Neutral Citation No: [2022] NICA 70	*Ref:* **McC12005**
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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **28/11/22**

IN HIS MAJESTY'S COURT OF APPEAL IN IN NORTHERN IRELAND

BANK OF IRELAND (UK) PLC

v

McKEEVER & McKEEVER

Before: McCloskey LJ and McBride J

Appearances
Mr Stevenson, of counsel, appeared on behalf of the Respondent
The appellant appeared in person, assisted by a friend

McCLOSKEY LJ (*giving the judgment of the court*)

[1] The court will give its decision orally now, as it frequently does in interlocutory appeals of this kind. This is the unanimous decision of the court.

[2] The issues which the court is required to determine are formulated in the appellant's notice of appeal dated 24 October 2022. In brief compass, following a rather protracted history, the Chancery Division of the High Court became seized of this case for the purposes of a fresh trial in the wake of the decision of this court, differently constituted, in its judgment delivered on the 22 December 2021.

[3] In its judgment, this court stated, amongst other things, the following:

> "The appeal is allowed and the order of the trial judge reversed. The case is remitted to the Chancery Court for the purpose of conducting a full trial of all issues requiring to be determined arising out of the pleadings. Such trial will be conducted in accordance with this judgment insofar as material. We would add the following: first, there is absolutely no reason why the retrial should not be assigned to the same trial judge; second, it will be clear from this judgment that certain

> pre-trial case management steps will be required; and third, given the antiquity of this dispute, expeditious finality is highly desirable."

[4] The trial judge became actively involved in the management of the remitted action in the month of May 2022. Having regard to the volumes of business that are transacted in the first instance courts in Northern Ireland, coupled with the additional burdens which the trial judge has by reason of other judicial responsibilities, the elapse of some four months between the date of the judgment of this court and the first active case management listing in the first instance court is entirely unsurprising and attracts no adverse observation whatsoever on the part of this court.

[5] We have considered the transcripts of the several listings before the trial judge which materialised in the month of May and continued thereafter. In short, the two main issues of contention which were raised by the appellant relate to discovery of documents and the recusal of the trial judge. There was a third issue of substance, that was an adjournment of the scheduled trial date of 10 October, which the trial judge resolved that issue in the appellant's favour. We do not overlook that the appellant has raised quite a lot of issues in the hearings before the trial judge to date, but we extrapolate from those the two main issues to which I have referred. That analysis is confirmed by the terms of the notice of appeal. Paragraph 1 makes clear that the appellant seeks to challenge in this court the judge's refusal to recuse himself and paragraphs 2 and 3 make clear that the second limb of the appeal is against the discovery ruling made by the judge.

[6] We make clear that these are interlocutory rulings with the result that there is no appeal to this court as a matter of right. Rather, by virtue of section 35(2)(g) of the Judicature (Northern Ireland) Act 1978, leave to appeal is required and an application for leave to appeal, by virtue of the statutory language, can be made either to the trial judge or to this court. No such application was made to the trial judge. However, this court, notwithstanding the terms of the notice of appeal, will treat this as an application for leave to appeal.

[7] The appellant has addressed the court on the first limb of the appeal only this morning. She has represented to this court that the judge "perjured himself" in court on 11 May 2022 when he expressed his recollection that at the first trial he had received evidence of an inter – account transfer. She says he should be made accountable for this. It is further said "… he went out on a limb to try to prop up the Bank's argument." It is suggested that there is "no evidence of transfer to a suspense account." Mrs McKeever continues "... the trial judge is not fit to be a judge." She says she has found herself against the plaintiff Bank and the judiciary throughout this litigation.

[8] This court in determining whether the judge ought to have acceded to the recusal application applies well settled principles. They are conveniently rehearsed

in the case of *Hawthorne and White*, at paragraphs [147] to [155]. Those principles were brought to the attention of both parties some weeks ago on the initiative of this court. The doctrine in play is the doctrine of apparent bias. Lying at the heart of this doctrine are the principles of judicial fairness and judicial impartiality.

[9] In determining the recusal limb of this appeal, the court has considered all of the materials provided. These include, *inter alia*, the transcripts of the hearings in question. These were conducted on 11 May, then on 23 June and most recently on 3 October. These we have considered as a whole. At the first of those hearings, the judge is recorded as having said "There was evidence given to me that they [the Bank] had transferred the indebtedness to another suspense account, obviously for their own internal reasons." That statement, the judge accepted at a later stage, was not an accurate portrayal of the evidence given to him at the trial. This he acknowledged during the third of the case management hearings to which I have referred. The statement is found at page 3, lines 17 to 19 of the transcript of the hearing on 11 May 2022.

[10] The appellant ventilated at some length her recusal application in the third of those three case management hearings. The judge declined to accede to the application. He said the following in doing so - here I refer to page 14, line 8 and following of the relevant transcript:

> "In terms of my own recusal, I have heard your application. Anything which I have said in case management, Mrs McKeever, look, I do not retain all the details in respect of all of the cases that I hear. If I said something which you felt was incorrect or which the Bank has felt incorrect, I apologise for, but I do not see that as a basis of my recusal. This case has long been listed on the 10th of October, it will go ahead on the 10th of October and I will look and I will hear the evidence then. If there is a basis for me to recuse myself at that point when the points are made, then I will consider that application at that point, but I am not going to do it in the ether of something which may have been said or I said which I personally cannot recall during the case management. So, I reject your application for recusal. The matter will be listed and will be heard on 10th October."

He added:

> "I made a statement perhaps off the top of my head. I don't remember saying it. I don't remember its relevance to the case. What this case will be about is the evidence that is put before the judge on the 10th of October. That is

> what it has to be adjudicated upon, not interactions like this leading up to the case. So, I see no reason for me to recuse myself on the basis of your allegations thus far, but as I've said, I'm very open to keeping an open mind to it and we'll look at the actual evidence in relation to the case when we come to it next week."

As I have said already, the judge did accede to the adjournment application.

[11] We, an appellate court, must view this issue through the lens of the hypothetical independent observer, that is the notional member of society who is fully versed in all relevant facts and dispassionately assesses all that occurred at all material times during the phase of the proceedings which are under scrutiny, namely, the case management phase from May to October 2022. So, the impartial observer would, as this court has done, consider all of the materials bearing on events during that period: the transcripts, the emails, the letters, the affidavits sworn, the discovery application, as well as all of the materials pertaining to the history of the proceedings. Having done so, and on a fully informed basis, they would make their assessment of a lack of impartiality and a lack of fairness on the part of the judge.

[12] As was said in the judgment in *Hawthorne and White,* the independent observer would take into account, *inter alia*: the presumed independence of the trial judge; the statutory judicial oath of office; the fact that the judge is a full time professional judge; the issue of the passage of time; how the hypothetical observer would likely react to the judge's reactions and replies in open court throughout the relevant history and in particular when he reacted to the arguments and assertions made at the third of the three case management hearings; any evidence assembled relating to the judge's reputation and standing generally; the character of the proceedings; and, finally, whether the case to be tried would involve the resolution of disputed factual issues or credibility assessments or fact finding, together with the overriding objective and so forth.

[13] This court is of the view that the independent observer would be particularly struck by context, in all of its material aspects. The context has the following salient ingredients in this case. First of all, it was pure case management, nothing more than that. It involved no fact finding and no judicial determination of any kind, whether interlocutory or otherwise. Second, the passage of time. The judge found himself seized of a case which, in his mind and in his daily working routine, would have belonged to the distant past and one which he would have no particular reason to recall in detail. Third, the judge was engaged in case management in circumstances where, during the previous period, that is from the listing of the trial before him to the first listing on the 11 of May 2022, he had managed and tried countless other cases and had been involved in his other burdensome judicial responsibilities which are well known.

[14] The independent observer would also take into account that the judge not only made no concluded determination against the appellant at any stage, but handled the contested issue, namely the issue of discovery of documents, in a balanced and open-minded way. He subjected the Bank to strict time limits and to stringent requirements. The independent observer would next take into account the discovery response of the Bank and how that influenced the judge when he continued to deal with the issue of discovery of documents during the succeeding two listings.

[15] Next, the independent observer would measure all that the judge said in open court at the listing on the 3 of October 2022, taking into account what the judge said about his lack of memory of the specific detail in question and, in particular, his professed willingness to maintain an open mind on the issue of recusal and to revisit it at any time.

[16] The independent observer, we consider, would regard the impugned statement of the judge as innocuous and of minimal import in the overall context. The independent observer, we conclude, would harbour no reservations whatsoever about the impartiality and fairness of the trial judge. The independent observer would identify no unfair predisposition on the part of the trial judge against the appellant or in favour of the Bank. The independent observer, we consider, would be satisfied that the conduct of the judge has evinced no prejudice of any kind against the appellant.

[17] The independent observer would further be aware that any suggestion of perjury is fundamentally misconceived. *Inter alia*, the judge was not giving evidence under oath with the result that the essential ingredients of the offence of perjury could not have been committed. Leaving aside legal technicalities, a bald allegation of judicial perjury would in our estimation carry no weight for the independent observer.

[18] The independent observer, we are satisfied, would find no merit whatsoever in the suggestion that the judge went out on a limb to try to prop up the Bank's argument. The independent observer would also have no reservations at all about the judge's fitness to hold judicial office.

[19] Accordingly, the challenge to the judge's order, whereby he dismissed the appellant's recusal application, is entirely devoid of merit and is dismissed by this court.

[20] Next, the appellant appeals against the judge's ruling on the issue of discovery. We have traced this painstakingly through the transcripts, the emails, the affidavits and everything else. This court is entirely satisfied that the judge committed no error of law whatsoever in the exercise of his discretionary powers in the matter of discovery of documents. He handled this issue meticulously,

conscientiously and fairly at all times, the result being that the issue of discovered documents will be handled at the trial in the orchestrated manner devised by the judge. Interference by an appellate court in an interlocutory matter of this kind is a rarity. For the reasons given this aspect of the appeal is equally unmeritorious.

[21] The final element of the appeal relates to the judge declining an adjournment application. The judge did, in fact, grant the adjournment application sought by the appellant. If and insofar as this element of the appeal is confined only to the re-scheduled hearing dates of 7 November to 9 of November that, of course, has been rendered moot by the elapse of time following upon the appellant's recourse to this court. So that aspect of the appeal is also without merit.

[22] The net result is that this court dismisses all aspects of this challenge to the judge's interlocutory orders and refuses leave to appeal.