THE HIGH COURT

[2012 No. 12005 P.]

BETWEEN

FINBAR TOLAN

PLAINTIFF

AND

CONNAUGHT GOLD CO-OPERATIVE SOCIETY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 31st day of May, 2017

1. This matter comes before the court by way of notice of motion brought by the plaintiff for a number of reliefs essentially re-entering these proceedings for the purpose of setting aside orders previously made herein on grounds including that the proceedings were tainted by bias on the part of the trial judge.

Background facts

2. The plaintiff is a farmer and cattle dealer from Claremorris, Co. Mayo. The defendant operates a number of cattle marts in which the plaintiff transacted business over a number of years. The plaintiff had a credit facility at the defendant's marts. It would appear that sometime around June 2012, a dispute arose between the plaintiff and the defendant which resulted, according to the plaintiff, in a new trading arrangement being entered into between the parties. The plaintiff complains that the defendant however reneged on its agreement. The plaintiff alleges that this resulted in him being barred from attending the defendant's marts and this ultimately caused him to go out of business.

3. Arising out of these alleged facts, the plaintiff says that he consulted Messrs. Dillon Leetch Solicitors in Ballyhaunis in September 2012. The plaintiff was initially dealt with by a partner in that firm, Mr. Robert Potter-Cogan. It would appear that Mr. Potter-Cogan, as a result of poor health, advised the plaintiff that if the matter proceeded to litigation, he would be unable to represent him. As a result, the plaintiff instructed another firm of solicitors, Messrs. John J. Quinn & Company of Longford who instituted proceedings on the plaintiff's behalf by way of plenary summons on 14th September, 2012.

4. It would appear that sometime in February 2013, the plaintiff terminated the retainer of Messrs. Quinn & Company. The plaintiff says that he was keeping Mr. Potter-Cogan up to date regarding the progress of his case and following dispensing with the services of Messrs. Quinn, Mr. Potter-Cogan introduced the plaintiff to Mr. John Brady, another member of Dillon Leetch who agreed to take over the plaintiff's representation in the proceedings.

5. It seems that during the course of 2014, the defendant brought a motion seeking to dismiss the plaintiff's claim on grounds relating to the plaintiff's alleged failure to provide particulars and discovery. This motion came on for hearing before the President of the High Court on 20th November, 2014. On that date, the President refused the defendant's application and assigned a hearing date for the trial of the 12th May, 2015, being the next available date in the Dublin non-jury list.

6. The plaintiff says he was unhappy with the fact that the trial of his claim was postponed for this length of time and he discussed this issue with his solicitor Mr. Brady and it would appear also contacted the President's registrar directly with a view to seeking to get an earlier trial date. In this regard, the plaintiff avers at para. 22 of his first affidavit as follows:

> "I immediately advised my solicitor of this development who was furious with my attempts to have my case expedited and moved to Cork. He told me the case must be heard in Dublin and in no other court and that there was a reason for this. When I question (*sic*) the reason he eventually told me that his firm had discussed the case with the then President of the High Court prior to the motion heard on 20th day of November 2014 and that the President knew all about the case and that therefore the President had retained seisin of my case and was going to hear the case himself personally and ensure that no other judge heard it and make sure it got a good and proper hearing."

7. The case came on for hearing before the President on the 12th May, 2015, and was heard over four days culminating in judgment being delivered by the President on 15th May, 2015, dismissing the plaintiff's claim. The plaintiff was represented throughout the trial by his solicitor Mr. Brady who instructed senior and junior counsel on the plaintiff's behalf.

8. In both of his affidavits sworn in support of this application, the plaintiff, who now represents himself, makes no complaint about the manner in which the case was heard by the President. He complains that what he describes as important witnesses were not called and suggest that this was in some way unsatisfactory. However, it is absolutely clear that this was entirely a matter for the plaintiff's legal team and if he had any dissatisfaction in that regard, that was between the plaintiff and his own lawyers.

9. Following the dismissal of the plaintiff's claim, the plaintiff pursued an appeal before the Court of Appeal which was heard on 19th December, 2015, when the plaintiff was again represented by solicitor and counsel. Judgment was delivered by the Court of Appeal on 5th May, 2016, dismissing the appeal and awarding the costs to the defendant. Thereafter the plaintiff attempted to appeal further to the Supreme Court but was refused leave to do so by that court.

10. The next event of relevance occurred in September 2016, when the plaintiff alleges that he became aware for the first time that the trial judge, Kearns P., was a brother-in-law of Mr. Robert Potter-Cogan. In essence, the plaintiff claims that this fact alone meant that the President should have recused himself from hearing the case and the hearing was tainted by bias. The plaintiff accordingly claims that the entire proceedings, including those before the Court of Appeal, must now be set aside and the case re-heard before an "impartial" judge.

Discussion

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. In that respect, the plaintiff relies upon the judgment of the Supreme Court in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 where the Supreme Court, on the application of the plaintiff, set aside a previous judgment of that court dismissing the claim, because of a relationship between one of the judges who heard the appeal and a party that had a professional involvement on behalf of the defendant in relation to the subject matter of the proceedings.

12. In *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412, the applicants alleged that two members of the Supreme Court who had heard and dismissed their claim had links with the respondents having acted for them in the past when the judges were members of the Bar. The applicants sought to have the judgment set aside on the grounds that these links gave rise to a perception of bias. In delivering her judgment, McGuinness J. held that the past professional relationship did not give rise to a reasonable apprehension of bias and dismissed the application. In a concurring judgment, Denham J. (as she then was) noted that exceptional circumstances were required for such an application to succeed.

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:

> "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.' "

14. She referred to previous authorities including *Bula Limited v. Tara Mines Limited (No. 6)* in which she said (at p. 441):-

> "…it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

15. These dicta were followed and applied in *Goode Concrete v. CRH plc & Ors* [2015] 2 ILRM 289 and again most recently in *O'Driscoll v. Hurley and Health Service Executive* [2016] IESC 32.

16. In the latter case, the unanimous decision of a seven member Supreme Court was delivered by Dunne J. She described the judgment in *Bula Limited v. Tara Mines Limited (No. 6)* as the *fons et origo* of the test in Irish law. She analysed and approved a number of other authorities to like effect. She noted that the law was described as being comprehensively and authoritatively stated by Denham J. in *Bula v. Tara (No. 6)* and by Fennelly J. in *O'Ceallaigh v. An Bord Altranais* [2011] IESC 50.

17. She noted the dicta of Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514, where he said at 672 – 673:-

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

18. Dunne J. went on to set out and approve the well known Bangalore principles approved by Denham C.J. in *Goode Concrete*.

19. In the course of submissions in these proceedings, counsel for the defendant accepted that the court does have an inherent jurisdiction in exceptional cases to set aside a judgment on very narrow and limited grounds, such as fraud or bias.

20. There is no doubt that in the authorities to which I have referred, the Supreme Court, as the final appellate court of the State, considered that it had jurisdiction to review its own judgments in the extremely rare and exceptional circumstances identified by Denham J. Whether the same can be said of the High Court remains to be seen, particularly in circumstances where, as here, an appeal has been taken and brought to conclusion before the Court of Appeal. In effect, what the plaintiff is asking this court to do is not only to set aside an order made by the High Court but also a final judgment of the Court of Appeal. I cannot conceive of any basis upon which the High Court, on any grounds, could purport to set aside a judgment of the Court of Appeal or the Supreme Court for that matter. That would be entirely a matter for those courts to consider and not the High Court.

21. However, leaving that issue to one side for a moment, the complaint made by the plaintiff in this application is extremely unusual and quite possibly unique. The plaintiff does not allege, as one might expect in such circumstances, that the trial judge was biased against him because of some connection or link to the defendant. Rather, the plaintiff complains of the trial judge's relationship with the plaintiff's own solicitor. Applying the test in *Bula Limited v. Tara Mines Limited (No. 6)* quite apart from the issue of whether this court could have any jurisdiction to intervene in this matter, I cannot envisage how the mere fact alone that the trial judge is related by marriage to the plaintiff's solicitor could conceivably give rise to an ordinary reasonable member of the public having a reasonable apprehension that the plaintiff would not have a fair hearing from an impartial judge.

22. Even if that were to give rise to any legitimate cause for complaint, one would have thought it could only be on the part of the defendant. In that regard, I must of course bear in mind that the defendant is entirely uninvolved in any of the matters of which the plaintiff complains and the prejudice to it must be considered. The legal test of bias already described is predicated on the assumption that a reasonable person might reasonably apprehend bias on the part of a judge in favour of the party with whom the judge has a connection. It would make no sense to suggest that a reasonable person would have a reasonable apprehension that a judge would be biased *against* the party with whom the judge has such connection. Logically therefore, it is difficult to see how the test could be satisfied in circumstances such as arise here.

23. However, to my mind, by far the more serious allegation made by the plaintiff in these proceedings, and one that is purely hearsay, is that which I have quoted from para. 22 of his affidavit, namely that the trial judge discussed the case directly with the plaintiff's solicitor in advance. Had such a thing occurred, it would of course have been quite improper but there is in my view no

admissible evidence that establishes that fact. What is key however is that even if it had occurred, the plaintiff himself was well aware of it long in advance of the trial of his action and yet took no objection to the President hearing the case. Nor, having lost the case before the President, did he raise it as an issue in the appeal.

24. Accordingly, there is in my view no conceivable basis upon which I would be entitled or justified in interfering with the final orders and judgments already pronounced in these proceedings. Further, as noted by Denham J. in Talbot, the court must consider all the circumstances of the case in determining whether the jurisdiction to set aside arises or should be exercised. It is highly material in that respect, as I have noted, that the defendant is quite blameless in relation to the matters complained of by the plaintiff. Therefore even if the jurisdiction could be said to arise, which I am satisfied it does not, its exercise would be highly prejudicial to the defendant, an entirely innocent party, and the justice of the case would require refusal.

25. I will therefore dismiss this application.