When might judicial conduct constitute apparent bias and result in an unfair trial?

Introduction

In the recent case of *M&P Enterprises (London) Limited v Norfolk Square (Northern Section) Limited*[1], the High Court was asked to set aside a trial Judgment on the basis that, given the trial Judge's alleged bias, the process underlying the Judgment was so unfair as to render its outcome void.

The High Court dismissed the appeal and, in doing so, provided guidance as to how the English courts will assess such rare allegations of judicial misconduct and the circumstances in which the outcome of a trial will subsequently be deemed to be unfair.

Background

The facts

M&P Enterprises (London) Limited (the **"Appellant"**) was a commercial tenant of Norfolk Square (Northern Section) Limited (the **"Respondent"**). At the trial, the Respondent had sought an order terminating the Appellant's tenancy agreement and preventing it from being granted a new tenancy under the Landlord and Tenant Act 1954. The trial Judge duly made an award in the terms sought by the Respondent, following which the Appellant appealed the decision.

Unusually, the Appellant did not appeal any of the specific findings but, rather, focused solely on the process underlying the Judgment which it submitted was so unfair that it should be set aside and a new trial should be held before a different Judge. In doing so, the Appellant alleged 170 instances of judicial bias, including that the trial Judge had persistently and unfairly intervened in cross-examination and had adopted a "*hostile manner*" in the way in which she had approached the Appellant, its counsel, expert and witnesses.

The law

Before turning to the High Court's assessment of the Appellant's appeal, it is important to set into context the overarching legal basis for the appeal. The right to a fair trial is enshrined in both Article 6 of the European Convention on Human Rights and in common law[2]. In turn, this includes the right to a trial conducted and made by a decision-maker free not only from actual bias but also from the appearance of bias.

Put another way, there are two types of bias: actual bias and apparent bias. Whereas actual bias arises where the Judge is a party to the litigation or has a financial or other interest in its outcome, apparent bias may be alleged where the Judge's conduct or behaviour is such that it gives rise to a suspicion that he or she is not acting impartially. It is the latter, namely apparent bias, which was relevant to the facts of this case.

The High Court's analysis

In assessing the appeal, Mr Justice Hildyard noted at the outset that there is sometimes "*a fine line between robust case management and disruptive judicial intervention*". As such, he provided a lengthy judgment exploring in some detail the key aspects of the law relating to the fairness of a trial and apparent bias. In particular, some of the most important points to note include the following:

(a) Whether a trial is conducted fairly is assessed subjectively and necessarily with the benefit of hindsight, but of course without the benefit of any input from the relevant Judge. In carrying out that subjective assessment, it is important to bear in mind that the trial Judge (while ensuring that he/she does not take on the role of an advocate) is entitled to a wide degree of latitude in conducting and overseeing proceedings.

1 [2018] EWHC 2665 (Ch).

2 Note that the case of *Lawal v Northern Spirit Limited* [2003] UKHL 35 confirmed that there is no difference between the requirements in each.

(b) In addition to the above, there is a separate question as to whether the trial Judge has acted with apparent bias. These matters are distinct and should not be conflated. While the question of fairness is considered subjectively, the apparent bias test is based on whether a "*fair-minded, informed observer*" would conclude that there was a real possibility of bias. This is therefore an objective test.

(c) In light of the above, while the same factual analysis may apply to both the concepts of "unfairness" and "apparent bias", the court must assess the trial process from two "*slightly different*" perspectives – i.e. there is both a subjective and an objective element to the court's analysis.

(d) Finally, in considering the case of *Re G (A Child)*[3], the High Court reiterated that the challenges of trial management may require judicial reaction without time for "*refined consideration*", for which generous allowance must always be made. For example, interventions during cross-examination may be necessary due to counsel's questioning or time management, and must be assessed not only quantitavely, but also qualitatively.

On the facts, and having regard to the above points, Mr Justice Hildyard held that the trial Judge's actions had largely been necessitated by the way in which the Appellant's "*shapeless*" case had been put forward. In particular, perhaps as a result of the fact that the Appellant had changed solicitor some four times in these proceedings alone and the legal team acting at trial was only retained a week prior to its commencement, he noted that the Appellant was poorly prepared for trial and, more specifically, this manifested itself in matters such as the Appellant's inadequate witness evidence, the late submission of its skeleton argument and its failure to answer questions directly at trial.

As such, in light of the state of the Appellant's case and the subsequent need for active judicial management during the trial, Mr Justice Hildyard held that:

(a) on a subjective analysis, considering the circumstances known to the trial Judge which were likely to have informed her behaviour and particularly given the wide latitude afforded to a Judge in overseeing a trial, the trial had not been conducted unfairly and the Appellant had not been prevented from presenting its case;

(b) although some of the trial Judge's comments and interventions were "*rather too strident in their assertion*", they were "*not misplaced in substance*" and had been required to progress the trial in an orderly and timely fashion; and

(c) as such, on a separate objective analysis, it would be clear to a fair-minded and impartial observer with knowledge of the relevant background, that the comments and interventions had been caused by the Appellant's own failures, rather than the trial Judge having pre-judged the issues or acted in a biased manner.

Conclusion

While the *M&P Enterprises* case turns on its specific facts and the appeal was largely rejected on the basis that the alleged 170 instances of judicial bias had been caused by the Appellant's own poor case management and preparation of the proceedings, the decision has provided a useful set of legal principles which will be considered by the courts in assessing whether a Judge's conduct was biased and resulted in an unfair trial.

As can be seen from those principles and the outcome of this case, while a Judge's actions at trial (such as constant interventions and hostile comments) may leave them open to criticism, this will not necessarily lead to the conclusion that the Judge was biased and the trial was unfair. Indeed, conversely, given the nature of the High Court's guidance, the threshold for overturning a Judgment on this ground is (unsurprisingly) high and it is likely to be only in extreme circumstances that a party will be successful in appealing a decision on the sole basis that the Judge's conduct resulted in apparent bias and the proceedings were thus unfair.

If you have any questions about the issues raised in this legal update, please contact your usual Mayer Brown contact or:

Ian McDonald
Partner, London
E: imcdonald@mayerbrown.com
T: +44 20 3130 3856

Robert Hobson
Associate, London
E: rhobson@mayerbrown.com
T: +44 20 3130 3986

3 [2015] EWCA Civ 834.

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