Neutral Citation Number: [2015] EWCA Civ 1297

Case No: A3/2014/1521

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (PROBATE)
CATHERINE NEWMAN QC SITTING AS A DEPUTY HIGH COURT JUDGE
HC12B04920

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2015

Before :

LORD JUSTICE SALES
MR JUSTICE COBB
and
SIR STANLEY BURNTON

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Between :

Gary Albert Watts	**Appellant**
- and -	
Christine Deborah Watts	**Respondent**

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- -

Mr Neil McLarnon, authorised by the Bar Pro Bono Unit, for the **Appellant**
Ms Penelope Reed QC & Mr Jordan Holland (instructed by **Thomas Eggar LLP**) for the **Respondent**

Hearing date: 10 November 2015

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Approved Judgment

Lord Justice Sales:

1. This is an appeal in two actions which relate to a dispute between a brother and a sister over their late mother's estate. The actions were brought by the sister, the respondent to this appeal, against her brother, the appellant, to dispute the due execution of a will purporting to have been made by the mother in 2011 to replace an earlier will made by her in 1999 ("the probate action") and for relief under the Inheritance (Provision for Family and Dependants) Act 1975 ("the Inheritance Act proceedings"). The trial took place before Catherine Newman QC, sitting as a part-time deputy High Court Judge. Ms Newman is a practising barrister.

2. In the event, in a judgment handed down on 12 March 2014, in the probate action the judge pronounced against the validity of the 2011 will and in favour of the 1999 will, which she directed should be admitted to probate. This meant that it was unnecessary to grant relief in the Inheritance Act proceedings, though the judge indicated that she would have done so had the 2011 will been found to have been valid.

3. At the commencement of the trial an issue arose whether the judge should recuse herself on grounds of appearance of bias, on the footing that in the course of her practice as a barrister she was engaged in long-running litigation in which she was leading the barrister appearing as counsel for the sister, Mr Jordan Holland. It was said on behalf of the brother that this gave rise to a legitimate concern that the judge would favour the sister in deciding the case. The judge heard argument on the brother's application that she should recuse herself and dismissed it, with reasons to follow. She gave her reasons for dismissing the application in a short separate judgment handed down on 14 February 2014 after the close of the trial hearing, which took place on 11, 12, 13 and 14 February 2014.

4. The appellant sought permission to appeal the orders made by the judge on the basis that the judge had erred in her decision on the merits of the case and also on the basis that they should be set aside on grounds of appearance of bias. Briggs LJ refused permission to appeal in relation to the merits but granted permission in relation to the appeal in respect of alleged appearance of bias.

5. The court is indebted to all counsel appearing on the appeal for their research and submissions. We are particularly indebted to Mr McLarnon, who is acting for the appellant on a *pro bono* basis and has put a great deal of time and effort into the preparation and presentation of the case.

The factual background to the recusal application

6. As is usual practice, the judge was assigned a reading day (10 February) on the day before the trial was due to begin. On reading into the case she realised that Mr Holland was instructed for the respondent and that she was leading Mr Holland in other, completely unrelated litigation. Mr Holland and the judge do not practise in the same chambers.

7. In the interests of transparency and to provide the appellant with an informed opportunity to make any objection to her sitting to hear the case, on the afternoon of 10 February the judge caused her clerk to send an email to the appellant's representatives to inform them that she was leading Mr Holland "on a separate case

and has been doing so for the last year." I think this was a sensible thing to do. Appearances matter and it was better to have this connection, albeit limited in nature, out in the open rather than run the risk of it emerging much later, after the end of the case, when it might have appeared more sinister than it really was: see *Davidson v Scottish Ministers* [2004] SCLR 991, HL, at [19] per Lord Bingham. The judge gave no further detail about the case in which she was instructed with Mr Holland.

8. In the probate action and the Inheritance Act proceedings Mr Holland was acting under a conditional fee agreement ("CFA"), so that whether he was paid or not in relation to the case would depend upon its outcome. This was pointed out to the judge by Mr McLarnon on the recusal application.

9. On the first day of the trial, 11 February, Mr McLarnon made an application for the appellant that the judge should recuse herself by reason of apparent bias. The principal thrust of his argument was that there were objective grounds for legitimate concern that the judge might be too generous to Mr Holland (and hence too generous to the respondent, his client) in the trial, to protect Mr Holland from disappointment associated with losing the case – which could be expected to be particularly great because of the personal financial implications of that for Mr Holland by reason of the CFA arrangement under which he was acting for the respondent – and so avoid damaging their future working relationship in the other litigation in which they were instructed to act together.

10. The respondent resisted the application. She had come to court ready to proceed with the trial and wished to avoid the expense, frustration and delay which would arise if the judge recused herself.

11. The judge heard argument on the recusal application at the outset of the hearing on 11 February. She made up her mind at that stage and announced her decision, which was to dismiss the application, with reasons to follow at the end of the trial. The trial then went ahead, with the eventual result in favour of the respondent referred to above.

12. On 14 February, the day after the hearing had finished, the judge handed down her written reasons for her decision to dismiss the application to recuse herself.

The judgment on the recusal application

13. The judge directed herself by reference to the correct test in relation to appearance of bias, as laid down in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": [103] per Lord Hope of Craighead. In this way the test at common law for apparent bias has been assimilated with that in Article 6 of the European Convention on Human Rights.

14. The judge also reminded herself of the guidance given by Lord Steyn in *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2004] 1 All ER 187 at [14]:

> "... Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such

> an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* (2000) 201 CLR 488 at 509 (para. 53), by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious";

and of his citation with approval at [22] of the view that

> "... What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

15. In addition, the judge referred to the recent guidance given by this court in *Resolution Chemicals Ltd v H. Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 WLR 1943 regarding application of the principle laid down in *Porter v Magill.*

16. The judge then said this at [10]:

> "10. ... in my judgment, there is no real possibility that a fair minded and informed observer would think that a Judge, even a deputy, would be biased in favour of another barrister who, on a completely different case, works in a team as a junior to the Judge. It would be obvious to such an observer that my experience in the conduct of trials, the practice of law and the assessment of evidence is much greater than that of a barrister called to the Bar thirty years after my own call and in the team in which we do work together I am the senior and he is the junior. If there is any disparity in authority between us, a fair minded person would think that it is I who command the authority, not counsel for the claimant. Authority aside, there is no real reason why a Judge would favour such a person. We share no common financial or other interest in the outcome of either of the two cases before the court, discretionary or otherwise. Favouring counsel for the claimant in this case would result in no advantage for either of us in the conduct of the case in which we are members of the same team. Above all, I cannot accept that any fair minded informed observer would think that there is a real possibility that I would lean in the claimant's favour against the weight of the evidence which I hear or fail to weigh the arguments properly so that counsel for the claimant of could recover a fee by winning the case."

Discussion

17. On the appeal, Mr McLarnon criticised the judge on three grounds: (i) for the paucity of information provided by her about her involvement with Mr Holland; (ii) for announcing her ruling at the commencement of the hearing but only giving her reasons at the end of it; and (iii) for the decision not to recuse herself, which he maintained was unlawful because of the appearance of bias which he submitted she presented in the circumstances. I deal with these in turn.

18. In relation to ground (i), Mr McLarnon relied in particular on the following guidance. In *Davidson v Scottish Ministers* Lord Bingham said at [19] that where a judge discloses matters which would or might provide the basis for a reasonable apprehension of lack of impartiality, "It is very important that proper disclosure should be made ..., first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment." Similarly, in *Jones v DAS Legal Expenses Insurance Co.* [2003] EWCA Civ 1071 at [35] this court emphasised that where a judge becomes aware of circumstances which might give rise to an appearance of bias and a real as opposed to fanciful objection being taken by a notional fair-minded observer and an application for recusal might be made, "The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties."

19. Mr McLarnon submitted that provision of full material in this sort of situation is particularly important because parties are not permitted to question the judge about the position, and so are not able to seek and obtain the full facts if they are not disclosed by the judge of her own volition at the outset. In that regard, Mr McLarnon referred to *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, CA, in which at p. 472A-B the court said "The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists." Mr McLarnon further submitted that the inadequacy of the disclosure by the judge serves to reinforce his main ground of appeal, that she presented an objective appearance of bias.

20. I do not agree with Mr McLarnon's criticism of the extent of disclosure made by the judge. The disclosure required to be given is of the material facts, not every background detail: see *Resolution Chemicals* at [42]. The judge did disclose the material facts. Armed with this information, Mr McLarnon was fully equipped to make the relevant application. No further disclosure was required.

21. Mr McLarnon submitted that the disclosure was inadequate because it did not reveal the subject matter of the litigation in which Mr Holland and the judge were instructed, so it was possible that the judge might have an interest in giving a ruling in the present case which might assist them in that other case. Additional disclosure should have been given to allay any such fears.

22. This argument proves too much. I cannot accept it. The notional fair-minded and informed observer, knowing the professional standards applied by part time judges

drawn from the legal profession, would understand that any deputy judge who found that she was being asked to try a case in relation to subject matter where there was a real risk that her ruling in the case (which would of course acquire a degree of authority as the ruling of a court) might have a bearing on the arguments to be advanced in other ongoing litigation in which she was involved as counsel, would immediately for that reason recuse herself. In such a case it would be clear that her interest as a barrister would conflict with her duty as a judge and, since that would be clear, it would be obvious that she could be expected to identify such a conflict and then act ethically and in accordance with her professional obligations by recusing herself. This would be so whether or not she happened to be instructed along with another counsel in the case, and whether or not that counsel was now appearing as counsel in the case in which she was to sit as a deputy judge. A part time judge does not have to reveal details of every ongoing piece of litigation in which she is professionally involved as counsel in order to allay suspicion whether any of them concern subject matter which overlaps with the case to be tried by her. On the contrary, the notional fair-minded and informed observer would not consider that there is any real risk that there is any such conflict of interest, since if there were the deputy judge could naturally be expected to identify the problem and recuse herself without more. The addition of the extra feature that the deputy judge might be leading other barristers in such other ongoing litigation does not change this analysis.

23. I should also mention that the judge was bound by obligations of confidentiality owed to her client in the other case and was therefore not at liberty to go further than she did unless there was a strong public interest to do so. There was none, for the reasons I have given. To my mind, it is clear that she has behaved entirely correctly in giving the disclosure that she did.

24. In fact, any residual concern the appellant might have had that the other litigation in which the judge was involved trespassed upon the subject area of the proceedings which she was to try could have been resolved very simply either by asking Mr Holland or by raising the matter with the judge herself. Mr McLarnon's reference to the passage in *Locabail* at p. 19A-B, set out above, as precluding such an approach is misplaced. The point being made there is that a judge cannot be questioned about influences upon her with a view to making out a case of actual bias; but if a party has a reasonable request to make of a judge for relevant factual information in the context of an argument that an appearance of bias exists, in the absence of which the application cannot be made on the proper fully-informed basis which is required by the law, that passage does not prevent raising the difficulty with other counsel or the judge. This is not to encourage requests to judges to provide further information in relation to recusal applications: as I have emphasised above, a judge only has to provide relevant information which is material to the application and will in almost all cases have done just that. But there is no rule of law which prevents a party asking politely for more information if it exists and explaining why disclosure of it is required in order to enable the recusal application on grounds of appearance of bias to be advanced in a properly informed and effective way.

25. I record here that we asked Mr Holland, through leading counsel, whether the subject matter of the other litigation in which he was instructed with the judge overlapped with the subject matter in the present proceedings and he confirmed it did not. No doubt the judge would have given the same confirmation had the point been raised

with her. But for the reasons given above this was not information which she was required to state or volunteer.

26. Under ground (ii), Mr McLarnon contends that the judge erred by reserving her reasons for refusing the recusal application until the end of the hearing. He submits that this left the appellant in the difficult position throughout the trial of believing that he had good grounds for objecting to the judge sitting in the case, knowing that she disagreed, but not knowing why: the appellant was subjected to a trial without any certainty that non-recusal on the part of the judge was justified. This again, Mr McLarnon says, reinforces the objective impression that the judge might be biased and might be behaving unfairly.

27. I reject this submission. In my view it was correct in the circumstances for the judge to give her decision with reasons to follow later, so that the trial could proceed without further delay and to minimise the risk that it might have to run over, so adding to the cost. The test is not one of how the individual litigant might feel subjectively, but an objective one of how the notional fair-minded and informed observer would view matters. Such an observer would not think that this way of proceeding displayed any disposition of unfairness towards the appellant. It only gave rise to the appearance of a judge willing to make a sensible case management decision in accordance with the overriding objective set out in CPR Part 1. Proceeding in this way was in line with the approach adopted by this court in *Resolution Chemicals*, in which the court considered an appeal in which permission had been granted for an appeal against the judge's refusal to recuse himself and then gave its ruling dismissing the appeal with reasons to follow, so that the trial could proceed straight away and before the court's reasons were handed down: see [4]. There was no suggestion by this court in that case that this would create any difficulty in terms of appearance of bias, simply because the disappointed applicant would not know until after trial the reasons why its arguable appeal for recusal of the trial judge had been unsuccessful. I cannot see that any difficulty arises by reason of a court proceeding in this way.

28. Finally I turn to ground (iii) and the main substance of the appellant's case. I would dismiss the appeal for the following reasons, which essentially reflect the reasons given by the judge below:

    i) The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved, reinforced by fears of severe criticism by peers and potential disciplinary action if they are departed from: *Taylor v Lawrence* [2001] EWCA Civ 119, [33]-[36]; *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528, [61]-[63]. These aspects of the legal culture of the Bench and legal professionals are not undermined by the fact that some litigation is now funded by means of CFAs;

    ii) The notional fair-minded and informed observer would understand that a part-time judge's approach to the case she is trying and to her relationships with other professionals will be governed by these professional standards. There is no reason to think that a judge would allow her professional training and ethics to be overridden by a concern not to upset a junior counsel she is leading in

other litigation. Moreover, the judge would know that the junior counsel would himself understand that she is bound by strict professional standards, and hence would have no expectation that she would do anything other than act in accordance with them. So the judge would not expect any disgruntlement or difficulty to arise in her relationship with the junior counsel even if she makes a decision adverse to him in the case she is trying. Accordingly, the idea that the judge would adjust her behaviour as judge to avoid upsetting the junior counsel is far-fetched indeed. The notional fair-minded and informed observer would not consider that there was any genuine possibility of this occurring;

iii) There is a danger in cases of this kind of multiplying reference to authority in the hope of finding analogies on which to found arguments one way or the other, and we were presented with a plethora of authorities to address what is really quite a simple matter. However, it may be observed that a number of authorities indicate strongly that it could not be said that there is any objectionable connection between the judge and counsel for the respondent sister in this case. In *The Gypsy Council v United Kingdom* (2002) 35 EHRR CD 96 the European Court of Human Rights dismissed as manifestly ill-founded an argument that Article 6 (right to a fair trial) was infringed on grounds of appearance of bias where a part-time deputy judge in a case involving gypsies on one side and a public authority on the other was a barrister in practice (David Pannick QC) who had been instructed as counsel for the government in numerous cases before the Court of Human Rights involving gypsies, in which he had argued that public authorities had not infringed the rights of gypsies: p. 101. The deputy judge in that case remained in practice and might hope to be so instructed by the government again, but still it was clear that no appearance of bias arose. In *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113, Rix J dismissed an application to remove an arbitrator on grounds that "circumstances exist that give rise to justifiable doubts as to his impartiality" (section 24 of the Arbitration Act 1996) where the arbitrator was a QC practising in the same chambers as counsel for one of the parties in the arbitration. It is true that the judge directed himself by reference to the then current standard for assessing an appearance of bias set out in *R v Gough* [1993] AC 646, which was adjusted in *Porter v Magill* to bring it into line with the test under Article 6, but I do not think that is significant for the analysis in the case. The position is underlined by *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242; [2007] 1 WLR 370. In that case, a personal injury claim was tried by a practising barrister and part-time judge sitting as a recorder, who was the head of the chambers to which both counsel for the claimant and counsel for the defendant belonged and who had also acted for the defendant or associated companies in the past and might do so in the future. This court rejected the suggestion that an appearance of bias arose by reason of the connection between the recorder and counsel through being members of the same chambers: [17]-[19]; it was only because the recorder regarded himself as having an on-going barrister-client relationship with the defendant that this court held he should have recused himself. Similarly, in *Resolution Chemicals* at [46] this court referred to the idea that the reasoning in *Lawal* "would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a

case in which a more senior member of his or her chambers was acting for one of the parties" as something which it regarded as obviously untenable;

iv) As both the *Taylor v Lawrence* judgments and these other decisions indicate, relationships between members of the Bar, or between members of the Bar and their clients, can be much closer than that between the deputy judge and counsel for the respondent in the present case, yet because the relationships are mediated through known professional standards no appearance of bias arises.

Conclusion

29. For the reasons given above, I would dismiss this appeal.

Mr Justice Cobb:

30. I agree.

Sir Stanley Burnton:

31. I also agree.