

JERSEY / JUDGMENT

AG -v- Sinel and Chiddicks

[2014] JRC 126B (09 June 2014)

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judgment

the commissioner: 1. There is before me an application that I, a Commissioner, should recuse myself from presiding over the Royal Court's determination of a disciplinary complaint against two Jersey advocates Mr Sinel and Mr Chiddicks. The complaint was referred to the Attorney-General by the Disciplinary Committee of the Law Society under Article 23(1)(c) of the Law Society of Jersey Law 2005 and by the Attorney General to the Royal Court under Article 25(b) of the same law. It is a reasonable inference that it raises in the view of the Committee and Senior Law Officer matters of some substance. 2. A Commissioner's role vice the Bailiff in presiding over the Royal Court in such a case is defined by statute. The Royal Court (Jersey) Law 1948 : "15 Powers of the Bailiff and Jurats

- (1) In all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole judge of law and shall award the costs, if any. (1A) For the purposes of this Law, a question of procedure is one of law.
- (2) In all causes and matters, civil, criminal and mixed, other than criminal causes tried before the Criminal Assizes, in which causes the jury shall, as heretofore, find the verdict, the Jurats shall, subject to Article 17(2), be the sole judges of fact and shall assess the damages, if any.
- (3) In all criminal and mixed causes, the Jurats shall determine the sentence, fine or other sanction to be pronounced or imposed.
- (4) In all causes and matters, civil, criminal or mixed, the Bailiff shall have a casting vote whenever the Jurats -
 - (a) being 2 in number, are divided in opinion as to the facts or as to the damages to be awarded or as to the sentence, fine or other sanction to be pronounced or imposed; or
 - (b) being more than 2 in number, are so divided in opinion with respect to any one or more of the matters specified in sub-paragraph (a) that the giving of a casting vote is necessary for the finding of a majority opinion. 16 Quorum of the Superior Number

- (1) Subject to paragraph (2), the Superior Number of the Royal Court shall for all purposes, criminal or civil, be duly constituted only if it consists of the Bailiff and not less than 5 Jurats." In brief summary the Commissioner must direct the Jurats as to the law which is exclusively for him (or her). The facts (and decision as to any sanction) are primarily for the Jurats. The Commissioner's involvement in facts is subsidiary, and will, unless there is an even number of Jurats split into two camps of the same size (in which case he will have the casting vote), he will only be called upon to exercise such vote in exceptional circumstances.
3. The sole basis upon which the application is made is that between 2005 and 2011 when I was, in a previous judicial incarnation, the senior Ordinary Appeal judge in Jersey I sat on a number of occasions with the members of the Court of Appeal, Jones, Steel and McNeill ("JSM JJA") who are the authors of the complaint. It is not asserted that in consequence (or for any other reason e.g. my treatment of Advocate Sinel in his occasional appearances in Court before me) I am actually biased against either of the two Advocates but rather that to cite the now standard test set out in the judgment of Lord Hope at para 103 of *Porter v Magill*
- [2002] 2 AC 357 :- "...whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." 4. It may seem a paradox that a Judge should be disqualified from sitting on a case where he has no actual bias; but in this context it is established beyond doubt that appearance is as important as actuality. Justice must not only be done but be seen to be done. As it was put in *Syvret v AG*
- [2009] JLR 330 , by Montgomery, J. A. at para 11: "A judge will be disqualified from adjudicating on a case where, even though no actual bias on his part is shown, the circumstances are such as to give rise to an appearance of bias, that is, to an impression that the judge may be influenced for or against one or other party for reasons extraneous to the legal and factual merits." 5. The High Court of Australia in *Ebner v Official Trustee in Bankruptcy*
- [2013] JRC 263 ("Ebner") has provided useful guidance as to the rationale for this austere approach, as to its key elements and as to how the existence or otherwise of apparent bias should be assessed. "The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror. (para 7) The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it

requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.(para 8)" 6. As to the last of these matters i.e. the assessment the first step is to consider the circumstances said to give rise to apparent bias. I have outlined the circumstances relied on by the Advocates in paragraph 3 above. To quote from Advocate Kelleher's skeleton argument "This gives rise to a reasonable apprehension of bias because of the close and long association between the Commissioner adjudicating the Complaint, and the Complainants, as members of the same judicial body" . The establishment of such circumstances is a necessary but not a sufficient ground for disqualifying a Judge. I shall proceed on the basis that the Advocates have successfully taken the first step without expressly finding that they have done so. 7. The second step rightly, in my respectful view, said to be "no less important" is to consider whether and, if so, how the existence of such circumstances could be thought capable of influencing the Judge in the matter before him. This requires identification and examination of that matter. The association of a judge with the alleged source of potential bias must be of a kind that is relevant to the disposition of the case in question, that is to say, as was put by Commissioner Sumption in *Syvret v Chief Minister* at para 35: "...it is necessary to identify what it is that might lead the judge to decide the case otherwise than on its merits and that there must be a logical connection between that matter and his potential deviation from deciding the case on its merits." 8. The Complaint alleges (at paragraphs 1 and 2) that Advocates Sinel and Chiddicks each: i) deceived or ii) knowingly or recklessly misled the Court of Appeal by: "failing to inform the Court of Appeal in the documents that [they] submitted to it or during oral submissions on behalf of Leeds United Football Club Ltd. ... that a protective writ had been issued on behalf of [their] client in England on or about 28 October, 2011, and when such fact was material and ought reasonably to have been considered to be material to the task that the Court of Appeal had to perform." In addition, "in failing to inform the Court of Appeal of the said protective writ, [they] each failed to uphold the dignity and high ethical standards of the legal profession and further failed to assist the Court of Appeal in the administration of justice". Reducing the factual complaint to its bare bones, it is said that the Advocates omitted to draw the attention of JSM JJA to a particular fact which was germane to the very issue which JSM JJA had to decide and that they were thereby misled. 9. It should be noted that two matters of primary fact are common ground; first that there was such particular fact i.e. the protective writ; second that the Advocates did not draw it to the attention of the JSM JJA. (It is not suggested that either positively denied its existence to JSM JJA.). 10. Given that common ground, the threshold issues for the Royal Court will be; first what was the issue that the JSM JJA had to decide; second was the non-disclosed fact germane to

that issue. The first is a question of fact, the second one of judgment. The first may itself be uncontroversial; the second obviously will not be. As Advocate Kelleher's written submissions state unambiguously "It is disputed by Advocates Sinel and Chiddicks that the issue of the protective writ was in any way germane or relevant to the issues before the Court of Appeal" . 11. In my view it is critical to the recusal application that the resolution of neither threshold issue depends upon the subjective perception of JSM JJA. JSM JJA may have thought that they were misled. The question for the Royal Court will be whether in fact they were misled. The finding as to whether or not JSM JJA were misled will depend on whether the Royal Court itself determines that the non-disclosed fact was germane to the issue that JSM JJA had to decide. 12. Advocate Kelleher representing the Advocates in his written submissions said that the Royal Court will have to assess the 'credibility' of JSM JJA; in his oral submissions he said that the Royal Court will have to assess their 'veracity' . In my view this is an inaccurate use of those two concepts. Advocate Kelleher referred in his written submissions to the "evidence" of JSM JJA in inverted commas; this itself underscored the absence of any collision of evidence in the true sense of the word between JSM JJA and the Advocates. If, which I repeat, is not the position, the Advocates' defence to an allegation of non-disclosure of a material fact was that it had been disclosed in the course of oral argument , then the veracity or credibility of JSM JJA in so far as they disputed that such disclosure was made, would be in issue. The Royal Court would have to choose between two versions of the same key event, and I accept that the contention that, because of my previous professional relationship with judicial colleagues, I might reasonably be thought to be predisposed to accepting their version might have some force (I do not need, however to decide this question which is entirely hypothetical as far as the complaint is concerned). But the resolution of the issue before the Royal Court does not depend upon acceptance or rejection of primary facts relied on the Court of Appeal. As to those there is no dispute. 13. Advocate Kelleher suggested that it was possible first that one or more Jurats might conclude not only that JSM JJA were not misled but that they did not actually believe that they had been misled and second that such conclusion might be articulated in circumstances where I had to exercise a casting vote, so compelling me either to endorse or reject that conclusion and where I would be vulnerable in the perception of the reasonable and well informed observer of predisposition in favour of JSM JJA. It is sufficient to note that the Advocates' pleaded defence to the complaint has (unsurprisingly) never been that it was made maliciously or in bad faith; nor during the hearing before the Disciplinary Committee was any submission to that effect made nor any application made to procure the presence of a member or members of that Court of Appeal for cross-examination as to their motives in complaining. Advocate Kelleher's suggestion was therefore as unsubstantiated as it was ingenious. 14. It will also be for the Royal Court to decide whether the Advocates failed to uphold the dignity and standards of the profession or failed to assist the Court in the administration of justice. Its decision on this issue will necessarily flow from its decision on the materiality (or lack thereof) of issue of the protective writ to the matter before JSM JJA. Again any views of JSM JJA cannot assist the Royal Court in reaching this consequential decision. Notwithstanding that

premise (not in itself disputed), and less extravagantly, Advocate Kelleher submitted that, if I had to become involved in such assessment, in so far as of fact not law, I would be perceived to be biased towards acceptance of the mere views of former colleagues that, inter alia, they had not been assisted by the Advocates in the administration of justice, even if an objective assessment would otherwise have led me to a contrary conclusion. 15. I cannot accept this submission which is based on an unacceptable and unrealistic view of the juridical process. In any appellate body there will often be dissimilar views as to the correct outcome of the case of which it is seized and, as perusal of the law reports will illustrate, such dissimilar views are sometimes expressed in forceful terms. Advocate Kelleher, while acknowledging that this is so, said that in this instance I might be called on not just to disagree with former fellow members of an appellate court about a case from which they were themselves detached, but about one to which they themselves were parties as complainants. 16. This seems to me to be a formal distinction but one without substantial difference. The focus of the Complaint is on what the Advocates should (or should not) have done; the exercise on which I would be engaged - and be seen to be engaged - in making a factual assessment, if any, would be the same as if the matter had come before me (and JSM JJA or any two of them) by way of an appeal from a disciplinary decision. I would neither be nor reasonably be seen to be inhibited in forming my own views in either situation irrespective of the contrary views of judicial or, as the case might be, ex-judicial colleagues. It is the song, not the singer, which must be the focus of a Judge's attention when evaluating any contrary views of his or her judicial brethren. 17. I find in this context compelling the observations of Commissioner Sumption in the case of *Syvret* at para 38: "he (the fair-minded observer) would appreciate that judges commonly have to consider the conduct of officials or fellow judges, with whom they may have official relations. Those dealings may have been more or less cordial, but in either case a judge is unlikely to feel personal loyalty for a purely official connection and is perfectly capable of detaching his mind from whatever views or impressions he may previously have formed about the official in question." 18. Obviously the fact that a Commissioner (like other judges) has sworn a judicial oath is not itself decisive; otherwise there would be no case law on apparent bias involving judges-but it is not irrelevant. It provides a stout shield against unconscious or subconscious bias (which is in fact a variety of actual (albeit latent) rather than apparent bias). Nor is it irrelevant that JSM JJA have no personal interest, financial, reputational or other in the outcome of the disciplinary process. Their letter to the President of the Law Society dated 7 th May, 2012, asked only that "the matter be investigated with a view to determining whether disciplinary action should be taken" The complaint itself was made by the Law Society although vouched for by JSM JJA (through Mr Jones QC, as he then was). JSM JJA would not benefit in any way were the Advocates found in breach of rules professional conduct; nor would they suffer in any way were the Advocates acquitted of such breach. (They have expressed, of course ,no view on what sanction, if any, would be appropriate were the Advocates to be found in breach of their own professional duties). 19. Advocate Kelleher did not shrink from asserting that I could even be thought prone to adjust my assessment of the legal issues involved in the

case out, for example, whether the facts relied on in the complaint were capable of establishing the case charged of professional misconduct out of some sense of deference to my former colleagues and in dereliction of my judicial duty. I am wholly unpersuaded that the reasonable and well informed observer could conceivably entertain such a view; nor is there any trace in the jurisprudence of such an argument being previously advanced, let alone accepted. 20. There will or may be other issues in the case, for example, whether even if (as is denied) the Advocates did mislead JSM JJA they did so knowingly or recklessly; but that turns, as Advocate Kelleher accepted, on their credibility, not on the credibility of JSM JJA. 21. I bear in mind that in considering whether I should recuse myself I am (subject to any appeal) in one sense a judge in my own cause. I am also conscious of the advice given by Courts of high standing not too readily to be influenced by a sense, however sincere, of my own impartiality. But equally the mere fact that the Advocates have themselves applied for my recusal cannot be decisive. It is the view of the observer who is both fair-minded and well informed which provides the touchstone. 22. The characteristics of such an observer were summarised by Lord Hope in the following passage in *Helow v Home Secretary*

[2008] 1 WLR 2416) (referred to at paragraph 13 (

[2009] JLR 330) and paragraph 33 (

[2011] JLR 343) of the *Syvret* judgments at paras 1-3: "1 My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby, J. observed in *Johnson v. Johnson* (2000) 201 CLR 488, 509, para. 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially. Then there is the attribute that the observer is 'informed.' It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well

as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." [Emphasis added] 23. The fair minded and informed observer, evaluating what it is the Royal Court will have to decide against a background of undisputed primary fact, and appreciative of the way Judges act inter se would not, in my view, conclude that there was any real possibility that I would be biased merely because previous colleagues had inspired a complaint of professional misconduct against the Applicants. (See analogically Taylor v Lawrence

[2003] QB 428 at para 75). 24. For a judge too readily to succumb to a tenuous application for recusal is as inimical to justice as too obstinately to reject it (Locabail Ltd v Bayfield Properties Ltd

[2000] QB 451 at para 21 Ebner at para 20). 25. For the reasons set out above I dismiss the application, and the preemptive and contingent application for leave to appeal on the grounds that an appeal would have no real prospect of success. (Crociani v Crociani

[2014] JCA 089 at para 51). The issue of costs of and arising out of this application can be stood over to be resolved at the conclusion of the substantive proceedings. Authorities Law Society of Jersey Law 2005. Royal Court (Jersey) Law 1948. Porter v Magill

[2002] 2 AC 357 . Syvret v AG

[2009] JLR 330 . Ebner v Official Trustee in Bankruptcy

[2013] JRC 263 . Helow v Home Secretary

[2008] 1 WLR 2416 . AG-v-Syvret

[2011] JLR 343 . Taylor v Lawrence [2003] QB 428. Locabail Ltd v Bayfield Properties Ltd

[2000] QB 451 . Crociani v Crociani

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