THE COURT OF APPEAL

Unapproved **No Redactions Needed**

Neutral Citation Number [2021] IECA 207
Court of Appeal record Number: 2020/74
High Court Record Number: 2019/5391P

BETWEEN

ANTONIO CASIMIRO LOPES

PLAINTIFF/APPELLANT

AND

PAUL SINNOTT, BARRY LYONS AND GRAHAM KENNY

DEFENDANTS/ RESPONDENTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 20th day of July, 2021

1. This is an appeal by Mr. Lopes from an order of Reynolds J. made on 28 February 2020 refusing to recuse herself from hearing his cases, and ordering that he pay the costs of the application.

Background

2. These proceedings were commenced in the Dublin Circuit Court by Mr. Lopes by Ejectment Civil Bill dated 28 March 2018, in which he claims title by adverse possession to property at 130 Thomas Street, Dublin which he claims was abandoned by the legal owner and was not subject to any lease. He further claims that he was wrongfully 'evicted' from the property by the second and third named defendants and seeks to impugn orders made in favour of those defendants in earlier proceedings, and to impugn the sale of the property by the second and third defendants to the first defendant in 2013. Mr. Lopes seeks a variety of reliefs, including substantial damages. By Order dated 25 June 2019 the proceedings were transferred to the High Court.

3. By Notice of Motion for Discovery issued by Mr. Lopes on 15 July 2019 and returnable to the High Court on 21 October 2019, Mr. Lopes sought non-party discovery from Dublin Land Securities relating to the title documents entitling that party to transfer the freehold in the property to the second and third defendants, and proving that it sold the property to the second and third named defendants. That Motion, after several adjournments, came on for hearing before Reynolds J. in the Chancery List on 27 January 2020. It was listed with another motion issued by Mr. Lopes on 9 December 2019. By the time it came on for hearing the same firm of solicitors was on record for Dublin Land Securities and the defendants.

4. From uncontested affidavit evidence of Mr. Kenny it appears that when the matters came on before Reynolds J. she put back both motions to the end of the Chancery List that day to afford herself an opportunity to read the papers during lunch hour, and to facilitate the hearing of less time-consuming applications. When the motions came on for hearing Mr. Lopes asked Reynolds J. to recuse herself, giving as his reason that the defendants had engineered a situation where she would hear his motions. Reynolds J refused to recuse herself or to adjourn (to allow a formal recusal application), indicating that the motions had been assigned by the Central Office to the Chancery List, as Mr. Lopes sought equitable relief, and that she was the Judge presiding over that list. Reynolds J. proceeded to deal with the discovery motion, and refused non-party discovery, but she adjourned the other motion (which sought by way of Notice of Motion similar relief to that sought in the Statement of Claim) to a later date (after a particular Circuit Appeal brought by Mr. Lopes would be disposed of).

5. This prompted Mr. Lopes to bring an application by Notice of Motion issued on 20 February 2020, and returnable to 28 February 2020, seeking orders that Reynolds J recuse herself from "presiding over any of my cases" on the basis of breach of the constitutional and ECHR right to a fair trial, bias, discrimination (including racial discrimination), lack of independence and impartiality, and also based on allegations of misconduct against the defendants. The application

was grounded on an affidavit sworn by Mr. Lopes on 13 February, 2020, to which the defendants responded by an affidavit sworn by Mr. Kenny on 26 February 2020. It is against the refusal of that application by Order of Reynolds J. made on 28 February 2020 that Mr. Lopes appeals.

6. There is no written judgment from the High Court, but this court has been furnished with a DAR Transcript of the hearing on 28 February 2020. It is apparent from this that Mr. Lopes relied on his own affidavit, and that in relation to Mr. Kenny's affidavit Mr. Lopes' felt that "There's nothing there really that matters" (p.8 line 29) and he did not wish to avail of the opportunity offered to him by the trial judge to put in a replying affidavit. Despite invitation from the trial judge Mr. Lopes did not engage with Mr. Kenny's affidavit. Mr. Lopes' "main point" was "the way you handled the case on Monday…on the 27th and you didn't allow me to present my case" (p.5 line 32-34), and he stated (p.6 line 2-5):

> "Now, that is in violation of my constitutional right to a fair hearing if I bring that motion to explain to the Court why I brought that motion and the judge refused to let me explain why I brought it. That's a complete violation of my right to a fair hearing, isn't it? How can you decide a case based on their submission there?"

The trial judge pointed out on a number of occasions that she had sought to facilitate Mr. Lopes on 27 January 2020 by reading the papers over lunch hour and dealing with his application. She rejected the suggestion that she was biased, or anything other than impartial. In ruling on the application she stated (p.14, line 14):

> "JUDGE: I have your affidavit. I have given you an opportunity to address me on it. I have given you an opportunity to deal with the replying affidavit from Mr. Kenny and, as far as I'm concerned, I've heard from you insofar as I need to deal with the application, not about the case or what happened in the Supreme Court or anywhere else, and I have given my decision. I am refusing your application because I am satisfied that that's the appropriate order to make."

As Mr. Lopes continued to address the court, the trial judge added (p.14, line 27):

> "JUDGE: I have just given my reasons why Mr. Lopes….
>
> MR LOPES: You have anything to win by staying in it?
>
> JUDGE: …and if you choose not to listen to me or shout across me, that's a matter for you. I have given my decision. As I say, it seems to me that this is purely an attempt to go judge shopping. I am satisfied that I have dealt with your motions appropriately…"

7. In his Notice of Appeal Mr. Lopes raises four overlapping grounds which may be summarised as follows:

(a) complaints that on 27 January 2020 the trial judge did not act independently or impartially, and discriminated against him in not allowing him to present his case until the end of the list, and then deciding it on the respondents' submissions, and not affording him a fair hearing;

(b) that the trial judge was biased and did not give him an adequate opportunity to present his case on 27 January 2020, and therefore the trial judge should be recused from hearing all his cases in the future;

(c) the oath of office of a judge combined with the rules against bias required that the trial judge recuse herself from proceedings "where bias may be an issue"; the motion did not come before the trial judge "in a normal way", but as a result of the request of counsel for the respondents that led her to agree to hear it notwithstanding Mr. Lopes' objection;

(d) Despite reminding the trial judge of his objection to her hearing it on that day she proceeded to hear the motion on 27 January 2020, and then refused to recuse herself.

8. Two aspects of this are of note. Firstly, it is entirely focussed on 27 January 2020, and raises no ground directed at the hearing of the recusal motion by Reynolds J. on 28 February 2020, and does not attempt to say how she erred in fact or law on that occasion. For instance it raises no

ground related to the law relating to objective bias as presented to the court by counsel for the respondents on 28 February 2020. Secondly, it appears to go beyond the facts as presented in the affidavits, which was the only evidence before the High Court and is the only evidence before this court as to what occurred in court on 27 January 2020. Of note in this regard is that fact Mr. Lopes, who bears the burden of proof, has not presented any transcript of the hearing on 27 January 2020.

9. The court has also received written submissions from the parties, and listened to their oral submissions. Much of Mr. Lopes' written submission addresses the history and substance of his case and is not relevant to the recusal issue, but the later parts set out why he asserts bias. He relies on a lack of fair procedures on 27 January 2020 as the basis for asserting bias, and he refers to and relies on well established authorities related to deciding on objective bias. Unfortunately much of his submissions repeat allegations of fraud against the respondents – for instance this is deployed as a reason why the court should disregard Mr. Kenny's affidavit – and he makes serious statements and criticisms that are not borne out by evidence, and which I have found not to be of any assistance. In many instances these reflect matters mentioned by Mr. Lopes in his grounding affidavit. Much the same arguments were made orally by Mr. Lopes, and he emphasised his question "why would the trial judge want to continue to hear my case when she does not need to hear it?" Unfortunately his own answer to this question seemed to be to suggest that the trial judge had something to gain and was assisting the defendants in perpetrating fraud on Mr. Lopes.

10. The law on objective bias is clear, and is not is dispute, and is set out in one of the cases cited by both Mr. Lopes and the respondents' in their written submissions. It suffices for present purposes to refer to *O'Callaghan v Mahon* [2008] 2 I.R. 514 at 672 where Fennelly J. held that –

> "80. The principles to be applied to the determination of this appeal are thus, well established:-

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

(b) the apprehensions of the actual affected party are not relevant;

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

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

11. I propose to address the fair hearing/bias issues raised by Mr. Lopes on this appeal in the context of the recusal motion and the affidavit evidence, the DAR Transcript from 28 February, 2020 (and such assistance as this gives as to what took place on 27 January, 2020) and the Grounds of Appeal as I have summarised them earlier.

12. What I do not propose to do is to address any additional material referred to in Mr. Lopes' Notice of Appeal, or his written or oral submissions to this court, that was not the subject of evidence adduced in the court below. It is not appropriate for an appellate court such as this to take into account fresh material/evidence where it has not been introduced in a proper fashion, and, if necessary, with leave of the court; no such leave has been sought or granted in this appeal.

13. Mr. Lopes' Notice of Motion seeking recusal sets out detailed grounds for his application. It is not necessary to address these as they are largely replicated in Mr. Lopes' grounding affidavit at paragraphs 1-5. In the remainder of his affidavit – paragraphs 6-8, running to some 5 pages - Mr. Lopes avers unhelpfully and at length to the history of these and related proceedings, and his broader grievances which are the substance of his claim. I do not consider this to be relevant to his recusal application. His affidavit in truth says relatively little about the hearing on 27 January 2020 and the

lead up to that hearing, but in this judgment I will address what he does say that might be considered to be directed at his claim, and what Mr. Kenny deposes to in his replying affidavit.

14. Fair hearing

In para. 2 of his Affidavit Mr. Lopes complains of bias because "[the trial judge] decided to hear my case after a long time waiting for no reason" and "she did not allow me to present my case, and in the end she delivered her judgment based only on the Defendants submission". Later, in para. 3, he says this was one of 70 motions, he was there from 10.30am, and his case was not called until 4 pm when only he and the defendants' legal team were in court.

15. Mr. Kenny responds at para. 26, rejecting the suggestion that the trial judge did not allow Mr. Lopes to present his case. He avers that the trial judge took the papers away over lunch and considered them, and after lunch went through the discovery documents (copies of which were given to Mr. Lopes) that had already been discovered by the second and third defendants showing their title to the property. He avers in para. 27 that the other motion was unmeritorious because it sought by motion the same relief as was sought in the Statement of Claim, and could have been struck out, but in the event was simply adjourned.

16. In my view Mr. Lopes' affidavit placed no evidence before the trial judge on 28 February, 2020 from which she could come to the conclusion that she had not given the non-party discovery motion a fair hearing, or on which this court could find that there was any breach of his right to fair procedures, whether arising under the Constitution, the European Convention on Human Rights, or otherwise. Mr. Lopes did not put in evidence the DAR transcript for 27 January 2020, and that makes it very difficult for this court to form any judgment on whether there was some want of fair hearing. From Mr. Kenny's evidence it does appears that, because the matter was going to take longer to hear than most Monday motions – and not unusually there were a good many of these – the trial judge allocated time to deal with it in the afternoon, giving herself an opportunity to read the papers over the lunch hour. It further appears, and on this Mr. Kenny is not contradicted, that

the trial judge went through the discovery documents with Mr. Lopes in the course of dealing with the motion. In the DAR Transcript for the hearing on 28 February 2020 Mr. Lopes is recorded as saying that this part of the hearing on 27 January 2020 "…didn't take more than 15 minutes" (p.4, line 31). Mr. Lopes complains that he was not allowed to "present his case", but he did not deny that the trial judge gave him an opportunity to make submissions on 27 January 2020.

17. The account given by Mr. Kenny appears to be borne out by the DAR transcript of what the trial judge said to Mr. Lopes on 28 February 2020. It is notable that at no point did Mr. Lopes disagree with or take issue with the trial judge's account of what she did on 27 January 2020. Of more importance however is that Mr. Lopes, having been expressly afforded an opportunity to file a further affidavit, chose not to file any replying affidavit in response to Mr. Kenny, and he must therefore be taken to accept the factual account given in Mr. Kenny's affidavit.

18. This was an entirely fair means of proceeding, and indeed demonstrates appropriate attention and diligence on the part of the trial judge. The fact that the case was reached last, or went on a bit late in the day, is not evidence that there was not a fair hearing; cases frequently start late and finish late, and it would take clear and compelling evidence pointing to a real deficit in the adequacy or fairness of the hearing for a complaint of this nature to succeed. There is no such evidence here. Of particular importance is that the trial judge had a significant opportunity at lunch hour to familiarise herself with the motion papers and discovered documentation, and when that opportunity exists it often means that a motion hearing can be dealt with expeditiously.

19. Mr. Lopes makes a suggestion at the end of para. 3 of his affidavit that the reason the trial judge put his case to the end of the list "…I believe is discrimination in making sure I was not attended before her own race." Perhaps not surprisingly, Mr. Lopes does not point to any evidence whatsoever to support such a belief. It can only in my view be Mr. Lopes' subjective belief. In so far as this leads him to the belief that the trial judge is biased, it is also an entirely subjective belief. No fair minded objective observer in possession of all the relevant facts, including a knowledge of

how the Chancery List is managed on a busy Monday, would reasonably apprehend any such belief. It is a statement and belief that is wholly unwarranted and needlessly insulting, and in the circumstances is a scandalous allegation.

20. I find Mr. Lopes' case, in so far as it based on an alleged lack of fair hearing on 27 January, 2020, to be unstateable.

21. I would add that Mr. Lopes informed this court that he did not appeal the adverse outcome of the non-party discovery motion. As the proceedings had been transferred to the High Court, it was a decision of that court that could have been appealed as of right to this court. Mr. Lopes was clearly aware of that right, and regretted not appealing. He complained that if the motion had been heard by an impartial judge he would not have had to appeal, and he said he chose not to appeal because of the delay that would entail in progressing his claim. This rings hollow in light of his issuing of the recusal motion, which he lost and which he appealed, surely adding to the delay. Mr. Lopes had a right of appeal, and in circumstances in which he had a fair hearing, and lost the motion, the appropriate course to take was to appeal, not to bring a recusal motion.

Delay

22. As I have said, the motion seeking non-party discovery was first returnable on 21 October 2019, but not heard until 27 January, 2020. Mr Lopes claims discrimination on the basis of delay in respect of "…one Motion, which normally takes one month to deal with." He suggests in para. 3 of his affidavit that "The reason for this delay is most likely to give the Defendants time to falsify documents of ownership proof for this property."

23. However, as Mr. Kenny points out in his affidavit, that delay was largely caused by Mr Lopes. At para 19 Mr. Kenny states:- "On or about 8 October 2019, Mr lopes issued a second motion (an application to amend his Statement of Claim) which was given a return date of 18 November 2019. On 21 October the Court acceded to the respondent's application to have the motion adjourned to 18 November 2019" for efficient use of Court time. On 18 November, as the

Mr Lopes had not exhibited a draft amended Statement of Claim nor highlighted the amendments he wished to make, contrary to the Rules of the Superior Courts, the two motions were adjourned to 2 December 2019. On 2 December 2019, Mr Lopes wrote to the respondents' solicitors saying he did not wish to proceed with the application amending the Statement of Claim. As a result the motion to amend was struck out on that day (Mr. Lopes did not attend court) and the discovery motion was adjourned to 27 January 2020, along with the other motion that Mr. Lopes had filed on 9 December 2019.

24. Based on this uncontradicted evidence I am quite satisfied that the court acted reasonably and in accordance with good practice in the manner in which the discovery motion (and the other motion) came to be adjourned to 27 January 2020. Mr. Lopes cannot attribute responsibility for any delay in the hearing of his discovery motion to the court, or any party, other than himself, and this cannot therefore form the basis of any claim of bias or failure to afford him fair procedures. In fairness to Mr. Lopes he did not push this point in the High Court; the DAR Transcript records Mr. Lopes at p.4 line 3 saying "Yes, Judge, the delay is really nothing to it, in fact", and at p.5 line 29 "No, no, I didn't say there was no issue, I said that is not the main point…The main point was the way you handled the case on Monday." Nonetheless he cannot escape the finding based on Mr. Kenny's evidence that the delay was his own fault and cannot form the basis of any complaint of want of a fair hearing, or of bias.

25. In these circumstances it is scandalous for Mr. Lopes to suggest that the delay was "most likely to give the Defendants time to falsify documents." This is a very serious allegation, suggesting that the defendants would falsify documents, and that a High Court judge would collude with them to facilitate such fraud. It would require compelling evidence to even make such an allegation, which could have enormous consequences for the judge concerned as well as professionals such as the second and third defendants. There is no evidence whatsoever to back it up, and I am satisfied that there is no justification whatsoever for such an allegation. I note that it

is roundly rejected by Mr. Kenny who describes it as "outrageous", and given the manner in which the allegation is made, I agree.

"Engineered" before this trial judge

26. It is not contested that the sole reason given by Mr. Lopes for his recusal application on 27 January 2020 was because he claimed the respondents had "engineered" a situation whereby Reynolds J. was to hear his motions (para.24 of Mr. Kenny's affidavit). In argument before this court Mr. Lopes asserted that the respondents "appointed" or "chose" their judge.

27. This has no basis in fact, and is, at best, Mr. Lopes' misunderstanding as to how listings are arranged and what in fact occurred. Again Mr. Kenny's affidavit explains this at para.s 18-23, and his evidence is uncontested. Mr. Lopes' non-party discovery motion was returnable before the High Court on 21 October 2019; on 8 October 2019 he issued a second motion, to amend his Statement of Claim, which had a return date of 18 November. On 21 October 2019 Reynolds J acceded to an application by counsel for the respondents to adjourn the discovery motion to 18 November, 2019, so that both would be listed together. That was a normal and sensible application, intended to convenience the parties and the court so that both matters could be dealt with together. On 18 November 2019 counsel pointed out the application to amend did not comply with the Rules of the Superior Courts (no amended draft was exhibited), and so Mr. Lopes was granted time to put in a further affidavit, and both motions were adjourned to 2 December, 2019; they were 'travelling together', and again this was normal good practice. On 2 December 2019 Mr. Lopes wrote to the respondents' solicitors indicating he did not wish to proceed with his amendment application, and that he would not attend court; counsel attended and the amendment motion was struck out and the discovery motion adjourned for hearing to 27 January, 2020. Mr. Lopes issued a further motion on 9 December 2019, which was also returned to 27 January 2020. That is how both matters ended up before Reynolds J., and it could not possibly be said that the respondents engineered that she would hear the motions.

28. Further, for the reasons given by the trial judge on 27 January 2020, I am satisfied that Mr. Lopes' complaint of the listing of the motions in the Monday Chancery List, could never be a basis for recusal. Mr Lopes was seeking equitable relief – including declaratory relief - in his Statement of Claim, and as a matter of course such cases are assigned to the Chancery List. It just so happened that that was where Reynolds J. presided at the time, and that motions in such matters are returnable before the Chancery List on a Monday. That was entirely in accordance with normal and accepted Central Office and court practice and procedure. No reasonable observer with knowledge of the way cases are assigned and the Chancery List operates would apprehend bias from the process that resulted in this listing. If this on its own could ever form a basis for an assertion of bias and an application for recusal, the system would be unworkable.

29. It is also significant that Mr. Lopes did not at the hearing on 27 January 2020 suggest that the trial judge should recuse herself on the further basis that the case was put back to the end of the list, or that he was not allowed to present his case. These matters were not of such importance to him on 27 January 2020 as to prompt him to protest at the time that he had not received a fair hearing, and this undermines his later attempt to rely on a suggested lack of a fair hearing.

Independence/impartiality

30. Mr. Lopes invokes the Constitution and the ECHR in support of this ground, and, at para. 4 of his Affidavit, avers that –

> "…while handling my motion on the 27th January 2020, [the trial judge] behaved like a person hired by the Defendants to provide a job for them. Accordingly it is within my constitutional right to ensure that she never preside over any of my cases to avoid that I be discriminated and humiliated again, and above all to make sure that justice prevails."

In para.5 he adds –

"Furthermore, on the 28th January 2020, Judge Reynolds was notified of my intention to lodge a complaint against her for indirect racial discrimination, and this alone disqualifies her from presiding over any of my cases."

31. The basis of his complaint of impartiality again seems to be Mr. Lopes' wholly unfounded allegation that the manner in which his case came up at the end of the list, when only he and the defendants' legal team were in court, was discriminatory. This entirely misses the point that there were good practical reasons for putting the case back, in order to deal with shorter motions and for the trial judge to have an opportunity to look at the papers during lunch hour. It also misses the point that someone's case must go last, and it will frequently be the longer case that is put to the end in a busy Monday list.

32. In this instance Mr. Lopes has at most only his subjective view to support his contention of bias, and his most serious allegations of wrongdoing, and that can never be enough. Even if Mr. Lopes held the wholly unjustified view that what occurred discriminated against him (which in any event I do not accept)–that is not sufficient to a justify a judge taking the significant step of recusal when that is not a view or apprehension that would be taken by the reasonable and impartial observer familiar with the way the High Court goes about its business on busy motion days in the Chancery List.

33. This is not a case in which Mr. Lopes avers to any statements on the part of the trial judge that might show prejudice, hostility or dislike towards him. The fourth limb of the test for objective bias laid down by Fennelly J. in *O'Callaghan* therefore does not arise.

34. Mr. Lopes appears to believe that the fact that he informed Judge Reynolds on 28 January, 2020 of his intention to complain about "indirect racial discrimination" is enough to "disqualify" her from hearing his cases. This is illuminating, because it demonstrates his lack of understanding on a number of fronts. He does not appear to understand how serious such an allegation is, and that it should not be made without a strong evidential base. He also does not understand that in order for

a judge to recuse himself/herself, or to persuade them to do so, the test in *O'Callaghan* must be satisfied, and that asking for recusal is in itself a serious move that should not be undertaken lightly. He seems to think that he only has to hold a view as to the judge's fitness to hear his case to entitle him to seek recusal. He could not be more wrong. He also does not seem to appreciate that when his case comes to trial it will be heard by a judge – whoever that may be (and it could be the trial judge here or other judges against whom Mr. Lopes has made similarly unfounded allegations, or whose recusal he has sought in the past) – who will, in accordance with their duty and the declaration that they made when taking up office, hear the evidence and argument and reach a decision independently and without fear or favour.

35. The trial judge clearly felt Mr. Lopes was 'judge shopping', and that is a view she was entitled to come to in all the circumstances – although it was not one that was required to refuse his recusal application. Kelly J in *O'Shea v Butler* [2015] IECA 48 quoted with approval the following passage from the judgement of Mason J in High Court of Australia in *Re:JRL ex parte CJL* [1986] 161 CLR 342:-

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe, that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide their case in their favour."

I agree with that observation, and it is clear the trial judge here properly rejected the suggestion of bias and refused to recuse herself. Mr. Lopes also entirely misunderstands the deep sense of public duty and obligation felt by judges to hear cases that are listed before them, and, quite apart from the fact that judges will be astute to prevent 'judge shopping', that is sufficient in itself to prompt a judge to reject a recusal application that does not meet the *O'Callaghan* test. It also answers a question repeatedly posed by Mr. Lopes at the hearing of this appeal- i.e. why, if it makes no

difference to the trial judge or the respondents, does she not recuse herself, in circumstances where it matters to Mr. Lopes? This question further demonstrates a complete misunderstanding of the principles applicable to applications of this kind .

36. I would therefore dismiss this appeal. As Mr. Lopes has entirely lost the appeal I would propose that the costs of the appeal be awarded to the respondents, to be adjudicated by a legal costs adjudicator in default of agreement, and I would not propose that there be any stay placed on the costs order. Should Mr. Lopes wish to dispute this proposed costs order he should so indicate in writing to the Court of Appeal Office within 10 days of electronic delivery of this judgment, and a short costs hearing will be arranged.

Judges Binchy and Collins having read this judgment have indicated that they are in agreement with same.