THE HIGH COURT

[No. 2010/559 SP]

BETWEEN

KIERAN WALLACE

PLAINTIFF

AND

GEORGE BEGGAN AND CATHERINE E. BEGGAN

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 17th day of February, 2017

Introduction

1. The defendants have requested that I recuse myself from hearing their applications pursuant to a Notice of Motion issued on 3rd June, 2016 seeking in terms which I abbreviate to the following:-

> (i) a declaration that the deeds appointing the plaintiff as a receiver are invalid and have no legal effect;
>
> (ii) an order striking out the plaintiff's action pursuant to O. 21(15) of the Rules of the Superior Courts ("RSC") which provides that where an action of the plaintiff is dismissed, the defendants counter claim may still proceed;
>
> (iii) an order for an inquiry as to costs and losses pursuant to O. 33(2) of the RSC which allows the Court at any stage to direct inquiries or accounts to be taken;
>
> (iv) a declaration that the plaintiff was at all material times the agent of ACC Loan Management Limited ("ACC");
>
> (v) an order granting the defendants liberty to bring a counter claim against the plaintiff "and \ or his appointing bank" (ACC) pursuant to O. 19(2) of the RSC (which concerns a set-off) and O. 24(2) of the RSC (which concerns a ground of defence arising pending an action).

2. The applications of the defendants are due to be heard on 8th March, 2017 in the Chancery List.

3. I am one of a number of judges assigned to hear applications and cases in the Chancery List for Hilary Term, 2017. Gilligan J. who is the "judge in charge" of the Chancery List has already refused the defendants' application to recuse himself in an *ex tempore* judgment delivered on 1st February, 2017. That application was grounded upon the same Notice of Motion issued on 20th December, 2016 which is relied upon by the defendants in this recusal application.

4. The judge who is the subject of a recusal application initially determines whether he or she should recuse himself or herself. There is of course a right of appeal and such an appeal most recently occurred in *O'Driscoll v. Hurley and Health Service Executive* [2016] IESC 32. There, the Supreme Court determined an appeal by the appellant in the Court of Appeal who was unsuccessful in an application for one of the appeal court judges to recuse herself on the grounds of objective bias.

Grounds for refusal

5. The first named defendant in his affidavit sworn on 20th December, 2016 averred that the plaintiff has an "*unfair and decisive*" advantage due to the determination in my judgment delivered on 2nd March, 2016 in *Farrell v. Petroysan* [2016] IEHC 522 ("the Petroysan judgment").

Apprehension

6. The first named defendant averred to his "*strong apprehension*" that both Gilligan J. and I "*have pre-judged the effect of the McCleary v. McPhillips judgment [2015] IEHC 591*" due to the judgment of Gilligan J. in *Fennell v. Gilroy* (*ex tempore* judgment of 20th April, 2016) which mentioned the Petroysan judgment in the context of the ratification of an agent's authority retrospectively.

ACC

7. Mr. Maher, solicitor for the defendants, submitted that the recusal application which is the subject of this judgment was indeed based on an objective standard of reasonable apprehension about whether there could be a fair and impartial hearing. He submitted that my judgment in Petroysan gave little prospect of a successful challenge to a resolution of ACC giving retrospective effect to an appointment of a receiver if the defendants' application was heard by me whether on 8th March, 2017 or on some other date. Mr. Maher contended that my previous determination of a significant issue in the defendants' application relating to ACC, albeit in an application by parties other than the defendants, indicated to an objective and informed person that the defendants could be deprived of an impartial hearing.

Informed Person

8. Using the words of the Court of Appeal in Commissioner of *An Garda Síochána. v. Penfield Enterprises Limited* [2016] IECA 141 at para. 59 and those of Denham C.J. in *Goode Concrete v. CRH* [2015] 2 I.L.R.M. 289 at para. 54 on p. 309, I ask whether a reasonable, objective and informed person would think that regardless of my declaration pursuant to Art. 34.6.1 of the Constitution to administer justice without fear or favour, I could provide an impartial hearing free of pre-judgment, hostility or prejudice to the defendants or their arguments?

9. Mr. Maher, solicitor, in his submissions clarified that his client defendants did not allege bias on my part. He stated that it would be very difficult, if not impossible, for me to find in a way which would contradict my finding in the Petroysan judgment. There is no suggestion that I have made a comment about the defendants or their conduct. I also assure the parties that I know little of these proceedings because I have only read the following relating to what appear to be the substantive issues:-

> (a) the Notice of Motion issued on 3rd June, 2016 setting out the reliefs which are set out at the beginning of this judgment;

(b) the Notice of Motion issued on 20th December, 2016 seeking orders that Gilligan J. and myself be recused; and

(c) The affidavit of the first named defendant which avers to his "*strong apprehension*".

10. Furthermore, it is not alleged nor is it a fact that I have any actual or potential pecuniary interest involving the parties directly or indirectly.

Novel application
11. Ms. Smith, counsel for the plaintiff, characterised this application as "*utterly novel*" and that it exhibited a lack of understanding of the common law system for administering justice. Ms. Smith, correctly in my view, explained that it was the task of lawyers to consider and differentiate facts for the application of legal principles. Moreover, a finding about the applicable law in one set of proceedings does not preclude the Court from hearing submissions on the identical or similar legal issue.

12. In this regard I mention the judgment of Finlay Geoghegan J. in *O'Riordan v. O'Connor* [2005] 1 I.R. 551 at 560 where the learned judge in the final paragraph highlighted how different submissions and authorities persuaded her to depart from her earlier decision on the point of law arising:-

> *"I am aware that the final conclusion in this judgment is contrary to that reached in an ex-tempore decision given by me in the Monday motion list on the 26th July, 2004, in Sarth Investments Ltd. (in receivership and liquidation). The issues were considered in greater detail in the submissions in this application and I reserved my decision. Whilst I regret the inconsistency, having considered the submissions made and authorities to which I was referred consider I am bound to so decide."*

Precedent
13. Gilligan J. in his ex tempore judgment delivered on 1st February, 2017 concisely stated:-

> *"The High Court is not bound by a strict rule of precedent that judgments of other judges must be adopted. Every day judges can and do distinguish cases that are heard and can take a different view on the law. It is accepted that reasons must be given for taking a different view".*

Principles to be applied
14. The following often cited paragraphs from the judgment of the High Court of Australia in *Ebner v. Official Trustee in Bankruptcy* [2000] HCA 63 and [2001] 2 LRC 369 are most useful and are applicable in this application:-

> *"[19] Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.*
>
> *[20] This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.*
>
> *[21] It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly be inclined to sit. Circumstances vary and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to arrange to hear the case and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise."*

Conclusion
15. It is my duty to determine each case which is assigned to my Court on its own merits without fear or favour. I do not yet know whether the defendants' application will be assigned to me for hearing – that will depend on the availability of judges on 8th March and the discretion of the judge in charge of the Chancery List on that day. Litigants should not influence the composition of the Court to determine their disputes just as judges should not arrange that he or she would hear a case. Indeed, the selection of Judges by litigants could bring the administration of justice into disrepute.

Determination
16. I find that the first named defendant's apprehension of an unfair and decisive advantage for ACC in having me determine the defendants' application is not an apprehension which an objective observer who is not unduly sensitive and is in possession of all the relevant facts could have in the circumstances. The defendants may find comfort from the law which I have referenced in this judgment. Furthermore, the defendants ought to be reassured by the professionalism and independence of legal practitioners when advising them and representing their interests before these courts.

17. Therefore, I refuse the application for my recusal in these proceedings based on the facts outlined for the defendants and of my understanding of the situation as it presently exists.