

JERSEY / JUDGMENT

Bedell Cristin v Coke Wallis

[2002] JRC 198 (18 October 2002)

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judgment

the master: 1. The procedural background to this action is as follows. By Order of Justice issued on 20th April, 2001 the plaintiffs sued the defendants for professional fees of £30,065 plus interest and costs. The action was placed on the pending list by the defendants on 27th April, 2001 and an Answer and Counterclaim were filed by the defendants (who are acting in person) on 25th May, 2001. The defendants deny liability for the fees claimed and counterclaim alleging professional negligence on the part of the plaintiffs. 2. On 8th June, 2001, the plaintiffs issued a summons seeking to strike out the Answer and Counterclaim on the grounds set out in Rule 6/13(1) of the Royal Court Rules 1992. The summons was to be heard before me on 10th July, 2001. It was, however, procedurally defective, so a new summons in identical terms was issued on 26th June, 2001 which was heard before me on 29th August, 2001. 3. At that hearing, Advocate Falle appeared for the plaintiffs, the first defendant appeared in person and the second defendant also appeared in person albeit that she arrived some 40 minutes late for the hearing. 4. At the hearing the defendants applied for an adjournment on the basis of the late filing of the affidavit and bundle of the plaintiff in support of the application. The defendants referred me to Rule 7/1(5) of the Royal Court Rules 1992 and argued that an affidavit needed to be filed at least ten days before the hearing of this application. I pointed out that the Rule in question dealt only with summary judgment applications and was not, therefore, applicable to the present summons which was brought under Rule 6/13. The bundle and affidavit had been filed on 24th August, 2001 and served on the defendants at the same time. The affidavit in support was short (being only 3 pages long) and in my view contained nothing which could take the defendants by surprise. The summons had been issued some two months earlier and the defendants knew full well the exception taken by the plaintiffs to their pleading. Having considered the submissions made by the defendants I dismissed their adjournment application and proceeded to hear the summons. 5. Having heard the submissions of the parties I stated that, in my opinion, the Answer and Counterclaim as filed by the defendant did not conform with the requirements of Rule 6/8(1) of the Royal Court Rules 1992 and its form was such as to mean it should be struck out pursuant to Rule 6/13(1)(b) and/or (c) of the Royal Court Rules 1992. I then advised that I considered the appropriate order for me to make in those circumstances was to strike out the Answer and Counterclaim and to give the defendants leave, within 14 days, to issue a summons to file an amended Answer and

Counterclaim in due and proper form (the draft of such Answer and Counterclaim to be annexed to the summons). Advocate Falle, on behalf of the plaintiffs, concurred with that suggestion and the defendants indicated that they were prepared to rest on the wisdom of the Court. I then made the order indicated and, having heard further submissions, ordered that the defendants pay the costs of the plaintiffs on the standard basis. 6. It appears that the defendants did not comply with the Order which I made but eventually, on 17th October, 2001, they issued a summons seeking an extension of time and leave to file an amended Answer and Counterclaim and the date fixed for the hearing of this summons was 22nd November, 2001. 7. In the meantime, however, the second defendant, on 15th November, 2001, wrote to the Bailiff asking that the summons to be heard on 22nd November, 2001, take place before another Judge. The full text of the letter to the Bailiff was as follows:- "15th November 2001 Your Honour, re: A. J. Dessain & Others t/a Bedell Cristin v PR Coke-Wallis & NE Coke Wallis

- PL2001/47 By Act of Court dated 30 August 2001 the Master of the Royal Court ordered that our answer and counterclaim filed on 25 May 2001 in reply to the Order of Justice issued by the plaintiffs in the above action be struck out. He ordered further that we issue a summons seeking leave to file an amended answer and counterclaim. Accordingly, on 22 November 2001, we should appear before the Master of the Royal Court to seek leave to file our amended answer and counterclaim in this action. In pleading to this effect it is inevitable that we will, incidentally, challenge the Master's decision duly recorded in the Act of Court of 30 August 2001. Our pleadings may inadvertently embarrass the Master. It follows therefrom that there is a real risk that we will not be at ease to plead in our best interests at the hearing on 22nd instant. In the interests of justice it may be preferable that the hearing of 22nd instant take place before another judge of the Royal Court and we would ask Your Honour to consider this. Yours faithfully Natalie Coke Wallis" 8. Following advice from the Bailiff's Chambers that the issue raised by Mrs. Coke Wallis should be taken up with me she wrote to me on 21st November, 2001 in the following terms:- "Dear Sir, re: A. J. Dessain & Others v Mr & Mrs PR Coke-Wallis - Hearing of 22nd November 2001 - PL2001/47 At the summons to be heard on 22nd instant, Piers Coke Wallis and I intend to challenge your judgement of 29 August 2001 in the above action. In any appeal system it would be inappropriate that a trial judge sit to decide an appeal at which he would be obliged to assess the merits of his previous in the same action. For these reasons, we wrote the Honourable Bailiff to consider the conflict, and I attach my letter and the response thereto. In the circumstances we would be obliged if you would recuse yourself in favour of another judge so that the summons may be argued before a judge who has not already sat at a previous hearing of this action. Yours faithfully Natalie Coke Wallis Director" 9. As I had been asked to recuse myself, I considered that this question should be disposed of before the summons scheduled for the 22nd November, 2001 relating to the amended pleadings of the defendants. I therefore gave directions that the recusal application should come before me on 11th December, 2001, with skeleton arguments and bundles being filed by the parties before that hearing. 10. The matter was part heard only on 11th December, 2001 and was then adjourned for a new date to be fixed. The matter eventually came before me again for

full hearing on 19th September, 2002. After hearing further submissions at that hearing I reserved my decision until today. I now set out my decision and the reasons for it. 11. Detailed skeleton arguments and supporting bundles were filed with me and at the hearings I also heard full oral submissions from all the parties. 12. Although the initial requests for recusal were on the grounds set out in the letters of November to which I have referred, it became clear from the defendants' skeleton arguments and oral submissions that they wished to make much wider accusations against me. Such are the nature of those allegations that I consider it necessary for me to address in some detail in this judgment the major complaints made by the defendants. 13. The grounds originally raised by the defendants were that it was wrong for me to sit in judgment on the summons seeking leave to file an amended pleading because this was effectively an appeal against my own decision. This is, in my opinion, a totally misconceived ground which shows a complete lack of understanding of the true position. My Order of 30th August, 2001, was made after hearing submissions from the parties and it should be noted that the defendants did not exercise their right of appeal under Rule 15/2 of the Royal Court Rules 1992 against that the decision. Furthermore, the hearing of this summons seeking to file an amended pleading has no bearing on the previous decision. I merely struck out a defective pleading and gave the defendants leave to issue a summons seeking to file a new pleading in due and proper form. That summons would be considered by me on its merits without any need for me to refer to my previous decision. 14. In the course of their submissions, the defendants raised additional matters with me which were in the nature of a much more personal attack on my performing the functions of Master. It is these matters which I consider it necessary to address at least by reference to the allegations which I consider to be the most significant of those made against me. 15. The defendants alleged that my behaviour towards Mrs. Coke Wallis at the hearing on August 29th in this action was unacceptable. The facts are as follows. Mrs. Coke Wallis eventually arrived at the hearing of the summons some 40 minutes late. Before I went to the hearing (which I started 30 minutes late because of her absence) all I had received was a message to the Judicial Greffe that she was "running late". When I commenced the hearing Mr. Coke Wallis did advise that she was at the Magistrate's Court but would be attending as soon as she was able. When she did appear she was, to use Advocate Falle's words in the course of his address to me, "weighed down by books but not clothing". When she did eventually appear I expressed my view that Mrs. Coke Wallis had not properly arranged matters when she had been summoned for ten o'clock but I did accept her apology for being late. I did, however, go on to indicate that I considered (and I still do so consider) that her attire was totally inappropriate for a Court hearing. 16. Another matter on which the defendants took exception with me was my requiring them to attend before me in October, 2001, so that I could personally arrange a number of dates for the hearing of summonses which were outstanding. The allegation made against me was that I unreasonably required them to attend before me when their respective parents were seriously ill, and, as a result, they were unable to spend time with them at crucial periods. As a result, I have been accused of having a totally wrong sense of priorities and justice and have put the interests of fee-building Advocates over those of parental illness. I should explain that the reason I

convened the defendants before me in October was because of their apparent unwillingness or inability to arrange to attend for the hearing of interlocutory summonses except many months in the future. It is, in my view, part of my role and in the interests of all parties and justice to ensure efficient case management of actions before the Royal Court. In accordance with the guidelines, laid down by the Royal Court and the Court of Appeal that includes ensuring so far as possible the orderly progress of cases to trial. It was for this reason that I considered it necessary to bring the defendants before me in person so as to ensure this could be achieved bearing in mind the number of actions in which they were involved. That attendance before me lasted approximately 1½ hours. 17. I was also accused by the defendants of "screaming" at the defendants at various times. Advocate Falle, in the course of his address expressed the view that having been present on every such occasion he had heard no such action on my part although once or twice I had shown a little impatience which he considered to have been justified. For myself, I do not recall shouting at Mr. Coke Wallis although I do remember one occasion in which he did display petulance or a tantrum which I would have found unacceptable in anyone. I certainly considered his behaviour as totally inappropriate for a litigant before the Court and I made my views to him quite clear on that point. 18. The defendants have also stated that I have generally showed bias against them. This has been illustrated by the fact that I ignore their submissions or do not give them due weight. This, in the view of the defendants, has occurred on so many occasions that it is obvious that I have a bias against them because they are litigants in person. I do not accept this criticism but the fact of the matter is that the defendants are involved in a number of actions which have seemed to turn into very complex litigation and often they appear to be somewhat out of their depth in relation to some of the procedural issues. Whilst I always listen carefully to their submissions there have been occasions where what they have argued has been patently incorrect. It perhaps bears repetition that I am generally involved with interlocutory procedural matters rather than substantive issues which will be determined by the Royal Court at trial. The defendants have exercised their rights of appeal against my decisions as conferred by Rule 15/2 of the Royal Court Rules 1992. I refute totally the allegations of animosity and the particular criticisms addressed against me at a personal level. 19. Another issue raised by the defendants in the course of their submissions to me concerns a fellow director of theirs in the trust company which they operate. They allege that another director of that company had a problem with me some years ago and this has run over into the present litigation. I do recall that some seven or eight years ago when I was in private practice the director named by the defendants was a client of the firm in which I was a partner. I also recall having a heated disagreement with him on a personal matter but this is something for which I apologised to him the following day. Since then I have had no communication or dealing with him whatsoever as far as I can recall. To suggest that as a result of this I have either a grudge against the director concerned or have carried that through to the defendants is, I regret to say, a figment of the defendants' imagination. All I can do is state categorically that the allegations are totally without foundation. 20. It is quite clear to me that the defendants have decided that they do not wish me to be involved in any way in dealing with any matters in which they are concerned before the Royal Court. This is

perhaps best encapsulated by the attitude of Mr. Coke Wallis. In answer to questions from me in the course of the hearing he expressed the view that not only should I not hear any applications in which the defendants were involved but also that I should not hold the office of Master of the Royal Court at all. 21. The law relating to *récusations* has been considered before the Courts in Jersey on a number of occasions. See for example:- (i) Mayo Associates SA -v- Cantrade Private Bank Switzerland (C. I.) Ltd. 1998 JLR 173 CofA; (ii) Attorney General -v- Young 1998 JLR 111 CofA; (iii) States Greffier -v- Les Pas Holdings Limited 1998 JLR 196 CofA; (iv) Attorney General -v- Barra Hotels Ltd,

(2000) JLR 150 . 22. The most up-to-date consideration of this subject was in re: Esteem Settlement (2001) JLR 169 CofA. The relevant part of the head note in that case as set out on pages 170 and 171 is in the following terms:- "(1) The Judge of Appeal should, as part of his duties as a judge, sit to determine the issue of his own *récusation* as he was in the best position to know whether the objections to his constitutional, judicial or personal circumstances were valid or not, or whether they might be perceived to be valid.... (2) The test to be applied was whether all the material circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the judge was biased. This was a wholly objective test and the subjective opinion of the party alleging bias would not be taken into account.

(4) Having decided not to recuse himself, it would be wrong in principle, unless there were some personal or other difficulty, for the Judge of Appeal to decide not to sit. Such behaviour would encourage *récusation* applications by suggesting that a judge might voluntarily decide not to sit even when the application had failed and lead to parties' attempting to select a Court of Appeal favourable towards them. Such "judge shopping" was not to be permitted." 23. The law on recusal is set out at pages 180 to 183 of the Judgment of Vaughan JA which I set out in full below:- The Law on Recusal : 21. I cannot do better than to repeat the passages from the Judgment of R. C. Southwell QC, Commissioner in Hirschfield (supra) where he set out the law with great clarity: "Attempts to recuse judges in this jurisdiction have become rather frequent. The governing legal principles are reasonably clear: A) If a Judge has a direct personal interest in the outcome of proceedings, bias is presumed to exist and the judge is automatically disqualified. Such an interest may be a financial interest or one of a different kind as in Reg

v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte

[2000] 1AC 119 HL (E). A party with the right to object to the judge sitting may be held to have waived that right so long as he does so with full knowledge of the relevant facts and the waiver is in clear and unequivocal terms. B) If a judge does not have a direct personal interest in the outcome, then the question may arise whether there is what is described as "apparent bias" C) The test to be applied when considering whether there is or was apparent bias has been the subject of much debate. In England and Wales it was decided in Reg

v. Gough

- [1993] AC 646 by the House of Lords that the appropriate test in English law is whether there is or was "a real danger or likelihood" of bias. This test has not been accepted in other jurisdictions (in particular, the European Court of Human Rights, Scotland, Australia and South Africa) in which a different test has been adopted, whether there is or was "a reasonable suspicion or apprehension" of bias (see the authorities cited in *Locabail (UK) Ltd v. Bayfield Properties Ltd*
- [2000] QB 451 English Court of Appeal at pages 475-477). Use of the two tests may in a particular case arrive at the same conclusion, but prima facie the "reasonable suspicion" test represents a lower threshold. The Jersey Court of Appeal in *In re Sinel* 2000 JLR 18 at page 28 has left open the question - which of these tests is to be adopted in Jersey law. For the purposes of the present case I propose to apply the "reasonable suspicion" test as being the easier test for an applicant to meet. I add that in my judgment this test is in any event the more appropriate test to be adopted in Jersey law, particularly having regard to the case-law of the European Court of Human Rights. The test is to be applied on an objective basis. D) The burden is on the applicant to establish bias. I adopt for the purposes of this judgment observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* (1999)
- (4) SA 147, 177 based on the applicant of the "reasonable suspicion" test: "It follows from the foregoing that 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. 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." E) Judges should not accede with too much readiness to suggestions of apparent bias, because to do so would inappropriately encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour (*Locabail* (above) at pages 479-480). "Judge shopping" like "forum shopping" is not to be permitted. F) The Jersey Court of Appeal in *States Greffier v. Les Pas Holdings Ltd*

- (1998) JLR 196 at pages 203-204 expressed the view, obiter, that "No application for *récusation* should be made without strong grounds to support it, and no such application should be granted unless such strong grounds are clearly established." 22. There are, however, two matters to which I need to refer: (1) Subsequent to *Locabail* there has been a further decision of the English Court of Appeal in the *Director-General of Fair Trading v. Proprietary Association of Great Britain*, judgment of 21st December 2000, which is of significance. In that decision the Court of Appeal, having considered the relevant jurisprudence (including the *Strasbourg* jurisprudence) came to the conclusion which I set out below. The issue of recusal in that case arose because one of the lay members of the Restrictive Trade Practice Court applied for employment with a firm of economists, who were then engaged in giving evidence for the Director General in that case. The question was whether there was an apparent bias, not actual bias. The Court of Appeal set out the law as follows (at paragraphs 83-85): "We would summarise the principles to be derived from this line of cases as follows: (1) If a Judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the Judge is to be presumed. (3) The Court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the Judge might not have been impartial. If they do the decision of the Judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice. This approach comes close to that in *Gough*. The difference is that when the *Strasbourg* Court considers whether the material circumstances give rise to a reasonable apprehension of bias, it makes it plain that it is applying an objective test to the circumstances, not passing judgment on the likelihood that the particular tribunal under review was in fact biased. When the *Strasbourg* jurisprudence is taken into account, we believe that a modest adjustment to the test in *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. 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, or a real danger, the two being the same, that the tribunal was biased." That is the legal test (for this is an issue of law) which I propose to apply. (2) Mr. Sinel also argued, on the basis of *Fey v. Austria*
- (1993) 16 EHRR 387 that the Court should, in addition to the matters set out above, also take into account the opinion of the party to the case who is alleging partiality for it is said that that is an important factor, albeit not decisive. *Fey* was certainly referred to in *Locabail* and I understand also in *Proprietary Association of Great Britain*. The Court of Appeal in both cases did not include the subjective view of the complainant as amongst the factors that they enumerated. I do not consider that anything said in *Fey* adds to the legal test set out in *Locabail* and *Proprietary Association of Great Britain*. The ultimate test is always an

objective one to determine whether the "material facts give rise to a legitimate fear that the Judge might not have been [or might not be] impartial". 24. In coming to my decisions I have considered very carefully the law as stated in the various cases to which I have referred. In particular, I have taken into consideration the very helpful exposition of the law as set out in the Esteem case to which I have just referred. I have applied those principles as best I am able in coming to my conclusions. 25. Those conclusions are as follows. It is quite clear that the defendants are clearly totally disaffected and have no confidence in my conduct as Master of the Royal Court. It is perhaps helpful to remember that the role is that of an interlocutory judge who deals with predominately procedural matters. There is, of course, an automatic right of appeal pursuant to Rule 15/2 of the Royal Court Rules 1992 and this is a right of which the defendants have frequently (as they are clearly entitled) availed themselves in lodging appeals against my decisions before the Royal Court. 26. Having considered the matter very carefully I have come to the conclusion that an objective test (which is the test which I am required to apply) would not justify my reaching the conclusion that there was a real possibility or a real danger that I was biased. In reaching that conclusion I have, as I believe I must, disregarded the subjective opinion of the defendants that I am biased against them. 27. Because of the personal attacks made against me by the defendants and the allegations made I have gone on to consider one other point raised in the Esteem case. This is whether, having decided not to recuse myself, there is some personal or other difficulty such as to make me decide that I should not sit. I have reached the conclusion that the stance of the defendants is an attempt at "Judge shopping" which the law says should be not permitted. I am not, therefore, prepared voluntarily to decide not to sit when the application asking me to recuse myself has failed. 28. For the reasons set above, I therefore refuse the application of the defendants requesting that I recuse myself. Following on from that decision I leave over the matter of costs. If the parties wish to address me on the question of costs I invite them to fix a convenient date so that I may hear argument on this aspect of the application. *Authorities Mayo Associates SA -v- Cantrade Private Bank Switzerland (C. I) Ltd.*

(1998) JLR 173 CofA. *Attorney General -v- Young*

(1998) JLR 111 CofA. *States Greffier -v- Les Pas Holdings Limited*

(1998) JLR 196 CofA. *Attorney General -v- Barra Hotels Ltd,*

(2000) JLR 150 . *In re: Esteem Settlement*

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