Neutral Citation Number: [2009] IEHC 316

THE HIGH COURT

JUDICIAL REVIEW

2008 1190 JR

BETWEEN

A. P.

APPLICANT

And

HIS HONOUR JUDGE DONAGH MC DONAGH

RESPONDENT

AND

P. P.

NOTICE PARTY

JUDGMENT of Mr. Justice Clarke delivered on the 10th July, 2009

1. Introduction

1.1 The applicant ("Mr. P") and the notice party ("Mrs. P") are a married couple who have been involved in family law litigation. In circumstances to which it will be necessary to refer in more detail, the proceedings between them came on for hearing before the respondent ("the Circuit Court judge"). It is said on behalf of Mr. P that certain comments made by the learned Circuit Court judge suggest that the case between the parties has been pre-determined by the learned Circuit Court judge. In that context, an application was made by counsel on behalf of Mr. P, which invited the learned Circuit Court judge to disqualify himself from any further hearing of the case. The learned Circuit Court judge did not agree with the application made on behalf of Mr. P, and refused to disqualify himself. A second subsequent like application was also refused. It is as against those refusals that Mr. P brings an application before this Court seeking judicial review.

1.2 On the 24th October, 2008, this Court (McMahon J.) gave Mr. P leave to apply for judicial review, which review, in substance, sought to prohibit the learned Circuit Court judge from "continuing to adjudicate and determine" the relevant family law proceedings. The grounds on which leave to seek judicial review was granted are set out in the statement of grounds dated the 24th October, 2008. In addition to reciting the factual circumstances which give rise to Mr. P's claim, the grounds relied on allege that the comments made by the learned Circuit Court judge demonstrate pre-judgment of Mr. P's case on the basis of what is said to be the appropriate test, that is to say an objective test. On that basis it is said that justice, at a minimum, would not be seen to be done should the learned Circuit Court judge be permitted to continue to adjudicate on the issues which have arisen in the relevant family law proceedings.

1.3 As is clear, the initial starting point for any consideration of Mr. P's contention has to be an analysis of what actually transpired in the course of the relevant family law proceedings which were conducted before the learned Circuit Court judge. I, therefore, turn to that factual background.

2. Factual Background

2.1 Mr. P and the Mrs. P are a married couple whose married relationship has broken down. In 2001, Mr. P began judicial separation proceedings under the Judicial Separation and Family Law Reform Act 1989. On 24th July, 2008, the parties' case came on for hearing before the learned Circuit Court judge. Before the case was heard, the representatives of Mr. P and Mrs. P agreed that those judicial separation proceedings would be converted into divorce proceedings. It was during the course of those proceedings that the learned Circuit Court judge made a number of comments which form the basis of Mr. P's complaint.

2.2 At the opening of the case, Mr. P's counsel indicated that Mr. P was desirous of a 50/50 spilt of the parties' assets, it being asserted that the parties' net assets amounted to €3.368 million. It was suggested on behalf of Mrs. P that considerable difficulties had been encountered while attempting to discover an accurate picture of Mr. P's financial affairs. In particular, it was said that it was not clear to Mrs. P as to whether the intended 50/50 split of assets would include the applicant's shareholding in two specified limited companies. Complaint in that context was made as to the adequacy of discovery.

2.3 On the first day of the hearing, the 24th July 2008, the learned Circuit Court judge directed that unless Mr. P discovered the required documentation in respect of his financial affairs by the afternoon of the same day, he faced incarceration for contempt for non –compliance with an order for discovery. Mr. P then complied with the court's direction.

2.4 Mrs. P concluded her direct evidence on the first day of the proceedings. On the second day of hearing, the 25th July, 2008, prior to resuming the case, the learned Circuit Court judge made the following remark to Mr. P's counsel:-

> "Your client will have to do a lot better. You should indicate that to your client."

2.5 Mr. P had not given any evidence at that stage of the proceedings. During the course of the lunch break and for the remainder of the afternoon, Mr. P and Mrs. P sought and were given time to attempt to settle the issues between them. By close of business on the same day, the learned Circuit Court judge was informed that the parties had reached a settlement agreement which was being reduced to writing and, on that basis, the parties sought to adjourn the case. The learned Circuit Court judge agreed to the adjournment sought and the case resumed on 30th July, 2008, for the purpose of the court ruling on the settlement which had been reach between the parties. Typed settlement terms were handed into court.

2.6 On the reading of the terms of the settlement, the learned Circuit Court judge stated as follows:-

> "What is the percentage split in favour of the applicant arising from this agreement?"

The learned Circuit Court judge was informed that on the basis of divergence between the parties' estimates on the value of the assets, the percentage spilt in favour of Mrs. P was in the region of 49 -51%. The learned Circuit Court judge stated:-

> "There is not proper provision for the applicant in the settlement."

The applicant, in the context of the family law proceedings being the Mrs. P.

2.7 Counsel for Mr. P indicated to the learned Circuit Court judge that the terms of the settlement had been reached with Mrs. P who had the benefit of legal advice and that Mrs. P's legal team were happy with the settlement and were content to recommend same to Mrs. P. The learned Circuit Court judge then stated as follows:-

> "I want to see a 55% / 45% split in favour of the applicant."

In relation to a proposed €120,000 lump sum payment to Mrs. P, the learned Circuit Court judge stated that he "wanted to see the figure of €240,000" before he would rule the settlement.

2.8 When Mr. P indicated that he was not prepared to vary from the agreed settlement terms, the learned Circuit Court judge stated that Mr. P "could give a further one acre field to the applicant". Counsel for Mr. P then pointed out the value of the field in question was approximately €175,000 which would mean that, rather than giving Mrs. P an additional €120,000, as the learned Circuit Court judge had initially indicated, Mrs. P would then be receiving an additional €175,000. Mr. P's refusal to renegotiate the settlement terms was communicated to the learned Circuit Court judge whereupon the learned Circuit Court judge is said to have stated:-

> "If your client is not prepared to give the sum, then there is an easy solution, I will just make an order in those terms."

2.9 There is a dispute as to whether the learned Circuit Court judge in fact made this statement. Evidence as to such a statement having been made was given on affidavit by Mr. P's solicitor and confirmed by a further affidavit from counsel. The solicitor for Mrs. P, who was present in court during the family law proceedings concerned, has given evidence to the effect that she does not recall this statement being made by the learned Circuit Court judge. In her affidavit, the solicitor for Mrs. P described the comment as being as follows:-

> "If your client is not prepared to give the sum, then there is an easy solution, I will hear the case and then make an appropriate Order."

2.10 Counsel for Mr. P submitted to the learned Circuit Court judge that that no orders could be made at that point as Mr. P had not gone into evidence. Mr. P, through counsel, stated that he was distressed by the learned Circuit Court judge's statements and requested that another judge continue to hear the case. Counsel requested that the learned Circuit Court judge discharge himself from the remainder of the case. The learned Circuit Court judge refused to disqualify himself.

2.11 On 23rd October, 2008, counsel for Mr. P made a further application to have the learned Circuit Court judge discharge himself from the relevant proceedings. Mrs. P opposed this application on the basis that the matter was *res judicata*, having already, it was said, been determined by the learned Circuit Court judge. The application was again refused.

3. The Judicial Review Proceedings

3.1 Mr. P argues that the learned Circuit Court judge has demonstrated a perception of pre-judgment in Mr. P's case. It is submitted that the learned Circuit Court judge indicated to Mr. P that he intended to make a particular order in favour of Mrs. P notwithstanding that no evidence had, by the time the statement concerned was made, been given by or on behalf of Mr. P, nor had the cross examination of Mrs. P finished.

3.2 Reliance is placed, in the statement of grounds, on the assertion that, on 24th, 25th and 30th July, 2008, the learned Circuit Court judge made the following comments from the bench:-

> (a) "Your client will have to do a lot better. Indicate that to you client."
>
> (b) "I want to see a 55/45 split in favour of the applicant."
>
> (c) "I want to see a figure of €240,000 before I will rule the settlement."
>
> (d) "The respondent could give the applicant a further field."
>
> (e) "If your client is not prepared to give the sum, there is an easy solution. I will just make an order in those terms."

3.3 Mrs. P opposed the application on a number of grounds, including that the learned Circuit Court judge was *bona fide* exercising his clear statutory obligation to ensure that proper provision was made. Mrs. P further argued that Mr. P failed to draw the court's attention to matters adverse to his application at the *ex parte* leave stage of the judicial review proceedings. Mrs. P also argued that an appeal would be an adequate remedy in all the circumstances of the case and that an order of Prohibition should not, therefore, be given even if Mr. P were correct as to his allegation of pre-judgment.

4. Submissions of Mr. P

4.1 Mr. P submitted that the court had before it sufficient facts to find that there would be an 'apprehension' of objective bias by a 'reasonable person' in the circumstances. It was argued that the learned Circuit Court judge had clearly set out, before hearing all the evidence, that he wanted to see a 55%/45% split in favour of Mrs. P with regard to any settlement or order as to the division of properties between the parties.

4.2 While in the documents filed prior to the hearing of this case, reliance was placed on behalf of Mr. P on each of the five comments attributed to the learned Circuit Court judge to which reference has already been made (see para. 3.2), it is fair to state that in the course of the hearing before me it was only in respect of the final comment attributed to the learned Circuit Court judge that objection was truly made. The context in which the case became refined in that way will be addressed further in the course of this judgment. However, in general terms, it was accepted by counsel on behalf of Mr. P that a judge dealing with divorce proceedings has an important role in ensuring that proper provision is made for all parties, including a role to assess whether any settlement entered into by such parties does, in fact, make such proper provision. In those circumstances it was, in the course of

argument, accepted by counsel on behalf of Mr. P, that a judge presented with either a proposal or a settlement is entitled, at least at the level of principle, to rule on whether, in the view of the judge, and on the basis of the information and evidence then available, the settlement would make proper provision for both parties.

4.3 However, it was argued that the final comment attributed to the learned Circuit Court judge went further than could reasonably be explained by the legitimate exercise by a judge of considering the propriety of any provision made, or proposed to be made, in a settlement of family law proceedings. It is said that that final comment amounted to a pre-judgment by the learned Circuit Court judge of a final determination of the proceedings before all the evidence had been heard.

4.4 It was submitted on behalf of Mr. P that there was an impression of lack of impartiality, not arising from oversensitivity but from genuine concern arising from a direct statement made by the learned Circuit Court judge, and that a reasonable person would think it likely or probable that the learned Circuit Court judge was more favourable toward Mrs. P than towards Mr. P. In this respect Mr. P pointed to the principle that justice should not only be done but should manifestly and undoubtedly be seen to be done. In those circumstances, it is said, this Court must examine the impression which would have been given to a reasonable person by the comments of the learned Circuit Court judge.

5. Submissions of Mrs. P
5.1 The learned Circuit Court judge, as is customary, is not participating in these proceedings. Mrs. P filed a statement of opposition.

5.2 Mrs. P submitted that the learned Circuit Court judge was entitled to ensure that proper provision was made, in accordance with s. 5 of the Family Law (Divorce) Act 1996, which states as follows:-

> "(1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that:
>
> (a) At the date of the institution of the proceedings, the spouses have lied apart form one another for a period of, or periods amounting to, at least four years during the previous five years,
>
> (b) There is no reasonable prospect of reconciliation between the spouses,
>
> (c) Such provision as the courts considers proper having regard to the circumstances exists or will be made for the spouses and any dependant members of the family, the court may, in exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned.
>
> (2) Upon the grant of a decree of divorce, the court mat, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, or right of access to, any dependant member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section."

5.3 In relation to the issue of bias**,** Mrs. P submitted that there was no evidence of any previous non-judicial position, statements or actions of the learned Circuit Court judge such as might raise the question of objective bias on his part.

5.4 Mrs. P further argued that Mr. P had not come to these proceedings with clean hands, in that, it is said, Mr. P did not disclose to the court granting leave for judicial review, that a previous order had been made for his committal for contempt of court on the grounds of non-compliance with an order for discovery in the family law proceedings. On the other hand there is no evidence to suggest that the learned Circuit Court judge, in considering the issue of proper provision, gave any particular weight to Mr. P's alleged litigation misconduct, or, indeed, whether he was entitled to take such conduct into account having regard to the provisions of the 1996 Act.

5.5 Mrs. P referred the court to Regina *(Madan) v. Secretary of State for the Home Department* [2007] 1 W.L.R. 2891, at p. 2895, where the court found that "Counsel and solicitors attending *ex parte* before the judge in the Administrative Court are under professional obligations (a) to draw the judge's attention to any matter adverse to their client's case, including in particular any previous adverse decision…"

5.6 Mrs. P also argued that an appeal would be an adequate remedy.

6. Jurisprudence on Bias and Pre-judgment
6.1 It is, of course, well established, since at least the dictum of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex Parte McCarthy* [1924] 1 K.B. 256, at p. 259, that "justice should not only be done but should manifestly and undoubtedly be seen to be done." This comment was quoted with approval in *Bula Ltd v. Tara Mines Ltd* (No.6) [2000] 4 I.R. 412, where the Supreme Court held that it was not necessary to show that there would be a real danger of bias in order to have a judge disqualified.

6.2 In *Bula*, the Supreme Court set out that the test for bias was an objective one, being whether an ordinary reasonable member of the public would have a reasonable apprehension that a party would not have a fair hearing from an impartial judge. At p. 441 of the judgment, Denham J. stated as follows:-

> "(t)here 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."

6.3 In the Australian case of *Webb v. the Queen* (1993-1994) 181 C.L.R. 41, Mason C.J. described the reasoning for the objective test for bias as follows:-

> "(t)he premise on which the decisions in this Court are based is that public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question."

6.4 In *O'Neil v. Beaumont Hospital Board* [1990] I.L.R.M. 419, at p. 438, Finlay C.J. described that test as:-

> "Whether a person in the position of the plaintiff, Mr. O'Neil, in this case who was a reasonable man, should apprehend that his chance of a fair and independent hearing…does not exist by reason of the prejudgment of the issues."

6.5 In *Orange Ltd v. Director of Telecoms (No.2)* [2000] 4 I.R. 159, Keane C.J. stated, at p.186, that cases coming within the pre-judgment category of bias call for an application of the test as to whether there is a reasonable apprehension of bias. Also in *Orange*, Geoghegan J. approved the use of the test of reasonable apprehension of bias stating as follows, at p. 252:-

> "Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken *O'Reilly v. Cassidy* [1995] 1 I.L.R.M. 306, or the judge having been involved in a different capacity in matters which were contentious in *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 I.L.R.M. 408, or where there was evidence of prejudgment by a person adjudicating *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419."

6.6 That bias exists prior to the decision or contemplated decision seems, in general, to be the case, as held by Barron J. also in *Orange* where, are p. 221, the following is stated:-

> "Insofar as bias may be found to exist or to have existed, it will always predate the actual decision or contemplated decision. Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing and in that way alert a party to the possibility of bias and so enable such party to establish facts which show that the attitude adopted by the decision maker in the course of the hearing was one which might have been expected having regard to those facts. The essence of bias then is the perception - the strength of that perception not being relevant for the purpose of this definition - once all the facts are known that the particular decision maker could never give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude. Obviously, if it is perceived that it may influence a decision yet to be given, it must exist at that stage…A belief or perception that a decision might have been different is at the heart of bias because if the decision would always have been the same, it cannot have been influenced by bias or any other cause."

6.7 The Irish Courts have not set down a finite definition of what will amount to bias. In relation to defining what will constitute bias, Barron J. stated as follows in his decision in *Orange Ltd* (at p. 228):-

> "Clearly, the principles of bias are too wide to be set out in one definition. However, it seems to me that the essence of bias is the existence of some factor as already explained that constitutes a set of circumstances from which a reasonable observer might conclude that there was a real possibility that such factor would cause the decision maker to seek a particular decision or which might inhibit him or her from making his or her decision impartially and independently without regard to such factor. As I have already indicated, this factor must predate the decision complained of or the contemplated hearing."

6.8 While holding that the principles of bias are too wide be conclusively defined, Barron J. favourably cited the factors listed in the English case of *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 1 W.L.R. 870, the Court of Appeal, sought to deal with the many situations where bias might be alleged. In *Locabail,* the Court of Appeal, while highlighting that it would be dangerous and flute to attempt to define or list such factors which may give rise to a finding of bias, set out a purposefully incomplete definition of bias, holding that each case depends on its own facts and stating, at p. 887, the following:-

> "Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

In his decision in *Orange Ltd,* Barron J. staetd that the list of factors set out in *Locabail* was important for the views expressed as to what would or would not normally give rise to a real risk of bias.

6.9 It is also of some particular relevance to the facts of this case to cite the judgment of Fennelly J. in *Kenny v. Trinity College* [2008] 2 I.R. 40, where, at p. 45, Fennelly J. said the following:-

> "The test of objective bias is expressed in general terms. Its application demands an appreciation of all the circumstances of the individual case, followed by a particularly careful exercise of the faculty of judgment. In his judgment in *O'Neill v. Beaumont Hospital* [1990] ILRM 419, where the allegation was one of pre-judgment bias, Finlay C.J. expressed the view, at p. 439, that, in analysing the facts, he should "take the interpretation more favourable where there is ambiguity to the plaintiff than to the defendant. Whether or not that is a principle of general application, it applies in a special way in the present case, where this Court is asked, in a very real way, to adjudicate on whether one of its own judgments was

tainted by objective bias."

6.10 It seems to me, therefore, that amongst the factors which a court should have regard to is the effect which an ambiguous statement by an adjudicator might reasonably have on persons connected with the process. If an adjudicator makes a statement which is reasonably capable of being intrepreted by an objective and informed bystander as implying that pre-judgment exists, then that is a factor to be weighed significantly in the balance in a challenge to the continued role of the adjudicator in question in the process under challenge.

7. Conclusions on the Principles to be Adopted

7.1 There was no real dispute between the parties as to the test to be applied in assessing whether bias had been established. The test is as to whether a reasonable and properly informed person (that is to say someone who is well informed as to the process engaged in and issues to be tried), would have had a reasonable apprehension that one of the parties would not have a fair hearing from an impartial judge.

7.2 The real issue of dispute as to the legal test to be applied derives from the submissions made on behalf of Mrs. P to the effect that bias must, in the words of Barron J. in *Orange,* "pre-date the actual decision or contemplated decision". In that context it is also important to note that Barron J. indicated that bias does not come into existence in the course of a hearing, but that bias may become apparent in the course of a hearing, so that the party concerned may be alerted to it by reason of what transpires at the hearing.

7.3 However, bias can take on a number of forms. What I am concerned with in this case is pre-judgment. To the extent that pre-judgment can be properly regarded as a form or bias, it seems to me that it is, nonetheless, in a somewhat different category. Most cases of bias involve an allegation that by reason of some factor external to the adjudicative process, the adjudicator might be perceived to be biased in favour of one party or the other. Thus there may be a relationship or connection between the adjudicator and one of the parties, or some common interest between the adjudicator and such party. Likewise, it might suggested that the adjudicator did not come to the hearing with an impartial mind, whether because of a connection of the type which I have described or by reason of some animus which the adjudicator might bear towards one of the parties, or in relation to the issue which the adjudicator was being called on to determine.

7.4 However, it seems to me that there is another form of pre-judgment which arises where the adjudicator indicates that the adjudicator has reached a conclusion on a question in controversy between the parties, at a time prior to it being proper for such adjudicator to reach such a decision (indeed it might well be more accurate to describe such a situation as premature judgment rather than pre-judgment). It can hardly be said that a reasonable and objective and well informed person would be any the less concerned that a party to proceedings was not going to get a fair adjudication if, at an early stage of the hearing, comments were made by the adjudicator which made it clear that the adjudicator had reached a decision on some important point in the case at a time when no reasonable adjudicator could have, while complying with the principles of natural justice, reached such a conclusion.

7.5 It is important that I emphasise that nothing which I say should be considered as presenting any barrier to adjudicators (and in that context adjudicators includes judges), giving indications as to questions, whether of fact or law, which are causing concern to the adjudicator even though such indications may be given in the course of a hearing. Indeed, many advocates would argue persuasively that an adjudicator who does not give any indication of the issues which may be causing concern to that adjudicator, leaves the parties in a most difficult position of not being able to address any such issues adverse to that parties case which may be causing such concern. There is a difference, however, between a judge or adjudicator indicating matters that may be causing concern, on the one hand, and using language which, on the other hand, might cause a reasonable and informed observer to believe that the judge or adjudicator concerned had excluded any realistic possibility of coming to anything other than one conclusion at a time when, in the context of the process being followed, further evidence or argument was to be expected in relation to the issue concerned.

7.6 It does not seem to me that the comments of Barron J. in *Orange* can be taken to prevent a finding of the form of pre-judgment (or premature judgment) to which I have referred (that is to say a pre-judgment stemming from an appearance being given of the adjudicator having made a decision at a time when further evidence or argument on the issue concerned remained to be presented), simply because such contention arises out of what happens at, rather than prior to, the hearing concerned. The form of pre-judgment which I have sought analyse can only happen at a hearing and arises from the adjudicator creating, in the minds of reasonable and informed people, an impression that a premature rush to judgment has occurred. Such a rush to judgment does not necessarily depend on the adjudicator having a particular animus towards one of the parties concerned, but rather stems from the fact that a reasonable apprehension has been created that the adjudicator has not considered all appropriate matters before reaching what appears to be a final view on the issue.

7.7 I am satisfied, therefore, that where the form of pre-judgment which is sought to be relied on in judicial review proceedings is of that type, it is not necessary to establish that it predated the adjudicative process.

7.8 In those circumstances it seems to me that the test which I must apply is as to whether the comments (and in truth, only the final comment) attributed to the learned Circuit Court judge is or are such as would give rise, in the mind of a reasonable and informed person, to a view that the learned Circuit Court judge had made a final decision on the case prior to hearing all of the relevant evidence and argument. In that context it must be recalled that there is a contest as to what was actually said. I, therefore, turn to that question.

8. The Factual Dispute

8.1 As will have been seen there is a dispute between the lawyers who were present in court as to what was actually said by the learned Circuit Court judge at the time when he rejected the settlement reached between the parties. To put that dispute in context I should emphasise that it was accepted that the learned Circuit Court judge had a jurisdiction, and indeed a duty, to consider whether the settlement concerned provided adequate provision for, on the facts of this case, Mrs. P. Indeed, that duty arises not only under the statutory provisions to which I have referred but also under the Constitution. It follows that the learned Circuit Court judge was more than entitled to come to the view that, on the basis of the information then currently before him, he was not persuaded that the settlement made such adequate provision. It was also accepted that in the context of a judge indicating that, on the basis of the information then currently available, a particular level of settlement in matrimonial proceedings is not sufficient to amount to proper provision, such judge is entitled to give an indication as to the sort of provision which would so satisfy the judge. However, when so doing it is important that a judge make clear that the exercise engaged in is a determination by the judge as to whether, on the basis of the information then available, the settlement proposed appears to make proper provision. It is also important that it be clear to the parties that, in the event that the case continues, the judge has not closed his or her mind to any further evidence or argument that might be made thereafter which might legitimately alter the judge's view as to what might be the

minimum amount of provision that might be regarded as proper. It is one thing for a judge to say, before a case has ended, that he is not satisfied that proper provision is being offered on the basis of the information then currently available. It is another thing entirely for a judge to say, at the same stage, that the final order is going to be of a particular type and, by inference, that that would be so irrespective of what other evidence or argument might be addressed.

8.2 It is against that background that the factual contest as to what was actually said by the learned Circuit Court judge needs to be viewed. Having regard to the jurisprudence to which I have referred concerning the approach which the court should take in the event that an adjudicator may make an ambiguous comment, it seems to me that it is unnecessary to resolve the factual dispute between the parties. Where responsible solicitor and counsel are in a position to swear on oath that a judge has made a comment of a particular type, then it seems to me that, in the absence of the court taking a view that the solicitor and counsel concerned could not reasonably have interpreted what the judge said in the manner suggested, the appropriate characterisation of the comments of the judge concerned must be that they gave rise to an apprehension in the mind of reasonable people along the lines suggested. If a judge makes an ambiguous comment such that a reasonable and responsible advocate appearing on behalf of one of the parties concludes that the judge has indicated a final view on the case, then it seems to me that it is unnecessary to resolve any specific differences as to what was actually said. The two versions of the comments attributed to the learned Circuit Court judge are sufficiently close (although having an important difference) that it seems to me, on the facts, that the learned Circuit Court judge, at a minimum, made an ambiguous comment which could have led a reasonable and informed observer to take the view that he was indicating that the solution to any failure on the part of Mr. P to come up with an enhanced offer would be that the learned Circuit Court judge would simply make an order along the lines indicated (that is a 55/45 split).

8.3 For the reasons already analysed it seems to me that such an impression meets the objective test, which I have identified, and for that reason it seems to me that Mr. P is correct in his contention that there was a reasonable apprehension that the learned Circuit Court judge had pre-judged the matter at a time prior to hearing all of the evidence and such arguments as might be addressed on behalf of Mr. P. Subject, therefore, to the question of it being said that Mr. P did not come before this Court, on the occasion of the application for leave to seek judicial review, with clean hands, and to the issue of the adequacy of an appeal as a remedy, it seems to me that Mr. P is entitled to the relief sought. I now turn to the question of clean hands.

9. The Issue of Clean Hands

9.1 It is well settled that a party making an *ex parte* application to court has an obligation to disclose any relevant material to the court. However, it is equally the case that, while relevance is to be viewed objectively (and is not based on the subjective view of the party making the application), nonetheless the court should not take an unrealistically high view of what needs to be disclosed. In particular, the consequences of the failure to disclose matters of marginal relevance should not be disproportionate. See for example *Bambrick v. Cobley* [2005] IEHC 43 and *Freney & Anor v. Freney & Anor* [2008] IEHC 330.

9.2 However, in *the State (Vozza) v. Ó Floinn* [1957] I.R. 227, the Supreme Court found that the applicant in that case had been grossly exaggerating and misleading in his grounding affidavits, yet he did not fail to secure the reliefs sought. Maguire C.J. stated as follows, at p. 243:-

> "While I am prepared to agree that in strictness, except where it goes as of course, the granting of an order of certiorari is in all cases a matter of discretion, I am of opinion that in cases where there is conviction on record, made without jurisdiction, the Court can only exercise that discretion in one way, viz., by quashing the order: see as to this FitzGibbon L.J. in *The King (M'Swiggan) v. Justices of Londonderry* [1905] 2 IR 318, and *Sir Wilfrid Greene M.R. in Rex v.Stafford Justices* [1940] 2 KB 33 . The right of a citizen to be tried by due process of law is as old as Magna Charta. It has now been enshrined in the Constitution in Article 38 (1) and while conviction of a crime remains on record it constitutes a representation that a person accused has been convicted after a trial in due course of law. Accordingly it cannot be gainsaid that to allow the conviction to remain on record is a serious matter for the prosecutor. It is submitted, however, that his lack of candour in presenting his case makes it proper that he should remain under the stigma which it carries. I find it difficult, however, to imagine conduct on the part of an applicant for certiorari which would disentitle him to an order of certiorari in regard to a conviction of a crime of any sort, where it is established that it was made without jurisdiction."

9.3 In *Bula*, the Supreme Court did not consider the applicant's lack of clean hand as sufficient in itself to cut him off from the reliefs that he sought. However, it was seen as a matter to be weighed in the balance when reaching a conclusion on the case.

9.4 While I am not here concerned with an application for judicial review in relation to a criminal conviction (as was the case in *Vozza*), nonetheless I am satisfied that it would only be a proportionate and, therefore, appropriate, for the court to decline the order sought by Mr. P if there were established a significant and culpable failure to disclose at the leave stage. The matter relied on, *i.e.* that Mr. P had, in the course of the proceedings before the Circuit Court, been found to have been guilty of a significant failure to make proper disclosure in discovery, needs, however, to be viewed against the background of the issue which was sought to be raised in the judicial review proceedings themselves. What needs to be disclosed is any matter that might be relevant to the decision of this Court in the judicial review proceedings, and not anything that might be tangentially relevant in some other sense. While it was undoubtedly highly improper for Mr. P to have failed to comply with his obligations to the court in respect of discovery, it seems clear on all the evidence, that all questions of discovery had been satisfactorily disposed of before the events which give rise to the issues in this case. Provided that discovery has been properly dealt with in the end, then it would be wholly improper for a judge trying family law proceedings to punish a party for a previous failure to make adequate discovery by allowing that fact to influence the proper orders to be made in the family law proceedings under consideration. The discovery issue was not, nor could it have been properly, an issue which the learned Circuit Court judge took into account in relation to the proper provision to be made for Mrs. P.

9.5 In those circumstances it seems to me that the only way in which it could be argued that the historical failure to make discovery could have been relevant to these judicial review proceedings was that the way in which the learned Circuit Court judge ultimately dealt with the discovery question (by allowing Mr. P more time), was a fact which tended to show that the learned Circuit Court judge acted towards Mr. P in a fair and balanced manner. Strictly speaking, therefore, it seems to me that a case can be made to the effect that disclosure in respect of that discovery should have been made at the leave stage. However, such disclosure would have been of only marginal relevance to the issues which this Court had to consider at the leave stage and, it does not seem to me that any culpability (which must necessarily be very small) concerning such non-disclosure would render it proportionate to deprive Mr. P of any relief to which he was otherwise entitled.

9.6 In those circumstances, it does not seem to me that it would be appropriate to deprive Mr. P, of the order which I have already indicated he is *prima facie* entitled to, on the grounds of failure to disclose.

9.7 It is finally necessary to turn to an argument touched on, on behalf of Mrs. P, to the effect that Mr. P had an adequate remedy in

an appeal.

10. Alternative remedy
10.1 Mrs. P argued that Mr. P had, at his disposal, an alternative and substantial remedy of a *de novo* appeal from any decision of the learned Circuit Court judge that he considered was unfavourable to him and merited a second hearing. In *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381, at p. 404, the Supreme Court had to consider how it would exercise its discretion where there was a right of appeal as an alternative remedy. In that case the applicant had the alternative remedy of appealing a decision of the respondent to the Planning Board. The court decided that, as a question of justice, and taking into account all the circumstances of the case, it should refuse to grant the reliefs, stating at (p. 404):-

> "The present case does not seem to me to exhibit the exceptional circumstances for which the intervention of the Courts was intended. On the contrary, certiorari proceedings would appear to be singularly inapt for the resolution of the questions raised by Abenglen. Certiorari proceedings, based as they are on affidavit evidence, can result only in a stark and comparatively unilluminating decision to quash or not to quash; whereas an appeal to the Board would have allowed all relevant matters to be explored (if necessary, in an oral hearing, with the aid of experts in the field of planning), thus allowing an authoritative exposition to have been given of the appropriate practice and procedure, aided, if necessary, by a reference to the High Court of a question of law."

10.2 In *Gill v. Connellan*, [1987] I.R. 541, the court held that an application for *certiorari* by way of judicial review was not to be regarded as a readily available alternative to an appeal by way of re-hearing to a higher court. In that case, however, due to interruptions by the trial judge concerned, Lynch J., in this Court, was satisfied that the case had not been adequately heard and that, therefore, an appeal could not be said to be by way of rehearing and, consequently, that judicial review was the appropriate remedy.

10.3 Likewise in *Leary v. National Union of Vehicle Builders* [1974] 1 Ch. 34, Megarry J. held; that, even where there was a right of appeal from an original decision, an applicant was entitled to natural justice both before the original tribunal and the appellate tribunal. At p. 49 of his decision Megarry J. stated:-

> "If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had?... As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

10.4 Therefore, in this case, the question is as to whether Mr. P has a sufficient remedy available to him in an appeal to this Court from the decision of the learned Circuit Court judge. Could the failure of natural justice in the Circuit Court be cured by an appeal *de novo* to the High Court? A right of appeal from the Circuit Court to the High Court in cases where oral evidence has been given is provided by s. 38 of the Courts of Justice Act 1936. In the recent decision of *F. & Ors v. Judge O'Donnell & Ors* [2009] IEHC 142, O'Neill J., addressing the issue of the adequacy of an appeal to a higher court, stated:-

> "The fact that the avenue of an appeal to the Circuit Court was available to the applicants in these cases is relevant and should also be considered. In *Doran v. Ireland* (Judgment of the European Court of Human Rights dated the 31st July, 2003) the Court held at para.58 that:-
>
> > '... even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may, in principle do so...'
>
> It was open to the applicants to appeal to the Circuit Court, which would have ensured a full re-hearing on all the issues of law and fact. The central complaint of the applicants in both cases, that they suffered a breach of fair procedures in the District Court, would not have been addressed in the context of an appeal. However, an appeal to the Circuit Court would have dealt with all issues between the parties arising from their original disputes, and, as it would have been a complete rehearing, the applicants' grievances in these judicial review proceedings, that they did not get a fair hearing, would have been remedied, even though the specific issue that arises in these judicial review proceedings would not have been considered by the Circuit Court in the appeals."

10.5 There is no doubt but that if Mr. P were to be dissatisfied with any decision which the learned Circuit Court judge might ultimately come to in this case, he would have the opportunity to have a judge of this Court consider the merits of any provision which might properly be made for Mrs. P afresh. Where, however, a case is made out that an applicant, on the basis of an objective test, was entitled not to be satisfied that he was going to get a fully impartial hearing, then it seems to me that it would amount to a failure to adequately vindicate such parties rights to require them to submit to the adjudication concerned, subject only to a right of appeal.

10.6 There is no doubt, as was pointed out by O'Neill J. in F., that procedural lack of fairness at first instance does not always give rise to a situation where an appeal would not, necessarily, be an adequate remedy. It seems to me that such questions depend, amongst other things, on the extent to which it can reasonably be said that the first instance hearing amounted (even though tainted by some lack of fairness) nonetheless to a hearing. It is also possible that a distinction can be made between cases involving an appeal within the courts and cases (such as those that arise in the planning and immigration areas) where parliament has established a two stage process involving a first instance consideration and an appeal. However, it seems to me that it is fundamental to any first instance hearing that the parties to it ought reasonably be satisfied that they will get a determination which has not been the subject of any pre-judgment.

10.7 On the facts of this case it does not, therefore, seem to me that an appeal would be an adequate remedy.

11. Conclusions
11.1 For the reasons which I have sought to analyse, I am satisfied that Mr. P has made out a case based on an objective test to the effect that there was a reasonable apprehension that the learned Circuit Court judge has already determined his case prior to the conclusion of the evidence and the hearing of arguments. On that basis, I am satisfied that Mr. P is, *prima facie*, entitled to an order of Prohibition, directed to the learned Circuit Court judge, precluding him from further hearing the family law proceedings to which this application relates.

11.2 Also, for the reasons set out in the latter part of this judgment, I am not satisfied that any sufficient case of failure to disclose on the leave application has been such as would disqualify Mr. P from obtaining any order to which he would otherwise be entitled. Neither am I satisfied, for the reasons also set out, that an appeal would, in all the circumstances of this case, be an adequate

remedy.

11.3 It follows that Mr. P is entitled to the order sought.