THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 229 J.R.]

BETWEEN

MIDNIGHT ENTERTAINMENT LIMITED

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF SERGEANT BRENDAN PADRAIC MOORE)

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 28th day of March, 2019

Background

1. The applicant is a limited liability company trading as "Four Aces Casino", having a registered address at 18 Upper Dominick Street, County Galway. Gardaí executed a search of the applicant's premises on 28 November 2015 and seized a quantity of alcohol. The applicant was prosecuted before Galway District Court for selling or exposing for sale alcohol without a licence contrary to s. 7 of the Intoxicating Liqueur (General) Act 1924.

2. A similar prosecution against a director of the applicant had been taken on 8 July 2015. During the course of the hearing on 8 July 2015, the District Judge stated that if the premises was a "genuine" casino then it "must" have a liquor licence. The District Judge proceeded to convict the director and imposed the maximum permissible sentence of six months imprisonment, which was suspended in its entirety. This conviction was subsequently overturned on appeal.

3. On 17 January 2017 the prosecution came before the same District Court Judge as had dealt with the prosecution of 8 July 2015. When the matter was called, the solicitor for the applicant informed the District Judge that a similar prosecution had been before her eighteen months earlier against a director of the applicant arising out of the same premises. The solicitor made the District Judge aware of the comments which she had made prior to convicting the director on that occasion. The solicitor requested the District Judge to recuse herself from hearing the prosecution against the applicant.

4. The District Judge refused the application and stated:

> "[I]n regard to the defendant, the very nature of the District Court area, where a judge has the District Court area as their responsibility, the very nature of it is that he would have the same people coming in time and time again, and the High Court has said that if a judge stands aside easily in each case, or on a different basis, that they could be asked to be standing aside everyday of the week."

5. In respect of the comments which the District Judge had made in the course of the earlier prosecution, the District Judge stated:

> "Well, I may have made some general comment about it; I'm not saying I did, I'm not say I didn't. But your client was convicted on evidence which went on - had a Senior Counsel or a junior counsel, I can't remember which."

6. The District Judge refused to recuse herself.

Application for judicial review

7. On 27 March 2017 the applicant was granted leave (Noonan J.) by way of an application for judicial review for, *inter alia*, the following reliefs:

> (i) An order of *certiorari* quashing the decision and/or order of the learned District Court Judge, dated 18 January 2017, refusing the application to recuse herself from hearing the trial.
>
> (ii) A declaration by way of an application for judicial review that the learned District Court Judge acted without or in excess of jurisdiction and otherwise than in accordance with law in the manner in which she conducted the application to recuse herself from the trial and/or in refusing to recuse herself from hearing the trial.

The Court, therefore, has to consider the circumstances whereby a District Judge is obliged to recuse himself/herself from hearing a particular matter.

8. The applicant maintains that the District Judge ought to have recused herself on the grounds of objective bias. It was further submitted that in reaching her decision not to recuse herself, the District Judge failed to apply the appropriate test.

Test to be applied

9. In a case of objective bias, the test to be applied has been considered in several authorities. I refer to *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412 wherein at p. 441 Denham J. (as she then was) stated:

> "The submissions in relation to the test to be applied roved worldwide. However, there is no need to go further than this jurisdiction where 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."

10. The question therefore is, "what would a reasonable person think?". In the instant proceedings, the charges brought in 2015 were identical to those before the District Court in 2017. The only difference between the proceedings being that the earlier charges had

been brought against a director of the applicant company whereas the 2017 charges were brought against the applicant itself. The District Judge convicted the director of the charge in 2015. There is a clear distinction in law between an individual and a company but as to a director and a company a reasonable person may well see this as being a distinction without a difference. Indeed, such may well have been on the mind of the District Judge when she made reference to "the same people coming in time and time again". A reasonable person, therefore, may well believe the instant case to be one where a person is convicted by a District Judge in respect of a particular charge which is subsequently successfully appealed and then reappears, as effectively the same "person", before the same District Judge to be tried on the same charges.

11. In reaching my decision, I refer to *EPI v. Minister for Justice, Equality & Law Reform* [2009] 2 I.R. 254 wherein the applicants were granted leave to seek judicial review of the respondent's decision not to exercise his discretion to accept and consider their application for subsidiary protection. The applicants had previously sought an interlocutory injunction preventing their deportation pending the determination of their judicial review proceedings, an application that was refused by Hedigan J. in the High Court. The applicants' substantive application was subsequently listed before the same High Court Judge and the applicants requested that the Judge recuse himself. In giving judgment, Hedigan J. stated:

> "[10] … Judges should not lightly recuse themselves of their responsibility to hear cases that come before them. As was stated by Denham J. in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, at p. 449, a judge has a duty to sit and hear a case. Nevertheless, as was held by Keane C.J. in *Rooney v. Minister for Agriculture* [2001] 2 ILRM. 37 at p. 40, the 'established and prudentpractice' for a judge is to disqualify himself if he has any reservations about the matter."

and,

> "[17] Thus, if I am satisfied on the balance of probabilities that there is a risk of such an apprehension and that it is grounded on some substantial basis, then I should recuse myself; if not, then I have a responsibility to hear the case that comes before me in the normal operation of the legal diary.
>
> [18] In this case, it seems to me that there is a substantial basis for a reasonable perception that the grounds upon which the applicants bring their case have already been adjudicated by the judge who is to hear the substantive action. This ground arises from the decision I felt obliged to make at the interlocutory stage. Unfortunately such problems occasionally occur in the normal handling of cases.
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> [19] In the circumstances, I have decided to accept the applicants' request and to recuse myself. By analogy, I am guided by the finding of Fennelly J. in *Kenny v. Trinity College Dublin* [2007] IESC 42, [2008] 2 I.R. 40 at p. 46 (para. [21]) that when asked to adjudicate on whether one of its own judgments was tainted by objective bias, a court must 'ensure respect for the principle that justice must not only be done but be seen to be done, to act with great care and circumspection. It should err on the side of caution.'"

In my view, the reasoning of Hedigan J. is instructive in reaching my decision in the instant case.

12. In reaching this decision, the Court is mindful of the fact that District Judges bear an extremely heavy workload and that it is often the case that the same persons appear before them on a regular basis. It does not follow that when this occurs that District Judges are obliged to recuse themselves. In this particular case, however, the charges were the same with the only difference being that on the first occasion the charges were brought against a director of the applicant company whereas on the second occasion the same charges were brought against the company itself.

Conclusion

13. By reason of the foregoing, the applicants are entitled to the reliefs sought. I will hear counsel as to the appropriate orders that follow from this decision.