THE COURT OF APPEAL

[2015 No. 387]

Irvine J.
Sheehan J.
Hogan J.

BETWEEN

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

PLAINTIFFS/RESPONDENTS

- AND -

PENFIELD ENTERPRISES LIMITED (BEING THE PUBLISHERS OF 'THE PHOENIX' MAGAZINE) AND PADDY PRENDIVILLE

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on 11th day of May 2016

1. This is the defendants' appeal against a ruling of the High Court (Hedigan J.) made on 20th July, 2015, whereby he refused to recuse himself from hearing a committal motion listed before him on that date. Accordingly, core to this appeal, are the circumstances in which a judge should yield to such an application.

Background Facts

2. On 26th September 2014, the first named appellant, Penfield Enterprises Limited, ("Phoenix"), published an article concerning the cases taken by Mr. Ian Bailey and his partner, Ms. Jules Thomas, for wrongful arrest arising out of the murder investigation into the death of Mme. Sophie Toscan du Plantier in December 1996. Mr. Bailey's case was due for hearing the following month. The second appellant is the editor of Phoenix magazine.

3. The respondents to this appeal, who are the defendants in the aforementioned civil proceedings, took exception to the content of the article and as a result the Chief State Solicitor, on their behalf, wrote to the editor of Phoenix on 9th October 2014, to express concerns regarding the content of the article.

4. The second paragraph of the aforementioned letter reads as follows:-

> "The piece was grossly improper and a clear contempt of court. It sought to rehearse evidence which may or may not be called in the case. It sought to suggest to the public, including potential jurors that 'unsurprisingly' the State has made efforts to settle the cases. It implied that despite a supposed offer of settlement Ian Bailey had refused this. It described the behaviour of the State as 'shocking'. It then speculated that settlement amounts would have to be very large and purported to give information about the size of the plaintiffs' legal bills."

5. The aforementioned letter also gave notice that the publication would be brought to the attention of the High Court the following day, *i.e.,* 10th October, 2014.

6. It is common case that the appellants were not represented before the court on 10th October, 2014, when the article was brought to the attention of Mr. Justice Hedigan. In this regard, the appellants have at all times maintained that this was because of the shortness of the notice given by the Chief State Solicitor, an excuse or justification which is not accepted as reasonable by the respondents.

7. In any event, on 10th October 2014, the respondents drew the judge's attention to the article. It is not disputed that in the course of that hearing they maintained that the article constituted an effort to derail the upcoming civil claim for wrongful arrest and that the publication amounted to contempt of court. It should be said that the appellants maintain that the article could not be considered to amount to contempt of court. All of the facts stated in the article were, they maintain, in the public domain before the article appeared. Further, no judge had been assigned to the case, no jury had been empanelled and in these circumstances the article could not have been in breach of the sub judice rule.

8. It is accepted that when the respondents complained to Hedigan J. about this article they did so in an effort to ensure that the appellants did not further air the matters mentioned in the particular article before the trials had been disposed of. They did not ask the court to make any findings in respect of the article but asked the court informally to issue a warning that there should be no further reporting or mention of this particular article prior to the disposal of both actions.

9. The following is what the High Court judge stated following the respondents' application:-

> "Well, I am glad you mentioned this, Mr. O'Higgins, because I read this article myself and I think you correctly characterise it as reckless. It is a reckless and irresponsible article in the light of a case of great controversy which is due to come on before the courts. I have noted and I have said it before that all of the media, with the exception of this particular article, in their coverage so far have, I thought, conducted themselves with great responsibility. It is a controversial and difficult case and I think that the media have generally speaking tried very hard, whilst exercising their obligations to report what goes on in the courts, have trod (sic) very, very carefully in complete contrast to this article which, as you've said, is a reckless and irresponsible article in relation to a case of this sort that is about to come on. Yes, I would direct that the other media should not make any reference to the contents of this article in the Phoenix magazine other than to say that it has been described as a reckless and irresponsible piece of journalism in relation to a case of such controversy imminently due to go before a jury and with complete disregard for the right of both sides to have a jury that has not been prejudiced in advance hear the actual case. In the event that there's any further repetition of that I think I would strongly urge the State to bring proceedings before the court and certainly the court will deal with it as seems appropriate at the time having heard any submissions that might be made by the respondent party."

10. The judge's pronouncements were then incorporated in a letter sent by the respondents to the editor of Phoenix on 13th October 2014. The editor was advised as follows: "Judge Hedigan indicated that the article was reckless and irresponsible. He took the view that it was calculated to interfere with proper progress of the trial". The letter also advised that the Court had made an order requiring that the media should not publish any material relating to the article in Phoenix or the fact that it had been mentioned in court until after the determination of the Ian Bailey and Jules Thomas's trial.

11. The claim brought by Ian Bailey against The Commissioner of An Garda Síochána and Others commenced on 14th November 2014, some six weeks after the article had appeared in Phoenix and was ultimately determined against the plaintiff on 30th March, 2015. That decision is under appeal to this court.

12. By letter dated 14th April 2015, the solicitors for Phoenix for the first time expressed dissatisfaction with what had occurred in the absence of their client on 10th October 2014. They stated that they were unhappy that the order would remain on the public record unchallenged and sought confirmation that the State would be prepared to consent to that portion of the order as referred to Phoenix Magazine being deleted from the face of the order, a request rejected by the Chief State Solicitor by letter of 30th April, 2015.

13. On 24th April 2015, in advance of the receipt from the Chief State Solicitor of the letter of 30th April 2015, Phoenix published a further article entitled "Will Ian Bailey appeal?" At the time this article was published the civil proceedings brought by Jules Thomas against the respondents were still awaiting a trial date. The respondents' response to this letter was to send a second letter to the appellants in which they maintained that the article was grossly improper and constituted a clear contempt of court for the reasons therein particularised. The letter noted that the alleged contempt followed upon the magazine's coverage of the Ian Bailey case in its article of 26th September 2014, which it also contended amounted to a gross contempt of court. The letter advised that contempt proceedings would follow.

14. It is as against the aforementioned background that on 11th May 2015, the respondents as plaintiffs brought a motion pursuant to Ord. 44 of the Rules of the Superior Courts seeking the attachment and committal and/or sequestration of the assets of the appellants for contempt of court in respect of the articles which they had published on 26th September 2014 and 24th April 2015. The motion also sought an injunction restraining Phoenix and its editor from publishing any further material calculated to interfere with the Jules Thomas litigation. The application was grounded on the affidavit of Ms. Frederique Duchene, solicitor, who set out the history earlier advised in this judgment and exhibited the relevant articles and correspondence.

15. In reply, Mr. Prendiville swore a brief affidavit dated 26th June 2015, which made the following basic assertions namely:-

> (a) Neither article was in breach of the sub judice rule in that at the time the articles were published no judge had been assigned to the cases nor any jury empanelled to hear them.
>
> (b) That everything stated in both articles was already within the public domain.
>
> (c) That the concerns expressed regarding the potential and size of a settlement and the legal bills in the Ian Bailey case were legitimate.
>
> (d) That there was no evidence that the respondents had been prejudiced by reason of the publication of the article of 26th September 2014, in that Mr. Bailey had, thereafter, lost his case.
>
> (e) That in respect of the article of 24th April 2015, the interpretation placed on the article by Ms. Duchene was ill conceived and untenable. The article did not refer to the Jules Thomas case but rather as to whether Mr. Bailey was likely to appeal the decision in his case.
>
> (f) That the article of 24th April 2015, did not seek to rehearse the evidence likely to be given in the Jules Thomas case.

16. The position adopted by Mr. Prendiville in his affidavit had already, to a certain extent, being flagged by his solicitors, Dore and Company, in their letter of 2nd June, 2015, in which the Chief State Solicitor was invited to withdraw the application for contempt of court. That request was refused by letter dated 12th June 2015.

Hearing of the Committal Motion - 20th July 2015

17. Prior to the hearing of the committal application, Mr. Dore, solicitor acting on behalf of Phoenix and Mr. Prendiville, made a very courteous request to Hedigan J. to recuse himself from hearing the application because of the views he had earlier expressed concerning the article of 26th September 2015.

18. This court has had the benefit of reading the transcript of that application. Mr. Dore submitted that in light of what the trial judge had said on 10th October 2014, it appeared to him that the judge had formed a view on the article and may have prejudged the issue which he was about to hear. In this regard, he referred to the letter which his clients had received following that hearing which recorded the judge's criticism of the article as "reckless" and "irresponsible" and his view that the article was calculated to interfere with the proper progress of the trial. If what was said in the letter was a true reflection of what had occurred on 10th October, he feared that his clients might not obtain an impartial hearing and he requested that the motion be heard by another judge.

19. It is relevant in this regard to note that while the letter written by the Chief State Solicitor dated 13th October 2014, asserted that the trial judge had taken the view that the article was "calculated to interfere with the proper progress of the trial" the transcript shows that the judge did not use those words.

20. Mr. O'Higgins S.C. on behalf of the applicants to the motion accepted that there was "something in" Mr. Dore's submission and that it was "true that the court has expressed a view which would certainly gel with some of the issues which require to be determined in the course of this hearing". However, Mr. O'Higgins submitted that given that Phoenix had not appeared on 10th October to make its position known to the court, it was difficult to see how the court could not have expressed some view on the publication in light of the assertion made by the State that the article was a deliberate attempt to influence the course of the proceedings. He further submitted that the recusal application should have been made in advance of the date fixed for the hearing of the application and that the approach of Phoenix in this regard was contemptuous of the court.

21. In resisting the recusal application, Mr. O'Higgins reminded the High Court judge that it was not at all unusual for a judge to discharge a jury in a criminal trial on the basis of some potentially prejudicial publication and on a later date to hear a contempt motion against the newspaper. While in such circumstances it might be said that the discharge of the jury by the judge might be considered evidence of prejudgment of wrongdoing on the part of the newspaper, the same judge would invariably be considered

capable of providing an impartial and fair hearing on the contempt application.

22. As to the approach of the trial judge to the recusal application, counsel submitted that the trial judge had correctly taken into consideration in reaching his decision the fact that he was better positioned than any other judge to deal with the contempt issue having regard to his knowledge of both sets of proceedings.

23. Finally, as to the second of the two articles Mr. O'Higgins considered that it could not seriously be argued that the judge should recuse himself from hearing the committal motion in respect of that publication on the grounds of bias in circumstances were he had said absolutely nothing concerning that article.

Judgment of the Trial Judge
24. The trial judge refused the application that he recuse himself from hearing the contempt motion. In doing so he first accepted the submission made by Mr. O'Higgins that his position was similar to that of the judge who had discharged a jury in a criminal trial based on a publication which he feared might influence the result, and who nonetheless would proceed to hear the application for contempt arising out of such publication. This practice, he was satisfied, was pursued because the judge in the criminal trial was best positioned to make the relevant assessment on the contempt motion and he considered himself to be in an analogous position in the present case by virtue of his prior involvement in the Ian Bailey case. Secondly, he was satisfied that notwithstanding the observations he had made on 10th October 2014, that he could nonetheless afford Phoenix and its editor an impartial hearing on the contempt application. Thirdly, he considered it relevant that there was, in his view, no other judge who was as familiar with the case as he was and that this was a factor to be taken into account in deciding whether he should recuse himself. Finally, having regard to the sworn obligation of a judge to carry out his role without fear or favour, he was satisfied that no judge should recuse himself from hearing any application absent "very powerful reasons" and there were none such in this case.

The Appellants' Submissions on the Appeal
25. Mr. Hayden S.C. on behalf of the appellants submits that the High Court judge applied the wrong test when he refused to recuse himself from hearing the contempt motion on the grounds of apprehended bias. He relied upon the decision of Denham J. in *Bula Limited (In receivership) & Ors. v.Tara Mines Ltd & Ors.* [2000] 4 I.R. 412, that of Denham C.J. in *Goode Concrete v. CRH plc* [2015] 2 I.L.R.M. 289 and that of Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514. He stressed that the test was an objective one, namely whether a reasonable person with knowledge of the relevant circumstances might have a reasonable apprehension that the respondents to the motion would not have a fair hearing from an impartial judge. He stressed that the test was not a subjective one and did not invoke either the apprehension of the judge himself or of the parties to the proceedings. The test invoked the apprehension of the reasonable person.

26. Mr. Hayden accepts that his clients are not entitled to forum shop and that a judge must sit to hear a case unless there is a good reason for him not to do so. However, in the circumstances of this case, and in particular having regard to what was said by the High Court judge on 10th October, he maintains that the reasonable person would apprehend that his clients might not receive a fair and impartial hearing from Hedigan J. on the contempt motion. Each case, he argues, turns on its own facts. On the facts of this case, the judge, without being requested to do so, had expressed a view to the effect that the article was both "reckless and irresponsible". Further, insofar as he noted that coverage of the Ian Bailey case by all of the media, with the exception of the coverage by Phoenix of the case in this particular article, had been conducted with great responsibility, it was to be inferred that his concluded view on the matter was that the appellants had not acted responsibly. Further, he had gone on to describe the article as a piece of journalism written "with complete disregard for the right of both sides to have a jury that has not been prejudiced in advance hear *(sic)* the actual case".

27. Mr. Hayden submits that the threshold to be met on a recusal application is a relatively low one. He argues that the evidence before the court met the relevant threshold. The appellants had established that the reasonable person would have a reasonable apprehension that they might not obtain a fair hearing from an impartial judge on the issue as per the decision of Denham J. in *Bula v. Tara*. Regrettably, the trial judge had not applied this test when he refused his client's application.

The Respondents' Submissions
28. Mr. O'Higgins S.C. on behalf of the respondents agrees that this appeal concerns apprehended bias i.e. objective bias and he does not disagree with the test as advised to the court by Mr. Hayden. He also agrees that "the reasonable man" for the purposes of the test is as described by Fennelly J. in *Kenny v. Trinity College and Dublin City Council* [2007] IESC 42.

29. Counsel once again relied upon the fact that a judge in the course of a criminal trial might discharge a jury if concerned that an article published in the course of a trial might have the potential to interfere with the integrity of the trial process. Nonetheless, it was never considered that the discharge of the jury in such circumstances might form the basis upon which the judge might later be asked to recuse himself on the grounds of prejudgment and thus apprehended bias.

30. While the trial judge had used words such as "reckless" and "irresponsible" in describing the article, he had not voiced any view as to whether the article constituted a contempt of court or was a breach of the *sub judice* rule and in particular had noted that any judicial determination in respect of the article would be dealt with having heard any submissions that might be made by the respondent party. Thus, counsel argued that the reasonable man was unlikely to apprehend that the judge had prejudged the matter or might not afford Phoenix and its editor a fair or impartial hearing. Further, while the respondents' letter of 13th October asserted that the judge took the view that the article was calculated "to interfere with the proper progress of the trial" the transcript did not substantiate that assertion.

31. Mr. O'Higgins submitted that the trial judge was correct to include within his consideration the fact that he was in a uniquely well informed position to determine whether the articles complained of represented a breach of the *sub judice* rule given that he had seisin of both cases and had heard the *Ian Bailey* case. The contempt issue was, he argued, best dealt with by a judge who had knowledge of the complexity of the issues involved in the *Bailey* trial. It would have been wholly inefficient for the High Court judge to have assigned the contempt motion to another judge in such circumstances.

32. Counsel further argued that the appellants had not pointed to any view expressed by the trial judge regarding the second of the two articles, the subject matter of the contempt motion. That being so there could be no valid basis for the appeal against the refusal of the trial judge to recuse himself hearing a contempt motion in relation to that article.

33. Finally, Mr. O'Higgins relied upon the fact that the trial judge's expressions as to the conduct of Phoenix and its editor were made in the course of an ex parte hearing. That being so, the reasonable man would understand that anything said by the judge should not be considered to be his concluded view on any matter that was to form the subject matter of a later *inter partes* application.

Decision

Principles to be applied by a Judge faced with a Recusal Application

34. The starting point for the court's consideration on this appeal is the right and indeed the duty of judges to hear and determine all such cases or legal issues as may come before them for adjudication, unless there are substantial reasons why they should not do so. It is relevant in this regard that judges, at the time of their appointment, make a declaration pursuant to Article 34.6.1 of the Constitution to administer justice "without fear or favour". They have made a public declaration to uphold the Constitution and the law. This necessarily includes a solemn promise to uphold the impartial administration of justice and to provide, for all who come before them, a fair and just hearing.

35. However, there are circumstances in which a judge has a duty to step aside from a pending or impending hearing so as to permit another judge determine some matter in contest between the parties. This is because not only must justice be done it must be seen to be done. One such circumstance is where a party to litigation can establish that the judge scheduled to hear their case or application has demonstrated objective bias.

36. As is apparent from the background facts, the present appeal concerns such an assertion. As it happens, the test for deciding whether objective bias has been established has been widely canvassed by the courts in recent years. Some of the most regularly cited authorities are the decisions in *Dublin Well Woman Centre Limited v. Ireland* [1995] ILRM 408; *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412; *Goode Concrete v. CRH plc* [2015] IESC 70; *O'Callaghan & Ors. v. Mahon and others (No.2)* [2007] IESC17, [2008] 2 I.R. 514.

37. There is no doubting the fact that the onus of proof of establishing objective bias rests on the party who asks the judge to recuse themselves. This issue was addressed by the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* [1999] (4) S.A. 147 at para. 48 where the court stated as follows:-

> "The correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant."

38. As to the standard of proof or the test to be applied by the court when faced with such an application, the aforementioned decision is once again of assistance. In the same paragraph as the last mentioned quotation, the Court described the test against the backdrop of the oath of office taken by a judge on their appointment:-

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. 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 predispositions. 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 a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

39. The aforementioned statement of the law was cited with approval by Denham C.J. in her recent decision in *Goode Concrete v. CRH plc & Ors.* [2015] IESC 70, [2015] 2 I.L.R.M. 289. Indeed, there is no dispute between the parties but that the test relating to the issue of bias is an objective one and hence the reference in all of the decisions to the effect on the "reasonable person" or "reasonable man" of knowledge of the circumstances and facts relied upon by the applicant in support of their application. This is what Denham C.J. stated at para. 54 of her judgment:-

> "The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

40. There is also authority for the proposition that in applying the test to the particular facts of a case a judge should, as was advised by Finlay C.J. in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 "take the interpretation more favourable [to the plaintiff] where there is ambiguity" .

41. What is also very clear from the leading decisions is that each case must turn upon its own particular facts and circumstances. Hence, the importance of establishing precisely what was said or done by the judge concerned and in what circumstances. It is fortunate in this case that there is a transcript of what was said by the High Court judge on 10th October 2014, and the context in which he said it. I will return later to his commentary on the article of 26th September, and my view as to whether the same, considered against the backdrop of all of the relevant circumstances, might reasonably raise an apprehension in the mind of the reasonable man that the appellants might not receive a fair and impartial hearing on the contempt motion.

42. In considering whether comments or actions on the part of a judge ought to be classified as bias, objectively assessed, it is clearly relevant to consider whether those words or actions might suggest that the judge has in some way prejudged some issue he is due to decide. Thus, in *Fogarty v. District Judge Hugh O'Donnell* [2008] IEHC 198, McMahon J. said the following when considering whether the judge concerned had been guilty of actual bias:-

> "[I]t is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.
>
> Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all of the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture."

43. In *O'Callaghan v. Mahon*, Fennelly J. stressed how important it was for the practical administration of justice that trial judges should not be required to refrain from expressing their views on the issues before them in lest they be charged with pre-judgment.

Such a model of justice was not to be emulated. This is what he stated at para. 77 of his judgement:

> "It is an inherent and invaluable part of the common law system of justice that open, sometimes even vigorous, argument takes place between the bar and bench. Judges on a daily basis express opinions in the form of questions, statements or argument in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can, and frequently does, enable counsel to change the judge's mind. On other occasions, the weakness of an argument is exposed. If judges did not come to the process was some clear, even strongly held, views, based on the experience they bring to the judicial process, they would be of little value as judges. Parties and their legal advisers assess how a case is going. They discern the approach of the judge. This may lead to a settlement. I am aware that there exists a different culture and the courts of some European countries. I understand that in some it is unheard of for the judge to intervene. I can only say that I do not agree. Of course, the judge may so behave that he steps outside his judicial role. If he does, it would be obvious. In my view, that is what is required, something quite outside the bounds of proper judicial behaviour to establish objective bias, based on judicial statements."

44. While I endorse these views as expressed by Fennelly J., I nonetheless harbour concerns that it is all too easy for judges, because of their long association with litigation and the legal process, to fail to recognise the extent to which strongly worded criticism or the forceful expression of their opinion on issues to be decided may have on litigants who come to court perhaps but once in the course of their lifetime. While, of course, they may be comforted by their legal advisors when told that the judge has not pre-judged the case and will remain open minded until the very conclusion of the litigation, some may lose confidence in the fairness of the process and end up extracting themselves from the proceedings on adverse terms.

45. It nonetheless remains the case that the guidance of Fennelly J. in *O'Callaghan (No. 2)* is particularly pertinent in the present case where Mr. Dore's submission was based upon his stated concern that the High Court judge, by the statements he made and the actions he directed on 10th October 2014, might raise in the mind of the reasonable person an apprehension that he may have prejudged the contempt issue or that the appellants might not receive a fair and impartial hearing on such an application.

46. The views of Fennelly J. in *O'Callaghan (No.2)* are indeed valuable in the context of the present proceedings because that was a case in which the Supreme Court was asked to consider the issue of objective bias in the context of prejudgment. The issue under consideration was whether, based on the evidence before the High Court, the reasonable independent observer would have apprehended that the Planning Tribunal had predetermined an issue as to the credibility of one particular witness, Mr. Tom Gilmartin, against another, Mr. Noel O'Callaghan, such that it should be restrained from continuing with its investigations in that regard. Fennelly J. in the course of his judgment endorsed the view that:

> "The normal judicial interventions, including debate and argument and, presumably, the expression of strong though necessarily provisional views on the subject matter of the litigation, would not normally be considered sufficient to justify a finding of bias."

47. At para. 80 of his judgment, he also helpfully summarised the principles relevant to a recusal application where the applicant relied upon prejudgment:-

> "80. The principles to be applied to the determination of this appeal are thus, well established:–
>
> (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;
>
> (c) 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;
>
> (d) objective bias 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 show prejudice, hostility or dislike towards one party or his witnesses."

48. The guidance given by McMahon J. in *Fogarty* and by Fennelly J. in *O'Callaghan* is also of some value in the context of comments or statements made by a judge on an ex parte hearing. However, I venture to suggest that where a judge expresses a strong view concerning the wrongdoing of a party who is not before the court on an ex parte hearing, it is hard to see how this could benefit the litigation process in the manner described by Fennelly J. when referring to the expression by a trial judge of their views in the course of an *inter partes* hearing.

49. When the ruling of Hedigan J. is assessed by reference to the aforementioned principles, I find myself obliged to conclude that he applied the correct test when faced with Mr. Dore's application that he recuse himself from hearing the contempt motion. Unfortunately, that application was made informally when, with the benefit of hindsight, it might with advantage have been made in a more formal manner, thus facilitating consideration by the judge of what is by now a large body of case law on the topic.

50. I find myself coerced to the conclusion that, the trial judge in the course of his ruling did not specifically direct his attention to the most important issue for his consideration, namely whether a reasonable person armed with knowledge of all of the relevant circumstances, and in particular what was said by him on 10th October 2014, might reasonably apprehend that the appellants might not receive a fair, balanced and impartial hearing on the contempt motion. He never considered Mr. Dore's submission that he may, in what he said, appear to have prejudged the conduct of the appellants as being in contempt of court and thus have been guilty of apprehended bias when objectively assessed.

51. It is important, therefore, for this Court to consider the import of what occurred on 10th October 2014 from the point of view of the reasonable person armed with knowledge of all of the relevant circumstances, including the nature of the contempt application, the proof that would be required for it to be successful and the potential consequences for the guilty party should that application prove successful.

52. However, before I address this issue, which will in effect determine the outcome of the appeal, I believe it is necessary to recognise and refer to some of the dangers and pitfalls attendant upon recusal applications. As Hardiman J. stated in *Goode Concrete*,

it is important to locate this important topic within what he described as "the overarching need to have a properly functioning system of justice, ensuring finality in the resolution of disputes". That this is necessary is because recusal applications have the potential to disrupt the ordinary conduct and management of litigation particularly where such applications are made, as occurred in the present case, on the date upon which an application or case is due to be heard or worse still, after the proceedings have commenced. Recusals invariably have adverse consequences for one or other party in terms of financial penalty and often lead to a substantial delay in the finalisation of the litigation. Thankfully, neither of these considerations are of any particular import in this case as the recusal, albeit made later than it ought to have been, was made before the commencement of what would have been a relatively short application which could, if necessary, have been rescheduled in relatively early course and without significant adverse consequences for the parties.

53. It is, perhaps, worth noting that it is exceptionally rare that a defendant against whom an interim injunction is granted will apply to the judge who made that order to recuse themselves from hearing the interlocutory application on the grounds that the order earlier made might suggest to the reasonable person that they had prejudged the issue they were about to determine. This is because judges are usually very careful when dealing with *ex parte* matters not to volunteer statements which may give the impression that they have prejudged the issue which has been brought before them. Their orders are rarely accompanied by language or commentary which might be considered hasty, excessive or prejudicial.

54. It is also true to say that it is desirable that applications to commit a party for contempt of court should, where reasonably possible, be heard by the judge who is most familiar with the proceedings, regardless of whether that application is to be made in the context of civil or criminal proceedings. I agree with Mr. O'Higgins' submission that the judge with the most knowledge of the facts of the case is likely to provide a more expeditious and efficient hearing of any such application. Of even greater import perhaps is that such a judge is often best placed to adjudicate on the issue for reasons to which I will now refer. That is not to state that any other judge should not, once fully conversant with all of the relevant material, be well capable of providing a just and fair result on such a hearing.

55. An example of the benefit of the judge best acquainted with the litigation hearing a related contempt motion is to be found in cases where a particular party may have demonstrated scant regard for the administration of justice by repeatedly flaunting orders of the court. Knowledge of such a party's prior litigation history may be of significant assistance in bringing about a just and fair result on any related contempt application. Another example is, as relied upon by Mr. O'Higgins in his submissions, the scenario in which a judge may discharge a jury in the course of a criminal trial because of a publication appearing in the course of the trial.

56. Notwithstanding the desirability of the judge having knowledge of the proceedings hearing any related contempt motion, if they made pronouncements in advance of such a motion, that might raise the apprehension in the mind of a reasonable man that the respondent might not obtain a fair hearing by reason of bias and/or prejudgment, then, regardless of the consequences from an administrative or financial perspective, the judge must recuse himself from hearing the motion. Administrative convenience and efficiency cannot trump the requirement that justice is not only done, but is seen to be done and it is to this imperative that the judge must yield. This point was emphasised by Denham C.J. in *Goode Concrete* when she quoted from the decision of the English Court of Appeal in *AWG Group Limited v. Morrison* [2006] 1 WLR 1163 at pp. 1166 and 1167:-

> "Para 6:
>
> Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is the fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighting various relevant factors in the balance."

57. Thus, while the proper and efficient administration of justice would, in unobjectionable circumstances, have suggested that Hedigan J. should hear any contempt motion having regard to his knowledge of the Ian Bailey litigation, if the established facts nonetheless demonstrated objective bias or prejudgment, any administrative inconvenience as might arise from the transfer of the motion to another judge is not a valid or material consideration.

58. It is worth observing at this point that the contempt issue which was pending before Hedigan J. was, in truth, a relatively straightforward one. It was not, as urged by Mr. O'Higgins S.C., a complex factual issue requiring the type of knowledge that the High Court judge would have had from his case management of the civil proceedings or the hearing of the Ian Bailey case itself. The affidavits were short and the exhibits discrete. There were no disputed facts. The publication of the articles was agreed as was the fact of the upcoming trial in the Ian Bailey case. The only real issue to be determined was whether or not either article was in breach of the *sub judice* rule. Undoubtedly, Hedigan J. might have found this contempt motion more straightforward than many of his colleagues unfamiliar with the litigation, but this was not, in my view, for the reasons already stated, a particularly relevant consideration.

59. Returning to the core issue on this appeal, the real question is, armed with knowledge of all of the relevant facts, what would the reasonable, objective and informed person think of the pronouncements made by the trial judge on 10th October 2014? Would they apprehend that, regardless of the public declaration made by the judge pursuant to Article 34.6.1 of the Constitution to administer justice without fear or favour and his own stated belief that he would be able to provide an impartial hearing, he had prejudged the issue or had demonstrated hostility or prejudice against the appellants such that they might not receive a fair hearing on the contempt motion?

60. For my part, I am satisfied that a reasonable person, having knowledge of all of the relevant circumstances, might well apprehend that the appellants might not receive a fair and impartial hearing on the committal motion because of the opinions expressed by the judge and his repeated stern criticism of the article and its publisher. In response to Mr. O'Higgins' submission, the judge stated that counsel had correctly characterised the article of 26th September 2014 as "reckless". He stated "it is a reckless and irresponsible article in the light of a case of great controversy which is due to come on before the courts".

61. While Mr. O'Higgins is correct that the judge did not state that the article of 26th September 2014, amounted to contempt of court, I venture to suggest that the reasonably informed observer might nonetheless consider his description of the article as "reckless and irresponsible" in the context of the case that was "about to come on" as indicative of his view that its publication, in light of the upcoming trial, might amount to contempt of court.

62. In these circumstances I cannot but conclude that the matters that might cause apprehension to the reasonable person would go

beyond the court's repeated criticism of the article as "reckless and irresponsible" and would necessarily include his charge that the appellants had engaged with a "reckless and irresponsible piece of journalism", and that he did so, having earlier stated that "all of the media with the exception of this particular article, in their coverage so far have I thought conducted themselves with great responsibility". It might reasonably be inferred from this comment that the judge had singled out the appellants from the rest of the media as lacking professional integrity.

63. Likewise, the reasonable person would have to consider the import of the trial judge's invitation to the Chief State Solicitor to issue a contempt motion in the event of there being any repetition of what had occurred. This is what he said:-

> "In the event that there's any further repetition of that I think I would strongly urge the State to bring proceedings before the court and certainly the court will deal with it as seems appropriate at the time having heard any submissions that might be made by the respondent party."

64. In my view, the reasonable person having knowledge of that invitation might well apprehend that the judge had already determined, as had been Mr. O'Higgins' submission on the *ex parte* hearing, that the article was impermissible and amounted to a contempt of court. I think it unlikely that their concerns would be assuaged by the fact that the trial judge indicated that any such future application as might be brought on foot of his pronouncement would be dealt with by him "having heard any submissions that might be made by the respondent party".

65. I am also satisfied that the reasonable person, knowing that the judge made his comments at a time when he had been specifically advised that it was not necessary for him to make any findings adverse to the appellant's interests would cause him to further call into question whether or not the magazine and its editor might be at risk of receiving something less than a fair, just and impartial hearing on the contempt application. All that the respondents had sought was that the court might reiterate its earlier warnings regarding media coverage of the proceedings and direct that any further reporting concerning that article should not take place before the trials were completed.

66. I am, of course, conscious of the fact that a judge faced with a recusal application does not treat the "reasonable person" as somebody who is over-sensitive or over-scrupulous. The apprehension relied upon by the applicant must be reasonable and realistic rather than fanciful or vague. However, I do not believe that those descriptions are apt to describe the concerns which might well be held by the reasonable person in the present case that the appellants might not be afforded a completely impartial hearing untainted by any possible pre-judgment.

67. Finally, in my view, it is of some importance that the reasonable person in considering whether the appellants were likely to be afforded a fair, just and impartial hearing, would have to know that all of the facts material to the contempt motion were, in reality, known to the judge on 10th October 2014, when he made his allegedly prejudicial pronouncements. This is not a case where, as discussed earlier, the judge on the *ex parte* application was only in possession of one side of the story such that the reasonable man might not apprehend that the judge had prejudged the issue. Here, there is no other side to the story as there is no factual controversy between the parties. There is no dispute but that the appellants published the article of which the respondents complain or of the fact that the proceedings in the Ian Bailey case were due to be heard some six weeks later. This is apparent by Mr. Prendiville's affidavit which does little more than state that the articles do not constitute contempt of court and/or are not in breach of the *sub judice* rule. Contempt in this case, insofar as the article of 26th September 2014, was concerned, was a legal issue to be determined by reference to the facts as they existed and were known to the judge on 10th October, 2014. In other words, in this case the judge's comments might realistically lead to the reasonable and informed onlooker to apprehend that the judge had prejudged the contempt issue.

Conclusion

68. I have to say that I sympathise with the position in which the trial judge found himself on 10th October 2014. He was dealing with an *ex parte* application in the course of which counsel for the respondents advised him that they had taken the view that the article was "thoroughly impermissible" and was "reckless" in the context of the imminence of the trial of the *Ian Bailey* claim and that the publication might become "a matter of more controversy later". His sure footedness was not helped by the fact that the appellants chose not to attend the hearing of which they had earlier been given at least informal notice. Thus, there was no one present to temper the view of the judge concerning the article so damningly criticised by the respondents.

69. I regret to say, however, that the repeated reference by the High Court judge to the article of 26th September 2014 as being "reckless and irresponsible" and his description of the article as "reckless and irresponsible journalism", when considered in the context of the inference to be drawn from his reference to the conduct of the rest of the media as well as unsolicited invitation to the Chief State Solicitor to bring a motion for contempt should there be any repetition by Phoenix, satisfies me that the appellants have met the threshold for objective bias as stated by Fennelly J. at paragraphs at para. 80(a) and (d) of his judgment in *O'Callaghan (No 2)*.

70. Accordingly, I am satisfied that a reasonable and fair-minded objective observer, who was not unduly sensitive, but who was in possession of all of the relevant facts, might reasonably apprehend that there was a risk that the High Court judge might not afford the appellants a fair and impartial hearing on the contempt motion. I am also satisfied that the reasonable person, when considering the statements made by the High Court judge in the context of an upcoming contempt motion, might reasonably apprehend that he had already prejudged the issue he was about to determine or was prejudiced to the point that he might not be in a position to afford a fair and impartial hearing.

71. While it is true to say that the High Court judge made no comment whatsoever on the latter of the two articles the subject matter of the contempt motion, there is great force in Mr. O'Higgins' submission that there is simply no basis upon which the appellants may argue that the High Court judge ought to have recused himself from hearing the contempt motion insofar as that article is concerned. However, from a practical perspective both articles are the subject matter of the one notice of motion. It would be highly irregular if the relief sought in one paragraph of one notice of motion was heard before one judge and another before a different judge. Administrative efficiency and proper use of court resources would, absent extraordinary circumstances, demand that all of the relief sought on one motion paper ought to be determined by the same judge. If there are valid reasons for a judge to recuse themselves from dealing with one of the reliefs sought, clearly they ought to recuse themselves from hearing the entire motion.

72. Accordingly, having regard to the comments he made on 10th October 2014, in relation to the first of the articles I am satisfied that, viewed objectively by reference to the by now established case-law the learned High Court judge ought to have recused himself from hearing the committal motion in its totality.

73. In the aforementioned circumstances, I would allow the appeal.