DESCENDING INTO THE ARENA:

SUPREME COURT GUIDANCE ON JUDICIAL UNFAIRNESS

A Case Note from the 2TG Personal Injury Group **Spring 2020**

Introduction

1. The Supreme Court has given a **unanimous judgment** in *Serafin v Malkiewicz and others* [2020] UKSC 23. In short, the Supreme Court gave guidance on what constitutes judicial unfairness; that is, when is a judge's behaviour, in and of itself, a ground of appeal and what are the consequences of the same? Despite the underlying substantive claim being for libel (and the judgment examining aspects of libel law that will be of importance to libel practitioners), given that the Supreme Court laid out general principles vis-à-vis unfairness, the decision and reasoning will be of interest to parties involved in all types of litigation.

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Facts

2. The Respondent brought a claim against the Appellants for libel on the basis of an article that the Appellants published about him. The article was published in a Polish newspaper produced in the United Kingdom. The Respondent was a litigant in person and alleged that the article carried 13 different defamatory meanings regarding, broadly speaking, the Respondent's business dealings and character. The Appellants were represented by leading counsel. At trial, Mr Justice Jay ("the Trial Judge") **found** that eight of the article's meanings were substantially true or caused no serious harm to the Respondent's reputation and as such did not constitute libel. The Trial Judge further found, in relation to all 13 meanings, that the Appellants had a defence under s 4 Defamation Act 2013 (i.e. the public interest defence). As such, the Trial Judge found against the Respondent.

3. In the course of the trial the Trial Judge made various comments to and about the Respondent. A selection of these are in the Schedule to the Supreme Court's judgment and make for interesting reading in full. In summary, such comments included the Trial Judge demanding the Respondent's tax returns within 24 hours and backing the same with a threat of an HMRC investigation, giving indications that he thought the Respondent was lying, telling the Respondent that he would report him for perjury, telling the self-represented Respondent that he was not asking a "brilliant question" in cross-examination, and so on.

4. The Respondent appealed the Trial Judge's order to the Court of Appeal, whose **judgment** found, after reviewing the transcript of the trial, that the "Judge's interventions during the Claimant's evidence were highly unusual and troubling…the Judge appears not only to have descended to the arena, cast off the mantle of impartiality and taken up the cudgels of cross-examination, but also to have used language which was threatening, overbearing and, frankly, bullying" ([114], CA Judgment). As such, the Court of Appeal found for the Respondent, holding that "the nature, tenor and frequency of the Judge's interventions were such as to render this libel trial unfair" ([119], CA Judgment). The Court of Appeal ordered that the matter be remitted for a quantum hearing (NB it was not clear what the Court of Appeal meant by this, given that liability had not been established against the Appellants: [36], SC Judgment).

5. The Appellants sought to overturn the Court of Appeal's order in the Supreme Court. They were unsuccessful.

Supreme Court Judgment

6. Lord Wilson, with whom all of the other Justices agreed, began by reviewing the principles relating to judicial behaviour and unfair trials. *Jones v National Coal Board* [1957] 2 QB 55 was said to remain the leading case. In that decision, Denning LJ stressed that "interventions should be as infrequent as possible when the witness is under cross-examination" because "the very gist of cross-examination lies in the unbroken sequence of question and answer" and because the cross-examiner is "at a grave disadvantage if he is prevented from following a preconceived line of inquiry". The core principle was given in *Michel v The Queen* [2009] UKPC 41 as "under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence". Lord Wilson cited *Michel* with approval at [42], SC Judgment. Further, even if a judge gives a seemingly fair and balanced judgment, the same does not undo unfairness that took place during the trial ([44], SC Judgment, citing *In re G (Child)* [2015] EWCA Civ 834, [52], with approval).

7. Lord Wilson also stated that, whilst a party may seek to invite the Trial Judge to comment on an allegation of unfairness, the same is undesirable where there is a transcript of the hearing. If there is no such transcript, then "it may well be appropriate to invite the judge to comment in writing and perhaps to provide his or her own note of the hearing" but, if there is a transcript, "it is less likely to be appropriate

to invite the judge to comment" ([45], SC Judgment) given that the focus is not on the Trial Judge but on the breach of the right to a fair trial.

8. Further, Lord Wilson paid attention to the fact that the Respondent was a litigant in person during the trial. Whilst a litigant in person can present challenges, it was important that the judge should not forget:

> "Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly" ([46], SC Judgment).

To bolster that analysis, Lord Wilson quoted from the Judicial College's *Equal Treatment Bench Book*, which advises judges on how to act fairly with litigants in person.

9. It was also made clear that, whilst one could potentially consider the relevant exerts of the transcript individually and only pass limited criticism, the transcript had to be read as a whole. When one does that and:

> "considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusion that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair. Instead of making allowance for the claimant's appearance in person, the judge harassed and intimidated him in ways which surely would never have occurred if the claimant had been represented. It was ridiculous for the defendants to submit to us that, when placed in context, the judge's interventions were 'wholly justifiable'" ([48], SC Judgment).

10. The consequence of the finding of unfairness was to, in effect, render the first trial void. *Jones* makes clear that "No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it". In perhaps even more poetic language, Lord Wilson stated, "Lord Reed observed during the hearing that a judgment which results from an unfair trial is written in water" ([49], SC Judgment). Whilst it might be "highly desirable" that, prior to a retrial, the parties should limit the issues, a full retrial was "the only proper order" ([49], SC Judgment).

Practical Points Going Forwards

11. This judgment is important for several reasons. First, the Supreme Court has reiterated the right to a fair trial and has reaffirmed cases

such as *Jones* and *Michel* at the highest domestic level. Second, the Supreme Court has made clear that, when assessing purported judicial unfairness, it will consider the entirety of the transcript, not just selected quotations. Obtaining and properly considering the whole transcript is key. Third, insofar as a seemingly balanced judgment may be produced, the same does not remedy an unfair hearing. Fourth, the approach to an assessment of purported unfairness would appear to be more stringent when the party alleging unfairness was unrepresented at the allegedly unfair trial or hearing.

12. Finally, and perhaps most importantly, the Supreme Court has made clear that the usual consequence of an unfair hearing will be to order a retrial of any matters in dispute. In more complicated, often commercial, litigation, therefore, where a party has succeeded on some points but has an argument that the judge, overall, acted unfairly towards them, great care and attention should be given as to whether or not to pursue an unfairness argument at appellate level. Such an aggrieved party may well be vindicated by the appellate court, but such success could well be a pyrrhic victory if it were to unravel the points the party did succeed on at trial and may lead, at any rehearing, to the party actually being in a worse position.

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Tom completed pupillage and joined chambers as a tenant in October 2019. He practises in all of chambers' key areas and has a particular interest in employment, personal injury, and commercial litigation.

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