Neutral Citation: [2018] NICh 8

Ref: **McB10658**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **09/05/2018**

2014 No 54002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

(Adjournment & Recusal applications)

RE: CYRIL FULTON

2014 No 54006

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE: ERNEST FULTON

McBRIDE J

[1] This is an appeal by Cyril Fulton ("CF") and Ernest Fulton ("EF") against the decision of Master Kelly dated 24 October 2016 whereby she:-

(a) Dismissed CF's application to set aside a statutory demand served by AIB Group (UK) plc ("the Bank"); and

(b) Dismissed EF's application to set aside a statutory demand served by the Bank; and

(c) Ordered EF and CF to pay costs.

[2] EF and CF each acted as a litigant in person. EF is a son of CF. The Bank was represented by Mr Gowdy of counsel.

[3] CF and EF both confirmed to the court that they had exhausted their domestic remedies in respect of their application for discovery and accepted that in these

circumstances the court could hear the substantive appeals against the orders of Master Kelly dated 24 October 2016.

[4] Before hearing the application to set aside the statutory demands EF, on his own behalf and on behalf of CF, made an application to adjourn the case on the basis that he and CF were about to launch a claim in the European Court of Human Rights in Strasbourg. EF further asked me to recuse myself from hearing the appeals.

[5] I declined both applications and indicated that I would give the reasons for my decisions after I had heard the substantive appeals. I now give my reasons for refusing to adjourn the appeals and refusing to recuse myself.

APPLICATION TO ADJOURN

[6] EF applied to adjourn the present proceedings on the basis that he and his father were about to issue proceedings before the European Court of Human Rights against the UK Government. He provided the court with a document entitled "Request for interim measures according to Article 39 of the Rules of the Court" ("the application"). The application was on headed note paper entitled, Dr Roland Giebenrath, Advocat. It was unsigned. This document set out details under the following headings:

> "Statement of facts"; "Admissibility criteria"; "Admissibility of interim measures"; "A statement of violations of the Convention" and "A request for certain interim measures."

[7] Under the heading, "Statement of facts" it stated as follows:

> "…the core issue in the present case based on the submissions of Mr Ernest Fulton and Mr Cyril Fulton before the domestic courts and other documents of the case file, is the de facto destruction of the family business because it would be allegedly negligent and even criminal the way the administrators have performed their function in the context of the bankruptcy proceedings involving the family business."

The Statement of facts further set out the background relating to the matters which are presently before this court. It referenced that facilities were provided by the Bank to CF and EF and the statutory demands were served. It then detailed the various court proceedings which took place in this jurisdiction and rehearsed the same arguments which have been made in the proceedings before the courts in this jurisdiction.

[8] Under "Admissibility criteria" the application states that EF is a victim, has exhausted his domestic remedies and is entitled to interim measures.

[9] The application avers that EF's Article 6, Article 1 of Protocol 1 and Article 8 rights have been violated. In particular it alleges that the domestic courts:

> "…have not taken into consideration, the immoral and illegal behaviour of the banks and have focussed their analysis on the sole contractual relationship between Mr Ernest Fulton and his bank. By doing so the courts have not fulfilled their task which consists of considering all the relevant aspects of the case. Therefore the right to be heard before a court and have a fair hearing has been violated."

It further states that there is a violation of Article 8 because:

> "… the state of play in the UK NI judiciary with the criminality that is described earlier herein has not been the subject of investigation by the UK NI institutes of State in the form of the Government, the judiciary, the police forces and the banking regulator despite those parties being notified in writing of the illegality in question."

[10] The application then states interim measures are admissible because:

> "The Northern Ireland judiciary is conflicted because as an Institute of State, it is consequently unable as a matter of law to determine in its own courts a case where the United Kingdom and Northern Ireland is the respondent in a formal process which Mr Ernest Fulton is going to pursue in the European Court of Human Rights. To prevent any further damage caused by the behaviour of the judiciary, the indication of interim measures is requested".

[11] I declined the application to adjourn the present proceedings for the following reasons:

(a) The application to the European Court of Human Rights (ECtHR) has not yet been issued. It was only when this case was listed for hearing that EF produced an unsigned application to the ECtHR as proof he was going to issue proceedings to the ECtHR "imminently". Throughout the course of the present proceedings EF has sought to delay and frustrate the final determination of the Bank's claims against him by bringing a number of

baseless applications and appeals. Given the fact no proceedings have yet issued in the ECtHR and the lengthy period of time which has elapsed since EF stated he would be issuing such proceedings I am satisfied that the present application to adjourn is motivated by his objective to delay and frustrate the hearing and determination of the Bank's claims against him.

(b) The application to the ECtHR states that EF fulfils the eligibility criteria to bring the claim as he has exhausted his domestic remedies. The present proceedings are appeals brought by EF and CF wherein they seek to set aside the statutory demands served by the Bank. Therefore, until these appeals are adjudicated upon, I consider that neither EF nor CF has exhausted his domestic remedies. In such circumstances I consider the present appeals should be heard so that, in the event the matter proceeds further, there can be no argument about whether the ECtHR has jurisdiction depending on whether the applicants have or have not exhausted their domestic remedies. To adjourn the appeals now may mean that the ECtHR would refuse jurisdiction and the appeals would then have to be re-listed and heard before any further application could be made to the ECtHR. This would lead to very substantial and unnecessary delay.

(c) I am satisfied that it will take a significant period of time before any application by EF and CF to the ECtHR will be heard and determined. This is because the proposed application has not yet been issued and it is unclear when it will be issued. Even when issued it will thereafter take many months or even years before the application will be determined by the ECtHR. In all the circumstances I considered that it would be prejudicial to the Bank to adjourn the case for what will be a significant period of time.

(d) I consider that there is no prejudice to either CF or EF in hearing these appeals, notwithstanding that they may in the future bring a claim in the ECtHR.

APPLICATION FOR RECUSAL

[12] EF submitted that I should recuse myself because:

(a) He was about to issue proceedings against the UK Government in the ECtHR. As a judge of the High Court I was part of the Government and therefore I was conflicted.

(b) I had breached his Article 6 rights when I heard his application for discovery in this case.

(c) During another hearing in which EF applied to have a right of audience to act and appear on behalf of CF I had criticised the tone of correspondence he had

sent to court staff and the respondent's solicitors and was therefore biased and prejudiced against him.

CONSIDERATION

[13] The governing principles in respect of recusal have been comprehensively set out by McCloskey J In the Matter of an application by Thomas Ronald Hawthorne and Raymond White for Judicial Review v Police Ombudsman for Northern Ireland [2018] NIQB 5 at paragraphs [147] – [155] and I respectfully adopt these.

[14] The importance of a judge being entirely impartial has long been a feature of our common law system and this is now also enshrined in Article 6 of the European Convention of Human Rights. The test as to whether the composition of any court poses a threat to the fairness of the trial was set out in the House of Lords' decision of Porter v Magill [2002] 2 AC 357 as follows:

> "Would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias?"

[15] In R v Jones [2010] NICC 39, McCloskey J at paragraph [7] stated:

> "... Bias, in my view, connotes an unfair predisposition or prejudice on the part of the court or tribunal, an inclination to be swayed by something other than evidence and merits."

Further paragraph [17] he opined:

> "… The hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unusually sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous factors and influences. Moreover, absence actual bias (a rare phenomenon), the proposition that a judge will, presumptively, decide every case dispassionately and solely in accordance with the evidence seems to me unexceptional and harmonious with the policy of the common law."

It was further acknowledged in Davison v Scottish Ministers [2014] UKHL 34 at [57] that the judicial Oath of Office was an important factor to be taken into account. By

section 19 of the Justice (Northern Ireland) Act 2002 every High Court judge swears or affirms that he or she will:

> "… do right to all manner of people without fear or favour, affection or ill will according to the laws and usages of this realm."

[16] In determining whether I should accede to EF's application I have to carry out an evaluative judgment.

[17] EF submits I cannot hear this case because he has brought proceedings in the ECtHR against the UK government and therefore, as a judge I am conflicted as I am part of the UK government. I am satisfied that the independent observer is aware of the legal traditions and constitutional arrangements in the UK including the doctrine of separation of powers which means that the judiciary are separate to and independent of the Legislature and Executive. For this reason the judiciary can properly hear and determine disputes involving government departments. Therefore, EF's claim that I cannot hear the case because I am a judge and therefore part of the government is completely misconceived.

[18] EF further submitted that as the application to the ECtHR seeks interim measures preventing any member of the judiciary in Northern Ireland and the UK hearing cases involving EF and CF whilst proceedings are pending before it, I should recuse myself. The interim measures are sought on the basis:

> "…the courts have neither set aside the statutory demands nor considered the conspiracy on the part of the AIB Group (UK) Plc along with other persons to bring about the undervaluation during the sale of the Balmoral Plaza to Boucher Developments Ltd."

The application further avers that the Court of Appeal in Northern Ireland when dismissing EF's claim on 14 June 2017:

> "…noted that it would not make any comment as to whether there was substance in the claims concerning conspiracy on the part of the bank along with other persons to bring about the undervaluation during the sale of the Balmoral Plaza to Boucher Developments Ltd.
>
> By not considering the prima facie evidence of serious criminality on the part of the bank and those with whom it had been complicating including its solicitors who despite their priority duties as officers of the court continue to hide evidence, the court does not even regard the likely existence of a criminal offence as well as the

> wrongful use of an insolvency process in a way amounting to the crime of extortion.
>
> In addition to that the courts have not taken into consideration the immoral and illegal behaviour of the banks and have focussed their analysis on the sole contractual relationship between Mr Ernest Fulton and his bank. By doing so, the courts have not fulfilled their task which consists of considering all the relevant aspects of the case. Therefore the right to be heard before a court and have a fair hearing has been violated."

[19] I am satisfied that the basis upon which interim measures are sought is factually incorrect. The courts in Northern Ireland have not yet determined EF and CF's arguments about collusion, criminality, conspiracy and sale of premises at an under-value because these are the very issues which stand to be considered and determined in the present appeals. Only the Master has considered these issues and the appeals are against her findings on these issues. The High Court and Court of Appeal has only to date dealt with the discovery application. Neither the High Court nor the Court of Appeal considered issues of alleged criminality and sale at an under value, because such matters were not relevant to the determination of the issue of discovery. Indeed, the Court of Appeal, when dealing with the discovery application specifically stated that the matters of conspiracy and sale at an under-value would feature at the substantive hearing of the appeals to set aside the statutory demands. I also have made it clear that these are matters that I will have to hear and determine in the present appeals. As set out above there is a live issue as to whether the ECtHR has jurisdiction because it is disputed that EF and CF have exhausted their domestic remedies. I am further satisfied, on the basis of the facts set out above, that there is a very live issue about whether the ECtHR has jurisdiction to grant interim measures, and if so whether it would grant relief on the basis of the facts in this case.

[20] I am satisfied that a fair minded observer taking this factual matrix into account and the fact that recusal on this ground would mean no member of the judiciary in Northern Ireland or indeed the UK could hear these appeals, would not conclude that there is a real possibility of bias if I heard these appeals.

[21] I also consider that a fair minded observer would take into account the fact that EF and CF have throughout these proceedings sought to delay and frustrate enforcement of the bank's claims against them as appears from the number and nature of applications made by them and that this application for recusal is motivated by that objective.

[22] Secondly, EF asserts that I breached his Article 6 rights because I dismissed his application for discovery. EF appealed my decision to the Court of Appeal and the Court of Appeal dismissed his application. When I probed EF about how I had

breached his Article 6 rights he accepted that during the discovery application I had given him an opportunity to present his case; I had listened to his arguments and that I had not shown partiality. He further accepted that he had exercised his right of appeal. He submitted, however that I breached his Article 6 rights because I had refused his application for discovery and he submitted this prevented him proving criminality on the part of the Bank.

[23] A right to a fair hearing is not a right to be successful. Therefore in light of the acceptance by EF that he was afforded all the elements of a fair hearing when I heard his discovery application, and given the comments of the Court of Appeal and my own view that the issues in respect of alleged criminality and sale at an undervalue stand to be considered in these appeals, I am satisfied that the hypothetical independent observer would not conclude, having regard to this factual matrix, that there is "a real possibility of bias".

[24] The third basis on which EF asserts I am conflicted is because I criticised the tone and tenor of correspondence he sent to the court staff and the respondent's solicitors in a related case.

[25] During EF's application to be granted a right of audience to act on behalf of CF in the case of Cyril Fulton v AIB Group (UK) Plc (Power of Attorney: Rights of Audience), unreported 2014/5079, I made a number of remarks about the tone and content of correspondence sent by EF to the court and to the respondent's solicitors. I made a ruling refusing EF a right of audience. In my ruling I made a finding that EF was not a suitable person to be granted a right of audience arising from the tone and content of correspondence sent by him to the opposing party and the court. I refer to paragraphs [26]-[32] which set out my findings.

[26] In Locabail (UK) Ltd v Bayfield Properties Ltd & Another [1999] EWCA Civ 3004 the court held:

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection."

[27] I am satisfied that an independent observer taking into account the presumed independence of the judiciary; the judicial oath of office and the fact that EF's appeal will not involve a credibility assessment of EF, would conclude, having regard to the factual matrix, that there is no "real possibility of bias".

[28] For all these reasons I did not accede to EF's application that I recuse myself.