THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 48

Kelly J.
Irvine J.
Mahon J.

Appeal Number: 2014/65

Crohan O'Shea

Plaintiff

and

Michael Butler and William Butler

Defendant/Appellant

Ex tempore Judgment of Mr. Justice Kelly delivered on the 9th day of March 2015

1. This is the appeal of Mr. William Butler against an order which was made in the High Court by Barrett J. The original notice of appeal was very extensive and went into a whole series of matters which, on the directions hearing, I required counsel to winnow down to what is the essential issue that falls to be determined on this appeal. He did so and the appeal has now been presented with a single ground of appeal.

2. That single ground is that Barrett J. ought to have recused himself from hearing the application in question because of objective bias. There is no allegation of subjective bias. It is said that all the circumstances which would give rise to an inference of objective bias were present and that the judge therefore ought to have recused himself.

3. The first question that arises for consideration is as to the nature of the application which was heard by the judge on the occasion in question. The judge acceded to an application to make an order appointing a solicitor to execute a conveyance in circumstances where there was a failure to execute such by a party who was obliged to do so pursuant to a court order. The application was made under the provisions of s. 33 of the Trustee Act 1893. It is a commonplace application in circumstances such as I have outlined.

4. The judge was not called upon to make any determination as to ownership of property or obligations or liabilities of the parties. All of that had been done beforehand. He was merely asked to give effect to orders already made by the court.

5. The person who actually appeared before Barrett J. on the occasion in question was Mr. Michael Butler. The judge permitted him to address the court. In fact, Mr. Michael Butler had no business being before Barrett J. at all. He had no interest in the lands in suit. That has already been found by Finlay Geoghegan J. Barrett J. indulged him by permitting him to appear and to make the case which he sought to do. It has to be said that the judge gave him a good deal of leeway on the various dates on which the matter was before the judge.

6. It is said that the allegation which was made by Mr. Michael Butler was such that the judge ought to have recused himself because of objective bias.

7. Mr. Michael Butler raised before Barrett J. the question of the judge's former employment with the Irish Bank Resolution Corporation (IBRC) formerly Anglo Irish Bank. The judge made it clear that if the case involved anything pertaining to IBRC he would recuse himself. On the transcript of the 17th November, 2014, p. 16, line 17, the judge says: "Right. Very good. To the extent that you raised matters regarding IBRC, I am not competent to hear those matters. I have a conflict of interest so I cannot hear them".

8. Again at the end of the transcript on the 24th November (p. 10) the judge made it clear that insofar as this case is concerned his approach was and I quote from line 34:

> "Well for the avoidance of doubt, I have absolutely no connection of any nature, and have never had with any of the parties in these proceedings. I am not going to recuse myself on that basis."

9. There is no doubt that IBRC has nothing whatsoever to do with this action. It has nothing to do with any of the parties or the lands involved. If the judge felt that there was any such involvement, he made it clear that he would recuse himself.

10. What then is the allegation which is made in support of the contention that circumstances were present which gave rise to objective bias? First, it was asserted that Mr. Sean Fitzpatrick, a former chief executive of IBRC and the plaintiff in these proceedings had some form of a business relationship. Second, it was asserted that the plaintiff in these proceedings gave as an address the address of IBRC. The third assertion was that the judge was a former employee of IRBC. It is said that because of these alleged circumstances, objective bias was made out and the judge ought to have stood down.

11. The test for objective bias in this jurisdiction has been dealt with by the Supreme Court in *O'Callaghan v. Mahon* [2008] 2 I.R. 514. There were a number of judgments delivered in that case. There was one dissenting judgment. All other judgments were in agreement.

12. In the course of his judgment, Fennelly J. synopsised the principles involved. He said:-

> "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 risk that the decision maker will not be fair and impartial."

13. He went on to say that the apprehensions of the actual affected party are not relevant. He also said that:

> "Objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process."

14. He also went on to make an observation concerning objective bias which is not relevant for the purpose of this appeal, where he said that *"it may be established by showing that the decision maker has made statements which, if applied to the case at issue would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses".* That has no relevance here.

15. So, on the basis of what I have outlined, which are the facts on which it is said objective bias is to be inferred, the appellant says that he is entitled to succeed on this appeal. In my view he is not. I do not believe that any reasonable and fair-minded objective observer who is not unduly sensitive but who is in possession of all the relevant facts could reasonably apprehend that there is a risk that the decision maker would not be fair or objective.

16. The tenuous connection of the judge as a former employee of IBRC being objectively biased in circumstances where IBRC is not party to this litigation but where a former chief executive of that entity has some form of personal business relationship with the plaintiff here, does not to my mind meet any of the tests which were advocated by Fennelly J. in the synopsis of principles which he gave in *O'Callaghan v Mahon*. In my view therefore this appeal ought to fail.

17. However, I cannot but note that this allegation of bias has been made not merely against the trial judge in this matter, but has also been made against a number of other judges, at least three, who have had previous dealings with this protracted litigation. It is, I think, important to bear in mind some other pertinent judicial observations where allegations of bias of this sort are made.

18. I want in particular to cite from a decision of the Court of Appeal in England in *Locabail UK Ltd. v. Bayfield Properties Limited* [2002] WLR at 870. There the Court of Appeal said (quoting with approval from the Constitutional Court of South Africa *in President of the Republic of South Africa v. South Africa Rugby Football Union* [1994] F.S.A. 147) in relation to the reasonableness of the apprehension of bias as follows:

> "The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predisposition. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant to apprehend that the judicial officer, for whatever reasons, was not or will not be impartial."

19. In the same vein, in the context of the obligation of judges to hear cases, the judgment of Mason J. in the High Court of Australia in *Re: JRL ex parte CJL* [1986] 161 CLR 342 is relevant. He said:

> *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe, that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

20. I would add to that, it is also important that judges be astute in assessing applications of this sort so as to ensure that parties are not encouraged to make unfounded applications of this type with a view not merely to having a case decided by a judge thought to be more likely to decide in their favour, but also with the object of having a case delayed.

21. I make those observations because allegations of bias have been made in this case against so many judges. It is also the case that allegations of this sort are becoming frequent in the courts of this jurisdiction.

22. Of course the presence of impartial judges is crucial to the administration of justice, but judges are also obliged not to accede too readily to applications of this type and have a duty to discharge their judicial office and to hear cases which are assigned to them.

23. A further relevant judicial citation in this regard is from the *Clenae* case [1999] ASCA 35 where Callaway J.A. said *"as a general rule, it is the duty of a judicial officer to hear and determine the case allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application".*

24. In my view the allegation of bias here comes nowhere near satisfying the criteria which would have to be met in order for objective bias to be made out. Consequently the judge, in my view, was correct not to accede to the application to discharge himself, because, to use the words of Callaway J.A., this was an unfounded disqualification application. Barrett J. was right not to disqualify himself. I would dismiss this appeal.

Ms. Justice Irvine: I agree with the judgment of Mr. Justice Kelly that this appeal is without legal foundation or merit.

Mr. Justice Mahon: I also agree.