THE HIGH COURT

[RECORD NO. 2016 638 JR]

BETWEEN

ADRIAN FLYNN AND PATRICIA FLYNN

APPLICANTS

AND

DUNDALK CREDIT UNION LTD.

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of July , 2018

Issues

1. By order of Humphreys J. on the 29th July 2016 the applicant Adrian Flynn was granted leave to seek an order for certiorari of a judgment of Judge Reynolds, as she then was, made in Louth Circuit Court on the 5th May 2016. He was also afforded leave to seek relief by way of an order removing a judgment mortgage on the applicant's family home by reason of the order of the 5th May 2016 together with the relief of a stay on the enforcement of the order of the 5th May 2016 until the judicial review proceedings have been decided.

2. Significantly, the applicant had also sought leave to apply for an order of certiorari in respect of prior orders respectively dated the 3rd July 2014 and the 29th January 2015, however leave in this regard was refused. The order of Humphreys J. of the 29th July 2016 was not appealed.

3. The impugned order is an order for judgment in favour of the respondent secured at Louth Circuit Court whereby the respondent was afforded judgment as against the applicants in the sum of €38,092.14 on foot of a credit agreement dated the 12th May 2010. The respondents were also afforded their costs to be taxed in default of agreement and a stay on the order was refused by the court.

4. The within matter was heard over two days on the 3rd and 4th July 2018. Both parties made submissions to the court and both parties tendered written submissions. These written and oral submissions deal with not only whether or not the applicants have discharged the burden of securing an order of certiorari in respect of the order of the 5th May 2016 but also deal with the possibility of notwithstanding that the court might find that the applicants have successfully established that they are entitled to an order for certiorari nevertheless that the court might exercise its discretion, based upon the conduct of the applicants, to refuse the relief sought.

5. In the events, I am satisfied on the basis of the matters hereinafter set forth, that the applicants have not discharged the burden of establishing an entitlement to an order of certiorari of the order of Judge Reynolds of the 5th May 2016 and accordingly this judgment does not deal with the possibility or appropriateness of exercising discretion as against the applicants based upon their conduct.

Brief factual background

6. The respondents issued a civil bill on the 18th April 2012 seeking judgment in the sum of €38,092.14 together with interest as against the applicants on foot of a credit agreement identified as C4/5614. An appearance was entered on the 16th May 2012 and subsequently the respondents sought judgment in default of defence by motion of the 29th November 2012. On the 5th December 2012, the applicants sought data access. On the 8th April 2013 the applicants were afforded an extension of time within which to file their defence by a period of twelve weeks and subsequently the first named applicant filed a defence and counterclaim on the 1st July 2013 and the second named applicant filed a defence on the 2nd August 2013, in excess of 4 weeks outside the time given. By order of the 3rd July 2014, an order for discovery was made against the respondents which discovery was to be made within a two week period and a further order was made that any application to amend the defence and counterclaim was to be made within a six-week period of the discovery. There is no appeal of this order. By further order of the 29th January 2015, an order was made in respect of the applicants' application for further discovery and/or dismissing the respondent's claim. No appeal was made in respect of this order of the 29th January 2015. As aforesaid, leave to apply for judicial review was refused in respect of the order of the 3rd July 2014 and the 29th January 2015.

7. The application of the respondent came before Judge Reynolds in Louth Circuit Court on the 5th May 2016 and was a plenary hearing. The applicants have since filed an appeal in respect of this order bearing date the 18th July 2016.

Pleadings before this Court

8. Following the order of Humphries J. of the 29th July 2016 aforesaid, the applicants have filed and served a statement of grounds bearing date 10th August 2016 together with an affirming affidavit of the first named applicant also dated the 10th August 2016 which said affidavit runs to 85 pages.

9. The respondent resists the application of the applicants and in this regard has filed a statement of opposition and replying affidavit of Cora Clarke, both dated the 26th September 2016 and which appear to have been served on the applicants under cover letter of the 26th of September 2016 and again on the 20th October 2016.

10. The first named applicant filed a further affidavit bearing date the 28th February 2017 which runs to 20 pages.

11. The within matter came before White J. on the 16th March 2017 pursuant to an application of the applicants by motion of the 19th February 2017, grounded on an affidavit of the 20th February 2017 when the court rejected the allegations made by the first named applicant in respect of the DAR relative to the proceedings held on the 5th May 2016. Following a further direction, not currently relevant, the court ordered that the first named applicant be at liberty to file and serve a further affidavit within six weeks of the date of the order with the respondent being afforded liberty to file and serve a reply within two weeks of the receipt thereof together with an order affording the first named applicant liberty to withdraw existing legal submissions and to deliver alternate legal submissions within six weeks, with the respondent being at liberty to deliver supplemental written submissions limited to 3,000 words within two weeks of receipt thereof.

12. In the events the order of the 16th March 2017 was not appealed and the first named applicant did not avail of the liberty to file a further affidavit or make alternate written submissions. It appears as a consequence thereof the respondent did not file any further replying affidavit or deliver supplemental submissions.

13. In the first named applicants' grounding affidavit of the 10th August 2016, the applicant deals extensively with the hearing of the discovery application of the 3rd July 2014 (see p. 6 of the affidavit wherein the said applicant acknowledges this ground relates to the hearing for the discovery of the 3rd July 2014). This ground is advanced by the applicants notwithstanding that the order of the 3rd July 2014 was not appealed and indeed leave to seek an order of judicial review in respect of such order was refused and that refusal of leave was not appealed, on the basis that the applicants assert that having been afforded leave to challenge the order of the 5th May 2016, they were then entitled to make a collateral attack on the order of the 3rd July 2014. Upon inquiry of the applicants as to what basis such a collateral attack could be made in the circumstances as aforesaid the applicants referred to the judgment of Clarke J. in the case of *Sweeney v. District Judge Fahy* [2014] IESC 50. Reference was also made to extraterritorial judgments however given that I was of the view that such a collateral attack on a prior order in all of the circumstances was impermissible I requested the applicants to identify Irish jurisprudence permitting such a collateral attack. The applicants also referred to para. 3.3 of the judgment of Clarke J. in *Sweeney v. District Judge Fahy* aforesaid in their submissions however this paragraph does not deal with enabling an applicant to make a collateral attack on an order in the manner sought. The applicant was invited to identify the particular paragraph or portions of the judgment which afforded such a liberty to the applicants however the applicant was unable to do so. In this regard the first named applicant was advised on the 3rd July 2018 that the specific reference to allowing such a collateral attack in the judgment in *Sweeney v. District Judge Fahy* would have to be identified and requested the applicants to do so on the following date being the 4th July 2018. However on that date, again, the applicants were not in a position to identify the section of the judgment relied upon. The applicants were afforded a further opportunity over lunchtime on the 4th July 2018 but were unable to identify the section of the judgement which apparently supported their proposition. A further period of overnight on the 4th July 2018 was offered to the applicants however the first named applicant indicated that such a facility would not assist as the applicant indicated that he would not be in a position to deal with the matter overnight.

14. In the circumstances as herein before outlined, I am satisfied that the applicants are not entitled to make a collateral attack on the order of the 3rd July 2014 in the within judicial review proceedings.

15. The first named applicant in his affidavit of the 10th August 2016 has asserted bias on the part of Judge Reynolds and suggested that Judge Reynolds entered into the arena. Two incidents are referred to by the first named applicant in support of this contention one being in relation to the hearing for discovery held on the 3rd July 2014 however, I am satisfied that the conduct of that hearing is not before this Court and accordingly any comments made by the first named applicant in his affidavits in respect of that hearing are disregarded.

16. At p. 57 of the affidavit of the 10th August 2016, the first named applicant complained that Judge Reynolds would not consider the first named applicant in relation to non-discovery by the respondent which the first named applicant suggests would have resulted in an adjournment of the case and costs awarded to him.

In para. 17 the first named applicants' states that Judge Reynolds ordered the plaintiff to commit perjury. Such an assertion is apparently made on the basis that in para. 16 the first named applicant states that Judge Reynolds ordered the plaintiff to say that the first named applicant had been given a complete set of the 2009 Rules notwithstanding that the first named applicant told Judge Reynolds that he did not. At para. 13 the first named applicant quotes from an affidavit on behalf of the respondents confirming that the full set of the rules of the Credit Union have been furnished by the plaintiff to the defendants. In all of the circumstances it appears that the assertion made in para. 17 on p. 59 of the affidavit of the 10th August 2016 relates to events prior to the 5th May 2016 and are therefore not relevant to the within judicial review application. This position is fortified by the fact that on p. 63 of the affidavit under the heading "The judge totally pre-judged the issue when assuming that the defendant caused delays in the proceedings" the deponent states that the issue relates to the hearing of the 5th May 2016 (the affidavit does not incorporate dates to assist the court in identifying date of the allegations made).

In p. 63 of this affidavit the deponent complains that Mr. Rooney (counsel for the respondent) alleges that the first named applicant was engaged in delaying tactic. However thereafter at para. 9 reference is made to the hearing of the 5th July 2014. The subsequent portion of the affidavit up to para. 77 deals with matters prior to the hearing of the 5th May 2016.

At para. 77 the deponent states that the judge pre-judged the matter when she assumed that I was trying to make it into a five-day trial as a delaying tactic. Given that earlier in his affidavit the deponent believed he would have secured an adjournment of the matter if his position with regard to the issue of discovery was accepted by the court, it is difficult to understand the precise complaint made by the deponent as against the judge in this regard.

At para. 78 of the affidavit the deponent states that the judged assumed the role of counsel when she prompted the only witness for the respondent. The incident thereafter referred to in the affidavit is the only incident highlighted in the affidavit referable to the hearing of the 5th May 2016 in support of the applicants' assertion that the judge was running the case for the plaintiff (see the written submissions of the applicants) or that the judge assumed the role of counsel for the plaintiffs. Details of this incident are repeated/amplified at para's 55 to 72 of the replying affidavit of the 28th February 2017. The deponent complains that during the course of this cross-examination of Cora Clarke on behalf of the respondent the deponent was asked as to how the witness could clearly remember a transaction six years earlier. The deponent complains that the judge jumped in and prompted the witness as to the answer, namely that "it's because not every day someone comes into you and tells you that they are not actually a member of the credit union" (see the first para. on p. 72 of the affidavit).

At para. 79 the deponent complains that the judge displayed bias throughout the hearing and in particular in not taking issue with the fact that allegations had been made (by the deponent) that a signature on a letter of the 7th February 2012 was forged.

At para. 80 the deponent complained that Judge Reynolds dismissed his witnesses and did not hear the evidence that they may have been able to offer.

In the final para. of p. 73, he complains that the judge would not hear matters in respect of prior transactions (prior to the transactions the subject matter of the claim of the civil bill of the 18th April 2012).

In the penultimate para. of p. 74, the deponent complains that the judge did not engage with the evidence and she never looked at the law on any of the issues.

In p. 77 the deponent complains that Judge Reynolds did not hear the counterclaim. Although the first applicant does not complain

that his evidence was truncated to prevent him giving details of the counterclaim.

In the final para. of p. 79 the deponent complains that the judge did not allow him to bring his books of pleadings and exhibits to the stand when giving evidence and he also complains that he was not enabled to read from a pre-prepared statement and accordingly suggests that this arose through an inequality of arms and put him at a severe disadvantage.

In p. 80 at para. 99 the deponent says that the judge's tone and manner caused him to lose his train of thought and the judge put him under pressure to continue instead of offering a short adjournment. In this regard in the first para. of p. 81, the deponent states that he got stuck in his cross-examination as he was not well prepared and he did not expect it to happen. He states that his mind went totally blank as he had a feeling of unfairness and he never thought to ask for a short adjournment.

At para. 100 the deponent deals with the judge dismissing most of his witnesses early and would not let him call the remaining witnesses at all. These witnesses included the solicitor and barrister on behalf the respondent, the current and past manager of the respondent credit union, two postal workers in relation to irregularities in relation to the service of summonses, two journalists in relation to articles written by them, someone from Louth County Council to prove that the applicants did not live in the Dundalk urban area (the deponent in his affidavit evidence acknowledges that the respondents did not pursue the claim on the suggestion that the applicants lived in the Dundalk area – see para. 79 of applicants grounding affidavit) an official from the credit union to prove that he had stated on a number of occasions he did not live in the Dundalk area together with an expert witness as to the asserted forgery of the signature on the letter of the 7th February 2012.

At para. 103, the deponent states that there was a constant appearance of unfairness which totally deflated him and made it difficult for him to represent himself however other than the foregoing assertions made in the affidavit no particulars in this regard have been included.

17. In the verifying affidavit of Cora Clarke on behalf of the respondents of the 26th September 2016, from para. 11 thereof, the deponent deals with the hearing of the 5th May 2016.

At para. 11 Ms. Clarke states that the court allowed the applicants to canvass each point raised in the defence.

At para. 14, the deponent deals with the applicant's attempt to submit an amended defence and counterclaim running to an excess of 80 paragraphs on the morning of the hearing without prior notice to the respondents and it is stated that following argument and objection on behalf of the respondent, the court agreed *inter alia* not to allow the amended defence and counterclaim.

At para. 16 of the affidavit the deponent says that the letter of the 7th February 2012 contained a written admission of the debt from the applicants.

At para. 18 it is stated that the first named applicant informed the court that he had sent a letter in the exact terms as set out in the letter of the 7th February 2012, produced by the respondents, but he claimed that the signature on the letter exhibited had been forged.

At para. 19 the deponent states that at the conclusion of her evidence, the respondent had concluded its case.

At para. 20 of the affidavit the deponent says that in respect of the respondents' application to have the summonses struck out in the light of the evidence adduced (at that time Ms. Clarke had given evidence in chief and was cross-examined by the first named applicant) for each witness summoned the court enquired of the applicants the purpose for the witness. At para. 23 the deponent says that the court dismissed the handwriting expert because whether or not the signature was forged was irrelevant given that the first named applicant had admitted that he had sent the letter and that the letter received by the respondent was fundamentally identical to the letter dispatched by him. This matter is again taken up at para. 34 where the deponent states that no witness was excused without first giving the applicants an opportunity to explain their purpose.

In para. 24 the deponent states that the first named applicant had a written summary of the evidence that he wished to read aloud for the court.

He asked the court to allow him to bring his extensive booklets of exhibits with him to the witness box, however the court declined to allow him to do either, instead asking him to put forward the matters in evidence that he believed were relevant.

At para. 25 the deponent states that the court engaged in effectively a conversation with the first named applicant in order to give his testimony structure and to address the issues raised.

At para. 28 the deponent says that the applicant consistently made allegations of unfairness or bias without setting out a single particular of same.

At para. 29 she states that the grounding affidavit of the applicant is not seeking to determine the manner in which the decision was made but rather the fact that the decision was made adverse to the applicants' interest. At para. 32 the deponent said that any intervention by the court was perfectly normal and went no further than would be considered appropriate.

18. As aforesaid, the first named applicant entered a replying affidavit bearing date the 28th February 2017 at which time he had secured, by order of the court, a copy of the DAR recording of the hearing of the 5th May 2016. The deponent complained that the order of Humphreys J. was to the effect that a statement of opposition and affirming affidavit be submitted fourteen days after the notice of motion for judicial review was served on the respondents. It is complained that the respondent did not comply with these terms and therefore the statement of opposition and affidavit should be struck out so that there is no valid statement of opposition to the application for judicial review.

19. Insofar as controverting the affidavit of Ms. Clarke is concerned at para. 210 of the affidavit of the 28th February 2017 the first named applicant refers to para. 20 of the affidavit of Ms. Clarke where she stated that for each witness summonsed the court enquired of the applicant the purpose of the witness. At para. 211 the deponent states that the judge was in his view very hostile abrupt and verging on aggressive. He had very little opportunity to explain the purpose of the witnesses.

20. As previously indicated the first named applicant was afforded additional time within which to put in a further affidavit however chose not to do so.

21. By reason of all of the foregoing therefore, the salient portions of the replying affidavit of Ms. Clarke to ground the statement of opposition remains largely uncontroverted.

22. Prior to proceeding further, it does appear to me that there are a number of paragraphs within the first named applicants' affidavit of the 28th February 2017, which inform the court that his application for judicial review and the suggestion of bias and prejudice on the part of Judge Reynolds is to a substantial extent based upon issues not arising as a result of the conduct of the hearing which took place on the 5th May 2016, as follows: -

> (a) "12. It is very possible if I lose this judicial review I will have to raise the issue of lack of fair procedures in this judicial review process as well as the initial hearings on appeal to the Court of Appeal.
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> 13. I have serious concerns that I will not get a fair trial in Ireland as I have had issues with public sector and political interference from multiple parties (which I approached for support, but never offered any of them a brown envelope) going on in my life for ten to thirteen years and this interference is why I have ended up in court."
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> (b) "142. The plaintiff must come to court with clean hands, but it would appear Justice Reynolds does not believe in this principle of law"
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> (c) "148. The Registrar, who just happens to be aligned to the same party as Justice Reynolds, is connected/synonymous/identified with, set it down for one day despite me informing her that the judge said two or more days.
>
> 149. However, the fact that the trial was set down for only one day and coupled with the way the hearing was conducted, and previous issued that had been going on in my life, in addition to the concerns in the UN and the EU about Ireland's judicial appointments and oversight, this gave me a real fear and apprehension that I would not and was not get/getting a fair hearing."
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> (d) "171. I say I have summoned the credit union employee who signed those applications to prove them, but Justice Reynolds conveniently dismissed her from giving evidence saying she was only looking at the last transaction."

Legal principles to be applied

23. The applicants referred to a publication produced by a Canadian firm in 2011 entitled "Active adjudication or entering the arena: how much is too much?" to support the proposition that with reference to the issue of intervention by a trial judge a reasonable apprehension of bias is an objective test. The interventions complained of must be evaluated cumulatively rather than as isolated occurrences from the perspective of a reasonable observer throughout the trial. The publication recognises that questions of the trial judge will be permitted but such power is not unqualified or limitless. It is suggested that the judge would be justified in posing questions to: - (a) clear up ambiguities and call a witness to order, (b) explore some matter which the witnesses' answers have left vague, or (c) put questions which should have been asked by counsel in order to bring out some relevant matter which was nonetheless omitted.

24. The respondents agree as to the need to assess the cumulative effect of interventions. The respondent also refers to the matter of *Fogarty v. District Judge Hugh O'Donnell & The DPP* [2008] IEHC 198 which in turn quoted from a prior Supreme Court decision to the effect that the test is objective in assessing whether the trial judge was or was not biased; that is, as to whether or not a reasonable person should apprehend that his chance of a fair and independent hearing by reason of the actions of the judge, would prevent a completely fair and independent hearing.

25. The respondent also refers to the case of *Dineen v. Judge Sean Delap* [1994] 2 IR 228, at p. 232 where it is stated that in the circumstances of that case, the judge had departed from the ordinary and recognised rule that evidence may not be given by reading a prepared statement. The court in that matter did afford an order of certiorari on the basis that the High Court in the judicial review application was unable to find any justification for the conduct of the respondent judge.

26. Insofar as the latitude to be afforded to a lay litigant is concerned the respondent refers to *ACC Bank PLC. v. Kelly* [2011] IEHC 7 where Clarke J. at p. 5 of his judgment, set out the principles which he agreed should be applied, namely that it is incumbent upon the judge to apply the principle of fairness and a balance must be had as to the duty fairness to the lay litigant with the rights of the other party and the need for as speedy and efficient a judicial determination as is feasible. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when this case is listed and litigants who choose to represent themselves must accept the consequences of their choice.

The court should not confer a personal litigant a positive advantage over his represented opponent nor put the party with the greater expertise at a disadvantage. At p. 7, Clarke J. indicates that whether a person represents themselves of choice or of necessity does not alter the overriding requirement that the conduct of the trial must be fair to both sides. The unrepresented cannot be allowed to operate at an unfairness to the represented party.

27. The respondent refers to the case of *Burke v. Judge Mary O'Halloran & The DPP* [2009] 3 IR 809. In that case the applicant had subpoenaed witnesses and complained that the witnesses concerned were not allowed to be called at all. The court at para. 13 refers to the duty of an experienced solicitor to call such witnesses as he considers have relevant evidence to give.

28. In *Talbot v. Hermitage Golf Club & Ors.* [2014] IESC 57, Denham C.J. at para. 13 of her judgment indicated that the use of judicial case management is crucial to the effective conduct of litigation including where litigants are unrepresented by lawyers. At page 16 of his Judgment, Charleton J states:- "courts are entitled, and indeed are required, to foster their resource. This is both a matter of public and private interest.

29. In *Kiely v. Minister for Social Welfare* (1977) IR 267 Henchy J stated: "the taint of partiality will necessarily follow if (the judge) intervenes to such an extent as to appear to be presenting or conducting the case against the claimant" (p.283) and "natural justice is not observed if the scales of justice are tilted against one side all through the proceedings" (p.281).

30. The applicants refer to the judgment of Humphries J in *FG v. Child and Family Agency* [2016] IEHC 156, page 7 (in an application for leave to maintain judicial review proceedings) when he stated "the court must be open to whatever approach to the pleadings serves the interests of justice, including what could be extensive liberty for a re-phrasing of a lay litigants pleadings so that the real

matters in dispute and the legal issues arising therefore are identified."

31. The applicants have also referred to the judgment of Humphries J in *Crowley v. AIB PLC* 2016 IEHC 154 where leave to maintain judicial review proceedings was afforded on the basis of unfairness and/or breach of natural justice.

32. The judgments aforesaid of Humphries J involve leave applications and therefore are not instructive in relation to the within inter parties contested matter requiring a different standard of proof. Furthermore, neither judgment is to the effect that it is for the court to engage in an exercise of identifying and formulating the litigants'/parties' arguments or pleadings.

The applicants' arguments

Application to strike out the statement of opposition and verifying affidavit of Ms. Clarke
33. It is noted that the order of Humphreys J. of the 29th July 2006 does not in fact make any reference to a time limit within which the statement of opposition and grounding affidavit might be filed. At para. 7 of the order of Humphreys J., the applicant had fourteen days to issue and serve the necessary documentation and the notice of motion was returnable for the judicial review list for mention on the 4th October 2016.

34. The documents were served under cover letter of the 26th September 2016 and were served by registered post on the applicants on that date which of course was during the vacation period.

35. The matter was before White J. in March 2017 at which time the applicants did not take any issue with the timing of the statement of opposition and grounding affidavit. No motion was issued by the applicants prior to the hearing of the entire matter.

36. The respondents point to the fact that the applicants secured a further six-week extension of time within which to put in an affidavit by order of White J. on the 16th March 2017.

37. It is apparent from the affidavits of the first named applicant that the first named applicant is conversant with the concept of maintaining motions prior to a trial.

38. In the circumstances as aforesaid, the striking out of the statement of opposition and grounding affidavit do not appear to me to be appropriate and this application is refused.

Preliminary applications by the applicant
39. At the commencement of the matter before Judge Reynolds on the 5th May 2016, the applicants made two preliminary applications as aforesaid namely: -

> (a) a complaint that the respondents had not complied with the order for discovery and the applicants indicated that on this basis they felt that they would secure an adjournment of the trial;
>
> and
>
> (b) the applicant sought to file an amended defence and counterclaim running to 80 paragraphs.

The applications were resisted by the respondent.

40. Having regard to the *Dineen* and *Talbot* jurisprudence aforesaid it appears to me that justification for the rulings of Judge Reynolds with regard to the discovery and the filing of the amended pleadings, is readily apparent and consistent with judicial case management. It is further consistent with the principles identified by Clarke J. in *ACC Bank PLC v. Kelly*, where the court is obliged to do fairness to both parties.

Dismissal of witnesses
41. Ms. Clarke as aforesaid has indicated in her replying affidavit that part of the dismissal of any of the witness summonses the court required of the applicants the purpose of the witness.

42. The first named applicant complains that he had very little time to explain the purpose of the witnesses.

43. There is nothing inherently unfair in seeking a concise and/or brief description of the nature of evidence to be given by a witness. Further, it is clear from the affidavit of Ms. Clarke that the Judge was appraised of the nature of the evidence sought to be adduced by each witness.

44. In the circumstances I am satisfied there was justification for Judge Reynolds in case managing the issues which were before her and in determining the witnesses sought to be called by the applicants would not in fact advance their position.

Reading from a prepared statement/bringing books and documents to the stand
45. The first named applicant acknowledges that he had three, four or even five boxes of books with him on the day of the 5th May 2016. There is no reference in either affidavit to seeking to have a discrete number of documents with him giving evidence.

46. Given the foregoing and the ordinary and recognised rules that evidence may not be given by a litigant reading a prepared statement (see *Dineen v. Judge Sean Delap* aforesaid) I am satisfied that this direction on behalf of the trial judge was consistent with proper case management and time management of the trial before her and appropriate in all of the circumstances. Further, the principle as was approved by Clarke J. in *ACC Bank PLC v. Kelly* that litigants who choose to represent themselves must accept the consequences of their choice is engaged in dealing with the alleged unfairness by the applicants not being entitled to bring several documents to the witness stand when giving evidence.

47. I am satisfied that the trial judge was fair reasonable and proportionate therefore in disallowing the pre-prepared statement and several boxes of documents to be available to the witness when giving evidence and the first named applicant's complaint that this did not amount to an equality of arms is as the consequence of his choice to be a lay litigant as opposed to any want of fairness or any breach of fair procedures on the part of the trial judge.

Refusal to allow submissions
48. In the course of oral submissions, the applicant complained that the trial judge refused, prior to making her order, to afford the

applicants an opportunity to make legal submissions on either jurisprudence or statute to the judge. The applicant further complained that the trial judge did not engage with the evidence as to misrepresentation on the part of the respondent and the fact that the applicants were stating that the transaction relied upon by the respondent mentioned in the civil bill of the 18th April 2012 was in fact a sham transaction.

49. The first named applicant accepted in the course of his oral submission that in fact he did not ask the trial judge to be allowed make submissions either prior to or during the course of the trial judge giving her judgment. The first named applicant did apparently interject during the course of the judgment being delivered by the trial judge but that did not relate to the furnishing of submissions on jurisprudence or statute and therefore there was no want of fairness on the part of the trial judge in this regard.

50. As to the complaint that the trial judge did not engage with the submissions or evidence tendered on behalf of the applicants, in my view this is a merits-based argument and is appropriate for an appeal and is inappropriate for a judicial review application.

Bias or prejudice of the trial judge
51. One incident is complained of with respect to the hearing which took place on the 5th May 2016 which related to the asserted prompting of the witness as to why Ms. Clarke remembered a particular transaction which was six years old. Although the affidavits of the first named applicant are replete with generalised statements of unfairness, bias, prejudice or aggression on the part of the trial judge incidents or examples in respect of same are lacking. Such an isolated incident does not amount to such an intervention as would give rise to a reasonable apprehension of preventing a completely fair and independent hearing, or could not be justification for a valid complaint of bias or entering into the arena.

Listening to the DAR
52. The applicant requested that the court listen to the DAR recording of the entirety of the hearing of the 5th May 2016 so that incidents of bias or prejudicial or aggressive behaviour might then be discovered – it is noteworthy that although the first named applicant secured the relevant liberty to identify such points having listened to the DAR, and record same in an affidavit he chose not to file an affidavit but rather believed that the exercise could be undertaken during the current judicial review process.

1. The applicant has the DAR recording since prior to the date of the 20th February 2017.

2. Liberty was afforded to the applicant to file further affidavits of 16th March 2017 pursuant to his application grounded on affidavit of the 20th February 2017.

3. The asserted purpose of listening to the DAR, according to the applicant, was to:- (a) identify proof of interference, anger etc. demonstrated by the Judge, and (b) assist in completing the analysis/preparing chart sheet of supporting matters/particulars from the applicant's point of view of his claim. Such proof had not been identified by the applicant from between the 5th May 2016 and the 20th of February 2017 nor has it been identified in 100 plus pages of affidavit, notwithstanding the applicants' presence at the hearing and the availability of the DAR to the applicant for in excess of 17 months. This task, according to the applicant was not yet completed by the applicant and the applicant was proposing that the court take part in some form of a trawling exercise of the DAR.

4. Taking the applicant's affidavit at its height the complaint of interference in the cross examination by the Judge is not enough to establish bias or prejudice entering the arena.

5. Judicial Review is to be heard on affidavit, and included in the minimum requirement that would warrant listening to the DAR would be to confirm particulars given in affidavit, and possibly disputed.

6. The DAR is 3 hours long in total and listening to it in one sitting without interruption would take one day essentially.

7. There is a need and an obligation on the judiciary to manage cases appropriately.

8. By reason of the foregoing, I refused to listen to the DAR.

Sequence of evidence
53. The first named applicant suggests that he was obliged to give evidence prior to the completion of the evidence on the part of the respondent. This fact is denied in the affidavit of Ms. Clarke and Ms. Clarke states that at the conclusion of her cross-examination, the respondent indicated that it did not intend to call Mr. Doyle, at that stage the respondent concluded its case (see para. 19 of the affidavit of Ms. Clarke on 26th September 2016.) This averment is uncontroverted as matters stand. Accordingly, there was no want of due process or fair procedure in the manner in which the trial was conducted.

54. I am satisfied that having regard to both affidavits of the first named applicant, the first named applicant has not demonstrated the behaviour of Judge Reynolds during the course of the trial was such as to afford the applicants an entitlement to an order of certiorari in respect of the order made on the 5th May 2016.

Conclusion
55. For the reasons herein before set out, the application of the applicants for an order of certiorari of the order of the 5th May 2016 is refused.

56. As a consequence of the refusal to grant certiorari of the order of the 5th May 2016, the application of the applicants to remove the judgment mortgage placed on their family home following the order of the 5th May 2016 is also refused as is the applicants' application for a stay on the enforcement of that order.