Federal Court of Australia

Isaac John Mackay Shields and Jennifer Margaret Shields v Cbfc Limited and Ors [1994] FCA 1311 (6 September 1994)

FEDERAL COURT OF AUSTRALIA

ISAAC JOHN MACKAY SHIELDS and JENNIFER MARGARET SHIELDS v. CBFC LIMITED and

ORS

No. NG94 of 1993

FED No. 617/94

Number of pages - 8

Courts And Judges

COURT

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION

SPENDER, FOSTER AND O'LOUGHLIN JJ

CATCHWORDS

Courts And Judges - Appellate review of findings of fact by trial judge - consideration of power of Appellate Court to overturn findings of fact which are contrary to the evidence of a witness where no reference or an incorrect reference has been made to that contrary evidence in the judgment of the trial judge.

Courts And Judges - Disqualification of judges on the ground of apprehension of bias by a fair-minded observer - whether announcement by the trial judge during previous proceedings that he would not be trial judge, when he later became the trial judge, constituted a sufficient ground for disqualification.

HEARING

SYDNEY, 20 September 1993

6:9:1994, BRISBANE

Mr Shields appeared in person on his behalf and on the behalf of the second applicant.

Counsel for the respondent: Mr R. G. Forster

instructed by: L. E. Taylor

ORDER

THE COURT ORDERS THAT:

1. The Appeal be dismissed.

2. The Appellants pay the Respondents costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

SPENDER, FOSTER AND O'LOUGHLIN JJ This is an appeal from a decision of a single judge of this Court (Morling J) who on 8 February 1993 dismissed the present appellants' claims for relief against the respondent, the CBFC Limited ('CBFC'). On 11 February 1993, Morling J gave judgment for $135,640.03 in favour of CBFC on its cross-claim against Mr and Mrs Shields and ordered them to pay the costs of the proceedings, including the cross-claim.

2. The appellants are husband and wife, who carried on a business "Shields Engineering" at Wamsley Road, Ourimbah on the Central Coast of New South Wales. The respondent is a finance company. The proceedings related to the financial dealings associated with the acquisition of a lathe to be used by the appellants in the engineering business.

3. Central to the dispute is a document headed "Hire Purchase Agreement" which was signed by Mr and Mrs Shields on 4 October 1989 and accepted by CBFC on 6 October 1989. Pursuant to that agreement, the appellants hired from CBFC a new Leadwell CNC Turning Centre wood lathe. The appellants took possession of the lathe and retained possession of it at premises occupied by Shields Engineering.

4. Under the agreement, Mr and Mrs Shields agreed to pay to CBFC rent in the sum of $4,080.70 per month for 59 months, with a final payment of rent of $15,700.00. It was an express term and condition of the agreement that they would make all payments agreed to be made punctually upon the agreed dates. Time was of the essence in respect of that term. The agreement had an express term and condition that if Mr and Mrs Shields made default in the payment due to be made under the agreement or if they otherwise were to commit a breach of the agreement, then CBFC would be entitled to possession of the equipment and would be entitled without notice to retake possession of it.

5. On 21 September 1992, the application the subject of this appeal was filed by the applicants. It asserted that CBFC and others had entered into a criminal conspiracy to defraud and asset strip them and had engaged in conduct contrary to ss. 52, 52A and 53 of the Trade Practices Act 1974 ('the Act'). The cross-claim of CBFC was filed on 23 October 1992. The cross-claim was based on an admitted failure by Mr and Mrs Shields to make payments of rent to CBFC in accordance with the hire purchase agreement. The cross-claim asserted that no payments had been received by CBFC subsequent to 14 March 1992. It asserted that CBFC determined the agreement on 18 May 1992, sought to obtain possession of the equipment, but was unsuccessful. The details of payments in the original cross-claim were not correct, but it is common ground that the payments of rent in accordance with the hire purchase agreement were not maintained by the Shields. In fact, four small amounts totalling $325.00 had been paid after 14 March 1992 by Mr and Mrs Shields in the months of June, July and August 1992.

6. The statement of claim filed with the original application on 21 September 1992 had many appendices and asserted that no debt existed between Mr and Mrs Shields and CBFC, the alleged debt being "created by the respondent as a book entry credit at no cost whatsoever" to them. In addition to references to the banking system and to extracts from a manual "How to Screw your Bank", the original statement of claim contained many references to Magna Carta, statutes of the English Parliament, and the Bible.

7. These proceedings and proceedings No. NG 694 of 1992 came before Morling J on 19 November 1992. Mr Shields then appeared in person for the applicants, Mr Forster of counsel appearing for CBFC. His honour referred to the material in the statement of claim and said that there is much "which could not possibly have any bearing on your case" and that "the statement of claim is just not in a satisfactory form". The statement of claim was struck out, and directions given about repleading.

8. An amended statement of claim was filed on 14 January 1993, which refocussed the claims of the appellants and which was the subject of the primary judge's judgment.

9. On 22 December 1992, Mr Parnell of counsel appeared for Mr and Mrs Shields, Mr Forster again appearing for CBFC. There was further discussion about pleadings, and about the application for summary judgment on the cross-claim by CBFC. Morling J gave further directions, and fixed 8 February 1993 for trial.

10. On 8 February, the trial proceeded before Morling J. Mr A Enright of counsel appeared for the appellants and Mr Forster again for CBFC. There was discussion between counsel and Morling J concerning the issues in the case and, in particular, any resolution of those issues against the context of orders that had been made in the other litigation, being proceedings NG 694, in which the ANZ Bank was a party. In the course of those discussions, Morling J said:

> " ...let me assure you, I do not have, as you - I am sure both
>
> of you appreciate, any view about the facts of this case. "

11. Counsel for the present appellants, in opening their case, said that there were three factual issues falling for resolution.

12. Because of the exigencies affecting witnesses' availability, the three witnesses called on behalf of CBFC gave evidence and were cross-examined before the witnesses for the applicants. They were Mr Ross Dearing, Mr John Gordon and Mr Anthony Higgs.

13. Mr Dearing was employed as Manager, Credit Management, by CBFC, and had some telephone conversations with Mr Shields concerning the application for finance to purchase the lathe to be used in the business of Shields Engineering. Mr Gordon was a finance broker working in association with Associated Brokers Company Pty Limited, who had been approached by Mr Shields, who had asked Mr Gordon to arrange finance for the lathe that he was wishing to acquire. Mr Gordon had submitted an application for finance on the appellants' behalf to CBFC. Mr Higgs was an employee of CBFC as collections officer. Mr Higgs, on 15 June 1992, with a licensed mercantile agent, went twice to the premises of the appellants seeking to recover possession of the lathe. Both his attempts on that day were unsuccessful. Later on that same day he had further conversations with Mr Shields and a telephone conversation with Mrs Shields.

14. Both Mr Shields and Mrs Shields gave evidence and were cross-examined.

15. At the conclusion of the evidence and submissions on behalf of the present appellants, Morling J gave judgment ex tempore. His Honour referred to the "common ground" that the outcome of the litigation depended on the answers to three questions, the first being whether a misrepresentation was made on behalf of CBFC at the time the hire purchase agreement was entered into to the effect that the effective interest rate payable under the agreement would be 19 per cent, and not 20 per cent, and that at the same time, a representation was made that the interest rate would fall after two years to what was described by Mr Shields as the "current interest rate". The second question was whether the hire purchase agreement was signed by Mr and Mrs Shields in circumstances which demonstrate that they did not fully appreciate or understand the terms of the document they signed. The third question was whether the representatives of CBFC were guilty

of conduct prohibited by s. 60 of the Act when the lathe was sought to be repossessed, and whether in that event a claim for damages arose as a result of that breach of the section.

16. The trial judge concluded that he was not satisfied that the alleged misrepresentations had been made out. In the course of his reasons he referred to having seen the witnesses in the witness box and said:

> " Where there are discrepancies...I prefer to accept the
>
> witnesses called by the respondent. "

In his reasons, he said that the objective facts tended to support the version of events given by the witnesses called by the respondent. He referred also to the lateness of complaints that formed the central allegations of the statement of claim.

17. The trial judge also rejected the complaint that the present appellants were denied a fair and proper opportunity of reading and understanding the agreement before they signed it.

18. Similarly, he rejected the complaint concerning a breach of s. 60 of the Act. That section provides:

> " A corporation shall not use physical force, or undue
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> harassment or coercion in connection with the supply or
>
> possible supply of goods or services to a consumer, or the
>
> payment for goods or services by a consumer. "

In this connection he said:

> " No doubt some indication would have been given to the
>
> applicants of the consequences of non-payment of the hire
>
> purchase debt. But I am not persuaded that anything that
>
> was said or done amounted to a breach of the section. "

The primary judge dismissed the application. He said:

> " Appropriate orders should be made to that effect and
>
> granting the relief sought in the cross-claim. "

19. Formal orders were made on 11 February 1993.

20. On the appeal, Mr Shields, who appeared in person for the appellants with obvious ability, sought to revisit the points the subject of the primary judge's judgment.

21. On the appeal, Mr Shields sought to rely on a video made on the day that the lathe was delivered at Ourimbah on 4 October 1989 for the purpose of showing that the circumstances then obtaining were such as to support the contention that inadequate opportunity had been given for an informed signing of the hire purchase agreement. It was said also that the video was relevant to the question of Mr Gordon's credit.

22. The court saw the video de bene esse. In our view there is nothing in the video which puts this court in a better position than the trial judge in a case in which the issues fall to be determined in large measure on an assessment of the evidence of witnesses. There is nothing in the video that would compel a different conclusion from that reached by the trial judge.

23. The position of an appeal court in circumstances such as this is summarised by Lord Sumner in S.S. Hontestroom v. S.S. Sagaporack (1927) AC 37 at 47, where his Lordship pointed out that:

> " ...not to have seen the witnesses puts appellate judges in a
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> permanent position of disadvantage as against the trial
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> judge, and, unless it can be shown that he has failed to use
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> or has palpably misused his advantage, the higher Court
>
> ought not to take the responsibility of reversing
>
> conclusions so arrived at, merely on the result of their own
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> comparisons and criticisms of the witnesses and of their own
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> view of the probabilities of the case. The course of the
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> trial and the whole substance of the judgment must be looked
>
> at, and the matter does not depend on the question whether a
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> witness has been cross-examined to credit or has been
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> pronounced by the judge in terms to be unworthy of it. If
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> his estimate of the man forms any substantial part of his
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> reasons for his judgment the trial judge's conclusions of
>
> fact should, as I understand the decisions, be let alone. "

24. Mr Shields submitted the primary judge had misstated the evidence. In his ex tempore reasons, his Honour said;

" There is no statement that the interest rate would be

adjusted, it is that it should be adjusted. That seems to

me to be a matter of some significance. "

25. However, Mr Shields, in an affidavit filed 12 November 1992 spoke of a conversation with officers of CBFC about the payment of instalments:

" ...I was told when I applied for the loan that the interest

rates in two years time would drop down to the current rate. "

In an affidavit filed 21 September 1992, Mr Shields had sworn that:

" ...I said to them in one of their harassing phone calls that

they had promised to drop their interest rate to the current

interest rates in two years' time. "

In an affidavit filed 21 December 1992, Mr Shields said that in a conversation with an employee of CBFC, the employee said:

" In two years (the interest rate) would be adjusted down to

the current interest rate. "

26. This account, however, has to be contrasted with Mr Shields' account of the same conversation contained in an affidavit of 14 January 1993, where Mr Shields said that the employee had told him:

" In two years it should be adjusted to the current rate. "

27. Read in context, however, the passage relied on by his Honour is identified in his reasons as being the statement made by Mr Shields "in his last affidavit" and the statement:

" There is no statement that the interest rate would be

adjusted, it is that it should be adjusted. "

is a reference by his Honour to what appears in Mr Shields' last affidavit. The comments by the primary judge are directed at the affidavit of Mr Shields most recently filed and the absence of a reference to different

statements by Mr Shields in earlier affidavits having a different complexion does not amount to error. Moreover, the position in any event would be of the kind described by McHugh J in Abalos v. Australian Postal Commission [1990] HCA 47; (1990) 171 CLR 167 at 178, where his Honour (with whom Mason CJ, Deane, Dawson and Gaudron JJ agreed) said:

> " ...where a trial judge has made a finding of fact contrary
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> to the evidence of a witness but has made no reference to
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> that evidence, an appellate court cannot act on that
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> evidence to reverse the finding unless it is satisfied 'that
>
> any advantage enjoyed by the trial judge by reasons of
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> having seen and heard the witnesses, could not be sufficient
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> to explain or justify the trial judge's conclusion': Watt or
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> Thomas v. Thomas (1947) AC 484 at p 488. "

28. As to the submissions made by Mr Shields concerning the findings of the primary judge, nothing in his submissions or to the further material on which he would wish to rely would permit this court to overturn the findings of the primary judge. As Deane and Dawson JJ said in Devries v. Australian National Railways Commission [1993] HCA 78; (1993) 67 ALJR 528 at 532:

> " An appellate court which is entrusted with jurisdiction to
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> entertain an appeal by way of rehearing from the decision of
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> a trial judge on questions of fact must set aside a
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> challenged finding of fact made by the trial judge which is
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> shown to be wrong. When such a finding is wholly or partly
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> based on the trial judge's assessment of the trustworthiness
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> of witnesses who have given oral testimony, allowance must
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> be made for the advantage which the trial judge has enjoyed
>
> in seeing and hearing the witnesses give their evidence.
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> The 'value and importance' of that advantage 'will vary
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> according to the class of case, and,...(the circumstances

of) the individual case'. See Watt or Thomas v. Thomas

(1947) AC 484, per Lord Thankerton, at 488. If the

challenged finding is affected by identified error of

principle or demonstrated mistake or misapprehension about

relevant facts, the advantage may, depending on the

circumstances, be of little significance or even irrelevant.

If the finding is unaffected by such error or mistake, it

will be necessary for the appellate court to assess the

extent to which it was based on the trial judge's

conclusions about the credibility of witnesses and the

extent to which those conclusions were themselves based on

observation of the witnesses as they gave their evidence as

distinct from a consideration of the content of their

evidence. "

29. There is one final matter in the appeal. The appellants alleged that Morling J erred in continuing to hear the matter, it being asserted that he had disqualified himself on 23 October 1992 "on the grounds of his personal bias and personal family pecuniary" interest. Further, the appellants say that on 19 November 1992 his Honour said "...I am not going to be hearing your case, if it ever comes on." It is also alleged that his Honour displayed personal bias against Mr Shields in wrongly labelling him as a "liar".

30. The question of bias has been the subject of recent observation at the highest levels. In The Queen v. Hay, a judgment dated 30 June 1994, the High Court was concerned with the question of bias in the context of a criminal trial where a juror arranged for flowers to the mother of the deceased victim. As Mason CJ and McHugh J noted in their judgment, at p. 1:

" When it is alleged that a judge has been or might be

actuated by bias, this Court has held that the proper test

is whether fair-minded people might reasonably apprehend or

suspect that the judge has prejudged or might prejudge the

case Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 at 553-554; Reg. v. Watson; Ex parte Armstrong (1976) 136 CLR 248 at 261-262, 264, 267; Re Judge Leckie; Ex parte Felman (1977) 52 ALJR 155 at 158; 18 ALR 93 at 97-98; Re Shaw; Ex parte Shaw (1980) 55 ALJR 12 at 14, 16; 32 ALR 47 at 50-51, 54; Livesey v. New South Wales Bar Association (1983) 151 CLR 288 at 293-294, 300; Re J.R.L.; Ex parte C.J.L. (1986) [1986] HCA 39; 161 CLR 342 at 349, 351, 359, 368 and 371; Vakauta v. Kelly [1989] HCA 44; (1989) 167 CLR 568 at 575, 584; Grassby v. The Queen (1989) [1989] HCA 45; 168 CLR 1 at 20. The Court has applied the same test to a Commissioner of the Australian Industrial Relations Commission Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd [1993] HCA 41; (1994) 68 ALJR 179 at 182; [1994] HCA 66; 119 ALR 206 at 210 and to a member of the Australian Broadcasting Tribunal Laws v. Australian Broadcasting Tribunal [1990] HCA 31; (1990) 170 CLR 70 at 87, 92, 102. The Court has specifically rejected the real likelihood of bias test Watson (1976) 136 CLR at 261-262. The principle behind the reasonable apprehension or suspicion test is that it is of 'fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' R. v. Sussex Justices; Ex parte McCarthy (1924) 1 KB 256 at 259 per Lord Hewart CJ; Re J.R.L.; Ex parte C.J.L.

(1986) 161 CLR at 351-352. "

31. In Saunders v. Gas and Fuel Corporation Superannuation Fund VG 298 of 1991 and VG 379 of 1993, a Full Court of the Federal Court (Davies, Gummow and Heerey JJ) were concerned with an appeal where a primary judge had upheld an application that he disqualify himself on the ground of apparent bias. The court allowed the appeals, the court concluding that where the primary judge had announced that he was unaware of the contents on the material (and thus could not have been influenced by it), it would be wrong to give effect to a hypothetical belief by a supposedly reasonable and fair-minded bystander that the contrary was the case.

32. In the present matter, no application was at any time made to the judge that he disqualify himself. In particular, in the curial history that has been outlined in some detail earlier, there was no discussion either on 22 December 1992 or at the trial on 8 February 1993 raising any question of apprehended bias. The statement on 19 November 1992 was made in the context of an application for summary judgment and summary dismissal by the ANZ Bank in proceedings NG 694 of 1992 as well as proceedings NG 695 of 1992. The statement on 19 November:

" Well, Mr Shields, I'm not going to be hearing your case if

it ever comes on, and what I am now saying has nothing to do

with it. "

was made in the context where the impugned statement of claim had been struck out. It was in that context quite likely that a trial would not be in the immediate future, a circumstance which lends weight to the prediction then made by his Honour, when it is appreciated that his Honour in fact retired as a judge of the Federal Court of Australia in April 1993. The prediction turned out to be erroneous, because the matter was mentioned before his Honour on 22 December 1992, in the vacation, and directions were given such as to permit the present appellants to have a final trial in the second week of term of the 1993 legal year before Morling J.

33. The circumstances as disclosed are not such as, in our opinion, to permit to a fair-minded person a reasonable apprehension or suspicion that the primary judge had prejudged, or might prejudge, the case. This conclusion is reinforced by the absence of any application that the primary judge disqualify himself, and by the observation made by his Honour at the outset of the hearing of the trial on 8 February 1993, where his Honour said to counsel for the parties:

" ...let me assure you, I do not have, as you - I am sure both

of you appreciate, any view about the facts of this case. "

34. For the above reasons, the appeal should be dismissed with costs.