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"Robust" case management and Judicial Bias

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Christopher Sharp QC examines some recent appeals from refusals by judges to recuse themselves after expressing strong opinions during case management and interlocutory hearings, and the principles which the Court of Appeal has applied.

July 2014 has seen several cases reported where the Court of Appeal has had to address the question of apparent bias from judges purporting to exercise their case management or interlocutory functions in a "robust" way. The Court has had to warn against judges going too far, while recognising the fine line that has to be trodden.

The principles governing the test to be applied in cases where it is alleged that a judge has manifested apparent bias are set out in *Porter v Magill* [2002] AC 357. The House of Lords approved the test to be applied in such cases in the following terms [at paragraphs 102 and 103]:

> 'The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased.'

This reflected the importance of justice "being seen to be done" and rejected the previous tests of "reasonable likelihood" and "real danger" of apparent bias which tended to concentrate on the court's (actual) assessment of the facts. This new test is not without its difficulties. What characteristics or degree of understanding should be attributed to the 'fair minded observer'? How familiar should she be assumed to be

with the judicial or forensic process? Given that the theoretical observer is a member of the public, the perceptions of a participant party will not be directly taken into account, but should they be?

In *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, at 787 it was held by the House of Lords that the "fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny." Case law (such as *Brunei Darussalam v Prince Jefri Bolkiah* [2007] UKPC 62) suggests (perhaps rather unrealistically) that the observer should be aware of the nature of the judicial oath to do right to all manner of people without fear or favour, affection or ill-will. In *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 In Lord Steyn's approved Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488, 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

More recently, however, in *Lesage v Mauritius Commercial Bank Ltd* [2012] UKPC 41, the Privy Council highlighted the importance of looking at the proceedings as a whole and, while looking at the particular facts, questioning whether, overall, the proceedings would have created at least the impression of bias and unfairness. Lord Kerr said:

> 51. Whether, in the mind of the informed observer, the failure to consider the propriety of their continuing to hear the case creates a possibility of bias is to be judged both prospectively and retrospectively. The actual conduct of the judges during the trial is to be examined therefore to see whether it supports or detracts from the suggestion that there was the appearance of possible prejudice

The revolution in the management of civil, family and criminal proceedings which has developed in recent years has led to a requirement for judges to take a far more pro-active role in managing cases as they progress to trial. This requires judges to identify and refine the issues, identify the evidence necessary to resolve the key issues, resolve issues where possible at "issue resolution hearings", and generally to provide a steer to the litigation.

A judge hearing a family case has a duty to further the overriding objective of dealing with cases justly (having regard to any welfare issues) by actively managing the case [FPR 2010, rr 1.1(1) and 1.4(1)]. Active case management involves a range of matters set out at FPR 2010, r 1.4(2) which include identifying the issues at an early stage [r 1.4(2)(b)(i)] and deciding promptly which issues need full investigation and hearing and which do not [r 1.4(2)(c)(i)].

In civil cases similar duties fall upon the Court under CPR 1.1(1) and (2) and 1.4(1) and especially 1.4(2)(b), (c) and (d). These powers are further set out at CPR 3.1.

There is a very real danger that in this process judges are going to be seeing issues without the benefit of all the evidence (which may not yet have been gathered), or without the benefit of a full understanding of both sides of an argument. The judge therefore has a fine line to walk between "robust case management" and appearing to jump to conclusions which may infect the whole process with the appearance of bias.

A striking feature of *Re Q (Children*) [2014] EWCA Civ 918 was that each party, with the exception of the children's guardian, had issued a Notice of Appeal complaining about one aspect or another of the judge's handling of a fact finding exercise in an application for a care order. A total of no less than 7 Notices of Appeal had been issued. The Court decided the case on the preliminary issue of whether the judge should have acceded to the mother's application for him to recuse himself.

The judge, at an early case management hearing. made no secret of his doubts that the local authority was going to find it difficult to make out the s.31 threshold. His views were however couched in comparatively cautious terms

> '… it seems to me that the local authority could be, I am using that word advisedly, could be in some difficulty in getting over the threshold in this case.'
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> '… at the moment, on the basis of what I have read in those police papers, I very much doubt, and I put it no higher that this, but I very much doubt that threshold would be made out. I can put it no higher than that at the moment, because obviously I need to give the parties an opportunity to

investigate that, and the local authority, perhaps, to file further threshold documents'.

McFarlane LJ giving the leading judgment observed:

50. Such expressions of judicial opinion, given the need for the judge to manage the case and be directive, are commonplace and would not be supportive of an appeal to this court based upon apparent judicial bias. The question in the present appeal is whether the other observations made by the judge, and the stage in the overall court process that those observations were made, establishes circumstances that would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased in the sense that he had formed a concluded view on the mother's allegations and her overall veracity.

The evidence relied heavily on the mother's allegations against the father and at the same case management hearing the judge had called for a police file which he then read but did not share with the parties. He then expressed strong views about several of the parties and the likelihood that their evidence would be credible.

MacFarlane LJ observed of the judge's function in such cases:

47. The task of the family judge in these cases is not an easy one. On the one hand he or she is required to be interventionist in managing the proceedings and in identifying the key issues and relevant evidence, but on the other hand the judge must hold back from making an adjudication at a preliminary stage and should only go on to determine issues in the proceedings after having conducted a fair judicial process.

48. There is, therefore, a real and important difference between the judge at a preliminary hearing inviting a party to consider their position on a particular point, which is permissible and to be encouraged, and the judge summarily deciding the point then and there without a fair and balanced hearing, which is not permissible.

In the instant case the Court, having reviewed the observations made by the judge, was clear that a fair-minded and informed observer would have concluded that there was a real possibility that the judge had indeed formed a concluded view on the mother's allegations and her overall veracity. The CMH was "seriously flawed", the judge having:

> "strayed beyond the case management role by engaging in an analysis, which by definition could only have been one-sided, of the veracity of the evidence and of the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process."

McFarlane LJ however also observed that:

> I am keenly aware of the need to avoid criticising a judge who is doing no more than deploying robust active case management. There is, as I have described, a line, and it may be a thin line in some cases, between case management, on the one hand, and premature adjudication on the other. The role of a family judge in this respect is not at all easy and I would afford the benefit of the doubt to a judge even if the circumstances were very close to or even on the metaphorical line.

In the instant case however, the judge had stepped well over it.

A few days later the Court of Appeal had to deal with a father's appeal in contested wardship proceedings: *In the Matter of K(A Child)* [2014] EWCA Civ 905. This appeal concerned (*inter alia*) another instance where a judge had refused to recuse herself from the proceedings and sentenced the father to 18 months imprisonment for contempt (for refusing to arrange the return of his child to the jurisdiction). He contended that in earlier hearings the judge had twice threatened to commit him to prison for a substantial period of time and on numerous occasions had made what the father described as prejudicial comments. McFarlane LJ applied the principles in *Porter v Magill* . While expressing no doubt that the judge, in making the observations she had

made, was seeking to bring home to the father just how important it was to comply with orders of the court, and out of deep concern for the child's welfare, he said: "That does not, however, deal with the issue of apparent bias." He held that the judge had not addressed the father's complaints when rejecting the application for recusal, and had not explained why, notwithstanding her earlier comments, she had not already decided that the father was in deliberate breach of her orders and should be sentenced to a substantial period of imprisonment.

The third case (*In the Matter of Ian Stuart West* [2014] EWCA Crim 1480) arose from criminal proceedings in which a defence barrister was found by the Court of Appeal (Criminal Division) to have been guilty of conduct which "constituted wilful and deliberate disobedience of an order of the court as an act of defiance". It was serious misconduct which was wholly inimical to the proper discharge of his professional duties and in total disregard of his duty to the court. The barrister had refused to have a conference with his client to resolve issues arising from a police interview, failed to attend an adjourned hearing and refused to provide a written explanation for his conduct, but instead demanded an apology from the judge. The Court of Appeal felt he had "shown breathtaking arrogance and his demand that the judge apologise was more than merely impertinent". In the event, however, the Court allowed his appeal from the finding of contempt on the basis that the judge had followed the wrong procedure under the Criminal Procedure Rules 2013.

One issue, however, which arose, was that of whether Judge Kelson QC should have recused himself from the contempt proceedings. Sir Brian Leveson P said at [27]:

> *Porter v Magill* [2002] 2 AC 357 makes it clear that, save where actual bias is established, personal impartiality is to be presumed but the question whether the material facts give rise to a legitimate fear that the judge might not have been impartial must be determined on the basis whether a fair minded observer would consider there to be a real danger of bias. Reflecting the common law, CPR 62.8(5)(b) provides that the court which conducts the enquiry may include the same member of the court that observed the conduct unless that would be unfair.

In the circumstances of the case the Court concluded the *Porter v Magill* test was not made out:

> There is no doubt that the judge had taken the view that the appellant had been impertinent to him but it goes far too far to suggest that this view demonstrates an inability impartially to determine whether the conduct constitutes a contempt of court: it is not merely the words uttered (which can be read on the transcript) but also the way in which this exchange occurred that is relevant: only the judge was in a position to assess that feature. The discretion to deal with contempt summarily properly remained with the judge: this complaint is rejected.

It follows that it is not in every case where the contempt is in the face of the Court that the judge must pass the matter to another judge to adjudicate. It will depend on the particular circumstances and the impression that would be made on the notional observer as to the fairness of the process.

The conflict between the court and the advocate in that matter had arisen as a consequence of the judge wanting counsel to explore with his client the likely challenge (if any) to a police interview which the judge suggested provided the defence with some difficulty. This again raises the question of case management and the boundaries of what is permissible. In this case the Court of Appeal felt the judge was on the right side of the line:

> Pausing at this point, the judge had proceeded with perfect propriety: if case management is to have any purpose, it is to understand the issues in the case so as the better to identify how much court time will be needed and, in certain circumstances, to make robust orders to ensure that efficient and effective progress is made: it is quite clear that there was a full summary of the interview and absolutely no reason why counsel should not be able to identify whether there was a challenge to admissibility. It is simply not good enough for counsel simply to assert that a defendant is not guilty and that is the end of the matter.

Conclusion

The approach in *Lesage* although not referred to in any of the three cases mentioned above, appears to have filtered through to the practical application of *Porter v Magill*, that is to say, it will be necessary to look to the particular circumstances of the case, look at the overall fairness, prospectively and retrospectively, and apply the test of a notional informed observer's perception of fairness.

What these cases do remind us, however, is that it is essential that judges, seized of matters at an interlocutory stage, despite the need for firm guidance (or "robust case management"), differentiate between identifying the relevant issues on the one hand and seeking to reach conclusions upon those issues, on the other, before all the evidence is available or before full argument has been heard. As McFarlane LJ said in *Re Q (Children)*:

> "There is, as I have described, a line, and it may be a thin line in some cases, between case management, on the one hand, and premature adjudication on the other."

The consequences if unfairness or bias is established, are significant cost and administrative inconvenience. However in *Lesage* the Privy Council was clear that these consequences have to be faced. Lord Kerr said:

> 59. In a case where it has been concluded that there is the appearance of bias and unfairness, however, these are consequences which simply have to be accepted. They cannot outweigh the unanswerable need to ensure that a trial which is free from even the appearance of unfairness is the indispensable right of all parties and is fundamental to the proper administration of justice. In *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 6 Mummery LJ dealt with this issue thus:
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> > "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 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 weighing various relevant factors in the balance."

60. The Board endorses this approach. Where the appearance of unfairness or bias has been established, ordering a new trial free from the taint of that manifestation is unavoidable.

The advocate can, however, seek to avoid such problems arising. Careful preparation for case management hearings, and realistic appraisal of those issues which are relevant to resolving the case justly and proportionately, are steps which the advocate must take to assist the Court and maximise his client's prospects of a satisfactory outcome.

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