constitutional challenge to the relevant provisions of the CLA. Thus, it will take some time to prepare the constitutional case for trial. It is reasonable to assume that this may take a few months. Again, time in the court schedule will need to be found to list that trial, though it may be that it will not require a listing for five months.

27. In either case, it appears to me that there will be ample opportunity to re-enter the application that the trial judge recuse himself from further hearing of the proceedings before the actual date when the trial, in whichever form it may take, is likely to resume. The appellant argued in the High Court that if the trial judge refused to recuse himself, it would be obliged to appeal that refusal and the trial could not resume until that appeal was concluded. At that stage, it was anticipated that the appeal would not be heard by the Court of Appeal for two years, thus adding further considerable delay to a case which had already taken years to progress this far. The position regarding the listing and disposal of appeals in the Court of Appeal has improved since January 2019 and this apprehension has been overtaken by events. Urgent appeals may now be listed for hearing within a few weeks of the filing of an appeal. It is unlikely that the prospect of appealing a refusal by the trial judge to recuse himself will in fact delay the resumption of the trial in the High Court at all, or certainly not to any significant extent.

28. The appellant referred to the statement in the judgment of 16 January 2019 *that "[s]ince it is functus officio, this Court also decided that it should not consider any of the oral submissions made by [the appellant] on the 16th January."* The appellant submitted that this finding underlines the fact that the refusal to hear the recusal application was tantamount to a refusal. It also points out that it is unclear how the court will consider the application in the future if it considers itself to be functus officio.

29. In my opinion, it is clear that the trial judge said that he was functus officio in relation to his decision to adjourn the motion and not in relation to the motion itself. Thus, it did not amount to a determination of the application. In his judgment of 22 January 2019, the trial judge said at para. 16 that although the court had made its decision regarding the recusal motion on 17 December, and so was functus officio, the court considered the points made by counsel for the appellant and did not make final orders regarding the adjournment, instead he put the matter in for mention on 21 December. On 21 December the court confirmed its decision of 17 December 2018 regarding the adjournment of the recusal motion. Further on in the judgment of 22 January, at paras. 55 and 56 quoted above, he referred to the fact that on 19 December 2018 the appellant had been granted

a second opportunity to argue that the trial judge should not adjourn the recusal motion and that on 16 January 2019 it was seeking, in effect, a third opportunity to make that case. The trial judge said that he had been *functus officio* on the second attempt to overturn the adjournment as much as on the first attempt. In para. 56 he makes it absolutely clear that his observations about the court being *functus officio* were solely with regard to the adjournment of the recusal motion.

30. It follows, and indeed is expressly clear from the terms of his written judgments, that he believed he was not *functus officio* to hear the actual motion when (and if) the appellant re-entered the motion before him, either on the basis of a change in circumstances justifying a re-entry of the motion, or on the basis that the appeal had concluded and the matter was due to come back for hearing before him. I, therefore, am not of the view that the trial judge's description that he was *functus officio*, with regard to the adjournment of the application, amounts to a refusal to hear the recusal application and that it was tantamount to a refusal of that application.

31. The final basis upon which the appellant contends that this court should treat the approach of the High Court as tantamount to a refusal is that it may find that it is faced with an argument that it has waived its entitlement to object to the trial judge continuing to hear the case on the grounds that it has not raised this point at the earliest opportunity. It refers to the decision in *Vico Limited v Bank of Ireland* [2016] IECA 273. On the facts of this case, the appellant indicated its intention to issue a motion the very next day it was in court after the judgment of 4 December 2018. It issued the motion and has, since then, assiduously sought to have it heard and determined. After the trial judge adjourned the motion, it twice sought to have him revisit his decision to adjourn the motion and hear the application. It appealed his refusal to do so to this court. In the circumstances, I cannot conceive how it could be suggested that it has waived its entitlement to seek to have the trial judge recuse himself from further hearing of the proceedings. Of course, if it fails to take any further steps in relation to the application after the appeal on the preliminary issue has concluded, that might be a different matter, but that is within its control in the future. It is not relevant to the issue whether the decisions of the High Court are tantamount to declining, or refusing, the relief sought.

32. In my judgment, for all of these reasons, the decision was to adjourn the motion and the trial judge has neither refused to hear the motion, nor rejected the application.

Discretion of the trial judge

33. The trial judge had a discretion whether to hear and determine the motion in December 2018 or to adjourn the motion to a specific date or, as occurred in this case, to adjourn the motion generally with liberty to apply. The parties accept that the law in relation to the approach of an appellate court reviewing a discretionary decision of the High Court on appeal is well settled. The appellant referred to the decision of *Collins v. Minister for Justice* [2015] IECA 27. At para. 79 Irvine J. summarised the position:-

> *"For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal*

> *(or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."*

34. The appellant complains that on 17 December 2018 the parties were simply informed of the trial judge's decision not to hear the motion, but to instead adjourn it generally, and that this occurred before the application had been moved in circumstances where the trial judge acknowledged that he had not looked at any of the papers. It argues that the court did not consider the rights and interests of the parties and that he instead unilaterally refused to hear the application. It is submitted that the power to adjourn proceedings must be exercised judicially and the appellant argued that when dealing with an adjournment application the rights of the parties involved must be balanced; a judge *"ought to have regard to the seriousness of the consequences that this decision would have for the [applicant] (Hynes v. The Appeals Tribunal of the Chartered Accountants Regulatory Body [2018] IEHC 138)."* The appellant also relied upon the decision of Peart J. in *Kildare County Council v. Reid* [2018] IECA 370. At para. 38 he stated:-

> *"The decision whether or not to accede to an application for an adjournment is always a matter of discretion by the trial judge. As such there is a wide margin of appreciation to be allowed to the trial judge in what decision is made. For this court on appeal, the central question is whether in all the circumstances the trial judge acted fairly having regard to the interests of all the parties, and not simply the party seeking the adjournment. The Court on an appeal should be slow to interfere with the manner in which the discretion was exercised, and should do so only where a clear error is manifest."*

35. It is clear from the written decision of 21 December 2018 that, in advance of reading the papers or hearing from any party, the trial judge decided that he was not going to hear the motion listed for 19 December 2018 but would adjourn the matter generally with liberty to apply. This, of course, did not afford the moving party an opportunity to argue why the matter ought not to be adjourned generally nor to urge why the court should proceed to hear and determine the motion. On 19 December counsel for the appellant asked the trial judge to revisit his decision of 17 December and to hear the recusal application rather than adjourn it. This is clearly set out in para. 14 of the judgment of 21 December 2018. The court expressly records in the following paragraph that it undertook to consider those submissions and to give its final decision on Friday, 21 December. The trial judge went on to state that the submissions by counsel were helpful and were gratefully received by the court. The court was fully aware of the seriousness of the application and understood the arguments advanced on behalf of the appellant. This court must conclude that the position of the appellant was heard and considered by the trial judge.

36. The appellant emphasised that the trial judge reached his decision in advance of and without hearing from the parties, and without having read the papers. In my view, any unfairness in the original decision was properly addressed by the trial judge, thereafter, in reconsidering his decision in light of the submissions of counsel for the appellant. With regard to the failure of the trial judge to read the papers, they were directed towards the substance of the application, and not the question of an adjournment. The exception to this observation is the additional affidavit which the appellant sought leave to file on 22 January 2019, which arose after the court had considered the arguments of the appellant opposing the adjournment. The court heard the submissions of counsel on this point and he described those submissions as helpful. On appeal, counsel did not identify anything in the motion papers which was relevant to the court's assessment that the application was both contingent and future and that, therefore, (i) there was no immediate need to hear and determine the motion (regardless of the amount of time required) and, (ii) that the appropriate use of scarce court resources was to adjourn the application with liberty to apply. It is, accordingly, not clear why the failure to read the papers for the application to recuse himself – as opposed to hearing the submissions of counsel urging the court not to adjourn the motion – of itself means that this court should reverse his decision and hear and determine the motion instead. It is a factor to be considered in assessing whether, in all the circumstances, the trial judge acted fairly, but in light of the relief sought and the basis of the relief, with which the trial judge was very familiar, it is not one to which I attach great weight.

37. The judgments of 21 December 2018 and 22 January 2019 make clear that the trial judge balanced various competing interests and, in the exercise of his discretion, determined that the appropriate step was to adjourn the motion generally with liberty to re-enter and not to determine the application at that point in time. An important factor to which he properly had regard was the contingent and future nature of the application. It is by no means certain that, after the conclusion of the appeal, the case will resume before him. This is the critical fact which weighed in his assessment of the appropriate use of scarce court resources. He was entitled to assess the amount of time it would take him to prepare for, to hear and determine the motion, and to weigh that estimate when reaching his decision.

38. Importantly, he emphasised that if there were a change in circumstances, such as would justify the re-entering of the motion before him, he would consider those circumstances and decide at that point in time whether to hear and determine the motion at that future date.

39. In my judgment, in all of the circumstances of the application made to the trial judge, he acted fairly having regard to the interests of all of the parties. As the appellant acknowledge, he is to be afforded a wide margin of appreciation in relation to a decision to adjourn a particular matter. This court, on appeal, should be slow to interfere with the manner in which that discretion was exercised. Critically, I do not think that the decision to adjourn the motion generally with liberty to apply gives rise to any real, manifest or

potential prejudice to the appellant for the reasons I have already explained. In *Rice v. Muddiman* [2018] IECA 402 at para 31 Irvine J. observed:-

> *"...an appellate court will only set aside what was, in this case, effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice... A significant margin of appreciation must be afforded to a High Court judge, particularly the judge charged with the administration of the Personal Injuries List and the management of the Court's own scarce resources... ."*

40. In my opinion, the decision of the trial judge to adjourn the motion generally with liberty to re-enter falls squarely within the margin of appreciation afforded to a trial judge in the conduct of proceedings. I am not satisfied that the appellant has established that that discretion was exercised in so egregious a fashion as to imperil the administration of justice or prejudice the rights of the appellant such that this court ought to allow the appeal.

Conclusion

41. The order of 21 December 2018 and the decisions of 16 and 22 January 2019 adjourned the appellant's application that the trial judge recuse himself from further hearing of the proceedings generally with liberty to apply. Those decisions were not tantamount to declining, or refusing, to hear the motion.

42. The question whether or not to adjourn the motion generally with liberty to apply constituted the exercise by the trial judge of his discretion in relation to the conduct of complex litigation. It was an order within his discretion to make. In the circumstances of the case, he heard and considered the arguments of the appellant opposing the adjournment of the motion generally with liberty to apply and he assessed those arguments in light of the competing claims on the resources of the court and reached his decision. In doing so, he took account of matters to which it was appropriate for him to have regard and he did not have regard to matters which were irrelevant or inappropriate to consider.

43. The appellant has not established that it is greatly prejudiced by the decision or, indeed, that the progress of the proceedings will be unduly delayed as a result of the decision.

44. Having reached this conclusion, it is accordingly not appropriate for the Court to engage in the substance of the application and, therefore, I make no observation on the merits of the application.

45. For these reasons, I would refuse the appeal.