[2017] IEHC 830

**THE HIGH COURT**

**[2016 No. 362 J.R.]**

**BETWEEN**

**LAURENCE DELTOUR O'CONNOR AND PETER O'CONNOR**

**APPLICANTS**

**AND**

**JUDGE JAMES O'DONOHOE AND PATRICK CRONLY**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Faherty delivered on the 21st day of December, 2017**

1. By order of the High Court (Humphreys J.) dated 30th May, 2016, the applicants were granted leave to seek by way of an application for judicial review:

> (i) An order of *certiorari* quashing the decision of the second respondent made on 11th March, 2016 in proceedings entitled Patrick Cronly v. Peter O'Connor and Laurence Deltour O'Connor, (hereafter "the Circuit Court proceedings"), being proceedings bearing Record No. EQ 035/2013 and which commenced in the Eastern Circuit County of Kildare;
>
> (ii) An order directing that the first respondent would have no further role in the said proceedings.

2. The second respondent in the within proceedings was the plaintiff in the Circuit Court proceedings and the applicants were the defendants.

3. The background to the Circuit Court proceedings, which gave rise to the first named respondent's decision, concern a dispute relating to four parcels of land, two of which are registered to the second respondent and two to the applicants. All four parcels of land were previously in the ownership of a Mr. William Scally and his wife from 1979 to 2003. The Scallys held the lands in two registered parcels. For the purposes of the within application, the Court was given a sketch on which the four parcels of land are marked A, B, C and D. In 2003, parcel B was sold to the second respondent for turf cutting and registered in his name in a new folio. In 2004, parcel D was sold to the second respondent and a new folio was opened. This resulted in there being four folios (Plots A, B, C and D). Post 2004, the lands depicted as A and C on the sketch provided to the Court remained in the ownership of the Scallys. In 2004, the second respondent fenced off the lands marked D, which he had acquired, and also a portion of land from parcel C. He filled in a section of drain and then constructed a roadway/laneway on plot D to connect plot B (which he had purchased in 2003) with the public road onto which plot D (the laneway) fronted. This laneway was fenced off and paved.

4. In 2010, plots A and C were sold to the applicants by the estate of William Scally.

5. In 2011, the applicants learned that in or about 26 metres of the second respondent's laneway (plot D) was registered as part of their lands. The applicants requested the second respondent to discontinue his use of the lands registered in their name. The second respondent refused. The applicants then removed fencing which had been erected by the second respondent. In 2013, the second respondent commenced the Circuit Court proceedings seeking to have the instrument of transfer relating to his acquisition of plot D from the Scallys rectified so as to reflect the full extent of the laneway which he had constructed. The second respondent applied for and was granted an injunction allowing him to continue the use of the laneway pending the outcome of the Circuit Court proceedings.

6. Ultimately, the Circuit Court proceedings came on for hearing and were heard over three consecutive days on 2nd, 3rd and 4th February, 2016 by the first respondent. One of the issues in the Circuit Court proceedings related to the intention of the Scallys and the second respondent at the time of the transfer of plot D to the second respondent in 2004.

7. Accordingly, it fell to the first respondent to determine what was intended in the transfer of plot D by the Scallys to the second respondent. If satisfied that there was an error in the transfer instrument, it fell to the first respondent to decide what action the court might take. This was a central issue in the equity proceedings before the first respondent.

8. On 11th March, 2016, the first respondent gave judgment in the Circuit Court.

9. Consequent on the first respondent's judgment, it was declared that the applicants' predecessors in title (the Scallys) intended to sell the second respondent the strip of land (plot D) which ran from the public roadway to plot B in order to facilitate the second respondent's access to plot B, which the second respondent had purchased in 2003.

10. It was thus ordered by the first respondent:

> "That [the applicants] …
>
> (i) Execute a Deed of Rectification to correct the error in the description in the Schedule and the mapping error on the map annexed to the Deed of Transfer executed on 27th February, 2004 between William and Catherine Scally of the first part and the [second respondent] of the second part; OR IN THE ALTERNATIVE (ii) execute a Deed of Transfer with the [second respondent] in which the disputed part of the lane-way is transferred from Folio KE6614F [being the applicants' folio] to KE42897F (being the second respondent's folio) for no consideration;
>
> 2. That [the applicants] do reinstate the said disputed strip of lane-way to the state it was in prior to September 2013, to include the reinstatement of the fencing between that lane-way and their own lands;
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> 3. That the costs of the Action and any reserved costs be awarded to the [second respondent]".

11. The within proceedings arise from the manner in which the applicants allege the first respondent conducted the trial of the dispute between them and the second respondent.

12. In summary, the applicants' amended statement of grounds (pursuant to a direction of Noonan J. on 12th December), 2016 plead

that the first respondent:

(1) Acted without jurisdiction in his manner of conducting the trial of the Circuit Court proceedings;

(2) Acted with *mala fides* towards the applicants;

(3) Was subjectively biased;

(4) Was objectively biased;

(5) Interfered with the direct examination and cross-examination of witnesses to a grossly excessive and unjustified extent and in a partisan manner which went well beyond any interruption needed for clarification;

(6) Erred in law in postponing the hearing of the applicants' counterclaim of his own motion where there was no application to do so;

(7) Refused to hear the applicants' counterclaim and thereby caused relevant evidence to be excluded from consideration;

(8) Failed to consider relevant evidence;

(9) Improperly curtailed the cross examination of the second respondent by persistently interrupting counsel and enquiring as to when the cross examination would be finished;

(10) Unfairly made case management decisions without inviting submissions of counsel and announcing such decisions during the direct evidence of a witness;

(11) Continually interrupted counsel during legal submissions;

(12) Failed to give adequate reasons for his decision;

(13) Failed to explain why he ignored uncontradicted evidence;

(14) Failed to resolve the contradiction in his informing the second respondent that his evidence was difficult to follow and the authority opened by the applicants stating that in order to rectify an instrument the evidence should be clear, cogent and convincing;

(15) Sought to assist the second respondent by cancelling the hearing of the counterclaim in circumstances where it was listed for hearing and in directing that the second respondent obtain the services of an engineer with environmental expertise;

(16) Relied on spurious grounds to cancel the hearing of the counterclaim;

(17) Sought to denigrate the applicants' witnesses including an expert witness and improperly asking why a particular witness had not been in court the day before;

(18) Refused to break at a normal time for a lunch break during the first day of the hearing despite the second respondent having finished his direct evidence at 1pm and then breaking the second respondent's cross examination at a critical point in the afternoon when the first respondent asked the second respondent to draw a line on a map which required the assistance of the second respondent's legal representatives;

(19) Attempted to mischaracterise the second respondent's evidence on a significant point;

(20) Relentlessly drove the trial to a pre-determined conclusion; and

(21) Entirely usurped the function of counsel by cross examining witnesses himself both during their direct evidence and cross examination.

13. On 12th June, 2017, the second respondent filed an amended statement of opposition. The first respondent's amended statement of opposition was filed on 23rd June, 2017.

14. In their respective pleadings, both respondents take issue with the grounds upon which the applicants rely in the within application and deny the applicants' claims. The first respondent contends that the applicants' claims as against the first respondent are misconceived and without any factual or legal basis. The Circuit Court trial was listed for four days: it was not in any way truncated by the first respondent. Evidence was adduced, and both parties' respective counsel made oral and written submissions to the first respondent. While the applicants maintain that the process was so flawed as to merit *certiorari*, it is submitted that the applicants' real issue is with the decision itself and not the process. It is submitted that none of the grounds relied on by the applicants, either singularly or cumulatively, are of such a serious nature as to vitiate the first respondent's decision-making process.

15. It is also the first respondent's case that if there was an error or a series of errors on the part of the first respondent (which is denied), they are not such that warrant a remedy of *certiorari*. It is also submitted that many of the complaints and arguments of the applicants are matters for an appellate court rather than the High Court in judicial review proceedings. Accordingly, if the applicants believed that the first respondent was incorrect in the order granted on 11th March, 2016, it was open them to appeal the orders made rather than having the matter determined by judicial review. In seeking judicial review, the applicants have failed and/or omitted to avail of an alternative avenue of redress, which is an issue to be taken account of by the Court as to whether relief should be granted, as set out in *State (Abenglen Properties Ltd.) v. Dublin City Corporation* [1984] I.R. 381.

16. The position of the second respondent is that the first respondent acted entirely within jurisdiction in his manner of case managing the Circuit Court proceedings and in the manner of his hearing of the action and the subsequent decision.

17. Arising from the pleadings and the parties' respective submissions, the principal issues for determination by this Court are:

(i) Whether the first respondent acted with *mala fides* towards the applicants?

(ii) Whether the first respondent was subjectively/objectively biased?

(iii) Whether there was unfair treatment of the applicants' counterclaim?

(iv) Alleged lack of reasoning in the decision.

(v) Whether the number and/or nature of the first respondent's interventions were such as to constitute unfairness in the hearing.

**Alleged *mala fides***

18. As verified sworn by the applicants' solicitor's affidavit sworn 5th July, 2017, the amended statement of grounds pleads that the first respondent acted with *mala fides* towards the applicants by reason of the following. Firstly, during the course of the second applicant's direct evidence, the first respondent demanded to know how much the second applicant wanted for the disputed portion of land. Secondly, the first respondent refused to adjourn the proceedings on Day 1 at the normal hour despite the hardship he was causing to the applicants who were parents of young children. This was in circumstances where it was just the first day of a scheduled four day trial and given that the first respondent had pronounced that he was not proceeding with the hearing of the counterclaim. It is further submitted that notwithstanding having stated on Day 1 that he wished to have the second respondent's cross-examination finished before 4:30pm, the first respondent continued to sit after that time and heard further witnesses. After 5pm, counsel for the applicants pointed out to the first respondent that the applicants were the parents of young children and were in difficulty. To this, the first respondent reacted by saying "well they will just have to wait". It is submitted that this was oppressive conduct on the first day of a scheduled four day hearing. Thirdly, the first respondent's failure to break for lunch at 1p.m. on Day 1 demonstrated the first respondent's *mala fides* in circumstances where the second respondent had finished his direct evidence. This placed unnecessary stress on the applicants' legal team who had been in court without respite since early morning.

Fourthly, the first respondent asked the second applicant when giving direct evidence whether or not he had engaged his own engineer to carry out a survey prior to the purchase of his property. It is the applicants' case that this query was not for the purpose of clarification and can only have been for the purpose of undermining the second applicant.

19. Both counsel for the first respondent and counsel for the second respondent submit that none of the matters relied on by the applicants reach the threshold for *mala fides*. It is submitted by counsel for the first respondent that irrespective of any other ground the applicants have not made out a claim for *mala fides*. Accordingly, it was not permissible for the applicants to name the first respondent in the proceedings.

20. It is the second respondent's position that the first respondent carried out his duties in a fair and impartial way at all material times. The first respondent did not seek to denigrate any of the applicants' witnesses. Furthermore, the second applicant gave evidence which was found to be incorrect which he was later forced to admit. The second applicant had testified that he would have no problem selling the second respondent the disputed piece of ground but he was forced to retract this evidence when he was referred to his own open correspondence refusing mediation and refusing the open offer from the second respondent to purchase the disputed portion of land.

21. The respondents contend that in the absence of giving any allegation of facts to support a claim of *mala fides*, the applicant breached O. 84, r. 20(3) of the Rules of the Superior Courts.

22. As to the naming of the judge as respondent, in *Hall v. Stepstone Mortgage Funding Ltd.* [2015] IEHC 737, Humphreys J. addressed the circumstances in which a judge might be named as a respondent, as provided for by O. 84, r. 22(2A)(a) RSC. He stated:-

> *"Merely because it is suggested that a particular hearing did not in some way or for some reason, whether outside the control of the court or otherwise, fully observe all of the stipulations of fair procedures does not, in any way, make it appropriate to name the judge as a respondent. Something much more flagrant and deliberate would be required to reach the level required to sustain an allegation of mala fides, and the applicants here have made no such allegation in their amended papers. I, therefore, find that the learned Circuit Court judge in the present case was quite properly excluded from the title of the proceedings by the applicants."*

23. As to the definition of *mala fides*, in *Price Waterhouse Coopers Inc. and others v. National Potato Cooperative Ltd*. [2005] 2 LRC 150, a decision of the South African Courts, it was stated :-

> *"The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof of mala fides. In order to prove mala fides a further inference that an improper result was intended was required. Such an application of a procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition of mala fides. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may, however, be a factor where the abuse of court process is in issue."*

24. In *Fearon v. the Director of Public Prosecutions* [2002] IEHC 118, O'Caoimh J. stated:

> *"I am firmly of the view that the plea should not be even raised in judicial review proceedings unless there is a clear evidential basis for advancing same and that it is not sufficient to suggest that this must be inferred from the facts pleaded."*

25. As regards the first matter which the applicants suggest constitutes *mala fides* on the part of the first respondent toward them, I am entirely satisfied that there is no evidential basis to ground their claim. While it is the case that the first respondent enquired of the second applicant how much he wanted for the disputed portion of land (having previously asked the second applicant if he would like to come to some resolution with the second respondent), the enquiry as to how much the second applicant wanted for the land was preceded by the second applicant's own testimony that he had "no problem selling [the second respondent] the piece of ground".

26. As regards the second alleged instance of *mala fides*, I am satisfied that the first respondent was entirely within jurisdiction in indicating an intention to sit beyond 5 p.m. Moreover, insofar as it is contended that the first respondent's intention in this regard was oppressive, it is patently clear from the transcript that some short while after stating that the applicants would have to wait, the first respondent expressly stated that one of the applicants could go and collect the applicants' children if they needed to.

27. Furthermore, I am entirely satisfied that the timing of the lunch break on the first day of the trial caused no prejudice to the trial of the action. I cannot perceive, even if it were the case that stress was caused to the applicants' legal team by deferring the lunch break, how the first respondent's deferring of the lunch break can be said to translate into an allegation of *mala fides* on his part. I also find no evidential basis for the contention that the first respondent's enquiry of the second applicant as to why he had not obtained an engineer's survey prior to purchase amounted to *mala fides*. The applicants have manifestly not made out the *mala fides* ground.

***Alleged subjective/objective bias***

28. In their amended statement of grounds, the applicants plead that the first respondent demonstrated subjective bias by asking the second respondent "you've no doubt in your mind that you were buying the entire laneway up to this piece of ground and it would have [been] nonsensical for you" followed by "now the defence have said you had an alternative means of getting there?"

It is also contended that the first respondent's statement to counsel for the second respondent, to wit, "I suppose you can put it to [the second respondent] does he understand [the second respondent and William Scally] were both *ad idem* that [the second respondent] was getting the full extent of the laneway?" amounted to the first respondent telling the second respondent what evidence to give. It is submitted that the clear purpose of the questions posed by the first respondent was to frame the evidence in a particular manner. The applicants contend that such intervention went far beyond clarification and was indicative of both subjective and objective bias.

29. Counsel also points to the first respondent's direction to the applicants' counsel, after counsel's first question in cross-examination of the second respondent "[to] keep this issue very tight". This, counsel argues, was a wholly inappropriate intervention at the start of a cross-examination and indicated subjective and objective bias on the part of the first respondent.

30. It is submitted that when the second day of the hearing opened, the first respondent conducted a discussion on the case, again indicating bias and pre-judgment. The applicants also point to first respondent's refusal to allow the applicants' counsel to put forward the witness of his choice and insistence on hearing firstly from the second applicant.

31. The applicants allege objective bias by reason of the first respondent: continually interrupting both witnesses and counsel and taking over the role of questioning witnesses from counsel; asking leading questions of the second respondent; giving assistance to the second respondent, who had not engaged an engineer prior to attending for the trial, by advising him to engage an engineer and recommending the specialty of the engineer the second respondent should engage; describing the disputed portion of ground as a "ransom strip"; and expressing a view from the outset as to the second respondent's motive in purchasing the disputed laneway. It is alleged that all of the foregoing could not be said by an impartial observer to be unbiased and neutral.

32. Counsel for the first respondent submits that the applicants have not established the threshold for bias, as alleged against the first respondent. It is submitted that the setting aside a final judgment and order on the ground of reasonable apprehension of objective bias could only be done in "*extremely rare and exceptional cases*". The first respondent says that the applicants have not addressed any exceptional circumstances other than the number of alleged interruptions by the first respondent.

33. Likewise, the second respondent submits that the applicants have adduced no evidence to show that the first respondent was subjectively or objectively biased. It is contended that the applicants assert bias without any allegation of fact to support this ground. It is submitted that the first respondent did not, by his words or actions, give rise to any reasonable apprehension that there was bias. The second respondent contends that the learned trial judge proved himself to be willing to hear what was offered in evidence and by way of submission from both sides. Moreover, he rose to allow the applicants give further instructions to their counsel during cross-examination and made further enquiries of both counsel during oral submissions. He did not deliver his judgment until he had considered the content of the oral and written submissions and evidence. It is submitted that the first respondent's handling of the case was not tainted by any bias. Even if there had been any bias, which is denied, no allegation of bias was raised by the applicants at any material time. It is submitted that the principle that an allegation of bias must be raised at the material time is "*fundamental*", as stated by Finlay C.J. in *O'Reilly v. Cassidy* [1995] WJSC 1425.

34. In *Tolan v. Connaught Gold Cooperative Society Limited* [2017] IEHC 351 Noonan J. reprised the law on bias, as follows:

> *"11. It is of course true to say that once a case has been litigated to a final conclusion by the court delivering judgment, that judgment cannot be re-visited save in very limited circumstances.*
>
> *…*
>
> *13. These issues were again considered by Denham J. in Talbot v. McCann Fitzgerald [2009] IESC 25 where the applicant sought to set aside a final judgment and order of the Supreme Court on the ground of reasonable apprehension of objective bias. In delivering her judgment in that case, Denham J. noted that the jurisdiction could only be exercised in extremely rare and exceptional cases. She said that the reason for the fundamental principle that a final judgment is conclusive of the litigation is because the finality of litigation is an important concept in the administration of justice. She approved in that regard the dicta of Lord Simon of Glaisdale in The Ampthill Peerage [1977] AC 547, at 576 :*
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> *'Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: "We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough."'*

35. With regard to alleged bias on the part of the first respondent, the first thing the Court observes is that the first respondent had no personal interest in the outcome of the decision or in the lands in question. Nor did he have any apparent relationship to any of the parties to the action or their legal teams.

36. I am not persuaded by the argument that there could be any apprehension of bias on the part of the applicants by the case management decisions taken by the first respondent such as to the order witnesses might be heard or in relation to the deferral of the applicants' counterclaim. As to whether the deferral of the counterclaim was otherwise unfair, this issue is considered more particularly below.

37. I am also satisfied that there is no basis for an apprehension of bias with regard to the issue of the "ransom strip" reference by the first respondent, which apparently was made in the course of delivery of his judgment on 11th March, 2016. The phrase "ransom

strip" is, in the first instance, clearly attributable to the second respondent's counsel during the course of the trial. As the transcript shows, on Day 2, the first respondent took issue with any suggestion that the characterisation of the disputed piece of land as a "ransom strip" emanated from him. It was clearly accepted by the applicant's counsel on Day 2 that that was not the case.

38. Many of the other matters upon which the applicants rely in support of their contention of bias on the part of the first respondent relate to the interventions made by the first respondent in the course of the trial. The first respondent's interventions in the course of the Circuit Court proceedings, and the nature of those interventions, are addressed later in this judgment.

***Alleged unfair treatment of the applicants' counterclaim***

39. The applicants allege that during the second applicant's evidence, the first respondent ruled that he would not deal with the applicants' counterclaim. The applicants contend that in so doing, the first respondent excluded evidence which was highly relevant to the Circuit Court in the exercise of its discretion whether to grant equitable relief to the second respondent. The first respondent's ruling was in circumstances where the counterclaim had been delivered more than a year prior. It is submitted that the nuisance alleged by the applicants against the second respondent was a relevant factor which the first respondent failed to take account of by virtue of his failing to allow the counterclaim to be heard in tandem with the second respondent's action.

40. It is also contended that on the final day of the hearing, upon learning that the second respondent had not previously engaged an engineer, the first respondent stated "so really in practical terms [the nuisance claim] wouldn't have been able to go ahead anyway, would it?" Counsel for the applicants submits that the first respondent's remarks in this regard were an attempt to justify the decision to postpone the hearing of the counterclaim.

41. The applicants also contend that it is not correct for the respondents to say that the counterclaim was inadequately pleaded. It was adequately pleaded and the nuisance alleged was outlined. No notice for particulars was raised by the second respondent in respect of the counterclaim, yet the first respondent, of his motion, adjourned it on the basis that the applicants did not raise nuisance in 2011. It is submitted that while the adjournment of the counterclaim may not of itself be grounds for *certiorari*, in the context of Circuit Court proceedings where the second respondent was seeking equitable relief, and where the applicants had raised the issue of nuisance, the counterclaim should not have been adjourned.

42. The first respondent contends that the applicants state only that the first respondent was wrong in the exercise of his discretion to postpone the counterclaim. Accordingly, the applicants have not questioned the exercise of the respondent's discretion, only his conclusion. It is submitted that first respondent's decision could have been appealed to the High Court, which was the applicants' proper remedy.

43. Similarly, counsel for the second respondent submits that there is no merit in the applicants' complaint regarding the postponement of their counterclaim. Contrary to the applicant's claim that the first respondent caused relevant evidence to be excluded from consideration, the first respondent heard direct evidence about an alleged nuisance from the second applicant which is recorded in the transcript. As a matter of fact, the allegation of nuisance was not raised in writing for four years and was first raised in the counterclaim. There was no allegation of nuisance in the applicant's defence to the Circuit Court proceedings. Furthermore, there was no allegation of nuisance raised in any attempt to oppose the interlocutory injunction granted to the second respondent to restrain the applicants from interfering with the use of the laneway. It is thus submitted that the first respondent did not refuse to hear the counterclaim but rather used his statutory powers to order that the counterclaim should proceed separately.

44. Clearly, the first respondent had jurisdiction to separate the hearing of the claim and counterclaim pursuant to O. 33 of the Circuit Court Rules. Order 33, r. 7 provides:

> "A counterclaim may be proceeded with separately, and, if so proceeded with, shall be treated as an action irrespective of whether the original proceeding in which the counterclaim is made is withdrawn, stayed, discontinued or dismissed."

Order 33, r. 10 states:

> The Judge may, if he thinks it expedient in the interests of justice, postpone or adjourn a trial for such time, and upon such terms, if any, as he shall think fit."

45. Overall, I am not persuaded by the applicants' argument that the first named respondent exercised his discretion to adjourn the hearing of the counterclaim in a manner that warrants interference by this Court. While the applicants take issue with that ruling, I am not satisfied that in so ruling the first respondent acted without jurisdiction, or otherwise unfairly, in circumstances where it was made clear to the applicants that they would have their day in court with regard to the nuisance claim, a claim which was sufficiently discrete from the matters at issue in the Equity Civil Bill and Defence as to render the postponing of the counterclaim a matter for the trial judge's discretion.

***Alleged lack of adequate reasons in the decision***

46. While it is acknowledged that the first respondent gave reasons for his decision, the applicants assert that those reasons were not adequate in circumstances where the first respondent has not set out in the decision how he came to be satisfied that the evidence necessary for an order of rectification was clear, cogent and convincing. The applicants also take issue with the fact that while the first respondent reserved his judgment he supplied no written judgment explaining his reasoning. It is also pleaded that the first respondent did not explain why he ignored legal authorities opened to him by counsel for the applicants, such as *In the matter of the Tara Mines Pension Plan Bolinden Tara Mines Ltd. v. Cosgrave & Ors.* [2010] IESC 62 as to the requirements for amending a concluded written agreement. Furthermore, he did not deal with the absence from the extant documentation of any corroboration of the contract the second respondent claimed that he had with the late William Scally. Nor did he deal with the lack of clarity and inconsistency in the second respondent's evidence, as had been outlined in the applicants' counsel's submissions. It is contended that the first respondent waved away the evidence given by Mr. Michael Farrell as being unreliable despite the fact that his evidence was not contradicted. Furthermore, there was no mention of Mr. Molloy's evidence in the first respondent's decision. The evidence of Mr. Farrell and Mr. Molloy was not contradicted, yet the first respondent failed to state why he ignored their testimony.

47. It is also contended that on a number of occasions, the first respondent remarked to the second respondent that his evidence was unclear, yet the first respondent made no reference in his decision as to what he had made of the evidence of the second respondent despite having heard legal submissions on behalf of the applicants that in order to grant the rectification relief sought by the second respondent, the evidence should be clear, cogent and convincing. The applicants' counsel's contention is that it was important to the applicants that the first respondent would have set out the basis of his decision. They were a young couple who bought their first family home without notice of the second respondent's claim to the disputed piece of land. It is submitted that it is a matter of bewilderment to the applicants how the first respondent could have directed rectification, without explaining how he

arrived at such a decision.

48. The position of both respondents is that there is no merit in the applicants' contention that the first respondent failed to give reasons for his decision. It is submitted that the first respondent gave a cogent and lucid explanation as to why he came to his decision. Those reasons were based upon the extensive submissions on the evidence and law which had been given orally and in writing by both sides to the dispute.

49. Specifically, counsel for the second respondent rejects the contention that the first respondent failed to resolve the contradiction between his finding that the second respondent's evidence was difficult to follow and the requirement that the evidence to rectify an instrument of transfer should be clear, cogent and convincing. It is submitted that the evidence adduced by the second respondent was clear, cogent and convincing. He gave uncontradicted evidence about the intention behind the purchase of the laneway which was to give him access to the rear field (plot B). This was supported by evidence from Mr. Cross that the purpose of his mapping was to facilitate access from the public road to the lands (plot B) which the second respondent had purchased from Mr. William Scally. There was uncontradicted evidence from the second respondent and Mr. Michael Scally that the late William Scally had supervised the erection of stud fencing all the way from the public road to the rear lands.

50. As set out in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC (Fennelly J.), a decision-maker has a clear duty to give reasons:

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*

51. It is accepted that the first respondent's reasons for his decision were as follows:

> • There was a boundary dispute. It was common case that the Land Registry map did not reflect the position on the ground.
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> • On 20th February, 2004, the second respondent purchased from the Scally's, having bought an earlier plot in 2003.
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> • The applicants bought in 2010 and in 2012 they discovered a mapping error.
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> • In 2013 the applicants blocked the [second respondent's] access and removed fencing.
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> • In 2013, injunctive proceedings issued.
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> • The second respondent contended that a genuine error had been made by Mr. John Cross who had prepared a map for the 2004 transaction using the original map and the earlier 2003 dealing was still pending.
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> • The second respondent's case was that the transfer failed to reflect the actual land transferred to him. The laneway on the [prepared] map stopped 20 metres short of the back field [plot B].
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> • The second respondent had fenced the laneway under the supervision of the late Mr. William Scally before Mr. Scally passed away in 2009.
>
> • The second respondent sought to resolve the matter by way of Deed of Rectification/Deed of Transfer.
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> • The applicants resisted this and relied upon a Declaration of Identity.
>
> • As the applicants only purchased in 2010, they were not a party to the Dealings of 2003 and 2004 with the Scallys.
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> • The applicants were less well placed to say what had been agreed and what had been the intention of the original transaction.
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> • The Circuit Court had to establish what had been the original intention of the parties.
>
> • The second respondent and William Scally cut turf together.
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> • The Scallys were well disposed to the second respondent and sold the bog field in 2003 to exclude the lane.
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> • The second respondent was to avail of other ways of access.
>
> • It would be nonsensical for the second respondent to have paid reasonable consideration for a field with no access. The alternate access was however restricted and the need arose for proper access.
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> • The court was satisfied on the evidence that William Scally intended to sell the strip of land to facilitate access [for the second respondent to plot B].
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> • The case met with the requirements under the decision in *Boyle v. Connaughton*. The applicants had not properly surveyed and inspected the site they purchased. If they had, they would have noticed the fencing.
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> • A s. 72 burden arose on the property.
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> • The auctioneer's brochure [on which the applicants relied] was not sufficient as it was simply to identify the property for sale.

- There should be a Deed of Rectification or Transfer with Land Registry map to reflect the situation on the ground.

52. It is clear to the Court that the applicants take issue with the basis upon which the first respondent arrived at his decision. However, to my mind, the fact that the applicants disagree with the decision does not of itself make the decision amenable to judicial review. The proper remedy lies in an appeal of the first respondent's decision if it is the applicants' contention that the learned Circuit Judge erred in fact or law in arriving at his decision and/or in relation to the reliefs afforded to the second respondent.

53. Furthermore, it is not the law that every argument and piece of evidence canvassed had to be addressed in copious detail by the first respondent in the decision, as long as the applicants were able to decipher the basis upon which the decision was reached. Nor is the absence of a written decision ground for judicial review, to my mind.

54. As far as the present case is concerned, this Court can only interfere by way of judicial review if it is established that the process leading to the decision was unfair, as is alleged here.

55. The applicants' primary contention in these proceedings is that the interventions by the first respondent over the course of the three day trial were grossly excessive such that the applicants did not receive a fair trial of the issues in contention between them and the second respondent.

***The trial judge's interventions***

56. It is alleged that the first respondent's interventionist approach commenced on Day 1 of the trial when he demanded that the second respondent be called as a witness despite the fact that the second respondent's counsel wished to tender another witness. After the second respondent was sworn, the first respondent immediately began to question him by asking six questions in sequence before the second named respondent's counsel asked one question. Thereafter, the first respondent continued to ask questions of the second respondent, asking more than 130 questions whilst the second respondent was in the witness box, including asking questions directed at counsel.

57. The applicants point to the fact that the first respondent asked more questions of the second respondent than had the second respondent's own counsel. Counsel contends that these questions went far beyond any necessity for clarification. It is also alleged that the first respondent asked the second respondent a leading question to the effect that if the second respondent did not have a roadway up to plot B, it would render plot B useless.

58. It is contended that during the applicants' counsel's cross-examination of the second respondent, the first respondent interjected on more than five hundred occasions. This, the applicants contend, was grossly excessive, unjustified and contrary to their right to a fair trial. Counsel submits that at the end of the day, in the Circuit Court, the applicants' counsel was denied the opportunity to properly or effectively cross-examine the second respondent.

59. It is also alleged that throughout the cross-examination of the second respondent, the first respondent pressed counsel as to when the cross-examination would finish.

60. It is also submitted that the first respondent intervened in the direct examination of Michael Scally (a witness called by the second respondent) on 48 occasions, and that with regard to Mr. Scally's evidence, the first respondent interjections were tantamount to expressing disappointment that hearsay evidence was not admissible.

61. It is further contended that the first respondent asked leading questions of Mr. Scally. Furthermore, immediately prior to cross-examination by counsel for the applicants, the first respondent stated of Mr. Scally's evidence "he can't say an awful lot first hand about it really". It is submitted that this was an inappropriate comment to make. The applicants also contend that the first respondent interrupted the cross-examination of Mr. Scally on 88 occasions. The first respondent also pressed the applicants' counsel as to when he would be finished with the witness.

62. In the direct examination of Gerard Gannon, another witness for the second respondent, it is contended that the first respondent intervened eight times with only two questions being put by the second respondent's counsel. He intervened thirty times in the cross-examination of Mr. Gannon. Later on Day 1, the first respondent intervened 22 times in the direct examination of Mr. John Cross (the second respondent's witness) and 58 times in his cross-examination.

63. In the direct evidence of the second applicant, the first respondent intervened immediately before the second applicant was introduced at all, and thereafter intervened in the direct examination on more than 200 occasions.

64. It is also the applicants' case that the first respondent engaged in lengthy exchanges with counsel for the applicant as regards the relevance of the evidence to be given by the second applicant. Furthermore, the first respondent repeatedly pressed the second applicant as to how much money he wanted for the disputed piece of ground which, counsel submits, was a wholly improper question to put to the witness. Such an intervention could not be said to amount to clarification. It is also contended that the first respondent displayed hostility to the second applicant in putting such questions.

65. The applicants further contend that the first respondent continually intervened and led counsel for the second respondent in his legal submissions. Equally, when counsel for the applicant was making legal submissions the respondent continually interrupted. At a later stage in the submissions, the first respondent discussed the nuisance aspect of the case and directed the second respondent to engage an engineer and recommended that it should be somebody with environmental expertise, in effect advising proofs for the second respondent. At this point also he questioned the qualifications of Mr. Molloy, the applicant's engineer, who had already given evidence before him. It is further contended that the first respondent was clearly influenced unduly by the evidence of Mr. Scally, despite accepting that his evidence was hearsay and inadmissible. The first respondent also engaged in lengthy exchanges with counsel regarding the doctrine of constructive notice.

66. It is submitted that all of the interventions went far beyond what was acceptable in a fair trial. It is thus contended that by virtue of the first respondent's actions, the Circuit Court proceedings lost the characteristic of a fair trial as provided for in the Constitution. Even if the applicants would have been unsuccessful in the end, they were entitled to a fair hearing, which they did not get.

67. It is the first respondent's contention that whilst issue is taken with the number of interruptions by the first respondent during the Circuit Court proceedings, the applicants do not say that the respondent had an improper motive for the interruptions. The applicants plead no inference from the first respondent's interruptions. It is submitted that throughout the proceedings, the first respondent sought to clarify, as he was entitled to do. Moreover, he ran the case as he saw fit. It is submitted that in this regard, the first

respondent has an unfettered discretion. Accordingly, it is the first respondent's contention that, prior to giving his decision, it was perfectly in order for him, as the ultimate adjudicator of fact, to ask questions in order to make clear the unclear, and which would thus assist his evaluation of the evidence.

68. It is further submitted that even if it were the case (which is not admitted) that the first respondent overstepped the mark with regard to the number of questions posed, the grant of an order of *certiorari* to the applicants would be disproportionate to the second respondent's case in the Circuit Court in circumstances where the applicants could have appealed the decision of the first respondent.

69. Similarly, it is the second respondent's case that there is no merit in the applicants' assertion that the first respondent interfered with direct and cross-examination of witnesses in an excessive and partisan manner. Each witness was fully and adequately examined and cross-examined as to the material facts in issue in the claim and defence. The second respondent rejected the contention that the first respondent entirely usurped the function of counsel and submitted that both counsel had ample opportunity to put questions in direct examination and cross-examination of witnesses. No issues were raised by either counsel with the first respondent in relation to this ground.

70. It is contended that there is no basis for the applicants' claim the first respondent improperly curtailed the cross-examination of the second respondent. Furthermore, the first respondent was entitled to ask appropriate questions during oral submissions particularly where both counsel had been given an opportunity to furnish written submissions to support their oral submissions.

71. It is also the second respondent's contention that the first respondent's statement that cross-examination should be kept very tight does not have the meaning ascribed to it by the applicants. Given that the applicants have conceded (at para. 3 of their written submissions) that the central issue in the Circuit Court proceedings related to the intention of the Scallys and the second respondent as regards the lands purchased by the second respondent in 2004, the first respondent's direction reflected only his desire that the cross-examination should relate to the matters pleaded in the endorsement of claim and defence, and not any matters which had not been pleaded in the defence. Furthermore, the transcript demonstrates that the purpose of the first respondent's interventions during the course of the second respondent's cross-examination was to enquire as to when the applicants' counsel might conclude the cross examination. As such, they were entirely innocuous and in no way detrimental to cross-examination. It is submitted that the examples chosen by the applicants to demonstrate their allegation misrepresents what went on before the first respondent.

72. The second respondent also submits that it is not the case that the first respondent led counsel for the second respondent during his submissions on Day 2. Oral submissions were made by both parties to the first respondent and counsel were given the opportunity to further submit written submissions arising from evidence and legal argument adduced. This was done on the third day of the trial and again each counsel made oral submissions to the first respondent.

73. The law on judicial interruption was considered in *DPP v. Heaphy* [2015] IECA 61, where the Court of Appeal reiterated that *DPP v. McGuinness* [1978] 1R 189 is the leading Irish case on the topic. In *McGuinness*, a re-trial was ordered where the trial judge's interventions rendered a rape trial unsatisfactory. The Court of Criminal Appeal noted that the defence had probably planned cross-examination carefully before the trial and would be severely handicapped if diverted from this plan. The trial judge had asked 123 questions of the complainant and made 60 remarks to counsel. At one point, he asked 20 consecutive questions of the complainant's mother during cross-examination by the State. A total of 423 questions had been asked of the complainant during the case – almost a third coming from the judge. The Court of Criminal Appeal was of the opinion that a number of questions and interventions by the trial judge made it impossible for the defence to conduct an effective cross-examination and could have caused the jury to believe he formed a definite opinion as to the credibility of the complainant.

74. In *Farrelly v. Watkin* [2015] IEHC 117, Kearns P. found the trial judge's interventions went well beyond the mere seeking of clarification. He stated:

> *"Historically, it has been a source of considerable annoyance to District Court Judges, and in my view rightly so, to read in judicial review court papers, or worse, in national newspapers, what they regard as wildly distorted accounts by applicants or their solicitors of the judge's conduct of a particular case or cases.*
>
> *Having read the transcript the Court finds, regrettably, that the contentions advanced on behalf of the applicant are borne out to a significant degree. In fairness to the respondent, the lack of clarity in the CCTV and in other parts of the prosecution evidence was such as to fully justify attempts by her to clarify exactly what had happened. Unfortunately, the frequency of the respondent's interventions during both witness evidence and the questioning by counsel on both sides went, however unintentionally, well beyond the mere seeking of clarification."*

75. It is the applicants' counsel's contention that as far as judicial interruptions are concerned, there is no difference between civil and criminal cases.

76. In *Jones v. National Coal Board* [1957] 2 QB 55, the English Court of Appeal set out the function of a judge in a civil dispute, in the following terms:

> *"[The judge] must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth*
>
> *…*
>
> *So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties…*
>
> *So also it is for the advocates, each in turn, to examine the witnesses, and not for the judge to take it on himself lest by doing so he appear to favour one side or the other…*
>
> *And it is for the advocate to state his case as fairly and as strongly as he can, without undue interruption, lest the sequence of his argument be lost…The judge's part in all of this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and to keep the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the*

> *mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'"*

77. In all the circumstances of the present case, and, more particularly, from a perusal of the transcript of the proceedings, I am satisfied that the level of judicial intervention was excessive. As recited in the statement of grounds, the first respondent interrupted the applicants' counsel approximately 2121 times and counsel for the second respondent 562 or so times during the course of the hearing.

78. It is undoubtedly the case, as a matter of law in this jurisdiction, that the first respondent was entitled to ask questions. As put by McCarthy J. in *Donnelly v. Timber Factors Limited* [1991] 1 I.R. 533:

> *"The role of the judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own - the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise".*

In *O'Callaghan v. Mahon (No. 2)* [2008] 2 I.R. 254, Fennelly J. opined:

> *"Judges, on a daily basis, express opinions in the form of questions, statements or arguments in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can, and frequently does, enable counsel to change the judge's mind…Of course a judge may so behave that he steps outside his judicial role. If he does, it will be obvious…"*

79. As far as the present case is concerned, I am not satisfied that the sole purpose of the questions posed by the first respondent were confined to seeking clarification of questions asked of witnesses or for the further purpose of resolving ambiguities. The transcript does not support the respondents' contentions in this regard.

80. While, contrary to the applicants' contention, the transcript does not show that immediately after the second respondent was sworn the first respondent asked a series of questions before the second respondent's counsel asked any questions, it remains the case, as evident from the transcript, that the first respondent effectively took over the direct examination of the second respondent. Moreover, there were five hundred interventions in the applicants' counsel's cross-examination of the second respondent, which was excessive by any standard and, in my view, cannot be excused on the basis that what was sought to be achieved was clarification.

81. The respondents make the case that the cross-examination of the second respondent was extensive and prolonged and was in no way curtailed. In this regard, they point to the fact that the cross-examination of the second respondent ran to over 100 pages of the transcript and that, upon completion, counsel for the applicants expressed his satisfaction that he had fully explored all the issues which he wished to canvass with the second respondent.

82. As the transcript shows, the second respondent's cross-examination commenced at 1p.m. on the first day of the trial and continued until the first respondent rose at the request of the applicants' counsel in order for the applicants to give further instruction. Following its resumption, the cross-examination ran for approximately 94 more minutes at the end of which the first respondent asked counsel for the applicants whether he had any more questions to which counsel replied "That's it. Thanks very much". All of this notwithstanding, the Court remains of the view that the first respondent's intervention in the cross-examination of the second respondent went well beyond his function as the trial judge.

83. It is also clear from the transcripts that the first respondent was the main player in the direct examination of Mr. Michael Scally, posing far more questions than counsel for the second respondent and intervening in the course of cross-examination by the applicants' counsel on eighty eight occasions. In the course of his submissions to this Court, counsel for the second respondent stated that the applicants were not correct in their contention that the first respondent wrongly relied on the evidence of Mr. Scally, having earlier accepted that Mr. Scally's evidence was hearsay and inadmissible. It is submitted that the transcript shows that the first respondent acknowledged that Mr. Scally had only given evidence which was within his own knowledge. By and large, I accept this to be the case. This does not however, to my mind, detract from the level of judicial intervention in Mr. Scally's evidence.

84. In similar vein, most of the questions, both in direct and cross-examination, which were put to Mr. Gerard Gannon (a witness for the second respondent), came from the first respondent.

85. In the course of his submissions to this Court, counsel for the second respondent asserted that it was not correct for the applicants to state in their submissions that the second respondent's counsel only put two questions to Mr. Gannon. I accept the second respondent's submission in this regard. However, I am not persuaded by the submission that the first respondent, in putting questions to Mr. Gannon, only sought clarification of the answers provided by the witness.

86. The pattern of intervention by the first respondent repeated itself with most of the other witnesses. In respect of Mr. John Cross, the Court notes that upon Mr. Cross being called by counsel for the second respondent, it was the first respondent who commenced questioning Mr. Cross, posing eight questions before counsel for the second respondent put his first question to the witness. In all, the first respondent intervened in the direct examination on twenty one occasions. Again, there were a substantial number of interventions (in excess of fifty) in the applicants' counsel's cross-examination of Mr. Cross. On Day 2, when Mr. Cross was recalled for the purpose of certain matters being put to him by the applicants' counsel, it was the first respondent who did most of the questioning.

87. The second applicant gave evidence on Day 2. The first question was posed by the first respondent who, in fairness, apologises for being "so interventionist", a sentiment which I note was repeated at the close of the hearing. The first respondent goes on to intervene in the direct examination of the second applicant in excess of two hundred occasions, in effect posing the vast majority of all questions put to the second applicant in the course of the trial. In the within proceedings, counsel for the applicants submitted that there was so much intervention by the first respondent in the second applicant's direct examination that, ultimately, the second applicant was not cross-examined by counsel for the second respondent which, counsel for the applicants submits, is telling.

88. Counsel for the second respondent takes issue with the applicants' surmise as to why there was no cross-examination of the second applicant. It is asserted that the fact of the matter is that the second respondent chose not to cross-examine as the second applicant had admitted all required facts in direct evidence, namely:

- He did not have an issue with the second respondent using the laneway;

- He had noticed the alleged nuisance from shortly after his purchase in 2010 and raised it for the first time in his defence and counterclaim in 2014;

- He had not taken any steps to investigate the occupation and use of the laneway prior to purchase.

While this may well be the case, it remains the position that most of the information upon which the decision not to cross-examine was based was elicited by the first respondent.

89. The pattern of judicial intervention was continued in respect of the direct examination of Mr. George Farrell, a witness called by the applicants. Similarly, most of the questioning done of Mr. Brian Connolly, an engineer called on behalf of the applicants, was conducted by the first respondent. In the course of the evidence of Mr. Molloy, another engineer called by the applicants, the first respondent's interventions exceed a hundred in the course of direct examination and thirty when counsel for the second respondent cross-examines him.

90. I note that in the course of direct examination of Mr. Molloy, the applicants' counsel advised the first respondent on at least two occasions that he would like to ask his own questions.

91. Despite the level of judicial intervention (and the leading nature of some of the questions posed), evident from a consideration of the transcript as a whole, it is difficult to categorise the first respondent's actions as objective bias, as contended for by the applicants, as the examination and cross-examination of witnesses for both sides of the dispute were continually interrupted by the first respondent throughout the three day hearing.

92. The question which arises for determination is whether the number of interruptions of itself amount to unfairness in the course of the trial. The second respondent clearly has no issue with the level of interventions since he was successful in the Circuit Court. However, it is the applicants' case that they were unfairly treated by the level of intervention. Is this borne out by what transpired over the course of the three day hearing in the Circuit Court? In all the circumstances of this case, I am satisfied that the applicants have just cause to feel aggrieved. In my view, the role played by the first respondent almost entirely usurped the function which more properly fell to the applicants' counsel in the Circuit Court, namely the cross-examination of the second respondent and witnesses called on his behalf, and then examining the second applicant and witnesses called on the applicants' behalf.

93. I hasten to add that for the purpose of the within proceedings, the Court is solely concerned with the process before the Circuit Court, and not with the merits of the dispute.

94. This Court has earlier determined that no issue of *mala fides*, as alleged by the applicants, arises in this case. By way of reiteration, the Court rejects any suggestion that the first respondent displayed hostility towards the applicants, either by dint of the interventions or by the manner in which certain questions were framed. Overall, the Court has no doubt but that the learned trial judge's interventions were, to echo Denning L.J. in *Jones v. National Coal Board*, "*actuated by the best of motives*". It is abundantly clear from the transcript that the learned trial judge was anxious to come to grips with a central issue in the case, namely what were the parties' respective intentions in 2004 when plot D was sold by late William Scally to the second respondent. The first respondent was also anxious to understand the nature and extent of the access routes which the second respondent had to plot B, over and above the access via the laneway (plot D) and which incorporated part of the applicants' registered title. The difficulty is that however worthy the learned trial judge's intentions were, it is a well established rule of the system of justice under which the courts operate that judicial interventions should be as infrequent as possible, in particular, when a witness is under cross-examination. As pointed out in *Jones v. National Coal Board*, "*the very gist of cross examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief.".* The facility was not afforded to counsel for the applicants in his cross-examination, in particular, of the second respondent, in circumstances where the applicants were disputing the second respondent's case that a mistake was made in relation to the 2004 transfer between the Scallys and the second respondent.

95. In the course of the within hearing, counsel for the applicants urged on the Court that the level of the interventions by the learned trial judge and the nature of some of the questions posed by him amounted to pre-judgment on his part and that he effectively drove the trial to a predetermined conclusion. The Court does not consider that these particular complaints have been made out given that the first respondent reserved his decision after the evidence was given and after receipt of oral and written submissions from both parties' respective counsel. However, the Court's finding in this regard does not lessen the justified sense of grievance on the part of the applicants with the manner in which the conduct of the trial was overshadowed by excessive judicial intervention.

96. I am satisfied that the unfairness inherent in the excessive interventions by the first respondent cannot be cured by an appeal of the decision. In this regard, the dictum of Denham J. in *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203 is apposite:

> "*a fair appeal does not cure an unfair hearing*" (at p. 218)

***Is there any basis upon which the Court should decline to grant the relief sought by the applicants?***

97. At the outset of the within hearing, complaint was made by both respondents that no verifying affidavit had been sworn by the applicants in respect of the amended statement of grounds which, the respondents contend, was a serious omission given the nature of the allegations levied against the first respondents, particularly alleged subjective bias and *mala fides*. It is also the case that the amended statement of grounds was delivered only in June 2017. The Court accordingly directed that the first applicant swear a verifying affidavit.

98. The applicants' written submissions were not made available to the respondents until the commencement of the judicial review hearing. This was in circumstances where the first and second respondents had filed written submissions by November, 2016. The late delivery of the applicants' submissions necessitated liberty being granted to the respondents to file amended written submissions, an opportunity which was duly taken up by the second respondent.

99. The respondents also pointed out that only when the applicants delivered their submissions was it conceded that the first respondent had given reasons for his decision.

100. Overall, I am not persuaded that the foregoing deficits in the manner of the applicants' conduct of the judicial review proceedings are of sufficient magnitude for the Court to decline relief in the case.

101. The Court is satisfied that the challenge to the first respondent's decision on the basis of excessive intervention in the trial has been made out. It is thus in order to grant the reliefs sought at paragraphs 1 and 2 of the Notice of Motion.